# THE REPORT OF SEVERAL CASES

Argued and adjudged in the COURT of

## King's Bench

AT

## WESTMINSTER;

FROM THE

First Year of King JAMES the Second, to the tenth Year of King WILLIAM the Third.

Collected by *ROGER COMBERBACH* Esq; late Recorder of CHESTER, and one of the Justices of NORTH-WALES.

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To the Right Honourable

# THOMAS

## Earl of *MACCLESFIELD*,

## Lord High Chancellor of *Great Britain*.

YOUR Lordſhip's tranſcendant Candour, and the Favours You have honoured my Father with, will, I hope, extenuate the Preſumption of this Addreſs; which I am the more inclined to, becauſe there cannot be a greater Advantage to theſe Reports, than that the World ſhould know that the Author was one, whom your Lordſhip was pleaſed to regard.

I was encourag'd to make theſe Caſes publick by ſeveral eminent Men of the Profeſſion. Had the Author prepared them for the Preſs himſelf, they had appeared in another Dreſs; but it is hoped, as they are, they may be of publick Service; to which it was his only Study and Ambition to contribute.

BUT when I am ſpeaking of doing Good to Mankind, I have the moſt extenſive Subject before me in your Lordſhip, whoſe great Endowments and indefatigable Induſtry do, in all reſpects, adorn the Station that has been filled by the moſt eminent Men of paſt Ages. No wonder your Lordſhip ſhould be moſt acceptable to his Majeſty; for Wiſe and Steady

Steady Princes are always most happy in the Choice of their Ministers: For which Reason your Lordship's Merits have always had much the Start of Your Honours; but Your Honours can never overtake Your Merits.

It is with Difficulty that I restrain my self upon this Subject, which, tho' pleasing to me, will be otherwise to your Lordship: But I can never be too full in expressing my self,

My LORD,

Your Lordship's most obliged,

And most devoted

Humble Servant,

*Roger Comberbach.*

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# ERRATA.

Pag. 170. lin. antepenult. for *Motralf* read *Metcalf.*
227. lin. 22. for *Replevin* read *Replication.*
229. lin. 27. for *A Bar* read *No Bar.*
261. in Margin. for *refused* read *returned.*
286. lin. 27, 28. for *duodecim* read *duodecem*; & è contr.
364. lin. 1. for The *Duke* read The *Parish.*
400. lin. ult. for *By, &c.* read *By the Churchwardens, &c.*

# DE

# Term. Sancti Mich.

## Anno 1 Jac. II. Regis, in B. R.

### Dorrington *versus* Edwin.

REplevin by Plaint in the Sheriff's Court transmitted to the Hustings, and so hither by Certiorari. After, upon an Elongavit return'd by the Sheriff, a Scire facias issued against the Pledges. Demurrer thereto.

Scire facias lies against Pledges in Replevin after Elongavit returned, and Pledges to be found both in a Writ and a Plaint, by West. 2. c. 2.

Pollexfen pro Defendente. Scire facias lieth not against the Pledges; for the Advantage of suing the Bail is lost by removing the Certiorari hither: So in Debt, if removed hither. This appears by the Words of the Certiorari, (dicite (to the Plaintiff) quod prosequatur si voluerit) And this is the Practice in other Cases upon a Removal out of an inferior Court.

Obj. In a Replevin, the Plaint it self is removed, and the Pledges liable.

Respons. By the Common Law there were no Pledges in Replevin pro retorn' habendo. Stat. West. 2. cap. 2. brought in the Pledges, and the Recordari & Pone are grounded upon that Statute.

Difference of Proceedings on a Recordari, and on a Certiorari.

The Proceedings upon a Recordari vary from those upon a Certiorari. Willis and Bronker. Hill. 1 Jac. 2. Rot. 1157. For in a Certiorari the Case is begun de novo. 3 H. 6. 2 & 3. That the Parties may proceed in a Plaint below upon a Recordari, but not in a Certiorari. The Declaration in this Court runs thus: A. summonit' fuit ad respondend' B. which proves it to be a new Original. There is no Precedent for this Case.

That a Scire facias would not lie if it had been removed by Pone, &c. for that lieth upon a Writ, not a Plaint. 2 Inst. 340.

8 Ed. 3. 72. 29 Ed. 3. 38. b. Dalt. Sher. 434. 1 Cro. 446. Mosyer and Gray, 1 Cro. 594. That admitting the rest, there must be an Alias and a Pluries Ret. habend. before the Scire facias. Fitz. Nat. Br. 74. 80. Rast. Entr. 569. Dalt. Sher. 273.

Westm. 2. c. 2.

Holt pro quer'. A Scire facias lies and is grounded on Stat. Westm. 2. cap. 2. that Pledges shall be found, both upon a Writ and when by Plaint: The Intent of the Statute is, that the Pledges should be liable after the Removal of the Cause, tho' commenced by Plaint.

And also on a Habeas Corpus and a Certiorari.

There is a Difference between a Habeas Corpus and a Certiorari; for this removes the Record, cum omnibus ea tangentibus; but upon a Habeas Corpus the Body is removed only, and they shall begin a-new; so at the Common Law, 3 H. 6. fo. 3. This is like a Writ of Error, where the Bail is removed by the Words (cum omnibus ea tangentibus). Sid. 213.

Inconvenience urged, That if by removing, &c. the Pledges were discharged, the Plaintiff also by a Certiorari might discharge his own Pledges. That Proceedings have been against the Pledges after a Removal. Jo. 439. 1 Cro. 446. Rast. Entr. 576.

Obj. 1. The Declaration here is a new Original. Answer. Rast. Entr. 570.

Obj. 2. That there must be an Alias and Pluries. Answ. 'Tis not necessary after an Elongavit returned per Vic. and this Objection might as well be taken to the Bail when a Non est inventus is return'd upon the Capias. Adjornatur, And at another Day it was adjudged for the Plaintiff, viz. that the Pledges are liable. And (per Aston) the Party is clearly in Court, and consequently the Pledges. Mich. 2 Jac.

Joinder in Ejectment.

Tenants in Common cannot join in a Lease in Ejectment, per Cur'. Opinion of Lord Chief Justice Jones accord'. Vide Post. Tenants in Common cannot join in Ejectment. Q. pag. 190.

Case against Attorney appearing sans Warrant.

Attachment deny'd by the Court against an Attorney, who appear'd for the Plaintiff, without Warrant; but said an Action on the Case lies.

A criminal Prisoner not to be charged with Actions.

A Motion was made to charge one with a personal Action, who was committed for a criminal Action; and deny'd: For this hath been rarely granted, and but of late.

## *Rex versus* Coroner *de* —

Felo de se Compos Mentis.

A Melius Inquirendum was granted upon an Affidavit, that no Insanity of Mind was given in Evidence before the Coroner's Inquest, who, notwithstanding, found the Person dead,

Non Compos. C. J. It is a vulgar Error, that none of sane Mind can be Felo de se, and that whosoever kills himself, must be Non compos. For if he be Compos as to other Acts, that sole Act shall not denominate him Non compos.

Those that come in upon a Habeas Corpus or Attachment must plead the same Term, without Imparlance, giving the ordinary Rules, which are eight Days. Per Aston. Time to plead on Habeas Corpus or Attachment.

Recognizance taken before a Justice of Peace, and forfeited there, and after removed hither, we cannot estreat it; and by this means the Recognizance may be vacated. Per Lord C. J. Jones. Recognizance before Justices of Peace, vacated.

The Plaintiff having Notice that a Motion would be made against him in Arrest of Judgment, (after a Verdict) because the Distringas was defective, receiving the Postea from the Clerk of the Assise, took off the Distringas, and hindred thereby his Motion; the Want of a Distringas being help'd after a Verdict, tho' an ill one be not. Distringas embezled.

No Marshal can sit here as an Officer of the Court, till he be first admitted by the Court: And (per Wright) the Right of the Office is in the King only. No Marshal of B. R. before Admittance.

## *Rex versus* Copeland.

INdictment for Engrossing upon 5 Ed. 6. Exception was taken, that the Indictment was laid in London, and the Sale in Surrey: Ruled, That it is well enough, (on a Special Verdict). Indictment in London, for Engrossing in Surrey.

## *Rex versus* Lord Brandon. *Vide post.* 5.

ATtorney-General moved, that he might not have a Copy of the Panel, &c. But ruled, That (he being to be tried for Treason) might have it before he was brought to the Bar, and in Sidney's Case 'twas allow'd, as reported by the Under-Sheriff of London, then in Court. Copy of the Panel allow'd.

## Snape *and* Dowse.

EXception was taken to an Order of Sessions, upon the Statute for Servants Wages, viz. That it doth not appear that the Servant was hired according to the Statute. Quash'd. And per Holloway, Only Labourers are within the Statute. Order of Sessions for Servants Wages, quash'd.

## Dennis *and* Edwards.

Quare cum, &c. in Trespass, ill; but amended.

ASsault and Battery; Verdict pro quer'. Moved in Arrest of Judgment, that the Count ran, de Placito quare cum, &c. so but a Recital, &c. But the Court granted that it might be amended, and Records were produced of Amendments in such Cases in C. B. But Note, Two Judgments were arrested for this very Fault, Termino Pasch. 8 Georgii, viz. Lay *versus* Brewster, and Simons *versus* Atkins, in C. B.

Misnosmer amended, tho' on Record.

Note, Harvert for Harbert (being only Vitium scriptoris) was amended upon Motion, tho' Issue was joined, and the Cause entred upon Record.

## Claxton *versus* Swift. Post. 30. (Rot. 1163.)

Bill of Exchange indors'd, &c.

UPon an Indorsement of a Bill of Exchange, by the Custom of Merchants. Demurrer, The Question was, Whether a Recovery by the Indorsee against the Drawer, without Satisfaction, be a good Bar to an Action brought by him against a mean Indorsor?

Thompson. It is not; He hath his Election to bring his Action against either, therefore it is no Bar. The Pleading in this Case is naught, there being an Indebitatus Assumpsit; so that non constat upon what account the Damages are given.

Pollexfen for the Defendant, to the Objection of Indebitatus Assumpsit, answered, They are averr'd to be the same; and agreed that he hath Election to bring against either severally, but not against both together. The Election is determin'd by the Recovery; and if he might after sue the others, they would be deprived of their Remedies. So in Trespass, 2 Cro. 73. Yelv. 65. and differs from the Case of Debt upon a Bond which is joint and several. Adjornatur. Note, This Case is reported in *Lutw.* and 3 *Mod.* where it appears, That Judgment was given for the Plaintiff, but afterwards reversed in the Exchequer-Chamber.

## Hawley *versus* Ludlow.

Principal renders in Discharge of the Bail before Day of Appearance, and good.

DEbt upon a Bail-Bond; the Condition was, That the Principal should appear at such a Day, &c. The Bail pleaded, That the Principal rendered himself before in Discharge, &c. and was discharged for Want of Prosecution.

Holt. A Surrender before the Day cannot discharge the Bond, the Condition being express to appear at such a Day: And the Condition here of this Bond differs from the Condition of a Recognizance.

Darnel contra, That the Law favours the Bail. 3 Cro. 22. Ro. 335. 26 H. 7. f. 7. 3 Bulstr. 191. C. J. Such Surrender shall discharge the Bail, for the Body being rendered, the Arrest hath its Effect.

## Vallet *and* French. Post. 12.

That Error in Fact, in this Court, must be brought the same Term. Fitz. Nat. Br. 21. (I) Dy. 195, 196. Yelv. 157. 3 Cro. 104. Ro. 746. Style 218, 219.

Error in Fact, amendable the same Term.

Answ. That it is pleadable before Execution executed.

Wythens. Such Writ lieth here in the same Term, because Judgment is so long in our own Breasts. And (per C. J.) we might alter it the same Term without a Writ of Error.

## Salter *and* Bellamy.

Error to reverse a Judgment given in an inferior Court, three Errors were assigned.

Error from inferior Court, no Jurors Names return'd; ill.

1. That Judgment is awarded by the Mayor and Bailiffs, without saying per Cur'.

2. That it is coram præfat' Major' & Ballivis, the Cause being continued above a Year after.

3. There are no Jurors Names returned.

The Court over-ruled the 1st, (it being said in eadem Cur', 'tis well enough) and the second, because the Corporation dieth not, and the same Mayor might be chosen again.

But for the last Error the Judgment was reversed Nisi. Vide Ro. 796. 800.

## *Rex versus* Lord Brandon. Vide ante 3.

It was moved in Arrest of Judgment for High Treason:

Arrest of Judgment in High Treason.

1. That he had not four Days to move in Arrest, &c. and cited Sir Henry Vane's Case.

2. That one of the Witnesses was examined to a Matter out of the Indictment.

3. The Improbability of Claxton's seeing the Writing of such a Letter, and the Reading of it after, and that he was yet unpardon'd.

4. That

4. That Rumsey was forsworn in Lord Russel's Trial; but that was utterly denied by the Court.

5. That the Lord Gray was not to be credited. 11 H. 4. 41. Bract. lib. 3. cap. 3. That a Pardon reverseth not the Outlawry.

6. That he had no Counsel. 1 Cro. 34. 147.

7. That his Jury were not all Freeholders; and cited Fitzharris's Case; but all these Exceptions were over-ruled by the Court, and Judgment given against him, quod, &c.

## *Rex versus* Lord Delamere.

Bail on the Habeas Corpus Act.

IT was moved, that he might be bailed upon the Habeas Corpus Act, for Want of Prosecution, within a Term.

Cur'. The Grand Sessions held at Chester, where the Cause ariseth, is in Nature of a Term; and if his Prayer had been entred there, we might have bail'd him (upon Motion) the first Day of this Term; but the Prayer being here upon the first Day, that can give him no Advantage; the Discretion of Bailing, which the Court had before, is now restrained by that Act. And where the Act saith Witnesses, yet if one Witness only be sick, 'tis within the Act: And (the Words of the Act being upon Oath made) an Affidavit was taken in Court viva voce; but this was afterwards waived, and the Prisoner was bailed by the Consent of the Attorney-General.

4

# DE

# Term. Sancti Hillar.

## Anno 1 & 2 Jac. II. Regis, in B. R.

### *Mayor of* Norwich *versus* Johnson.

AN Action of Waste was brought in C. B. against an Executor de son tort of a Term, and Judgment there for the Plaintiff. The Defendant brings a Writ of Error.

Waste against an Executor de son tort of a Term.

Appleton pro quer' in Error. Waste lieth not against such an Executor, it being penal, and treble Damages to be recovered. 1 Cro. 282. that Trover lieth.

Waste lay not against him at Common Law; and the Statute of Gloucester is only against Tenant for Life or Years, which is to be construed strictly, quia Penal. Tenant in Tail apres Possibility, Tenant by Elegit, at Will, at Sufferance, cestui que Use, Pernor of Profits barely, until Stat. 11 H. 6. cap. 5. were not within this Statute. So the Question will be solely, What Estate such an Executor gains by his Entry? That he gains a Fee-simple by Disseisin, Vide 1 Inst. 271. Ro. 662. and Digby's Case, ibid.

Stat. of Gloucester.

To bring him within the Statute, he must be either Tenant for Life or Years, and such Estates must be gained either by Right or by Wrong; that they cannot be by Wrong, is Helliar's Case, 6 Co. And here it cannot be by Right, because it appears upon Record that he is an Executor de son tort, and so in by Wrong. Estates for Years must be gained, either by Act of the Party or Act in Law; here it appears, that he comes not in by Act of the Party, and by Act of Law he cannot; for the Act of Law will work no Wrong. None without Claim or Entry can gain an Estate by Wrong. Mo. 126. And by such Claim, &c. he must gain a Fee; for no uncertain Estate can be gain'd by Wrong.

This

Election.

This is not like the Cases of Election, where to make the other a Disseisor or Lessee, is at the Election of the Party. 1 Cro. 302. Blunden and Baugh. Nor will the Case of an Occupant, who is punishable for Waste, be like unto this; for there the Entry is lawful, but here unlawful. The Law takes Notice of such Executors in respect of the Creditors, and will not construe any Thing to their Prejudice. Hob. Castilion and Smith.

Holt contra, cited 5 Co. 33. An Executor de son tort may be of a Term, Mo. 136. tho' he cannot derive a Title to another; that 'tis a Disseisin at the Election of the Party, Mo. 303. So the wrongful Guardian in Socage is a Disseisor at the Election of the Heir: That this is justifying one Wrong by another, the Waste by the Disseisin.

Obj. He is liable to Creditors. Answ. This can be no Wrong to them.

Stat. of Gloucester, penal, yet favoured.

Such an Executor is liable to all Actions, tho' he shall not have equal Advantages with a rightful Executor. 5 Co. Coulter's Case, 1 Inst. 271. To the Objection, that 'tis a penal Statute, he answered, that by 2 Cro. 414. 4 Mod. &c. it appears to be a remedial Statute: That if such Action lay not, it would be of great Wrong to the Reversioner. 'Tis true, Tenants by Elegit, &c. are out of the Statute, because they are created by an after Statute, and the Waste they do shall go in part of Payment of their Debts.

C. J. Tho' the Act be penal, yet being of publick Benefit, it shall be construed favourably; and being an Executor, he represents the Testator, and consequently may have a Term for Years.

The Judgment was affirmed.

Interrogatories.

Note, Upon a Motion to be discharged, because no Interrogatories were put in within four Days; Ruled, That the four Days must be in Term.

Trial by Reference.

Per Lord C. J. Nothing triable by an Issue between the Parties can be directed by the Court to be try'd by Reference.

## Close *and* Vaux.

Ejectments, how regulated.

Judgment in Ejectment, and Costs tax'd, the Lessee releaseth the Costs. Ruled, upon Motion, to be an undue Practice, and the Release void: For (per C. J.) Ejectments being framed by the Court to save long Proceedings in Real Actions, the Court hath Power to regulate all Matters that fall out in such feigned Actions.

## Keblethwait *versus* Palmes.

CAse in C. B. for diverting a Watercourse, Judgment pro quer', Error brought in B. R. Thompson pro quer' in Error. The Declaration here is ill laid; there is a Difference between Case and Trespass; for in Case the Plaintiff must well intitle himself; here he hath laid no Prescription for the Watercourse, without which he cannot gain a particular Property. 1 Sid. 167. The Action should have been Trespass, not Case: here is no Damage done, because the Plaintiff shews no Right. See 4 Co. Lutterel's Case.

Case for turning a Watercourse, good; sans Prescription. Vide Post. pag. 39.

1 Cro. 325. is nothing to our Case. 1 Cro. 494. and Dy. 248. b. amount to a Prescription. 1 Roll. 107. is for me. 1 Leon. 280. Palm. 209. tho' it says, Case, it must be intended of Trespass. The Defendant hath well justify'd, for it was to turn his own Mill, and stood upon his own Ground.

Williams pro def. The Declaration is good; no Difference between Trespass and Case, but only for Aggravation of the Damages. Wheresoever an Injury is done, Case lieth; here the Injury is apparent, and Malice also. In possessory Actions the Title need not be strictly made out, as in a Prescription. Bract. cap. 43.

Obj. That the Mill is not alledged to be antient, or any Prescription laid.

Answ. The Watercourse is not apply'd particularly to the Mill, but to the Place, and may be put to other Uses. That the Mill is mentioned only to aggravate the Damages. Bracton, cap. 42. de Aquæ ductu. Rast. fo. 441. tit. Uses. 21 H. 7. fo. 30. Rast. Entr. fo. 90. b. tit. Molin.

Obj. 11 H. 4. fo. 47. Answ. There an Injury doth appear. Dy. 248. b. express 2 Cro. 42. Hob. 290. Biggot. 1 Cro. 499, 500. Palm. 290. Thelwal Digest of Writs, tit. Executor, placito 7.

## Burman *versus* Buckle.

CAse upon a Bill of Exchange; Declaration upon the Custom of Merchants, Verdict pro quer'.

Bill of Exchange.

Treby moved in Arrest of Judgment. 1. The Custom, as here laid, is as general as the Common Law of England. 1 Ro. 29. pl. 30, 31. 1 Sid. 396.

Custom of Merchants.

2. The Custom is laid, Mercatori vel alicui al' personæ (omitting the Words Commercio utenti.)

Wythens J. All the Precedents are, Commercio utent', except one which passed sub silentio. Judicium arrestetur nisi, &c.

## *Rex versus* Newdigate.

Indictment for challenging.

THE Defendant was convicted upon an Indictment for challenging, &c. and now fined 1000 Marks, and found Sureties for his Good Behaviour for three Years.

London.

Resolved, That the City of London cannot set a Fine, &c. for Non-performance of a By-law.

Nusance abated.

One was indicted and found guilty of a great Nusance: A Writ goeth to the Sheriff (if the Party refuseth to abate it at his own Charge) the Court will raise the Fine accordingly; Secus, If the Nusance may be easily removed, as pulling down a Wall, &c.

## *Rex versus* Baily.

Indictment for Kidnapping.

BAily being convicted and fined, upon an Indictment for Kidnapping, a Motion was made to estreat his Fine. Aston, The Course is not to estreat, &c. when the Party is in Execution, unless at the King's particular Request.

## Brent *and* Whitchcock.

The King's Monyers to repair Highways.

REplevin. The Defendants avow upon the Statute of Ph. & Mar. and 22 Car. 2. for not repairing Highways. Plaintiff replies, and pleads the Privilege of the Moneyers of the Mint to be exempt, &c. the Defendant demurs.

Holt for the Defendant argued, That the King's Letters Patents reach not these Acts, for the Exemption is only from Duties, &c. granted to the King, and the Duty of repairing the Highway comes not within those Words; but admit it were a good Discharge, yet the subsequent Acts repeal it. Inst. 121. 6 Co. 73. Drue Drury's Case. 2 Inst. 704. that all Exemptions of Clergymen are taken away. 2 Ed. 3. 6. and 2. 2 Inst. 569, and 570. Here this Tax is laid by Acts of Parliament since the Patents. Sid. Dr. Webb's Case.

Afterwards Judgment was given for the Avowants. Pasch. 2 Jac.

## Upjohn *and* Dawkins.

TRespass quare liberam Piscariam, &c. fregit & pisces, viz. &c. ipsius (quer') cepit & asportavit. Narr. in Trespass quod Pisces ipsius Quer. cepit, &c. ill.

Pollexfen, Here is a Verdict for the Plaintiff, and tho' it be libera Piscaria, yet one may put Fish of his own there. Usher's Case of Pheasants.

This is like the Case of a Tenant in Common, who shall recover when he declares singly, if Tenancy in Common be not pleaded in Abatement.

It was said by Wythens, and not denied by the Court: Here it appears by the Declaration, that he is a Tenant in Common; secus, in the Case put, where he is presumed to be sole Tenant, until the contrary be shewn: Ruled, that the Declaration is naught, and Judgment accordingly. Post.

## Humfreys *and* Misdale.

REplevin in C. B. Avowry by Damage-fesant: Nonsuit: The Jury omitted to find Damages, and tax Costs upon the Nonsuit; and the Question was, If that might be supply'd by a Writ of Inquiry? Thompson, That it cannot 21 H. 8. cap. 19. Co. Entr. 572, 574, 5, and 7. In Replevin, Damages omitted, supply'd by Inquiry.

Pollexfen, That it may be supply'd: The Precedents are both Ways, Thesaurus Brevium 1 Part 107. 2 Part 247. Cur', A Writ of Inquiry doth lie in this Case; and granted accordingly.

## Herring *and* Brown.

EJectione firmæ. The Jurors found a Settlement to Uses, with Power of Revocation 1643, and afterwards a Fine is levied 1649, and then a Deed declaring the Uses of the Fine: The Question is, Whether the first Uses are well revoked? Revocation of Uses, &c.

Williams pro quer'. Here the Deed doth closely follow the Fine, and the Intent of the Fine was, only to sever the Estate and raise new Uses. Deeds of Uses are usually made after the Fine, tho' dated before; no Difference as to this Case, whether the Deed is precedent or subsequent; only an Averment lies against a Deed made after a Fine; secus if made before.

Powers of Revocation are largely taken. Hob. 312. Kibbol and Lee. 10 Co. Snape's Case.

The common Way of executing a Power of Revocation, is by Fine and Deed. Dy. 136. 380.

This Court will not judge according to Niceties. 1 Cro. 191. Rushw. Vaugh. 43, 49, 50.

Holt contra, The Power of Revocation is extinguish'd by the Fine, which works a Forfeiture being levied by Tenant for Life, who thereby is in of a new Estate.

And 'tis not absurd, That he who hath a Power of the Inheritance may commit a Forfeiture, it being a limited Power.

That it is a Forfeiture, Inst. 251. b. 1 Ro. 855. And whatsoever was the Intent of the Party, we must argue upon the Fact done. 1 Cro. 391.

That it works an Extinguishment, Albany's Case and Diggs's Case are express. Tho' the Fine and Deed, to some purposes, make but one Conveyance, yet here they must be severally consider'd, and the subsequent Deed cannot amount to an Execution of the Power, for then it should purge the Forfeiture, which it cannot do, Inst. 250, 252. Sid. 90. Lestrange's Case. Difference between a precedent and a subsequent Deed, Inst. 236. b. Tho' Revocations are favoured, yet the Circumstances must be pursued, Quod fuit concessum per Cur' præter Wythens Just. who held, that the Fine and Deed should be consider'd as one Conveyance in Favour of common Assurances, where the Distance of Time is not apparently long: But it was adjudg'd for the Defendant. Vide Post.

2d Imparlance in Quo Warranto.

Williams moved for a second Imparlance in a Quo Warranto, and said it was granted in the Case of the City of London, but the Court denied it; for Astry said, by the Course of the Court they were to have but the common Imparlance. And (per Cur') being ex gratia, we may grant or deny it as we see Cause.

Procedendo ad Judicium to an inferior Court.

A Motion was made for an Attachment against the Mayor of upon Affidavit, that he had long delay'd a Trial. Holloway, You may have a Procedendo ad judicium, and compel him to proceed; but an Attachment was denied by the Court.

## Gardner *versus* Stroud *& al'.*

Attorneys Clerk, &c. not privileg'd.

ADjudged that an Attorney's Clerk hath no Privilege; also that an Attorney being jointly sued with others, loseth his Privilege.

## Valet *and* French.

Error de Recordo, &c. no Supersedeas or Plea to a Scire facias.

SCire facias to revive a Judgment, the Defendant pleaded a Writ of Error depending de Record' coram nobis residen', and adjudged, that it was no Supersedeas; secus of Error in other Courts.

Cooke

## Cooke *versus* Williams.

ERror of a Judgment in C. B. Exception taken, that no Day was given to impart, the Judgment being of the same Term, Rast. Ent. 631. Sed non all', for (C. J. said) Want of an Imparlance, if pray'd, is Error; secus, if not pray'd. Aston, the Dictum est, &c. in the Record, is only to give a Rule. The Judgment was affirmed, for it appeared upon the Record that the Judgment was by Nihil dicit.

Where Want of an Imparlance is Error.

## *Rex versus* Vaux.

WIlliams moved to quash an Indictment for Perjury. For that in the Case of Mrs. Cellier, An Indictment in Yorkshire for a Perjury committed in London, was quash'd for that Reason.

Indictment in Middlesex, for Perjury in London, quash'd.

C. J. If an Indictment be apparently vitious (be the Crime what it will) it ought to be quash'd; for if there were a Trial and Verdict thereupon, Judgment must afterwards be arrested for the Vitiousness of the Indictment; and therefore, as amicus Curiæ, any one may move to quash it.

Amicus Curiæ.

Withers. The Course is usually to direct a Trial in such Cases; and so it was done here.

## *Rex versus* Freake.

INdictment for calling one Thief; Exception taken, that it is actionable at Common Law: Quash'd.

No Indictment for Words actionable.

Note, In Ejectione firmæ, the Court, upon good Cause shewn, will enlarge the Term.

Term enlarg'd in Ejectment.

A Motion was made for Judgment in Ejectment, upon a Lease sealed on the Land, and deny'd; for (per Cur') you must try it.

Ejectment on a Lease sealed, must be tried.

DE

# DE

# Termino Paſchæ.

## Anno 2 Jac. II. in B. R.

Where Trial by Reference or Audita Querela.

IRregularities in ſuing out a Judgment or Execution, are to be try'd by Reference, &c. but other Matters ſubſequent to the Judgment, by Audita Querela.

New Trial denied.

The Court denied to grant a new Trial, upon Affidavit that the Jury went by Votes; tho' Serjeant Stroud ſaid it had been granted in the like Caſe.

### Palmer *and* Allicot.

Statute of Diſtributions.

PRohibition. A Man dieth Inteſtate, leaving a perſonal Eſtate, and only one Son; and the Queſtion was, 1. Whether any Intereſt veſts in the Son by the Statute of Diſtributions?

2. Whether this be not more proper for the Juriſdiction of the Arches, and conſequently no Prohibition lieth?

Williams for the Defendant in Prohibition. To the firſt, Before 22 & 23 Car. 2. No Diſtribution was granted of Inteſtates Eſtates. 1 Cro. 62. Fotherby's Caſe, Jo. 228. (6 Car.) Vandam's Caſe.

At Common Law, before 31 Ed. 3. Ordinary could not grant Adminiſtration, but had only a delegate Power by ſpecial Commiſſion, 9 Co. 40. Henſlow's Caſe; but 31 Ed. 3. enables the Ordinary to grant Adminiſtration. And the Statute of H. 8. ties him up to the next of Kin. 1 Cro. 208. No Right in the Adminiſtrator, but in Right of the Inteſtate.

That 22 & 23 Car. 2. doth not alter the Law as to this Case, being casus omissus.

That there is no need of raising a Construction in this Case, for he had a good Remedy by the other Statute, 5 Co. 39. No Distribution can be made where there is but one Child; for the Statute is not to be construed beyond the express Words. Trin. 31 Car. 2. Burnel's Case.

Distribution where only one Child. Sed vide post contr.

2. To the second Question. Vide Cottington's Case.

That by 22 & 23 Car. 2. The Jurisdiction is fix'd in the Ecclesiastical Court, exclusive in effect of all others. The Chancery and Exchequer never relieve in case of Distribution.

Prohibition where it lies. Vide infra.

Pollexfen pro quer'.

The Construction of an Act of Parliament doth always belong to the King's Courts.

The Clauses of this Act for Distribution, which give Power to Ecclesiastical Courts, &c. do not take away a Prohibition in this Court.

We contend not for the vesting of an Estate in the Infant, but only such an Interest as where there are more Children, or in Case of a Legacy; we agree, that the Estate is in the Administrator, and the Interest we claim is only a Chose in Action. This Act is in Lieu of the Intestate's Will, and as good as an actual Will.

If no Interest vests before Distribution, Children will want their Portions for their Preferments, and Administrators will be encouraged to delay Distribution.

Precedents are many in the Courts of Delegates, that such an Interest vests, and the constant Practice there accords. Stat. 1 Jac. prevents the Mother's going away with the Child's Part, which proves that such an Interest is vested. Practice in Canc accord'.

Obj. This is casus omissus, for the Statute extends not to one sole Child.

Answ. Distribuere shall be taken as tribuere. And as to this Point the Court was of Opinion, That one sole Child is within the Statute. Vide prox' pag. contra.

Post S. C.

In Burwel's Case, the Point in Debate in this Case came not in Question: And (per Cur') that being only an Opinion of a Case in Equity, will not govern this Case. 'Tis unreasonable that Administrators should only have the Trouble, &c. and after Legacies, &c. paid, the Estate shall go to another. 4 Co. 51. 1 Cro. 106. Dy. 372.

That Administration de bonis non, shall go to the residuary Legatee.

C. J. Where Power is given to Ecclesiastical Courts, and an Act directs them, &c. 'tis unreasonable that they may not judge of this Act.

Wythens,

Wythens, Whenever Acts of Parliament come in Question, this Court grants a Prohibition. 'Tis the Constant Practice.

C. J. Prohibition lieth only when other Courts hold Plea of that whereof they have no Jurisdiction, or having a Jurisdiction, they mistake. But Wythens, Wright, and Pollexsen contra as to this Point. For a Prohibition is to see if those Courts proceed regularly, or no; and if they do so, then to grant a Consultation, which Writ proves, that it lieth in Cases where no Wrong, &c. is done; and tho' it appears they had originally good Conusance of the Cause. Sed hæc obiter.

At another Day Pollexsen insisted, that Construction of Acts of Parliament belongs to the King's Courts, and cited Vaugh. 230. Sid. 431. 1 Cro. 62. 202. 1 Sid. 179. Pasch. 27 Car. 2. Spence *versus* England. 22 Car. 2. B. R. Offley *and* Best. Cur'. Construction of Statutes may be made in inferior Courts, and if good, we will not prohibit them.

C. J. You agree, that when they give Judgment below, which is against the Statute, there is no Remedy but by Appeal, which (you say) must be stopp'd by a Prohibition as soon as brought, which is unreasonable. And it agrees not with my Reason, that if the Judge below be strongly of another Opinion, that he must afterwards judge contrary to it, according to our Opinion, upon the Prohibition.

If a Prohibition lieth only when they judge of Matters out of their Conusance, then here no Prohibition lieth: But if a Prohibition lieth also ad informand' Conscientiam, &c. then it will lie in all Cases whatsoever.

C. J. and Holloway against the Prohibition, Wythins and Wright for it. Ideo adjornatur in Cam. Sacc.

Afterwards, at another Day, per Cur', No Interest vests. And a Consultation awarded. Mich. 2. Post.

Money brought into Court.

Note, The common Rule, upon the Motion, that bringing so much into Court, &c. it may be struck out of the Declaration, doth not extend to a Quantum meruit. Quære.

Indictment for cheating, &c.

Per C. J. (and not denied) All Cheats and Abuses of Tradesmen are Matters indictable.

Pardon, with Clause of Transportation.

A Pardon of Felony, with a Clause of Transportation, was allowed, and the Party discharged, without finding Sureties: But per Astry, The usual Course is to insert the Clause for finding Sureties to transport himself within such a Time; but, per Cur', He ought to transport himself within the Time, at his Peril; and therefore it was allowed, &c.

Distress for Rent. Per C. J. One cannot break open the outer Door; but per Pollexfen, If the outer Door be open, one may break open the inner Door. Door broke to distrain.

One was committed by Warrant as Confederate to the Felony, &c. And by the Rule of Court, the Justice was ordered to amend it, and make it Accessary. Confederate, no Accessary.

A Habeas Corpus was deny'd to bring up one in Execution, to be a Witness, because it seems to be an Escape. Habeas Corpus.

Indictment for taking a laced Scarf, and converting it, &c. Exception was taken, that this is in Nature of a Trover. Cur'. If it had been laid violenter, it had been good; but no such Indictment lieth without actual Violence. Where Indictment or Action.

## Cockruft *versus Eundem.*

BAttery, in removing him from his Seat in the Church; Defendant pleads molliter manus imposuit, &c. Selby pro Quer'. The Plea is naught; for in this Case there can be no Justification. Noy 104. 2 Cro. 366. The Court at first inclined for the Defendant, that such a Removal was justifiable, and directed Judgment to be entred for the Defendant, Nisi, prox' Term'. Sed postea prox' Term', It was adjudged for the Plaintiff; for the Court said, there could be no Justification of a Battery in the Church, unless in Case of a Church-warden, &c. Sid. 301. 1 Saund. 10. 13. No Justification for Battery in a Church, Nisi.

## *Rex versus* Jane.

INdiament sur Stat. 5 Ed. 6. for keeping a Country Ale-house without Licence. Q. If keeping Ale-house, sans Licence, indictable. Post .

Pollexfen took Exception, That 'tis not indictable, being no Offence at Common Law. Hutt. 100.

And the Statute directs the Punishment, therefore no Indictment lieth; and to that Opinion the C. J. inclined, but Wythens said there had been many Precedents of such Indiaments. Adjo.

Excessiveness of Damage, no Ground for a new Trial; and this was ruled in the Case of Bernadiston and Soams. Per tot' Cur'. New Trial deny'd.

## Rodney *versus* Stroud, *& al'.* Post.

Nolle prosequi against one, where Judgment against divers.

AN Action brought against divers, for False Imprisonment, upon pretended Suspicion of being in Monmouth's Army; Verdict pro quer', and the Damage severed by the Jury, the Plaintiff enters a Nolle prosequi against one.

Levinz moved in Arrest of Judgment; he denied, that 1 Bul. 157. was Law, and resolved ill in Heydon's Case. and 1 Cro. Hayer *versus* Wood. A Difference when the Jury find a several Battery.

2. The Entry of a Nolle prosequi is as good before Judgment as after, altho' it was a Doubt formerly. 24 Ed. 4. 7. 25 Ed. 4. 26. b. Co. Entr. 650. b. and 676. b. Rast. Ent. 582. b. Hob. 108. & 70. are all before Judgment. Secus, Mo. pl. 855. 2 Roll. 100. 3 Cro. 762.

Where the Plea and Verdict are joint, the Plaintiff can by no Act make them several; otherwise of the Act of the Jury, or of the Defendant by pleading. 11 Co. 50. b. 1 Cro. Player.

Obj. A Nolo prosequi is no Release.

Answ. An Agreement upon Record is as strong as an Agreement in Pais. 1 And. 316. b. 20 Ed. 4. fo. 2. And therefore, by Littleton's Rule, the other shall take Advantage of it.

The Jury may do what the Party cannot. Sty. 34. 148. Dy. 210. a.

Pollexfen contra.

Nol. pros. no Release.

Walsh and Bishop's Case seems to have settled the antient Dispute, that a Nolo prosequi is no Release; and none of the Cases cited do prove any Difference between a joint and a several Plea. Adjournatur.

No new Trial in Ejectment.

Per Wythens. In Ejectment we rarely grant a new Trial, for they may try the Title over again.

Affidavit contra Affidavit.

Where there is an affirmative Affidavit and a negative Affidavit, the affirmative Affidavit of the Plaintiff is to be taken.

## *Rex versus* Williams.

Information. Order of the House of Commons pleaded to the Jurisdiction.

AN Information was exhibited by the Attorney-General against the Defendant, for licensing Dangerfield's Narrative. The Defendant pleads to the Jurisdiction of the Court, that he did it as Speaker, and by Order of The House of Commons, and demands Judgment of this Court, whether they will take Conusance of it: To which the Attorney-General demurs, (See the Case put at large by Sir Robert Atkins, in his Discourse

course of the Power, Jurisdiction, and Privilege of Parliament, occasioned by this Information, and published, Anno 1689.)

Pollexfen for the Defendant. This Matter touches the Parliament, and therefore not triable here. This being done in Pursuance of an Order of the House of Commons, is their Act, not his. The Parliament is the highest Court.——

C. J. The House of Commons is no Court, nor Part of a Court.

Wythens. The King himself cannot licence a Nusance, nor (per C. J.) any Thing that is malum in se. A minori in this Case. Judgment (instanter) quod Respondeat Ouster.

Astry. Upon a Respondeas Ouster they have usually four Days Time to plead, as in Fitzharris and Elliot's Case; but it is in the Discretion of the Court, and four Days were given accordingly, and afterwards

Four Days to plead after Respondeas Ouster.

He pleaded the common Plea, Quod non vult contendere cum Domino Rege, and was fined 10000 l.

Upon a Quo Warranto, when the Liberties are seised quousq; &c. and they do not replevy them. (Per Astry) The Course is, That Judgment final be given, nisi they plead within such a Day.

Judgment in Quo Warranto.

## Hilliard *versus* Smith.

Bill of Exchange in Satisfaction of Obligation; and in Assumpsit, Payment of a lesser Sum in Satisfaction, good; but Debt on Obligation; Plea of Part received, ill.

Debt on a Bond, the Defendant pleads, that he hath given a Bill of Exchange in Satisfaction; and ruled a good Plea. And per Cur'. Payment of a lesser Sum in Satisfaction of a greater, is good in an Assumpsit; but in Debt sur Obligation, Defendant pleads in Abatement, that the Plaintiff received part of the Money after the Action brought; and ruled ill.

Information against two, for a Riot. It was moved in Arrest of Judgment, that (by my Lord Coke) there must be more than two to make a Riot.

A Riot is by more than two.

C. J. There must be more than two Rioters, yet two only may be indicted. Judgment pro quer'.

Per Cur', A second Writ of Error brought after Nonsuit in a former, is no Supersedeas; and Leave given, upon Motion, to charge the Defendant in Execution.

Second Writ of Error no Supersedeas.

When one is malitiously and vexatiously outlawed in private, who appears daily, and may be taken, we usually reverse the Outlawry, upon Motion. Per Wythens.

Malitious Outlawry.

One makes his Will, yet dies Inteſtate.

Error was aſſign'd, that one pleaded (cum teſtamento annexo, qui obiit inteſtat') which is abſurd and repugnant. 'Tis well, (per Cur') for tho' one make a Will, yet if he make no Executor, he is an Inteſtate.

Money brought in on an Indebitatus Aſſumpſit, well, contra in Quant. Meruit.

Indebitatus Aſſumpſit and Quantum meruit, for the Loan of a Horſe for three Miles; Motion was made, that bringing 2 s. 6 d. into Court, it may be ſtruck out of the Declaration; and granted per Cur', upon the Indebitatus Aſſumpſit, but deny'd as to the Quantum meruit.

No Coſts in Prohibition.

Per C. J. No Coſts in a Prohibition, tho' it ſeems reaſonable there ſhould be.

Medietas Linguæ.

Note, Wherefoever a Medietas Linguæ is to be had, a ſpecial Jury is to be return'd.

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# DE

# Term. Sanctæ Trin.

## Anno 2 Jac. II. Regis, in B. R.

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Seſſions may chuſe a Conſtable, &c.

IT was agreed, per Cur', that the Seſſions may chuſe a Conſtable, and that the Order here, (which was moved to be quaſhed, upon Suggeſtion that it was grounded upon an Offence now pardon'd) appointing him to take the Oaths, is an Election of him, &c. He may be a Perſon not living within any Leet. And (per Holloway) they might have compell'd him to take the Oaths by increaſing his Fine.

Cur'. This Case is like a Judgment; which, if good, is irreversible, tho' the Crime be pardon'd. And the Order was confirmed.

Per C. J. An Indictment may be quash'd, if it appear vitious, after Issue joined. Indictment quash'd after Issue join'd.

Per Wythens. Trover lieth against a Carrier for the Owner of the Goods, and for the Carrier against him that took them away. Trover after Trover.

Ruled per Holloway, That a Delivery of a Declaration upon a Sunday is not good. Post. Declarations delivered on Sunday, ill.

## Burroughs *and* Hays.

COvenant upon a Demise for Years, rendring Rent; and Breach assigned for Non-payment. No Covenant against Covenant.

Defendant pleads, that Part of the Rent was to be allowed, &c. Mo. 135.

Cur'. This is a Covenant against a Covenant. Yelv. 43. Judgment pro quer', Nisi, &c.

## Godwin *versus* Hales.

DEbt upon the Statute 25 Car. 2. cap. 2. for the Penalty of 500 l. wherein the Plaintiff declares, That whereas it was provided by the Statute, &c. (setting forth the Statute) Notwithstanding which, the Defendant having a Commission to serve the King as a Colonel of Foot, and not having received the Sacrament, nor taken the Oaths and Test, &c. within the Times prescribed by the Act; That after the Times expired, wherein he ought to have received the Sacrament, and taken the Oaths and Tests, as aforesaid, he did execute the said Office, and continued to act by Colour of the said Commission, of which he was indicted and convicted at the Assizes in Kent, whereby the Action accrues to the Plaintiff, for the Penalty of 500 l. The Defendant pleads, That before the Times expired, &c. he had a Dispensation under the Broad-Seal to act, Non obstante that Statute; to which the Plaintiff demurs. The King's Dispensation for the Sacrament and Test pleaded.

Northy pro quer'.

1. The Plaintiff hath well intitled himself, having fully pursued the Directions of the Statute, by setting forth: 1. His being in an Office. 2. That he neglected to take the Oaths, &c. 3. That he executed the Office after the Time, &c. expired. 4. That he was indicted and convicted pursuant to the Act.

The

The Defendant's Plea comes too late; for he should have pleaded this to the Indictment, &c. which not being done, it shall be an Estoppel. Bro. Char. of Pardon 15. 3 Cro 4. pl. 2. 2 Roll. 306.

Here we sue upon the Conviction, and it is in Nature of suing out an Execution upon it; and like to an Administrator De bonis non, &c. who may sue, &c.

Note. 2. To the Matter of the Plea: In many Cases the King cannot dispense by his Prerogative. 11 H. 7. fo. 12. 5 Co. 135.

A Statute which prohibits, &c. with a Charge of Disability, is not dispensable. Co. pl. Cor. 154. 2 Cro. 385. Hob. 79. Mo. 1299. Statute of Ed. 6. is not dispensable. Vaughan's Report's, Thomas *versus* Sorrel.

The Intent of the Statute appears plainly, and the Disability is attached before the Dispensation granted. Vide Stat. 7 Jac. c. 6. Co. Pl. Cor. 154.

Obj. 12 Co. 18. and 2 H. 7. 6. b. there cited.

Answ. That is but Coke's single Opinion, and the Original is mistaken. Bro. Patents 45. 109.

Also that Case differs from ours, for that disables the King, but ours the Subject. Hill. 27 & 28 Car. 2. Sir John Read's Case, in Scaccario.

Solicitor-General for the Defendant.

Obj. That the Dispensation is now pleaded too late, and that we are estopped, &c.

Answ. An Estoppel never works between Party and Party, and you ought to have shewn that we had it in our Hands, and rely'd upon the Estoppel, and not to have demurr'd, &c.

If the Disability had been attached before the Dispensation granted, we had been barr'd; but here the Dispensation was before the Sessions, before which there was no Conviction.

So the single Question is, Whether the King's Dispensation will avoid the Penalty of this Act of Parliament?

In many Cases, a Non obstante will dispense with a Statute. 7 Co. 36, 37. 8 Co. 38. Vau. 347.

This Prerogative hath been allow'd by Parliament. 2 Roll. 380. 1 Rushworth's Collections 572, 573.

Dispensations, &c. have been allow'd ever since H. 3.

The King may dispense in case of Malum prohibitum; otherwise of Malum in se. Vau. 333.

Note. 7 H. 7. 14. b. Hob. 209, 346. 8 Co. 118. 2 Inst. that Statutes have been adjudged void.

The King may dispense with Penal Laws, where the Subject hath no Damage in particular. Vau. 342. 1 H. 7. 11, 12. 3 Inst. 74. Noseby's Case, 2 R. 2. 11 b. 11 H. 7. 12. a. Dy. 52 and 54. Vau. 352, &c. Fitz. Nat. Br. 222.

Statutes that concern Property are indispensable, but those which relate to Government the King may dispense with. 12 Co.

33, 34. where Magna Charta, cap. 3. is dispensed with 12 Co. 12, 13.

The End of all Laws is Salus publica, which, when any Law opposeth, it must be laid aside, as all our old obsolete Statures are.

The Judges found out a Way of barring Entails, Non obstante the Statute De bonis Condition', for pure Necessity; so the King may dispense with the Statute of chusing Sheriffs. Dy. 225. b.

This Statute falls under the Rule of Quilibet potest renunciare juri pro se introducto.

This Act would entrench upon an inseparable Branch of the King's Prerogative, which no Act can take away. 2 Co. 18. Dispens. &c. non obstant. Stat. R. 2. So of Non-Residence. Hob. 146.

To command the Subject's Obedience, is the King's highest Prerogative. 12 Co. 18. 3 Inst. 239.

Sir Walter Raleigh's Case, 2 Cro. 495. Tho' the Commission, &c. did not pardon him, yet it did capacitate him to serve, &c.

Obj. That the Subject hath his Election, by taking, &c. or not, to avoid, or not to avoid the Incapacity.

Answ. No Subject hath Election to pay Allegiance, or not. Sir John Read's Case.

At the Common Law, the Militia was only in the King, and consequently he must have a Power of declaring the Officers at his Discretion.

Stat. 8 R. 2. c. 2. 33 H. 8. c. 24. may be dispensed with. 12 Co. 19. So of Stat. 4 H. 4. 12. ibid.

Stat. 1 H. 4. 13. 21 H. 6. 21. 1 H. 8. 8. are dispensable. Plo. 502. 29 Car. 2. Davies *and* Stukely, in Scaccario.

Stat. 23 H. 6. was pro bono publico, and disabled both King and Party, and inflicts a Penalty, &c. and is stronger than in our Case, and yet was dispensed with by Ed. 4.

That the King must be served by his Subjects. Vide Calvin's Case. Plo. 457. 502. 11 Co. 82. 12 Co. 18.

As to Simony and Usury, the Statute cannot be dispensed with, because they are Mala in se.

Ingram's Case, Inst. 234. seems strongest against me; but it differs from our Case; for there the Party came too late, &c. which was fatal.

This Act seems to imply in it self a Dispensation, for it says, there must be first a Conviction upon an Indictment, &c. And if the King enters a Nolo prosequi, there can be no Conviction.

C. J. The sole Question is, Whether the King can dispense with a Penal Law? As to the Objection, that he comes too late, that hath been clearly confuted by Mr. Solicitor.

The

The supreme Legislator may dispense with any Law; so of the Law of Murther, by God, in Abraham's Case. So the Laws of Men may be dispensed with by their Legislators, for all Laws human being liable to Imperfection, a dispensing Power is necessary.

Where a Statute makes that which is Malum in se, to be Malum prohibitum, it is not dispensable.

The Cases of Usury and Nusance, are upon the Reason of the Subjects having thereby a particular Damage.

Obj. Acts pro bono publico not dispensable.

Answ. That holds not, for then no Act at all might be dispensed with.

Ingram's Case reacheth not our Case, for there he had elapsed his Time, but not so in our Case.

The Reason why the King cannot dispense with the Statute of buying Offices, or sitting in Parliament, without taking the Oaths, is, because there is a Disability actually incurred, which cannot be taken off but by Act of Parliament. But in our Case there is no Disability actually laid upon any Man, but certain Things required to be done; and as a Penalty for omitting those Things, the Disability, with other Forfeitures, are to be incurred after Conviction. Now the Nature of a Dispensation being to make that lawful to him that hath it, which is unlawful to every Body else, prevents the committing any Offence, &c. and consequently the incurring any Penalty or Disability at all: But in the Case of buying Offices, the Person is disabled before the Dispensation comes, for he is disabled, ipso facto, by contracting, &c.

The King may prevent the incurring a Disability, but cannot purge it afterwards, as the King may (by his Pardon) prevent the Attainder of a Traitor, but cannot purge it afterwards.

The Statute of provides, That none shall be a Judge in his own County; yet here I shall rely upon the King's Dispensation.

The Case of Sheriffs is stronger in all Points than ours; yet all the Judges were of Opinion, That the King might dispense with it, tho' an express Clause of Non Dispensation was added; for it is like to an Act made with a Clause, Not to be after repealed: And if that Case be not Law, many have judged unjustly, &c. and we know not how to give any Judgment.

We must not argue from Consequences; the Consequences of debasing Money may be very ill, yet we dare not deny the King hath such a Prerogative.

At another Day the Chief Justice declared, That by the Opinion of eleven of the Judges, the Case of 2 H. 7. of Sheriffs holding above one Year by Dispensation, &c. is good Law.

And as to the Case in Question, we have resolved the Points following (Street only dissenting). See 2 Show. 478.

1. That the King is a Sovereign (or absolute) Prince.
2. That the Laws of the Land are the King's Laws.
3. That to dispense with Penal Laws (where the Subject hath no particular Damage) for necessary and urgent Occasions, is an inseparable Prerogative of the King.
4. That the King is sole Judge of such Necessity, &c.
5. That this Trust residing in him, came not from the People, but was a sovereign Right of the King ab antiquo.
6. That the Dispensation in this Case is a good Bar to the Plaintiff's Action, because it came within three Months before any Disability incurred.

Judicium quod quer' nil capiat per Billam.

## *Rex versus* Griefly.

Poor's Rates.

AN Order of Sessions was returned upon Stat. 43 Eliz. for rating the Parishes adjacent, &c. for Relief of a poor Parish. Exception was taken, That by the Statute this ought to have been done by the two next Justices, whereas this Order was made at Sessions.

Solicitor-General. If it be made by all the Justices, &c. then it is by two, and they shall be supposed to be at the General Sessions.

Wythens. You have not pursued the Statute, and do hereby prevent the Appeal. Adjournatur, And it was afterwards, at another Day, quashed for that Reason.

Sheriff to return the Writ.

Upon a Motion against a Sheriff to return a Writ, we never grant a Penalty upon the first Motion.

Where Costs are against Executors.

Per Wythens. Wheresoever an Executor might have brought the Action in his own Name, there we give Costs against the Executor, &c.

Rule ad loquend' cum Consilio, &c.

Per Astry. Where one is a Prisoner in a civil Cause, and not in Execution, the Course is, upon Motion to grant him a Rule, ad loquend' cum consilio, &c. and it was granted accordingly.

Certioraries return'd.

Per Astry. All Certiorari's, tho' directed to divers Justices, may be returned by one; and so is the usual Practice.

## Tuckey *versus* Flower. Vide pag. 28.

Scandalous Words sans Damage.

ACtion for Words, She is a common Whore, and *J. S.* lay with her in *A. B.*'s Barn.

Shower moved in Arrest of Judgment, That the Words are of Ecclesiastical Conusance, and not actionable, if the special Damages be not particularly set forth, as it is not here, and so are all the Books. 1 Roll. 36.

C. J. 'Tis laid in the Declaration, That she lost her Marriage: And tho' the Woman cannot alledge any particular Suitors going off upon that Account, yet the Scandal may prevent Addresses being made to her; so Reason seems to be against the Books. Wyth. accord. & Adjournatur.

## Okey *versus* Hardistrey.

Certiorari ad informanda' conscientiam.

A Fine by Dedimus and Error assigned, that no Time is mentioned when the Caption was taken, nor any Commissioners named; and it was pray'd, that it might be amended.

Pollexfen contra. The Fine was taken in Chester, and therefore not amendable here.

Holt. Counties Palatine are of a high Nature, and like to C. B. and it is usual to alledge Diminution there, and pray a Certiorari. Saund. Pelham's Case accord'.

Wythens. We will grant it to make a Fine good; secus, if it were to reverse it. And a Certiorari was granted ad informand' Conscientiam.

## Aldrish *and* Duke.

Stat. of Limitations commences after one imprison'd is discharg'd.

IT was ruled, That where one was falsly imprison'd for thirteen Years together, the Statute of Limitations shall not run upon him whilst in Prison, but he shall have six Years to bring his Action after Enlargement; so, tho' the wounding was above six Years ago.

*The Proclamation of Adjournment on the last Day of the Term*, viz.

Proclamation the last Day in Term.

Vous que pluis aves a faire per tout Angleterre per brief bill Roll ou paroll venus avant tantoft & vous serra deliveres, Et vous que riens aves a faire avoides le Bar.

# DE

# Term. Sancti Mich.

## Anno 2 Jac. II. Regis, in B. R.

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### Simons *and* Pashley.

LEssee for Years leaseth at Will, Quamdiu, &c. The Rent is arrear, Lessor distrains, Lessee sues Replevin. Lessor avows, for that he was possessed of a Lease for Years, &c. and shews not who hath the Fee; and Exception was taken to the Avowry by the Plaintiff in Replevin.

Avowry for Rent on Lessee for Years, who had leas'd at Will.

Holt pro quer'.

The Defendant must shew a Title to the particular Estate. 2 Inst. 303. 6 Co. Helier's Case, That Seisin of a particular Estate is not traversable.

Difference inter Debt and an Avowry for Rent; this pleading had been good in Debt, which is personal, but an Avowry is in the Realty. 1 Cro. 571. Savage *versus* ——

A ne cannot claim a Que Estate of a Term for Years. Tenants in Common shall join in Debt for Rent, but must sever in Avowry.

Pollexfen contra.

This is as good in Avowry as in Debt for Rent; for the Avowant is in Nature of a Plaintiff.

The Difference put in 1 Cro. 571. is not adjudged, nor is that Case between Lessor and Lessee; but in Jones another Reason is given, viz. for that the Land was not in question; and we allow, if the Land was in Question, your Exception had been good.

Holloway. Here the Right of the Land is not in question, but the Rent only.

Post. Wythens. I take no Difference between Debt and Avowry in this Case, for both are for Recovery of the same Rent; and agree the Difference put by Pollexfen, where the Right of the Land is in Question, and where not. And the Pleadings (if otherwise) would be very prolix.

Judicium pro Defendente in Repl'.

## *The Wife of* Glover *the Marshal* versus *her Husband.*

Supplicavit, how moved. UPon Motion to the Court for a Supplicavit.

Wythens. You must first exhibit your Articles in Parchment, and then move us. Vide infra.

## Stratford *versus* Overbury.

Homine Repleg. Elongatus, &c. HOmine Replegiando. An Elongatus was returned, and thereupon Capias in Withernam issued, which can be directed but into one County at once: The Defendant to defeat the Process, removes into another County; and the Court (upon Motion) granted a Tipstaff, for this Action is partly Criminal.

Tipstaff.

Scandalous Words. Action for Words spoken of a Farmer: He owes more than he is worth, and is broke. It was moved in Arrest of Judgment, that the Action did not lie. Sid. 299. Godb. 40. Hutt. 50. Adjournatur.

## *Rex versus* Lewis.

Supplicavit. Supra. NOte, When a Supplicavit is moved for upon Articles exhibited to the Court in Parchment, &c. the Plaintiff swears, That he moves not for this Writ out of Hatred, &c. but for Fear of his Life, &c.

## Tuckey *and* Flower. Ante pag. 26.

Words, Whore, Action lies not sans Damage. ACtion for Words. She is a Common Whore, and *J. S.* lay with her in *A. B.*'s Barn: It was moved in Arrest of Judgment, that the Action did not lie without a particular shewing, that she lost her Marriage hereby. 2 Cro. 162. 1 Roll. 36. pl. 12. Wetherel 30 Car. 2. Heatly and Mumms in Communi Banco.

2. The Words are only an Offence Ecclesiastical, and no temporal Damages. Palm. 298.

Keen contra.

Roll. 35. adjudged, that the Action lay, altho' it is not alledged, that she had lost her Marriage.

Wythens. Many Books say, that the Action lieth not without particular Loss of Marriage, and the Authorities determine me, tho' it seems hard in Reason.

C. J. I shall not follow Precedents, where against Reason; and by common Presumption, the Words will make her lose her Suitors. In the Case of the French Pox, it was agreed per Cur', That the Action would lie without any special Damage, and this Case falls under the like Reason, Ergo, &c.

Wright and Holloway agreed with Wythens, whereupon Judgment was arrested against the Opinion of the Ch. J.

## Harris *versus* Glover, *the Marshal of* B.R.

THE Plaintiff had Judgment in Debt for an Escape, and moved per Sir R. Allibon, that the Profits of the Office might be sequestred, for that the Plaintiff could have no Execution nor other Benefit of his Judgment. And the Security taken by the Marshal from his Prisoner (which usually satisfies, being assigned to the Plaintiff in Escape) was here nothing worth. Debt on Escape against the Marshal.

Holt contra, This hath been often moved, but never granted in this Court.

Show. There are several Precedents for it; and, per Cur', Time given to bring Precedents.

## *Rex versus* Feilding.

DEfendant coming to give Security of the Peace, was afterwards arrested in Court, upon an Action of False Imprisonment. Arrest in Court.

C. J. If it had been to have sworn the Peace, we would have allow'd the Arrest; but here he is priviledg'd for the Time.

Motion for a Prohibition on a Libel for Tithes, and suggests Letters Patents of Queen Elizabeth, and a Title under them, &c. and for that the Letters Patent are conusable at Common Law; but it was denied by the Court, because they have Conusance of the Principal Matter, and consequently of the Patent. Tithes, no Prohibition.

Motion was made, upon bringing so much into Court, to strike it out of the Declaration, upon a Quantum meruit. Money brought in, &c. not in Quant. meruit. Vide ante. p. 20.

Aston. Upon a Tender in Quantum meruit, I may plead, that you deserve so much, and no more: And as to this Rule, I see no Difference between a Quantum meruit and an Indebitatus Assumpsit.

Cur'.

Cur'. The Practice hath been otherwise, which we will not alter.

Jennings *versus* Hankey *Administrator*, &c. Post.

Debt in B.R. on obl. in Cheshire.

DEbt on Bond, on a Bond sealed in Cheshire, Fully administer'd, pleaded, and try'd at the Sessions there, by Award, and Assets found.

Williams.

1. This Court hath no Conusance of Matters arising within a County Palatine; and this appears to be so upon the Record: I agree, the Matter being transitory, if it had been laid out of the County Palatine, it had been good.

2. If triable here, it must be by Commission under Seal of this Court, which appears not in this Case, so no Mittimus can be.

3. The Action is brought in the Debet & Detinet, which is male.

Holt contra.

To the last Exception, the Bill upon the File is right, and being only a Mis-entry of the Clerk, 'tis amendable.

To the first, A Bond dated in Chester, may be sued here or in C. B. if the Obligor lives out of the Jurisdiction; for now the Franchise cannot do the Party Right. 12 Co. 114.

That a County Palatine is not compleat without a Court of Equity and of Common Pleas. Hutt. 59. Griggs's Case. 4 Inst. 213.

The Party, if within the County Palatine, should have so pleaded it, but having fully pleaded, he comes now too late. A Plea of a County Palatine is a Plea to the Jurisdiction. Rast. Entr. tit. Jurisdiction 5. and not to be after Imparlance.

Pollexfen contra.

4 Inst. 212. in the latter part, is against you.

If the Matter had been laid out of the County Palatine, I agree it should have been pleaded; but here it appearing upon the Declaration, this Court will take Notice of the County Palatine.

Williams. I agree the Difference put, where else there would be a Failure of Justice: As if a Party be Judge there; so in the Case of Obligor and Obligee put already; so in Case of an Information for the King.

Vide Davis's Reports of the Incidents to a County Palatine, and how the Court takes Notice of them.

Wythens. That the Party lives out of the Jurisdiction, ought to have been pleaded; but as to the Contract, no need of pleading that to be out of the Jurisdiction.

2. As to the Debet & Detinet, the Bill upon the File being right, it is amendable. Adjournatur.

## Pindar *versus* Darby.

IN this Case Wythens said, That he could not take the Case of Pordage in Siderfin to be good Law. Authority deny'd.

## Cary *and* Buckhurst.

CAse for infringing the Liberty of the Bailiff of Westminster; Defendant demurs to the Declaration. Franchise of Westminster.

The chief Exception was, That the Plaintiff had not shewn any Title to the Franchise, which being against common Right, ought to be by Grant, and can't be by Prescription; and is not like the Case of a Market, which may well be by Prescription.

Holt pro Defendente. 1. The Plaintiff hath not shewn that there is such a Franchise which hath the Return of Writs.

Quoad 1 Cro. 499. There a sufficient Title is shewn, being (currere consuevisset).

Quoad 1 Cro. 575. There a Seisin in Fee is alledged of a Mill, which was a good Title; so in 2 Cro. 43. and 122. Dent and Oliver's Case.

But where a Man claims a Franchise or Liberty in Gross, it can't be by Prescription. Inst. 121.

It's agreed, That a bare Possession alledged of one Thing appertinent to another is sufficient; otherwise of a Thing that lieth in Grant, and is in Gross.

2. No Title is made, 5 Co. Foxley's Case, and the Abbot de Strata Marcella, A Man may prescribe to hold Pleas, but not to have Conusance of Pleas, because that excludes others. In all possessory Actions, where the Declaration is for the Infringement of a Liberty, &c. a Title ought to be shewn in the Writ. Fitz. Nat. Br. 91. O. Reg. 101.

This being an incorporeal Inheritance, Occupation can't be gained by Possession. Latch. 87. Stanhope's Case.

Pollexfen pro quer'.

It is impossible, in many Cases, to shew a Title, by Reason of Length of Time and many mean Conveyances. The Case of Sir Robert Atkins and Holford, in the Exchequer, is adjudged in Point.

As to Fitz. Nat. Br. 91. D. that is answered in F. there.

Powell Justice, (it being moved again Termino Michaelis 1687) doubted and said, that Dent and Oliver's Case, Sands and Trefuses Case, and the Case in 2 Cro. are Authorities, for a Title ought to be shewn with a Difference, where the Thing is appendant,

dant, and where in Gross, which is not very clear; and in Placita Rediviva, a Title is set forth; but by the Opinion of the C. J. as also of Holloway and Allibone, Judgment was given for the Plaintiff. Mich. 3 Jac. 2.

## Claxton *and* Swift. Ante p. 4. (Rot. 1163.)

Case on a Bill of Exchange endors'd.

CAse on the Custom of Merchants on a Bill of Exchange; the Defendant, who was one of the mesne Indorsors, pleads a Judgment recovered by the Plaintiff against the Drawer; the Plaintiff demurs to the Plea.

Shower pro Quer'.

The Plea is not good, for an Assumpsit in Law is created by drawing the Bill to us, and he shews no Satisfaction.

No Plea in Bar is good, which doth not answer or avoid the Plaintiff's Declaration.

This Contract of the Defendant is several and distinct from the Contract of the Drawer. And an Indebitatus lieth against the Drawer, tho' not against the Endorsor.

Where there are two Obligors, Judgment against one cannot be pleaded in Bar against the other.

Our Election is not determined by our first Judgment. 2 Cro. 73. Yelv. 65. and the Case in Mo. . . . affects not our Case; for there the Action was founded upon a Tort, ours upon a Right.

Indebitatus Assumpsit is of the same Nature with Debt. 4 Co. Slade's Case.

2. In the Case in Yelv. &c. the Damages were uncertain; secus in ours.

Two warrant Land, the Warrantor hath Judgment against one, yet he may sue the other. Fitz. Nat. Br. 135.

The Indorsor, by superscribing, makes, in effect, a new Bill of Exchange.

The Forms of pleading are for me; Non-payment must be alledged, therefore no Proceeding, without Satisfaction, can be a Bar. (Note, This was chiefly rely'd on.)

Holt contra.

The Question is, When the last Indorsee waives all mean Indorsements, and sues the first Drawer, and hath Judgment, Whether he may sue any of the mean Indorsors after?

I agree he had such Election, for it is as a new Bill of Exchange; but now he hath made his Election, it would be inconvenient that this Action should lie; for then Hughes would be liable to two Actions and two Judgments.

No Case in Law resembles this, but that of a Warranty, where there are Warranties over: If he come upon the first

Warrantor, he shall never after take Advantage against any of the mean Warrantors; so in our Case.

Where one is liable to two Mens Actions for the same Thing, he only which brings the first Action shall recover, and he shall not be charged by the other. 1 Cro. 502. 33 H. 6. 22. a like Case.

2. He hath here made his Election; and 'tis not like the Case of a Bond; the Case of Brown and Wotton in Yelverton, comes up to our Case.

Our Action is an Indebitatus Assumpsit, but grounded upon a special Custom; 'tis not like a Promise; for that is collateral; but in our Case one Thing depends on another by the Nature of the Thing; and he hath waived what before he ought to have taken Advantage of.

The Court seem'd to allow the Reasons urged by Holt; and Wythens said, All Actions on the Case are founded upon a Deceipt, and run fraudulenter, &c. and are like to a Tort.

Judicium pro Defendente, Nisi, &c.

Note, 4 Feb. 95. Sir Bart. Shower cited this Case in B. R. and said this Judgment was reversed in Cam. Scacc.

## Horton *and* Ruesby.

IN this Case the Court resolved;

1. That an Execution may be executed after the Death of the Party. 1 Roll. 193. 3 Cro. 26 Car. 2. Mod. 188. for the Executor being privy, is bound as well as the Testator. Execution after Death of the Party.

2. The Statute of Frauds and Perjuries intended only to remedy an Inconvenience of selling Goods after the Teste of the Writ; so that now the Writ binds only from the Delivery, quoad a Purchasor; but the Statute was not made for the Benefit of the Party, or his Executors; therefore quoad them, it binds from the Teste, and there's no Fraud in the Case. Statute of Frauds, &c. Post.

Sir G. Treby (ut amicus Curiæ) said he was present at the making of the said Statute, and that was the Intention of the Parliament. Amicus Curiæ.

And a Supersedeas was deny'd.

## Hodges *and* Nicholas.

ERror of a Judgment upon Demurrer in Covenant, (viz.) That the Return of a Writ of Enquiry omits per Sacr'um xii, &c. and says not, virtute brevis præd. And the Question was, Whether this might be amended? For the Writ of Inquiry Return of a Writ of Inquiry amended.

 was

was well executed and return'd, and this only a Mis-entry of the Clerk.

Levinz. This is not amendable after Error assigned; all the Statutes of Amendments are after Verdicts; this upon a Demurrer. 1 Cro.

See 6 Mod. Tutchin's Case.

For Amendments at Common Law. Vide Co. Blackamore's Case. 14 Ed. 3. was the first Statute of Amendments, and speaks of a Letter only; but by the Opinion of the Parliament, extended to a Word. Stat. 8 H. 6. amends Mispision of Clerks in Matters of Fact, not of Law. 22 Ed. 4. pl. 1. Latch. 203.

The Bill upon the File in this Court is as an Original in C. B. Jo. 99. Palm. 123. Holland *versus* Lee. is strongly for me.

Holt contra.

This Mis-entry is amendable by the 8th of H. 6. when it appears an Oversight only, tho' never so material.

If a Plea in the Office be right, the Roll shall be amended. 1 Cro. *Rex versus* Sir J. Tufton.

Jo. 199. makes for me; for the Judges were for the Amendment.

Quoad Palm. 123. That was the Ignorance of the Attorney or Counsel.

In C. B. a whole Panel hath been rased and amended.

Pollexfen ad idem. The Cases put reach not our Case, for we have all here duly in Court, and nothing is amended but Words only; which lay before the Clerk, and ought to have been inserted, are omitted by him.

A Judgment against an Executor de bonis propriis hath been amended, and made De bonis Testator'.

Wythens. In the Case in Latch, there is no Transcript, and therefore unlike this Case; and the Inquisition is a Record of this Court.

And ruled, That it should be amended, *Nisi, &c.* (*abs' C. J.*)

It was moved at another Day, and Levinz said, Tufton's Case was for him.

Wythens. That is the strongest Case of Amendments in the Law.

Holt contra, cited 8 Co. 161. 2 Cro. 365. Chamberlain's Case, (fort') Hutt. 56. Barker's Case.

Wythens. Ours is a Mistake of the Clerk in his own Business, and not in the Right or Merits of the Cause; and per Cur', 'tis amendable.

4

*Rex*

## *Rex versus* Drake.

INformation on the Statute of Deer-stealing. Exception was taken to a Witness, because he was Party and Prosecutor. Information for Deer-stealing. Prosecutor a Witness.

Pollexfen contra. Informers are Parties and Witnesses upon the Act against Conventicles, and the like; and raising up an Informer is the same Thing in effect.

C. J. 'Tis not grantable in Usury, because other Witnesses may be easily had; secus, in this Case.

Wythens. In Case of Robbery, the Party may swear for himself; so in this Case.

C. J. Mischief of the Party's being like to forswear himself for Gain, might have been a good Objection to the Act before it was made, but is none now. And the Exception was over-ruled.

An Habeas Corpus was denied, on a Suggestion that the Party was detained by a private Person. Habeas Corpus deny'd.

## Harman *versus* Harman *Administrator.*

DEbt on Bond. The Defendant pleaded plene administravit, and no Notice before such a Day: Issue was joined on Assets, and it was found, That the Defendant paid Money upon a simple Contract, not having Notice of the Debt upon the Bond. Debts paid on contract, no Plea to Debt on Bond.

Pro quer', Notice not necessary. 12 H. 7. 11. Offic. Exec. 9.

Pro Defendente.

The Notice is material: An Executor may have Knowledge of a Judgment being upon Record; but it is not in his Power to come to the Knowledge of a Bond.

The Testator had Power to pay either first, and it would be hard to charge the Executor otherwise.

By this means any Obligee may make an Executor liable De bonis propriis.

In Debt brought upon a Judgment on a simple Contract, an Executor is compellable to pay it before a Debt on Bond, and Judgment in such Action is pleadable to a Bond. Vaugh. Edgcomb and Dee's Case. 2 And. 187. 220. 1 Mod. 175. Broke's Case. Post.

Wythens. There is great Difference between a compulsory Payment and a voluntary one, as here.

And it was afterwards adjudged for the Plaintiff in Mich. 3 Jac. 1.

## *Rex versus* Johnson.

Libel.

THE Defendant being convicted upon an Information for a Libel (cui titul', To the Protestants of the Army, &c.

Judgment.

Judgment was given, that he should be degraded, fined 500 Marks, whipp'd and pillory'd.

Cur'. He cannot be degraded before Sentence given, and then it must be done by the Spiritual Court.

Star-Chamber.

Per C. J. The Reason of disallowing the Star-Chamber Court, was because their Authority was before, and now is, in B. R. and consequently that Court unnecessary.

## *Rex versus* Whiteacre.

Post. One outlawed, fined, tho' absent.

UPon Discovery of the Defendant's Estate, who was outlawed, &c. it was moved, that a Fine might be set upon him.

Aston. Upon a Capias Utlagat. return'd Non inventus, the Court may set a Fine upon the Party absent.

And it was so done.

Prisoner by King's Warrant discharg'd.

Note, The Court discharged a Prisoner upon a Habeas Corpus, for that the King's Warrant was not under Seal, tho' his Hand was to it, and so appeared to the Court.

Day-Rule for a Serjeant Prisoner.

Upon Motion, that Serjeant Hampson, a Prisoner in B. R. may have Leave to come and attend his Cause in Chancery; the Court denied the Motion, and said he may have the Day-Rule, according to the Course of the Court.

## *Rex and* Dodswell.

Post. Poor Apprentice.

AN Order made by Justices of Peace, That the Defendant should take a Girl for his Apprentice, was quash'd, because they have no such Power. Vide Sid. Videtur contra. And accordingly it has been since often ruled.

Prisoner refusing to pay the Gaoler, remanded.

Note, A Gaoler, at his own Charge, brought up a Prisoner upon a Habeas Corpus, and the Prisoner refusing in Court to repay the Gaoler, he was remanded by Rule of Court.

## Creſwell *and* Trott.

IN Debt on Bond. The Defendant prayed Oyer of the Condition, which was (To pay 59 l. upon the Birth of his first Child by his Wife, or any other Woman) and avered, That he had no Child by his Wife. Plaintiff reply'd, That he had a Child by another Woman. Defendant demurr'd.

Condition to pay on his first Child by his Wife, or other Woman.

