WE well knowing the great Learning, Judgment and Integrity of the Author, do allow and approve of the Printing and Publiſhing this Book, entitled, *Reports of Caſes in the Court of Exchequer, by* WILLIAM BUNBURY, *late of the* Inner Temple, *Eſq*;

Hardwicke C.
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Tho. Clarke,
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T. Deniſon,
M. Foſter,
E. Clive,
Tho. Birch,
H. Legge,
S. S. Smythe,
Rich^d. Adams,
Hen. Bathurſt,
Eardley Wilmot.

REPORTS

OF

CASES

IN THE

Court of EXCHEQUER,

FROM THE

Beginning of the Reign of King GEORGE the Firſt, until the Fourteenth Year of the Reign of King GEORGE the Second.

By WILLIAM BUNBURY, Eſq;

Late of the *Inner Temple.*

Taken in Court by Himſelf, and publiſhed from his own Manuſcript by his Son in Law, *George Wilſon*, Serjeant at Law.

In the SAVOY:

Printed by HENRY LINTOT, Law-Printer to the King's moſt Excellent Majeſty; for D. Browne, at the *Black Swan* without *Temple-Bar*; J. Shuckburgh, at the *Sun* in *Fleet-ſtreet*; J. Worrall, at the *Dove* in *Bell-yard*, near *Lincoln's Inn*; and Thomas Gamul, next the *Temple* Cloiſters.

MDCCLV.

To the RIGHT HONOURABLE

Sir *THOMAS PARKER*, Knt.

Lord CHIEF BARON of his MAJESTY's Court of EXCHEQUER,

These REPORTS are with the utmoſt Reſpect,

Humbly inſcribed by

His LORDSHIP's

Moſt obedient and obliged Servant,

George Wilſon.

THE

PREFACE.

THE learned Author attended *Weſtminſter-Hall* above forty Years, chiefly at the Exchequer Bar; but for the laſt thirty Years thereof in that Court only: He retired in the Year 1743, and when he took Leave of the Court, had been many Years * Poſtman there. His long Experience in the ſeveral Branches of Buſineſs in the Exchequer induced Gentlemen of the Profeſſion to deſire his Notes, which, in his Life-time, were all or the greateſt Part of them tranſcribed, are in many Hands, and frequently cited in *Weſtminſter-Hall.*

* The Poſtman of the Court of Exchequer is the ſenior Barriſter attending conſtantly at that Bar, who has the Privilege of moving *there* before the King's Attorney and Solicitor General, and all his Majeſty's Council.

From

From ſome Apprehenſion that theſe Caſes might get into the Preſs improperly, and come out imperfect, and, indeed, by the Deſire of ſome Gentlemen eminent in the Profeſſion, the Editor was perſuaded to give the Publick a true Copy of ſuch Caſes only, as the Author took in Court with his own Hand, and are ſettled and corrected by himſelf from his Notes.

☞ All the Marginal Notes in this Book are the Author's own, except one in *Page* 302, of *Walker* v. *Jackſon*, *coram* Lord Chancellor *Hardwicke*, *July* 22, 1743.

George Wilſon.

AT

AT
Serjeants Inn,
December 10, 1713.

Smith v. *Johnſon.* 1.

IF a Man depaſtures unprofitable Cattle in his Ground, he ſhall pay Tithes in Proportion to the Number of the Cattle and the Value of the Land, generally at the Rate of two Shillings in the Pound; and the ſame Proportion is to be obſerved, if they are travelling Cattle that come and go ſucceſſively: Cattle fed upon Meadow Ground after it is mowed, ſhall not pay Tithes, unleſs by Cuſtom.

Tithe Herbage or for Agiſtment. Hard. 35, 184.

Nov. 14, 1714, Sir *Sam. Dodd* made Lord Chief Baron, and Sir *James Mountague* made a Baron of the Exchequer.

At Serjeants Inn, February 26, 1715.

2. *Keddington* v. *Bridgman.*

Compoſition for Tithes. Yelv. 95. Cro. Ja. 137. Hob. 176. 2 Brownl. 17. 2 Ro. Abr. 63. Sir Wm. Jones 174. Q. Godol. 353, 363. Latch 176. 1 Lev. 24. Godol. Rep. 358, 368. Noy 121. 2 Cro. 637, 669.

IT was held by *Bury* and *Price* Barons, that a Compoſition by way of Retainer by Parol can be good only for one Year, being by way of Contract, but a Leaſe of Tithes even for one Year by Parol would be void: *Mountague* Baron, ſeemed to be of Opinion, that an Agreement between the Parſon and his Pariſhioner for Years by Parol would be good, though not for Life, being only an Agreement that he will not ſue the Pariſhioner for ſo many Years for Tithes.

DE
Term. S. Hilarii,
1715.

Underwood v. *Gibbon.* Jan. 31, 1715. 3.

RESOLVED by *Bury*, *Price* and *Mountague* Barons, * that the Tithes for depaſturing unprofitable Cattle ought to be paid by the Occupier of the Ground, and not the Agiſtor: And by Ld. C. B. *Bury* and *Price* contra *Mountague*, that Saddle Horſes ſhall pay no Tithes, no more than Cattle for the Plough and Pale, or Cattle killed for the Uſe of a Man's own Family, in reſpect of the Profit that otherwiſe accrues to the Parſon from theſe.

Tithe Herbage or Agiſtment Tithe, by whom payable. Hard. 184. 1 Bulſt. 171. Poph. 126. 2 Cro. 430. 1 Ro. Abr. 641, 647. Godolp. 429, 384. 2 Bulſt. 183.

W. Jones 254. 2 Ro. Rep. 191.

* This was ſettled in the Caſe of *Fiſher* v. *Leman*, *Nov.* 17, 1720. But in the Caſe of a Common, the Bill muſt be againſt the Owner of the Cattle (if known) becauſe the Owner of the Soil has no Profit by it.

DE
Term. Paſchæ,
1716.

4. *Rex* v. *Albert.* April 18, 1716.

The Security is to pay neither Coſts nor Intereſt on a Recogniſance forfeited, which was given upon a Plea to an Extent.

AN Extent iſſued againſt *Albert*, *Knight* puts in his Claim to the Goods ſeized, and pleads to the Extent, *Hook* and *Scanderet* were Security to the Pleader according to the Courſe of the Court; *Knight* afterwards withdrew his Plea, upon which an Order was made for the Payment of the Money, which accordingly was paid: Mr. Attorney General moved, that the Security ſhould pay Coſts and Intereſt from the Time the Recogniſance was forfeited; but Mr. *Turner* and Mr. *Ward* objected, that they having paid the Sum mentioned in the Recogniſance, and the Condition being only to abide ſuch Order as the Court ſhall make, and the Order that was made by the Court being only for the principal Sum, neither the Principal nor the Security ought to be any further charged; though where a Man is bound in a Bond to the Crown, *there* Intereſt ſhall be allowed in reſpect of the Penalty of the Bond, but this Recogniſance is only a Security for a collateral Matter. *Per* Baron *Price*, If there had been Judgment for or

againſt the King on this Plea, there could have been no Coſts of either Side; and it is againſt the Method of this Court to pay Coſts upon Extents, though it is allowed upon *Scire facias's* by the new Act of Parliament.

Per Curiam, Neither Intereſt nor Coſts ought to be allowed againſt the Security, no more than againſt the Principal: So the Attorney General took nothing by his Motion.

Rex v. *Southerby and Etchins.* 5.

SOUTHERBY was outlawed and an Extent iſſued, and an Inquiſition was taken thereupon, and his Houſe and Goods ſeized by virtue thereof: *Etchins* the Landlord moved upon the Stat. 8 *Ann.* to have the Goods delivered to him, ſuggeſting that they had been diſtrained by him for Rent three Days before the Extent.

The Landlord not relieved where Goods are ſeized upon an Outlawry. Poſt Pl. 68, 269.

Per Curiam, Not the Party but the King only is concerned in the Outlawry, and we cannot relieve the Landlord upon this * Motion.

* The ſame Motion was made in *Michaelmas* Term, *Nov.* 26, 1717, between *The King* and *Burgeſs*, but the Defendant was not relieved.

DE
Term. S. Trinitatis,
1716.

Junii 10, 1716, Baron *Bury* made Lord Chief Baron in the room of Lord Chief Baron *Dodd* deceaſed.

At Serjeants Inn in Chancery Lane.

6. *Mullins* v. *Pratt.* June 28, 1716.

When the Probate of a Will of Lands may, or may not be read.

BILL for a Legacy, the Plaintiff ſet forth the Subſtance of the Will, and referred to it when produced: The Defendant in his Anſwer ſays, He believes there is ſuch a Will: When the Plaintiff came to make out his Proof, he offered to produce the Probate; which was not admitted, becauſe it was in the Caſe of a real Eſtate, of which the Spiritual Court hath no Conuſance; and beſides, the Defendant hath admitted only, that there might be ſuch a Will, but doth not know that it was executed according to the Statute; otherwiſe, if the Admiſſion of the Defendant in his Anſwer had been full, it might have been read.

At Serjeants Inn in Chancery Lane.

Ayde v. *Flower*. June 28, 1716. 7.

A Vicar preferred his Bill for Tithe Herbage and ſmall Tithes; it was objected for the Defendant, that Tithes for the Depaſturing of barren and unprofitable Cattle may be due of Common Right, but not to the Vicar; therefore it lies upon him to ſhew that he was endowed of it, or at leaſt that it hath been uſually received by the Vicar, which would be an Evidence of an Endowment: As to the Tithe of Meadow Ground that hath been mowed, of which the Vicar has had the Tithe, and after it is depaſtured by unprofitable Cattle, there is no Tithe due for that. *Note*; The Copy of the *Valor Beneficiorum* (which was taken by Commiſſion in the Reign of *Hen.* 8.) was produced, and it did not appear that this Demand of the Plaintiff was mentioned there among the other ſmall Tithes. Lord Chief Baron *Bury* and *Mountague* contra *Price*, That the Bill ſhould be diſmiſſed.

A Vicar need not ſet forth how he is intitled to Tithe Herbage and ſmall Tithes. Hard. 321. Stone *v.* Ludlowe. Hard. 130, 131.

N. B. It was objected to an Evidence, that he had the Inheritance of Lands within the Pariſh (though he was not an Inhabitant, and the Lands were in the Hands of a Tenant) and therefore his Evidence would be to diſcharge the Inheritance of the Lands of the Tithes; which would be ſuch an Advantage to him, as to render him not indifferent: But notwithſtanding this Objection, which goes only to the Credit of a Witneſs, he was admitted to be read.

That a Witneſs has the Inheritance of Lands in the Pariſh (in the Hands of a Tenant) only goes to his Credit.

Mr. *Forteſcue Aland* being made a Baron, this Cauſe was reheard *July* 17, 1717, and *then* the Plaintiff

Plaintiff produced the Endowment of the Vicar by the Dean and Chapter of *York*, whereby the Vicar is endowed *de omnibus & omnimodis minutis Decimis quibuſcunque:* And as to the *Valor Beneficiorum* it was ſaid, That there were other Tithes not mentioned in that Book, which the Defendants themſelves admit belonged to the Vicar; and by the Opinion of the four Barons, the Defendants were decreed to account with Coſts.

8. Modus. Godol. Rep. 364. Lib. 11. Grant's C. Hetley 133. 13. Cro. Car. 237. Latch 48. 1 Vent. 265. Hob. 247. 3 Keb. 527. Hard. 406. Poſt Pl. 21.

IT was ſaid in the Caſe of *Hucks* v. *Phelps*, That if a Man libels in the Spiritual Court for Tithes in Kind, and the Defendant in that Court pleads a Modus, and the Spiritual Court refuſes that Plea, a Prohibition ſhall go: A Man may libel below for a Modus, or for Tithes due by Cuſtom; but if the Modus or Cuſtom be denied, the Spiritual Court cannot proceed.

At Serjeants Inn in Chancery Lane.

9. *Rex* v. *Peck*. July 4, 1716.

An Extent comes to the Sheriff's Hands before the Return of a Fieri facias, and before the Goods levied thereupon were ſold.

A *Fieri facias* iſſued out of the Court of Common Pleas at the Suit of *Roberts* againſt *Peck*, which *Fieri facias* was teſted 3° *Aprilis*, by virtue of which the Sheriff levied the Goods, &c. but before the Sale thereof, or the Return of the Writ, an *Extent* came to the Sheriff at the Suit of the Crown to levy the Goods, &c. of *Peck*, teſted 2° *Maii*. The Sheriff returned this ſpecial Matter on the *Fieri facias*, and likewiſe upon the *Extent*, into the Court of Exchequer, in which it was ſaid, That *Peck fuit poſſeſſionatus* of the Goods the 30th of *April*; upon which Mr. *A.* moved to quaſh the Inquiſition, and Mr. *F.* moved that the Sheriff might amend his Return.

Baron

Baron *Price* was for quaſhing the Inquiſition, which being found by a Jury, he did not ſee how the Sheriff could amend it: Lord Chief Baron *Bury* and Baron *Mountague* were of Opinion the Sheriff might amend his Return, and an Order was made for that Purpoſe, which was what the Counſel for the Sheriff wanted, to indemnify him, in caſe any thing had been moved againſt him in the Common Pleas upon the Return of the *Fieri facias*. *N. B.* It was taken for granted, that though the Goods were levied by virtue of the *Fieri facias* three Days before the *Teſte* of the *Extent*, yet *that* was no Bar to the Crown: But *quære* if they had been ſold, for then Execution had been executed.

3 Mod. 236. Hard. 25. Dyer 67. 2 Ro. Abr. 157, 8. Poſt Pl. 68.

Powell v. *Robinſon.* 10.

THE Admiralty granted a Warrant according to the Courſe of their Court to ſeize a Ship, and before a Libel was exhibited, a Prohibition was moved for, which was alledged to be too ſoon, the Warrant being only in Nature of Proceſs to bring them into Court, and it not yet appearing that the Admiralty had no Juriſdiction: But it being inſiſted upon of the other Side, that it was the conſtant Practice not to exhibit any Libel on ſuch Warrant, but to proceed only on the Warrant, and Precedents being cited of Prohibitions granted in like Caſes, a Prohibition was awarded *per* Lord Chief Baron *Bury* and *Price* contra *Mountague*.

Prohibition to the Admiralty.

Poſt Pl. 317.

Adams v. *Carter.* 11.
Olive v. *The ſame.*

TWO Informations exhibited the ſame Day for the ſame Matter, both ſhall be ſet aſide.

Hob. 128.

DE
Term. S. Hilarii,
1716.

January 24, 1716, *John Forteſcue Aland* Eſquire made a Baron of the Exchequer.

12. *Benſon* v. *Watkins.* Feb. 20, 1716.

Modus, where too rank, Defendant is decreed to account for Tithes in Kind.

Poſt Pl. 25.

BILL by an impropriate Rector for Tithes; Defendant inſiſts upon ſeveral Modus's, *viz.* Five Shillings *per* Acre for Wheat and Rye; four Shillings *per* Acre for Summer Corn; three Shillings *per* Acre for Meadow, &c. The Court diſallowed theſe Modus's, and decreed the Defendant to account, they being too rank, and too near the Value of the Land, eſpecially when theſe Modus's were ſuppoſed to commence when the Land was at a much leſs Value, and the Money at a much greater. It was ſaid in this Caſe, that the only Difference between a Modus and a Compoſition is, that the firſt is Time out of Mind, and the laſt only a late Agreement. All the Garden Ground in *England* ſhall pay Tithes for different Crops; Turnips, when they are pulled ought to pay Tithes, though never ſo often ſowed, and though upon the ſame Land. Tithes of * Aftermoath ſhall be paid, but not Tithes of After-paſture, unleſs by Cuſtom. But *quære de les Points darrein.*

Garden Ground. Different Crops. Turnips. Aftermoath. After-paſture. Godol. Rep. 359, 384. * Trin. 33 Car. 2. Marget's v. Butcher.

DE

Term. Paſchæ,

1717.

Lamb v. *Bowes.* May 17, 1717. 13.

SIR *Conſtantine Phipps* * moved for an Injunction, Injunction.
becauſe the Defendant had only demurred to the Bill without pleading or anſwering, which he alledged was only in Delay. The Court refuſed to grant an Injunction upon this Reaſon, but ordered the Demurrer to be ſet down to be argued at a ſhort Day.

Pierce v. *Johns.* May 18. 14.

BILL for an Account of ſeveral Sums of Money; A Judgment at Law is no Eſtoppel in Equity.
Defendant pleads a Verdict and Judgment at Law for the Money demanded by the Bill. *Per Curiam*, The Plaintiff cannot be eſtopped by this Verdict, for there is no ſuch Thing as an Eſtoppel in a Court

* *Nov.* 6, 1724. The like Motion was made in a Cauſe between *Ram* and *Bradbury & al'*; the Defendant *Bradbury* demurred to the whole Bill, being for diſtinct Matters againſt ſeveral Defendants: But the Court (*Price*, *Page* and *Gilbert*) denied the Injunction, and would not compel the Defendant to argue his Demurrer before the Day, having been in no Delay.

Court of Equity, it is only a Term of Art at Law: If a Bill is preferred where there has been a ſtated Account, and the Plaintiff ſets forth particularly one or more *Items* that are wrong charged; though the Defendant may plead the ſtated Account, yet he muſt anſwer to thoſe *Items* particularly ſet forth by the Plaintiff; and in that Caſe we often open the Account: Here the Defendant has anſwered to what he had pleaded to, and that muſt over-rule his Plea.

15. *Ridge & Ux' & al'* v. *Hudſon & al'*. May 23.

Deviſe to Truſtees to ſell Lands, and the Money ariſing to go to his Daughter and her Iſſue, and if ſhe die without Iſſue, then to two other Daughters. Ray. 154. p. 2. 2 Vern. 552.

A. By his Will deviſes, that Truſtees ſhall ſell his real Eſtate, and what ariſes by ſuch Sale ſhall go to his Daughter and her Iſſue, and if ſhe die without Iſſue, then to two other Daughters. Plaintiffs preferred their Bill to have the real Eſtate ſold, and to have the Money ariſing by ſuch Sale; but the two Daughters Defendants oppoſed it, becauſe of the contingent Intereſt they had by the Will, in caſe the Plaintiff died without Iſſue: But the Plaintiff inſiſted there could be no ſuch Limitation of a Chattel, as this would be, if the Land was ſold: And the Court accordingly did decree a Sale to be made; for it would be prepoſterous to oblige the Truſtees to ſell Lands in order to lay the Money ariſing out again on Lands; and being the Plaintiff was of Age, ſhe could bar her two Siſters by a Recovery, which this Court might ſave the Trouble and Expence of, by decreeing this Sale, and converting the Land into Money.

Jenkins qui tam, &c. v. *Larwood.* 16.
May 31.

SIR *Robert Raymond* moved upon the Stat. 13 & 14 *Car.* 2. *cap.* 11. *ſect.* 29. for a Commiſſion to examine Witneſſes abroad, in order to make uſe of the Depoſitions at the Trial of the Cauſe, though the Words of the Act are, "*A Commiſſion out of the High Court of Chancery*;" but he inſiſted, this being a remedial Law, and though it mentions only one Inſtance, yet it ſhall extend to others within the ſame Equity: As the Act which ſays *Juſticiarii* ſhall grant a Bill of Exceptions, has been extended to the Chancellor in the Petty Bag, and the Barons of the Exchequer, the Statute of *Circumſpectè agatis* ſays, *Circumſpectè agatis circa res tangentes Epiſcopum Norvicenſem*, which, Lord *Coke* ſays, is put only for an Inſtance, and extends to other Biſhops. The Statute of *Weſtm.* gives an Action of Debt upon an Eſcape againſt the Warden of the *Fleet*, and this has been conſtrued to extend to Sheriffs, Gaolers, &c. though only the Warden of the *Fleet* is named. Lord Chief Baron *Bury* and Baron *Price* were of Opinion that ſuch Commiſſion ſhould go, not upon the Act of Parliament, but by virtue of their original Juriſdiction; Baron *Forteſcue Aland*, that it might go, even upon the Statute; Baron *Mountague* diſſenting in both.

Commiſſion to examine Witneſſes abroad, in order to make uſe of their Depoſitions at the Trial of the Cauſe.

Hard. 506.

Hard. 32.

Vide Co. Mag. Cart.

DE
Term. S. Trinitatis,
1717.

17. *Rex* v *Oliver*. June 21, 1717.

If a Diſtreſs be for any Duty to the Crown, the Party diſtrained cannot replevy.

IF there be a Diſtreſs for any Duty to the Crown, the Perſon diſtrained cannot replevy, no more than in the Caſe of a Fee Farm; and if he does, an Attachment ſhall be granted for this Contempt. *Oliver* a Conſtable, who was fined by the Commiſſioners of the Land-Tax, and diſtrained upon, replevied: But *note*, he was diſcharged of this Contempt by the Act of Pardon.

18. *Rex* v. *The Tenants of Lord Derwentwater*. July 10.

How the Court of Exchequer proceeds upon the Certificate of Commiſſioners to inquire into forfeited Eſtates.

MR. Solicitor General moved upon the Statute for appointing Commiſſioners to inquire into forfeited Eſtates of Perſons in the Rebellion; the Commiſſioners having certified to this Court, that the Defendants were poſſeſſed of ſeveral Lands forfeited, that they did not diſcloſe them according to the Direction, and within the Time limited by the Statute:

There was an Affidavit of the Commiſſioners ſigning the Certificate, and likewiſe a Copy of the Attainder of Lord *Derwentwater*, and therefore he now moved for Exchequer Proceſs againſt them, *viz.* a *Scire facias*. But *per Curiam*, The Clauſe relating to the Certificate is applicable only where the Tenants commit Waſte, &c. but by the Clauſe of not diſcloſing, &c. the Forfeiture veſts in the Crown without Office, and you may take the ſame Method as for Lands forfeited for Treaſon. Baron *Forteſcue Aland*, A *Scire facias* is always grounded upon a Judgment; and if we ſhould allow it on this Certificate, it would be giving Judgment that the Tenants had forfeited two Years Value, and the more proper Method would be by Information; and they would not permit the Certificate to be inrolled *.

Reynel v. *Rogers*. July 17. 19.

REYNEL preferred his Bill againſt *Rogers* for Tithe of Hops; the Defendant inſiſts upon a Compoſition; Plaintiff ſays he gave Notice to determine the Compoſition; but being the Compoſition appeared to be for all ſmall Tithes, and the Notice to determine only as to Hops: The Bill was diſmiſſed, becauſe you cannot determine a Compoſition as to Part, and let it continue as to the reſt †.

A Compoſition for Tithes cannot be determined as to Part, and continued as to the reſt. 1 Sid. 443. Hard. 203. Salk. 414. 1 Lev. 24. Carth. 10. Raym. 14. Yelv. 94, 131.

* By a ſubſequent Statute 4 *Geo.* on ſuch Certificate the Court of Exchequer is to proceed as on an Inquiſition; and upon Mr. Solicitor General's Motion on ſuch Certificate, *June* 13, 1719, the Court ordered a *Scire facias*, as upon an Inquiſition found.

† It was ſaid by Baron *Price*, It is Time enough to give Notice to determine an Agreement for a Compoſition before the Reaping of Corn, and picking Hops, but not after. *Feb.* 19, 1717.

Pettifer

20. ## *Pettifer* v. *James*. July 19.

A Wife divorced a Menſa & Thoro for Adultery, forfeits her Right to her Moiety and Widow's Chamber, which ſhe is otherwiſe intitled to by the Cuſtom of London. Hob. 181. 3 Cro. 908. Dr. & Stud. 16. Lit. Rep. 194.

A BILL was preferred by a Widow for her Moiety and Widow's Chamber, according to the Cuſtom of the City of *London*; Defendant inſiſts in his Anſwer, that ſhe was divorced by Sentence in the Spiritual Court *a Menſa & Thoro* for Adultery, and therefore that ſhe ought not to be intitled to her cuſtomary Part: Lord Chief Baron *Bury* was for the Plaintiff; but by the Opinion of *Price*, *Mountague* and *Forteſcue*, Barons, the Bill was diſmiſſed; and *Price* ſaid, She comes with a very ill Grace into a Court of Conſcience to be relieved in this Caſe; that the Civilians were all of Opinion that Mrs. *Sayer* had forfeited her Right to the Adminiſtration by living in Adultery with the Murderer of her Huſband, and *pari ratione* the Widow here ſhould forfeit her Right to the Diſtribution.

DE
Term. S. Michaelis,
1717.

Offley v. *Whitehall.* 21.

THIS Diſtinction was taken, that if a Man libels in the Spiritual Court for Tithes in Kind, and the Defendant below ſuggeſts, and inſiſts upon a Modus, *there* the Spiritual Court has no Juriſdiction to try the Modus, their Method of Trial of Preſcription being different from ours; but if a Man libels for a Modus, and the Defendant admits the Modus, the Spiritual Court may proceed in that Cauſe: But even in the firſt Caſe, if they permit them to proceed to Sentence, they come, *then*, too late for a Prohibition, being it is *pro defectu Triationis* only; but you are never too late, where it is *pro defectu Juriſdictionis*.

At what Time it is, or is not too late to come for a Prohibition. Ante Pl. 8. Lib. 2. Bp. of Winton. 1 Sid. 251. March 73. 2 Salk. 548.

IF a Bill be preferred for a Matter or Sum beneath the Dignity of the Court, it may be diſmiſſed as well upon Motion as by Demurrer. *Per Price* Baron, *Nov.* 15, 1717 *. 22. Bill below Dignity of Court.

* Where there is a Fraud, or it is a complicated Matter, the Bill will be retained, though the Sum be never ſo ſmall.

23. *Doctor Sloane* v. *Heatfield.* Dec. 15.

Bill for Treaſure trove diſmiſſed with Coſts. Poſt Pl. 45.

THE Plaintiff brought his Bill for *Treaſure trove* within his Manor, and to diſcover what was found: The Court ſaid the Bill was proper enough, as to the Diſcovery, but he could have no Relief, becauſe he might bring an Action of Trover; and the Bill was diſmiſſed with Coſts.

DE
Term. S. Hilarii,
1717.

In Domo Procerûm, Jan. 24, 1717.

Nicholas v. *Elliot.* 24.

MATTHEW NICHOLAS Clerk, Vicar of *Shalford*, in *Hilary* Term 10° *Annæ*, preferred his Bill in the Court of Exchequer againſt *Elliot* the Farmer of the impropriate Rectory (among other Things) for the Tithes of Peas and Beans; and alſo preferred his Bill in the ſame Court afterwards againſt *Auſten* Eſquire, the Impropriator, and had a Decree for the ſame, though it was inſiſted by the Defendants, that the Vicar was only intitled to the Tithes of Peas and Beans * ſet and planted in Rows and Ranks, that have been hoed and weeded with the Hand, where the Ground has been turned with the Spade, as well in open Fields as in Gardens; but not where they have been ſet in Rows and Ranks, and hoed and weeded with the Hand, where the Ground

Tithes of Peas and Beans ſet and planted in Rows are ſmall Tithes.

Vide Gumley *v.* Burt, June 11, 1724, poſt.

* *Quære* if the Quantity or Place of ſowing will alter the Nature of the Tithe. 3 *Lev.* 365.

has been turned only with the Plough: From this Decree there was an Appeal to the Houſe of Lords, and it was there affirmed 24 *Jan.* 1717.

25. ## *Smith* v. *Roocliff.*

Modus too rank.

Ante Pl. 12. Poſt Pl. 246.

THE Barons were of Opinion, that a Modus of one Shilling in the Pound for Paſture, according to the Value of the Land, was a void Modus, as is alſo a Modus of one Shilling in the Pound according to the Value of the Rent.

26. ## *Bate* v. *Spracking.* Feb. 18, 1717.

Tithes. Hops, Hop-Poles, Milk. 1 Ro. Abr. 644. Godol. Rep. 414. 1 Sid. 283, 443. Ray. 277. Milk, poſt Pl. 123. Dodſon *v.* Oliver.

IT was decreed by the Court, that no Tithe ſhould be paid of Hop-Poles, that Tithe Milk ought to be every tenth Meal, and that in all Caſes where you do not make out ſome Cuſtom, you muſt pay according to the * Canon. Mr. *Ward* quoted the Caſe of *Chitty* v. *Reeves*, *in Scaccario*, *Term. Trin.* 30 *Jac.* 1687, wherein it was reſolved, that † Tithes of Hops are not to be paid till after they are picked, and before they are dried, every tenth Meaſure.

* *Quære* as to this.

† The Tithing of Hops was ſettled in the Cauſe of *Bliſs* v. *Chandler*. *Term. S. Mich. Nov.* 10, 1720.

And a Modus may extend to Hops or Clover (though of late brought into *England)* if the Modus covers all ſmall Tithes. 1 *Vent.* 61. 2 *Cro.* 116. *Yelv. Green* and *Auſtin. Lutw.* 1071. 1 *Keb.* 620.

George Duckett At

At Serjeants Inn, Feb. 24.

The Attorney General v. *Melliſh.* 27.

Bullion ſeiſed in a Ship, the Defendant claiming Property to the Value of 10,000l. not obliged to ſwear to it.

UPON a Seiſure of Bullion in a Ship at *Portſmouth*, the Defendant claimed Property to the Value of ten thouſand Pounds; * Mr. Attorney General moved, that the Defendant might be put to ſwear to his Property: But *per Curiam*, Though before the Pepper Act, 8° *Ann. ſect.* 76. it was uſual to make them ſwear, yet ſince, there has been no Inſtance of it (but where there were † two Claimers, and then the ſecond was to ſwear); therefore they would not oblige the Defendant in this Caſe, though the Attorney General produced an Affidavit that the Defendant was in mean Circumſtances, which was ſome Reaſon for ſuſpecting a Fraud.

Parker qui tam v. *Aſton.* Feb. 24. 28.

Writs of Delivery and Appraiſement, when, and for what Cauſes granted.

They are granted at the Diſcretion of the Court.

THE Court was moved for a Writ of Appraiſement and Delivery for a Ship loaded with Salt, that was ſeiſed but ten Days before; for though it was not within one Reaſon for granting Writs of Delivery, *viz.* Delay of Proſecution, yet it was within another, " that the Goods were periſhable;" But *per Curiam*, We will not grant a Writ of Delivery, which is diſcretionary in the Court, and there is Reaſon to ſuſpect this Ship was going to *Gottenburgh*.

* The like Motion was attempted in the Caſe of *Allen* v. *Cooper*, *December* 8, 1718, but denied.

† There were two Claimers of Bullion, but the Court refuſed to make either ſwear Property, but put the laſt to ſhew Cauſe why his Claim ſhould not be diſcharged. *Robinſon qui tam* v. *Verivelt* and *Treſco*, *May* 31, 1728.

29. *Anonymous.*

Abridgment of Demand.

IF there be a general Demand of Tithes, and a general Replication put in, if the Plaintiff upon the Commiſſion gives Notice, that he will proceed only as to ſuch and ſuch particular Matters, it is as well as if the Demand had been abridged in the Replication. *(Sed quære.)*

May 15, 1718, Sir *Francis Page* made a Baron of the Exchequer, and Baron *Forteſcue Aland* made a Judge of the King's Bench.

DE
Term. S. Trinitatis,
1718.

Anonymous. June 14, 1718. 30

IF a Replication is put in to an Anſwer, and a Commiſſion is taken out, and the Depoſitions returned; ſo long as thoſe Depoſitions are in being the Defendant cannot move to diſmiſs, whatever Delay the Plaintiff is afterward guilty of, but he muſt ſet the Cauſe down to be heard *ad requiſitionem Defendentis*; but if he ſuppreſſes the Depoſitions upon the Delay of the Plaintiff after, Defendant may move to diſmiſs for want of Proſecution.

When the Defendant may, or may not move to diſmiſs.

Elliot v. *Davis.* June 16, 1718. 31

INTEREST upon a Bond was decreed to be paid, although it exceeded the Penalty of the Bond.

Intereſt exceeding Penalty of a Bond decreed.

Caſes in Parl. 16. Sir And. Corbet's C. lib. 4. 1 Chan. Ca. 271, 226. Hard. 136. 2 Vern.

Dudds

32. *Dudds* v. *Billings*. June 17, 1718.

Witneſſes not twice examinable.

IT was ſaid by Baron *Price* in this Caſe, That Witneſſes who have been examined upon the firſt Commiſſion, cannot be examined upon a ſecond to the ſame Matter without Leave of the Court.

33. *Harriſon*'s Caſe. June 17, 1718.

Writ of Privilege. Cr.Car.389. 1 Lev. 233. Vaugh. 155. 1 Mod. 22.

THIS Day *Harriſon*, who was Deputy to Mr. *Maſham* the foreign Oppoſer, was allowed his Writ of Privilege to exempt him from ſerving the Office of Conſtable.

34. *Rex* v. *Gibbons & Ux'*. June 21, 1718.

An immediate Extent, when iſſuable.

IT was ſaid in this Caſe, That if an Extent iſſues againſt *A.* who is indebted to the Crown, and *B.* upon the Inquiſition is found indebted to *A.* upon the Return of that Inquiſition, and upon Affidavit made that the Money in *B.*'s Hands is in Danger of being loſt, an immediate Extent ſhall iſſue againſt *B.*

35. *Rex* v. *The Archbiſhop of Canterbury*. June 26, 1718.

Eſtreat, in what Caſe it is amendable, or not.

A Man who lived within the Liberty of the Archbiſhop of *Canterbury* was fined by the Judges of Oyer and Terminer in *Southwark*, for a Miſdemeanor in Court, which Fine was eſtreated, but no Notice was taken in the Eſtreat of what Place the Man was; therefore

therefore Sir *Conſtantine Phipps* moved that the Eſtreat might be amended by adding the Place where the Man lived, that the Archbiſhop (who had the Grant of the Fines *tam integrè Tenentium quam non integrè Tenentium infra, &c.*) might come before the foreign Oppoſer, and claim this Fine by virtue of his Grant, and ſaid, That a Man had been indicted and fined in *Eſſex*, which Fine was eſtreated here, and ſuch an Amendment made upon Application; but to this it was ſaid, *There* was an Addition in the Indictment, which was a Guide to the Court, being a Record to amend the Eſtreat by; but here is a Record for the King, and nothing but an Affidavit of the other Side; and *the Court* refuſed to do any thing in it upon the Motion. Lane 90. Bromley's Caſe.

Woodcock v. *Smith*. June 26, 1718. 36.

ALTHOUGH at Law they hold a Parſon or Vicar to the Proof of his Admiſſion, Inſtitution and Induction, and reading the Articles, yet *per tot' Cur'*, We never do in Equity. Proof of Admiſſion, Inſtitution and Induction, not required in Equity.

Rex v. *Barlow*. 37.

'PER Baron *Mountague*, If a Man traverſes an Inquiſition, the uſual Courſe of the Court is to take Security to the Value of two Years Profits of the Land, becauſe in that time it is intended the Right of the Crown and Party will be determined. Security on traverſing an Inquiſition.

38. *Baily* v. *Peaſly*. July 8, 1718.

Value of the Tithes to be aſcertained by Plaintiff's Oath, in what Caſe.

BILL for Tithes, the Defendant ſtood out till a Sequeſtration, and the Bill was taken *pro confeſſo*: It was moved for the Defendant, that upon paying the Coſts, the Value of the Tithes might be aſcertained, and reduced either by the Taxation of the Maſter, or by the Oath of the Plaintiff himſelf, as was done in the Caſe of *Croſman* and *Goodrick*, *Hil. Term.* 2° & 3° *Jac.* 2^di^. But *nota*, there was a Conſent in that Caſe; and the Court now would make no other Rule, but that the Plaintiff ſhould ſhew Cauſe why he ſhould not conſent to give his Oath to the Value.

39. *Benning* v. *Dowce*.

Exemption from Tithes, how to be laid.

THIS was a Bill for Tithes, the Defendant inſiſted that the Lands where, &c. were Part of the Homeſtall which is Part of the Biſhop of *London*'s Palace, and therefore exempt from Payment of Tithes, but did not lay it perſonally in the Biſhop; and this was allowed by Lord Chief Baron *Bury* and Baron *Price* againſt *Page*, to be well enough, becauſe this Exemption goes along with the Lands; although it would have been better laid by way of formal Preſcription as at Law; that the Biſhop for himſelf and his Tenants have time out of mind, &c. And as to Lands belonging to a Monaſtery, they muſt ſet forth how the Preſcription is, but where the Land itſelf is exempt, it is diſcharged, in whatever Hands it comes; and by the Opinion of two Barons againſt one *(abſente Mountague)* the Bill was diſmiſſed.

DE
Term. S. Michaelis,
1718.

Scott qui tam v. *Caſwell.* Oct. 23. 40.

SEIZURE of a Ship with Sugars was in *July* laſt after the Term, the Goods being periſhable, the Proſecutor conſented that a Writ of Appraiſement and Delivery ſhould go out in Vacation Time, the Defendant giving Security; this Term the Information came in, and the Court was moved for a new Writ of Appraiſement and Delivery, and that the old appraiſed Value ſhould be returned upon the new Writ of Appraiſement, which being by Conſent was granted, although regularly the Writ of Appraiſement and Delivery cannot iſſue until the Information is in.

Writ of Delivery and Appraiſement, at what Time to be iſſued.

Abthorp & al' v. *Jennings.* Oct. 25. 41.

MR. *Bootle* moved for an Injunction on a *Dedimus*, and that it ſhould extend to ſtay Proceedings in the Biſhop of *Ely*'s Court (until Anſwer) where the Defendant, as Rector of *Gambliga* in *Cambridgeſhire*, libelled

Injunction, to what Court extended.

libelled againſt the Plaintiffs his Pariſhioners for all ſorts of Tithes, and upon alledging that there were ſeveral Modus's, the Proof of which would ariſe out of the Anſwer, the Motion was granted. *(Quod nota.)* But the Rule was diſcharged *Nov.* 28 following *.

42. *Anonymous.*

At what Time a Tender of Tithes ſaves Defendant's Coſts.

IF to a Bill for Tithes the Defendant doth not ſhew a Tender before, or make it in the Anſwer, the Plaintiff is intitled to an Account, although the Value be never ſo ſmall; if there hath been a Tender before, and a Tender is alſo made by the Anſwer, the Defendant ſaves his Coſts; if the Tender is only by the Anſwer, he muſt account with Coſts.

43. *Seymour* v. *Rapier & Foreman & al'.* Nov. 17.

Deviſe of Stock in Trade, what it extends to.

BILL for an Account of the Teſtator's perſonal Eſtate; Defendants in their Anſwer inſiſted, that the Teſtator had deviſed to them all his Stock in Trade, and that his Book Debts, Caſh, Bills and Money in Goldſmiths Hands, which was applied to the carrying on of his Trade, ſhould be included in thoſe Words: But by the Opinion of *three Barons* againſt the Lord Chief Baron *Bury*, nothing ſhall be deemed Stock in Trade but the Shop Goods and Utenſils in Trade; though Baron *Price* thought the ready Money in the *Till* might come within that Conſtruction, but no farther. *N. B.* It was ſtrongly inſiſted on for the Defendants, that they ſhould be

* *Attorney General* v. *Starkey*, *April* 27, 1722, *Term. Paſchæ.* An Injunction was granted to ſtay Proceedings in the Spiritual Court of *Richmond* in *Yorkſhire.*

permitted to prove what Directions the Teſtator gave to the Perſon who drew the Will, and what he intended ſhould be comprehended in theſe Words in his Will; this was proviſionally read, but no Streſs was laid upon this Evidence by the Court.

Sheregold v. *Brewſter*. Nov. 21, 1718. 44.

THE Plaintiff obtained a Verdict in the Common Pleas for thirty Pounds againſt the Defendant, and the Defendant had thirteen Pounds Coſts taxed againſt the Plaintiff in this Court upon Diſmiſſion of his Bill; the Defendant proſecuting the Plaintiff in this Court for the Coſts, it was moved, that the Court would lay their Hands on theſe Coſts, and that ſo much as they come to ſhould be deducted out of what was due to the Plaintiff upon the Judgment in the Common Pleas. The Court made an Order to ſtay Proceſs of Contempt for not paying the Coſts, until further Order; though Baron *Price* thought the proper Method would be to prefer a ſhort Bill.

Coſts for Defendant in the Exchequer deducted out of a Judgment at Suit of Plaintiff againſt him in the Com' Pleas.

Thomas v. *Williams*. Nov. 26. 45.

IF a Bill is preferred againſt an Executor to diſcover Aſſets, which likewiſe prays * Relief, this Court will grant Relief upon ſuch Bill, by the Opinion of *three Barons* againſt *Price*, as was done in the Caſe of *Depuis* v. *Duke of Kingſton*, *June* 16 laſt, and in the preſent Caſe. But *nota*, in both theſe Caſes the Defendant had joined in Commiſſion; but if he had demurred to the Relief, it ſeems the Demurrer would have been good.

Bill to diſcover Aſſets and praying Relief. Ante Pl. 23.

* *May* 5, 1726, *Alpot & al'* v. *Thompſon & al'*. Lord Chief Baron *Gilbert* declared the ſolid Diſtinction, That where an Executor or Adminiſtrator confeſſes a liquidated Debt, there, *Diſcovery* ſhould draw *Relief*, *aliter non*.

46. *Johnſon qui tam* v. *Sowers*. Dec. 7, 1718.

Information of Seiſure, the Steps therein, and what Delay ſhall be a Ground for a Writ of Delivery.

AFTER a Seiſure of Goods, the regular Steps are to * file an Information, and then take out a Writ of Appraiſement, upon the Return of which the Defendant is to enter his Claim, and then may move for a Writ of Delivery: If the Proſecutor delays filing an Information, or does not ſue out a Writ of Appraiſement, the Defendant upon entring his Claim in the Book in the Office, may move for a Writ of Delivery: It was very much debated in the Caſe of *Allen qui tam* v. *Cowper*, what ſhould be called *Delay*, but no certain Rule laid down; ſo alſo the ſame thing was debated this Day in the preſent Caſe; what was moſt generally agreed to was, that where a Seiſure was in the Vacation Time, and there is no Information filed the Term following, if they could have tried it that Term, this would be *Delay* to ground a Writ of Delivery upon.

47. *Walter* v. *Ruſſel*. Nov. 28, 1718.

A Decree *Niſi* made abſolute at the Day per Defendant's Default, if he petitions for a Rehearing he muſt pay 10 l. Coſts. Exceptions over-ruled, Injunction is diſſolved without a Motion.

IN this Caſe it was ſettled as a Rule, that if there is a Decree *Niſi*, and at the Day the Defendant makes Default, and the Decree thereupon be made abſolute; if the Court afterward upon the Petition of the Defendant, grants a Rehearing, the Defendant ſhall pay ten Pounds Coſts. And *nota*, in the ſame Caſe *Dec.* 10, that if Exceptions, which are put in only to continue an Injunction, are over-ruled, the Injunction is diſſolved of courſe without Motion.

* It hath been uſual to enter Informations in a Book kept for that Purpoſe, beſides filing them.

Anonymous. Dec. 9, 1718. 48.

A Sequeſtration iſſued againſt *J.* for not performing a Decree; Lands being ſeiſed by the Sequeſtrators, *J.* died; whereupon it was moved, that the * Sequeſtration ſhould be diſcharged, but *the Court* refuſed it, becauſe the Sequeſtration was not returned, for the Sequeſtrators are anſwerable for what Profits they have received of the Lands, and they have nothing to indemnify them, but the Authority given them by the Sequeſtration.---But the Sequeſtration being returned, the Court diſcharged it (as to the Lands) from the Death of *J.*

A Sequeſtration muſt be returned before it can be moved to diſcharge it on the Death of the Party, as to Lands. Poſt Pl.

* Iſſuing as meſn Proceſs, it determines by the Death of the Party; but not, if in purſuance of a Decree. *Nota*, It binds from the Time of awarding. 1 *Vern.* 58, 118, 166, 248.

DE
Term. S. Hilarii,
1718.

49. *Cotterell* v. *Chamberlain.* Feb. 9, 1718.

Where there are ſpecific and Money Legacies, the laſt ought firſt to be applied to Payment of Debts.

F. *Cotterell* ſenior by his Will deviſes his Farm at *Briſtow-Cauſeway*, and the Stock upon it, to his eldeſt Son, whom he made Executor; and deviſed his Stock and Farm at *Mitcham* to his ſecond Son, upon Condition that he ſhould pay one hundred and fifty Pounds within a Year to his Executor, the better to enable him to pay the Money Legacies, which amounted to one hundred and twenty Pounds: *F.* the Executor preferred his Bill for this one hundred and fifty Pounds, and a Legatee preferred his Croſs Bill to have his Legacy of one hundred Pounds paid to him: And upon all the Pleadings, the Maſter's Report, &c. it appeared that the Plaintiff had paid above four hundred Pounds, and that therefore his Legacy of *Briſtow-Cauſeway* Farm and Stock being a ſpecific Legacy, and there not being Aſſets ſufficient beſides, the Money Legacies ought firſt to be ſwallowed up, and the ſpecific Legacies not broke into, till after: And upon this Point the whole Debate was; and at laſt *the whole Court* agreed, that there ought

Raym. 335. 2 Salk. 416. 3 Pt. Swin. of Wills 190.

ought not to be a proportionable Deduction between ſpecific and Money Legacies, but that theſe ought firſt to be applied to the Payment of Debts; and upon this Foot there was a Decree for the Plaintiff in the original Bill; though the *Chief Baron* ſeemed to think, that this Legacy of one hundred and fifty Pounds being deviſed out of *Mitcham* Farm, which was a ſpecific Legacy, was as much a ſpecific Legacy as *that*: But *cæteri Barones contrà*.

At Serjeants Inn, Feb. 25, 1718.

Rex v. *Earl.* 50.

EARL become a Bankrupt upon the 26th of *January* 1718, upon the 31ſt of *January* a Commiſſion of Bankruptcy was awarded againſt him, and an Aſſignment was made by the Commiſſioners the ſame Day, by virtue of which the Aſſignees ſeiſed Part of his Goods, &c. *Earl* being indebted to the Crown by ſeveral Bonds given as a Merchant, ſome of which were forfeited, and others not, an immediate Extent iſſued againſt him, teſted the 31ſt of *January*, by virtue of which the Sheriff took the Goods out of the Hands of the Aſſignees, which they had ſeiſed: *Nota*, The Meſſenger under the Commiſſion took Poſſeſſion of the Goods before the Extent; but it was given up, and admitted that the Extent bearing equal Date with the Commiſſion of Bankruptcy and Aſſignment, that the Extent ſhould undoubtedly have the Precedence: But it was moved, in regard the Extent was only for what was due to the Crown at the Time of the Extent, that it ſhould be referred to the Deputy Remembrancer to ſtate what was due at that Time; for which the Aſſignees (who now moved) offered to make the Crown ſafe;

Extent and a Commiſſion of Bankruptcy iſſue the ſame Day, the Extent ſhall have the Preference.

Extent, whether it does not reach Bonds not forfeited.

but there being other Bonds not yet forfeited, and the Extent not returned, the Attorney General oppoſed it, becauſe this could not appear to the Court until after the Return, and never was done without the Conſent of the Attorney General; and ſaid, the Aſſignees might be relieved either by Bill, or by pleading properly upon the Statute of Equity, but not upon Motion; ſo the Defendant *per Curiam* took nothing by his Motion.

51. *Brotherton* v. *Chancey*. Jan. 31, 1718.

Coſts: Plaintiff accepting a 3d Anſwer before he receives Coſts for the 2d Anſwer, does not waive them.

IF a Man puts in his ſecond Anſwer, Coſts are thereupon due to the Plaintiff, and though the Plaintiff accepts a third Anſwer from the Defendant, he doth not thereby waive his Title to his Coſts on the ſecond Anſwer, but may take out a *Subpœna* for them.

52. *Bereholt* v. *Candy*. Jan. 31, 1718.

Officers of the Revenue ought to be ſued in the Exchequer for what they do in the Execution of their Office. Poſt Pl. 56.

CANDY, an Officer, ſeiſed Coffee on board a Ship, as if it was intended to be relanded contrary to the Condition of the Owner's Bond; he alſo ſeiſed the Ship, and carried her to a Place where he could conveniently ſearch her in the Preſence of Witneſſes: The Owner of the Coffee brought an Action againſt him *in Banco Regis* for this Seiſure; but this Action was removed upon Motion as uſual, becauſe an Information was actually filed for the Coffee: But an Action being brought *in Communi Banco* againſt *Candy* by the Owner of the Ship, it was alſo moved to remove this Action, but oppoſed by the Plaintiff, becauſe there was no Information for the Ship, and

And the Court will remove an Action commenced in the C. B. againſt an Officer, for Seiſure of a Ship, though no Information for the Ship be yet filed here.

therefore not within the Rule: But by the Opinion of *the Court*, Officers belonging to the Revenue ought to be ſued *here* for what they do in the Execution of their Offices; and although no Information for the Ship be filed, yet a Seiſure is not examinable in another Court; and in the Action below, the *ſtopping* and *ſeiſing* muſt be given in Evidence, and therefore we will remove the Action *.

Ker v. *The Dutcheſs of Munſter.* 53. Feb. 4, 1718.

BILL of Diſcovery againſt the Defendant, who moved that the Plaintiff, being a *Scotſman*, might give Security as a Foreigner, which was allowed, and the Plaintiff not being able to get Security, offered to depoſit Money (*viz.* forty Pounds, which is the uſual Security) to ſtand inſtead of Security; but *the Court* refuſed it.

Where a Foreigner, Plaintiff, is to give Security for Coſts, a Depoſit in Money will not be permitted inſtead thereof.

Bennet v. *Loggan.* Eodem Die & Term. 54.

IN order to get an Injunction, Mr. *Ward* produced an Affidavit, verifying the Allegations of the Bill, which was admitted to be read.

Affidavit read verifying the Bill, to get Injunction.

* An Information was tried, and a Verdict for the Defendant: The Informer moved for a new Trial, which was denied: An Action was commenced in the Common Pleas againſt the Officer for the Seiſure, and the Court was moved, that it might be removed here, but denied, becauſe the Officer was now out of Court, and could have no Protection here. *De Term. Paſchæ, May* 3, 1721.

Eddowes

55. *Eddowes* v. *Deane.* Feb. 5, 1718.

There can be no Decree againſt an Executor de ſon Tort, without ſetting up an Adminiſtrator.

PER Curiam, There is no Precedent in a Court of Equity of a Decree againſt an Executor *de ſon Tort*, without ſetting up an Adminiſtrator; for if there ſhould be an Adminiſtrator, and the Defendant pay the Money, he would be again liable to the Adminiſtrator.

56. *Tanner qui tam* v. *Allfriend.* Feb. 7, 1718.

Reſeiſure of run Goods, when allowed. Ante Pl. 52.

A Seiſure was made of ſome Snuff in *September* 1718, but no Information filed; the Defendant brought an Action againſt the Officer in *Michaelmas* Term following; on *February* 6th following Mr. Attorney General moved (though there was no Information then filed) that the Defendant might admit the Seiſure, or that the Officer might be at liberty to reſeiſe (upon an Affidavit that the Goods were run, and that when the Officer ſeiſed, he had nobody with him to prove the Seiſure): After the Motion they filed their Information, and Mr. *Ward* came the next Day, and ſhewed for Cauſe againſt it, that it was the Officer's own Fault to ſeiſe in ſuch manner, as not to be capable of proving it; but *here* he might have had the Evidence of the Coachman who carried away the Snuff, or of the People of the Houſe where it was carried: And beſides, they had ſlept two Terms, and filed no Information; but notwithſtanding theſe Reaſons, becauſe he would not admit the Seiſure, and upon the Circumſtances of Fraud, which ran high about this Time, they ſtopped the Action, Baron *Price totis viribus contrà*; but as to admitting the Officer to reſeiſe, the Court were divided.

The

The Attorney General v. *Paul, Miller and Frampton.* Feb. 10, 1718. 57.

THIS was a *Scire facias* upon a Bond to export ſeveral Goods to Parts beyond Seas, and not to reland them, and to produce a Certificate of ſuch Exportation; upon Oyer of the Condition the Defendant pleaded the Statute of Equity, and that the Goods were put on board, and that they were not relanded, but that certain Perſons unknown, by Force in the Night-time, came and carried them away: To this the Attorney General demurred; and Judgment was given by *the whole Court* againſt the Defendant (as in the Caſe of *The Attorney General* v. *King*) the Statute extending only to two Caſes, *viz.* firſt, to taking by Enemies; ſecond, to Loſs by Sea.

Plea to a Scire facias upon a Bond for the Exportation of Goods.

At Serjeants Inn, Feb. 20, 1718.

Hanking v. *Gay & al'.* 58.

BILL for Tithes; Defendants in their Anſwer inſiſted, that the Lands where, &c. were formerly belonging to the Abbot of *Crowland*, and therefore exempt; but do not ſay, that they were diſcharged when Parcel of the Abby Lands, though not one of the Orders which was diſcharged. (*Nota*, this was one of the greater Monaſteries diſſolved by the Stat. 31 *Hen.* 8.) And the Defendants inſiſted, that conſtant Non-payment was a ſufficient Evidence of an Exemption, eſpecially being coupled with being Parcel of one of the greater Monaſteries: And in the Caſe of *Collard* v. *Newton*, *Hil.* Term, 1681, the Defendant there inſiſted, that the Lands, &c. were

Exemption of Land from Tithes, as belonging to one of the greater Monaſteries, how to be laid in Bill. Degge 339. 1 Leon. 240, 1. Cr. El. 206. Hob. 309. Lib. 4, 44. Dyer 349. More 219. Hard. 322. Poſt Pl. 111.

Medley *v.* Talmey, Lempſter in Suſſex, 1695. 1 Ro. Abr. 654. Cr. Car. 422. Sir W. Jones 368.

diſcharged by Bull, Order, Preſcription, or ſome other Way, and allowed to be good. But *the Court* unanimouſly decreed for the Plaintiff in the preſent Caſe, for that the Proof was not full as to Non-payment, and alſo though the Defendant ſays the Lands were in the Abbot's Hands, yet he does not ſay they were diſcharged in his Hands: And the Stat. 31 *Hen.* 8. extends only to *ſuch.*

59. *Rex* v. *Fowler.* Eodem Die & Anno.

Outlawry, to whom Money levied thereon is payable.

FOWLER was outlawed in a Civil Action at the Suit of *Peck*, an Extent iſſued out againſt him, and an Inquiſition and a *Levari facias* thereon; by virtue of the *Levari* the Sheriff levied fifty Pounds; and it was moved that it might be paid to *Peck*, which would put an End to all Diſputes between them: Although *Fowler* conſented by his Counſel, yet *the Court* would not do it, becauſe nobody conſented for the Crown, and the King is intitled to the fifty Pounds, unleſs a Leaſe had been taken out.

Not to the Plaintiff in the Action without the Conſent of the Crown.

DE
Term. Paſchæ,
1719.

Rex v. *Wynn & Parry.* 60.

MR. *Wynn* diſtrained Corn, &c. for Rent due the firſt of *November* 1718; an Extent iſſued the 14th of *November*, by virtue of which the ſame Corn, &c. was ſeiſed by the Sheriff; but *Wynn* detained ſo much as would ſatisfy him his Rent; upon which *Lloyd*, at whoſe Suit the Extent iſſued, moved for an Attachment againſt *Wynn*, being the Extent, though executed the 14th of *November*, was teſted the * 10th of *October*; and upon this Motion it was taken for granted, and admitted *per totam Curiam*, that the Extent binds from the *Teſte*, as was reſolved in the Caſe of *The King* and *Tanner Arnold*.

An Extent binds from the Teſte.

* *Quære*, for *Hard.* 126, ſays, That *Diem clauſit extrem'* never bear *Teſte* in Vacation Time, but from Term to Term.

Geale

61. ## *Geale* v. *Winter.*

Decree is never *Niſi*, when the Cauſe comes on after Equity reſerved.

IT was ſaid in this Caſe, that when a Cauſe comes on after the *Poſtea* returned upon the Equity reſerved, the Decree is never *Niſi*, but always abſolute.

62. ## *Rex* v. *Carr.*

Fine to the King on an Indictment for an Aſſault, Satisfaction on a Record acknowledged per Attorney General.

CARR was indicted at *Kingſton* Aſſiſes for an Aſſault, and fined fifty Pounds, which Fine was eſtreated: It was moved to diſcharge this Fine, upon Suggeſtion that the King had ſignified his Pleaſure to the Attorney General, that he was willing to remit the ſame, and that Satisfaction ſhould be acknowledged upon Record; that in purſuance of *this* the Attorney General had iſſued his Warrant to the Clerk of Aſſiſe of *Surrey*, to acknowledge Satisfaction upon Record, which the Clerk did accordingly; and of this a Certificate was produced: But *the Court* took a Diſtinction, where the Eſtreat is upon a Recogniſance forfeited, and where upon a Judgment, and ſaid, The Attorney General ſhould come and acknowledge Satisfaction here, and they muſt apply to him for that Purpoſe, before the Court could grant the Motion.

63. ## *Watſon* v. *Lindſel.*

Modus for Tithe Milk. It is, primâ facie, an Objection to a Witneſs that he is an Inhabitant of the Pariſh where the Modus is inſiſted on.

THIS Modus was inſiſted upon by the Defendant for Tithe Milk, that he paid the tenth Meal from the firſt of *May* incluſive, twice every tenth Day at the Church Porch, until the firſt of *Auguſt* excluſive; but this Cauſe going off upon another Point, no Opinion was given as to the Validity of

the Modus. It was ſaid in this Cauſe, that it is a good Objection to a Witneſs, that he is an Inhabitant of the Pariſh where the Modus is inſiſted upon; and if he is not in the Occupation of any Lands tithable, it lies upon the other Side to ſhew it.

And it lies on the other Side to ſhew he enjoys no tithable Lands. Raym. 277.

Diſney & al' v. *Robertſon & al'*. 64.

BILL preferred by Plaintiff, as Owner of the Manor of *Kirkſhed* in the County of *Lincoln*, for ſeveral Tolls payable for the Landing of Goods, &c. But *per totam Curiam*, the * Bill was diſmiſſed, being a Matter proper at Law, and a Decree in this Caſe could be of no Uſe; for it could not conclude any body but the Defendants, and it is not like a Bill of Peace, which binds all Parties, as againſt the Inhabitants of a Pariſh, or the Tenants of a Manor, in which Caſes a Bill ſhall be retained to prevent a Multiplicity of Suits.---A Bill of the ſame Nature was diſmiſſed in *Hilary* Term, 1718, between *Bond* and *The City of Exeter*.

Bill for Tolls for landing of Goods in Plaintiff's Manor diſmiſſed, as being proper at Law.

Anonymous. 65.

IF a conſiderable Sum be due for Intereſt on a Mortgage, and the Mortgagee aſſigns over for the Conſideration of ſo much as the Principal and Intereſt come to (if this Aſſignment be without the Privity of the Mortgageor) then the Intereſt ſhall be carried on only upon the Principal; but if the Mortgagee had applied to the Mortgageor before, and demanded his Money, and required him to join in the

Mortgage aſſigned, with or without the Privity of the Mortgageor, the Difference as to Intereſt.

* A Bill of the like Nature was diſmiſſed at Serjeants Inn, *June* 26, 1719, between *Harding* and *Ainge*.

Aſſignment, if the Mortgageor refuſes either to pay or join, the Aſſignee ſhall carry Intereſt both on the Principal and Intereſt.

66. *Read qui tam* v. *Francia.*

Information for importing Brandies, Duty unpaid, how to be laid.

AN Information was exhibited againſt *Francia* for importing Brandies and landing the ſame, the Duty not being paid, &c. There was a Verdict for the Informer: And now Sir *Conſtantine Phipps* moved in Arreſt of Judgment, that the Offence was not laid to be between ſuch a Day, and *ante exhibitionem hujus Informationis*, according to the uſual Way, but only before the exhibiting, &c. (though this ſeemed a fatal Objection, ſays the Reporter himſelf, yet) *the Court* were all of Opinion for the Informer, and gave Judgment accordingly.

67. *Rex* v. *Sir J. Packington.*

Upon an Extent in Aid, Debts without Specialty cannot be found without Motion in Court.

UPON an Extent in Aid they cannot find Debts without Specialty, but upon Motion in Court, if in Term Time.

68. *Rex* v. *Dale.*

Extent comes after a Diſtreſs for Rent, but before a Sale of the Goods. 2 Saund. 47. Cr. Car. 148. 1 Vent. 37. Noy 119. 1 Ro. Abr. 673. p. 8. Dyer 67.

AN Extent bearing *Teſte* the 4th of *November*, iſſued againſt *Dale*, by virtue of which, Corn and Hay were ſeiſed; but *Mitchell* the Landlord having diſtrained the ſame for Rent the 29th of *October* before, refuſed to let it go; upon which an Attachment was moved for againſt *Mitchell*, the Goods not having been ſold within five Days, purſuant to the

Statute of the 2d of *William* and *Mary*, no Property was diveſted by the Diſtreſs, and they were in the Landlord's Hands only by way of Pledge: But this being a Point of Law, which *Mitchell* was not ſuppoſed to underſtand, and being the Sheriff was negligent in executing his *Venditioni exponas*, the *Court* refuſed to grant an Attachment. Ante Pl. 5, 9.

The Earl of Scarborough v. *Hunter & al'.* 69.

A BILL was preferred by the Earl of *Scarborough* for the Tithe of Fiſh due by Cuſtom, which Cuſtom was laid for all Fiſh taken at Sea, and brought to Land and ſold within the Pariſh of *Hort*, of which the Plaintiff was the impropriate Rector; ſecondly, for all Fiſh ſold at Sea, and the Veſſel came back to the Pariſh; thirdly, for Fiſh taken by the Inhabitants, and ſold at another Port: Although the Plaintiff did not prove his Cuſtom as laid in the Bill, yet *by three Barons againſt the Chief Baron*, an Iſſue was directed to try, whether there was ſuch Cuſtom as laid in the Bill, or whether any and what Cuſtom; though it was ſaid, there never was any Inſtance, where either the Plaintiff or Defendant inſiſted upon a Modus, or Cuſtom, and did not prove it, that ever it went to a Trial at Law, it being eſſential to a Modus, or Cuſtom, that it be certain. It was alſo objected, that the Cuſtom was illegal as it was laid; for if it is a perſonal Tithe, as inſiſted upon (and as the Court ſeemed to think) then a double Tithe may be payable, not only in another Port where the Fiſh is ſold, but alſo where the Fiſher inhabits; to which *three Barons againſt the Lord Chief Baron* ſaid, It was a good Cuſtom; for one Tithe may be paid by Cuſtom, and one of Common Right.

Tithe of Fiſh, how to be laid.

Iſſue directed to try a Cuſtom, though no Proof of it made.

A double Tithe may be payable, for one Tithe may be due by Cuſtom, and another of Common Right.

Doe

70. *Doe qui tam* v. *Cooper.*

Information for importing Brandy in unſizeable Caſks.

AN Information was exhibited againſt *Cooper* for importing Brandy in unſizeable Caſks; and the Queſtion was upon the Stat. 8° *Ann. cap.* 7. whether they ſhould be forfeited, or pay Duty; and though the Stat. 4 & 5 *Will. & Mar. cap.* 5. ſays, they ſhall be forfeited, or the Value, yet *three Barons* againſt *Mountague* gave Judgment, that they ſhould pay Duty.

71. *Knight Executrix* v. *The Dutcheſs of Hamilton.*

An Executrix ſhall not pay Coſts, although a greater Sum is paid into Court than ſhe had a Verdict for at the Trial.

ACTION upon the Caſe upon an *Indebitatus aſſumpſit*, the Defendant brought ſixteen Pounds into Court with the uſual Motion, that the Plaintiff (who was an Executrix) ſhould proceed at the Peril of Coſts; at the Trial the Plaintiff proved, and had a Verdict for only thirteen Pounds; and it was now moved, that the Plaintiff ſhould pay Coſts, and that the three Pounds overplus paid into Court ſhould be reſtored to the Defendant; which laſt Part was granted; but the Court would not make the Plaintiff (being an Executrix) pay Coſts: But *quære* if the Plaintiff ſhould not have Coſts till the Time of the Rule.

DE
Term. S. Trinitatis,
1719.

Sir Edw. Delaval v. *Sir Edw. Blackett.* 72.