Cur'. This must be intended of a Child by any other Wife, and not otherwise. Judicium pro Defendente.

Motion for a Prohibition upon a Libel for Words spoken to the Husband of his Wife; (She is a drunken, cheating, forsworn Jade.)

Words of spiritual Conusance.

Powel. Ecclesiastical Courts have no Conusance of Words which are not of a spiritual Defamation: A Quean and a tainted Quean. 1 Cro. 111. Winch 14. Latch. 205. 2 Roll. 296. Yates and Glover, 8 Car.

Wythens. These Actions have of late been much alter'd; for in Lord Hobart's Time, the best Construction was made of the Words, but now they are construed as taken in common Parlance.

Agreed per Powel, That they are actionable with an Averment; but none is here.

Prohibition was denied per Cur' (abs. C. J.) for the Inconvenience that would follow of Quarrels between Husband and Wife.

## Acourt *and* Swift.

ERror of a Judgment in Ireland in B. R. there, on an Assumpsit against three, to pay Money for Wines sold; the Defendants plead severally, two of them plead Non Assumpsit, and the third confesseth the Action; and Judgment was given for two, and against the third.

In Assumpsit jointly against three. No Severance of the Judgment. Q.

Pollexfen pro Quer' in Error. In Trespass they may sever, but not in a Contract, as our Case is.

Here the Debt and Contract and Declaration is Joint, and so by Consequence ought the Judgment to be.

7 H. 6. 33. Sid. 76. Hill. 24 & 25 Car. 2. Legar's Case.

The Words ipse Non Assumpsit, cannot imply ipsi non Assumpser', and so answers not the Declaration.

Issues of all Pleadings ought to be most certain, and no Construction shall be made against the Words.

Holt

Holt contra.

The first Exception is against you; for you shall not take Advantage of a Judgment given for you, tho' erroneous. Vide Slocomb's Case.

The Judgment given for the two Defendants is good. I agree, if an Assumpsit be brought against three, if a joint Promise be laid in the Declaration (I apprehend he meant an actual Promise) Judgment cannot be given against one; but where three are jointly charged, Non Assumpsit modo & forma must signify according to the Declaration.

In Debt upon a joint Bond, one may plead Non est factum suum, and yet it must be proved to be a joint Bond before the Plaintiff can recover.

Pollexfen. The last Case is against you, for Non est factum suum cannot signify Non sunt facta sua.

All the Books are, that modo & forma go to the Substance of the Issue.

The Court, at first opening of the Case, seem'd to agree with Holt, but afterwards Judgment was reversed. Post.

## *Rex versus* Baspole.

Depositions in Chancery. Quære, If Evidence.

AN Information of Perjury on Depositions in Chancery: And the Question was, Whether they could be Evidence, the Commissioners before whom they were sworn being dead.

C. J. and Holloway held, That they could not; for the Commissioners cannot now be here to swear in Court the Depositions to be true. So per Pollexfen, Pemberton and Finch, And none swearing the Words, he cannot have his Remedy over, if acquitted.

Wythens and Wright contra, because the Practice is otherwise.

Nolle prosequi.

Then the Attorney-General said, he would enter a Nolo prosequi; but, per Curiam, that can't be, and took a Verdict, Non Cul', But said, they would set it aside, if he could maintain his Nolo prosequi, which he strongly insisted on.

## *Rex versus Sir* John Knight. Post, p. 40.

Information for going to Church armed.

INformation for going to Church with Pistols, &c. contra Stat. 2 Ed. 3. of Northampton.

Winnington pro Defendente. This Statute was made to prevent the People's being oppressed by great Men; but this is a private Matter, and not within the Statute. Vide Stat. 20 R. 2.

C. J. This Offence had been much greater, and better laid at Common Law. But tho' this Statute be almost gone in desuetudinem,

tudinem, yet where the Crime shall appear to be malo animo, it will come within the Act (tho' now there be a general Connivance to Gentlemen to ride armed for their Security); but afterwards he was found, Not guilty.

## Rodney *and* Stroud. Ante p. 18.

HOllis. This Case differs from Heydon's Case; for here the Jury have gone contrary to Evidence. 3 Cro. 860. Miles's Case. Nolle prosequi.

Bulst. 157. and Cro. Walsh and Bishop come not up to our Case, which is on a Nolle prosequi.

Pollexfen contra. Cited Trebarefoot and Greenway's Case in B. R. and that it is in the Plaintiff's Power to help it by Nolle prosequi.

Roll. Error 784, 785. Vide two Cases there in an Ejectment for a Term, and a Fishery. So in an Action for Words, if some are incertain, a Nolle prosequi will help the other.

C. J. This differs from Heydon's Case; where several Damages are given by several Juries, there the Release of the one, and Election of the better Damage, is good. But where one Jury assess several Damages, the Verdict is bad. Damages, where severable.

An insufficient Verdict is not curable; and the Cases cited are not in Point; for in them the Fault is in the Declaration; but here the Declaration is good, and the Fault in the Verdict.

Wythens, Holloway, and Wright contra pro Quer'.

Judgment pro Quer'.

Order to provide for a Bastard-Child: Exception was taken, that it doth not appear in the Order, that he is chargeable to the Parish, or likely to be so. 1 Cro. 36. Sid. 222. Quash'd. Order for a Bastard.

## *Rex versus* Davies.

INdicted of Felony and Murder, and pray'd to have his Pardon allow'd. Felonica Interfectio, implies Murder in a Pardon. Q.

Per Wythens and Holloway, Felonica Interfectio is well enough, tho' Murdrum be omitted.

C. J. contra. Manslaughter is Felonica Interfectio, but at another Day (the Chief Justice being absent) it was allowed.

Comperuit ad diem pleaded. Clerk of the Rules gives a Day by Rule. Rule on a compernit ad Diem pleaded.

Per Aston and other Clerks, A Defecit de Recordo cannot be entred without a Rule given, and Notice; the like in Bail.

Per

Attaint.

Per C. J. An Attaint lieth against a Jury for giving excessive Damages.

New Rule of Practice.

This Term a new Order was made per Cur', That all Orders to be spoke to, shall be put in the Paper and Copies given, and not to be spoke to the two last Days of the Term.

Twice punished.

C. J. When a Man proceeds both criminally and civilly upon the same Cause of Action, we will favour the Fine, by Reason of the Hardship to be twice punished for the same Fault.

## Isted *and* Clark.

Misnomer.

DEbt on Bond. (John was named in the Bond, but it was subscribed Robert) The Defendant pleaded Non est factum: The Jury found, that Robert, the Defendant, sealed it by the Name of John Clarke.

Cur'. There is a great Difference between the Case of a Corporation, and this Case, Quia constat de persona.

Judgment pro Quer'.

(Note, This Judgment was reversed, as reported by Lutw. 891. Et vide 5 E. 4. 56. b.)

Antient Demesne pleaded in Ejectment.

In Ejectment it was moved, that the Defendant might plead Antient Demesne. And per Cur', it is a good Plea.

Warrant of Attorney.

Upon a Warrant of Attorney above a Year old, Judgment cannot be entred without Motion; nor then, but upon Notice.

One attainted, charg'd in Execution.

One attainted of Treason is charged with an Execution; and moved that he might be discharged of it. Fonsell's Case. Cro. 5 R. The Court denied to discharge the Execution, but punished the Officer, &c.

## *Rex versus Sir* John Knight. Ante p. 38.

One acquitted, yet bound to Good Behaviour.

MOved per Attorney-General, That the Defendant, tho' found Not guilty, may be bound to the Good Behaviour, according to Jordan's Case. And it was ordered accordingly per Cur'.

# DE

# Term. Sancti Hillar.

## Anno 2 & 3 Jac. II. Regis, in B. R.

A Mandamus to restore a Surgeon to an Hospital was denied; because it is not in the Power of the Court, nor is it a publick Office.

Mandamus to restore.

### *Rex versus* Jenner.

THE Defendant was indicted for diverting a Water-course, and the Indictment was quashed; because it was in the Nature of an Action on the Case.

Indictment for turning a Water-course.

### Powell *and* Price.

SOllicitor-General. The Return of the Mandamus is ill; because the Writ was directed to the Mayor and Burgesses, and return'd by the Mayor and Part of the Burgesses only.

2. The Return ought to be under the common Seal; because a Corporation aggregate; and is like the Case in this Court on a Quo Warranto against the City of Chester.

Mandamus directed to Mayor and Burgesses, return'd by Mayor.

Holt contra.

To 1. Obj. The Mayor's Hand is to it, which is sufficient; and you can't aver against the Record.

To 2. Obj. He denied it to be Law; so they never file a Warrant of Attorney under their common Seal. 11 Co. Bagg's Case, and the Case of the City of Oxford in Latch.

Acts of Record ought not to be under the common Seal; otherwise of Acts in Pais.

Pollexfen ad idem. In Enfield *and* Hill's Case, it was ruled, That it ought to be under the Hand of the Mayor.

Thompson contra. That it impower'd the Mayor to make a false Return.

Post. Holt. Setting of the Hand to it is not material, and it had been good without it: And before the Statute of York, in the Case of a Sheriff, he was not required to set his Hand to it.

Post. Astry. The Precedents are sundry Ways, but the greater Part are only under the Hand and Seal of the Mayor; and the Return of the Mandamus was allowed.

## Soan *and* Mace.

London Customs, Feme sole Merchant.

HOlt moved for a Procedendo in an Action against a Feme sole, Merchant in London, removed hither, and alledged, That by the Custom of London, it should be tried there; and it was granted per Curiam.

## Kingston *and* Herbert.

Reversal of a Recovery vacated nisi.

A Recovery is suffered, which is afterwards reversed on two Scire facias and Nichils returned against the Heir of the Demandant only, without the Tertenants.

Maynard. A Scire facias lieth only against him who is privy to the Record.

Winn. ad idem. That in Error brought in a real Action, the Court takes no Notice of the Tertenants. 28 Ed. 3. 20. pl. 7. Dy. 320, &c.

Williams ad idem. Altho' a Scire facias doth sometimes issue against the Tertenants, yet it is only discretionary. Winn and Lloyd, 24 Car. 2.

Pollexfen contra. This Recovery is erroneously reversed. 1 Roll. 763. 8 Hen. 4. 17, 18. Dy. 104. Bro. Summons 14. 16 Inst. 259. b. 9 H. 6. 46. 10 Ed. 4. 12, 13.

Obj. That it can't be vacated upon Motion.

Answ. Palm. 151. 2 Cro. 256. 3 Cro. 531. 12 Co. 133. Mo. 690. Sid. 222.

Holt ad idem. That the Reversal was by the second in Remainder (the first in Remainder being alive) upon a false Surmise, and therefore erroneous: That there ought to be a Summons, and a Nichil could not be returned. 10 H. 6. 12. b.

Curia. The Reversal of the Recovery ought to be vacated: And it was ruled accordingly, nisi, &c. Trin. 3 Jac. 1.

## *Earl of* Peterborough *versus* Williams. Vide ante 18.

SCandalum Magnatum for signing Dangerfield's Information, which reflected on him, &c. Scand. Magnatum.

The Defendant pleads, That it is the Law and Custom of Parliament, that The Speaker of the House of Commons, as their Servant, ought to sign all Things that are ordered by them, and that he signed this Information in Pursuance of the Order of the House of Commons, being then their Speaker. The Plaintiff demurs.

Pollexfen pro Defendente. The Declaration is ill, because the Libel doth not reflect on the Lord Peterborough, and because nothing that concerns the Lord Peterborough is alledged to be true or false; and there is no Averment of it as there ought to be.

2. The Declaration says, That the Libel contains diversa falsa mendacia, which is incertain, and it can't be known, whether it be true or false. Adjournatur.

It was ruled by the Court, That an Attorney having Money due to him from his Client, should not be compelled to deliver up the Papers before he was paid his Fees, &c. Attorney not to deliver Papers, &c. till paid.

## Glyn *and* Nichols.

TRespass for diverting a Water-course by a Stranger, The Defendant demur'd to the Declaration, and took an Exception thereto, that no Title is made in the Declaration to the Water-course, nor for what Use it was. But adjudged pro quer'. Trespass of a Water-course, good, sans Title shewn.

## Buckworth *and* Salmon.

WHether a Prohibition, the Court was divided, therefore no Prohibition. Prohibition, Court divided.

## Perkins *and* Titus.

ERror on a Judgment in C. B. in Replevin, where the Defendant avowed for Damage-fesant; the Plaintiff reply'd, that the Land was Copyhold, and granted to him in Fee, &c. The Defendant rejoin'd, confessing that it was Copyhold, and so granted; but that a Fine of 35 l. was assessed, and not paid, and justified the Custom to pay a Year's Value on a Copyhold Fine.

Taking, as in Land forfeited to him. The Plaintiff surrejoins a Custom to pay for the Fine, a Year's Value of the Land, as it should be at the Time of the Admission, and no more; and pleads a Tender of it and Refusal, whereupon the Defendant demurs; and Judgment was given in C. B. that the Custom was good, and thereupon a Writ of Error was brought.

Pollexfen and Holt against the Custom.

Of Fines certain and uncertain.

That Fines are either certain or uncertain; certain Fines are taken of common Right without any Custom alledged by the Lord; uncertain Fines are to be adjudged by the Court on Demurrer, or by the Jury on Issue joined. 13 Co. 1. Co. Entr. 647. 4 Co. 27. 1 Cro. 196. This Fine is uncertain, because the Value of the Land is uncertain, and therefore void. Dav. 33. Godb. 14.

Obj. Certum est quod certum reddi potest.

Answ. It ought to be a constant and perpetual Certainty, or else 'tis ill. Inst. And on this Difference, 2 Saund. 343. 23 Ed. 3. Fitz. Tit. D'un fait infra ætatem, pl. 3. Tit. Bar. 277. 77.

An Estate for so many Years as J. N. shall name, is good; but that is to be done but once.

There is no way to reduce this Custom to a Certainty, not by the Court; for then it's not due until it is assessed, and then it is not a customary Fine; aliter of arbitrary Fines. 2 Roll. 264. in Point.

He also moved an Exception to the Pleading, viz. That a Fine shall be paid of a Year's Value (as it should be at the Time of the Admittance) and if the Admittance be in the Middle of a Year, it can't be known in what manner the Reference shall be made, &c. But that was over-ruled.

Fuller and Finch contra. It may be made certain by a Jury. 11 H. 6. 53. Inst. 33.

The Year's Value shall be reckon'd, and so is pleaded tempore Admissionis. 2 Leon. 114. Latch. 14. That disputing the Law with the Lord on a probable Cause, is no Forfeiture of the Copyhold. 4 Co. Tavern's Case. Co. Entr. 288. Wheeler and Honour. 13 Car. 2. in B. R.

The Common Law hath in some Cases ascertain'd the Value of an uncertain Fine, and it may by the same Reason be very well ascertain'd in our Case.

Obj. Roll. 264.

Answ. That Case is agreed, because there is no Certainty.

A Custom to pay so much as another shall assess, was adjudged good. 1 Roll. 48. Worm and Sawyer, Noy 1. b. and in C. B. Rawlins and Mason's Case.

Obj. That the Lord may refuse to admit before the Fine paid, where the Fine is certain.

Answ. That's admitted, but it is otherwise where the Fine is uncertain, as in our Case, &c.

Curia. (At another Day) The Custom is more certain than in the Case in Noy; and (per Allibon) The Case cited by Holt, to be for him, is expressly against him.

Judgment affirmed Mich. 3 Jac. 1.

In Trover it was moved, That bringing Money into Court, Proceedings should stay, &c. And denied per C. J. for in all Trovers a Wrong is done to the Party in detaining of it.

Money brought in in Trover

## Benson *versus* Offley, *& al'.*

Appeal by the Wife for the Murther of her Husband *versus* Offley, as Principal, and Lipton and another as Abettors. On non cul' pleaded, the Jury found that Lipton gave the Stroke, and that Offley was aiding, &c. And the Question in Arrest of Judgment was, Whether this was a good Verdict?

Exceptions to an Appeal of Murder

Plowd. 98. was cited, That it was so in the Case of an Indiament. 9 Co. Markally's Case.

Thompson contra. He agreed the Case of an Indictment; but it is otherwise in an Appeal, because at the Suit of the Party; and here the Declaration is falsified by the Verdict, and therefore she can't have Judgment.

C. J. This may as well be alledged in Case of an Indiament. And the Court inclined to give Judgment, but it was adjourned on other Exceptions.

In an Action of the Case for 20 l. the Defendant pleads the Statute of Limitations, but mistakes the Plaintiff's Name for the Defendant's; and upon Motion it was granted, that he might amend, if he would swear that he did not owe the Debt.

Misnomer in pleading the Stat. of Limitations.

Moved to amend an Information of Perjury after Plea pleaded, but it was denied per Curiam.

Information of Perjury not amendable after Plea.

## Sarsfield *versus* Witherly. Post.

Declaration on a Bill of Exchange, the Defendant pleaded, That he is a Gentleman, and took up the Money to travel, absq; hoc, that he is a Merchant. And it was moved, that this Plea amounted to the General Issue: But per Cur', The Plea is good, (quod nota) but the Court gave Leave to discontinue on Payment of Costs, &c.

Plea to Bill of Exchange, that the Defendant is a Gent', &c.

Nota, Sir Barth. Shower (8 Feb. 95.) cited this Case to be adjudg'd in B. R. pro Defendente, and that the same was reversed in

in the Exchequer-Chamber, which the Court ſeem'd to agree. Vide Poſt.

# DE

# Termino Paſchæ.

## Anno 3 Jac. II. in B. R.

Eccleſiaſtical Court, no Prohibition to prove a Will there.

THE Court denied to prohibit the Probate of a Will in the Eccleſiaſtical Court, becauſe it concerned Lands and Chattels: And Holloway ſaid, That Witneſſes might well be examined there to the Whole.

A Will exemplify'd under the Great Seal, no Evidence.

Per Cur'. A Will exemplified under the Great Seal, is not Evidence to a Jury in Ejectment.

Coſts in Ejectment againſt the Plaintiff's Leſſor.

Nota, Coſts againſt the Leſſor of the Plaintiff in Ejectment, are not ex debito juſtitiæ, but ex gratia Curiæ, (this being but a Fiction) leſt none ſhould pay Coſts; but if by Conſent of the Parties, another is bound to pay Coſts, the Court will not compel the Leſſor to pay them.

Scandalous Words of a Juſtice, indictable.

A Man was indicted for Words ſpoken of a Juſtice of Peace, [A Buffle-headed Fellow] and an Exception was taken, That the Words were not indictable.

But per Curiam, Becauſe it appears they were ſpoken of him in the Execution of his Office, the Indictment is good. And per C. J. All Actions for ſlandering a Juſtice in his Office, may be turned into Indictments.

## Davenport *and* Calne.

DEbt was brought in the Debet & Detinet against an Administrator, on a Suggestion of a Devastavit; the Defendant demurred to the Declaration.

Debet & Detinet against an Administrator, ill.

Pollexfen. Such Action doth not lie against an Administrator in the Debet & Detinet; and so 'twas adjudged in the Case of Ent and Withers.

C. J. Here is a Suggestion of a Devastavit by the Administrator, before an Action brought against him as Administrator.

And admitting the Declaration true, yet there may be no Wrong to you; for besides the Goods wasted, the Administrator may have sufficient to pay you; and this is a new Practice, not to be countenanced. Judicium pro Defendente.

That such Action is maintainable on a Judgment recovered against him. Vide 1 Ven. 321. 1 Sid. 397. 2 Sid. 102. 1 Lev. 255. 1 Saund. 216. 1 Salk. 314.

And he shall be held to Bail thereon. 1 Ven. 355. 1 Sid. 63, 368.

Per Holloway. The Delivery of a Declaration in Ejectment to a Servant, is ill in B. R. but it is allowed in C. B.

Declaration in Ejectment delivered to a Servant, ill.

Note, The Venue may be changed after Plea pleaded in transitory Actions on Payment of Costs, because it is discretionary.

Venue changed in transitory Actions.

Per Holloway. An Arrest of the Marshal is an Escape of all the Prisoners; and where there is an Inquisition for the King, for the Forfeiture of this Office, it is in the King immediately; and this appears by the Judgment quod manus Domini Regis amoveantur.

Marshal arrested is an Escape and Forfeiture.

*Memorandum*, That about 21 *April*, 1687. Sir *Edward Herbert* was removed, and made Chief Justice of the Common Pleas, and Sir *Robert Wright* was made Chief Justice in his Room; and Sir *Richard Allibon* one of the Justices of *B. R.*

Judges removed.

## *Rex versus* Levir. Post.

ERror in Judgment on an Indictment of Barretry in Lancaster; and Error assigned, That the Trial there was by a Tales, which can't be; for the Statute of Eliz. doth not extend to Counties Palatine, unless it be in civil Causes, not in criminal.

Writ of Error to a County Palatine, quashed.

Holt,

Holt, upon this, moved to quash the Writ of Error, for it is directed to the Justices of Assize, Gaol-Delivery, and Oyer and Terminer, where it should be Justic' ad Placita Coronæ, for in such Capacity they have given Judgment.

Curia. The Judges sit there by one Commission, but that includes several Authorities.

Ingolsby Serj. That the Writ of Error is good, for being directed to the Justices of Assizes, that comprehends Placita Coronæ. 4 Inst. 159.

Pollexfen. The Words (ad Gaolam deliberand' & alia malefacta, &c. audiend') are equivalent to the Words Placita Coronæ. 3 Co. 2. Hob. 179. Sid. 133. But per Curiam, The Record is not well removed; and therefore the Writ of Error was quash'd, Nisi, &c.

Debt on Judgment after Error brought, &c.

After a Writ of Error, the Plaintiff in the former Action brought an Action of Debt on the Judgment. Et per Cur', The Writ of Error pending, may be pleaded in Abatement, but not in Bar.

Habeas Corpus ad testificand', where.

An Habeas Corpus ad testificand', is grantable for one in Prison on mean Process, but not if he be in Execution. Ante 17.

## Jennings *and* Hankey. Ante 30.

Transitory Actions in County Palatine, triable here.

Pollexfen mov'd in Arrest of Judgment, That the whole Fact is laid in Chester.

Agreed, That transitory Actions arising in Chester, may be try'd here or there; but then the Cause of Action must be laid in some other County, if try'd here.

Where Matter is local, Issue shall be joined here, and sent down to Chester, and thence remanded hither for Judgment. Rast. Entr. 325. 25 H. 6. Bro. Trial 146. 39. and 12. Mich. 30 Car. Case of the Town of Berwick in this Court. Sid. Bond or Nusance can't be laid out of the County where it ariseth.

In transitory Actions, when the Party hath once laid it in a County Palatine, he cannot after lay it in any other Place, for he hath determin'd his Election.

Obj. Fitz. Jurisdiction 29, 57. and tit. Venue 50.

Answ. Inst. 261. That the Cases are not mentioned in the Year-Books at large.

Holt contra.

Obj. It appears on the Face of the Record, that the County Palatine hath Jurisdiction.

Answ. That the Facts arising in Chester is not sufficient to intitle the County Palatine.

The Jurisdiction of the County Palatine is derivative and controulable by this Court, when they exceed their Jurisdiction.

Trespass is committed in Chester, the Offender flieth out of the County; this Court will help the Plaintiff, that there be no Failure of Justice. 12 Co. Darby's Case, Chancery hath Jurisdiction where the County Palatine is deficient: Here, non constat that the Party lives out of the Jurisdiction of this Court, it not being pleaded, and therefore shall not be intended.

At another Day, (viz. Term. Mich. 3 Jac. 2.) Maynard to the same Purpose.

He cited Sid. 369. 18 Ed. 3. Fitz. Jurisdiction 19, 20. 3 H. 4. 15. 32 H. 6. 25. Fitz. Trial 300. that the County Palatine can't try a foreign Voucher, but it shall be tried in C. B. and remanded to the County Palatine for Judgment: It appears by the Pleading, That the Defendant is in Custod' Mar', and therefore it can't be tried in the County Palatine.

The Court cited 4 Inst. 213. Savil 35. Sid. 309. and gave Judgment for the Plaintiff, Nisi, &c. Mich. 3 Jac. 2.

## Hardy *and* Upwait.

Want of super Sacramentum in a Verdict, ill.

Debt on Bond, and Verdict for the Plaintiff. It was moved in Arrest of Judgment, That the Verdict was ill, because it was Jur' dicunt pro Quer', without saying super Sacramentum.

Powell Justice. This is not aided by the Statute of Jeofails, and Judgment was reversed (wherefore it seems it was in a Writ of Error. Quære.)

## *Rex versus The Earl of* Devonshire.

A Peer fined for striking in the King's Court.

Information for striking in the King's Court, &c. The Defendant pleaded Privilege of Parliament; and urged for himself, that a Peer could not be impleaded during the Privilege of Parliament, either in a civil or criminal Cause, unless it was capital, and cited the Case of the Lord Arundel and Lovelace.

Williams pro Defendente. The Case of the Lord Arundel was a great Misdemeanor; and yet it was adjudged, that he could be prosecuted only in Parliament, during the Sitting of Parliament.

Solicitor-General contra. Privilege of Parliament doth not extend to High Treason, Felony, Breach of the Peace, or Surety of the Peace. 4 Inst. E. 6. Hugh Spencer's Case. Prinn's Survey of Parliament Writs, 4th Part 701, 702.

Curia. The Defendant ought to plead in Chief; but notwithſtanding this, the Defendant put in his Plea of Privilege, to which there was a Demurrer, and afterwards the Plea was over-ruled by the Court. And he was fined 30000 l. Trin. 3 Jac. 2.

## Dighton *and* Greenvill.

The Term enlarg'd in Ejectment.

THE Court compelled the Defendant to conſent to the Enlargement of a Term in an Ejectment-Leaſe, and cited the Caſe of Forteſcue and Abbot, where it was ſo done, 32 Car. 2. Quære per moy. How a Conſent may be forced; for it ſeems rather that this was done by the Court, without the Defendant's Conſent.

## Dalby *and* Smith.

Where Tender a good Plea.

IN Debt for Rent, The Defendant pleaded a Tender after Imparlance; and it was adjudged a good Plea. Dy. 300. 2 Cro.

Inferior Court, Judgment in Engliſh reverſed. 1 Cro. 514.

Error of a Judgment in an inferior Court, the Proceedings were returned in Engliſh, and it was therefore reverſed, Niſi, &c.

Trial per Pais 200.

In an Aſſault and Battery, (at the Niſi prius in Middleſex) The Defendant juſtified, and the Plaintiff replied, de Injuria ſua propria, and Iſſue thereupon; the Defendant proves his Juſtification at one Time: Now, per Thompſon, the Plaintiff can't, without a ſpecial Replication, give in Evidence a Battery at another Time; and the C. J. was of the ſame Opinion, and therefore the Plaintiff was nonſuited, Vide 2 Roll. 680. Brownl.

Infant of fourteen may make a Will.

One moved for a Prohibition on a Suggeſtion, that an Infant could not make a Will of a perſonal Eſtate. Inſt. 89. b. And at firſt a Rule was given for a Prohibition, Niſi, &c. But Pollexfen contra, cited Office of Executor and Godolphin, That an Infant of the Age of fourteen Years might make a Will of a perſonal Eſtate; and ſo it hath been adjudged in this Court (which Powell, Juſtice, remember'd) and therefore the Rule was diſcharged.

## Smith *and* Tunstal.

THE Plaintiff brought an Action of Trover as Executor Durante minori ætate, and did not aver, that the Party was under Age. Executor durante minoritate.

Pollexfen contra. That this Action is founded on a Tort, and the naming himself Executor is not material; and Powell, Justice, was of that Opinion, scilt', that such Averment ought to be in Actions founded on a Contract, not where they are founded on a Tort.

Allibon Justice. He intitling himself as Executor durante, &c. the Declaration is ill for Want of an Averment. Judgment pro Quer', Nisi, &c.

But at another Day (Hill. 3 & 4.) I suppose, after the Return of the Writ of Inquiry, the Court was divided, C. J. and Holloway for Judgment, Powell and Allibon contra. Vide 1 Leon. 170. 2 Cro. 439. 3 Leon. 230. or 213. 2 Saund.

Where Judgment is given on the Declaration, and a Writ of Inquiry awarded, and the Court is divided, Judgment can't be given; secus on a Demurrer to the Declaration, or after a Verdict, per Astry, and admitted by the Court. Court divided.

# DE

# Term. Sanctæ Trin.

## Anno 3 Jac. II. Regis, in B. R.

Attorneys Practice in delivering Declarations.

PER Aston. After Bail filed, by the Course of the Court, the Attorney ought to deliver a Copy of the Declaration; and not only to file the Declaration in the Office: But per Allibon, if the Defendant's Attorney will take Notice of a Declaration so filed, it is good.

### Peat & Ux' *versus* Parry.

Words.

ACtion for Words. You are a Break-lock and a Pick-lock, and keep Pick-locks in your House; and I will arraign you, and have you whipp'd and swing for it.

Williams, in Arrest of Judgment.

These Words amount only to a Trespass. Hob. 305. fort Roll. Abr. Action pur Parol. pl. 73. Yelv. 64. Sir J. Hollis's Case.

Pollexfen ad idem. He cited Hutt. 38. 2 Cro. 302. Long's Case. 2 Roll. 73. Sty. 127.

Holt contra.

The Cases cited do not reach our Case; the Words (be arraigned and whipp'd, and shall swing for it) cannot but import Felony. 1 Roll. 43. Sid. 52. 220. 324.

On the Word Whipping. 1 Roll. 43. 50. 1 Roll. Rep. 51. 2 Sid. Langley *and* Clerk.

Judgment pro quer'. (Mich. 3.)

## *Merchants Adventurers versus* Rebow.

DEclaration, That ever since 8 H. 4. they had traded, &c. and had by the Patents 18 and 28 Eliz. the Privilege of the sole Trade granted them, exclusive of all not free of their Society. Patent for sole Trade.

The Defendant pleaded the Statute 15 Ed. 3. of Mare liberum, to which the Plaintiffs demurred. Monopoly.

Holt pro quer'. I shall consider, 1. The Right of the Subject to Trade. 2. The King's Power to restrain his Subjects to go beyond the Seas. 3. The King's Prerogative to regulate Trade.

1. The Subject hath not an absolute Liberty of Trading. Grot. Mare liberum, cap. 8. The Foundation of Trade depends on Leagues with foreign Princes. 4 Inst. 155. and therefore the Subjects may be restrained from trading, &c. and for trading, after a League made, the Subject is liable to an Information.

Magna Charta, cap. 3. That Merchant Strangers have free Liberty to trade, Nisi publice prohibiti. 2 Inst. 57. In the Case of the East-India Company against Sands, it was adjudged, that (publice prohibiti) should be intended by the King only, and the Opinion of Co. there, that it should be intended prohibited by Parliament, hath no Authority.

2. The King may restrain the Persons of his Subjects from going out of the Kingdom; the Matter alledged by the King in the Writ of Ne exeas Regnum, is not traversable. 3 Inst. 179. Dy. 176. And the Departure after such Writ is a Forfeiture of all his Goods. Dy. 375. Mo. 109. 1 Leon. 95. and 93. or 35. and that at Common Law.

Before 27 Ed. 3. Goods ought to be brought to the Staple where the King would direct, Stat. 2 Ed. 3. c. 9. The 27 Ed. 3. is the first Statute for the Regulation of the Staple, which continued at Calais almost to the Time of Queen Mary.

The Subjects can't trade in Companies without the King's Licence; and it's like the Case of a Market, where a Quo Warranto lieth, if Persons assemble to make a Market, without Licence; and they shall be fined for it.

If a Market be granted by the King, in an inconvenient Place, the Inhabitants can't change the Place. Fitz. Nat. Br. 135. 2 Roll. tit. Nusance.

There may be a Restraint of Trade on a reasonable Consideration. 8 Co. 125. 2 Cro. 596. Brown's Case, and for the reasonableness of it in this Case, Vide 8 Co. 128. on the Words there (Order and Government) which can't be without By-Laws; and they are to be made by a Society. 5 Co. Jeffery's Case, and that

that is the chief Reason of the Incorporation of ancient Boroughs, &c. to trade, &c. 10 Co. 30. 1 Bul. 11. Franklin's Case, that none are subject to a By-Law, but those who are free of the Company.

In our Case the Liberty of the Subject is not taken away, for one that is skilful in the Trade, may demand to be made free of a Company, and on a Refusal, a Mandamus lieth. Hill. 14 & 15 Car. 2. Townesend's Case.

Mandamus.

For the Antiquity of this Company, it was from the Time of H. 4. Vide 2 Roll. Prerogative 174. which Case is to be intended of this Company, for there was no other then in Being. 2 Roll. 170. pl. 17. 28 H. 6. N° 50.

Statutes for it 28 H. 6. c. 3. there is a Confession of the King's Prerogative, and an express saving of his Power. 38 E. 3. c. 11. hath the same Saving, and Artificers are there excepted; because 'tis for the Benefit of the Kingdom that they should remain here. 38 Ed. 3. c. 18. 3 Jac. c. 6. 4 Jac. c. 9. 2 Roll. 112. And the Case of the East-India Company *versus* Sands, adjudged in Point in this Court, and affirmed in Camera Scaccarii.

It is lawful for the Subject to export Wool, but it is an Offence when it's prohibited. Hob. 270.

The Power of Printing is in the King, and the sole Trade thereof may be granted, as it was adjudged in C. B.

He said an Exception might be taken to the Pleading, for the Plea is founded on 25 Ed. 3. whereas the Statute intended, is 28 Ed. 3. but that he would not insist upon it.

Note, At the Time of this Statute, the whole Trade was in the Hands of foreign Merchants.

Obj. That it is an Engrossing.

Answ. Co. 3 Inst. 196. expounds what shall be engrossing, and that was not known in the Law before, except for dead Victuals.

Obj. That it is a Monopoly

Answ. It is contrary to the Definition of a Monopoly, which is the Taking away of the Right of a Subject in a Thing which he had before; but in our Case he had no Right before. Vide Townesend's Journal 244, 245. And it was not adjudged before 21 Jac. that any Thing was a Monopoly. And see there the saving for Patents of Companies.

Obj. Stat. 3 H. 7. c. 6.

Answ. That was made only for the Reformation of Abuses of Companies, and not to destroy Companies; for the Statute allows ten Marks, which supposeth a Right to take 'em.

On another Day Finch argued to the same Purpose.

Pollexfen contra.

Obj. This Charter doth not exclude any Subject to be a Member of the Company.

Answ. The Corporation is not compellable to admit all Persons; but admitting that, yet 'tis impossible that all should meet; and so the Merchants of London, which is most likely to be the Place of Meeting, will by Consequence govern the Estates, &c. of the rest of the Company.

I agree that,

1. The King hath Power to restrain his Subjects from going beyond Sea.

2. Trade is under the Government of the King.

3. The King, in his Truces, &c. hath Power to restrain and regulate Trade.

4. I admit the Cases put of the Law of the Staple; but Nota, That that hath been discontinued for a long Time, so that it is difficult to prove the Law and Nature of it.

Obj. An Exception in the Statute 3 Jac.

Answ. There is no Mention made of sole Trade.

Obj. 12 H. 7. 6.

Answ. That can't be intended of this Company, which was not incorporated with this Power of sole Trade, till the Time of Queen Elizabeth.

Obj. The Case of the East-India Company and Sands.

Answ. That Case was adjudged on another Reason, viz. Because the Persons with whom the King had restrained his Subjects from trading, were Infidels; but it is otherwise in our Case: And there it was admitted by the Court, that it should have been otherwise adjudged, if their Trade had been with Christians; and therefore the Cases relied upon for that Judgment were 7 Co. 17. b. 12 H. 4. 4. Reg. 202. 2 Brownl. 246.

1. A Grant of a sole Trade, exclusive of others, is ill by the Common Law. 3 Inst. 381. 1 Roll. Rep. 4. The Case of the Taylors of Ipswich. 13 H. 4. 14. Fitz. Nat. Br. 222.

The Grant of a Market by the King, which is to the Prejudice of another Market, is void.

In the Case of the King against Crisp, in this Court; a Grant to engross, &c. was adjudged void.

Vide 3 Inst. 181. The Difference between Engrossing and Monopolizing, which is strongly for our Case. Vide the Statute 21 Jac. c. 3. of Monopolies, and the Recital of it, which mentions Letters Patents, &c. which are contrary to Law.

As to Statutes, admitting that the Statute 18 Ed. 3. extends only to the Staple, yet there are several other Statutes which fully give this Power of Trading to the Subject. Stat. 9 Ed. 3.

c. 1.

c. 1. Stat. 18 Ed. 3. c. 2. in 2 Roll. tit. Prerogative 181. Stat. 25 Ed. 3. c. 2. 2 R. 2. c. 1. 11 R. 2. c. 7.

The Statute 21 Jac. c. 3. of Monopolies, makes this Patent void; Vide the enacting Clause of it. And such Patent is not excepted by any Proviso; and if it had been, it would be repugnant to the enacting Part of the Statute, and therefore void. 1 Co. 46. Plowd. 563.

This Prerogative of regulating Trade, is inseparable from the King, and can't be granted over. 2 Roll. 187. Johnson's Case; for the Care of his People is inseparably inherent in the King. 2 Inst. 540. Many Patents of Monopoly have had such specious Preambles. 11 Co. 88.

Note. Where the King grants a Thing by Patent which was in the Grantee before by the Common Law, there the Party is in by the Common Law, and the Patent is but declaratory of it.

The Prohibition in this Case, being against the Common Law and the Statutes aforesaid, is void in Law.

There is a Difference between the King's Grants and Prohibitions; for his Grants pass an Interest, which can't be afterwards revoked, but no Interest passeth in a Prohibition.

All Mandates, Licences, &c. are alterable at the King's Pleasure, and are all determined by his Death. Latch. 115. Watkins's Case, and 58. Molineux Case. Palm. 402. Dickes Case.

2. As to the second Point, No Action lieth: Here is no Grant of a sole Trade, but only a Licence to trade, with a Prohibition, &c. which doth not pass an Interest. If the King grants a Company Licence to hunt and fish in his Wood and Fishery, the Company hath no Power to punish a Stranger for hunting and Fishing there, but he is answerable to the King.

Obj. (per Finch) That this is not like other Patents, where they trade with a Joint-Stock, but here we trade with separate Stocks.

Answ. It is therefore manifest that they can maintain no Action.

(Note, This last Argument was Pasch. 4 Jac. 2.)

## Barton *and* Wolliford.

Bill of Lading or Policy of Insurance.

CAse on a Bill of Lading, on Condition that the Defendant shall deliver here so much Gold, the Perils of the Sea excepted: The Defendant pleads Piracy, to which the Plaintiff demurs.

Thompson pro Quer'. The Dangers of the Seas are intended only of the Acts of God, not of Men; for Robbery is no Excuse to a Master of a Ship, any more than to a common Carrier. Vide the Case of Mors and Sluce in this Court accordingly. 1 Mod. 85. 2 Lev. 69, &c. Molloy de Jure Maritimo 111.

Fuller contra. That the Case of Mors, cited before, was within the Body of the County; and it was there agreed by Hales, That if it had been by Enemies, it would be otherwise.

Curia. There is no Difference (as to charging a Sheriff with an Escape) between the Breaking of the Prison by Rebels, and by common Enemies: So in Case of a Robbery of a Carrier, &c. So here, Piracy is one of the Dangers of the Sea.

Judgment pro Defendente. Mich. 3 Jac. 2.

Case by a Termor for stopping his Way, and he prescribed to have such Way, Time out of Mind, &c. And it was moved in Arrest of Judgment, that a Termor can't prescribe, &c. Surplusage help'd by Verdict.

Cur'. The saying he was possessed of the Land is sufficient, and the Prescription but Surplusage, and help'd by Verdict; and so it is Moody and St. John's Case.

Judgment pro Quer'.

## Price *and* Davies. Post. 71.

ERror to reverse a Fine: The Error assigned was, That the Conusor died between the Teste and Return of the Writ of Covenant; and for that Reason the Fine was reversed. Vide 3 Cro. 484. (468 in the mistaken Fol.) Ow. 21. 2 Sid. 54, 92. Roo and Evely's Case, Dy. 246. 2 Cro. 468. Fine revers'd by Death of the Conusor.

## *Rex versus* Combs.

THE Defendant swore an Affirmative, and afterwards an Information was exhibited against him for it; and altho' a Negative could not be proved, yet the Court directed that they should first give their probable Evidence, and that the Defendant should afterwards prove his Affirmative, if he could. Negative Evidence.

## Pilton *and* Darby.

DEbt for two Quarters Rent of an Annuity, before the whole Term was ended; and it was moved in Arrest of Judgment, that the Action did not lie. Tanfield's Case, 3 Cro. 3. On the other Side it was said, that 3 Cro. 268. Brown and Petlebury's Case is adjudged contra, which is a later Case; and it was adjudged accordingly in this Case pro Quer'. Debt, for two Quarters of an Annuity.

In Battery against A. and his Servants, because the Battery appeared (upon Affidavit) to be foul: It was moved for a Special Special Writ and Bail in Battery.

cial Writ (with an ac etiam) for Special Bail against the Servants, and granted per Cur'.

New Trial.

Per Cur' and Pollexfen. A new Trial never was granted in Perjury; otherwise in Battery.

## *Rex versus Duke of* Grafton.

Exception to Indictment of forcible Entry.

Pollexfen took several Exceptions to an Indictment of forcible Entry; but the most material was, that the Words (ad inquirend' pro Domino Rege) were omitted, and therefore it don't appear to be a Grand Jury, but rather by a Petty Jury.

Holt contra. 1. It is not necessary that the Words pro Domino Rege should be inserted. Vide Stat. H. 6.

2. Admitting that it is Error, yet it being in the Caption, it is amendable in the same Term.

3. The Coroner's Inquest doth not require these Words pro Domino Rege. Co. Entr. 354. a Fortiori in an Inquest taken by Act of Parliament.

4. It appears in Fact, and therefore need not be shewn. Sid. 259. Glover's Case.

Pollexfen. In a Coroner's Inquest, the Death of the Party is found, and therefore 'tis not like our Case.

Here is no Caption, and therefore it is not within the common Rule of Amendment.

Inquisitions, when pro Domino Rege & Corpore Com', &c.

Per Cur' and Astry. The antient Rule is, That if an Inquisition be taken at the Assizes or Quarter-Sessions, it should be pro Domino Rege & corpore Comitat', but on this Statute, or at a private Sessions, it ought to be pro Domino Rege tantum.

Astry. Coroners Inquests may be amended on Process directed to him out of this Court; but he seem'd to incline, that it was not amendable in this Case. And the Indictment was quash'd. Mich. 3 Jac. 2.

Amending Declarations.

On a Motion to amend a Declaration, the Defendant may have Costs or an Imparlance at his Election.

## *Rex versus* Levir. Ante pag.

Error quod coram vobis.

Chetham moved for a Writ of Error quod coram vobis residet. Dy. 164. pl. 8. Yelv. 211, 212. 2 Cro. 254.

Holt contra. 3 Co. Marquis of Winchester's Case, here the Record was not removed.

Curia. In the Cases cited by Chetham, the Record was well removed as to the Judges; otherwise in our Case.

Powell Justice. Where the Record is once removed, and the Writ of Error abates, there a Writ of Error coram vobis is good; otherwise where it was never removed, &c.

Motion to stay Proceedings upon a second Ejectione firmæ, the Costs of the first not being paid.

A second Ejectment, Costs not paid on the first.

Cur'. We never grant this without an Affidavit, that it is the same Land, same Lessor, and same Title.

## Paul *and* Claxton.

Error on a Fine, Death of Conusor before K.'s Silver paid.

ERror to reverse a Fine, because the Conusor dy'd before the King's Silver paid.

Holt. That is not assignable for Error, because it is contrary to the Record; and there is a Difference between Fines on a Writ of Covenant, after a Dedimus Potestatem, and before; and this is a Fine of the Land to all Intents; if the Fine is taken in Court, then doubtless it is not assignable for Error; the same Law of a Recognizance. 3 Cro. 468. Wright's Case. This Fine was taken in the Vacation, yet in Judgment of Law it is a Fine of the precedent Term.

Obj. That this is a common Error, to reverse Judgments.

Answ. If the Party appear by Attorney, that is assignable, and is not contrary to the Record; otherwise where the Party appears in Court in Person, for then he is estopp'd. The Case in Hob. 330. is express in Point, and Hutt. 135. Chapman's Case. And the Reason why Fines are levied of the preceding Term, is to avoid the Accident of Death (but it was agreed by all in this Case, that the Death of the Conusor, before the Entry of the King's Silver, is an apparent Error).

Note.

Powell Justice, cited 12 Co. Carrell's Case.

Pollexfen. The usual Way to stop Proceedings in a Fine on Suspicion of the Death of the Party, &c. is to enter a Caveat in the Office of the King's Silver; but that would be in vain, if it shall have such Relation to the preceding Term; and likewise inconvenient. Adjournatur.

Prohibition to stay Waste against a Parson.

A Prohibition was granted to stay Waste on a Suggestion, That the Parson plowed up the antient Glebe Land.

## Fountain *and* Gnales.

Covenant against Executor for Arrears of Rent-charge.

COvenant against an Executor for the Arrears of a Rent-charge due long before.

Powell Justice. An Avowry for the Arrears of a Rent-charge in 79, is no Estoppel to bring Covenant for the Arrears in 78, &c.

&c. And by him there is a Diversity, where the Acquittance for the last Quarter is under the Plaintiff's Hand and Seal, and where it is under his Hand only; for in the first Case it is an Estoppel, in the latter it is but Evidence.

## Brinley *and* Taylor.

Judgment in C. B. revers'd for Variance inter the Writ and Declaration.

ERror of a Judgment in C. B.

Pollexfen. The Original is Quare clausum fregit, the Declaration is Clausum & Domum, which is a Variance, and that was assigned for Error.

Levinz contra. That this shall not be supposed to be the very Original. 2 Roll. 790.

Pollexfen. Cro. 290. Stainer's Case, and 307. Johnson and Davies.

Judgment reversed per Cur'.

## Langford *and* Weaver.

In Trespass, Damage-fesant pleaded, sans Title. Quære.

TRespass for taking a Horse: The Defendant justifies for Damage-fesant, and doth not set forth any Title; and the Plaintiff demurs.

Pollexfen. The Title ought to be set forth. 1 Cro. 571. Inst. 303.

Obj. Yelv. 74. 1 Cro. 138. Answ. In those Cases the Title was not in Question.

Holt contra, cited 8 Co. Crogate's Case, and this Plea is meer Matter of Excuse.

Curia (dissentiente Holloway) The Plea is ill: And Judgment pro Quer' nisi prox' Term. Quære de hoc.

## Dennis *and* Snape.

Bond in tricesimo secundo libris, good.

DEbt on Bond. The Defendant pleaded Non est factum; and it was found by special Verdict, that the Bond is, in tricesimo secundo libris. 1 Cro. 416. and 18. 2 Cro. 284, 290.

Powell Justice. In Hob. Sexagesimo libr' was adjudg'd good.

Judgment pro Quer'.

# DE

# Term. Sancti Mich.

## Anno 3 Jac. II. Regis, in B. R.

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INdictment against five, on the Statute 5 Eliz. for using a Trade, not having been Apprentice, was quashed; because several can't be joined in one Indictment for this Offence. Indictment on 5 Eliz. Trades.

This Court will not respite a Recognizance on Motion, after the Estreats are made up, but Application must be made to the Exchequer. Recognizances estreated.

The Plaintiff had Judgment on a Verdict: The Defendant moved, that paying the whole Money recovered, Execution might be stayed. But per Cur', currat Lex. Execution not stayed.

Per Astry. The Court hath used to allow the quashing of a Return of a Rescous, without the Parties being in Court, where the Debt is small, and on Affidavit of great Age or Infirmity; and it was so done in this Case per Cur'. Return of a Rescue quashed.

Error on a Judgment in Debt on Bond, because the Entry is quod defendens sit in Mia', where he came in primo die, &c. 8 Co. Beecher's Case, and Shepley's Case. Judgment in Mia', good, tho' the Defendant appear'd.

Girdler contra. The Judgment is good, because he came in on the Capias, quod fuit concess. per Cur'.

Lessee for Years is barr'd by the Statute of Limitations, and he who hath the Inheritance is disseised: It was agreed by the Court, that the Lease which is barr'd could not be given in Evidence. Lease barr'd per Stat. Limitations, no Evidence.

Restitution on a Possession by Force in Ejectment.

A Man to get Possession of certain Land, causeth his Servant to make forceable Entry on the Tenant, and afterwards delivereth a Declaration of Ejectment against his Servant, and adjudged against him, &c. And Restitution granted by the Court.

An equivocal Oath is Perjury.

Per Allibon. A Man having rolled up a Declaration in Ejectment, like a Piece of a Tobacco-pipe, hid it in his Box, and after delivered the Box to the Tenant in Possession; and after swearing the Delivery of a Declaration, &c. was pillory'd.

In Chancery 29 Octob. 87.

Sequestration against a Peer not answering in Chancery.

A Peer of the Realm appears, and doth not answer, formerly an Attachment lay; but now, by Order of Parliament, no Process lies, but a Sequestration.

Condition of a Bond mistaken, amended by Decree.

The Condition of a Bond was for Payment of 50 l. with Interest; and the Penalty, by Mistake, was but 20 l. yet it was decreed, that the Obligor should pay the 50 l. with Interest.

## In Banco Regis.

### *Rex versus* Gibbs.

Stat. 5 Eliz. using a Trade.

INformation for using the Trade of a Brewer; and an Exception was taken, That by 31 Eliz. cap. 5. it ought to be brought at the Quarter-Sessions. But per Astry, it was lately adjudged in this Court, that it was well brought here; and the Court over-ruled the Exception.

Indictment return'd, sans a Caption, finable.

An Indictment was returned without any Caption, and therefore the Town-Clerk was fined.

Ground Rents to pay poors Rates.

Note, It was lately resolved by the Court, that Ground-rents are liable to the Poor's Rate. Post 244

Delivering Declarations.

The Husband is in Prison, and the Wife at large, a Declaration against the Husband and Wife is delivered to the Wife, for scandalous Words spoke by her, and Judgment thereon by Default, and allow'd to be good per Cur'; but per Allibon, this may be mischievous, for this is different from the Case of a Declaration in Ejectment, for that may be tried again, but this can't.

Per Holloway. After a Consultation awarded for not proving his Suggestion, &c. the Party shall be for ever barr'd from having another Prohibition on the same Libel. After Consultation, no second Prohibition.

Per Holloway. It was adjudged in this Court, that the Defendant could not plead Privilege of Parliament, and ruled, that he answer over. Privilege of Parliament not pleadable.

An Order for keeping a Bastard-Child, to which an Exception was taken, that none of the Justices were of the Quorum; sed non allocatur, for per Cur', this Exception hath been of late several Times over-ruled. Order for a Bastard.

A Man is charged with a Contempt, and on Interrogatories he cleareth himself on his Oath, the other Party can proceed no further in this Matter, but shall take his Remedy by Action, if he will, per Cur'. Interrogatories on a Contempt.

A Motion to forejudge an Attorney of this Court, for refusing to plead; but it was denied per Cur', for it is not usual in this Court, otherwise in C. B. Forejudging an Attorney.

Per Pollexfen. A Man may be indicted for Non-performance of an Order of Sessions. Indictment for Non-feasance.

A Motion was made to join several Declarations (for several Assaults by A. *versus* B.) in one, but it was denied, per Cur'; because it is not the Practice. No joining of several Assaults.

## Matthews *versus* Port.

IN this Case the Visitation-Book of the County of Worcester, by the Heralds, was allowed as Evidence, being an Original, but a Copy hath been often disallowed. Heralds Books good Evidence. 3 f 230.

The Witnesses may be examined before a Judge, by Leave of the Court, as well in criminal Causes as in Civil, where a sufficient Reason appears to the Court, as going to Sea, &c. and then the other Side may cross examine them. Witnesses examin'd by a Judge.

## — *versus* Peters.

THE Defendant appear'd by Attorney where he ought to appear by Guardian; and Affidavit was made, that the Attorney had Notice of the Infancy at the Time of his Appearance, and Infant appears by Attorney, Action discontinued.

and afterwards bragged, that he would arrest the Judgment for that Reason, whereupon the Court gave the Plaintiff leave to discontinue, &c.

## *Rex versus* Hill.

Indictment ut Ballivus, no Averment.

SHower took an Exception to an Indictment against a Bailiff, for Extortion, because it only said ut Ballivus, he took so much Money colore Officii, &c.) without saying he was Bailiff, or that he took more than his due. Quash'd.

## *Archbishop of* Canterbury *versus An Attorney.*

Judgment amended.

THE Judgment in Quare Impedit was enter'd, per Attorn' suos præd', whereas it should be præd' Episcopus per Attorn' & Def' in propria persona. And per Aston, this is aided by the late Statute of Jeofailes, and the Court order'd it to be amended. Cro. Chamberlaine's Case.

## Smith *and* Simonds.

Judgment for an Administrator de bonis non, affirmed in Error.

COvenant by an Administrator de bonis non, Breach assigned, that the Land was not discharged of Incumbrances. Judgment pro Quer', and Error brought. And Fuller assigned for Error.

1. That it is not set forth, that Simonds was ever in Possession by this Conveyance, or by which of them he took the Estate.

2. That the mean Assignments are not set forth, and no regress is pleaded, altho' they were out of Possession. Vide 5 Co. Saffin's Case, 3 Cro. 22.

3. Some of the Covenants run with the Land, and for those the Executor hath no Cause of Action, and the Verdict is intire, and therefore ill. Inst. 384. and 5 Co. Spencer's Case.

4. To the Judgment, that it is coram Justiciar' præd', the Judgment being given in the Reign of his present Majesty, and the Action brought in the Time of the late King.

But it was answer'd by Holt, and resolved by the Court.

1. Testat' exit' is good in Covenant, but ill in a Bar, (and Holt said it ought to be specially demurr'd to, for a Man could not at Common Law demur generally to a double Plea).

2. 'Tis not necessary to shew the mean Assignments, because they are only Inducements to the showing of the Breach of

Covenant, and the common Pleading per diversas medias assignationes, is sufficient.

3. That where a Covenant is made with a Man, his Heirs, Executors, and Assigns, if their be a Breach in the Time of the Heir, the Executor may have the Action; but in our Case the Breach was in the Time of the Testator, and the Miskeasance is all one continued Act.

4. As to the Entry of the Judgment, that is sufficient.

Judgment affirm'd.

Per Aston. The Plaintiff may countermand Notice of Trial, and give new Notice to try it at the next Sitting, but not to try it sooner than the Day first prefix'd; and this was admitted by the Court. Notice of Trial, &c.

Libel in the spiritual Court for Distribution of an Intestate's Estate; it was suggested, That the Intestate died before the Statute of Distribution, and thereupon a Prohibition was granted, nisi. Statute of Distributions.

## Jefferys *versus* Snow *Mil' & Bar'*.

THE Plaintiff declared against J. Snow Baronet, The Defendant pleaded in Abatement, that he ought to be named Miles and Baronet', Squib. Hardr. 198. Cro. Jac. 482. Vide Stat. 1 H. 5. c. 5. At Common Law Knt. is Parcel of his Name. Leon. Baronet for Knight and Baronet, an ill Plea in Abatement. Quære.

Holt contra. 1. I agree, 'tis ill to sue a Knight by the Name of Esq; but the superior Degree includes the inferior. 2 Inst. 594. 28 H. 6. 29.

2. Admitting the Plea to be good for the Matter, yet it is ill for the Manner, for he hath not shewn the Time of his Knighthood, which is traversable, and therefore the Plea is ill. Note, The Plea said quod fuit Miles die exhibitionis Billæ, and not ante diem. And on this second Exception it was ruled, That he answer over. 1 Salk. 1.

A Justice of Peace presented the Parishioners of A. for not Repairing a Highway, super notitiam suam propr', whereas it ought to be super visum: And for that Reason it was quash'd. Super notitiam for visum, ill in a Presentment.

## *Rex versus* Darby *on an Information.*

INgolsby Serjeant, in Arrest of Judgment. The Words were Sir *John Key* is a Buffle-headed Fellow, understands not Law, and is not fit to discourse it with me; and hath not done Justice to my Client, *&c.* Words of a Justice of Peace.

These Words are not actionable. Sid. 67. Bill and Field's Case: The Words (hath not done Justice) may be construed a Mistake in him of the Law. 2 Cro. 55.

Pollexfen. The Words are not spoke of him in the Execution of his Office; it doth not appear, that Sir J. K. was a Justice of Peace at the Time of Speaking the Words, but only at the Time of the Information brought.

Levinz contra. Indictments and Informations are more favour'd than Actions, because they are pro bono publico.

Obj. This is primæ Impressionis. Answ. The King's antient Commissions ran (ad inquirend' de propalationibus verborum.)

Words indictable, tho' not actionable.

Holt ad idem. Admitting the Words are not actionable, yet an Information lies. If a Man saith, the King hath appointed an ignorant Man to be a Justice of Peace, it is a Matter indictable.

Curia. Many Words are indictable that are not actionable, because contra bonos mores, and relate to the publick Peace; otherwise where the private Interest of the Party is only concern'd. Judgment pro Rege.

## *Rex versus The Inhabitants of* Studley.

Poors Settlement.

AN Order of Settlement of a poor Man was made, and afterwards alter'd, and a Resettlement made by a second Order.

Tremain. This second Order can't be made by Law; and therefore the Order was quash'd.

## Ball *and* Cox.

Fine reversed for Death of the Conusor after the Caption, and before the King's Silver paid.

ERror to reverse a Fine, because the Conusor died after the Caption of the Fine, and before the Entry of the King's Silver.

Levinz pro quer' in Error. A Fine is in Nature of an Action, and there shall be Judgment in it, &c. And therefore the Death of the Parties shall abate the Writ. 5 Co. 39. a. 2 Inst. 511, 517. It is not a Fine before the Entry of the King's Silver. Dyer 246. a. 3 Cro. 469.

The Fine given pro Licentia concordandi, implies that it can't be paid before the Concord made, like the Lord's Taking a Fine of his Copyholder.

2 Inst. 512. L'Conge d'accord', is, that the Concord is such, &c.

I agree, that a Matter against the Essence or Substance of a Record can't be assigned for Error, as Nul tiel Record', &c. otherwise

therwise of a Circumstance only. 3 Inst. 230. Syer's Case, a strong Case against a double Record.

If the Party dies before Judgment, it is assignable for Error on the Judgment, altho' the Whole be entred on Record, and that Allegation be contrary to the Record. 4 Co. Hind's Case, that there may be an Averment of the Time of a Bargain and Sale enrolled, contra the Enrolment.

10 H. 7. 24. It is triable per Pais, whether a Writ of Error came to the Party before Execution granted, or not?

The Assertion of the other Side is contrary to the Record, for a Record taken the 30th of July, can't be a good Record of the preceding Term; and the Caption is of the Substance of the Time, and so it appears on the Record.

Sir George Treby contra. The Matter alledged is directly contrary to the Record, and therefore it is not assignable for Error. Dy. 220. 12 Co. 124. 3 Cro. 662. 2 Cro. 12. Yelv. 33. Hutt. 135. 1 Roll. Abr. 795. m.

The Caption is no part of the Record. 5 Co. 39. it is not mention'd there. Vide 18 Ed. 1. that Fines shall be levied in C. B. the 15 Ed. 2. gives Authority to levy by Dedimus potestatem, but don't mention the Caption 23 Eliz. c. 3. of Certifying the Day, &c. is distinct from the Caption, and the Caption may be certified without it.

Manuscript of Baron Walter agrees, that the Caption of a Fine may be taken out of Term (that was 5 Jac.) and so the Law hath been taken ever since.

An Averment that the Party was dead, &c. can't be where a Judgment is enter'd in propria persona; otherwise where it is by Attorney.

It was resolved by the whole Court that the Fine is good; for otherwise it would be very inconvenient. And per Powell, there can be no Averment in this Case against the Record.

## Hanmer *versus* Eyton.

ON a Special Verdict in Ejectment, the Case was thus: A. had the Interest of a Term for Years in Trust, for securing Childrens Portions. B. in Possession, under the Estate of C. levies a Fine; five Years pass without Claim: The Question is, Whether the Term be barr'd.

Fine and Nonclaim bars a Term in Trust.

Trindall for the Defendant.

I admit the being out of Possession, yet the Term is not put to a Right, and therefore shall not be barr'd, either by a Fine, or by the Statute of Limitations.

Obj. Saffin's Case, 5 Co. 23. That by an Entry and Feoffment the Term is put to a Right.

Answ. That's not like our Case, 3 Cro. 273. Wingate's Case, Inst. 249. 1 Roll. Abr. 270, &c. 3 Cro. 15. Bruerton's Case express.

And the Pleading will prove, that the Term is not put to a Right without an actual Entry. Co. Entr. 661. and in Saffin's Case, our Case is stronger, because the Term is for securing Childrens Portions. Sid. 350. Barnes.

And it would be inconvenient that Fines should bar such Trust Terms.

But it was resolved by the Court, That admitting the Term is in Trust, yet it is barr'd by the Fine: And per Allibon, it is also barr'd in Chancery. And Judgment was accordingly given pro Quer'.

## Cart *and* Mogg.

Fifteen Days between the Teste and Return need not be in a Scire Facias on a Judgment in Ejectment.

SCire Facias on a Judgment in Ejectment, the Defendant pleaded in Abatement, that there were not fifteen Days between the Test and Return, &c. to which the Plaintiff demurr'd.

Selby. The Statute 26 Car. 2. doth not extend to Ejectment, because it is not a personal Action, 5 Co. 105. 9 Co. Peytoes Case, Dy. 206. 2 Cro. 261.

Curia. This hath been oftentimes over-ruled, because an Ejectment is a mix'd Action; and per Powell, A Release of personal Actions, is a good Bar in Ejectment. Curia (and Aston) it is within the Proviso of the Statute, and help'd by it; and a Respondeat Ouster was awarded.

Process on a Recognizance estreated with Retuat'.

Per Astry. The Barons of the Exchequer have now agreed, that they may cause Process to issue on a Recognizance estreated, with a Respectuatur; but the Court directed, that in such Cases the Sums be scraped out in this Court, and then they can't proceed; and the Court directed the Officers of this Court to proceed accordingly.

Special Imparlance on Plea to the Jurisdiction.

On a Plea to the Jurisdiction on special Privileges, it is usual to grant a special Imparlance, as in the common Case of Conusance, &c. for Oxford, &c. but they can't impari generally.

London Customs, Procedendo on a By-Law.

In Debt on a By-Law in London, for exercising the Trade of a Taylor, not having served seven Years; a Procedendo was moved for.

pro Defendente. The Defendant lives in Black-fryars, and so out of their Jurisdiction.

But the Court granted a Procedendo, because in several Cases the Parties, &c. may try their own Jurisdiction, as in the Case of the Chancellor of Cambridge, &c.

## *Rex versus* Johnson.

AN Exception was taken to an Order for Keeping a Bastard-child, That it is not pursuant to the Statute, because it makes Provision for the Maintenance of the Child (till he shall be no longer chargeable, &c.) whereas by the Statute, it should be, till the Child be able to get his own Living. Sed non allocatur. And the Order was confirmed. Vide Sid. 222.)

Order of Bastardy confirm'd.

## *Rex versus* Foot.

THE Defendant was indicted at a Quarter-Sessions, for Breaking a Park and Taking away a Deer De bonis & catallis, &c.

1. Exception. Because one can't have such a Property of a Deer in a Park, as De bonis & catallis.

2. 'Tis Extitit presentatum for existit.

3. That the Price is quadragint'.

But it was answer'd by the Court. 1. The Offence is, Killing the Deer, &c. which is well laid, and De bonis & catallis, is Surplusage. 2. Extitit or existit, good both Ways. 3. It is good without any Price. Co. Entr. 362. And the Indictment was confirm'd.

Indictment at Sessions for Deer-stealing.

## Petley *and* North.

CASE against a Gaoler for an Escape on mean Process, Judgment for the Plaintiff, and Error brought.

Levinz pro Quer' in Errore.

1. The Declaration is ill, because he doth not say he was indebted (infra Jurisdiction' Cur'.)

2. The first Process was a Capias, which ought not to be in an inferior Court.

Sed non allocatur, Because the Declaration is good against the Gaoler; and it might have been pleaded, but the Gaoler shall not take Advantage of those Matters by Error. And the Judgment was affirmed.

Case lies against a Gaoler for an Escape on mean Process.

Ashbrooke

## Ashbrooke *and* Manby.

Bankrupts Action by Assignees.

CAse by the Assignee of the Commissioners of Bankrupt. The Defendant pleaded Non Assumpsit infra sex annos.

Holt pro Quer'. The Assignment and Promise, which give a new Cause of Action, are within the six Years, and the Assignee shall have a new six Years.

Curia contra. The six Years shall be accompted from the original Cause of Action, and the new Promise is but a Fiction in Law. The Court inclined to give Judgment for the Defendant, but a Discontinuance was granted, &c.

## *Rex versus The Lord* Brandon.

Attainder of Treason reversed.

ERror to reverse an Attainder of High Treason, and assigned for Error. 1. That one Stalcock was returned a Juror, and one Calcock sworn. 2. J. M. Ar' was return'd, and J. M. Gen' was swore; and the Errors were allowed by the Court, and the Attainder was reversed.

In Indictment of forcible Entry no Addition necessary. Expulit implies a Disseisin.

An Exception was taken to an Indictment of forcible Entry, That the Defendant had no Addition, as he ought, by the Statute. Allibon Justice, 'Tis not necessary, but in Outlawry. Powel Justice, It is aided by the Appearance. 2. Exception, It is not said that he was disseised. Cur', Expulit implies it; and the Indictment was confirmed.

Caption of an Inquisition not amendable, contra of Indictments.

Astry said, That he never remember'd the Caption of an Inquisition amended, which was admitted by the Court; but the Caption of an Indictment is amendable in the same Term.

# DE

# Term. Sancti Hillar.

## Anno 3 & 4 Jac. II. Regis, in B. R.

MEmorandum, That this Term, Powys, Solicitor-General, was made Attorney-General (Sir Robert Sawyer being laid aside) accordingly, and William Williams was made Solicitor-General.

A Prohibition was granted to the consistory Court, Nisi, &c. on a Suggestion, That the Libel there, was for Writing a Libel and Publishing it, which is a Matter indictable at Common Law. Prohibition to the Consistory.

If a Judgment is enter'd on the Roll with Blanks, they may be filled up, without Notice, within the Year. Judgment entred with Blanks.

Price *versus* Davies. Ante p. 57.

ERror to reverse a Fine acknowledged before Commissioners in Montgomeryshire, and the Error assigned was, because the Conusor died before the Return of the Writ of Covenant. Vide 3 Cro. 484. (468 in the mistaken Fol.) Ow. 21. Dy. 246. 2 Sid. 54, 92. Roo and Evely's Case. Judgment quod reversetur, Nisi, &c. Fine revers'd for Death of the Conusor before Writ of Covenant returned.

Per Cur'. A Prohibition doth not lie to the Admiralty-Court, where the Libel is purely for Seamen's Wages; secus where the Master brings an Action against the Owners, for the Wages which he hath paid to the Mariners, &c. Quære the Stat. 4 & 5 Annæ. Where Prohibition to the Admiralty.

Rouse

## Rouse *and* Wilcocks.

Words of a Justice of Peace.

ACtion for Words spoke of a Justice of Peace (Rogue and busy Knave for Searching after him and other honest Men of his Sort, and would make him give Satisfaction for Plundering him). It was moved in Arrest of Judgment, That those Words were not actionable.

Pollexfen contra. Because they were spoke of him in the Execution of his Office. Roll. 59. Cotton's Case.

Shower. Here is no Colloquium laid of his being a Justice of Peace, and the Words (after him) are absurd.

Innuendo.

Allibon Justice. The Innuendo in the Declaration takes away the Absurdity, and the Intention of Scandal is plain, and therefore actionable.

Holloway Justice, ad idem.

Court divided, Judgment not arrested.

But the Chief Justice and Powell, held, that the Words were insensible, and if they had been (Searching after me) yet they were not actionable. 2 Cro. Hollis's Case; and the Court being divided, Judgment was for the Plaintiff. For Aston said, That when the Court is divided on a Motion in Arrest of Judgment, Judgment shall be enter'd on the Verdict, and shall not be arrested.

## Boyle *and* Boyle.

Prohibition to the spiritual Court, pro jactitatione Maritagii.

A Prohibition was moved for to the Spiritual Court on a Libel there, Causa jactitationis Maritagii, claiming to be Wife to a Man, not being married to him; and it was suggested, that one married with A. and afterwards married with B. and was indicted and convicted for it on the Statute of Jac. and had his Clergy, and was Burnt in the Hand, and therefore could not be afterwards drawn in Question in the Ecclesiastical Court.

Williams against the Prohibition. Here is no Conclusion, this Matter is proper for the Ecclesiastical Court, altho' a Marriage may be collaterally tried by a Jury, yet in other Cases, as in Dower, ne unques accouple, ought to be tried in the Ecclesiastical Court: And in this Case the Ecclesiastical Court may examine for Alimony and Dower. In the Case of Emmerton and Hide, married or not married, was tried in an Ejectione firmæ, and was, notwithstanding, afterwards tried in the Spiritual Court, and held clearly there, that the Verdict and Judgment, at Common Law, was no Estoppel (Cur', there is a great Difference between the Cases, but they did not say what).

The Saving in the Statute 1 Jac. favours the Proceedings in the Ecclesiastical Court in this Case. 2 Inst. 88. Two several

Juries in this Court may find, the one that it was a Marriage, the other that it was not, and therefore the Argument, that the Judgment of the Ecclesiastical Court may be against that of this Court, is not so valid.

Levinz ad idem. The Ecclesiastical Court can't falsify Matters tried in this Court, in a Suit for the same Thing; but in our Case the Marriage in fact was in Question here, but in the Ecclesiastical Court the Marriage de Jure.

Pollexfen ad idem. That after a Man is found no Simonist in this Court, the Ecclesiastical Court may very well examine the same Matter. The Laying Hands on a Clerk is a like Case, and may be tried in both Courts.

Holt contra for the Prohibition. Because otherwise the Jurisdiction would interfere; he agreed, that this Matter might be tried first in the Ecclesiastical Court, and afterwards the Judges at the Old Baily would have relied on their Sentence. 2 Cro. 535, 625. And the like Case in my Lord Hale's Time, Laundon and Pickering; but after Judgment here it is not examinable in the Ecclesiastical Court.

All Strangers are concluded from Falsifying in the Point tried. Vide 3 Inst. Tit. Fauxify Recovery. The Case of Emmerton and Hide comes not up to this Case, because that was in a personal Action, viz. Ejectment. Hob. 288. Serle and Williams's Case.

Chief Justice Holloway and Allibone for the Prohibition, because the Libel is, pro Jactitatione, and they will not allow this Plea there; and they granted a Prohibition, Powell dissentiente.

## *Rex versus* Hocknall.

THompson moved in Arrest of Judgment on an Information for a Riot, That the Offence was laid after the Information brought, and whether this was amendable was the Question.

Riot laid after the Information brought, amendable.

Attorney-General. That it was, for it is only in the Memorandum, not in the Body of the Information, and is but a Mistake of the Clerk, which is amendable in an Information; he agreed, that the Statutes of Jeofailes did not extend to criminal Matters, yet this is amendable at Common Law. 20 Ed. 4. 7. 11 H. 7. 25. 8 Co. 156. b. Blackamore's Case. 5 Ed. 3. 25. is before any Statute of Amendments.

At Common Law there were Amendments in the King's Case, where they were not admitted for the Subject, as in original Writs. 4 H. 6. 16. in Blackamore's Case. 1 Cro. 144.

See 6 Mod. 269 to 287.

Jones ad idem. Dr. Edis's Case in this Court was on a Mistake of the Clerk, and amended. Note, in that Case, per C. J. the Reason of the Amendment was, because the Defendant's

dant's Clerk makes up the Issue; and if it is not amendable, he may easily make a Mistake to defraud the King of his Judgment. Vide Fitzwalter's Case in this Court on Stat. of Amendments.

Thompson. In Case of Ejectment its always denied, by the constant Practice, to amend the Memorandum. Jones 421. the Judges would not amend Continuances.

Curia. It is only the Mistake of the Clerk, and amendable; and it was ruled, that it should be amended.

Habeas Corpus denied.

An Habeas Corpus was denied for one committed to Bridewell for Lewdness.

What may be pleaded, and what evidenced in Assumpsit in Law.

Per Pollexfen. On an Assumpsit in Law, and non Assumpsit pleaded, whatsoever discharges the Contract discharges the Assumpsit, and the special Matter in such Case ought to be given in Evidence. But the Court seemed to be of Opinion, that Infancy or a Release ought to be pleaded.

## Chapman *and* Lamphere.

3 Mod. 155. Words, Bankrupt of a Carpenter.

Action for Words spoken of a Carpenter. He is a broken Fellow, and run away. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that a Carpenter can't be a Bankrupt, which was admitted by the Court; but they held the Words were actionable, because they concern his Trade.

Selby. The Words do not scandalize him in his Trade, for it is not laid, that he got his Living by Buying and Selling, and therefore they are not actionable. Sid. 209. Emerson's Case. Style 420. of a Farmer. 2 Cro. 585. Squire's Case. Pasch. 2 Jac. Rot. Dobson and Thornicroft adjudged accordingly in this Court, in the Case of a Farmer.

Pollexfen pro Quer'. Admitting it is not a Trade within the Statute of Bankrupts, yet the Words are actionable for scandalizing him in his Trade. Roll. 59. Best's Case. 60. Ellis's and Hunt's Case. It is actionable to say of a Merchant, that he is a Cheat.

Selby contra. It can't be a Disparagement to him in his Trade, because his Skill is his Livelihood. Latch. 114. Poph. 184.

Ch. J. The Words are not actionable.

Holloway. They are.

Powell. They are not without special Damage, and a Carpenter is a manual Trade, and not of Buying and Selling.

Court divided, Judgment pro Quer'. Ante .

Allibon. They are actionable, for tho' he can't be a Bankrupt, yet the common People can't distinguish it, and therefore it is an equal Defamation to him in his Credit. The Court being divided

divided in Opinion, the Plaintiff had Judgment; but it is otherwise where the Court is divided on Demurrer or Special Verdict. Ante 69.

## Lander *and* Elliot.

DEbt for Rent brought in Middlesex. The Defendant pleaded an Entry before the Rent became due, and that he was held out, &c. at such a Place in Hertfordshire, where the Land lay; and Issue was taken thereon and tried in Middlesex. Declaration in Middlesex, Plea in Hertford.

Pemberton moved in Arrest of Judgment, that this was a Mis-trial. Mis-trial.

Tremain contra. It is aided by the Statute of Jeofailes, Croft and Waters's Case in Saunders, adjudged, (I believe he meant Craft and Boit, 1 Saund. 247.) Wise and Adderly's Case in C. B. in Saunders.

Pemberton. A local Justification will alter the Case, and the Locality was necessary in our Case; otherwise in the Case in Saunders, (which was agreed by the Court) the later Judgments are contrary to Wise and Adderley's Case; so per Pollexfen in Jennings and Hankey's Case. Locality.

Curia. This is a Mis-trial, and a Venire facias de novo was awarded.

Per Cur'. Where a Juror is withdrawn, both Parties ought to pay the Costs equally; but on a Nonsuit the Plaintiff pays all the Costs. Costs on a Juror's being withdrawn, differs from a Nonsuit.

A new Trial was granted in Perjury on the Judge's Information, that it was a malicious Prosecution; but it shall not be granted without such Information, unless the Attorney-General or King's Council consent to it. New Trial in Perjury.

## 9 Feb. 8⅞. *in* C. B.

## Benton *and* Carpenter.

THE Case was in Trespass on the Statute Car. 2.

Herbert C. J. It was adjudged by all the Justices in Serjeants-Inn, that in all Actions pro bonis asportatis, or in Trespass for Taking a Stake out of a Hedge, or for Tithes taken away when severed, &c. there should be full Costs, altho' but two Pence Damages. Full Costs in Trespass.

Lutwych Justice contra totis viribus, and that he had known it adjudged both Ways, and that it is contrary to the express Words of two Statutes: He said it had been held also, that a

Cow's Eating a mouthful of Grass was a Carrying away, &c. Vide Stat. 43 Eliz. confirm'd by the Statute Car. 2.

Action for 3 s. &c.

Per Ch. J. An Action for 3 s. brought by a poor Man, may be very well brought in this Court, and it shall not be adjudged vexatious, for it may be a great Sum to him.

Lutwych. By the Constitution of this Court, no Plea can be held here which is under 40 s. Adjournatur.

## Matthews *and* Cary.

Avowry for Amerciament in a Leet.

A Avowry for an Amerciament in a Leet for Melting stinking Tallow, &c. The Plaintiff replied, de injuria sua propria absq; hoc, that he melted, &c.

Pollexfen. That is not a Matter traversable. Fitz. Barr. 271. 5 H. 7. fo. 3. 19 H. 8. fo. 11.

Tremaine contra. It may be traversed in a collateral Action. Dy. 13. b. Bro. Presentment 156.

That their Plea is ill.

1. Exception. Hob. 129. Wilton's Case, 1 Roll. Abr. 542.

2. Exception. The Plea says præsentat' fuit, but it is not expressly alledged, that the Offence was committed.

Where traversable.

Powell J. Where it concerns Freehold it is traversable, otherwise not. Mo. 574, 627. in 3 Cro. 835. and 1 Leon. 242. præsentat' fuit is good, but the latter Resolutions are contrary. Adjournatur.

## *The Rector of* Westbury's *Case.*

Parish to provide Bread and Wine for the Sacrament.

LIbel in the Ecclesiastical Court, for not Providing Bread and Wine for the Easter Communion. Now a Prohibition was moved for on a Suggestion, that the Parson ought to provide it: To which it was answer'd on the other Side, that by the Act of Uniformity the Parish ought to provide it, and that a Sentence was given accordingly; and the Court refused to grant a Prohibition.

A Judgment set aside, no Attorney of B. R. being present.

Note, A Judgment was set aside, because no Attorney of this Court was present when the Warrant of Attorney was given, altho' there was an antient Practiser of the Common Pleas, for the Rule is to be understood of an Attorney of this Court only. Quære 6 Mod. 85. contra.

Note, A Defendant can't be admitted in forma Pauperis, without Moving the Court, by a late Rule. A Defendant pauper.

Nota, A Man being outlawed on a Capias ad faciend' finem; Per C. J. and Astry, a Man may be fined, being present in Court, before the Outlawry is reversed; but per Allibon, he cannot. One outlawed fined.

## Deighton *and* Greenvill, *adjudged* Pasch. 4 Jac. II.

SIR Thomas Lewis seised of Lands in Fee, acknowledgeth a Statute-Merchant to Knight, and after enters into a Recognizance in Nature of a Statute-Staple to Gerard, and after enters into the like Recognizance to Elways and Burroughs. Elways and Burroughs extend, and liberate taken out, then Knight extends, and then Gerard extends; Knight and Gerard assign their Interests to Edward Lewis, and then Sir Thomas Lewis levies a Fine sur Conusance de droit come ceo, &c. to the use of Sir John Lewis and his Heirs. Afterwards Sir John Lewis having Notice that Edward Lewis was in Possession, devised the Lands to Edward Lewis in Tail male, and dieth: Afterwards Edward Lewis levies a Fine, with Proclamation, to the Use of himself and his Heirs, and dies without Issue, five Years pass, the Lands descend to the two Daughters of Sir John Lewes (married to the Earls of Huntingdon and Scarsdale) as Heirs to Edward Lewis: Elways dies, Burroughs dieth, Administration of his Goods and Chattels is granted to the Wife of the Defendant Greenvill, who likewise was Administrator to Gerard; Greenvill and his Wife after acknowledge Satisfaction in Chancery of Gerard's Statute, and he enters in right of his Wife to Burroughs Statute, within five Years after Satisfaction acknowledged. And the Question in general was, Whether his Entry were lawful?

2 Ven. 327. 1 Show. 36. Stat. Merchant and Stat. Staple. Extents. Fines. Entry congeable.

This Case was several Times argued by Somers, Trevor, and Pollexfen, for the Plaintiff; and by Bonithon, Holt, and Levinz, for the Defendant; and it was subdivided into four Points.

1. Whether the Fine by Sir Tho. Lewis, the Conusor, being in actual Possession, turned the extended Interests to rights, and wrought a Bar by the Statute 4 H. 7.?

2. Admitting they were not bound by the Fine, Whether by the Devise to Edward Lewis, the Extents are not drowned in the Inheritance, whereby a new Right of Entry accrewed to Burroughs, which is now barr'd?

3. Whether the second Fine of Edward Lewis, with Nonclaim, barred not the Extent upon Burroughs Statute-Staple.

4. Whe-

4. Whether any new Right accrewed to Burroughs by the Acknowledgment of Satisfaction upon Gerards Statute.

To the first it was argued for the Plaintiff, that the Fine by Sir Thomas Lewis turned all the extended Interests to mere Rights, for they had an Interest vested by the Extent, and might enter immediately upon the Liberate before any Possession given them by the Sheriff. 3 Cro. 463, 464. And a Fine will divest such an Interest as that, 1 Cro. 110, 201, 576. Mod. 217. A Fine will bar a Lessee for Years before Entry. 5 Co. 123. Saffin's Case. And the dormant Interest of a Statute is as prejudicial to a Purchasor as any other sleeping Right: It appears by the Return of the Liberate, that the Lands were delivered to Burroughs and Elways, and they shall be estopped to say the contrary, and therefore should have entred to avoid the Fine. 9 Co. 105, 106. Jones 211. Dy. Lord Audley's Case.

Obj. These Statute Interests are to be considered as Reversions for Years, and so Knights Statute drowns in Gerards.

Answ. That cannot be; for there is no Privity, Tenure, Fealty, nor Attornment. Inst. 289, 290. 4 Co. Fulwood's Case, If a Merger should be allow'd, it would be of dangerous Consequence, and destroy Fulwood's Case, but admitting Knights Statute to be merged in Gerards, yet Gerards is barred by Tho. Lewis's Fine and five Years Nonclaim.

Obj. The Conusees are not obliged to enter within five Years, because their Entries would make them Trespassors.

Entry congeable.

Answ. One may enter in some Cases to save his Estate, where his Entry to other Purposes would not be lawful: As if Lessee for twenty Years leaseth for ten, and a Fine is levied, the Lessee for twenty Years must enter or be barred, tho' his Entry on any other Account would have made him a Trespassor. Dy. 354. b. And that the Conusees in this Case might have entred to have avoided the Fine. Vide Inst. 250. Plow. 374.

If one hath a Means to avoid a Fine, and doth not, he shall be barred. Jones 210, 211. Salve *versus* Clark. 1 Cro. 157.

Obj. 3 Cro. 254. Laund *versus* Tucker, that where Tenant for Life levies a Fine, and five Years pass, he in the Reversion shall have new five Years after the Death of the Tenant for Life.

Answ. That is in Case of a Forfeiture, which no Body is obliged to take Advantage of.

Obj. The Case of Whaley and Tankard, Hill. 24 & 25 Car. 2. Lessee for ninety-nine Years, if he so long live, levies a Fine, the Remainder-Man may chuse whether he will enter till five Years after the Expiration of the Term.

Answ. That's in Case of a Forfeiture too.

Obj. Barker and Holden's Case, Pasch. 30 Car. 2. B. R. Lessee for ninety-nine Years, Remainder to B. for Life, Remainder to C. in Fee; B. levies a Fine, the ninety-nine Years expire, C. may enter then.

Answ. There was a Continuance of Possession, and it was ruled upon a different Reason.

Obj. That Tho. Lewis's Fine was only of the Reversion, and so there was no divesting of the Statute-Interests.

Answ. It is found that Tho. Lewis was in Possession at the Time of the Fine levied, and a Fine is a Feoffment of Record, and divests all Estates whatsoever.

2. That by the Devise to Edward Lewis, the Assignee of Knights and Gerards Statutes, the Statute Interests were merged in the Inheritance. 2 Co. Wiscot's Case; where-ever the Reversion comes to the particular Estate, the particular Estate is merged.

Obj. That Burrough's Interest intervening, prevents the Merger.

Answ. That cannot be, if we consider the Statute-Interests, either as present Interests or as Reversions for Years; if as present Interests, Sir Tho. Lewis's Fine hath divested them all; if as Reversions for Years, then it hath turn'd them all to Rights; for by turning one, all are turn'd to Rights. Saffin's Case, 5 Co.

They are most like to future Interests, but then, as such, they are plainly barred; but they are really different from Reversions for Years in several Respects; for here there needs no Attornment, nor can there be any Surrender to a subsequent Statute, &c. as in Case of a Reversion, in all Statutes the Debt is the Principal. 1 Cro. 214. Flower's Case. Bro. Stat. Merchant 42. The Difference between a Statute and a Term for Years as to the Extinguishment on Purchase of Part.

3. The second Fine by Edward Lewis bars Burrough's Statute; for where once the Land is extended, if after the Fee thereof come to the Assignee of the Statute, the Statute is discharg'd. Plowd. 72. Inst. 150. So then Burroughs ought to have entred, which he not doing, is barred by the Fine of Edward Lewis, for it cannot be pretended that the Fine of Edward Lewis passed the Statute and Remainder only. 1 Roll. 855. (9) And Burroughs, by his not Entring, could not make the Statutes have Continuance, which were merged by the Devise.

Obj. Burroughs could take no Notice of the Merger, being a private Thing.

Answ. This Objection might as well be made in any Case of a Fine, which it cannot, for the Law presumes Notice by the Proclamations. Stat. 4 H. 7. was not made to save old Rights, but to extinguish them for the Avoiding of Vexation. Plowd. 369. Where none is obliged to give Notice, it must be taken. 1 Co. 82. Corbet's Case, 1 Cro. 391. and 577. that Notice is not necessary: Agreed, that Farmer's Case doth a little Countenance the Giving of Notice, but that was ruled upon the notorious Fraud.

Obj.

Obj. That an Estate may have Continuance to some Purposes, tho' not as to others. 1 Co. 67. So here it may be a Merger in Respect of Edward Lewis, but in Respect of Burroughs not.

Answ. That Case is only where a Man claims by another who hath forfeited, but not so here.

4. Burroughs cannot have any new five Years; for that must be either because the former Statutes are satisfy'd by Perception of Profits, and on that Account he cannot enter, but must bring a Scire Facias ad computandum, or it must be by Acknowledging Satisfaction; and no new Right could accrew by that; for that which hath once received a Determination (which Gerard's and Knight's Statutes had by the Merger) can give no new Right, and a Right without a Remedy, is none; if Knight's Statute were gone by the Fine or Merger, then is Gerard's, if neither, then Acknowledging Satisfaction is as necessary to be on Knight's as on Gerard's, before Burroughs can have any Right, which is not done in our Case.

On the contrary it was argued by the Counsel for the Defendants, that Knight's Statute was gone by the Merger in Gerard's Statute, tho' there had been no Fine in the Case; for Knight had such an Interest as might be surrendred. 4 Co. 82. b. Bro. Stat. 41.

That Gerard had a Reversion. 2 Cro. 424. 477. 4 Co. 66. 29 Ed. 3. Fitz. Scire Facias, pl. 12.

Obj. Inst. 273. That a Chattel cannot merge in a Chattel; as if I have a Lease for ten Years, and another hath a Lease for twenty Years, to commence from the End of mine, and that other Assigns to me, there is no Merger, because they are to take Effect at several Times; but,

Answ. Where both are to have their Being at the same Time, one may merge in the other, as 3 Cro. 302. Hughs *versus* Robotham and Poph. 32. A Possession may drown in a Reversion, tho' the Possession be for the greater Number of Years.

Gerard's Statute (which is after Knight's) must be either a Reversion, a Remainder, or a future Interest; 'tis not a Remainder, for then it must have been created at the same Time with the particular Estate, and cannot take Place till after the Determination of the particular Estate: But a Statute, tho' a second one, takes Place presently, as appears from the Form of it, viz. quod Currat super se, which is in present, tho' it may be obstructed by a Precedent one; 'tis no more than a Lease to A. for Life, Remainder to B. from the Death of A. if A. refuse, B. cannot take; otherwise if it were from the Determination of A.'s Estate. If Knight had refused to extend, Gerard might:

A future Interest it cannot be, because 'tis an Interest presently, the Lien being present, therefore 'tis a Reversion, the distinguishing Mark of which is, that it commenceth in Interest presently: The Conusee of the second Statute takes what the Conusor had left, which was a Reversion. Ergo, Gerard and Burroughs had but Reversions: As a Lease to A. for ten Years, to B. for twenty, to C. for thirty; the Lessees for twenty and thirty Years have but Reversions.

If Sir Tho. Lewis, before Conusance, had leased for 100 Years, reserving Rent, and then had acknowledg'd these Statutes, each successively should have had the Rent, therefore 'tis a Reversion.

Obj. If it were a Reversion, there must be Fealty done by the Conusees.

Answ. (per Levinz) So there must for ought I know, I know no Authority to the contrary: Devisee, till Debts paid, shall do Fealty to the Heir, tho' he hath but an uncertain Interest; besides, 'tis no necessary Argument to conclude, because there is no Fealty, therefore there is no Reversion; for Tenant at Will shall not do Fealty, yet the Lessor hath a Reversion.

Knight's Statute did merge in Gerard's, and Gerard's could not be drown'd by the Accession of the Fee, because Burrough's Statute, which is a Reversion, did interpose; and where there is an intermediate Estate, there can be no Merger. 1 Brownl. 134. Otherwise the common Assurance by Way of Demise and Redemise (where the intervening Days prevent the Merger) would be destroy'd. 2 Bulst. 11.

'Tis all one, tho' the last Conusee had Possession first, for when the first entred upon him, the Reversion is in the last; as was to A. for ten Years, to B. for twenty, to C. for thirty, to commence at once; C. enters first, then A. enters, C. hath a Reversion.

Now let us see what Operation the Fines have; Knight's Statute could not be barred, for the Verdict finds that Edward Lewis was in Possession at the Time of the Fine levied, prout lex postulat, which Possession was by Knight's or Gerard's Statutes; if so, then the Fine levied by Thomas Lewis to John, will not hurt Edward: But the Verdict goes further, and finds that Sir Tho. Lewis was in actuali & reali possessione de premissis, and that he levied a Fine, which must be intended of the Reversion, for 'twas found before that Edward Lewis was possess'd by the Statutes. Note, This was taken from the Argument of Levinz in Cam' Scaccarii, sur brief d'Error, delivered at Serjeants-Inn in Fleet-street, Mich. 1 Will. & Mar. (for I do not find he argued in B. R.) and Pollexfen then Ch. J. of C. B. said that cannot be intended, because the Jury have found that Thomas Lewis was in Possession when he levied the Fine.) Note.

Admitting that Gerard's Statute be barred by these Fines, yet we are not; there are two Savings in the Statute 4 H. 7. viz. of present, and of future Rights; the Saving of future Rights extends to them when they come in Being, if Claim be made within five Years after they so come in Being; and tho' another accidental Right which they might have taken Advantage of, tho' they do not accrue in the mean Time, 'twould be a very hard Construction to bar their future Right, because they did not take Advantage of their accidental one. 3 Cro. 219. Tenant for Life levies a Fine, the Reversioner shall have five Years after the Death of Tenant for Life; yet if he pass by five Years, he shall not enter during the Life of Tenant for Life. 2 Brownl. 134. Tenant for Years, Remainder for Years, Tenant for Years purchaseth the Reversion and levies a Fine, he in Remainder shall have five Years after the first Term ended; otherwise a Man might be forced to look for Fines forty Years together. Noy 23. Archpole's Case. Trin. 20 Car. 2. Rot. 554. 1 Cro. Blunden.

In Saffin's Case, there was a plain Right of Entry, not so here.

We had no Way to know when the Statute was satisfy'd, but to look in Chancery; and at last were forced to bring a Scire Facias ad Computandum, and we are come Time enough, within five Years after Satisfaction acknowledg'd.

Suppose Gerard had made a Feoffment, released the Debt, &c. We could not know when Gerard's Statute was satisfy'd, for he was to be satisfy'd his Charges, and we had no Way to know that, but by Scire Facias, which is but a Right of Action; and tho' that be barr'd, our Right of Entry is not: So we not knowing well when to enter, till we found his Statute satisfy'd on Record; we entring within five Years of that, are not barr'd by the Fine, tho' Gerard were.

Note, The Difference taken in Margaret Podger's Case. 9 Co. 105. was over-ruled in Hill. 24 & 25 Car. 2. Tankard and Whaley's Case.

And now, this Term, the C. J. at the Request of the other Judges, put the Case upon the Record, and the Points thereof; and held, That the Interest of Burroughs was not barred: That there was no Merger, that the third Point was within the second Proviso of the Statute 4 H. 7. and gave Judgment for the Defendant.

It seems afterwards a Writ of Error was brought, and the Case was argued again at Serjeant's-Inn in Fleet-street. Mich. 1 Will. & Mar. Ley Somers for the Plaintiff, and Levinz for the Defendant. Quære, What Judgment was given thereupon.

# DE

# Termino Paſchæ.

## Anno 4 Jac. II. in B. R.

### Hardeſty *verſus Eundem.*

DEBT on Bond dated the 27th of December, 82. The Defendant pleads a Releaſe of all Actions the 28th of December. The Plaintiff replies, That the Releaſe was delivered before the Day of the Date of the Bond; Holt demurr'd, becauſe he is eſtopp'd to ſay it. 2 Co. Goddard's Caſe, 12 H. 6. 1. And Judgment was given for the Defendant.

Eſtoppel.

Releaſe before the Bond.

### Stephens *and* Croker.

ERror out of Ireland, in Ejectment; and the Error aſſign'd was, That the Declaration is ill, becauſe the Demiſe was for eleven Years, habend' a 12 die Julii, and the Entry alledged Poſtea ſcilt' 12 die Julii, See 1 Sid. 8. That the viz. contrary to the Plea, is repugnant and void.

Declaration, of an Ejectment before the Leaſe, ill.

Pollexſen. The Caſe in Sid. is on a Special Verdict, in our Caſe the Ejectment is laid before the Commencement of the Leaſe.

2 Cro. 154, 136, 312. Adams and Gooſe's Caſe, that the Plea is void, and and Deſmond and Johnſon Caſe in Trover. In our Caſe the Entry before the Commencement of the Leaſe is impoſſible and void, and ſhall be taken as Surpluſage, and the

Day of the Entry in a Declaration in Ejectment is unneceſſary and unuſual, and therefore void.

C. J. and Powell. That the Declaration is ill. Allibon and Holloway contra. Adjournatur.

No new Trial after Exceptions in Arreſt.

After Exceptions in Arreſt of Judgment argued and over-ruled, the Court will not admit a Motion for a new Trial.

## Hawe *and* Burton.

A void Will not made good by ſubſequent Act.

A Man at full Age declared in the Preſence of ſeveral Witneſſes, that his Will made when he was under Age ſhould ſtand.

Per Holloway and Allibon. The Will is void by Reaſon of the Infancy at the Time of the firſt Publication, and the latter Publication will not make it good, becauſe it wants the Circumſtance required by the Statute of Frauds and Perjuries, which will never make any Retroſpect. And Judgment accordingly, Niſi, &c.

## Edgborough *and* Stephenſon.

Fact in Staffordſhire tried in Middleſex, no miſ-trial.

THE Plaintiff declares, that he was the firſt Inventor of the horizontal Mill, for which he had Letters Patent for fourteen Years, and that notwithſtanding which, the Defendant made another Mill, like, &c. and Damages, &c. Verdict pro Quer'.

Holt moved in Arreſt of Judgment, that it was a Miſ-trial in Middleſex, the Mill being made in Staffordſhire, where only the Cauſe of Action ariſeth.

Obj. Bulwer's Caſe. Anſw. In that Caſe there are two tortious Acts there; ſecus in our Caſe.

Here the Letters Patent are only an Inducement to the Action. 1 Cro. 143, 183.

He is the Offender which uſeth the Art, and not he that makes the Mill, which the Court deny'd.

Pollexfen pro judicio.

The Cauſe of Action ariſeth in both Counties. Vide 7 Co. Bulwer's Caſe; but admitted, that before Bulwer's Caſe, the Opinion was, that the Action ſhould be brought where the original Fact was done.

Obj. That it is not averr'd, that no other uſed this Art before the Plaintiff, at the Time of granting the Patent.

Anſw. It appears by the Record quod primus inveniſſet, &c.

Obj. Notwithstanding that, it might be used beyond Sea.

Answ. Admitting that, yet it shall be good, and within the Statute, for that speaks only of new Manufactures within this Realm, which Holloway agreed.

The Court over-ruled the Exceptions, and gave Judgment pro Quer'.

## Goodwyn *and* Annis.

ERror of a Judgment in Trespass from the Court at Canterbury. Inferior Courts Jurisdiction.

1. Error. That no Jurisdiction is laid to intitle the inferior Court.

Answ. It appears by the Record, that it was a Court by Prescription, and confirm'd by Charter.

2. Error. That the Declaration begins, in hac que sequitur forma.

Answ. It is the common Form there. Et per Cur' [ad effectum] is ill; but [tenor cujus, &c. sequitur] is good, so here.

3. Error. Because here are some Jurors return'd who have not 4 l. per Ann. Vide Roll. 799.

Answ. There their Jurisdiction was by Patent, and therefore 'twas necessary to have Jurors who had 4 l. per Annum, but our Case is of a Jurisdiction by Custom. Cro. Eliz. Morris and Thomas's Case.

4. Error. The Venire Facias is awarded to A. and it doth not appear by the Return, that the Jury came from the same Place. Roll. 797.

Answ. It shall be intended, and is according to the Direction aforesaid, and to the Custom of the Court.

The Court agreed in omnibus, and the Judgment was affirmed.

## Anonymus.

A Motion was made in Arrest of Judgment on an Action of Trespass for a forcible Entry against the Statute 8 H. 6. (but Quære if it was not an Indictment) that this Statute doth not extend to Copyholds, quod Curia concessit, and the Judgment was stayed, Nisi, &c. but it was admitted by the Court, that the Statute of 21 Jac. doth extend to Copyholds, but the Declaration was not founded on that Statute. Nota, Darnel denied the Case of Sir Andrew Noel, Yelv. 81. to be Law in this Point. Stat. 8 H 6. extends not to Copyholds, but 21 Jac. 1. does.

Crawley and Oldish. Vide Post. . but in Time it should come in here.

Earle

## Earle *and* Andrews.

Quadringint for Quadringent in an Original, amendable. So 8° for 9° in the Tranſcript.

ERror out of the Court of Grand Seſſions at Lancaſter, in Debt on a Bond for 400 l. the Original was, quadringint' for quadringent' libr'.

Pollexfen moved, that it was aided by the Statute 8 H. 6. 12. Vide 8 Co. 159. in Blackamore's Caſe, and this Statute extends to inferior Courts.

Curia. We ſhould have help'd it in a Bond, but otherwiſe in an Original. 4 H. 6. 3.

At another Day it was ſaid, that the Tranſcript was miſtaken in the Time of the Aſſizes, ſcilt' 8 die, where it ſhould be 9 die, &c. and it was prayed, that it might be amended, being vitium ſcriptoris, and a like Caſe was urged of an Amendment of a Tranſcript out of Newcaſtle, where the Name of a Juror was miſtaken; and it was ruled accordingly in this Caſe, and the Judgment was affirmed.

Nota, (I apprehend by this, that the Quadringint' was alſo amendable, tho' in an Original.)

Declaration amended, &c.

If a Declaration be delivered in Hillary-Term as of Michaelmas, and no Plea put in, he may amend his Declaration, or give a new Declaration of Eaſter-Term. Per Aſton & Cur' accord'.

## Faulkner *verſus* Feake.

Departure, Replication ill.

DEbt on Bond, the Condition was, That if he ſurrender'd a Chamber in the Middle-Temple, into the Hands of Sir H. C. Treaſurer, at the Requeſt of the Plaintiff, that then, &c. The Defendant pleaded, that the Plaintiff had not requeſted him; the Plaintiff replied, that he had requeſted him. Et hoc paratus eſt verificare, the Defendant rejoin'd, that Sir H. C. is not Treaſurer.

It was admitted by the Court, that the Rejoinder was ill, becauſe 'twas a Departure.

But two Exceptions were taken to the Replication. 1. Becauſe the Plaintiff replied, that he had requeſted him, without ſaying, that he had not ſurrender'd purſuant to ſuch Requeſt. 2. That he ought to have concluded to the Country, there being an Affirmative and a Negative, and it is Subſtance. 1 Saund. Hayman and Gerard.

Curia. The Replication is ill.

## Throgmorton *versus The Countess of* Plimouth *Executrix of the Earl of* Plimouth.

THE Earl of Plimouth, by a Writing under his Hand and Seal, appoints that Throgmorton should retain 100 l. of the first Money, which he should receive for the Earl (he being the Earl's Steward). The Earl dieth before Throgmorton had received any Money, whereupon he brings an Action of Debt against his Executrix. And the Question is, Whether this Bill amount to an Obligation, whereupon to maintain an Action of Debt?

What Writing amounts to an Obligation.

Maynard and Levinz. 'Tis a good Obligation, &c. Dy. 20, 21, 22, 23. 140. So where I acknowledge that I have received such an one's Money, or that I will pay him. Vide 10 H. 6. 25. 16 Ed. 3. 27. Vaugh. 92, 93. Plow. 182, 183.

If I grant a Rent out of my Lands in Dale, and have no Lands there, yet I am chargeable.

If I draw a Bill of Exchange, and the Person, to whom 'tis directed, doth not pay it, I shall be chargeable, &c.

If I by Writing under my Hand and Seal, direct A. to receive, to his own Use, 100 l. of my Money, this is an Obligation, for it shall be intended that I was indebted to him.

Holt and Pollexfen contra. Agreed the Rule, &c. but here there are no Words sufficient to create a Debt, but only an Authority to receive, &c. and it is like to a Letter of Attorney to receive Money, &c.

There are but two Ways of declaring upon an Obligation, one ut factum suum, the other ut scriptum suum Obl', and neither of these is in the Declaration.

The Court inclined, that it was a sufficient Obligation; but Quære what Judgment?

Note, This Case seems to be upon a Writ of Error out of the Common Pleas; but Quære.

# DE

# Term. Sanctæ Trin.

## Anno 4 Jac. II. Regis, in B. R.

No Certiorari to remove, &c. *sans* a Judge's Hand, or Motion. 3 Mod. 229, 230.

IT was question'd, Whether a Certiorari should go to Ely without a Motion in Court, or without Signing by a Judge in his Chamber.

Pollexfen. That it should, for it is so in other privileged Places, and this is a Writ of Right.

Per Attorney-General. It is not unusual to grant a Certiorari to remove an Indictment before the Justices of Assise, which was not denied by the Court.

Powell J. No Certiorari was allowed to remove an Indictment before Sir John Cary's Case.

It was ruled by the Court, that no Certiorari should be granted without a Judge's Hand, Nisi, &c.

### Villiers *and* Fitzgerald.

Admission of, and Plea by Guardian. 3 Mod. 236.

IN Error on a Judgment in Dower in C. B. The Errors assigned per Broderick were. 1. That no Warrant is enter'd on the Roll for the Assignment of the Guardian; that the Admission of a Guardian is the Act of the Court. Br. G. 77. b. that this Admission is triable only by the Record. 29 Ass. 67. 1 Roll. 303. Old Book Entr. 45. 4 Co. 53. b. Rawlins's Case. 1 Cro. 86. Young's Case. Litt. Rep. 60. Hett. 52. 3 Cro. 158, 447. Hob. 5. 1 Roll. 28. 1 Roll. 787. 1 Leon. 164. Cop's Case.

2. The Confession is by the Guardian in his own Name, quod ipse non potest dedicere, &c.

Holt contra pro Defendente in Error.

It is not necessary that the special Admission should be enter'd on the Plea-Roll, altho' it is necessary there should be an Admittance. 2 Saund. 94.

The Court inclined, that it was ill for the second Exception; but adjourned.

## Goreing *versus* Deering.

2 Show. 507. S. C.

Appeal of Death after Conviction of Manslaughter. 3 Mod. 156.

APpeal de morte viri. The Appellee pleaded, That he was indicted for Murder at Hicks's-Hall, that the Indictment was transmitted to the Old Baily, and there he was convicted of Manslaughter, but no Judgment was enter'd, but that paratus fuit legere & adhuc paratus est, &c. with an Averment that he is the same Person, &c. To this Plea the Appellant demurs.

Pollexfen and another for the Appellant.

Vid. 2 Show. 507. 381, &c. and Keeling 109, &c.

I agree, that this was a good Bar at Common Law, before 3 H. 7. Stamf. 106. 4 Co. 146.

At Common Law the Party had a Year and a Day to bring his Appeal. Stamf. 107. Jones 148.

But the Statute 3 H. 7. hath taken away this Plea of auterfoits acquit or convict, which was at Common Law (if Clergy be not had) and it is not had in our Case.

This Statute was made in Disadvantage of the Appellee. Here are two Points:

1. What the Law was from 3 H. 7. to 18 El. 6.
2. Whether the Statute 18 El. hath made any Alteration.

As to the first Point, The Reason was, a Want of Power in the Temporal Officer after Clergy had, and the Manner of Entry is, Legit ut Clericus Ideo tradatur Ordinario. 11 Co. Poulter's Case. 3 Inst. 214. on the same Reason. Dy. 214. and the Statute 8 El. c. 4. was made to Remedy this Mischief, that Clergy was not taken away from Murder before 23 H. 8. and otherwise 3 H. 7. would be of no Force. Dy. 214. Stamf. 107, 108. that it is in the Discretion of the Court, and when a Man prays his Clergy, it may be delay'd 'till he is tried for another Offence, for which Clergy is taken away.

As to the second Point, The Statute 18 El. takes away Purgation, and therefore the Reason aforesaid ceaseth.

Obj. 4 Co. 46. Bird and Holcroft's Case.

Answ. There Clergy was actually demanded; otherwise in our Case, because it is not pray'd judicially. Sid. 316. And in Bird's Case, that is not a Conviction by Verdict. And. 68. 4 Co. 46. 3 Inst. 131. Hob. 288.

The Word Attaint in the Statute 3 H. 7. is the same as convict.

Trevor for the Appellee.

A Person convicted is not within the Act before Attainder, for the Words are, Acquitted or Attainted, and it shall be taken strictly, because 'tis in Alteration of the Common Law.

I agree, 'tis said in Holcroft's Case. 4 Co. that the Word Attaint extends to a Person convicted; but it is said in the same Case on another Point, that the Act of the Court shall not prejudice the Party, and I deny the Reason of the Book, which may very well be retorted on him. Vide 11 Co. 60, 65. 1 And. 46.

Where a Person is convicted, and was capable of Clergy, it is not necessary for the Act to give an Appeal, for he may afterwards, on Conviction in the Appeal, demand his Clergy, and therefore the Appeal is to no Purpose; otherwise where the Party was incapable of Clergy at first. Obj. 15 H. 7. 9. Answ. It is as well after Clergy granted, as before.

Obj. The Difference where the Prayer of the Clergy is on Record, and where it is not.

Answ. I agree Co. Entr. 355. Rast. 120, 121. But the Denial of the Court shall not Prejudice, &c.

Treby for the Appellee.

Admitting the Word Attaint extends to Persons convicted, yet the Plea is good, for first it is within the Words of the Act, for Clergy is had de Jure, and so Littleton expounds the Statute of Marlebridge, Si Parentes conquerantur, that is, if they have Cause, &c. 2. It is within the Equity of the Statute, for Clerks can't be condemned, our Case is like the Case of a Remitter, where the Party hath a Right, but can't have his Action.

Obj. If he had pleaded his Clergy, it might have been counterpleaded. Answ. The same Objection may be made to Holcroft's Case.

Now all the Judges (except Street) because 'twas adjourned, it seems, into the Exchequer-Chamber propter Difficultatem) were of Opinion, that the Plea was ill; for otherwise be Statute would be of no Use.

3 Mod. 203. S. C.

## Nosworthy *and* Basset *in* Ejectione firmæ (*or rather* Hutchins *Lessee of* Nosworthy *versus* Basset.)

Later Will not appearing, no Revocation of a former.

SIR H. Killegrew seised in Fee of the Manor of A. devised it to J. S. And the Jurors found that he afterwards made another Will, but the Contents thereof they knew not; and if the Court should be of Opinion, that this latter will be a Revocation

vocation of the former, then for the Defendant; if not, for the Plaintiff.

Maynard and Finch pro Quer'.

Every Will is revocable, either expresly or by Implication (as where a latter Will disposeth of the same Things, that were disposed of by the former) but it is not found in this Case, that the latter Will was of any Lands, and therefore it can't be a Revocation by Implication. The Court cannot add any Thing to what the Jury have found; they have not found any Contents, and without Contents a Will is nothing, therefore the Jury have found nothing. Et ex nihilo nihil fit.

Obj. A latter Will, let it contain what it will, is a Revocation of the former.

Answ. Argumentari non est ex particulari, Some latter Will is a Revocation of a former; this is a latter Will, ergo, this is a Revocation of the former; so some Animals are Horses, Bulls are some Animals, ergo, Bulls are Horses.

Where there is no Remedy there is no Right; here is no Executor to prove this latter Will, no Man is concerned in it, wherefore it is as if it had not been at all.

That a latter Will may be consistent with a former. 3 Cro. 721. 1 Cro. 23, 24. 51. Mod. 614, 615. Mountague's Case, Roll. 614, 615. 2 R. 2. 33. 1 And. pl. 721. 1 Cro. 51. 292 or 192. Swinburn, pl. 7. S. 14. 15 H. 7. 17. 1 Cro. 13. Godb. 23, 263. Perk. 92.

Obj. That a Revocation is in the Nature of a Restitution to the Heir, which shall be construed favourably. 1 Cro 303.

Answ. Restitution supposeth a precedent Right, which can't be to one, who never had any Right.

Obj. A void Will, as to a Monk or Corporation. 1 Roll. 614, 615. 2 H. 5. 8. b. is a Revocation; and an unknown Will shall not operate less than a Void one.

Answ. It is void as to one Purpose, but not to all; it is void as to Passing any Thing to the Devisee, but not to make a Revocation; for it is evident, that by making of a latter Will, his former Will, Mind, and Intention, is changed.

Levinz, Pemberton, and Holt, for the Defendant.

Here is no Title found for the Lessor of the Plaintiff, were this latter Will out of the Case, for the Jury have found only, that he made a Will, without saying, his Last Will, which I am sure is ill in Pleading; and the Court will not intend it to be his Last Will, when 'tis not found to be so; like the Case, 1 Cro. 392. Where a Man was found by special Verdict, to be unicum filium, yet he should not be intended to be Heir.

2. This subsequent Will, that is found, is his compleat Will, but a latter compleat Will must be a Revocation; for if it be consistent with the former, 'tis only part of his Will, and then

cannot be his compleat Will. Vide Swinb. Part 7. S. 14. Glossar's Case, Constitution' d'Othobon 109. Linwood Tit. Testaments 75. Office of Executors 25 2 H. 5. 8.

If he had said, this is all my Will, or my whole Will, doubtless it had been a Revocation; but as it is, 'tis tantamount. Litt. S. 168. Perk. 478.

Obj. 3 Cro. 721. Answ. That doth not affect our Case, nor 1 Cro. 73. for there the latter and former make but one Will, and then the latter is only a Codicil; if several Legacies be given in a former Will, and two or three of them omitted in the latter, yet this is a Revocation, tho' they are consistent. Godolph. 448 or 43.

The enabling Statute of 32 H. 8. requires the Disposition to be by the Devisor's Last Will, that is, the Last that a Man makes; but here Mr. Nosworthy, the Lessor, claims not by the Last Will, for the Jury have found, quod condidit aliud Testamentum. And 34 H. 8. which is a Statute of Explanation, hath the same Words, viz. Last Will: And in a Statute of Explanation, the Court will not vary from the Letter; for 'tis a Rule, that no Exposition must be allowed upon a Statute, that explains a former Statute, which varies from the Letter, for that would be Exposition upon Exposition.

Here the Defendant being a Stranger to the second Will, 'tis sufficient for him to shew that there is a latter Will, for we have not this Last Will, but it is in the Hands of the Executor, and it should come on the other Part, to shew that it is not contradictory to the former.

Nothing ought to be intended or presumed against an Heir or a Purchasor in Possession. Vide 3 Cro. Coward and Marsham. 15 H. 7. 16.

3 Mod. 209. Parl. Cases 146.

But Trin. 5 W. Judgment was for the Defendant, which was afterwards affirm'd in the House of Lords.

## Mason *versus* Fulwood.

Usurious Contract.

THE Case, it seems, was on a Contract for Payment of the Principal Money, and a Sum for the Forbearance of it, above the common Interest, after three Months, if J. S. should so long live; but if J. S. died within three Months, that then the whole should be lost. And whether this Contract was usurious, was the Question.

It was agreed on the one Side, that the Contract is usurious where the Loss of the Interest is only ventur'd; otherwise where the Loss of the Principal is also in Danger. 2 Roll. Rep. 77, 78. Mod. 397. 2 Cro. 507. 3 Cro. 643. 5 Co. 69. b. Burton's

Yelv. 47. Cro. Jac. 33.

ton's Case. But supposing the Contract to be usurious, that will not affect Mason, who is a third Person, and not privy to it, and so is Mod. 752. in which Case there is a Difference made between the Statutes of Usury and Simony.

Pemberton contra. A. agrees with B. that for the Loan of 30 l. he will pay him 6 l. per Month, after three Months; and if he dies within the three Months, the Whole shall be lost; this is after the Rate of 40 l. per Cent. which being great Profit and small Hazard, if it should not be Usury, the Statute would be intirely evaded and render'd ineffectual.

Obj. Burton's Case. Answ. That Case is not to the Purpose, for it depended on another Reason, for there the Defendant might have paid the Money within such a Time, and defeated the Plaintiff of his Profit; but having slip'd that Advantage, he should not avoid it afterwards.

Obj. 2 Roll. Rep. 47, 48. Answ. Those are Bottomry Bonds, which are allowed for the Benefit of Trade, and also there the Hazard of the Seas is very great.

Obj. Here the Principal is in Danger, if the Party dies within three Months. Answ. So it is if it should be on the Death of twenty Men, or if it had been for a Week or a Day.

C. J. Tremain's Case. 2 Cro. 507. is strong against Pemberton, and there are several Cases, where the Construction to make it not Usury tends to great Charity in supplying the present Necessity of some People, who have only Reversions or Offices, &c. which is as good a Reason as the Advancement of Trade. Vide post. Mason and Abdy.

## Born *versus* Jackson.

A Prohibition was granted on a Libel, for Shutting up and Locking a Chapel that belong'd to an Alms-house, where 10 l. a Year was granted to the Parson for Reading Prayers; for the Parson may have an Action on the Case for the temporal Loss, for he loseth the 10 l. if he doth not read, and he can't read, &c. where the Chapel is lock'd up.

Prohibition for temporal Loss.

## Hyley *versus* Hyley.

A Man having three Grandsons, Peter, John, and Charles, by his Last Will gave 1000 l. to Peter; and to my Grandson John, and his Heirs, all that my Mansion-house and Appurtenances; and to Charles in like Manner another House, and made them three his Executors, and gave 'em all the rest and remaining Part of my Estate to be equally divided, and all Bonds, Mort-

3 Mod. 228. Where a Reversion in Fee passes by Devise of remaining Part of my Estate.

Mortgages, &c. except what was devised to Peter, John, and Charles, and their Heirs; and if any of my Executors die without Issue, his Part to be equally divided between the two Survivors, and their Heirs. Now the Question on a Special Verdict was, Whether by the Clause all the remaining Part to be equally divided, except (ut ante) the Reversion of the Mansion-house passed, or not, if not, pro Quer'; otherwise for the Defendant.

That the Reversion passed. Hob. 32. 1 Cro. 369. 2 Cro. 157. 3 Cro. 742. 6 Co. 17. and the Rule there, that Estate and Lands are convertible Terms, and altho' it is not sufficient to pass the Reversion without more Words, yet the Exception afterwards puts it out of Dispute.

Holt contra, because he had other Lands.

That these Words [rest and remaining Part of my Estate] goes to the Lands and Remainder also. Aleyn 28. Wheeler's Case is strong, that the Exception afterwards is not restrained to the last Words.

Powell J. That the Exception extends only to the Estate given.

C. J. and Holloway contra. That it extends to both.

Allibon. That nothing was intended to come in Distribution, which came not to them in Parts.

Judgment pro Quer'.

# DE

# Term. Sancti Mich.

## Anno 4 Jac. II. Regis, in B. R.

MEmorandum. In this last Vacation Holloway and Powel received their Quietus's; and in their Places were put Powell and Baldock, and Sir Richard Allibon dying, his Place was filled by Serjeant Stringer.

Judges removed, &c.

### Croket *versus* Daniel.

ERror in C. B. brought by several Defendants. The Defendant in Error pleads the Release of one of the Plaintiffs only, to which Plea there was a Demurrer, there being no Summons and Severance.

Summons and Severance.

Pollexfen. This is a good Bar against the Releasor, but not against the others, and therefore there ought to be a Summons and Severance. 2 Cro. 116. Blunt's Case; and for that Reason Judgment was reversed, Nisi, &c.

### *Rex versus* Lenthall *& al'.*

AN Office was found and return'd here on a Commission out of Chancery, that Lenthall had granted to Norris, and other Persons unknown, the Office of Marshal of the King's Bench, &c. Norris neglected to intermeddle with the Office. Lenthall officiates, and afterwards puts in Cooling for Life, Cooling suffers voluntary Escapes; it is likewise found, that Cooling

Marshal of B.R. appoints a Deputy, who permits Escapes. &c. 3 Mod. 143.

Cooling was insufficient, then the Office is granted to Glover for Life, who suffers several voluntary Escapes, wherefore the Office was seised into the King's Hands.

Lenthall traverseth this Inquisition and pleads, That he was seized in Fee of this Office, and conveyed to Norris, 9° Augusti, and that 10 August, the Trustees sealed another Deed, whereby 'twas declared, that this Office was in Trust for Lenthall for Life, and afterwards for his Wife's Jointure, &c. and that he by their Consent executed the Office quorum pretextu, he was Tenant at Will; and he pleads further, That the Escapes were not voluntary, on which Issue was joined, and there was a Demurrer to the Residue.

Norris pleaded the Conveyance as before, and also the Deed of Trust quorum pretextu, Lenthall continued the Possession by Cooling and Glover, his Deputies, &c. to which there was a Demurrer.

Glover pleaded his Possession, and did not set forth how he came in, and there was a Demurrer to that Plea.

Nota, It was agreed by the Counsel on both Sides, that the King, by his Prerogative, had his Election, either to try the Issue or Demurrer first, at his Pleasure; also where a Demurrer is joined in Chancery, without any Issue in Fact, there the Demurrer shall be tried in Chancery; otherwise of a Demurrer and Issue in the same Case, for there the Issue being to be tried in B. R. draws to it the whole Record, as in this Case. 2 Saund. 23. Jefferson's Case.

Prærogative.

The Question was, Whether, on the whole Record, there ought to be an amoveas manum, or not?

Pollexfen and Somers for the King.

1. As to Norris's Plea, it doth not confess and avoid, nor traverse and deny the Matters charged, and therefore ill. Stamf. 624. 2 Leon. 102, 103. 3 Leon. 105. Vaugh. 61.

The Deed of Trust is no Answer, for it may be made by Covin in Deceipt of the Court, and to the Prejudice of the Subjects by Reason of the Insufficiency of the Marshal, and it is so found by the Inquisition.

That the Plea is not direct and positive, but the quorum pretextu only argumentative, and is no Answer to the Escapes, and altho' Lenthall traverseth the Escapes, yet Norris being a Stranger, shall not be aided by it, but each Defendant ought to stand on his own Plea.

This Office is not grantable in Trust, because 'tis a personal Inheritance, and a Thing which lieth in grant. Jones 128. Willowby's Case; Pollexfen said, that a Trust is of no Account in Law. 1 Co. 121.

Admitting the Trusts good, yet the Grant is void, because 'twas without the Notice of the Court. 9 Co. 97. b. 18 E. 4. 7. Fogg's Case. 11 Co. 3. Hob. 153. 1 Cro. 587. Jones 463.

The Office can't be granted at Will, without Deed. 1 Leon. 219. and therefore the Pleading quorum pretextu, is ill.

Here is no profert in Cur', &c. Dy. 277. 1 H. 7. 14. 1 Cro. 143. which is Matter of Substance, 8 Co. 94. Yelv. 201. 1 Cro. 143. that a Grant at Will of this Office, is inconvenient, because it makes the Grantee careless and corrupt in his Office, and discharges the Grantor of Escapes, and therefore it is ill. 9 Co. 97. Hob. 10, &c. Office at Will, &c.

Obj. Per Holt. The Office of Marshal was never granted for Years, but only in Fee, for Life or at Will. 19 H. 6. 34. Answ. That was only a sudden Opinion. Vide 1 Cro. 585.

Admitting a Grant at Will good, yet here is only Evidence of an Estate at Will, but the Pleading ought to be quod admisit,, &c. to hold at Will, &c. an Agreement without Deed may make a Tenant at Will of Lands, but not of an Office. Inst. 85. 1 Leon. 219. 3 Cro. 671. Godb. 64.

Admitting also an Estate at Will here, yet it was determin'd before the Inquisition, for when a Tenant at Will doth any Thing inconsistent with the Nature of his Estate, that amounts to a Determination of it. Inst. 57. a. Litt. Sect. 71. that a Grant for Life by Tenant at Will is a Determination of his Estate. Vaugh. 181. Plow. 371. Dav. 35. Jones 281. 39 H. 6. 34. b. the Duke of Norfolk's Case.

Obj. Tenant at Will can't determine his Estate just before the Rent-Day.

Answ. In our Case no third Person is hurt by it, and therefore the Cases are not alike.

Admitting also that it is a good Estate at Will, yet it appears there was no Execution of the Office, for a Tenant at Will can make no Deputy. Vaugh. 181. Plow. 379. Dav. 35. Jo. 281. Deputy.

Obj. That a Sheriff may make a Deputy.

Answ. Hob. fo. 12. Norton's Case.

As to the Causes of Forfeiture.

1. The Superior in Reversion ought to answer for the Escapes of his Grantee Glover (or Plummer) and Whitchot in B. R. agrees, Stat. W. 2. c. 11. Mag. Char. 382. 9 Co. 38. of a Grantee for Life. Dy. 278. 11 E. 2. 34. Hall and Whitchcot. Mich. 28 Car. 2. Rot. 396. B. R. Lit. Sect. 368. of a Condition in Law. 8 Co. 44. Inst. 233. 7 Co. 34. Forfeiture.

2. Cause of Forfeiture is the Non-user, because Norris neglected to execute it, being a publick Office. Litt. 233. Inst. 133. 11 Ed. 4. 1. Dyer 198. 9 Co. 58, 95. 1 Cro. 56. Sid. 81. Poph. 181. 3 Cro. 384. Ryley's Case, p. 387. Dy. 151. Keilw. 195, 196. Here the Non-user by Norris for several Years was notorious.

3. The several voluntary Escapes are a Forfeiture. 11 Ed. 4. 1. b. Poph. 118. Mo. 76. 3 Cro. 384. Ryley's P. P. 187. Dy 151. Keilw. 195, 196. 9 Co. 50. and Sir George Reynel's Case.

Several negligent Escapes are a Forfeiture. 1 Cro. 491.

As to Lenthall's Plea, and the Demurrer thereto: The Plea is ill, because it makes no Title to the Office, and therefore it cannot traverse the Title found for the King. Hob. 162, 164. Colt and Glover's Case. 37 Ass. pl. 11. Br. Abr. 48. Fitz. Abr. Tit. Livery 34. and Traverse 5. Vaugh. 64. 2 Inst. 695. Staundf. Prær. 62, 64. 2 Leon. 23, 123, 202. 3 Leon. 185.

That the Deed of a Thing, that can't pass without Deed, ought to be shewn to the Court. Dy. 277. 1 H. 7. 12. 1 Cro. 143. 10 Co. 94. Yelv. 201. Hob. 233. Hern's Case, a good Rule laid down there.

Holt and Winnington for the Defendants made two Points.

1. Of what Consequence Lenthall's Assignment to Norris, &c. was, without Notice given to the Court.
2. If the Escapes make a Forfeiture.

The first may be subdivided into four Points.

1. What Estate Lenthall had after the Assignment.
2. If Lenthall had thereby forfeited his Interest.
3. Whether Lenthall had Power to make a Deputy.
4. If Notice to the Court was necessary on the Assignment, &c.

1. When Lenthall had assigned his Office, he became Tenant at Will, for he had the Possession by the Agreement of the Trustees, and as to that there is no Difference between an Office and Lands, as hath been objected.

Obj. Jones 128. That the Trust is void. Answ. The Reason of that Case was, because the Office was in Grand Serjeanty; but our Office is manifestly alienable, and therefore the Office is grantable at Will. Vide 9 Co. 97. expressly, and our Case of a Trust is stronger. Vide Godb. 64. that an Action lies for Nonperformance of a Trust.

Obj. That the Estate at Will is not granted here by Deed, nor the Deed set forth in Pleading.

Answ. It is shewn by the Pleading, 1 Leon. 136. that the Agreement was a Lease at Will. Hob. 35.

2. The Grant by Lenthall to Cooling for Life was not any Determination of the Will (as was objected) for the Grant is void, and therefore it doth not amount to a Determination.

2 Co. 55. (2 Cro. 51.) and as to Inst. 571. the Cases cited in the Margin do not warrant Coke's Opinion there; however, admitting that the Will is thereby determined, yet the Estate of the Trustees shall not be determin'd without Notice, which is not pleaded in this Case. Yelv. 73. Carpenter's Case.

That an Estate at Will shall not be determin'd against the Will of the Lessor. 1 Cro. 304. Blunden's Case.

That Lenthall was afterwards allowed to continue in Possession, according to the Trust, &c. 2 Cro. 659. Powsly's Case.

Altho' the Act of a Tenant at Will may subject the Superior to an Action, yet 'tis unreasonable that it should amount to a Forfeiture.

3. As to the Making of a Deputy. There is a Difference between Offices judicial (who can't, without a special Clause in the Grant,) and ministerial; and there is also a Difference between such Office ministerial, where it can be only executed by the Grantee, and is to be done only to the Person of the Grantor; there a Deputy can't be made without a special Clause, but if it be of such a Nature, as it ought of Necessity to be executed by several, there it is otherwise. Inst. 107. Perk. 100, 101. Mo. 845. 3 Bul. 77. 1 Roll. 274. Phelps's Case, a strong Case, that a Constable may make a Deputy, and a Sheriff may make his Under-Sheriff, without the Clause per sufficientem Deputat' suum, and there is no Necessity of Pleading the Deed of Deputation, for that belongs to the Deputy. Dy. 174. pl. 19. 278. 3 Leon. 99. 1 Leon. 146. 3 Cro. 173. And a Deputation need not be pleaded by Deed, because he Claims no Interest. 2 H. 8. 17. 3 Cro. 67. Deputy.

Obj. 9 Co. Shrewsbury's Case. Answ. The Book of Brook there cited was admitted, but the Matter thereof was not debated; and in 3 Cro. 69. the Opinion of Gawdy is, that it is not necessary, and 9 Co. Reinel's Case, no such Exception was taken; and in the Serjeant at Arms's Case there cited, the Deputation is not pleaded by Deed.

Obj. Jones 281. Answ. It was not resolved there, that he could not make a Deputy.

Obj. 39 H. 6. That the Duke of Norfolk could not make a Deputy.

Answ. The Duke there was only Tenant in Tail.

4. Notice to the Court of the Assignment is not necessary, for 'tis contrary to the Purity of an Estate in Fee-simple, to be so tied up, (tho' it was not so respectfully done); The Alienation of the King's Tenant, without Licence, is no Forfeiture. 2 Inst. 55. 7 E. 3. 57. 30 H. 6. 32. 18 & 19 Car. 2. Dennis and Lovell's Case in the Exchequer. Notice.

Admitting, that after the clandestine Grant, Lenthall continued the Officer to the Court. 3 Co. Walker's Case, between

Lord and Tenant, that the Office is not changed, tho' the Estate is; and therefore 'tis not necessary to acquaint the Court, because 'tis done in an Instant.

2. As to the Escapes. The Escapes suffer'd by Lenthall do not affect the Inheritance, and are answer'd by his Plea; an Escape is the Tort of him in Possession only. 2 Cro. 17. Lady Russel's Case.

If Lessee for Years makes a Feoffment, it is a Forfeiture; otherwise if he makes a Lease at Will, and the Tenant at Will makes a Feoffment, &c. 39 H. 6. Duke of Norfolk's Case resolved.

Obj. That if it is not a Forfeiture, there will be no other Remedy.

Answ. He ought to be indicted and convicted, and the Office seised, and then he, who hath the Inheritance, ought to come in Pasch. 25 Car. 2. Dame Broughton's Case, in Hale's Time, she was indicted for Oppression, being the Keeper of the Gate-house, and she was fined, and the Office seised, and the Office was afterwards delivered to them, who had the Inheritance.

Lenthall being Tenant at Will, may well falsify this Office, and here all voluntary Escapes are travers'd, and negligent Escapes do not amount to a Forfeiture.

Obj. Per Somers. That several negligent Escapes do make a Forfeiture. Negatur, Because, in the Case of Rebels or Fire, there may be several Escapes, yet the Marshal shall not be answerable. 33 H. 6. 1. 5 E. 4. 27. Dy. 66. (5) and the Negligence ought to be shewn specially, &c.

Obj. That it is not pleaded, that there was a Lease at Will.

Answ. 'Tis allow'd, where a Man is to shew a Thing by special Matter, he may plead it as it is, and leave the Construction thereof to the Court. Adjournatur.

## Owdy *and* Gibbons.

Bond to the Arbitrator to submit to his Award, good.

A Bond is given to J. S. to stand to his Award, by the Parties in Difference being J. D. and J. R. and adjudged good by the Court, tho' 'twas objected, that the Referree would make an unreasonable Award to entitle himself to the Penalty of the Bond.

## Cone *and* Bowls.

1 Show. 165. Three Bailiffs, one an Infant, all appear by Attorney.

Three Bailiffs (in Replevin) avow for Damage-feasant in Right of a Lord, two of 'em are of Age, and the other not, and they all appear by Attorney.

Holt. This is Error and doth not differ from the Case of Executors. 2 Saund. 312. 3 Cro. 78. Earl of Rutland's Case.

Turner Junior contra. Executors are as one Person in Law; but otherwise in this Case. Bridg. 73. But it was answer'd by the Court, that it was lately adjudged contrary in Scaccario. Adjournatur.

Per Pollexfen (and not denied per Cur'). If a Man hath Title but to part of a House, he may well declare for the Whole in an Ejectment, and the Jury ought to find such Part, or so many Foot of the House, and he shall have Judgment and Execution accordingly. See the next Page. Title to part, declare for all.

# DE

# Termino Paſchæ.

## Anno 1 Willielmi & Mariæ Regis & Reginæ, in B. R.

### *Rex verſus Lord* Macclesfield.

Outlawry of a Peer reverſed.

THE common Error was aſſign'd to reverſe an Outlawry againſt the Defendant for a Misdemeanor, and it was therefore reverſed; but another Exception of his Privilege of Peerage was not debated.

Coſts for Non Trial in Ejectment.

Per Holt C. J. In Ejectment the Rule of this Court is, That the Leſſor of the Plaintiff ſhall pay the Coſts tax'd for not going on to Trial, altho' by the general Rules of the Law, in other Caſes, he who brings the Action ought to pay 'em.

Mandamus to deliver Corporation-Books.

A Town-Clerk of Northampton refuſed to deliver ſeveral Books, which belong'd to the Corporation, and a Mandamus was moved for to compel him to deliver them: And firſt, the Recorder ſaid, he knew a Mandamus granted to reſtore a Mace, but did not mention the Caſe, or the Year; but the Court did not remember it, and it was adjourn'd to ſee Precedents.

Affidavit of Poſſeſſion of the Premiſſes or Part.

Affidavit of the Delivery of a Copy of a Declaration in Ejectment to A. and B. Tenants in Poſſeſſion of the Premiſſes, or of Part thereof, ruled, that there ſhould be Judgment for ſo much as was in their Poſſeſſion. Vide pag. 10.

## *Rex versus* Colbert.

AN Order made by the Justices of Peace was quash'd. 1. Because it was made on an Affidavit brought to them, without the Examination of any Witnesses. 2. Because the Defendant was order'd to pay 6 l. a Sum in gross, for the Charges that the Parish had been at, &c. without shewing how, or for what. Order quash'd.

A Bond to stand to the Award of A. and B. ita quod, it be made ante prim' diem prox' Termini (the next Term being Hillary-Term, which was discontinued) but before Hillary-Term, the Arbitrators said, they could not make any Award, but afterwards, the first Day of Hillary-Term, they were perswaded by the Attorney, that they had Time 'till the first Day of this present Term, and they accordingly made an Award. But per Cur', It is not Binding, for the Authority of the Arbitrators was determin'd. Et per Holt, Hillary-Term was a Term, tho' it was not held; and the Intent of the Parties was, that the Award should be made before that Time, for they could not foresee that the Term would be discontinued. Time to Award slipp'd.

## Obryan *and* Ram.

ERror out of Ireland, where there was a Judgment against a Feme sole, who married; a Scire Facias issued against the Husband and Wife, and Judgment against them on two Nichils. The Wife dies, a second Scire Facias is awarded against the Husband, and Judgment thereupon against him, and Execution awarded; the Question is, if the Husband is chargeable. 3 Mod. 186. Scire Facias against the Husband after the Wife's Death, on a Judgment against her, Dum sola.

This Case was argued last Year by Pollexfen and Finch for the Plaintiff in Error, and by Holt and Keeble for the Defendant.

Pro Quer'.

It is agreed, that if a Feme sole is indebted by Bond, and takes a Husband, and an Action is brought, and Judgment had against the Husband and Wife, that this shall bind the Husband, after the Death of the Wife.

That Debts or Choses in Action of the Wife, shall go to the Administrator, and not to the Husband, but as Administrator. Mo. 453. 1 Cro. 308.

It is admitted, That a Debt owing by the Wife shall not charge the Husband after the Death of the Wife. Roll. 351. and then the first Judgment against the Wife, dum sola, shall not charge the Husband; and then the sole Question is, Whether the

the ſecond Judgment in the Scire Facias againſt the Husband and Wife, ſhall charge the Husband? It ſhall.

Obj. Per Holt N. B. 122. G. Anſw. The Judgment in the Annuity charges the Succeſſor there, and not the Judgment in the Scire Facias.

Obj. 2 Leon. 14. Anſw. There Debt lies on the Recognizance, and 4 Leon. 186. requires the ſame Anſwer: We have no expreſs Authorities in Point, but only Reaſons.

1. The Nature of a Scire Facias is to be conſider'd on the Stat. W. 2. c. 45. 2 Inſt. 469. the Proceedings on a Scire Facias ſhew the ſame Thing, for they recite the former Judgment, and conclude juxta vim, &c. Recuperationis præd. A Scire Facias is not an Original, but a judicial Writ, and therefore can't extend the Judgment further than the former Judgment.

A Writ of Error ſuſpends a Scire Facias, and if the firſt Judgment be revers'd thereby, the whole Proceedings on the Scire Facias are gone. 1 Roll. 777. 8 Co. 143. (otherwiſe if Judgment be obtained in Debt on the firſt Judgment.)

Judgment can't be given againſt a Man without an Appearance, but two Nichils don't make an Appearance.

The Statute W. 2. which gives a Scire Facias, doth not extend to give a Scire Facias on a Judgment in a Scire Facias.

In our Caſe the Words of the laſt Scire Facias are ſecundum formam Recuperationis & adjudicationis, and the Statute don't warrant ſuch Form of a Scire Facias.

That it is impoſſible to have ſuch a Recovery as they ſue for, to charge the Husband, for the firſt Judgment bound the Lands and Choſes in Action of the Wife only, and the Adminiſtrator of the Wife may bring Error to reverſe the firſt Judgment, and ſhall be reſtored, and therefore the Husband is not chargeable.

Holt for the Defendant.

It is admitted on the other Side, that a Judgment on a Bond enter'd into by the Wife, againſt Husband and Wife, in the Life-time of the Wife, ſhall bind the Husband after the Death of the Wife, and there is no Difference between that Caſe and ours. Fitz. N. B. 120. The Statute of W. 2. gives a Scire Facias in Lieu of an Action of Debt, which was intended for the Advantage of the Party, which will not be ſo, if the Husband ſhall not be chargeable; the Award of Execution againſt the Husband and Wife is a Recovery, and it now becomes a joint Debt.

In Debt againſt an Executor, if a Devaſtavit is return'd, and Judgment thereon de bonis propr', it alters the Debt. Mo. 299. 3 Cro. 216. A. marries an Executrix, who had waſted, &c. if the Wife dies, the Husband ſhall not be charged afterwards. 1 Cro. 519, 603. 1 Sid. 337.

Q. That Debt is not maintainable againſt the Husband on this Award of Execution. Fitz. N. B. 122. E. 2 Leon. 14. 4 Leon. 186.

Finch pro Quer', denied that a Scire Facias came in Lieu of an Action of Debt, for it might happen that the Party might hereby be in a worse Condition than if he had brought an Action of Debt, for no Bail lies in a Scire Facias, otherwise in Debt.

The Case of an Executor on a Devastavit is not parallel, for there he is chargeable for his personal Tort, but the Husband in this Case only for Conformity.

Keble pro Defendente.

That a Scire Facias is a new Action. 49 E. 3. 29. b. Fitz. Nat. Br. 128. 3 Cro. 844. 2 Inst. 407, 472. Bro. Scire Facias 146. 1 H. 5. 5.

A Release of all Actions, is a good Release of a Scire Facias. Litt. Sect. 505. Inst. 193. Hutt. 37.

It is a new Judgment, and is as distinct as Debt on the same Judgment would be. 43 E. 3. 2. b. and the Objection of the Relation to the former Judgment is the same in Case of Debt upon it, &c. and as to 8 Co. 43. that ought to be understood where there were the same Parties to the Original and to the Scire Facias, but there are other Parties in our Case; and the same Objection holds Place in the Case of Debt on the first Judgment. Vid. Dy. 214. (47) Rast. Entr. 193. Br. Judic. 55. 27 E. 4. 4. b. pl. 3. 2 Leon. 4. or 14.

For Cases taken by the Equity of the Statute W. 2. Br'ia Judic. 237. Moyle's Entr. 48. 1 Leon. 284. Godb. 96. 1 Cro. 208. Jones 248. the same on Judgment in Debt.

Pasch. 23 Car. 2. B. R. Pain and Minshull. Bro. 182. Fitz. Nat. Br. 121. C. a Difference there. 9 E. 4. 24. b. pl. 32. Mod. 179. 3 Cro. 844. Hern's pl. 299. Pl. Rediv. 224. 1 Sid. 351.

And now this Term Judgment was affirm'd, Nisi, &c. Vide Post.

Treby moved for a Mandamus to swear in a Clerk of the Parish of St. Dunstan, who was elected according to the Custom, and it was granted him. Mandamus to swear a Parish-Clerk.

## Garret *and* Dandy.

DEbt on Bond. The Condition was for Payment of Money and Performance of Covenants. Judgment thereupon, on which Error was brought; and it was ruled, that it is not within the Statute 3 Jac. c. 8. which requires Bail to be put in in Cases of Debt or Contract. Vide 2 Bul. 53, 54. 2 Keble 131, 234. Stat. 3 Jac. 1. c. 8. of Bail.

Motion for a Prohibition, because the Party is cited out of his Diocess; but it being after Plea pleaded, per Dolben, it is too late; and so it was adjudged in the Case of Vanacre and Spleen, No Prohibition for citing out of the Diocess after Plea.

6 Mod. 337. Spleen, in Hale's Time, in which Caſe I was Counſel. And it being moved afterwards, Lord C. J. North allowed the Caſe of Vanacre and Spleen, to be good Law.

Holt C. J. ſaid, 'twas reaſonable that it ſhould be good Law, but he doubted of it.

The Counſel urged, that the Words mentioned in the Libel were not ſpoke within the Dioceſs, &c.

The Court anſwered, the Juriſdiction is not local, as to the Cauſe of Action, but as to the Reſidency of the Perſon; and if the Perſon lives within the Dioceſs, 'tis no Matter where the Words were ſpoke.

## Tredway *and* Harbert.

Rule to ſtay Trial till Coſts paid.

A Motion was made to ſtay the Trial of an Ejectment at Bar, till the Payment of Coſts of a former Trial in Ejectment in C. B. (Note, 'Twas not between the ſame Perſons, for there was another Leſſor.)

Dolben J. The Rule of ſtaying a Trial for Non-payment of Coſts at firſt was in the ſame Court, where the former Trial was; but now the Rule is extended to other Courts, and forasmuch as it appears in this Caſe to be on the ſame Title, it is reaſonable to grant the Motion. Holt, we can't take Notice that it is on the ſame Title. Dolben, It appears by Affidavit. Holt, admitting it to be the ſame Title, yet here is another Perſon, (viz. an Heir or a Deviſee) who is not liable to pay the Coſts of the former Action; and it was agreed, that, where the Leſſor makes a new Leſſee in the ſecond Action, that ſhall not avoid the Payment of Coſts. Adjournatur.

3 † 202.

Ante . Poſt. 110.

Habeas Corpus. Bail for Burglary.

On Motion for a Habeas Corpus, the C. J. took Occaſion to blame the Country Juſtices of the Peace, for taking on them to Bail for Burglary, &c. and ſaid he would ſend for ſuch.

S.C. 1 Show. 4.

## Calvert *verſus* Prior.

Scire Facias by Adminiſtrator de bonis non.

Scire Facias, by the Plaintiff as Adminiſtrator de Bonis non, and ſets forth, that one Treminier, the Teſtator, recovered a Judgment againſt the Defendant (ſuch a Day and Year) and after made J. S. his Executor, and died, J. S. dies, not having adminiſtred, &c. and Adminiſtration de bonis non, &c. was granted to him. The Defendant pleads, quod Executionem non quia dicit, that the ſaid Treminier made J. S. and J. D. his Executors, and that J. D. is yet alive, unde petit Judicium & quod breve præd. caſſetur: The Plaintiff replies, caſſari non quia dicit quod

præd. Treminier, made J. S. his only Executor. Absq; hoc, that he made J. S. and J. D. his Executors, Et hoc petit quod inquiratur per priam', to which the Defendant demurs generally.

It was objected, That the Replication ought to conclude, Et hoc paratus est verificare, and not to the Country.

But it was answer'd, that here is an express Affirmative and Negative; and altho' it be informal, it is good in Substance, and aided by the general Demurrer.

Another Question was moved, Whether this be a Plea in Bar or in Abatement (for 'tis ill in Bar)?

Holt cited 36 H. 6. 18. that a Plea which begins in Bar, and concludes in Abatement, is a Plea in Abatement, and vice versa; and if it should not be so, yet the Plaintiff hath made it so, by replying cassari non. Mo. 692. Onely's Case agrees: Wherefore Judgment quod respond' ouster. 2 Mod. 63, 64. 1 Mod. 214.

Procedendo lies of Course without Motion, for not putting in of Bail. Procedendo of Course.

## Inter *the Parish of* Malden *and* Haverage *in* Essex.

Rating a Man to the Poor of the Parish is equivalent to Notice in Writing to the Church-wardens within the Statute Jac. 2. for they have taken Notice of him by Rating of him; and it would be mischievous to expound the Statute literally; for the Statute recites (That whereas People used to conceal themselves) here is no Concealment in this Case. Poors Rates.

## Fitzpatrick *versus* Robinson.

Debt on Bond for Performance of Covenants, one of which was, That one Price should, before such a Day, pay the Plaintiff 1200 l. and that he should render a just and true Account of all such Profits, Advantages, &c. as should arise from such an Office, between the 25th of March 85. and the 25th of March 86. The Defendant pleads Performance generally; Plaintiff replied, Quod non dedit verum & justum Computum, Defendant demurs. 1 Show. 1. Bond to perform Covenants, account, &c.

Thompson pro Defendente.

The Replication is double, for he should have said, either that he had made no Account, or that he had made one, but it was not true and just; and he cited one Vere's Case, of which he had a Report.

Tremain pro Quer'.

The Plea is ill, for one of the Covenants being to be performed by a Stranger, he ought to shew how he had performed it, and

not generally, &c. (and of ſuch Opinion was Holt on the firſt Day) and then the Plaintiff ought to have Judgment, unleſs it appears that he hath no Cauſe of Action. 8 Co. Turner's Caſe; yet here the Replication is good, becauſe we have perſued the Words of the Covenant. Yelv. 39, 40. But per Cur', that is in a Declaration and in an Aſſumpſit alſo.

Dolben J. The Replication ſeems to be good, becauſe the Nature of the Caſe doth not admit of any other Manner of Pleading, eſpecially the Plaintiff being a Stranger to the Thing, of which the Account ought to be made.

Holt, to maintain his Opinion, cited 2 R. 3. 17. a. Replication adjudg'd ill, tho' after a Verdict, becauſe it was not ſufficiently certain. Sty. 473, 476. Arnold's Caſe. Debt on Bond, to account every Saturday Night; and the Breach aſſigned was, That he had not accounted on Saturday the 24th of July, yet Judgment was arreſted.

At another Day Holt ſaid, that (verum & juſtum Debitum) is good Pleading, and in Accompt Plene computavit is a good Iſſue, and the Caſe 2 Roll. 9. comes up to this Caſe.

Dolben agreed, and that the Caſe in Yelv. Hayward and Reeves is a ſtronger Caſe.

Judgment pro Quer'.

## Betts *verſus* Lowe.

Bankruptcy, how pleaded.

IT was ruled in this Caſe, that, in Pleading a Man to be a Bankrupt, it is ſufficient to ſay, that he became a Bankrupt, ad omnes Intentiones ſeparal' Statut', without ſetting forth any particular Act of Bankruptcy, as Departure out of the Kingdom, Taking Sanctuary, or Keeping his Houſe, and Abſconding there; it was urged, that, in Pleading a Man to be a Simoniſt, 'tis neceſſary to ſhew ſome particular Act of Simony: Holt agreed, becauſe that the Word Simony is not in the Act, and therefore 'tis neceſſary to ſhew, &c. to bring the Perſon within the Act.

## Evans *and* Petifer.

1 Show. 8. 1 Cro. 481. Poſt. Principal and Bail join in Error, ill. Error coram vobis, &c.

PRincipal and Bail join in Error, it is ill per Cur', and thereupon the Writ was quaſh'd, but they were directed to bring a Writ of Error, quod coram vobis reſidet, for an erroneous Writ of Error removes the Record into B. R. and Hob. 72. is good Law; for no Writ of Error coram vobis, lieth in the Exchequer-Chamber, becauſe the Tranſcript only is removed there. Vide Entr. 240, 241.

Holt. In this Case, where a Writ of Error is abated, the Party can't have a new Writ, without praying it.

## *The Warden of the* Fleet's *Case.*

IT was said, that he might detain a Prisoner after a Habeas Corpus directed to him out of B. R. for his Fees, but not for Chamber-Rent, &c. Gaoler detains Prisoner.

## Andrews *versus Sir* Robert Clarke.

A. Brought an Action of Debt on a Bond against B. in the Court of the Sheriffs of London, C. is indebted to B. by Bond; A. sues out a Scire Facias against C. quare attach' non C. the Garnishee appears and imparls, and afterwards pleads, that the Bond made by B. to A. was made in such a County, out of the Jurisdiction of the Sheriffs Court, which Plea was refused, and a Prohibition was moved for in B. R. on a Suggestion of this Matter. London Customs, Attachment.

Shower for the Prohibition.

Where Part of the Cause of Action arisseth within the general Jurisdiction of B. R. and Part within a particular Jurisdiction there, B. R. shall hold Plea. Hob. 15.

Thompson contra.

If a Prohibition should be granted in this Case, it would destroy all foreign Attachments, also the Garnishee can't say he doth not owe the Money in London, for a Debt is a Debt in all Places, and the Custom extends to it, and it is call'd Foreign Attachment, because the Debt of any Person, altho' he lives out of London, may be attached for the Debt of another living in London, to whom he owes it.

Holt Ch. J. The Garnishee can't plead to the Jurisdiction after an Imparlance, and therefore they have well refused the Plea to the Jurisdiction, for an Imparlance is an Admission of the Jurisdiction: And a Prohibition was denied. Vide Post.