THE Plaintiff preferred his Bill againſt the Defendant for Tithes, and had a Decree for an Account; but before the Coſts were aſcertained Sir *Edw. Blackett* died; Sir *Edw. Delaval* revived againſt the Executor, and upon the Queſtion, whether the Defendant ſhould pay Coſts, this Diſtinction was taken, that if the Revivor againſt the Defendant had been only for Coſts, which had not been aſcertained in the Life-time of the Teſtator, then the Defendant ſhould not have paid Coſts; but here the Revivor was for the Duty as well as the Coſts; and therefore the Defendant, though an Executor, ſhould pay Coſts.

Upon a Bill of Revivor for the Duty as well as the Coſts, an Executor Defendant ſhall pay Coſts; aliter when the Revivor is only for the Coſts to be aſcertained. Poſt Pl. 230.

Rex v. *Reeves & al'.* 73.

IT was ſaid by Baron *Price* in this Caſe, That no *Venditioni exponas* ought to iſſue without Motion in Court, and ordered the Rules 15° *Car.* 2. to be inſpected.

Venditioni exponas is not to iſſue without Motion in Court.

74. ## *Boning* v. *Sprott.*

Order to examine to the Credit of a Witneſs before Publication.

UPON Motion you may have an Order to examine to the Credit of a Witneſs, even before Publication paſſes.

75. ## *Anonymous.*

An Impropriator's Predeceſſor's Book admitted as Evidence of a Mortuary due. Poſt Pl. 253.

UPON a Bill by an impropriate Rector for a Mortuary, the Book of ſome of the Predeceſſor Impropriators was offered to be read as Evidence, wherein were Entries of Payments of Mortuaries; but it was objected, that although a Parſon's Book (who is only Tenant for Life, and therefore not ſuppoſed to enter any thing with Partiality to his Succeſſor) may be read; yet the Book of a Lay Impropriator, who has the Inheritance, ought not to be read: To this it was anſwered, that the Book of a Lord of a Manor, who has the Fee, is admitted as Evidence of Quit Rents. (*Sed quære*, if the bare Entry of the Lord of a Manor in his Book be Evidence; though a Bailiff's Accounts, where it appears the Rents have been paid and allowed in the Account, are admitted as Evidence.) *Per Curiam*, Let the Book be read.

Quære, if a Book of Lord of a Manor is Evidence of Quit Rents.

A Bailiff's Accounts of Rents paid and allowed, is Evidence.

76. ## *Johnſon* v. *Elleker.*

An Affidavit muſt be annexed to a Bill for the Diſcovery and Eſtabliſhing of Deeds only, that Plaintiff has not the original Deeds, &c.

WHERE a Man prefers his Bill to have a Diſcovery only of Deeds, and (having the Counterpart) to have the Deeds eſtabliſhed, there he ought to annex an Affidavit to his Bill, that he has not the

original Deeds, nor any other Perſon in Truſt for him, or elſe it is Cauſe of Demurrer; but if there is Relief prayed, as well as a Diſcovery (as where the Heir preſers a Bill againſt a Mortgagee to have a Mortgage Deed delivered up, ſuggeſting the ſame has been ſatisfied, and that he has loſt the Counterpart) there is no need of an Affidavit.

But if Relief be prayed, an Affidavit is not neceſſary.

The Dutcheſs of Hamilton v. *Fleetewood.* 77.

WHERE, upon Exceptions to an Anſwer, the Court are equally divided, the Exceptions are over-ruled of courſe.

Exceptions are over-ruled when the Court is equally divided.

The Biſhop of Exeter v. *Trenchard & al'.* 78.

IN a Bill for Tithes, the Defendant, as to ſome of them, inſiſts upon a Modus, but admitted others, which he had not paid, and having omitted to make a Tender of them by his Anſwer, he upon Motion obtained an Order, that he might be at Liberty to pay ſo much Money in Lieu and Satisfaction of all his Tithes not covered by the Modus, together with the Plaintiff's Coſts to that Time, and the Plaintiff to proceed at the Peril of Coſts. (But I believe this was by Conſent).

Tender of Payment for Tithes admitted after Anſwer.

DE
Term. S. Michaelis,
1719.

79. *Peploe* v. *Swinburn.* Oct. 26, 1719.

Creditors by Judgment at Law, and Creditors by Decree in Equity, ſhall be paid equally by an Executor, without any Preference.

IN this Caſe the Queſtion was, who ſhould have the Preference to be paid by an Executor, a Creditor by Judgment at Law, or a Creditor by Decree in a Court of Equity: Sir *Edward Northey*, who was Counſel for the Judgment Creditor ſaid, That it was never taken in the Court of Chancery, that a Decree ſhould be upon an equal Foot with a Judgment at Law, though it ſhould with a Pocket Record, as a Recogniſance, &c. The *Barons* were divided in their Opinion, and no Judgment was given in the Point at this Day; but in *Hilary* Term following it was decreed, that the Judgment and Decree Creditors ſhould come in and be paid equally. *Vide* 2 *Chan. Rep.* 193. 1 *Chan. Rep.* 194. 1 *Lev.* 155. *Joſeph* and *Mott*, *in Canc' coram* Lord Keeper *Wright*. 1 *Leon.* 155.

Baldwin

Baldwin qui tam v. ——. 80.

BALDWIN made a Seiſure of Tea upon the 11th of *November*, and exhibited his Information the ſame Day, in which it was alledged, that between ſuch a Day, and the Day of exhibiting his Information, the Tea was imported, &c. This would have been bad, for the Day of the Seiſure would have been excluded, there being no Fraction of Days; but upon Motion the Court gave them leave to amend and to make it the 12th.

Amendment of an Information.

1 Salk. 325. Poſt Pl. 98.

Evans qui tam v. ——. 81.

UPON a Seiſure of a Parcel of Snuff there iſſued a Writ of Appraiſement; the Appraiſors appraiſed it at two Shillings and ſix Pence *per* Pound, which was a Shilling *per* Pound more than it was worth; therefore the Officer now moved for a new Writ of Appraiſement; for if it was not really worth ſo much as appraiſed at, it would undoe the Officer, for he muſt pay the King's Moiety according to the appraiſed Value: And *the Court* ordered the Appraiſors to ſhew Cauſe.

New Writ of Appraiſement.

Poſt Pl. 260.

Bill v. *Robinſon.* 82.

AN Information was exhibited upon a Seiſure, and upon the Trial there was a Verdict for the Defendant; therefore the Defendant brought an Action againſt the Informer for this Seiſure *ſine aliquâ probabili Cauſa*; upon the Trial of this Cauſe before

Information, and Verdict for Defendant.

In an Action againſt the Informer, he ſhall be permitted to give in Evidence, that there was a probable Cauſe for making the Seiſure.

Baron *Price* at *Wincheſter*, he would not permit the Defendant to go into the Evidence given upon the Trial of the Information to prove the *probabilis Cauſa*, becauſe, he ſaid, it would be arraigning that Verdict: But upon a Motion for a new Trial, the Lord Chief Baron *Bury* and Baron *Page (abſente Mountague)* were clearly of Opinion, that *that* Evidence ſhould have been admitted, and made no Difference (which was much inſiſted on) where the Action was tried before the Information, and where after; and it would not be arraigning the Verdict on the Information; for that there was a wide Difference between a ſtrict legal Cauſe, and a probable Cauſe; and a new Trial was granted.

83. *Jones* v. *Clement & Hughes.*

Commiſſioners of Rebellion, when to take Security.

UPON a Motion for an Attachment it was ſaid, *by the Court*, that Commiſſioners of Rebellion not only might, but ought to take a Bond as a Security from the Defendant to appear, where it is upon the ordinary Proceſs of the Court, though a Serjeant at Arms could not in that Caſe: But where it is upon an Attachment, or Contempt of an Order of the Court, *&c.* there they ought not to take any Security, but to have the Body in Court at the Day of the Return of the Commiſſion of Rebellion.

84. *Johns* v. *Stafford.* Nov. 14.

Publication of old Depoſitions, where refuſed to be granted.

JOHNS exhibited his Bill againſt *Stafford* to eſtabliſh a Decree relating to a Diſpute about the Right to Mills and the Water running to them; and in his Bill *(inter al')* ſets forth, that in King *Charles* the Second's Time the City of *Exeter* preferred their

Poſt Pl. 148.

Bill againſt the now Defendant's Father; to which the then Defendant put in his Anſwer, and there were Depoſitions taken, to which he refers; that Cauſe abated by the Death of one of the Parties before the Hearing; and the Defendant moved, that theſe Depoſitions might now be publiſhed to be made uſe of in this Cauſe, and inſiſted, that though the Cauſe abated by the Death, and was conſequently out of Court, yet that the Plaintiff, by referring to them in his now Bill, had in effect revived the Suit: But Lord Chief Baron *Bury*, *Price* and *Page (abſente Mountague)* were againſt the Order for granting Publication; and the Defendant took nothing by his Motion.

Namink v. *Farwell.* Nov. 17. 85.

A new Trial granted after a ſpecial Verdict ſigned by Counſel on both Sides.

UPON an Action brought againſt an Officer for a Seiſure *abſque probabili Cauſa*, there was a ſpecial Verdict ſigned by the Counſel on both Sides; but the Attorney General notwithſtanding moved for a new Trial, and obtained it: Although it was ſaid by the Counſel on the other Side, that there never was any Inſtance that a new Trial was granted after a ſpecial Verdict which is ſigned by Counſel.

Melliſh v. *Arnold.* Nov. 20. 86.

New Trial granted for Miſbehaviour of the Jury.

IN an Action brought againſt an Officer for a Seiſure *abſque probabili Cauſa*, a new Trial was granted, becauſe the Jury threw up Croſs or Pile, whether they ſhould give the Plaintiff three hundred Pounds, or five hundred Pounds Damages, and the Chance for five hundred Pounds came up. And *note*, the Court now made a Rule, that *Middleſex* Juries at *Niſi prius* ſhall be paid in Court.

Nota,

Nota, The Affidavits moved upon were made by Perſons who heard the Jurymen talk of the Matter; and the Jurymen did not think fit to make any Affidavit to clear themſelves; ſo a new Trial was granted.

87. *Carter* v. *Saywell.* Nov. 24, 1719

Condemnation. Q. whether it may be given in Evidence without pleading ſpecially. Hard. 195. Carth. 27.

CARTER bought a Parcel of Goods that were condemned in this Court, and theſe Goods were afterwards ſeiſed, and upon the Trial of the Information of Seiſure of theſe Goods, *Carter*, who was then Defendant, gave in Evidence a Condemnation in the Exchequer Court; which Mr. Attorney General ſaid ought to have been pleaded; and upon this a Caſe was ſtated for the Opinion of the Court *.

88. *Duppa* v. *Briddley & Horn & Newman.*

Infants, how to aſſign purſuant to Stat. 7 Ann.

THE Method in the Court of Exchequer is, where an Infant is to aſſign purſuant to the Statute 7° *Annæ*, *cap.* 19. †A Petition is drawn in the Name of him who craves the Benefit of the Act, and upon *that* it is moved by Counſel on his Behalf, that the Infant may aſſign, and Counſel is to conſent for the Infant: But the Court refer it to the Deputy to ſtate all Matters, and upon his Report they make an abſolute Order; and ſo it was done in this Caſe.

* In *Mich.* Term, 1721. *Per Page* and *Mountague* Barons, It muſt be pleaded; *per Price* Baron, That it may be given in Evidence without pleading it.

† I think (ſays the Reporter) it is now done upon Motion without Petition.

Whiſtler

Whiſtler v. *Webb & al'.* 89.

BILL for a Redemption; the Defendant in his Anſwer ſets forth, he was only a Truſtee for *A.* ---This was objected to the Plaintiff at the Hearing, that the *Ceſtuy que Truſt* ſhould have been made a Party, and he might have amended, this being diſcloſed in the Anſwer; and for this Reaſon the Bill was diſmiſſed.

Bill diſmiſſed for want of Parties.

Anonymous. 90.

THIS was cited by the Court as the Courſe of the Court of Chancery, *viz.* That where Tenant for Life makes a Leaſe for Years, the Leſſees apprehending that the Leſſor had a Power to make ſuch a Leaſe certain, lay out great Sums in Improvements, and he in Reverſion ſtands by and lets them go on, without giving Notice that the Leſſor was only Tenant for Life, that the Court of Chancery has, in ſuch Caſe, decreed the Leſſees the Remainder of the Term after the Death of the Tenant for Life.

Reverſioner permits Leſſees of Tenant for Life to build, &c. their Term ſhall be ſupported in Equity. 1 Vern. 325. Rep. of Ca. in Equity, fo. 85.

Jones v. *Langham.* Dec. 12. 91.

BARON *Price*, It is not regular to refer the Bill for Scandal after the Anſwer is come in.

Scandal. Poſt Pl. 383.

At Serjeants Inn, December 14.

92. *Frazer & al'* v. *Moor.*

Poſſeſſion for 34 Years good againſt a Redemption. 2 Vern. 418, 377. 2 Vent. 340.

UPON a Bill to redeem it appeared by the Plaintiff's own ſhewing, that the Defendant had been in uninterrupted Poſſeſſion above thirty-four Years, and no Incapacity was pretended; for which Reaſon the Defendant demurred, and the Demurrer was allowed by *Price* and *Page* Barons *contrà* Lord Chief Baron *Bury* *.

* *Dean* v. *North*, *Term. Paſchæ*, *May* 6, 1725.

DE
Term. S. Hilarii,
1719.

Smith v. *Watſon*, *Laſſels*, *Jenkins* & *King*, & *è contrà*. Feb. 1, 1719. 93.

T. Clogie being indebted to *Watſon* by Judgment agrees to aſſign over a Leaſe which he had, to *Watſon*, as a Security for his Debt, and *Watſon* thereupon agreed to give *T. C.* a Defeaſance for twelve Months; *T. C.* ſent his Leaſe to *Watſon*, and a Letter ſpecifying this Agreement to a Scrivener, with Directions to draw an Aſſignment and Defeaſance purſuant to this Agreement; but before the ſame was executed *T. C.* dies, having made his Will, and *Ph. Laſſels* his Executrix, who, before any Notice of this Agreement aſſigns over the Intereſt of the ſaid Leaſe to *Jenkins* and *King* in Truſt for herſelf, and then for them, who were all likewiſe Judgment Creditors; *Watſon* preferred his Bill againſt *Laſſels*, *Jenkins* and *King*, to carry this Agreement into Execution. Baron *Price* was of Opinion this was a Writing within the Statute of Frauds and Perjuries, and ſuch a Lien upon *T. C.* that, as if he had lived and refuſed to perfect the ſaid Agree-

Agreement to aſſign a Leaſe, whether it ſhall be carried into Execution againſt an Executrix.

ment, a Court of Equity would have obliged him to do it; ſo they ought likewiſe to oblige the Executrix and her Aſſignees to execute the ſame: But Chief Baron *Bury* and Baron *Page (abſente Mountague)* though they thought this Letter a Writing within the Statute, and that it would be a good Lien upon *T. C.* himſelf, and even upon his Executrix, yet *Jenkins* and *King* the Aſſignees, had not only as good a Title in Equity as the Plaintiff, but had alſo by the Aſſignment a Title at Law too; ſo they could not decree them to execute the ſaid Agreement. *Nota*, Upon *Smith*'s original Bill the Queſtion was only, whether *Watſon* ſhould deliver up the Writings.

94. *Holden qui tam* v. *Broad.*

Informer dies pending the Information.

THE Informer *Holden* died pending the Information, and upon Motion the Court gave leave to make a Reſeiſure.

95. *Lady Granville & al' Commoners of Epworth* v. *Ramſden & al'.* Jan. 25.

Bill of Review, when it ought to be brought.

BILL was preferred to eſtabliſh the Plaintiff's Right to Common, and to ſet aſide ſeveral former Decrees; the Defendant demurred to the whole Bill; for if there was any Error in the former Decrees, they ought to have brought a Bill of Review, and not do it in this Method; and the Demurrer was allowed.

Delver

Delver v. *Hunter.* 96.

A Woman recovered in Dower, and brought a Bill for the meſn Profits; Serjeant *Bridges* for the Plaintiff cited a Caſe of *Dean* v. *Wade*, in 1 *Chan. Rep.* large Octavo, and 2 *Chan. Rep. Coventry* v. *Thynn:* But *per totam Curiam* the Bill was diſmiſſed; for even where the Huſband dies ſeiſed, there ſhall be no meſn Profits until Demand, as *per Stat. Merton*, *Co. Lit.* 32, 33. But if the Huſband does not die ſeiſed, as he did not in this Caſe, the Wife can have no meſn Profits; and beſides, it is admitted the Plaintiff is in Poſſeſſion, ſo may have Remedy at Law, if ſhe has any Right to meſne Profits.

Bill by a Woman who recovered in Dower, for meſn Profits.

Roe & al' v. *The Biſhop of Exeter.* 97.

IN a Bill to eſtabliſh Modus's, theſe were inſiſted upon, and allowed; firſt, For every Cow having a Calf, for the Tithe of the Milk and the Calf ſeventeen Pence. 2dly, For every Milch Cow milked without a Calf, eleven Pence for the Tithe of the Milk. 3dly, For every Heifer, the firſt Year ſhe has a Calf, thirteen Pence for the Milk and Calf; theſe payable at *Michaelmas*.---For every Hogſhead of Cyder made of Apples grown in the Pariſh, eight Pence. For Hoard Apples, a Penny.---For Fire-wood ſpent on the Farm, an Hearth Penny.---For Fruit, Herbs, Roots, and other Garden Stuff, a Garden Penny.--- For a Colt, a Penny; theſe payable at *Eaſter*.

Modus's allowed. Poſt Pl. 244.
Milch Cow and Calf.
Milch Cow without Calf.
Heifer and Calf.
Cyder.
Hoard Apples.
Fire wood.
Fruit, Herbs, Roots, and other Garden Stuff.

98. *Rex* v. *Yale.*

A Bond taken in the Name of the Crown by the Caſhier of the Exciſe is good.
Poſt Pl.
1 Lev. 129.
2 Lev. 195.
1 Vent. 272.
2 Vent. 262.
Cr. El. 865.
Ante Pl. 80.

MR. *Pauncefoot* was appointed Caſhier of the Exciſe by Conſtitution from the Commiſſioners of the Exciſe; he employed Sir *Matthew Kirwood* to pay the Money he ſhould return into his Hands to the Crown, and took a Bond from Sir *Matthew*, and Mr. *Yale* as his Security, in the Penalty of forty thouſand Pounds, for the Payment of the Money to the Crown, *and on his own private Account: Kirwood* broke, and an Extent iſſued againſt him, and a *Scire facias* was brought againſt *Yale* on his Bond. (*Nota*, If *Yale*'s Bond had been for the Payment of Money, an immediate Extent might have gone againſt him.) Upon the Pleadings to this *Scire facias* there was a Demurrer, and it was argued on the Behalf of *Yale*, that the Bond taken by *Pauncefoot* was void in Law; becauſe, firſt, he was not a Commiſſion Officer, only conſtituted Caſhier without expreſs Authority (which he ought to have had) to take ſuch Bond. 2dly, It is againſt the Rule that any Tradeſman ſhould be appointed Caſhier to any Farmer, &c. 3dly, This Bond is an Oppreſſion to the Subject; for by the Stat. 33 *Hen.* 8. Body, Lands and Goods are liable. But *note*, *November* 23, 1720, *per Opinion' totius Curiæ*, this Bond was adjudged to be good.

99. *Kennett qui tam* v. *Lloyd.* Feb. 12.

The Indenture of Appraiſement dated before the Writ of Appraiſement, which was before they had any Authority.

INFORMATION upon a Seiſure of a Quantity of Tobacco; Verdict *pro Quer'*: It was objected in Arreſt of Judgment, that the Information was the 16th of *June*, the Writ of Appraiſement the 17th, returnable the 17th, and the Indenture of Appraiſement the 15th, which was before they had any Authority;

thority; and Writs of Appraiſement are a neceſſary Part of the Information upon a Seiſure; and if this be void, there is no Value at all ſet upon the Goods, and the Courſe of the Court has made it neceſſary; beſides the Act of Tonnage and Poundage, directs the Moiety of the Rate to be anſwered to the King, which ſhews there is a Neceſſity for a Valuation: There is a Diſtinction indeed between a *Seiſure* and a *Devenerunt*; upon a Seiſure the general Words are ſufficient, becauſe the Return of the Appraiſement makes a ſufficient Certainty (but is wanting in this Caſe); but in a *Devenerunt*, which is the Crown's Action of Trover, there muſt be greater Certainty, having nothing elſe to help it. *Nota*, The Court ſeemed to think this was amendable.

But quære, if not amendable.

Diſtinction between a Seiſure and a Devenerunt.

DE

Term. Paſchæ,

1720.

100. *The Dean and Chapter of Weſtminſter* v. *Sir Thomas Croſs & al'.* May 14, 1720.

Stat. of Limitations.

THE Statute of Limitations was pleaded to a Bill of Diſcovery, but it was over-ruled.

101. *Gumley* v. *Fontleroy.* Eodem Die.

Modus, although it be pleaded, yet Quantities and Values muſt be ſet forth.

BILL by a Vicar for Tithes; the Defendant pleads that the Plaintiff employed a Perſon to collect the Tithes, and that he the Defendant paid the Collector five Pounds, and does not ſet forth Quantities and Values; ſo the Plea was over-ruled with Coſts; for this Court never admits a Plea, even of a Modus, to cover the Diſcovery of Quantities and Values, becauſe the Defendant may die before they go to Examination, and then Tithes lying only in the perſonal Knowledge of the Party, there would be no way of coming to the Knowledge of the Particulars: And the Caſe in *Hard.* was denied, and it was ſaid it had often been ſo.

Rex v. *Biſhop & al'*. May 20. * 102.

MOVED to diſcharge Iſſues ſet by Commiſſioners of Sewers, alledging they had no Juriſdiction by the Stat. 33 *Hen.* 8. *cap.* 5. becauſe this was only a Bank thrown up by the Sea; and ordered them to ſhew Cauſe, on Notice to the Clerk of the Sewers; though it was doubted whether this could be done by Motion, becauſe it was a Judgment of the Commiſſioners; and no *Certiorari* would lie originally to remove their Order.

Iſſues ſet by Commiſſioners of Sewers diſcharged on Motion.

Jordan v. *Colley & al'*. May 23. 103.

BILL by a Rector for Tithe-wood in the Pariſh of *Little Wenlocke* in the County of *Salop*, as it had been Time out of Mind paid in that Pariſh, againſt the Defendants, as Vendees of Sir *William Forreſter*; the Defendants in their Anſwer ſay, that no Tithe had been paid for this Coppice-wood called *Holebrook Coppice*, when felled before, and that they never heard that any Tithe or Modus had been paid for Wood in that Pariſh. It was inſiſted upon for the Defendants, that Tithe-wood was not due *de communi Jure*, and therefore that the Proof lay upon the Plaintiff, and that it was only founded upon a Canon in Biſhop *Stratford*'s Time, *Anno* 17 *Ed.* 3. and therefore the Defendants need not alledge any Preſcription or Cuſtom by way of Exemption: But it was anſwered for the Plaintiff, that Occupiers muſt always ſet forth an Exemption. And *per Curiam*, The Defendants ought to have ſhewn ſome

Tithe-wood, whether due of Common Right.

Linw. Prov. 190. Cro. Car. Norton *v.* Farmer. Dr. & Stud. cap. ult.

* *Rex* v. *Flanders*, *May* 12, 1721.

Exemption; and there is no Inſtance, that a Pariſh can preſcribe *in non decimando* for Tithe-wood; Wilds and Hundreds are upon another Conſideration. But *nota* (ſays the Reporter himſelf) though the Defendants were decreed to account, I do not find that it is yet certainly determined, that Tithe-wood is due *de communi Jure*.

104. *Yarroth* v. *Seys*. May 24.

Sequeſtration. No new one to be granted before the firſt be returned.

UPON a Commiſſion of Sequeſtration, the Commiſſioners ſequeſtred ſome live Cattle, which not being ſufficient to anſwer the Debt, it was moved for Leave to ſell theſe Cattle, but denied, becauſe the Commiſſioners had not returned the Commiſſion; but when *that* was done, and it appeared what they had ſequeſtred, and the Value as ſo much in Part of the Debt, then for the Remainder a new Sequeſtration ſhould iſſue, and a *Venditioni exponas* to ſell the Goods ſequeſtred upon the firſt.

105. *Rex* v. *Robinſon*. May 25.

When an Extent has been long dormant, Proceſs upon it muſt be moved for.

AN Extent iſſued againſt the Defendant ſo long ago as 3° *W*. 3. and an Inquiſition was taken thereupon, but no Proceſs iſſued againſt him, becauſe there was a former Extent againſt him; but *that* being now ſatisfied, Mr. *Foley* moved, that Proceſs might iſſue upon this laſt Inquiſition; for it was ſettled in Chief Baron *Ward*'s Time, that upon dormant Extents no Proceſs ſhould go without Motion in Court, and it was now granted, unleſs Cauſe.

Frazer

Frazer Adminiſtrator v. *Moore.* Ma. 27. 106.

BILL by an Adminiſtrator; the Defendant demurs, and the Demurrer is allowed, and the Bill is diſmiſſed *with Coſts*; and ſo ſaid to be the conſtant Courſe in Equity, *per totam Curiam.*

Adminiſtrator Plaintiff, pays Coſts in Equity.

Qui tam v. *Jackſon.* May 30. 107.

WHERE there are ſeveral Seiſures by ſeveral Perſons, and the Whole does not amount to one hundred Pounds, it is allowed that all may be put into one Writ of Appraiſement, and one Information only may be exhibited in the Names of all the Perſons ſeiſing, for the ſeveral Matters ſeiſed. *Quære.*

Several Seiſures by ſeveral Perſons not amounting to 100 l. may be put into one Information only.

DE
Term. S. Trinitatis,
1720.

108. ## *Hart* v. *King*. June 28.

Bill for a Diſtribution. Plea that it ought not to be made within the Year after Inteſtate's Death over-ruled.

BILL for the Diſcovery of a perſonal Eſtate againſt an Adminiſtrator, and for a Diſtribution; the Defendant in his Anſwer ſets forth the perſonal Eſtate, but as to the Diſtribution pleads, that the Inteſtate died but in *March* laſt, and therefore by the Stat. 22 *Car.* 2. *cap.* he was not obliged to a Diſtribution until the Year was expired: But by the Opinion of the Lord Chief Baron, *Price* and *Page* Barons, the Plea was over-ruled, and ordered to ſtand for an Anſwer, with Liberty to except (in which Caſe no Coſts) *Mountague* Baron *diſſentiente.*

109. ## *White* v. *Roberts*. July 6.

Writ of Error to the Houſe of Lords muſt be tranſcribed in 14 Days, or it is no Superſedeas, if the Parliament be prorogu'd.

A WRIT of Error was brought in the Houſe of Lords upon a Judgment *in Scacc'*; the Parliament was prorogued, and then Execution was taken out upon the Judgment here, and the Money levied: The Attorney General and Mr. *Fazakerley* moved to ſet this Execution aſide; for though the Parliament

was prorogued, yet the Writ of Error continued in Force, and conſequently it is a *Superſedeas* to the Execution; but upon hearing Serjeant *Cheſſhire* on the other Side, and inſpecting the Orders of the Houſe of Lords, whereby it appeared that the Writ of Error ſhould have been tranſcribed within fourteen Days, which was not done in this Caſe: The *Court* thought it not reaſonable to hang up the Party, but that he ought to have the Benefit of his Execution, Baron *Mountague diſſentiente*. And the Caſe of *Hood* v. *Godfrey*, in *Hilary* Term, 1710, was cited, in which Caſe there was Judgment in an *Aſſumpſit* in *Trinity* Term before, and a *Fieri facias* iſſued, and then a Writ of Error was brought in Parliament; the Parliament was diſſolved in *September* following; then a *Teſtatum fieri facias* iſſued and was executed, which was ſet aſide, becauſe the *Teſtatum fieri facias* was grounded upon the *Fieri facias*, which was certainly ſuperſeded by the Writ of Error. But *nota*, this proves that an original Execution might well be taken out after the Diſſolution of the Parliament.

Poſt Pl. 115. 3 Mod. 338, 9. 1 Salk. 261. Raym. 383.

Hood *v.* Godfrey, Term. Hil. 1710.

Binſted v. *Coleman*. July 12. 110.

THIS Diſtinction was laid down upon the Statute of Frauds and Perjuries, that where there is a whole Agreement by Parol, and Part of it is executed, a Court of Equity will decree a ſpecific Execution of the Whole, for the Statute of Frauds (ſays the Chief Baron) does not extend to that: But where there is an Agreement by Writing executed, you cannot come by Evidence to ſupply any *Defect* in that Agreement, *which* was intended to be Part of that Agreement, but not inſerted in it; for that would be to evade the Statute of Frauds, and introduce more Perjury. The whole Court were of the ſame Opinion.

Equity will not ſupply a Defect in a written Agreement, intended to be inſerted in it.

III. ***Clark*** v. ***Daſhwood.*** July 13.

Exemption from Tithes, where good.

Ante Pl. 58. Hicks *v.* Golding, Feb. 6. 1720, a general Exemption held bad. More 219. Degge 333. Dyer 349. Town of Warwick *v.* Lucas.

BILL for the Tithes of the Rectory of *Carſington* in the County of *Oxford*, particularly of the Coppice-wood called *Burleigh-wood*; and the Plaintiff derives his Title from the Leſſee of the Dean and Chapter of *Chriſtchurch*: The Defendant inſiſts, that no Tithe of this Wood was ever paid but once (being terrified) for that it was exempt as Part of the Poſſeſſions of *Eynſham* Abby, which was one of the greater Abbies, and conſequently capable of an Exemption by the Stat. 31 *Hen.* 8. and inſiſted by Mr. *Ward* for the Defendant, that conſtant Non-payment was an Evidence of Exemption in the Caſe of a Lay Impropriator. But *nota*, the Proof was only *Belief* and *Hearſay*, and the Defendant was decreed to account.

DE
Term. S. Michaelis,
1720.

Brier v. *Lanſdown.* Nov. 25. 112.

Proceſs of Venire facias left at the Defendant's Houſe good, though he is beyond Sea.

IT was moved by Sir *Conſtantine Phipps* to ſet aſide a *Venire facias* (which was the old Proceſs of this Court on the Plea Side) and a *Diſtringas* thereupon, upon an Affidavit that the Defendant was in *France* when the *Venire facias* was left at his Houſe: But upon hearing Serjeant *Cheſſhyre* and Mr. *Bootle* on the other Side, the Proceſs was adjudged to be good by *three Barons* againſt *Price* Baron.

At Guildhall Sittings. 113.

Etriche v. *An Officer of the Revenue.*

Trover for Goods ſeiſed will not lie againſt the Officer.

UPON an Information of Seiſure of Goods there was a Verdict for the Defendant, who afterwards brought Trover againſt the Officer for theſe Goods, which was tried before the Lord Chief Baron *Bury* at the Sittings after this Term; and the Attorney General for the Defendant objected, that Trover

did not lie (for theſe Goods, for that the Seiſure of the Goods, and putting them into the Cuſtomhouſe Warehouſe, could not be ſaid to be any Converſion to his own Uſe) but * Treſpaſs, or Treſpaſs upon the Caſe; and Mr. Attorney inſiſting upon a ſpecial Ver-
Poſt Pl. 132. dict, and the Chief Baron inclining to be of that Opinion, that Trover would not lie, the Plaintiff choſe to be nonſuited.

At Serjeants Inn, Dec. 6, 1720.

114. *The Attorney General at the Relation of the Dutcheſs of Buccleugh* v. *Ayre & al'.*

Bill for eſtabliſhing a Right to Tolls in a Manor.
4 Mod. 319.
2 Inſt. 209, 220.
1 Mod. 47.
1 Sid. 454.
1 Mod. 104, 143.
3 Lev. 85.
Hard. 177.
Bro. Abr. Toll 6.
Davie's Rep. 32. b.
2 Lev. 96.
3 Lev. 424.

THIS was a Bill brought for eſtabliſhing a Right to Tolls in the Manor of *Spalding*, &c. in the County of *Lincoln*, and it was laid, that Time out of Mind there has been a Duty payable to the Lord of the Manor for all Carts, *&c.* coming to the Manor, *&c.* *Nota*, In this Caſe there was a Fee Farm Rent reſerved, which (it was ſaid by Sir *Conſtantine Phipps* for the Plaintiff) diſtinguiſhed it from the Caſes Pl. 64 *antè*. But it was inſiſted by Mr. *Brown* and Mr. *Toller* for the Defendant *(inter alia)* that this was *Toll thorough*, and conſequently void without alledging a Conſideration; and *the Court* (except *Mountague*, who thought the Fee Farm Rent reſerved gave the Court Juriſdiction) inclined to diſmiſs the Bill; but they afterwards went into the Proofs, and the Bill was diſmiſſed, it not appearing that the Place where the Toll Bars were erected, was within the Manor of *Spalding*.

* If after Condemnation, neither Treſpaſs nor Trover will lie. *Raym.* 336.

DE
Term. S. Hilarii,
1720.

Froſt v. *Dawes*. Jan. 23. 115.

A WRIT of Error was nonproſſed in the Exchequer Chamber for want of aſſigning Errors; and upon *that* a Writ of Error was brought *in Domo Procerûm*, but the ſecond was not tranſcribed, according to the Order, within fourteen Days; therefore upon Motion on the Behalf of the Defendant in Error, it was ordered that the Record ſhould be tranſcribed in eight Days, and certified into Parliament, or the Defendant in Error to be at Liberty to take out Execution.

Error to the Houſe of Lords, when to be tranſcribed. Ante Pl. 109.

Bull v. *Allen & 5 al'*. Feb. 12. 116.

BILL to be relieved againſt ſeveral Contracts entered into by the Plaintiff with the Defendants, relating to Shares in a Bubble called the *Pennſylvania* Bubble, and to have his Money repaid, which he had paid to the Defendants for Shares ſold by them reſpectively, and charges that the Defendants had

Demurrer to a Bill containing diſtinct Matters and Parties.

formed themſelves into a Society to carry on the Fraud; the Defendants demurred, becauſe the Bill contained ſeveral and diſtinct Charges againſt ſeveral and diſtinct Defendants; and the Demurrer was allowed. *Nota*, They denied Combination, as is neceſſary upon ſuch a Demurrer as this.

Combination muſt be denied upon ſuch a Demurrer. 1 Vern. 416, 463.

117. *Aſgill* v. *Dawſon.* Feb. 13.

Plea to Diſcovery and Relief over-ruled.

A PLEA to the Diſcovery and Relief in a Bill, when the Bill prayed only a Diſcovery, was over-ruled.

118. *Rhodes* v. *Lovit.* Eodem Die.

Averment that Plaintiff was ready to transfer Stock according to his Contract. Proof that another was ready to transfer, is not ſufficient.

IN an Action upon a Contract for the Sale of Stock, the Plaintiff averred in his Declaration, *Quod paratus fuit* at the Day to transfer; upon the Evidence it appeared, that the Plaintiff had another Perſon ready to transfer, and a Verdict for the Plaintiff; for which Reaſon a new Trial was moved for, and granted, becauſe the Defendant was not obliged to accept this Stock from a third Perſon.

119. *Glanvil* v. *Trelawney.* Feb. 24.

Impropriator muſt be a Party to a Bill brought againſt his Leſſee, to eſtabliſh a Modus.

WHERE a Man prefers a Bill to eſtabliſh a Modus againſt the Leſſee of the Impropriation, he muſt make the Owner of the Impropriation a Party; for this Court will not bind the Inheritance of any Perſon, unleſs he is before the Court.

Rex v. *Rawlins*. Feb. 27. 120.

UPON an Extent an Inquiſition was taken, which found a Term of ſo much Value; the Defendant pleaded to the Inquiſition, and it was found for the Crown, and this Day it was inſiſted for the Defendant, that the Court ſhould order a *Venditioni exponas*; for if the Crown was to be put into Poſſeſſion, the Defendant who was to have the Reſidue of the Term after the Crown is ſatisfied, would be without Remedy. But afterwards, *May* 20, 1721, *per Opinion' totius Curiæ*, an Injunction was awarded to put the Crown into Poſſeſſion.

Injunction to put the Crown into Poſſeſſion.

DE
Term. Paſchæ,
1720.

121. *Pye* v. *Rea.* April 27, 1721.

Vicar, in what Caſe need not ſhew any ſpecial Title by Endowment or Preſcription.

BILL by a Vicar for Tithes; the Defendant admitted in his Anſwer, that the Plaintiff was intitled to all ſorts of Tithes, but inſiſted upon a ſpecial Exemption; upon this Admiſſion the Plaintiff was not obliged to ſhew any ſpecial Title either by Endowment or Preſcription, which, otherwiſe, he ought to have done.

122. *Lock qui tam* v. *Williford.* May 3, 1721.

Information, a ſecond granted upon one and the ſame Seiſure.

LINEN was ſeiſed, and an Information filed, for being brought from a wrong Port; the Officer finding himſelf miſtaken upon this firſt Information, brings a ſecond, for that it was imported, the Duty not being paid; and moved, that the ſecond Information might be received, which was granted upon theſe Terms, *viz.* that the Attorney General ſhould enter a *Non proſ'* upon the firſt, and the Officer

ſhould pay the Coſts; and the ſecond was permitted to bear *Teſte* as the firſt did, to make it agree with the Writ of Appraiſement, and to ſave the Informer's Time.

Dodſon v. *Oliver*. May 11, 1721. 123.

THE ſingle Queſtion adjourned until this Day for the ſolemn Judgment of the Court was, Whether Tithe of an ancient Corn Mill, that had never paid Tithes, was payable or due of Common Right. Baron *Price* and Baron *Mountague* were of Opinion, that an ancient Mill ought to pay the tenth Toll Diſh, which being a tenth Part of the Thing itſelf, was a predial Tithe, and due of Common Right: But Lord Chief Baron *Bury* and *Page*, that it is a perſonal Tithe, and not due of Common Right, and not having been paid, is now exempt by the Stat. 2 *Ed.* 6. So the Court being divided, the Plaintiff had no Decree as to this Matter of the Mill.

Ancient Mill, whether Tithes thereof be payable.

Nota, If there be any Cuſtom in a Pariſh for the Manner of tithing Milk, as to carry it to the Church Porch, or Parſonage Houſe, *that* muſt be obſerved by the Pariſhioner; but if there be no particular Cuſtom or Uſage, the Pariſhioner is obliged *de Jure* to pay every tenth Meal, to milk the Cows at the uſual Place of Milking into his own Pails, and the Parſon is obliged to fetch it away from the Milking Place in his own Pails in a reaſonable Time; and if he does not fetch it before the next Milking-time, the Pariſhioner may juſtify the pouring the Milk upon the Ground, becauſe he *then* has occaſion for his own Pails. And it was determined by the whole Court of Exchequer, in this Cauſe of *Dodſon* and *Oliver*, at a former

The Manner of tithing Milk of Common Right, where there is no particular Cuſtom to go by. Ante Pl. 26.

ſormer Day, that the Milk ought not to be carried either to the Church Porch, or to the Parſon's Houſe, and that it ought to be fetched by the Parſon.

124. *Phillips* v. *Winter.* May 17, 1721.

Where Time given, or Commiſſion to anſwer, Defendant cannot demur, or plead and anſwer.

WHERE Time is given, or a Commiſſion granted to anſwer, without more, the Defendant cannot demur, or plead and anſwer.

125. *Rex* v. *Blundell.* Eodem Die.

The King may proceed either by Scire facias, or Extent, or by both.

A *Scire facias* was brought againſt a General Receiver upon his Bond, and afterwards an immediate Extent was moved for againſt him, upon an Affidavit that one of his Bail was become Bankrupt, and he decayed in his Credit; and it was granted; for the King may be at Liberty to proceed either by *Scire facias* or *Extent* (which is the ſpeedier Method) or by both.

126. *Gatehouſe qui tam* v. *Reith.* May 25, 1721.

Writ of Delivery for Watches.

MR. *Ward* moved for a Writ of Delivery, which was granted, for a Parcel of Gold Watches, upon giving Security, the Springs and Steel Work being periſhable Goods, and liable to receive Damage by lying in a damp Warehouſe.

Smith v. *Nottingham.* May 25, 1721. 127.

Injunction to ſtay Execution on a Judgment on a Bond for 105*l.* given upon a S. S. Contract for 300*l.* the 2d Subſcription.

UPON a Contract to aſſign to *Smith* a three hundred Pounds, the third Subſcription in the *South-Sea*, on the 28th of *Auguſt*, *Smith* did covenant upon aſſigning to pay one thouſand and fifty Pounds, for which he gave a Bond, and Judgment was obtained thereupon in the Common Pleas: Now *Smith* prefers his Bill for an Injunction, and obtains it, becauſe the Money the Bond was given for, was the Conſideration of the Contract; and this being a mutual Agreement, we will not put them to croſs Actions at Law.

DE
Term. S. Trinitatis,
1721.

128. *Sewell qui tam* v. *Johnſon.* June 14, 1721.

Bidder, upon what Circumſtances he may be diſcharged of his Bidding; and in what Time the Goods are to be delivered to him after Condemnation.

MAYHEW bids in Court for a Parcel of Tea; after his Bidding there is a Claim put in, whereby the Goods could not be delivered until the Claim was tried; in the mean time a great Quantity of Tea is imported, whereby the Value of the Tea, ſince the Time of Bidding, ſunk ſeventy Pounds; therefore *Mayhew* moved to have his Bidding diſcharged, which (as was alledged) is frequently done where Goods are periſhable, and a Claim is put in after the Bidding, and there is Delay in the Proſecution: But *per Curiam*, by this Method, if a Man thinks he hath outbid himſelf, he may ſet up a Claimer, and make *that* a Pretence for a Diſcharge: And it is by no means a *Rule*, that a Bidder ſhall be diſcharged when a Claim is put in afterward. And upon further Motion, *June* 20, the Bidder was held to his Bidding. And in *Michaelmas* Term, *Nov.* 10, 1721, *Leaper qui tam* v. *Bound*, *Bound* had bidden in the ſame Manner, and paid one hundred and ſixty Pounds, and the Claim being tried, there was a Ver-

dict for the Crown; and Mr. Attorney General then moved, that *Bound* might take the Goods, and pay his Bidding purſuant to the Order of Court in 1715, "That if Bidders do not within fourteen Days after the Goods are legally condemned, take out a *Debet*, and pay the King's and Officer's Moieties, the Bidding Money ſhall be forfeited to the Officer that ſeiſed the Goods;" which, *nota*, *Bound* was willing to do, but the Court would not diſcharge him: The Court had ſome Doubt * what Execution to order againſt *Bound*, this being an Information of Seiſure; upon which, regularly, Proceſs of the Pipe ſhould iſſue, but *that* being long and tedious, they, at laſt, ordered a *Fieri facias* againſt *Bound*, as in the Caſe of a perſonal Information is uſual.

After Trial, if there is a Verdict for the Crown, the Judgment is, that the Bidder ſhall be charged one Moiety to the King, the other to the Seiſor. Nota.

Where there is a Condemnation without a Trial, the Bidder muſt ſtand to all Hazards; but if after Trial the Bidder ſuffers by Delay, the Court often diſcharges the Bidder. (*Sed quære*, ſays the Reporter himſelf.) Nota.

A Bidder hath a Right to have his Goods delivered eight Days after the Bidding, if they are then condemned. Nota.

* In the Caſe of *Bower qui tam* v. *Miles*, *Nov.* 1715. An Attachment iſſued againſt the Bidder for not paying the Bidding Money; and *Rex* v. *Jackſon*, *June* 13, 1729, the like Rule. *Nota*, An Affidavit was made in both Caſes.

129. *Bradley qui tam* v. *Long.* June 14, 1721.

Information for importing Brandy in a Collier, upon Stat. 5 Geo. Q. Whether the Goods ought not to be alledged to be foreign. Poſt Pl. 185, S. C. 2 Mod. 129. Hard. 20, 105, 217. 1 And. 49. Lib. 11. Dr. Foſter's C. Cr. Car. 464. Dyer 363. Poſt Pl. 250.

THIS was an Information upon the Statute of the 5th of King *George*, *cap.* for importing Brandy in a Collier; Verdict *pro Rege*: Mr. *Ward* moved in Arreſt of Judgment, that it is not alledged in the Information, that the Goods alledged to be taken into this Collier were foreign Goods, which the Statute expreſſly requires. To this it was obſerved for the Informer, that the Information concludes *contrà formam Statuti*, and the Verdict ſuppoſes every thing neceſſary was proved. On the other Side it was replied, that theſe Words only make the Concluſion of the Caſe, not the Caſe itſelf. Mr. Attorney General being abſent, no Judgment yet given.

130. *Franklyn and others Pariſhioners* v. *The Maſter and Brethren of St. Croſs as Impropriators, Bennet their Leſſee, and Jenkins the Vicar of the Pariſh of Faram in the County of Southampton.* June 15, 1721.

Modus's, which good, or rank. 12 d. for a Milch Cow is too rank. And ſo is 6d. for every Calf killed and ſold, too rank.

THIS was a Bill brought by the Plaintiffs the Pariſhioners againſt the Defendants, to eſtabliſh certain Modus's in the Pariſh of *Faram*. The firſt Modus inſiſted upon was twelve Pence for a Milch Cow; the ſecond was * ſix Pence for every Calf killed and ſold: Theſe were both of them adjudged to be void Modus's, being too rank; the firſt being

* Since this Caſe, a Modus of 6 *d.* for a Calf has been held to be good, *inter Reynel & Ackland.*

above Half the Value of the Milk at the Time the Modus was ſuppoſed to commence; and the ſecond, if ten Calves were ſold, five Shillings muſt be paid, which is in effect for one Calf, for the Tithe is one in ten.---A Penny for Gardens and Orchards allowed to be good. (But *nota*, this can be only for ancient Gardens and Orchards, as was adjudged *inter Perrot & Markwick*, *July* 5, 1716.) The Vicar being endowed of ſmall Tithes and Hay, it was decreed that he was thereby intitled to Hops, being a ſmall Tithe, though of Growth ſince the Endowment; and alſo to Clover, St. Foin and Rye Graſs, which are Species of Hay, that is the *Genus*.---No Tithes due for After-paſture, or Cattle fed on Stubble. Although by the Endowment the Vicar was to find the Sacrament Wine, yet the Court were of Opinion it ſhould be found by the Pariſhioners, according to the Direction of the Canon. *Nota*, Where * *Altaragium* is mentioned in old Endowments, and ſupported by Uſage, it will extend to ſmall Tithes, but not elſe.

1 Vent. 61. Hetley 85. Watſon 447. Lutw. 1071. 2 Cro. 116. 1 Keb. 620. 3 Keb. 479. Hall *v.* Ball, Trin. 1683. Canon 20, 1603. 3 Lev. 365.

Leaper qui tam v. *Smith & Elliot.* 131.

June 17.

UPON a Motion for a new Trial after an Information of Seiſure of Goods in a Ship that was twenty Miles below the *Hope*, but within the Limits of the Port of *London*; the Queſtion was, whether it could be ſaid to be an Importation before the Ship comes above the *Hope*: But a new Trial was denied *per totam Curiam*; ſo that it ſeems it ſhall be deemed an Importation, if within the Limits of the Port, though below the *Hope*.

Importation. It ſhall be deemed an Importation, when a Ship is within the Limits of the Port.

* See to what *Altaragium* ſhall extend in *Kennet's Parochial Antiquities, in Gloſſar' Verb'* Altaragium.

Iſrael

132. *Iſrael* v. *Etheridge & al'.* June 20, 1721.

Trover or Treſpaſs, whether they will lie againſt an Officer for ſeiſing abſq; probabili Cauſâ. Ante Pl. 113.

Exchequer Rules.

Carth. 325. Hard. 194. Raym. 336. Ekins *v.* Smith.

UPON an Information of Seiſure there was a Verdict for the Claimer, who did not move for a Writ of Delivery, but brought an Action of * Treſpaſs for the Goods againſt the Officers that ſeiſed: Upon a Motion for a new Trial (there being a Verdict for the Plaintiff in this Action) *Price* Baron ſaid, that it was now allowed and taken for Law, that Trover did not lie againſt an Officer for ſeiſing *abſquè probabili Cauſâ*, but Treſpaſs would; and if the Claimer had moved for a Writ of Delivery, he ſeemed to think he could not have this Action, becauſe then he would have a double Remedy. Baron *Mountague* was of Opinion, that neither Trover nor Treſpaſs would lie, becauſe the Seiſure is not *contra Pacem*; but that Treſpaſs upon the Caſe, ſetting forth that the Seiſure was *abſquè probabili Cauſâ*, would lie, as was done in the Caſe of *The King* and *Melliſh*. Baron *Page* was of Opinion, that Treſpaſs or Caſe, for the conſequential Damages, will lie; but now the Verdict was ſet aſide, for that they thought here was *probabilis Cauſa*. *Nota*, *Bury* and *Page* ſeemed of Opinion, that in Treſpaſs the Party ſhall not recover the Value of the Goods, but only the Damages, for unlawful ſeiſing.

133. *Turton* v. *Clayton.*

Modus. Diſtributive Modus's are not good. Hob. Cooper *v.* Andrews. Parker *v.* Cotter.

BILL for Tithes by the Rector of *Standiſh* in the County of *Lancaſter*; the Defendant inſiſted on a Modus of three Pence for Houſe, Hay, Hen, and Yard, *viz.* For Hay a Penny, for an Houſe a Penny,

* *Martin* v. *Winford*, *Trin.* 1695. Trover or Treſpaſs does not lie for Goods after Condemnation.

for

for Hen an Half-penny, and for Yard an Half-penny. *Per Opin' totius Curiæ*, This is a void Modus, taking it either diſtributively or intirely; for as to the Hay a Penny is unreaſonable, for if a Man has ſixty Acres of Hay he pays only a Penny, and if he lets them to ſixty ſeveral Perſons, they ſhall pay a Penny a-piece.---If a Man ſhould declare in Debt for one intire Rent of ſix Pence, *viz.* Two Pence for black Acre, two Pence for white Acre, and two Pence for green Acre, this would be bad, *per Page* Baron; Defendant decreed to account. 1 Keb. 602. Hetley 94.

Sir Iſaac Rebow v. *Bickerton & al'.* 134.
June 23.

THIS was a Prohibition to the Spiritual Court of the Biſhop of *London*, where a Libel was exhibited againſt Sir *Iſaac* to oblige him to contribute towards the Repairs of the Church, in reſpect of a Light-houſe erected for the Benefit of Navigation at *Harwich*, which received a Toll and Duty from Ships paſſing, &c. Upon a Demurrer to the Declaration, *the Court* this Day gave their Opinion, and two Points were made; firſt, Whether they were not too late to come for a Prohibition after Sentence below, and an Appeal to the Delegates; ſecond, Whether the Thing in its own Nature was rateable towards the Repairs of the Church: And in both Points Lord Chief Baron *Bury*, *Mountague* and *Page* were of Opinion for the Plaintiff in Prohibition; Baron *Price* contrary in both Points, and cited in Support of his Opinion, *Lib.* 2. *Biſhop of Winton*, *Cro. Eliz.* 571. 2 *Ro. Abr.* 319. *Creſwell*, 2 *Lutw.* 1022. *Dawſon* and *Nicholſon*, *in Scacc'*, *Mich.* 1710. 2 *Ro. Rep.* 42. Dr. *Prideaux's Office of Churchwardens*, *Yelv.* 173.

Light-houſe, whether it is chargeable to the Church Rate.

1. Cr. Car. 394. Hetley 61. Hard. Terry *v.* Huntingdon & al'. Latch. Davies's Caſe. 2 Salk. Garden & Brook.

2. 2 Ro. Abr. 262, 270, 255. 2 Ro. Rep. 270. More 474. Stat. 8 Eliz. cap. 13.

DE
Term. S. Michaelis,
1721.

135. *Cuthbert* v. *Adean.* Oct. 24, 1721.

Meſſenger, if grantable after a Cepi corpus returned upon an Attachment.

THE Defendant was taken upon an Attachment for want of an Appearance, and the Sheriff returns a *Cepi corpus*, and aſſigns the Bail Bond to the Plaintiff, who moves for a Meſſenger to bring in the Body of the Defendant, and offers to waive all Proceedings upon the Bail Bond, according to the ſixth Rule (which *vide)* and the Motion was granted: But Baron *Mountague* oppoſed this, becauſe if there was any Delay in the Party, it ſhould appear by an Affidavit, and becauſe this Method would be ſo great an Expence to the Party. *Nota*, *(per* the Reporter himſelf) As I apprehend there had been Proceedings upon the Bail Bond, which may diſtinguiſh it from the ſixth Rule.

Rex

Rex v. *Tomkins*. Oct. 27, 1721. 136.

THERE was a Judgment upon an Information againſt *Tomkins* for running Wool; and he not having paid the Sum in the Act mentioned, the Solicitor General moved upon the Stat. 4° *Geo. cap.* 11. for preventing Burglaries, *&c.* that he might be tranſported. *Nota*, *Tomkins* had been committed to the *Fleet*, charged with the ſaid Judgment: It was objected by Sir *Conſtantine Phipps* for *Tomkins*, that he was not within the Words or Meaning of the Act; for firſt, he muſt have been committed for want of ſufficient Bail, but he was in Cuſtody before the Day mentioned in the Act; ſecondly, an Information muſt have been delivered to him, or the Turnkey; and this being a penal Statute, no equitable or liberal Conſtruction ought to be made upon it: But notwithſtanding theſe Reaſons (which I thought not anſwered) the Man was tranſported *per Curiam*, *diſſentiente* Baron *Price*.

One tranſported on the Stat. 4 Geo. cap. 11. upon a Judgment on an Information againſt him for running of Wool.

Rex v. *Powell*. Nov. 4, 1721. 137.

A Purchaſe was made of Lands lying in *Radnorſhire*, of *Powell* by the Duke of *Chandos*; while the Purchaſe was depending, *Burton*, the Receiver General of that County, paid *Powell* three hundred Pounds, and took a Bond in the Name of the Crown, upon which an Extent iſſued againſt *Powell*: The Extent was teſted *undecimo* —— *Anno Georgii Regis ſeptimo*, omitting the Month; for which Reaſon it was moved by Mr. Serjeant *Comyns* and Mr. *Bootle* to diſcharge it; and the Caſes in the Margin were cited, to prove that Writs without a *Teſte* ſhall abate.

Extent, the Teſte of it amended.

Latch 11.
1 Sid. 304.
2 Jones 83.
1 Lev. 2.
Cr. El. 592.
2 Salk. 700.
Shore 80.
Salk. Tutchin's Caſe.
Sir Tho. Jones 41.

abate. Baron *Mountague*, That the Diſtinction is between original and judicial Writs, which laſt only are amendable, becauſe there is a Record to amend them by: But *quære* (ſays the Reporter himſelf) if an Extent is not an Execution, and may not be amended by the *Fiat?*---And afterward, *November* 22d following, this was amended by *three Barons* contra *Mountague*.

138. *Awbrey* v. *Fitzhught*. Nov. 7.

Injunction. Upon what Circumſtances a Court of Equity will grant it, upon a Contract relating to South-Sea Stock.

AWBREY contracts upon the 17th *Sept.* 1720, with *Fitzhught* for the Purchaſe of 500*l.* *South-Sea* Stock at 530*l.* *per Cent.* to be delivered in *October* following; *Awbrey* not being able to pay the Money then, a new Agreement was entered into, that upon *Awbrey*'s giving a Bond for the Payment of 1060*l.* being the Difference of 200*l.* Part of the 500*l.* Stock, and entering into another Bond for 1590*l.* for the other 300*l.* Stock, the Time of Acceptance ſhould be enlarged until the 4th of *May* following: accordingly *Awbrey* entered into a Bond on the 4th of *November* 1720, for the Payment of the ſaid 1590*l.* in the Penalty of 3180*l.* on the 4th of *May* following; and an Indenture of Defeaſance of the ſame Date was executed between the Plaintiff and Defendant, reciting the ſaid Bond, and that the 300*l.* Stock was to remain in the Defendant *Fitzhught*'s Hands as a collateral Security; *Fitzhught* thereby covenanted, that in caſe *Awbrey* paid the 1590*l.* due by the Bond to transfer the 300*l.* Stock; but if the 1590*l.* was not paid, then the Defendant *Fitzhught* was to be at Liberty to ſell the 300*l.* Stock towards Payment of the 1590*l.* The Money was not paid purſuant to the Bond, and *Fitzhught* put the Bond in Suit, and the Plaintiff *Awbrey* pre-

ferred his Bill, ſetting forth this Matter, and that the Defendant had not transferred nor tendered, and alſo ſetting forth the Clauſes in the Bill of Credit 7° *Geo.* relating to Contracts, that this was a Contract unperformed, and that, by the Act, Execution ought not to go, and therefore prayed an Injunction.

The Defendant in his Anſwer admitted the Fact, as before ſet forth, *and that he did not tender nor transfer*, but gave the Plaintiff Notice, that he was ready to do it; but it was upon the Plaintiff's Requeſt that he did not do it, and inſiſts this was not a Contract within the Act of Parliament.

Now upon Motion for an Injunction, upon the Merits, the Defendant's Counſel inſiſted, that the Parol Contract was merged in the Bond, and that if the Plaintiff had any Remedy, he had it as much at Law as he could have it in this Court.

But it was anſwered, that the Plaintiff could have no Remedy below now; if it had remained upon the Parol Contract, in an Action upon that Contract the Plaintiff there muſt have averred and proved a Tender, according to the Courſe of the *South Sea*; but upon this Bond he will have nothing to do but to prove the Bond, and the Defendant cannot either by ſpecial Pleading, or upon the general Iſſue at Law, ſhew what the Conſideration of the Bond was, or that there was no Tender, but that it was proper for a Court of Equity, before whom all this Matter appeared, to take Cogniſance of the whole Matter; and though the Parol Contract is admitted to be merged by the Bond, yet in a Court of Equity it will be conſidered as a Part of the Contract unperformed, ſince the Conſideration of the Bond is the ſame as the Conſideration of the Parol Contract;

and if they ſhould obtain Judgment upon the Bond, we could not come by Affidavit to ſtop Execution, and ſet forth all this Matter, ſince nothing appeared upon the Record to prevent the common Method of taking out Execution: And an Injunction was granted upon theſe Grounds by *three Barons contrà* Lord Chief Baron *Bury*; and Baron *Price* ſaid, the laſt Clauſe of the Act extended to all Contracts whatſoever, as well as thoſe mentioned in the preceding Clauſes.

139. *Tarent* v. *Trewit*. Nov. 15.

Coſts for not moving according to Notice.

UPON a Motion that *T.* might pay Coſts for not moving according to Notice (which was denied by *the whole Court)* it was ſaid by one of the Barons, that if there are three Notices of Motion given, and after a fourth Notice given, they ſhall not move upon the fourth without paying Coſts of the three firſt.

140. *Winch* v. *Page*. Nov. 15.

Portion of a Feme Covert, where ſecured in Equity for the Benefit of her and her Children.
1 Vern. 40.
2 Vern. 626.
Skinner 110.

A Father gives a Bond to his Daughter for the Payment of a Sum of Money (being her Portion) at the Age of twenty-one, or Marriage: He depoſits this Bond in a third Perſon's Hands; ſhe afterwards marries without his Conſent; the Perſon who had the Bond delivers it up to the Huſband, who puts it in Suit. The Father prefers his Bill for an Injunction, and ſets forth that he is willing to pay the Money, but inſiſts that the Court ſhould lay their Hands on it, and ſecure it for his Daughter and her Children; and the Injunction was granted upon bringing the Money into Court.---But this was going a great Length, and I believe beyond what has been done in Chancery, for the Obligee is Defendant here; indeed,

indeed, if the Huſband in theſe Circumſtances comes into a Court of Equity to have the Wife's Portion paid, then they will put Terms upon him; for he that comes for Equity muſt do Equity; but the Perſon who was to have the Money is Defendant here, and aſks nothing of the Court. *Nota*, It did not appear in this Caſe, whether the Daughter was under Age; but *quære* what Alteration that would make in this Caſe.

Fox v. *Rutty*. Nov. 16. 141.

BILL by the Vicar of *Melſham* againſt a Pariſhioner for Tithes; an Iſſue was directed to try whether a Parcel of Lands, called *Iſlay*, uſually paid Tithes to the Vicar of *Melſham*, or to the Rector of *Whaddon* (who was not before the Court): The Jury find, that it had paid Tithe to neither; and upon the *Poſtea* returned, it was inſiſted for the Defendant, that by this finding the Court could make no Decree, for that they had no Satisfaction by it: But *per Curiam*, The Vicar is endowed *de omnibus minutis Decimis infrà Parochiam*, &c. and the Defendant's Defence, both in Law and Equity, is falſified; and though Tithes have never been paid, yet the * Vicar has the ſame Right to all within his Endowment, even without Uſage (unleſs an Uſage to the contrary is ſhewn) as the Rector has of Common Right; in which laſt Caſe a Man cannot inſiſt, that Tithes have never been paid, which is a *Non decimando*; and decreed for the Vicar accordingly. Serjeant *Glyde* and Mr. *Ward* for the Plaintiff; Serjeant *Pengelly*, Serj. *Stevens*, Sir *Conſtantine Phipps* and Mr. *Bootle* for the Defendant.

Iſſue directed to try whether Tithes of I. are paid uſually to the Vicar of M. or Rector of W. and the Jury find to neither.

A Vicar has the ſame Right to all Tithes in his Endowment, as a Rector has of Common Right.

* *Quære*, If a Vicar has received for many Years Tithes not mentioned in his Endowment, whether ſubſequent Augmentation or Endowment ſhall not be preſumed. *Hard.* 328, 9.

142. ## *Rex* v. *Spenſer*. Nov. 17.

Recogniſance diſcharged, where the Offence is pardoned.

SIR *Conſtantine Phipps* moved to diſcharge the Recogniſance of a Perſon who was indicted for beating a Cuſtomhouſe Officer in the Execution of his Office, *In diminutionem Reventionúm Domini Regis*; and this was oppoſed by Mr. *Raby* for the Crown upon thoſe Words, the Act of Pardon 7° *Geo. cap.* excepting that Offence: But the Recogniſance was diſcharged *per totam Curiam*; and if the Fine was levied, and ſtill in the Sheriff's Hands, it muſt be reſtored by an expreſs Clauſe in the Act, which gives the Fines to the Party. And the Lord Chief Baron *Bury* ſaid, that the Words *In diminutionem*, &c. were only Pepper and Salt: Baron *Mountague* quoted a Caſe upon the Act of Pardon in 1709, *The Queen* v. *Hinton*, where an Information for carrying Salt without a Permit, &c. was pardoned, being only conſequential defrauding.

143. ## *Rex* v. *Blundell*. Nov. 18, 1721.

A new Extent and Inquiſition ordered to be engroſſed from the Minutes taken by the Sheriff, and ſigned by the Jury, the original Extent, &c. being loſt.

THE Attorney General moved, that the Clerk in Court might have Liberty to new-ingroſs an Extent and Inquiſition thereon, which were loſt: *Nota*, The Sheriff had the Minutes of what was found by the Jury ſigned by the Jury, and this was compared to the Caſe where a Perſon had, in a falſe Name, taken a Record from *Pickering* the Aſſociate in the *Oxford* Circuit; they permitted a new *Poſtea* to be made from the Minutes in his Book: There had been made out a *Venditioni exponas* upon the Copy of the Extent and Inquiſition that were loſt; and there being a Conſent for *Blundell*, a new Extent, &c. was ordered to be ingroſſed, *diſſentiente Mountague*.

Harwood

Harwood v. *Faulke & Rawley.* 144.
Nov. 18, 1721.