## Knight *versus* Perry.

A Prohibition was pray'd for to the Admiralty. The Case was this, there were several Part-Owners of a Ship, the major Part set the Ship out to Sea without the Consent of the rest, (which they might well do) the others libell'd in the Admiralty-Court, that the major Part should give Security by Way of Stipulation, for the Return of the Ship; the Ship perishes at Prohibition to the Admiralty.

at Sea, and a Libel is against the Executor of one of the Stipulators on this Stipulation; and it was thereupon decreed, that he should pay, &c. or go to Gaol; and now a Prohibition was moved for, because it don't appear that the Executor had Assets: But Holt answer'd, that by their Law (to which Credit is to be given) an Executor is liable; but per Cur', this Stipulation being a Matter done on the Land, the Admiralty hath nothing to do with it; and altho' it was urged, that it was the constant Course of the Admiralty, to proceed on such Stipulations, yet that can't prevail against the Statute of H. 4.

Obj. That there is no Remedy at Common Law. Answ. Per Ch. J. An Action on the Case lies.

Eyre J. Altho' there should be a Failure of Justice, yet we can't intitle the Admiralty to a Jurisdiction: And a Prohibition was granted.

## Dence *and* Doble.

Term in Ejectment not enlarged, sans Parties Consent.

THE Question was, Whether the Court on a Motion could inlarge the Term in an Ejectment, without the Consent of the Parties: And the Court agreed that it could not be granted; but Holt said, it had been sometimes done without the Consent of the Parties, but he never approved of it.

It was then pray'd, that the Proceedings might be stay'd till the Costs of a former Nonsuit were paid.

Costs of Nonsuit.

Ante 106.

Holt. It hath always been the Rule, that the Lessor of the Plaintiff should pay the Costs, for he hath the Benefit of it; and if the same Person, after a Non Pros. in a former Action, proceeds in a second before Payment of the Costs of the former, they have used to stay him quousq; &c. but that is where the same Person is Lessor, now here is another Lessor. Obj. This is on the same Title, and the Wife claims by the Devise of her Husband.

Answ. We can't take Notice of the Title, besides the Costs in the former Ejectment being tax'd fourteen Years ago, the Title perhaps is changed.

Dolben J. There is no Difference between this Case and the other common Cases on the same Title.

Gregory J. agreed with Dolben.

Eyre with Holt. That in Courts of Law equitable Rules ought not to be extended further than they had been extended before: And so the Matter was put at large.

## Witham *and* Dutton.

TRespass and False Imprisonment: There was a Demurrer to Part, and a Verdict for the Residue; the Jury gave 500 l. Damages on the Demurrer, and but a Shilling on the Verdict, and a Writ of Error being brought, the Question was, Whether the Recognizance should be for 1 s. or for the Whole; in this Case the Damages on the Verdict were released, and Execution taken out for Want of Bail on the Writ of Error, according to the Statute of 16 & 17 Car. 2. and a Motion was made for a Supersedeas.

Bail in Error.

Stat. 16 & 17 Car. 2.

Curia. Bail ought to be for the Whole, and there was a Case in C. B. in Trespass, for the mean Profits resolved accordingly; but it is objected, that the Statute ought to be intended of Damages on Verdicts, and not on Demurrers; to which Holt and Dolben answer'd, that the Bail ought to justify themselves to be sufficient, as well for the Damages on the Demurrer, as on the Verdict; and if no Bail be put in, the Writ of Error is no Supersedeas, and Execution may be taken out.

A Man was arrested on a Writ returnable die Martis prox' post Quinden' Paschæ, where the Term began on Wednesday.

Ill Writ made good by Appearance, &c.

Ch. J. The Writ is ill, yet the Party is in Custody, and he hath made it good by accepting a Declaration; but, however, he ought to be discharged on common Bail; and he likewise said, that altho' the Writ was ill, yet the Officer is excuseable.

In Case for inveigling away his Son, who was also his Servant (the Defendant being a Sea-faring Man) an Acetiam billæ of 50 l. was order'd on Motion, and Affidavit.

Servant inveigled. Bail.

This Court may Bail for High Treason, but it is a special Favour, and not done without the Consent of the Attorney-General, And they may likewise Bail for Murther, but it is seldom done, and never without a special Reason, and it is not a sufficient Reason that it is found Manslaughter before the Coroner, for it may be afterwards found Murther per Cur'.

Bail in Treason and Murder.

Per Ch. J. In an Action for Words, where some of 'em are actionable, and some not, if they are laid as several and different Sentences, and intire Damages are given, there altho' the Words are alledged to be spoken, eodem die & anno, it is ill for the Whole, because the Sentences are several.

Several Words several Damages.

# DE

# Term. Sanctæ Trin.

## Anno 1 Willielmi & Mariæ, Regis & Reginæ, in B. R.

### Brown *versus* Brown, *and* Brown *versus* Farndale.

In this Case three Points were resolved,

1 Show. 1. Stat. of Distributions.

1. THAT a Brother of the half-Blood shall have an equal Share in the Distribution of the Goods of the Intestate within the Statute, according to the Case of Storey and Hawkins, and Smith and Tracy. Mod. 209. And where it hath been said, that he shall not have an intire Share, but only a Moiety of it, that was exploded as a Fancy; and Dolben said, the Lord Hale was of the same Opinion in that Point.

2. Each Party hath such an Interest in his Share before Distribution, that if he dies, it shall go to his Executor, for the Act hath made it as if the Intestate had made his Will, and by such Words in a Will, without doubt, an Interest vests.

3. Altho' the Party, to whom Distribution ought to be made, dieth within the Year, that shall not alter the Case; for the Proviso, which gives Time to make the Distribution, is only for the Administrator and Creditors, to the End that the Debts should be the better known.

Ante . S.C. Note, In this Case, the Case of Palmer and Alicot was cited, where it was debated, whether an Interest vests in Case of an only Child; and the Judges were of different Opinions there, but a Consultation was granted on another Point.

Also the Case of Burrell and Newton in the Exchequer, in 1683, on the Equity Side, where the Son took Administration to his Father, and made his Executors, and died; another took Administration de bonis non, of the Father; and the Question was, Whether Mortgage-Money should go to the Executor of the Son, or to the Administrator de bonis of the Father? And the Court there were of Opinion, that it was out of the Statute, but Holt said he was of a contrary Opinion, for he held an Interest vested as in the Case of an only Child, quod nota. Ante . S.C.

And in the principal Case a Consultation was granted.

## Strode *versus* Osborn.

ERror on a Judgment in Waste, for cutting down fifty Trees in forty Acres, in such a Wood sparsim crescen'; on nul Waste pleaded, the Jury found the Oaks and Ashes infrascript', cut down in twenty Acres, and for the Residue no Waste committed. 1 Show. 3. Waste for cutting Trees, sparsim in 40 Acres, Verdict in 20, and no Waste *pro resid.*

Summers assigned for Error.

1. It don't appear that the Jurors had a View, which six of 'em at least ought to have. 2 Inst. 306. quod Cur' concessit, but that is not necessary to appear on the Record. Vide Ward and Poole's Case. Saund.

2. The Verdict is ill and unformal, for neither the Number nor Value of the Trees is found.

3. The Judgment is quod recuperet, without saying, per visum Jurator' præd'.

To which it was answer'd and resolved, that the View is directed in the Distringas, and it appears on Examination at the Trial: And Holt said, the Defendant in this Action need not demand the View, but the Jury is to have it; otherwise in a real Action, where he is to have it himself.

2. The Verdict is certain as to the Place, viz. in twenty Acres, and also as to the Trees, viz. infrascript', and the twenty Acres only shall be recover'd.

3. The major Part of the Precedents are per visum, &c. but not all. And per Dolben, where the Judgment is by Default, there is a greater Reason that it should be per visum Jur', but here it is good after Verdict. Rast. Entr. 696. which Holt agreed.

Then Summers perceiving the Opinion of the Court, mov'd that the Record was not removed, for the Writ of Error is directed to Herbert Ch. J. C. B. to remove a Judgment Loquelæ coram vobis & Sociis, and the Record return'd is Placita coram H. Bedingfield & Sociis suis, and altho' the Award of the Venire Facias and the Judgment were in Herbert's Time, yet they shall have Relation to the Placita in Bedingfield's Time; and the whole Record not removed.

Court were of that Opinion, (altho' 'twas objected that the Loquela is depending till Judgment) and therefore the Writ of Error was quash'd.

## *Rex versus The Executors of* Ayloff.

Outlawry after Execution revers'd.

ERror brought by the Executors to reverse an Outlawry for High Treason (on which Ayloff was executed) it was assigned for Error, that the Year of the King was in Figures, but being in numerical Figures, per Holt, it is well enough. And Holt doubted very much, whether an Executor could have Error in this Case, for he is a Stranger in Blood, and therefore shall not have Error to restore the Blood; and as to the personal Estate, that is not so considerable in Law.

Dolben and Eyres contra. Because otherwise the personal Estate would be lost. Vide 1 Leon. pl. 459. and 3 Cro. Marshal's Case in Case of Felony: And in the Case of Williams and Williams, an Executor brought Error to reverse a Judgment in Dower, as to the Damages quod Holt concessit; but he said that in such Case the Judgment is not absolutely revers'd: But afterwards, in this Term, the Attainder was reversed against the Opinion of Holt.

## Brook *and* Cooke.

1 Show. 57. Debet & Detinet against a Sheriff for an Escape, ill.

DEbt on an Escape against the Sheriff in the Debet & Detinet, and recited, that whereas he recover'd against B. per nomen Executoris, and the Defendant had him in Execution, and afterwards suffer'd him to escape: The Defendant pleads, he retook him by fresh Suit, on which there was Issue joined, and a Verdict for the Plaintiff: It was now moved in Arrest of Judgment, that the Declaration is ill in the Debet & Detinet. 2 Cro. 545.

Thompson for the Judgment. In this Case the Action is not grounded on the Tort in the Testator's Time, but in his own Time. An Executor hath a Lease for Years, and makes an under Lease, he shall have Debt for the Rent in the Debet & Detinet. 2 Cro. 12. Holman's Case, that an Executor shall have Debt in the Debet, and Debt on the Statute E. 6. of Tithes. The Words per nomen Executoris are but Surplusage.

Hall contra. Where it appears on the Record that the Plaintiff recovers as Executor, there the Action ought always to be in the Detinet only, because it will be Assets. 3 Cro. 326. Aleyn 34. for the Reason of the Case of a Lease and Under-lease made by an Executor.

Holt. For an Escape on a Recovery by an Executor, the Action for the Escape should be in the Detinet only, because it will be Assets; and as to the Case put by Thompson, of a Lease, there it ought to be in the Debet & Detinet, because 'tis on his own Contract, and so in all Actions by Executors on their own Possession or Contract.

It can't be intended, but that he recovered as Executor, &c. and the Party ought to shew in what Right he brought his Action, or else he can't recover, and therefore it shall not be intended Surplusage; for otherwise it can't be known in what Right he recovered, and then no Judgment can be given for the Incertainty, for in one Case that, which is recovered, shall go to the Executor of the Plaintiff, and in the other to the Administrator de bonis non of the Testator of the Plaintiff; and, if it was generally pleaded, on Issue non Debet, it can't be given in Evidence that he recovered in the Right of the Testator.

Dolben agreed, and Judgment was arrested, nisi, &c.

## Smith *and* Sephton.

Debt on Bond made at Chester, on plene administravit pleaded, it was tried here by Mittimus to Chester, and a Verdict for the Plaintiff: It was now moved in Arrest of Judgment, that the Bond being made at Chester, ought to be tried there; but it was adjudged, because it was not pleaded, that the Party dwelt there, or had whereby to be attached there, that there would be a Failure of Justice, if it could not be tried here; and Minshew and Ireton (per Dolben) was adjudged accordingly.

Bond at Chester tried here.

Judgment for the Plaintiff. Vide Fitz Jurisdiction 29, 57. and Jennings and Hankey's Case. Ante .

## Spencer *and* Durant.

Covenant on Articles of Agreement between several Fidlers, That they would not Play, &c. asunder, unless on my Lord Mayor's Day, &c. and they were bound in 20 l. each to the other jointly and severally, and one only brings Covenant and assigns the Breach, that the Defendant play'd ad quandam Tabernam, &c.

1 Show. 8. Action joint, tho' Covenant several.

Judgment was given for the Defendant. 5 Co. Slingsby's Case, and 2 Leon. 27. for they ought all to have joined, the Interest being joint; and it is repugnant and contradictory for four Persons to bind themselves, the one to the other jointly and severally.

## Stowball *and* Ansell.

Case for malitious Indictment.

CAse against a Juryman for malitiously indicting the Plaintiff of Barretry. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Action did not lie.

Levinz for the Plaintiff. That the Word [malitiose] well maintained the Action, otherwise he admitted it did not lie; an Action lieth against a Judge for a malitious Act. 1 Leon. 189. Bridg. 130. 47 E. 3. 16, 17. 21 E. 3. 21.

But it was answer'd and resolved by the Court, that the Action did not lie, altho' it be laid malitiose. There is a Case in the old Books, that where a Man enter'd into a Conspiracy, and was afterwards sworn on the Grand Jury, that purged the Conspiracy. In such Action brought by the Lord Maxfield against Gravenour in the Exchequer, the Defendant pleaded that he was a Juryman, and made his Presentment, as a Juryman on his Oath, and altho' the Declaration was malitiose, yet the Plea was held good.

And Judgment was given Quod Quer' nil capiat per billam.

## Boson *and* Sandford *& al'.*

3 Lev. 258. Both Master and Part-Owners of a Ship are liable; but Part-Owners must be joined.

TRespass on the Case on a Special Verdict, the Case was, A. loaded Goods in good Plight on board a Ship, which commonly carried Goods in Safety from Topsham to London, and from London to Topsham, for reasonable Freight (the Danger of the Seas only excepted); and 'tis found that these Goods were damnify'd otherwise than by the Sea; that the Goods were delivered to the Master of the Ship, that the Plaintiff did not know the Part-Owners; that the Owners had the Money agreed for the Freight; and farther, that there were more Owners than the now Defendants.

Upon this Case three Points do arise.

1. Whether the Action lay against the Owners or against the Master.

2. Whether the Action be well brought against some of the Part-Owners only.

3. Admitting it is not, whether it be good now, it being waved, and not pleaded in Abatement?

Carthue. That the Action brought against some is sufficient, as in the Case of several Executors, who all prove the Will, and only one takes the Administration, a Creditor may maintain an Action against him only; so in this Case, he having Notice of some and not of others.

How the Act of the Master shall bind the Servant. Vide 21 H. 7. 29. a. 20 H. 7. 40. b. Dy. 161. a. b. for the Relation between Master and Servant. 11 H. 6. 16.

How the Master is bound by the Act of his Servant. Vide Plow. 11. b. Litt. Rep. 374. 3 Cro. 711. 12 H. 8. 4. b. 9 H. 6. 53. b. Here the Owners have the Consideration, and therefore ought to be answerable.

Levinz contra. In Case of a Contract, all the Contractors ought to be charged; and it is agreed on the other Side, that here is a Contract by the Owners, and therefore the Action ought to be brought against all of them, and the Ignorance of the Plaintiff shall not charge one Owner only; and as to the Objection, that it ought to be pleaded in Abatement, I do insist that the Declaration ought to be proved in Evidence; and altho' this be an Action of Trespass, yet it is Trespass on the Case, and ariseth ex quasi Contractu, for the Words are, that the Defendant did undertake, which implies a Contract, and let the Contract be either expressed or in Law, the Action ought to be brought against all.

The Owners are not chargeable at all, for the Master of the Ship is not like a common Servant, and therefore the Cases before cited are nothing to the Purpose, for the Master hath Power over the Ship, and may charge it. Hob. 17.

It was doubted in the Case of Morse and Slew, whether a Hoyman, who is not Owner of the Ship, be chargeable, or not? (but Holt said the Doubt there was, Whether it lay against the Master, for it was agreed, that it would lie against the Owners)? That prima facie it ought to be brought against the Master, and the Owners are not to be charged till it appears that the Master is not answerable. 1 Mod. 85.

Holt Ch. J. Here it is found, that the Profits came to the Owners, and therefore they are chargeable. In Justin. Inst. Tit. Exercita Navis. An Action doth not lie against a Man as Owner, but as he hath the Benefit of the Freight; for where there are several Owners, and one dissent from the Voyage, he shall not be liable to an Action afterwards for a Miscarriage, &c.

That the Master or Owners may have an Action for the Freight, and for the same Reason, either the one or the others are liable.

Obj. That the Action ought to be brought against all. I agree that this is the great Doubt of the Case.

If it be an Action grounded on the Contract, all ought to be charged, as in an Assumpsit, otherwise, if it be grounded on the Tort, and here is a Charge by a Contract in Law, and not by an express Contract (as the Master is answerable for the Ship robbed by Felons); the Plea in this Case is not to the Contract but non cul', but the Ground of the Action is the Contract, and

so

so it is mis'd. Debt for not setting forth Tithes against one Occupier, where there are two, is ill.

Dolben. If a Carrier's Porter receives Goods, the Carrier shall be liable.

Eyre. A Water Carrier is answerable as well as another Carrier. Sid. 36. And a Master shall be answerable for the Receipt of his Servant.

But it was adjourned on the two last Points.

Cos. R. Mynshul, by Letter 21 Oct. 99. informs me, it was adjudged in this Case: 1. That the Action would lie, either against the Master or Part-Owners.

2. That the Part-Owners ought all to have been joined, for the Benefit being to all, all ought to be charged, tho' the Action were grounded upon a Tort, because it is a Tort arising ex Contractu.

## King *and* Dillison.

Lutw. 765, 779. Show. 31, 83. 3 Mod. 221. Salk. 386. Infant not bound by Custom of a Manor.

ERror out of C. B. in Ejectment, where it was found that the Lands were Copyhold-Lands of such a Manor, in which there is a Custom, that, if the Party to be admitted doth not come in, on three Proclamations to be made at three several Courts, after the Surrender, that then the Lord may seize the Land for a Forfeiture; and they found that J. S. was Tenant for Life of this Land, the Remainder in Fee to J. D. and that J. S. and J. D. surrender'd to the Use of F. G. F. G. died before Admittance, his Heir being an Infant, three Proclamations were made, and the Heir did not come in; the Lord seized, and whether this Seizure be good, was the Question.

Treby. The Custom is good notwithstanding the Infancy, for else the Lord will lose his Time, for he hath no other Remedy. That such a Custom is good to bar one of full Age. 3 Cro. 879. Yelv. 1. Noy 42. I agree, that this is not an absolute Forfeiture, for an Infant shall have the same Privilege, as a Man beyond the Seas. 8 Co. Sir R. Lechford's Case; but if the Lord may seize as for a temporary Forfeiture, that is sufficient in this Case, which seems to be allowed by Implication in the Case of Sir R. Lechford. 2 Cro. 227. otherwise it would be inconvenient, for there may be several Discents to Infants or Persons beyond the Seas.

This Custom ought to be construed to be an absolute Forfeiture, if there be no Impediment; but if there be any Impediment, as Infancy, &c. then a Seizure quousq; &c. 3 Cro. Baspole's Case. 1 Cro. 7. Latch. 199.

In the Case of a Cessavit, or if an Infant marries himself, yet the Lord shall have the double Value; and altho' those Cases are by Statute, yet they shew that it is not unreasonable at the Common Law.

Obj. 1 Leon. 100. 3 Leon. 221. Answ. Those Cases were where the Ancestor was a Copyholder.

Baldock contra.

That this Custom doth not bind an Infant, and he cited 1 Leon. 103. to be in Point. The Cases of Penalties on the Statute do not come up to our Case, and, as to the Loss of the Fine, the Estate before Admittance is in the Surrenderor, and he shall pay the Services.

Holt Ch. J. The Infant hath no Right or Estate before Admittance, and therefore can't keep the Lord out: The Infant can't take the Profits before Admittance, and therefore can't hinder the Lord from taking 'em.

The Forfeiture (because the Surrendree doth not come in) is in the Surrenderor, for he only hath the Estate; and it is not a peremptory Forfeiture, but he shall have the Estate, when he doth come in; otherwise if there be several Discents to Infants, the Lord will never have his Fine.

Infancy shall never take away another's Right, altho' it may delay it, and there is no Mischief by this Construction; Lechmere's Case admits that the Lord may seize quousq; and so is 2 Cro. 277. admitted by all the Judges, it is an incident to the Tenure, and as reasonable in the Case of a Copyhold, as in the Case of a Freehold.

Dolben J. By the general Opinion, and Practice of the Nation, an Infant is not bound by such a Custom, and the Verdict finds, that the Lands are forfeited; it would perhaps be otherwise, if the Verdict had found, that the Lands were seised.

Holt, North, and others, five great Lawyers, were for a Seizure, quousq; in such Case.

Dolben, Ashfield's Case in Latch. is, that an Infant is not bound by such Custom.

Eyres. Noy 93. Jones 157. that it is no Forfeiture, but the Case is not so well reported by Latch. 199.

Holt. An Infant, Tenant for Life, makes a Feoffment in Fee, the Lord may enter for the Forfeiture; but the Infant, when he attains his full Age, shall enter on the Lord.

Eyres. Here is no Forfeiture.

Gregory agreed, and said that he remember'd a Custom of a Manor, that if the Fine should not be paid, the Land should be forfeited to the Lord for a Year.

The Court being divided, it was adjourned.

Beake

## Beake *and* Tirrell.

3 Mod. 194. 1 Show. 6. Trover lies for a Ship after Sentence in the Admiralty.

TRover for a Ship and Goods brought by an Executor, the Defendant (after a special Imparlance) pleads to the Jurisdiction, That tempore quo, &c. he was a Captain of a Man of War, and that he seized the Ship super altum Mare, within the Jurisdiction of the Admiralty, per Mandatum Domini Regis ut prisam, and carried her into Sally, where she was condempned by the Court of Admiralty, as Prize, and sold ad Commodum Domini Regis, to which the Plaintiff demurr'd, and a Respondeas Ouster was awarded, because the Common Law Courts have a concurrent Jurisdiction with the Admiralty, and the Plaintiff hath his Election. Then the Defendant pleaded the same Matter in Bar, and the Plaintiff demurred.

Thompson took two Exceptions to the Plea.

1. Because the Defendant hath not shewn any Commission, whereby he was made Captain.

2. For that he pleads he took the Ship, ut prisam, and doth not shew that she was a Prize, or how she became Prize, nor alledges any Offence, for which she was condempned as Prize.

Trevor contra. Where a Court hath Jurisdiction, there, while their Sentence is in Force, all, who act under such Sentence, are indempnified, and the Captain is under no Necessity of shewing his Commission here, for that Matter had been consider'd by the Admiralty before their Sentence, and our Law gives Credit to the Sentence of a Court, that hath Jurisdiction, and can examine Matters, which relate only to the Jurisdiction, and not to the Sentence. 7 Co. 17. Ken's Case. 8 Co. 68. 29 Car. 2 Hutchinson's Case, who killed a Man in Spain, and was tried and acquitted there; and afterwards being indicted here, he pleaded that Acquittal in Bar, and it was held a good Bar; and another Case 34 Car. 2. in B. R. Cornelius brought Trover for a Ship, and it was found that the Ship belonged to the Plaintiff at such a Time, but that afterwards she was taken and condemn'd in the Admiralty, and sold to the Defendant; and it was adjudged that by that Sale the Property was alter'd: And as to the Exception, that no Commission is shewn, he answer'd, that the Authority to be Captain, &c. need not be by Matter of Record, but it is sufficient, if it be under the King's Hand, and that is a Matter of Fact triable; and the other Side might have replied, that he was not Captain, &c. As to the second Exception, there is no Occasion to shew a Cause of Seizure, because it is not a Matter traversable here, and he need not shew the Proceedings in the Admiralty, because it is not a Court of Record; but otherwise if it had been a Court of Record, for then the Matter

so pleaded, is triable by the Record; he agreed, that in Case of a Sentence in the Ecclesiastical Court, the Proceedings ought to be shewn, for that may be tried by the Certificate of the Judge; otherwise in the Case of the Admiralty, for that Court can't write to them.

Holt Ch. J. The Pleading that he was Captain generally is good; but as to the other Exception, it is not well pleaded, because 'tis not shewn for what Cause the Ship was taken as Prize. In the Case of Cornelius, an English Ship was seized by a Dutch Man, there being War between Holland and France, but not with England, and the Ship was condemned by Sentence in the Admiralty, which Sentence bound the Property, because it was grounded on a good Foundation; and this Court would not permit it to be examined, Whether the Ship was English or Dutch: And moreover, it is not pleaded, whose Court this was, in which the Ship was condemned, nor before what Judges.

And afterwards, in this Term, Judgment was given for the Plaintiff.

## Thompson *versus* Harvey.

Debt on Bond, Part of the Condition was, that the Defendant should not buy Sheeps Trotters of any Person, of whom the Plaintiff had or should buy, &c. On Demurrer.

1 Show. 2. Bond in restraint of Trade.

It was moved, that the Declaration and Bond were good, altho' it seemed to be restrictive of Trade.

See 2 Show. 345 to 364.

1. Because it is not such a Trade, whereof the Law takes any Notice.

2. It is not an absolute and universal Restraint, but a special one, and limited to the Plaintiff's Customers, which is allowed for Law. 2 Cro. 596. Broad and Jolliffe, Assumpsit for using his Trade in Newport. Palm. 175, 198. 2 Bul. 137. Litt. Sect. 360, 361. a. A Condition, which restrains the Alienation of Lands in Fee generally, is void, but that he shall not alien to J. S. or J. N. is good. March 191.

Selby for the Defendant. A Condition that is against Law, is void; this Condition is against Law, because it restrains Trade, for we are obliged not to buy of any Person, of whom the Plaintiff buys but one single Sheep's Trotter, which he may easily do of every Person that sells them, and so we shall be wholly excluded.

We are likewise obliged by this Condition, not to buy of several Persons, of whom the Plaintiff had bought, and if he will not buy of any of them, we can't exercise our Trade, and that tends to a Monopoly. Rex *versus* Cusack. 2 Roll. Rep. 113.

If the Condition of it self be not against Law, yet we have made it so by our Averment. March 158. otherwise of Simony. Vide 1 Cro. 180, 425. 1 Leon. 203. Jones's Case. Mo. 641. 2 Cro. 249.

Holt Ch. J. That don't aid this Case: It's agreed, that where an Act of Parliament makes a Bond void, there an Averment that it is against the Statute (altho' it doth not appear in the Bond) shall be admitted, and shall make it within the Statute; but it ought to be such an Averment, as consists with the Condition of the Bond, and not such a one, as is contrary to it.

But this Bond seems to be very much in Restraint of Trade, for it not only binds the Defendant, but his Executors and Administrators also (for they are included in the Condition) which is contrary to the publick Good; and in the Case of the Taylors of Exeter lately adjudged in the Exchequer-Chamber, no Difference was made between a Restraint of Trade in a particular Place, and where it is in general, and the Case of Broad and Jolliff is not impeached thereby, for there the Person restrained had a good Consideration.

Dolben J. In the last Case the Consideration is not material, for we are only to take Care of the Common-wealth, and not of the Party, whether he hath made a good Bargain, or not? And a Man may restrain himself from Trading in a particular Place; and so is the common Practice, where an Apprentice gives his Master more for the Goods in his Shop than they are worth, and the Master gives him a Bond to trade no more there. Ow. 143. Noy 38. Mo. 119, 242. Adjourn'.

Now this Term Holt held the Bond was void, and said, that in the Case of the Taylors of Exeter *versus* Clarke, the Condition of the Bond being not to exercise a Trade in Exeter was adjudg'd Good; but that Judgment was reversed in the Exchequer-Chamber on solemn Argument against the Opinion of Jones C. J. 2 Show. 364.

It is usual to restrain a Lessee from such a Trade in the House let, for I can chuse whether I will let the House, or not?

Dolben J. Against the Judgment given in the Exchequer-Chamber, in the Case of the Taylors of Exeter. 1 Saund. 311. Denham and Hemlock's Case. A Bond not to use a Trade in such a Street, good.

A valuable Consideration will make such a Bond good.

An other Part of the Condition was, that he should not buy more than he had done before, which by Eyres is ill, because it restrains him from inlarging his Trade.

The Court was clearly of Opinion, that it tended to a Monopoly, and gave Judgment for the Defendant.

## Lechmere *and* Thorowgood.

TRespass by the Assignees of the Commissioners of Bankruptcy against the Sheriffs of London, and others, for taking his Goods: It was found by special Verdict, That one Toplady was a Vintner, and a Judgment had against him, and a Fieri Facias awarded, tested 27th of April, and afterwards, viz. the 28th of April, he became a Bankrupt; the 29th of April the Sheriff took the Goods by Vertue of the Fieri Facias; afterwards an Extent issued out of the Exchequer, whereby the Goods are taken out of the Sheriff's Hands: Afterwards the Commissioners of Bankruptcy make an Assignment to the Creditors, and the Assignee brings Trespass against the Officers, who took the Goods by Vertue of the Extent: And whether the Defendants be guilty, or not, is the Question?

1 Show. 12. 3 Mod. 236. After Judgment executed, the Goods, &c. are in Custodia Legis, and not liable to Exchequer-Process, or Commission of Bankrupts.

Pollexfen for the Plaintiff. That the Fieri Facias being after the Bankruptcy comes too late by the Statute 21 Jac. c. 10.

Vide Perry and Bowyer's Case, that an Inrolment is good ab initio. Baily and Bunning's Case. Sid. 271. that an Action lies against the Sheriff on an Execution after the Bankruptcy.

1 Lev. 173.

Thompson contra. That this is not for the King's Debt, but a Process in Aid; that such Extent in Aid shall not take the Goods taken in Execution by the Fieri Facias. Vide Baily and Bunning's Case.

And Shower said, that the Extent came Time enough before the Assignment; and so is the Practice of the Exchequer. *versus* Lewis in the Exchequer 20 Car. 2. Vide Sish and Bunton's Case there accordingly.

Holt C. J. The Property of the Goods is vested by the Delivery of the Fieri Facias, and the Extent afterwards for the King comes too late, and that on the Statute of Frauds and Perjuries.

Afterwards in this Term, the Court were of Opinion, that a Construction should not be made to make the Officer a Trespasser by Relation, for the Taking was lawful at the Time, and Baily and Bunning's Case in Siderfin, agrees per Holt and Dolben.

Judgment for the Defendant, Nisi.

Debt on Bond. The Defendant pleaded that the Plaintiff, after the Money was due on the Bond, covenanted and granted by Indenture, not to sue the Defendant in ninety-nine Years: To which the Plaintiff demurr'd.

1 Show. 46.

Tremain. That a Bond may be defeasanced, as well after the Money is due, as before, 21 H. 7. 24. 3 Cro. 623. 1 Roll. 939. that the Using of it as an Acquittance, is the Case of 21 H. 7.

and 3 Cro. 623. is to avoid Circuity of Action, and is a Defeazance.

Holt Ch. J. agreed; the Rule put by Tremain, that the Case of 21 H. 7. goes only by Way of Discharge; and as to the Case in Cro. that is a plain Defeazance: That the Suspension of this Action will not destroy the Bond, for every Defeazance is quodammodo, a Suspension; that a Covenant not to sue at all, is an Acquittance, but a Covenant not to sue a Bond within such a Time goes only in Covenant; that the Rule, that a personal Action once suspended is for ever extinct, doth not hold in all Cases, and Dolben agreed.

Eyres. 3 Cro. 352. is a Case in Point (but Tremain urged, that that Case was afterwards denied).

Judgment pro Quer'.

## Simpson *versus* Mayhill.

1 Show. 47. Trespass, justifies by Process of inferior Court, with *Taliter processum*.

TRespass for entring into his House, and taking his Goods. The Defendant justifies that he was seised of an Hundred, to which a Court a tempore cujus, &c. belonged, held before the Suitors every three Weeks, and that a Plaint was enter'd Et taliter processum fuit, that a Non pros. was enter'd against the Plaintiff, and 9 s. Costs thereon given, upon which a Levari Facias issued to levy the Costs, and that he enter'd and took the Goods by Virtue of the said Writ, as Bailiff, &c. to which the Plaintiff demurred.

Northey for the Plaintiff, took several Exceptions to the Plea.

1. That it ought to shew for what Purpose the Court was held.

2. That the Plaint is laid to be levied according to the Custom of the Hundred, but not according to the Custom of the Court of the Hundred.

3. That the Pleading of a Taliter processum fuit is not good in any Court, not of Record, in which all Proceedings are traversable; otherwise if it had been in a Court of Record.

4. That the Process is made out by one, who doth not appear to have any Authority (but admitting it had been pleaded to be per Curiam, it had been good) but here it is awarded by the Steward, where it ought to be by the Suitors.

Levari Facias or Distringas.

5. That the Levari Facias is not good, but it ought to be a Distringas. 22 Ass. 72. pl. Noy 17. that Execution ought to be by Distress infinite.

Thompson contra.

To the 1st, The Law takes Notice of the Jurisdiction of the Hundred-Court.

To the 3d, The Practice was formerly to set forth the Proceedings at large, and that even in the Courts of Westminster; but now there is no Difference as to that, between superior and inferior Courts.

To the 4th, It is laid to be according to the Custom, and to be ad Curiam, and under the Hand of the Steward, and therefore good.

To the 5th, That it is according to the Custom, and therefore good.

Holt Ch. J. agreed, that the Process of an Hundred-Court is a Distress, and not a Levari Facias; but it may be good by Custom, and it is here laid to be secundum Cons' Cur'. Farsly 1.

Taliter process' fuit was not heretofore allowed in any Court; but there is a Difference between superior Courts, in which it is good, and inferior Courts, where it is not. And there was a Case in the Time of the Lord Hale, in Trespass, for taking Goods, where the Defendant justified, as here in the principal Case, and pleaded Quod taliter processum fuit, and on a Demurrer thereto the Plea was adjudged good; and it was held in the same Case, that it was not necessary to lay a Custom to make the Process by Levari Facias good.

To the 4th Exception. It is well enough for the Reason given by Thompson.

Dolben J. Taliter processum fuit is ill in an inferior Court, and hath been so adjudged several Times since the Lord Hale's Time, and there is no Case against it, except the Case above cited by Holt, and that Case was disallowed by Pemberton, but Hale was always very much inclined to make Pleadings good.

Then Northy took another Exception, That the principal Case was on a Nonsuit, and the Costs are awarded pro non prosequendo unde convictus fuit; and it don't appear, Whether the Nonsuit was before Appearance, or after; and if it was before Appearance, then no Costs are given by the Statute, and thereupon Adjournatur.

## Mason *and* Abdy.

Ante .

Debt on a Bond of 600 l. the Condition was, That whereas the Plaintiff lent 300 l. on an Adventure, on the Life of the Defendant, if therefore the Defendant should at three Months end pay 22 l. Præmium, and the 300 l. Principal; or if he should, after the three Months, pay 6 d. for every Pound per Month for the Premium, or if the Plaintiff should die within six Months, then the Bond to be void. The Defendant pleads quod corrupte agreatum fuit, for the Loan of 300 l., and Interest to be paid ut supra, and that it exceeded the Rate of 6 l. per Cent. to which the Plaintiff demurs. Usurious Contract.

Holt

Bottomry-Bonds, &c.

Holt Ch. J. This is not like a Bottomry-Bond, by Reason of the Danger of the Sea, for they, who lend on Bottomry-Bonds, are as Merchants-Adventurers: But Dolben said, that it is now usual to put a Clause in these Bottoms, for saving the Principal, wherefore he thought that those Bonds were also usurious.

At another Day, Thompson urging the Hazard the Plaintiff run in this Case; Holt said, I am of your Opinion Brother Thompson, for you run a great Hazard, not of the Casualty of Death, but of the Loss of your Money, for it is manifestly usurious, for dying within half a Year is no Hazard; and if it should not be so, the Statute would be easily evaded, and signify nothing, for here he shall have 6 d. per Pound per Mensem, for his Life, and the Principal also, and no Hazard, if he lives six Months, and it is not like a Bottomry-Bond.

Dolben J. Robert's Case in 2 Cro. is not Usury, for as he runs small Hazard, so he gains small Profit. There are several Cases that this is no Usury.

Eyres. That this is Usury. Vide 3 Cro. 741. on six Months Hazard.

Holt. Insurance of Life cannot be Usury, because there is no Loan, but a plain Bargain.

Gregory agreed with Eyres, and the Court was ready to give Judgment for the Defendant, but on Thompson's Importunity Adjournatur.

## Gordon *and* Powell.

Plea versus Attorney the Stat. 1 Jac. 1. No Bill delivered.

Assumpsit on three several Promises: 1. For Money lent. 2. On a Quantum meruit, for Business done as Attorney. 3. On an Insimul computasset, the Defendant pleaded, that the Plaintiff gave him no Bill before the Action brought, according to the Statute 1 Jac. to which Plea the Plaintiff demurr'd.

That this is no Plea after an Account between the Parties. Aleyn 4. Evelin's Case.

Curia. An Account is clearly out of the Statute, and it being pleaded to all the Promises, the Plea is ill for the Whole: And Judgment was given for the Plaintiff.

## Lloid *and* Rowse.

Quære if Solicitor of the Treasury be within Stat. E. 6. of Offices.

Debt on Bond. The Defendant pleaded the Statute Ed. 6. of Offices: And the Question was, Whether the Office of Solicitor of the Treasury be within the Statute.

Holt, Eyres, and Gregory held it was not, but Dolben thought it was. Et adjournatur.

## Speaker *and* Styant.

TRespass. The Defendant justified for his Common. On the Pleadings the Case was thus: A Copyholder of Inheritance, to which Common belong'd by Custom, purchased the Freehold by these Words [Grant, Bargain, and sell the said Messuage, with all the Commons thereunto belonging]. Copyholder purchases the Freehold, with all the Commons belonging.

Two Points were made.

1. Whether by the Acceptance of the Grant, &c. the Common was extinct; if it was, whether it could not be revived without a special Grant?

2. Whether it passed by Bargain and Sale?

The Common is extinct by the new Purchase, and then the Purchaser of the Freehold cannot have it without a special Grant de novo. Vide 3 Cro. 494. Mo. 467. and Ford and Ward's Case in the same Book.

If the Common passed by Bargain and Sale, it ought to pass as Common de novo, which can't be by Bargain and Sale, for it can pass thereby only by Way of Use, which can't be of a Thing created de novo. 2 Cro. 189.

Darnel contra agreed, that it could not pass by Bargain and Sale.

Holt Ch. J. The Word [Grant] being in the Deed, if it had been pleaded by Way of Grant, it had been good. A Common escheats to the Lord, there it is extinct; and therefore if the Lord regrants it by the Words, All Commons thereunto belonging, yet the Common doth not pass to the Grantee.

Judgment for the Plaintiff, nisi, &c.

By Eyres. A Mandamus don't lie to swear the Steward of a Court-Baron. No Mandamus for Steward of Court-Baron.

On a Habeas Corpus it was returned, that Issue was joined before the Writ came to him, but did not say, that Issue was not joined within six Weeks, &c. as it ought to be by the Statute, and therefore ill: There was likewise another Fault, because it being in an inferior Court, it is not return'd, that the Cause of Action arose within the Jurisdiction. Q. Return of Habeas Corpus ill.

Judgment pro mis' omitting Custag', yet good per Cur'. Judgment Custag. omitted.

Clifton

## Clifton *and* Keen.

Post. Judgment in Error nil capiat.

A Writ of Error was brought, and Errors assigned. The Defendant in Error pleaded a Release of Errors by the Plaintiff in Error: The Plaintiff demurr'd per Holt Ch. J. The Judgment can't be affirmed, but it ought to be a Nil capiat per breve.

## Periam *versus* A. *Vicar in* C. B.

Tithes.

Resolved in C. B. that it is not necessary for the Parishioner to give Notice to the Parson of his setting forth of Tithes. Vide Roll 643. 2 Roll. 302. Deggs Parsons Counsellor 220. Hob. 107. that a Custom for Tithing, without View, is ill. Quære the Difference.

## Harrison *and* Austin.

3 Mod. 237. What Words make a Covenant to stand seised to Uses.

Ejectment of Lands in Kent, on the Demise of Stoakes and Sarah his Wife, on a Special Verdict, the Case was, A. seized in Fee the 1st of July, 27 Car. 2. made a Deed-Poll, whereby he recited, that he had no Issue, and that his Meaning and Intent was, that his Lands and Tenements should remain in his Blood and Kindred, if he died without Issue; and after this Recital, in Consideration of natural Affection, he gave, granted, and confirmed to Sarah Stoakes, his Niece, to the Use of himself for Life, the Remainder to the said Sarah Stoakes in Tail: The Jury further found, that after this Deed he made a Feoffment in Fee, and that afterwards Sarah Stoakes and her Husband enter'd for the Forfeiture.

This Case was argued Trin. 4 Jac. 2. by Holt, Serjeant, for the Plaintiff, and Fuller, Serjeant, for the Defendant.

Holt, Serjeant, for the Plaintiff.

That it amounts to a Covenant to stand seised, because there is not any Transmutation of Possession. 1 Co. 121. the Definition of an Use, that Cestuy que Use shall take the Profits; and he, that had the legal Estate, was compellable to make the Estate and Conveyance to Cestuy que Use. Before the Statute of Uses, an Use was only an Equity to have the Profits; if one had bargain'd and sold, the Bargainee should have had the Use; and the Words Bargain and Sell are not necessary, but other Words tantamount will do. 2 Inst. 672. Plo. 300. 8 Co. 93. 2 Roll. 786. Since the Statute of Uses the equitable Estate is



become

become legal; here is a good Consideration. Winch 59. Dy. 96. pl. 40. Sid. 26. Dy. 186. An Estate to the Use of one and his Heirs, for the Life of A. determines upon the Death of A. J. S. limits an Use to commence after his own Death, J. S. hath an Estate in the mean Time. Inst. 222. 1 Roll. 238, 240. Here, if it be not construed as a Covenant to stand seised, the Remainder in Tail is void.

Fuller contra.

A. seised in Fee, having then no Issue, makes a Deed: If I die without Issue, I intend my Land to continue in my Blood and Family, therefore I give, grant, and confirm, in consideration of natural Affection to Sarah my Niece, to the Use of my self for Life, Remainder in Tail to Sarah. In this Case the Words, give, grant, and confirm cannot be a Covenant to stand seised to the Use of the Grantor, because, if Sarah hath it by Covenant to stand seised, she hath it as an Use, and then no Use can arise to the Grantor, for an Use cannot be out of an Use, and certainly the Intent of the Grantor was not to have no Estate himself, which must be, if it be construed a Covenant to stand seised. Roll. Rep. 286, 287. Scudamore's Case hath no need of Warranty.

In Covenants to stand seised to Uses the Intents of all Parties must be observed, the Words are, If I die without Issue, then to *Sarah*; so that no Use can be to Sarah till he dies, but the Use is to her upon this contingent. Mo. 683. 3 Cro. 384, 510 or 570. 1 Co. 99. 3 Cro. 439.

And now in this Term it was argued by Winnington pro Quer' and Fuller pro Defend'.

Winnington pro Quer'.

That this Deed-Poll amounted to a Covenant to stand seised. Plo. 300. is the first Case of a Covenant to stand seised, and it is so mention'd in 1 Inst. 112. afterwards the Ignorance of Persons employed in drawing Deeds made several Questions about the Nature of Covenants to stand seised; that a Covenant to stand seised is construd from the Consideration, and an implied Consideration is a good Consideration. 7 Co. 40. 11 Co. 24. but if there be an express Consideration and an implied Consideration also, there the express Consideration shall make the implied cease. Sid. 82. 3 Cro. 394. Vide Sanders and Savil's Case. Mich. 27 Car. C. B. And Plo. Que. 305. seems contrary.

If there be a Clause of Warranty in a Deed, or a Warrant of Attorney, which denotes it to be a Conveyance at Common Law; there it hath been formerly held, that it should not be construed a Covenant to stand seised, because the Intent appears to pass it otherwise than by Way of Use. 2 Roll. 786. Mod. 175. but of late the Consideration breaks thro' this too, for an ignorant Person puts in Clauses of Warranty, &c. without knowing

the Force or Operation of 'em. Trin. 28 Car. 2. in the Exchequer Walker *versus* Hall. there was the Consideration of Marriage expressed, and altho' there was a Warrant of Attorney to deliver Seisin in the Deed, yet it was construed a Covenant to stand seised by Reason of the Consideration. He cited another Case adjudged in the Exchequer in the Time of Car. 2. where the Words, give and Grant in a Deed, to the Use of a third Person, were construed to amount to a Covenant to stand seised, and the Case in Question is stronger than any of the Cases put, for here there is no valuable Consideration expressed, nor any Clause of Warranty.

2 Ven. 318.

Fuller for the Defendant. I agree that a Use may be raised by an implied Consideration.

The Intention of the Parties ought to raise Uses, and where no such Intention appears, there no Use can be raised. 2 Inst. 172. where a Letter of Attorney, &c. is in a Deed, it shews that the Intent was, that the Estate should pass by Transmutation of Possession, and not by Way of Use.

Sid. 225. Give, Grant, &c to a Stranger, to the Use of himself for Life, Remainder to his Son, nothing arises to the Stranger, because there is no Livery; and if any Thing did pass to him, yet no Use could arise to him or his Son, because a Use can't arise out of a Use; and in our Case, altho' a Use be raised, yet it is to Sarah, and then no Use can arise to the Covenantor, because Sarah had a Use before, and so there can't be a Use upon a Use, and then the Covenantor is but Tenant at Will, and then he can't commit a Forfeiture.

The Words are, If I die without Issue, then to *Sarah*, and therefore no Use can arise to Sarah, till the Death of A. without Issue.

Holt Ch. J. It is not as Fuller says, in Case that A. dies without Issue, but the Words are (whereas he hath no Issue) by which it seems, that A. at the Time of the making this Deed despair'd of having Issue, and it is but a Recital, which can't Influence the Limitations.

Habend' to Sarah to the Use of A. for Life, and after to Sarah in Tail, must be construed to enure by Way of Covenant to stand seised, for if it be construed to be intended by Way of Transmutation of the Possession, then Sarah can have only an Estate for Life, and then the Use can be only for Life, for the Use cannot be larger than the Estate, out of which it riseth. And forasmuch as it cannot take Effect any other Way, than by Way of Covenant to stand seised, to give Sarah her Remainder in Tail, therefore it must take Effect that Way. Sid. Scudamore's Case, and so is the Case 2 Roll. 786.

2 Ven. 318.
Sid. 25.

As to the Case in the Exchequer put by Winnington before, on the Words, give, grant, &c. to the Use of another, that is not

Law, for there the Intent appeared manifestly, that it passed by Transmutation of Possession.

And altho' in the Case in Question it is hard that Sarah should enter for a Forfeiture, yet the Law is the same as if A. was dead.

Dolben J. agreed, that the Recital in the Deed is purely to shew the Condition of his Family at that Time, and can't Influence the subsequent Limitations.

Eyres J. I doubt of both the Cases cited by Winnington to be in Exchequer.

The whole Court inclined, that it is a Covenant to stand seised; and afterwards Judgment was given for the Plaintiff, Nisi, &c.

A Coroner's Inquisition was quashed, nisi, because it was found before the Coroner infra Burgum, and not de Burgo. Coroner's Inquisition.

For a Prohibition. It was suggested, that the Bishop libelled for a Pension before his own Commissary, and so would be Judge in his own Cause: But the Court refused to grant a Prohibition; for by Holt and Eyres J. A Suit lies before a Chancellor in such Case, and there is a Case in Dyer, where the Lord sued before his Steward. A Bishop sues before his own Commissary.

Then it was said, that the Libel was not for a Pension in Fee, but for an Annuity, as in 2 Inst. in the Comment on the Statute de circumspecte agatis. But Holt and Dolben J. said that an Annuity is suable for in the Ecclesiastical Court: And Holt said that the Comment of the Lord Coke on the Statute de Circumspecte agatis had been often denied to be Law. Annuity suable in Ecclesiastical Court.

Ch. J. If the Declaration don't agree with the Acetiam, there shall be only common Bail.

## Allen *versus* Grey.

TRespass for Taking his Wife. The Defendant pleads, ne unques accouple in loyal Marriage, and the Plea was adjudged ill, and a Respond' Ouster awarded, because a Marriage in Fact is sufficient to maintain this Action: But per Holt, a Plea that they were not married, or not covert in Marriage, would be good. 1 Show. 50. 2 Salk. 437. Ne unques accouple, an ill Plea.

## Woodward *versus* Mackpeth.

3 Mod. 211. Church Ornaments chargeable on the Inhabitants and Occupiers.

PAsch. 4 Jac. 2. A Prohibition was moved, for the Libel being for not paying a Tax towards Bells laid upon him by Reason of Land, which he occupy'd in Coventry or Litchfield (he living in the Diocess of Peterborough) upon the Statute of H. 8. that none shall be sued out of the Diocess. And Jeffery's Case was cited, that every one that hath Lands in Occupation within a Parish, shall be said to be an Inhabitant of it; but it was bad, because it was said, terras habentes, and not occupantes.

Now this Term a Prohibition was moved for again; and it was said the Suggestion contain'd double Matter, viz. his being cited out of the Diocess; and that he was not liable to be tax'd for Ornaments, not living within the Parish; and it was said the Party ought to have demurr'd for this Duplicity. 2 Roll. 289. 5 Co. 67. that a Man shall be charged, tho' he lives in another Parish. And per Holt and Dolben, Bells are no more Ornaments than the Steeple.

Tremain. The Party is within the Diocess, because he occupies Land within it. 1 Cro. 97.

Holt. Bells are Chattels not fix'd to the Freehold, but indeed the Frames are (Tremain contra, 3 Cro. 659. 2 Roll. Rep. 1. 191. Poph. 197.) Holt, He is within the Diocess, for tho' he lives out of it, yet he occupies Land within it, and 'tis not within the Statute of H. 8. like to the Case upon the Statute of Winton. He shall be an Inhabitant within the Hundred, that occupies Land within the Hundred.

Obj. That such an Inhabitant is not taxable for Ornaments. Answ. As much as for Reparations, and for the same Reason; I confess 'tis against the Case in Roll. But I never could see the Difference between Ornaments and Reparations; besides, Bells are not Ornaments, and so said Dolben and Eyres. Vide 2 Roll. Rep. 270. 1 Bul. 20. Latch. 203. Consultation was awarded.

## Husley *versus* Cassock.

Church Rates to repair, &c.

A Prohibition was moved for. The Libel was for Rates towards the Repair of a Church; it was suggested, that they had used to repair a Chapel, a tempore cujus, &c. but forasmuch as they had not alledged it to be a Chapel, that had all parochial Rites; the Prohibition was denied, for if but one is omitted (as Burial) no Prohibition shall go; and therefore they were advised to amend the Suggestion.

## Garret *and* Foot.

DEbt on Bond. The Condition (on Oyer) was to pay so much within sixty Days after the Return of a Ship, or at the End of thirty-six Months, which shall first happen, according to Articles of Bottomry: The Defendant pleaded the Statute of Usury; the Plaintiff replied, non corrupte agreatum fuit, to which the Defendant demurred. Bottomry-Bond not usurious.

Holt. Where a Man pleads directly to a Bond, there the Plaintiff in his Replication ought to shew a Breach; but where the Defendant pleads another Matter, than that which is in the Condition of the Bond, as the Plea of the Statute of Usury, in this Case the Party may well demur for the Insufficiency of the Plea, and need not assign a Breach.

Curia. This is Usury apparent on the Condition of the Bond, being 19 l. 10 s. per Cent. and no hazard of the Principal; but the Articles of Bottomry not being set forth, per Dolben, there may be something in the Articles that may Hazard the Principal, and then it is not Usury, and therefore it was adjourned.

At another Day, per Curiam, it is not usurious, for it don't appear to be for Money lent or borrowed; and per Holt, If I covenant to pay 100 l. a Year hence, and if I do not pay it, to pay 20 l. it is not Usury, but only in Nature of a Nomine pœnæ.

And Judgment was given for the Plaintiff.

On an Amendment after Plea pleaded, the Plaintiff hath Election to pay Costs, or give an Imparlance. Amendment after Plea.

A Recognizance was moved to be discharged on an Affidavit that the Nuisance was abated, but the Court refused so to do, unless the Party would confess the Title, and submit to a Fine in Person, or try the Right, and then if it was found for him, they would discharge the Recognizance, otherwise they would not. Recognizance to abate a Nuisance.

A Mandamus to restore a Clerk of a Dean and Chapter was denied, for he hath nothing to do with the Publick, (his Office being only to enter Leases granted, &c.) and it don't lie for him any more than for the Bailiff of a Manor, the same Law of a Register of a Dean and Chapter, unless there is an Affidavit that they have Ecclesiastical Jurisdiction. No Mandamus for a Clerk to Dean and Chapter.

Altho' a Poor's Rate be really made at the Sessions on an Appeal, yet if it don't appear by the Order it self, as by Recital of the Sessions Order quash'd.

the former Order, &c. the latter Order shall be quash'd; and the Court refused to supply this defect in the Order by Affidavits.

## Crawley *and* Oldish.

Simony.

HIll. 3 & 4 Jac. 2. A Prohibition was moved for on a Libel exhibited in the Arches against Crawley, for Simony, who is pronounced Simoniack by Sentence, there Crawley upon this Appeals to the Delegates, where the Sentence was confirmed.

Against the Prohibition.

3 Cro. 788. That a Simoniack is an Intruder, and his Admission is void, that this Crime of exercising the Jurisdiction of the Archdeacon after Deprivation is properly triable in the Ecclesiastical Court, and the Freehold will not come in Question in this Case.

Pollexfen and Thompson ad idem. That the Freehold will not come in Question, but it's only a Prosecution for a Contempt, &c. and Crawley is not without Remedy by Action to try his Title to the Perception of the Profits, &c.

Holt contra for a Prohibition.

In this Case there is no Sentence of Deprivation, and there is no Canon Law, which makes Simony to deprive a Man, &c. The Canon Law in Case of Pluralities was always allowed, and therefore is in Force. Statute 31 El. of Simony.

That an Ejectment, or Case, or Assise will well try this Case, the Temporal Court may very well try the Regularity of a Deprivation; and, if it is within the Jurisdiction, we will admit the Justice of their Proceedings, where they have Authority.

Summers ad idem. That no Part of the Libel directly lays a Deprivation, but only by Reason of which he was deprived: that no Canon binds as a Law, till it's received and allowed; and it was admitted by the Court, that the Temporal Courts will take Care that no new Canon be introduced. That on the Libel the Patronage of Necessity ought to come in Question, and therefore the Court granted a Prohibition.

And afterwards Pasch. 4 Jac. 2. Holt cited Roll. Tit. Prohibition 285. which is a stronger Case than ours, because brought by one in Possession, but in our Case it is by one out of Possession. Fitz. Nat. Br. 36. Tit. Spoliation, and the Rule there put, that in such Cases there shall be a Prohibition, when the Freehold comes in Question. Roll. Tit. Prohibition 292.

Summers ad idem. That in this Case the Patronage and Freehold comes directly in Question. Roll. Prohibition 285.

Curia. There shall be a Prohibition for the Reason aforesaid; but Alibon contra, because the Sequestration is only for the Punish-



ment

ment of the Offender, and it affirms the Freehold to be in Crawley, for the Profits are sequestred as the Profits of Dr. Crawley. A Prohibition was granted.

Now in this Term, between Crawley and Oldish, it was said, that an Ejectment lay for an Archdeaconry.

## Corset *versus* Husely.

Suit in the Admiralty after Prohibition.

Hypothecation of the Ship.

Declaration on a Prohibition to the Admiralty, on the Statute R. 2. The Defendant, as to impleading after the Prohibition, pleads Not guilty. Et pro consultatione habenda, that the Ship in controversy was hypothecated at Roterdam by the Master of it, for the necessary repair of it. And now Suit is against the Master of the Ship in the Admiralty; and if a Prohibition lieth is the Question.

Goodwin for the Prohibition. That the Admiralty hath a Jurisdiction by Reason of the Locality, not of the Nature of the Thing by the Statute Sid. 331. Latch. 11. a Ship pawn'd for Victuals. Cotton Records 341. for Wages, and as to the Cases in Hob. 11. Roll. 530. there it was by Contract at Sea, but here in the Harbour.

Tremain contra. The Master may pawn, as in our Case, he may in Case of Necessity hypothecate the Ship, and hath a qualified Property in it: The Master makes Charter-parties, and maintains Actions thereon, and not the Owners: If Goods are dampnified, an Action lies against the Master, and several Statutes take Notice of the Master of a Ship, and it is necessary that he should have such a Power, for else no Body would trust him for Necessaries. Hob. 11. Latch. 252. Noy 95. in Point, that the Master may Pawn. Several Mariners can't join in a Suit at Common Law, but they may in the Admiralty, for their Conveniency. The Courts in Westminster-Hall will not prohibit where the Suit is for Mariners Wages. Hill. 34 & 35 Car. 2. Heathcock *versus* Wood, the Master hypothecates, &c. the Party, that lends the Money, takes Process out of the Admiralty to seise the Ship, and no Prohibition bould be obtain'd, and I have the Rule of this Case, but not the Suggestion; for that is never entred, when the Prohibition is denied, but is put into the Office only; but where the Prohibition is granted, 'tis entred upon Record.

Holt Ch. J. The Master may, in Case of Necessity, pawn the Ship, tho' at Land; but here is no Colour for a Prohibition, for it is a Matter properly triable by the maritime Law, and they have no Remedy at Common Law.

Dolben. The Master may pawn in such a Case, and 'tis unreasonable for us to prohibit, since there is no Remedy at Common Law.

Eyres.

Eyres. No Action lies against the Master, but only in the Admiralty, because the Party hath taken the Ship for his Security.

Gregory agreed, and a Consultation was awarded, and Dolben said, he wondred that this could be made a Question, since 'twas admitted that the Money was for the Use of the Ship, but if the Master had employed the Money to his own Use, a Prohibition should have gone.

And per Curiam. No Prohibition shall be granted, where the Libel is not brought into Court.

No Prohibition where the Libel not brought in.

Habeas Corpus to Winsor Court.

A Procedendo was moved for, because the Steward of Windsor-Court (being an utter Barrister) obeyed a Habeas Corpus, and returned the Cause thereon, altho' there were ten Weeks between the Appearance and Issue joined: But the Court denied it, for the Steward might have made a special Return to the Habeas Corpus.

Dolben J. It was resolved in Kelynge's Time, that the Steward might proceed where Issue is joined according to the Statute, notwithstanding the Habeas Corpus, and the Statute directs it; but Kelynge was of a contrary Opinion, and that it is a Contempt, and he ought to have made a special Return thereof.

# DE

# Term. Sancti Mich.

## Anno 1 Willielmi & Mariæ, Regis & Reginæ, in B. R.

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Tuckey *and* Flower. Vide ante Mich. 2 Jac. II.

Words.

ACtion for Words (Whore, and hast had a Bastard) not actionable per Dolben, because it appears not that it was chargeable to the Parish, and then not liable to be sent to the House of Correction; and he denied the Opinion in Ann Davies's Case. 4 Co. 17. to be Law.

Old Sheriff delivers Prisoners retaken to the New.

Some Persons breaking Prison about the Time of the Prince's Landing, in the Time of the old Sheriff, were taken upon fresh Pursuit by the old Sheriff; and the new Sheriff refused to receive them from the old, not being delivered over to him by Indenture with the rest of the Prisoners: Upon which the old Sheriff moves the Court, that the new Sheriff may be compelled by Rule to take them.

Cur'. If the old Sheriff did tender them afterwards to the new Sheriff by a new Indenture, he is bound to take them, and a Rule was granted, Nisi, &c.

Several Actions on several Bills.

The Plaintiff having brought seven several Actions against the Defendant upon several Bills of Debt; the Defendant moved that they might be all joined in one to prevent Vexation. The Plaintiff gave the Reason of his bringing several Actions, viz. to discourage the Defendant from bringing several Writs of Error; but the Defendant not agreeing to this, and yet having admitted

mitted the Debts to be just, the Court left the Plaintiff at Liberty. Holt contra.

Post. Money into Court.

Rule of bringing Money into Court deny'd in Covenant; secus, if Debt had been brought upon the Charter-party.

Copies of Court-Roll Evidence.

Copies of Court-Rolls examined by the Steward allow'd to be good Evidence in Ejectment, without bringing the Rolls themselves into Court.

## Brooks *and* Webster.

Stopping a Way.

CAse for stopping a Way, and declares, that he was possessed of two antient Messuages, &c. and that he had a Way leading to them, and that they were burn'd; and that he had erected a new House super quandam partem eorundem Messuagiorum. Thompson, after a Verdict for the Plaintiff, moved in Arrest of Judgment, that it could not be upon part of the said Messuages, for he had shewn before that they were burnt; to which it was answer'd, that the Ground is part of the Messuage, and so it shall be intended, that he built upon the Ground, to which the other Side reply'd, that that Intendment will not consist with what was said before, for then the same Words must have two Intendments.

Holt. This would have been bad upon a special Demurrer; but Cur' were of Opinion that it was good after Verdict.

Judgment pro Quer'.

## Watson *and* Clerke.

London Customs, Words, Whore, &c.

ACtion in London for calling Whore, the Defendant removes it by Habeas Corpus, and the Plaintiff moves for a Procedendo, having made an Affidavit that the Action was for the Word Whore. Ch. J. A Procedendo cannot be granted, unless it appeared upon the Return of the Habeas Corpus to be an Action warrantable only by the Custom of London, and an Affidavit cannot supply it; to which it was answered, that the Habeas Corpus coming before the Plaintiff could put in his Declaration below, it could not be return'd to be an Action for the Word Whore, for the Entry of the Action is only in Case. Ch. J. The Plaintiff might have put in his Declaration after the Habeas Corpus came to the inferior Court. Dolben J. That would be such a Proceeding after the Habeas Corpus received, as would make the Judge of the Court guilty of a Contempt, to which Eyres Justice agreed; and several of the City Counsel unconcern'd

cern'd in this Cause said, that Procedendo's had been usually granted upon producing the Declaration, with an Affidavit that it belong'd to the Action return'd. And agreed by Dolben, Gregory, and Eyres, that a Procedendo should go; forasmuch as the Cause could not appear upon the Return of the Habeas Corpus, &c. but Holt Ch. J. retained his Opinion to the contrary.

At another Day Thompson moved for a Procedendo, alledging the usual Course to be, not to return the Declaration; but said the Court would take Notice of the Custom of London, and he had an Affidavit that the Words were spoke in London, which was all that had been required tho' a continued Course of Practice. He said the Difference was, where an Action was on a By-Law, 'twas usual to return the By-Law; but not the Custom, where the Action was grounded on the Custom. Customs and By-Laws differ.

It appeared afterwards, that there was not only a Plaint entred, but 'twas likewise return'd, quod partes placitaverunt & quod exitus intratus fuit, but no Declaration, nor the Custom return'd. Ch. J. Dolben, and Eyres, seeing the Declaration was in the inferior Court, it ought to have been return'd, and to be averr'd in the Return, what the Cause of Action was.

## Orbell *and* Ward.

APpeal of Death, the Appellee comes in propria persona sua & petit, &c. quibus lectis, &c. per Christophorum Guise, Attornat' suum dicit, and so pleads in Abatement of the Writ, that there is no such Vill of St. Martins in Westminster, but St. Martins within the Liberty of Westminster, to which Plea the Appellant demurs.

1 Salk. 59. 1 Show. 47. 3 Mod. 266. In Appeal of Murder nul tiel Vill, &c. pleaded in Abatement of the Writ, and well.

1. That the Plea in Abatement is by Attorney. 2 Inst. 313. 3 H. 7. c. 1. Bro. Attorn. 82.

2. He ought to have pleaded over to the Felony. 3 Cro. 694. Co. Entr. 59. Rast. Entr. 46, 47. Bro. Appeal 44, 94, 101, 111. Obj. è contr. Bro. Appeal 66. Fitz. Coronæ 140. 27 Ass. pl. 3. where the Defendant pleads ne unques accouple, and doth not plead over, &c. yet good. Answ. That Case don't come up to this, because there it is an absolute Bar, and therefore a Diversity.

Ward contra. The Record is Defendens in propria persona sua petit auditum Brevis, &c. quibus lectis, &c. dicit per C. G. Attorn' suum, &c. if it shall be taken to be all at the same Time, then it is a Plea in propria persona, but if at different Times, then it is a Discontinuance, because there is no Dies datus.

2. It is good with a Plea over, but such Plea is not absolutely necessary. Bro. Appeal 66. express. Nota, Pollexfen in his Argument in this Case, Pasch. 4 Jac. 2. said that the Precedents

dents are both Ways in a Plea in Abatement; but admitted that in a Plea in Bar he ought to plead over at his Peril, and that the Statute of H. 7. doth not enable the Defendant.

Holt Ch. J. You ought to have refused the Plea, and taken your Judgment by nihil dicit, but agreed, that the Defendant ought to appear and plead in Person, but here is no Plea at all, and so there is a Discontinuance; you ought to have moved, that the Defendant might have pleaded over, but that is a distinct Plea, and doth not vitiate the Plea in Abatement: If the Plea over be of Necessity, you ought to have taken your Judgment for Want of it.

That in a special Plea in Bar you plead over to the Felony or not, at your Election; but the Question is, Whether that be of Necessity in Case of a Plea in Abatement, which Dolben J. agreed; but he was of Opinion, that if the Defendant pleads over to the Felony at the same Time that his Plea in Abatement is over-ruled, it is sufficient, and so it was resolved in Parliament ten Years ago.

Per Holt and Solicitor-General. An Appeal is Festinum Remedium, and therefore he ought to plead over at the same Time, for if it should be admitted to plead over to the Felony, after his Plea in Abatement is over-ruled, then there would be two Trials, which is a Delay, but per Holt, the Fault is, that the Plaintiff hath not taken his Judgment by Nihil dicit, for Want of a Plea.

Dolben. As to the Form of the Plea in Abatement, it is always pleaded, that St. Martins is infra Libertates Westm', but St. Margaret's is pleaded always infra Westmonasterium.

Ward afterwards took an Exception to the Return of the Writ, that the Sheriff's Name is not subscribed, as it ought to be by 12 E. 2. c. 5. of York, and therefore ill; and the Appearance don't aid it. 9 H. 5. 2. here the Return was Respons' J. Firebrasse Vic.

Now in this Term, after it had been argued by Hawles of Lincoln's Inn for the Appellant, Judgment was given for the Appellee per totam Curiam, and it was resolved,

1. That he coming in propria Persona, and demanding Oyer of the Writ, and of the Return in propria Persona, it being the same Day, it shall be intended that he pleaded also in propria Persona especially, forasmuch as it was in an Action, wherein he could not plead by Attorney (for Holt said, that a Man might appear in Person and plead by Attorney) and the Words per Attorn' shall be rejected as Surplusage: But if the Plea be void, because it is pleaded by Attorney, then there is a Discontinuance, and so quacunque via data, Judgment ought to be given for the Appellee.

2. The Return of the Writ is good, for it is respons' J Firebrasse Vic', and then it is subscribed per eundem Vic', and so he is named in the Return within the Statute. In Civil Causes the Want of the Sheriff's Name is aided by the Statute of 21 Jac.

Judgment for the Defendant.

## *Rex versus* Abraham & al'.

INformation by the Attorney-General against several Persons for a Riot in pulling down Fences, &c. on a Demurrer to the Information, Sir Fr. Winnington shewed Cause the last Term, viz. that the Defendants ought not to answer to the Information; But it ought in this Case to be by Presentment of a Jury.

Information lies for Riots, &c.

For the Beginning of Informations, and if they lay. Glanvil, cap. 1. Fleta 112, 113. 2 Inst. 46. 5 E. 3. c. 9. 25 E. 3. c. 4. 43 E. 3. c. 3. 6 E. 3. fo. 33. 26 E. 3. 74. pl. 20. 40 Ass. pl. 5.

Original of Informations.

For the Original of the Word Information. Rast. . 11 H. 7. c. 3. 1 H. 8. c. 6. this Statute is repealed. 1 And. 156. 4 Inst. 41. that it ought to be by Presentment, and not by Information.

That Informations are not mentioned in Rast. and Co. Entr. and are not to be found till 5 Car. 1. Rushw. Collect. 52, 53. Vide 1 Cro. Rex *versus* Wingfield and Dr. Lamb's Case, and Freeman's Case.

Not to be favoured, &c.

Vide the Statute 16 & 17 Car. 1. which takes away the Star-Chamber, that Informations were not frequent till the Restoration of Car. 2. That it is unreasonable, that tho' a Man comes in by Recognizance, he shall plead instanter, as the Course now is. 1 And. 152.

Williams contra. Obj. Statute H. 7. Answ. Informations are as antient as Indictments, and the Statute objected is strong for the King. Obj. Statute 16 & 17 Car. 2. Answ. The Preamble of that Statute is strong for us, for it saith informable here. Obj. Hollis and Lamb's Case in Cro. Answ. The Information there was good, and no Exception taken that the Information did not lie, that the Practice of Pleading instanter in the Case mentioned by Sir Fr. Winnington is good in the Case of the King.

Treby agreed with Williams, and desired Time to argue it 'till next Term.

Holt. We can't impeach the Justice of several of our Predecessors, Informations were frequent in the Time of the Lord Hale; but agreed that Informations for Batteries, &c. are oppressive, that the Star-Chamber was an antient Court at Common Law, and they proceeded by Information, and therefore so

may

may we; that the Statute of 32 H. 8. of Maintenance supposeth Informations to be as lawful, as Actions by Bill or Plaint, and it was not a new Way of suing, &c.

Dolben. That Informations were before 1 Car. there is an Information mentioned in the Institutes to be against Plowden and others in the Time of Queen Elizabeth.

Holt said obiter, that no Information could be quash'd; secus of an Indictment.

Now this Term per Eyres and Dolben, Informations are more antient than 5 Car. and per Dolben, the Statute of 5 Eliz. mentions that Informations were more antient.

Holt. Informations were at Common Law, for there is no Statute that gives 'em. That this Court can't take Indictments out of the County, in which it sits; but this Court hath all the lawful Power that the Star-Chamber had, and therefore may punish Offences committed in other Counties, which for the greater Part would be unpunished, if Informations for them would not lie in this Court.

Ante 36, 65.

Dolben. There are several Informations in the Books of Entries of Perjury, Extorsion, &c.

Curia. Clearly the Information lies, and Judgment for the King, Nisi, &c.

## Crosse *and* Gardner.

3 Mod. 261. 1 Show. 68. Warranty on a Sale.

CAse. The Plaintiff declares, that the Defendant having Discourse of two Oxen did affirm them to his own proper Oxen, to which the Plaintiff fidem adhibens, gave him so much for them, ubi revera they were the Oxen of J. S. &c.

It was agreed by the Attorney-General last Trinity-Term, that the Action did not lie on a bare Affirmation without a Warranty. 2 Cro. 4. 11 Ed. 4. 6. 1 Roll. 96, 97. 1 Roll. Rep. 276. in Point; and he said farther, that it was not laid to be deceptive.

Gold contra. As to the Case in 2 Cro. 4. The Reason of that is, because 'tis in his Trade, as to 11 Ed. 4. 6. that is on an Affirmance, that such a Thing was of such a Weight or Measure, and it was the Plaintiff's Fault that he did not Weigh or Measure it; but in our Case it is an offer to sell, and is a Possession, and without Doubt, if it had been laid Sciens, it had been actionable, but as it is here, it is Damnum & deceptio Ass. pl. 8. 2 Cro. 197. the Difference, where the Party hath the Goods in his Possession, which he affirms to be his own.

That the Affirmance induceth the Buying, and the Eviction by the rightful Owner is the Damage. 2 Cro. 474. 196, 197. Mo. 126. 1 Roll. 96.

Attorney-General. Admitted, if an Affirmation with an Intent to deceive had been laid, the Action had lain, but it is not so here. 2 Cro. 474.

Holt Ch. J. Affirmation to support the Action ought to be at the Time of the Sale, and there it is an Inducement to buy, and the Difference taken is good, where the Plaintiff may as well satisfy himself as the Defendant; and where it lieth only in the Conusance of the Defendant, who affirms. Yelv. 20. Sciens is supply'd by the Verdict.

Dolben inclined, that the Action lay, and that there was such a Case in this Court seven Years ago.

Afterwards, in this Term the Case was argued again, and per Cur', the Action well lieth. 3 Cro. 44. Jones 196. 1 Roll. 91. Sciens omitted, and yet the Action lies 1 Sid. 146.

Holt. That Credit given on the Affirmation makes the Action lie.

Eyres agreed on the Case. Jones 196.

Judgment pro Quer'.

## Parkinson's *Case*.

SIR Francis Winnington pray'd a Mandamus to restore him to his Fellowship of Lincoln-College in Oxon, having been expell'd thence about the Year 83, and cited Appleford's Case, Mod. 82. where a Mandamus was granted; 'tis true, Mr. Appleford was not restored, because it appeared upon the Return that he was legally expell'd, and 1 Sid. 71. Dr. Widrington's Case.

No Mandamus for a Fellow of a College.

But Dolben J. said, that Mandamus was got by Surprize, and so was Goddard's Case, of which Winnington had a Manuscript. But Holt Ch. J. said, he had also a Manuscript of that Case, and his Manuscript was otherwise; but it was not of his own Taking, for he did not then attend the Court.

Ch. J. Here is a Visitor, to whom an Appeal may be, the Matter is only examinable before him, and no where else. Such a College is a Lay Corporation, and if no particular Visitor be appointed, the Founder and his Heirs are Visitors. If it be in Case of an Ecclesiastical or Spiritual Corporation, and no Visitor appointed, the Bishop of the Diocess is Visitor. This is a private Corporation, it no Way concerns the Publick, and we will not grant any Mandamus, and so it was ruled in this Court in Ailoff's Case, who was Fellow of All Souls.

Dolben J. I remember Dr. Roberts's Case, who was a poor Man, and the Court was very willing to have help'd him, but my Lord Hale said he could by no Means grant a Mandamus, for that he had taken his Place subject to those Terms; and as it were

were secret Conditions; and he could no more complain of his ill Usage, than a Man could do of an ill Award, to which he had submitted. And the Court agreed.

Contra of a School-master or Parish-Clerk.

Nota. It was admitted by the Court, that a Mandamus lies to restore a School-master or Parish-Clerk.