FAULKE and *Rawley* ſeiſed a Parcel of Goods in the Hands of *Harwood* the *Cambridge* Carrier; the Seiſure was made in *September* in 1720; Part of the Goods were appraiſed in *Michaelmas* Term in the Name of *Faulke* only, and condemned the laſt Day of that Term, and the other Part returned in the Writ of Appraiſement in *Hilary* Term following, in the Name of *Rawley*, and condemned the laſt Day of that Term. *Harwood* entered his Claim in the Book of Appraiſements before Condemnation, and afterwards ſearched the Writs of Appraiſement, but found no Writ in the Names of *Faulke* and *Rawley*, nor any ſuch Goods as ſeiſed, deſcribed in any Writ of Appraiſement. By the Order 1ſt *Novem.* 1715, (which *vide*) they ſhould have returned but one Writ of Appraiſement, and the Species of Goods ſhould have been particularly deſcribed, which was not done in this Caſe; and therefore it was now moved by Sir *Conſtantine Phipps* to ſet this Condemnation aſide, all this Fact appearing upon the Maſter's Report. *Nota*, Before a Writ of Appraiſement returned, the Claim after a Seiſure muſt be entered in the Book in the Office; but after the Writ returned, it muſt be indorſed on the Back of the Writ; but *Harwood* could never be able to do this, becauſe no ſuch Writ could ever be found. Upon a Seiſure there ought to be an Information, which in itſelf is a ſufficient Notice; but here was no Information, and conſequently there could be no Condemnation on the Roll: In this Caſe the Goods were condemned and ſold, and one Moiety paid to the Crown, and the other to the Officer; but however, upon the Circumſtances of this Caſe,

Writ of Appraiſement muſt ſpecify the Goods particularly.

If there is but one Seiſure, the Goods ought to be put into one Writ of Appraiſement, and deſcribed ſo certainly, that the Defendant may know when to put in his Claim, otherwiſe an Attachment ſhall go againſt the Officer.

the Court thought, that *Harwood* ought not to be without Remedy, and therefore ordered the Appraiſers to ſhew Cauſe why the Condemnation ſhould not be ſet aſide, and why there ſhould not go an Attachment againſt them. Mr. Attorney General of Counſel for *Faulke* and *Rawley*.

145. *Clarke & al'* v. *Clarke*. Nov. 20, 1721.

Specific Legacy, when applied to pay Debts in Eaſe of the real Eſtate. 3 Cro. 161. 2 Vern. 688, 739, 747.

WHERE Jewels are deviſed as a ſpecific Legacy, yet they ſhall be applied to Payment of Debts upon ſimple Contract (if the reſt of the perſonal Eſtate falls ſhort) in Eaſe of the real Eſtate *. Mr. *Hungerford* for the Plaintiffs; Mr. *Aris* for the Defendant.

146. *Baker & al'* v. *Sweet*. Eodem Die.

Tithe Wool of Lambs ſhall be paid, and Tithe for Agiſtment of Yearlings. 1 Ro. Abr. 642.

IN this Caſe it ſeemed to be admitted, that Wool of Lambs ſhall pay Tithes, though the Lambs had paid Tithes two Months before; and that there ought to be paid Tithe for the Agiſtment of Yearlings, being a new Increaſe. Sir *Conſtantine Phipps* and Mr. *Bootle* for the Plaintiff; Mr. *Ward* for the Defendant.

147. *Shipton qui tam* v. *Newman*. Nov. 24, 1721.

Coſts allowed by the Stat. 6 Geo. where there is a Verdict on an Information, for the Defend'.

AN Information was brought upon a Seiſure of a Parcel of Cocoa Nuts, and tried, and there was a Verdict for the Defendant, who brought his Action againſt the Officer for this Seiſure of the Nuts, and

* But not to make up Deficiency of other Legacies. 2 *Salk.* 416. 1 *Vern.* 31. And *Q. Trotman* v. *Terret*, *coram* Maſter of the Rolls, on Chief Baron *Mountague's* Will.

alſo ſome Bags, which the Officer took to carry away the Nuts *in:* This Action was tried in the Court of Common Pleas, and there was a Verdict for the Plaintiff: And Lord Chief Juſtice *King* was of Opinion he might have his Coſts and Damages below for the Bags, but for the Nuts the Officer was acquitted, being included in the Information; and the Defendant in the Information having a Verdict thereon for him, his proper Remedy was to move this Court for his Coſts on the Stat. 6° *Geo. cap.* which he now did by his Counſel Sir *Conſtantine Phipps*, but was oppoſed by the Attorney and Solicitor General, who inſiſted that the Act never deſigned the Party a double Remedy, but only gave him his Election to bring his Action, or have his Coſts, but not both: But *Curia contrà*; for though he has joined the Nuts in his Action, when he might have brought it for the Bags alone, *that* ſhall not preclude him of the Satisfaction the Act gives him: And Baron *Page* ſaid, that if the Action had been brought for the Nuts alone, and Damages had been recovered, this Court would have allowed Coſts on the Information, becauſe we ought to do right, though another Court does wrong; and the Party could not, in that Caſe, have had Judgment. Q. *(abſente Mountague).*

Baker v. *Sweet.* Nov. 27, 1721. 148.

DEPOSITIONS taken in a Cauſe in Chancery in 1675, relating to Modus's now in Diſpute, to eſtabliſh theſe Modus's, wherein the Occupiers of Land in this Pariſh were Plaintiffs, and the Impropriator (who was the Provoſt and College of *Eaton*) and the Vicar were Defendants; but the Impropriator

Depoſitions in a former Cauſe, between the ſame Parties, and for the ſame Matter, not allowed to be read where Iſſue was not joined in the former Cauſe. 2 Mod. 229. Hard. 22, 472. Ante Pl. 84. Carth. 181. 1 Vern. 413.

had

had never anſwered, and there was no Replication to the Vicar; and therefore it was objected, that theſe Depoſitions could not be read, for that Modus's being to affect the Inheritance, the Act of the Farmer ſhall not bind, unleſs the Impropriator or Landlord be made a Party, and Iſſue be joined as to them: And *per Curiam*, They cannot be read; and the Bill and Anſwer upon theſe Occaſions muſt be produced to make the Depoſitions Evidence in another Cauſe, to ſhew that it is between the ſame Parties, or thoſe under whom they claim; and, 2dly, that it is the ſame Matter that is now in Iſſue, *(abſentibus Price & Mountague.)* Sir *Conſtantine Phipps* for the Plaintiff; Mr. *Ward* for the Defendant.

149. *The Attorney General* v. *Gradyll & al'.* Nov. 28, 1721.

Power. Collateral or perſonal, whether it can be executed for the Benefit of the Crown after Attainder of High Treaſon.

IN a Marriage Settlement there was a Power for *William Dickenſon* (who was thereby made Tenant for Life) to make Leaſes for three Lives, or twenty-one Years; *William Dickenſon* makes a Leaſe to Truſtees for ninety-nine Years, if he ſhould ſo long live, in order for the Payment of his Debts; *(Nota*, This was not by virtue of his Power) and in the ſame Deed he conſtitutes the Truſtees his Attornies to make Leaſes for three Lives, or twenty-one Years, purſuant to the Power in the Settlement. *William Dickenſon* is outlawed for High Treaſon, and the Attorney General now comes into this Court to compel the Truſtees to execute this Power veſted in them, by making Leaſes for twenty-one Years, or three Lives, to ſuch Nominees as the Crown ſhall appoint, and inſiſted upon it, that this was a Power transferrable, and ſince the Forfeiture ought to be executed for the Benefit of the Crown, and cited *More* 612. 1 *Vent.* 338.

Sir *Tho. Jones* 110. and *Lib.* 7. *Engleſield*'s Caſe. But to this it was anſwered, that where a Power is collateral to an Eſtate, there the Alteration of the Eſtate does not affect it; but where the Power ariſes out of the Eſtate, any Alteration of the Eſtate will ſuſpend it for ſo much; and if the Alteration be total, will totally extinguiſh it, *Hard.* 410. But *nota*, the Counſel for the Defendants ſeemed to differ, whether this was a perſonal or a collateral Power; but all inſiſted, that the Authority given to the Truſtees to act as Attornies, was deſtroyed by the Attainder of *William Dickenſon*: *Price* and *Page* Barons were clearly of Opinion, that by making the Leaſe of ninety-nine Years the Power was ſuſpended, and *William Dickenſon* had nothing left in him, but a Reverſion during his Life after ninety-nine Years, and the Power of Attorney can ſubſiſt no longer than the Power of *William Dickenſon* himſelf, which is gone by the Attainder: And the Attorney General took nothing by his Motion *(hæſitante* Lord Chief Baron *Bury*; *abſente Mountague)* *. Mr. Attorney General and Sir *Conſtantine Phipps pro Rege*; Serjeant *Stevens*, Serjeant *Reynolds*, Mr. *Fazakerley* and Mr. *Bootle*, for the Defendants.

Lib. 9, 76. Palm. 429, 499. 2 Ro. Rep. 393. Lib. 1. Mildmay. 2 Ro. Abr. 260. p. 1. Lib. 8, 71. Lib. 9, 76.

Huſe v. *Lawes*. Dec. 5, 1721. 150.

UPON Exceptions to the Maſter's Report, the Court would not permit them to go into any Exceptions as to any Matter not objected to, before the Maſter.

Exceptions to the Maſter's Report. None can be gone into, that were not objected to, before the Maſter.

* But compare this Caſe with *Engleſield*'s Caſe, and ſee the Difference.

151. *Borrett* v. *Gomeſerra*. Dec. 7, 1721.

Parol Agreement for the Sale of Copyhold Lands carried into Execution.

BILL to have a Diſcovery of a Parol Agreement for the Sale of Copyhold Lands, and whether the Defendant did not pay 200 *l.* Part of 2300 *l.* being the Purchaſe Money, and if the Plaintiff did not give the Defendant a Note, acknowledging the Receipt of the ſaid 200 *l.* in Part, &c. and thereby alſo promiſing to make a good Title, &c. and whether the Plaintiff did not bring his Writings before the Defendant's Counſel, who approved of the Title, and to have a ſpecific Performance. The Defendant pleads the Statute of Frauds and Perjuries to the whole Bill, it being a Parol Agreement, but overruled *per totam Curiam* *. This Cauſe afterwards, *May* 31, 1722, came to a Hearing; and though it was objected for the Defendant, that this was within the Statute of Frauds, &c. that it was an hard Bargain, and ought not to be carried into Execution in Equity, being (as they pretended) 1300 *l.* more than it was worth; yet upon Proof of the Plaintiff's Side that there was no Fraud, that it was worth 2335 *l.* that the Defendant had done ſeveral Acts of Ownerſhip, as ordering in Bricks, fiſhing in Ponds, &c. and had made frequent Promiſes, &c. There was a Decree for the Plaintiff *per totam Curiam*, *viz.* Lord Chief Baron *Mountague*, Barons *Price* and *Page*.

1 Vern. 364, 151, 159, 473. 2 Vern. 200, 373. Prec. in Can. 526, 561.

* *Quære*, If Copyholds are included in the general Words of an Act. *Haydon*'s Caſe, *Lib.* 3. and *Hard.* 433.——How far a Court of Equity will carry a Parol Agreement in Part executed, into a full Execution, *vide* 2 *Chan. Ca. Leake* v. *Morrice*—*Hatton* and *Gray*—And theſe Caſes lately decreed in Chancery, but not yet in Print—*Lyſter* v. *Pycroft*—*Bauds* v. *Amhurſt*—*Seagood* and *Gold.*

Taylor

Taylor v. *Crompton & al'.* Dec. 5, 1721. 152.

THIS was a Bill brought by the Vicar of *Madely* in the County of *Salop*, who was endowed of the Glebe, to have an Account againſt the Defendants of what Quantity of Coals were dug, and got by them, by a Work carried by them through a Foot-way under his Glebe, and alſo to have Satisfaction for the Coal, and alſo prayed an Injunction to ſtay the Works. The Defendants anſwered, but at the Hearing inſiſted, that this was a bare Action of Treſpaſs; and though the Plaintiff might be intitled to a Diſcovery *, yet he ought not to have Relief, for that the *Quantum* of the Coals might be aſcertained by a Jury, or if diſcovered by the Anſwer, they could aſcertain the Damages more properly than this Court; and of this Opinion *the Court* were at firſt, but afterwards would not diſmiſs the Bill abſolutely, but retained it 'till the Plaintiff had aſcertained his Title at Law: The Reaſon ſeemed to be, becauſe there were ſeveral Defendants Copartners in theſe Works, ſome of them Executors, and ſome Adminiſtrators, and the Plaintiff would be under great Difficulty in proceeding intirely at Law for the Damages.

Bill for a Diſcovery of Coals got under the Plaintiff's Glebe, and Relief, whether this is not proper at Law. 1 Lev. 107.

* Q. 1 Vern. 130. Hard. 182.

DE
Term. S. Hilarii,
1721.

153. *The Attorney General* v. *Snow.*
Jan. 27, 1721.

Pleading double to Information of Debt.

SNOW was Surety for one of the Clerks of Mr. *Pauncefoot* (Caſhier of the Exciſe) and entered into a Bond for that Purpoſe; now upon an Information of Debt upon this Bond it was moved by Mr. *Bootle*, on the Behalf of the Defendant, upon the Statute for the Amendment of the Law 4° & 5° *Annæ*, for Leave to plead double; that is to ſay, *Non eſt factum*, and Conditions performed, which was granted: *Quod nota*; for *quære*, firſt, if the Statute extends to this Caſe of the Crown; and, 2dly, the Pleas ſeem contradictory.

154. *Warwick qui tam* v. *Rawlins.*
Feb. 1, 1721.

Two Informations upon one Seiſure of Tea.

A Seiſure was made of ſeventeen hundred Pounds Weight of Tea on the 16th of *December* laſt; the Officer took away Part of the Tea at that Time,

and ſealed down the reſt of the Canniſters, and came another Day and took away the ſealed Canniſters; upon this two Writs of Appraiſement iſſued, and two Informations were filed upon this Seiſure: And it was moved by Sir *Conſtantine Phipps*, that the Seiſure being but one in Point of Law, there ought to have been but one Information and one Writ of Appraiſement; and therefore the former ought to be ſet aſide; and of this Opinion were Lord Chief Baron *Bury* and *Price*, otherwiſe the Defendant would be doubly grieved, obliged to give double Security, and liable to double Coſts; but this being oppoſed by a Bidder, *Mountague* and *Page* Barons were of another Opinion; ſo no Rule was made. *Nota*, *Feb.* 23. it was moved for Coſts againſt the Seiſor for not going on to Trial; in which the Court were divided, being on an Information of Seiſure, though they ſaid it was uſual in Caſes of *Devenerunt*.

Vide Stat. 18 Eliz. cap. 5.

In Cam' Scacc', Feb. 1, 1721. 155.

The Attorney General v. *Stannyforth & al'.*

AN *Engliſh* Information was brought by the Attorney General, ſetting forth that *Nicholas Skinner* in the Year 1710, for himſelf and Company, imported one hundred and ſeventeen Tons, and one hundred and thirteen Gallons of *Galicia* Wine, and upon Application to the Cuſtomhouſe obtained *a Sight*; in purſuance of which the Officers appointed to view certified, by Indorſement on the *Order of Sight*, that thirty-three Tons were ſo damaged, as to be only fit to make Spirits or Vinegar, and ſunk one Third in Value; the Agent of *Skinner* entered the ſaid Wines for *Skinner and Company* in the Cuſtomhouſe, and by a Miſtake of the Clerk in the Office,

Partners in Merchandiſing, each of them is liable to pay the whole Duty to the King. Poſt Pl. 296.

fice, the whole thirty-three Tons was allowed for Damage, though no more than one Third of the thirty-three Tons was intended to be allowed by the Commiſſioners; ſo that the Crown was, by this Miſtake, defrauded in its Duties five hundred and thirty-five Pounds; and the Diſcovery being made about the Year 1715, this Information was not brought till Term, which prayed that the Defendants (being five) might make good this Deficiency; and the Court decreed accordingly, that though the Importation and Entry was only by *Skinner*, yet all the Partners, who were ſo at the Time of the Importation, were liable in the Whole to the Crown; and the Decree was drawn up, that the Defendants ſhould pay the ſaid Sum to the Crown, as Mr. Attorney General ſhould think fit. *Nota*, *Skinner* became a Bankrupt in 1715, and *Richards*, one of the Defendants, was Aſſignee, and inſiſted in his Anſwer, that he had long ago made a Diſtribution of all the Effects of *Skinner* to the Creditors, ſo that he had nothing left in his Hands; and as to him the Court were in ſome Doubt, and took Time to conſider, whether this Sum of five hundred and thirty-five Pounds, occaſioned by this Miſtake, was a Debt ſo veſted in the Crown, that the Aſſignee could come upon the Effects ſo diſtributed, or whether the King is bound by the Statute of Bankrupts.

156. *Greenaway* v. *The Earl of Kent.*

Timber-trees above 20 Years Growth are tithable, if cut and corded for Fuel. Aliter not.

BILL was exhibited in 1704, by the Vicar of *Waſford* in the County of *Hereford*, ſetting forth that the Defendant was poſſeſſed of a Coppice called *The Chace*, and other Wood-land within the ſaid Pariſh, and to have the Tithe of the Wood cut down, and Bark, and inſiſted that if any of the Wood was above

above twenty Years Growth, yet the ſame were but ſome few Poles growing *ſparsim* from the Stubs or Stocks of other Trees, and not fit for Timber, but only for Fire-wood or making Laths, and were accordingly ſold to the Iron Maſters, who uſed the ſame for Fuel at their Furnaces: The Defendant in his Anſwer inſiſted, that the Woods, &c. conſiſted of an innumerable Quantity of Timber-trees, of Oak of thirty Years Growth and upwards, and alſo of Coppice and Underwood under twenty Years Growth, that he cauſed the Timber-trees (which he hopes to prove were above thirty Years Growth) to be ſtripped and the Bark to be perked by itſelf, and ſo delivered to the Buyers, and the Timber-trees to be fallen, and the ſound and merchantable Parts thereof to be ſold by the Country's Uſe, and the Parts not employed in the Defendant's own Affairs for Building and Repairs, and the Lops and Offal he cauſed to be ſized into Billets, and ranked and corded by itſelf apart from the Coppice-wood, and delivered the ſame to Iron Maſters, and inſiſts that the Timber-trees were free from the Payment of Tithes: But the Court decreed, that all the Wood above twenty Years Growth (as well as Underwood) *cut and corded*, and the Bark ſtripped from the ſame, ſhould pay Tithes, but that no Tithe was due from ſuch Wood above twenty Years Growth, nor of the Bark thereof, which was *not corded*. *Nota*, This Decree was cited by the Court, and plainly makes Timber-trees above twenty Years Growth tithable, if *cut and corded* for Fuel, *per* Lord Chief Baron *Bury*, and *Price* and *Smith* Barons.

Vide 2 Leon. 79.

Lib. 11. Lifford 48, 49. Sir W. Jones 100. 1 Ro. Abr. 640. 1 Sid. 300. 2 Keb. 90. 1 Lev. 189. Palm. 38.

Nota, *Inter Buckle & Vanacre*, *Feb.* 20, 1692. Upon a Bill for Tithe-wood in *Erith* in *Kent* above twenty Years Growth, Part uſed for Timber, and Part made into Billets and Faggots, reſolved that the laſt ſhall pay Tithes, for the Trees being above twenty Years Growth *alone* will not privilege them, but *the Uſe*. The ſame Reſolution was in *Acton* and *Smith*, which was reheard and reviewed, and *Franklin* and *Jones*, in 1684, and *Cowper* and *Layfield*.

In

157. ## In Scaccario, Feb. 9, 1721.

Mead v. *Wyndham.*

Non aſſumpſit infra ſex Annos pleaded after Money brought in Court, but ſet aſide.

INDEBITATUS aſſumpſit for Goods ſold and delivered; the Defendant moved, that upon bringing ſix Pounds into Court it might be ſtruck out of the Declaration, &c. and afterwards pleaded *Non aſſumpſit infra ſex Annos:* It was now moved by Sir *Conſtantine Phipps*, that the Plea might be ſet aſide, and the Defendant be obliged to plead the General Iſſue, which the Court ordered accordingly, the bringing the Money into Court being a ſort of an Admiſſion that the Promiſe was within ſix Years: Then Mr. *Bootle* for the Defendant moved to withdraw his Money out of Court, it being in the Maſter's Hands and in the Power of the Court; but that they would not permit.

158. ## *Crawford*'s Caſe. Feb. 10, 1721.

Compoſition after Licence obtained, and then moved to have the Fine rated, but oppoſed by the Bidder.

CRAWFORD ſeiſed a Parcel of *Hippocociana* upon the 23d Day of *September*; in *Michaelmas* Term following *Crawford* took a Writ of Appraiſement, and *Hyam* put in his Claim and gave Security: A Letter of Licence was granted to enable *Crawford* to compound with *Hyam*; and upon an Affidavit made by *Crawford* that the Compoſition was made, it was moved by Mr. *Foley*, that the Fine might be rated, there being no Colluſion between the Officer and the Claimer, and the Compoſition having been at one Third according to the Rule: But this Motion was oppoſed by Mr. *Ward* on Behalf of the Bidder, who had been at ſome Expence; and the Motion was denied *per Curiam.*

In Scaccario, Feb. 10, 1721.

Monkhouſe v. *Hutchinſon.* 159.

A BOND was entered into to the Plaintiff by her Name of *Elizabeth*, in which Name the Action was brought; the Defendant pleaded in Abatement, that the Plaintiff's Name was *Iſabel*, and not *Elizabeth*: But upon Motion this was ſet aſide as a ſham Plea, *per totam Curiam*. *Quære* the Difference as to the Time allowed for pleading in Abatement upon a ſpecial *Quo minus*.

Plea of Miſnomer in the Plaintiff's Chriſtian Name ſet aſide as a ſham Plea.

The Mayor of Boſton v. *Jackſon & al'.* 160. Feb. 21, 1721.

BILL for Beaconage (*i. e.* a Duty, for ſetting up Lights for the Benefit of Navigation) which the Plaintiff claimed by Letters Patent; the Defendants admit they had paid this Duty, but inſiſt they had paid it in their own Wrong: It was objected by Sir *Conſtantine Phipps* for the Defendants, that this was proper at Law, and the * Caſes in the Margin were cited. On the other Side was cited by Serjeant *Cheſſhyre* the Caſe of the City of *London* and *Palliſter*, *Mich.* 1721; to which it was anſwered, that the Court retained their Bill, becauſe there had been Precedents of ſuch Bills by the City of *London*, and their Uſages and Cuſtoms are confirmed by Act of Parliament, and they had alſo aſcertained their Title at Law; and the Bill in the preſent Caſe was diſmiſſed

Bill for Beaconage diſmiſſed, being proper at Law.

* *Diſney* v. *Robertſon*, *ante* Pl. 64. *Harding* v. *Ange*, *Trin.* Sittings, 1719. *City of Exeter* and *Bond*, *Hil.* 1718.

by *three Barons* againſt *Mountague*, who thought that where a Matter extended to ſeveral Perſons, and was of little Value, a Court of Equity ought to take Conuſance of the Matter to ſave Trouble and Expence.

161. *Pocock* v. *Titmarſh.* Feb. 21, 1721.

Southwark. Lib. 11. Dr. Grant. Hob. 10. Dr. Leyfield.

BILL for Tithe of Houſes not within the City of *London*, and ſo not within the Statute 37 *Hen.* 8. It was admitted by the Plaintiff, that this Demand was againſt common Right, and he did not alledge this Payment to be either by Cuſtom or Preſcription, but that this was the only Proviſion for St. *Saviour's Southwark*, in Right of which Church the Plaintiff claimed: It was proved that the Houſes in the Pariſh had, ſince the Year 1653, *generally* paid twelve Shillings *per Annum*; but no Proof that the Defendant's Houſe had paid for twenty-five Years, but by one ſingle Witneſs; yet the Court decreed an Account without directing an Iſſue.

162. *Rex* v. *Barnfield.* Feb. 22, 1721.

Plea to an Inquiſition upon an Extent on an Outlawry, that the Party outlawed is dead, without ſetting forth Title, allowed to be well enough for the Tertenant. Rex v. Hungerford. Lutw. Rep.

UPON an Outlawry againſt the Defendant's Huſband there iſſued an Extent, and an Inquiſition was taken thereupon, which finds that the Huſband was ſeiſed of the Lands *in Right of his Wife, and in Jure ſuo:* The Eſtate was ſeiſed into the King's Hands; the Defendant pleads as Tertenant, that her Huſband died the Day of *October*, and prays that the King's Hands may be amoved, and ſhe reſtored to the Poſſeſſion and Perception of the Profits, without ſetting forth any Title. It was inſiſted by Mr. *Probyn pro Rege*, that it ought to appear upon Record, that the Defendant has a Title,

before the King's Hands can be removed: before the Stat. 2d and 3d *Ed.* 6. *cap.* 8. when the King's Title was found, there was no Way but by Petition; but that Statute gave a Traverſe; now this Matter being traverſable, the Party ought to ſet forth a Title, that ſuch Title might be traverſed. But it was anſwered by Mr. *Foley* for the Defendant, that where the Crown is intitled only to the Profits, to plead as Tertenant is ſufficient without ſetting forth a ſpecial Title, and an Inquiſition upon an Outlawry is not an Office of *intitling*, but of *Inſtruction* only; and *per totam Curiam*, the Plea was allowed, it being the uſual Method of pleading the Death of the Party outlawed; and upon Affidavit of the Fact the Attorney General uſually allows the Plea, which is the moſt ſummary Method, there being after the Party's Death no Title ſubſiſting in the Crown.

4 Inſt. 215. Hard. 58, 59, 75, 101, 191, 422. 9 H. 6. 20 b. 1 Lev. 33.

DE
Term. Paſchæ,
1722.

163. *Rex* v. *Blunt Widow & Atfield Widow.* April 14, 1722.

Whether the Sheriff can ſell a Term for Years upon an Outlawry.

BLUNT made a Mortgage for Years to *Atfield* for fifty Pounds, of which eight Years were to come; *Blunt* was waived, and a *Capias utlagatum* iſſued, and an Inquiſition was taken thereupon in *December* 1720, and this Term for Years was found and ſold by virtue of a *Venditioni exponas*, which iſſued in *November* 1721, and was returnable *in octabis Sancti Hilarii*; but no Notice was given to the Mortgagee, who was not in Poſſeſſion (the Intereſt being regularly paid): It was therefore now moved by Sir *Conſtantine Phipps* and Mr. *Ward* on the Behalf of *Atfield* the Mortgagee, that ſhe might be at Liberty to plead to the Inquiſition, not having had any Notice, and for that if ſhe was to bring an Ejectment, in that Action they could not try the Validity of the Inquiſition, for the Term is bound by the Inquiſition, and ſeiſed into the Hands of the Crown, and the King's Title ſhall not be conteſted in an Ejectment; and therefore *Atfield* will be without Remedy, unleſs ſhe be permitted to plead. In Anſwer to this it was ſaid

Lib. 7. Sir T. Cecil.

Mortgagee of a Term, whether ſhe ſhall be permitted to plead to an Inquiſition on an Outlawry againſt Mortgageor, after the Term ſold upon a Venditioni exponas.

ſaid by Mr. *Bootle*, that the Inquiſition itſelf was Notice in Law, and this Method propoſed would tend to defeat Purchaſers for a valuable Conſideration, who have Title by virtue of the Sale by the Sheriff. (But *nota*, here the Mortgagee never was in Poſſeſſion, ſo could not take Notice of the Proceedings upon the Inquiſition.) And it was alſo farther objected on the Behalf of *Atfield*, that the *Venditioni exponas* was void; for by the Outlawry the Profits only are forfeited to the King, but the Sheriff has ſold the Term itſelf: And this was a Doubt with the Court, whether the Sheriff can ſell a Term upon an Outlawry, as he may a Chattel Perſonal, and as he alſo may a Chattel Real upon an Extent or Judgment; *the Court* ſeemed inclined to permit *Atfield* to plead, but referred it to the Deputy to ſtate the Fact, that they might more fully conſider the Matter.

If a Venditioni exponas ought to iſſue for Sale of a Term found upon an Outlawry, or only on an Extent and Judgment. Dyer 223 b. Poſt Pl. 293.

Goddard v. *Keeble*. April 19, 1722. 164.

BILL by the Rector of *Caſtle Eaton* in the County of *Wilts* for Tithe; the Defendant inſiſts upon ſeveral Modus's; firſt, Three Pence for every Milch Cow in lieu of Tithe Milk; 2dly, Three Pence for every Lamb yeaned in the Pariſh (but this was given up as too rank, for ten three Pences amount to the preſent Value of a Lamb); 3dly, One Shilling for a dry Cow and Ox depaſtured, &c. 4thly, One Penny for each dry Sheep not ſhorn in the Pariſh; 5thly, Three Pence for every Colt fallen. It not being alledged at *what Time* theſe Modus's were payable, the Defendant was decreed to account. *Nota*, I believe this is the firſt Inſtance in a Court of Equity that Modus's were diſallowed upon this Reaſon *.

Modus's diſallowed, no Time being mentioned when payable.

* There was the ſame Reſolution in *Pemberton* and *Sparrow & al'*, *June* 7, 1722.—And in *St. Eloy* and *Prior*, *Feb.* 3, 1723-4, upon the ſame Reaſon the Time not being mentioned, and in ſeveral Caſes ſince that Time.

165. ## *Warwick qui tam* v. *White.* April 21, 1722.

Commiſſioners of Exciſe ſhall be held ſtrictly to the Letter of Stat. 6 G. which gives them Juriſdiction.

UPON the Stat. 6° *Geo. Regis, cap.* which gives Juriſdiction to the Commiſſioners of Exciſe to condemn forfeited Goods therein mentioned, this Court will hold them very ſtrictly to the Letter of the Act, ſince it breaks in upon the ancient Juriſdiction of this Court; and in this Caſe a Writ of Delivery was granted for Goods ſeiſed by their Officer, upon giving Security, it appearing in the Information before them, that the Goods were removed from one Port to another *without a Permit*, which is an unlawful Importation, and therefore not within their Juriſdiction. Serjeant *Stevens*, Sir *Conſtantine Phipps*, Mr. *Ward* and Mr. *Brown*, for the Writ of Delivery; Mr. Attorney and Solicitor General *contrà*.

166. ## *Doctor Bennett* v. *Treppas & al'.* April 26, 1722.

Tithe of Houſes in London. Cuſtomary Payments ſet up againſt it.

Hard. 116. 2 Inſt. 660. Lit. Rep. 102, 141. Degge 351. Watſon 387. Cr. Car. 596. Hob. 11.

BILL by the Vicar of *Cripplegate* for two Shillings and nine Pence *per* Pound, according to the Rent of the Houſes, purſuant to the Decree and Stat. 37° *Hen.* 8. and to ſupport the Juriſdiction of this Court (the Statute giving Power to the Lord Mayor of *London* to determine, &c.) the Caſes in the Margin were cited: Several Inſtances were given, where the two Shillings and nine Pence *per* Pound had been decreed; as the Caſe of *St. Bride's*, *Townley* v. *Wilſon*, *Mich.* 1705; *Sawyer* v. *Montford*, 1694; *Grant* v. *Cannon*, *Mich.* 5° *Gul. & Mar.* *Sheffield* v. *Serjeant*, 1658; *St. Swithin's*, *Humfreville* v. *Plumſted*; *Aldgate Pariſh*, 21 *Car.* 2. But the Difficulty in

in this Caſe was, that here appeared to have been paid from Time to Time ſeveral Payments, as ten Shillings for *T.*'s Houſe, ſix Shillings for *Borketts*', and four Shillings for *Whichett*'s, and the Charges in the Vicar's Books appeared to be the ſame, though in ſome of them the Payments ſometimes varied, and the Right of the Vicar cannot be deſtroyed, but by an uniform, conſtant Payment. (See the Statute.) This being a Thing of great Conſequence, the Court took Time to conſider of this Decree.

Scott *v.* Warren, fo. 408. of the Decree Book in Scacc', Paſ. 16 Jac. 1. Scudamore *v.* Lambert, Nov. 1676, in Scacc'.

In *Michaelmas* Term, *Oct.* 26, 1722, the Court gave Judgment: Baron *Price*, That there ought to be a general Decree for the Plaintiff; *Mountague*, *Page* and *Gilbert* directed an Iſſue to try whether there had been ſuch cuſtomary Payments as was ſet up by Defendants; and a Verdict was for the Defendants. From this Decree Doctor *Bennett* appealed, and the Decree was confirmed. Sir *Conſtantine Phipps*, Mr. *Ward*, Mr. *Edlin* and Mr. *Bootle*, for the Plaintiff; Serjeant *Cheſſhyre*, Mr. *Fazakerley*, Mr. *Brown* and Mr. *Bunbury* for the Defendants.

Lady Carrington v. *Cantillon & al'.* 167.

Eodem Die.

CANTILLON ſenior and *Hughes* were Partners in *France*; *Cantillon* ſenior withdrew, and put in his Nephew, a Child of eight Years old, into the Partnerſhip: A Bill was preferred againſt the two *Cantillons*, *Hughes*, and Lady *Herbert*, to have an Account of ninety-three *Actions* and eighty *Primes* depoſited in *Cantillon*'s and *Hughes*'s Hands, as a Security for Lady *Herbert*: The Defendant *Cantillon* ſenior, in his Anſwer admits that he is Agent for *Hughes*; and it was now moved by Serjeant *Pengelly*

Service of Subpœna upon one Partner here deemed good Service of his Partner in France.

on

on the Behalf of the Plaintiff, that Service of the *Subpœna* upon the *Cantillons*, or their Clerk in Court, may be deemed good Service as to *Hughes*, who was then abroad in *France*; and *per totam Curiam*, the Service was allowed; as was done in the Caſe of *Furnes* v. *Lawes*, the Service on the Brother *here* being allowed, Mr. *John Lawes* being in *France*. Serjeant *Cheſſhyre* for the Defendants.

168. *Baker* v. *Planner & al'*. April 28, 1722.

Exception allowed for not ſetting forth Quantities and Values of Tithes particularly.

BILL for Tithes; Exception taken to the Anſwer, that the Defendant doth not ſet forth Quantities and Values: The Defendant ſets forth what tithable Matters he had, and ſays, he had no other tithable Matters whatſoever. Barons *Price* and *Page* thought this inſufficient, and that he ſhould have ſet forth particularly, that he had not ſuch and ſuch Things as charged in the Bill; and upon their Opinion the Exception was allowed. (But *nota*, this ſeems very extraordinary and contrary to the conſtant Method of drawing Anſwers.)----Baron *Mountague* thought it would be well enough, if the Defendant ſays, he has no other tithable Matters in the Bill mentioned.---But *nota*, then it might be thought inſufficient, if there were (as is uſual) a Charge in general in the Bill, that the Defendant had divers other tithable Matters.

169. *Fotheringham* v. *Mozato & al'*. May 10, 1722.

A Note given upon a S. S. Contract is a Compoſition within the Stat. 7 Geo. as well as a Bond.

UPON a Motion for an Injunction upon a *South-Sea* Contract: The Caſe was, that the Plaintiff had given three Notes for the Payment of the Money; it was inſiſted that this was a Contract neither

performed nor compounded, within the Stat. 7° *Geo.* and therefore ought to have been regiſtered; and Mr. *Bootle* who moved it, endeavoured to diſtinguiſh this Caſe upon *a Note* from *that* of *a Bond* (which had often been reſolved to be a Performance or Compoſition) for that the Bond was a Specialty which extinguiſhed the Contract, but a Note is to be taken as Part of the ſubſiſting Contract; but *the Court* upon the firſt Opening were clearly of Opinion, that theſe Notes being for a leſs Sum, were a Compoſition, and denied an Injunction.

DE

Term. S. Trinitatis,

1722.

May 25, 1722, Lord Chief Baron *Bury* being dead, Sir *James Mountague* came up Lord Chief Baron.

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170. *Pearce* v. *Penroſe & al'.* May 25, 1722.

Injunction to quiet Plaintiff in his Poſſeſſion, may be moved for before Service of Subpœna to anſwer.

IT was ſaid by Baron *Price*, and ſo admitted *per Curiam*, That if a Bill be filed to quiet the Plaintiff in Poſſeſſion, *&c.* upon an Affidavit of Diſturbance, and the Bill being filed, the Plaintiff may come before Service of the *Subpœna* to anſwer, and move for an Injunction to quiet him in ſuch Poſſeſſion as he had at the Time of filing the Bill.

171. *The Biſhop of Lincoln* v. *Sir W. Ellis & al'.* May 28.

A Decree read in Evidence, where the Leſſee, and not the Impropriator was Party.

UPON a Bill for Tithes, as Rector of *Barney* in the County of *Lincoln*; the Defendants inſiſted that the Lands were Parcel of one of the greater Monaſteries diſſolved by the Stat. 31° *Hen.* 8. A Decree

was

was offered to be read in Evidence, wherein Sir *Thomas Skipwith*, Leſſee of the then Biſhop of *Lincoln*, was Plaintiff againſt the then Tenants of the Land; but it was objected to the Reading of this, for that no Admiſſion of the Leſſee ſhall bind him that has the Inheritance, and who was no Party to the Decree: But by the Opinion of the Lord Chief Baron *Mountague* and Baron *Price*, it was read, who ſaid they ſhould have made no Doubt of reading it, if the Leſſee had prevailed; and therefore they ſaw no Reaſon why it ſhould not, ſince he did not prevail: But Baron *Page* was of another Opinion, and his Reaſons ſeemed to be the better. Mr. *Ward* for the Plaintiff; Serjeant *Cheſſhyre* for the Defendants.

Armiger v. *Clarke*. May 28, 1722. 172.

BILL for the ſpecific Performance of Articles for the Purchaſe of Lands at thirty Years Value, whereupon five hundred Pounds had been paid by the Defendant in Part: There was a *Memorandum* indorſed on the Articles, that the five hundred Pounds ſhould be repaid, in caſe the Plaintiff did not make out a good Title by the Time agreed upon and fixed for that Purpoſe. It appeared in the Proofs, that the Plaintiff's Father, who was the Perſon contracting for the Sale of the Lands, had written the Defendant a Letter, intimating that he could not make out any Title, the ſame being in Settlement upon his Wife, &c. And ſo it appeared in the Proofs, that the Plaintiff's Father was only Tenant for Life, and conſequently the Son, who was now Plaintiff, would not be concluded by his Father's Covenant; and ſince the Lien is not reciprocal, it ought not to conclude in a Court of Equity, where alſo

Bill for a ſpecific Performance of Articles for the Purchaſe of Lands diſmiſſed, becauſe the Lien or Remedy was not mutual or reciprocal.

2 Mod. 87.

alſo a Writing under Hand has the ſame Conſideration, as a Writing under Hand and Seal, and therefore the Letter ſhall be taken to be a Waiver of the Articles: It was alſo inſiſted upon for the Defendant, that this was an hard Bargain, and a Court of Equity will relieve not only againſt Fraud and Circumvention in an Agreement, but alſo againſt an Hardſhip; in the firſt Caſe they will ſet the Agreement aſide; in the ſecond, they will only not carry it into Execution. The Bill was diſmiſſed *per totam Curiam*, chiefly upon this Principle, that the Remedy was not mutual. The Lord Chief Baron took this Difference, if a Man comes for a ſpecific Performance as to the Land itſelf, a Court of Equity ought to carry it into Execution, becauſe there is no Remedy at Law; but if it is to have a Performance in Payment of the Money, they may have Remedy for that at Law. Sir *Conſtantine Phipps* for the Plaintiff; Serjeant *Cheſſhyre* and Mr. *Ward* for the Defendant.

173. *Joſlin* v. *Brewett*. May 30, 1722.

Reſiduum, when it ſhall go to the next of Kin, and not to the Executor. 2 Williams 158. 1 Williams 544, 114. Prec. in Can. 170. 2 Vern. 675. Rep. of Ca. in Equity, fo. 74.

A MAN makes his Will, and after ſeveral Legacies deviſes the Reſt and Reſidue to his Wife during her Life, and dies; ſhe makes her Will, and deviſes to the Defendant, and dies; he poſſeſſes himſelf of her perſonal Eſtate, and alſo of the Reſidue of the Huſband's perſonal Eſtate: The Plaintiff, as next of Kin, prefers his Bill for a Diſtribution of the Reſidue of the Huſband's perſonal Eſtate, which was only deviſed to her for Life; and upon this the long controverted Queſtion aroſe, whether a Legacy, being given to an Executor ſpecifically, did not exclude him from the Reſiduum; and this Caſe having been ſeveral Times argued, this Day Judgment was given by

by *Page* and *Price* Barons for the Plaintiff, that he ought to have a Diſtribution; Lord Chief Baron *Mountague* being of a contrary Opinion. Mr. *Cumyns* for the Plaintiff.

Proſſer v. *Winſton.* June 1. 174.

THE Queſtion was, whether *Sunday* ſhall be taken to be one of the Days a Defendant has to plead in; *Nota*, *Sunday* is included in the eight Days for Notice of Trial: But the Diſtinction is between Matters in *Païs* and Matters tranſacted in Court; and therefore in this Caſe the Plea was received. *Nota*, This was an Action of Treſpaſs, and the Defendant pleaded the *Locus in quo*, &c. was Ancient Demeſn.

Sunday, whether it is one of the Days a Defendant has to plead in. 2 Leon. 206.

June the 9th, 1722. This Day Mr. Baron *Gilbert* took his Seat as Puiſne Baron.

Upton v. *Coward.* June 9. 175.

THE Defendant's Plea of Privilege as an Attorney of the Court of King's Bench, was received *per totam Curiam*, after Appearance by the Defendant, and Bail put in: Theſe Caſes were cited againſt it; *Dyer* 33, 287. *Hard.* 316, 365. 2 *Ro. Abr.* 276, 5. ---Theſe cited for it; 3 *Lev. Sir Geo. Daſhwood*; *Salk.* 445, 545.

Plea of Privilege of an Attorney of the King's Bench, admitted after Appearance, and Bail put in.

In Scaccario, June 9.

176. ## *Morgan* v. *Skinner.*

Treſpaſs. Defendant juſtifies for Toll, and need not ſay he gave Notice how much the Toll was. 3 Lev. 224. Lutw. 377.

IN Treſpaſs for taking *duos Boves*, the Defendant juſtifies for Toll; upon Demurrer this Exception was taken to the Defendant's Plea, that he had not given Notice how much the Toll was: But to this it was anſwered by Serjeant *Comyns pro Defend'*, and holden *per totam Curiam*, that laying a Demand was ſufficient Notice of itſelf; and the Plea was holden to be good.

In Scaccario, June 12.

177. ## *Birchall* v. *Smethurſt.*

Proviſo not to commit Waſte, whether it is a Covenant or a Condition. Yelv. 206. 2 Cro. 281. 1 Ro. Abr. 518. c. 2, 5, 6. Dyer 150. 1 Leon. 277. 2 Lev. 116. Tomly's C. 40 Ed. 3. fo. 5 b. 1 Lev. 274. Pordage *v.* Cole. Raym. S. C. Saund. S. C. 1 Lev. 155.

THIS was an Action of Covenant upon an Indenture of Leaſe, for cutting down five Oaks, *&c.* The Queſtion aroſe upon theſe Words, Proviſo that if the Leſſee ſhall commit wilful Waſte, then the Leaſe ſhall determine and ceaſe; upon a Demurrer the only Queſtion was, whether theſe Words, *Proviſo*, *&c.* ſhall be conſtrued to be Words of Condition or Covenant; for if it ſhall be taken to be a Condition, then a Breach of Covenant is improperly aſſigned, and Judgment ought to be for the Defendant; of which Opinion was *the whole Court*; for though a Proviſo may amount either to a Condition or Covenant, yet that muſt be, when the Intent of the Parties leads to ſuch Conſtruction reſpectively; but there is no ſuch Intention, nor any Neceſſity here to conſtrue it a Covenant, for there were other Proviſions

viſions in the Leaſe by way of Covenant, for the Benefit of the Leſſor. Mr. *Bootle* (who demurred) for the Defendant; Mr. *Fazakerley* for the Plaintiff.

Penny Executor of Penny v. *Hoper.* 178.
June 21.

IN a Bill for Tithes in *Lucton* in the County of *Hereford*; the Plaintiff ſets out his Title, that Sir *Herbert Croft* being poſſeſſed of a long Term of Years unexpired of the great and ſmall Tithes, demiſed to the Plaintiff's Teſtator: It was objected at the Hearing, that the Plaintiff had made no ſufficient Title; for firſt they had not proved Sir *Herbert Croft*'s Leaſe, ſo that it might appear whether his Term was ſubſiſting or not; and if they had, *that* alone would not be ſufficient, for they ought to have ſhewn (being a Lay Impropriation) in whom the Fee is veſted, and derived the Title from thence: And the Court ſeemed of this Opinion, but let the Cauſe ſtand over with Liberty to amend *.

Title muſt be ſhewn in a Bill for Tithes, where there is a Lay Impropriation.

Baily v. *Worrall.* June 22. 179.

BILL by Plaintiffs, as Leſſees of the Rector of *Winterbourn*, for a Portion of great and ſmall Tithes in *Stoke Gifford*, being a neighbouring Pariſh, the Tenants and the Lay Impropriator, who claimed the great Tithes in *Stoke Gifford*, were made Parties;

Bill for a Portion of Tithes in a neighbouring Pariſh, the Vicar of that Pariſh muſt be a Party.

* At the Sittings at Serjeants Inn after *Mich.* Term, 1722, this Cauſe came on again, and the Plaintiffs had amended their Title in Exhibits, by ſhewing a Leaſe from the Impropriator to Sir *Herbert Croft:* But it was objected for the Defendants, that the Plaintiffs had not amended their Bill, and conſequently had not given the Defendants an Opportunity of controverting the Plaintiff's Title; and upon this Objection the Cauſe was again put off with Liberty for Plaintiffs to amend. *Q. Cro. Jac.* 318.

but

but becauſe the Vicar of *Stoke Gifford*, who might be intitled to the ſmall Tithes, was not made a Party, the Bill was ordered to be diſmiſſed; but upon Application ſtood over with Liberty to amend.

180. *Lord Carliſle* v. *Wymondſel & al'*. June 12.

Notice of filing Exceptions muſt be two Days before you can move for Injunction.

UPON a Motion originally for an Injunction; it was ſettled in this Caſe, that where you ſhew for Cauſe that you have filed Exceptions; they muſt be filed, and Notice given at leaſt two Days before the Motion, or the Injunction, upon that Reaſon, is not to be granted.

181. *Crawford qui tam* v. *Hyam*. June 25.

Fines, when and in what Manner to be rated. 14 Car. 2. Hard. 334.

PER Lord Chief Baron *Mountague*, The Power of compounding was only by virtue of their Privy Seal: The Statute of Frauds ſays, it ſhall not be leſs than one Third, by the Privy Seal; ſo as they ſhall not rate any Fine at leſs than one Half of what the Seiſor is to have. See the Rules of 1697.

Nota, No Fine by the Privy Seal can be rated without the Leave of the Lord Chief Baron and the Attorney General. The Court now determined, that when any body applies to rate a Fine, they will inquire firſt, whether there was any Bidder, and if there was, the Court would, in rating the Fine, take his Intereſt into Conſideration.

The Caſe of the Commiſſioners of the Land Tax of the Town and Univerſity of Cambridge. June 27.

182.

A Motion was made by the Town of *Cambridge*, that a *Super*, which was ſet upon them jointly with the Univerſity, might be taken off, and put only upon the Univerſity for the Arrear of the Land Tax; but the Court was unwilling to do this without producing Precedents, and at laſt one was produced of Sir *William Fleming* in 1709; but in that Caſe the *Super* was not altered, but the Proceſs directed to iſſue againſt the Perſons who were chargeable, who were the Commiſſioners that were in Default, and not againſt all the Commiſſioners: At laſt it was, by Compromiſe, agreed that the *Super* ſhould ſtand, and the *Diſtringas* iſſue againſt thoſe Commiſſioners only of the Town and Univerſity, who ſigned the deficient Duplicates. Mr. *Reeves* for the Univerſity.

A Super cannot be taken off *one* and ſet on *another*, but Proceſs may iſſue againſt *ſome* of the Commiſſioners of the Land Tax only.

DE
Term. S. Michaelis,
1722.

183. *Rex* v. *Michener*. Oct. 24, 1722.

Diem clauſit extremum not ſet aſide on Motion, for the Defendant may plead to the Inquiſition.

THOMAS NEWSHAM was Receiver General of the County of *Warwick*; *W.* and two others of his Sons, and others, were his Security; *Thomas Newſham* became indebted to the Crown; *John Michener*, one of his Sureties, dies, againſt whoſe Eſtate a *Diem clauſit extremum* iſſued, and two Houſes, &c. were ſeiſed: *Robert Michener* moved by his Counſel Mr. *Williams* to ſet aſide this Writ, the Order for it being, that *John Michener* was Surety for *Thomas* and *W. Newſham*, whereas *W.* was only Surety for *Thomas*: And it was alſo ſuggeſted, that *Robert Michener* was a Mortgagee and Purchaſor of theſe Houſes for a valuable Conſideration without Notice. To the the firſt it was anſwered by Sir *Conſtantine Phipps*, that they were all jointly bound by the *Obligation* to the Crown, and it was the *Condition* only that ſhewed that *Thomas* was the Principal; and this ſmall Variance between the Affidavit (upon which the Order for the *Diem clauſit extremum* was made) and the Bond, is not material; and the other Matter the Defendant

Hard. 378.

fendant may take Advantage of by * pleading to the Inquiſition: *Per Curiam*, We will do nothing in it upon Motion.

Nota, It was laid down as a Rule in this Caſe, that wherever an *Extent* might have iſſued againſt a Man in his Life-time, a *Diem clauſit extremum* may iſſue againſt his Eſtate after his Death.

Vernon v. *Cholmondeley*. Oct. 26. 184.

PER Curiam, The Jury upon a Writ of Inquiry of Damages may give Intereſt upon a promiſory Note, Bill of Exchange, and Money lent; and *per Mountague* Chief Baron, upon an *Indebitatus aſſumpſit* for Goods ſold and delivered: But *Page*, *Price* and *Gilbert* Barons, thought it could not be upon an *Indebitatus aſſumpſit* for Goods ſold, though in the other Caſes they were of Opinion it might †.

Jury may give Intereſt upon a Writ of Inquiry of Damages.

Bradley qui tam v. *Long*. Nov. 22, 1722. 185.

IN an Information for importing Brandy (*Vinum aduſtum*) upon the Stat. 5° *Geo.* it was not alledged that it was foreign Brandy, but concluded *contra formam Statuti*. In Arreſt of Judgment: *Per Curiam*, The Concluſion *contra formam Statuti* will not aid; but the Queſtion is, whether *Vinum aduſtum* does not *ex vi termini* import the Brandy to be foreign; and now it was adjourned to be conſidered, and Precedents to be ſearched.

Information for importing Brandy, not alledging that it was foreign Brandy. Ante Pl. 129. S. C.

* This Matter came on upon the Plea in *Trin.* Term, *June* 21, 1723, when the Plea was over-ruled.

† This was a Motion to ſet aſide a Writ of Inquiry, for that in an *Indebitatus aſſumpſit* for Goods ſold and delivered, the Jury had given Intereſt for the Money.

Nota, Afterwards, *in Term. S. Mich.* 1723, *per Price*, *Page* and *Gilbert* Barons, Judgment ought not to be arreſted upon this Objection.

186. *Lowther* v. *Whorwood.* Nov. 23, 1722.

Bill for an Injunction, the Court refuſed to grant a Commiſſion to examine at Barbadoes.

BILL for an Injunction, and to ſtay Proceedings at Law in an Action of falſe Impriſonment, and to have a Commiſſion to *Barbadoes* to examine Witneſſes there (whoſe Depoſitions might be made uſe of in the Trial at Law) which was now moved for: But *per Curiam*, The Application had been proper in the Court of King's Bench, where the Action is brought, but no Iſſue is joined here; and the Court would not grant a Commiſſion.

Though an Anſwer be to the original, you may demur to an amended Bill.

Nota, In this Cauſe the Plaintiff obtained an Order to amend his Bill, and afterwards amended only by praying Relief, it being before only for a Diſcovery; and it was now moved *(Dec.* 8th) for the Defendants, that this Order ſhould be ſet aſide, becauſe it deprived the Defendants of the Opportunity of demurring, and cited *Aſgill* v. *Dawſon*, *Trin.* 5° *Geo.* ---*Hely* and *Clarke*, 30° *Maii* 5° *Geo.* But *per Curiam*, Though you have anſwered to the original Bill, you may ſtill demur to the amended Part. Mr. *Reeves* for the Plaintiff; Serjeant *Cheſſhyre* for the Defendant.

187. *Long* v. *Bland.* Nov. 28, 1722.

A Perſon giving a promiſſory Note becomes a Bankrupt before it is payable.

A NOTE was given upon a Day, promiſing Payment a Year after; the Perſon who gave the Note became a Bankrupt after the Note given, and before the Day of Payment, and the Queſtion was, whether

whether the Bankrupt being diſcharged *per Stat.* 5° *Annæ* & 5° *Geo.* this Note was diſcharged; and *per* three Barons againſt *Price*, it is not.

Minnett & Heys v. *Ann Robinſon.* 189.

Prohibition to the Admiralty Court denied, where there was a Libel for Mariner's Wages after Seiſure of the Ship.

ANN ROBINSON libels in the Admiralty Court as Adminiſtratrix to her Huſband, for his Wages due as Mariner aboard the *Prince Frederick*; *Minnett* and *Heys* move for a Prohibition, upon a Suggeſtion that this Ship was ſeiſed for importing Wines from *Holland*, not being *Rheniſh* or *Hungarian* Wines, and therefore forfeited by the Stat. 12 *Car.* 2. that Claim being put in by *Bowen* the Maſter, an Information was filed by the Seiſor, and *Bowen* pleaded the General Iſſue; but before Trial *Bowen* ſubmitted, and compounded according to the Courſe of the Court; and upon Payment of one hundred and thirty-ſix Pounds to the Informer, &c. there was Judgment *Quod vas deliberetur*, &c. It was likewiſe ſuggeſted, that the Libel was for Wages due before the Seiſure. Upon this Motion I inſiſted, that the Act of Parliament had ſo altered the Property of the Ship, that by the Seiſure, Submiſſion to a Fine, and Judgment *Quod deliberetur*, &c. upon it, all precedent Incumbrances were diſcharged: But *the Court*, upon ſhewing Cauſe, diſcharged the Rule, though they admitted, if there had been *a Condemnation*, that would have been a good Ground for a Prohibition, and a Diſcharge of all precedent Incumbrances: Therefore *quære*, for the Fine does imply a Condemnation, although not actually given, but prevented by the Submiſſion.

At Serjeants Inn, Dec. 7, 1722.

190. ***Lord* v. *Turk*.**

Exemption, or Diſcharge from Tithes, the Lands being Parcel of a Monaſtery of the Ciſtertian Order. 2 Ro. Rep. 142. Cro. Ja. 559.

BILL by the Vicar of *Tiſchurſt* in the County of *Suſſex* for Tithes; the Defendant inſiſts the Lands were Parcel of the Monaſtery of *Robertsbridge*, which was of the *Ciſtertian* Order, and therefore diſcharged, being diſſolved by the Stat. 31 *H.* 8. as one of the greater Abbies. But *nota*, Lands, though of the *Ciſtertian* Order, were not diſcharged but *quamdiu in propriis manibus*, and even not all thoſe, but only *ſuch* as were in them before the Council of *Lateran*, as is expreſſed in that Council, which was held 5° *Hen.* 2. *Anno* 1179.---The Method of proving whether the Lands were purchaſed before or ſince the Council of *Lateran*, is only by Payment of Tithes, which will induce a Preſumption that they were purchaſed after; and *per Curiam*, the Defendant was decreed to account, for that it appeared that the Lands were in Tenants Hands, and conſequently not diſcharged when they came to *Hen.* 8. Sir *Conſtantine Phipps* for the Plaintiff.

The Method of proving whether Lands were purchaſed before or ſince the Council of Lateran, Anno 1179.

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Term. S. Hilarii,

1722.

Rex v. *Tollet Arm'*. Jan. 25, 1722. 191.

TOLLETT was outlawed at the Suit of *Bailey*, *Term. Paſchæ*, 8° *Geo. Regis*, an Inquiſition was taken thereupon, and returned into the Exchequer; a *Levari facias* iſſued returnable *Octabis Hilarii Anno nono Geo. Regis*, by virtue of which the Sheriff levied one hundred and twenty Pounds. *Craddock*, who had a Statute Merchant againſt *Tollett* for a thouſand Pounds, *Maii* 7° *Geo.* and was in Poſſeſſion of the Land, moved for Time to plead to the Outlawry and Inquiſition, and that upon giving Security, the Money in the Sheriff's Hands might be repaid to him, which was granted, and ſaid to be the conſtant Courſe of the Court of Exchequer.

Upon giving Security, Money levied by the Sheriff upon an Outlawry may be paid to the Pleader.

Cotes v. *Turner*. Jan. 26, 1722. 192.

PER Curiam, Where a Plea or Demurrer is overruled upon Hearing, and the Defendant anſwers alſo (even by only denying Combination) the Defendant

Whether a further Anſwer be required before Exceptions be put in.

dant is not obliged to put in a farther Anſwer until the Plaintiff has put in Exceptions for that Purpoſe; but if the Demurrer is to the whole Bill, and over-ruled, the Defendant muſt anſwer according to the the Rules of the Court, without Exceptions put in by the Plaintiff.

193. *Price* v. *Lord Coningsby*. Jan. 28.

Letter to a Peer by the Chief Baron.

THOUGH a Letter ſent by the Lord Chief Baron to a Peer is not ſuch Proceſs as ſubjects the Party to a Contempt, yet it is ſuch Proceſs as gives the Party ſuing it out, Priority of Suit: If a Man files a Bill, and takes out no Proceſs upon it, if a Croſs Bill be filed, the Plaintiff in the original Cauſe cannot compel the Defendant to anſwer his Bill firſt, he having taken out no Proceſs on his Bill.

Bill and Croſs Bill, who ſhall or ſhall not be compelled to anſwer firſt.

194. *Gold* v. *Freame*. Feb. 1.

In Debt for a Fine ſet in the Court of a Manor, you cannot pay Money into Court.

IN an Action of Debt for fifteen Pounds ſet for a Fine in the Court of the Lord of a Manor, the Court refuſed to let the Defendant bring four Shillings and two Pence into Court, &c. as had been done in Debt for Rent, Covenant, &c.

195. *Calverly* v. *Parker*. Feb. 1.

In caſe of a Bill for a Diſcovery only, the Plaintiff ſhall pay Coſts, though he has a Diſcovery, and the Defend' was the Occaſion of the Bill.

WHEREVER a Bill is for a Diſcovery only, and the Plaintiff has a Diſcovery by the Defendant's Anſwer, the Plaintiff cannot reply or proceed; for by the Diſcovery the Plaintiff has obtained the End of his Bill; and when he has had the Benefit of it in an Action brought at Law, and comes after to diſmiſs his Bill (which he muſt do, or the

Defendant will) ſuch Diſmiſſion will be with Coſts to be taxed; which ſeems hard, ſince the Defendant was the Occaſion of this Bill by his falſe Plea below, and the Plaintiff *there* can be allowed no Coſts in Equity. *Vide Stat.* 4° & 5° *Annæ*, *cap.* 16. *ſect.* 23.

Bate v. *Hodges*. Feb. 1722. 196.

BILL by the Rector of *Wareham* in the County of *Kent* for Tithes; the Defendant inſiſts upon this Modus, *viz.* One Shilling *per* Acre for Marſh Land, four Pence *per* Acre for Up-land, payable at *Michaelmas*, for Hay and all ſmall Tithes within the Pariſh (except Hops). *Nota*, It was admitted, if this Modus had been for Tithe Hay only, or the Tithe ariſing on the Land, the one Shilling had been too rank. Baron *Price* was of Opinion this was (as laid) a void Modus; *Page* and *Gilbert* Barons, that it was good, and decreed accordingly for the Defendant. Againſt the Modus was cited *Cro. Eliz.* 139. *Bury* and *Graſcomb and Jeffreys*, 17 *Novem.* 1687; *Gardener* and *Wickford*, 1704.--For the Modus *Smelter* and *Bridges*, *Hil.* 1694.

Modus for Hay and all ſmall Tithes. Poſt Pl. 202.

This Cauſe of *Bate* v. *Hodges* was reheard *Nov.* 23, 1724, before *Eyres* Chief Baron, and *Price*, *Page* and *Gilbert* Barons, and the Decree was reverſed, *dubitante Gilbert*.

Nota, After this, upon a new Bill and Croſs Bill, the ſeveral Objections to the Manner of laying the Modus were cured, and it was allowed to be good at laſt.

197. ## *Tully* v. *Kilner*. Feb. 11, 1722.

Modus in lieu of Tithe Hemp, Flax and Hay.

BILL by the Rector of *Aldingham* in the County Palatine of *Lancaſter*, for the Tithes of Ley Ground formerly uſed as Arable, but (ſince) converted into Hay Ground: The Defendant inſiſted upon this Modus---That the Occupiers of ancient Tenements within particular Vills, or Townſhips (expreſſed) within the ſaid Pariſh, with their own Carts, Carriages and Horſes, led and carried, and ought to lead and carry *a Cart Load* of Peat and Turf, from *Ulverſton Moſs* to the Parſonage Houſe, for the Uſe of the Parſon and Rector, his Farmer or Deputy, on ſuch a Day, or within the Space of every *two Years*, as they have or ſhould require the ſame, in full Diſcharge of all the Tithe of Hemp, Flax and Hay growing or ariſing on the ſaid ancient Tenements: This was held to be a void Modus by *three Barons (abſente* Lord Chief Baron *Mountague)*; for a Cart Load is too uncertain; it may be drawn by two or ſix Horſes; and there is no Right of Turbary alledged in the Parſonage Houſe, or in the Defendant's ancient Tenements. Sir *Conſtantine Phipps*, Mr. *Ward* and Mr. *Brown* of Counſel for the Plaintiff; Serjeant *Cheſſhyre*, Mr. *Fazakerley* and Mr. *Bootle* for the Defendant.

1 Ro. Abr. 649. D. 4. Watſon 1006.

At Serjeants Inn, Feb. 21.

198. ## *Lloyd* v. *Mackworth*.

Timber ſhall be preſumed to be above 20 Years Growth, unleſs the contrary be proved.

BILL for Tithe-wood; the Defendant inſiſts that it was Timber, but does not ſay that it was above twenty Years Growth: *Per Curiam*, We will preſume Timber to be above twenty Years Growth, unleſs the Plaintiff proves the contrary.

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Term. Paſchæ,

1723.

Rex v. *Taylor & Newman.* May 8, 1723. 199.

NEWMAN was indebted to *Taylor* and others, and *Newman* committed an Act of Bankruptcy; before a Commiſſion was taken out, the Creditors met in order to ſettle their Shares owing by *Newman*. *Taylor* having executed a Bond to the Crown, takes out an Extent againſt himſelf, and upon the Inquiſition taken thereon, *Newman* was found indebted to *Taylor*; it was now moved by Mr. *Bootle* to refer the Regularity of entering into this Bond by *Taylor* to the Crown, and of taking out this Extent, upon a Suggeſtion that it was done with an Intent to ſtrip the reſt of the Creditors: But Mr. Attorney General oppoſed it with Warmth for the Precedent's ſake, it never having been done before; and *per Curiam*, it was denied. *N. B.* The Chief Baron doubted whether *Newman*, who was ignorant of the Tranſactions between the Crown and *Taylor*, ſhall upon this finding be liable to an immediate Extent, but that rather a *Scire facias* ſhould firſt iſſue againſt *Newman*; for there

In what Caſe an immediate Extent ſhall iſſue.

Poſt Pl. 210.

there is no Plea to this, as there is to a *Scire facias*; *per* Baron *Price*, this was the regular Way: But however, that upon Affidavit made, that *Newman* was in a decaying Condition, and the King's Debt likely to be loſt, an immediate Extent might iſſue againſt *Newman*. Baron *Gilbert* thought this laſt was the right Method; for this is more than a Debt acknowledged, in which Caſe a *Scire facias* might be proper. *Per Curiam*, If a General Receiver pays over the Money to *A.* and this is found by Inquiſition againſt the Receiver, an immediate Extent may iſſue againſt *A.* for this is the Crown's Money. *Vide* the Rules of 15 *Car.* 1.

200. ## *Smith* v. *Green.* May 10.

Superſedeas to an Execution againſt a Priſoner, at what Time it ſhall iſſue.

IF a Perſon againſt whom a Judgment is obtained ſurrenders himſelf in Diſcharge of his Bail (as for Inſtance, in *Michaelmas* Term) and the Plaintiff does not proceed againſt him in the mean time, the Defendant may have a *Superſedeas* to the Execution againſt him in *Trinity* Term following. But *nota*, the Practice is different in *B. R.* and *C. B.*

201. ## *Evans* v. *Newell.* May 20.

Aſſart means Lands grubbed up and made fit for Tillage.

BILL for the Tithe-wood of all extraparochial Lands within the Foreſt of *Dean*, by virtue of a Grant from King *Edward* the Firſt of all Tithes iſſuing *de Aſſartis* within the Foreſt *de novo aſſartatis & aſſartandis*; but by the Proofs it appeared, that theſe Lands never were grubbed up, but were always Wood-lands, and no Tithes ever paid.

Nota,

Nota, The Debate in this Caſe was principally upon the Meaning of the Word * *Aſſart*; and *per Curiam*, it is only ſuch Lands as have been grubbed up and made fit for Tillage; and the Bill was diſmiſſed. Sir *Conſtantine Phipps* for the Plaintiff; Mr. *Bootle* and Mr. *Ward* * for the Defendant. Poſt Pl. 392.

Burwell v. *Coates*. May 20. 202.

BILL by the Plaintiff as Leſſee of the impropriate Rectory of *Normanby* in the County of *Lincoln*, under the Dean and Chapter of *Lincoln*, for Tithe Hay: It was inſiſted upon for the Defendant, that the Plaintiff (being a Lay Impropriator) had not ſet forth a ſufficient Title; and upon *that* the long controverted Queſtion, whether there was any Difference between a Lay and a Spiritual Perſon (claiming Tithes) was revived: But it was not now determined; for, *per Curiam*, the Title was well enough ſet forth in the preſent Caſe.

Whether a Lay Impropriator muſt ſet forth Title.

The Defendant inſiſted upon a Modus of four Shillings payable at *Eaſter*, in lieu of Tithe Hay ariſing on his Farm and other Lands particularly ſet forth: But *per Curiam*, This is a void Modus, becauſe it may introduce a Fraud; for if a Farmer ſhould turn all his Arable Land into Meadow, he would be diſcharged of the Whole for four Shillings; beſides it is too uncertain, it not being certain what a Farm conſiſts of. Mr. *Ward* and Mr. *Brown* for the Defendant; Sir *Conſtantine Phipps* for the Plaintiff.

Modus of 4s. at Eaſter, payable in lieu of Tithe Hay of a Farm, diſallowed. Hetley 94. Hutton 50. Ante Pl. 196.

* *Spelman, Verb.* Aſſart. *Manwood, cap.* 9. Stat. 4 *Ed.* 1. *Extenta Maner'. Regiſter. Du Freſne, Verb.* Aſſart. *Blunt's* Dict. *Verb.* Aſſart. *Jacob's* Dict. *Verb.* Aſſart.

† Mr. *Ward* ſaid the Word *Aſſart* was derived either from *exarando* or *aſſerendo Maner'*.

203. *Robinſon* v. *Jago*. May 22.

The Mortgageor of an Advowſon ſhall preſent to the Church. 1 Vern. 401. Amhurſt *v.* Dawling.

THERE was a Bill filed to redeem a perpetual Advowſon that was mortgaged, and the Incumbent dying, the Mortgageor moved, before the Anſwer came in, that the Mortgagee might preſent the Nominee of the Plaintiff the Mortgageor; and ſo it was ordered *per Curiam*, as, it was ſaid, was uſual, eſpecially where the Plaintiff will give Security to redeem, or bring the Money into Court, as was now offered.

204. *Rex* v. *Hollingsby*. May 23.

Seiſure before two Juſtices, by the Stat. 6 Geo.

SIR *Conſtantine Phipps* moved to ſtay Proceedings before two Juſtices upon a Seiſure of Brandy, and the Waggon which it was put into: As to the Brandy the Juſtices have Juriſdiction by the Stat. 6° *Geo. cap.* and ſo they would have as to the Waggon and Horſes, if they had been running Goods from the Water-ſide; but here the Brandy was taken in at *Southwark*, to be carried to *Alverſtoke*, and therefore the Officer who ſeiſed, was ordered to ſhew Cauſe why there ſhould not be a Writ of Delivery for the Waggon.

DE
Term. S. Trinitatis,
1723.

Wright v. *Grove.* June 14, 1723. 205.

Prorogation. If it be a Superſedeas to a Writ of Error in the Houſe of Lords. 2 Lev. 93. Raym. 383, 4. 2 Cro. Bp. of Oſſory. Order of the Lords 19th of June 1678. 1 Vent. 266. See Exchequer Rules.

A WRIT of Error was brought, upon a Judgment in Treſpaſs, into the Houſe of Lords; the Houſe being prorogued, the Writ of Error (as was alledged) was expired; and therefore it was now moved by Sir *Conſtantine Phipps*, for Leave to take out Execution; the Record alſo having never been tranſcribed (it was ſaid) the Lords could do nothing upon it: But *per Curiam (abſente Price* Baron) If the Prorogation is a *Superſedeas*, you may take out Execution without applying to the Court; if it is not, we cannot grant the Motion. What the Lords do in their judicial Capacity, goes over from Seſſion to Seſſion, as Matters below do from Term to Term; and the Motion was denied, being oppoſed by Mr. *Kettleby* and Mr. *Raby*.

Rodd

206. *Rodd* v. *Lord Coningsby*. June 19, 1723.

Ancient Demeſn is not pleadable, where Damages only are recoverable, &c.

TRESPASS for entering the Plaintiff's Houſe; the Defendant pleads the Houſe was holden of his Manor of *Marden*, and that it was Ancient Demeſn, and all Actions, &c. ought to be tried *in Curiâ Manerii*; the Plaintiff demurs. *Per totam Curiam*, Judgment for the Plaintiff; for wherever Damages only are to be recovered, and an Action is *contra Pacem* or *Vi & armis* (though the Title may come in Queſtion) Ancient Demeſn is not pleadable. Mr. *Willes* for the Plaintiff; Mr. *Raby* for the Defendant.

207. Fines levied of Lands in the Dutchy of Lancaſter, who ſhall have the Poſt Fines. 2 Ro. Abr. 193. Bro. Patent 109.

BETWEEN the Grantee of the Poſt Fines in the Dutchy of *Lancaſter*, and the Grantee of the Gildable: It was inſiſted on Behalf of the latter, that the Fines of Lands levied of the Gildable, though within the Dutchy, ought to go to the Grantee of the Gildable. *Nota*, firſt, If they are Lands held *in Capite*, they belong to the Gildable; 2dly, Though a Place is in the *Nomina Villarum*, yet it does not follow that the whole Town is Dutchy Lands.

208. *Shenton* v. *Jordan*. June 27, 1723.

Depoſit upon a Contract for Stock, the Party can recover no more than the Depoſit.

BILL to be relieved againſt a Verdict upon a Contract for Sale of ten Shares in *Welch* Copper; the Plaintiff at Law having recovered ſix hundred Pounds more than the Depoſit, it appeared by the Pleadings now, that the Contract was thus; "*Memorandum*, "that *Jordan* has ſold to *Shenton* ten Shares in *Welch* "Copper for next Opening of the Books, at eighty-"ſeven Pounds *per* Share; for the Performance of

" which, each Party has depoſited two hundred " Pounds in *Long*'s Hands. *Nota*, If either Party " does not perform the above Agreement, to forfeit " their Depoſit." And *per totam Curiam*, the Plaintiff was relieved on paying the two hundred Pounds, for that the Plaintiff at Law ſhould have recovered no more than the two hundred Pounds Depoſit: But *quære*, for this ſeems an extraordinary Opinion.

At Serjeants Inn, July 11, 1723.

Reignolds v. *Vincent*. 209.

BILL for Tithe *(inter al')*, of Lamb); the Defendant inſiſts that it was cuſtomary to tithe their Lambs at St. *Mark*'s Day (25th of *April)*: But for the Plaintiff it was ſaid, that by the Defendant's own Proofs it appears, they generally then are but three Weeks old, and cannot live without the Dam; but it is uſual to tithe them not until *Auguſt*, and ſometimes not until *Michaelmas*; but the General Rule is to tithe them when they are capable of living without the Dam. And *per Curiam*, the Cuſtom inſiſted upon by the Defendant is unreaſonable; and decreed for the Plaintiff.

The uſual Time for tithing Lambs is, when they can live without the Dam.

DE
Term. S. Michaelis,
1723.

210. ## *Rex* v. *Enderupp.*

Immediate Extent in Aid for the Under Treaſurer of the Board of Ordinance.

LANSDELL was Under Treaſurer of the Board of Ordinance, to whom Money had been impreſſed for the King's Uſe; *Enderupp* was a Merchant, and became indebted to *Lanſdell* by Bond for one thouſand ſix hundred Pounds on private Account; *Lanſdell* apprehending that *Enderupp* was declining in his Circumſtances, got an Extent againſt himſelf, and upon the Inquiſition taken thereon this Bond from *Enderupp* to him was found; upon *that* he applied (making an Affidavit before Baron *Price* at his *Chambers*, that *Enderupp* was likely to become inſolvent, having told him he could not pay the Debt, nor give Security, and was ſelling off his Effects in order to withdraw himſelf, *&c.* much according to the common Form, but did not ſay he abſconded) for an immediate Extent in Aid againſt *Enderupp*, which was granted *March* 1, 1721. Now this Day, being the 12th of *November* 1723, it was moved to diſcharge this Extent; firſt, Becauſe *Lanſdell* was not an Officer within any of the Rules to intitle him to

Vide Hard. 226, 404. Ante Pl. 199.

this Extent: To this it was anſwered *per Curiam*, That Money has been impreſſed to him, and he is an Accountant before the Court. Secondly, The Affidavit is not in the common Form: To this it was anſwered *per Curiam*, There is no certain Form of Words preſcribed in Affidavits for Extents. Thirdly, It is not according to the Rules of the Court of the 15th Year of *Car.* 1. nor of the 35th Year of *Car.* 2. To this it was anſwered *per Curiam*, An Extent in Aid being Prerogative Proceſs, is always under the Care of the Court, and they have a diſcretionary Power over their own Rules; they will not indeed let the Prerogative be made an Handle to get in a private Debt. And fourthly, It was objected that a *Scire facias* ought to have gone; but this ſeemed to have no Weight, later Practice being otherwiſe *. So *Price*, *Page* and *Gilbert* Barons (only in Court) denied the Motion, for that the Extent was regularly ſued out, but if not, would not have ſet it aſide in this Caſe, becauſe *Enderupp* had come to an Agreement with *Lanſdell* the Day after he was in Cuſtody; and alſo by reaſon of the long Acquieſcence after the Extent †.

In Cam' Scacc'.

Cappur v. *Harris*. 211.

IN this Caſe theſe Rules were laid down by Baron *Gilbert* in relation to Contracts for *South-Sea* Stock or Subſcription: Firſt, That if a Contract be executed, a Court of Equity will not unravel or break into it. Secondly, If it be only executory, and a

If Contract for S.S. Stock be executed, the Court will not break into it, if executory, the Plaintiff muſt ſeek his Remedy at Law.

* Two other Objections were made, firſt, That the Extent ought to have been moved for in Court. Second, That it ought not to have extended to *Enderupp*'s Body: But theſe were over-ruled as well as the reſt.

† In a like Caſe between *Bradley* and *Bowling*, *Jan.* 26, 1725, the ſame Objections were made to ſet aſide an Extent, but over-ruled *per totam Curiam*.

Man

Man comes to have it carried into Execution, there, a Court of Equity will not aid the Plaintiff, but leave him to ſuch Remedy as he can have by Law.

In Cam' Scacc'.

212. *Smee & Ux'* v. *Eliz. Martin & Spakeman.*

Legacy to a Son not to be paid him till he is of Age, no Deduction ſhall be allowed to his Mother for his Maintenance, &c. 2 Vern. 137.

W. MARTIN in *April* 1700, by Will deviſes to his Son *Edward* one hundred Pounds, not to be paid until he came of Age, and in the mean time five Pounds *per Annum* to be allowed out of the Produce of the perſonal Eſtate for his Maintenance, and made his Wife, the Defendant *Eliz.* ſole Executrix, and died: *Edward*, when he was an Infant, went to the *Eaſt-Indies*, where he came of Age in the Year 1709, and made his Will in the Year 1712, and then died there. By his Will he gave the Plaintiff *Abigail* this one hundred Pounds, and made the Defendant *Spakeman* ſole Executor, who proved the Will according to the Method in the *Eaſt-Indies*, and at the Charge of the Defendant *Eliz.* proved it again in the Prerogative Court here; and now the Plaintiffs preferred their Bill here for this one hundred Pounds Legacy; the Defendant *Eliz.* in her Anſwer inſiſted that ſhe had, when her Son *Edward* was an Infant, laid out in binding him Apprentice, and in fitting and ſetting him out for the *Eaſt-Indies*, and in other Neceſſaries for him, more than the one hundred Pounds. But *per Page* and *Gilbert* Barons (only in Court) No Deduction ought to be made for this; for the Mother, by Nature, ought to provide for the Maintenance and Education of her own Son, 2 *Vent.* 346; beſides, it appears plainly the Intention of the Teſtator, that this one hundred Pounds ſhould not be touched until *Edward* came of Age;

for there was an yearly Allowance in the mean time of five Pounds, and it was at her Peril that ſhe exceeded *that*; and the Plaintiff had a Decree for this one hundred Pounds, with Intereſt from the Date of *Edward*'s Will.

Lucy & Ux' v. *Gardener*. Nov. 11, 1723. 213.

BILL for a Legacy of one thouſand five hundred Pounds given to the Plaintiff *Sarah* by the Will of her Father, who made the Defendant, his Son and Heir, Executor; the Defendant inſiſts there are not Aſſets ſufficient to anſwer the Whole, and to make out the Deficiency ſays, that the Teſtator upon his Marriage with his laſt Wife conveyed a Freehold Eſtate, and alſo a Term for Years in the *Sun* Tavern in *Holborn* to Truſtees, to raiſe one thouſand five hundred Pounds for his Wife, in full of any Demand ſhe might otherwiſe have; and that he, the Defendant had ſold the Term for Years, and thereby raiſed the one thouſand five hundred Pounds, and paid the ſame to the Wife; and therefore the Reſidue of the perſonal Eſtate was not ſufficient to anſwer the whole one thouſand five hundred Pounds Legacy now demanded. But it was decreed *per Curiam (Price, Page* and *Gilbert* Barons) That the Executor ſhould not apply this Term to the Payment of the Widow's one thouſand five hundred Pounds; but the ſame ſhould go, in caſe of Deficiency of other perſonal Aſſets, towards Payment of the Debts and other Legacies, and the one thouſand five hundred Pounds given to the Widow (but now paid) ſhould remain a Charge on the Freehold Eſtate.

Where Proviſion is made by a Teſtator to pay a Debt out of his real Eſtate, a Term for Years or his perſonal Eſtate ſhall not be applied for that Purpoſe, ſo as to ſink the Legacy.

2 Salk. Hern v. Merrick.

214. *Lloyd* v. *Mackworth*. Nov. 11.

Two Defendants ſued for Tithes, one makes Default, a Decree againſt the other with the whole Coſts.

BILL for Tithes againſt two; the Defendants anſwer ſeparately, and there were ſeparate Examinations; one Defendant made Default, and there was now a Decree againſt the other with the whole Coſts; and the Court would not diſtinguiſh as to the Coſts between the two Defendants, but left *Mackworth* to get his Contribution from the other as he could. But *nota*, *this*, as it ſeems, can only be by Bill.

November 16, 1723, Sir *Robert Eyre* Knight, one of the Judges of the King's Bench, appointed Lord Chief Baron in the room of Lord Chief Baron *Mountague* deceaſed.

215. *Lambert* v. *Cumming*. Nov. 21, 1723.

Exemption from Tithes ſhall extend to a Common appurtenant.

BILL for Tithes in the Pariſh of *Warton* in the County of *Lancaſter*; the Defendant inſiſts upon an Exemption for his Eſtate called *Hilderſton*, and for his Right of Common *ſans* Number in *Yealand*, which Eſtate was Parcel of the Abbey of *Cockerſand*, one of the greater Abbies; which Exemption was proved: But it was objected for the Plaintiff, that the Common is only a *Profit apprendre* out of other Land, and an Exemption cannot ariſe for an Appendancy or an Appurtenancy. But *per Curiam*, We will make no Diſtinction between the Common and the Eſtate; and decreed for the Defendant.

1 Mod. 216.

Gregory

Gregory qui tam v. *Hunt.* 216.
Nov. 22, 1723

UPON a Motion for a Writ of Appraiſement and Delivery for a Cart and Horſes ſeiſed for carrying Tea and Coffee, the Cuſtoms not being paid, there being a Proceeding againſt them before two Juſtices, purſuant to the Stat. 8° *Geo. cap.* 18. which refers to the 6° *Geo. cap.* and alſo to two Statutes 8° *Annæ*. *Per Curiam*, Though the Statutes (having no negative Words) do not take away the Juriſdiction of this Court, yet the Party has his Election to proceed here, or before the Juſtices; and that being now attached in the Juſtices, and there not appearing to have been any great Delay, they denied the Motion.

Juriſdiction of Juſtices of Peace as to Carts and Horſes ſeiſed, upon the Stat. 8 Geo. 1. c. 18.

Boys v. *Ellis.* Nov. 25, 1723. 217.

IN a Bill for Tithes, a Queſtion aroſe whether there was Fraud in tithing Lambs, on this Caſe: The Ewes were kept by the Defendant in the Pariſh of *Driffield* in the County of *York* (where the Demand lay) all the Year, until *Chriſtmas*, when they were ready to drop their Lambs, and then were removed into the Pariſh of *Skern* (where there was a ſmall Modus only for Lambs) and there kept 'till *Lady-day* for Convenience of Forage, as inſiſted upon by the Defendant, and at *Lady-day* were brought back to *Driffield*. *Nota*, There was no Demand of Tithe *pro rata*, and *quære* if there had, if it could be decreed; for the Tithe of Lamb muſt be paid where they fall, and is not a diviſible Thing as Wool is. *Nota*, The Land in *Skern* was the Defendant's own. *Per Curiam*, Here is not a ſufficient Proof of Fraud, and

Whether Fraud or not in tithing Lambs. Lane 16, 17. More 913. 1 Ro. Abr. 652. Poph. 197. 2 Keb. 293. F. N. B. 51. Bro. Diſmes 16.

Tithe of Lambs not diviſible as Wool is.

and the Plaintiff's Bill was diſmiſſed: But *Page* and *Gilbert* Barons thought, at firſt, it might be proper to ſend it to an Iſſue, to try whether Fraud or not Fraud, and whether this had been the uſual Method of the Defendant's Courſe of Huſbandry; but, afterwards, they concurred with Baron *Price*.

218. ## *Fuller qui tam* v. *Jackſon.*

Information for importing Tea, &c. from Oſtend, contrary to the Act of Navigation, the Maſter of the Ship not allowed to be a Witneſs. Poſt Pl. 279. Lane 65.

UPON a Trial upon an Information for importing Teas, &c. from *Oſtend*, not being the Place of their Growth, &c. contrary to the Act of Navigation; the Maſter of the Ship was produced as Evidence for the Defendant; but it was objected to him, that the Ship, &c. being forfeited by the Act, as well as the Goods, by the Fault of the Maſter, he thereby is become reſponſible to the Owners, and therefore ſwears to diſcharge himſelf in Conſequence: And this Objection was allowed by *Page* and *Gilbert* Barons, before whom it was tried at the Sittings after *Michaelmas* Term, 1723, at *Weſtminſter*. But *nota*, This Objection had never been allowed before, eſpecially if there had been no Information againſt the Ship, &c. And at theſe very Sittings the ſame Objection was made to the Maſter of a Cart (which by the Stat. 6° & 8° *Geo.* is forfeited for running Goods) and was not allowed *.

* In the Caſe of *Rickſon qui tam* v. *Sandforth*, *Feb.* 17, 1724, at the Sittings after *Hilary* Term at *Weſtminſter*; on a Trial upon an Information upon the 9th and 10th *W.* 3. *cap.* 10. *ſect.* 3. for importing *India* Silks, &c. the Maſter of the Ship was offered as a Witneſs for the Defendant, but was refuſed by Lord Chief Baron *Eyre*, for that by the third Section *Abettors* were liable to a Penalty of five hundred Pounds, and the Maſter liable to a Proſecution (though no Proſecution was now commenced).

The Biſhop of London & Beaumont v. *Nicholls.* 219.

BILL by the Biſhop of *London* and *Beaumont*, as Sequeſtrator during the Incapacity of Mind of *Barefoot* the preſent Incumbent, for Tithe-wood in the Pariſh of *Birchanger* in the County of *Eſſex*: The Defendant demurs, for that it does not appear, that either of the Plaintiffs had any Title; and it was inſiſted upon by the Counſel for the Defendant, that (now, ſince the Diviſion of Pariſhes) the whole Right to Tithe was veſted in the Rector, and the Biſhop had nothing to do with the Right (even ſince the Stat. *Hen.* 8. which relates to a Vacancy) but only to take care that the Cure be ſupplied, and the Profits ſequeſtred for that Purpoſe; and the other Plaintiff was only a Sequeſtrator, who, as it appears by the Form of the Sequeſtration, and by his own ſhewing in the Bill, was only an Agent or Collector; beſides, the Incumbent *Barefoot* ſhould have been made a Party, for poſſibly, at this time, he may have recovered his right Senſes; and if he ſhould exhibit his Bill, a Recovery *now* could not be pleaded in Bar of his Demand. Baron *Price* was of Opinion, that no Decree could have been for the Plaintiff, if it had been a Sequeſtration during the Vacancy, nor can there be in this Caſe: But *Page* and *Gilbert* Barons were of Opinion the Bill had been well enough, if *Barefoot* had been a Party, either in Perſon or by his Committee; and the Bill was diſmiſſed, but without Coſts, the Want of Parties not being expreſſly aſſigned as Cauſe of Demurrer. And *nota*, the Words ("and for divers others Cauſes, &c.") were not in the Demurrer, as they ſhould have been.

Bill for Tithes by the Biſhop and Sequeſtrator, during the Incapacity of the Incumbent, diſmiſſed for want of making the Incumbent a Party. Poſt Pl. 267.

Cited for the Defendant, 2 Vent. 35. Mich. 1686. Banks *and* Rye. This was by a Sequeſtrator only quouſq; the Vacancy was ſupplied, and the Bill diſmiſſed.

Cited for the Plaintiffs, Bp. of Norwich & Butler *v.* Eachard, Trin. July 9, 1713. Chan. Ca. 31. Pern *v.* Oldfield. Vide 1 Mod. 259, &c. 2 Mod. 256.

DE
Term. S. Hilarii,
1723.

220. ***Pugh*** v. ***Roſſington.***

Attachment refuſed againſt a Perſon ſubpœnaed as a Witneſs, who went away before he was examined.

R. An Officer of the Navy Office, was ſerved with a *Subpœna* to attend as a Witneſs on the Behalf of the Plaintiff; he attended two Hours, and then went away before he was examined, by reaſon whereof the Plaintiff was nonſuited; wherefore it was now moved, that an Attachment of Contempt might go againſt him; but this was oppoſed, becauſe there is a proper Remedy given in this Caſe by the Stat. 5°. *Eliz. cap.* 9. And *per Curiam*, the Motion was denied *.

221. ***Croſley*** v. ***Shadforth.*** Jan. 27.

Rehearing not permitted upon the Minits.

THIS Cauſe came on upon a Rehearing, but the Petition was for a Rehearing upon the Minits, and the decretal Order never was drawn up; for which Reaſon the Court would not permit the Plain-

* But in the Caſe of *Troubleſome* v. *Edwards*, *May* 8, 1729, this Court in the like Caſe granted an Attachment, becauſe an Action was ſo difficult and hazardous.

tiff to proceed, but ordered the Plaintiff to draw up the Decree, and rehear upon that. But *nota*, there have been often Petitions for rehearing on the Minits only.

Rex v. *Norton*. Jan. 28. 222.

NORTON was committed to *Lincoln* Gaol by a Juſtice of the Peace, for aiding and aſſiſting in the Running of Goods; it was now moved to diſcharge him out of Gaol, upon an Affidavit that he was not concerned in the Running the Goods, and that he offered good Bail: But the Court denied to diſcharge him without giving Notice to the Juſtice of Peace, and alſo bringing his *Habeas corpus*.

The Court will not diſcharge One committed by a Juſtice for aiding in running Goods, upon Bail, without Notice to the Juſtice, and bringing his Habeas corpus.

Doctor Bennett v. *Treppaſs & al.* Jan. 31. 223.

AN Iſſue was directed in this Cauſe, to try whether there had been any Variation in the Payment of Tithes, or Sums of Money in lieu of them, for Houſes in *London*, according to the Stat. 37 *Hen.* 8. It was now moved, that the Plaintiff ſhould produce at the Trial the Books of the former Rectors; and although it was objected, that theſe were properly private Books, and the Plaintiff's own Evidence, yet as they had before been produced at the Hearing of the Cauſe, and as the Iſſue to be tried is to inform the Conſcience of the Court, the Jury ought to have all the Light the Court can give them: So *per Curiam*, the Plaintiff was ordered to produce theſe Books at the Trial.

Books of former Rectors produced upon Trial of an Iſſue, whether any Variation had been, as to Sums paid for Tithes of Houſes in London.

Laſco

224. ## *Laſco & al'* v. *Moys.*

One of the Plaintiffs dies, the other proceeds without reviving; if the Suit be abated, the Defendant will have Advantage of this at the Hearing.

AFTER the Bill was filed, and the *Subpœna* taken out and ſerved, but before the Return thereof one of the Plaintiffs dies; the other Plaintiff, without reviving, takes out an Attachment, and it being in the Vacation-time, the Defendant could not apply to the Court, but was forced to put in his Anſwer: It was now moved on the Behalf of the Defendant, that the Anſwer obtained from him in this Manner might be taken off the File, for there muſt be a Bill of Revivor, unleſs it appears that *all* the Matter in Demand by the Bill ſurvives, which it did not in this Caſe. But the Court would not do it, for they ſaid, If the Plaintiff is irregular, and the Suit is abated, the Defendant will have the Benefit of it at the Hearing.

225. ## *Goole Clerk* v. *Jordan & al'.* Feb. 6.

Bill by a Vicar for Tithe Herbage and Furze.

BILL by the Vicar of *Eynſham* in the County of *Oxford* for ſix Years Tithe Herbage and Furze, of a Cloſe called *Amberry* alias *Hanbourough Cloſe* in the Pariſh of *Eynſham:* The Defendants inſiſted, that they did not know that the Vicar was intitled to theſe Tithes, that they were informed no Tithes thereof ought to be paid to the Vicar; but that the great Tithes, Herbage, and Furze, (if any was due) belonged to the Impropriator; and then ſay, that it was Part of the diſſolved Abbey of *Eynſham*, and exempted by the Stat. 31° *Hen.* 8. The Plaintiff made out by his Proof, that the Vicar was intitled to all ſmall Tithes within the Pariſh, that the great Tithes were conſtantly paid to the Impropriator, and gave one

one Inſtance within thirty Years of a Compoſition with the Vicar for the Agiſtment Tithe of this Cloſe. The Defendants Proof was negative, that they never knew Tithe paid for this Cloſe; and although it was objected, that a Vicar ſhould have made out a fuller Title to the ſmall Tithes, yet the Court were of Opinion it was ſufficient; and decreed the Defendant to account.

John Butler and Elizabeth his Wife againſt *Peregrine Gaſtrell Eſq; Bachelor of Laws, Judge of the Conſiſtory Court of Cheſter.* Feb. 8. 226.

Prohibition. The Marriage of a Man with his firſt Wife's Mother's Siſter is within the Levitical Degrees, and prohibited, and a Conſultation awarded.

JOHN BUTLER was libelled in the Spiritual Court of *Cheſter* for Inceſt, in marrying *Elizabeth Lounds*, who is the Siſter of the Mother of *Hannah Butler* alias *Berrington* deceaſed, who was the late Wife of the ſame *John Butler*, who in *Mich.* Term 6° *Geo.* came and ſuggeſted for a Prohibition, that his Marriage with *Elizabeth* his firſt Wife's Mother's Siſter was lawful, *ac per Legem Leviticalem minimè prohibitum*, and was lawful and good by the Statute; and that although he had pleaded this Matter, and offered to prove the ſame, yet the Defendant refuſed to admit that Plea, and endeavours to diſſolve the Marriage *contra divinam Sententiam, in Regis Contemptum & Exhæredationem & contra formam Statuti.* And upon hearing Council on both Sides the Court ordered the Plaintiffs to declare in Prohibition, that it might come judicially before the Court, and be determined in a ſolemn Manner. And it was argued by Mr. *Bunbury* on the Side of the Defendant, that a Conſultation ought to be granted.

The Queſtion that ariſes upon this Record is, whether the Marriage of the Plaintiff *John* with *Elizabeth*, who is his firſt Wife's Mother's Siſter (*Matertera*, i. e. Aunt) be a Marriage within the *Levitical* Degrees.

For that is the Rule the Temporal Courts will govern themſelves by, if it be *extra Gradus Leviticales* now ſince the Stat. 32° *Hen.* 8. *cap.* 38. * they will prohibit where there is any Proceeding in the Spiritual Court to impeach any ſuch Marriage.

But before that Statute no Prohibitions were ever granted, but Cauſes Matrimonial were intirely left to the Juriſdiction of the Spiritual Court, even after the Statutes of the 25° *Hen.* 8. *cap.* 22.--the 28° *Hen.* 8. *cap.* 7.--and the 28° *Hen.* 8. *cap.* 16.

The firſt of which Statutes enacts, that a Separation by definitive Sentence in the Spiritual Court ſhall be without Prohibition or Appeal.

But this is repealed by the 28° *Hen.* 8. *cap.* 7. (which is ſtill in Force) and adds, in the Caſes mentioned in the former Statute, "*if carnally known*, &c."

The 28° *Hen.* 8. *cap.* 16. makes good all Marriages (not prohibited by God's Law) where there was no Divorce before the third Day of *November Anno* 26° *Hen.* 8.

* The Words of the Stat. 32 *Hen.* 8. *cap.* 28. are—That no Reſervation or Prohibition (God's Law except) ſhall trouble or impeach any Marriage without the *Levitical* Degrees. *Nota*, This Statute, as to *Præcontracts*, was repealed by the 2 *Ed.* 6. *cap.* 23. and by the 1 & 2 *P.* & *M. cap.* totally repealed; but by the Stat. 1 *Eliz. cap.* 1. it was revived as to ſo much as was not repealed by the Stat. *Ed.* 6.

And even ſince the Statute 32° *Hen.* 8. the Judges of the Temporal Courts have very unwillingly granted Prohibitions in Cauſes Matrimonial (the Reaſon of which ſeems to be, becauſe Marriages were originally of Spiritual Conuſance *) and that if it was now *Res integra*, they would not do it, but leave them to the Deciſion of the Spiritual Courts; and ſo it appears in the Caſe of *Harriſon* and *Dr. Burwell*, as reported both by Lord *Vaughan* and *Ventris*, and in the Caſe of *Good* and *Hill*, *Vaugh.* 304. Raym. 464. 3 Keb. 166. p. 47.

But as there have been ſeveral Inſtances of Prohibitions granted in Matrimonial Cauſes ſince the Stat. 32° *Hen.* 8. that Practice is not now to be altered; for it muſt be admitted, that that Statute has made the Temporal Courts Judges of the *Levitical* Degrees in conſequence of theſe Words, " That no " Reſervation or Prohibition (God's Law except) " ſhall diſturb or impeach any Marriage *without* the " *Levitical* Degrees."---And that no Perſons ſhall be admitted to any Allegation or Plea in any Spiritual Court, contrary to that Act of Parliament.

So that the Temporal Courts muſt take Conuſance of what the *Levitical* Degrees are, before they can know whether the Plea or Allegation in the Spiritual Court be without the *Levitical* Degrees, or contrary to the Act of Parliament.

But ſtill this leaves it as it was before the Statute, as to all Marriages within the *Levitical* Degrees, and

* *De Cauſa Matrimoniali, Curia Regia non ſe intromittat, ſed in Foro Eccleſiaſtico debet placitum terminari.* Bracton lib. 2. cap. 20. fo. 7. And ſo it appears by the Statute *Circumſpectè agatis*, 13 *Ed.* 1. That the Temporal Courts ſhall not hold Plea of Things *quæ ſunt merè ſpiritualia, viz. pro Fornicatione, Adulterio; & hujuſmodi.* And Lord *Coke*, in 2 *Inſt.* 488. in his Expoſition ſays, theſe are put but for Example, but extend likewiſe to Inceſt and Solicitation of Chaſtity.

therefore

therefore the Juriſdiction of the Spiritual Court as to them ſtill ſubſiſts; and the Temporal Courts, whenever they find that the Proceedings in the Spiritual Court are in relation to a Marriage *within the* Levitical *Degrees*, never interpoſe, but leave them to that Juriſdiction they had before the Stat. 32° *Hen.* 8. * ſo that it brings it to what (was before ſaid) is the Queſtion in this Caſe, *viz.*

Whether this is a Marriage within the *Levitical* Degrees or not?

This Propoſition may be laid down that will not be controverted---That divers Marriages, which are not expreſſly ſpecified either in the 18th or 20th Chapters of *Leviticus*, or in the Stat. of the 32d or any other of the Stats of *Hen.* 8. (mentioned before) yet are moſt certainly prohibited by the *Levitical* Law, and conſequently by the Stat. becauſe they come within the ſame Degree, and conſequently fall under the ſame Reaſon as thoſe expreſſly prohibited.

Of this, many Inſtances may be given:

1. For the Son to marry the Mother is within the expreſs Prohibition.

But for the Father to marry the Daughter is not expreſſly prohibited, but is in Conſequence, as being within the Degree prohibited.

2. The Marriage of the Nephew with the Aunt is within the expreſs Prohibition.

* And even at this Time the *Loyalty* of Marriage is to be tried by the Biſhop's Certificate upon an Iſſue Accoupled in lawful Matrimony or not, as in Dower, Appeal, &c. though the *Factum* of Marriage is to be tried by a Jury. 1 *Inſt.* 134. *a.*

But

But the Marriage of the Uncle with the Niece is only implied, as being within the ſame Degree. And many more might be put.

All which fall under this Rule of Prohibition in 2 *Inſt.* 684. *Quia eandem habent Rationem Propinquitatis cum eis qui nominatim prohibentur.*

Taking it therefore for granted, that Marriages within the Degree of the expreſs Prohibition are prohibited by the *Levitical* Law, and that the Statute makes no Marriages good, which are within the *Levitical Degrees*, it remains next to be conſidered, which Rule in the *Levitical* Law extends to this Caſe.

And it is this Prohibition in the 18th Chapter of *Leviticus*, Verſe 14, *Thou ſhalt not uncover the Nakedneſs of thy Father's Brother, thou ſhalt not approach to his Wife; ſhe is thine Aunt* *.

That Reaſon extends fully to this Caſe; the Wife of a Father's Brother is an Aunt (not in Conſanguinity but) in Affinity only.

The firſt Wife's Mother's Siſter is alſo an Aunt in Affinity, the Degrees are equally diſtant, whether we compute by the Method of the Civil, Canon, or Common Law.

* The general Prohibition in the 6th Verſe of the ſame Chapter is, "None of "you ſhall approach to any that is near of Kin to him to uncover their Naked-"neſs." And *Vinnius* in his Comment on *Juſtinian's Inſtitutes*, *Amſterdam* Edit. 1665, fo. 51, ſays, *Quo Gradu quiſpiam eſt cognatus Marito, eo Gradu eſſe affinem Uxori, & quaſi cognatum, & contra.*—And in fo. 52, 2d Col. *In univerſum etiam dicendum videtur, eoſdem Gradus Affinitatis prohibitos cenſeri debere, qui prohibiti ſunt in Cognatione—Et Propoſitionem illam Levit.* 18. *ver.* 6. AD PROXIMAM SANGUINIS SUI NEMO ACCEDAT, etiam ad Affines qui pro Conſanguineis ſunt, pertinere, & tam latè patere, quam latè patet Prohibitio inter Sanguine junctos.

And Lord *Vaughan* ſays, in the Caſe of *Hill* and *Good*, *fo.* 308. that the near of Kin to the Wife's near of Kin are prohibited by a ſecond general Law deduced from this Verſe of *Leviticus*.

It will not be diſputed, but the Mother's Siſter is near of Kin to the Mother, who is near of Kin to the Daughter, who was the firſt Wife.

The next Conſideration is, how far the Judges of the Courts of Law have extended the Rules laid down in the *Levitical* Law, as to comprehending of Caſes not expreſſly prohibited therein; and here it muſt be owned, that the Caſe now before the Court is not to be found expreſſly determined; what this is to be imputed to, is not very clear (ſince it is a Caſe which muſt have frequently happened before) unleſs, that when Prohibitions have been moved for, they have been denied; and then there is no Entry made of ſuch Motions: And if this Suppoſition is true, then it may be argued, (according to what is ſaid in *Hard.* 457.) that Want of Precedents, where a Thing may frequently happen, is an Argument that the Thing is not allowable.

But however this be, and though there be no expreſs Reſolution of the Caſe in Queſtion, yet it has been fully ſettled by Reſolutions which extend to the Reaſon of this Caſe, and therefore comes under that known Maxim, *Ubi eadem eſt Ratio, idem eſt Jus:* As in the Caſe of the Marriage with the firſt Wife's Siſter's Daughter; *Mann*'s Caſe, as reported by *Moore*, *fo.* 907. a Prohibition was granted; but *per Cro. Eliz.* 228. a Conſultation was granted; and Lord *Vaughan*, *fo.* 322. ſays, a Conſultation was granted in that Caſe, and therefore conceived, *that* Marriage

Marriage with his Wife's Siſter's Daughter to be within the *Levitical* Degrees, though not ſpecified to be prohibited in the 18th Chapter of *Leviticus*. 4 *Leon.* 16. ſame Caſe.

There was a Caſe of one *Pierſon*, againſt whom a Libel was exhibited in the Spiritual Court for marrying his firſt Wife's Siſter's Daughter; and it was ſaid by Lord *Coke* on *Litt.* 235 *a.* That a Prohibition was granted in that Caſe; but that was plainly a Miſtake; for Lord *Vaughan* (*fo.* 322.) examined the Record of that Caſe, whereby it appears that a Conſultation was awarded; and in all the Editions of *Co. Litt.* ſince the firſt, that Caſe is omitted. And in the Caſe of *Wortly* and *Watkinſon*, 3 *Keb.* 660. that by Order of the King and Council that Caſe was expunged.

In the Caſe of *Howard* v. *Barlett*, *Hob.* 181. the Caſe of one *Kennington* is cited, who married his firſt Wife's Niece, for which he was queſtioned as for an inceſtuous Marriage, and put to Penance by the high Commiſſion Court, and bound from her Company, and then died: The Widow came into Court, and prayed her Widow's Eſtate; and it was reſolved her Widow's Eſtate was due to her, in as much as ſhe was never divorced *à Vinculo Matrimonii*, *though there was Cauſe*.---By which it appears they ſhould have been divorced *à Vinculo Matrimonii*, for the Omiſſion of which only ſhe had her Dower.

Lord *Vaughan*, in his Obſervation on theſe Caſes, *fo.* 322. ſays, that the Marriage with the Wife's Niece is prohibited within the *Levitical* Degrees for Nearneſs of Kin to the Wife,---which Reaſon fully takes in the Caſe now before the Court, the Wife's Mother's Siſter being full as near of Kin, as the Wife's Siſter's Daughter.

This

This Point of the Illegality of the Marriage with the Wife's Siſter's Daughter has been eſtabliſhed by ſeveral Reſolutions ſubſequent to thoſe already mentioned, which, as they in a great meaſure govern the Caſe in Queſtion, it may be neceſſary to take notice of.

In the Caſe of *Wortley* v. *Watkinſon*, 2 *Lev.* 254. 31 *Car.* 2. a Prohibition was prayed to the Court of *York*, where there was a Suit for a Marriage with the Wife's Siſter's Daughter: The Court ordered the Plaintiff to declare in Prohibition, that the Matter might come judicially before the Court. Upon the Argument of that Caſe Mr. *Wallop*, who was for the Prohibition, gave up the Point of the Marriage of the Nephew with the Aunt, and a Conſultation was granted, *ut audivi*, ſays *Levinz*; but as it is reported in Sir *Tho. Jones* 118. it appears a Conſultation was granted.

* *Raym.* 464. *Watkinſon* v. *Mergatron*, There a Prohibition was denied *per totam Curiam* in the ſame Caſe to the Court of *York*; and *quære* if this is not the ſame Caſe with that in *Levinz*.

This Point of marrying the Wife's Siſter's Daughter came again to be debated in the Caſe of *Snowling* v. *Nurſey*, *Lutw.* 1075. *Mich.* 13 *W.* 3. *Rot.* 361. but the Judgment is 1° *Annæ*. *That* was upon a general Demurrer to a Declaration in Prohibition, where the only Queſtion was, as to the Validity of that Mar-

* It is ſaid in this Caſe, "*his Siſter's Daughter*, but it muſt be intended "*his Wife's Siſter's Daughter*," for the other could be no Queſtion: And *per Curiam*, It is a Cauſe of Eccleſiaſtical Conuſance, and though ſometimes Prohibitions have been granted in Cauſes Matrimonial; yet if it were now *Res integra*, they would not be granted.

riage; and after three ſeveral Arguments, Lord Chief Juſtice *Trevor* gave the Opinion of the whole Court, that this was a Marriage within the *Levitical* Degrees, and a Conſultation was granted.

So that it may be concluded this Point is fully eſtabliſhed by the repeated Reſolutions of the Courts of Law, and that the Caſe in Queſtion is not to be diſtinguiſhed from it, either in Reaſon or in the Diſtance of the Degree; the Mother's Siſter is certainly as near of Kin to the Mother's Daughter, as the Niece is to the Mother's Siſter; if the Huſband cannot marry the firſt Wife's Siſter's Daughter, becauſe he is her Uncle, neither can he, as in this Caſe, marry the firſt Wife's Mother's Siſter, becauſe ſhe is his Aunt. If *John Butler* the Plaintiff had married his laſt Wife firſt, and then married *her* who was his firſt Wife, ſhe then would have been his firſt Wife's Siſter's Daughter, which is the determined Caſe; the marrying the Aunt firſt, or the Niece firſt, can make no Alteration in the Degree, or in the Reaſon of the Thing. If theſe Caſes are not to be diſtinguiſhed, then it may be fairly concluded, that the Caſes above are (though not expreſs, yet in the Reaſon of them) a full Determination of the Caſe now before the Court.

It may be argued *à fortiori*, if the Marriage with the Niece is unlawful, that the Marriage with the Wife's Aunt is more ſo; for, by the Civil Law, Uncles and Aunts are taken to be *in loco Parentûm*; and one of the Reaſons given why Marriages with the near of Kin are prohibited is, becauſe *that* Subjection, which by Nature is due to a Parent, would, by the Marriage of a Man with his Aunt, be ſubverted, and ſhe who, before, was intitled to ſome Degree of Subjection by virtue of her parental Right, would, by ſuch

Intermarriage, become ſubject herſelf, which ſeems incongruous, and *contra Naturæ Ordinem.*

If this Caſe now in Queſtion was to be determined by the Canons, there could be no room left for Diſpute; for by the 99th Canon, none ſhall marry within the Degrees mentioned in a Table for that Purpoſe; and in that Table the Marriage of a Man with his firſt Wife's Mother's Siſter is expreſſly prohibited.

Theſe Canons were made *Anno* 1603, 1° *Jac.* 1. and were confirmed and ratified under the Great Seal according to the Stat. 25° *Hen.* 8. *cap.* 19. and have always been received here.

As to the Authority of theſe Canons, and how far they are binding upon the Subject *, *Moore* 78. *Trin.* 4° *Jac.* *Smith* v. *Bird*; in one Point of that Caſe it was reſolved, that the Canons of the Church made by the * Convocation and King without Parliament, ſhall bind *in all Matters Eccleſiaſtical*, as well as an Act of Parliament.

The Caſe of Matrimony is properly a Matter Eccleſiaſtical, and of which their Courts had originally the ſole Conuſance; and it is to be obſerved, that this Reſolution in *Smith* v. *Bird* was but a Year or two after the making the Canons.

In the Caſe of *Corey* v. *Pepper*, 2 *Lev.* 222. it is ſaid, that the Canons made in 1571, and thoſe 2° *Jac.* 1. being confirmed by the Queen and King, are

* *Goldſb. Rep. Append.* 3. 2 *Vent.* 44. *Grove* v. *Dr. Elliot.*

† *Vaughan* ſaid, the Convocation, with the Licence of the King, may make Canons for Regulation of the Church, and that as well concerning Laicks as Eccleſiaſticks; and ſo is *Lindwood.*

good

good by the Stat. 25° *Hen.* 8. ſo long as they do not impugn the Common Law or Prerogative of the Crown: They cannot be ſaid to impugn the Common Law, for the Common Law did not interfere in Cauſes Matrimonial, but left them to the Juriſdiction of the Spiritual Courts; nor to impugn the Stat. 32° *Hen.* 8. which has given Conuſance to the Temporal Courts only in Caſes *extra Gradus Leviticales*; nor the Prerogative of the Crown, no Branch of which is affected or incroached upon by this Canon, which received its Sanction from the Crown itſelf, being ratified under the Great Seal.

Lord *Vaughan*, in the Caſe of *Harriſon* and *Dr. Burwell* (and ſo it is reported alſo in 2 *Vent.* 20.) argues, That this Canon is ſo penned, that it muſt be underſtood that all the Degrees are expreſſed there, within *which*, Marriage was intended to be prohibited; and concludes, that *Harriſon*'s Marriage (which was with the Wife of the Great Uncle) was not prohibited, becauſe not mentioned there.

And in the Caſe of *Hill* and *Good*, 327, he again argues from the Parochial Tables, and concludes *Hill*'s Marriage (which was with the firſt Wife's Siſter) to be illegal, becauſe expreſſly mentioned there, and ſays, By a lawful Canon, which is enough, and not only ſo, but by a Canon warranted by Act of Parliament, the Marriage of *Hill* is declared to be prohibited by God's Law, therefore we muſt admit it to be ſo.

From this Reaſoning it is apparent that it was his Opinion, and *that* of the whole Court (whoſe Opinion he gave) that theſe Canons ſo ratified, were binding upon all the Subjects, as well Eccleſiaſtical as Lay.

Laſtly, An Objection was taken to the Declaration, that there is no expreſs Averment that the Marriage was *extra Gradus Leviticales*; for theſe Words in the firſt Part of the Declaration (before the Libel) "*Cumque Matrimonium prædict' inter prædict'* "*Johannem & Elizabetham fuit & eſt Matrimonium* "*extra Leviticales Gradus*," are only by way of Recital, and do not amount to an Averment. But notwithſtanding this Objection the Court this Day gave Judgment (upon the Merits of the Queſtion before them) that this was a Marriage within the *Levitical* Degrees.

Lord Chief Baron *Eyre* ſaid, If a Man cannot marry his own Aunt, he cannot marry his Wife's Aunt; and if there be Aunt and Niece, and a Man marries one of them, he cannot afterwards marry the other; let him marry which he will firſt, it makes no Difference: And he thought the Caſe of marrying the firſt Wife's Mother's Siſter a much ſtronger Caſe, and ſaid the Caſe of *Snowling* v. *Nurſey* was a proper Foundation for the Court's preſent Determination; but ſeemed to think, that the Parochial Tables were not binding upon the Laity.

Baron *Price:* I am of the ſame Opinion, that this is a Marriage within the *Levitical* Degrees, and that this Caſe is not to be diſtinguiſhed from the Marriage with the firſt Wife's Niece.

Baron *Page:* I am of the ſame Opinion, and there is no Difference, whether you marry the Aunt firſt or the Niece firſt.

Baron

Baron *Gilbert:* I am of the ſame Opinion. The Statute has ſet the Bounds to the Spiritual Court, which are the *Levitical* Degrees.

The *Levitical* Computation is the ſame as the Civil Law Computation: By the Law of God a Marriage in the third Degree is inceſtuous, and all Marriages within the third Degree have been conſtrued to be within and prohibited by the Statute; and the Canon goes ſo far as to ſhew the Senſe of the Church of *England* as to the Expoſition of the *Levitical* Law. And *per tot' Cur'*, *a Conſultation* was awarded *Feb.* 8, 1723-4.

Sittings after Hilary Term, 1723.

Janſon v. *Bury & al'.* 227.

THE late Lord Chief Baron *Bury* had ſeveral Brothers and Siſters (ſome of the half, and ſome of the whole Blood) who all died in his Life-time, all leaving ſeveral Children; and now upon a Bill exhibited for the Diſtribution of his Eſtate, it was decreed *per totam Curiam*, that the Diſtribution ſhould be *per Capita*, and not *per Stirpes* *; for now they do not take by Repreſentation, but as next of Kin to the Inteſtate, by virtue of the Stat. 22° & 23° *Car.* 2. But if one of the Brothers or Siſters of the Chief Baron had ſurvived him, the Children of the reſt muſt have taken only by Repreſentation, that is to ſay, *per Stirpes*; and the Caſe in this Court

Diſtribution, when to be per Capita, and when per Stirpes. Prec. in Can. Walſh *and* Walſh, fo. Eq. Ca. Abr. S. Caſe 249.

* The ſame Point was determined *Mich.* 1688, before the Judges Delegates, That Diſtribution ſhould be *per Capita*, and not *per Stirpes*, all the old Stock being gone; for they claim as next of Kin, and not by Repreſentation; *aliter*, if any of the old Stock had ſurvived. *Clarkſon* v. *Spateman.*

between *Wall* and *Theedham* was cited, which was 28th *June* 1711; Dr. *Wall* the Inteſtate had two Siſters, *Suſanna Sumpter* of the half Blood, who left *Samuel*; *Elizabeth* of the whole Blood, who left *John*, *Mary* and *Dorothy*; both the Siſters died in the Life-time of Dr. *Wall*; his Wife as Adminiſtratrix preferred a Bill for Direction in the Diſtribution; and the Court decreed one Moiety of the Inteſtate's Eſtate to the Wife, the other Moiety to be divided into four Parts, one Part for the Iſſue of *Suſanna*, and three for the Iſſue of *Elizabeth*; and no Diſtinction was made between the *whole* and the *half* Blood.

At Serjeants Inn, Feb. 20.

228. ## *Barefoot* v. *Fry*.

Injunction perpetual after five Ejectments and two Bills in Equity.

THIS was a Bill preferred for a perpetual Injunction to quiet the Plaintiff in his Poſſeſſion; the Defendant *Fry* having brought five Ejectments, and been nonſuited upon full Evidence in three of them, and had Verdicts againſt him in the other two, and having alſo brought two Bills againſt the Plaintiff, one in Chancery, and the other in this Court, which were both diſmiſſed, and the Caſe of *The Earl of Bath* v. *Sherwin*, *coram* Lord *Cowper*, in 1709, upon an Appeal to the Houſe of Lords, wherein a perpetual Injunction was decreed, was cited.

Mr. *Ward* of Counſel for the Defendant ſaid, that this was the firſt Inſtance of attempting to obtain a perpetual Injunction upon Ejectments brought at Law, and that Courts of Equity have never decreed it, but upon an Iſſue directed, and not upon Ejectments.

Lord

Lord Chief Baron *Eyre*: At Law a Man could not bring the ſame real Action twice for the ſame Thing; but now, Ejectments being introduced in the Place of real Actions, he may bring as many of them as he pleaſes at Law; and this is a Reaſon why a Court of Equity ſhould ſettle and quiet the Rights of People, and, after ſo many Trials, grant a perpetual Injunction; and *per totam Curiam*, a perpetual Injunction was decreed. And Baron *Price* ſaid, That ſince the Decree in the Houſe of Lords in the Caſe of *The Earl of Bath* and *Sherwin*, it had been uſual to grant Injunctions perpetual under ſuch Circumſtances as are in the Caſe now before the Court. Baron *Page* ſaid, That in the Caſe of *Sherwin* he claimed under a voluntary Deed, which occaſioned ſome Doubt before the Decree by the Lords; but the Plaintiff in the preſent Caſe (it appears) is a Purchaſor for a valuable Conſideration, ſo there is no Doubt at all, but that a perpetual Injunction ought to be decreed in the preſent Caſe.

Beardmore v. *Gilbert*. Feb. 21, 1723. 229.

THIS was a Bill brought by the Impropriator for the Tithe of *Forley* and *Oakmore* in the Pariſh of *Alford* in the County of *Stafford*; the Defendant in his Anſwer inſiſts, that the Ground, for which the Tithe is demanded, is Heath and barren Ground, and exempted by the Stat. *Ed.* 6. for ſeven Years; but he admits by his Anſwer, that it was Wood Ground which had been grubbed up; and therefore the Plaintiff's Counſel inſiſted it had yielded Profit before, and was not barren Ground within the Meaning of the Stat. of *Ed.* 6. This came on upon Bill and Anſwer, and it appearing from the Defendant's

Wood Ground grubbed up is not exempted for ſeven Years as barren Land, within the Stat. Ed. 6.

own Admiſſion, that it was Wood Ground grubbed up: *Per Curiam*, The Defendant was decreed to account.

230. ***Dodſon*** v. ***Oliver***. Feb. 24, 1723.

Bill of Revivor for the Duty and Coſts not taxed in the firſt Defendant's Life. Ante Pl. 72. 2 Chan. Rep. 7. Temple *v.* Rouſe. Lib. 5. Hall's Caſe.

BILL of Revivor both for the Duty, (which was three Pounds ſix Shillings and eight Pence, for Tithe Milk and *Eaſter* Offerings,) and Coſts, againſt the Defendants as Executors to the firſt Defendant, who died after the Decree, but before the Coſts were taxed; and therefore it was objected for the Defendant, that the Coſts not being aſcertained in the Life-time of the Party by Taxation, there could be no Revivor for them now: But *per Curiam*, Although there can be no Revivor for Coſts alone, yet there may be for the Duty and Coſts; and decreed accordingly.

Nota, *In Scaccario*, all the Inrolment *there*, is the Entry.---*Nota*, There can be no *Subpœna Scire facias* until the Decree be entered.

DE
Term. Paſchæ,
1724.

Finch Cl' v. *Maiſters & al'.* 231.
April 7, 1724.

Modus of 1d. for Hay, and of 26s. 8d. for Hay and ſmall Tithes, allowed.

BILL by the Rector of *Winwick* in the County of *Lancaſter* for Tithe Graſs cut and made into Hay; one Defendant inſiſts, that he and all thoſe, &c. in an ancient Meſſuage called *Newhalls*, and the Demeſn Lands thereunto belonging, containing ſixty-eight Acres, two Roods and eighteen Perches, in *Aſhton* within the ſaid Pariſh, have immemorially paid a Modus of a Penny at *Eaſter* annually in lieu of the Tithe Hay growing on the Premiſſes.

Another Defendant inſiſted upon a Modus of twenty-ſix Shillings and eight Pence for Hay, ſmall Tithes and *Eaſter* Offerings, for an ancient Tenement called *Brynn* and *Garſwood*, containing ſix hundred and twenty-five Acres.

It was objected for the Plaintiff, that it appearing by the Proof in the Cauſe that this Payment was for Hay (as a ſmall Tithe) therefore Hay made from

Graſs being in its Nature a great Tithe, it muſt be intended that this Hay Penny was for ſomething elſe, and the ancient Import of the Word * Hay or Haw was an Hedge or ſome ſmall Incloſure belonging to an Houſe; it was alſo objected to this and the other Modus, that they were uncertain, could not be ſuppoſed to have a reaſonable Commencement, and, 3dly, were liable to Fraud; for if all the Land was turned into Meadow, it would pay but one Penny: But notwithſtanding theſe Objections, both theſe Modus's were allowed *per Curiam*.

232. *Roupe* v. *Atkinſon*. May 4, 1724.

A Leaſe for Years ſettled before Marriage, aſſigned after by Baron and Feme, ſhall conclude the Feme, tho' no Fine be levied.

A LEASE for a Term of Years was aſſigned to Truſtees before Marriage, in Truſt that they ſhould make Leaſes for the Benefit of the Huſband and Wife; after Marriage the Huſband and Wife aſſign to *Sparke*, in Conſideration of building the Premiſes; *Sparke* aſſigns to *Atkinſon* for a valuable Conſideration.

Dyer 91, 146, 169. 1 Ro. Abr. 475. p. 1. Cro. Ja. 563. 1 Ro. Rep. 403. Cr. El. 769.

The Huſband being dead, *Mary Roupe* his Widow brings a Bill againſt *Sparke* and *Atkinſon* to be relieved againſt this Leaſe made during the Coverture, no Fine having been levied. And *nota*, this Bill muſt have been diſmiſſed as being proper at Law, but that the Defendants had filed a Croſs Bill to be quieted, and for an Injunction.

It was inſiſted upon for the Defendant in the original Bill, firſt, That this Leaſe being aſſigned by Huſband and Wife, who were *Ceſtuy que Truſts*,

* *Spelman, in Verb.* (Haia) *Sepes, Sepimentum, Parcus, &c. Skinner's* Dict. *Verb.* (Haw) *i. e. Agellulus juxta Domum, &c. Junius, Dict. Etym. Anglo-Sax.* (Haw Cantianis) *Agellus Domui jacens & circumſeptus, &c.*

ſhould bind in Equity as much as if it had been by the Truſtees: *Per Curiam*, If the Truſtees had been Parties, they ſhould have been decreed to have executed the Truſt to the Defendants, purſuant to the Aſſignment of *Ceſtuy que Truſt*.

2dly, It appeared that the Plaintiff was preſent often during the Rebuilding, and took no notice of her Intereſt; but this appeared to be only during the Coverture.

3dly, It was ſaid that the Plaintiff, after her Huſband's Death, had affirmed the Leaſe by accepting the Rent; but this was not made out in Proof.

For the Plaintiff it was inſiſted, that ſhe had both the Law and Equity on her Side, which ought to prevail againſt Equity alone, for the Defendants do not pretend to Law.

But to this it was anſwered, that the Truſtees are Truſtees for the Defendants, who have the equitable Intereſt.

Upon the Whole, *per Curiam*, the original Bill was diſmiſſed, and an Injunction was decreed upon the Croſs Bill; and *per* Lord Chief Baron *Eyre*, *Sparke* is a Purchaſor for a valuable Conſideration by building, nor does it appear he ever had Notice; but if he had, I ſhould have been of the ſame Opinion.

Chambers

233. *Chambers* v. *Robinſon.* May 6, 1724.

Coſts, in what Manner taxed, when the Anſwer is reported ſcandalous.

THE Defendant's Anſwer was referred for Scandal, and was reported by the Maſter to be ſcandalous, and the Plaintiff's Coſts were ordered to be taxed; the Plaintiff in the Taxation of Coſts had allowed to him ſeveral *Items*, of twenty-one Pounds ſix Shillings, and three Pounds, as Fees given to Counſel, although he did not pretend that ſuch Sums had been really given; but it was alledged, and ſo admitted now, that it was the conſtant Method in Chancery to allow Coſts in this Manner by way of Damages and Satisfaction to the Party for the Scandal: The Whole, in this Caſe, that was thus *item'd* to Counſel, amounted to ſixty Pounds, which, this Day, the Court would not alter, but, upon the 8th of *May*, they thought it too extravagant, and reduced it to forty Pounds.

234. *Rex* v. *Mann.*

Extent cannot be antedated.

JAY and *Dowſe* are Receivers General of the County of *Huntingdon*, the two *Norcotts* (Bankers) were Securities for them in a Bond to the Crown. The King's Money was returned up by *Jay* and *Dowſe* to the *Norcotts*, to be paid by them into the Exchequer; the two *Norcotts* afterwards became Bankrupts, and upon the 4th of *October* 7° *Geo.* a Commiſſion of Bankrupt iſſued againſt them, and upon the ſame Day *Mann* was choſen Aſſignee, and an Aſſignment was made to him by the Commiſſioners of the Eſtate and Effects of the *Norcotts*.

The Receivers *Jay* and *Dowſe* on the 5th of *October* 7° *Geo.* obtained a *Fiat* (dated that Day) for an Extent

Extent againſt the two *Norcotts*, their own Securities, which was teſted the 6th of *October*, which was irregular, in that it ſhould have been only to find Debts; and finding that the Aſſignment of the Commiſſioners was prior in Time to the *Teſte* of their Extent, they procured a new Extent, which was teſted before the Aſſignment, *viz.* the 6th of *July* before.

Whether this Extent, thus antedated before the *Fiat*, was not void, was (by way of Motion) twice argued before by ſeveral Counſel on both Sides, *viz.* *Nov.* 18, 1720, and *May* 22, 1723, when the Barons were equally divided.

And this Day, *May* 12, 1724, this Matter came on again before the Court, when the Queſtion was, whether the antedating this Extent ſhould not be taken Advantage of by Pleading, and not determined upon a Motion: It was objected to Pleading, that it would be averring againſt the *Fiat*, and that this was Matter of Irregularity, and not erroneous: But *per Curiam*, It was ordered to be pleaded to. Mr. Attorney General demurred to the Plea, and afterwards in *Hilary* Term 1726, it came on again to be argued by Mr. *Bootle pro Rege*, and Mr. *Strange* for the Defendant, and then the Court (as I think) ſeemed againſt antedating Extents, but adjourned the Matter without giving any Judgment, only they All now ſaid, this was a Matter of Irregularity, and not of Error, and ought to have been determined on Motion. The Plaintiffs ſeeing the Court incline againſt antedating the Extent, ſubmitted *(ut audivi)* *.

1 Lutw. 332. Hard. 226. Con. 1 Sid. 272. 1 Lev. and 2 Mod. Bayley *v.* Bunning.

* *June* 25, 1726, *Rex* v. *Vanderplank*, *Per totam Curiam*, An Extent cannot be antedated.

At the Sittings in Middleſex.

235. *Palliſer* v. *Ord.* May 13, 1724.

Action of Debt grounded upon Stat. 6 Geo. accrues upon a Demand and Refuſal, the exact Sum certified to be due, muſt be demanded.

DEBT was brought upon the Certificate of the Commiſſioners for ſtating the Debts due to the Army purſuant to the Stat. 6° *Geo.* for one hundred and five Pounds eighteen Shillings and ſeven Pence Farthing, certified to be due to the Plaintiff, for which the Statute gave an Action of Debt upon a Demand made and Refuſal; in proving the Demand, it was, of one hundred and five Pounds eighteen Shillings and ſix Pence Farthing, inſtead of ſeven Pence Farthing, which varied from the Sum certified. Lord Chief Baron *Eyre* (before whom this Cauſe was tried) was of Opinion, that this Certificate was in the Nature of a Judgment, that it being a Debt thereby reduced to a Certainty, and the Demand being of a different Sum, it was fatal; and thereupon the Plaintiff was nonſuited.

A naked Authority delegated to another, by expreſs Authority for that Purpoſe. Salk. 96.

Nota, The Plaintiff gave an Authority to *Moore* his Attorney to make the Demand, or to authoriſe any other Perſon to do it, who accordingly executed a Letter of Attorney to another to do it; ſo it was objected for the Defendant, that *a naked Authority* could not be delegated: But the Chief Baron was of Opinion it might, by *expreſs Authority* for that Purpoſe, otherwiſe not.

Mitchel

Mitchel v. *Soaper*. May 18, 1724. 236.

TRESPASS. Verdict for the Plaintiff, *quoad Tranſgreſſion' cum Averiis & Sepium & Fenſurarum Fraction' Proſtration' & Divulſion'*, that the Defendant was Guilty, and a Penny Damages. The Judge who tried the Cauſe had not certified as the Statutes 22° & 23° *Car.* 2. *cap.* 9. *ſect.* 136. and 8° & 9° *W.* 3. *cap.* 10. *ſect.* 4. direct; and now it was moved, that the Defendant ſhould have no more Coſts than Damages, here being no Word which amounts to an *Aſportation*, nor any voluntary Treſpaſs certified, and *Divulſion'* did not in itſelf import either; and of that Opinion were *the Court*; and the Plaintiff had but one Penny Coſts.