Winnington urged, that in Appleford's Case, and in almost all the others before cited, a Mandamus was granted, altho' the Party had not much Benefit by it on the Return; and he prayed a Mandamus, and then they might make what Return they thought fit; but the Court said they would not put the College to such Charge to no purpose.

## *Rex versus* Speke.

Attainder reverse'd by the Heir.

ERror brought by the Brother and Heir of Speke, to reverse the Attainder of Mr. Speke, Mr. Dolben assigned for Error, that there was no Arraignment, venit & petit auditum Indictament' præd. & ei legitur, &c. Et dicit quod ille est inde culpabilis & ideo, &c.

Ch. J. It is good, and his Confession is sufficient; for the Asking him whether he is guilty, or Not guilty, is to compel him to answer, and to try whether he'll stand mute; but when he confesseth he is guilty, he need not be ask'd.

Dolben J. It is ill. But the other Justices delivered no Opinion, for the next Exception was fatal, viz. that he was not asked what he had to say, why Judgment should not be given against him; and perhaps he had a Pardon or some other Matter to have offer'd: And for this Cause the Judgment was reversed.

## Rawlinson *and* Oriel *& al'.*

1 Show. 75. Two Defendants join in a Plea in Abatement. An Action proceding against one.

TRespass for entring his House and taking thence some Brandy; the two Defendants plead in Abatement, that there was a former Writ brought against Oriel by the same Plaintiff, for the same Trespass, &c.

Goodfellow. They ought not to have joined in this Plea, for Trespass may well abate against one Defendant, and stand good against the other; but Oriel should have pleaded it by himself. 14 H. 6. 3. Debt against two Executors, and one of 'em pleads Misnosmer, 5 Ed. 4. 2. indeed, if the Matter pleaded in Abatement arise on the Plaintiff's Part, or relate to both Defendants, they may join, otherwise not. 13 H. 7. 18.

Ch. J. If the Writ be abatable as to both, then both may plead it. And per Eyres J. it is abatable as to both. 3 Cro. 667.

667. (Vide Hob. 137. 250. Winch. Entr. 892. 5 Co. Sparry's Case.)

Ch. J. Judgment against one Trespasser is pleadable in Bar by the others; a fortiori, Judgment with Satisfaction, Adjournatur.

Per Ch. J. and Dolben (obiter). The Statute of Frauds and Perjuries, which saith, that the Property of the Goods taken in Execution, shall be bound only from the Delivery of the Writ to the Sheriff, and not from the Teste thereof, is to be understood only in Respect of Purchasers of them: But in Respect of Executors, where the Party dies after the Teste and before Execution, the Property shall be bound from the Teste.

Ante Statute of Frauds, &c.

## Roe's *Case*.

A Mandamus was granted to the Mayor of Bristol to restore Mr. Roe to the Office of Sword-Bearer.

Mandamus for a Sword-bearer.

## Smith *versus* Fierce.

ON a Special Verdict in Ejectment, the Case was thus, viz. A. seised in Fee, devised to B. and five others for ninety-nine Years in Trust, to pay Debts and Legacies, the Remainder to L. his Brother in Tail, and if L. and his Heirs pay the Debts, &c. that then his Executors shall assign to L. the Remainder to the right Heirs of the Devisor; L. after the Death of the Devisor enters with the Consent of the Devisees for ninety-nine Years, and took the Profits, and sold part of the Land by Bargain and Sale, and paid all the Debts and Legacies, except 181. and makes Leases to Strangers, with whom he Covenants to levy a Fine, and then levies a Fine sur Conusance de droit come ceo, &c. to the Use of himself for Life, Remainder to his Wife for her Life for her Jointure (it being found that he had 500 l. Portion with her). He continues in Possession for above five Years without Entry or Claim by the Devisees for ninety-nine Years. The sole Question is, if the Term for ninety-nine Years be barr'd by the Fine and Nonclaim.

A Term devised to pay Debts, &c. Remainder over in Tail.

Remainder-man enters and levies a Fine, the Debts, &c. not paid. Quære, if the Fine and Non-claim bars the Term.

Treby pro Quer'.

It is not barr'd; If the Term for ninety-nine Years were not divested and turn'd to a Right at the Time of the Fine levied, 'tis not barr'd, for the Fine could not work upon it.

I agree, that a Term may be divested and the Termor have nothing left but a Right, but that must be by an actual Expulsion, contrary to the Assent of the Termor. Vide 9 Co. 106.

10 Co. 96. 2 Inst. 519. That Tenant for Years, by Statute, &c. may be barr'd by a Fine, if out of Possession; the Reason of the Bar is their Nonclaim: But 'tis absurd to force one in Possession to make claim, because he hath all in him, which he can gain by Claim; and none of the Acts of L. hath turn'd the Term in our Case to a Right: His Entry hath not, for that was by their Consent, and is therefore rather an Affirmation, than a Destruction of the Term. He is but their Tenant at Will, entring by their Consent. A. enters, claiming to hold my Land paying certain Rent, my Acceptance of it makes him my Tenant at Will; so if Lessee for Years (without saying how many) enters so of Cestuy que Trust, or Mortgagor, by Implication of Law. He, that enters by Consent, can never be a Wrong-doer; if he had entred as a Disseisor, he would not have asked their Consent, nor have paid the Debts and Legacies. In Litt. Sect. 70. you have the Reason of a Tenant at Will, viz. If Feoffee before Livery enters, he is Tenant at Will, because he enters by the Consent of the Feoffor, and then his Possession is the Possession of the Feoffor. 1 Cro. 302. Jones 315. And. 134.

The Taking of the Profits, and selling part of the Land by Bargain and Sale to pay Debts, &c. is no divesting, for the Bargain and Sale divests nothing, being but a Contract, and besides the Lands in the Declaration were not sold. The letting to Under-tenants, with whom he covenanted to levy a Fine, was only to raise Money for Payment of Debts; also 'tis not found that those under Lessees entred, and then 'tis but a bare Contract. But admit they did, yet 'tis no divesting, for they pretended to have but seven Years, for the Leases were for no longer Time. And you will not make those Lessees wrong-doers against their Wills: And those Under-Leases shall be taken to be made by the Licence of the Devisees for ninety-nine Years. 2 Roll. Rep. 285.

Yet admitting it should be a divesting, 'tis not so ex necessario, but at the Election of the Termors for ninety-nine Years. Dy. 61, 62. 173. Latch. 75. 1 Leon. 121. And so is Blundel and Baugh's Case, as it is cited in Latch. 53. Roll. 661. Litt. Sect. 588, 589. 1 Sid. 458. Freeman and Barns's Case. And the bringing this Action shews that the Termors do not admit themselves to be divested of the Term. And Freeman and Barns's Case went upon the Difference, where it is a Term attending upon the Inheritance, it shall be barr'd, where in gross not, and ours is a Term in gross, viz. to raise Money to pay Debts and Legacies, which is not found to be done, and if it had, it is not appointed to attend the Inheritance, but to be surrendred to him in Remainder.

Obj. That L. had a Mind to divest the Term by the Fine.

Answ. 'Tis not to be regarded what L. intended, but what the Termors intended; if this should be construed to be a Divesting,

it would work a manifest Wrong and Breach of the Trust reposed in L. by the Termors, and therefore your Lordship will not construe it a Wrong, if the Case will admit of any other Construction.

Obj. That Farmer's Case in 3 Co. was adjudged upon the Fraud.

Answ. That was not the true Reason, for at the Time of the Fine levied there was no Fraud, and at that Time it must operate as a Bar, or not at all; but the true Reason of the Resolution of Farmer's Case was, that it should never be in the Power of the particular Tenant, by any Fine, &c. to defeat the Estate of his Lessor, because of the Privity between them. And the Lessor hath Election to admit himself out of Possession, or not. And 2 Bul. 138, 139. goes a little further, than I have occasion to use it.

'Twill be inconvenient to construe it a Divesting; as if Mortgagor for Years having a Mind to marry his Son, levies a Fine, the Mortgagee is not barred thereby, as hath been resolved, and there the Mortgagor is Tenant at Will, as here L. is. If I have a Mind to purchase an Estate incumbred, I cause the Incumbrances, as Terms attending the Inheritance, Judgments, &c. to be convey'd first in Trust for me, afterwards I purchase the Land by Fine; this doth not destroy the said Incumbrances, for that would be to destroy and bar my own Security.

And tho' it be found that but 181. be unpaid, yet the Case is the same as if there were 1000 l. unpaid, and this Money can never be raised, but by this Term, which cannot be if the Termors are barred.

Gold contra.

That the Fine is a Bar within the Words of the 4th of H. 7. which concludes Parties and Privies, saving such Actions and Rights, &c. which shall first come or descend to them after the Fine levied; and in this Case there is a present Right, which the Termors have, and nothing but a Construction upon the Statute can exempt them from being barred, which shall never be made, but where there is a Fraud or Incapacity, or no divesting, &c. An Interesse Termini may be barred, as in Saffin's Case, and Mary Podger's Case, and that tho' it be cloathed with a Trust to pay Debts, &c. as in Saffin's Case. Farmer's Case was adjudg'd upon the Fraud and Incapacity; but in our Case there is no Fraud found, and it shall not be intended. 1 Cro. Crisp's Case, 10 Co. 56. 3 Cro. 471.

Also he cannot be a Tenant at Will upon this finding, it being only that he entred by Consent; but in Blundel and Baugh's Case it was expressly found, that he occupy'd at Will, and Entry by Consent vests nothing, but is only an Excuse for Trespass.

1 Inst. . in the Case of Bastard and Mulier. In Blundel and Baugh's Case, other Constructions than was made would have protected a Wrong, but in our Case to construe it a Bar will make good an honest Settlement; there they considered the Intent of the Parties, and were of Opinion, that if it had appear'd that either of the Parties intended it should have been a Bar, that it should have been so; and not that the Parties should have Election, whether it should be a divesting, or no?

The Term is divested, for that the Fine passeth the Estate in Possession as well as the Remainder. Inst. 324. b. That a Fine is a Feoffment of Record, and works not by Way of Fraction, but shall carry the whole Estate, which is an Answer to what was objected, that the Fine should not wholly loose its Effect, but work upon the Remainder only.

Ch. J. This Case differs from Freeman and Barns's Case, and 'tis very unreasonable that a Fine levied by him, that hath the Inheritance, should bar the Term, which he himself hath created for the Protection of his Inheritance, and let in the Incumbrances. Saffin's Case and Oldford's Case differ from this Case, for in those Cases the Entry was barred.

1 Inst. 112. Estate of Inheritance vests in the Devisee before Entry. A Fine may bar a Term not divested in some Cases, for the quieting of Possessions, where it hath been long dormant. Adjournatur.

## Hitchin *Parish in* Hertfordshire.

3 Mod. 264. Church Rates for Repairs. Chapel of Ease.

Suit in Spiritual Court to compel the Plaintiff to pay a Tax for the Repair of his Parish-Church; he moved for a Prohibition, suggesting that there was a Chapel of Ease within the same Parish, which had parochial Rights, and that he and all those, whose Estate, &c. had, Time out of Mind, paid to the Repair of that Chapel.

Tremain. There ought to be no Prohibition. Hob. . Glasse and Bromny, that it is discretionary in the Court, whether they will grant a Prohibition, or no, in this Case? And there was a Case between Palfry and Brown in Hale's Time, where the Plaintiff in the Prohibition was inforced to try, whether the Chapel had parochial Rights, or no? And it appearing in this Case that the Chapel had been out of Repair for forty Years, and no Divine Service in it for all that Time; the Court deny'd a Prohibition, tho' Chapel-Wardens and other Officers had been yearly chosen.

## Wilkins *and* Wilkins.

CAse. Plaintiff declares, that he being possessed of divers Goods did deliver them to the Defendant, in Consideration of which the Defendant assumed to sell them and accompt for them, and avers, that he did neither sell, which he might have done, nor accompt for them: Defendant pleads in Abatement, that the Plaintiff ought to have brought Accompt, and not Case, for that the Defendant was the Plaintiff's Factor and Bailiff; the Plaintiff demurs.

1 Show. 71. Case to accompt for Goods. Plea he receiv'd 'em as Bailiff, &c. ill.

Case doth not lie, for that we can have no Allowance for Factorage, bad Debts, &c.

Goodfellow contra. Where a Factor makes an express Promise to accompt, Case or Accompt lies. 1 Roll. Rep. 52. Dy. 20. Woodly's Case seems to favour the Plaintiff's Election, to have the one or the other Action. 11 Inst. 172. And the Charge of Factorage shall be recouped in Damage.

Ch. J. It will be inconvenient to permit an Action upon the Case by Reason of the Trouble and Length of Accompts.

Dolben contra. That Case lies, because an Action of Accompt is a tedious and troublesome Action.

Eyres J. Difference where Money is delivered to traffick generally, and where it is to be laid out in particular Commodities.

That the Lord Hale would reject Actions upon the Case, where Matters of Accompt came in Question, but Kelynge Ch. J. did admit it in his Time.

Ch. J. If the Factor had covenanted under Hand and Seal, Covenant would have lain, because that's of a higher Nature, but Case is not so.

Dolben. 'Tis the same Trouble to try Matters of Accompt in an Action of Covenant, as in Case. Adjournatur.

## Lewis *and* Weekes.

DEbt in B. R. upon a Judgment given in the Hundred-Court, the Declaration begins with the Judgment, and doth not set forth the Plaint, and mentions the Judgment to be coram sectatoribus, without naming them; and also it doth not appear in the Declaration, that the Cause of Action arose within the Jurisdiction. There was a Verdict for the Plaintiff, and moved in Arrest of Judgment.

1 Show. 71. On Nil debet pleaded to Debt, on Judgment in inferior Court, the Plaintiff's not shewing any Proceedings, only recuperasset good after Verdict.

Ch. J. The not Shewing the Plaint, which was in the inferior Court, is aided after Verdict; secus upon Demurrer, and so of the

the other Exceptions: And as to the Objection, that it appears not that the Cause of Action arose within their Jurisdiction, that shall be intended to have been given in Evidence. An Executor brings Debt for Rent-arrear in his own Time, but sets not forth what Estate the Testator had, yet help'd after Verdict. 1 Sid.

Eyres accord'. Altho' it be an Intendment of the Title. As to the Cases in Mirror, cap. 1. Sect. 3. and 2 Cro. 184. Noy 125. they are not after Verdict.

Cur'. The Statute 16 & 17 Car. 2. helps all after Verdict, where the Right hath been try'd.

Judgment pro Quer'.

## Short *and* Maynard.

Award Bond. Post.

DEbt upon a Bond to perform an Award, the Submission was of all Matters to the Time of the Award: The Award being made in October, was that one of the Parties should release all Actions in December following; yet per Cur', it is good, unless it be shewn that some new Cause of Action interven'd, and Judgment pro Quer' sur Demurrer.

## Dogget *versus* Roe.

Hab. Fac. Possession. de novo.

FUit ruled sur Motion, That if the Sheriff doth not return an Habere Facias Possessionem, the Plaintiff may have a new Habere Facias Possessionem. And if a Man be put in Possession by Virtue of such a Writ, and after be disturbed by Violence, an Attachment may be granted, for 'tis a Contempt to this Court. And because the Justices of Peace would not relieve the Party, that complain'd of such Disturbance, they were ordered to attend the Court.

## Young *versus The Hundreds of* Sarum, Totrum, *and* Mudbury.

1 Show. 60. Stat. of Winton. Hue and Cry, Robbery. Vide Post.

IN an Action on the Statute of Winton after a Verdict for the Plaintiff it was moved in Arrest of Judgment: 1. That it is not said in the Declaration, that the Robbery was committed in the Highway, but only prope the Highway.

2. 'Tis alledged to be apud quendam locum prope faire mile gate infra Hundred' præd'. And Hundred' præd' refers to fair mile Gate, and not to the quendam locum, so that it doth not appear that the Robbery was within the Hundred.



3. 'Tis

3. 'Tis not averr'd that the Robbery was in the Day-time.

Cur'. To the first, it is Matter of Evidence, and after a Verdict it shall be intended to have been given in Evidence. 2. Hundred prædict. refers to both. 3. It needs not to be averr'd to be in the Day-time: And Rastal and Co. Entr. do not mention it to be in the Highway, or in the Day-time.

Judgment pro Quer'.

## Shuttleworth *and* Garrett.

INdebitatus Assumpsit against an Executor for a customary Fine to be paid on the Death of the Lord, and it is laid two Ways. 1. On a Promise of the Testator generally. 2. On a special Promise by the Testator to pay.

Indebitatus Assumpsit lies for a customary Fine due to the Lord of a Manor.

Thompson moved in Arrest of Judgment, (the last Term) that the Action did lie.

That this Fine don't arise by Contract of the Party, but by Custom out of the Land, and Customs for Fines vary.

That this is not like a Fine of a Copyholder, but is due on the Death of the Lord, and ariseth in Respect of the Tenure, and may be compared to Relief or Aid to marry his Daughter, &c. for which Case doth not lie. Jones 329. 2 Cro. 598. that Case don't lie thereon, because it savours of the Realty.

An Indebitatus Assumpsit don't lie on a Policy of Assurance or Bill of Exchange. That no Indebitatus Assumpsit lieth where the Cause of Action is grounded on a Custom.

Hoyl contra. Debt lieth for a Relief, for it's like a Flower fallen, and Relief doth not savour of the Realty, for then Debt would not lie during the Continuance of the Inheritance.

If the Fine had not been reasonable, or the Term ended, this would have appeared upon Evidence, and is good after Verdict; otherwise it seemeth on Demurrer. Indebitatus Assumpsit for Rent is good after Verdict, for the Court will intend an express Promise. An Indebitatus Assumpsit lieth for the Fine of a Freehold-Lease; and so for the Purchase-Money of Land, and our Case is not so strong, as the Case of Rent, for here is no real Contract. Debt lies for the Fine of a Copyhold.

Holt. It doth not follow that an Indebitatus Assumpsit lies, because Debt lies; where Wager of Law doth not lie, there an Indebitatus Assumpsit don't lie, and it is mischievous to extend it further than Slade's Case; for an Indebitatus Assumpsit is laid generally, and the Defendant can't tell how to make his Defence, but Debt is laid more particularly. Post.

Dolben. It is no Mischief, for a Tenant knows the Custom, and the Plaintiff cannot recover more, than he proves to be due by the Custom, and an Indebitatus Assumpsit lieth for a Relief.

Holt.

Holt. An express Promise to pay Rent due will not alter the Nature of it, so as to intitle the Party to have an Indebitatus Assumpsit: But to that Dolben J. answer'd, that it was otherwise adjudged in this Court in Hale's Time.

Now, (this Term) by three Justices against Holt. It was adjudged that an Indebitatus Assumpsit lieth for the Lord of a Copyhold Manor for a customary Fine.

2 Ven. 292. S. C.

Sarsefield *and* Witherly. Ante . *At* Serjeants-Inn *in* Fleet-street.

Bill of Exchange indors'd, &c. yet the Drawer liable.

ASsumpsit upon a Bill of Exchange drawn by the Defendant being beyond Sea upon a Merchant in London: The Declaration sets forth the Custom of Merchants, that if a Bill of Exchange be refused and protested at the End of two Months, that the first Drawer is chargeable, &c. And shews how the Bill came to him by mesne Indorsements, averring that the Defendant drew this Bill, and that the same was refused: And that he protestavit, seu protestari causavit, the said Bill at such a Time, which was after the two Months, &c. The Defendant pleads that he was no Merchant, and traverseth the Custom, that the first Drawer is liable to the Action of the Assignee of the Bill, &c. Plaintiff demurs, and shews for Cause that this Plea amounts but to the General Issue, and that he cannot traverse the Custom, because 'tis the Consequence of the Assumpsit; and to maintain the Demurrer. 3 Cro. 201, 250. was cited, that the Consideration of an Assumpsit is not traversable, because it amounts but to the General Issue. (Nota, This is true of a Consideration executed, not of a Consideration executory as the Diversity was cited, is in 3 Cro. supra.)

Pleas amount to the general Issue.

Hoyle contra. In many Cases one hath Election to plead a Matter, or give it in Evidence. Dy. And this is a special Action, and in it the Consideration is traversable, for it is material; but I agree, that in a general Indebitatus Assumpsit, the Consideration is not traversable.

What to be pleaded and what evidenced.

Ch. J. Pollexfen. It may be either pleaded specially or given in Evidence, and that to avoid the Involving a great deal of Matter in the Issue.

Another Exception to the Plea was, That the Defendant cannot plead that he was no Merchant, for the very Taking up of Money and Drawing a Bill makes him a Merchant to this Purpose.

Ch. J. Pollexfen. It is a merchandizable Act, and hinders him from Pleading that he is no Merchant; also the Custom is laid for Merchants and other Persons negotiantes.

Hoyle insisted, that the Declaration is not good. 1. Because the Time of protesting is laid by the Custom to be at the End of

two Months, and the Plaintiff hath alledged the Protesting to be after the End of two Months, and so hath not pursued the Custom. Sed non allocatur.

2. 'Tis protestavit seu protestari causavit, which is uncertain; sed non allocatur, for if he had pleaded Quod protestavit, he might have given in Evidence that the Publick Notary did it: As if A. and B. be bound to pay at such a Day jointly and severally; in an Action against A. he pleads solvit ad diem, he may give in Evidence that B. paid it, per Ch. J. Pollexfen; And the Judgment was reversed, for that he is a Merchant by the Taking up of Money and Drawing the Bill.

## Durdant *and* Burchet. (Burchet *versus* Durdand. 2 Ven. 311.) *At* Serjeants-Inn *in* Fleet-street.

ERror out of the King's Bench in Ejectment. It was found by Special Verdict to this Effect, That A. seised in Fee made his Will, and the Clause of it, which made the Case, was, I devise to my Cousin H. during the Life of J. all my Lands upon Trust, that I shall enjoy the Profits of them during his Life, and after his Decease to the Heirs Males of J. now living, or such other Heirs Male or Female, as he shall have at the Time of his Death. J. hath a Son at the Time of the Devise, and whether this Son takes by Purchase was the Question?

Of contingent Remainders and Estates executed.

Hæres viventis.

Treby. The general Question is, whether the Fine and Surrender destroy the Remainder to the Heirs Male of R. D.

2 Vent. 311. 1 Vent. 334. Raym. 330. 2 Jon. 99.

2. If the Remainder to the Heirs Male of R. D. then living, vests in the Son, or if it be a contingent Remainder.

Obj. That the Words, then living, is a Designation of a particular Person.

Answ. I deny it, for it is a Contingency, and the Son then living took not presently, but such Son, as was alive at the Father's Death, so of a Devise to the next of the Name of the Testator.

Four Things are to be consider'd in this Will.

1. The Word (Heirs).
2. The Words (now liding).
3. The whole Clause together.
4. The Intent of the Devisor upon the whole Will.

To the first; Heir, is one that succeeds to the Right of Blood of his Ancestor; we have no adopted Heir in our Law; and since Bracton's Time, the Rule hath been non est hæres viventis. There is no Instance of an Heir's Taking by Purchase, in the Life-time of his Ancestor, by Devise.

To the second, (now living) If those Words cannot subsist they must be rejected, they make the Absurdity and Intricacy.

Inst. 27. One deviseth Gavelkind Land to his eldest Heirs, the Law rejects eldest. Devise to his Executors, when the Party is alive, is void. So if Devisee had no Heir Male then living, such Words had been void. Hob. 65. Green's Case.

Obj Hæres sometimes denotes a Person during the Life of his Ancestor, as in the Statute 25 Ed. 3. of Treason; and in an Action of Trespass Quare fil' & hæredem rapuit.

Answ. This is an improper Sense, and that it ought to be taken in the aforementioned Sense. Vide Fleta, lib. 3. cap. 8. Quod nomine hæredes omnes hæredes comprehenduntur nati & nascituri. Inst. 20. b. accord'. Here (Heirs now living, and such other as he shall have) do no more denote a certain Person, than the Nati & Nascituri in Fleta, or the Procreati and Procreandi in 1 Inst. 20.

To the third, (Heirs) being in the plural Number, it cannot be restrain'd to a particular Person; tho' Heir comprehends Heirs, yet Heirs cannot be restrain'd to a single Heir only; also this is a Devise in Remainder; but I agree, if it had been of a present Estate, it had been more reasonable to have strain'd it to the Construction they would now make of it, for in that Case, without such Construction, it could by no Possibility take Effect.

As to the Writ of Trans' quare fil' & hæred', &c. that of Necessity must be understood of an Heir apparent. If we construe (Heirs now living) to be a Designation of the Person of the eldest Son, yet to help the Defendant it must be construed likewise in the plural Number, for that the Tail is now spent, so (Heirs) must first be taken for (Heir) and then that (Heir) shall include Heirs. All Words ought to have a certain Signification, that Deeds and Wills may be certain, and this is the Reason of the Law in affixing a certain Signification to Words.

In Wills we must not expect Cases exactly to quadrate; but I shall cite some Cases that come very near to the Reason of this Case. Perk. Sect. 506, 507, 508. Dy. 333. b. Chapman's Case, 2 Leon. 70. that to the next, that are of the Name and Blood, makes an Estate-tail. Hob. Counden and Clerk's Case, 1 Co. 66. 3 Cro. 453. 2 And. 37. Archer's Case, 3 Cro. 453. Sid. 193, 194. 2 Sid. 23, 51. 148. Devise to the Heir of his eldest Brother (who was an Alien), and the Devise rather adjudged void, than that it should be construed a Designation of the Person.

To the fourth, The Intention of the Devisor was, that it should be a contingent Remainder to H. for if he had otherwise intended, he would have call'd him by the Name of Godson or Heir.

That the Words (such other) are relative, which shews that (Heirs) mentioned before were not intended to denote a Person in certain; and according to the other Side, the Words, such

Heirs, &c. must be intended of proper Heirs, else there can be no Estate-tail.

Another Reason why he devised it to H. during the Life of J. was to support the contingent Remainder, for there can be no Reason given for this, if he had not intended it to be a contingent Remainder.

Summers contra, pro Defendente in Error.

The Devise is to the right Heirs of J. now living, and such other Heirs Male and Female hereafter to be born.

Eldest Son in common Parlance is Heir, as in the Writ of Ravishment of Gard Quare fil' & hæred', &c. In trans' quare consanguineum & hæred', &c. Nullus hæres viventis means no more, but that he cannot succeed to the Inheritance; but in legal Proceedings, where the Father and Son are named together, he is named Heir. Vide the Case of Pybus and Mitford. Covenant to stand seised to the Use of the Heirs Males of the Body of the Covenantor, and of his Wife Jane; the Covenantor had a Son by his former Wife, yet it was resolved that the Son by Jane took by Purchase in B. R. in Hale's Time.

If the Word Apparent had been in the Will, it had been clear for us; and the Words (now living) are as strong and as plain a Designation of the Person.

Obj. That it is (Heirs) not (Heir) and so not intended to describe a particular Person.

Answ. The Words (now living) make it as clear, as if it were (Heir). Lease for Life, Remainder to the present Heirs Males of J. S. If J. S. die, leaving one Heir only, he shall take.

There is no such nice Description requisite in a Will, as a Devise to J. S. my Son (the Devisor having two Sons of that Name) is good. Lord Cheney's Case.

A Devise will carry an Estate by Implication; as a Devise to A. after the Death of his Mother. So cross Remainders are good by Implication, as to two Sisters, and if they die without Issue of their Body, the Remainder over is an Estate-tail by Implication. Hob. 32, 33. A Devise to a Stock or House is good. Rex and Mellin in B. R. in Lord Hale's Time, Issue and Heirs were resolv'd to be all one in a Will; and if it were to the Issue Male now living, without Doubt it would be an Estate-tail.

The Words (now living) are not to be rejected: We cannot construe it to be a contingent Remainder, for that is never done but in Case of Necessity.

Obj. That if he take it, it must be only for Life.

Answ. The Word Heirs is not only a Description of the Person to take, but also a Limitation of the Estate to be taken: That the Word Heir comprehends all Heirs in infinitum. 2 Roll. Tit. Parols 253. 1 Co. Archer's Case is not like the Case in

Roll, there the Intent that the Father should take nothing appears, for 'tis to the Heirs of the Body of such Heir, but not so in Roll.

The Words (now living) restrain to the first Person. Inst. 29. that Heir includes Heirs.

Here we are in Case of a Will, where precise Words are not requisite, which is inforced by the Words (And for Want of such Heirs, to such Heirs Males and Females, &c.)

Construction ought to be made according to the Intent of the Devisor. 2 Cro. 448. 9 Co. Sunday's Case, that doubtful Words of Limitation in a Will may be help'd by the subsequent Words.

Obj. The Cases in Leon. Hob. and Perkins ante.

Answ. The Words (now living) distinguish our Case from those, and this Case is of a Will.

Obj. Dy. . Chapman's Case.

Answ. That Case is for me, for there 'tis a Devise to the next of the Name, &c. which is no better Description than (Heirs now living): And in Dyer those Words make an Estate-tail a fortiori in our Case.

Pollexfen Ch. J. If it were (Issue Male now living) tho' in a Deed, it had been good, as a Lease for Life, Remainder to the Issue Male of B. then living, B. having but one Son, he shall clearly take.

Sir Robert Atkins. The Words now living, differ not from the Word (procreatis), the Intent of the Devisee was to respect him, who should be Heir at the Time of his Death.

Pollexfen. Here Necessity occasions contingent Remainders.

Adjournatur ad prox' Term' pro ulterior' Argumento.

Vide 2 Ven. 311. Adjudged, that the Son born at the Time of the Death of the Devisor took a Remainder in Tail by Purchase, and the Judgment given in B. R. for the Plaintiff there was affirmed in the House of Lords.

## Edleston *versus* George Speak *alias* Petty.

3 Mod. 258. 1 Show. 89. A good Will not to be revoked by any subsequent Writing, unless that also be a good Will.

A Trial in B. R. for a great Estate in Wiltshire, which the Plaintiff claim'd as Heir at Law, and the Defendant by a Will: The Plaintiff, in proving his Pedigree, would have given in Evidence the Answer of an Infant by his Guardian to a Bill in Chancery (which was admitted on all Sides to be no binding Evidence) but the Court doubted whether it should not be read as Evidence, and the Credit of it left to the Jury, and the Defendant's Counsel insisting strenuously that it ought not to be read; Eyres J. went to the Court of Common Pleas to

know their Opinion, and all the Judges there were of Opinion that it could not be read: Then the Plaintiff gave in Evidence, that at a Trial between the Defendant and J. N. the Defendant had given in Evidence a Deed — comprehending that, &c. but the Defendant's Counsel said, that it could not be now given in Evidence, that the Defendant at another Trial had given such a Thing or Deed in Evidence, because the now Plaintiff was no Party to the former Trial: And Finch said, it is a constant Rule in Case of Depositions, that the Advantage of 'em is mutual, if they can't be read on the one Side, they shall not be read on the other; but here that, which was given in Evidence at the Trial between the Defendant and J. N. is no Evidence against the now Plaintiff, and therefore it shall not be Evidence against the Defendant, but per Curiam, the Reason that Evidence given at one Trial can't be Evidence at another, unless it be between the same Parties, is, because they are Strangers to it; but in this Case the Defendant was a Party, and likewise hath the Deed in his Custody, and if the Witnesses don't recite it truly, he may produce the Deed and satisfy the Court, but the Deed is not in the Plaintiff's Power, and so the Evidence was admitted.

The Plaintiff having proved his Pedigree, the Defendant produced the Will of Dame Ann Speak, whose Title was admitted, whereby the Lands in Question were devised to him, on Condition that he should change his Name from Petty to Speak, and the Will was published and executed according to the Statute, but one Butter, one of the Witnesses to this Will, swore that he was also a Witness to another Will of the said Dame Speak, which was made afterwards, but that one Redman tore off the Witnesses Names, and shew'd him his own Name, and then threw a Paper into the Fire, and told him that was the Last Will of the said Dame Ann, and so the Paper was burnt, whereupon a Question arose, but it was not debated, whether the said Will so burnt was a Revocation of the former, forasmuch as the Contents were not known, which is a like Point with that in Basset and Nosworthy's Case; and a young Woman swore there were two or three other Wills, that were later than that produced by the Defendant, and that she was a Witness to them, but did not know what was become of 'em: But in short, a subsequent Will was shewn, wherein there was a Disposition of the same Lands to the same Person, under the same Condition of changing his Name from Petty to Speak (which shew'd the Testatrix's Mind was not alter'd, but there was a Clause of Revocation of all former Wills in it, and it appear'd that the Witnesses to it were directed by the Testatrix, who was sick, to go out of the Chamber into the Hall, which they accordingly did, and there they subscribed their Names, and it appear'd on the

Evi-

Evidence that there was a small Space between the Hall, and six Steps, which lead to the said Chamber, in which the Lady was, so that she could not see the Witnesses subscribe, &c. unless she went to the Chamber-Door, and put one Foot out, and one of the Witnesses swore the Lady sate in her Chair next the Fire all the Time, and did not move towards the Door, and altho' the Case of Sir George Shier's was urged, which was thus, Sir George being in his Bed, and the Curtains drawn, the Witnesses to his Will came into a Room next adjoining, and there subscribed, &c. but between Sir George's Chamber and the Room, where the Witnesses subscribed, &c. there was a Pair of Glass-Doors, and two or three Pains in it broke, so that if Sir George had look'd that Way, he might have seen 'em subscribe thro' the Holes in the Glass-Door, and that was adjudged a good Subscription in the Presence of the Testator, within the Statute of Frauds, &c. and it was not proved that Sir George did undraw the Curtains or look that Way; but there was a Difference between the Case at Bar and Sir George Shier's Case, for in our Case the Testatrix could not have seen the Witnesses, altho' she had look'd that Way: And Eyres J. said, that Presence shall be understood View, so that this Will, in the principal Case, not pursuing the Method appointed by the Statute, was adjudged void to pass the Lands: But the Plaintiff's Counsel would have it to be a good Revocation, tho' not a good Will especially, it containing a Clause of Revocation of all other Wills; however, the Court seem'd to be of Opinion, that a Revocation ought to have the same Ceremonies, as a Will, altho' in the Clause of the Statute concerning the Revocation of Wills, the Signing and Subscribing of the Witnesses is not required to be in the Presence of the Testator, for the Statute takes equal Care to prevent Fraud, &c. in the Revocation of Wills, as in the making of 'em: And in this Case the Disposition of the Estate is the same with that made in the former Will, so that the Testatrix did not intend it should be a Revocation, unless it should be a Will also, and the Clause of Revocation (as Eyres said) is but a Scrivener's Form.

And a Special Verdict was found.

No Mandamus to enforce the Spiritual Court to execute their own Sentences.

Tremain moved for a Mandamus to the Spiritual Court to compel 'em to put their Seal to Letters of Administration, they having decreed Administration to his Client: The Case was thus, viz. the next of Blood refusing to take Administration, the Ordinary decreed it to the principal Creditor, according to the Custom of London; but because the Creditor would not enter into a Bond to pay all Debts, as well of Record, &c. as Debts on simple Contract, equally pro rata, they refused to put their Seal to the Letters of Administration: But a Mandamus was



denied,

denied, and the Court said, they could not oblige the Spiritual Court to execute their Sentences, if they would not themselves.

*The Case of my Lord* Lovelace *Chief Justice in Eyre, and several, that had made Destruction in the Forrest of* Dean.

They appeared by Habeas Corpus cum causa, and the Cause of their Commitment appeared to be upon the Warrant of my Lord Lovelace, Chief Justice in Eyre of the Forrest, which was sent and executed by a Messenger, upon their having Wood and Timber of the Forrest found in their Yards.

Inferior Jurisdiction, Chief Justices in Eyre of Forrests, can't commit before Presentment at a Swanimote.

Powel Serj. for the Prisoners. By the Charter de Forresta, and 1 E. 3. c. 8. and 7 R. 2. cap. 4. No Man shall be imprison'd before a Presentment at the Swanimote, and the Chief Justice in Eyre is within those Statutes, and restrained thereby from imprisoning, and he cited Register de B. 80. Fitz. Nat. Br. 67. C. to the same Purpose.

Attorney-General contra. The Commitment is good, I agree, the Statutes and the Books cited are of Writs grounded on the said Statutes, but those Statutes do not extend to restrain the Chief Justice in Eyre, who is the supreme judicial Officer, but those Statutes intend to restrain the ministerial Officers, as Forresters, Warders, &c. and they, 'tis true, can't imprison before Presentment by the said Statutes.

This Commitment is also good, because it appears by the Return, that they were taken in the Manor, viz. Timber, &c. of the Forrest was found upon them: The Body shall be taken immediately upon assarting, and the cutting down Timber and Wood of a Forrest is an Assarting. The Difference between the Power of the Chief Justice, and the ministerial Officers of the Forrest is like that, which is between a Justice of the Peace and a Constable; the Peace is broke scilt', the Constable, if the Peace be broke in his Presence, may seize and carry before a Justice of Peace, but can't commit; but a Justice of Peace may commit in such Case, and that notwithstanding there wants such a particular Power in his Commission. 1 Roll. 534. Chief Justice in Eyre may commit out of Court, and the universal Practice, which is the best Interpreter of an antient Statute, agrees with it.

Holt Ch. J. The Statutes cited, 'tis true, doth not exclude the Chief Justice in Eyre from committing, 'till Presentment by express Words; but yet he is within the general Words of 'em. Nota, The Words of 1 E. 3. 8. Church-warden, and other Ministers,

sters, the Words of 7 R. 2. are, None shall be taken by any Officer of the Forrest.

Eyres J. An Excuse or Justification of an Imprisonment ought to be shewn by the Party committing, if the Forrest Law justifies the Commitment. 3 Leon. 218. Russel's Case; and I conceive clearly, that the Chief Justice can't commit, but only where the Party is taken in the Manor, scilt' with bloody Hands or with Venison in the Forrest, or in the Act of cutting down Trees, &c. but if Timber be found in my Yard, which was cut in the Forrest, that is not in the Manor, to which Dolben J. and the rest agreed.

Pemberton Serj. said, altho' one be taken in the Manor, yet the Chief Justice in Eyre can't commit, for he can ground his Warrant on nothing but a Presentment, but Holt thought he might on Oath made, that was taken in the Manor. It was likewise agreed by all, that it was irregular, in as much as that he sent a Messenger with the Warrant (I conceive by Reason of the Statute R. 2. none shall be taken by any Officer, &c. (but the Judges did not declare wherefore) And per totam Cur', the Warrant is illegal.

Attorney-General objected, that it was not, and that they ought to sue out their Writ of Mainprize; yet afterwards the Court discharged the Prisoners.

## Shorter *versus* Friend.

3 Mod. 283. 1 Show. 158. Proof by one Witness, refused in the Spiritual Court, ergo prohibited.

A Prohibition to the Spiritual Court was moved for, upon their refusing to admit Proof by one Witness, of Payment of a Legacy.

Holt. We will not grant a Prohibition. Dolben contra. Because one Witness is sufficient in our Law.

Eyres. It hath been often deny'd, because the Conusance of the Cause doth originally belong to the Spiritual Law; and if you are grieved, you have your Remedy by Appeal.

Dolben. That's no Remedy at all, because those, that you are to appeal to, judge by the same Law, and will refuse your single Witness; and so a Man may be compelled to pay twice, and in such a Case a Prohibition was granted upon solemn Debate in the Time of my Lord Hale.

Upon a second Motion it was ruled, that the Party should declare upon the Prohibition, that the Point might be settled. Vide Hob. 188. that there shall be a Prohibition, but vide the latter Cases contra.

Statute of Winton. Ante .

In an Action on the Statute of Hue and Cry against the Hundred. Tremain moved in Arrest of Judgment, that the Declaration was ill, because it concluded contra formam Statuti. Whereas

as there are two Statutes, viz. Winton, and that of Elizabeth. Sed non allocatur, for the Action is grounded solely upon the Statute of Winton, and that of Eliz. is but directory.

2. Exception. That the Declaration is above a Year after the Robbery.

Cur'. That's well enough, if the Original be brought within the Year, for perhaps the Defendant hath stood out Process, and so may keep the Plaintiff above a Year before he can declare against him.

## Rice *versus* Pidgeon.

A Writ of Error out of the Marshalsea, upon a Judgment there in Case, for Words brought by a Butcher, who (in his Declaration) lays a Colloquium of the Plaintiff, & de una quarta parte Vaccæ Vendibili; and that the Defendant said, that the Cow, of which the Quarter was part, died of Calving, per quod he lost his Customers, and the Plaintiff had Judgment. Words of a Butcher.

The first Error assigned was, that there wanted an Averment, that the Cow was dead; and Dolben J. said, there ought to be such Averment: But 3 Cro. 832. was cited to the contrary. Declaration ill.

Dolben J. It hath of late been ruled contrary to that Case that there ought: As if an Action be brought for these Words, A. kill'd B. there ought to be an Averment that B. is dead. 1 Sid. 51, 52. cited to the contrary.

Cur'. The laying Loss of Customers is too general; but if it had been laid, that he did expose a Quarter of a Cow to Sale, and by Reason of those Words he lost the Sale, then it would have been actionable; but as it is now laid, it is not, and therefore the Judgment was reversed.

## Gibb *versus* Tisom.

A Writ of Error out of the Court of York. The first Error assigned was, because the first Process was a Capias, and no Summons: But upon View of the Record, it appeared there was an Attachment returned the same Day immediate. Cur'. That's good enough. Inferior Courts, Judgments there.

2. Error. The Declaration is against the Defendant as in Custody, whereas it appears that he was bailed.

Cur'. In Custodia is Surplusage and ridiculous, but no Error; and Judgment affirmed.

## Trevilian *and* Seacomb.

1 Show. 80. Several Outlawries pleaded, makes it double. Q.

SEveral Outlawries were pleaded in Abatement, upon which the Plaintiff demurr'd.

This Plea is good, for altho' a Man can't plead double Pleas in Bar, yet he may plead several dilatory Pleas. 1 Inst. 304.

Ch. J. That Book is to be intended of several Dilatories at several Times, and one after another, but not at the same Time, but Tremain cited Vaughan's Case, Pasch. 25 Car. 2. R. B. Rot. 25. that several Outlawries may be pleaded at the same Time; but per Cur', the Plea is ill, for the Doubleness and Judgment was given for the Plaintiff, Nisi, &c.

Outlawry sub sigillo.

Nota. Ch. J. said, It was not necessary to plead an Outlawry to be under Seal, for it was sufficient, if it be produced under Seal.

## Brandley *and* Milbank.

Obligor joint and several.

ERror on a Judgment in C. B. The Case was, A. and B. enter into a Bond jointly and severally, in which they bind themselves, their Heirs, &c. A. dies. In Debt against his Heir he pleads that B. solvit ad diem, and it is found against him, and Judgment enter'd generally, Quod Quer' recuperet debitum.

Judgment against the Heir general or special.

Hoyl assign'd for Error, that there ought to be a special Judgment, and not a general one. 1 Cro. 437. Poph. 153. Jones 88. but admitted that Plow. 440. Davie *versus* Pepys is, that there shall be a general Judgment; but the Cases before cited, and several others, are contrary to Plow'.

Curia. The Judgment is good, and if it had been as Hoyl would have it, it had been ill. Vide 2 Roll. Tit. Heir, that there ought to be a general Judgment in such Case, unless the Plaintiff prays a special Judgment.

And the Chief Justice said, as to Bowyer's Case in Poph. that was in a Plea to a Scire Facias, and in that Case there shall not be a general Judgment, because he is there charged as Tertenant; and the Reason of the Difference between the Pleas of an Executor and an Heir, is, because the Heir and the Land are bound by the Bond, but not the Executor; so Judgment shall be general on Nihil dicit by the Heir. And Judgment was affirmed, Nisi, &c.

But Dolben hæsitavit.

## Lee *versus* Bashpole.

Assumpsit, in Consideration that the Plaintiff having a Debt due to him from J. S. a Stranger, had forborn to sue him at the Defendant's Request; the Defendant, for the Consideration aforesaid, promised to pay, &c. and did not set forth the Place, where he had forborn, and therefore it could not be tried: There was Judgment by Default in C. B. and upon a Writ of Error in B. R. that was alledged to reverse the Judgment; but per Curiam, it is sufficient, for the Consideration being pass'd, it is not traversable, and therefore it is not necessary to lay a Place, but the Defendant ought to take Advantage at the Trial on Non Assumpsit, if there was no Consideration.

Consideration past not traversable in Assumpsit.

2. This Promise don't appear to be by Writing, and then, by the Statute of Frauds and Perjuries, it don't bind the Defendant, because 'tis for the Debt of a Stranger.

Curia. This is never done in Pleading, but ought to be proved on the Trial.

Plea or Proof.

And the Judgment was affirm'd.

## Duppa *versus* Gerard.

Debt for Fees of Knighthood, and the Plaintiff intitul'd himself as Gentleman Usher to the King, attendant on the King, and set forth a Custom to have 5 l. of every one, that is made a Knight, Judgment pro Quer', and it was said by the Chief Justice, that it was so adjudged lately in C. B.

1 Show. 78. Debt for Fees of Knighthood.

Nota. It was alledged that Gerard was made a Knight voluntarily.

## Coleman *versus* Sherman.

A. B. and C. in Consideration of such a Rent reserved by a Deed-Poll concesserunt & dimiserunt to the Plaintiff, and on this Covenant in Law the Plaintiff brought an Action against A. and assigned for Breach, that A. and another by his Command, enter'd on the Plaintiff; and he shew'd further, that A. B. and C. had nothing, but that one D. was seised in Fee: The Defendant comes and traverses absq; hoc, that A. and another by his Command, enter'd; to which the Plaintiff demurs.

1 Show. 79. A. and B. Dimiserunt, a joint Covenant in Law.

Gold pro Quer'. 1. The Traverse is ill, for it ought to be absq; hoc, that A. and another, or either of them, enter'd. It is objected, that it is a joint Covenant, and therefore not well

brought against A. only. Answ. If it had been on an express Covenant, it had been joint, but here it is on the Covenant in Law; the Breach is also assigned in an Act of the Defendant himself: And whereas it is objected, that it shall be intended to be joint by Reason of the Word (Demise) he said, so it should be in Ejectment, but not in Covenant.

Darnel contra. An Action of Covenant on a Covenant in Law doth not lie, unless there be an Estate to fix it to; but here the Plaintiff hath shewn that the Defendant hath no Estate in the Land demised, and tho' it might be good by Indenture, by Reason of the Estoppel, yet not here, being by Deed-Poll.

Note. Holt. Clearly, Covenant lies on the Word (dimisit) Hob. . Holder *versus* Taylor, Fitz. Nat. Br. Tit. Covenant, that an Action of Covenant lies on a Covenant in Law, altho' there be no Estate, if the Covenantor himself enters, and he cited Treport's Case. A. and B. join in a Lease by the Word (Demise) B. hath nothing. An Action of Covenant don't lie against B. if A. hath a Title to demise (to which it was said, that in the principal Case none of the Lessees had any Thing). Ch. J. Then an Action ought to be brought against 'em all together.

Gold. The Breach being laid on a personal Act of A. is good against him only; and the Ch. J. agreed, that a Covenant, which is joint in it self, shall be taken severally, when the Breach assigned is a separate Act of one of the Parties: But A. the Defendant traverseth his Entry, which is good, altho' it be absq; hoc, that he and the other, by his Command, enter'd, and doth not say nec aliquis eorum.

Traverse on a general and special Plea differ. Gold insisted, that those are several Breaches, viz. the Entry of A. and the other; but Curia contra, that it is but one Breach and the Traverse good; and the Chief Justice took this Difference, viz. in a special Plea, as here it is not necessary to traverse, nec aliquis eorum; otherwise on a general Plea, as in Debt on a Bond against two, quod non solverunt, it is necessary to say, nec aliquis eorum; so in Waste non fecerunt vastum, nec aliquis eorum, &c.

## *Rex versus* Fairfax.

3 Mod. 269. 1 Show 76. Order of Sessions to take an Apprentice in Husbandry. An Order was made by the Justices of the Peace, at their Quarter-Sessions, to compel a Man to take an Apprentice.

Powel Serj. moved to quash it, because Justices of the Peace have no such Power: The first Statute concerning this Matter is 5 Eliz. c. 4. sect. 25. and then 43 Eliz. c. 2. sect. 5. as the Justices shall see convenient, and these Words (if any) enable the Justices, but those Words do not; for the Statute 1 Jac.

c. 25. sect. 23. had been needless, if the 5 Eliz. or 43 Eliz. had given such Power before. I confess the general Practice is against me, but that seems to be founded on the Resolution of the Judges mentioned in Dalton; but Twisden J. said, there never was any such Resolution. Obj. That if the Justices have no such Power, that Law will have no Effect. Answ. The Churchwardens may raise a Stock to put out Apprentices, and with that the Justices may put 'em to such Masters, as consent to take 'em; and he said, that such a Power in the Justices would be inconvenient, for a poor Lad may be forced on a Merchant, Attorney, &c. who shall have no Security, that a Thief, Enemy, or infectious Person shall not be put upon him. Vide Pine's Case 29 & 30 Car. 2. B. R. by the Advice of all the Judges, that Justices of the Peace have no such Power.

Somers Solicitor General contra. He insisted on the common Practice ever since the Statute, and cited Sid. 99, 411. and the Clause of the Statute for raising of Money was, that they should do it where none in the Parish were able to take the Apprentice without.

Ch. J. The Raising of a Stock seems to import, that the Master should have something with his Apprentice; and the Inconveniences afore-mentioned will follow, if it should be otherwise.

Per Dolben. An Alderman or Merchant may employ such Apprentice in his Kitchin.

Ch. J. He must be bound to a Trade.

Dolben. Husbandry is no Trade, yet they are often put to Husbandmen, and it shall not be presumed, that Church-wardens, &c. will put Rogues or diseased Persons upon any Man. Vide the Case of the King *versus* Jellifer, in Chief Justice Foster's Time, and the Course in Chief Justice Mountague's Time: And as to what my Brother Powel said, that the Practice was founded upon the Resolution of the Judges, in Dalton Justice, Cro. and Hutton, in their Circuit delivered their Opinions, that the Justices of Peace had such a Power, which is much antienter, than Dalton. And as to Pine's Case, several of the then Judges told me, they were of Opinion contrary to what Twisden reported to the Court.

Gregory J. The Justices of the Peace have such a Power, and, if a Master happens to have an ill Apprentice, he hath his Remedy by Appeal to the Sessions: And the Inconvenience would be great to interpret the Statute so, as to give Power to the Justices of the Peace to raise Money to put out the poor Children, for then they might raise great Sums, and put them to Merchants, &c.

Eyres J. Where a Statute gives a Power, it gives all Things necessary to the Execution of it; so by giving them a

Power

Power to put out, it gives them a Power to compel the Taking: And so by 3 Justices against Holt (who retained his Opinion) the Justices have such a Power; but the Order was quashed, because it was made originally at the Sessions, where it ought to have come thither by Appeal.

## Broad *versus* Piper.

3 Mod. 268. Mortuaries due by Custom only.

SUit in Spiritual Court for 10 s. as a Mortuary (the Party deceased leaving a personal Estate of 40 l.) And after Sentence there, it was moved here for a Prohibition, upon Suggestion of the Stat. of H. 8. and that there was not any Custom in the Parish to have a Mortuary.

Roe shewed Cause that there ought not to be a Prohibition after Sentence, and especially where the Spiritual Court hath original Conusance of the Cause. Vide 2 Roll. 318. 12 Co. 76. Hob. 79. that where it appears not that the Spiritual Court hath not Jurisdiction, no Prohibition shall go after Sentence, and a Mortuary is of a Spiritual Nature, altho' it be a customary Duty. 2 Inst. 491. Stat. de circumspecte agatis: If one sue for Money due upon a Modus, or for an antient Composition in the Spiritual Court, there shall not go a Prohibition. Hob. 249. 2 Inst. 610. 1 Cro. 237. where the Court was divided. Rast. Entr. . Sid. 263. a Prohibition denied in the Case of a Mortuary; but there the Question was, cui solvend'. Vide 3 Cro. 151. a Prohibition granted where the Suit was for a Mortuary.

The Rule given by the Court in this Case was to declare in a Prohibition, but that the Sentence should stand as to the Oblation (for which there was a Suit as well as for the Mortuary) and the Reason why it was insisted, that the Sentence should stand for the Oblation, was, because for that the Plaintiff should recover his Costs.

## Ingleton *versus* Burges.

1 Show. 27. Trespass, justify for Common of Turbary, Rejoinder, an Estoppel by Verdict.

TRespass for taking Turf and Stone. The Defendant pleaded that J. S. was seised in Fee of an antient Messuage, to which Common of Turbary did belong, and laid a Privilege a tempore cujus, &c. to dig Stone, &c. on the Common, and so brings down a Title from J. S. to him; the Plaintiff traverseth the Prescription, the Defendant rejoins, that in an Action of Trespass brought against him by one of the Plaintiff's Issue was join'd on the Prescription, and it was found against him, and relies on the Estoppel, to which the Plaintiff demurs.

Hooper. That the Plea is ill: 1. Because the Prescription to dig Stones is laid in gross, and not as belonging to an antient Messuage, and then it can't pass to the Lessee by the Lease.

Curia. Altho' it is not said spectan', yet it ought to be intended on the whole Record to be appurtenant.

2. Exception. That the Usage to dig Stones is laid larger than the Prescription, for the Prescription is to repair the antient Messuage, and their Justification is, that they took 'em to repair their Tenement.

3. Exception. That it is not alledged, that there were any Quarries open, which is too large, for thereby they may dig throughout the whole Common.

(The Court inclined that it was ill) As to the Estoppel, Hooper said, they are not favoured in the Law, because they suppress Truth, that no Persons are bound by 'em, but Parties or Privies to the Record. Bro. Estate 14. 33 H. 6. 51, 52. that he being join'd with the other shall be privileged from the Estoppel. Litt. sect. 672.

Tremain contra. That Tenement and Messuage is the same.

Holt. Tenement is larger than Messuage, and if they are employed on the Ground, they are employed on the Tenement, but not on the Messuage.

Tremain. You can't take Advantage of this Exception, because 'tis waved by your going over and traversing the Prescription, as in a Justification for Common, altho' the Defendant doth not say, levant and couchant, yet if the Plaintiff traverseth the Prescription, without taking Advantage of that Fault in the Plea, it is good.

Curia. It is clearly aided by a Verdict, but it is ill in this principal Case, because on Demurrer, and you ought to prove that it is aided by the going over and replying.

Tremain. As to the Matter in Law; that in personal Actions, where the Person is once barr'd by Verdict, he is for ever concluded. 6 Co. Ferrer's Case.

Holt. The Meaning of Ferrer's Case is, that it is a Bar for the same individual Thing; but here is a new Cause of Action. 13 E. 4. 2, 3, 4. there one Trespass is a Bar to another by Way of Estoppel, but that is for taking a Villain, but that is grounded perhaps on the Reason of the Favour of Liberty. 7 H. 6. 8. In Trespass on an Issue, whether such a one died seised, a Verdict was a Bar to another Action of Trespass by Way of Estoppel, because there Issue was join'd on a Matter in the Realty.

As to the Section of Littleton before cited, the joining can't Privilege as a Release by one, who afterwards joins with another, that Release is pleadable to both; if this had been in a real Action, where there might be Summons and Severance, there 'tis admitted it would be an Estoppel.

Hooper.

Hooper. There is a Difference between an Estoppel and a Release, for the first bars the Person from speaking the Truth, but the other doth not.

Dolben J. Ferrer's Case is not like this, for here is a new Cause of Action, a new Trespass; but in Ferrer's Case 'twas another Action for the same Trespass. And the Court was entirely against Tremain.

Contra Pacem of the late and present King.

At another Day Judgment was given for the Defendant, for a Fault in the Declaration, for being in Trespass Quare clausum, &c. tali die & anno Car. 2. with a Continuando to such a Day in the Reign of Jac. 2. it concludes contra pacem Domini Regis nunc, which was ruled ill upon a general Demurrer, for contra pacem refers to the Trespass, not to the Continuando, and then 'tis as if no contra pacem had been at all, which is Substance, and bad upon a general Demurrer. And that it is Substance, is proved by the Stat. 16 & 17 Car. 2. which by express Words aids it after Verdict; so that it appears by this Statute, that it was not aided by Verdict before that Statute, which it would have been, if it had been but Form. The common Way is to conclude tam contra pacem dicti nuper Regis, quam Domini Regis nunc.

## Fitzgerald *and* Clanrickard. Post.

1 Show. 76. Want of Warrant of Attorney, or Admission of Guardian, &c. to be certified, if assigned for Error.

Error in Dower out of B. R. in Ireland, where the Judgment was given by Confession, &c.

1. Error. That there is no Entry of the Admittance by Guardian on the Roll. Bro. Gard. 7, 17.

2. Error. A. B. comes per J. S. Attorn' suum, omitting specialiter admiss' per Curiam (this was on the Plea-Roll.) Old. Entr. 35, 36. 1 Roll. 303. 29 Ass. 67. 4 Co. 53. Hutt. 92. 3 Cro. 158.

Nota. In this Case, on Diminution alledged, there was a Rule of Court certified, that there was an Admittance, ut infra. Mo. 434, 447. Roll. 787. Leon. 164.

Dolben, to the first Error. It appears that she pleaded per Guardianum, and it is certified that there was an Order for Admittance, &c.

Holt, to the second Error. It appears by the Record, that she was admitted, and therefore 'tis Matter of Form only, and it is in Dower, which is favour'd. Vide 2 Saund. 94.

Diminution.

On Diminution alledged, an Order or Rule of Court there was certified of the Admittance, which was, that Ellenor Fitzgerald was admitted by Guardian, whereas the Action is brought per Dominam Ellenam Fitzgerald, which the Court inclined was ill.

Misnomer.

3. Error. The Plea is quod ipse non potest dedicere, which refers to the Guardian, and it ought to be quod ipsa non potest dedicere, &c.

Holt. It is well enough. Eyres. If ipse had been omitted, it had been good, and therefore false Latin in Surplusage will not vitiate.

Holt. Ipse being in alters the Sense, but 'twas admitted by all, that it had been good, if it had been left out.

At another Day Holt Ch. J. said, It is not assigned for Error in this Case, that there is no Admission per Curiam, but only that [specialiter admiss'] is omitted, and that is not Error, if it was so in Fact. Vide Rast. Entr. 366. and Tit. Age 26.

Dolben J. There are several Precedents where 'tis omitted.

Holt Ch. J. On the common Error you can't assign no Admission per Curiam.

Eyres J. In the Resolution of Rawlins's Case, it appears that a Record of the Admission per Guardian', is not necessary.

Motion, that (whereas a Scire Facias had issued out against the Tertenants, on a Judgment, and they had pleaded ne unques seisie, and Issue found against them, and Judgment for the Plaintiff) the Elegit might be stopped on bringing the Money into Court; for if the Elegit were taken out, and the Lands extended, we might have the Lands discharged by Scire Facias, and bringing the Money into Court; granted. The like Motion was lately granted in C. B.

Elegit stopp'd on bringing the Money into Court.

## Wait *versus* Perkins.

PRohibition mov'd for on a Suit in the Spiritual Court, for a Seat in a Church, the Plaintiff suggests that it is an antient Seat belonging to such a House Time out of Mind, &c. And alledged, that Reparation hath been of it by him, and all those, whose Estate he hath in the said House; and Prohibition granted, Nisi, &c.

Suit for Seat in a Church prohibited.

## Dove *versus* Martin.

AN Action of Debt against two, one of the Plaintiffs dies before Verdict, and after the Verdict passed; and then a Motion was made to set aside the Verdict, because the Action was abated; and the Question was, if it can be set aside upon Motion, or whether it ought to have been pleaded in Abatement, Puis darein Continuance?

1 Show. 56. Debt against two, one dies before Verdict, Action abated.

Ch. J. If it be abated, then the Court will set the Verdict aside, but why cannot you bring a Writ of Error, and assign it for Error in Fact, and have it debated on the Writ of Error, whether it be abated, or not? (1 Sid. Worral's Case

Nota, There's a Case in Sid. . where a Difference is taken between an Action founded on a Tort, and one founded on a Contract; in the former Case it is not abated by the Death of one of the Defendants) but it was ruled in the principal Case, that the Verdict should be set aside, nisi causa, and that the Action was abated. Hob. 162, 281.

Amicus Curiæ.

If it be abated, any one as Amicus Curiæ, may move to have the Verdict set aside, even the Defendant himself.

No new Trial, or new Writ of Inquiry for excessive Damages.

Court will not grant a new Trial or a new Writ of Enquiry upon every Excessiveness of Damage, but only where they are extravagantly Excessive.

## Hudson *and* Fisher.

No Prohibition on a Devise of Land.

ONE deviseth Lands and Chattels by his Will to several Persons. It was ruled by the Court, that no Prohibition shall go in any Manner to the Ecclesiastical Court, to restrain the Probate of the Will, for the Probate doth not affect the Devise of the Land, altho' 3 Cro. 346. was objected, to which Holt answered, that it had been adjudged contrary to that Case ever since.

Ante .

Dolben J. First a Prohibition in this Case was granted absolutely, then it was granted only quoad the Lands, but for these many Years last past, no Prohibition at all hath gone.

Eyres J. agreed, and it was ruled that there should be no Prohibition.

## Stephenson *and* Etherick.

1 Show. 63. Plaintiff discontinues after a Writ of Inquiry.

There was Judgment upon a Demurrer, and a Writ of Enquiry was executed and returned, the Plaintiff thinking he had too little Damage given moved that he might discontinue. And 1 Cro. Earl of Oxford's Case, and Leon. were cited by Winnington, that he might discontinue, for the Judgment upon Demurrer is but the Award of the Court, and but interlocutory.

Vide 11 Co. Motralf's Case. If either Party dieth, the Action, after such interlocutory Judgment, abates. Vide 1 Saund. 23. One may discontinue after a Special Verdict.

Thompson contra. Here is not only an interlocutory Judgment, but the King's Writ awarded to inquire is returned.

Crisp Serj. contra. (The Court cannot give leave to discontinue in this Case, because both Parties are out of Court, for they have no Day, & transit in rem judicatam, but in Case of a Special Verdict, the Parties have a Day over, and are in Court, that a Scire Facias lieth upon such a Judgment upon the Death of the King. Rast. Entr. 144. because the Parties are out of Court. Vide Sid. 16. As to the Case in 1 Saund. supra, That was upon a Demurrer before any Judgment entred. And a Writ of Inquiry is a judicial Writ. Dy. 195. pl. 37. that cannot discontinue, and no Precedent can be produced of a Discontinuance after Judgment.

Holt Ch. J. It is discontinuable by Consent, but not without 1 Roll. Tit. Discontinuance. That 'tis not discontinuable by the Court after Verdict, without the Defendant's Consent, which doth not differ from this Case: And 'twas said, if the Plaintiff should on Purpose omit the Continuances, the Defendant may enter then without his Consent, and the Defendant may bring in the Writ of Enquiry, if the Plaintiff do not.

Dolben and Eyres J. The Plaintiff in this Case cannot discontinue, and there is no Difference between this Case and that of a Discontinuance after Verdict. And Dolben said, he had two or three Cases to the same Purpose, and it would be vexatious and mischievous to discontinue in suce a Case.

## Skinner *and* Crouch.

Privilege of the University must be pleaded; and the Charter set forth, if claim'd thereby.

TRespass brought by J. S. against the Proctor of the University, for Goods seised by him going down the River to Sturbridge-fair, the Duty to the University not being paid for them: The Defendant pleads the Privilege of the University. After this the Action abates by the Death of the Plaintiff, and his Executors bring another Action against the same Defendant for the same Trespass, the Defendant at the Time of this Action brought having left the University: And now the Defendant pray'd that the Privilege of the University might be allow'd him by the Court, upon Motion; and that he might not be put to the Charge of Pleading it specially.

Thompson opposed it, for that the Privilege of the University extends only to Persons resident, which the Defendant is not now, having left the University, and taken a living in the Country.

2. The Privilege ought not to be allow'd in this Case, for the University cannot be Parties and Judge in their own Cause, and for a Duty due to themselves.

Grove contra. To the first Objection. Answ. That the Defendant was a Member of the University at the Time of the Trespass committed.

To the second, agreed that the Vice-chancellor cannot try his own Cause, but he may depute his Bailiff or Steward to try it, and so it is usually done. 2 Sid. 121. And it being chargeable for us to plead our Charter, we pray it may be allow'd us upon Motion.

Dolben J. It is discretionary in the Court to allow the Privilege of the University upon Motion, or no; and the Defendant ought to have this Privilege, being sued for a Matter done by him as Proctor of the University.

Holt Ch. J. Privilege respects the Person, not the Cause, and you ought to plead it; and then it will properly come before us, whether the Defendant not being a Member of the University at the Time of the Action brought, is intitled to his Privilege, for that he was a Member at the Time of the Fact done. Ruled per Cur', that the Charter be pleaded.

## Scounden *and* Hawley.

A Covenant with B. to obtain a Grant of Lands from C. A. is bound, tho' C. has no Title.

COvenant upon Articles of Agreement, one of which was, That whereas the Plaintiff had informed the Defendant, that Bradshaw, one of the Regicides, was Mortgagor of such and such Lands, which Discovery the Plaintiff had made, to the Intent to intitle the Duke of York to those Lands, as forfeited by the Attainder of Bradshaw, (whereas in Truth, Bradshaw was only Trustee of the Term for another). The Defendant covenants to obtain a Grant of those Lands from the Duke of York to the Plaintiff, within such a Time, and Assigns for Breach, that the Defendant had not procured such a Grant, &c. The Defendant pleads, that at the Time of the Articles entred into, the Duke of York had no Interest or Title to the Lands, the Plaintiff demurs.

Eyres J. The Defendant is bound by this Covenant to procure a Grant from the Duke, tho' the Duke were not intitled; but it is clear, that if the Trustee of a Term commits Treason, it is a Forfeiture in Law of the Term, tho' Cestuy que Trust hath an equitable Right to it.

Dolben J. The Cestuy que Trust hath such an equitable Right, and in such Cases it is usual to grant the Land to him upon Petition, but in Strianess of Law the King is intituled to the Lands, and you are bound by this Covenant to procure such a Grant, as the Duke might make.

Holt accord'. The Defendant is bound to procure such a Grant, Et valeat quantum valere potest; and it was adjudged that the Plea was naught.

## Saviere *versus* Lenthal & *al'*.

Proceedings in an Assise of an Office.

ASsise of the Office of Marshalsea. Per Holt Ch. J. The Jury must first appear, and be called and sworn; then the Writ is to be delivered into Court, and the Count ought to be in Parchment, and annexed to the Writ, and if the Writ be returnable upon a Return-Day, then is the Assise to be arraigned upon the Quarto die post, but if returnable upon a common Day, as this was, then if the Assise be not arraigned upon that Day, it is ill. In this Case the Jury appeared and were sworn, and the Writ was delivered into Court, and the Assise was arraigned in French, and the Tenant demanded; but the Count not being in Court, the Counsel for the Tenant insisted upon it, that the Tenant could not be demanded (which was allow'd by the Court) and that therefore the Demandant should be nonsuited, but the Court said they were sufficiently possessed of the Cause by the Writ being return'd into Court, and upon that gave Day to the Demandant till the Day following, and adjourned the Jury to the same Day, upon which Day I was informed, after the Jury sworn and the Plaint read; the Counsel for the Tenant demanded Oyer of the Writ, which being read, and the Demandant having still neglected to bring his Count into Court, (as he was directed by the Court to do) the Tenant could not be demanded, and the Court refusing then the Favour of a further Day, the Demandant was nonsuited.

Demandant in Assise nonsuited, because not ready to Count instanter on the Tenant's Demand.

## *Rex versus* Clench.

Stat. 13 H. 4. of Riots, Information thereon may be before two Justices.

MOved to quash an Indictment for a Riot upon the Stat. of 13 H. 4. cap. 7. The Exception was, that by the Statute, the Indictment ought to be taken before two Justices, and the High-Sheriff or Under-Sheriff; and this is taken before two Justices of the Peace only.

Holt Ch. J. If the Conviction be upon View, then it ought to be as you alledge; otherwise, if made upon Inquiry. Vide the Clause of the Statute. After, upon reading of the Statute, it appeared to be taken a Month after the Riot committed. And therefore per Cur', it is clearly good by the Statute, before two Justices only.

## Lee *and* Libb.

3 Mod. 262. 1 Show. 68. Two Witnesses to a Will, and two to a Codicil, one whereof was a Witness to the Will, are not three Witnesses to the Will itself.

EJectment. Special Verdict. A. seised in Fee (tali die) made his Will in Writing, by which he devised the Lands in Question to the Defendant, and that he did seal and publish this Will in the Presence of two Witnesses only, and that these two Witnesses only did subscribe in his Presence, and that a Year after he caused to be made another Writing, which did recite that he had made his Will, and confirms it in all Things, only by this Codicil 'twas said (And my Will is, that this Codicil be taken to be of Force, and part of my Will). And 'twas found that the Codicil was signed by two Witnesses, one of which was a Witness to the former Will, the other a new one, not Witness to the former Will; and 'twas further found, that this Codicil was distinct, and not annex'd to the former Will.

Thompson. This Will is not good within the Statute of Frauds and Perjuries to carry the Lands, for that Statute requires all Wills, that devise Lands, should be in Writing subscribed by three Witnesses at least, in the Presence of the Testator, which is not here, for the new Witness subscribing the Codicil cannot be a good Witness to the Will, for it is distinct from the Codicil, they be not annex'd together, there was a Year betwixt the making of them: And this third Witness never saw the Will, neither is it found that he was ever in the Testator's Presence, so that he can never make a third Witness to satisfy the Statute.

That this is in Disinherison of an Heir, whom your Lordships will Favour; and it is upon a Statute to suppress Fraud, which shall be taken strictly.

Treby Attorney-General contra. The Question is, whether the new Witness to the Will shall be accounted a third Witness to the Will, so as to make it a good Will to pass the Land?

The Jury have found that it was his Will, the Codicil and the Will are to be taken together, they are two Parts indeed, and are found to be distinct, and not annex'd, but they make up but one intire Will. One Will may consist of several Writings made at several Times, for no Man can think all at once, and there is no need that they should be tacked together: A Will made in three or four Sheets of Paper not stiched together, and one Witness subscribes on one Sheet, another on another, a third on the third, this is a good Will. And Dolben just cited the Earl of Essex's Case, where, after the Earl's Death, one Sheet was found in one House, and another in another House, yet adjudged a good Will.

It hath been objected that the Witnesses to the Codicil never saw the Will. Answ. Witnesses seldom do, Mens Wills are Secrets, and they very often subscribe upon the blank Part of the Will, saying, This is my Will, and good.

I cannot cite many Cases, for 'tis a new Question upon a new Statute, but there is a Case or two comes up to the Reason of this. 2 Cro. 144. Molineux Case, Noy 117. Where in a Devise of some Rents and Annuities, Reference was had to an Indenture: The Words of the Will were, Item, I Will that A. shall have all such Annuities, &c. as be expressed in an Indenture, &c. signed, &c. So that the Will alone, nor the Indenture alone, would not have carried those Annuities, &c. but both together make a very good Will, juncta juvant.

A Fine alone, nor an Indenture alone, to declare the Uses of that Fine, do not make a Revocation, but both together. Obj. This would disinherit the Heir. Answ. The Honesty of the Case is with us, for the Will was made for Payment of Debts and Legacies, and Provision for Children, and your Lordships will not favour the Heir to defraud the Creditors.

The End of the Statute is answered, you have here the Credit of three Witnesses attesting, the Honesty of the Case is with us; and the Jury have found that it was his Will.

Thompson objected, that 'twas not found that the Witness did Sign in the Presence, &c.

Ch. J. 'Tis found they seal'd, and Sealing is Signing.

Dolben J. A signs his Will, and two Witnesses subscribe in his Presence; and the next Day a third subscribes in his Presence, this is good; for there is no need that the Testator should sign in the Presence of three Witnesses.

Ch. J. The Testator's Signing is requisite to make the Will valid, and the Witnesses must be Witnesses of his Signing, which they cannot be, if it be not done in their Presence.

Thompson. It is not found that the Codicil was subscribed in the Presence, &c. And it shall not be intended.

Ch. J. That may be amended by the Notes of the Special Verdict, or if it cannot, you must not think to get Judgment by that Slip, for we will award a Venire Facias de novo, if you will not allow it to be amended.

At another Day the Chief Justice delivered the Opinion of the Court, viz. that it was not a good Will within the Statute, for the Words of the Statute are (signed by the Devisor, and attested by three Witnesses in the Presence of the Devisor) And here wants the Attesting by three Witnesses, according to the Act. The Codicil will not carry the Land without the Will, nor the Will without the Codicil: And the three Witnesses within the Statute ought to be Witnesses to the Whole.

Dolben

Dolben said, he was sorry that they could not help the Plaintiff, for two Witnesses do as much shew the Intent of the Devisor, as twenty, but it would be of dangerous Consequence to make so wide a Breach in the Statute.

Judgment pro Def'.

## Duckmanee *versus* Keckwith.

Bill of Exchange payable to A. not saying, or Order.

A Bill of Exchange is drawn payable to J. S. (not saying, or Order) J. S. assigns this Bill by Indorsement, and the Action is brought against J. S.

Holt Ch. J. If this be a Bill, which is assignable, then clearly the Action lieth; but here the Question is, whether this will amount to a new Bill to charge the Indorsor? I agree, if it were payable to J. S. or Order, there it is assignable, and you may have your Action against the Indorsor, or resort to the first Drawer.

Bill taken as Money.

Dolben J. If my Creditor takes a Bill from me, upon a Goldsmith, who after breaks, before Payment of this Bill, my Creditor cannot after come upon me, for he hath taken this Bill for his Debt.

Holt Ch. J. If the Bill be upon the Goldsmith, or Order, the Creditor may after come upon you.

Dolben contra. For it might be a good Bill at the Time that I gave it, and my Creditor may neglect to call the Money in in Time, whereas the Goldsmith might be responsible at the Time that I gave the Bill, and fail afterwards. Adjournatur.

# DE

# Termino Paſchæ.

## Anno 3 Willielmi & Mariæ, Regis & Reginæ, in B. R.

### Cudliff *and* Rundle.

CAſe. Plaintiff declares, that he was poſſeſſed of a Term in a Houſe, which he let to the Defendant for ſeven Years, and that the Defendant negligently kept his Fire, &c. Defendant pleads non dimiſit, the Houſe per Indenturam præd. Special Verdict, that the Plaintiff let the Tenement called with all Houſes, &c. except, and always reſerved the new Houſe for the Uſe of the Plaintiff and his Family, and not to be let to any other, but the Defendant to have the Uſe of it in the Plaintiff's Abſence; And find further, that only one Room was in the Plaintiff's Cuſtody, and the reſt in the Defendant's, and that the Fire happen'd in the Defendant's Part.