Treſpaſs, where no more Coſts than Damages.
2 Vent. 48, 215.
5 Mod. 74, 315.
Salk. 193.
Raym. 487.
Sir Tho. Jones 232.
Comberb. 420.
Poſt Reeves v. Butler, pl.

At Serjeants Inn in Chancery Lane.

Glover & al' v. *Eliz. Young*. May 21, 1724. 237.

ALTHOUGH the Rule is, That a Feme Covert, in the Abſence of her Huſband, muſt anſwer by her Guardian (that there may be ſomebody anſwerable for the Coſts) yet upon an Affidavit made, that her Huſband, ſince he entered his Appearance, was run away, and could not be found; that ſhe had applied to all her Friends and Acquaintance to be her Guardian, but that *all* had refuſed, becauſe ſhe could not give Security to indemnify them againſt the Coſts; in this Caſe of Neceſſity the Court gave leave to file her Anſwer without a Guardian.

Feme Covert's Anſwer without a Guardian permitted to be afiled in a Caſe of Neceſſity.

DE
Term. S. Trinitatis,
1724.

238. *Granſlade* v. *Baker.* June 4.

Writ of Aſſiſtance granted for Sequeſtrators, they having been oppoſed. See Exchequer Orders. 1 Vern. 160, 248.

IT was ordered *per Curiam*, upon the Motion of Mr. *Foley*, that the Sequeſtrators (nominated for not performing a Decree) might ſell ſo much of the Eſtate, as appeared by their Certificate they had ſequeſtred; and alſo that they ſhould have a Writ of Aſſiſtance to ſequeſter the reſt, it appearing by their Affidavit and Certificate, that they were oppoſed in ſuch Sequeſtration. It was moved by Mr. *Edlyn* in Behalf of two Perſons, that Part of the Eſtate ſequeſtred belonged to them, and a Leaſe was offered to be produced: But *per Curiam*, We will not enter into the Title upon Motion, but they muſt go before the Maſter upon Peril of Coſts.

239. *Coulſton* v. *Richardſon.* Eodem Die.

Upon Exceptions allowed, Plaintiff had an Order to amend without Coſts; Defendant, without waiting for the Amendment, puts in a ſecond Anſwer.

UPON arguing Exceptions they were allowed; whereupon the Plaintiff obtained an Order to amend his Bill without Coſts, he amending the De-

fendant's

ſendant's Copy; the Defendant, without waiting for the Amendment, put in a further Anſwer, and then moved to diſſolve the Injunction upon the coming in of his ſecond Anſwer: But it was moved for the Plaintiff, that this Anſwer came irregularly before he had amended his Bill, and it appeared (although Delay on the Plaintiff's Side was ſuggeſted) that the Plaintiff offered to amend his (the Defendant's) Copy: And the Court thought the moſt proper Method, in this Caſe was, for the Plaintiff, to take Exceptions to the ſecond Anſwer, and to turn the whole Amendments into Exceptions; and the Order for ſhewing Cauſe why the Injunction ſhould not be diſſolved, was enlarged.

Shorter v. *Scortin.* Junii 5, 1724. 240.

PER Curiam, Where a Matter is referred to the Maſter to make his Report thereupon, we will compel the Witneſſes (though they are Strangers) to attend by Rule, as they do in the Common Pleas.

Witneſſes compelled by Rule to attend the Maſter.

Chambers v. *Robinſon.* Junii 6, 1724. 241.

WHERE a Defendant ſubmits to Exceptions, or Exceptions, on arguing, are allowed, the Plaintiff has a Right, of courſe, to amend his Bill without Coſts, he amending the Defendant's Copy.

If Exceptions are allowed, Plaintiff mends his Bill without Coſts of courſe.

Gumley v. *Burt.* Junii 11, 1724. 242.

BILL by the Plaintiff as Leſſee of the Vicar of *Thiſtleworth*, for Tithe of Peas and Beans *ſet and ſowed in Rows, drilled, hoe'd, and Hand-weeded in a*

Tithes of Peas and Beans ſhall be paid to the Impropriator, if the Vicar doth not ſhew an Endowment or Uſage to the contrary.

Garden-like Manner, againſt the Leſſee of the Impropriator (the Dean and Chapter of *Windſor*) as being a ſmall Tithe: The Defendant inſiſts, that a great Part of the Pariſh is converted into this Method of Cultivation, and that this Tithe was never paid to the Vicar, but always to the Impropriator. Two Caſes were quoted by Mr. *Amyrant* for the Plaintiff; firſt, *Stephens* v. *Martin*, *Hil.* 7° *W.* 3. which was affirmed upon an Appeal to the Houſe of Lords; ſecond, *Nicholas* v. *Elliott*: To which it was anſwered by Serjeant *Stevens* and Mr. *Ward* for the Defendant as to the firſt, That it did not appear (in that Caſe) the Impropriator conteſted it, nor what the Endowment was; and as to the ſecond, there was a Proof of Uſage by the Vicar for forty or fifty Years receiving Tithe Peas and Beans, where *Plough* and *Spade* were uſed; but where the Plough only was uſed, the Impropriator received them. And *per Curiam*, There being no Endowment produced, nor Uſage proved in the preſent Caſe, the Bill was diſmiſſed as to the Demand of Peas and Beans.

Cro.El.578. More 910.

243. *Davies* and *Williams*. Eodem Die.

Prohibition to ſtay Proceedings in Spiritual Court for Proctor's Fees.

LIBEL in the Spiritual Court for Proctor's Fees; Mr. *Bootle* moved for a Prohibition, which was granted; for *per Curiam*, where there is Remedy at Law the Spiritual Court ought not to proceed, and this Caſe depends upon a Contract and Retainer, which is triable at Law.

The Caſes cited for the Prohibition, 2 *Ro. Abr.* 285. *p.* 37. 3 *Keb.* 441. *Hyde* v. *Partridge*, *Salk.* 2 *Keb.* 810, 845.---Mr. *Welden* againſt the Prohibition cited *Regiſt.* 53. 2 *Ro. Rep.* 59. 1 *Mod.* 167.

3 *Keb.*

3 *Keb.* 203. 4 *Mod.* 255. 1 *Vent.* 165. *March* 45. 5 *Mod.* 238.

Phillips v. *Symes & al' & è contra.* 244.

June 15.

BILL by the Rector of *Stoke Abbots* in the County of *Dorſet* (among other Things) for the Tithe of Furze, Coppice and Under-wood, Milk, Calves, Wool, and Fruit, &c. of Gardens.

Modus of 8d. for a Cow, and 4d. for a Heifer, for Milk and Calf.

The Defendants inſiſt, firſt, That no Tithe of Furze ought to be, or ever was paid, *unleſs it was ſold*; 2dly, Nor any Tithe of Coppice or Under-wood, if Cattle were depaſtured where the Wood grew; 3dly, They inſiſt upon a Garden Penny for the Produce of the Garden; 4thly, Upon a Modus of eight Pence for every Cow, and four Pence for every Heifer, in lieu of the Tithe of Milk and Calves of ſuch Cow and Heifer; 5thly, That three Shillings and four Pence was payable for every Score of Sheep ſhorn out of the Pariſh, and ſo proportionably for a leſs Number than twenty, or for a leſs Time than a Year, for the Wool and Lamb of ſuch Sheep.

Ante Pl. 97.

Nota, The Defendants omitted in their Anſwer to ſpecify the Day whereupon the ſaid reſpective Modus's were payable; and therefore to ſupply that Defect, they exhibited their Croſs Bill to eſtabliſh theſe Modus's, and alledged the ſame to be payable at *Eaſter*; and alſo to compel the Rector to keep a Bull, which, by Cuſtom, he ought to do for the Uſe of the Pariſhioners, and ſo was admitted by the Defendant to the Croſs Bill.

Cro. El. 569. Moore 355.

Upon

Upon hearing both theſe Cauſes together it was decreed *per Curiam*, firſt, That the Defendants ought to account for Furze, and Coppice and Under-wood; for the Defence, as to theſe, amounts, in effect, only to a *Non decimando*. 2dly, That although the Plaintiff in the original Cauſe had a Right to a Decree for Tithe in Kind, becauſe the Defendants had omitted the Day on which the Modus's were payable, yet now that Defect was ſupplied by their Croſs Bill, both Cauſes being now but as one; and it would introduce great Inconſiſtency in the Decree, if the Modus's ſhould, for that Reaſon, be adjudged void in the original Cauſe, and eſtabliſhed in the Croſs Cauſe, provided they are good in other Reſpects. 3dly, The Garden Penny was allowed. 4thly, The eight Pence for a Cow, and four Pence for an Heifer, were adjudged good; though it was objected, that it was not good for the Milk and *Calf*, for then it would be payable although there was no Calf; to which it was anſwered, that then the four Pence and eight Pence would be payable, for it was payable for all the Tithe a Cow, *&c.* produces, which is only Milk and Calf. 5thly, To the three Shillings and four Pence for every Score of Sheep ſhorn out of the Pariſh, and ſo proportionably for a leſs Number than twenty, or for a leſs Time than a Year, for the Wool and Lamb of ſuch Sheep; it was objected, firſt, That this is too rank; 2dly, It is payable for Wool *and Lamb*, though the Lambs might be fallen before the Sheep were removed, and the Tithe of Lamb would be payable before; 3dly, There is great Uncertainty, becauſe of the Fractions which might ariſe, when a ſmall Number was only removed; 4thly, It is liable to Fraud, for the Pariſhioner might remove them out of the Pariſh for a little Way only,

only, juſt before Shearing-time, and then bring them back again. To theſe Objections it was anſwered *per Curiam*, We cannot take notice of this, nor enter into the Conſideration thereof; *(ſed quære de ceſt Reaſon)*. 2dly, It is payable at *Eaſter*, and is a Satisfaction for all the Wool and Lamb before that Time. 3dly, The ſame Objection might be made to ariſe from the Fraction, where only a ſmall Quantity of Wool was, and Tithe in Kind paid. 4thly, If Fraud appeared, as it would be taken to be, under the Circumſtances put in the Objection, then the Pariſhioner ſhould pay Tithe in Kind, as well as if they had continued in the Pariſh to which the Modus doth not extend; ſo the Defendants were decreed to account in the original Cauſe for Tithe of the Furze and Wood; but the Bill was diſmiſſed as to the reſt, and the other Modus's were eſtabliſhed on the croſs Cauſe, and the Defendant decreed to keep a Bull purſuant to the Cuſtom.

But afterwards, *Feb.* 3, 1725, this Cauſe came on to be reheard, and principally as to the Modus of three Shillings and four Pence for every Score of Sheep ſhorn out of the Pariſh, *&c.* and upon Inſpection of the Croſs Bill, the Payment was alledged to be at *Eaſter*, *or otherwiſe when the Sheep ſhall be ſold*, which being uncertain, *per totam Curiam*, this Modus was adjudged void. *Vide* 1 *Ro. Rep.* 38, 39. 2 *Leon.* 70. *Moore* 913. *Hob.* 107.

Modus of 3s. 4d. payable at Eaſter or otherwiſe, &c. for a Score of Sheep ſhorn out of the Pariſh, is void, as uncertain in Time of Payment.

Laurence v. *Jones*. Junii 18. 245.

BILL by the Vicar of *Brockworth* in the County of *Glouceſter* for Tithes: It was decreed *per totam Curiam*, that *Eaſter* Offerings were due of common

Eaſter Offerings are due of common Right.

Right at two Pence *per* Head, unleſs it had been cuſtomary to pay more; that the Vicar ought to have a Decree accordingly, though there was no Proof of *Eaſter* Offerings ever having been paid, (there being a Lay Impropriator, * who is not intitled to Offerings, but *he* only who exerciſes the Spiritual Function). And it was ſaid by Baron *Gilbert*, that Offerings were a Compenſation for Perſonal Tithes.

246. *Harriſon* v. *Sharp & Hurſt.* Eodem Die.

Modus of 1s. in the Pound of the yearly Rent of the Land, void.

BILL by the Plaintiff as Vicar of *Grantham* in the County of *Lincoln*, who therein demanded Tithes of Lands in the Vill of *Harrowby*; the Defendants inſiſted on this Modus, *viz.* That when any of the incloſed Paſtures in *Harrowby* were ploughed, and ſown with Corn or Grain of any Kind, or laid for Meadow, and mown and made into Hay, Tithes in Kind were paid to the Rector; but when eaten and depaſtured with Sheep or Cattle, then the Occupier paid to the *Vicar* one Shilling in the Pound of the yearly Rent or Value thereof, and no more, upon *ſome Day* after *Michaelmas*, yearly, in Lieu and Satisfaction of all Tithes whatſoever: *Per Opinionem totius Curiæ*, this Modus was adjudged void upon the Authority of the Caſe of *Startupp* and *Dodderidge*; and therefore gave no Opinion upon the Uncertainty of the Day.

Ante Pl. 25. Salk. 657.

* The Reporter himſelf puts a *Quære* upon this.

Snowball v. *Vicaris*. Junii 22. 247.

A Judgment was obtained at Law in an *Aſſumpſit*, upon an abſolute promiſory Note for fifty Pounds againſt the Plaintiff *Snowball*, who now brings his Bill to be relieved, ſuggeſting the Note was really agreed to be conditional, *viz.* "That unleſs *Ram*'s "Inſurance roſe to one hundred Pounds *per Cent*. I "(the now Defendant) give you my Word I will ne-"ver trouble you for the Money."

Evidence admitted, that might have been produced before at Law.

It was objected for the Defendant, firſt, That the Plaintiff ought not to be permitted to enter into this Evidence now, becauſe he might have done it at Law, either upon the General Iſſue, or by pleading ſpecially.

Secondly, That the Plaintiff ought not to give parol Evidence to prove the *Intent* of a Note in Writing under Hand.

Parol Proof to explain the Intent of a Note.

But *per Curiam (dubitante Eyre* Chief Baron) The Plaintiff was permitted to go into this Evidence, and was relieved; and Baron *Price* ſaid he could not diſtinguiſh this Caſe from that of *Lady Clarges* v. *Williams* in this Court, *Feb.* 20, 1723.

Murriet v. *Lyon & Ux*'. Junii 23. 248.

THE Defendant moved for Liberty to anſwer without his Wife, upon an Affidavit made that ſhe declared ſhe would not anſwer with her Huſband, but that ſhe loved the Plaintiff better, and would ſtand by him; which was ordered accordingly.

Huſband allowed to anſwer without his Wife.

Sir

249. *Sir Edward Blacket* v. *Doctor Finney.* Junii 25.

Injunction to the Spiritual Court to ſtay a Libel for Tithes, where a Modus is ſought to be eſtabliſhed.

BILL ſuggeſted that there was a Modus of four Pence *per* Score of all Sheep going on *Gayerfield* in the Pariſh of *Ryton* in the County of *Durham*, in lieu of Tithe of Lamb and Wool; that the Defendant libelled in the Spiritual Court for Tithes in Kind; that the Plaintiff moved for a Prohibition in the Court of Pleas in *Durham*, but permitted a Conſultation to go, and depended on Relief in this Court, and prayed to have the Modus eſtabliſhed: The Defendant Doctor *Finney* inſiſted there was no ſuch Modus, but that the four Pence was in lieu of the Milk of the Ewes, which was uſual in that Country.

Now upon Motion for an Injunction to the Spiritual Court the Defendant's Council inſiſted, that this was proper Matter of Suggeſtion on a Prohibition; and alſo the Defendant had in the Anſwer denied the Modus: But *per Curiam*, there being ſome Diſpute between the Parties, whether the Modus is as alledged in the Bill, and as the Spiritual Court cannot try the Modus, we will grant the Injunction *.

* *June* 6, 1733, *Salmon & al'* v. *Rake Rector of Holcombe in Com' Somerſet:* A like Bill for eſtabliſhing Modus's, ſome whereof the Defendant admitted, but abſolutely denied the moſt and greateſt of them; and *per totam Curiam Scacc'*, though the Plaintiff here had not put in a Plea to the Libel in the Spiritual Court, yet ſince that Court cannot try Modus's, and the Bill prays an Eſtabliſhment thereof, an Injunction was granted.

Holden

Holden qui tam v. *Weedon Widow.* 250.
Eodem Die.

THIS was an Information againſt the Defendant upon the Statute 11° & 12° *W.* 3. for having *India* Silks in her Cuſtody knowing them to be ſuch, whereby ſhe became liable to the Penalty of two hundred Pounds: There was a Verdict for the Plaintiff, and now in Arreſt of Judgment ſeveral Exceptions were taken to the Information, but over-ruled. At laſt an Objection was made, that this was no Offence at Common Law, and therefore every thing ought to be ſhewn in the Information to make it an Offence within this Act of Parliament; and though there was an Averment that the Commiſſioners had appointed Warehouſes, &c. yet they have not averred that there were Warehouſes ſtill continuing at the Time of the Seiſure, or that Security was not given, as by the Act is directed: To which it was ſaid, that the Defendant being to have the Benefit of them, it laid upon her Part to ſhew it. But *per Curiam*, The *contra formam Statuti* is only a Concluſion from the Premiſes, and they thought the Caſe in Sir *W. Jones* 156. *Bedo* v. , not to be Law: So much ought to appear in the Information, as to make this Matter a compleat Offence within the Statute. Upon the Stat. 5° *Eliz.* it muſt be averred in an Indictment, that the Defendant did not exerciſe the Trade at the Time of the Statute, although it is above one hundred Years ago: And upon the Objection, that it did not appear that there were Warehouſes continuing, or that the Goods were not delivered out upon Security, Judgment was arreſted. And Lord Chief Baron *Eyre* ſeemed to think, there was nothing in the Diſtinction between an Exception and Proviſo mentioned in 1 *Lev.* 26.

Information upon a new Statute muſt ſet forth every thing requiſite to bring the Offence within that Law.

Dyer 312. Cr. El. 749. Hard. 217. Raym. 487. AntePl. 129. Mod. Ca. 58. 2 Inſt. 134. 2 Keb. 289, 129. Sid. 348, 303.

At Serjeants Inn, poſt Trin. 1724.

251. ### *Vernon* v. *Minſhull.*

Bill to be relieved againſt a Judgment at Law, though the Matter ſuggeſted was a proper Defence at Law. 1 Vern. 176.

THE Plaintiff brought his Bill againſt the Defendant to be relieved againſt a Judgment at Law, upon a Suggeſtion and Proof that two Notes, which would have been a proper Defence at Law, were miſlaid at the Time of the Trial, and ſince that Time have accidentally been found, whereupon the Plaintiff was relieved, and an Injunction was granted to ſtay Execution on the Judgment.

At the ſame Sittings.

252. ### *Sir Alexander Anſtruther* v. *Chriſtie.*

The like Bill as the laſt above.

A BILL was preferred by the Plaintiff againſt the Defendant to be relieved againſt a Judgment at Law *by Default*, upon a *South-Sea* Contract for nine thouſand four hundred and forty-five Pounds for one thouſand Pounds Stock, to be transferred on the 21ſt of *December* 1720.

The Plaintiff by his Bill ſuggeſted, that the Defendant had not regiſtered;--was not poſſeſſed of the Stock as the Statute requires;--that he had not tendered;--that it was an uſurious Contract, two Notes being given for one thouſand three hundred and fifty Pounds for continuing the Contract for three Months.

For the Defendant it was objected, that theſe Matters were all a proper Defence at Law, and therefore that the Plaintiff ought not to be permitted to enter into this Evidence, and that there was no Difference that

that the Judgment was by Default, for that it was the Plaintiff's own Neglect, that he did not plead and make his Defence at Law, of which he ought not to take Advantage. And it was alſo inſiſted upon for the Defendant, that ſince here was a Contract in Writing produced, the Plaintiff ought not, by Parol, to give Evidence that it was a Continuance of a former Contract: But notwithſtanding theſe Objections, *the Court* permitted the Plaintiff to go into Proof of the before-mentioned ſeveral Matters; but afterwards an Iſſue was directed to try whether the Defendant was poſſeſſed of Stock as the Statute requires.

Nota, It appeared in this Cauſe there had been the moſt ſhameful Subornation of Perjury that ever appeared to a Court; Sir *Alexander* having, in his own Hand-writing, dictated what his Witneſſes were to ſwear, with a Deſcription of the Defendant's Perſon, Time, Place, Sums, *&c.*

DE
Term. S. Michaelis,
1724.

253. *Woodnoth* v. *Lord Cobham & Gibbs his Tenant.* Oct. 26.

Evidence. Entries by the Lord's Steward admitted to prove a Modus to the Vicar, in Diſcharge againſt the Parſon. Ante Pl. 75.

A LAY Impropriator prefers his Bill for great Tithe of the Pariſh of *Thornbrough* in the County of *Buckingham*; the Defendant inſiſted that there was a Payment of ſixteen Shillings and four Pence to the Vicar, in lieu of the Tithes of the Chantry Paſtures (which were in Demand) and to prove this, produced Accounts of one *Edward Chaplin*, who was Steward to the Defendant's Father, wherein there were Entries of this Payment: But it was objected for the Plaintiff, that though a Parſon's or a Vicar's Book, (where it appeared that Payments were made) were Evidence, yet never admitted in the Caſe of him who has the Fee: But *per Curiam* (*diſſentiente* Baron *Price*) Even old Rent Rolls (where it appears Payments have been made, &c.) are good Evidence; and they ordered theſe Entries to be read. But *nota*, by Baron *Gilbert* they ought to be read, becauſe no better Evidence can be had; but if *Edward Chaplin* had been alive, they ought not.

N. B.

N. B. In this Caſe it ſeemed to be the Opinion of the Court, that the Payment of a Modus to the Vicar is good Evidence of an Exemption againſt the Parſon.

Spendler & al' v. *Potter.* Nov. 12, 1724. 254.

BILL to eſtabliſh a Cuſtom, whereby the Owners and Occupiers of certain Lands in the Pariſh of *Tort Baldwin* in the County of *Oxford* were obliged to keep a Bull and Boar for the Uſe of the Pariſhioners: It was objected at the Hearing, that a Cuſtom which binds the Inheritance of the Lands can never be eſtabliſhed in a Court of Equity, without the Owners of the Inheritance are made Parties, as *Queen*'s College (who were Owners, &c.) ought to have been here; upon which Objection the Bill was diſmiſſed *per totam Curiam.*

Bill to eſtabliſh a Cuſtom, the Owner of the Inheritance muſt be a Party.

Nota, Alſo it was objected, that as to the Occupier, an Action on the Caſe would be proper.

1 Ro. Abr. 559. E. 3. Skin. 399.

Williams v. *Evans.* 255.

UPON the Return of a Reſcous, the Court upon Motion for an Attachment will make it abſolute at firſt, as againſt thoſe mentioned in the Return.

Reſcous. Attachment at firſt, on Motion.

Jones Adminiſtrator cum Teſtamento annex' of Bromhall v. *Lord Strafford Adminiſtrator of Sir Johnſon.* 256.

MR. *Peer Williams* moved on the Behalf of the Defendant for Leave to plead to this Action, which was Debt upon a Bond (and appeared by the Declaration to be twenty-nine Years ſtanding) *Solvit ad*

Solvit ad diem and Plene adminiſtravit pleaded, on an Affidavit of the Truth of the laſt Plea.

Ante Pl. 153. *ad diem* and *Plene administravit*; but the Court refused to grant the Motion, unless the Defendant would make an Affidavit that he had fully administred, and this, they said, had been the Practice of both the * *King's Bench* and *Common Pleas*. The like Rule was made the same Day between and *Lord Bristol* (in an *Indeb' assumpsit*) who moved to plead *Non assumpsit* and *Plene administravit*.

257. *Simmons* v. *Mullins & al'*. Nov. 17.

Injunction. Liberty given to Defendant to proceed at Law notwithstanding.

SIMMONS preferred his Bill to be relieved against an Award (which was made a Rule of the Court of King's Bench pursuant to the Stat. 9° & 10° *W.* 3. and whereupon an Attachment was granted against him for not performing it) suggesting Corruption in the Arbitrators; and the Plaintiff obtained an Injunction, the Exceptions to the Answer being allowed.

The Defendants now moved for Liberty to proceed to examine the Plaintiff upon Interrogatories in the King's Bench, notwithstanding the Injunction, as is often done where the Defendant applies for Leave to affirm his Judgment, or to proceed to Trial only: And *per three Barons* it was granted, because the Plaintiff was the Occasion of the Delay, he comes here where he need not; for he might have had the same Remedy in the Court where the Rule was made, as here, and therefore it would be against Conscience to tie the Defendants up; but the Defendants were not to proceed to have a Report on the Examination; *(dubitante Price.)*

* But the Practice in the King's Bench and Common Pleas seems at this Time to be altered; for there they now allow the pleading double Pleas without any Affidavit at all of the Truth of any of the Pleas. See the Books of modern Practice in *B. R.* and *C. B.*

Whitehead

Whitehead v. *Murat*. Nov. 27, 1724. 258.

MR. *Kettleby* on Behalf of the Plaintiff moved, that the Defendant might be obliged to give Security to abide the Event of the Suit before he went to *Oporto*, where he lived, and (as was ſuggeſted in the Bill) that the Defendant owed the Plaintiff four hundred Pounds; but *the Anſwer of the Defendant being come in*, the Court would make no Order.

Security, under what Circumſtances a Defendant, being a Foreigner, ſhall give it, to abide the Event of the Suit.

But upon the 8th of *December* following, in another Cauſe where the Defendant *had not anſwered*, but was in Contempt, the Court obliged the Defendant to give Security, until Anſwer and further Order.

Bailey at the Relation of the Attorney General v. *Cornes*. 259.

A BILL was preferred for a Penſion *only*, payable to the Preacher of *Bridgnorth*; and upon hearing of the Cauſe (which was afterwards ended by Compromiſe) it ſeemed to be admitted, that a Bill might be brought for a Penſion only.

Bill for a Preacher's Penſion. 1 Mod. 218. 1 Sid. 146. 1 Keb. 523, 562. Co. Litt. 146 a. 2 Inſt. 491. 2 Cro. 666.

Chapman v. *Barlow*. Dec 8, 1724. 260.

BILL by the Rector of *Radnage* in the County of *Buckingham* for the Tithe of Head-lands, of a Mill, and Cherries.

Tithes of Head-lands, Mill, and Cherries.

Lit. Rep. 13. Lane 16. 1 Ro. Abr. 649. N. 9. 2 Inſt. 261, 621.

The Defendant inſiſts the Head-lands were only large enough to turn the Plough upon, and as to this, the Bill was diſmiſſed.

March 15. Skinner 561. Ro. Rep. 405. Brownl. & Goldſ. 32. Carth. 215. 4 Mod. 45. 2 Cro. 523. Show. 81. Anſell *v.* Adman, Trin. 1695, reſolved that an ancient Mill pays no Tithes.

As to the Mill, no Tithes thereof having ever been paid, and being an ancient Mill, it was adjourned to conſider whether the Tithe of a Water Corn Mill was a predial or a perſonal Tithe.

As to the black Cherries, the Defendant inſiſted they grew wild in Hedges and waſte Places, and ſerved for fencing his Grounds: But the Defendant was decreed to pay the Tithe of theſe Cherries.

DE

Term. S. Hilarii,

1724 *.

Allen qui tam v. Jan. 23, 1724. 261.

IT was this Day moved on the Behalf of *Allen* (and others, Officers) who had ſeiſed a Quantity of *Opium*, that there might be a Re-appraiſement, the firſt Appraiſement being at fifteen Shillings *per* Pound, which was too much by five Shillings *per* Pound, as appeared by an Affidavit; and if the firſt Appraiſement ſtood, it would be a great Loſs to the Officers who ſeiſed, for they muſt pay the King's Moiety according to the appraiſed Value. *Per Curiam*, There being no Bidder in this Caſe, let there be a Re-appraiſement.

A Re-appraiſement ordered, where the firſt Value was ſet too high. Ante Pl. 81.

But *quære* in what Reſpect the Caſe would differ, in the Reaſon of the Thing, if there had been a Bidder.

* The firſt Day of this Term Baron *Gilbert* ſat in Chancery as one of the Commiſſioners of the Great Seal.

262. *Boughton* v. *Wright*. Jan. 26, 1724.

Cuſtomary Manner of Tithing alledged in general, the Defendant cannot be let in to prove a particular Manner.

BILL by the Rector of *Barrow* in the County of *Suffolk* for the Tithes of Corn, &c. The Defendant inſiſted that he ſet out the tenth Sheaf of Wheat and Rye, and the tenth Shock of Barley, according to the Cuſtom of the Pariſh: The Cuſtom he would have proved was, that the Defendant's Cart was brought into the Field, and he threw nine Sheaves into the Cart, and left the tenth for the Plaintiff.

The Queſtion was, whether this cuſtomary Method of tithing the Corn was good; for it was inſiſted upon, on Behalf of the Plaintiff, that nine Sheaves ought to be ſet out on the Ground, and the tenth left out, and marked with a green Bough for the Plaintiff; and that they ought not to bring the Cart into the Field, and throw the nine Sheaves into the Cart, before the whole ten are ſet out; for the Plaintiff ought to be able to view and judge whether he has a fair and juſt tenth Part.

And the Court would not let the Defendant in to prove the particular Cuſtom upon this general Allegation; ſo he was decreed to account, for they thought the whole *ten* ought firſt to be ſet out before the *nine* are thrown into the Cart.

263. *Mullins* v. *Simmonds & al'*. Jan. 26.

Anſwer amended before Iſſue joined. Poſt Pl. 319.

MR. *Ward* moved for Leave to amend an Anſwer in three Particulars, wherein the Defendant found herſelf miſtaken; and *per Curiam*, We often do it where Iſſue is not joined; and it was ordered accordingly.

Rollfe

Rollſe v. *Budder*. Feb. 1, 1724. 264.

A MAN and his Wife, after many Years Cohabitation parted, and lived ſeparate about the Year 1714, ſhe being then above ſixty Years of Age: The Wife being deſtitute of a Place to live in, was at laſt received by the Defendant at his Houſe at *Dulwich*. After the Separation a Son of them dies, and by his Will deviſes an hundred Pounds Bond to his Father, and an hundred Pounds *Eaſt-India* Bond, marked N° to his Mother (whom he made Executrix) and her Aſſigns for ever, *to her ſole and ſeparate Uſe*; the Bond deviſed to the Father (after the Son's Death was paid) the Mother being indebted to the Defendant for Lodgings, Neceſſaries, &c. agrees to let him have her *Eaſt-India* Bond, and that it ſhould be changed for another in the Defendant's own Name, which was accordingly done: The Mother dies, and now the Huſband exhibited his Bill to have an Account and Satisfaction for this hundred Pounds *Eaſt-India* Bond, ſuggeſting ſhe had eloped, and that he was poſſeſſed of the Bond.

Deviſe of a Bond to a Wife to her ſole and ſeparate Uſe, it is her ſole Property, as much as if it had been veſted in Truſtees.

1 Vern. 161, 245.

To which the Defendant anſwered as above, denying the Elopement, or any indirect Practice to draw away the Wife, but that ſhe was forced to leave him upon the Account of his Cruelty to her: But no Proofs were entered into, ſo it ſtood ſingly upon the Point, whether under theſe Circumſtances ſhe had not ſuch a ſeparate Property in the Bond, as that ſhe could diſpoſe of it: And *per Curiam* clearly, She is not only Executrix, but the Bond is *deviſed to her ſole and ſeparate Uſe*, which veſts the Intereſt in her in a Court of Equity, as much as if the Son had veſted it in Truſtees for her ſeparate Uſe; and there

are many Inſtances, where a Court of Equity has decreed an Huſband to ſtand as a Truſtee for the ſeparate Uſe of his Wife. Lady *Suffolk*'s Caſe, who married Serjeant *Maynard*; Sir *Joſeph Hern*'s Wife; *Seymour* v. *Dilkes*, *Nov.* 17, 1718.---And they ſaid it would have made no Alteration in this Caſe, if the Plaintiff had taken out Adminiſtration to his Wife; and ſo the Bill was diſmiſſed with Coſts.

1 Chan. Ca. Pridgeon *v.*

265. *Hodges* v. *Mary Beverley & Burton.* Feb. 11, 1724.

Feme Covert, a Note given to her for Money in her Huſband's Life-time, whether Aſſets of the Huſband.

A MAN as principal Creditor takes out Adminiſtration to *J. S.* and prefers a Bill againſt the Widow, and alſo againſt *B.* for a Diſcovery of the Aſſets of the Huſband.

B. in his Anſwer inſiſts, he has no other Aſſets than five hundred Pounds and one hundred Pounds, which he ſubmits to the Court, whether they are the Huſband's Aſſets or not.

As to the five hundred Pounds he ſays, that he being a Relation of the Wife, and obſerving her to live in great Straights and Difficulties, out of meer Kindneſs and Compaſſion propoſed to give her five hundred Pounds to her own ſeparate Uſe, for her better Support and Maintenance (but this, as appeared by the Defendant's Proofs, was without the Huſband's Privity) and in order to make ſuch Gift certain and ſure to her, he gave her a promiſory Note, dated *Feb.* 4, 1707, " I acknowledge to have " received of *Mary Beverley* five hundred Pounds to " be laid out upon the publick Funds, and for which " I promiſe to be accountable. *Barthol' Burton.*"

As

As to the one hundred Pounds he ſays, that in the Year 1709, the Wife delivered and depoſited in his Hands one hundred Pounds, to be kept and ſecured by the Defendant for her ſeparate Uſe.

He inſiſted alſo, that he frequently paid her Sums of Money in her Huſband's Life-time, and gave her Cloaths, which he prayed an Allowance for, out of the five hundred Pounds and one hundred Pounds; he ſubmitted to account, but whether to the Widow, or to the Adminiſtrator of the Huſband, referred to the Judgment of the Court.

This Cauſe came on to be heard on *Thurſday* the 11th of *Feb.* 1724, and *per totam Curiam* (Lord Chief Baron *Eyre*, *Price* and *Page* only in Court) It was decreed for the Plaintiff, that this Note of five hundred Pounds and the one hundred Pounds, ſhould be taken as Part of the Aſſets of the Huſband, but gave the Defendant *Burton* Allowance for what Sums he had advanced to the Wife in her Huſband's Life-time, in Diſcharge of ſo much of the principal Sums of five hundred and one hundred Pounds; and it not appearing that he had made any Advantage of this Money, they would not decree him to account for the Intereſt.

Downes v. *Mooreman, & è contra.* 266.

Feb. 11.

BILL by the Rector of *Bonchurch* in the *Iſle of Wight* in the County of *Southampton*, for the great and ſmall Tithe of a Farm, called *Luccomb Farm*, in the Defendant's Poſſeſſion.

Portion of Tithes are diſtinct from Tithes annexed to a Rectory.

The Defendant inſiſts that *Lovecomb* alias *Luccomb* Farm formerly belonged to the Abby of *Quarrer*, that the Abbot of *Quarrer* was ſeiſed in Fee of the Manor and Farm of, &c. and all the Tithes renewing thereon, *as of a Portion of Tithes in groſs*; that this Abby, by Surrender, and by the Stat. 27° *Hen.* 8. came to the Crown; that after King *Henry*'s Demiſe the ſame deſcended to King *Edward* the Sixth, who in the ſeventh Year of his Reign, by his Letters Patent granted *Manerium de Lovecomb ac Grangiam, &c. ac omnes & omnimodas Decimas, &c. in dicto Manerio de Lovecomb, &c. Parcel' Reventionum dictæ Abbatiæ de Quarrer dudum exiſten'*, to *Cotton* and others, and ſo derives the Title down to *Knight*, to whom the Defendant was Leſſee for twenty-one Years. And in his Anſwer he ſet forth the Clauſe in the Stat. 27° *Hen.* 8. That all Perſons, &c. who ſhould have, by any Letters Patents, any Lands, &c. Tithes, &c. belonging to any Monaſtery, &c. diſſolved by that Statute, ſhould hold the ſame, in like Form, Manner, and Condition, as the Abbots, &c. held the ſame, and might have held the ſame, if the ſaid Abbies had not been ſuppreſſed. This Cauſe was heard *Feb.* 11, 1724, and the Defendant carried his Proof down from the Year 1289, in a regular Method, to the Hands of the Defendant's Leſſor, *the Knights*. But *nota*, all the written Evidence produced mentioned the Tithe only "*omnes vel omnimodas Decimas, &c.*" but in none of the Inſtruments was mention made of *a Portion* of Tithes, upon which the Plaintiff founded his Objection, that no Title appeared in the Defendant; *Portio Decimarum* being a Thing diſtinct from Tithes in the general Acceptation. *

Lib. 4, 35.

* *Nota*, There were never any Tithes in Kind paid.

But the Proof being ſo clear, *per totam Curiam*, the Plaintiff's Bill was diſmiſſed, and the Party had a Decree on his Croſs Bill to enjoy his Tithes purſuant to his Grants, &c.

Copy of an Agreement between the Abbot of Quarrer and Monks of Lyra read in Evidence. Wynch 70.

Nota, A Copy of an Agreement between the Abbot of *Quarrer* and the Monks of *Lyra* was produced in Evidence; to which it was objected for the Plaintiff, that by the Rules of Evidence it could not be read, being neither a Record nor a publick Thing: But the Defendant produced a Copy of the Statute of *Oxon*, that no Book, &c. ſhould go out of the *Bodleian* Library; and the Court gave leave to read this Copy of Agreement in Evidence, though they admitted it not to be within the general Rules of Evidence, but upon the very particular Circumſtances of this Caſe.

Rickſon qui tam v. *Sandforth*. Feb. 17. 267.

Evidence of Condemnation by Parol, where the Defendant was not the firſt Purchaſor after it.

INFORMATION of Seiſure of a Parcel of Wines; the Defendant gave in Evidence that he bought them of *Boys*, and *Boys* bought them at the Cuſtom-houſe in *Portſmouth*, being condemned Wines.

The Attorney General objected at the Trial, that the Condemnation ſhould have been pleaded, or at leaſt they ſhould have produced the Condemnation: But *per* Lord Chief Baron *Eyre*, the Defendant now is a third Perſon, and bought the Wines of *Boys*, and it would be hard to put him to ſhew, much more ſo to plead the Condemnation, whatever might have been done in caſe *Boys* (had been the Defendant) who was the firſt Purchaſor after the Condemnation; and therefore he thought it ought to be left to the Jury, and ſo it accordingly was, and they gave a Verdict for the Defendant. (But the Point of pleading was reſerved for the Judgment of the Court. *Vide* the Exchequer Rules.)

Jones

268. *Jones* v. *Barrett*. Feb. 22, 1724.

Bill againſt a Sequeſtrator during the Vacancy of a Church, whether the Biſhop ought not to be a Party.

BILL by the Vicar of *Weſt Dean* in the County of *Suſſex* againſt the Defendant, who was Sequeſtrator, for an Account of the Profits received during the Vacation: It was objected for the Defendant, that the Biſhop ought to have been made a Party, ſince the Sequeſtrator is accountable to him for what he receives by the Stat. 28° *Hen.* 8. The Court ſeemed to think the Biſhop ſhould have been a Party; but by Conſent this Cauſe was referred to the Biſhop of the Dioceſe. *Nota*, It was ſaid a Sequeſtrator could not bring a Bill alone for Tithes *.

269. *Bibye* v. *Huxley*. Eodem Die.

Whether Beech be eſteemed Timber in Com' Bedford.

IN a Bill for Tithes of Wood by the Rector of *Whipmeed* in the County of *Bedford*; the Queſtion was, whether Beech was eſteemed Timber in this Country, which went to an Iſſue to try. *Vide* the Caſes cited, *Plow. Com.* 470. 2 *Inſ. Com. ſur le Stat.* 45° *Ed.* 3. *Stat.* 35° *Hen.* 8. *Cro. Jac.* 100. *Moor* 908. 2 *Cro.* 199. 1 *Ro. Abr.* 640. *p.*5. 1 *Inſ.* 53.

270. *The Attorney General at the Relation of Waters* v. *Vincent*. Feb. 25, 1724.

Demurrer allowed to a Bill to diſcover Waſte.

ENGLISH Information to diſcover Copyhold Lands, and alſo what Timber had been cut down, and what Waſte committed, &c.

* *Trin.* 1692. *Berwick* v. *Swanton*, ſo it was reſolved, becauſe he is a Bailif, and accountable to the Biſhop, and has no Intereſt.

The

The Defendant demurs, becauſe there is a Forfeiture of the Place waſted, and treble Damages, and yet the Attorney General has not waived Forfeitures; *per Curiam* the Demurrer was allowed, and this differs from the Caſe of a Tithe Bill, which uſed indeed formerly to be with a Waiver of Penalties, but has of late been diſcontinued, becauſe the Bill prays only the ſingle Value of the Tithes.

DE
Term. Paſchæ,
1725.

271. *Greaves* v. *D'Acaſtro.* April 17, 1725.

Outlawry, and Capias utlagatum, the Landlord relieved as to one Year's Rent on the Stat. 8 Ann.

D'ACASTRO, who was Tenant to *Webſter*, was outlawed at the Suit of the Plaintiff *Greaves*, and his Goods and Money were ſeiſed by Proceſs on the Outlawry, but ſtill remained in the Sheriff's Hands.

It was now moved upon the Stat. 8° *Annæ*, *cap.* 14. on Behalf of the Landlord *Webſter*, that he might be ſatisfied one Year's Rent in Arrear out of the Money in the Sheriff's Hands.

And the Court thought it ought to be granted, becauſe a *Capias utlagatum* at the Suit of *the Party*, is to be conſidered only as a private Execution, and is only auxiliary to the Party; and ordered the Sheriff to ſhew Cauſe.

On the firſt of *June* 1725, this Order was made abſolute, Baron *Price* only then in Court; but on the 9th of *June* 1725, it was ſtirred again before Lord

Lord Chief Baron *Gilbert*, *Price* and *Page*, when the Order was made abſolute *per totam Curiam*. But *vide anteà* Pl. 3.

Wilſon & al' v. *Philips*. April 22, 1725. 272.

A Freeman of *London* makes a Will of his whole Eſtate, and now the Plaintiffs, who were his Children, come to have the Legacies deviſed to them by the Will, and alſo their Shares of the cuſtomary Part; and a Debate ariſing whether the Plaintiffs ought not to make their Election either to have one or the other, Baron *Gilbert* informed the Court that this Point had come before the Lords Commiſſioners in the Court of Chancery the Day before, and that Commiſſioner *Jekyl* laid this down as a Rule obſerved in Equity, that if a Freeman of *London* deviſes more than his teſtamentary Part, his Children who claim Legacies by virtue of ſuch Will, ſhall be intitled to both the Legacies and the cuſtomary Share; but where he takes upon him to deviſe his whole Eſtate, there they ſhall make their Election to take either one or the other *.

A Freeman of London deviſes no more than his Teſtamentary Part, his Children ſhall have both their Legacies and Cuſtomary Shares. Prec' in Canc' 351. Kitſon *v.* Kitſon 508.

Lord Digby v. *Meech, Seymour, & Templeman*. April 26. 273.

BILL brought to eſtabliſh the Plaintiff's Right to the Manor, *&c.* of *Sherborn Caſtleton* in the County of *Dorſet*, and Liberties and Hundred of *Sherborn*, to Green Wax Fees, Fines, Amerciaments, Poſt-Fines, and Fines ſet at the Aſſiſes upon the Inhabitants within the Liberty, and alſo Poundage

Title not well ſet forth in the Bill, it not appearing *how* the Premiſes veſted in the Plaintiff.

* 2. *Webb* v. *Webb*. 2 *Vern*. 116.

Fees on Executions, and *Retorna Brevium*, &c. by virtue of a Grant 14° *Jac.* 1. The Bill was brought againſt three ſucceeding Sheriffs of the County, and *Templeman*, who had been the Under Sheriff for three
Skinner 43. or four Years, and as to him to have an Account of what Poundage Fees, &c. he had received within the Liberty: The Title ſet forth by the Plaintiff was, that King *James* the Firſt granted to Sir *John Digby*, (after Earl of *Briſtol*) from him they deſcended to *George*, from him to *John* Earl of *Briſtol*, *and on his Death veſted in the now Plaintiff.*

It was objected at the Hearing, that here was not a ſufficient Title ſet forth, it not appearing *how* the Premiſes veſted in the Plaintiff, whether by Deſcent, Settlement, or how.

And *per totam Curiam*, Lord Chief Baron *Eyre*, *Price* and *Page*, The Bill ought to be diſmiſſed for that Reaſon, the Bill being to eſtabliſh a Right, as well as for an Account.---And upon this the Cauſe went off, but the Plaintiff had Liberty to amend his Bill.

274. ## *Mullins* v. *Symmons.*

Anſwer of two Defendants read againſt a third.

BILL to ſet aſide an Award, as being unduly obtained: Now upon Motion for an Injunction upon the Merits, the Anſwer of the Arbitrators (Defendants) was admitted, by Lord Chief Baron *Eyre*
1 Vern. 159. and Baron *Price*, to be read againſt the other Defendant, who was Party to the Award, and for whoſe Benefit it was. *Nota*, All the Defendants joined in their firſt and ſecond Anſwers to the original Bill, but the Arbitrators ſevered in their Anſwers to the amended Bill. Baron *Page totis viribus contrà*, and thought

thought it a dangerous Precedent; for a Man might add a ſham Defendant, and by his Anſwer, at any time, obtain an Injunction, and it was never done before, and ſo admitted.

May 27, 1725, Lord Chief Baron *Eyre* appointed Lord Chief Juſtice of the Common Pleas.

DE

Term. S. Trinitatis,

1725.

Junii 1°, 1725, Sir *Jeffery Gilbert* Knight, one of the Barons, appointed Lord Chief Baron, and *Bernard Hale* Eſquire appointed a Baron of the Exchequer.

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275. *Egerton Cl'* v. *Still.* June 7, 1725.

Eaſter Offerings due of common Right. AntePl. 245.

IT was decreed *per Curiam* in this Cauſe, firſt, That Plaintiff ſhould have *Eaſter* Offerings, as due of common Right, although he demanded them as due by Cuſtom.

Odd Number above ten Lambs, &c. not to be carried over to the next Year.

Secondly, That where there are above ten Calves, Lambs, Pigs, &c. the Tithe of the odd Number above ten ſhall be paid according to the Value, and not be carried over to the next Year.

276. *Sir Edward Blacket* v. *Doctor Finney.* June 10, 1725.

Modus payable *on or about* the 25th of April is uncertain and bad as to the Time.

BILL to eſtabliſh a Modus of four Pence *per* Score of Sheep in lieu of the Tithe of Lamb and Wool payable, or which ought to be paid *on or about* the 25th Day of *April* yearly. It

It was objected at the Hearing to the Uncertainty of the Time of Payment; and the Court allowed the Objection, but gave the Plaintiff Liberty to amend, upon paying the Costs of the Day.

At the Sittings at Westminster, Junii 14°.

The Attorney General v. *Sir John Elwell.* 277.

A *Scire facias* was brought in the Name of the Attorney General against Sir *John Elwell*, setting forth that there had an Extent issued against Sir *Matthew Kirwood*, and an Inquisition was taken thereon, which found Sir *John Elwell* indebted to Sir *Matthew Kirwood* by two promisory Notes, one for one hundred and fifty Pounds, and the other for one hundred Pounds, and prays that the Defendant should shew Cause why the Crown should not have Execution for this Debt.

In an Action upon a promisory Note interlocutory Judgment does not merge the Note.

The Defendant pleads, that he was not indebted by those Notes, or either of them *die Inquisitionis*: The Attorney General proved (only) Sir *John*'s Hand to the Notes: The Defendant gave in Evidence that *Kirwood*, before he failed, brought an Action on these Notes, and obtained Judgment by *Nil dicit*, and that a Writ of Inquiry of Damages issued, and was executed, and thereupon a final Judgment was had; and therefore that he could not be indebted on those Notes, because they were merged in the Judgment, according to *Higgins*'s Case.

But it appeared, that although the interlocutory Judgment was entered before the Inquisition was taken upon the Extent, yet the Writ of Inquiry and

final Judgment were not executed and obtained, until a long while afterwards; for the Inquiſition on the Extent was upon the 28th of *November* 5° *Geo.* the interlocutory Judgment was before, but the Writ of Inquiry was not executed until the 7th of *February* 5° *Geo.*

And thereupon the Lord Chief Baron *Gilbert*, who tried the Cauſe, immediately directed the Jury to find, as they did, for the Crown.

Debts are not bound till the Teſte of the Inquiſition.

Nota, Firſt, By this Plea it appears, that Debts are not bound till the *Teſte* of the Inquiſition; 2dly, That Notes of Hand are not merged by an interlocutory Judgment, the Debt not being aſcertained before the Writ of Inquiry returned, and final Judgment entered thereon.

278. *Rogers* v. *Linton.* Junii 16, 1725.

Who muſt be Parties to the Bill. Cauſe permitted to be heard without a neceſſary Party.

BILL for an Account of *Ch. Rogers*'s perſonal Eſtate, who was a Freeman of *London*, and having had three Wives, and Iſſue by the firſt Wife two Children; by the ſecond, one; and by the third, four; deviſed one Third to his Wife, and one Third to all his Children, and the other Third to the Children by the laſt Wife.

Theſe laſt were Plaintiffs, and demanded the Share deviſed to all the Children, alledging that the Children by the two former Wives were provided for, in the Teſtator's Life-time.

Ch. the Son by the ſecond Wife, was named a Party, but never anſwered, nor was ſerved with Proceſs.

The

The Plaintiffs moved the Court that they might hear the Cauſe without *Charles*, he being beyond Sea, and if it appeared he had any Right, he might come before the Deputy on the Account; and though no Precedent was produced of ſuch an Allowance *before*, the Court, *viz.* Lord Chief Baron *Gilbert* and *Price*, contrà *Page*, gave Liberty to hear the Cauſe without *Charles*.

DE
Term. S. Michaelis,
1725.

279. ## *Rex* v. *Pixley*. Nov. 16, 1725.

Stat[s] of Bankrupt do not bind the Crown.

IN 1715, *Ball* was made one of the Clerks to Mr. *Pauncefort* the Treaſurer of the Exciſe, and he and *Pixley* entered into a Bond of two thouſand Pounds Penalty to the *Crown*, with Condition that *Ball* ſhould duly account with *Pauncefort* for what Monies, &c.

Pixley in *May* 1721, became a Bankrupt, and ſurrendered himſelf, and complied in every Reſpect with the Stat. 5° *Geo.* and had a Certificate, which was confirmed, and he was actually diſcharged.

Laſt Vacation a *Capias* was taken out upon this Bond againſt him, and he was arreſted thereon, and in Cuſtody of the Sheriffs of *London*; and this Day I moved that *Pixley* might be diſcharged out of Cuſtody by virtue of the Stat. 5° *Geo.* and another Stat. 6° *Geo.* and alſo upon producing a Copy of the Certificate confirmed as the Statute directs. But *per Curiam*, The Statutes of Bankrupt do not bind the Crown, and therefore we cannot diſcharge him; and

it was ruled ſo, not only in caſe of an Extent, but even of an *Extent in Aid*; in which laſt Caſe the Court refuſed to relieve.

Nota, It was objected, that a *Scire facias* ſhould have iſſued firſt upon this Bond, being for Performance of Covenants; but it was ſaid to be every Day's Practice, that a *Capias* iſſues immediately where Oath is firſt made of the Debt, as was done in this Caſe.

Harman v. *Immins*. Nov. 20, 1725. 280.

EXCEPTIONS were allowed to two Anſwers to the original Bill, and then the Plaintiff amended his Bill (as he might do without Coſts;) the Defendant put in an Anſwer to the amended Bill, and the Plaintiff ſet down the Exceptions (with ſome little Additions) to that Anſwer, and they were allowed; and the Queſtion was, whether the Defendant ſhould pay nine Pounds Coſts, as upon a third inſufficient Anſwer, or only three Pounds, as upon a firſt inſufficient Anſwer to the amended Bill. And *per Curiam*, The Defendant was ordered to pay nine Pounds.

Coſts upon inſufficient Anſwers.

Spong qui tam v. *Faſting*. 281.

INFORMATION for importing Brandy in Caſks under ſixty Gallons; upon the Trial the Defendant produced the Maſter of the Veſſel, as a Witneſs, but it was objected by the Attorney General, that the Maſter was liable to a Penalty of one hundred Pounds for breaking Bulk, by the Stat. 14° *Car.* 2. and therefore concerned in the Queſtion; of which Opinion was the Chief Baron, but he reſerved this Point for the Opinion of the Court. And now *per totam Curiam*, The Maſter ought not to be admitted as a Witneſs, though no Information was filed againſt him;

Information for importing Brandy in unſizeable Caſks, the Maſter of a Veſſel cannot be a Witneſs.

him; and ſeemed to make no Difference where it was, or was not filed, though many Inſtances were
AntePl.218. mentioned on this Diſtinction before. Cited for the Defendant, *Williams qui tam* v. *Ward*, 1702, for importing in unſizeable Caſks; *Knapp* v. *Walſh*, 1704, on the Act of Navigation; *Leſley qui tam* v. *Grey*, 9° *Geo.* Tobacco; *Jenkins qui tam* v. *Larwood*, on the Act of Navigation.

282. *Talbot* v. *Whitfield*. Nov. 25, 1725.

Deviſe of Money to be laid out in Lands to be ſettled in Tail, the Tenant in Tail, who is of Age, deſires the Money (which has not been laid out) to be paid him; for if Land be purchaſed in Tail, he can ſuffer a Recovery, and ſell it.

A MAN by his Will deviſes a Sum of Money in Truſt, that the ſame ſhould be laid out in a Purchaſe of Lands by his Truſtee; which Lands ſhould be to the Uſe of the Mother for Life, Remainder to her firſt and other Sons in Tail, Remainder to *A.* in Fee: The Mother died; the Son, who by the Will was to be Tenant in Tail, preferred his Bill, ſetting forth this Caſe, and that the Truſtee had not laid out the Money, and prayed that it might be paid to him, being more advantageous to him in his Way of Buſineſs than Lands, and likewiſe to ſave Expence; for if it was laid out in Land, the Plaintiff now being of Age, could ſuffer a Recovery, and thereby bar the Remainder Man, and ſell the Land: The Defendant Truſtee in his Anſwer agreed to this Prayer. But *nota*, the Remainder Man was not made a Party, and therefore it was objected, that the Plaintiff might die before he ſuffered a Recovery; and it would be wrong in a Court of Equity to deprive the Remainder Man of this Chance without being heard. Lord Chief Baron *Gilbert* and *Page* thought they might decree in this Caſe, as there was no Infant concerned; but *Price* and *Hale totis viribus* of another Opinion; ſo the Court being divided, the Bill was diſmiſſed by Conſent.

D E

DE
Term. S. Hilarii,
1725.

Sir Cleave More v. *Ellis Freeman & al'.* 283.
Jan. 26, 1725-6.

Articles of Agreement are binding In Equity between Huſband and Wife, without the Intervention of Truſtees. 1 Vern. 415.

SIR *Cleave More* having married the Daughter of Mr. *Edmonds* of *Hertfordſhire*, after ſome Years Cohabitation Lady *More* eloped, and lived in a ſcandalous Manner with ſeveral Perſons, as appeared by Proof: This Marriage proving ſo unfortunate, Mr. *Edmonds*, by his Will in 1696, deviſed (among other Things) ſix thouſand Pounds to three Truſtees, in Truſt that the ſaid Truſtees, &c. ſhould pay both the Principal and Intereſt thereof to ſuch Perſon or Perſons as Lady *More* ſhould, by Deed in Writing ſubſcribed by two or more Witneſſes, appoint; and Sir *Cleave*, or any after-taken Huſband, not to intermeddle therewith, nor the ſame to be ſubject to the Debts of Sir *Cleave*, or ſuch after-taken Huſband.

After this, Lady *More* continued to live in the ſcandalous Manner ſhe had done, and Sir *Cleave*, on the 10th Day of *Auguſt* 1716, met with her in a Coach, and took Poſſeſſion of her; and on the next

Day there was an Agreement executed by Sir *Cleave* and his Lady, the Subſtance of which (Articles) was, that in Conſideration Sir *Cleave* would permit her to live ſeparate from him, ſhe would ſettle upon him for his Life two hundred Pounds *per Annum*, and alſo pay him the Sum of one thouſand Pounds out of her ſeparate Eſtate, the firſt quarterly Payment to commence three Months after; and the Articles being reduced into Writing were ſubſcribed by Lady *More* and Sir *Cleave*, and witneſſed by four Perſons; they met afterwards at the *Middle Temple* Hall on the the 10th of *November* following, the Day of the firſt Payment, and on the 24th of *November* the ſaid Agreement was ratified by Indorſement on the Articles, and ſubſcribed and witneſſed as before.

1 Salk. Spendelow.

The Morning of the Day of meeting, at the *Temple* Hall, Lady *More* made her Will, and deviſed ſeveral ſpecific Legacies to Mr. *Ellis*, who ſhe alſo made Executor and reſiduary Legatee.

There having been a Bill before by Lady *More* againſt Sir *Cleave*, to ſet aſide the Articles, or that he ſhould make his Election to take three hundred Pounds *per Annum*, or according to the Articles, and a Croſs Bill by Sir *Cleave* againſt Lady *More* and her Truſtees, to carry thoſe Articles into Execution; (which Cauſes were heard, and the Court then equally divided, and ſo went to the Chancellor of the Exchequer, who referred them to the Judges again) but before they were heard again Lady *More* died.

And now upon Revival of all the Proceedings in both Cauſes againſt Mr. *Ellis*, as Executor of Lady *More*, *per Opinionem totius Curiæ*, theſe Articles were deemed a good Execution of the Power under the Will of Mr. *Edmonds*, and that Sir *Cleave* could not

be excluded by the negative Words; * and, 2dly, That though the Truſtees were not Parties to the Articles, yet in Equity it was good to bind her, it not being a direct transferring of an Intereſt, but an Appointment purſuant to a Power: But a Point ariſing, whether theſe Articles were obtained by Dureſs, *that* was ſent to an Iſſue to try.

Nota, Mr. *Ellis* was a Witneſs to the Force in the former Cauſes; but it was now objected, that he being become the Party intereſted by the Act of Lady *More* herſelf, ſwore now to ſupport a preſent Intereſt; and beſides, his Examination in the former Cauſes was after the 10th of *November* 1716, the Day he made the Will, whereby he was made Executor and reſiduary Legatee; and for theſe Reaſons, though he might have been a good Witneſs in the former Cauſes, his Depoſition was now rejected. 1 Salk. Tilly's Caſe. 2 Vern. 700. con.

Nota, After a Trial of the Iſſue, which laſted nine Hours, there was a Verdict, that the Articles were fairly obtained without Dureſs.

Upon the Equity reſerved there was a Decree for Sir *Cleave*, from which Mr. *Ellis* appealed to the Houſe of Lords; but the Decree was affirmed with forty Pounds Coſts.

Reeves v. *Butler*. Jan. 29, 1725. 284.

THIS was an Action of Treſpaſs *Quare Domum & Horreum fregit*; *& Bona & Catalla, &c. cepit &* detinuit *& deprivavit Quer' de uſu Horrei &* Treſpaſs, whether more Coſts than Damages.

* *Mitchell Vid'* v. *Mitchell*, 15th and 18th of *July* 1712, *in Scacc'*, where there was a Gift by the Huſband to the Wife without the Intervention of Truſtees, it was held good in Equity.

Domus

Domus & Bonorum, &c. Verdict for the Plaintiff and two Pence Damages.

This Caſe was argued in *Michaelmas* Term, 1724, by Mr. *Owen* for the Plaintiff, and Mr. *P. Ward* for the Defendant, and the ſingle Queſtion was, whether the Plaintiff ſhould have more Coſts than Damages.

Lord Chief Baron *Eyre* thought that the Plaintiff was intitled to full Coſts; *Price*, *Page* and *Gilbert* Barons doubted; ſo it was adjourned to be further conſidered.

And after Time taken, *Gilbert* being now Lord Chief Baron, gave the Opinion of the whole Court this Day, and went over all the Statutes relating to Coſts, as the Statutes of *Glouceſter*, *Eliz.* 21 *Jac.* 1. 16 *Car.* 2. and upon comparing and conſidering them, founded his Opinion on this Diſtinction, which the Court agreed to, *viz.* Where an Action of Treſpaſs is brought *Quare clauſum fregit*, and there is any thing laid by way of Aggravation of Damages *, there can be no more Coſts than Damages, though the Freehold might come in Queſtion, unleſs the Judge certifies: But if there are ſeparate and diſtinct Counts, and intire Damages are given, there the Plaintiff ſhall have his full Coſts, even without a Certificate. If a Plaintiff in Treſpaſs counts of a *Clauſum fregit*, and in another Count *De bonis aſportatis*, if the Defendant is found Not guilty as to the laſt Count, and Guilty as to the *Clauſum fregit*, then the Plaintiff ſhall have no more Coſts than Damages.

* As in the preſent Caſe.

The

The Caſe of Fiſher & al' Leſſees of the Dean and Chapter of Chriſt Church in Oxford. Feb. 3, 1725. 285.

THIS Caſe ſtood for the Judgment of the Court this Day, when it was expected that the long-controverted Queſtion, whether a conſtant Non-payment of Tithes is Evidence of an Exemption againſt a Lay Impropriator, would have been decided: But the Court gave Judgment on the Words of the Patents mentioned in the Cauſe, though they determined that the Dean and Chapter was a Spiritual and not a Lay Body.

Whether a conſtant Non-payment of Tithes is Evidence of an Exemption againſt a Lay Impropriator. Skin. 494. 2 Salk. 672. Q. as to a College. 4 Mod. 112.

The Attorney General v. *Randall.* Feb. 4, 1725. 286.

UPON an Information for running of Goods a *Capias* iſſued as the firſt Proceſs, purſuant to the Stat. 8° *Geo. cap.* 18. by virtue of which the Defendant was taken and put in Priſon. It was now moved to ſuperſede this Proceſs, becauſe although the Information was filed, yet it was not entered in the Book * (ſo that the Party might have Notice) purſuant to the Rules in 1687 and 1700; and it was alſo ſaid, that the Information was only the Commencement, &c. *Cro. Eliz.* 261. *Rex* v. *Harris*, and it would be inconvenient to the Subject not to have Notice by the Book. To which it was anſwered and reſolved *per totam Curiam*, That to prevent the Inconvenience, &c. the *Baron* never ſigns a

Information. Whether it ought not to be entered in the Book in the Office, before a Capias iſſue upon it.

* Q. Order, *June* 26, 1700, That no Proceſs go out upon Information until it be entered in the Information Book, and be filed.

Warrant for a *Capias* without an Affidavit; and as to the Stat. 18° *Eliz.* there is a Proviſo in that Act, ſo that this Caſe is not within that Statute: And *per* Lord Chief Baron *Gilbert* and Baron *Page* (only in Court) the Motion was *denied.*

287. *Mills* v. *Etheridge.* Feb. 3, 1725.

Plea of Non-reſidence to a Bill for Tithes by Leſſee of a Rectory allowed.

BILL by the Leſſee of *Matthew Hawes* Cl' (ſetting forth his Leaſe dated *Feb.* 4, 1723.) for the Tithes, &c. for 1724 and 1725, in the Pariſh of *Simpſon* in the County of *Buckingham.*

The Defendant, as to the Diſcovery of the Quantity of Lands he held, and what Tithes he had in thoſe Years, and alſo as to the Account, pleads, that it appears by the Plaintiff's Bill that his Leaſe was dated *Feb.* 4, 1723; then pleads the Stat. 13° *Eliz. cap.* 20. touching Leaſes of Benefices, and other Eccleſiaſtical Livings with Cure, and avers, that *Matthew Hawes* Cl' the Leſſor, was abſent from his Benefice eighty Days *and more* in one Year ſince the Leaſe, and before the Filing of the Bill, *viz.* in 1724, that the Church of *Simpſon* is not impropriate, and that it is a Benefice or Eccleſiaſtical Promotion with Cure, and therefore by ſuch Non-reſidence, and by virtue of the ſaid Act, the Leaſe was abſolutely void.

Noy 116. Cro. El. 100.

Pro Qu. Mo. 448. 1 Bulſt. 111. N. The Ch. Baron denied this to be Law. Lib. 6. Butler & Goodall. Pro Def. Yelv. 106.

Now upon arguing this Plea (which was drawn by myſelf) Baron *Price* was for over-ruling the Plea, becauſe it covered the Diſcovery, which, according to the Uſage of the Court, a Plaintiff was intitled to, whatever Exemption or Diſcharge a Defendant might have. (And at the time of drawing the Plea I was of that Opinion, and ſo informed my Client;) but the Lord Chief Baron, *Page* and *Hale* were of Opi-

nion that the Plea was good, extending even to Diſcovery, becauſe it amounted to an abſolute Incapacity in the Plaintiff, which differed from the Caſes where the Plaintiff was intitled of common Right; and there is no Neceſſity to aver that the Abſence was voluntary, (for if it was otherwiſe, it lay upon the Plaintiff to ſhew it) or to aver that the Abſence was eighty Days together; ſo the Plea was allowed *.

Geale Cl' v. *Wyntour*. Feb. 11, 1725. 288.

BILL for Tithes as Vicar of *Biſhop's Lyddiat* in the County of *Somerſet*, ſets forth a former Bill in this Court in 1717, and a Decree in 1718, for theſe Tithes, after Iſſue (to try Modus's, and Verdict for the Plaintiff.)

Plea of a Decree in Chancery to eſtabliſh Modus's to a Bill for Tithes allowed.

The Defendant pleads, that in *Trinity* Term 1721, he preferred his Bill in the Court of Chancery to eſtabliſh the Modus's, *&c.* that Iſſues were directed and found for the Modus's, and decreed thereupon to be eſtabliſhed, and pleads the ſame Verdict and Decree in Bar of the Plaintiff's now Demand; and the Plea was allowed *per totam Curiam.*

* *Nota*, The ſame Plea came on *inter Quilter & Lowndes*, and *Quilter & Maſſenden*, *May* 20, 1726, and then was allowed *per totam Curiam*, Baron *Price* being now of the ſame Opinion *in omnibus*. And in the Caſe of *Bokenham* v. *Bentfield*, *Nov.* 15, 1726; but *nota*, no Counſel appeared for the Plaintiff, and ſo upon the Authority of theſe Caſes the Plea was allowed.

December 16, 1726, Plea to a Bill for Tithes from *Michaelmas* 1723, to *Michaelmas* 1724, that the Rector was abſent eighty Days, *viz.* in 1724, which might be after the time wherein the Tithes were demanded in the Bill; and for this Reaſon it was over-ruled.

Quære, if this a good Plea, if Rector and Leſſee join, for by Non-reſidence *before Sentence* he only forfeits his Leaſe and Rent, not his Tithes. *Atkinſon and Prodgers* v. *Peaſley*.

At

At the Sittings after Hil. Term, 1725.

289. *Anonymous.*

Fraudulent Importation of Cocoa Nuts from Holland.

UPON the Trial of an Information for importing Cocoa Nuts from *Holland*, not being the Place of their Growth, &c. contrary to the Act of Navigation, it appeared that the Goods were only Huſks and Shells, and ſome little of the Nut mixed with them, which they did in *Holland*, ſeparating the Huſks from the Nut by putting them over the Fire; and this the Defendant pretended was a manufacturing of the Cocoa Nuts, and ſo excepted out of the Act, and that this was uſed only in Water, which the *French* Refugees drank. But *per* Lord Chief Baron *Gilbert*, This is a plain Fraud, and no manufacturing.

DE

Term. Paſchæ,

1726.

Marſton v. *Cleypole & al'.* May 11, 1726. 290.

BILL by a Lay Impropriator for Tithes for about twenty-four Years.

Limitations, the Stat. not pleadable to a Bill for Tithes.

The Defendant, as to ſuch Part of the Bill as prays Diſcovery and Relief for any time before within ſix Years next before the filing the Bill or ſerving the *Subpœna*, pleads the Statute of Limitations, and that he did not promiſe to make any Satisfaction for any Tithes before the ſaid ſix Years.

This Plea was now argued, and over-ruled *per totam Curiam*; for the Defendant, as to the Tithes, is in the Nature of a *Receiver* or Bailiff for the Plaintiff, in which Caſe the Statute of Limitations does not operate.

Cited for the Plaintiff, *Cro. Car.* 513. 1 *Saund.* 38. 2 *Saund. Webber* v. *Tyrrell.*

Cited for the Defendant, *Cro. Car.* 115. *Hetley* 111.

291. *Hanſon* v. *Fielding.*

Exemption, as being Parcel of the Poſſeſſions of the Priors of St. John of Jeruſalem.

BILL by a Lay Impropriator for Tithes within the Pariſh and Boundaries of *Shilton* and *Barnacle* in the County of *Warwick.*

The Defendant, as to the Manor of *Barnacle*, by his Anſwer inſiſts, that the Manor was Part of the Poſſeſſions of the Priors of Saint *John of Jeruſalem*, whoſe Poſſeſſions were exempt from Payment of Tithes *quamdiù propriis Manibus*, *&c.* then ſets forth the Stat. 31° *Hen.* 8. with the Clauſe of Diſcharge, and alſo the Stat. 32° *Hen.* 8. whereby theſe Priories, with *all Privileges*, &c. were veſted in the Crown; and that no Tithes in Kind had been paid for this Manor.

Upon the Debate of this Exemption were cited for the Plaintiff, *Lib.* 2. 47. [a]. *Cro. Jac.* 57. *Moore* 913. *Degge* 346. —— For the Defendant, *Dyer* 277. [b]. *Bridgm.* 32. *Latch* 89. Sir *W. Jones* 182. *Ray.* 225. *Daniel Vicar of Bengo in Com' Hertf'* v. *Sir J. Gower*, *Trin'* 1687.

The Court ſeemed all of Opinion, that it was a good Diſcharge; but the Plaintiff, after, failed in making out his Title, and the Bill, upon *that*, was diſmiſſed.

The

The Attorney General at the Relation of Saint John's College in Cambridge v. *The Town of Shrewsbury.* 292.

Touching the Naming a Maſter to the School at Shrewſbury of Royal Foundation.

KING *Edward* the Sixth by Letters Patent erects a Free-ſchool in *Shrewſbury*, and gives the Bailiffs and Burgeſſes Power *nominandi & appunctuandi* a School-maſter, and of making Laws *concernen' & tangen' Ordinem, Gubernationem & Directionem Pædagogi*, with the Advice of the Biſhop of *Litchfield* and *Coventry*, and alſo for the Preſervation of the Revenue, &c.

Queen *Elizabeth*, *Anno* 13° *Regni*, increaſes the Revenue of the School, in Conſideration whereof the Bailiffs and Burgeſſes agree to ſuch Ordinances as Mr. *Aſhton* (then the Head Maſter) ſhould, with the Advice of the Biſhop, make; who did accordingly make *ſeveral* relating to the Diſpoſition of the Revenues and Qualification of the Maſter.

Anno 20° *Eliz.* the Bailiffs and Burgeſſes made By-laws, the ſeventh and eighth of which were, "That "upon every Vacancy of a Maſter the College ſhould "elect and nominate a proper Perſon (qualified as "by *Aſhton*'s Ordinance) to the *Bailiffs*, who ſhould "nominate ſuch Perſon:" But by the eighth By-law had Power to approve or diſapprove. And by Indenture 20° *Eliz.* between the Bailiffs and Burgeſſes and the Biſhop of *Litchfield* and the College, they covenant to perform the ſaid By-laws, and enter into Bond of one thouſand Pounds for that Purpoſe; and this Method of Election had been obſerved for one hundred and fifty-two Years, without any Interruption 'till lately.

And now upon an Information by the Attorney General at the Relation of the College of Saint *John*, to compel the Town to nominate according to the By-laws and Uſage,

Caſes in Parl. Philips & Bury. 4 Mod. 106. S. C. Stat. 43 Eliz. c. 4. Duke's Cha. Uſes 157. Skin. 13, 454. Comberb. 168.

It was firſt objected by the Court, that by the Letters Patent of *Edward* the Sixth, He being the Founder, is conſequently Viſitor, and the Decree now prayed is interfering with the viſitatorial Power, and the Crown can viſit only under the Great Seal.

But upon the ſecond Hearing the Court thought there was no Weight in this, but that the Court might proceed to eſtabliſh this as a Charity.

2dly, It was objected that the Power of nominating by the Letters Patent of *Edward* the Sixth, was veſted in the Body as a Truſt or naked Authority, and therefore could not be delegated.

To which it was anſwered, that this was not a total Delegation of the Authority, but only a Regulation to prevent Confuſion, as in the Caſe of Corporations, *Lib.* 4. To which it was ſaid, that the ſame Objections might be made as to this; and the Uſage of two hundred and fifty-two Years did much corroborate this Caſe; and of that Opinion was the whole Court, and decreed for the Plaintiff.

DE
Term. S. Trinitatis,
1726.

Bridges v. *Mitchell.* June 18. 293.

THE Bill ſets forth, that the Plaintiff and Defendant many Years ago were Partners as Merchants, and that upon ſettling Accounts between them in 1701, there was due upon the Balance of that Account, from the Defendant to the Plaintiff, one hundred and ninety Pounds, and prays a Diſcovery, an Account and Satisfaction.

The Statute of Limitations pleaded by one Partner to a Bill brought by another for the Balance, and an Account and Satisfaction.

The Defendant pleads to ſo much of the Bill as ſeeks an Account and Satisfaction, that it appeared upon the Plaintiff's own ſhewing, that the pretended Balance was due above twenty-four Years before the Filing of the Bill, and that in all that time he never commenced any Suit for it; and alſo pleaded the Statute of Limitations.

And *per totam Curiam*, the Plea was allowed on the long Acquieſcence of the Party; and after ſuch a Length of time without Suit, it ſhall be preſumed 2 Vern. 276.

the Balance was ſatisfied: And the Court ſeemed to think this was not a Merchant's Account within the Statute of Limitations, theſe Perſons not dealing as Merchants with one another, but as one Merchant with others; but gave no poſitive Opinion on this Head, but allowed the Plea on the other.

DE
Term. S. Michaelis,
1726.

Friday, October 28, 1726, This Day Sir *Thomas Pengelly* Knight, took his Place of Lord Chief Baron of the Court of Exchequer, in the room of Lord Chief Baron *Gilbert*, who died about the 4th of this Month.

Howell v. *Lord Coningsby*. Oct. 28. 294.

Decree, whether it ſhall be only Niſi, where the Bill is taken pro confeſſo after Appearance.

A Defendant after Appearance ſtands out to a Sequeſtration for want of an Anſwer; upon Motion the Bill was taken *pro confeſſo*, and then ſet down in the Paper of Cauſes, to be heard; and Yeſterday upon the Hearing the Queſtion was, whether the Decree ſhould be abſolute, or only *Niſi*. Barons *Page* and *Hale* (then only in Court) doubted, and deferred giving Judgment on this Point, until the Lord Chief Baron came up; and this Day it was ſtirred again, when the new *Lord Chief Baron* and *Page* were of Opinion it ſhould be *Niſi* only, *(hæſitantèr)*: But Baron *Hale*, upon the Precedents produced, was *clear* that it ought to be abſolute. Which (I think) ſeems to be the better Opinion; for when a Bill is taken

pro confeſſo after *Appearance*, it is giving time to a Defendant for no Purpoſe; for when he comes, he can be admitted to ſay nothing. Baron *Page* made a Difference ariſing from the quick Proceſs againſt a Peer, which is not in the Caſe of a common Subject; but the Reaſon has but little Weight *(ut videtur)*.

295. ## *Watts* v. *Robinſon*. Oct. 29, 1726.

Outlawed Perſon is found poſſeſſed of a Term, but he dies before it is ſold by a Venditioni exponas; the Widow let in to plead this againſt the Purchaſor. AntePl. 163.

A. WAS outlawed, and by an Inquiſition taken thereon it was found, that he was poſſeſſed of a Term for Years *in jure Uxoris*; after his Deceaſe a *Venditioni exponas* iſſued, and the Term was ſold.

Now the Widow moved that ſhe might be at Liberty to plead to the Inquiſition, which was granted; although it was objected in Behalf of *H.* the Purchaſor, that he had purchaſed under the Sanction of the Court, had ſince brought an Ejectment, which was defended by her, that ſhe had brought a Writ of Error, and alſo a Bill in Chancery relating to this Matter: But *per Curiam*, Though ſhe has been wrong adviſed, we will not deprive her of the Liberty of pleading now.

November 3, 1726, Baron *Page* appointed a Judge of the King's Bench.

296. Juror. Whether one can be withdrawn by the Attorney General in an Information Qui tam.

NOTA, A Queſtion aroſe, whether the Attorney General upon an Information *Qui tam*, *&c.* could withdraw a Juror.

Upon an Information in the Attorney General's Name *only* it was admitted he could enter a *Non*

2 Keb. 506. 1 Vent. 28. pl. 81. 1 Inſt. 139. 2 Shore 487. 18 Eliz. c. 5. Stat. 6 Geo. c. 21. ſ. 41. Raym. 84. 2 Ro. Abr. 679. p. 10. Kelyng 25, 6.

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proſ upon that Information, which in effect amounted to withdrawing a Juror.

1 *Inſt.* 139. was mentioned for the Defendant; but to that the Attorney General ſaid, it related only to *Actions qui tam*, not to Informations; and in theſe Informations the Attorney General only joined Iſſue. Baron *Price*, Nothing but the Practice of the Court can juſtify that, which is only to ſave the King's Right *.

November 9, 1726, This Day Sir *Laurence Carter* and Sir *John Comyns* came up as third and fourth Barons of the Court; ſo that at this time the Court conſiſts of

Sir *Thomas Pengelly* Knt. Lord Chief Baron.
Sir *Bernard Hale* Knt.
Sir *Laurence Carter* Knt. } Barons.
Sir *John Comyns* Knt.

Rex v. *Clarke*. Nov. 11, 1726. 297.

Extent in Aid ſet aſide, the Crown's Debt being paid.

PAUNCEFORT, Caſhier of the Exciſe, imployed *Nicholas Clarke* as his Bill-man to receive Money ariſing by the Revenue of the Exciſe, and took a Bond from him to account and pay what Money he ſhould receive of the Revenue Money, and alſo on his own private Account.

In 1724, *Clarke* was called upon to account to the Commiſſioners of the Exciſe, and being in Arrear one thouſand eight hundred Pounds, he applied to

* *Quære* the Reſolution in *Gravenor qui tam* v. *Bene*, *May* 17, 1726. And *Farewell qui tam* v. *Norris*, when *Lechmere* was Attorney General. *Trin.* 11 *Jac.* 1. *rot.* 5. & 42. *Bede qui tam* v. *Brown & Drury*.

Pauncefort, to help him to the Money to anſwer the Demand; and *Pauncefort* did, by Mr. *Georges*, pay the whole Money to the Commiſſioners, and took a Bond from *Clarke* to him for that Money. Mr. *Pauncefort*, after, dies; and Mr. *Georges*, one of the Executors of Mr. *Pauncefort*, makes an Affidavit that *he (Clarke)* had not paid the Money due to his Majeſty, that the ſame was *unpaid*, and in Danger of being *loſt*, and thereupon obtains an Order for an immediate Extent againſt *Clarke*.

Now this Day we moved to diſcharge the Order; firſt, Becauſe the Affidavit upon which it was granted was fallacious, for that it only ſaid *he* had not paid, *&c.* 2dly, That the ſame was unpaid, but not ſaid *to the Crown*; 3dly, In Danger of being loſt, but not ſaid *to the Crown*. And by our Affidavit it appeared as above, that *Georges* himſelf had paid the Money to the Crown, that nothing was in Arrear to the Crown; for, as appeared by Certificate from the Exciſe Officer, *Pauncefort* had his Diſcharge, and all his Bonds and Securities delivered up; and therefore there was nothing to found this Extent upon. And laſtly, That any Benefit *Pauncefort* or his Executors might have by the Prerogative Proceſs, was waived by taking a private Bond from *Clarke* for the Payment of the Money; and of this Opinion was the whole Court, and diſcharged the Order for an Extent.

But *nota bene*, upon Mr. Attorney General's Requeſt they declared it ſhould not be a Rule, that a Debtor of the Crown (though the Crown Debt was ſatisfied) ſhould not have the Benefit of the Crown Proceſs to reimburſe himſelf, though it could not be granted under the Circumſtances of this Caſe.

The Attorney General v. *Burges.* 298.
Nov. 29, 1726.

Partners concerned in run Goods, the Crown may come againſt any one for the Penalty. AntePl. 155.

UPON an Information by way of *Devenerunt* for the treble Value on the Stat. 8° *Annæ*, for Goods that came to the Hands of the Defendant, knowing they had not paid the Duties: It was determined at the Trial at the Sittings by Lord Chief Baron *Pengelly* *, that if ſeveral Perſons were concerned, either in Partnerſhip or otherwiſe, yet the Crown might come againſt any one of them for the whole Penalty, it being in Nature of a Tort, and not a Contract, as in Caſes of Tort a Subject might come upon any one concerned in the Tort: And it was alſo reſolved, that on ſuch an Information there was no Neceſſity that the Goods ſhould be proved to come actually into his Hands, if they came into his Power, or into the Cuſtody of any Agent of his, or to any Perſon by his Direction.

Proof need only be, that the Goods came into his Power, or into his Agent's Cuſtody.

The Attorney General v. *Weeks.* 299.
Dec. 1, 1726.

Upon an Information in Debt for Non-payment of Duties.

UPON an Information in Debt for Non-payment of Duties, it was laid in the Information, that the Defendant imported the Goods 12° *Geo.*---The Plaintiff gave in Evidence an Importation in *April* 1719.

In this Caſe two Objections aroſe, firſt, Whether they could be permitted to give Evidence of Impor- Cro. El. 660.

* In the Caſe of *The Attorney General* v. *Carbold*, *Feb.* 13, 1732, An Information of *Devenerunt* was tried before Lord Chief Baron *Reynolds*, who was of the ſame Opinion.

But *nota*, the King can have but one Satisfaction.

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tation at any time before the Day laid in the Information.

2dly, Whether any Perſon can be charged on ſuch an Information in Debt for the Duties, but the actual Importer.

Att' Gen' *v.* Houghton, coram L. C. B. Gilbert. Idem *v.* Jewers & Batty, Dec. 2, 1726.

The Day laid is not material.

To the firſt Objection it was anſwered, and reſolved by the Lord Chief Baron, That this might have been made eaſy to the Defendant by Application to the Court, who would have made an Order for confining the Evidence to a certain time; and the Chief Baron thought the Caſe in *Cro. Eliz.* 660. not to be Law; that the Day is not material, and conſtant Experience had juſtified this Practice.

And every Perſon to whom the Goods come may be charged for the Duties.

To the ſecond Objection, Though upon a *Devenerunt*, which is a criminal Proſecution, every Perſon to whoſe Hands the Goods come may be charged, yet in Debt, the Perſon to be charged as Importer muſt have ſuch an Intereſt in the Goods, as to be liable to pay the Duties, and it will not extend to a mere Agent or Servant; but if he is jointly intereſted with another, the Crown may recover the Whole againſt one; as in caſe of ſeveral Obligors in a Bond, the Obligee may ſue one or all, though he can have but one Satisfaction.

A Factor for a Merchant abroad muſt be taken to be the Importer.

A Factor for a Perſon abroad is in this Caſe undoubtedly liable, becauſe the Crown cannot get at the Principal; and a Factor for a Merchant *here* has ſome ſort of Intereſt in the Goods, and has ſome Share and Allowance for his Factorage, and has a ſpecial Property in the Goods; he is to take the Goods and pay the Duties, and therefore muſt be taken to be the Importer; *alitèr* in caſe of a mere Agent or Servant.

The Attorney General v. *Jewers & Batty.* 300.
Dec. 2, 1726.

Coram Lord Chief Baron *Pengelly.*

Information of Debt for Duties on French Wines.

INFORMATION of Debt for the Duties; it was objected as to Part, *ſcil'* the *French* Wines coming from *Holland*, that they are prohibited and forfeited, and ſo no Duties are payable, *Simms* v. *Kenniſon.* But *per* Lord Chief Baron, After a Seiſure is made the Crown cannot make an Election, becauſe the Right is attached in the Informer as to his Share; and this is not an abſolute Prohibition, but a Prohibition *ſub modo*, as in caſe of Brandies had been reſolved ſince the Caſe of *Doe qui tam* v. *Cooper*, *Mich.* 2° *Geo.*

At the Sittings at Serjeants Inn.

Rex v. *Bowling.* 301.

Extent in Aid ſhall not iſſue but for a Debt originally due to the Crown's Debtor.

BOWLING became Surety with *Acock* on his obtaining a Writ of Delivery for a Ship, and entered into a Recogniſance for that Purpoſe, according to the Courſe of the Court.

Bowling (after a *Scire facias* on the Recogniſance againſt him) takes out an Extent againſt himſelf to find Debts; and upon Inquiſition it was found, that *Harriſon* was indebted to *Sandys* in two hundred and twenty Pounds for Goods ſold and delivered, and that *Sandys* had, three Days before the Extent, by Deed Poll aſſigned this Debt to *Bowling* for a valuable Conſideration; and the Inquiſition concluded, that *die captionis Inquiſition' Harriſon indebitatus exiſtit*

to *Bowling* in two hundred and twenty Pounds; upon *that*, *Bowling*, upon making an Affidavit that this Debt was really and *bona fide* due to him, obtains an Extent againſt *Harriſon*.

And this Matter coming before the Court on the Maſter's Report, wherein it appeared that no Evidence was given upon the Inquiſition, that any Debt was due from *Harriſon* to *Sandys*, and that the Solicitor for *Bowling* had only ſworn, that the Conſideration of the Aſſignment from *Sandys* to *Bowling* was a promiſory Note *to the beſt of his Remembrance*: I now moved that the Extent againſt *Harriſon* might be ſet aſide, becauſe it appeared that there was no original Debt due from *Harriſon* to *Bowling*, as the Rules of the 15 *Car.* 1. direct; upon which Reaſon the Extent was diſcharged. I alſo objected, that the Intereſt of *Bowling* by the Aſſignment from *Sandys* was only an equitable Intereſt, and that * *Debts in Equity* cannot be ſeiſed upon an Extent: But in this the Court would give no Opinion.

Carth. 5. Show. 4. Skin. 264.

* *Vide Hard.* 495. *The Attorney General* v. *Sir Geo. Sands*, Truſts may be found by Inquiſition. 2 *Vent.* 310. *con.* *Q. Hard.* 436, 466.

DE
Term. S. Hilarii,
1726.

The Attorney General v. *Flower.* 302.

Tried at *Weſtminſter* before Lord Chief Baron *Pengelly*, Feb. 14, 1726.

INFORMATION by the Attorney General on the Stat. 8° *Annæ*, *cap.* 7. *ſect.* 30. for aſſiſting, *&c.* in unſhipping of Wines, whereby the treble Value is forfeited: The Defendant pleads Not guilty. *Nota*, The Information was, That the Defendant *tempore Exonerationis fuit Opitulator vel alitèr Particeps*, Anglicè, otherwiſe concerned *in Exoneration' prædict'*, *&c.* The Words of the Statute are, "*The Perſons* "*who are aſſiſting or otherwiſe concerned in the unſhip-* "*ping*, &c." Information on the Stat. 8 Annæ, for aſſiſting in unſhipping Wines, againſt whom it lies. Poſt Pl. 318, 353.

Upon the Evidence it appeared, that the Defendant had been preſent and aſſiſting in unſhipping two Parcels of Wine, but that he afterwards went away; and before he went commanded his Servant *Neve* (the Witneſs) to ſtay and aſſiſt in getting other Parcels of Wine into the Cellar, which afterwards came in,

and the Servant *Neve* did accordingly aſſiſt, &c. but the Maſter (the Defendant) was then at *Andover*, about forty Miles diſtant from *Pitts Deep* in *Hampſhire*, the Place where the Wine was run.

Mr. Attorney General inſiſted this was ſufficient Evidence to bring the Defendant within the Act as to the two laſt Parcels, and was within the Words "*otherwiſe concerned*;" or elſe thoſe Words would amount to no more than the Word aſſiſting. But we for the Defendant inſiſted, that the Act extended only to thoſe who were actually *preſent* at the very *Act* of unſhipping, and never intended to puniſh any Perſons but thoſe with ſo ſevere a Penalty; and the Words "*otherwiſe concerned*" related to ſuch who were *preſent* giving Orders and Directions, but did not actually *aſſiſt*. And the Conſtruction contended for by the Attorney General would render the ſubſequent Words, *or to whoſe Hands they ſhall knowingly come*, totally uſeleſs: And of this Opinion was the Lord Chief Baron, eſpecially as it was laid in the Information. And upon the Chief Baron's declaring his Opinion *only* as it was laid in the Information, *viz. tempore Exonerationis*, &c. the Attorney General agreed the Defendant ſhould be acquitted as to the two laſt Parcels.

303. *Piper* v. *Thompſon*. Jan. 27, 1726.

SCIRE *facias* upon a Recogniſance againſt the Bail; the *Sci. fa.* reciting the Record was *in hac parte*, whereas againſt the Bail it ſhould have been in *ea parte*. It was moved to amend upon theſe Authorities, 1 *Salk.* 51, 52. 1 *Roll. Abr.* 797. *Stat.* 8° *Hen.* 6. *cap.* 15. but was denied *per totam Curiam*. 2 *Salk.* 599. *Hil.* 3° *Annæ in B. R. Brewſter* v. *Wells*.

DE

Term. Paſchæ,

1727.

Binſted v. *Collins*. May 6, 1727. 304.

Prohibition. The Ordinary cannot puniſh a ſingle Treſpaſs on the Body of the Church, if it does not hinder divine Service.

LIBEL in the Spiritual Court againſt *Binſted*, Churchwarden (but it did not appear he was ſo in the Proceedings) for breaking an Hole in the Church Wall, and cutting down the Boughs of a large Yew-tree in the Church-yard. *Nota*, There was a Decree in the Spiritual Court for twenty-ſix Pounds Coſts *præter feod' Monitionis & Execution' ejuſdem Monitionis*.

Now upon ſhewing Cauſe why a Prohibition ſhould not go, it was inſiſted againſt a Prohibition, that this was a Matter proper for the Juriſdiction of the Spiritual Court, and that a Man may be puniſhed for the ſame Fact in different Reſpects, and cited *Salk.* 547. 1 *Sid.* 281. *Goldſb.* 113. *Godb.* 259. That the Parſon had a Freehold in the Church-yard for the Benefit of the Church. 2 *Bulſt.* 279. 1 *Ro. Rep.* 255. *Noy* 104.

For the Prohibition it was ſaid, that the Parſon has the Right or Remedy as well as the Freehold, and conſequently might have an Action; 2 *Cro.* 367. *Bro. Treſpaſs* 210.---That it was not too late for a Prohibition, even after Sentence, if the Proceedings are *coram non Judice*, *Noy* 137. *Cro. Eliz.* 178. *Het.* 94.

Per Curiam, The *Ordinary* cannot puniſh a ſingle Treſpaſs committed on the Body of the Church, which does not hinder the Service, which is the Caſe the Statute of *Circumſpectè agatis---De Eccleſia diſcooperta*---extends to, and which is not alledged in the Libel: The Rector, who has the Freehold in him, has a Right to bring his Action, and therefore it would be hard to ſubject this Man to a double Proſecution; and the *Expenſæ* here (though properly Coſts) are in the Nature of Damages. But the Plaintiff might, if he thought fit, declare in Prohibition.

305. *Idle qui tam* v. *Vanheck.* May 16, 1727.

Information for importing Goods from Rotterdam, not being the Place of their Growth. Whether Notice in the Maſter is neceſſary to be proved.

INFORMATION upon the Stat. 12° *Car.* 2. *c.* 18. *ſ.* 4. for a Ship forfeited by bringing over Goods from *Rotterdam*, not being the Place of their Growth.

Upon the Trial the Defence was, That theſe Goods were brought either by the Paſſengers, or the Mariners, without the Knowledge or Privity of the Maſter; and therefore it would be hard to ſubject this Ship to a Forfeiture by an Act he could not help, and much harder upon the Defendant, who was the Owner, that he ſhould loſe the Ship, and cited the Stat. 27° *Ed.* 3. *cap.* 19. 38° *Ed.* 3. *cap.* 8.

But Lord Chief Baron *Pengelly* ſaid, that his (then) preſent Thoughts were, that *Knowledge* in the Maſter was not neceſſary, for the Act is an expreſs Prohibition without any Limitation or Reſtriction, and the Fact proved comes directly within the Deſcription of the Act, the Forfeiture is upon the Goods themſelves, and not upon the Perſon, the Intention of the Law was the Support of Trade, and therefore we may preſume it was, that all Perſons ſhould take the utmoſt Care that Trade ſhould be carried on without any Fraud. The Owner is to take Care what Maſter he employs, the Maſter what Mariners, and what Paſſengers he takes in; and being *Exercitor Navis*, and having the intire Controul of the Ship, he may ſearch and examine, where, and when he will, and no Damage accrues to the Owner; for he may recover againſt the Maſter for the Ship forfeited by his Default; and (as He then thought) the Maſter might, againſt * a Paſſenger who created a Forfeiture by his Act: And there is the more Reaſon he ſhould ſuffer by this, becauſe he has the Benefit of the Freight of theſe very Goods which occaſioned the Forfeiture. The Maſter is to report, and therefore he is obliged to ſee what he does report.

There was a Caſe cited, *Foſter qui tam* v. *Phillips*, in an Information on the ſame Statute, *Trin.* 1722, where it was ſaid the then Lord Chief Baron was of the ſame Opinion.

Nota, Afterwards it appeared it was not neceſſary to determine this Point, which the Chief Baron would have reſerved to the Defendant for the Opinion of the

* *Lib.* 3. *Ridgway's* C. *F. N. B.* 130. b. If a Man committed eſcapes, the Gaoler ſhall anſwer to the Party, and ſhall have an Action againſt the Priſoner for Damages.

Court,

Court, for the Jury found the Defendant had actual Knowledge of the Goods.

Nota, A new Trial was moved for in this Cauſe *June* 11, 1727, and upon that Motion all the four Barons were of Opinion, that *Notice* in the Maſter was not neceſſary to create a Forfeiture upon this Act of Parliament: Though, for a * *ſmall Matter*, they thought it would be hard that a Ship ſhould be condemned.

Cited by Baron *Comyns*, *Maline's Lex Mercatoria*, *edit. Jac.* 1. *Stat. Stap.* 27° *Ed.* 3. *cap.* 19. By the Chief Baron, *Molloy* 204, 209, 10, 11, 12, 23, 24. 1 *Sid.* 298. *Huſey* v. *Puſey*.

* *Greeby qui tam* v. *Palmer*, *Feb.* 13, 1733, Lord Chief Baron *Reignolds* put this Point upon this Diſtinction, whether Goods ſo brought were *Part or not Part of the Cargoe*; and therefore if Mariners or Paſſengers privately bring over a *ſmall Parcel* of Goods, *that* is not to be looked upon as *Part* of the *Cargoe*, and it would be hard the Ship ſhould be forfeited for *that*.

DE
Term. S. Trinitatis,
1727.

Rex v. *Bulley & Blommart.* June 3, 1727. 306.

Upon taking an Inquiſition upon an Extent, a Stranger has a Right to prove his Property in Goods.

HENRY BULLEY was indebted in three hundred and ninety-five Pounds ſeven Shillings and ſix Pence to *Blommart* before *April* 1727, and *Blommart* was alſo bound with him to the Crown, to the Value of three hundred Pounds, in Conſideration whereof *Bulley*, by two Bills of Sale of the 8th and 24th of *April* 1727, aſſigned to him ſixty Hogſheads of Tobacco, which was to pay him for the three hundred and ninety-five Pounds ſeven Shillings and ſix Pence lent by *Blommart*; the Remainder to continue in his Hands to ſecure him againſt the Bond wherein he was Security for *Bulley*.

Upon the 27th of *April* an Extent iſſued againſt *Bulley*, upon which (by Warrant from the Sheriff) the Officer broke open the Door of the Cellar where *Blommart* had lodged forty of the Hogſheads of Tobacco, and ſeiſed them for the Crown.

Blommart was adviſed to make the beſt Inquiry he could, when the Inquiſition would be taken on the Extent, and accordingly he did, in order to give Evidence that theſe Tobacco's were not now the Property of *Bulley*, but, before the Extent, were conveyed to him for a valuable Conſideration; As it appeared by the Affidavits, the Secondary of the Compter in *Wood-ſtreet*, and his Clerk and other Officers, had been guilty of great Shuffling and Evaſions, to prevent *Blommart* from knowing the Time and Place of executing the Inquiſition; and this was not contradicted by any Affidavit on the other Side; therefore, upon this Fact we moved to ſet aſide the Inquiſition *ſo* irregularly taken, that we might have an Opportunity to aſſert our Property, and not be put to the Expence, Difficulty and Hazard of pleading our Property, and inſiſted on the Statutes 34° *Ed.* 3. *c.* 13. 36° *Ed.* 3. *c.* 13. 1° *Hen.* 8. *c.* 8. 2° & 3° *Ed.* 6. *c.* 8. All which Statutes (though they related to Freeholds and Chattels real) ſhew the Care of the Legiſlature, as to the Property of the Subject, and that Inquiſitions ought to be taken openly, and not privily; and the Stat. *Ed.* 6. implied (at leaſt) that the Subject had a Right to have his Property found on an Inquiſition. And we alſo inſiſted much on the Form of the Writ of Extent---that the Sheriff was to inquire *per Sacramentum*, &c. & *omnibus aliis viis*, *mediis* & *modis*, &c.

Mr. Attorney General, in Anſwer, admitted the Facts as alledged in the Affidavit, but inſiſted that the Party had no Right of being permitted to give Evidence in this Caſe, but ought to reſort to a Plea of his Property; firſt, Becauſe this has not been the Practice; 2dly, Nor uſual to give Notice of execu-

ting theſe Inquiſitions, this being only in Nature of an Office; 3dly, Admitting it to be irregular, yet that is not a ſufficient Reaſon to ſet aſide the Inquiſition.

But *per totam Curiam*, The Extent and Inquiſition ought to be ſuperſeded (the Return of the Extent being out) with Liberty to take a new Extent of the ſame Date as the firſt; and laid great Streſs upon the Statutes cited, though they related only to Freeholds and Chattels real; and alſo upon the mandatory Part in the Writ of Extent; and it is not enough to ſay, it has not been the Practice, unleſs it can be ſhewn that the Practice has been to the contrary; and Notice in this Caſe cannot be given, becauſe every body may be concerned, and therefore there is no body particularly to give Notice to; but if a Party is there, and offers Witneſſes to prove his Property, they ought by Law to be admitted; otherwiſe the Difficulty would be very great upon the Subject; for, firſt, Before a Plea he muſt give Security; 2dly, He can have no Remedy by Action againſt the Sheriff, (becauſe the Inquiſition has found the Goods to be *Bulley*'s, which would ſkreen him againſt *Blommart*) or other Perſon, or any other Way; 3dly, He can have no Coſts or Damages, if he ſucceeds in his Plea. And it was obſerved, the *Statute* mentioned might take no Notice of mere Perſonals at that time, becauſe they were of little Value, but have, ſince, been much increaſed.

Nota, That in a Commiſſion of Lunacy there are the very ſame Words in the Writ of Inquiry, as in this Caſe, and now it is uſual to give Notice there: And the Lord Chief Baron thought they ſhould go as far as they could in this Caſe; for this is a Right the

the King had not at Common Law, but by the Stat. 33° *Hen.* 8. and ſaid, he himſelf had attended on Inquiſitions on Outlawries, and on *Elegits*.

307. *The Attorney General* v. *Jackſon.* June 19, 1727.

Information on the Act of Navigation for running Tea fromOſtend.

INFORMATION on the Act of Navigation for importing Tea from *Oſtend:* The Fact inſiſted on by the Defendant was, that the Veſſel was bound to *Liſbon*, but came into the Port of *Cowes* to mend her Bowſprit, where ſhe was ſeiſed by the Officers; and after ſuch Seiſure, and when the Ship was in their Poſſeſſion, ſome Goods were run by the Sailors.

It was admitted by the King's Counſel, that if the Ship had been ſeiſed *before ſhe came into Port*, ſuch Running would not have ſubjected the Ship to a Forfeiture: And the Chief Baron was of Opinion, that this was not an Importation within the Act, and that ſuch Running would not amount to a Forfeiture, becauſe after the Seiſure the Ship was under the Power and Controul of the Officers; but the Jury gave a Verdict for the Plaintiff, thinking *the coming into Cowes* only a Pretence; and *the Running after* declared the firſt Intent.

308. *The Attorney General* v. *Browſe.* June 24, 1727.

Information on Stat. 12 Car. 2. for exporting Wool, may be laid in any County.

INFORMATION upon the Stat. 12° *Car.* 2. *c.* 32. for carrying Wool aboard in order to export; which Information was laid in *Middleſex:* It was objected for the Defendant, that it ought to have been laid

laid where the Offence was committed, or where the Party was apprehended, *per Sect.* 1. & 5. To which it was anſwered, firſt, That the Precedents all run otherwiſe; 2dly, The Stat. *Jac.* 1. ſays, that Informations ſhall be brought in the proper County, and not elſewhere; the Words in the Stat. *Car.* 2. are only "*ſhall or may*, &c." ſo that they are only in the Affirmative, and do not repeal the Stat. *Jac.* 1.

Lord Chief Baron: The Stat. *Jac.* 1. does not extend to any Offence created ſince; *(vide Salk.* Title *Informations)* and therefore it muſt now ſtand on the Stat. *Car.* 2. there are no negative Words in it, ſo it does not take away the Prerogative of the Crown to lay it any where; and this, at the Common Law, would be tranſitory, and over-ruled the Objection.

But *quære* the Inference from his Premiſes.

At the Sittings in Serjeants Inn in Fleet-Street.

Thornhagh v. *Hartſhorn.* 309.

BILL for a ſpecific Performance of Suit to the Court of the Plaintiff's Manor was immediately diſmiſſed, as being proper at Law.

Bill for Suit of Court to a Manor diſmiſſed, and ſo for a Fee-farm Rent, or Law-day Silver, as proper at Law.

There was the like Diſmiſſion *inter Sir William Pynſent* and *Skillings*, the Bill being for a Fee-farm Rent, or Law-day Silver of thirteen Shillings and four Pence, payable at the Plaintiff's Court Leet, or at the Tourn of the Hundred of *Swymmonbourn.*

At the ſame Sittings.

310. ***Sweetapple*** v. ***The Duke of Kingſton.***

Bill for Tithes, Glebe, and Common.

A BILL was preferred by the Rector of *Fledborough* in the County of *Nottingham*, firſt, for Tithes; 2dly, for Glebe; 3dly, for Right of Common.

To the firſt the Defendants inſiſted upon a Modus of forty Pounds *per Annum*, although the Lands *now* are not above four hundred Pounds *per Annum*. To the ſecond, That the Plaintiff had never had any Poſſeſſion, though he produced an ancient Terrier of 1645, ſpecifying his Glebe; and the ſame Anſwer as to the third, and that both were proper at Law.

Per Curiam, We will retain the Bill until the Plaintiff has, by Action, aſcertained his Title at Law, (though *nota*, he had prayed a Commiſſion as to the Glebe and Common) and though the Modus ſeemed void, as being too rank; yet they would not decree the Tithes, until the other Points were ſettled at Law *.

* Between *Chamberlain Rector of Braybroke in the County of Nottingham* and *Spencer and about forty others Defendants*, for Glebe, Common, and Tithes: The Caſe upon Bill and Anſwer were almoſt exactly the ſame as this of *Sweetapple* and *The Duke of Kingſton*, which being cited, the Court inclined to follow the ſame Rule; but the Plaintiff agreed to have his Bill diſmiſſed as for the Glebe and Common, *November* 4, 1731.

At the ſame Sittings.

Gweavas v. *Kelynac and above one hundred more Defendants.* 311.

BILL for Tithe of Fiſh according to the Cuſtom; the Plaintiff in his Bill ſet forth a former Decree eſtabliſhing this Cuſtom in the Pariſh *tempore Car.* 2. And though there ſeemed to be no Evidence by the Defendants againſt the Cuſtom, and the Plaintiff had the former Decree ſigned by above one hundred and thirty Pariſhioners, teſtifying their Acquieſcence in the Decree; yet the Court ſent the Plaintiff to an Iſſue: *Reluctante* Baron *Hale.*

Bill for Tithe of Fiſh.

Ante Pl. 69.
Poſt Pl. 332.

DE

Term. S. Michaelis,

1727.

312. *Bilſon* v. *Saunders.* Oct. 26, 1727.

From what time a Legacy ſhall carry Intereſt.

BILL by Infants for Legacies againſt the Executor, and alſo for Intereſt from the Death of the Teſtator.

The Defendant by his Anſwer inſiſted, that he was always ready to pay the Legacies, but did not know who to pay them to, ſafely; that he ought not to pay Intereſt, becauſe, though he had eleven hundred Pounds *Bank* Stock from the Teſtator's Death ſtill remaining Stock, that it was, at the time of the Teſtator's Death, one hundred and fifty Pounds *per Cent.* and at preſent was only one hundred and thirty Pounds *per Cent.* and with the other Aſſets he had purchaſed other Stocks, which falling, he was ſo far from making Intereſt, that, even Part of the Principal was loſt.

Payment of a Legacy to an Infant is a good Payment

But *per Curiam*, Payment of a Legacy into the Hand of an Infant is a good Payment *(Wentworth's Office of Executor)* and *that* the Defendant ought to

have done: 2dly, That wherever Legacies are deviſed out of a real Eſtate, or there is other real ſufficient Fund to anſwer them, they ſhall carry Intereſt from the Death of the Teſtator, if no time is appointed for Payment; but upon the Authority of the Caſes following they decreed Intereſt to be paid from a Year after the Teſtator's Death. 2 *Chan. Ca.* 152. 2 *Salk.* Tit. *Legacy.* 2 *Vern.* 745.

Thurkettle & Ux' v. *Sir Humph. Howorth.* 313.

Eodem Die.

Whether a Court of Equity will carry a voluntary Deed into Execution, before the Party has tried to get Remedy at Law.

A. Prevailed on a young Woman to come and live with him after the Death of his firſt Wife, to take Care of the Affairs of his Family, &c. and voluntarily, on the 15th of *December* 1722, executed a Deed to her (mentioned to be in Conſideration of five Shillings) to pay her a Rent-charge of ſixty Pounds *per Annum*, with a Clauſe of Diſtreſs in any of his Lands in *Radnorſhire* or *Brecknockſhire*, not exceeding ſeventy Pounds *per Annum*; or elſe that ſhe, her Executors, &c. might ſue him, his Heirs, Executors or Adminiſtrators, for one thouſand Pounds, with Intereſt from the Date of the Deed: He afterwards diſcharged her, and ſhe intermarried with the Plaintiff; and the Defendant afterwards refuſing to pay any thing, and his Lands being incumbred, the Plaintiffs preferred their Bill to have the Benefit of this Deed, and that the Defendant might either pay the Arrears of the ſixty Pounds *per Annum*, or the one thouſand Pounds with Intereſt.

The Defendant in his Anſwer inſiſted, that the Deed was made without any valuable Conſideration, and upon ſeveral other Matters, as that ſhe plundered his Houſe, &c. But *nota*, he had no Proof in the

original Cauſe; whereas it was proved for the Plaintiffs, that he himſelf owned ſhe had ſaved him three hundred Pounds in three Quarters of a Year, and ſeveral of his Letters ſhewed his great Fondneſs of her, and his Intention of Kindneſs to her; and his laſt Letter (when he quarrelled with her) had this Expreſſion in it--" That he had nothing now to do, *but to pay the Money.*"

The Defendant preferred a Croſs Bill, ſuggeſting that the Deed was without Conſideration, that ſhe had executed a Defeaſance three Days after, and had got both the Deeds up by Stealth, and that ſhe had plundered him of a Gold Watch, Rings, &c. All which Matters were denied by the Anſwer, and the Plaintiff had no Proof in the Croſs Cauſe, but that ſhe had been ſeen to wear the Watch, &c. which was admitted and accounted for.

Upon hearing this Cauſe it was objected for the Defendant in the original Cauſe, that this Deed was merely voluntary, and that a Court of Equity would never carry a Deed into Execution, where there was a Remedy at Law, as there was here; for though it was alledged in the Bill, that the Lands were ſo incumbred that they could not tell where to diſtrain, yet there was no Proof thereof (as indeed there was not, but ſhould have been).

But it was anſwered by the Counſel for the Plaintiff, that this Deed, upon all the Circumſtances that appeared in the Caſe, could not be deemed merely voluntary; however, ſince the Defendant had brought a Croſs Bill, ſuggeſting (amongſt other things) that ſhe had executed a Defeaſance, and praying to be relieved thereon, that the whole Matter was before the Court, and proper to be determined in a Court

of Equity; and they cited the Caſe of *Carey* and *Strafford* in this Court, 7° *Feb.* 1725, where Relief was granted in a Caſe of much the ſame Nature, though there was no Croſs Bill.

But *per Curiam*, You ought to try firſt your Remedy at Law, and we will retain the Bill in the mean time; But is there any Precedent of a Court of Equity's carrying a voluntary Deed into Execution, when there is a plain Remedy at Law? And the Caſe of *Carey* and *Strafford* was a mere Fraud, for the Defendant pretended to ſettle Lands of twenty-two Pounds *per Annum*, when there were no ſuch Lands in Nature. *Nota*, Lord Chief Baron *Pengelly* and Baron *Comyns* were of this Opinion; but Baron *Hale* and Baron *Carter* doubted.

Odams v. *The Duke of Grafton.* 314.

AN Action was brought by the Indorſee of a promiſory Note payable to *A.* or Order, and it was moved before the Trial, on Behalf of the Defendant, that the Plaintiff might produce the Note, and leave it with his Attorney, in order to be inſpected by the Defendant, his Attorney, &c. on a Suggeſtion that the Note was forged; and it was inſiſted for the Defendant, that ſince even a Bond, upon ſuch Motion, might be produced, much more might a Note: But it was anſwered by the Counſel for the Plaintiff, and *per Curiam*, Though a Bond might be produced, being under Hand and Seal, yet *that* was upon this Reaſon, that the Plaintiff declares upon it with a *Profert in Cur'*; yet there is no Inſtance that in this, or ſuch a Caſe, a Plaintiff was ever obliged to produce his Evidence of what is the Foundation of his Action; and the Statute 3° & 4° *Annæ*, *cap.* makes

Plaintiff is not obliged on Motion to produce a Note of Hand, it being his Evidence, and the Ground of his Action.

makes no Difference between theſe Notes and Inland Bills of Exchange, but in the Point of pleading; and there is no Inſtance ſince that Statute (which muſt have often happened) that ever ſuch a Motion was made, or granted; nor before that Statute, that ever a Bill of Exchange was produced upon ſuch Motion.

315. *Wilkins* v. *Edſon*. Dec. 8, 1727.

One in Contempt permitted to examine Witneſſes to fortify his Denial of the Contempt.

IN Caſes of great Contempts, where the Party is examined on Interrogatories, and denies the Contempt, the Court have given Liberty to the other Side to examine Witneſſes to falſify his Examination: But *nota*, this is only in *great* Contempts (for the Practice of the King's Bench and Common Pleas is otherwiſe). In the preſent Caſe, the Court gave Leave for *Purcell* (the Perſon in Contempt) to move for an Order for Liberty to examine Witneſſes on his Part, to fortify his Denial of the Contempt.

DE

Term. S. Hilarii,

1727.

Croſley v. *Shadforth.* Jan. 25, 1727. 316.

Coſts not given in the Exchequer after an Appeal to the Houſe of Lords.

A BILL was preferred to have an Account of the Produce and Profit of *Amſterdam* Subſcriptions, wherein the Plaintiff was to be concerned one fourth Part with the Defendant.

The Defendant alſo preferred a Croſs Bill for Allowance, and for an Account of ſome other Matters: A Decree was made in *Feb.* 1722, that the Account was referred to the Deputy, and the *Coſts were reſerved* until the Report came in. There were ſeveral Proceedings afterwards, and on the 21ſt *Feb.* 1725, the Deputy made his Report, that there was due to the Plaintiff one Pound ten Shillings and nine Pence, which Report was confirmed next Day, but no Notice taken of Coſts ſince the firſt Decree.

From this, and alſo from the original Decree and other Proceedings, there was an Appeal to the Houſe of Lords, who ordered that the Deputy of the Court of Exchequer ſhould vary the Account as to one Ar-

ticle; but the Decree and all other Matters therein to be affirmed.

This Day it was heard upon the Report made, purſuant to the Order of the Houſe of Lords, whereby the Balance was ſwelled (to the Plaintiff) to eighty-two Pounds; the Plaintiff now applied to the Court for Coſts, ſince the Balance was conſiderably now on his Side, and ſince, by the firſt Decree, Coſts were reſerved: To which it was anſwered, that the Judgment of the Houſe of Lords was final and concluſive, and the full Satisfaction intended him by the Lords, ſince they took no Notice of Coſts in their Order *; which they probably would have done, if they had intended him any; for in the Appeal it was expreſſly alledged, that Coſts were reſerved; and this Court are now bound down, and have nothing to do but to execute the Order of the Lords; and the Court accordingly refuſed to give the Plaintiff Coſts, Lord Chief Baron *Pengelly*, *Carter* and *Comyns* contrà *Hale*.

Ca. in Parl. 57. Philips & Bury. Skin. 514. Carth. 319, 180.

317. *Wickins* v. *Pratt*. Jan. 26, 1727.

The Court will not give Leave to add or amend an Exception.

AN Anſwer was put in to a Bill, which being inſufficient, Exceptions were filed; to which the Defendant ſubmitted, and put in a ſecond Anſwer; after which it was diſcovered, that the moſt material Exception was not drawn according to the Words of the Charge and interrogatory Part of the Bill, of which the Defendant took Advantage, and in his ſecond Anſwer anſwered to the very Words of the Exception; whereupon I moved for Leave to amend, or add an Exception; but *per totam Curiam* it was refuſed, there being no Precedent for it; and the Plaintiff might amend his Bill by varying only a Word or two from the firſt.

* Q. The Caſe of *Strong* v. *The Dutcheſs of Marlborough*, in Scacc'.

Nutkins v. *Robinſon*. Feb. 3, 1727. 318.

IF a Churchwarden makes up his Accounts, and has them allowed at a Veſtry; if there is a Libel againſt the Churchwarden in the Spiritual Court, relating to his Account, a Prohibition ſhall go.

Prohibition for a Churchwarden, when his Accounts allowed by a Veſtry.

1 Vent. 367. 1 Sid. 281. Godolp. Rep. 166. p. 16. Raym. 418. Sir T. Jones 132. Poſt. Pl. 370.

Roberts v. *Cadd*. Feb. 10, 1727. 319.

A Prohibition to the Court of Admiralty to ſtay Proceedings upon their Warrant to arreſt a Ship, was now moved for, upon an Affidavit that the Contract was at Land; but it was now refuſed *per totam Curiam*, though it had frequently been granted in former Caſes.

Prohibition to the Admiralty refuſed. Ante Pl. 10.

Nota, By the Direction of this Court the Admiralty had altered the Forms of their Warrants.

Nota, It was ſaid the Party could not compel them to exhibit a Libel there.

The Attorney General v. *Woodmaſs*. 320. Feb. 13, 1727.

INFORMATION upon the Stat. 8° *Annæ*, *cap.* 7. *ſect.* 30. for being aſſiſting or otherwiſe concerned in unſhipping five hundred Gallons of Brandy, &c.

Information on the Stat. 8 Ann. for aſſiſting, &c. in unſhipping Wines, &c.

The Evidence was, that ſixty half Anchors were run, and put into private Houſes, and from thence carried to the Defendant's Houſe; but it did not appear the Defendant was preſent either at the time of running

Nota, In the Caſe poſt. Pl. 355. it was ſaid, that the Words *tempore Exonerationis* were in the Information.

running or removing the Goods to his Houſe; but he afterwards paid the Coble-men for running theſe Goods.

Lord Chief Baron *Pengelly* was of Opinion this was *a being concerned* within the Statute, if the Jury were of Opinion that the Defendant employed the Perſons to run the Goods on his Account, and paid them for that Purpoſe; for that thoſe Words muſt have a reaſonable Effect and Import, and muſt mean ſomething diſtinct from *aſſiſting*: As a Man was proſecuted on the Stat. 5° *Eliz.* for exerciſing the Trade of a Weaver; and though he did nothing himſelf, but employed others, yet adjudged within the Statute; and the Defendant cannot be doubly charged in this Caſe, for to an Information for aſſiſting he might plead a Recovery in this, as alſo to a *Devenerunt*. Verdict *pro Rege*.

AntePl.302.

At Serjeants Inn, Feb. 24, 1727.

321. ## *Berney* v. *Chambers*.

Anſwer amended. AntePl.263.

LEAVE was given to amend an Anſwer to a Tithe Bill, wherein the Defendant had ſworn, that ſuch a Cloſe contained nine Acres, and to make it ſeventeen, though Iſſue was joined and a Commiſſion had iſſued (which I never knew done before) but it was upon the Defendant's paying all the Coſts ſince the Anſwer, ſwearing the Anſwer over again, and taking out a new Commiſſion at his own Expence *.

* But *nota*, ſince, in the Caſe of *Mr. Wortley Mountague* v. the Court refuſed to let the Defendant amend his Anſwer by only altering the Day of Payment of a Modus, although Iſſue was not joined, and the Day ſet right in the Croſs Bill.

Lord

Lord Caſtlecomer an Infant v. *Lady Caſtlecomer.* Feb. 24, 1727. 322.

A Receiver had been appointed by this Court of the Plaintiff's Lands in *Ireland*, and *Marcus Barnes* was approved of for that Purpoſe, and a Commiſſion iſſued out of this Court to take his Recogniſance in *Ireland*, together with two Sureties, in the Penalty of three thouſand Pounds, for due accounting, &c. which was accordingly done, and tranſmitted hither; *Barnes* became in Arrear two thouſand five hundred Pounds.

A Receiver's Recogniſance in this Court cannot be tranſmitted by Mittimus to the Exchequer in Ireland.

I now moved, in regard that *Barnes* and his two Sureties lived in *Ireland*, and that all their Lands and Effects were there, and ſince no Proceſs out of this Court could reach either of them, that we might be at Liberty to tranſmit the Record of the Recogniſance by *Mittimus* into the Court of Exchequer in *Ireland*, in order that Proceſs might iſſue upon it out of that Court.

But *per* Lord Chief Baron and Baron *Comyns* (only in Court) it cannot be done, and the only Method you can take is, to file a Bill on the Foot of this Recogniſance in the Court of Chancery in *Ireland*, againſt *Barnes* and his Sureties, to have an Account, &c. and when Iſſue is joined, the Certificate of this Recogniſance here will be good Evidence of it in the Court there.

But the Method is to file a Bill in the Chancery in Ireland, and when Iſſue is there joined, a Certificate of ſuch Recogniſance will be good Evidence there.

DE
Term. Paſchæ,
1728.

323. *Keen* v. *Godwin.* May 14, 1728.

An Award of Releaſes to the Date of the Award, is good.

IT was adjudged upon Demurrer, *per Curiam*, that an Award for the Parties to give mutual Releaſes to the Day of the Date of the Award was good; although it was objected, that being beyond the time of the Submiſſion, it was void. To which it was anſwered *per Curiam*, that Awards have been more favoured of late, than in former Times; Tender of a Releaſe to the time of the Submiſſion is good, though the Award mentions Releaſes to the time of the Award; for it ſhall be good for ſo much as the Arbitrators have Authority to do, though they exceed their Authority.

In Support of the Objection were cited 1 *Sid.* 154. 1 *Keb.* 569. 1 *Ro. Abr.* 242. B. 4. 3 *Lev.* 188, 344. *Nota*, This was to ſupport the Diſtinction between a general and an expreſs Releaſe. *Lutw.* 549.

E contra, 1 *Salk.* 74. *Abraham* and *Brandon*, *Hil.* 12° *Annæ in B. R.*

May 22, 1728. 324.

NOTA, It was agreed *per Curiam*, that a Defendant ought to ſign his Anſwer, or for ſuch Defect an Injunction may be continued: But *quære*, whether if the Plaintiff takes a Copy of the Anſwer, it is not a Waiver of that Informality.

Defendant muſt ſign his Anſwer, or Injunction may be continued.

The Corporation of Scarborough v. *Jackſon*. 325. May 24, 1728.

ALTHOUGH the Defendant was in Contempt, yet the Court gave him Leave to plead, anſwer and demur; the ſame Day it was declared *per Curiam*, that for the future, where the Defendant being in Contempt prays time to anſwer, if it is granted, he ſhall enter his Appearance with the Regiſter.

Defendant in Contempt has Leave to plead, anſwer and demur. If time is given, he muſt enter his Appearance. Poſt Pl. 372.

Sir John Rouſe v. *Barker & al'*. 326. May 28, 1728.

IT was ordered that a Commiſſion ſhould iſſue to aſcertain Lands, Parcel of a Manor, charged with Quit-rents; the Commiſſioners returned, that one *Mayhew* ſurrendred ſome Copyhold Lands, Parcel of the Manor, in the Year 1704, whereas it was really in the Year 1703; for which Reaſon I moved that the Return might be amended; which the Court ordered that the Commiſſioners ſhould do, though they could not do it themſelves.

The Return of a Commiſſion to aſcertain the Lands of a Manor ordered to be amended. 3 Mod. 100. 1 Sid. 259.

Edgell

327. *Edgell qui tam* v. *Sir Matthew Decker.*
Eodem Die.

Amendment of an Information on the Act of Navigation. Salk. Tit. Amendment, Pl. 3, 10. Exchequer Rules.

MR. Attorney General and I moved to amend an Information of Seiſure of a Ship upon the Act of Navigation, for importing from *Holland* Cherry-derries, Cherconees and Sooſees, called in the Information *Indian* Silks: The Amendment prayed was, firſt, To ſtrike out *Silks*, and make it *India Goods* generally; 2dly, And alſo to add five hundred Weight of Tea; this laſt Part was denied, for it was to make a new Information, and to put the Defendant upon a new Defence; but the former Part was granted *per Curiam*.

DE
Term. S. Trinitatis,
1728.

Robinſon qui tam v. *Lequeſne.* 328.
July 2, 1728.

UPON an Information of Seiſure of Jeſuits Bark on the Stat. 14° *Car.* 2. *cap.* 11. *ſect.* 12. for fraudulent Exportation of Jeſuits Bark, two Caſks out of ſix being Duſt. There was a Verdict for the Defendant, and now a Motion was made for a new Trial; but *per totam Curiam* it was denied.

Whether a new Trial can be granted on an Information of Seiſure, where a Verdict is for the Defendant.

Nota, It ſeemed to be admitted in a Caſe of this Nature a new Trial might be granted, if the Fact would have admitted of it; and the Counſel for the Plaintiff were prepared with Precedents (if they had been called for) to that Purpoſe.

Nota, Nothing is forfeited on this Clauſe of the Act, but the Goods themſelves.

329. *The Attorney General* v. *Forgan.* July 9, 1728.

Information for unſhipping Tea.

AN Information was brought on the Statute of for being concerned in unſhipping *Parcel' Herbæ exoticæ* (without an *Anglicè*) the Duties not being paid, upon which there is a Forfeiture of the treble Value: Upon the Trial the Defendant made no Defence, relying upon the Objection which he made in Arreſt of Judgment, that this *Herbæ exoticæ* (without an *Anglicè* to reduce it to Certainty) was too uncertain (there being many foreign Herbs) eſpecially in a perſonal Information, as this was, and on which there was ſo great a Penalty; and the Caſes in the Margin were cited, and upon the firſt Motion the Court inclined to arreſt the Judgment, but gave the Attorney General time to ſearch Precedents, there being only three or four produced in perſonal Informations to ſupport this; but the Court thought that Precedents in Informations of Seiſure would be of equal Weight to ſhew the Uſage, and what was generally underſtood by theſe Words *Herbæ exoticæ*; though it was objected, that the Writ of Appraiſement and Indenture of Return were Part of the Record, and ſo reduced it to a ſufficient Certainty; whereas perſonal Informations had nothing but the Information to explain itſelf: But the Court thought, on Seiſures, the Writ of Appraiſement and Return could explain nothing in the Information but what was certain before; and therefore on the laſt Motion above one hundred Precedents being produced, where, in Informations of Seiſure the Words *Herbæ exoticæ* were uſed without an *Anglicè* to ſignify Tea; Judgment was given *pro Rege per totam Curiam.*

Lib. 5, 85.
1 Vent. 53.
Cr. Car. 338.
Lutw. 1384.
Sty. 358.
1 Sid. 60.
1 Lev. 48.
1 Vent. 142, 329.
Hard. 361.

D E

DE

Term. S. Michaelis,

1728.

Biſhop v. *Lloyd & al'.* Oct. 23, 1728. 330.

Writ of Privilege granted to the Deputy of the Uſher of the Cuſtoms.

ONE *Martin*, who was Deputy to Mr. *Taylor*, Uſher of the Cuſtoms, being choſen Headborough for *Weſt Ham* in the County of *Eſſex*, moved for a Writ of Privilege to diſcharge him from that Office, which was granted (at the Side Bar, *ut credo)* the 11th of *July* 1728; upon the Authority of which Precedent, I this Day moved for a Writ of Privilege for the Plaintiff, who was Chief Accountant to the Commiſſioners for victualling the Navy (and choſen Churchwarden of the Pariſh of Saint *Botolph Aldgate*, *London)* his Attendance on the King's Buſineſs and the Revenue of the Crown being equally concerned as in the other Caſe: But the Court thought this not like the other Caſe, for it did not appear here, that there was a Clauſe of Exemption in the Patent conſtituting the Commiſſioners of Victualling, as in the other Caſe there was for *all* Officers, *&c.* and the true Reaſon they went upon in the other Caſe was, for that *all* Officers of the Cuſtoms are bound to an Attendance in this Court, which in this Caſe, the Party applying for this Writ of Privilege is not.

But denied to the Chief Accountant to the Commiſſioners for victualling the Navy.

331. ## *Rex* v. *Belling.*

Whether the Court will ſtay the entring of Judgment upon an Information on a Suggeſtion, that the Witneſſes were perjured at the Trial.

THE Defendant was convicted upon the Teſtimony of two Witneſſes upon an Information for being concerned in unſhipping uncuſtomed Goods; it was moved on Behalf of the Defendant, that the Court would ſtay entring up Judgment on the *Poſtea*, becauſe the Witneſſes were perjured (of which Affidavits were produced) and were intended to be proſecuted for Perjury: But the Court refuſed to ſtay Judgment on this Allegation, there being no Precedent of any ſuch thing. But the Chief Baron ſeemed to think it might be done, if there had been an Indictment of Perjury actually found.

332. ## *Gwavas* v. *Kelynack & al'.*

Bill for Tithe Fiſh payable by Cuſtom to the Impropriator.

A BILL was preferred by the Plaintiff as Impropriator of the Rectory of *Pauli* alias *Paulin* in the County of *Cornwal* for the Tithe of Fiſh, and inſiſted upon this Cuſtom, *viz.* That every Pariſhioner of the ſaid Pariſh *and others*, being Proprietors or Occupiers of any Fiſhing Boat, Fiſhing Net or other Fiſhing Craft, which has been uſually tied, moored or kept within any Part of the Rectory or Pariſh, (when not uſed in Fiſhing) ought to pay to the impropriate Rectors the tenth Part of all great and ſmall Fiſh taken in the Bay, *or adjoining Seas*, with ſuch Boats, Nets or Fiſhing Craft, except Fiſh uſed for Bait for Fiſhing, and Fiſh meaſhed in the Sleeves of Nets, called *Saynes:* And the Plaintiff ſet forth in his Bill a Decree obtained by his Grandfather againſt about one hundred and thirty Pariſhioners, which was made upon a very ſolemn Hearing, wherein all

all the then moſt learned Counſel in *England* were engaged on one Side or the other, and whereby the Cuſtom, as now alledged (except only as to the Exception of Fiſh meaſhed in the Sleeves) was eſtabliſhed.—(But *nota*, the Bill in 1680 alledged the Cuſtom to be Inhabitants, *&c.* alone, and not "*or others*, &c.").

The Plaintiff alſo now inſiſted, that a Year after the Decree one hundred and thirty of the then Defendants, by Indorſement on the Decree, acknowledged the Cuſtom, and there had been an Acquieſcence ever ſince until the Year 1722, which was about forty Years.