4 Mod. 9. 1 Show. 310. Caſe for negligent keeping his Fire.

Gold pro Quer'.

1. An Action will lie by a Leſſee againſt his Under-Leſſee, becauſe chargeable over to his Leſſor. Hern pl. 161. Jermy and Lowther. 3 Cro. 461. Jones 224. 1 Cro. 187.

2. That upon this Iſſue of Non dimiſit, &c. The Indenture found by the Jury varies not from the Declaration, becauſe the Houſe is demiſed, and the Plaintiff only privileg'd to be there ad placitum, and no Intereſt excepted. 2 Cro. 329. 3 Cro. 40. 1 Leon. 68. Ow. 91. Inſt. 281.

Roe contra. Admitted the firſt Point.

Admitting the new House to be demised, yet not demised for seven Years, prout in the Declaration. 1 Saund. 206. Ow. 20. 1 And. 52. Bend. 181.

That it is at most but a Lease at Will, and then not such a Lease as the Plaintiff hath declared on 2 Roll. 709. Dy. 260.

Holt Ch. J. It appears not that the Plaintiff hath any Reversion, whereupon to ground his Action; the Declaration being, that the Plaintiff was possessed of a Term for Years then, and yet to come, which may be, tho' the Plaintiff hath passed away his whole Interest.

Afterwards, in Hillary-Term following, the Court spake to this Case. Eyres J. That a good Action would have lain for the Plaintiff, if he had well declared; but here he declares upon a Lease for seven Years of the new House, whereas the new House passed not by Reason of the Exception. Brownl. 181. in Point. 1 Saund. 52, 206.

Gregory J. accord'. Jones 224. Hob. 170. Inst. 47. Bendl. 181. And. 52. in Point. Dy. 264. Ow. 20.

Dolben J. accord'.

Holt Ch. J. accord', That the new House was absolutely excepted.

Judgment pro Defendente per Cur'.

# DE

# Term. Sanctæ Trin.

## Anno 3 Willielmi & Mariæ Regis & Reginæ, in B. R.

### Hobbs *and* Young.

INformation sur Stat. 5 Eliz. for exercising a Trade, not having been, &c. it was found specially, that he employed those, that had been Apprentices in the said Trade, and kept a Master Workman to Oversee them, who had served as Apprentice to the said Trade.

1 Show. 241, 266. 3 Mod. 313. Employing Workmen, he not having been Apprentice, is an Exercising the Trade within 5 Eliz.

Eyres J. pro Quer'. At Common Law any Man might exercise a Trade, but the Statute restrains this. 1 Cro. 347, 576. 2 Bul. 191. 1 Saund. 312.

He is a Trader in Law, who runs the Hazard of the Loss, and is to have the Profit of the Trade: The Widow of a Tradesman cannot exercise her Husband's Trade, unless the Custom warrants it. Noy 50. Hutt. 132.

Private Use of a Trade in one's own House, for the Use of one's Family, not within 5 Eliz. secus, if exercised privately to export and sell abroad. 8 Co. 130. Hob. 211. 11 Co. 54.

Gregory J. accord'.

Dolben J. contra. The Defendant here exerciseth only the Trade of a Merchant, and not of a Cloth-worker within the Statute. The Intent of the Statute was to prevent Idleness, and for well-working in the Trade, which Defendant hath pursued.

Holt Ch. J. pro Quer'. One of a particular Trade cannot exercise another Trade: As Coach-maker cannot make the Wheels of his Coach, that belongs to the Trade of a Wheeler. Noy 133.

A Comb-maker presseth and smootheth Horns for his own Use in his Trade, held at the Assizes to be within this Statute; and the Counsel were well satisfy'd with the Judgment.

The Defendant's employing Journey-men is an Using of the Trade; and in an Action brought against the Journey-man, it had been a good Defence that he did not Use the Trade, but his Master, and that his Master took the Profits and stood to the Loss. The Statute is not confined to a manual Occupation by the Person, but the Words are, He that sets up a Trade, which the Defendant doth in this Case. And tho' the Defendant may have great Skill in the Trade, yet in Presumption of Law he hath none, and therefore within the Statute.

Judgment pro Quer'.

## Pain *and* Partridg *&* *al'*.

1 Show. 243, 255. 3 Mod. 289. 1 Salk. 12. Case lies not for hindring his Passage in a common Highway, but Indictment.

CAse. Plaintiff declares that the Town of Littleport was an antient Village, by which there runs an antient River, over which was an antient Passage for Horses, &c. by a Ferry-boat, kept by the Proprietors, who used to take such a Toll of all Passengers, &c. except of the Inhabitants of the antient Messuages in the said Vill, who used to pass Toll-free, and that the Defendants neglected to keep a Ferry-boat, whereby the Plaintiff was deprived of his Passage ad Dam', &c.

Defendants plead, that they, at their own Costs, built a Bridge over the River, at the same Place, which was an easier and safer Passage. Plaintiff replies, that he was not suffer'd to go over; Defendants demur.

Eyres J. pro Defendente. Admitted the Custom well alledged as to Matter and Form.

Customs may be good, tho' no lawful Commencement can be shewn. 6 Co. . Gateward's Case, 1 Leon. 142. Inst. 113. Sid. 267. Dav. 32. 12 H. 8. 5. 1 Roll. 216. 3 Cro. 746. 1 Roll. 566. 1 Cro. 419.

That the Manner of the Custom is good, to go ad libitum over the Ferry. 3 Cro. 441, 664. 1 Cro. 419. Admitted the Defendant's Plea not good, no more than in Justification for stopping a Way, to say, that he hath set out a better, which is not good.

But I am of Opinion, that Judgment ought to be given for the Defendant; because, upon the Plaintiff's own shewing 'tis a common Passage, and no other than a Highway; and all other Subjects may maintain this Action as well as the Plaintiff, which the Law will not admit of. 5 Co. 73. Inst. 56. 3 Cro. 664. Mo. 180. That here the Defendant may be indicted at the King's Suit, and therefore the Action lieth not. 13 Co. 33. 2 Inst. 30. Dav. 57. 1 Cro. 132.

Gregory J. accord'.

Holt Ch. J. accord'. This is a good Custom, tho' the contrary hath been held in another Action in the Common Pleas. That this Custom consists not in charging the Defendants; and the Laying of the Keeping of a Ferry-boat is but Inducement: And the Custom consists not in a Right of Freedom of Passage, but in being discharged of Payment of Toll; and 'tis a meer Easement. Vide Gateward's Case. 1 Cro. 418. 18 Ed. 4. 3. b. 3 Cro. 509.

This Custom might have reasonable Commencement: And the Inhabitants might agree at first that one of them should have the Property of the Ferry, and the rest should be at the Charge of the King's Grant, and in Consideration thereof to be carried over Toll-free, which would be a good Commencement, &c. at this Day. 1 Roll. 552. The Plea in Bar is not good, for the Erecting of a Bridge is voluntary, and he may pull it down at his Pleasure.

This Action lies not, because the Plaintiff hath no more Special Damage, than others of the King's Subjects. 22 H. 6. 14.

Hindrance of Business by Stopping of a Passage, is not a sufficient particular Damage, whereupon to ground an Action; secus of a Horse, &c. falling into a Pit. Fitz. Nat. Br. 94. (f) or (h).

And the Chief Justice said, that Dolben J. concurred with them in omnibus.

Judgment pro Defendente.

## Newton *versus* Trigg *& al'.*

TRespass for breaking his House and Close, and carrying away Goods particularly named. Special Verdict finds, that Newton was an Inn-keeper of London, and bought Hay, Oats, &c. which he sold in his Inn, and thereby got his Living; that he with others built a Ship, and had a Share therein to the Value of 50 l. They find that he became indebted in so much to Creditors, who took out and prosecuted a Commission of Bankruptcy against him, that the Commissioners assigned to the Defendant such and such Goods in a Schedule found in hæc verba; and that the Defendant took away the Goods (being the Goods mentioned in the Declaration). Et si, &c.

3 Lev. 309. 1 Show. 96, 268. 3 Mod. 327. An Innkeeper can't be a Bankrupt.

Eyres J. pro Quer'. The Matters found, neither single nor altogether, do make the Defendant a Bankrupt: His having a Share in the Ship doth not make him a Bankrupt any more, than having a Share in a Hackney-Coach, &c. the Finding that he had 50 l. Stock, ad negotiand', is not within the Statute, for tho' he be thereby a Merchant in potentia proxima, yet he is not

not thereby a Merchant in actu exercito. 1 Sid 411. 1 Cro. 282.

That the Buying of Necessaries for the Inn, and Vending them there, whereby he got his Living, doth not make him a Bankrupt, because Inns are of Necessity, and Inn-keepers have not a Liberty to refuse Guests. 2 Roll. 345. Hutton 100. 2 Roll. 84. Dalton's Just. 28. 1 Roll. 84. 2 Roll. 84, 85. Vide Stat. 1 Jac. cap. 21. which speaking of Ale-houses extends to Inns. 2 Roll. 84.

That Inn-keepers are indictable for Extortion, which those are not, that sell upon Contract. March 35. Crisp's Case. An Inn-keeper is no general Trader, but only with particular Persons within the Verge of his Inn. Vide Sir Tho. Littleton's Case in the same Court.

None can be a Bankrupt, unless the greatest Part of his Gains be by Trading, but an Inn-keeper gets chiefly by Lodging, Servant's Labour, &c.

Never yet resolved, that an Inn-keeper was a Bankrupt, but in Crisp and Prat's Case, there were two Judges against two, and so it rested ever since: And the Statute is not now to be enlarged, which, as now used, is become inconvenient.

Gregory J. accord' pro Quer'.

Holt Ch. J. pro Quer'. That an Inn-keeper is not taken Notice of in Law as a Trader in Buying and Selling, but is called Communis Hospitator. Vide 8 Co. Caly's Case, and the original Writ: That he receives his Money, not only in respect of his Provisions, but also for his Pains and Attendance in securing of the Goods, &c. And Buying and Selling is only incident to the Trade of an Inn-keeper. Obj. That a Shoemaker is within the Statute. 1 Cro. 31. and a Baker. Hutt. 42.

Answ. Here the End of Buying is to make them fit for Sale. It is unreasonable to make all that buy and sell to be within the Statute, for that would include a Farmer, who clearly is not within the Statute. That an Inn-keeper sells under the Restraint of the Law, and therefore not within the Statute.

Sir Thomas Littleton's Case was held upon a Trial at Nisi prius, not within the Statute, his Employment being the Furnishing of the Fleet, and not being a Trader at large. So in the Case of the Exchequer, which was grounded upon the Case of Sir Tho. Littleton.

This Point was settled before in Crisp and Pratt's Case, as reported in Croke; and Jones's Report seems to be mis-printed in this Case, for he goes upon the finding; and agreed, that if a bare Inn-keeper, he was not within the Statute. No Difference between an Inn-keeper and a School-master.

The having a Share in a Ship makes him not a Bankrupt any more, than letting Horses to Hire. And his having a Stock is but a particular Venture.

And the Chief Justice said, that Dolben J. concurred in Opinion.

Judgment pro Quer'.

## Heydon *and* Pace.

EJectment. The Defendant pleads, that the Lands are Parcel of such a Manor within antient Demesne: The Plaintiff replies, and traverseth, that the Tenements, or any Parcel thereof, are antient Demesne.

1 Show. 271. Antient Demesne pleaded. Vide pag. 185.

Cur' If he had traversed that they were Parcel of the Manor, it had been naught, for they might be Frank-fee, tho' held of a Manor in antient Demesne. The Plea was held good, and

Judgment pro Defendente.

## Burden *and* Burden.

ERror in Dower, the Defendant, after Imparlance, pleads Detinue de Charters

2 Salk. 252. 1 Show. 271. Detinue of Charters, no Plea after Imparlance.

Cur'. 'Tis not pleadable after Imparlance, for it goes only in Abatement, and Judgment was affirmed, Nisi, &c.

## Carpenter *and* Adams.

TRespass for Taking away a Gun. Defendant justifies as Game-keeper duly made within ten Miles of London.

Game-keeper takes away a Gun. Trespass lies, and the Lord's Warrant no Justification. v. 9. Intw

Cur'. The Plea is ill, not saying by whom he was made, nor that the Plaintiff was an unqualify'd Person by the Statute: And the Defendant ought to have had a Warrant from a Justice of the Peace: And an Authority from the Lord of the Manor is not sufficient.

Judgment pro Quer'.

## Godfrey *and* Newport.

DEbt for Rent against an Executor upon a Lease-parol after the Term ended.

Debt for Rent equivalent to Bond.

Defendant pleads, that his Testator entred into a Bond, &c.

Cur'. The Plea is ill, for the Rent being in the Realty is of as high a Nature as a Bond, for no Wager of Law lieth.

# DE

# Term. Sancti Mich.

## Anno 3 Willielmi & Mariæ, Regis & Reginæ in B. R.

### Baker *and his Wife versus* Barber.

Trespass for Beating the Wife, ad dampn' ipsor' ill.

VIde the Register 105. A Writ of Trespass by Husband and Wife, for a Battery of the Wife ad dampn' ipsorum.

Curia. That is not Law, and Judgment was arrested for this Exception in the principal Case.

### *Sir* Robert Parker's *Case.*

Outlawry as Knight. Pardon as Baronet, ill.

DEfendant was indicted and outlawed for Treason, by the Name of Knight, and after pardon'd by the Name of Baronet.

Ch. J. The Pardon is not good for this Variance, but the other three Judges were against him, and allow'd it. And in this Case the Outlawry was reversed for an Error in Fact, viz. that he was a Baronet and not a Knight, which was confessed by the Attorney-General.

## Hill *and* Mills.

1 Show. 293.

Prohibition on Suit for revoking Probate of a Will.

MOtion for a Prohibition to the Ecclesiastical Court, for granting Administration to A. where B. was named Executor by the Testator, for that B. was a Bankrupt.

Shower urged, that this was not in the Ordinary's Power, and that a testamentary Estate is not liable to Bankruptcy.

Ch. J. Ordinary is not to grant Administration, where an Executor is named, and Bankruptcy is no material Disability, and he acts en auter droit, and the Testator hath intrusted him. But in Case of non sane Memory there is an absolute Necessity to grant Administration.

Eyres J. accord'. And that till of late the Chancery would not put out an insolvent Trustee, for that he was intrusted by the Donor, &c.

Dolben J. Sir William Middleton, about forty Years ago, made H. Middleton his Executor, and left many Children: H. Middleton became very poor, by which the whole personal Estate was in Danger: And the Master of the Rolls and two Judges would not alter the Executor, for that he was intrusted by the Testator, and they were forced to give him Money to relinquish: And the like Matter was endeavoured in vain in the Spiritual Court. A Prohibition was granted.

It was said by Mr. Jones, that a Prohibition was granted in a Case, where there were two Executors named, one of which was a Papist convict, and so disabled, and the other insolvent; and the Ordinary granted Administration, which ought not to be, while there remains one Executor, tho' insolvent, for he is intrusted by the Testator, and the Ordinary cannot put him by.

## Blake *and* Gell.

Scire Facias against Tertenants.

SEveral Tertenants in several Counties. Scire Facias against the Tertenants in one County only, one Tertenant in another County dieth, and this assigned for Error. Roll 775, 778. 2 Cro. 506. Palm. 56. 1 Roll. 757. Judgment that 'tis erroneous. And held by the Court in this Case, that one may be summoned by a Rent liable to the Judgment, and the Summons to be upon the Land.

## Glover *and* Cope.

THE Case is wanting here (but is in 1 Show. 284. 4 Mod. 80. 3 Lev. 326. 1 Salk. 185.

Northy pro Quer' cited Hob. 176. 3 Cro. 361. Inst. 59. 4 Co. 27. Poph. 38. 1 Cro. 204. 4 Co. 28, 29. 3 Cro. 442. (Ch. J. The Assignee of a Reversion cannot have an Action of Covenant, for a Covenant that runs with the Land. Eyres J. contra cited 1 Roll. 576. but the Chief Justice was dissatisfied with it.) Fitz. Covenant 7. 30. 1 Cro. 221. Ow. 152. 2 Bul. 281. 1 Saund. 240. Bro. Covenant 30 or 22. 3 Co. 7. 4 Co. 26. 3 Co. 8. 1 Cro. 242. Dy. 264. Inst. 33. 4 Co. 30. 1 Cro. 24.

Cooper contra. 2 Cro. 559. 1 Co. 46. 2 Cro. 17. Plow. 174. 1 Cro. 44. Mo. 876. 4 Co. 29. Yelv. 222. 2 Cro. 301.

And afterwards, in Easter-Term following, 'twas adjudged pro quer', that the Assignee of a Copyhold Reversion is within the Equity of the Statute 32 H. 8. cap. 30. to bring Covenant.

## Baker *versus* Winch.

Antient Demesne pleaded. Vide prox. pag. ante.

EJectment. Defendant pleads, that the Lands are antient Demesne of the Crown, and Time out of Mind were parcel of the Manor of Bray, and that Bray is antient Demesne.

Ch. J. If it be part of the Manor, then it cannot be held of the Manor, nor impleadable in the Manor Court; and it should have been shewn that they are held of the Manor.

Respond' Ouster.

1 Show. 330.
1 Show. 342.

## Stockton *versus* Collison.

Consideration, serving as a Commissioner, good.

ASsumpsit brought by Commissioners pro opere & labore, in serving upon a Commission in a Cause depending in the Exchequer. And moved in Arrest of Judgment, that the Action lies not upon the Special Matter. Latch. 55. Noy 76. Inst. 156. 2 Cro. 103.

Ch. J. and Eyres (cæteris tacentibus) that the Action lieth, and Judgment pro Quer'.

# DE

# Term. Sancti Hillar.

## Anno 3 Willielmi & Mariæ, Regis & Reginæ, in B. R.

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### Henderſey *verſus* Foſter.

2 Salk. 462.

DEbt on Bond, and declares for 36 l. The Bond was Sex trigint' libris, 1 Cro. 386. Down and Hathwait's Caſe was cited to prove it was good, and 2 Cro. 261. that it was ill.

Sex trigint' libris in a Bond well.

Ch. J. The Plaintiff might have declared ſpecially, and ſhewn the Condition, which would have ſhewn the Intent, but here the Defendant had pray'd Oyer of the Obligation, and not of the Condition: And Judgment for the Plaintiff upon Demurrer.

Nota. After the Defendant had pray'd Oyer of the Obligation only, the Plaintiff having no other Way to ſhew it, by Reaſon of the Defendant's Demurrer, pray'd that the Condition might be entred, all being in Court, and the ſame Term in which the Bond is produced.

### Potter *verſus* James.

1 Show. 347.

INdebitatus Aſſumpſit pro denar' debit & inſolut. not ſetting forth how the Debt did ariſe, and held ill per Cur', becauſe it may be on a Bond.

Indebitatus Aſſumpſit.

And the Judgment was reverſed.

1 Show. 394.

## Tallent *versus* Jermy.

Misnomer.

ASsumpsit against Jermin; the Defendant pleads, that his Name is Jermy, absq; hoc, that it is Jermin.

Curia. This is a material Variace, but is cured by the Defendant's Appearance; but the Defendant ought to have pleaded Quod Jermy qui implacitatus est per nomen Jermin dicit, that his Name is Jermy. And therefore Judgment quod respond' ouster.

DE

# DE

# Termino Paſchæ.

## Anno 4 Willielmi & Mariæ, Regis & Reginæ, in B. R.

### *Lady* Winchelſea *verſus* Nichols.

SUit in the Spiritual Court againſt an Executor, who pleaded, that he had fully adminiſtred, and thereupon a Prohibition was granted, niſi cauſa, and now per Curiam; the Spiritual Court may well try this Iſſue, but if they over-rule this Plea, or refuſe to give Precedency to Debts of a higher Nature, and ſo vary from the Common Law, they ſhall be prohibited.

Spiritual Court varying from the Common Law prohibited.

### *Lord* Dover's *Caſe.*

HE appeared at the Bar, with a Writ of Error to reverſe his Attainder of High Treaſon; and the Error aſſigned was, that he was outlawed by the Name of Henry Lord Dover, without any Addition, and produced a Patent, whereby he was then made Baron of Dover.

Attainder reverſed.

Eyres J. Asked how they could take Notice, that he was the ſame Perſon; to which it was anſwer'd, that they could, becauſe he came in and appear'd as ſuch, which the Attorney-General not oppoſing, it was reverſed, and afterwards he pleaded his Pardon of Treaſon: And per Dolben and Eyres, He being a Peer, the Court can't demand what he hath to ſay, &c. becauſe they can't

A Peer's Pardon read.

can't award Proceſs; but that he might voluntarily have it read, without being ask'd, &c. which was done, and the Pardon allowed, and he diſcharged.

4 Mod. 149.
2 Vent. 145.
3 Lev. 291.

## Baker *and* Lade.

Grant for Money and Affection, how to operate.

IN an Avowry a Deed was pleaded, by the Words Give and Grant to his Son for Money; and it was objected, that it was not well pleaded, becauſe 'twas not pleaded according to the Operation thereof in Law, viz. by Covenant to ſtand ſeiſed; as if Tenant for Life grant, &c. to him in Remainder, it ought to be pleaded as a Surrender; and if it be pleaded by Way of Grant, and found ſpecially, it ſhall be adjudged againſt the Pleader.

Squibb contra. cited 9 H. 7. 2. 7 H. 7. 16.

Curia. The Conſideration being natural Affection to the Son, altho' it be likewiſe for Money, yet it is in Law a Covenant to ſtand ſeiſed, and therefore it being pleaded by Way of Grant, it is ill, and Subſtance.

Stat. of Limitations pleaded to a Bill of Exchange.

Aſſumpſit upon a Bill of Exchange againſt the Drawer, for Value received; Defendant pleads the Statute of Limitations; Plaintiff replies, that it was upon Accompt between Merchants, and that the Defendant was beyond Sea, &c.

Cur'. The Defendant's being beyond Sea doth not exempt the Plaintiff from the Statute of Limitations, as in the Caſe of Hall and Wyburn lately in this Court: And alſo this appears not to be upon an Accompt, becauſe for Value received: And per Cur', the Caſe in Saunders, of a ſtated Accompt, is good Law.

Judgment pro Defendente.

1 Show. 327.
4 Mod. 65.

## Moor *verſus* Parndon.

One Habend' to two Demiſes, good.

ERror on a Judgment in C. B. in Ejectment. The Error aſſigned was, that the Declaration was on two Demiſes, and there was no Habend' in the Firſt, but afterwards the ſecond Demiſe was, Habend' Tenementa prædicta, which, as 'twas urged, did not extend to both the Demiſes, nor would it be good in Caſe of a Grant, and the Judgment is entire, quod recuperet Terminos prædict'; but per Cur', it is well enough, and the Judgment was affirmed.

## *Rex versus* Warrington *& al.*

AN Information for a Riot committed in the City of Chester was sent down thither to be tried; and it was suggested, that Warrington was one of the Sheriff's there, whereupon the Venire Facias was awarded to the other Sheriff, and not to the Coroners; after a Verdict there for the King, it was moved in Arrest of Judgment, that the Venire Facias ought to be directed to the Coroners: But by the Chief Justice, who gave the Resolution of the Court, the Award of the Venire Facias is right; and so it was in the Case of Sir T. Player on the like Suggestion. 22 H. 6. 51. where there be five Coroners, if one be challeng'd, the other four may execute the Writ, so is the Current of the Books, and Mod. 198. Dy. 328 or 329.

Riot.

Information.

## Burton *versus* Woodward.

1 Show. 368.
4 Mod. 95.

SPecial Verdict in Ejectment of a Rectory and Tithes: The Question was, Whether the six Months for taking the Oaths after the first of August, upon the late Act, shall be accounted Solar or Lunar; if Lunar, then pro Quer'.

Six Months for a Lapse, Lunar and not Kalendar.

Webb of the Inner-Temple pro Quer'. That they shall be accounted Lunar, because more certain, and so they are accounted in all Cases, except in a Quare Impedit. Inst. 135. 2 Cro. 166. Yelv. 100. 2 Roll. 521, 522. 2 Inst. 624. Dy. 218, 219. Mich. 22 Car. 2. Holcroft's Case. Act concerning Nonconformist, which speaks of six Months, was accounted Lunar. Litt. 19. That several Clauses of this Statute, as that of Imprisonment, and of being suspended, are to be construed of Lunar Months for Advantage of the Sufferer, and for the same Reason in our Case. 1 Sid. Rex *versus* Custus.

Sir Tho. Powis pro Defendente. Where an Act relates to Church-men, there the Computation shall be according to the Computation of the Church; otherwise in Case of Lay-Persons. 6 Co. 621. 2 Inst. 361, 365. The Law condescends to the common Understanding of the Times, as a Bond to pay Money upon the first Day of the Term, shall not be construed upon the Essoin-Day, but the Quarto die post. Tempus Semestre is understood of six Months, not half a Year. Lit. 19. 2 Roll. 521. 12 H. 4. 7. Sid. 186. 3 Cro. 227.

That

That the Act being Penal ſhall be conſtrued favourably.

6 Co. Catesby's Caſe, the Rule, where Words are ambiguous, they ſhall be conſtrued in Favour of the Party. Adjournatur.

## Richards *and* Turvy.

Covenant againſt an Aſſignee of an Aſſignee.

ERror on a Judgment in C. B. The Caſe was, A. demiſed to B. reſerving Rent, with a Covenant to pay it; B. enters and aſſigns to C. who Covenants to pay the Rent, and there was an Indorſement of a Covenant to pay twelve Bottles of Sack. A. brings Covenant againſt C. C. as to Part of the Money and Part of the Sack, confeſſeth it, &c. and, as to the Reſidue, pleads an Aſſignment over to D. before it became due. Judgment in C. B. for A. by Ch. J. Pollexfen and Rookby, Powel diſſentiente, and Ventris ægrotante.

Pemberton pro Quer' in Errore. This Aſſignment is a good Diſcharge. Walker's Caſe, 3 Co. 3 Cro. 555. 1 Sid. 338. that Notice is not neceſſary per Twiſden.

That needs no Notice of Aſſignment to the Leſſor, because it is no prejudice to him.

Defendant might have pleaded Nil Debet, and have given this Aſſignment in Evidence, and ſo was Criſly and Wilcocks's Caſe in C. B. per Cur', againſt the Lord North; and that it was no fraudulent Aſſignment, tho' no Notice given.

Levinz contra. That till Notice a Privity of Eſtate remains as to Payment of the Rent. Bro. Avowry 11. The Caſe of Marrow *verſus* Turpin, in Walker's Caſe, was pleaded with Notice. 2 Cro. 398.

Holt Ch. J, Aſſignment by Aſſignee diſchargeth him, because he was only chargeable as having the Land: And there is no more Reaſon for his giving Notice to the Leſſor of his Aſſignment over, than of the Aſſignment to him by the Leſſee.

Dolben and Eyres agreed, and (abſente Gregory) the Judgment was reverſed.

## Horner *versus* Bridges.

TRespass Quare clausum fregit, and pulled down a Wall. 2 Apr. 2 W. & M. with a Continuando to the 20 Feb. 1 W. & M. on Not guilty pleaded, there was a Verdict for the Plaintiff, and intire Damages assessed. It was now moved in Arrest of Judgment, that the Continuando is laid before the Trespass.

Trespass with Continuando.

Gold. The Continuando is void, and all the Damages are given for the Trespass. Butler *versus* Hodges. Hill. 18 & 19 Car. 2. B. R. 1 Sid. 319. 2 Cro. 207.

Northy contra. I admit an impossible Continuando void: But here the Pulling down of a Wall may be continued.

Ch. J. and Eyres. That the Continuando is void, because it is impossible, and the Damages shall be intended for the Trespass only.

Post.

Judgment for the Plaintiff.

## *Rex versus* Roberts.

1 Show. 389. 4 Mod. 100.

INformation, that the Defendant had a common Ferry-boat to carry all the King's Subjects, Time out of Mind, and that Time out of Mind, every Horse and Man, &c. paid 1 d. and every Score of Sheep 2 d. and every Score of Bullocks 7 d. and that the Defendant being the Ferry-man did carry from such a Time to such a Time, and extorted from several of the King's Subjects that passed, for every Man and Horse 2 d. for every Score of Sheep 4 d. &c.

Information for Extorting divers Sums, &c. uncertain. Q.

Verdict, That the Defendant was guilty, &c.

Williams. That the Information is good. Obj. It is not mentioned who went over.

Answ. Quidam ignoti to the Attorney-General is sufficient.

Obj. Not laid, for how many Men and Horses, and Scores of Sheep the Defendant had extorted.

Answ. Number not material, because it is for every Man, Horse, &c. between such and such a Time. 1 Cro. 314. 1 Roll. 88. 2 Cro. 440. 2 Leon. 38.

This is an Information at Common Law, where no certain Penalty; and therefore sufficeth that a Crime appears. 3 Cro. 365, 609.

Shower contra.

Admitted de quibusdam ignotis good, if the Offence were shewn certainly, which is not here done. Obj. Verdict will help it.

Answ. The Statute of Jeofailes doth not extend to Informations. Roll. 88. 2 Leon. 38.

Ch. J. Every ſeveral Taking is a ſeveral Extortion, and not good to lay many Extortions together. Johnſon's Caſe, 2 Cro. 609. ſeems not to be Law.

That being diſtinct Offences, and not particularly ſet forth, the Court cannot tell how to ſet a Fine.

Dolben and Eyres agreed, for the laſt Reaſon; and that the Caſe in 1 Roll. is in Point: Afterwards Sir William Williams moved that the Defendant might be bound to the Good Behaviour, being found guilty of Extortion, but that was not done.

# DE

# Term. Sanctæ Trin.

## Anno 4 Willielmi & Mariæ Regis & Reginæ, in B. R.

1 Show. 353.
4 Mod. 129.

### Culliford *and* Blandford.

Debt on 23 H. 6. c. 15. for falſe Return of a Burgeſs to Parliament.

DEbt on the Statute 23 H. 8. by a Stranger againſt the Mayor, &c. for a falſe Return of a Perſon elected to Parliament, the Bill is 3 M. 2 W. & M. the Declaration was delivered above a Year after, but the Latitat was taken out within the Year, whether ſuch Informer be within the Statute 31 Eliz.

Eyres J. He is not, becauſe the Statute 31 El. extends only where the Informer and the King, or the King only is to have the Penalty, but on this Statute the Informer is to have the whole Penalty. Noy 71. 1 Cro. 336. 11 Co. 65. 3 Cro. 138.

2. That the Latitat brought within the Year is a sufficient Commencement of the Suit within the Year. 1 Sid. 53. the Latitat here is as an Original.

Gregory agreed in both Points.

Dolben J. agreed, but doubted whether it was within the Statute of 31 Eliz. because it is a several Penalty given to the King, and a several Penalty to the Informer.

The Chief Justice held, that the Statute giving two Penalties, the Moiety is to the King, and the Moiety to the Informer; and doubted whether it should not be taken as a joint Penalty for the Whole.

And as to the second Point. That the Latitat is no Commencement of the Suit within the Year, within the Statute 31 Eliz. it being a Penal Statute; otherwise in the Case, where a Man hath a Right, for there it will prevent the Statute of Limitations, and here the Party might have sued by Original, and so at no Prejudice; and the Trespass in this Case shall be accounted from the Time of the Offence to the Time of Filing the Bill: But, by Reason the other Judges were of the contrary Opinion, Judgment was given for the Plaintiff.

## Princeford *versus* Smith.

4 Mod. 131.

ON a Special Verdict in Ejectment the Case was thus; J. S. seised in Fee, in Consideration of the Marriage of his Son with A. Covenants with J. D. &c. to levy a Fine to such Uses in Tail, or else that they should stand seised to the Use of his Son in Tail, &c. the Son marries A. no Fine is levied, but three Years after J. S. makes his Will in these Words, I do hereby make good and confirm the Estates granted in Marriage, for the Use of my Son, and his Wife, or any of them: And it is found further, that J. S. made no other Writing, but this, to which the Will refers, and that he had not settled any other Estate on his Son, and his Wife, or any other to their Use: And the Question was, Whether the Deed and Will together made an Estate-tail.

A. Covenants that B. stand seised to Uses, &c.

Gold Serj. That they did Hob. 32. Bro. Devise 48. 2 Cro. 144, 145. 1 Roll. 611.

Hooper contra. That here the Estate is not executed, because the Will is to confirm the Estate to the Trustees to Uses, on which the Statute does not operate, but Curia contrary to that. 1 Cro. 369, 447. Mo. 52.

Curia. This is a good Devise of an Estate-tail, on the Intent of J. S. which is apparent; and altho' J. S. had not granted any Estate to his Son, &c. yet here the Word Grant shall not be taken strictly, but as it signifies any Agreement in common Parlance.

lance. Poph. 188. 1 Leon. 313. 2 Cro. 145. And per totam Cur', It is a good Devise of an Estate-tail, and Judgment was accordingly given.

4 Mod. 133.
1 Show. 355.

## Mason *and* Hanson.

Administration, how committed.

ADministrator brought Debt for Rent due in the Life-time of the Intestate, and shewed, that Administration was granted to him by the Official of the Prebendary of Brampton, & peculiaris Jurisdictionis: There was a Verdict for the Plaintiff, and it was moved in Arrest of Judgment by Darnel, that it being a Peculiar, the Plaintiff ought to shew by what Authority, &c. 2 Cro. 556. Palm. 98.

Gold Serj. contra. It is ill on Demurrer, but it is now aided by the Verdict. Sty. 236. Vide 3 Cro. 431, 791, 879. Sid. 228. 2 Roll. Rep. 104, 150.

Judgment for the Plaintiff by three Judges. Holt dubitavit, but by Eyres, Dolben and Holt the not Producing the Letters of Administration is but Form.

## Fletcher *and* Porter.

Windsor Court Plea in Abatement in Replevin.

ERror on a Judgment in Replevin out of Windsor Court.

1. Error. That the Pledges are not amerced.

2. Error. That it is Quod nil capiat per narrationem, where it should be per Querelam.

3. This Court ought to give the same Judgment, as ought to be given below, viz. Nil capiat, and not to have a Return without making any Avowry. Bro. Replevin 1, 3, 31. 39 H. 6. 35. 2 Cro. 519. 2 Roll. Rep. 64. that here it ought to have abated, and then no Return can be. 3 H. 6. 3. 2 Roll. 433. 9 H. 6. 4.

That here the Replevin is brought de sex peciis Corii, which is incertain, and therefore it ought to abate.

Curia. You shall not take Advantage of your own Default.

Ch. J. Where a Plea in Abatement goes to the Point of the Action, as a Plea of Property, there it is not necessary to avow to have a Return, because such Plea implies an Avowry; otherwise where the Plea in Abatement doth not go to the Point of the Writ. 26 H. 6. 18. 2 Roll. Rep. 64.

In this Case the Court reversed the Judgment; but because it appeared to them that the Plaint ought to have abated, Judgment was given that the Defendant should have a Return. Quære.

## Mason *and* Watson.

CAse against the Sheriff of York, and shews, that in such a Court of York, there are so many Attorneys, and that on the Death of every Attorney, the Mayor hath used to elect a new Attorney, and that the Sheriff ought to admit the Person elected, and that this Usage had been for 200 Years last past, and that on the Death of such an Attorney, the Plaintiff was elected by the Mayor, and that the Sheriff had refused to admit him: To this the Defendant demurs.

In Pleading Customs against common Right, the Charter to be shewn.

Holt Ch. J. This Matter being against common Right, it ought to be shewn, that it was by Charter or Prescription, and you are not a Stranger to the Matter, because you Claim under the Title of another, and the Action is not grounded on the Possession.

Dolben J. agreed.

Eyres J. That consueverunt & debuerunt had been somewhat, if the particular Time of 200 Years had been omitted, but it is otherwise now, because it hath Reference to the Time mentioned: But the Plaintiff had Leave to discontinue paying Costs.

Discontinuance with Costs.

## *Rex versus The Mayor of* Exeter.

1 Show. 258, 364.

ON a Mandamus to restore one Glide, it was returned, that there was a Custom within the City to chuse the Aldermen out of Twenty-four, and to remove them on a reasonable Cause; and that Glide being an Alderman, &c; removed out of the said City, and resided at Dale, and neglected his Duty as Alderman, and did not attend at the Common Council, and also spoke contemptuous Words, and took not the Oaths, for which he was disfranchised.

Mandamus to restore an Alderman.

Eyres J. Altho' several bad Causes are return'd, yet there is a good Cause for his Disfranchisement, viz. his Removal out of the City and residing at Dale, for Residency is incident to the Duty and Place of an Alderman: That the Words deseruit and reliquit shall be intended an absolute Leaving of the City, tho' I admit much shall be intended in Favour of Liberties. 3 Bul. 189. 1 Co. 409. but admitting he return'd afterwards, yet that will not purge the Forfeiture.

Gregory J. agreed. And that his declaring that he would come among them no more, is no good Cause of Disfranchisement, without an actual Absenting.

Dolben

Dolben contra. Because 'tis not said, that he never return'd again, and the Words deseruit, &c. shall not be intended of an absolute and total Leaving the City.

Holt Ch. J. Admitted his Removal, and Leaving of the City a good Cause of Removal. Mo. 135, 833.

Here is no good Summons, and therefore, altho' the Cause of his Removal be sufficient, yet he ought to be resolved: The Return is, that he was summoned, but not that he was summoned to answer those particular Matters.

If his Desertion be a Cause of Removal, yet if he return'd before his Removal, and resided in the City, then he ought to be summoned, but admitted a Summons was not necessary, where the Party is alway out of the City, and here Certainty is required to every Intent, because the Party hath no Opportunity to answer. 3 Bul. 189.

No Mandamus by three Judges against the Ch. J.

1 Show. 17, 377.

## Cary *and* Callice.

Case for Entring his Liberty; Plaintiff need not shew his Title.

CAse for entring his Bailiwick of Westminster, and sets forth, that he was seised of the Liberty, and that the Defendant enter'd upon him, and executed an Execution: The Defendant pleads, that he enter'd by Virtue of Warrant from the Sheriff, &c. to which the Plaintiff demurs.

It was objected for the Defendant, that the Declaration was not good, because there was no Title made to the Bailiwick, viz. by Grant or Prescription.

Ch. J. Somewhat might be, if the Sheriff had declared otherwise of the Sheriff's Bailiff, who is a Stranger; but per Ch. J. In the Case of Cary and Backhurst lately, such a Declaration was held good, and affirm'd in Error; and so in the Case of Sir Robert Atkins in Hale's Time: And per Cur', antiently the Title was set forth at large, but of late this short Way hath obtained, and the Declaration was adjudged good; tho' per Ch. J. this Case goes further, than any before.

4 Mod. 97.

## Knight *and* Symms.

In Ejectment the Nature of the Lands must be shewn.

EJectment de quinque Clausis terræ arabilis & pasturæ vocat' Long Furlong, continen' 10 Acras.

Ch. J. The Declaration is ill, because it don't specify how many Acres of each.

Dolben J. There is another Fault, for it is habend' prædict' claus' Terræ, and saith nothing of the Pasture, and so the Sheriff can't give Possession.

Ch. J. The Sheriff can't take Notice of it by the Name, and the Nature ought to be shewn in certain, and an Ejectment ought to be as certain, as a Præcipe quod reddat'. 2 Cro. 435.

Gregory J. agreed that it was ill.

Eyres J. It is ill, because the Sheriff can't give Possession thereon, but by him the latter Opinions are against Savil's Case, and that an Ejectment lieth of a Close without more, which the Chief Justice absolutely denied.

Judgment arrested.

## Higden *versus Eundem.*

DEbt on Bond. The Defendant pleads, That the Plaintiff accepted a Feoffment, with Seisin of such Land before the Day, on which the Money became due by the Condition, in Satisfaction of the Bond. Judgment for the Plaintiff, because it is not pleaded, that he gave the Land in Satisfaction, &c.

## Fesse *versus* Hawtry.

ASsumpsit against the Husband for Goods taken up by the Wife: The Defendant pleads, that he had settled 1500 l. per Annum, for the separate Maintenance of his Wife, and that they lived separately, and that the Plaintiff had Notice of it; to this the Plaintiff demurred, and Judgment was given for the Plaintiff; but per Cur', it is good Evidence, that the Husband Non Assumpsit.

Where Notice of separate Maintenance, the Husband not bound by the Wife's Contract.

## Inns *and* Humphreys.

DEbt on a Judgment. The Defendant pleads in Bar, that a Writ of Error is depending.

The Court were of Opinion, that the Plea was ill in Bar, but good in Abatement, and Judgment was given for the Plaintiff, Nisi, &c. But the Court said, that altho' the Practice be so here, yet the Exchequer have used to reverse it, &c. and they said that they would speak of it to the rest of the Judges.

Plea, Writ of Error pending, ill in Bar, but good in Abatement.

## Drew *versus* Barsdell.

4 Mod. 104.

THE Court were of Opinion, that a Scire Facias might be well brought here, on a Recognizance removed hither out of C. B. by Certiorari, and that by Reason of some Precedents shewn them in their Chambers.

Scire Facias in B. R. on a Recognizance remov'd from C. B.

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# DE

# Termino Paſchæ.

## Anno 5 Willielmi & Mariæ, Regis & Reginæ, in B. R.

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### Hicks *and* Harris.

Inceſtuous Marriage.

THE Court Chriſtian having proceeded to annul an inceſtuous Marriage (where the Woman died before Sentence) per Cur' fiat prohibition. quoad their declaring the Marriage to be void; for when the Inceſt is determin'd by the Woman's Death, they cannot now baſtardize the Iſſue, tho' they may puniſh the Inceſt.

Poor's Settlements.

In an Order made by two Juſtices to remove a poor Perſon, they muſt ſet forth that one is of the Quorum; and Note, it is not ſufficient to ſay, that a Man is poor and like to be chargeable, &c. but it muſt be ſaid he doth not Rent 10 l. per Annum.

See 2Shower.

### *De la* Baſtide *verſus* Reynel *& Ux'.*

In homine Replegiando, on pleading Non cepit, a Superſedeas to the Withernam.

HOmine Replegiando. The Sheriff return'd Elongavit, whereupon iſſueth a Capias in Withernam, but the Defendant had appeared before the Capias in Withernam was awarded.

Levinz pro Defendente. Said it would be an intolerable Hardſhip, if the Defendant could not be admitted to traverſe the Elongavit, which the Sheriff returns of Courſe, when he would plead non Cepit.

Sol. Gen. pro Quer'. Prays that the Defendant may gage Deliverance.

Holt Ch. J. In a common Replevin, where the Defendant appears, no Withernam shall go: And here, if the Sheriff cannot execute the Writ, he must return Elongavit, for else he should falsify the Writ, which he cannot do. But the Defendant in Replevin shall not gage Deliverance where he pleads non Cepit. It was ruled, that, upon the Defendant's Pleading non Cepit, there should go a Supersedeas to the Withernam, quia improvide emanavit. Post.

## Middleton *versus* Swail.

Devise to Survivors, Share and Share alike makes 'em Tenants in Common.

Middleton devised seven several 36th Shares in the New River Water to his several Children (by two several Venters) in Fee: Provided, that, if any of them die under Age, or unmarried, then the Part or Share of him or her so dying to be divided among the Survivors, Share and Share like; one of the Devisees dies, it was adjudg'd, that the Survivors were Tenants in Common of that Part for Life only; for the Word Share doth not denote the Interest, but the Quantity. Vide 3 Cro. 52. Pettiwood *versus* Cooke, 3 Leon. 180. S.C. Roll. 835, 836. Hanbury and Cockerell.

## Wharton *and* Lisle. Post.

Flax, &c. in Gardens or common Fields. Q. If small Tithes.

The Plaintiff being Impropriator of the Parish-Church of T. in Essex, the Question upon a Special Verdict was, Whether Flax be great or small Tithes? Holt said, if it were planted in a Garden, it were small Tithe; but if in a Field upon antient arable Land, it were great Tithe, which Dolben and Eyres deny'd, for they said the Place of Sowing could not alter the Nature of the Tithe. Nota, By a particular Endowment, the Vicar may have Tithe-Hay, and it shall be presumed, that what the Vicar hath enjoyed, he was originally endowed of. Vide 1 Roll. 643. (20) Web's Case. Hutton 77. Udal and Tindal. 3 Cro. 467. and Mo. 909. Bedingfield's Case. Adjo. *versus* Resid'. Post.

## Ambrose *versus* Whittingham.

Ejectment de Mineris Carbonum sans, shewing the Number.

Error upon a Judgment in Ejectione firmæ pro Mineris Carbonum in Durham, not shewing how many.

Pro Quer'. Ejectment lieth not pro Miner' Carbon' generally, for it is uncertain. Own 18. Palmer's Case. Mo. 702. S. C. 2 Roll. 166, 189. Sty. 30, 193. 1 Cro. 593. 11 Co. 25, 55.

Pro Defendente. It would have been good de Miner' sans Question. As to Mineris, one Mine may go thro' a whole Manor, but when there are several Shafts they are called several Mines, so that if the Ejectment had been brought pro Miner', probably he would have recovered but one Shaft.

Such Ejectments pro Mineris have been usually brought in Durham, we have Copies of the Records and Judgments thereupon.

Ch. J. hæsitavit. 'Tis hard to maintain an Ejectment of a Mine, but that is settled. Here Mines may be taken for all the Mines in the Parish; yet the Judgment was affirmed.

## *In* C. B.

Return of Habeas Corpus to inferior Court.

UPon a Habeas Corpus to remove a Cause out of an inferior Court they returned the Stat. 21 Jac. 1. cap. 23. And that the Plaint was entred tali die, the Appearance tali die, and the Demurrer joined tali die, (which was in Truth above six Weeks after) but they did not say, that it was above six Weeks (to bar the superior Court by the Statute); nor that it was not joined sooner. Another Fault was, that the Return was not directed to the Court.

The Return was disallowed, and ordered that the inferior Court return the Cause within a Week.

Cook Prothonotary, If the inferior Court would have the Benefit of the Statute, they should not have received and allowed the Certiorari. Cur' contra, for this Court ought to be ascertain'd by their Return, else 'tis a Contempt, &c.

Contempt.

## *Dr.* Harscot's *Case.* B. R.

Ejectment of a Rectory.

DR. Harscot, Dean of Windsor, was presented by the King (ratione Lapsus) to the Rectory of great Hasley in the County of Oxford, and caused an Ejectione firmæ to be brought for Recovery of the Possession; and now it was try'd at the Bar, and when he had proved the Presentation (under the great Seal) and his Admission, Institution, and Induction, and reading the 39 Articles, &c. the Defendant's Council insisted, it should be proved that he was in Orders.

Admission, &c. of a Layman, not void, &c.

Holt Ch. J. The same Proof shall be allow'd to prove Orders, as to prove Marriage, viz. constant Reputation, &c. And if he were laicus, the Admission, Institution, and Induction, were not void, but voidable, and till deprived the Plenarty remains.

The Defendant intitled himself to the Rectory by the Presentation of the Dean and Chapter of Windsor, under their common Seal; to which the Plaintiff reply'd, that the Seal was unfairly obtain'd, and so no good Chapter-Act. A Corporation must act by a Majority. There were several Orders upon the Foundation tempore Ed. 3. and confirm'd by Act of Parliament, that this Living should be disposed of by the Dean and Chapter, and that there should be ten Days Warning. The Body consists of the Dean and twelve Canons; and only Dr. Scott and Dr. Dowty were present, when the Presentation was sealed; that it was done suddenly, and without Warning.

Corporations act by Majority of those present. Vide infra.

Sir William Williams for the Defendant. If there was an Order of the Chapter directing the Presentation, there needs no Majority, when the Seal is put: When a Tenant hath the common Seal, shall he be obliged to prove that there was a Majority at the Making of the Act?

Holt Ch. J. The Seal is Evidence prima facie, but may be disproved, if obtained unfairly. Of common Right there must be a Majority of the whole present; and the Majority of them present must make the Act: But here, by the particular Constitution (as appears by several Precedents) a lesser Number may make Acts, &c.

Vide supra.

Obj. The Precedents are against the Constitution, which hath been confirmed by several Acts of Parliament. Answ. The Acts of Parliament do not reach this Case.

Holt Ch. J. A By-Law may subject Persons to Penalties, but cannot make an Act void, which is warranted by the original Constitution; and here it appears, that by the Usage a Chapter may be held without a Majority of the whole Body.

By Laws.

## Trevagnion's *Case*.

A Mandamus was granted to the Justices of the Peace in Cornwall, to give Judgment in his Case, upon the Statutes for Releasing poor Prisoners.

Mandamus to Justices to give Judgment.

## *Rex versus* Cherry.

It was moved to quash an Order made at the Sessions at Hicks's-Hall, for discharging an Apprentice, because it was made at the Sessions per Saltum, whereas it should first have been under the Hands and Seals of two Justices.

Sessions can't per Saltum Discharge an Apprentice.

Eyres J. It shall be intended to have come to the Sessions by Recognizance, as the Statute directs. But Holt C. J. and Dolben J. contra.

Eyres held, that the Sessions might order Money to be returned to the Apprentice; but Holt Ch. J. contra, for the Statute relates only to Apprentices in Husbandry, and such like.

## *Rex & Regina versus* Lloid.

Constable, an Officer of the Sessions.

ONE Hesketh was arrested by the Defendant Lloid, a Constable, by Vertue of a Warrant of a Justice of the Peace in Middlesex, against the said Hesketh, as the reputed Father of a Bastard-Child; Hesketh pleads, he is no such Person, and deposits Plate and Money in the Hands of the Officer.

Afterwards, upon Examination of the Matter at the Sessions, Hesketh entred into Recognizance, &c. And the Court ordered Lloid to return the Money and Plate; and now it was moved to quash this Order, but deny'd, for the Constable is an Officer of the Court of Sessions, over whom they have Power, &c.

Suit for getting a Bastard prohibited.

Sir Barth. Shower moved for a Prohibition to the Court-Christian, upon a Libel against a married Man for Adultery, and getting a Bastard-Child. And it was granted, quoad the Compelling him to answer upon Oath; but the Court-Christian may proceed for the Incontinency, tho' not for the Bastard-Child.

## Hodges *versus* Steward.

Bill of Exchange payable to A. or Bearer, is not to Indorsee.

CAse upon a Bill of Exchange: Custom was laid in London, that where a Bill is payable to A. or Bearer, it must be paid to the Endorsee. Holt Ch. J. said, it was repugnant, for another Person, and not the Endorsee might be the Bearer. No Indebitatus Assumpsit lieth against the Accepter of a Bill of Exchange, tho' accepted under Hand.

## Knight *versus* Leach *in Errore* C. B.

Assignment of a Breach too general.

CAse upon an Agreement, that the Defendant should assign his Part of a Ship, and that the Plaintiff should pay 23 l. in Hand, and 600 more, upon an Assignment in Writing; and it was alledged in the Declaration, that Def. non aliqualiter performavit agreamentum præd. And now assigned for Error after Verdict, that the Assignment of the Breach was too general, as, if a Man covenant to repair a House, 'tis too general to say, that he hath not repaired it, and upon this Ground were cited 5 Co. Playter's Case. 3 Cro. 292. Gregory *versus* Nevil. Hob. 69. Austin and Jervoys. 2 Cro. 503. Leneret *versus* Rivet. Yelv. 176. Rock's Case.

Sir Barth. Shower argued to the contrary, for that an Action of the Case hath no particular Form. 4 Co. 91. Here was a mutual Agreement, and Damages given for Non-performance of it; 'tis a Negative upon an affirmative Covenant, and certainly very well after a Verdict, and he cited Sid. 178. Baxter and Jackson 270. Please *versus* Palfry 447. Gibbons and Northcot. Non infregit conventionem is naught upon Demurrer; but good upon Issue after a Verdict; for a Verdict will help where the Thing wanted must be intended to have appeared at the Trial, as Attornment upon an Avowry, &c.

Holt Ch. J. cited Dyer 297, 298. and 2 Saund. 350, 352. Damages are given here occasione non performationis, probably it might have been good upon Demurrer. 3 Cro. 543. Gower *versus* Cappar. Yelv. 11. Gurnons *versus* Hodges 133, 134. Bettisworth *versus* Campion. Hob. 88. 106. Lampleigh *versus* Brathwait. But this being after a Verdict, the Judgment was affirm'd sans Difficulty.

## *Rex & Regina versus* Wiggot *and* Petty.

Indictments, how to conclude.

UPon an Indictment for bringing back one Hall to the Parish of Whitchurch, after an Order to settle him in Fecknam in the County of Worcester. Eyres J. said, where a Statute prohibits a Thing without a Penalty, or makes a new Duty to an Officer, the Indictment needs not conclude contra formam Statuti.

## *Rex & Regina versus The Bishop of* London *in* Quare Impedit *for the Vicarige of St.* Martins.

Variance between the Writ and Count.

THE Defendant pleaded in Abatement a Variance between the Writ (which says the Church is void, Et ad nostram donationem spectat) and the Count, which is jure Prærogativæ ad nostram, &c.

Jure Prærog.

Sir Barth. Shower argued, that where the King is intitled to present jure Prærogativæ, or alieno jure, the Writ ought to be so too, as Reg. fol. 30. spectat ad donationem nostram ratione custodiæ terræ & hæredis. Reg. fol. 32. 'Tis true, in an Action of Waste the Writ may be general, and the Count special, but that is, in eodem jure. And in 3 Cro. 240. (which seems against me) the Count was only Explanatory of the Writ, not in another Right.

Tremain contra, relied upon 3 Cro. 240.

Holt Ch. J. 'Tis clear, the Crown hath the Prerogative to present in Case of Simony, yet there a general Writ is good, never said Ratione Simoniæ. As to Wardship, it may be either general

general or ſpecial. Raſt. 528, 530. pl. 11. the Words ſpectat ad donationem noſtram do not imply pleno jure. Ruled quod Reſpondeat Ouſter.

## Houghton *and* Howard.

Writ to the Ch. Juſt. of Cheſter, ſive locum tenenti, well.

UPon a Writ of Error directed to the Chief Juſtice of Cheſter, ſive ejus locum Tenenti.

Sir William Williams moved to quaſh the Writ, for that the Record return'd is coram A Capital' Juſt' & B. alt' Juſt'.

Holt Ch. J. Before the Stat. Eliz. there was but one Juſtice, but that Statute adds another, and ever ſince the Records have been as this is; tho' Sir William Williams ſaid, 'twas always return'd coram Juſticiario, till King Charles the Second's Time. The Judgment was affirm'd.

Ante Poſt.

## Dubray *verſus* ———

Adminiſtrator not to give Bail on ſuggeſting Devaſtavit.

RUled, an Adminiſtrator ſhall not be compelled to find Special Bail upon a bare Suggeſtion of a Devaſtavit; but in Debt upon a Judgment, where a Devaſtavit is actually return'd by the Sheriff, he ſhall. *post 325. Carthew. 264*

## James *verſus* Barkley.

Where Error in Parliament, or on Judgment in C. B. is no Superſedeas.

HOlt ſaid, A Writ of Error in Parliament, where there is a long Prorogation, ſo that a Term doth intervene, is no Superſedeas; and ſo of a Writ of Error upon a Judgment in the Common Pleas. Where a Record is actually return'd into Parliament, if there be a Prorogation, and no Continuance of the Writ of Error, Execution ſhall be awarded. Vide Mod. 285. 2 Cro. 341, 342. Heydon and Godſalve.

# DE

# Term. Sanctæ Trin.

## Anno 5 Willielmi & Mariæ, Regis & Reginæ in B. R.

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Thomas Savere *Gen. Demandant versus* Lenthal, Briggs, Faringdon, Glover, Cook, *and* Ellis, *Tenants.*

Assise of the Office of Marshal.

A Assise of Novel Disseisin for the Office of Marshal of this Court try'd at the Bar. The Demandant makes Title by Grant of the Office from Lenthall, one of the Tenants, to the Demandant for his Life; and Articles were read, whereby Lenthal, in Consideration of 40 l. paid in Hand, granted and covenanted to convey the Office to the Demandant for his Life, from and after the Death, Surrender, Forfeiture, or other Determination of the Estate of Glover, of, and in the said Office, paying a yearly Rent of 1600 l. whereof 355 l. to be paid upon the Sealing the Conveyance for the first Quarter.

That Glover committed a Forfeiture by a voluntary Escape: And it was proved, that the Demandant was seised and disseised by the Tenants.

What Covenants pass Estates, or not.

But the Court was clearly of Opinion, that no Estate pass'd by the Words of the Articles, but they sounded only in Covenant, for if the Sentence ended at the Word Grant, then nothing was granted. A Covenant that one shall enjoy, makes a Lease, but not a Covenant, that one will convey, &c. Vide Hob. 34, 35. Tisdale *versus* Sir William Essex. 1 Cro. 207. Drake *versus* Munday. And the Plaintiff was non pros'd.

*Case*

## *Case of the Parishes of* Shermanbury *and* Boldney.

Poor's Settlements.

A Woman is settled with three Children in the Parish of Shermanbury, and relieved by the Parish at 3 s. per Week. A Man of Boldney marries the Woman, the Children follow their Mother: The Justices at the Sessions make an Order, that the Parish of Shermanbury should continue their Payment to the Children in Boldney.

Holt Ch. J. This cannot unsettle the Children, unless the Step-Father be able. Yet Quære, Whether the Children being under Age must necessarily follow their Mother as Nurse-Children.

Eyres J. Tho' the Father be chargeable with Maintenance, &c. yet they may not thereby be removed to another Parish, for if so, that Parish might be charged with them after the Death of the Father.

Then it was said by the Council, that this Order was made originally at the Sessions, without any Appeal.

Eyres J. In some Cases the Justices may make an original Order at the Sessions, as to charge the Grandfather, &c. Adjournatur.

## Lamb *versus* Archer.

Devise of a Term in Remainder after a Tail on a Contingency, good.

Upon a Special Verdict in Ejectment the Case was, A Man possess'd of a long Term for Years devised it to Richard his Son, and the Heirs Males of his Body; and if he die without Issue (living Elizabeth his Mother) then it should go over to his Son John; the Contingent happen'd.

It was adjudged without Difficulty, that the Devise over to John was good, upon the Reason and Authority of the Duke of Norfolk's Case, which the Court said was decreed according to the Rules of Law, and no Danger of a Perpetuity doth ensue. And Note, Child and Baily's Case hath been very much shaken.

Where Action lies for malitious Prosecution.

Eyres J. It is a Question in our Books, Whether an Action will lie for the malitious Prosecution of one for Felony, before the Felony try'd: And where the Judge will proceed (tho' 'tis ill done) yet we cannot tie up his Hands, 'tis an Error in Judgment.

Q. If confessing Lease, Entry, and Ouster, be good in inferior Courts.

Eyres J. I much Doubt, whether the Rules of confessing Lease, Entry, and Ouster, be good in an inferior Court, but they should proceed the antient Way.

Holt Ch. J. No Man is to be admitted Tenant or Defendant in Ejectment by the common Rule, unless he hath been in Possession, or received Rents, and not a meer Stranger.

Who to be admitted Defendant in Ejectment.

## Wharton *and* Lisle. Ante .

IT was now argued again upon a Special Verdict in Trover, whether the Tithe of twenty-six Acres sown with Flax be a great Tithe or a small (there being 1300 Acres in the Parish.)

Tithes of Flax, &c. small Tithes.

A Case was cited for the Plaintiff, between Witherington and Henden, adjudg'd in the Exchequer. Pasch. 27 Car. 2. that Turneps, when sown in great Quantities, were great Tithes. But Dolben J. deny'd that it was so resolved, but that the Tithes remain of the same Nature, whether in Gardens or Fields, and of that Opinion were the rest of the Justices; but they said, if the greatest Part of the Parish should be sown with Flax, perhaps they might alter their Opinion. Vide Linwood 192. Linum reckon'd inter minutas decimas.

Judgment for the Defendant, Nisi, &c.

Holt Ch. J. I wonder that any Creditor, that is in Earnest, should desire to remove a Prisoner out of the Country, for he may as well Charge him in the Country by Vertue of the late Act, &c. which hath taken very good Effect, so that the Habeas Corpus is but a Trick.

Habeas Corpus for Prisoners in the Country; a Trick.

## Nosworthy *and* Basset.

ONE devises the Manor of D. by Will, and afterwards makes another Will, without mentioning the Manor of D. Quære, If this be a Revocation.

Two Last Wills, reddendo singula singulis.

Holt Ch. J. hæsitavit. For by the Stat. H. 8. it must be the Last Will.

Finch contra. For the former Will shall be taken for the Last Will, as to D. Adjournatur.

## Harcourt *versus* Fox.

INdebitatus Assumpsit for the Profits of the Office of Clerk of the Peace of Middlesex, the Jury found specially the Statutes 37 H. 8. cap. 1. and 1 Will. & Mar. relating to the Office of Clerk of the Peace: And the sole Question was, Whether the Plaintiff continued Clerk of the Peace after the Removal of the Custos Rotulorum.

Clerk of the Peace continues after Removal of the Custos Rotulorum.

And now all the Justices seriatim delivered their Opinions for the Plaintiff, upon the Words of the new Statute, that the Custos shall name the Clerk of the Peace to hold the same Office so long only, as he shall behave himself well, which gives him an Estate for Life.

First Justices of Peace made 1 Ed. 3.

Holt Ch. J. In his Argument said, that the Office of Custos Rotulorum is not Time out of Mind, but it is an antient Office. Lambert's Inst. fol. 371. Justices were created 1 Ed. 3. in Lieu of the Conservators of the Peace; without Question, they had thereby the same Authority as the Conservators had, Stat. 34 Ed. 3. gives them greater Authority, this gave Occasion for the Office of Custos Rotulorum. The Justices are Keepers of the Records, but that was inconvenient, for one might take one Record and another another: The King may name one of them, that are named in the Commission (for Convenience) to be Custos Rotulorum, tho' legally still they are in the Custody of the Justices, for the Writ of Certiorari is directed to them; but the Custos is chargeable, if they be embezell'd: hence it follows, that the King cannot name one to be Custos, who is not in the Commission of the Peace. 2 H. 7. fol. 1. A Recognizance for the Peace shall be certify'd to that Justice, who is Custos Rotulorum.

Note. Custos Rotulorum, his Creation and Authority.

'Tis incident to the Office of Lord Chancellor to name the Custos (but in the Name of the King) without Warrant, as he now grants Commissions of Oyer and Terminer and Gaol-Delivery; for ex officio he ought to provide for the Execution of Justice. The Stat. 37 H. 8. that takes the Nomination from the Chancellor (and appoints a middle Way by Bill signed) was an Incroachment upon his Office, and found to be inconvenient; and therefore, by the Statute 3 & 4 E. 6. 1. the Power of the Lord Chancellor was restored.

The Nomination of the Clerk of the Peace belong'd to the Custos, as the most proper Person. 2 Inst. 425.

It was plainly the Intent of this new Statute to make Provision, that the Sessions should be always furnished with an able Clerk, who might dispose of himself and his Affairs accordingly. It was the general Temper of the then Parliament to make Offices more lasting (our Places are so) and Contemporanea Expositio est optima.

Judicium pro Quer'.

## Hermitage's *Case*.

Mandamus to Governours of a Free-School to restore the Master. They Return a Power to displace, and well.

J. Hermitage brought a Mandamus to be restored to the Place of Master of the Free-School of Wakefield in the County of York: The Governours return their Foundation by Queen Elizabeth, and their Power to chuse a School-master, who was to continue quamdiu compertus foret per Gubernatores sive majorem

rem partem eorum esse diligens fidelis & aptus; with Power to the Governours to make By-Laws and Statutes for the better Government of the School; and they return'd several Statutes and several Breaches of them by Hermitage, and therefore they displaced him, &c.

His Council offer'd several Exceptions to the Return, insisting that one or two Failings do not amount to a Forfeiture of the Office, but it must be an obstinate persistance.

But the Court was of Opinion, that the Statutes in this Case are but directory, and the Governours by the Foundation are made the absolute Judges, from whom there lieth no Appeal.

## Anonymus.

Covenant to pay Rent, free from Taxes, how intended.

Upon a Covenant in a Lease to pay the Rent, without any Allowance of Taxes, Impositions, or Assessments, which are imposed, or hereafter shall be imposed.

It was urged by the Council, that a Covenant to pay Rent, free from Taxes, shall not be extended to parliamentary Taxes, which the Court seem'd to admit; but here the Words Assessments, and which shall be imposed, must extend to parliamentary Taxes, and cannot otherwise be satisfied, else many Contracts would be avoided.

## Anonymus. Post.

Error pending, pleaded in Abatement to Debt on Judgment.

Debt upon a Judgment, the Defendant pleaded a Writ of Error depending in Abatement.

Holt Ch. J. It is a good Plea in Abatement, tho' not in Bar, according to the new Distinction in the Exchequer-Chamber: The Judgment is suspended in a great Measure by the Writ of Error; for tho' an Executor ought to pay Judgments before Statutes, yet he may pay off a Statute before a Judgment, upon which there is a Writ of Error depending.

Dolben J. The Law, in Oliver's Time, was that a Writ of Error should not be a Supersedeas, and it would be well if it were so now.

Eyres J. The Distinction between Bar and Abatement is new.

Holt C. J. I'll talk with the other Judges about it. Adjo.

## Anonymus.

Alien-nee in Abatement.

IT was pleaded in Abatement, that the Plaintiff was an Alien-nee apud Roan in Regno Franciæ infra Ligeantiam Regis Francorum: The Plaintiff replies, that he is Alien Amie nee al Hamborough infra Ligeanc' of the Emperor, and traverseth that he was born at Roan modo & forma, &c.

Holt Ch. J. It seems to be an ill Traverse, and puts an ill Issue.

Serjeant Darnel cited 2 Roll. 681. D. 1, 3.

Eyres J. In those Cases modo & forma alters the Case.

Holt Ch. J. 1 Inst. 281. Upon a Traverse quod feoffavit modo & forma. A Feoffment by Parol will not satisfy the Allegation of a Feoffment by Deed.

Eyres J. The later Authorities are otherwise.

Holt Ch. J. He might have been born at Roan, and yet infra Ligeanciam Angliæ, as if attending on an Embassador, and therefore he should have pleaded Alien Enemy nee, &c. Adjournatur.

## Edwards *versus* Pierce.

Two submit, Award against one, good.

TWO submit to an Award, and nothing was awarded as to one, but only, that all Actions should cease: Yet the Court held it to be a good Award.

Warrant of Attorney to enter Judgment.

Ch. J. By the Practice a Warrant of Attorney before the Essoin-Day to enter up Judgment, as of the precedent Term, is good. I once knew a silly Attorney, that entred up a Judgment of the precedent Term upon a Bond given, and dated in the Vacation.

## *Rex versus* Read.

Indictment for using a Trade, the Trade must be in Latin.

HE was indicted upon the Statute 5 Eliz. for exercising artem de le Fabre; and the Indictment was quash'd, for by the Statute all Indictments ought to be in Latin, here 'tis in French.

Judgment in Ejectment against a Co-parcener for a Moiety.

It was moved for a Co-parcener, one of the Defendants in Ejectment, that the Plaintiff might take a Judgment for a Moiety, else if he proceed and recover but a Moiety, he may pay Cost. Granted Nisi.

## *Rex versus* Pullen.

HIS Conviction for Deer-stealing being affirm'd, Sir Barth. Shower now moved for an Attachment; but the Court deny'd it, for they said they must pursue the Statute, and make out such Process, as the Statute directs. Vide 3 Inst. 162. 13 Co. 64. In Case of forcible Entry, this Court may award Restitution; and 'tis a general Rule, that this Court in all Cases may grant the like Execution, as the Court below should have done.

Deer-stealing.

## Harcourt *versus* Fox.

SIR Barth. Shower moved for a peremptory Mandamus, the Right being now try'd, and said it was granted in the Cases of Maxfield-School and Birmingham-School, without Return of a first Mandamus. The Surmise of a peremptory Mandamus is quia constat nobis de Recordo quod A. debet admitti, which is true in this Case, as well as upon Return of a Mandamus.

Mandamus, peremptory.

Dolben J. Then there should have been a Rule by Consent for trying the Right.

Holt Ch. J. They may bring a Writ of Error; Then Sir Barth. Shower pray'd a general Mandamus, and it was granted.

A Mandamus directed to the Mayor, Aldermen, Common Council, and Chamberlain of Canterbury, was returned by the Mayor and Commonalty. And now Turner moved for a peremptory Mandamus.

Mandamus, how directed.

Holt Ch. J. A Mandamus need not be directed to the Corporation (tho' it may be so) but to the Person, who did the Wrong, and hath Power to do Right. You should have moved, that the Persons, to whom the Writ was directed, should have returned it, the Return must be quashed; But you may take a new Writ.

Eyres J. If two Tenants in Common be disseised, their Lessee in Ejectment must declare upon two several Demises.

Ante Two Demises, where two Tenants in Common disseised.

## *Rex versus* Pope.

THE Defendant being Overseer of the Poor, was indicted for not obeying an Order of Sessions concerning the Settlement of a poor Man; and now the Indictment was quashed, because it recited quod cum ordinatum fuit, &c. whereas it should have been absolute, without the Cum. Vide post. contra.

Overseer indicted for disobeying an Order of Sessions. Post. quod cum.

Ano-

## Anonymus.

Trespass lies on a Possession.

HOlt C. J. A Man possessed of Goods may have Trespass in his own Name, by Reason of the Possession; but where he declares as Administrator for Money received ad usum Administrator. 'tis otherwise.

Eyres J. I thought it had been for lent Money, and then the Administrator might declare either Way, and the Naming himself Administrator is but Surplusage.

Holt Ch. J. Where the Administrator gives a Man Authority to receive Money for him, the Action must be brought in his own Name; but if paid to a Stranger without such Authority, the Administrator hath his Election.

Where one sues as Administrator, the Defendant may have Audita Querela.

Where an Administrator names himself so, &c. the Defendant may have an Audita Querela. I remember the Case somewhere.

Sir Barth. Shower. 'Tis in Saunders.

## Bret *and* Johnson's *Case*.

Mandamus to restore divers Common-Council-Men.

MR. Harrington moved for a Mandamus to the Mayor and Citizens of Chester, to restore Richard Bret, Thomas Johnson, and seven others, to their Offices of the Common Council there, and it was granted.

# DE

# Term. Sancti Mich.

## Anno 5 Willielmi & Mariæ, Regis & Reginæ, in B. R.

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### Sands *qui tam versus* Child *& al'.*

AN Action brought upon the Statutes 13 R. 2. 5. 15 R. 2. 3. 2 H. 4. 11. for suing in the Admiralty for Things done super terram.

Action for Suit in the Admiralty, to stay a Ship bound for the East-Indies.

That the Plaintiff, 34 Car. 2. was going with his Ship from London to the Maderas.

That the Defendants 13 December, 34 Car. 2. prosecuted a Plaint in the Court of Admiralty, and on the 14th caused the Ship to be arrested, for Caution not to trade with Infidels within the Limits of the East-India Company's Charter, without the King's Licence, whereby the Ship was stopp'd till April. The Defendants pleaded Non Cul'.

The Jurors found specially the Licence of the East-India Company, the Petition of Child to the King; whereupon the King order'd the Commissioners of the Admiralty to cause the Ship to be stopp'd, until Security given, &c. that on the 13th of December, the Defendants, as Agents for the Company, procured a Warrant to arest the Ship, which was arrested on Behalf of the Company: And they refer'd it to the Court, whether the Defendants were guilty within the Statute.

Finch pro Defendente.

1. Here is no Suit at all in the Admiralty, neither Plaintiff nor Defendant, nor Thing in demand, no Libel, to which Answer

swer required: The Writ of ne exeat Regnum is no Suit; so here.

2. It cannot be any Suit within the Meaning of the Statute, for the Occasion of the Statute was, because the Admiralty held Plea of Things triable by the Common Law; but there is no Way to stop a Ship at the Common Law: This is not for a Matter done upon the Land, nor for a Matter done at all, but only for Prevention, &c.

The King without Question may lay an Embargo, and it may be executed by the Admiralty, for which he cited the Case of Stock and Cullen in this Court, upon an Appeal from the Duke of York, Warden of the Cinque-Ports, whence it follows, that the Admiralty had a Jurisdiction. 2 Cro. 133. Waterhouse and Bawd. Whether the Embargo be well or ill laid, not material.

The Defendant is no Prosecutor within the Statute: The King may lay an Embargo as to particular Places, which must be by Security. Upon a Ne exeat Regnum the King may require Security; this Act is not to be extended by Equity: An Attorney or Solicitor is no Prosecutor within the Act; By the Stat. of Præmunire 16 R. 2. All Agents are included within the Words.

'Tis true, one, who prefers an Indictment, or accuseth a Man of Felony, is liable to an Action, but that is only because of the Scandal.

Sir Barth. Shower contra.

The King may lay Embargo's in Time of Danger, but this was a Time of Peace, whereof the Court will judicially take Notice. Every Man hath a Right to traffick, and is encouraged therein by the Common Law. Magna Charta, cap. 30. in Favour of Merchants. 2 Inst. 53. publice prohibiti, must be by Act of Parliament. No Writ of this Nature, that of Ne exeat Regnum doth not justify it, for upon that a Habeas Corpus lies; A Writ of Ne exeas Regnum is not granted, but by Reason of Special Danger to the Crown. Lit. R. 27. Noy 182. The Law doth not warrant such Proceeding, for prevention whereof, if any Wrong be done, there may be Remedy afterwards. Here the whole Matter ariseth super terram.

As to the Prosecution, it is not necessary to be a Suit, but here is a sufficient Intermedling within the Statute; here is 1. Judex suprema Cur' Admiralitatis. 2. Rite & legitime procedens. 3. Advocate and Proctor. 4. Allegation and Surmise. 5. Prayer for Decree against the Ship. 6. Warrant made thereupon.

As to the Objection, that it was the King's Suit. If the King grants a Warrant to imprison a Man against Law, he that executes it is a Trespassor.

Sir Josiah Child was not the King's Attorney, nor the Company's, for it doth not appear that he had any Authority under

their Seal. In the Case of the King and the City of Chester in Quo Warranto, no Appearance could be entred for them, without Warrant under their common Seal.