The Defendants inſiſted, firſt, That they ought not to be bound by this Decree, there being only two of the preſent Defendants who were Defendants in the former Cauſe. 2dly, That the Cuſtom did not extend to Driving Nets, which of late Years had been moſtly uſed, and *Saynes* neglected. 3dly, That it was unreaſonable to extend to Inhabitants *and others*, and into *adjoining Seas*, out of the Pariſh, and therefore prayed an Iſſue.

But the Plaintiff's Counſel inſiſted, that here was ſufficient Foundation for a Decree without ſending it to an Iſſue; firſt, The former Decree being ſo ſolemnly obtained; 2dly, The Indorſement by one hundred and thirty of the then Defendants, two of which were now alive, and Defendants to this Bill; 3dly, Conſtant Uſage and Acquieſcence ſince until the Year 1722.

The Lord Chief Baron, and *Comyns* Baron, ſeemed to think this a ſufficient Ground to decree for the Plaintiff; but the other Barons (*Q. Hale* Baron) doubting, and upon great Importunity of the Defen-

dants Counſel an Iſſue was directed to be tried at the Bar, to try the Cuſtom as laid in the Bill, which came on to be tried at *Weſtminſter in Cur' Scacc'*, *Nov.* 6, 1728; and upon the Trial (which laſted fourteen Hours) there was a Verdict for the Plaintiff, though the Defendants gave pretty ſtrong Evidence, that Drift Nets were as ancient as Saynes, and no Tithes had ever been paid for Drift Fiſh; (*Nota*, Drift Nets were looked upon as a Fraud upon the Cuſtom;) but the Authority of the Decree (when the Matter was fully conſidered) and an Acquieſcence for forty-one Years ſince, was too ſtrong to be got over; and the Verdict was to the Satisfaction of all the Court, but Baron *Carter*.

The Defendants appealed from this Decree to the Houſe of Lords, which was there heard *Feb.* 26, 1729, when the Decree was affirmed. Mr. *Bunbury* and others for the Plaintiff; Serjeant *Stevens* and Mr. *Fazakerley*, &c. for the Defendants.

333. *The Attorney General at the Relation of Hughes Mayor of Liverpoole & al' v. Norris & al'.* Nov. 13, 1728.

Proceedings not ſtayed, becauſe the Information was without the Privity or Conſent of one of the Relators.

IT was moved to ſtay Proceedings on an Information upon an Affidavit made by two of the Defendants, that one of the Relators had acknowledged that the Information was brought without his Privity or Conſent. But *per Curiam*, This may be a Reaſon why (if the Relator applies himſelf) we may ſtrike his Name out, but no Reaſon why we ſhould delay the reſt of the Relators; and denied the Motion.

Nota, Upon the Defendant's praying a *Dedimus* to anſwer, the Plaintiffs immediately craved an In-

junction according to the Prayer of the Information, which was to injoin them from misapplying Money received for the Benefit of the Corporation of *Liverpoole*, which, though special, was granted.

The Dutchess of Marlborough v. *Grey Arm'*. 334.
Nov. 27, 1728.

TRESPASS for entering the Plaintiff's Close, breaking her Gates and Locks, &c. the Defendant pleads Not guilty: Upon Trial before Lord Chief Baron *Pengelly* at the Assises in *Berks*, he permitted the Defendant to give in Evidence on the General Issue, that the Place where, &c. was a common Highway; but it appearing that the Inheritance was in the Crown, he reserved this Point for the Plaintiff to speak to. Now upon Motion for a new Trial the Lord Chief Baron adhered to his former Opinion; and I think Baron *Comyns* was also of the same Opinion; but Baron *Hale* and *Carter* differed: But because the Inheritance appeared upon the Evidence to be in the Crown (it was the great Park at *Windsor*, of which the Plaintiff was only Ranger) the Court at last were of Opinion it could not be given in Evidence; so a new Trial was granted. Cited for the Plaintiff, 1 *Salk.* 287. 1 *Cro.* 184. *Yelv.* 215. 1 *Bulst.* 116. *Godb.* 183. *Lib.* 9. *Aldred*'s Case; 2 *Roll. Abr.* 138. *Cro. Car.* 266. 2 *Vent.* 344. 2 *Lev.* 220.——For the Defendant, 1 *Leon.* 301. 1 *And. p.* 291. 3 *Keb.* 286. *Lit. s.* 463. *Noy* 173. *Plowd.* 322. 2 *Mod. Birch* v. *Wilson*, *Roll.* Tit. *Chemin*; 1 *Sid.* 106. *Pro Rege Stanf.* 72, 5, 6. *Savil.* 125. [b]. *Ley* 1. *Cro. Car.* 60. *Hob.* 45.

Evidence on the General Issue in Trespass that the *Locus in quo*, &c. is a common Highway.

DE
Term. S. Hilarii,
1728.

335. *Ferguſon* v. *Cuthbert.* Jan. 23, 1728.

Prohibition, for Words Thou art a Jilt and a Strumpet, refuſed.

SUIT in the Spiritual Court for ſaying, Thou art a Jilt and Strumpet; a Prohibition was moved for, but denied *per Curiam.*

336. *Lucy & al'* v. *Bromley & al'.*

Real Eſtate charged with Payment of Debts, &c. yet the Reſidue of perſonal Eſtate applied in Eaſe of the real.
2 Vern. 568. 43, 302, 718. 1 Lev. 203. Prec. in Can. 101.

A. By Will charges his real Eſtate with Payment of his Debts, Funerals and Legacies, and gives to his Wife one thouſand Pounds, payable in two Years after his Deceaſe, with Intereſt at five Pounds *per Cent.* in the mean time, and his Houſe in *Red Lion Square*, with the Uſe of the Goods therein during her Life, and the Uſe of the Plate and Goods at *Charlcott* in the County of *Warwick* during her Widowhood; and after giving other Legacies concludes his Will, and made his Wife ſole *Executrix of his Will*, "*and of all my Goods, Chattels, and Arrears of Rent,* "*not before given or limited in this my Will.*"

It

It now became a Queſtion, whether the Reſidue of the perſonal Eſtate in the Hands of the Executrix ſhould not be applied to the Payment of the Debts in Exoneration of the real Eſtate: And *per totam Curiam*, The perſonal Eſtate ought to be applied in Eaſe of the real Eſtate.

Nota, It was inſiſted, that making her Executrix of Particulars amounted to no more than making her Executrix in general. Cr.Car.293.

The Attorney General v. *Moyer*. 337.

INFORMATION for not making a true Report, contrary to the Stat. The Importation was laid to be within the Port of *London*; upon Evidence it appeared the Importation was at *Cowes* in the County of *Southampton*.

Information for not making a true Report muſt be laid to be where the Importation actually was.

It was objected for the Defendant, that though the Information might be brought in *Middleſex*, yet they ought to have alledged the Importation to have been according to the Fact, *ſcilicèt*, at *Cowes*: And of this Opinion was the Lord Chief Baron *.

Tiffin v. *Jackſon*. Feb. 5, 1728. 338.

THE Defendant was outlawed at the Suit of *Tiffin*, who got a Leaſe under the Crown, and took out a *Levari*, but could have no Benefit of that Proceſs (being obſtructed) it was therefore now moved

Outlawry. Plaintiff got a Leaſe from the Crown, Injunction to put him in Poſſeſſion refuſed.

* *Nota*, In the Caſe of *Martin* v. *Winford*, *Trin.* 1695, *Lechmere* Baron cited the Caſe of *Burcher* v. *Hamit*, 20 *Car.* 2. which was an Information for a falſe Report, and all laid to be in the Port of *London*; upon the Trial it appeared to be at *Briſtol*, and was allowed to be good.

on his Behalf for an Injunction to put him into Poſſeſ-
AntePl. 120. ſion: But *per Curiam*, We cannot do it, and he may have an Action of Treſpaſs for the Profits.---It was alſo ſaid he might have an Ejectment. *(Sed quære de ceo.)*

339. ## *The Attorney General* v. *Hatton.* Feb. 13, 1728.

Information in Debt for the Duties of Goods imported in May 1727, Plaintiff may give Evidence of ſeveral Importations at ſeveral times.

INFORMATION in Debt for the Duties of Goods imported in *May* 1727: In Evidence Mr. Attorney General offered to prove ſeveral Importations at ſeveral times; but it was objected for the Defendant, that as only one Importation is laid in the Information, the Plaintiff ought not to be permitted to give in Evidence more than one Importation; though it was admitted the Plaintiff was not confined to any particular time. But this Objection was over-ruled by the Lord Chief Baron, not only from Precedents, but he ſaid it was no more than the common Caſe of an *Indebitatus aſſumpſit pro diverſis Bonis vendit' & deliberat'*, &c. where the Plaintiff may give Evidence of any Goods at any time ſold. *Nota*, In this Caſe the Plaintiff had given the Defendant a Note of the *Times* of the Importations, but of the Places the Defendant was refuſed Notice.

At Serjeants Inn, Feb. 28, 1728.

340. ## *Stone* v. *Rideout.*

Bill for Tithe Hay by Impropriator under a Grant of Jac. 1. diſmiſſed, none having ever been paid.

BILL brought by a Lay Impropriator for Tithe Hay in the Pariſh of *Framfield* in the County of *Suſſex*, and derives Title under a Grant 3° *Jac.* 1. which expreſſly grants the Tithes of Hay.

To this Bill the Vicar was made a Party, and the Plaintiff had no Proof that he, or thoſe under whom he claimed, ever had received Tithe Hay: The Defendants (Pariſhioners) inſiſted he was only intitled to Corn and Grain, and that the Vicar was intitled to Tithe Hay; though there was no Evidence that Tithe Hay had ever been paid, either to the Impropriator or the Vicar, but the Farms of the Defendants were under ancient Modus's or cuſtomary Payments, and the Defendants inſiſted that the Hay was covered under the Modus's, and to corroborate this, gave ſeveral Inſtances of Payments of Modus's to the Vicar by ſeveral Pariſhioners, who had nothing but Meadow Ground, and conſequently could pay only for the Tithe of Hay. This Cauſe was this Day heard, and though there was no Proof of Payment of Tithe Hay in Kind to the Vicar, but only preſumed to be ſo by the Modus's, yet ſince there was no Inſtance of the Impropriator's having received Tithes of Hay for one hundred and twenty Years ſince the Grant of *Jac.* 1. the Bill was diſmiſſed *per totam Curiam.*

DE
Term. Paſchæ,
1729.

341. *Reignolds* v. *Hind.* May 4, 1729.

Bill to have the Benefit and Enjoyment of a Watercourſe diſmiſſed, as being proper at Law.

BILL to have the Benefit and Enjoyment of a Watercourſe running to the Plaintiff's Houſe in *Cheſhunt* in the County of *Hertford*, and to have Satisfaction for Damages done by the Defendant's ſtopping it.

1 Vern. 308, 312.

It was objected for the Defendant, that this was proper at Law, firſt, Becauſe it is for Damages; 2dly, The Plaintiff is only a Leſſee for Years, and cannot come here to eſtabliſh a Right (eſpecially) until Title be aſcertained at Law.

To which it was anſwered for the Plaintiff, that an Action at Law (if a Verdict ſhould be obtained by the Plaintiff) would not be an adequate Remedy; for the Plaintiff could only have Damages for what was paſt, but could not have his Right eſtabliſhed and continued without the Aid of a Court of Equity; that this was to prevent Multiplicity of Actions, and

in the Nature of a Bill of Peace. But *per totam Curiam*, the Bill was diſmiſſed without entering into the Proofs. (Lord Chief Baron *Pengelly* abſent.)

Rex v. *Green*. May 7, 1729. 342.

MELL was bound as one of the Sureties for *Wilkinſon* the Receiver General for the County of and *Wilkinſon* becoming indebted to the Crown, an Extent iſſued againſt *Mell*, dated *Feb.* an Inquiſition which was taken thereupon in *May* following, found *Green* indebted to *Mell* in *Feb.* *ſcilicet die emanationis Brevis de Extent'*; upon which I moved the Court, at the ſetting down of Cauſes after the laſt Term, to quaſh the Inquiſition, becauſe Debts are not bound by the *Teſte* of the Extent, but only *à die Captionis Inquiſition'*, of which Opinion the whole Court was, but gave ſeveral Days for the Attorney General to ſhew Cauſe; and this Day Mr. Attorney General would not appear to ſhew Cauſe, and ſo the Rule was made abſolute to quaſh the Inquiſition.

Debts are not bound by the Teſte of the Extent, but only from the Caption of the Inquiſition.

Alardes & al' v. *Campbel*. May 6, 1729. 343.

A BILL was preferred to have Satisfaction on a Note of Hand for 3184 *l.* given to one *Richardſon* by the Defendant, and which by ſeveral Aſſignments came to the Plaintiffs, and to ſet aſide an Award or Umpirage; and the Bill expreſſly charged that the Note which was awarded to be delivered up by the Plaintiff, was never produced to the Umpire; that one of the Plaintiffs informed the Umpire, that the other Plaintiff *(Alardes)* was gone into *Scotland*

Award purſuant to the Stat. 9 & 10 W. 3. whether a Court of Equity can inquire into it.

to inquire whether the Defendant had paid this Note to ſeveral Owners of Ships there, as he pretended, and that *Alardes* was the only Perſon who knew any thing of this Affair, and therefore deſired that the Umpire would ſtay 'till *Alardes* was returned, which the Umpire promiſed to do, but afterwards made his Umpirage before *Alardes* returned; but both the Umpire and the Defendant promiſed it ſhould be only conditional, and that *Alardes* ſhould be heard after his Return from *Scotland:* And there were other Charges in the Bill of undue Practice in making this Umpirage; and therefore prayed to ſet aſide this Award.

The Defendant pleaded the Arbitration Bonds, the Election of the Umpire, the Umpirage made within time; that the Submiſſion was made a Rule of the Court of King's Bench, that there had been no Application to that Court purſuant to the Stat. 9° & 10° *W.* 3. and therefore that all other Courts were now concluded; but gave no Anſwer to the expreſs Charges in the Bill, but verified their Plea only, and anſwered only by denying Combination.

It was objected by the Plaintiffs, that the Defendants ought not to plead this Award, which is the very thing the Plaintiffs pray to be relieved againſt, eſpecially ſince they have not ſupported their Plea, by giving an Anſwer to the particular Charges of Partiality alledged in the Bill; and the Court were of that Opinion: But then the Queſtion was upon the Stat. 9° & 10° *W.* 3. whether this Court was not now precluded; and the Lord Chief Baron and Baron *Comyns* were of Opinion that it was not (now the time *in B. R.* is elapſed) but Baron *Carter* that it was, Baron *Hale dubitante.* At laſt it was

Reynolds *v.* Perrott, in Scacc', May 4, 1727.

was ordered that the Plea ſhould ſtand for an Anſwer, with Liberty to except; and the Court intimated, that the Exceptions ſhould be confined to Matters ſubſequent to the 9th of *May* 1726, the Date of the Arbitration Bonds, and to the expreſs Charges of undue Practice in the Umpire.

Taylor Clerke v. *Walker*. May 13, 1729. 344.

BILL was preferred by the Plaintiff as Rector of *Checkley* in the County of *Stafford*, for Tithes of five Cloſes in that Pariſh in the Defendant's Poſſeſſion.

Upon an Iſſue to try a Modus of 3s. 4d. for five Cloſes, it appeared in Evidence it extended to two more, new Trial granted becauſe the Judge miſdirected the Jury.

The Defendant by his Anſwer inſiſted, that there was a Modus of three Shillings and four Pence in lieu of all Tithes ariſing on the five Cloſes, and that no Tithes in Kind were ever paid: Upon the Hearing the Court directed an Iſſue to try the Modus, and upon the Trial it appeared in the Evidence, that this Modus was payable not only for the five Cloſes, but two Cloſes more, particularly named; Mr. Juſtice *Probyn*, upon this Evidence (at *Stafford*) directed the Jury, who accordingly gave a Verdict for the Plaintiff againſt the Modus. Now upon the Return of the *Poſtea* it was moved for a new Trial, for that this being an Iſſue to inform the Conſcience of the Court, the Defendant ought not to be held ſo ſtrictly, eſpecially ſince no Proof of Tithes in Kind being paid was given; and therefore though it extended to two Cloſes more, yet it was leſs than really the Preſcription was which he inſiſted on, and therefore he ought to have had the Benefit of the Proof as to five Cloſes only. For the Plaintiff it was inſiſted, that a Modus ought to be certain, being in Bar of common Right, and therefore he has failed in the Defence he

inſiſted on; and Mr. Juſtice *Probyn*'s Opinion, as certified by Baron *Hale*, was relied on: But *per totam Curiam*, a new Trial was granted; and they ſaid they could not diſtinguiſh this from the Caſe of a Prohibition, and cited theſe Caſes; *Hetley* 111. 1 *Vent.* 32. *Hob.* 64. 1 *Shore* 347. 4 *Mod.* 89. *Carth.* 89. *Cro. Eliz.* 531, 722.

DE

Term. S. Trinitatis,

1729.

Rex v. *Pritchard.* June 20, 1729. 345.

Extent againſt a Tenant, the Landlord not relieved on Stat. 8 Annæ.

UPON the 12th of *Feb.* 1728, an Extent iſſued againſt *Pritchard*, Tenant of *Sambrook*; the 22d of *April* 1729 *Sambrook* diſtrains for Rent; 30th of *April* 1729 the Inquiſition finds the Goods then in the Poſſeſſion of *Pritchard*. *Nota*, The Extent was not executed till the 23d of *April*, the Day after the Diſtreſs. Mr. *Foley* moved that *Sambrook* might have the Benefit of the Statute 8° *Annæ* for his Rent, notwithſtanding the Extent; but it was denied *per Curiam*.

The Biſhop of Hereford v. *The Duke of Bridgwater.* 346.

Evidence. Motion to inſpect Books of Defendant's Manor.

THE ſame Day Doctor *Egerton* Biſhop of *Hereford*, who had preferred a Bill for Tithes againſt his Brother the Duke of *Bridgwater*, and ſeveral Tenants of his Manor, moved to have an Inſpection of

the Court Rolls of the Manor, to ſee what Proportions they paid of a Modus inſiſted on; but denied *per totam Curiam.*

347. *The Town of Pool in Dorſetſhire* v. *Bennett & al'.* June 23, 1729.

Bill for Wharfage and Keyage, &c. whether proper at Law.

BILL by the Town of *Pool* againſt *Bennett and others* for Duties of Wharfage, Keyage, &c. Upon the Hearing it was objected, that the Bill ought to be diſmiſſed as being proper at Law, upon the Authority of *The Mayor of Boſton* againſt *Jackſon*, *ante* Pl. 160, and ſeveral other Caſes: But the Court retained the Bill *(Carter Baron' diſſentiente, Comyns Baron' hæſitante)* and gave the Plaintiff Liberty to bring an Action at Law, but would not diſmiſs it. *Nota*, The Reaſon was, becauſe the Defendant admitted the Plaintiff's Right, but ſet up an Exemption in the Town of *Wareham.*

DE

Term. S. Michaelis,

1729.

Springer v. *Sommerville.* Oct. 25, 1729. 348.

Fieri facias delivered to the Sheriff after the Defendant's Death, but teſted before, is well enough.

A *FIERI facias* upon a Judgment iſſued againſt *J. S.*--the Attorney for the Plaintiff informed him of it, upon which *J. S.* went and ſhot himſelf through the Head; after his Death the Attorney delivered the *Fieri facias* to the Sheriff, who executed it upon the Goods of *J. S.*

It was now moved to ſet aſide this Execution as irregular, becauſe the Defendant was dead before the Delivery of the Writ to the Sheriff: But *per Curiam* clearly, that the Execution was regular, and that the Statute of Frauds and Perjuries extended only to Creditors and Purchaſors, but not to Executors or Adminiſtrators, who ſtood in the Place of the Party; and conſequently, as to them, the Writ bound from the *Teſte*, which was before the Death of *J. S.* *.

Fenwick

* Upon a Motion to ſet aſide an Execution executed, becauſe Dr. *Needham*, upon whoſe Goods the Execution was levied, was dead at the time the *Fi. fa.* was delivered to the Sheriff, ſo that the Property was never bound by that Writ; for that the Lien has Retroſpect only to the time when the Writ is delivered to the Sheriff. 29 *Car.* 2. *c.* 3. The Court held that the Writ binds from the *Teſte*,

as

349. *Fenwick* v. *Forteſcue*. Nov. 7, 1729.

Security for Coſts, whether it ſhall be given by a Plaintiff protected by an Ambaſſador.

IT was moved that the Plaintiff ſhould give Security to anſwer the Coſts, before he ſhould be at Liberty to proceed in his Bill, in regard he was protected by the *Heſſian* Envoy; and ſo no Proceſs could be ſerved upon him, and conſequently he came under the ſame Reaſon as of a Foreigner; but this being a Bill for an Injunction to ſtay the Defendant's proceeding at Law in Ejectment, the Court denied the Motion, becauſe the Plaintiff was in a manner forced into this Court, and did not come in originally.

350. *Desbrow* v. *Crommie*. Eodem Die.

Sequeſtrators, in caſe of Contempt, for want of an Anſwer cannot remove the Defendant's Goods. 1 Vern. 248. 1 Chan. Rep. Dr. Salmon *v.* Hamborough Comp.

A Sequeſtration iſſued againſt the Defendant for want of an Anſwer; the Sequeſtrators entered the Defendant's Houſe, and removed all the Goods, to the Value of ſeventy Pounds at leaſt, though the thing in Demand by the Bill was little more: I now moved to have Reſtitution of the Goods, in regard that the Removal of the Goods was not within their Power without a particular Order of the Court for that Purpoſe. And *per Curiam*, *viz.* Lord Chief Baron *Pengelly*, Baron *Carter* and Baron *Comyns* (Baron *Hale* dying this Day) there is a Difference between a Sequeſtration for want of an Appearance, and for want of an Anſwer; even in the firſt Caſe it is to be looked

as againſt the Party, in the ſame Manner as at Common Law; though in reſpect to Purchaſors this Statute has altered it. Dr. *Needham*'s Caſe, *Paſc.* 3 *W.* & *M. B. R.*—The ſame Reſolution was in the Caſe of *J. Parſons* againſt *The Executors of Gill*, *Paſc.* 13 *W.* 3. *B. R.* in which it was reſolved, that a Judgment entered in *Hilary* Vacation well enough ſupported a *Fi. fa.* taken out after, but teſted before, the Judgment (by Relation) being taken to be of the preceding Term. *Vide* 1 *Mod.* 188.

upon only as a *Diſtringas in infinitum* at Law, and the Diſtreſs *there* ought to be only, at firſt nothing, then increaſing by Degrees, as the Court directs, in order to compel an Appearance; ſo the Sequeſtrators ought in the firſt Caſe, after Seiſure of ſome Goods, to apply to the Court for further Directions for Seiſure, in order to compel an Appearance; but in the ſecond Caſe, the Sequeſtrators have no Power to remove any Goods, much leſs to ſell, for the Goods are only to be retained in Nature of a Pledge, to anſwer the Contempt, and the Plaintiff receives no Injury by this, for he may ſet down his Cauſe, and his Bill may be taken *pro confeſſo*; and in this Caſe the Sequeſtrators had a Day given to ſhew Cauſe why an Attachment ſhould not go againſt them.

Price Cl' v. *Pratt & al'*. Nov. 13, 1729. 351.

THE Plaintiff preferred his Bill as perpetual Curate of *Bovington*, being a Chapel annexed to the Church of *Hemel Hemſted* in the County of *Hertford*, againſt the Defendants Inhabitants and Occupiers of Lands within the ſaid Chapelry: He made his Title under a Nomination to his Curacy in the Year 1716, by *Cornelius Price*, then Vicar of *Hemel Hemſted*, who alſo gave him, by the ſame Inſtrument, the ſmall Tithes in *Bovington*, with Power to ſue for them in his (the Vicar's) Name; and he alſo ſet forth a Licence to preach from the then Biſhop of *Lincoln*; and alſo that *Topping* (*Price*'s Succeſſor) in *June* 1722, granted him a new Nomination to this Curacy expreſſly for Life, with like Power to ſue for the ſmall Tithes in both their Names. But though he took a ſecond Nomination, yet that by the firſt, and the Biſhop's Licence, he was ſufficiently intitled to the Tithes, becauſe by ſuch Nomination he be-

Curate perpetual removeable at Pleaſure, and he cannot ſue for Tithes.

came perpetual Curate. But *per Curiam* (Lord Chief Baron *Pengelly* and Baron *Carter* only in Court) the Bill muſt be diſmiſſed, for no Title appears in the Plaintiff; for though a Curate is appointed by a Vicar, either generally, or expreſſly for Life, yet ſuch Appointment is in its own Nature revocable at Law, even without any Cauſe aſſigned, and by the Eccleſiaſtical Law upon Cauſe ſhewn; ſo that the Plaintiff had not ſuch a permanent Intereſt as to claim any Tithes.

Nota, *per* Baron *Carter*, If a Biſhop grants ſuch Licence to a Curate to preach, and after is tranſlated, there is no Neceſſity for a new Licence by the ſucceeding Biſhop. (But *quære de ceo*, for *videtur aliter.)*

Nota, In this Caſe *Topping* was made a Party, but not brought to Hearing, which, *per Curiam*, muſt have been done before the Plaintiff could have a Decree, if he had had a Title in the other Reſpect.

352. *Quaintrell* v. *Wright*. Nov. 17, 1729.

Uſage as to Tithes ſhall explain a Leaſe of a Farm with *all Tithes*, againſt the very Word.

PLAINTIFF brought his Bill as Leſſee of the Biſhop of *Norwich* of the Rectory of *Ingham* in the County of *Norfolk*, and produced his Leaſe, dated *May* 8, 1723: The Defendant ſet forth, that the Biſhop of *Norwich*, at *Michaelmas* in the Year 1693, demiſed the *Grainge* Farm, with all *Tithes* thereto belonging, or therewith uſually letten; that this Leaſe was ſurrendred *July* 7, 1724, and a new Leaſe made the next Day by the Biſhop of *Norwich* to the Perſon under whom the Defendants claim, with the ſame Words; ſo inſiſt, that at the time of the Grant of the Rectory the Tithes could not paſs to the Plaintiff (of this Farm) they being before expreſſly

preſſly granted by the Leaſe in 1693, and which was ſubſiſting at the time of the Plaintiff's Leaſe.

But *nota*, there was Proof that the Leſſees of the Rectory had uſually received the Tithes of the whole Pariſh, Farm and all; and no Proof of the Defendant's Side of the Leſſees' of the Farm ever receiving Tithes.

Therefore *per Curiam* (Lord Chief Baron *Pengelly* and Baron *Carter* only in Court) the Defendant was decreed to account, for Uſage ſhall explain this Matter; and theſe Tithes cannot be ſaid either to belong to *Grainge* Farm, or to be uſually letten with it; and the Word *Tithes* was taken in only as a Word of courſe, and from the old Leaſe: If there had been a Diſpute between the Biſhop himſelf and the Leſſee of *Grainge* Farm, it might have had another Conſideration.

Williams v. *Jones & the Attorney General.* 353.
Nov. 22, 1729.

Security Bond for three Years ſhall extend farther.

ONE *Griffith* was appointed Poſt-maſter for *Landovery* in the County of *Carmarthen*, on the 23d of *March* 1713; his Deputation was only for three Years, and the Condition of the Bond given by him to the Crown was expreſſed to be only for three Years: Upon the 21ſt and 22d of *July* 1717 (which was after the three Years expired) he made a Mortgage to *John Williams* of a ſmall Eſtate, which upon the 4th and 5th of *June* 1718, he and *Williams* aſſigned to the Plaintiff in Conſideration of eighty Pounds.

In the Year 1720, the Plaintiff obtained Judgment in Ejectment, and hath had Poſſeſſion ever ſince.

Griffith

Griffith continued Poſt-maſter 'till 1722, at which time he was in Arrear to the Poſt-office ſeventy-two Pounds; but on the 25th of *March* 1717 (when the three Years expired) there was due only nine Pounds ſixteen Shillings. *Nota*, There was no new Deputation or new Bond after the Expiration of the three Years.

Afterward, in 1722, the Defendant was appointed Poſt-maſter, and the Office compelled him to give a Bond for the whole Arrears in his Predeceſſor's time; therefore he took out a *Scire facias* on the Bond of *Griffith*, and after *that* an Extent, upon which the mortgaged Lands in Poſſeſſion of the Plaintiff were ſeiſed.

The Plaintiff prefers his Bill on this State of the Caſe, and offers to pay the nine Pounds ſixteen Shillings, the whole Arrears at the End of the three Years, and prays an *Amoveas manus*.

The Queſtion was, whether this old Bond ſhould be a Lien on *Griffith*'s Lands for any longer than three Years.

And *per* Lord Chief Baron *Pengelly* and Baron *Carter* (only in Court) the Plaintiff can have no Relief without paying the Whole, for he ſtands in the Place of *Griffith*, and if *Griffith* had come and made this Offer, the Court could not have accepted it; if the whole Arrear at the End of three Years had been diſcharged, they ſeemed to think the Plaintiff ſhould then have been relieved.

Nota, A Difference was made, where the *Party* himſelf is before the Court, and where the *Surety*; as in theſe Caſes quoted, *Moor* 126. *p.* 274. 2 *Saund.* 413. 1 *Leon.* 240. *Hungate* v. *Hull.*

Willy v. *Thompſon.* Nov. 22, 1729. 354.

TRESPASS *Quare clauſum fregit* of the Huſband and Wife, and for treading down, and conſuming and depaſturing the Graſs of their Cloſe: Adjudged on Demurrer that the Action was well brought by the Huſband and Wife, the Cloſe being her Inheritance, and there being no Severance of the Graſs; if it had been Corn cut down, that would have been a ſeparate Intereſt veſted in the Huſband alone. *Vide Cro. Eliz.* 133, 96. 2 *Vent.* 195. 1 *Bulſt.* 110. 15 *Ed.* 4. 9. *Cro. Car.* 437, 8.

Treſpaſs Quare clauſum fregit by the Huſband and Wife, of her Inheritance, lies.

The Attorney General v. *Lake.* 355. Dec. 3, 1729.

AN Information was brought by the Attorney General upon the Statute 8° *Annæ*, for aſſiſting or being otherwiſe concerned in unſhipping, &c. Upon the Evidence it appeared, that the Defendant gave Orders to *Burley* to fetch the Goods from *Rotterdam*, and land them at *Holcomb* in *Norfolk*, and to deliver them to one *Porter*; and that he had given Orders and Directions to *Porter* to aſſiſt in landing them, and to receive the Goods and carry them to his (*Porter*'s) Houſe. There were four ſeveral Inſtances, but the Defendant was not actually preſent at the time of landing and unſhipping; and it being laid in the Information that he was, *tempore Exonerationis, Opitulator vel alitèr Particeps*; I objected for the Defendant, upon the Authority of the Caſe of *The Attorney General* v. *Flower*, *ante* Pl. 302. that the Evidence did not prove the Information, it being here tied up to the *tempore Exonerationis*, a perſonal Preſence was requiſite.

Information for aſſiſting or being otherwiſe concerned in unſhipping, &c. on Stat. 8 Annæ.

Ante Pl. 302, 320.

But the Lord Chief Baron *Pengelly* diſtinguiſhed this Caſe from that of *The Attorney General* v. *Flower*, for *there*, at the time the Defendant gave his Orders, it was uncertain when the Ship would come in, and the Orders were only general, to attend and aſſiſt when the Ship came in with the Goods; but *here* the Orders were particular as to the ſeveral times when the Goods were to be landed, and *where*, and *when*, and *where* to be received; ſo that this muſt be *being otherwiſe concerned*, within the Meaning of the Statute, which muſt intend ſomething farther than the aſſiſting, or thoſe Words would be of no Signification at all; and he alſo ſaid that the Words *tempore Exonerationis*, or Words importing the ſame Signification, muſt be in the Information, or it would be bad. And there was a Verdict *pro Rege*.

DE
Term. S. Hilarii,
1729.

Hayes D. D. v. *Dowſe.* 356.

THE Court ſeemed to think, that Vetches and Clover cut green, and given to Cattle uſed in Huſbandry, ſhould pay no Tithes *.

Tithes. Vetches and Clover. Cr. Car. 393. Sir W. Jones 237. Degge

357. 2 Leon. 27. Cr. Eliz. 139. 1 Ro. Abr. 645, 6, 7.

Woolferſton Clerk v. *Manwaring & al'.* 357.

BILL by the Rector of *Drayton Baſſet* in the County of *Stafford* for Tithes; the Defendant inſiſts that the Lord of the Manor time out of mind, for himſelf and his Tenants, on *Aſcenſion* Day gave and delivered to the Rectors nine Cart Loads of Log Wood, in lieu of all Tithes: This Modus was found upon an Iſſue directed; and *per totam Curiam*, adjudged a good Modus, as well as a Modus of a Hogſ-

Modus's of nine Carts of Log Wood, a Hogſhead of Cyder, 2d. per Acre, good.

* *Nota, Trin.* 1715, *Hodgſhon* v. *Smith & Webb*, it was reſolved by *three Barons* contra *Price*, that Tares, whether green or ripe, are a great Tithe, and belonged to the Rector.

head of Cyder, which are equally uncertain, yet both held to be good.

Nota, In this Caſe one of the Defendants inſiſted on a Modus of two Pence *per* Acre for eighteen Acres, but ſet forth no Day of Payment, nor by whom; but this being likewiſe found for the Defendant, was eſtabliſhed, being after a Verdict: *Quod nota.*

358. *The Attorney General* v. *Lutwydge & al'.* Feb. 11, 1729.

Juriſdiction, whether this Court has any of the Revenues in Scotland.

INFORMATION in Debt upon Bond; the Defendant craves Oyer, and pleads to the Juriſdiction of the Court, firſt, That the Bond was executed at *Dumfries* in *Scotland*; 2dly, That it was given for the Payment of Duties of Tobacco imported there; 3dly, That the Duties became payable in *Scotland*, and not elſewhere; 4thly, The Defendant avers, that Conuſance belongs to the Court of Exchequer in *Scotland*, and not to this Court. The Attorney General demurs.

And in arguing inſiſted, that this was a tranſitory Matter, and might be ſued any where; as in the common Caſe of Subjects, where a Bond executed in the *Eaſt Indies* might be ſued here, eſpecially in this Caſe, the Parties being found here within the Juriſdiction; and that this Court was not deprived of its Juriſdiction, either by the Articles of Union, or by the Act for erecting the Court of Exchequer in *Scotland.*

To which it was anſwered, that the Queſtion now did not depend upon the Reſidence of the Parties, but

but upon the Nature of the Matter for which the Bond was given; and though there were no negative Words in the Articles of Union or Statute, yet the Expreſſion is as excluſive in Conſequence, as negative Words; and for this Purpoſe were quoted *Lib.* 11. 59. *Lib.* 4. 65. [b]. *Plowd. Com.* 206. [b]. 1 *Inſt.* 105. 2 *Lutw.* 946.

Lord Chief Baron *Pengelly*; Before the Union this Court had no Juriſdiction of the Revenues in *Scotland*, and therefore the Queſtion is, whether the Statute is not excluſive of us, ſince it is giving a farther Juriſdiction to them who had it excluſive of us before.

This being a Matter of great Conſequence and Difficulty, both he and the reſt of the Barons thought it ought to be adjourned into the Exchequer Chamber *propter Difficultatem*; but in the mean time Mr. Attorney General to ſignify to the Court what he was willing to do.

Jobſon v. *Selwin*. Feb. 14, 1729. 359.

ACTION for Money had and received by the Defendant for the Plaintiff's Uſe; this came to be tried before the Lord Chief Baron at *Guildhall*, and the Queſtion was, whether Meal of Wheat imported ſhould not pay the ſame Duty as Wheat imported, by the Statute of Tillage 22° *Car.* 2. and there being an Authority expreſs in the Caſe, upon ſolemn Argument upon a ſpecial Verdict in the Caſe of *The Attorney General* v. *Santen*, 26° & 27° *Car.* 2. the Chief Baron would not let it be found ſpecially, but directed the Jury to find for the Defendant, who, as Officer, had received the Money for the Duty as for Wheat.

Whether Meal of Wheat imported ſhall pay Duty as Wheat per Stat. 22 Car. 2.

DE
Term. Paſchæ,
1730.

360. *Lord Sutherland & Ux'* v. April 26, 1730.

Feme marries after interlocutory, and before final Judgment, the Court will not ſet it aſide.

THE Plaintiff's Wife obtained an interlocutory Judgment againſt the Defendant, and before final Judgment married; and after the final Judgment the Huſband and Wife brought a *Scire facias* thereupon for the Defendant to ſhew Cauſe *quare Executio non*, &c. and now the Defendant moved to ſet this Judgment aſide; but the Court refuſed to do it upon Motion, and put him to his *Audita Querela*.--- *Nota*, This being an Action *in Cur' Scacc'*, a Writ of Error lies only to the Exchequer Chamber, where they have no Juriſdiction of Error in Fact.

April 30, 1730, Sir *James Reynolds*, one of the Judges of the King's Bench, appointed Lord Chief Baron of the Exchequer in the room of Lord Chief Baron *Pengelly*, who died at *Blandford* in *Dorſetſhire* upon the laſt *Lent* Circuit, about the 30th of *March* laſt.

DE
Term. S. Trinitatis,
1730.

Chubbs v. *Billington.* Junii 6°, 1730. 361.

THE Plaintiff (being a Woman) married after the interlocutory Judgment, and before the executing the Writ of Inquiry; and it was now moved to ſet aſide the Writ of Inquiry and the Inquiſition thereon taken: But *per totam Curiam* it was refuſed, and the Defendant was left to his *Audita Querela.*

Feme marries after interlocutory Judgment, and before the Writ of Inquiry.

The Attorney General v. *White.* 362.
Eodem Die.

ON Trial of an Information for importing Brandy by the Defendant's Teſtator; there was a ſpecial Verdict, which found that the Importation was upon the 10th of *April* 1725, but by the Minits it was in 1719 and 1720. *Per totam Curiam*, it was permitted to be amended, though it had been once argued.

Amendment of a ſpecial Verdict after one Argument.

Benſon

363. *Benſon* v. *Olive*. Junii 8°, 1730.

Bill by an Impropriator for Tithe Hay.

BILL by the Impropriator of *Bromley St. Leonard*'s in the County of *Middleſex* for Tithe Hay, &c.

Defendant does not deny Plaintiff's Title, but ſets up Exemption.

The Defendant in his Anſwer does not deny the Plaintiff's Title, but inſiſts upon Exemption, as being Parcel of one of the larger Abbies which came to the Crown by the Stat. 31° *Hen.* 8.

So Defendant muſt firſt prove his Exemption.

Now upon hearing the Cauſe the Lord Chief Baron thought, that where the Defendant admits the general Right, and inſiſts only upon his Exemption, ſuch Admiſſion is ſufficient to put the Defendant upon proving his Exemption, and the Plaintiff (although a Lay Impropriator) is under no Neceſſity of proving Payment of Tithes to him.

Decree refuſed to be read, becauſe not proved to be touching the ſame Lands or Title.

2dly, A Decree in 1673 was offered to be produced in Evidence, wherein the then Impropriator, was Plaintiff, and *Semain* Defendant, and wherein the Plaintiff's Title was affirmed; but the Court would not permit this Decree to be read, becauſe the now Plaintiff could not ſhew that the Defendant claimed either the ſame Lands, or under the ſame Title as *Semain*.

Miniſters Accounts in 34 & 35 H. 8. permitted to be read.

3dly, It was objected for the Plaintiff, that the Defendant's producing Miniſters Accounts in 34° & 35° *Hen.* 8. was not ſufficient, being ſubſequent to the Stat. 31° *Hen.* 8. but that he ought to ſhew the Surrender, or when it came to the Crown: But this Objection was over-ruled.

4thly,

4thly, A Deed was produced by the Plaintiff dated 30th of *March* 1690, and it was admitted it was old enough to be read without Proof; but Baron *Carter* objected, that the Plaintiff ſhould give ſome Account how he came by it; but the Lord Chief Baron ſaid he could not ſee the Uſe of that, and it would be very inconvenient; for then there muſt have been an Interrogatory to prove this Matter by Depoſitions, for it could not be inquired into on the Order to prove Exhibits; and the Deed was read at laſt, but by Conſent, though the reſt of the Barons ſeemed to be of Opinion with the Lord Chief Baron.

A Deed 40 Years old proves itſelf, and Plaintiff need not prove where he had it, or how he came by it.

5thly, Another Deed in 1694 was offered, but objected to, by the Defendant, as not being old enough to prove itſelf; and *per Curiam*, this Deed was not admitted to be read; for though ſometimes thirty-five or even thirty Years has been thought ſufficient, yet not where it is objected to; but the uſual Rule is forty Years.

A Deed 35 Years old does not prove itſelf.

6thly, The Plaintiff had brought an Action againſt the Defendant upon the Stat. *Ed.* 6. and obtained a Verdict, which he offered now in Evidence; but it was oppoſed, becauſe this was a Matter which happened after Iſſue was joined in this Court; and the Plaintiff not being able to prove that *that* Trial was for the ſame Lands, the Court refuſed to admit it.

A Verdict refuſed to be read, becauſe not proved to be touching the ſame Lands.

Nota, At laſt the Bill was retained for a Year, and the Plaintiff to be at Liberty to bring his Action in the mean time.

364. *Rex* v. *Roſevere*. Junii 9°, 1730.

Whether Judgment can be arreſted as to Part, and given pro Rege as to the other Part, upon an Information.

INFORMATION for importing Salt without Payment of the Duties, for the treble Value on the Stat. 8° *Annæ*; and alſo for one hundred Pounds Penalty on the Stat. 5° *Geo.* 1. *c.* 18. the Defendant being concerned in unſhipping, knowing the Duties not to be paid. There was a Verdict *pro Rege.*

And upon a Motion for a new Trial an Objection was ſtarted by Baron *Comyns*, that the Information laid it, that it was without Duty being ſatisfied or paid, or Warrant for landing the ſame, whereas the Stat. 8° *Annæ* ſays, "*paid, or ſecured to be paid*;" Mr. Attorney General therefore gave it up that he could not have Judgment on the Stat. 8° *Annæ* for the treble Value, but inſiſted that he might on the other Part of the Information for the Penalty of one hundred Pounds, on the Stat. 5° *Geo. cap.* 18. which has not the Word *ſecured*, but ſays,---ſhall *over and above the Penalties already given* forfeit one hundred Pounds: And upon this the Debate was, whether Judgment could be arreſted as to Part, and given *pro Rege* for the other. There was ſome Doubt and Difference in the Court about this, and it was adjourned to be further argued, wherefore I have not now ſet down what was then offered on both Sides.

Allen 74.

Poſt Pl. 378.

3

Kerſlake,

Kerſlake Adm' of Frankpitt v. *Pannel & al'.* June 15, 1730. 365.

BILL for a Diſcovery and Relief, ſuggeſting that the Defendants broke into the Room of the Inteſtate (who died ſuddenly) and took away ninety-nine broad Pieces, twenty-two Guineas, Bonds, Notes and Memorandums.

Bill for Diſcovery and Relief, ſuggeſting that Defendant broke into the Inteſtate's Room and took away 99 broad Pieces, &c. diſmiſſed, as proper at Law, the Equity in the Bill being denied.

On the Hearing, I objected that this was proper at Law, the Defendants having denied the whole Equity of the Bill, and that this was a mere Tort, and that Trover would lie for the Money, *&c.* and cited the Caſe of *Dr. Sloan* v. *Heathfield*; and on the other Side were cited 1 *Vern. Hunt* and *Matthews*, 2 *Vern.* 33. But *per totam Curiam*, The Bill was diſmiſſed with Coſts.

Lee v. *Holland.* June 17, 1730. 366.

INDEBITATUS aſſumpſit, the Defendant brought ſixteen Shillings into Court; upon the Trial there was a Verdict for the Defendant, and now the Plaintiff moved that he might have the ſixteen Shillings out of Court, though the Verdict was againſt him, which was ordered accordingly. But *nota*, the Plaintiff was a *Pauper*, otherwiſe the Defendant would have had the ſixteen Shillings towards his Coſts.

Money paid into Court, and Verdict for the Defendant, the Plaintiff being a Pauper, ſhall have it paid out to him.

DE
Term. S. Michaelis,
1730.

367. *Dean Cl'* v. *North.* Oct. 27, 1730.

Bill to redeem a Mortgage of 37 Years ſtanding.

MR. *North* had been in Poſſeſſion, as Mortgagee, ſince 1686; he apprehending that there would be no Redemption, the Mortgageor having gone off inſolvent, and having more than the Value upon the Eſtate, looked upon it as his own, and kept his Accounts of this Eſtate intermixed with his own (which was very conſiderable) for many Years; but in the Year 1720 a Bill was brought by the Repreſentative of the Mortgageor, after thirty-ſeven Years ſince the time of the firſt mortgaging, for a Redemption; and Mr. *North* preferred a Bill for a Foreclоſure, and upon Hearing the uſual Decree was made, that he ſhould account, have all juſt Allowances, and be examined on Interrogatories, which he was; and it appeared thereby, that the Eſtate was indebted to him above five thouſand Pounds: Now it was moved for the Plaintiff, that the Defendant ſhould produce all Books, Writings and Papers relating to the Account on Oath; which the Court ordered as to the Books and Papers (though not directed

rected in the Decree, and though attended with the Circumſtances before-mentioned) but made no Order as to the Writings relating to the Title.

Terry v. *Harriſon.* Eodem Die. 368.

IT was moved that an Injunction on an Attachment ſhould extend to ſtay the Defendant's receiving *South-Sea* Annuities; which was granted, the Anſwer not being come in, and this being according to the Prayer of the Bill.

Injunction to ſtay Defendant's receiving S. S. Annuities.

Fricker v. *Moore.* Oct. 28, 1730. 369.

THIS Day the Court ſuppreſſed Depoſitions, becauſe they were taken before the Plaintiff's Solicitor, who was one of the Commiſſioners, and alſo ordered the Solicitor to pay all the Coſts, or an Attachment to go againſt him.

Depoſitions ſuppreſſed becauſe a Commiſſioner is Solicitor for Plaintiff.

Snowden v. *Herring.* Nov. 6, 1730. 370.

WHERE Churchwardens have paſſed their Accounts at a Veſtry, the Spiritual Court ſhall not afterwards proceed againſt them to account upon Oath; ſo held *per totam Curiam*, on a Motion to diſcharge the Rule to ſhew Cauſe why a Prohibition ſhould not go.

After a Churchwarden's Accounts allowed at a Veſtry, the Spiritual Court ſhall not proceed againſt him to account on Oath. Ante Pl. 318.

371. *The Attorney General at the Relation of Jackſon* v. *The City of Coventry.* Nov. 10, 1730.

Corporation as Truſtees of a Charity, not obliged to produce their Books relating thereto.

IT was moved that the Defendants, who were Truſtees for a Charity, might produce their Books and Writings relating to the Truſt, and which they confeſſed in their Anſwer, and that they were ready to be produced as the Court ſhould direct: But *per totam Curiam* denied; for though the Information was againſt the Body, yet it was only as they were Truſtees, and not as a Corporation, and this being their private Evidence, they ſhall not be obliged to diſcover it; and it is not like the Caſe of Corporation Books, or Court Rolls, which are of a public Nature; and Baron *Comyns* ſaid that it was the Opinion of Lord *Trevor*, that where the Diſpute about the Cuſtom of the Manor, &c. is between the Lord and a Stranger, who conteſts any of the Cuſtoms of the Manor, there the Lord ſhould not be obliged to let him have the Inſpection of the Rolls, becauſe it was his private Evidence; but if the Diſpute is between two Copyholders, or between a Copyholder and the Lord, he ſhall produce the Rolls, and permit Copies to be taken thereof.

372. *Lord Berkley* v. *Verden.* Nov. 17, 1730.

Where the time for anſwering is out, the Defendant ſhall be deemed in Contempt, though no Attachment is ſealed.

UPON a Motion for time to anſwer, it was declared it ſhould be an eſtabliſhed Rule for the future, that where time for anſwering is out, the Defendant ſhall be deemed in Contempt, though no Attachment is ſealed; and in ſuch Caſe he ſhall not

Ante Pl. 325.

have farther time to anſwer without entering his Appearance with the Regiſter as upon a Contempt, *per tot' Cur'*.

Hooper v. *Lethbridge & al'*. 373.
Nov. 19, 1730.

Tithes. Bill diſmiſſed for want of Parties.

BILL by Lay Impropriator for Tithes in *Pilton* in the County of *Devon*; ſome of the Defendants inſiſted by their Anſwer that Part of the Lands, of which Tithes were demanded, ought to pay Tithes to Mr. *Incledon*, who was intitled to a Portion of Tithes in *Pilton*; other Defendants inſiſted that they were Tenants to Mr. *Rolle*, and that King *Henry* the Eighth granted to his Anceſtors their Lands and the *Tithes thereof*, prior to a Grant of the Rectory under which the Plaintiff claimed; neither *Incledon* nor Mr. *Rolle* being made Parties, it was objected that the Plaintiff could not proceed as to theſe Lands reſpectively; and though Mr. *Incledon* was before the Court as Plaintiff in the Croſs Bill, yet *that* praying an Exemption as to other Lands; both Objections were allowed *per totam Curiam*.

Makepeace & al' v. *Needler & al' and the Attorney General*. 374.
Nov. 21, 1730.

Bill diſmiſſed for want of making the Commiſſioners of Exciſe Parties.

BILL charges that the Plaintiff was bound for *Clarke* (who was Door-keeper and Accountant of the impreſt Money to the Commiſſioners of Exciſe) for juſtly accounting and faithful Performance of his Duty during the time he continued in his Office, which was from *November* 1727 to *June* 1730, in which time *Clarke* had received a conſiderable Sum, but had paid more than he had received about one

one hundred and ſixty-one Pounds; and ſo it would appear by the Books of Account delivered by *Clarke* (when he went out of his Office) to the Defendants, who were Accountants to the Commiſſioners of Exciſe; notwithſtanding which it was pretended, that *Clarke* was indebted, at the time he went out of his Office, above two hundred Pounds, and thereupon a *Scire facias* iſſued againſt the Plaintiff on his Bond, whereas he charges that if there was any ſuch Arrear, it was incurred before the time he (the Plaintiff) became bound, and therefore prays againſt the Attorney General (who was Party to the Bill) that Proceedings might ſtay on the *Scire facias*, and that the other Defendants (Accountants) might diſcover if *Clarke* did not, on his going out of Office, deliver ſuch Books of Account to them, and that the Plaintiff might have Liberty to inſpect them, and take Copies at his own Expence.

To this whole Bill the Defendants (Accountants) demurred, becauſe the Commiſſioners of Exciſe were not made Parties; and upon arguing it for the Plaintiff it was inſiſted on, that there was no Neceſſity for ſuch Parties, for the Attorney General having the Superintendency of the whole Revenue, he ſtood in the Place of the Commiſſioners, and could litigate the Account without them: But *per totam Curiam*, The Defendants (demurring) appear to be only miniſterial Officers to the Commiſſioners, and in Nature of Servants, and they thought the Commiſſioners now in Being ſhould be made Parties, though the Commiſſion might be varied from the time the Plaintiff firſt became bound; and allowed the Demurrer.

The Biſhop of Hereford v. *Cooper & al'* & *è contra*. Nov. 21, 1730. 375.

IT was moved for Leave to read the Decree and Depoſitions in a former Cauſe, ſaving juſt Exceptions; and though this had been formerly taken to be a Motion of courſe in this Court, and was now every Day done in Chancery, yet the Order could not now be obtained, there being *two Barons* againſt *two*; *the two* who oppoſed it diſtinguiſhed between this Court and the Court of Chancery; *there* they had but one Judge, *here* were four; and if Depoſitions ſhould be offered to be read, and two Judges ſhould be of Opinion they ought not, and two of another Opinion, yet they muſt then be read, there being no juſt Exception. (But *quære de ceſt Reaſon.)*

The Court divided in a Motion of courſe, which was to read a Decree and Depoſitions, ſaving juſt Exceptions, yet they muſt be read.

Rex v. *Allen*. Dec. 7, 1730. 376.

AN Extent iſſued againſt *Allen* the Receiver General of the Land Tax and Duties upon Houſes in the County of *Norfolk*; an Inquiſition taken on that Extent finds ſeveral Perſons indebted to *Allen* to the Amount of fourteen thouſand Pounds, but moſt of theſe were ſmall Debts; ſo that if ſeparate Extents were to be taken out againſt each ſeparate Debtor (as the old and uſual Practice of the Court is) the Value of the Debts would be ſwallowed up by the Expence of ſo many Extents: Mr. Attorney General therefore moved, that inſtead of taking out ſo many Extents, a Receiver might be appointed (who ſhould give Security) to collect in theſe Debts, and pay them to the Deputy Remembrancer of this Court for the Be-

Upon an Extent to find Debts, a great Number of ſmall ones are found: A Receiver is appointed to ſave Expence of a great Number of Extents.

nefit of the Crown, it being alſo for the Benefit of all Parties to ſave the Expence of ſo many Extents. And *per Curiam*, This was granted.

377. ## *Anonymous.*

A Rector compounds with Pariſhioners for Tithes at ſo much per Annum, and dies before the End of the Year.

A RECTOR agrees with a Pariſhioner for his Tithes for a certain Sum payable yearly at *Michaelmas*; the Rector dies the Beginning of *September*, the Agreement determining by the Death of the Parſon, the Succeſſor ſhall be intitled to Tithes in Kind only from the Death, and the Executor of the laſt Incumbent to a Proportion according to the Agreement 'till the time of his Teſtator's Death, and this is by an equitable Conſtruction.

Quære the Caſe of *Muly* and *Webber*, wherein it was ſo reſolved *in Scaccario*.

DE
Term. S. Hilarii,
1730.

Rex v. *Roſevere.* Feb. 12, 1730. 378.

THIS Day the Lord Chief Baron gave the Opinion of the whole Court, that Judgment ought to be arreſted *in toto.* See this Caſe before *Pl.* 364. AntePl.364.

The Biſhop of Ely & al' v. *James & al'.* 379.
Eodem Die.

A BILL was brought for a Commiſſion to aſcertain the Bounds of Leaſehold Lands belonging to the Biſhop of *Ely*, intermixed with Freehold Lands belonging to the Defendant *Kenrick*; the other Defendant *James* (who was Steward to *Kenrick)* by the Draught of his Anſwer ſwore, that twenty-five or thirty Acres had, thirty-five Years ago, been allotted to the Biſhop; in the Ingroſſment it was, by Miſtake, made two hundred and fifty or three hundred, and *ſo* ſworn; whereupon I now moved (on an Affidavit of the Miſtake, and how it came) to amend the Anſwer in this; which was granted *per totam Curiam.* Amendment of an Anſwer by the Draught.

Curiam. There was another Miſtake of eighty-ſix Acres inſtead of ſixty-eight, but *that* they would not let us amend, becauſe the Draught and Ingroſſment were the ſame.

At Serjeants Inn, Feb. 18, 1730.

380. ## *Leigh* v. *Maudſley.*

Tithes. Bill by a Lay Impropriator.

A LAY Impropriator by his Bill ſets forth, that in the Year 1724 he was ſeiſed in Fee of all impropriate Tithes in the Townſhip of *Weſthaughton* in the Pariſh of *Dean* in the County of *Lancaſter*.

He only proved theſe Tithes belonged to the Andertons, under whom he claimed, and ſufficient.

Upon the Hearing he went no farther in his Evidence of the Title, than that about thirty-four Years ago theſe Tithes were reputed to belong to the *Andertons* of *Loſtock*, under whom the Plaintiff claimed; it was objected for the Defendant, that here was not a ſufficient Title ſhewn, ſince a Layman was not capable of Tithes in *Pernancy* but from the Crown, ſince the 32° *Hen.* 8. and therefore it was incumbent on the Plaintiff to ſhew how he derived them out of the Crown.

But *per totam Curiam*, If he had ſet out in his Bill a Title under the Crown, and derived it down, he muſt have proved it as he had ſet it forth; but ſince he had not, this Proof was ſufficient. (*Quod nota & quære* former Practice.)

Where a general Exemption is inſiſted on, a partial one cannot be admitted in Proof.

The Defendant in his Anſwer inſiſted, that his Lands were diſcharged as being Parcel of the Poſſeſſions of the Abbey of *Cockerſand*, diſſolved by the Stat. 31° *Hen.* 8. But there having been ſeveral Inſtances of Payment of Tithes of Corn in Kind, they farther

farther alledged, that ſince no Hay had ever been paid, that as to *that* Species of Tithe they ought in all Events to be diſcharged, as againſt a Lay Impropriator.

But *per Curiam*, Though a Defendant may in Equity inſiſt on ſeveral Defences which are conſiſtent, yet having undertaken to prove a general Exemption, and failing in *that*, he cannot have the Benefit of the other Point; ſo the Defendant was decreed to account generally.

DE

Term. Paſchæ,

1731.

381. *Siddon* v. *Charnells & al'.* May 6, 1731.

Mortgagee gets a Settlement into his Hands by indirect Means, yet ſhall not be obliged to deliver it up.

A. Upon the Marriage of his Son, ſettles his Eſtate upon his Son for Life, then on the intended Wife for Life, Remainder to the Heirs of the Huſband on his Wife begotten, Remainder to the right Heirs of the Wife.

A. dies, the Son has Iſſue *B.* and *C.* by his Wife, and dies; the Wife marries again, and ſhe and her Huſband agree to convey their Intereſt to *B.* the eldeſt Son, and for that Purpoſe depoſit (among other Deeds) this Settlement in the Hands of an Attorney to draw an Abſtract of the Title, and then to deliver them all into the Hands of *E.* for the Uſe of *B.* after the Conveyance to the Son *B.*

B. dies without Iſſue, ſo that the Lands came to *C.* the ſecond Son, who demanded this Settlement made by the Grandfather, and preferred a Bill againſt the Attorney and againſt a pretended Mortgagee (as alledged in the Bill) for to have it delivered up to him;

The Attorney in his Anſwer admitted that he had the Settlement, ſet it forth *in hæc Verba*, and ſaid he was ready to produce it as the Court ſhould direct; but before the Hearing of the Cauſe he delivered it to the Mortgagee.

And it was now inſiſted for the Plaintiff, that though a Court of Equity might not oblige a fair Purchaſor to deliver up a Security, which corroborates his Title, whatever Means he procured it by, yet that the Defendant (the Attorney) having had *this* in his Hands for a particular Purpoſe, and delivering it up *pendente Lite*, was guilty of a Breach of Truſt, and of ſuch a Miſdemeanor, that a Court of Equity would compel him to procure the Deed, or commit him until he did.

But the Court thought he was equally a Truſtee for the Mortgagee as for the Mortgageor (who was only Tenant in ſpecial Tail, and no Fine levied or Recovery ſuffered) and therefore diſmiſſed the Bill.

Hughes v. *Owen*. May 11, 1731. 382.

A BILL was taken *pro confeſſo*, the Defendant being brought up three times, and charged with it, and not putting in any Anſwer; I now moved upon an Affidavit that the Defendant was in *Shrewſbury* Gaol at the time he was ſerved with the *Subpœna*, that he employed an Attorney in the Country to appear and put in an Anſwer for him, but neglected it, that he had ſince been removed to the *Fleet*, where he had continued ever ſince in poor Circumſtances, but had lately procured Money to defend his Cauſe) that he might be at Liberty now to put in his Anſwer.

After a Bill is taken pro confeſſo, the Defendant not permitted to put in his Anſwer.

But

But *per totam Curiam* the Motion was denied; and indeed I thought there was neither Reaſon nor Precedent for it.

Nota, The Bill was brought by a ſecond Mortgagee to have the Eſtate abſolutely by virtue of the Statute of 4 & 5 *W.* & *M. cap.* 16. the Defendant not giving Notice of the firſt Mortgage, which the Defendant denied, but not by Affidavit.

383. *Rex* v. *Jans vel Smith.* May 12, 1731.

Extent to find Debts finds a Merchant indebted to the Sub-collector of the Cuſtoms, an Extent in Aid ſhall not go.

JANS, Sub-collector of *Biddiford*, takes out an Extent againſt himſelf to find Debts.

Upon the Inquiſition *Smith* (who was a Merchant in *Biddiford)* was found indebted to *Jans* in one hundred and fifty Pounds, Money had and received to the Uſe of *Jans*.

Jans therefore moved for an immediate Extent againſt *Smith* upon this Inquiſition, and upon an Affidavit that *Smith* was in ſuſpicious Circumſtances, and that the Debt was in Danger of being loſt.

But *per totam Curiam (viz.* Lord Chief Baron *Reynolds*, Baron *Carter* and Baron *Comyns)* it was denied, becauſe it might be of dangerous Conſequence in the Caſe of a Trader; and it did not appear, but that this was a ſimple Contract Debt, and that this one hundred and fifty Pounds was not the Money of the Crown; beſides, the Affidavit did not go far enough, and was not according to the old Form.

Kennedy

Kennedy Cl' v. *Goodwin.* May 13, 1731. 384.

RECTOR brings a Bill for Tithes in the Pariſh of *South Okenden* in the County of *Eſſex*;

Modus of 4l. 10s. per Annum for a Farm of 30l. per Annum is too rank.

The Defendant inſiſts upon a Modus of four Pounds ten Shillings, payable yearly at ſuch a Day, for his Farm called *Quince Farm*, which was thirty Pounds *per Annum*.

It was objected for the Plaintiff, that this Modus was too rank, and of that Opinion was the whole Court; and the Defendant was decreed to account.

Nota, The Caſe of *Edge* v. *Oglander*, *Ter. Hil.* 1691, was cited for the Defendant, where a Modus of eight Pounds for a Farm of eighty Pounds *per Annum* was allowed to be a good Modus; and alſo the Caſe of *Biſhop* v. *Arundell*, *Paſc.* 1705, where a Modus of twenty-ſix Pounds *per Annum* for a *Farm* (not ſaying of what Value the Farm was) was allowed.

Fereyes v. *Robertſon & al'.* Eodem Die. 385.

A MAN by his Will deviſes his Leaſehold Eſtate, and other his Chattels real to his Son *William*, and to the Iſſue of his Body; and if he die without Iſſue, to his Son *B.* and the Iſſue of his Body; and if he die without Iſſue, to *C.* &c.

Deviſe of a Leaſehold in Tail with Remainders over, the whole veſts in the firſt Deviſee. 1 Ro. Abr. 611. L. 1. Moore 810. 1 Sid. 37. 2 Vern. 43.

Per totam Curiam, The whole Intereſt veſts in *William*, and ſhall go to his Executors or Adminiſtrators, and the Limitations over are void.

Freehold Eſtate deviſed to be ſold for Payment of Debts, yet the perſonal ſhall be firſt applied, there being no negative Words.

A Man deviſes all his Freehold Houſes, Lands and Hereditaments in *Whitehaven* to three Truſtees, to hold to them in Truſt, that the Freehold Eſtate ſhall be ſubject to, *and be ſold* and diſpoſed of by them for Payment of his juſt Debts; and after diſpoſing of ſome particular Legacies he gave to his Nephew the Reſt and Reſidue of his Goods, Chattels, Debts, Rights, Credits, and perſonal Eſtate not before diſpoſed of.

Hereupon the Queſtion was, whether the perſonal Eſtate ſhould be firſt applied to the Payment of the Debts, notwithſtanding the real Eſtate was expreſſly deviſed for that Purpoſe.

The Counſel for the Defendants (who were the Truſtees and reſiduary Legatee) inſiſted that the real Eſtate being not only made ſubject, but directed to be ſold for Payment of the Debts, the perſonal Eſtate ſhould not be applied for that Purpoſe, and cited 1 *Lev.* 203. 2 *Vern.* 718.

But *per totam Curiam*, Here being no negative Words to exclude the perſonal Eſtate from being applied for the Payment of Debts, *that* ought to be firſt applied for the Benefit of the Heir at Law (who was the Plaintiff); and decreed accordingly *.

Errington

* By Lord C. *Hardwicke*, in the Caſe of *Walker a Bond Creditor* v. *Jackſon & al' Heir and Executor of Teſtator*, upon a Rehearing at *Lincoln's Inn* Hall, *July* 22, 1743. The General Rule is, that the perſonal Eſtate ſhall be firſt charged with Payment of Debts and Legacies, and the Teſtator cannot exempt it from being liable to his Debts, as againſt Creditors; but as between Heir and Executor he may charge them upon any other Fund, which is not primarily liable, and diſcharge the perſonal Eſtate. There are ſeveral Ways, by any of which a Man may give his real Eſtate for Payment of his Debts; as firſt, to Truſtees; ſecondly, by way of Charge in Equity, which this Court will decree to be performed; or thirdly, he may direct that his real Eſtate may be ſold for Payment of his Debts; but let him do it what Way he pleaſes, none of thoſe Ways will make the real Eſtate firſt chargeable, if there be not in the Will, either expreſs Words, or a manifeſt

Errington v. *The Attorney General & the Executors of Sir Ran. Knipe.* May 25. 386.

Interpleader. There muſt be an Affidavit annexed to the Bill.

UPON a Bill of Interpleader by the Plaintiff againſt the Attorney General, and the Executors of Sir *Randolph Knipe*, it was agreed *per Curiam*, that there is a Neceſſity of annexing an Affidavit to the Bill, or elſe it is demurrable to. (But *quære* if there is any Neceſſity where only private Perſons are Defendants.)

In this Caſe the Attorney General had put in the common Anſwer, *viz.* that he was a Stranger to the Matters in the Bill, and that he hoped the Intereſt of the Crown would be taken care of, &c.

The Defendants (*Knipe*'s Executors) now moved, that the Plaintiff's Bill might be diſmiſſed, and the Injunction diſſolved, and that they might have the eighty-nine Pounds three Shillings and ſix Pence (brought into Court by the Plaintiff) paid to them.

The Attorney General permitted to withdraw his general Anſwer, and to put in another, inſiſting on the particular Right of the Crown.

This was oppoſed by Mr. Attorney General, who at the ſame time prayed that he might be at Liberty to withdraw his general Anſwer, and put in another Anſwer, inſiſting on the particular Right of the Crown to this Money.

And *per totam Curiam* it was granted, and thought it would be very unreaſonable to diſmiſs the Plaintiff's Bill, or diſſolve the Injunction, and to leave him

manifeſt Intent to diſcharge the perſonal Eſtate, but it ſhall be firſt liable. *Vide* 2 *Vern.* 568. *Gilb.* 73. *Prec. in Can.* 101. And *quære* the Caſes of *Baddiſk* v. *Liſle*, 2 *Nov.* 1732; *Bromhall* v. *Wilbraham*, at the Rolls, 1734; and *Stapleton* v. *Coleville*, at the Rolls, *July* 17, 1735, affirmed *July* 10, 1736, *coram* Lord *Talbot*.

afterwards

afterwards to be harraſſed at Law by either Party, when he had acknowledged the Debt and paid the Money into Court, but did not know to which of the Parties to pay it to; and now the Defendants are become in the Nature of Plaintiffs.

1 Vern. 351. *Quære* if the Plaintiff has any thing more to do, when both Anſwers are come in, than to move that the Defendants may interplead between one another?

387. *Woodward* v. *Aſtley & al'.* May 26, 1731.

Impertinence and Scandal. Ante Pl. 91.

PER *Curiam*, After an Anſwer is come in, it is too late to refer the Bill for Impertinence; but it is never too late to refer for Scandal.

DE
Term. S. Michaelis,
1731.

Rex v. *Burrell.* Nov. 6, 1731. 388.

Poundage to the Sheriff upon a Levari.

BURRELL was outlawed at the Suit of *Luſcomb* in a Plea of Debt in the Common Pleas, from whence a ſpecial *Capias utlagatum* iſſued, and ſeveral Lands of the Defendant in the County of *Devon* were ſeiſed.

The Outlawry being tranſcribed into the Exchequer, a *Levari* iſſued to the Sheriff, by virtue of which he levied the Rents and Profits to the Value of ſixty Pounds.

The Defendant obtained an Order for ſix Weeks time to plead, and to have Reſtitution of the Money upon giving Security, which Order was ſerved upon the Sheriff, and which he was willing to comply with, *deducting his Poundage*, according to the Stat.

Now upon Motion for an Attachment againſt the Sheriff for not obeying the Order, the Queſtion was,

whether he ſhould not retain his Poundage, or ſhould be left to have it allowed in his Accounts with the Crown.

And *the Court* ſeemed clearly of Opinion he ſhould detain his Poundage, and pay the Reſidue only to the Defendant, but would not abſolutely determine it in this Method.

389. *Barkley & al'* v. *Walters*. Nov. 6, 1731.

Officer of Cuſtoms ſeiſes two Cables, one whereof is only foreign, the Court refuſed to remove the Action of Treſpaſs from B. R.

A Cuſtom-houſe Officer ſeiſed two Cables on board a Ship after ſhe was cleared, and brought them on ſhore, being not reported; one of them was a foreign Cable, and ſo forfeited by the Stat. 5° *Geo.* 1. *c.* the other he would have brought back again to he Ship, but the Maſter refuſed to receive it, unleſs he could have them both.

The Owners of the Ship brought an Action of Treſpaſs againſt the Officer for taking fifty thouſand Pounds Weight of Ropes and Cordage in *B. R.* ſo I this Day moved to remove the Action into this Court, the Defendant being an Officer of the Revenue, acting in the Execution of his Office, and the foreign Cable being actually condemned in this Court.

But it not appearing, but that the Action was brought in *B. R.* for the other Cable *only*, the Court denied the Motion.

Brinklow

Brinklow & al' v. Edmonds Rector of the Pariſh of Newton Longville in the County of Buckingham. Nov. 7, 1731. 390.

A BILL was exhibited by the Landholders, &c. to eſtabliſh ſeveral Modus's in the Pariſh of *Newton Longville* in the County of *Buckingham*. Bill to eſtabliſh Modus's.

Firſt, That Tithe Milk ought to be paid by every tenth Evening and Morning's Meal in Kind from *Hoe Monday* to the ſecond Day of *November*, to commence upon the Evening of *Hoe Monday* (*i. e.* the *Monday* Fortnight after *Eaſter* Day) and the Morning following to be taken by the Rector at the Place of Milking, and no Tithe Milk to be paid for the Reſidue of the Year. Milk. Payment of Part for the Whole is a bad Modus.

But *per Curiam*, This is void upon the Face of it, being only a Payment of Part for the Whole.

The Second was a Modus of an Half-penny for each Calf in lieu of Calves, payable on *Wedneſday* before *Eaſter*: This was admitted by the Defendant, and eſtabliſhed. An Half-penny for each Calf, good.

The Third was a Smoak Penny, in lieu of Fire-wood burnt in their reſpective Houſes, which was alſo admitted and eſtabliſhed. A Smoak Penny for Fire-wood, good.

The Fourth was an Half-penny, payable on Sheer Day for the Wool of each Sheep dying between *Candlemas* and Sheer Day, which was likewiſe admitted and eſtabliſhed. An Half-penny for each Sheep dying, good.

The Fifth was four Pence *per* Month, payable on Sheer Day, for the Tithe of Wool of every hundred Sheep ſhorn in the Pariſh, which were brought into it after the ſecond Day of *February*. 4 d. per Month for Wool of every 100 Sheep, good.

As

As to this it was objected for the Defendant, that the Witneſſes differed in their Evidence as to the time of Payment, one proving it to be payable about *Eaſter*, the others a few Days after Sheering Day; but notwithſtanding this Objection it was eſtabliſhed, the Defendant having no Proofs in the Cauſe.

Modus decimandi Lambs.

Sixthly, Where the Pariſhioner has ten Lambs, the tenth is due to the Rector on Saint *Mark*'s Day; if nine, the Rector is to have one, and pay the Pariſhioner an Half-penny; if eight, he is to have one, and pay the Pariſhioner a Penny; and when ſeven Lambs, the Rector is to have one, and pay the Pariſhioner three Pence Half-penny; but for a leſs Number the Rector is to have no Lamb, but is only to have an Half-penny paid him for each Lamb under ſeven.

This was eſtabliſhed, notwithſtanding it was objected that by the Caſe of *Reignolds* v. *Vincent* a Payment on Saint *Mark*'s Day was adjudged void. But *nota*, it was proved in this Cauſe that the Parſon had a Benefit; for when there were ten Lambs, after the Pariſhioner had taken two, the Rector was to chooſe his one.

Seventhly, The like Modus as to Pigs was alſo eſtabliſhed.

Eggs and Chickens. Not to extend to Turkies becauſe brought into England lately.

Eighthly, Three Eggs for every Cock and Drake, payable on *Wedneſday* before *Eaſter*;---and for every Hen and Duck reſpectively three Eggs, in lieu of Tithe Eggs and Chickens and Ducks hatched in the Pariſh, eſtabliſhed all as above without Trial, the Defendant having no Proof.

Drake v. *Hopkins*. Nov. 13, 1731. 391.

NOTA, It was this Day declared by the Court upon a Motion for a Rehearing in this Cauſe, (wherein it was granted, though after two Years and an Half ſince the Decree, and after the Parties had been long before the Deputy upon their Charge and Diſcharge) That for the future no Rehearing ſhould be granted, unleſs Application was made for it within ſix Months after pronouncing the Decree.

A Rehearing muſt be applied for in ſix Months after the Decree.

Penny v. *Bailey*. Nov. 17, 1731. 392.

TROVER was brought in the Common Pleas againſt a Cuſtom-houſe Officer for a Quantity of Tea and other Goods; and in the Declaration the Plaintiff threw in a great Coat, Saddle, Whip, and Spurs.

Trover againſt a Cuſtom-houſe Officer removed from C. B.

Now it was moved by Mr. Solicitor General to remove the Action into this Court, upon an Affidavit that the Tea and other Goods ſeiſed were actually condemned, and that the Defendant had not ſeiſed the great Coat, &c. and they were only thrown in to give a Colour to his Action *there*; the Plaintiff not coming to ſhew any Cauſe why the Action ſhould not be removed, the Rule was made abſolute.

393. *Niblett* v. *Daniel.* Nov. 18, 1731.

If the Cauſe ſtands over to add a material Defendant, the Depoſitions taken before cannot be read againſt him.

IT was this Day declared in this Cauſe by the Court, that if a Cauſe is brought to Hearing, and there is an Objection for want of Parties, and the Court lets the Cauſe ſtand over with Liberty for the Plaintiff to add a Party; if *that* Party is *a material Defendant; and concerned in Intereſt*, the Depoſitions taken before, cannot be read againſt this Defendant, he not being a Party when Iſſue was joined, and the Commiſſion executed.

Q. Then what Method to take, ſince they cannot examine *de novo*, becauſe Publication was paſſed before.

Will of Lands not to be proved as an Exhibit.

It was alſo declared in this Cauſe, that for the future no Will of a real Eſtate ſhall be proved as an Exhibit.

394. *Lady Lawley alias Halpen* v. *Halpen.* Nov. 24, 1731.

A Feme Covert permitted to change her Prochein Amy.

A Feme Covert, who had brought a Bill againſt her Huſband by her *Prochein Amy*, having ſome Suſpicion that the Huſband and the *Prochein Amy* were in a Confederacy, moved to change her *Prochein Amy* after there had been a conſiderable Progreſs in the Cauſe; which the Court at firſt were in ſome Doubt about, becauſe it would be a Queſtion whether the ſucceeding *Prochein Amy* would be liable to the Coſts before his time; but at laſt they ordered that there ſhould be a new one named, he entering into a Recogniſance to anſwer the Coſts, and abide the Order on Hearing.

The

The Attorney General v. *Poppleſtone.* 395.
Dec. 2, 1731.

One in Execution upon a Judgment on an Information for being concerned in unſhipping, &c. is no Bar to an Information againſt *another* for the very ſame thing.

ON a Trial before the Lord Chief Baron *Reynolds* at *Weſtminſter*, upon an Information againſt the Defendant for being concerned in unſhipping, &c. contrary to the Stat. 8° *Annæ*, it was objected that one *Ruſſell* had been found Guilty on an Information of the ſame Nature for the ſame Goods, and was actually in Execution in the *Fleet* upon that Judgment; and therefore the Crown could not have a double Satisfaction, and quoted *Moore* 553. *Noy* 62. *Cro. Eliz.* 480. and inſiſted that in this Caſe an *Audita Querela* did not lie.

The Lord Chief Baron thought the Defendant might have pleaded this Matter *puis darrein Continuance*; but however, that *Ruſſell*'s being in Execution in the *Fleet* was not a Satisfaction to the Crown; and ſo the Defendant went into Evidence, and on Proof it plainly appeared, that the Witneſs for the Crown was perjured, ſo Mr. Attorney General gave it up; and there was a Verdict for the Defendant.

DE
Term. S. Hilarii,
1731.

396. *Bond* v. *Barrow.* Jan. 27, 1731.

Bill for Tithes of aſſart Lands. AntePl. 201.

UPON a Bill for Tithes of aſſart Lands; Baron *Comyns* ſeemed to be of Opinion, that the Words *de novo aſſartatis & aſſartandis*, in the Grant of *Edward* the Firſt, ſhould be conſtrued to extend only to ſuch Lands as were at that time aſſarted, or intended ſhortly to be ſo, and not to ſuch as in future Ages ſhould happen to be aſſarted, eſpecially if no Tithes have uſually been paid; as if a Man grants Tithe Wool of his Sheep that he ſhall have ſeven Years hence, if he had no Sheep at that time of Grant it will be void. *Quære Hob.* 132.

397. *Head & Ux'* v. *Winter.* Feb. 1, 1731.

Prohibition to the Spiritual Court for Words refuſed after Sentence.

LIBEL in the Spiritual Court for theſe Words--- *Moll Winter* is a Whore and a common Whore, and Plier in a Bawdy-houſe; and there was a Sentence againſt the Defendant for Penance and for Coſts, and Excommunication denounced purſuant to the Sentence.

A Prohibition was moved for, on a Suggeſtion that the Words were ſpoken in *London*; but *nota*, upon the Face of the Libel it appeared, that the Words were ſpoken in the Pariſh of
in the Dioceſs of *London*; ſo that though it might be in the Dioceſs, yet it did not follow that it was in the City, as in Truth that Part of the Pariſh where the Words were ſpoken is in *Middleſex*, and therefore it was inſiſted for the Defendant in Prohibition, that it was too late after Sentence to come for a Prohibition; and of that Opinion was the whole Court, and diſcharged the Rule to ſhew Cauſe why a Prohibition ſhould not go. Cited for the Plaintiff in Prohibition, 1 *Vent.* 343, 352. *Nota*, theſe were before Sentence. Cited for the Defendant, *Offley* v. *Whitall*, *Mich.* 1717. 2 *Salk.* 548. *March* 73. *Stat.* 23° *Hen.* 8. *c.* 9. 2 *Ro. Abr.* 318. *L.* 1, 2. 1 *Vent.* 61, 243.

Poor v. *Seymour*. Feb. 19, 1731. 398.

BILL for Tithe Herbage for Sheep depaſtured in the Pariſh three or four Months after they had been ſhorn, and then were removed into another Pariſh, and ſhorn there; and cited for the Plaintiff, *Coleman* and *Barker*, *Paſchæ* 1726, and *Dummer* and *Wingfield*, 1 *W. & M.* (cited there). But *per Curiam*, No Tithe Herbage ſhall be paid for ſuch Sheep becauſe they are *Animalia fructuoſa*.

Tithe Herbage ſhall not be paid for Sheep ſhorn out of the Pariſh.

399. *Swinfen* v. *Digby*. Eodem Die.

Turnips (ſown after the Corn is cleared) fed with Sheep and barren Cattle, ſhall pay Tithes.

IN this Cauſe the Court declared, that where Land is ſown with Turnips after the Corn is cleared, and fed with Sheep and barren Cattle, that Tithe ſhall be paid of ſuch Turnips; though it was inſiſted upon for the Defendant, that the Soil in that County *(Staffordſhire)* was dry and ſandy, and that this Method of Huſbandry improved the Land, ſo that the Plaintiff had *uberiores Decimas* of Corn, and had received the Tithe of Lambs and Wool of the Sheep ſo fed, before: But the Court over-ruled this Defence, and ſaid it amounted to a *Non decimando*, as to Turnips.

DE

Term. Paſchæ,

1732.

Rex v. *Wilkinſon.* May 22, 1732. 400.

THOMAS and *Charles Wilkinſon* were conſtituted Receivers General of the Duties on Houſes for the County of *York*, *& al'*; and upon the 20th and 21ſt Days of *January* 1717, they, together with *Hutchinſon* as their Surety, entered into the uſual Bond for the faithful Diſcharge of their Truſt. Quietus, the Effect thereof.

Upon the firſt of *November* 1718, *Thomas Wilkinſon* died, but *Charles* continued to act, and received ſeveral Sums of Money, although the Commiſſion being joint, the Authority, as was inſiſted, determined by the Death of *Thomas*.

In 1724, *Hutchinſon* became uneaſy, and was unwilling to continue any longer Security; whereupon *Charles Wilkinſon* applied to the Lords of the Treaſury, and upon ſuch Application the Bond in 1717 was delivered up.

Upon

Upon the 28th of *January* 1724, *Charles* entered into a new Bond with new Sureties for duly accounting to the 28th of *November* 1724. *Nota*, The Condition recited that *Charles Wilkinſon* was conſtituted Receiver General, whereas he had no new Commiſſion, but *that* in 1717 only.

Afterwards *Charles Wilkinſon* paſſed his Accounts to *Lady-day* 1724, and had his *Quietus* for each Year to that time.

He afterwards became greatly in Arrear for the Years 1725 and 1726, and was then removed from being Receiver, and Judgment was obtained againſt him and his Sureties on the Bond of the 28th of *January* 1724.

Charles Wilkinſon, on the 3d of *September* 1723, having, upon the Marriage of his Son *Andrew* with the Daughter of Mr. *Jeſſop*, ſettled an Eſtate in Poſſeſſion upon the ſaid *Andrew*, Mr. Attorney General, in order to over-reach this Settlement, obtained an Order for an immediate Extent againſt *Charles Wilkinſon* and his Eſtate, to extend to all Lands and Tenements which the ſame *Charles Wilkinſon* had on the 20th Day of *January* 1717, being the time when he firſt became accountable to the Crown, upon a Suggeſtion that he was greatly in Arrear for the Years 1725 and 1726; and accordingly an Extent was made out, reciting that *Charles Wilkinſon* was accountable from the 20th of *January* 1717, founding it on the Stat. 13 *Eliz. cap.* 4.

Lib. 11. Auditor Curl. 1 Mod. 187. Lib. 11. Earl of Devon. Stat. 13 Eliz.

For the Defendant we now moved to diſcharge this Extent; firſt, Becauſe it is not a Caſe within the

2 Mod. Rex *v.* Alſton. 2 Vern. 389. Moor 646. Vide bon Conſtruction del' Q. Lib. 8. Sir Ger. Fleetwood. Hard. 226.

Statute, he not remaining an Accountant within the Meaning thereof, ſince the Commiſſion, which was joint, determined by the Death of *Thomas Wilkinſon* in the Year 1718.

2dly, Becauſe they ought to go no further back than *Lady-day* 1724, to which time *Charles Wilkinſon* had paſſed his Accounts, and obtained his *Quietus*; and if this Method was to prevail, it would be of dangerous Conſequence to Purchaſors, and render *Quietus's* of no Effect.

The Court now refuſed to determine this nice Point upon a Motion, but ordered the Defendant to plead.

The Defendant accordingly pleaded this Matter, to which Mr. Attorney General demurred, and upon the 23d of *May* 1737, the Court after ſolemn Argument were unanimouſly of Opinion, and gave Judgment for the Defendant.

DE
Term. S. Trinitatis,
1732.

401. *Rex* v. *Knight Executor of Fenwick.* June 10, 1732.

Commiſſion to find Debts, in what Caſe it ſhall iſſue.

BURGISS, a Collector of the Exciſe at *Thetford*, paid to *Abraham Ward* one hundred and eighty-two Pounds of the King's Money; *Ward* drew three Bills of Exchange upon *Michael Fenwick* his Correſpondent in *London*, for that Sum, payable to the Commiſſioners of Exciſe, *Value received of* Burgiſs, *being the King's Money.*

Fenwick accepted the Bills, but did not pay them, and they were returned proteſted.

Fenwick dies, and after his Deceaſe one of the Billmen of the Exciſe Office made Affidavit of theſe Facts, that the Bills were underwrote *accepted* (not ſaying *by whom*)---that they are ſtill due (not ſaying *to whom*)---that *Fenwick* died in bad Circumſtances (which was too general and uncertain)---and that the King was in Danger of loſing his Money *from Fenwick.*

Upon which Affidavit a Commiſſion iſſued, reciting this Matter, to inquire if theſe Bills were accepted by *Fenwick*.

An Inquiſition was taken upon this Commiſſion, which finds the Matters aforeſaid, and upon *that* a *Scire facias* iſſued againſt the Executor of *Fenwick*.

We now moved in Behalf of the Executor to ſet aſide the Commiſſion, Inquiſition and *Scire facias*.

Firſt, Upon the Uncertainty of the Affidavit, which is not purſuant to the old Rules; and there ought to be the ſame Certainty, or a greater, to ground a Commiſſion than an Extent; but this Objection was over-ruled.

Secondly, That no Commiſſion ought to have iſſued in this Caſe, becauſe *Fenwick* only accepted the Bills, and it did not appear that one Farthing of the King's Money ever came to his Hands; and therefore the Crown ought to have taken a Remedy againſt *Ward*; beſides, Commiſſions themſelves are but of late Invention, and there is no Inſtance where they have iſſued in a Caſe of this Nature.

Thirdly, That a Commiſſion cannot iſſue after the Party's Deceaſe, no more than a *Diem clauſit extremum* can iſſue where there is no Debt upon Record before the Party's Death.

But the Court refuſed to determine theſe laſt Matters upon Motion, and put us to plead or demur.

Nota, Another *Scire facias* againſt *Knight* was quaſhed *per totam Curiam*, it being made returnable the 18th of *May*, which happened to be *Aſcenſion* Day, which by Act of Parliament is *Dies non juridicus*; ſo that the Defendant had no Day in Court.

Scire facias returnable on Aſcenſion Day, quaſhed.

DE
Term. S. Michaelis,
1732.

402. *The Eaſt-India Company* v. *Naiſh & al'.* Oct. 25, 1732.

Motion to examine Witneſſes De bene eſſe refuſed, becauſe they were the Plaintiffs Servants, and they might keep them at home, if they pleaſed.

A BILL was exhibited for a Diſcovery and Satisfaction for a Fraud and Breach of Truſt in the Defendants in the *Eaſt-Indies:* The Bill was filed in *Michaelmas* Term, 1731; all the Defendants (who were Supercargoes and Writers) but one, had anſwered; but *nota*, the principal Defendant came over but in *July* laſt, ſo he could not be ſerved with Proceſs to appear 'till then, which Proceſs was returnable the firſt Day of this Term, and he appeared on that Day.

The *Eaſt-India* Ships being obliged to go out the latter End of this Month, it was moved in Behalf of the Company, that two of their Captains, who were ſworn to be material Witneſſes, and not likely to return in leſs time than eighteen Months, might be examined *De bene eſſe*, ſaving juſt Exceptions, which was alledged to be often done in Chancery, though there was no Precedent for it in this Court, but only where Witneſſes are aged or ſick.

This

This was debated by ſeven Counſel of a Side, and the Motion was refuſed *per totam Curiam*; what they principally went upon was, that if there was a Neceſſity of examining theſe Witneſſes, it was a Neceſſity of the Plaintiffs own creating; for it appears they are as Servants to the Company, and they might have employed other Ships and Captains: 2dly, That it would be putting a great Difficulty upon the Defendants, ſince theſe Witneſſes are to go ſo ſoon; for though *Naiſh* might croſs examine (having appeared) yet it is impoſſible he ſhould get Interrogatories prepared (conſidering the many Charges in the Bill) within the time, though the Plaintiff might be prepared with his.

Chriſtian v. *Wrenn & al'.* Oct. 26, 1732. 403.

BILL by the Vicar of *Croſthwaite* in the County of *Cumberland* for Tithes.

Depoſitions in the original Cauſe not permitted to be read in the croſs Cauſe, becauſe the Point in Iſſue in the croſs Cauſe was not in Iſſue in the original Cauſe.

The Defendants inſiſted on a cuſtomary Manner of Payment of Tithe Wool of the elder Sheep, by weighing the Wool and delivering the tenth Part without Fraud to the Vicar, *abſque Viſu & Tactu*; but this was over-ruled on the Authority in *Hob.* 107.

They alſo inſiſted on a Modus in lieu of Lambs and the Wool of Lambs the firſt Clipping, when they are called Hog Sheep, *viz.* eleven Pence for every tenth Lamb, *and ſo in Proportion* for a leſs Number.

They alſo preferred a Croſs Bill to eſtabliſh this Modus, but varied from *that* in the Anſwer, that whereas *there* it was ſaid, "*and ſo in Proportion*, &c."

that Fact not being true, *here* the Proportion for each under ten was ſet out, as for nine Lambs nine Pence Half-penny, &c.

The Plaintiff examined no Witneſſes in the croſs Cauſe, but obtained an Order that the Depoſitions in the original Cauſe ſhould be uſed in the croſs Cauſe.

Now upon the Hearing, the Plaintiff in the croſs Cauſe offered to read the Depoſitions in the original Cauſe; but it was objected, that the *Modus* in the croſs Cauſe was a different *Modus* from *that* in the Anſwer to the original Bill, and therefore was not in Iſſue on that Examination; and of that Opinion was the whole Court; ſo the Plaintiff had a Decree for an Account in the original Cauſe, and the croſs Bill was diſmiſſed with Coſts.

404. ## *The Biſhop of Ely* v. *Kenrick.* Nov. 16, 1732.

Commiſſion to ſet forth Lands, in what Caſes it ſhall or ſhall not be granted.

IF a Bill is preferred for a Commiſſion to ſet forth Lands, the Particulars of which the Plaintiff doth not know; and if the Defendant doth not admit the Plaintiff's Title, but denies that he has any Lands in his Poſſeſſion belonging to the Plaintiff, in ſuch Caſe a Court of Equity will not grant a Commiſſion, becauſe *that* would be admitting the Plaintiff's Title in general, though the particular Lands were not known. Indeed if the Plaintiff's Title was admitted by the Defendant, and the Diſpute was only about the particular Lands, *there* a Commiſſion would be proper; and in the preſent Caſe the Title being denied, the Bill was diſmiſſed by *three Barons* contra *Comyns*, who was for directing an Iſſue.

Holliday

Holliday v. *Nabb.* Nov. 17, 1732. 405.

An Anſwer permitted to be amended, where it was for the Plaintiff's Benefit, and the Defendant being ninety Years old.

A BILL was preferred for a Diſcovery of the Defendant's Title, and for an Account of the Rents and Profits of the Eſtate.

The Defendant in his Anſwer ſaid, that he purchaſed the Eſtate in the Year 1676, and had continued in Poſſeſſion ever ſince, and received the Rents and Profits thereof; upon Recollection the Defendant diſcovered, that by Agreement on the Purchaſe the Vendor and his Wife were to continue in Poſſeſſion, and receive the Rents and Profits during their Lives, which they did until the Year 1690, and the Defendant hath ever ſince: Upon Motion the Court gave Leave for the Defendant to amend his Anſwer in this Particular, it being rather for the Plaintiff's Benefit, and the Defendant being ninety Years of Age.

Rex v. *Ward.* Eodem Die. 406.

Return to an Inquiſition on an Extent, if amendable.

AN Extent iſſued againſt *Abraham Ward* at the Suit of *Carter* the Receiver General of the Land Tax for the County of *Norfolk*, teſted the 26th of *April*.

Another Extent iſſued againſt the ſame *Ward* at the Suit of *Burgiſs* Collector of the Exciſe, teſted the 28th of *April*, which was delivered to the Sheriff of *Norfolk* the 29th, and the other was delivered to him the firſt of *May*.

Inquiſitions were taken on both upon the ſecond of *May*, and the ſame Jury found Effects of *Ward* to the Value of two hundred Pounds, and to each Inquiſition

quiſition annexed the like Schedule; and the Sheriff returned on both the Inquiſitions, that he had ſeiſed theſe Goods to the Value of two hundred Pounds, *in manus Domini Regis.*

Upon which, two *Venditioni exponas's* were directed to him to ſell theſe Goods; he, finding that by theſe Returns he was likely to be charged with both theſe Sums, now moved the Court that he might either have Liberty to amend his Returns to the Inquiſitions, or that he might not be obliged to obey the *Venditioni exponas's* until the Parties, for whoſe Benefits the Extents iſſued, had litigated the Right of Preference of their Extents.

But the Court refuſed both, and left him to make ſuch Return to the *Venditioni exponas's* as he could by Law; (which ſeems hard.) And

Nota, I apprehend that the Statute of Frauds and Perjuries not extending to the Crown Proceſs, the Sheriff ought to have taken an Inquiſition on *that* Extent which bore *Teſte* firſt, and to have made the common Return upon *that*, *viz.* that he had ſeiſed the Money found *in manus Regis*; and the ſame being found by the ſecond Inquiſition, to have returned upon *that*, that the ſame was ſeiſed by virtue of the firſt Inquiſition, and then he would not have been twice liable.

DE
Term. S. Hilarii,
1732.

At Serjeants Inn, Feb. 20, 1732.

Lady Charlton v. *Sir Blunden Charlton.* 407.

There can be no Preſcription in Non decimando againſt a Lay Rector, any more than againſt a Spiritual Rector.

LORD Chief Baron *Reynolds* declared it as his Opinion, that there could be no Preſcription in *Non decimando* againſt a Lay Rector, any more than againſt a Spiritual Rector, and that they were equally intitled to Tithes of common Right; and that it was ſufficient for a Lay Rector to ſet forth in a Bill, that he was ſeiſed of the impropriate Rectory; and if he made out his Title to that, it would be ſufficient, without putting him to the Proof of having received Tithes; and to this Opinion Baron *Comyns* ſeemed to aſſent; but *nota*, he diſtinguiſhed between one who ſet up a Title to the *Rectory*, and one who intitled himſelf only to the Tithes, or any *Species* of Tithes, within a Pariſh; for in this laſt Caſe the Plaintiff ſhall be held to ſtrict Proof, not only of his Title, but alſo of the Perception of all the Tithes he ſets up a Title to; and in this preſent Caſe, the Plaintiff having ſet forth a Title in Sir *Francis Charlton* (under

whom ſhe claimed) to all the Tithes in the Pariſh of *Lucford* (except ſuch ſmall Tithes as the Vicar uſually received) and not to the Rectory; and the Defendant denying the Plaintiff's Title to Tithe Herbage, and the Plaintiff not being able to prove any Herbage Tithe ever paid, though ſhe attempted to prove an Unity of Poſſeſſion for above ſeventy Years, yet the Bill was diſmiſſed.

DE
Term. Paſchæ,
1733.

Fox v. *Bardwell & al'*, *& è contra.* 408.
April 16, 1733.

A VICAR prefers his Bill for Tithe Hay, and all ſmall Tithes.

A Vicar's Right to Tithe Hay made out from the Defendants Anſwer, though the Vicar had not uſually received it.

The Defendant inſiſted (among other things) that the Dean and Chapter of *Norwich* was intitled to all the great Tithes, and conſequently to Tithe of Hay, unleſs the Vicar could ſhew that he had uſually received Tithe Hay; but the Dean and Chapter having ſaid in their Anſwer, that the Vicars had been intitled to all Tithe, except Corn and Grain, the Court thought this ſufficient Evidence to ſupport the Vicar's Right to Hay, without putting him to farther Proof of having received it; and decreed accordingly.

DE
Term. S. Trinitatis,
1733.

409. *Gibb Cl'* v. *Goodman & al'*. June 11, 1733.

Modus of 4d. for Tithe Milk.

BILL for Tithes by the Vicar of *Bedminſter* in the County of *Somerſet*.

The Defendants inſiſted on a Modus of four Pence for the Milk of each Cow, and ſix Shillings and eight Pence for every tenth Calf, for the Tithe of all Calves. *Nota*, No Day was alledged in the Anſwer, which, according to former Precedents, ſeemed to be a fatal Objection; yet *per totam Curiam*, the Defendant was permitted to prove the Day by Depoſitions; and thereupon the Court directed an Iſſue to try the ſame, with Liberty to indorſe the *Poſtea*.

Where the Day of Payment of a Modus is omitted in an Anſwer, it may be ſupplied by Evidence; aliter if omitted in a Bill to eſtabliſh a Modus.

Nota, The Lord Chief Baron took this Diſtinction, that in an Anſwer the Day might be ſupplied by the Evidence, ſo as to be a Foundation for the Court to direct an Iſſue; but in a Croſs Bill to eſtabliſh a Modus, a Day muſt be expreſſly alledged.

Nota,

Nota, It was objected, that the ſix Shillings and eight Pence was too rank; and it was not alledged, that any thing was payable if there were leſs than ten Calves; both which ſeemed material Objections: But the Court thought a Verdict might make it good.

Modus of 6 s. 8 d. for one Calf in ten, and not ſaid, and ſo leſs in Proportion, if under ten, is bad.

May the 20th, 1734, this Cauſe came on again upon the Return of the *Poſtea*; the Jury found the Iſſue for the Modus for the Milk, and that the Modus of four Pence was payable at *Eaſter*; ſo as to *that*, the Bill was diſmiſſed with Coſts both at Law and in Equity, as to ſo much.

As to the other Modus for Calves, the Jury found it, but no Day when payable; but upon the Objection that it was not ſaid, " and ſo in Proportion, if " there be a leſs Number than ten;" and the Jury not having found it ſo (if they had, *quære* if it would have made any Difference) the Defendant was decreed to account for Tithe Calves, but no Coſts were allowed on either Side at Law as to this Modus, the *Fact* being for the Defendant, the *Law* for the Plaintiff.

DE
Term. S. Michaelis,
1733.

410. *Orlebar* v. *Snead.* Nov. 10, 1733.

After Publication paſſed, and Depoſitions delivered out, Publication can never be enlarged.

THIS Day the Court made a general Order, That when Publication was paſſed, and the Depoſitions delivered out to be copied, they would in no Caſe enlarge Publication, or give Liberty of examining any more Witneſſes.

411. *The Town of Nottingham* v. *Wood.* Eodem Die.

Bill for an Account of Toll and Relief diſmiſſed, as proper at Law.

BILL ſets forth that they were a Borough by Preſcription, that they were incorporated by the Charter of *Henry* the Sixth, by the Name of Mayor and Burgeſſes,---that King *John* by Charter *confirmed* all their ancient Cuſtoms and Privileges, reſerving a Rent of fifty-two Pounds *per Annum*, that *Time out of Mind* they were Lords of the Manor, and as ſuch, Time out of Mind, intitled to a Toll of two Pence *per* Ton for all Goods navigated on the River *Trent* within the Manor; that the Defendant carried ſuch

a Quantity of Goods; and therefore the Bill was for a Diſcovery, Account and Relief.

The Defendant demurred to the Account and Relief, for that this was properly determinable at Law by Action or Diſtreſs, and the rather, for that it did not appear by the Bill, that the Plaintiffs had aſcertained their Title at Law.

Now, upon arguing this Demurrer, the Plaintiffs Counſel inſiſted, firſt, That this was in the Nature of a Bill of Peace; to this it was anſwered, that this is not like a Suit againſt the Inhabitants of a Vill, or Tenants of a Manor, who may be all bound by one Decree; but the Defendant here is a Stranger, and a Decree againſt him could be of no Validity againſt any other.

Secondly, The Plaintiffs Counſel ſaid, that here being a Fee-farm Rent reſerved by King *John*'s Charter, this was a Prerogative Caſe, and to ſupport this ſeveral Caſes in *Hardreſs*, about Suit to the King's Mills, were cited, where it is ſaid, the Fee-farmer ſhall have the Prerogative to ſue as the King could: But it was anſwered *per Curiam*, that thoſe Caſes are not applicable to this; for the Fee-farm here does not appear to be reſerved out of the Toll, for King *John*'s Charter did not grant it, but only confirmed what the Plaintiffs had before; ſo *per totam Curiam*, the Demurrer was allowed.

Rex v. *The Governor, &c. of Chelſea Water-works.* Nov. 13, 1733. 412.

AN Extent iſſued againſt *Sparrow*; an Inquiſition taken thereon finds *Negus* indebted to *Sparrow*.

Negus

Negus being dead, a *Scire facias* iſſued to the Sheriff of *Middleſex* to warn the Executors, Adminiſtrators and Occupiers of the Goods, &c. of *Negus* to appear.

To this the Sheriff returned, that *Negus* had no Executors or Adminiſtrators, but that the Governor and Company of *Chelſea* Water-works occupied and poſſeſſed ſeveral of the Goods and Effects of *Negus*.

They come in, and crave *Oyer* of the Extent, Inquiſition and *Scire facias*, and plead that they were not Occupiers of any of the Goods of *Negus*, & *de hoc ponunt ſe ſuper Patriam*, &c.

To this the Attorney General demurred, for that they ought not to have concluded to the Country, but ought to have concluded with the general Averment, *Et hoc ſunt parati verificare*; for this is no Anſwer to the Extent, but only to the Return of the Sheriff; ſo that here is no Iſſue joined between the Attorney General and them.

And for this Reaſon Judgment was given *per totam Curiam pro Rege*.

413. *Morgan* v. *Crompton*. Dec. 5, 1733.

Bill by an Infant by his Prochein Amy diſmiſſed for want of Proſecution, the Coſts are loſt if Infant or Proch' Amy dies before they are taxed.

BILL by an Infant, who ſues by his *Prochein Amy*; the Bill was diſmiſſed for want of Proſecution, but before the Coſts were taxed the Infant died; it was admitted, that by the Death of the *Prochein Amy* the Coſts would have been loſt, and ſo they are by the Death of the Infant before Coſts taxed, *per Opin' totius Curiæ*.

DE

Term. S. Hilarii,

1733.

Beaver v. *Spratley.* Jan. 28, 1733. 414.

THE Plaintiff as Leſſee of Mr. *Blagrave*, Impropriator of *Stratfield Mortimer* in the County of *Berks*, brought his Bill for Tithes of Wheat, Barley, &c. and ſet forth, that by Cuſtom in that Pariſh all the Occupiers ought to give Notice to *the Perſon intitled to the Tithes*, of ſetting forth their Tithes, *or there was ſome other Cuſtom of the like Nature*, and that the Defendant had not given Notice, and prayed an Account.

Bill for Tithes, and lays a Cuſtom for the Pariſhioners to give Notice of ſetting out Tithes, *or that there is ſome ſuch Cuſtom*, bad, and diſmiſſed with Coſts.

Now upon the Hearing it was objected for the Defendant, firſt, That it was unreaſonable the Occupier ſhould be obliged to give Notice to the Perſon intitled to the Tithes, for he might live an hundred Miles out of the Pariſh.

Barons *Carter* and *Comyns* thought there was ſomething in this Objection; though the Lord Chief Baron thought this well enough, for Notice to the Servant would be good Notice in that Caſe.

The ſecond Objection was, that it was too uncertain, "*or ſome other Cuſtom of the like Nature*;" to which it was anſwered, that this Bill was not to eſtabliſh a Cuſtom, but only for an Account, and the Cuſtom was only alledged as an Inducement to that Demand; though in the firſt Caſe greater Certainty was required, becauſe it is to be the Foundation of an Iſſue, which is generally directed before a Court of Equity eſtabliſhes a Cuſtom.

But *per totam Curiam*, this is a fatal Objection to the Cuſtom, and *that* being the Foundation of the Plaintiff's Demand, we cannot decree an Account without firſt eſtabliſhing the Cuſtom; and the Bill was diſmiſſed with Coſts.

415. *Brooke qui tam* v. *Day*. Jan. 29, 1733.

Information of Seiſure ſo mended, as to make a new Offence.

UPON a Motion to diſcharge an Order made at the Side Bar for mending an Information of Seiſure; the Information at firſt was for importing Brandy and *Rum* in Caſks not containing ſixty Gallons at leaſt; the Amendment was as to the *Rum*, to make it in Caſks not containing twenty Gallons; which, as was objected, was making a new Offence; for Brandy imported in Caſks under ſixty Gallons is forfeited by the Stat. 4° & 5° *W. & M. cap.* 5. *ſ.* 8. but Rum in Caſks under twenty Gallons, by the Stat. 5° *Geo.* 1. *cap.* 11. *ſ.* 2. which is a different Offence from what was firſt charged.

But *nota*, though the Court admitted that a new Offence could not be created by an Amendment, yet they thought that this was only a Miſtake, and made the Rule abſolute. *Quod mirum!*

Blackett

Blackett v. *Middleton.* Eodem Die. 416.

THE Court was moved for Leave to amend a Bill by ſtriking out a Defendant's Name (who was never ſerved with Proceſs, but voluntarily appeared and anſwered) without Coſts; but the Court would make the Plaintiff pay Coſts, though it was agreed by the Counſel at the Bar, that there ought to be no Coſts in this Caſe.

One Defendant, who was never ſerved with Proceſs, appears and anſwers, and has his Coſts on mending the Bill, by ſtriking out his Name.

Smith v. *Morgan.* Jan. 31, 1733. 417.

A BILL was preferred for twelve or thirteen different ſorts of Tithes, and the Plaintiff did not abridge his Demand by his Replication: Upon the Hearing it was referred to an Account, but Coſts were reſerved generally 'till the Report came in.

Bill for 13 ſorts of Tithes, and the Plaintiff proves but one Species due, and doth not abridge by his Replication, yet the Court decreed him Coſts generally.

Now upon the Report it appeared the Defendant was indebted to the Plaintiff for one Species of Tithes only (*viz.* Wood) forty Pounds, but not for any of the other Tithes demanded by the Bill; and therefore it was inſiſted for the Defendant, that the Plaintiff ſhould have his Coſts only *quoad* the Wood, which was reported for him, but that he ought to pay Coſts for all the others demanded, and which he had not proved.

Nota, This ſeemed very reaſonable, the Plaintiff not having abridged his Demand by his Replication, but having put the Defendant to the Trouble and Expence of entering upon Proof of the other Matters. But the Court (too haſtily) decreed Coſts generally to the Plaintiff.

Mertins

418. *Mertins* v. *Bennett*. Feb. 10, 1733.

A Deed Poll executed in ſecret by the Son to the Father, on the ſame Morning of executing his Marriage Settlement, ſet aſide upon the Circumſtance of Secreſy only.

A MAN upon the Marriage of his Son makes a Settlement on him by Articles, and covenants that he would make him worth full four thouſand Pounds over and above all his Debts, &c. The very ſame Morning the Settlement was executed, he got his Son to execute a Deed Poll to covenant to contribute one hundred and twenty Pounds towards the Repair of a Houſe and Ditches which lay within *Dagenham Level*; this Deed Poll was drawn by the ſame Perſon who drew the Settlement, and he ſwore that the Son executed it with a ſeeming Unwillingneſs, that he believed that the Father of the intended Wife, and the Truſtees (who all ſwore the ſame) knew nothing of it; and upon this Circumſtance of Secreſy only, without any Proof of Threats or Reſtraint by the Father on the Son, this Deed Poll (upon a Bill preferred by the Son againſt the Executor of the Father) was ſet aſide, as being in Fraud of the Marriage Agreement. By *Carter*, *Comyns* and *Thompſon* Barons (only in Court) though it was proved for the Defendant, that the Son had paid this one hundred and twenty Pounds at three ſeveral Payments, about five Years after the Settlement, and about five Years before his Father's Death, and yet had made no Complaint of it 'till two Years after his Father's Death.

2

DE
Term. Paſchæ,
1734.

Rex v. *Lacy*. May 17, 1734. 419.

LACY was Deputy Poſt-maſter, and became indebted to the Crown; an Extent iſſued againſt him.

Extent againſt a Bankrupt diſcharged, the Aſſignees paying the Crown's Debt, &c.

He alſo became a Bankrupt, and the Aſſignees under the Commiſſion obtained an Order, that upon Payment of what was due upon his Bond, the Extent might be diſcharged.

Now upon Motion to diſcharge this Order it appeared by Affidavit, that *Lacy* had promiſed alſo to diſcharge a Debt due from his Father (who was alſo Deputy Poſt-maſter, and is ſince dead) to the Crown, and for which a *Diem clauſit extremum* had iſſued; and therefore that the Aſſignees (who ſtood in the Place of *Lacy*) ought not to have the Benefit of this Order, unleſs they would pay both Debts purſuant to *Lacy*'s Promiſe; and of this Opinion was the whole Court, and would have diſcharged the Order, but the Aſſignees ſubmitted to pay the Whole.

DE
Term. S. Trinitatis,
1734.

420. *Strudwick* v. *Pargiter an Infant.*
June 29, 1734.

Exceptions cannot be taken to an Infant's Anſwer, becauſe he is not bound by it, but may amend it when he comes of Age.

BILL for a Diſcovery of Lands to make them real Aſſets, in the Hands of the Heir (the Defendant) to anſwer a Bond Debt of the Mother whilſt ſole, and given above twenty Years ago, and on which, as charged in the Bill, no Intereſt had been paid.

The Defendant, who was an Infant, put in his Anſwer by his Guardian, but it was not full, therefore the Plaintiff took Exceptions to the Anſwer, which coming on this Day to be argued, it was objected for the Defendant, that no Exception could be taken to an Infant's Anſwer, by which he could not be concluded, and might amend it when he came of Age; and a Caſe was cited in Chancery, *Hil.* 1733, *coram* Lord *Talbot*, *inter Gibſon* and *Cole an Infant and her Mother*, who were both Executrixes of the Teſtator, and had both joined in the Probate of the Will; and the Plaintiff expreſſly charged that a Book was

come to the Hands of the Defendant, whereby it would appear there was a conſiderable Debt due from the Teſtator to the Plaintiff; the Infant (about twenty Years of Age) put in a ſhort Anſwer, to which the Plaintiff took Exceptions, the Matter being fully and ſolemnly debated *coram* Lord Chancellor *Talbot*, he was clearly of Opinion no Exception could be put in to an Infant Defendant's Anſwer, and the Exceptions were diſcharged; and upon the Authority of this Caſe and the Reaſon of the Thing, the Exceptions were diſcharged in the preſent Caſe.

Lord Maſham v. *Harding & al'.* 421.
July 10, 1734.

THIS Day the Court gave their Opinions, and *three Barons* contra Baron *Thompſon* were clearly of Opinion, that where a Man deviſes a real Eſtate to two Truſtees and their Heirs, to be ſold for Payment of Debts, &c. and makes thoſe two Truſtees and a *third Perſon* his Executors, that the Lands, when ſold, ſhall be *legal*, and not *equitable* Aſſets. *Vide* 1 *Chan. Ca.* 32. 2 *Chan. Ca.* 54. 2 *Vern.* 133, 281. 1 *Roll. Abr.* 920. *Prec. in Canc.* 127, 136. *Lib.* 9, 98. *Noy* 69. *Latch* 187. *Dyer* 264, 405. and Lord *North*'s Caſe of *Bluck Uſher of the Rolls*, *coram* Lord *Cowper*, *Canc.* 7° *Annæ*. Aſſets legal and equitable.

DE
Term. S. Michaelis,
1734.

422. *Laithes & al' v. Chriſtian Cl' Vicar of Croſthwaite in Cumberland.* Oct. 31, 1734.

Iſſue directed to try a Modus, though it is not proved exactly as laid in the Bill.

BILL by the Owners and Occupiers of Lands in the Pariſh of *Croſthwaite* in the County of *Cumberland*, to eſtabliſh *Modus's*; one in the two Foreſts of *Barrowdale* and *Wythburn* within the Pariſh; the other, within the Pariſh at large; but there was no Variance of the *Modus's*, only as to the Sums payable; ſo that they were in Effect the ſame as to the Point in Diſpute now, which was this:

Vide Pl. 403. The Plaintiffs by their Bill laid their *Modus's* to be for every tenth Lamb, payable on *Monday* next after *Midſummer-day* after the Lambs fallen, *except ſuch as were not alive on* Midſummer-day, in lieu of Lambs and *the Wool* of ſuch Lambs which were called Hog Sheep.

The Defendant in his Anſwer admitted there were ſuch *Modus's* payable as in the Bill for Lambs only, but

but not for *the Wool*; and moſt of the Witneſſes agreed with the Bill, as the Defendant did, except the being paid for *the Wool*.

The Plaintiffs had but one or two Witneſſes to prove (and in the Pariſh at large only) that the Modus was for Lambs alive on *Midſummer-day*; all the reſt of their Witneſſes proved that it was for ſuch as were alive on the *Monday* next after *Midſummer-day*; which varied from the Bill, and therefore the Defendant objected, that the Plaintiffs had not proved the *Modus* as laid in the Bill; but the Defendant having admitted, and his Witneſſes agreeing with the Bill, but differing only as to the Extent of it, the Court thought here was a ſufficient Ground to grant an Iſſue to try the Modus's, with Liberty for the Judge to indorſe the *Poſtea*, which they accordingly directed.

January 1735, Baron *Comyns* was made one of the Judges of the Common Pleas, and *William Forteſcue* Eſq; Attorney General to the Prince of *Wales*, was appointed one of the Barons of the Exchequer.

DE
Term. S. Hilarii,
1735.

At Serjeants Inn in Chancery Lane.

423. *Rex* v. *Williams*. Feb. 19, 1735.

Truſt of a Term in Jointenancy ſhall go to the Survivor, in Equity, as well as at Law.

TWO Joint Purchaſors of a Leaſe for Years aſſign this Leaſe to a third Perſon (a Friend of one of the Jointenants, and with the Conſent of the other) but it was without Conſideration, and no Declaration of Truſt was given, and ſo the Defendant confeſſed in his Anſwer; the Jointenant who conſented to aſſign died in Debt.

Upon the Bill and Anſwer the Queſtion was, whether this Truſt ſhall reſult for the Benefit of the Jointenant ſurviving only, as it would at Law; or whether the Creditors of the Jointenant that died, ſhould come in for an equal Moiety in Equity.

Nota, The Truſtee was made Executor to him that died, and was alſo a Creditor of his.

Nota,

Nota, The two Jointenants continued to receive the Profits jointly after the Aſſignment.

Upon this State of the Caſe the whole Court were of Opinion, that though Survivorſhip is looked upon as odious in Equity, yet that in this Caſe the Truſt ſhall ſurvive for the Benefit of the ſurviving *Ceſtui que Truſt* only.

July 7, 1738, Mr. Juſtice *Comyns* of the Common Pleas made Lord Chief Baron in the room of Lord Chief Baron *Reynolds*; and Mr. Serjeant *Parker* made one of the Barons of the Exchequer in the room of Baron *Forteſcue*, who was appointed a Judge of the Common Pleas.

DE
Term. S. Hilarii,
1738.

424. *Wallis* v. *Pain & Underhill.*

Clover Seed is a ſmall Tithe.

THE Court * decreed, that the Seed of the ſecond Cutting of Clover was a ſmall Tithe: The Lord Chief Baron *Comyns*, Baron *Carter* and Baron *Thompſon* were of this Opinion; but Baron *Parker* thought it a great Tithe, as it partook of the Nature of the Stalk from whence it was taken; (and this Opinion, I think the beſt) and in Support thereof was cited the Caſe of *Pomfret Vicar of Luton* v. *Launder & al'*, *July* 8, 1680, Tithes of Clover Graſs threſhed, and made into Horſe Bread, and Hogs fed with the Seed, yet adjudged to be Hay, and tithable to the Vicar, who was endowed of Hay, and not to the Impropriator, as a new and different Tithe from Hay; but notwithſtanding the Authority of this Caſe and the Reaſon of the Thing, Judgment was given as above.

* It has alſo been decreed, ſince this Caſe, that the Seed of Clover is a ſmall Tithe.

DE
Term. S. Trinitatis,
1739.

The Corporation of Bury v. *Evans.* 425.
July 2, 1739.

THIS Day the long-controverted Queſtion ſeemed to be ſettled, *viz.* That there can be no Preſcription *in non decimando*, even againſt a Lay Impropriator, and that the Preſumption that ariſes from a conſtant Non-payment, would not be ſufficient, unleſs the Defendant could ſhew, either that the Lands were Parcel of one of the greater Abbies, or that ſome of the Impropriators had releaſed the Tithes.

Preſcription in non decimando cannot be, even againſt a Lay Impropriator.

DE
Term. S. Michaelis,
1739.

426. *Jones* v. *Meredith, Watkins & Ux' and Roberts.* Nov. 10, 1739.

Mortgage by a Popiſh Heir may be redeemed by the next Proteſtant Kin.

THE Plaintiff preferred his Bill upon the Stat. 11° & 12° *W.* 3. *cap.* 4. ſuggeſting that the Defendants were Papiſts, educated in, and profeſſing the Popiſh Religion, and that they (after the Death of their Father) had made a Mortgage of the Eſtate to the Defendant *Roberts*, and that he (the Plaintiff) as next Proteſtant Kin, had a Right to redeem this Mortgage, and to be let into the Perception of the Rents and Profits, purſuant to the Statute ('till Conformity of the Heir.

The Defendants *Merediths* demurred to ſo much of the Bill as prayed Relief and a Redemption of the Mortgage, for that the Plaintiff had not made any Caſe by his Bill proper for Relief; and as to the Diſcovery, pleaded that they were not obliged to diſcover any Matters that might ſubject them to a Penalty.

2

Watkins

Watkins & Ux' added *this* to their Demurrer, that *Watkins* the Huſband was, and ſtill is a *Proteſtant*.

Now this Day Lord Chief Baron *Comyns* gave the Opinion of the whole Court, *viz.* of himſelf, *Carter* and *Parker* Barons (Baron *Thompſon* being lately dead) that the Pleas ought to be allowed, but the Demurrers to be over-ruled; for though it was objected that no body could come to redeem a Mortgage, but either the Mortgageor, the Heir, an Aſſignee, or a ſubſequent Incumbrancer, and the Plaintiff was neither of them; yet the Lord Chief Baron ſaid, that a *Pernor* of the Profits had *that* Right, and ſo had a Tenant by *Elegit*, *Statute Merchant* or *Staple*, or *Tenant by the Curteſy* or *in Dower*; He was in doubt as to the Demurrer of *Watkins* (the Proteſtant Huſband) but as upon the Hearing the Plaintiff might be intitled to ſome Things *(quære* what?) as to him, that Demurrer was alſo over-ruled.

November 13, 1739, This Day Mr. Baron *Wright* came up in the room of Baron *Thompſon*.

April 1740, Mr. Baron *Parker* appointed one of the Judges of the Common Pleas, and Mr. Baron *Reynolds*, an *Iriſh* Judge, appointed a Baron of the Exchequer here.

November 1740, Sir *Thomas Abney* appointed a Baron of the Exchequer.

DE

Term. Paſchæ,

1741.

427. Fee-farm Rents, Receipts touching the ſame.

THIS Day, *April* the 29th, 1741, upon the Complaint of *Roberts & al'* v. *Myddleton Arm' Receiver of the Fee-farm Rents in Denbighſhire and* The Court declared that the Receiver could not take more than four Pence for one Acquittance (though for ſeveral Years) if demanded by the Perſon paying the Rent; and if ſuch Perſon brought an Acquittance ready written, he was obliged to ſign it without any Fee, purſuant to the Stat. 33° *Hen.* 8. *cap.* and if the Party tenders his Rent, but refuſes to pay for the Acquittance, the Receiver cannot diſtrain for the Rent and Acquittance; and in this Caſe an Attachment was granted, but reſpited on Terms.

Levari lies not for a Fee-farm Rent.

Nota, The ſame Day, in a Cauſe between *Lupton & al'* and *Barker Clerk, Rector of North Burton in the County of York*, I think the Court ſeemed to be of Opinion, that a *Levari* ought not to iſſue for a Fee-farm Rent (though there was one Precedent for it in 36° *Car.* 2. produced) but that the proper Remedy was by Diſtreſs.

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THE
BARONS of the EXCHEQUER,
AND THE
Attornies and Solicitors General,
During the ſeveral and reſpective Years of theſe REPORTS.

In *Michaelmas* and *Hilary* Terms, 1714.
Eaſter, *Trinity*, *Michaelmas* and *Hilary*, 1715.
And *Eaſter* Term, 1716.

Sir *Samuel Dodd*, Knt. Lord Chief Baron.
Sir *Thomas Bury*, Knt.
Sir *Robert Price*, Knt. } Barons.
Sir *James Mountague*, Knt.
Sir *Edward Northey*, Knt. Attorney General.
Nicholas Lechmere, Eſq; Solicitor General in *Michaelmas* and *Hilary*, 1714, and in *Eaſter*, *Trinity* and *Michaelmas*, 1715.
John Forteſcue Aland, Eſq; Solicitor General in *Hilary*, 1715, and *Eaſter* 1716.

In *Trinity* and *Michaelmas* Terms, 1716.

Sir *Thomas Bury*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *James Mountague*, Knt. } Barons.
Sir *Edward Northey*, Knt. Attorney General.
John Forteſcue Aland, Eſq; Solicitor General.

In *Hilary* Term, 1716.
And in *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1717.

Sir *Thomas Bury*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *James Mountague*, Knt. } Baron.
Sir *John Forteſcue Aland*, Knt.
Sir *Edward Northey*, Knt. Attorney General.
Sir *William Thompſon*, Knt. Solicitor General.

The BARONS of the Exchequer, &c.

In *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1718.
And in *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1719.

Sir *Thomas Bury*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *James Mountague*, Knt. } Barons.
Sir *Francis Page*, Knt.
Nicholas Lechmere, Eſq; Attorney General.
Sir *William Thompſon*, Knt. Solicitor General.

In *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1720.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1721.
And in *Eaſter* Term, 1722.

Sir *Thomas Bury*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
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Sir *Francis Page*, Knt.
Sir *Robert Raymond*, Knt. Attorney General.
Sir *Philip Yorke*, Knt. Solicitor General.

In *Trinity*, *Michaelmas* and *Hilary* Terms, 1722.
And in *Eaſter* and *Trinity* Terms, 1723.

Sir *James Mountague*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *Francis Page*, Knt. } Barons.
Sir *Jefferey Gilbert*, Knt.
Sir *Robert Raymond*, Knt. Attorney General.
Sir *Philip Yorke*, Knt. Solicitor General.

In *Michaelmas* Term, 1723.

Sir *Robert Eyre*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *Francis Page*, Knt. } Barons.
Sir *Jefferey Gilbert*, Knt.
Sir *Robert Raymond*, Knt. Attorney General.
Sir *Philip Yorke*, Knt. Solicitor General.

In

The BARONS of the Exchequer, &c.

In *Hilary* Term, 1723.
In *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1724.
And in *Eaſter* Term, 1725.

Sir *Robert Eyre*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *Francis Page*, Knt. } Barons.
Sir *Jeffery Gilbert*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Sir *Clement Wearg*, Knt. Solicitor General.

In *Trinity*, *Michaelmas* and *Hilary* Terms, 1725.

Sir *Jeffery Gilbert*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *Francis Page*, Knt. } Barons.
Sir *Bernard Hale*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Sir *Clement Wearg*, Knt. Solicitor General.

In *Eaſter* and *Trinity* Terms, 1726.

Sir *Jeffery Gilbert*, Knt. Lord Chief Baron.
Sir *Robert Price*, Knt.
Sir *Francis Page*, Knt. } Barons.
Sir *Bernard Hale*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Charles Talbot, Eſq; Solicitor General.

In *Michaelmas* Term, 1726.

Sir *Thomas Pengelly*, Knt. Lord Chief Baron.
Sir *Francis Page*, Knt. till *Nov.* 3d.
Sir *Bernard Hale*, Knt. } Barons.
Sir *Lawrence Carter*, Knt.
Sir *John Comyns*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Charles Talbot, Eſq; Solicitor General.

In

The BARONS of the Exchequer, &c.

In *Hilary* Term, 1726.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1727.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1728.
And in *Eaſter*, *Trinity* and *Michaelmas* Terms, 1729.

Sir *Thomas Pengelly*, Knt. Lord Chief Baron.
Sir *Bernard Hale*, Knt.
Sir *Lawrence Carter*, Knt. } Barons.
Sir *John Comyns*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Charles Talbot, Eſq; Solicitor General.

In *Hilary* Term, 1729.

Sir *Thomas Pengelly*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt. } Barons.
Sir *John Comyns*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Charles Talbot, Eſq; Solicitor General.

In *Eaſter*, *Trinity*, *Michaelmas* and *Hilary* Terms, 1730.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1731.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1732.
And in *Eaſter* and *Trinity* Terms, 1733.

Sir *James Reynolds*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *John Comyns*, Knt. } Barons.
Sir *William Thompſon*, Knt.
Sir *Philip Yorke*, Knt. Attorney General.
Charles Talbot, Eſq; Solicitor General.

In *Michaelmas* Term, 1733.

Sir *James Reynolds*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *John Comyns*, Knt. } Barons.
Sir *William Thompſon*, Knt.
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The BARONS of the Exchequer, &c.

In *Hilary* Term, 1733.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1734.
And *Eaſter*, *Trinity* and *Michaelmas* Terms, 1735.

Sir *James Reynolds*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *John Comyns*, Knt. } Barons.
Sir *William Thompſon*, Knt.
John Willes, Eſq; Attorney General.
Dudley Ryder, Eſq; Solicitor General.

In *Hilary* Term, 1735.
And *Eaſter*, *Trinity* and *Michaelmas*, 1736.

Sir *James Reynolds*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *William Thompſon*, Knt. } Barons.
Sir *William Forteſcue*, Knt.
John Willes, Eſq; Attorney General.
Dudley Ryder, Eſq; Solicitor General.

In *Hilary* Term, 1736.
Eaſter, *Trinity*, *Michaelmas* and *Hilary* Terms, 1737.
And in *Eaſter* and *Trinity* Terms, 1738.

Sir *James Reynolds*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *William Thompſon*, Knt. } Barons.
Sir *William Forteſcue*, Knt.
Dudley Ryder, Eſq; Attorney General.
John Strange, Eſq; Solicitor General.

In *Michaelmas* and *Hilary* Terms, 1738.
And in *Eaſter* and *Trinity* Terms, 1739.

Sir *John Comyns*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *William Thompſon*, Knt. } Barons.
Sir *Thomas Parker*, Knt.
Dudley Ryder, Eſq; Attorney General.
John Strange, Eſq; Solicitor General.

The BARONS of the Exchequer, &c.

In *Michaelmas* and *Hilary* Terms, 1739.

Sir *John Comyns*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *Thomas Parker*, Knt. } Barons.
Martin Wright, Eſq;
Dudley Ryder, Eſq; Attorney General.
John Strange, Eſq; Solicitor General.

In *Eaſter* and *Trinity* Terms, 1740.

Sir *John Comyns*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Martin Wright, Eſq; } Barons.
James Reynolds, Eſq;
Sir *Dudley Ryder*, Knt. Attorney General.
Sir *John Strange*, Knt. Solicitor General.

In *Michaelmas*, *Hilary* and *Eaſter* Terms, 1740.

Sir *Edmund Probyn*, Knt. Lord Chief Baron.
Sir *Lawrence Carter*, Knt.
Sir *James Reynolds*, Knt. } Barons.
Sir *Thomas Abney*, Knt.
Sir *Dudley Ryder*, Knt. Attorney General.
Sir *John Strange*, Knt. Solicitor General.

FINIS.

ERRATA.

Page 5, Margin Line 9, for 269. read 271.
7, L. 5, for *Tithes* r. *Tithe.*
9, M. L. 10, for 317. r. 319.
33, L. 12, for *become* r. *became.*
37, M. L. 15, for *Bill* r. *an Anſwer.*
49, M. L. 5, dele *Poſt Pl.* 98.--M. L. 9, for 260. r. 261.
53, M. L. 18, for 383. r. 387.
58, M. L. 14, dele *Ante Pl.* 80.
97, M. L. 10, for 296. r. 298.
99, L. 31, dele *Lord Chief.*
105, M. L. 13, for 293. r. 295.
129, M. L. 1, for 392. r. 396.
140, M. L. 13, for 279. r. 281.
141, M. L. 15, for 267. r. 268.
177, L. 23, caret *Alpe.*
186, M. L. 15, for 319. r. 321.
227, M. L. 9, for 318. r. 320.--M. L. 10, for 353. r. 355.
306, L. 14, for *he* r. *the.*