As to the Forfeiture of 10 l. to the King, and the King's Dispensation by his Licence, that cannot help. 4 Inst. 139. The Property of the Ship is to be presumed with the Possession; and if joint, yet Merchants may bring several Actions; if several 10 l. 'tis their Fault; if but one 10 l; might plead auterfoits acquit.

As to the Doubling of the Costs, he cited Dy. 159. b. 1 Leon. 282. 2 Leon. 52. Rolston and Chambres. 10 Co. 116. in Pilfold's Case, no Distinction of Damage de Incremento. Bro. Costs 14. 3 Cro. 582. Thoroughgood *versus* Scroggs 26 H. 6. 57. Fitz. Nat. Br. 248. 1 Roll. 517. True, there is no Danger in the Country.

Now the Chief Justice delivered the Opinion of the Court, that tho' the Proceeding in the Admiralty was not at the Suit of Sir Josiah Child, yet his Promoting it was sufficient; and whereas it was objected, that Sands was only a Tenant in Common, no Advantage can be taken of that now, it might have been pleaded in Abatement.

Judgment affirmed.

## Pope *and* Haman. Post. 220.

Upon the Proviso in the Statute 28 Eliz. cap. 4. That Poundage shall not be taken for any Executions in Corporations. Holt Ch. J. and Dolben J. held it must be intended of Executions upon Judgments in their own Courts, and not upon foreign Judgments.

Poundage not to be for executing Judgments in Corporations.

It was moved, that the Bail upon his producing the Principal might be relieved against the Bail-Bond, tho' a Term had interven'd.

Proceedings not stay'd on the Bail-Bond, on producing the Principal.

Aston reported, the Practice had been both Ways, according to the Circumstances.

Holt, Gregory, and Eyres, that Proceedings should stay upon the Bail-bond: But Dolben said he never knew it done, where a Term or an Assizes interven'd; whereupon the Court agreed, that they would not relieve the Bail in such Cases for the Future.

Holt Ch. J. Upon a Judgment against one Copartner, the Sheriff may take the Goods of both in Execution: And the other Copartner hath no Remedy at Law, otherwise than by retaking the Goods, if he can, for the Vendee of the Sheriff becomes Tenant in Common with the other Copartner.

Judgment against one Partner, Execution may be of both their Goods.

H. P. C. 58. Aleyn 44. Conclusion of Indictment.

Holt Ch. J. said. An Indictment upon the Statute of Stabbing need not conclude cantra formam Statuti.

## Matthew *versus* Ollerton.

Award, Submission to the Plaintiff himself, good, tho' Judge in his own Cause.

DEbt upon an Award, Serjeant Levinz moved in Arrest of Judgment, that the Submission was to the Plaintiff himself and another: And it is against Right and Law, that the Plaintiff should be Judge in his own Cause. If I Licence a Man to beat me, such Licence is void.

Curia. The Defendant may refer to the Plaintiff himself, if he will; but Licence to beat me is void, because 'tis against the Peace. Dolben J. said, he remembred a Case where a Gentleman's Steward brought an Action in his Master's Name; and the Defendant entred into Rule by Consent, to pay what the Plaintiff should think fit. And my Lord Hale held it to be a good Submission.

## Lucas's *Case*.

Poor's Settlement.

ONE Lucas, an old blind Man, was born at Walton in Lancashire, and about thirteen Years ago was settled as a Servant at Huntington in Cheshire, and thence removed himself, and was settled at Stoke in Herefordshire, where he became Blind, and thence return'd to Walton in Lancashire, whence two Justices removed him by Order, &c. to Huntington. Mr. Booth and Mr. Hurlston, two Justices in Cheshire, make an Order for removing him to Stoke in Herefordshire.

Mr. Solicitor Trevor moved to quash the Order of Cheshire, for that they should have appealed to Lancashire, and could not make an original Order, for otherwise the Poor would be tossed from Pillar to Post.

Curia (absente Holt Ch. J.) hæsitavit. At another Day, Mr. Cheshire pray'd, that the Order of the Justices in Cheshire might be affirmed, for the Order of Lancashire is binding to Cheshire, quoad Lancashire (only) but doth not hinder them from finding him a new Place of Settlement; and the Statute 14 Car. 2. cap. 12. which directs the Persons grieved to make their Appeal to the next Quarter-Sessions, &c. cannot be taken to extend to foreign Counties. 1. Because of the Shortness of the Time, for it must be to the next Sessions. 2. Because of the Distance of the Place, which may be to the remotest Part of the Kingdom.

Holt Ch. J. The first Order of two Justices is good, till revers'd; but whether the Order of Cheshire be good as an original Order, hæsitavit.

Sol. Gen. The Justices of Cheshire can make no Order contrary to that of Lancashire, and consequently cannot remove him to any other Place; for the Terminus ad quem is Part of the Order, as well as the Terminus a quo. Post.

Mr. Cheshire. The Order of Lancashire is Faulty, for that Huntington is not said to be the Place of his last Settlement. Note.

Cur'. That Order is already affirm'd in Court, else the Exception were good.

Sol. Gen. I shall take Mr. Cheshire's own Exception against the Order of Cheshire, which hath the same Fault: And therefore it was quashed per Cur'.

## Green *versus* Horn.

THE Plaintiff declares, that in September, 1688. George Pollard being his Debtor by Bond, he sued out a Writ against the said Pollard, and he being under Arrest in the Bailiff's Hands, the Plaintiff, at the special Instance of the Defendant, did enlarge him, in Consideration whereof the Defendant, by Writing under his Hand and Seal, promised to bring Pollard into the Bailiff's Hands, on or before the 29th Day of September then next following; and assigns the Breach, that he did not bring the said Pollard ante præd. 29. Diem Sept. nec unquam Postea, the Defendant demurs to the Declaration; and Northy moved two Exceptions: Covenant. Q. Breach.

1. The Breach is not well assigned, for the 29th of September, which is the most proper Time, is quite excluded; and the Defendant might bring Pollard on that Day, tho' neither before nor after.

2. That the Engagement was made to the Bailiff, and not to the Plaintiff, he is not so much as named in the Note. But as to that, the Court held clearly, that the Plaintiff may take Benefit of it, tho' not mentioned as Party: If I oblige my self to pay J. S. 100 l. the Obligation is made to him, for whose Benefit it is.

Holt Ch. J. to the first Exception hæsitavit. May it not be taken, that he did not render him before the 29th, nor at any Time afterwards, that is, after the Time before the 29th, which endeth with the 28th, and then the 29th is included in the Postea.

Day was given to the Plaintiff to answer, whether he would discontinue paying Costs.

Note, Tho' the Bailiff could not take Pollard again without a new Writ, yet it seemeth the Defendant should have done his Part, viz. to have brought him.

## Middleton *versus* Wheeler.

Debt lies not below on Judgment in B. R.

ADjudged that an Action of Debt lieth not in an inferior Court upon a Judgment in this Court.

## Pope *and* Haman. Ante 217.

Debt for Sheriffs Fees.

May intends shall in a Statute.

ERror of a Judgment in Bristol in Debt for the Sheriffs Poundage for executing a Ca. Sa. The Court held, that the very Permission by the Statute makes it lawful, and a Duty to the Sheriff, for which he may maintain an Action of Debt. 3 Cro. 654. Staunton *versus* Sulliard. 1 Cro. 287. Lister *versus* Bromley. It being further demanded at the Bar, if upon a Statute one Sheriff takes the Body, and another Goods, which of them shall have the Fees: The Court answered, that both should have their Fees, and wheresoever the Sheriff hath double Trouble, he shall have double Fees. Vide Latch. 51.

## Nicholas *and* Chapman.

Damages on Default in Debt, not said Ex assensu suo, well.

ERror of a Judgment in C. B. in Debt by Default. Cheshire assigned for Error, that the Entry of the Damages should have been ex Assensu suo, for, if the Plaintiff do not like them, he may have a Writ of Enquiry. 2 Saund. 106.

Holt Ch. J. It is well enough in Debt by Default, otherwise in Case: But Aston told me privately, that all the Precedents and Entries are ex Assensu suo, and he thought those Words necessary. And Mr. Cheshire told me, he did not expect such an Answer from the Court, but rather to have been told, that the Omission of those Words was cured by the Stat. 16 & 17 Car. 2. cap. 8. for so he thought it was, tho' the Court took no Notice of it, tamen Quære; for that Statute doth not seem to extend to Judgment by Default.

## Harding *versus* Salkin *Executor of* A. B.

Administrator and not Executor pleaded in Bar. Q.

DEbt against one as Executor, the Defendant pleaded in Bar, that A. B. died Intestate, and that Letters of Administration were committed to him.

Northy pro Defendente. That such Plea may be pleaded in Bar appears by Robinson's Case. 5 Co. 331. Where a Diversity is taken between a perpetual Bar, and a Bar as to the Action of the Writ.

Holt Ch. J. That is where the Plaintiff brings an Action as Executor, when in Truth he is Administrator; but here the Defendant cannot plead such Plea in Bar, that himself is Administrator and not Executor, for he is still chargeable to the Plaintiff, tho' he be Administrator. (Northy cited Dyer 305.) Vide Office of Executor 248.

Holt Ch. J. You cannot give Letters of Administration in Evidence upon a Ne unques Executor, but Letters ad Colligendum you may. If there be Judgment against an Administrator by the Name of Executor, and he be sued afterwards as Administrator for the same Cause, he may give the former Judgment in Evidence. Evidence, &c.

## *Master, Wardens, Assistants, and Community of* Stationers *in the City of* London *against* Salisbury, *upon a* Habeas Corpus.

Debt upon a By-Law, that the Master, Wardens, and Assistants, or major Part of them, should from Time to Time elect such Members as they think fit into the Livery, and if any Person so elected refuse to accept the same Office, &c. without a reasonable Excuse, to be approved by the Court of Assistants, that the Person so refusing should forfeit 40 l. Stationers Company By-Law.

The Declaration recites the By-Law, and that the Defendant on such a Day was elected into the Livery, and refused, &c. per quod actio accrevit, &c. with Averment, that he had no reasonable Excuse, and that the By-Law was made by all the Corporation. The Defendant demurs.

Northy pro Defendente.

1. The Company are here made their own Judges of the reasonable Excuse, which is against Law. 1 Roll. 364. Case of the Taylors of Ipswich. 8 Co. Dr. Bonham's Case.

2. Admitting the By-Law to be good, here is no good Breach assigned, for the Defendant should have been required by the Court of Assistants, and to that End summoned before them, which is not alledged.

Sir Barth. Shower contra.

The Action is here brought by the Company, the Approbation to be by the Court of Assistants, who could have no Benefit, but only as Part of the Community. If a By-Law were made that none should do such an Act, without the Consent of a certain Person (who is a Freeman) it seemeth a good By-Law: As to the Case of the Taylors of Ipswich in Roll's Abridgment, the Reason of the Resolution of that Case by the Lord Coke's 11th Report was, for that it tended to the Restraint of Trade, &c. If one of the Justices of this Court brings an Action in this Court, he may

may have Judgment, for it is per Curiam: So if one Coroner brings an Action, and he and another pronounce the Judgment of Outlawry, it is no Error. 2 Roll. 93. But if a Mayor bring an Action before himself by Name, that is erroneous. Here they have averr'd, that he had no reasonable Excuse, and that the By-Law was made by the whole Company, whereof the Defendant is a Party, and the subject Matter of it is lawful, and the Defendant by his Demurrer hath confessed the Averments, and the Penalty shall be presumed prima facie to be reasonable.

Holt Ch. J. Here the Cause of Excuse is to be approved by them, so that, if it were reasonable and not approved, the Party would be without Remedy; and we cannot here reject that Part: Where a Parcel of By-Laws come before us together, some good and some bad, they may be sever'd; but not so where the Sense is intire, as in this Case.

2 ∓ 272.

Sir Barth. Shower. Suppose it were, Upon due Proof to be allow'd by a certain Officer, sure that were good?

Holt Ch. J. I Doubt that.

Sir Barth. Shower. This By-Law was signed by the Lord Chancellor Finch.

Cur'. 'Tis never the better for that, for that is done of Course. So we use to do in the Circuits; but if the Orders be not good, let the Parties look to that at their Peril.

And the Court inclined for the Defendant upon both the Exceptions, but advised him to submit to his Company, and recommended a Reference to my Lord Mayor, &c.

## Phelps *and* Rainer.

Costs on Judge's Certificate.

SErjeant Darnel moved for the Defendant, that whereas the Judge that try'd the Cause, certify'd only an Assault, and no Battery; yet the Plaintiff had sued out and executed an Execution for his full Costs, which exceeded the Damage, being under 40 s.

Holt Ch. J. You come too late, after Execution executed. You may take your Action. Vide Stat. 22 & 23 Car. 2. cap. 9. ad finem.

## Porter *and* Clinton.

Fraudulent Conveyance purged by a good one.

HOlt Ch. J. said, If a Conveyance be made by Fraud, and afterwards the Land is conveyed over upon valuable Consideration, bona fide, the Fraud is purged.

## Leonard *qui tam versus* Beech.

PLaintiff declares on the Stat. 1 Jac. cap. 22. that the Defendant being Sealer and Searcher of Leather in the City of London, Allocavit & sigillavit 150 Coria insufficientia contra formam Statuti. Per quod, &c.

Stat. 1 Jac. c. 22. against Fraud in Officers in Sealing Leather.

Sir Barth. Shower (in Arrest of Judgment come semble) That it is but one single Offence; the Allowance but one Act, therefore the Defendant should incur but one Penalty.

Dolben J. The Refusal of twenty sufficient Hides is but one Offence; so it seems of the Allowance of so many insufficient.

Holt Ch. J. The Setting the Seal every Time is a complete Offence, the Sealing is the Teste of the Allowance; and Searcher and Sealer is the same Office.

Sealing every Hyde a several Offence.

Eyres J. Allowance signifies nothing without the Seal.

Sir Barth. Shower. The Office of Searcher and Sealer seem to be different by the 31st Paragragh of the Statute.

At another Day it was resolved, that every Putting the Seal is an Allowance within the Statute.

Judicium pro Quer'.

It was moved, that whereas a Sheriff had return'd a Cepi Corpus, and stood out long before he had brought in the Body, that now he should pay Costs before his Amerciaments should be discharged.

Sheriff amerced on a Cepi return'd.

Holt Ch. J. It seems reasonable, but I never knew it done.

Dolben J. I never knew such a Motion, you have Costs for all your Proceedings tax'd at last upon your Judgment.

## Heath *and* Reece *Error e Cur. Pal.*

SKinner assigned for Error, that whereas the Plaint was general, viz. in his own Right, yet he declares as Administrator for Money received by the Defendant to his Use.

In Com. Pal. Plaint general, Count special.

Northy contra. He needs not name himself Administrator, 'tis but Surplusage; so in Trover; so for an Escape in his own Time. Trin. 26 Car. 2. Curtis and Dawe. If an Executor orders a Man to receive Money for him, a general Indebitatus Assumpsit will lie.

Holt Ch. J. cited the Case of Herenden and Palmer. Hob. 88. And said, unless there were an express Promise to the Executor, it cannot raise a Consideration for an Action in his own Right. In the Case of an Escape upon a Judgment obtained by the Executor himself, he need not shew the Letters testamentary; otherwise upon a Judgment in the Life of the Testator. Adjour'.

Holt

Warrant, no Attorney present.

Holt Ch. J. If one under Arrest give a Warrant of Attorney to confess a Judgment to the Plaintiff, no Attorney being present, we generally vacate it; but if the Judgment were to another Person, as to his Bail, &c. it seems to be out of the Rule.

*Master, Wardens, and Assistants of the Company of* Cutlers *in* Hallamshire *in the County of* York *against* Hursley.

Costs on a Penal Stat. besides the Penalty.

Debt upon the Statute (Quære if a private Act) that no Person using the Occupation of a Cutler, &c. should employ more than one Apprentice, except his Son, &c. upon Pain of 40 s. per Month; now, after Verdict for the Plaintiffs, for 6 l. for three Months, it was debated, whether the Plaintiffs should have any Costs in this Case.

Sir Barth. Shower urged, that this is upon a Penal Statute, where there was no Penalty before 10 Co. 116. Pilfold's Case. In Case of a Quare Impedit, where Damages are given by Statute, there are no Costs. 2 Inst. 289. So in Debt upon the Statute 2 Ed. 6. for not setting out of Tithes no Costs, tho' the Judgment be by Confession or Default. Hutton 22. In Debt upon the Statute 5 Eliz. for Perjury, 'tis said the Plaintiff should have no Costs, the Penalty being certain.

But it was answered by Northy, and resolved by the Court, that, wheresoever Damages are to be given in Debt, Costs are to attend them: And the Reason of the Damages is, because the Money is not paid upon Demand; for if the Defendant pleads Tout temps prist, &c. the Plaintiff must reply, and set forth a special Demand, whereupon Issue may be taken; and if it be found for the Defendant, the Plaintiff can have neither Damages nor Costs: Nothing is due to a common Informer before the Action brought, and therefore he shall have neither Damages nor Costs: But where a new Action is given to the Party grieved for a certain Penalty, he shall have Costs, for else the Penalty might be less than the Costs. Roll. 516. and 574. North and Musgrave is in Point; and the Saying in Hutton 22. is no Law.

Adjudged the Plaintiffs should have Costs.

*Rex & Regina versus* Yaxley.

Special Authority by Stat. ought to be pursued.

It appeared, upon the Return of a Habeas Corpus, that Yaxley being suspected to be a Jesuit, and refusing to Answer was committed by the Lord Nottingham, Secretary of State, until he should be delivered by due Course of Law.

Sir Barth. Shower pro Defendente. This Commitment is grounded upon a special Authority given by Stat. 35 Eliz. 2. to commit upon Refusal to Answer, and the Commitment ought to pursue the Statute, viz. until he should Answer, and not until he be deliver'd, &c.

Cur'. It is a special Authority given by the Statute, which ought to be pursued; but this Court (not being excluded by negative Words) hath Authority to ask the Question now, which was accordingly done: And the Defendant answered, that he is no Jesuit, Seminary, or Romish Priest, and he was discharged.

Sir Francis Winnington moved for a Certiorari, to remove a Presentment against one Godfrey.

Presentment and Indictment differ. 2 Inst. 739.

Holt Ch. J. A Presentment and Indictment is in Law the same, they differ only in common Parlance. It is an ill Practice, that they are not drawn up in Form the same Assizes. They use to put it in Form at the Assizes following; and then upon the Clerk's Oath, that it was presented by the last Grand Jury, they write Billa Vera. But I think the Clerk may put it in Form, ex officio.

Dolben J. I do not regard the Presentment more than a Bit of Paper.

Cur'. It is not usual to grant a Certiorari to the Assizes, because the Matter must go down again by Nisi Prius; and therefore we will not meddle in it.

No Certiorari to the Assizes.

## *Rex & Regina versus* Allen *and* Hazard.

Upon an Information for Perjury. Holt Ch. J. said, If the Prosecutor gives Notice of Trial (tho' in an Information) the first Assizes, and does not proceed, the Defendant must have Costs. If the Person indicted gives Notice, the Prosecutor shall have Costs.

Costs in Information of Perjury.

## *Rex & Regina versus* Wright.

The Defendant was indicted for Forestalling Trecent' & octagint' Aves Anglice Turkeys, the Defendant demurs to the Indictment.

Indictment of Forestalling.

Serjeant Darnel pro Defendente. Where there is a proper Latin Word to express a Thing by, an Anglice will not satisfy. Noy 68. Bestwick and Conden. Sty. 313. Floyd *versus* Morgan. 2 Roll. 81. And here is Octaginta pro octoginta.

Pro Defendente. That an Anglice may reduce a general Word to a Certainty, as Pecias Auri Anglice Guineys. Pipas

Anglice, its Use.

Vini Anglice Canary Wine. Hardr. 361. Kelway 100. Retes pro Retia.

Dolben J. Ferreum Instrumentum Anglice a Key, hath been adjudged good, yet there is a proper Word for a Key.

Octagint' for octogint', well.

Holt Ch. J. It hath been taken both Ways: But here Aves is certainly well enough, without any more. One Letter too little or too much will not vitiate it, but here octagint' pro octogint' is one Letter for another.

Sir Barth. Shower pro Defendente. It may be well however for the 300.

Holt Ch. J. No, the Offence is intire. Adjournatur. Quære of the last Exception.

## Smith *versus* Wood.

Words of spiritual Cognizance.

THE Court deny'd a Prohibition to the Ecclesiastical Court upon a Suit for these Words, You are a Rogue, Rascal, Whore-master, and the Son of an old damn'd perjured Affidavit Bitch. Dolben J. said, that a Prohibition had been often deny'd in Case of the Word Whore, and there was the like Reason for Whore-master. Vide 1 Cro. 110. Sid. 248. 1 Cro. 332. was cited; but Eyres J. said, that Case had been since exploded. Selby objected, that the Libel is for speaking these Words aut-iis in effectu similia: But the Court said, that is their common Form, and that the Objection had been over-ruled for twenty Years past.

Post.

## *The Inhabitants of* Swanburn *in the County of* Bucks *versus Inhabitants in the County of* Bedford.

Poor's Settlements.

TWO Justices of the Peace make an Order to settle a poor Man in in the County of Bedford. Two Justices of Bedfordshire remove him to Swanburn, Swanburn Appeals to the Sessions in the County of Bedford, and the Order was affirmed upon them. Now Lemon moved that the two last Orders might be quashed, for that the second Order was void; but the Court would not quash it, because they had appealed upon it.

Ante

Of Entring Judgment.

Resolved, that by the Course of the Court Judgment cannot regularly be entred upon a Warrant of Attorney after the Year, without Motion.

## Knight's *Case*.

A Woman was removed by Order of two Justices of the Peace to her Husband; and upon Appeal to the Sessions, 'tis there ordered, that the Man and his Wife be removed to the same Place, whence the Woman was removed to before: Now, upon Motion this Order of Sessions was quashed quoad the Husband.

Poor's Settlements.

## King & *Ux' versus* Peppard.

Assault and Battery upon the Plaintiff's Wife; the Defendant pleads son Assault demesne; the Plaintiff replies, that the Defendant entred the Plaintiff's House, and abused the Husband, whereupon the Wife, tempore quo, &c. molliter manus imposuit, without any Traverse or Averment, quæ est eadem, &c.

Moliter, manus, &c. reply'd to son Assault, good.

For the Defendant it was said, there ought to be a Traverse, as in Rastal 612. (12) Old Entries. 1 Cro. 164. Durscomb and Smith's Case. And it may be averr'd Quæ quidem mollis impositio, &c. est eadem, &c.

Holt Ch. J. That would be a very insipid Averment: When the Defendant pleads son Assault demesne generally; non constat to the Court, whether that Assault were justifiable, or not? Then the Plaintiff by the Replevin shews it was a justifiable Assault, and so confesseth and avoids, which is a full Answer without a Traverse: Where the Repl' is de injuria sua propria, it must conclude ad patriam. Here the Laying on of Hands is a Beating, and if the Plaintiff had given the Defendant a Box of the Ear, that might have been shewed in the Rejoinder: And where the Parties agreed in the Time (as here tempore quo) there needs no Averment that it is the same Trespass. 21 H. 7.

Judicium pro Quer'.

## Pearson *and* Garrett.

CAse upon the Custom of Merchants, and declares that Defendant per notam five bill' secundum consuetudinem promised to pay 60 Guineas to the Plaintiff, if the Plaintiff should be married within two Months, and avers that he was married, &c. the Defendant demurs.

Count, the Custom of Merchants on a promissory Note, ill.

The Court inclined against the Custom, this not being by Way of Negotiation, but a Note to pay Money upon a meer Contingency, which by this Artifice they would make equal with

Judges to suppress new Inventions.

a Bond, and not set forth any Consideration; and they said it is the Duty of the Judges to suppress new Inventions.

3 Lev. 375. 4 Mod. 244.

## Gale *and* Till.

Administrator not to pay Costs, or give Bail on a Writ of Error.

Yelv. 168.

2 J. 32. 151.

Judgment being given below against the Plaintiff there (who sued as Administrator) he brought a Writ of Error, whereupon the Judgment being affirmed. Levinz now moved, that the Administrator might pay Costs, because the bringing the Writ of Error was his own Act, which was within the Reason of the Case of Atkey *versus* Heard. 1 Cro. 219. But the Court deny'd it, and said, an Administrator shall not give Bail upon a Writ of Error, no more shall he pay Costs; and Twisden's Opinion, Sid. 183. was deny'd.

Delivering Declarations.

By the Course of the Court, if a Declaration be not delivered within two Terms, the Defendant is not obliged to receive a Declaration afterwards, but may enter a Non pros. of the Term precedent.

## Lane *and* Foulk.

Replevin Bond.

Return Habend'.

Debt upon a Replevin-Bond taken by the Sheriff conditioned, that if C. B. appear at the next County-Court, and prosecute with Effect for taking, &c. and make Return, &c. if Return be adjudg'd, and save harmless the Sheriff, &c. Then, &c. — The Defendant (after Oyer) pleaded, that at the next County-Court, tent' tali die, he did appear, and prosecuted, &c. until it was removed by Recordari, and did save harmless the Sheriff, but doth not say, that no Return Habend. was adjudged; and upon Demurrer the Court inclined for the Plaintiff, for the Defendant should have said, that no Return was adjudged at all; for tho' he prosecuted to the Recordari, yet Return Habend. might be adjudg'd afterwards, and the Condition goes to any Adjudication of Return.

Dolben J. said, the Sheriff is responsible, if he do not take sufficient Security before he delivers Cattel, 'tis instead of Pledges, and a better Way.

2 Salk. 411. 4 Mod. 215, &c.

## Blancard *and* Galdy.

Jamaica. Laws of conquer'd Countries remain after Conquest.

Debt upon a Bond for Performance of Covenants, whereby the Defendant agreed to pay the Plaintiff 400 l. per Annum, for a Deputation of the Office of Provost Marshal of Jamaica; the Defendant pleaded the Statute Ed. 6. and that Jamaica

maica is Part of the Possessions of the Crown of England; the Plaintiff replies, that after the Conquest thereof, it was govern'd by the Laws of this Kingdom; the Defendant rejoins, that after the Conquest thereof it was govern'd by the Laws of that Island, whereunto (it should seem) the Plaintiff demurr'd; and it was adjug'd for him, for the Laws of the Conqueror do not take Place till establish'd. Laws of Wales remain'd till Stat. 27 H. 8. the Isle of Man is Part of the Possessions of the Crown, yet not govern'd by the Laws of England: And where it is said in Calvin's Case, that the Laws of a conquer'd Heathen Country do immediately Cease, that may be true of Laws for Religion, but it seems otherwise of Laws touching the Government.

## Greenvil *and* Dighton.

Debt upon a Judgment in this Court. The Defendant pleads in Abatement a Writ of Error pending in Camera Scaccarii. Writ of Error no Supersedeas to Debt on the Judgment.

Levinz. Debt lies notwithstanding the Writ of Error, for the Judgment remains in full Force. 1 Sid. 236. the Record remains in this Court, and it were in vain to bring Debt after the Judgment affirmed, for then he might have Execution. Debt will lie in Common Pleas after a Writ of Error brought in this Court. 4 H. 6. 21. a. 14 Ed. 4. 6. b.

Holt Ch. J. The Case in Sid. is the first that I remember in this Point; 'tis strange that a Writ of Error should be a Supersedeas to the Execution, and not to that, which is in Order to have Execution. A Writ of Error is a Bar to a Scire Facias, which is given by the Statute in Lieu of an Action of Debt. An Executor may well discharge a Statute pending a Writ of Error, tho' he hath not Assets for both. Yelv. Read and Berbeck. But I must submit to the late Resolutions. Sid. 236.

Judicium pro Quer'.

## Grammar *and* Thompson.

The Plaintiff caused the Defendant to be brought up by Habeas Corpus from Stafford; and now the Gaoler moved to be allow'd his Charges for bringing him up; but the Court said he should have agreed with the Plaintiff before he brought him. Ch. J. Take your Action against the Plaintiff for your Charges. Gaolers Charges on bringing up Prisoners.

Turner

## Turner *and* Fuller.

What shall be travers'd to an Avowry.

REplevin. The Defendant avows for the Moiety of certain Rent, and sets forth, that A. B. Anno 83. demised to one Harris, rendring Rent, and afterwards assigned the Moiety of the Reversion, &c.

The Plaintiff replies, that the Defendant at the Time of the Distress was seised of a Moiety, and Mary Chone heretofore, and her Son now seised of a Moiety.

Ch. J. You should have traversed the original Seisin at the Time of the Lease. Judgment for the Avowant.

Clerk of the Peace returns a Certiorari in his own Name, ill.

A Clerk of the Peace returned a Certiorari in his own Name sub sigillo meo: And the Court said he was an impudent Fellow, and directed that he should take out a new Writ, and return it at his own Charge, else they would send for him.

## *Sir* Richard Mansel's *Case for Murther.*

A Pardon of Murder allow'd.

HE pleaded his Pardon, and being asked for his Writ of Allowance, it was answered, that it had been allow'd at the Old Baily. And after some Debate it was allow'd here without a new Writ.

## Sanders & 24 *al' versus* Johnson (*all Herald Painters.*)

Herald Painters, Breach in Covenant.

IT was covenanted by Articles of Agreement, that the Work of Herald Painting should be brought to one Shop, and the Advantage to be equally divided: In Covenant hereupon the Breach assigned was, for not bringing the Work to the Shop or Work-house; and after Judgment by Default, and a Writ of Inquiry executed. It was moved in Arrest of Judgment, that the Covenant here is several (with each and every of them) and therefore the Plaintiffs cannot join in this Action, for the Damages are to go according to the Distribution of the Profits. But the Court declared, that the Action was well brought, for the not bringing the Work to the Work house was a joint Damage, for it was first to be brought into the joint Stock, and then the Articles take Place for the Division.

Judgment pro Quer'.

## *Rex & Regina versus* Belvin.

UPon return of a Certiorari to remove Orders, Grove took several Exceptions. 1. That the Orders were return'd in Latin. 2. That it was said Civit. Exon. and afterwards Com. præd. 3. 'Tis not said Justiciar' assignat. 4. The Order is directed to two Parishes, and says he intruded in vestram parochiam non constat to which of them it refers. Exceptions to Order of Charter Justices.

Holt Ch. J. to the first, said it was well enough; to the second, that Civitas was sufficient for the County, and usually so; to the third, that they were not assignat. being Charter Justices, but the fourth Exception was allow'd.

## Prickman *and* Trip.

THE Plaintiff declared, that he 1 die Julii, 1 Will. & Mar. and till the Day of March last, was possessed of an antient Messuage in in Com. Somerset, and that a certain Water-course at D. currere debuit & adhuc debet in quendam fontem, and, as often as the Well overflow'd, did run into the Plaintiff's House for his necessary Use, that the Defendant malitiose solum & fundum prope fontem præd. did dig and subvert, and a Cistern near the said Well did Place, whereby the Water was diverted, and did not overflow from the 15th Day of March, &c. whereby the Plaintiff lost his necessary Water. After a Verdict for the Plaintiff. Water-course diverted. Currere debuit, well.

Serjeant Pawlet moved in Arrest of Judgment. 1. There is no Terminus a quo of the Water-course. 2. 'Tis not averr'd that it used to overflow. 3. There is no sufficient Diversion alledged.

But it was answered by Gold Serjeant, and resolved by the Court, that it is not necessary to alledge a Terminus a quo, and that the other Informalities were cured by the Verdict. So the Plaintiff had Judgment. Vide Palmer 290. Hetley 34. Duncomb's Case. Cured by Verdict.

## Shorter *and* Davison.

THE Court held, that an Action lieth not for indicting one of Trespass: It was long before it was allow'd in Case of an Indictment for Felony; but this is altogether new in Trespass. Nota, Mr. Cheshire tells me, the contrary was adjudged in B. R. Savil *versus* Roberts, about 10 Will. but a small Matter will suffice for a probable Cause. Case, for indicting of Trespass. See 1 Salk 13, 14, 15. 5 Mod. 349, 405.

Sir

Execution. Sir Sam. Astry said, it is the Practice not to award an Elegit upon the Roll, because Attorneys think they can have no other Execution afterwards; but per Cur', 'tis a mischievous Practice.

Bastard-Child. An Order, that the Father of a Bastard-Child should allow 2 s. per Week for seven Years, and that the Mother should keep it, was allow'd good and consistent.

## Somers *and* Howe.

Words. CAse for these Words, You are a Rogue, and you broke open a Shop at *Oxon:* And your Grandfather *Jones* brought over 30 *l.* to make up the Breach. Upon a Motion in Arrest of Judgment. Eyres J. doubted very much, and cited 2 Cro. 302. Long *versus* King for these Words, Mr. *Masters* was robbed of 40 *l.* worth of Plate, and *John Ford* and *Ann King* (innuendo the Plaintiff) had it, and for that they will be hanged. Where Judgment was given for the Plaintiff in the King's Bench, but afterwards reversed in the Exchequer-Chamber, for that the Words were not actionable. And Latch 159. *Keymer* is a base Gentleman, and hath had four or five Children by *Ann* his own Maid, and hath either killed them or procured them to be killed; and held actionable, only by Reason of the Preface, base Gentleman. But Holt Ch. J. said, he thought the Words in the former Case were actionable, and likewise in the later, without such Introduction. And afterwards the Plaintiff had Judgment.

# DE

# Term. Sancti Hillar.

## Anno 5 Willielmi & Mariæ, Regis & Reginæ, in B. R.

### *Rex & Regina versus* Moseley *& al'.*

THREE were convicted of Deer-stealing upon the late Statute, one upon his Confession, and two upon Evidence; and the Judgment saith, that all three were Convict. de seperalibus offens. &c. by Confession and Testimony; and yet held well enough reddendo singula singulis; but for another Exception (venatus in parculum,) the Conviction was quashed.

Deer-stealing.

### Broom *versus* Roberts.

THE Court will not give Leave to discontinue after a Verdict, unless the Verdict be set aside as an ill Verdict, but in the principal Case the Verdict was not blamed; however, for fuller Satisfaction, a new Trial was granted.

No Discontinuance after Verdict, nisi, New Trial. 2 f 30.

### Benson *and* Scott.

EJectment for Copyhold Lands. The Jury found the Custom to make Surrender by two customary Tenants, &c. that Samuel Scot did so surrender to the Use of Barbara Callard and her Heirs, and this was presented in the Life of Sam. Scot at the next

Copyhold Surrenderees Title is before Admittance, i. e. by the Surrender.

next Court, but Scot died before Admittance, then B. C. was admitted, and afterwards Martha, the Widow of Sam. Scot, was admitted, they find the Custom of Frank Bank within the Manor, and that Martha continued a Widow, and conclude generally, &c.

R. Webb pro Quer'. Who claimed as Assignee of Callard.

1. By the Construction of this Custom the Widow is to enjoy it in the same Manner, as the Husband should have done, and not otherwise. 2 Cro. 36. Fairly's Case 126. Lashmore's Case.

2. Here, by Relation the Husband did not die seised. Inst. 59.b. the Estate being bound by Relation from the Surrender. 3 Bul. 219. Roll. 505. Roswell and Welch. 2 Roll. Rep. 383. Royden and Malster. Indeed there is a Heriot due by the Death of the Surrendror, but that is a Profit fallen from his Estate. This differs from Conveyances at Common Law, and more like those by Way of Use, tho' sometimes Relation holds Place even in Common Law Conveyances. Inst. 310. b.

Levinz pro Defendente cited 3 Cro. 349. Berry *versus* Green, and Yelv. 16. which are not much material: He said the Defendant's Title was inchoate by the Marriage, and consummate by the Death of the Husband before Admittance of the Surrendree: But the Ch. J. said, the Title doth not commence by the Marriage, for then it could not be barred, but 'tis only by the dying seised.

And it was adjudged for the Plaintiff without much Difficulty.

Note, Here the Mortgagee had assigned to the Heir; and the the Court were of Opinion obiter, that the Widow paying the Mortgage-Money might be relieved in Equity.

Attachment for not returning a first Mandamus.

Tho' it is not usual to grant an Attachment upon not returning a first Writ of Mandamus, yet it may be done, if the Court see Cause, as in Case of a Rank and wilful Disobedience and Obstruction of Justice.

## *Rex & Regina versus* Evans.

Information in B. R. for Perjury in Wales.

SIR Barth. Shower moved to stop Proceedings upon an Information for Perjury in Wales, because the Stat. 26 H. 8. doth not extend to such Offences. Vaugh. 412.

Ch. J. If you think it doth not lie here, you may plead to our Jurisdiction, for we will not determine it upon a Motion.

Rex

## *Rex & Regina versus* Jones *of* Briſtol.

HOlt Ch. J. The Court of Seſſions may try the ſame Seſſion when Iſſue is joined, if there be an Adjournment, ſo that there may be fifteen Days for the Return of the Venire. Quod Nota.

Iſſue and Trial the ſame Seſſions

## *Rex & Regina verſus The Inhabitants of* Iſlington.

THE Juſtices of Middleſex made an Order at their Seſſion for re-imburſing one Duncumb, Surveyor of the Highways, upon the new Statute; and it was moved to quaſh this Order, for that it appeared Mr. D. had firſt applied to the Special Seſſions, where the Juſtices refuſed to meddle, then he apply'd himſelf to the General Seſſion as a Perſon aggrieved.

Highways. Order of General Seſſions to re-imburſe a Surveyor, can't be per Saltum.

Holt Ch. J. It comes to the General Seſſion per Saltum, for it cannot be by Way of Appeal, where the Juſtices have done nothing before; and tho' it was urged by Sir T. Powys, that there is another Clauſe in the Act, which gives an original Juriſdiction to the Seſſion; to that Eyres J. anſwered, that is only where former Statutes about repairs do not reach, and upon Affidavit, &c. He ſaid further, it ſeem'd doubtful whether a Surveyor can be re-imburſed by this Statute for any Thing but Gravel, tho' he thought he might, &c.

## Brig *verſus* Adams *and* Wilkins.

IN Treſpaſs, Aſſault, and Falſe Impriſonment. The Defendant juſtifies the Impriſonment, for that Briſtol is an antient Borough, and that upon the fifteenth Day of July, 3 Will. & Mar. the Defendant Adams levied a Plaint in the Court there held before the Mayor and Aldermen of Briſtol, de placito tranſ. ſuper Caſ. ad dam. iiii l. againſt the Plaintiff Brig, and declared for 3 l. 15 s. to which Brig pleaded Non Aſſumpſit, and the Jury gave 5 s. Damages, but the Coſts were 54 l. for all which the Defendant Adams had his Judgment, and thereupon ſued out a Ca. Sa. by Vertue whereof the Defendant Wilkins took the Plaintiff Brig in Execution, &c.

Officer juſtified.

The Plaintiff confeſſeth the Plaint, Judgment, and Ca. Sa. and ſets forth a private Act of Parliament made 13 Feb. 1 Will. & Mar. erecting a Court of Conſcience in Briſtol, to be holden before the Mayor, Aldermen, and Common-Council, or any three, &c. to determine Debts under 40 s. from which there ſhould be no Writ of Error or Appeal, &c.

Private Stat. erects a Court of Conſcience in Briſtol.

And if any such Person or Persons begin or prosecute any Suit in any Court at Westminster, &c. against any Inhabitant of Bristol, for Damage, &c. which shall appear at the Trial to be under 40 s. no Judgment to be entred; and if any be entred, to be void, and the Defendant to have Costs. Avers, that at the Time, &c. the Plaintiff and Defendant were Inhabitants of Bristol, and therefore the Judgment void.

The Defendant rejoins, that at the Time of the Plaint, the Defendant below was indebted to him in 4 l. that, at the Trial and before Judgment, neither the Plaintiff, nor any other on his Behalf, did pray the Benefit of the said Act, or give Notice to the Court thereof. The Plaintiff demurs.

Serjeant Gold argued for the Plaintiff, that this Act for erecting a Court of Conscience in Bristol is a publick Act, for that it concerns Courts of Justice, according to the Rule in Holland's Case. 4 Co. at least 'tis lex loci, and a general Law at Bristol. 1 Bulstr. 11. Franklin and Green. the Act it self doth here oblige; the Defendant is not obliged to pray that Judgment be not entred, for the Court is to take Care of that ex officio.

Northy pro Defendentibus. This is a private Statute by the Rule of Holland's Case, the Replication here is insufficient; but the main Point is, Whether they were obliged to take Notice of this private Act without Pleading it, the Case in Bulstr. doth not go so far, for tho' they had Power there to make By-Laws, yet they could not execute them without Notice.

The Defendant should have pray'd the Benefit of the Act, for it did not appear the Parties were Inhabitants, nor is it aver'd that they were of the poorer Sort of People, &c.

Tho' it be declared that such Judgment shall be void, yet the Process is not void, but the Officer is justifiable thereby, for it is not meant so to be void, as to make the Officer a Trespasser, before it be regularly avoided by Writ of Error. 8 H. 6. 10. Jones 442.

The Party might wave the Benefit of this private Act, and the not Praying the Benefit is a Waver, he should have made an Entry, &c. The Town might refuse the Act, for there is no coercive Power upon them, and non constat that the Act was ever executed.

Holt Ch. J. I take it that the Persons concerned in Interest in a private Statute must take Notice of it at their Peril; Even in the Case of a By-Law, Strangers, that come to reside, must take Notice of it at their Peril: Here this is lex loci at Bristol. Admitting that the Judgment were void, without declaring it so, then 'tis False Imprisonment in the Plaintiff, not in the Officer: As in the Case of Turner and Felgate, Anno 1665. in Serjeant Glyn's Time: A Judgment was irregularly obtained, and the Defendant's Goods taken by Fi. Fa. and afterwards the Judg-



ment

ment was vacated; the Court held that Trespass would lie against the Plaintiff, but not against the Officer.

The Jurisdiction of the Court is here taken from them, but the Plaintiff ought to take some Notice of it. The not averring that they were of the poorer Sort seems not to be material.

Dolben J. Where the Court hath a Jurisdiction we cannot make their Judgment void, unless the Parties appear to be within the Act of Parliament.

Holt Ch. J. If two Strangers contract in Bristol, and some Time after come to inhabit there, Quære, Whether the Court of Conscience, or the Common Law Court be intituled to the Action.

Northy. The Right is attached to the Common Law in that Case.

Holt Ch. J. The Action here was laid above 40s. the Defendant could not plead the Act before Verdict. Dolben J. He might move in Arrest of Judgment. Holt then out of Court.

Northy. The Defendant there is by the Act to have Costs, therefore should make some Entry.

Holt Ch. J. The single Point in the Case is, Whether the Judgment be void to all Intents, or voidable? The Bond of an Infant is void ipso facto, but he cannot take Advantage of that Matter extrinsick without Special Pleading, by Reason of the Seal and Delivery: So in Case of Dures and Usury.

And now this Term Holt Ch. J. delivered the Opinion of the Court, that the Action did not lie; and that the Judgment was not like a Judgment set aside (as irregularly obtained) where 'tis void ab initio, so as Nul tiel Record might be pleaded; but here it was only voidable, so that the Execution was lawful, and cited 2 Inst. 670. for Construction of Statutes.

Judicium pro Defendentibus.

## Johnson *versus* Oxenden.

Spiritual Court, Suit for Proctors Fees prohited.

THE Question was, whether a Prohibition lieth to a Suit in the Spiritual Court for a Proctor's Fees, several Cases were cited on both Sides.

The Court doubted of the Matter, and, because it was of great Consequence, ordered a Declaration should be given in Prohibition, and then would consider further of it.

Vide 1 Mod. 167. Horton and Wilson. 3 Kee. 203. S. C. 2 Kee. 810, 845. Doily and Dod.

*Rex*

## *Rex & Regina versus The President and Scholars of* St. John's *College* Oxon.

Alias Mandamus to admit A. to his Scholarship of St. John's Oxon.

SErjeant Pawlet moved for an Alias Mandamus to be directed to the President and Scholars, &c. to admit one King to his Scholarship: That Dr. Thomas White, Founder of the College, constituted by Charter fifty Fellows or Scholars, whereof two to be nominated by the City of Bristol, who have always nominated accordingly; that they last nominated one Baskervile, who surrendred, and then they nominated William King, who hath a Testimonial of his Good Behaviour.

Shute got an Instrument signed by the new Mayor and a few of the Citizens, whereupon the College hath admitted Shute.

Court not to take Notice of a special Visitor till return'd. 3 † 165.

Altho' there be a proper Visitor, yet the Court will not take Notice of that before Return. Sid. 71. Mod. 82. Appleford's Case, that there ought to be a Return.

Levinz contra. The Court may deny a Mandamus, if it appear to be vexatious; the Bishop of Winchester is Visitor by the Foundation: King was expelled in Oxon, and another Bristolman taken.

Holt Ch. J. The Visitor shall determine all, that relates to Persons, that are of the Foundation, but here is a collateral Interest in Bristol, they are no Part of the College, the Visitor hath no Power before a Person be made a Member: However it be

Exeat alias Mandamus.

## Croom *and* Talbot.

Plea withdrawn after Demurrer (i. e. by Consent.)

DEbt for 18 l. Rent for two Years, the Defendant pleads quoad first Year Nil debet, and quoad the other Year he divides the Rent, and quoad Part pleads Nil debet, and quoad residuum nihil habuit in tenementis. The Plaintiff demurs generally, quod placitum præd. est minus sufficiens, &c.

Carthue pro Defendente. If the first be a good distinct Plea, then what follows cannot hurt it, as in Trespass, if Defendant pleads not guilty as to all, except carrying away of Trees, and after justifies, all that cannot hurt the first Plea. 1 H. 6. 19. 21 H. 7. 21. b. the last Plea petit judicium as to 7 l. only: When the Plaintiff demurs quod placitum præd. to which shall it refer. Yelv. 65.

Holt Ch. J. Upon a Nil debet you might give in Evidence, Nil habuit in tenementis (or Eviction per Eyres) If a Man demise A. and B. and hath nothing in A. the whole Rent issueth out of B. as if a Man demiseth Lands and Goods, the Rent is only for the Land.

Carthue urged 12 H. 8. 11. b. to the contrary.

Holt and Eyres. The later Authorities are all contrary, you study the old ones too much. Mo. 50. (pl.) 150. 3 Cro. 606, 622. Collins and Harding.

Eyres J. Placitum is nomen Collectivum, and shall take in the Whole. Placitum nomen Collectivum.

Afterwards by Consent the Plea was withdrawn, and Nil debet pleaded to the Whole.

Sir William Williams moved for a Mandamus to the Inquiry Jury of the Borough of Clithero, to present two Persons to be Freemen, for by the Custom they must be presented by them, before they can be admitted by the Bailiffs. No Mandamus to an Inquiry Jury.

Holt Ch. J. We'll grant a Mandamus to him, who is to admit, but not to them, who are to present upon Oath the Truth of a Fact; not to a Jury: We suppose a Grand Inquest will present, as they ought; so here. post 285 But notwithstanding, Mand. wont as prayd. 3 t.

## *The Bishop of* Exeter *versus* Heal.

Error of a Judgment in Quare Impedit in C. B. where the Plaintiff declared, that he was seised of the Manor of Southpool, to which the Advowson of the Church of Southpool in the Diocess of Exeter, being a Benefice with Cure of Souls, was appendant; and being so seised, and the Church being vacant, it belong'd to him to present, but the Defendant disturbed, &c. Parl. Cases. In Quare Impedit. Minus sufficiens in Literatura, &c. an ill Return on a Presentation.

The Bishop pleads, that he claims nothing but as Ordinary; that Hodder fuit minus sufficiens in literatura seu capax ad locum præd. habend. and that the Bishop, upon Examination, found him in literatura insufficientem & ea ratione 'inhabil', &c. and gave Notice thereof to the Patron, who lapsed his Time, and therefore by Lapse the Bishop presented Haman.

The Plaintiff replies, that Hodder was in Orders, and after other frivolous Pleadings, upon a Demurrer it was adjudged in C. B. against the Bishop: Now, upon the general Error assigned, the sole Question is, whether the Defendant's Plea be good.

Harrington pro Quer. in Error. That the Plea hath sufficient Certainty, there can be no more, than the Nature of the Thing doth admit of, and there needs no more, than what sufficeth to bring on a Trial without inveigling Judge or Jury. 40 E. 3. 25. b. 39 E. 3. 1. b. 2. a. 2 Leon. 200. an old Book cited: Insufficiens in literatura is the antient Pleading.

The Nature of the Thing doth not admit greater Certainty; the Bishop's Power to examine is warranted by the Common Law, but his Proceedings are according to the Ecclesiastical Laws.

Laws. Articuli Cleri, cap. 13. 2 Inst. 632. that the Bishop is a Judge in this Case. Fitz. Nat. Br. 163. B. Cause of removing a Coroner is expressed generally. Antient Books do not warrant what is said in Specot's Case. 40 E. 3. 37. 18 Ed. 4. 29, 30. Burdet's Case. Learning is a Thing of a complex Nature; the Assignment of one Error, tho' gross, doth not render a Man minime idoneus, a gross Instance might be given in this Case, where Hodder wrote Ego subscribo tricena novena Articulos fiderum; other Disabilities (as 3 Cro. 119. Albans *versus* The Bishop of St. Asaph, where the Presentee could not speak Welsh) are reducible to a single Point, and there persona inhabilis generally is insufficient: As to Specot's Case it may be said, that the Bishop might set out the Heresy certainly; but in this Case sufficiency of Learning is traversable.

The Statute of Articuli Cleri gives Power to refuse propter defectum Scientiæ seu pro alia causa Rationabili, Want of Learning is mentioned by express Words, and we need not set it forth otherwise, than 'tis in the Statute; here the Plea is in the Negative, not capable of an Affirmative, cites Manser's Case. 2 Co. 4. upon the Difference between Negative and Affirmative Pleas: The Law often allows general Pleading, no where more favour'd than in Bars, but 'tis most to be favour'd, where the Nature of the Matter admits of no other.

Carthue contra. The Replication is good, for Ordination implies a sufficient Qualification, the Plea is insufficient. 1. Here is too great a Delay between the Refusal and the Notice, for Hodder was presented the 19th of May, and Notice was not given till the 22d of June; here appears an affected Delay to the Prejudice of the Patron; in this Case the Lapse accrews by the Vacancy, not by the Notice. Dyer 327. 1 Leon. 31, 32. Albany's Case, and 3 Cro. 119. S. C. that twenty-two Days delay was a Disturbance in the Bishop.

2. The Matter pleaded is too general and incertain, for if it be not necessary to shew the particular Cause in certain, then the Court would conclude the Subject's temporal Right without any Cause shewn; where the Matter is meerly Spiritual, it belongs only to the Ecclesiastical Jurisdiction, and there general Pleading is sufficient, but if there be a concurrent Jurisdiction, the Pleading must be full, &c. where it trencheth upon a temporal Right, as where Excommunication is pleaded. 8 Co. 68. a. So in Case of Divorce. 11 H. 7. 27. a. 2 Leon. 369. here 'tis minus sufficiens, not minime, if it had been homo illiteratus, it had been a plain and full Plea. Oportet quod certa res deducatur in judicium. Yelv. 227, 228.

Holt Ch. J. The Time is not material, unless you shew in Pleading that you had not sufficient Notice. If the Person be criminal, which lieth in the Notice of the Patron, the six Months run on, but some Doubt in Case of Learning, whereof the Ordi-

nary is Judge, but not absolutely, for then his Judgment would be conclusive. I think 'tis no Power in the Bishop, but a Care, and the succeeding Bishop may re-examine him.

Eyres J. How should the Jury try in this Case, if the Clerk were dead, I do not see it possible.

Holt Ch. J. Here he is admitted by one Bishop and refused by another.

Now in this Term the Judgment was affirmed, for that the Plea is uncertain.

## *Rex & Regina versus The Inhabitants of* Little Glen *in the County of* Leicester.

Contribution of Parishes to Poor's Relief.

IT was moved to quash an Order made by two Justices, that the Inhabitants of L. G. should pay an yearly Sum to Whetstone. 1. Because it was not said Quorum unus, but that Exception was disallow'd. 2. For that it was only said, that Whetstone was at great Charge in maintaining the Poor, but not that they were unable. Note, Upon an Appeal the Justices made an Order at the Sessions, wherein 'tis said they were oppressed, which implies Inability.

## Reinold *versus* Jump.

Trespass for Goods in Plaintiff's Possession not saying, his. Ante 10. Post.

TRespass for carrying away 20 Carectatas Fœni in the Possession of the Plaintiff, not saying they were his.

Eyres J. said, a Man may bring Trespass for a possessory Property.

Holt Ch. J. It should have been abinde provenien' or ipsius quer', for I may give a Man leave to lay his Hay in my Close.

Eyres J. That is a foreign Intendment.

## Underwood *and* Bernard.

Payment of Part pleaded absq; hoc, quod Assumpsit, &c. ill.

UPon an Assumpsit, the Defendant pleads Payment of 6 l. the 6th of March, in Satisfaction, and then traverseth absq; hoc, quod Assumpsit modo & forma.

Holt Ch. J. The Promise is acknowledged, and then he should have traversed absq; hoc, quod Assumpsit at any Time after the 6th of March, for the Time laid in the Declaration is not material.

Judgment for the Plaintiff, nisi.

## Richardson *and* Taylor.

Case for new Windows towards Plaintiff's Court.

IN Case. The Plaintiff declares that he was seised of a Court-Yard, and the Defendant made new Windows towards it, whereby his Goods could not be kept safe, &c. to which the Defendant demurred.

Holt Ch. J. You must Fence your own Yard, here is no Obligation laid by Prescription to inclose for you, you may build against it.

## Gibbons *and* Davies.

Bond good, tho' to perform void Articles.

DEbt upon a Bond conditioned for Performance of Covenants in certain Articles made between the Defendant and his Wife before Marriage, (viz. that the Man should bring 50 l. and the Woman 25 l. into a Stock into the Hands of a third Person, to be so and so disposed of) Grove urged Hob. 216. Smith and Stafford, and 2 Sid. 58. Lupart *versus* Hoblin, that the Promise was suspended, and consequently extinguish'd by the Marriage.

Marriage a Release. Q.

Holt Ch. J. Tho' the Articles are suspended by the Marriage, yet it was the Intent of the Parties that the Things should be performed, tho' the Articles are gone; and the Bond is not void, being made to a third Person. And Eyres J. cited 1 Inst. 206. And they said the Money was to be brought in presently, so that tho' the Marriage had been a Release, yet they should plead Performance to that Time. 3 Cro. 244. Hill and Pilkington.

Judicium pro Quer', nisi.

Contribution to Poor's Relief.

Upon a Motion to quash an Order for charging several Parishes to contribute to the Relief of the Poor of another Parish, it was said by the Court, that such Contribution may be by a gross Sum yearly.

The Avowant in Right to pay Costs

The Court will not make a Rule in Replevin, that he, in whose Right the Defendant avows, should enter into a Rule to pay Costs, for he might have been made Party to the Action.

Fi. Fa. and Money paid to Plaintiff good. Q.

Upon a Fieri Facias, if the Sheriff returns Fieri Feci, and the Money paid to the Plaintiff, 'tis good. Q.

*Rex & Regina versus* Combs.

IT was moved to quash an Indictment, which sets forth that there is an antient Custom in Winchester, that no Person should exercise any Trade till free of the Guild of Merchants there, and after the Charge the Indictment concludes ad grave damnum liberorum hominum de Guilda, &c. & contra laudabil' consuetudin', &c. And it was quashed without Difficulty.

Indictment on Custom, none to exercise a Trade till free of the Merchants Guild. quash'd.

An Indictment against a Woman, for that being debito modo requisit. ad vigilandum non vigilavit; and it was quashed, because it is not said, nor procured one to watch for her, which she might have done.

Indictment against a Woman required to watch, &c. quash'd.

If a Man be within and keeps his Doors shut, the Leaving a Rule at the House is good Service, not so if he be from home.

Service of a Rule good, if Door shut.

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# DE

# Termino Paschæ.

## Anno 6 Willielmi & Mariæ Regis & Reginæ, in B. R.

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PER Holt Ch. J. 'Tis the Course of the Court to give Interest in Damages upon a single Bill or Bill of Exchange (which must always be under the Sum laid in the Close of the Declaration) in Case of a Demurrer in Debt, and there needs no Writ of Inquiry.

Interest in Damages on a single Bill, or Bill of Exchange.

Mandamus for a Town-Clerk.

Mr. Eyres moved for a Mandamus to ſwear a Town-Clerk of Oxon. (Holt Ch. J. being abſent)

Harcourt, My Lord Ch. J. ſaid the other Day that a Mandamus doth not properly lie, where an Aſſize lieth.

Eyres J. I cannot agree to that, the Practice having been otherwiſe, for an Aſſiſe doth not lie without an actual Seiſin; Fiat Mandamus. Vide infra.

Voluntary Appearance.

Note, It is a general Rule, that where a Defendant appears voluntarily it ſhall be of no Force, unleſs the Plaintiff ſue out his Latitat or Bill of Middleſex within a Fortnight.

Judgments entred.

Holt Ch. J. A Judgment may now well be entred in the Vacation as of the precedent Term, and no Miſchief to Purchaſors ſince the Statute of Frauds, before it was doubtful A Releaſe of Errors before Judgment entred is good, where Judgment is entred afterwards of the precedent Term.

Releaſe of Error.

## *Rex & Regina verſus The Dean and Chapter of* Weſtminſter.

Mandamus or a Bailiff of Weſtminſter.

A Mandamus was granted upon debate to admit Mr. Edwyn to the Office of High Bailiff of Weſtminſter, tho' the Chief Juſtice ſaid it was hard to determine it upon a Motion; but the Exceptions would be ſaved upon the Return of the Writ. A Man cannot have an Aſſiſe upon a bare Election and Conſtitution as a Recorder, but where it is by Patent or Grant; I am not for granting a Mandamus, where an Aſſize lieth, I wiſh there were no ſuch Office as Bailiff in England. Nota, here the Bailiff is a miniſterial Officer, and makes returns of Writs in his own Name; the Franchiſe is in the Dean and Chapter; but Quære if they ſhall Anſwer, if the Bailiff be inſufficient. Vide Noy 69. The Caſe of the Dean and Chapter of St. Paul's.

Supra.

## Saracini *and* Kilner.

Joinder of Actions.

PER Holt. Where ſeveral Actions are brought for ſeveral Cauſes, the Court may compel to join them in one, where they may be joined; but where ſeveral Pleas are requiſite, as in Aſſumpſit and Trover they cannot be joined.

Changing Venues.

The Court would not change a Venue upon an Affidavit that the Cauſe of Action did ariſe in a foreign County, but it ſhould be, if any ſuch Promiſe was made, &c. for Country People are

 not

not supposed to understand the Cause of Action. And per Holt Ch. J. We never change a Venue into a County-Palatine.

## Foden *and* Haines.

Debt on Sheriffs Bond Plea Stat. H. 6. Reply Security for Money, and Traverses Ease and Favour.

DEbt upon a Bond made by a Prisoner to an Under-Sheriff conditioned to pay 60 l. the Defendant pleads the Stat. H. 6. of Sheriffs Bonds, and that this Bond was made for Ease and Favour, and so void by the Statute: The Plaintiff replies, that it was for the better Security of Money due to himself, and traverseth the Ease and Favour, to which the Defendant demurs.

Ill Inducement makes the Traverse ill.

Cur'. 'Tis an ill Inducement, but that is no substantial Part of the Plea, but only Matter of Form, and the Demurrer is general; if we could cast away the Inducement, the Traverse is well; but here you confound the Cause of Action in this Inducement. 8 Co. . Frances's Case, tho' a Matter be well alledged, yet, if no Cause of Action appears, the Plaintiff cannot have Judgment. Here you should have said that it was pro bono & vero debito, and then traversed the Ease and Favour.

Judicium pro Defendente, nisi.

## *Rex & Regina versus* King *& al'.*

Habeas Corpus returned, a Press-Warrant from the Admiralty, ill.

UPon an Habeas Corpus it was returned, that the Commissioners for executing the Office of High Admiral of England directed their Warrant to Sir Isaac Reboe, Vice-Admiral of Essex, to impress 300 Seamen, and to send them to Harwich, Buoy in the Nore, or Long reach, and that by Vertue thereof he impressed the Defendants, and delivered them to the Keeper of the Gaol (who was debito modo appointed Conductor) to be carried to the King's Ships: And the Court held the Return insufficient, because it is not said how he was appointed Conductor, nor to which of the three Places they were to be carried: It is a very ill Practice to put them into Gaol, they should be kept in an Inn or other convenient Place, till there be a competent Number of them to be conducted, we cannot remand them, the Stat. 5 Eliz. 5. sect. 27. makes it Felony for Seamen impressed in Time of War to desert.

So the Men were discharged upon their Promise to go into their Majesty's Service after three Weeks respite.

Car-

## Carpenter *verſus* Beer.

On ill Replication to an ill Plea, if the Declaration be good Judgment for the Plaintiff.

DEbt upon a Bond with a ſpecial Condition: Whereas the above-named Eliz. Beer, on the Day of the Date of this Obligation, hath made her Laſt Will, and thereof nominated John Carpenter ſole Executor; now if ſhe ſhall not at any Time revoke her ſaid Will, but the ſame ſhall for ever continue, then the Obligation to be void; which appearing upon Oyer, the Defendant proteſtando, that there was no ſuch Laſt Will, pro placito dicit, that the ſaid Laſt Will adhuc remanet firma & ſtabilis. The Plaintiff replies, that after the ſaid Will, the ſaid Eliz. made a new Will and the Defendant her Executor, who had proved the later Will: The Defendant demurs.

Condition againſt Law, yet the Bond good.

The Court held the Plea was naught; and tho' the Replication were ill likewiſe for Want of a Traverſe abſq; hoc, that the firſt Will continued, yet forasmuch as the Declaration is good, the Plaintiff muſt have his Judgment. Nota, Where the Condition of a Bond is to do any Thing, that is not malum in ſe, tho' againſt Law, the Condition is only void and the Bond ſingle. In the Taylor of Ipſwich's Caſe, the Condition was againſt the publick Good, which makes the Bond void. Per Holt Ch. J.

Judicium pro Quer'.

## Stephens *verſus* Corbin.

Words, Witch, &c. not actionable.

CAſe for Words. You are a Witch, and I'll make you ſuffer for a Witch; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Darnel, that theſe Words do not import any Witchcraft within the Statute: He cited 2 Cro. 399. Lloyd and Coke 531. Hawk *verſus* Ange. 2 Leon. 30. Clark *verſus* Green. Allen 37. and Roll. 45. Yates and Linden.

Gold pro Quer' ſaid, the later Words here do inforce the former more, than in the Caſes cited; for one cannot ſuffer for a fair Complexion or a good Tongue. He cited 1 Cro. 282. George and Harvey. Hutton 13. Stone *verſus* Roberts. 3 Cro. 571. Rogers *verſus* Gravat. 1 Sid. 52, 53. Dacy *verſus* Clinch 386. Slayter *verſus* Davyes.

Eyres J. Conceived that the later Words made it actionable, but the other three Judges contra. Dolben J. ſaid, one may ſuffer by being prick'd with Pins, or thrown into a River, as is uſual for Trial of a Witch in the Country. Or (per Holt) it may mean a ſuffering by private Revenge for bewitching by fair Words, &c.

## Smith *versus* Williams. (Intr. Hill. 5. Rot. 327.)

CAse for Words spoken at several Times. He confessed he was the Man that robb'd the *Hockley Butcher*. He was a Thief, and broke and robb'd a House. He is a Rogue and robb'd the *Hockley Butcher*. The Jury had given entire Damages, and now Girdler moved in Arrest of Judgment, that the last Words are not actionable. Rogue is not, and robb'd is not, for it doth not import strict Robbery from the Person. An Action doth not lie for these Words, Thou hast kill'd or murther'd A. B. without Averment that he is dead. 4 Co. 16. Snag and Gee. Here it doth not appear that there was an Hockley Butcher. Words of Theft and Robbery.

Holt Ch. J. Then the Fault is the greater, it is a double Crime.

Girdler cited 1 Roll. 71. (59) Brown and St. John, Thou hast committed Burglary in breaking his House and stealing his Goods, adjudged not actionable, because it is not mention'd whose House, which the Court thought was a strange Resolution.

Judicium pro Quer', nisi.

Ordered that the Register-Books of a Dean and Chapter should be made use of at a Trial, for they are publick Books. Register-Books Evidence.

In the same Term you may deliver as many Declarations by the by as you please, and likewise in the second Term for the same Plaintiffs. Declarations delivered.

After a Verdict one cannot discontinue, 1 Roll. 487. So in Case of a Writ of Inquiry, which is in Nature of a Verdict. No Discontinuance after Verdict.

## Smart *versus* Williams.

1 Salk. 245, 280.

TRial at Bar in Ejectment for Lands in Cornwal of the Demise of Andrew Newport Esq; John Kendal being seised in Fee 28 Junii, 1659. conveys a Capital Messuage, &c. to William Pennoyer for 500 Years, for securing 2000 l. which Deed was inrolled in 67. John Kendal 4. December, 1663. conveys all the Manor of Tregoney, whereof the said Capital Messuage, &c. were Part, for securing 3000 l. (that is 604 l. Interest of the said 2000 l. and the Remainder was paid in Money to make up 3000 l.) to the said William Pennoyer, and this was in Trust for one Thomas Kendal, Uncle of the said John Kendal. Pennoyer 6. July, 1665. by Direction of the said Thomas Kendal, conveys to John Birch. And the same Day John Kendal conveys likewise

Indenture of Bargain and Sale inroll'd is good Evidence, tho' not prov'd to be executed by the Bargainor.

likewise the Manor of Moreval to the said Birch for a further Security. John Birch dies, Margaret Birch, his Executrix, 15. Febr. 20 Car. 2. conveys all her Interest to Thomas, John, and James Kendal, Sons of the said Thomas. The three Kendals in December 1672. for 5000 and odd Pounds convey to Sir Charles Muddiford; and he 18 Apr. 1674. for 3000 l. conveys to Secretary Coventry for 400 Years, Part of the said Term. One Mr. Browne a Scrivener was intrusted to keep all the Deeds, who dies, and after Brown's Death the original Deed is missing, but it was acknowledged in Chancery by the said John Kendal, and inrolled: Now it was debated whether a Copy of the Inrollment of the original Deed should be offered in Evidence, which Levinz opposed, for here the Estate passed by the Deed and not by the Inrollment, but it would be otherwise in case of Bargain and Sale of Lands in Fee, where the Estate passeth by the Inrollment; and he cited 1 Inst. that the Inrollment is no Evidence (semble que il intend. 1 Inst. 225.)

Holt Ch. J. How strong the Evidence is, is to be left to the Jury, but it is Evidence, for in Case of Inrollment, where Land passeth, it cannot be a Proof of the Deed by help of the Statute, but at Common Law. There was an Inrollment at Common Law; it makes an Estoppel, the Party in Case of a Bond inrolled cannot plead Non est factum.

The Acknowledgment is Evidence of as high a Nature as a Recognizance to this Purpose, tho' the bare Inrollment is not Evidence.

Copy of a Will, &c. Evidence.

Afterwards the Plaintiff's Council offered in Evidence a Copy of Birch's Will examined at the Prerogative Office, which was opposed, because it is but a Copy of a Copy, but the Court allow'd it, for the Entry in their Ecclesiastical Books is the original quoad hoc, otherwise to make a Title to Lands by Devise; it appears that Margaret Birch is Executrix to J. Birch.

Then the Assignment from Margaret Birch was produced, whereupon the Court declared, that where there are two Witnesses to a Deed, who are dead, if there be full Evidence to prove one of their Hands, and any Evidence that Endeavours have been used to find one to prove the other's Hand, it is sufficient, for perhaps the Witness might be a Stranger, and it would be a hard Task to prove his Hand: So the Deed was read, whereby Mr. Birch assigns to the three Kendals.

Levinz. If Birch the Executrix was out of Possession, she could not assign, unless it were seal'd on the Land, and then the three Kendals could not assign, and consequently their Deed ought not to be read.

Holt Ch. J. Yes, read it as a Deed, dispute the Operation of it afterwards.

Sir Charles Muddiford's Deed to Secretary Coventry is not an Assignment, but an original Demise.



Quære,

Quære. Whether a Scrivener's Book be Evidence to prove a Consideration paid. Evidence

Levinz. No sure, no more than a Tradesman's Book.

Holt Ch. J. Not for himself, but for another it is; so a Tradesman's Book after his Death. We have allow'd a Burser's Book of a College for Evidence. Note.

It was proved that the Lord of the Plaintiff is surviving Executor of Secretary Coventry, and the Consideration prov'd paid by Mr. Coventry.

Levinz pro Defendente. Where there is a Covenant for the Mortgagor to retain quousq; the Mortgagor is Tenant at Will, and the first Assignment of the Mortgagee may be good by Determination of his Will, but the subsequent Assignments made when out of Possession are void, unless seal'd upon the Land, and I have been nonsuited on that Point. (Holt obiter. You had hard Luck) The Conusee of a Statute after Livery from the Sheriff before actual Possession by Ejectment assigned, and it was adjudged void. A Lease for Years at Common Law is no Lease, before actual Entry nothing passeth. See 1 Salk. 245.

Sir Tho. Powis and Sir Barth. Shower ad idem. Where Interest is paid, the Mortgagor is always supposed Tenant at Will, there is a supposed Assent, but here there is no Interest paid.

Holt C. J. If the original Mortgage was fraudulent, and assigned over for valuable Consideration, the Fraud is purged, and the Estate legitimated by the Words of Stat. 27 Eliz. for, what Muddiford doth for valuable Consideration, Kendal doth.

Eyres J. Per 1 Instit. A voluntary Conveyance may become lawful, and bona fide, &c. by Matter ex post facto.

Holt Ch. J. When the Mortgagor continues in Possession and the Mortgagee assigns, the Tenancy at Will is determin'd, but he remains Tenant at Sufferance, he is no Disseisor, for there was no tortious Entry. Note.

Lezinz. Here was an Ejectment by the Lessee of the three Kendals, whereby they admitted it to be a Disseisin, and no Possession was gained thereupon, for a Writ of Error was brought, and the Assignment was made pending a Writ of Error. 1 Cro. Blundel and Baugh. Mortgagee Covenants that Mortgagor shall enjoy till Default, and then Assigns; Mortgagor is afterward only Tenant at Sufferance.

Holt Ch. J. The bringing an Ejectment doth not amount to an Entry to avoid a Fine, it cannot turn an Estate to a Right, tho' the Lessor be Principal by the Course of the Court, yet legally he is a Stranger to the Record, therefore cannot be estopped.

Eyres J. 'Tis so ruled in the Modern Reports, and that it is an Estoppel only against the Lessee. Here the original Covenant, to suffer the Mortgagor to continue in Possession, governs all the subsequent Assignments, for he Covenants for himself, his But by the Word Assigns, the Assignees are Tenants at Will.

Executors, Administrators and Assigns, that the Mortgagor shall hold till Default of Payment, which creates a Tenancy at Will upon all the mesne Assignments; whereto Holt agreed, and said it was well observed.

Note, 'Tis usual (in London especially) to have a Bargain and Sale for safe Custody, and also a Lease and Release, &c.

Note, The Defendant's Title commenced in 1690, from John Kendal.

Note, Defalters never lose Issues, where a full Jury is.

Serjeant Gold moved to excuse those Jurors, who were return'd and did not appear.

Holt Ch. J. They are excused of Course, for a full Jury did appear, and then the rest never loose Issues.

## Barwick *and* Fenwood.

No Execution on a Judgment in Ejectment after the Year, sans Scire Facias.

Northy moved for an Execution upon a Judgment in Ejectment after the Year, and cited Sid. 224, 351.

Holt Ch. J. After Judgment in Ejectment hath lain a considerable Time, I do not think it fit to grant Execution without a Scire Facias, (notwithstanding that Case in Sid. 351. which is not fully reported) for the Tenant may be changed, &c. An Ejectment is a mix'd Action, it is real in respect of the Lands, and personal in respect of the Damages and Costs; now a Scire Facias lies at Common Law in all real Actions. 2 Inst. 469. Discharge the Rule, and take out Execution at your Peril.

Northy. I hope we shall not be punished for a Contempt.

Holt. No.

Sir Barth. Shower. It may be inconvenient to take out Execution without a Scire Facias, for a former Habere facias possessionem may be executed and not returned.

Holt Ch. J. You may compel a Return. If a Scire Facias be brought upon a Fine executory, it is a good Plea to say that it was executed before.

Eyres J. If for Costs and Damages it must have Scire Facias upon the Statute, but, whether for the realty in Ejectment, old Books doubt; yet here it seems necessary.

## *Rex & Regina versus* Cudmore.

On a Fine for Contempt, a third Part only to the Party, and it must be return'd into the Exchequer before a Levari issues.

When a Man is fined for a Contempt to a Rule of Court, the Party grieved can have but a third Part of the Fine.

Sir Barth. Shower. When he is fined we can have a Levari Facias.

Holt Ch. J. It must be returned into the Exchequer first.

Sir Sam. Astry. No, I have known several Precedents, where a Levari Facias for a Fine hath issued out of the Crown-Office.

Holt Ch. J. That hath been much question'd.

A Trial at Bar being appointed but ten of the Jury appeared, and the Court could not grant a Tales de Circumstantibus (being by Original) but granted a Tales returnable on the next Return.

No Tales de Circumstantibus on Trials at Bar by Original.

## Holditch *and* Ainsworth.

HOlt Ch. J. Where a Declaration is delivered before the Essoin-Day, the Defendant hath four Days in this Term to plead in Abatement as of the last Term; if he pleads not till after the four Days expired, then 'tis after Imparlance, and of this Term within the four Days the Plaintiff is bound to take it without Imparlance, but after the four Days an Imparlance must be entred.

Time to plead in Abatement after Declaration delivered.

Imparlance.

Northy. After the four Days the Plea in Abatement is not to be received at all,

Holt Ch. J. Indeed by that Plea the Plaintiff will get longer Time, than he ought to have.

Northy. If the Defendant gives a Plea, without saying Defendit vim & injuriam, the Plaintiff is not bound to receive it.

Eyres J. 'Tis an ill Plea; but Quære whether Plaintiff must demur or may reject it.

Quære, If ill Plea may be rejected.

Sir Sam. Astry. I have known it rejected after the four Days, to which Aston agreed, but Clark said it may not be rejected, but demurr'd to.

Holt Ch. J. You may demur to it immediately, and they must join in three Days.

Sir Barth. Shower. If the Plea were put in within four Days, yet they will gain an issuable Term by it.

## Webb *and* Edwards.

THE Court will not grant an Attachment for Non-payment of Money appointed to be paid at a certain Time and Place by an Award upon a Rule of Court, if the Money were tendred to the Person any where else the same Day, or within a reasonable Time after and before the Motion.

Where Attachment for Non-payment of Money on Award by Rule of Court.

## *Rex & Regina verſus* Brigs.

Stat. 2 & 3 Ph. & Mar. Trades. Seſſions have only a limited Juriſdiction. Fitz. Nat. Br. 175. S.C.

HE was indicted upon the Statute 2 & 3 Ph. & Mar. for exerciſing the Trades of Weaver and Cloath-worker, and after a Special Verdict ſeveral Exceptions were taken to the Indictment; but the moſt fatal one was, that the Indictment was taken before the Juſtices of the Peace at the Quarter-Seſſions, who having but a limited Commiſſion had no Juriſdiction of the Cauſe: And the Court ſeem'd to be of that Opinion very clearly. Sed Adjourn'.

## Reve *and* Long.

Of executory Deviſes and contingent Remainders.

ERror in C. B. in Ejectment. John Long ſeiſed in Fee deviſeth his Lands to Henry Long, his Nephew for Life, and after his Death to the firſt Son of Henry, and the Heirs Males of his Body, and, for Default of ſuch Iſſue, to the ſecond, third, fourth, &c. Sons of Henry Long in Tail Male, and for Default of ſuch Iſſue to William, another Nephew of the Deviſor in Tail Male, with Remainders over. The Deviſor dieth, Henry Long dieth without Iſſue, leaving his Wife privement enſeint with a Son. William Long enters, the Son is born. The Defendant in C. B. claimed under the Son of Henry Long, and Judgment was there given againſt him.

Gold argued for the Reverſal; becauſe the Intent appears plainly that the Eſtate ſhould go to the Heir Male, and then the Court ſhould mould the Words to ſerve the Intention, which may be done by Conſtruing it to be an executory Deviſe. Here the Intent needs not to be carried further, than it was allow'd by ſome of the Judges in the Caſe of Fuller and Fuller. 3 Cro. 424.

Pemberton contra. If it be an executory Deviſe to one, then all the reſt are ſo too; and then 'tis a plain Perpetuity. Two Things are neceſſary to an executory Deviſe. 1. It muſt be limited on an Eſtate in Fee. 2. Upon a Condition. And he cited and rely'd upon 2 Saund. 388. Purefoy and Rogers, that where there is ſuch an Eſtate limited, upon which there may be a Remainder, it cannot be an executory Deviſe.

And of that Opinion was the whole Court, ſaying, otherwiſe there could be no ſuch Thing, as a contingent Remainder, and Archer's Caſe muſt be cut up by the Roots.

The Judgment was affirmed: But I was informed that this Judgment was afterwards reverſed in Parliament, the Lords having more Regard to the Equity of the Caſe, than to the ſettled Rules of Law, and the Opinions of the Judges.

## Denham *versus* Plumpton *in* C. B.

IT was said by Coke, Protonotary, that one cannot plead to the Jurisdiction at all after any Imparlance, tho' Special, for the Entry is Salvis exceptionibus, &c. tam ad breve quam ad nar', &c. (not said ad Jurisdictionem Curiæ.) Vide 3 H. 6. 30. a. 11 H. 6. 8. 20 H. 6. 32.

Ante . No Plea to Jurisdiction after any kind of Imparlance. Quære.

## Clench *and* Cudmore *in* C. B.

ADjudged, that the Clause of 12 Car. 2. 24. which enables Parents to dispose of the Guardianship of their Children, &c. by Will, doth not extend to Copyhold Estates: And that a Copyholder in Fee cannot of common Right dispose of the Guardianship of his Son, tho' by Custom it may be good.

Stat. 12 Car. 2. c. 24. Extends not to Copyholds.

## Gold *and* Burket.

HOlt Ch. J. said, the old Way of Pleading a Record was to begin at the Original, and not to omit so much as any Continuance, Summons or Severance. But, if there be diverse Matters in a Record, it is sufficient to plead any of them inter al'.

How to plead Records and Judgments.

There is a Diversity, where a Judgment is several, and where 'tis intire, for where forty Acres are recover'd to plead a Recovery of twenty Acres is ill, but it should be pleaded of forty Acres, whereof twenty are Parcel.

Note. This was upon a Writ of Error, tam in redditione judicii quam in adjudicatione Executionis: And it was objected that the Writ was naught, for that there was no Error in the Execution: But Holt Ch. J. said, the Writ of Error is not so intire but that it may be good for Part, and ill for Part, and said the Record was well removed by it. 11 Co. Godfrey's Case. Eyres J. said, it had been adjudged both Ways, and cited Roll. 748, 749. and Roll. 754.

Writ of Error good for Part. Ante .

## Pocock *and* Nash.

PRohibition to the Spiritual Court was granted after Sentence, for these Words, Mr. Nash is a Rogue and a Dog, and will never be good, till he be three Foot under-ground. And I had rather my Son should make Hay on a Sunday, than hear *Nash* Preach. Mr. *Nash* burst into my House, and I do not know what

Where Prohibition lies after Sentence.

Words.

what Goods I have lost. Holt Ch. J. 'Tis no more but saying, I do not like his Preaching. Preaching consists in Degree. There is a Diversity between the Case of an inferior Court and a Spiritual Court, but in both, after you have allow'd their Jurisdiction, no Prohibition lieth, if the Matter were conusable there; but if the Court had no Conusance, then a Prohibition lieth well enough after Sentence.

Post.

## Goodright *and* Cornish.

Executory Devises.

Upon a Special Verdict in Ejectment, whereby it was found that John Nowlin being seised in Fee, &c. and having two Sons, John and Richard, deviseth the Lands in Question to his Son John for fifty Years, if he so long lived; and, after that Term ended, he deviseth the Lands to the Heirs Males of the Body of his Son John, and if he died without Issue, Remainder to Richard, and the Heirs of his Body. John the Devisor dieth; John the Son enters and suffers a Common Recovery to the Use of the Defendant Cornish, and dieth without Issue.

Holt Ch. J. An Estate for Life is a good Foundation for a Remainder to work upon and grown, but not so of an Estate for Years. Here the Term could not be merged, because the Freehold is in the second Remainder-Man, and therefore the Recovery no Bar.

'Tis hard to construe it an executory Devise, for then the Devise over to Richard, &c. is void, for there cannot be two executory Devises, nor would that help, for the Man is dead, and so his Issue.

Eyres J. I Doubt 'tis hard to maintain an Executory Devise to the Heirs Males of a Man's Body. Holt Ch. J. 'Tis not good to commence in futuro, but it may be good in præsenti. (Vide per moy. 1 Sid. 153. le Case d'un devise al un enfant en ventre sa mere.)

If the Limitation to the Heirs Males of the Body of John be good, then the Remainder vested; if void, then it is all one as if it had been a good one, and determined for Want of Issue, so quacunq; via data, the Law is against the Defendant. 2 Leon. 70. Challenor and Bowyer is an Authority in Point.

Judicium pro Quer'.

## *Rex versus* Coller.

Using a Trade seven Years is sufficient tho' not Apprentice.

Eyres J. One Brother living with another at the Trade of a Tallow-Chandler for seven Years may set up the Trade tho'

there were no Indenture, and he is a good Apprentice within the Stat. 5 Eliz.

## Taylor *versus* Batten.

Goods taken upon a Fieri Facias were appraised at 26 l. and afterwards sold for 10 l. and the Sheriff returned Fieri Feci 10 l. Affidavits were read on both Sides as to the Value, and it appears the Sheriff might have had more than 10 l.

Action lies against the Sheriff for selling Goods for less than apprais'd.

Holt Ch. J. What can we do? Eyres J. 'Tis a Misdemeanour in the Officer.

Holt. But we cannot falsify the Sheriff's Return by Affidavits An Action of the Case lieth against him, the Matter was compromised.

In Covenant. A Breach was assigned for Non-payment of 50 l. Dee moved, that upon bringing 40 l. into Court (which he said was all that was due) so much might be struck out of the Declaration. Holt Ch. J. No, it cannot be done; there is no general Issue in Covenant. What can you plead? It was not paid before the Action brought.

In Covenant, Money can't be brought in. Ante.

## Harding *versus* Brook.

Upon a Motion to stop a Suit in Ejectment for the Forfeiture of a Lease upon Payment of the Rent in Arrear to be ascertain'd by Mr. Aston. Per Eyres J. If there be a Tenant at Will, and the Landlord dies the Day before the Rent-Day, the Tenant may keep his Rent.

Tenant at Will may keep the Rent, if Landlord dies before Day of Payment.

Holt Ch. J. Tenant for Life, Remainder in Fee, Tenant for Life makes a Lease reserving 100 l. half yearly; Tenant for Life dieth the Day next before the Rent-Day: A small Matter sufficeth to make a Lease at Will. I should construe the Permission of the Landlord and the Continuance of the Tenant to make a Lease at Will in that Case. Few Tenants make any Scruple to retain Rent, &c. This Way of Stopping a Suit in Ejectment by bringing the Arrears into Court is but a new Course here, about ten Years standing; it hath not yet obtained in C. B. And in this Case it was deny'd.

No stopping Ejectment on bringing in Arrears.

Holt Ch. J. observed, that in Chancery they subscribe the long Declaration of 30 Car. 2. wherein he thought they were mistaken, the short one is always used here.

Subscribing the Declaration 30 Car. 2.

Per Eyres J. We never prohibit in Case of Mariners Wages, tho' on Articles of Agreement at Land, for they have a proper

No Prohibition for Mariners Wages.

proper Jurisdiction, let them proceed how they will, tamen quære if there be an Agreement under Seal. See now the Stat. 4 & 5 Annæ, for Amendment of the Law.

Poſt. Suit per Guardian.

The Court will admit one to ſue by Guardian upon a Motion, tho' not preſent, nor any Affidavit made.

## Mansfield *verſus* Stephen. *In* C. B.

Promiſe against Promiſe gives mutual Remedies, and no Averment of Performance neceſſary.

ASſumpſit. The Plaintiff declares, that whereas he tali die apud D. had bought of the Defendant all his Corn growing in ſuch a Cloſe for ſo much Money: And that before the Reaping, the Defendant, in Conſideration that the Plaintiff had paid ſo much Money in Hand, and promiſed to pay ſo much more Reſidue, &c. promiſed to deliver the Corn; and that altho' he was always ready to have paid the Reſidue, yet the Defendant hath not delivered the Corn.

Defendente proteſtando quod non Aſſumpſit, &c. confeſſeth the Bargain, & pro placito dicit, that the Plaintiff hath not paid the Reſidue.

Plaintiff replies, that upon the firſt of Auguſt at D. he tendred the Reſidue, &c. Defendant demurs.

Girdler argued for the Defendant, that the Declaration is not good, becauſe there is no Place alledged where he offer'd the Money; and it is not ſufficient to ſay, that he tendred, &c. but he ought to offer it in Court. Inſt. 207. a.

But it was anſwered for the Plaintiff, and reſolved by the Court, that in this Caſe there needed no Averment that he was ready, &c. for there is a Promiſe againſt a Promiſe, which gives mutual Remedy. Hob. 88. Nichols and Rainbred, and 105. Lampleigh *verſus* Brathwayt. But if it had been ſold proinde, the Money muſt have been firſt paid.

2 Saund. 352.

Judicium pro Quer'.

## Bliſſet *and* Cranwell. *In* C. B.

What Words make a Jointenancy or Tenancy in Common.

A Man made his Will in theſe Words: I give all my Lands in *Dale* to my two Sons *B.* and *C.* and their Heirs for ever, and the Survivor of them, equally to be divided between them and their Heirs, after the Death of my Wife. B. deviſeth all his Intereſt to E. and dieth, the Wife dieth, the Deviſee of B. claimeth a Moiety. Now the Queſtion was, whether B. and C. were Jointenants or Tenants in Common.

It was adjudged by Treby, Nevil, and Rookby (contra Powel) that they were Tenants in Common, they cited 3 Cro. 443. Lewin and Dod. 2 And. 17. S. C. 2 Roll. 90. Furze and

Weeks, tho' the Word Survivor regularly makes a Jointenancy, yet the subsequent Words do explain and alter the Sense of the Precedent.

Judicium pro Quer'.

## *In* B. R.

Where Parish issues, &c. are levied upon particular Persons, the Parish ought at Common Law to make a Rate to re-imburse them. But Quære, whether the Court will grant a Mandamus in such Case. Eyres J. I never knew any Mandamus in such Case.

Quære, If a Mandamus lies to re-imburse Money over paid on Parish Rates.

Broderick. A Mandamus hath been granted for Repairing of Hedges; 'tis in Styles, and to Scavengers. Holt. Ay, Scavengers are publick Officers, and there is an Act of Parliament in the Case.

Eyres J. I do not see how it lieth for Hedges, &c.

## *Rex versus* Tucker.

See Cases in Parliament.

Upon a Writ of Error to reverse an Attainder for High Treason several Errors were moved.

Reversal of an Attainder of Treason.

1. That the Indictment is Ad general' Sess. &c. tent' coram Withers, Heath, Stroud & al' virtute literarum patentium eis duobus tribus vel pluribus eor' direct', whereas the Commission is directed to them all, authorizing two or more, &c. 4 Inst. 162. Co. Entr. 355.

2. That it is not laid Vi & Armis, as it is Plow. 385. but note, that is cured per Stat. 37 H. 8. cap. 8.

3. That the Prisoners should have been separatim allocuti, for tho' the Answer be several separatim dicunt, yet the Question is joint, which ought not to be.

4. The King's Council should have demanded Judgment for the King.

5. The Judgment should have been quod trahatur super traham or Hurdellam. Stamf. 182. but to that Sir Sam. Astry said, it is usually entred at the Old Baily super traham, &c. but never so in this Court.

6. The Judgment is quod per Collum suspendantur & uterq; eor' suspendatur, whereas it ought to be per Colla.

7. So it is quod Corpora eor' & utriusq; eor' in quatuor partes dividantur, whereas it should be & Corpus utriusq; eor'.

8. 'Tis omitted in the Judgment quod secreta membra amputentur.

9. The Indictment doth not conclude contra ligeanciæ suæ debitum.

The Court at first seem'd to have some Regard to the first, third, sixth, and seventh Exceptions, but, by Reason of the great Variety of Precedents, they seem'd afterwards to disallow all the Exceptions, save only the two last, against which it was argued by the Council for the King, that it may be imply'd in the Judgment quod secreta membra amputentur, and they are as often omitted as put in; and Holt Ch. J. said, he did not find them in any Record before that of the Regicides: And as to the last Exception, Levinz argued, that it appears to be Treason in the Body of the Indictment, and then such Conclusion is not necessary. Here the Indictment says debitam Obedientiam erga Regem subtrahentes proditorie Compassaverunt Regem naturalem Dominum suum de Regali statu deprivare & guerram levaver' contra naturalem Dominum suum. The Conclusion drawn from the Premisses cannot be of more Force, than the Premisses themselves. He said, that in the Records of Benstead's Case. 1 Cro. 583. Vane and Lambert's Case. Sid. 84. and Cotton and Messenger's Case, Sid. 358. the Words contra Ligeantiam are omitted. Powis cited Roll. Indictment 82. That an Indictment is good without the Words contra Coronam, tho' there it is said indeed that contra pacem is necessary.

Gold argued, that it is debitum ligeantiam minime ponderan', which implies it, that in 1 Cro. 314. Fen's Case, who was indicted for engrossing Fish ea intentione ad revendend' contra formam Statuti, after Conviction the Court would intend it was unlawful Regrating, otherwise he being a Fishmonger (for whom there is a Saving by the Stat. of 5 Ed. 6.) might have given in Evidence that he sold them at reasonable Prices: So here, if the Party had been a foreign Enemy he might have given it in Evidence.

And now the Cause having long depended, the Court declared that they would not give any Opinion as to the Omission of the Words quod secreta membra amputentur, because they are not inserted in any antient Record, tho' Eyres J. said, the Books make it a Part of the Judgment, and he knew not by what Authority the Privities can be cut of without such Judgment: But they all agreed that the Attainder was erroneous for Want of those Words Contra Ligeanciæ suæ debitum, which are not supply'd by the Words contra formam Statuti, as Gold urged, for the Statute 25 Ed. 3. was made for the Advantage of the Subject, and is but a declaratory Law. Eyres J. said, Every Indictment ought to have sufficient Matter, legal Form, and apt Conclusion. As to the Matter and Form, it ought to be precise, in apt legal Words: Furatus fuit unum equum is ill, without saying felonice; so felonice ex malitia præcogitata interfecit is not sufficient without the Word Murdravit. 2 Cro. 20. Stamf. 96. Vide 4 Co. 44. b. Vaux's Case, and 5 Co. 122. b. Long's Case, that an Indictment ought to be certain, and shall not be taken by Implication:

plication: The Word Proditorie can no more supply it than felonice or illicite can supply the Want of contra pacem. Nor will the Words contra naturalem dominum avail for this Purpose, for they denote no more, than that the Person was born in England, 'tis said by Grotius, that Service and Obedience became due after Dominion introduced, and not by Nature. 2 Inst. 47. and that appears plainly by the Form of an Indictment against an Alien amie, for that is against the Allegiance establish'd by the Law of England; where there is no Law there is no Transgression, tho' the Party offended be natural Lord. Every Indictment ought to have a proper Conclusion: Where an Offence is by several Statutes, the Indictment ought to conclude contra formam Statutorum. 2 Cro. 142. Broughton *versus* Moor. Here the Conclusion contra ligeanciæ debitum is as essentially necessary, as contra pacem in an Indictment of Trespass.

Holt Ch. J. to the same Intent: But he held it not necessary that the Indictment should conclude with those Words contra Ligeanciæ debitum, for they might as well be in the Body of the Indictment, but somewhere in the Indictment they must be, other Words are aggravating or Argumentative, but these describe the Offence; so the Word Proditorie is essentially necessary, and not to be supply'd; so contra pacem in Indictments at Common Law, and the Words Vi & Armis, &c. before the Stat. 37 H. 8. Words, that are superabundant shall not supply the Want of Words, that are necessary. I have searched many, and find but very few Precedents without these Words. Indeed there are several tempore H. 8. for denying the King's Supremacy, and so tempore Car. 2. for taking Orders from Rome, &c. which do not conclude contra Ligeanciæ suæ debitum, but that is in Case of a new Treason by a particular Act of Parliament; where it may be sufficient to conclude contra formam of that Statute, which makes it so, it not being contra ligeantiam in its own Nature, which probably might give Occasion to that Omission, Calvin's Case is a full Authority.

Judicium quod Reversetur. And afterwards, upon a Writ of Error in Parliament, this Judgment of Reversal was affirmed.

## Alford *and* Turner.

Upon a Writ of Error. The Defendant pleaded a Release of Errors, and in the Conclusion of his Plea pray'd that Judgment might be affirmed, which Northy urged was a Waver of his Plea: But the Chief Justice said it was but Surplusage, and the Judgment was

Release of Errors, how pleaded.

Quod querens præcludatur.

## Billinge *and* Croſly.

Declaration with a ſimul cum, &c.

HOlt Ch. J. ſaid, if a Man bring an Original in Treſpaſs against one, and declares against him with a ſimul cum, he abates his own Writ; but the Defendant cannot take Advantage of it without demanding Oyer. If the Writ be against two, the Plaintiff may declare against one of them with a ſimul cum.

## Hall *and* Baily.

Proceſs of inferior Court by Patent. ſecundum conſuetud. well.

ERror upon a Judgment in an inferior Court held by Vertue of his Majeſty's Letters Patents: The Proceſs was awarded ſecundum conſuetudinem. Holt Ch. J. ſaid it was well enough, for it is intendible according to Law; but they could not ſay a tempore quo, &c. because by Patent.

## Rogers *and* Marſchal.

Capias lies in Caſe, in inferior Courts. Quære. Vide infra prox. Caſe.

HOlt Ch. J. ſaid, that Twiſden was once ſtrongly of Opinion that a Capias doth not lie in an Action upon the Caſe in an inferior Court: But upon Conſideration of the Book of H. 6. Twiſden ſaid that he was convinced that a Capias well lay.

## Anonymus.

Proceſs in inferior Courts.

ERror of a Judgment in Caſe of an inferior Court. Eyres J. ſaid by the Caſe in 2 Cro. the Defendant ſhould be ſummon'd in all inferior Courts. But Holt Ch. J. ſaid, the regular Proceſs is a Pone, in Caſe; and a Summons in Debt; but however, the Miſawarding of Proceſs is cured by the Defendant's Appearance. Note, The Court allow'd, that the Statutes of Jeofailes extend to inferior Courts after Verdict.

Statutes of Jeofails extend to inferior Courts.

## *Lady* Lovelace's *Caſe*. (Poſt. 262.)

Writ of Reſtitution on Forcible Entry, Juſtices Power and Duty therein.

PER Holt Ch. J. Juſtices of the Peace, upon a Conviction of Forcible Entry, may commit Offenders, but may not alter the Poſſeſſion without an Inquiſition, nor doth it become them to go armed on that Occaſion. If a Juſtice convicts all the Perſons in Poſſeſſion for Offenders, and ſets the Doors open;

 this

this is an Altering of the Possession by necessary Consequence, and therefore it was ruled there should be a Writ of Restitution, nisi.

Per Holt Ch. J. Where a Tradesman brings an Action, his Books are not Evidence for him; yet if the Defendant desires that the Book may be produced, if the Plaintiff refuseth his Cause is very suspicious.

Tradesman's Book. Q. If Evidence.

## Curling (*vel* Hurling) *and* Long.

THE Court was moved for a Prohibition to the Chancery-Court of the Cinque-Ports, where a Bill was exhibited, setting forth a Custom that every Ship, that useth the Pier of Ramsgate (which is a Member of Sandwich, one of the Cinque-Ports) should pay 4 d. per l. for all their gettings in the Year, for the Maintenance of the Pier; and prays a Discovery of the Defendant's Gettings, and whether there hath not been such a Custom, and to be relieved, and says it belongs to that Honourable Court to see the Duty levied. The Defendant admits by his Answer, that the 4 d. per l. hath been taken by Charter, By-Law, or some other Way, but says the Custom is triable at Law.

Prohibition to the Chancery of the Cinque-Ports.

Holt Ch. J. A Prohibition here is not to try the Custom, and after to send a Consultation to proceed, as in the Ecclesiastical Court, for here the Chancery wants original Jurisdiction of the Cause, and yet if the Pier-wardens (who are chosen yearly by the Custom) are no Corporation, they cannot sue at Law, we'll be tender of Matters, which concern Navigation, but I know not how to intitle a Court of Equity to lay a Charge on the King's Subjects, the Bill may be good for the Discovery, but it is naught for the Custom, you must not proceed to try that there.

## Reeve *and* Goldega.

EYres J. (absente Holt) said, the Plaintiff could not have Leave to discontinue after a Writ of Enquiry returned.

No Discontinuing after Writ of Inquiry refused.

Eyres J. I do not like the Committing a Man by Justices of Assize for a Contempt of the Court, they should rather Fine him, and commit him till paid.

Commitment by Justices.

Rex

*Rex verſus* Berry.

Indictment extitit preſentatum, well.

Exception was taken to quaſh an Indictment, that it is only hiſtorical Recital, Extitit preſentatum quod billa ſequens eſt vera ſcilicet quod Margaretta, &c.

Eyres J. ſeem'd to allow the Exception, for every Indictment ought to begin Jurator' pro Domino Rege ſuper Sacrum' ſuum preſentant, 'tis a neceſſary Part thereof.

Holt Ch. J. It may be either Way, this is well enough and tantamount. Quære.

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# DE

# Term. Sanctæ Trin.

## Anno 6 Willielmi & Mariæ, Regis & Reginæ in B. R.

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*Rex & Regina verſus* Clinton *and* Stanway, *alias Lady* Lovelace's *Caſe.* Ante 260.

Rule and Writ of Reſtitution on Forcible Entry.

Serjeant Thompſon moved for a Writ of Reſtitution; for Note, the Tenant was changed, ſo that there could be no Fruit of the Rule for Reſtitution.

Sir William Williams contra. There ſhould be ſome Foundation for the Writ of Reſtitution, as Indictment, Information, &c. Here are only Affidavits. If the Juſtice hath done

no more than he can justify by Law, then there is no Ground for such a Writ.

There was a Complaint of a notorious Force, he came only to remove the Force, and demands Entry for that Purpose, commits the Offenders without medling with the Possession; goes home to prepare a Conviction, returns about nine a clock, finds the Force stronger. He may by Stat. R. 2. remove the Force in the Night.

Holt Ch. J. If a Justice of Peace grants Restitution upon a Conviction of Forcible Entry, without Inquest, and doth not certify the Restitution, cannot we inquire and grant a Writ of Re-restitution. If we have a Record upon a Writ of Error out of an inferior Court, and they take out Execution hanging the Writ of Error, we may inquire into it, and award Restitution.

## Fitzgerald *and The Countess of* Clanrickard.

THE Husband join'd for Conformity in a Writ of Error, yet it was ruled, that by his Death the Writ abated; otherwise it is where the Defendant in Error dieth after, in nullo est erratum pleaded, for there the Court may proceed to examine the Errors. Vide Yelv. 112, 113. adjudge.

Death of one Plaintiff, tho' added for Conformity, abates the Writ.

If the Plaintiff accepts the Bail, he may take away the Bail-piece from the Judge's Chamber, and File it for his own Expedition, but after twenty Days then it becomes absolute, and the Defendant takes it away and files it.

Filing Bail-pieces.

If the Defs' reddidit se in Discharge of his Bail, the Bail-piece should be marked and discharged, otherwise the Plaintiff may proceed against the Bail.

On Reddidit se. Bail-piece to be mark'd.

## Combs *versus The Hundred of* Brackley.

UPon the Statute of Hue and Cry the Plaintiff declares that he was robb'd de denar' suis propr', &c. upon not guilty pleaded the Jurors found that the Plaintiff was robb'd prout, and that he made Affidavit that he was robb'd of 36 l. 10 s. whereof 1 s. 6 d. was his own, the rest his Masters, and the Doubt was, whether the Plaintiff should recover against the Hundred?

Hue and Cry.

The Servant may sue.

Levinz argued, that the Oath falsify'd the Declaration, this is not like the Case of a Carrier or Sheriff upon a Fieri Facias. 2 Saund. 380. where they are responsible to the Owner, but the Servant is not so here. Can a Servant release his Masters Debt?

Debt? if he recovers 'tis to his own Use. In some Cases it hath been said, that the Servant may bring the Action, but often otherwise.

For Possession gives both Interest and Property.

But it was argued for the Plaintiff, and resolved by the Court, that the Action was well brought by the Servant. It is true, there is a Difference between a Servant and a Sheriff or Carrier, but the Possession gives an Interest and Property in both Cases; 'tis the Master's own Act to let the Servant bring the Action. 2 Saund. 379, 380. 2 Sid. 44, 45. Latch. 127. But the Case in 1 Brownl. 155. is an express Authority in Point.

Judgment pro Quer'.

Post. Order reversed in Part.

Per Holt, in a Case of Bastardy Part of an Order may be reversed and Part stand.

Quit-Rents taxable to the Poor. Ante 62 Carth 14.

Eyres J. said, that a Quit-rent is not taxable to the Poor, for the Tax ought to be laid on the Occupiers, but Holt said it was otherwise ruled in the Case of one Williams of Suffolk.

## Williams *and* Cary.

Shewing the Writ of Error before allow'd is a Supersedeas of Execution.

NOtice was given in the Morning of a Writ of Error, and that it would be allow'd in the Afternoon, in the mean Time the Plaintiff below takes out a Fi. Fa. and seiseth some of the Defendant's Goods: Now an old Rule made 36 Car. 2. was read, that the Writ of Error is no Supersedeas till allow'd. Eyres (obiter) while Goods are in the Sheriff's Hands, before Writ of Error allow'd, we can Order Restitution, for 'tis but in Fieri: But Holt was strongly of the contrary Opinion; and it was ruled, that the Shewing of the Writ of Error, it being allow'd afterwards in convenient Time, is a good Supersedeas from the Shewing, for it shall be taken as one Act.

Money brought into Court.

Serjeant Levinz moved, that upon Payment of 10s. into Court, so much might be struck out of the Declaration; but it appearing to be in Case upon an Indebitatus Assumpsit, and Quantum meruit, the Court said he might do it as to the Indebitatus Assumpsit, but not as to the Quantum meruit.

Mandamus for a Bishop's Register.

The Court (after some Hesitation) granted a Mandamus to restore one to the Office of Register of the Bishop's Court of Glocester.

## Guy *and* Nichols.

DEbt for a Penalty for Non-performance of a Covenant. The Defendant covenanted to pay the Plaintiff so much as would make up what the King allow'd him for Wages 3 l. 3 s. per Month.

Mutual Covenants, and on Condition precedent.

Holt. One Covenants to serve him, the other Covenants to pay him so much for his Service, this is mutual, and not upon a Condition precedent: One Covenant cannot be pleaded in Bar of another; if he serves one Month, and then runs away, the first Month's Wages is due.

Hall took Exception that there was no Venue laid where the King's Allowance was, which is traversable.

Venue.

Holt Ch. J. That should come on the other Side, for if they say the Allowance was 30 s. you may say the King allow'd 40 s. viz. apud B. If they lay the Allowance right, you have no Occasion to traverse, if Wrong, the Venue comes on your Side.

Upon a Writ of Error directed to the Mayor, Recorder, and elder Aldermen Burgi de Kirbykendal, the Return was Reponf. A. Major. B. Recordator. & C. & D. sen. Alderman. not saying Burgi præd. And upon Northy's Motion it was ruled that it should be amended, and that the Officer might amend the Transcript.

Return of a Writ of Error amended.

Where the Plaintiff laid his ac etiam for 300 l. and then swears only, that the Defendant ow'd him above 10 l. just to bring him within the Rule for Special Bail, the Court ordered him to take Common Bail for his Fraud.

Common Bail ordered, tho' ac etiam 300 l. because fraudulent.

## Philips *and* Bury.

RObert Philips brought an Ejectione firmæ against Dr. Bury, upon the Demise of William Painter, Rector of Exeter-College in Oxford, for the Rectory-House of the said College. The Defendant pleads, that the Messuage is the Freehold of the Rector and Scholars, and that he himself is Rector, &c. absq; hoc, that the Lessor of the Plaintiff is Rector. The Plaintiff replies, that himself is Rector, and thereupon Issue is joined. And a Special Verdict found, whereby the Jurors say, that at the Time of the Demise the Place in Question was Parcel of the Possessions of the College, and that the Bishop of Exeter was Founder of the College, and appointed the Bishop of Exeter for the Time being to be Visitor, and they find several Statutes of the College touching the Rector, &c. That one Comer, a Member of the College, was convicted of Incontinency, and expell'd

Power of a Visitor, and whether his Sentence is examinable in a collateral Action.

 the

the House, who appeal'd to the Bishop of Exeter, who grants a Special Commission to Masters to examine the Case, &c. Bury the Rector protests. On the 16th of May, 2 W. & M. the Bishop gives Notice of a general Visitation to be on the 16th of June next, and then came to the College and found the Doors of the Chapel shut against him, and the Porter refused to open them. The Bishop makes another Visitation on the 24th of July, Bury protests, the Bishop deprives Dr. Bury for Obstinacy, and if the Rectory thereby became void, then pro Quer' aliter pro Defendente.

This Case was argued at the Bar Termino Trin. 4 Will. & Mar. by Pemberton for the Plaintiff, and Wallop for the Defendant, and afterwards by Sir Tho. Powis pro Quer' and Blincoe pro Defendente.

And now it was argued by the Judges seriatim; and the Case was divided into three principal Questions. 1. Whether the Visitor here had a Jurisdiction and Power to deprive the Rector? 2. Whether he had pursued that Power? 3. Whether the Justice of the Sentence be examinable in this Court, which is the main Question.

Eyres Jun. and Sen. and Gregory, Justices, argued for the Defendant, that the Visitor here is not an absolute Judge, but is circumscribed by the Statutes of the College, whereby he hath his Authority, and not by the Common Law; and that his Proceedings in this Case not being warranted by the Statutes were absolutely void to all Intents and Purposes; but their Arguments and Reasons need not here be set down, because the Case turns principally upon the last Question, as to which the said three Justices held, that the Validity of the Sentence of the Visitor was examinable here in this Court in a collateral Action; for of a void Thing all Persons may take Advantage, tho' it be done by Semblance of Justice, and they relied upon the Authorities of Dyer 209. Coveney's Case, 13 Co. 70. 11 Co. 99. b. in James Bag's Case, Palm. 251. and Latch. 229. Dr. Sutton's Case, by which Books it appears, that a wrongful Deprivation is avoidable in a collateral Action a fortiori, a void Deprivation, tho' he could not have Assize in his own Name to recover the Possession, yet sure he may defend his Possession in a collateral Action. 5 Co. 58. Specot's Case is stronger: And as to the Cases cited on the other Side, which seem to exalt the Power of the Visitor, they are good Law with respect to spiritual Visitors proceeding by ordinary Jurisdiction; but he, that is deprived by a lay Visitor, cannot have an Appeal to be restored to his Name first, and therefore his only Remedy is at Law. And the Cases of Mandamus. Mod. 84. Dr. Widdrington's Case. Sid. 71. Dan. Appleford's Case, are likewise good Law, for the Writ of Mandamus is fully answered by Return of such Sentence of a Visitor, and the Party is left to his Appeal or other Remedy at Law. So a Man-

damus to restore to an Office is well answered by the Judgment of an inferior Court at Common Law, but sure the Party may have other Remedy; those Cases on Writs of Mandamus go upon different Reasons, and what the Judges said obiter were but extrajudicial Opinions, the Possession not being then under Examination, but the Means to it.

4 Co. 29. a. Bunting's Case, 5 Co. Cawdrey's Case, 7 Co. Kenn's Case, Mo. 781. Bird *versus* Smith. Jones 393. Allen and Nash. 2 Roll. 219. S.C. do all depend on Reasons widely different, for the Persons were deprived, &c by the High Commission Court by Virtue of their general and ordinary Jurisdiction by the Ecclesiastical Law, saved implicitly by the Statute 7 Eliz. For the King before that Statute might grant such an Ecclesiastical Common, as appears by Cawdrey's Case and Huntley's Case, but if the Power had been given by Statute, it might be avoided in a collateral Action, as appears by Cawdrey's Case and Huntley's Case.

Where the Ecclesiastical Law hath provided Remedy by Appeal, or otherwise, the Party cannot fly to an extraordinary Remedy; and tho' the Sentence of the High Commissioners cannot be repealed by Appeal, yet it may be by Commission of Review, which, tho' not of Right, yet it is presumed the King will grant it.

The Bishop of Exeter is a temporal Judge in this Case, and if the Defendant be expelled unjustly, an Action upon the Case lieth against the Visitor as it doth against a Bishop for not assoiling. 12 Co. 76. 2 Inst. 623. or against an Archdeacon for not inducting. Fitz. Nat. Br. 47. H. It is true, the Founder had absolute Power over his Land, but he could not exclude the Jurisdiction of the Common Law no more than a Man may dispose of his Estate by Will; so as if any Difficulty arise, it shall be determined by two Friends, such a Clause would be void to oust the Common Law of Jurisdiction. Inst. 145. The King himself cannot do Wrong: An Appeal is a natural Remedy, otherwise Oppression would be set up for Law.

Holt Ch. J. pro Quer'.

1. The Bishop of Exeter hath Power to give Sentence of Deprivation, tho' a Visitor be restrained to visit ex officio, more than once in five Years, yet as Visitor he hath a standing Authority to determine all Differences. Lit. sect. 136. Bishops can visit but once in three Years ex officio, yet their Courts are always open.

2. The Justice of the Sentence is not examinable in Westminster-Hall.

There are two Sorts of Corporations aggregate. 1. For publick Government. 2. For private Charity. That for publick Government, as Mayor and Citizens, &c. is subject to the Common Law, of such there is neither Founder nor Visitor,

nor Patron, but they subsist by Virtue of the King's Letters Patents; therefore if it be not mentioned in the Charter, how the Succession shall be made, the Law says it shall be by Election. 1 Roll. 513, 514. But it is otherwise of Corporations for private Charity, for there, if there be no Provision for the Succession, the Founder shall have the Management, &c. and not the Law, but the Law says he shall be Patron and Visitor, for the visitorial Power is not introduced by foreign Laws.

Where an Hospital for the Poor is not incorporated, there is no Visitor: The Case of Sutton's Hospital. Deprivation by a Patron or by a Visitor is all one. He, whom the Founder appoints, shall have the same Power as the Founder himself: And there is no Difference save only in Degree between a College and an Hospital, if both incorporated. 8 Ed. 3. fol. 69, 70. 8 Assisar. 29. & 31. that no Appeal lieth, soit a Droit ou à Tort.

Tho' the Visitor hath no Court, nor is he a Judge of Record, yet that is not material; if the Founder directs no Appeal, no Appeal lieth: Here he Subjects the Rector and all the Scholars to the absolute despotick Power of the Bishop of Exeter, who shall judge of the Statutes of the College, if the Visitor shall not.

If a Sentence of Deprivation be pleaded, the Cause is not traversable. Rastal 1. 11 H. 7. 27. 7 Co. Ken's Case. If the Rector had been a sole Corporation, and had brought an Assise, it had been a good Plea that the Bishop of Exeter being Visitor, &c. for certain Causes and Crimes had deprived him, and the Cause is not traversable, and therefore needs not be set forth; and, if it be not to be shewn in Pleading, it needs not in a Special Verdict.

The Sentence is not weaker because no Appeal lieth. In the Cases cited of the Sentence of the High Commission Court, no Appeal lieth: And as to the Distinction taken by Reason of the Ecclesiastical Constitution, that Constitution is derived from the Law of the Land, and so is the Power of a Visitor, if it be conclusive in the one Case, by the same Reason in the other. Coveny's Case, and James Bagg's Case are all as one Case, the later being grounded upon the Error in the former. It was held that no Appeal lay to the Archbishop; Ex hoc sequitur (saith the Reporter) that he may have an Assise: But I say, non sequitur, and the Cases there cited do not warrant the Distinction. The Opinion may be justly suspected in a Case, where an Assise lieth not, for the Head of a Body aggregate not solely seised cannot maintain an Assise, he hath no Property of any Thing till dividend made, and then 'tis Dr. Bury's and not the Rectors.

In Appleford's Case, the Lord Hale said he could not have Assise, and did disallow of the Opinions in Coveney's Case and James Bag's Case. Nor is there any Difference at all between this Case and the Case of a Mandamus. In Appleford's Case



(wherein

(wherein I was of Counsel for him) it was said pro crimine enormi, and held not necessary to shew the Cause, because not examinable.

I thought the Law had been settled, how shall we know when any Deprivation is valid, if the Founder trusted the Visitor, why should we suspect him. A Recovery by Default is a good Plea against the Issue in Tail, till it be falsify'd by him. Here in my Opinion the Doctor's Contumacy was a good Cause of Deprivation, Ignorantia juris non excusat.

He, that receives a Charity with a Yoke, must undergo the Yoke.

And he concluded for the Plaintiff, but the other three Judges being of the contrary Opinion, Judgment was given for the Defendant.

This Judgment was afterwards reversed by Writ of Error in the House of Lords.

## *Rex & Regina versus* Goodwyn *& al' sur Information.*

UPon a Trial at Bar, it appeared that the Town of Orford is an antient Town in the County of Suffolk, That Queen Elizabeth granted them a Charter by the Name of Mayor and Commonalty of Orford, and constituted one Mayor, eight Portmen, twelve capital Burgesses, and that the twelve capital Burgesses yearly on Munday before Michaelmas, chuse two of the Portmen, and the Burgesses Name one of the Two to be Mayor, and he to take the Oath of Mayor on the Monday following. When any Portman dies or removes, others to be chosen out of the capital Burgesses by the Mayor and Portmen, and when any of the capital Burges die, others to be chosen by the Burgesses: The Information sets forth, that Richard Goodwyn Mayor, William Goodwyn and Thomas Palmer Portmen, 13 April, 5 Will. & Mar. malitiously and seditiously intending to subvert the Constitution, &c. did without due Notice to the Burgesses elect Glenham, Bence, and Hook, Foreigners, to be capital Burgesses in the Room of three capital Burgesses deceased, and the 24th of May did amove Parker and Hastings Portmen without Cause, and swore Hook and Sanders in their Places.

Hastings Evidence proves, that the usual Time of the Election of Portmen and capital Burgesses is at the Time of Election of Mayor, and, if done at any other Time, there used to be three or four Days Notice.

That the Mayor the 12th of April, 93. told the Witness that it was Time enough, and next Morning the Mayor and he rode out of Town together, and the Mayor said he was to go to there to lie all Night, but they parted, and in the Afternoon, when

when the Witness returned, he found the Defendants had called a Court, and there without Notice proceeded to chuse capital Burgesses, the two Hastings did protest. Note, The Reasons given for amoving Parker and Hastings were, for that Parker was non-resident, and Hastings being one of the Clavers had refused to let the Mayor see the Charter, but had taken it away out of the Chest.

Ante S.C. Notice.

Northy pro Defendente. In Glide's Case of Exeter, it was resolved that an Alderman, &c. of a Corporation, who is non-resident, may be removed without Notice, for he having withdrawn himself is the Occasion Notice cannot be given, to which Eyres Sen. J. assented.

Serjeant Wright ad idem. If Electors be present to make a Majority, they cannot make void an Election by their Protest, and it appears the two Hastings were present.

Evidence was given, that Hastings, one of the Clavers, refused to let Goodwyn the Mayor see the Charter, saying, there was something in it, which was not fit for every one to see.

Eyres Sen. J. They could not chuse Out-setters, for by Charter they must chuse of the Inhabitants, but if the Usage of Place hath been to chuse Out-setters since the Charter (tho' Wrong) yet it takes of the Conspiracy charged by the Information.

The Town Clerk, Mr. Porter, attends with the Books, but insists to have his Charges. Eyres Sen. J. You are a publick Officer of the Town, and ought to have given Sight of the Books, and he commanded him to produce the Books, without giving any Order for his Charges) The Mayor might command the Charter, for 'tis his Direction. Quære quid inde venit.

*Rex & Regina versus* Joseph Hornby, *upon a Writ of Error in the Exchequer-Chamber, (there being likewise three other Writs of Error against Sir* Jer. Snow, Robert Williamson, *and* Thomas Smith, *severally upon the same Question in them all.)*

The King's Revenue of Excise not chargeable by Patent, but for his own Life.

HOrnby in Hillary-Term, 1 Will. & Mar. exhibited before the Barons of the Exchequer Letters Patents of King Charles the Second, dated 30 April Anno Regni sui 29. whereby he grants an yearly Rent or Sum of 1352 l. 17 s. 10 d. to him, his Heirs and Assigns for ever, issuable out of the Revenue of Excise; and Hornby pray'd that the same Letters Patents might be inrolled, and so they were.

The Letters Patents recite, that many Persons suffered for Want of that Money, which the King had taken out of the Goldsmith's Hands, &c. and the King grants this Rent in Trust for Mr. Hornby's Creditors proportionably, and after they were satisfied, then for Mr. Hornby, with a Clause that the Patent should be taken favourably for Mr. Hornby, and favourable Non Obstante's, That Hornby, by Deed inrolled 33 Car. 2. released Part of his Rent.

Avers that there was sufficient of the said Revenue (over and above what was charged for the Queen and Duke of York) and that he hath received only 10000 l. which was the Consideration of the said Release.

The Petitioners obtained Judgment in Hillary-Term, 3 Will. & Mar. in the Exchequer, that the Sums and Arrears should be paid, &c. out of the Revenue of Excise, &c.

And now it was argued in the Exchequer-Chamber by Eyres Sen. and Jun. Justices of the King's Bench (in their Turns) that the Judgment should be affirmed.

There are two great Points in this Case.

1. Whether a Petition in the Exchequer be a proper Remedy.

As to the First, the King is not a bare Trustee of the Revenue of the Crown, but is an absolute Proprietor, and may Grant or Charge the same as well as any Subject; it is true, he cannot subject his Realms or Crown, or grant any Part of his Stile Royal, but hath absolute Power over his Revenue, else Acts of Resumption would have been needless, and the Rules given in our Books for Construction of the King's Grants impertinent.

The Kings of England have executed this Power in all Ages.

Inter Memoranda Scaccarii. pag. 10, 101. the King granted to his Son the County-Palatine of Chester, and several Manors.

Pag. 28. is a Grant of the Sheriffalty of Westmoreland in Fee, which continueth to this Day. Pag. 26. The Manor and Castle of Devises granted 21 Ed. 3. 47. b. Edw. 2. granted an Annuity out of the Mill of Ed. 3. Anno Regni sui 1. granted the Prisage of Wine to the City of London. 3 Bulstr. 1. and Mo. 832. Sir Thomas Walter *versus* Hanger. (Note, By these Books the Grant was quod de vinis Civium nulla prisa fiat, sed perpetuo sint inde quieti.) and allow'd to be a good Grant.

Ri. 2. Anno Regni sui 13. granted to the Duke of York 1000 l. per Annum,

7 H. 6. The King granted to John Merbury Esq; a Rent of forty Marks out of the Profits of the County of Glocester during his Life. Cotton's Records 588. 17.

H. 8. granted to Sir Thomas Wroth an Annuity of 20 l. per Annum. Plowd. 452. Wroth's Case. Dyer 92. 2 Cro. 78. York *versus* Twine. 4 Inst. 283. A Grant of the Isle of Man unacum patronatu Episcopatus to Sir John Stanley and his Heirs. All Tenures of the King arose by Grant originally. The King may grant that, which is not in esse. 2 Roll. 198. 6 H. 7. 5. 19 H. 6. 32.

There have been five Objections made on the other Side.

1. This is a Charge upon an Inheritance created by Act of Parliament.

2. The King takes this Revenue as a Purchasor, and in Lieu of that, which was not grantable over.

3. That there is a Clause in the Grant, which by Implication restrains the King from granting it over.

4. That a Rent cannot issue out of an incorporeal Inheritance.

5. The King is deceived in his Grant.

As to the First, The Customs both Magna and Parva were granted by Parliament. 2 Inst. 58. Vaugh. 161, 162. Inter Memoranda Scaccarii. 20 Ed. 1. the Grant to the Duke of York &c. was out of the Customs. Great Part of the Abbey-Lands came to the Crown by several Statutes; and tho' there be a Clause in Stat. 27 H. 8. that the King might do his Pleasure with the lesser Monasteries, yet that Clause is void, for the Law implies as much, and therefore the King hath as much Power by the other Statute 31. without such Clause. The Case in Plowd. 235. is upon another Reason, where Land descends upon the King in Tail in his natural Capacity.

Quære.

The Profits of the Court of Wards might be granted or charged or discharged, which is all one. 19 H. 6. 62. 2 Roll. 198. but if Wardships are not grantable, non sequitur that this which comes in Lieu of it should not be so. Purveyance is a personal Privilege.

If Tenant by Homage-Ancestrel exchange his Lands, they are not now held by Homage-Ancestrel, for the Tenure is an incident inseparable, and not transferable. Inst. 99. a.

3. The Clause in the Act doth not import any Power to grant for three Years, but an Authority to the Treasurer to treat, contract and agree. There is a stronger Implication to restrain the King from granting the Abbeys, which came by the Stat. 31 H. 8. (because there is no such Clause as in 27 H. 8.) than there can be in this Case.

4. The King hath equal Power upon an incorporeal Inheritance as upon Land Sir H. Constable's Case. Case de Swans. Davies 57. what he may grant he may charge. 9 H. 6. 12. Bro. Patents 7. Quinzims 5. but this is not properly a Rent, but an yearly Sum in Nature of a Rent. Fitz. Nat. Br. 152. K. Dy. 92.

5. If the Grant be capable of a double Construction, 'tis for the Honour of the King that it should be made good. 10 Co. 76. b. 11 Co. 11. Here it cannot be an Annuity to charge the Person as it would be in the Case of a common Person. Hob. 148. but it must be a yearly Sum to charge the Revenue.

The most material Objection is the not Averment of the Delivery up of the Talleys, but that is not the Consideration, but the Money received by the stated Account. 10 Co. 67. Plowd. 455. Bro. Patent 4.

2. Here the Remedy is proper, for which Nevil and Wroth's Case in the Commentaries, and Plowdens Nota thereupon are very strong Authorities, the Letters Patents are equal to a Liberate: If the Officer had paid it upon View of the Letters Patents, it had been allow'd him on his Account. Fitz. Nat. Br. 52. K. 9 H. 6. 13. And when the Officer refuseth, the Barons may well compel him to pay the King's Revenue according to his Command by the Letters Patents. The Authority of the great Seal need not be inforced by the Privy Seal. So they concluded against the King, and so did all the other Justices in their several Arguguments, as I was informed, except Treby Ch. J. of the Common Pleas; and afterward Sir J. Somers, Lord Keeper, argued for the King, and gave Judgment accordingly: Quære upon which Point, &c.

## *Rex & Regina versus* Carol' Knowles.

2 Salk. 509, 510, &c.

Peerage allow'd in B.R. tho' contrary to an Order of the House of Lords.

THE Defendant was indicted at the Old Baily for the Murther of one Lawson, and this Indictment being removed into this Court by Habeas Corpus; he pleaded a Misnosmer, viz. that he is the same Person mentioned and intended in the Indictment, but ought not to be try'd thereupon, for that King Charles the First, Anno Regni sui 2. by his Letters Patents created William Viscount Wallingford to be Earl of Banbury, to him and his Heirs Males, and from him the Honour descended to Edward his Son, and from him to Nicholas his Brother, and from him to the said Charles his Son, and prays Judgment.

The Attorney-General replies, that the Defendant by the Name of Charles, Earl of Banbury, did Petition the House of Lords to be try'd by his Peers, whereupon Consideratum & ordinatum fuit secundum legem & consuetudin' Parliamenti, that he had no right to the said Earldom, and his Petition was dismissed. Charles Knowles demurs.

This Case was argued by the Attorney and Solicitor-General for the King, and by Levinz and Pemberton for the Prisoner. It was urged for the King, that the Defendant is concluded by the Judgment of the House of Lords, for they have an original Ju-

 risdiction

risdiction to try the Right of Peerage, and their Judgment is conclusive, they are Judges of their own Methods, that there is such a Judgment, and that in course of Parliament is confessed by the Demurrer; such Petitions have been sometimes to the King, and sometimes (always in Case of Trials) to the House of Lords, as in Lord Pembrook's Case, 1677. Lord Stamford's Case, 1685. the Lord Mohun's lately was so; in the Lord Preston's Case the Lords adjudged the Letters Patents to be void. Here the Defendant gave the Lords a Jurisdiction, if none before.

Exception was likewise taken to the Pleading, for he says hoc paratus est verificare, without saying per Record', whereas this must be tried by Record, for if the Creation were by Patent it must be certify'd under the Great Seal. Fitz. Nat. Br. 165. E. 247. 4 Inst. 126.

2. That it is not pleaded, that he is unus parium hujus Regni Angliæ, nor averr'd that Banbury is in England.

But it was answered by Levinz and Pemberton, and afterwards adjudged by the whole Court (the Justices giving their Opinions seriatim) that the Plea was good, and that the Indictment should abate. Holt Ch. J. argued to the Effect following: Here are two Questions in the Case, 1. Whether the Plea in Abatement be good. 2. Whether it be well answered and avoided.

1. The Plea is good, for here are Letters Patents set forth, and a plain Descent derived; and as to the Exceptions, it appeareth sufficiently that he is an English Earl, being created by Letters Patents under the Great Seal.

An Earldom antiently consisted of three Things. 1. Dignity. 2. Office. 3. Revenue or Possessions. Before the Time of Edward the Third, there were but two Titles of Honour, Earl and Baron, Barons were most antiently by Tenure, then afterwards by Writ, and after 11 R. 2. by Letters Patents. Maud the Empress created Milo of Glocester Earl of Hereford H. 2. created Aubrey de Vere Earl of Oxon. Seld. 356. 2. As to the Office of an Earl. Britton, lib. 1. cap. 8. Comites non a Comitatu sed a Comitando Regem. 9 Co. 48, 49. in the Earl of Salop's Case. 7 Co. 33. Nevil's Case, it may be entailed, and therefore as an Office forfeitable for Treason before the Statute of H. 8. . 3. Large Possessions were antiently given to an Earl, afterwards but 20 l. per Annum, called Pension-Money, yet the Heir should pay 100 l. Relief, for he died seised de integro Comitatu. 6 E. 3. Earl of Suffolk's Case, but now 'tis given only ut honorificentius dignitatem sustentet, therefore not such Relief, and now that Part is quite lost.

The Earldom is not confined to the Place, but what is under the Great Seal must relate to England; if the King before the

Conquest of Ireland, had made one Earl of a Place in Ireland, sure he was an English Peer, and then the Conquest of Ireland could not alter the Law and divest him of his Peerage: Foreign Intendments are not to be regarded (especially in Bars, as Eyres J. said, where Certainty to a common Intent in general sufficeth. Inst. 303)

The King cannot make an Earl of Ireland by the Great Seal of England, without special Words, for it is a special Prerogative in him, and the Great Seal reacheth thither because of the Subordination: An Act of Parliament in England generally doth not extend to Ireland without special Words, and so of Letters Patents. Seld. fol. 696. At the Time of Magna Charta there was an English Earl of Albemarle, which is in Normandy). 39 E. 3. 35. the Earl of Angus sate in our Parliament. 6 E. 4. cap. 13. (in the Tower) Earl Rivers, I do not know that there is any such Place; if the Place be not material, and no express Words quoad Ireland, then he is a Peer of England, and 'tis said here that he is so, which is sufficient without any other Averment.

As to 6 Co. 53. Where a Peer was called by Writ, it was not thought at that Time to be Part of his Name, but where created by Letters Patents, it was, 36 H. 6. 13. Peers eldest Sons are called Lords there; the Dignity is now become his Name. Here, in Case of Misnosmer he doth not claim Privilege of his Peerage, but in Abatement of the Indictment, because Part of his Name.

As to the Objection, that there ought to be a Writ to certify, &c. the Case in 35 H. 6. is good Law: A Man cannot prescribe that he and his Ancestors were Barons of Parliament, but must support it by Record, according to the Reason of the Cases. 9 Co. 31. Where a Man is a Baron and cannot shew the Commencement of his Honour (as many of the Barons and one Earl) he must set forth that some one of his Ancestors or himself sate in Parliament, and must have a Writ to certify, so where he claims Deodand Felons Goods, &c. And Lord Coke saith, that he must produce a Writ that he or his Ancestors were called to Parliament, the Writ is only as a Writ of Privilege, if a Matter of Fact be mix'd with the Record, the Fact must be traversed, as if a Servant of an Officer in Chancery be impleaded in this Court, and plead that his Master is Cursitor, &c. and produce the Writ, you cannot deny the Master's Privilege, but you may deny that he is his Servant, for that is a Matter of Fact, and the Court that sends it knows no more of Matter of Fact, than that to which 'tis sent; if no Writ be brought, he may plead Nul tiel Record (tho' 'tis not so expeditious a Way) which he cannot do if there be a Writ, but no Patent is pleaded in any of the Cases cited, for that is a sufficient Record of itself.

There can be no such Issue here as Earl or not Earl, one cannot deny the Creation where Letters Patents appear under the Great Seal, nor can one plead Non concessit, as in Case of Lands.

2. The Earl of Banbury is not estopped by the Order of the House of Lords.

1. This is not a Judgment per Curiam Parliamenti.
2. If it were 'tis an original Case, whereof they have no Conusance.
3. Of the Right to the Earldom no Plea was depending.
4. No Judgment was given to debar him.

If I prove any one of these it is sufficient.

Power of the House of Lords.

The Parliament hath a judicial Power (besides their Legislative) executed and administred by the Lords, yet 'tis legally and virtually the Judgment of the King, if not of the Commons also; sometimes the Judgment is entred coram Rege & ejus Concilio ad Parl', Ryley 4. 1. 145. 1. 3. 66. and 266. sometimes coram ipso Domino Rege in Parl', The Writs of Error say, coram nobis ad presens Parl', that we may proceed by the Advice of the Lords Spiritual and Temporal; and the Judgment is entred per Curiam Parliamenti, but here the King seems to be excluded. Journals are no Records of Parliament. Hob. 110. for when made up, the Record must be per Dominum Regem or Curiam Parliamenti, if the King's Authority be neither expressed nor implied, 'tis excluded. Fleta, cap. 17. Nemo potest judicare in temporalibus nisi solus Rex vel sub eo clamans, their Style shews in what Capacity they act, when we give Judgment, 'tis not per Just', that would be void, but per Cur' Domini Regis, and so of the Lords.

Their Journals no Records.

Parliament, the dernier Resort, and not the Primier.

2. 'Tis an original Case whereof the Parliament could not have Canusance, for they are the dernier Resort; and this original Case is mix'd with Matters of Fact, which are below their Enquiry, as it appears by the common Case of a Writ of Error if there be Error in Fact in C. B. that is triable here upon an Issue after the Writ of Error; but if there be Error in Fact in this Court, the Writ of Error lieth coram nobis for Necessity, and not in Parliament, for the Reason aforesaid. Again, if the Parliament should have Conusance originally, the Party would be concluded at first Hearing against the Reason of the Common Law, and could neither have Appeal, nor Review, nor Attaint.

No going into Parliament per Saltum.

Within these four Years last past, there was a notable Case between the Earl of Maxfield and Starkey, in an Action of Scandalum Magnatum, there was Judgment in the Exchequer against the Earl, whereupon he brought a Writ of Error in Parliament;

ment; at last it was started, that there had been no Writ of Error in the Exchequer-Chamber; and the Question was, whether the Exchequer-Chamber, being a new Jurisdiction, should interpose? and it was resolved, that the Case came too soon for the Parliament, and the Writ of Error was quash'd.

The Earldom of Banbury is under the Great Seal, and directed as to the Discent by the Rules of the Common Law, and if obstructed, the Remedy is at Law.

The Remedy for a Peer is by Petition to the King, which is a Petition of Right, and the King ought to endorse soit droit fait, and send it into Chancery, there a Commission issues, when that is found and returned, the Attorney-General must traverse or confess it, if traversed, it must be sent hither to be try'd. Stamf. Prær. 72, 73. General Rule. 22 Ed. 3. 5. Jervis Clifford. 5 Ed. 4. 117.

Lord Delaware petition'd the Queen, she referr'd it to the Lords, they reported, but not determin'd; the ordinary Way is to the Chancery, but it was the Queen's Pleasure to send it to the Lords, never originally begun in Parliament.

Lord Willoughby's is a like Case, the eldest Precedent on the other Side is but in 1628. if it were in Point it doth not make up Lex & consuetudo Parliamenti.

Except Matters of their Precedency.

But the Lord Montjoy's Case is nothing to this Purpose, that Matter of Precedency and necessary to be determin'd before he could sit; the Lords resolved the Clause of Precedency in the Patent to be void; the Inheritance of the Dignity was not at all in Question.

Lord Preston's Case was the same as if he had produced a Patent under Seal of the French King, also they did not resolve that as a Court of Judicature.

The Lord Stamford's Petition was only a Request to the Lords to interpose on his Behalf that he might be try'd.

That, which is below a Jurisdiction, is as much out of it as that which is above it.

What is below a Jurisdiction is out of it, as what is above it.

We cannot hold Plea originally in a real Action, nor of a Writ of false Judgment before the Common Pleas.

3. There was no Plea depending of the Earldom of Banbury, for the Petition supposeth him in Possession, he did not put his Earldom in Question, 'tis strange they should have Power to give Judgment against a Man, and not for him, that one should lose, and not that he should recover. In Trespass in a House, if the Plaintiff hath no Title to the House, we cannot give Judgment to dispossess him of the House.

No Power to give Judgment against a Man, except also for him.

4. Here 'tis said Ordinatum & Consideratum, that he hath no Title, but no Judgment that he be excluded from having or enjoying. In the Case of a Quo Warranto, Judgment that the Party had no such Privilege signifies nothing without the Words

Words Quod amoveatur, 'tis but Opinion. 2 Cro. 284. Levet and Hall.

Lex & Consuetudo Parliamenti is Lex Terræ.

'Tis not a proper Judgment in a Court of Law, that the Petitioner be dismissed, indeed 'tis urged to be secundum legem & consuetudinem Parliamenti, but I know no Meaning of it, unless it be to fright the Court, for Lex & consuetudo Parliamenti est Lex Terræ.

Conuzance of the Principal is also of the Incident.

In Case even concerning Privilege, where the King's Court hath Conusance of the principal Matter, they shall have Conusance of an incident. Dyer, fol. 60. Trewyniard's Case.

In Case of a Writ of Error in Parliament, where a Term intervenes between the Prorogation and the Meeting, 'tis no Supersedeas. A Commitment by Parliament determines by Prorogation, and in these Cases we give Judgment accordingly; shew me where any Title of Inheritance is try'd per legem & consuetudinem Parliamenti. A Custom must be supported by many Precedents, here is none, if this be Lex Terræ, it must be by Act of Parliament or Custom, but neither appears: Must we comply or submit to it, if without Jurisdiction, because it is the greatest Court? no; therefore void. Arcanum imperii is good in Politicks, not in Law, Ubi jus vagum & incognitum ibi misera est Servitus. Peers are in a hard Case, if their Inheritances are to be try'd per arcana Imperii. 38 E. 3. 14. The Judges would not obey the Command of the Parliament, where out of their Jurisdiction. 13 E. 3. Tit. Voucher 119. 15 E. 3. fol. 1 & 2. reported in libro in Oxon.

He concluded that the Indictment be abated.

Four Sureties Bail for Felony.

Shower moved that my Lord Banbury's Recognizance be discharged, but the Court answered there was another Indictment against him by his right Name, so that he must find Sureties, or be committed; in Case of Felony by the Course of the Court, there must be four Sureties, tho' in Misdemeanor two may serve.

He was bailed.

## Acman's *Case*.

A Soldier committed by the General, bail'd.

He (being a Soldier) was committed to the Guard for giving the General sawcy Language, and now the Court bailed him upon a Habeas Corpus, and they inclined to have discharged him, if it had been moved.

*Rex & Regina versus The Master, Fellows, and Scholars of St.* John's *College in* Cambridge, *upon a* Mandamus.

Mandamus to remove Fellows of a College for not taking the Oaths, &c.

Peremptory Mandamus deny'd, because not Parties.

THE Writ sets forth the Act of Parliament for abrogating the Oaths of Allegiance and Supremacy, and appointing other Oaths, that such Fellows of Colleges, who should refuse or neglect to take the new Oaths before the first Day of August, 1689. should be suspended for six Months, and afterwards upon Refusal, &c. for other six Months their Place to be void: That twenty Fellows of this College refused, &c. whereby their Places became void, yet the Master and Fellows permitted them to remain in the College, and to enjoy the Profits of their Fellowships (sicut informamur) and commands to discharge expel and amove them from their Places and Fellowships.

Return Mag. Charta.

They Return the Statute of Magna Charta, 25 E. 3. that none should be put out of their Freehold, Nisi per legale judicium parium suorum vel per legem terræ, that these twenty Persons before the said first of August were elected and admitted, and took the Oaths, &c. and were never forejudged of their Fellowships, &c. & non constat nobis that they had not taken the new Oaths, &c. & non habemus legal. jurisdictionem ad audiend. & terminand. offens. præd. That the College was founded by Margaret, Countess of Richmond and Derby, who appointed the Bishop of Ely to be Visitor thereof, who hath Power by their Statutes to punish atrocia & enormia Crimina, and that if any Fellow were convicted before the Master and the greater Part of the eight senior Fellows of certain Crimes, as Adultery, &c. then to be expelled, and that none of these Fellows were so convicted, & ea de causa amovere non possumus.

In Michaelmas-Term, 1693. Pemberton moved to quash the Writ before the Return, because it was peremptory in its Nature, wanting the Words vel causam nobis significes, and the Writ was read, but the Court said they would take no Conusance of it before the Return.

No Seal, &c. to the Ret^n.

Afterwards, when the Writ was returned, it was objected by Trevor Attorney, that there was no Name, Subscription, or common Seal, and therefore no Body can be prosecuted for it, if false.

Sir William Williams. In the Case of the Quo Warranto against Chester, we set a Seal to the Return, but the Court upon Inquiry upon Motion would not allow it.

Holt Ch. J. The Seal is not necessary to a Record (Return) in Bag's Case the Mayor did subscribe, 'tis directed to Dr. Gower by

by Name: The Sheriff before the Statute of Carlisle did not set his Name, we'll not hear any one say it is not Dr. Gower's. Afterwards he said, this Cause being in the Paper, they would hear but one Council of a Side the same Day.

But one Council of a Side the same Day.

This Case was argued on several Days by Trevor Attorney, Serjeant Thompson and Sir William Williams for the King, that this was a good and proper Writ, and the Return insufficient.

1. There is a sufficient Obligation upon the Fellows to take, and the Master to tender the Oaths, which per Stat. 7 Jac. ought to be taken in the open Hall.

2. If the Oaths are not taken accordingly, their Places are void.

3. Without Notice, at their Peril.

4. Master and Fellows cannot be ignorant, for the Oaths are to be taken before them: Whence it follows,

1. That if the Fellows do not take their Oaths, 'tis an Offence in the Master to permit them to continue there, &c. for 'tis an Affront to the Government; a Contempt of the Law, &c.

2. The Writ of Mandamus is a proper Remedy to remove them, for this Court hath an original Jurisdiction and Authority to enforce the Execution of the Laws, and for the Preservation of the Government, and hath an extrajudicial Authority in all Cases of Misgovernment. In the Case of a common Nusance (private say some) this Court may command it to be removed, and there cannot be a greater Nusance to the Government than here.

'Tis settled that a Mandamus will lie to a College, unless it appears that the Matter properly falls under the Jurisdiction of the Visitor. In the Cases of Restitution one cannot be restored without putting out another, intus existens prohibet alienum, and he that is so put out hath no Wrong, for he is not concluded.

Mandamus, when peremptory.

As to the Form of the Writ, tho' it wants the Words vel causam nobis significes, yet it is not a peremptory Mandamus, 'tis said sicut informamur, and requires a Return, Precedents are many of this kind (whereof he gave a Note in Writing to the Court.)

As to the Stat. 25 E. 3. a subsequent Statute-Law is another Magna Charta, and if they have not taken the Oaths, the Law hath forejudg'd them; and it not being returned that they have taken them, it must be intended they have not.

The Atrocia & enormia Crimina there specify'd do properly fall within the Jurisdiction of the Visitor, and he is limited by the Statutes of the College, and hath no Power in this Case of a new Statute, they are to take Notice of Acts of Parliament, as the Visitor is of local Statutes.

To which it was answered by Sir Tho. Powis, Sir Barth. Shower and Mr. Northy, in their several Arguments for the College. 1. That the Writ was illegal. 2. That the Matter returned, or some Part thereof, was a sufficient Excuse.

1. That Case which hath no Brother may be suspected to be illegitimate, Writs of Mandamus are remedial in Aid of the Weak against the Strong, where no Assise lieth, as in Case of Aldermen, Attorneys, &c. Sid. 94. Hurst's Case 107. Townsend's Case 443. Sabine's Case. As to Riley, fol. 601. it is not akin, per Regem & Concilium shews it was a parliamentary Writ, 'tis si per Inquisitionem constaret, no Return in Riley of any of those old Writs. Here the Writ is vindictive and malignant.

The Law is tender of Freeholds, Nullus liber homo, &c. is in Favour of bad Titles, if a Tenant's Lease expire, no Mandamus lieth, there must be Ejectment; the Fellows cannot plead here, nor have the Persons, to whom the Writ is directed, any Opportunity to inquire, &c. but the Writ is positive, that they have not taken the Oaths.

Fitz. Nat. Br. 234. The Writ de Leproso amovendo is quia accepimus, &c. diligenter videri & examinari faciatis, this should have been a Mandamus to put the Act in Execution like the Writ de procedendo ad judicium, here 'tis like a Mandamus to give Judgment for the Plaintiff, this new Act doth not enjoin Patrons to present nor to amove, a Mandamus will not lie to a Patron: An Officer upon a corrupt Contract against the Statute E. 6. cannot be removed by Mandamus; so of Simony. Statutes there have the same Effect. Thus Aldermen of Corporations might be removed at Pleasure, without Opportunity to plead, which would be worse than a Quo Warranto. Co. 2 Inst. 51. recites the Mischiefs, that ensued upon a short-lived Act of Parliament crossing Magna Charta.

Non constat, for they cannot be obliged to take Notice what is done out of the College, there are no negative Words in Stat. 7 Jac. The Justices may tender to any of eighteen Years, if upon a Penal Law a Fellow takes the Oaths elsewhere, 'tis a good fulfilling of the Law; 'Tis not yet resolved that Fellows are not within Stat. 25 Car. 2. as having a governing Part as Aldermen of a Corporation, otherwise most Fellows in the Universities have lost their Fellowships. If it were done in the open Hall, yet the Fellows might not know it, for the Statute requires it to be done openly before the Master (who may be dead) and no Direction for any Entry or Memorandum, that's at the Peril of the Fellows. Every eleemosinary Foundation (whether Spiritual or Lay) is visitable of Commune droit. Litt. sect. 136. Exeter-College's Case. Ante . The Visitor hath Power to remove a Person disabled by publick Law, stronger than in Case of a private Law; there hath been great Labouring here for a Man-

damus to restore a Fellow, much harder to turn one out: If it would lie, it should first appear that the Visitor hath fail'd of his Duty.

If upon this special Return the Court should grant a peremptory Mandamus, the Fellows (who are no Parties) might be wrong'd, but could have no Remedy, not by Mandamus, for that would be deny'd them, nor by Appeal to the Visitor after the Act of this Court, nor by Assize, for that lieth not, nor by Action of the Case against Dr. Gower, who having returned the Special Matter, would be justify'd by the Command of this Court.

Mandamus to remove a Nusance.

The Court seem'd to be in some Doubt. Holt Ch. J. said, A Writ lieth to remove a Nusance, as a Bowling-green; but Northy in his Argument said, such Writ must be grounded on some Record, as in Jacob Hall's Case. Mod. 76. it was presented by the Grand Jury, or the Justices might Record it upon their View.

Holt Ch. J. This is not to deprive a Man of his Freehold, for 'tis first void by the Statute, if the Master before whom, &c. were dead, that should have been so returned.

The Court seem'd to doubt, whether the Fellows might not take the Oaths at the Quarter-Sessions, and then it might not Constare. And upon the whole Matter, but especially because the Fellows were no Parties to this Proceeding, the Court refused to grant a peremptory Mandamus.

Poor's Settlement.

Ruled, that the Rating a poor Occupier of a House for his Landlord to the King's Taxes is a Rating him within the new explanatory Act to make a Settlement.

## Millard *and* Cole.

Prescription to hold Pleas, good, but not to have Conusance.

UPon a Writ of Error it was returned Cur' Episcopi Winton secundum Consuetudin'. Holt Ch. J. said, one may prescribe to hold Pleas, but not to have Conusance of Pleas, for that excludes other Jurisdictions; but the Writ of Error was quash'd for another Cause.

## Berisford *and* Cole. *(In Error come semble.)*

Bar, concludes in Abatement.

Scire Facias against Tertenants.

IN a Scire Facias against Tertenants one of them begins his Plea in Bar Quod Executionem habere non debet, and concludes in Abatement. Holt Ch. J. said, actio non affirms the Writ, so that he cannot plead in Abatement afterwards. 36 H. 6. 18. Judgment was quod Respond. Ouster. Where one undertakes to name Tertenants in the Scire Facias, he should name them all, otherwise, where the Scire Facias is general to the Tertenants.

2 Cro. 507. Michel and Croft. 3 Cro. 740. Holland and Dantzey.

Sir Barth. Shower. 'Tis pleaded thus in 2 Saund. 8. Jefferson and Moreton.

Cur'. Many Entries may be so, but 'tis wrong.

Eyres J. There cannot be a final Judgment in this Case, therefore the Judgment seems well enough; but Holt said, that he ought not to answer till the other Tertenants warned, and therefore the Judgment ill; but the Party may have an Audita Querela, not to avoid the Extent, but for Contribution. All to be summoned.

Eyres J. The Books say he cannot after a Scire Feci.

Holt Ch. J. Yes, it is the very Case in Mo. 535. Verey *versus* Carew and Gibson.

## Austin *versus* Burscoe.

ERror of a Judgment in C. B. in Debt, for the treble Value of Tithes upon the Stat. 2 E. 6. 13. It was moved for Error, that the single Value laid in the Declaration is 35 l. and the treble Value laid to be 73 l. (whereas it really is 105 l.) and the Jurors find 40 l. Part of the 73 l. And Trinder urged, that where a Man should demand an intire Duty, and demands but Part, the Party may be doubly ver'd. Stat. 2 E. 6. c. 13. not setting out Tithes, &c.

Cur'. No Matter for the single Value, the Action is for the treble Value, where the Sum is certain, as 20 l. upon Bond, or for a Quarter's Rent, if one demands but 10 l. and doth not shew how the rest is paid, it is naught, but here the Value is uncertain, and to be ascertain'd by the Jury (who are not bound by the Sum laid in the Declaration, &c.

But the most material Exception was, that it was not averr'd in the Declaration, that the Defendant had not agreed with the Parson, for the not agreeing being in the same Clause, which gives the Action for treble Value, the bare not setting them out no sufficient Cause of Action. 2 Cro. 70. Dag and Kent *versus* Penkevon 361. Moyle and Ewer.

Hall contra. The Case in 2 Cro. 70. shews only, that it might come in on the other Side, so makes nothing for them, and 2 Cro. 361. is not to the Purpose (Trinder said he cited it only for a Precedent of the Declaration) but that it ought to come in on the other Side, he cited 1 Leon. 17, 18. Sir John Smith and Peare's Case 72. Smith and Kirfoot 130, 131. Chamberlain and Thorp. Hob. 78, 124. Mod. 63. Jordan and Martin. March 195. Taylor's Case. 2 Leon. 5 Eliz. Dormer's Case. Plowd. 376. in Stowel and Zouch's Case.

Holt Ch. J. I Doubt the Cases cited are not alike. In Case of a Fine and Non-claim one needs not aver that the Par-

ty non-claiming was of full Age, &c. for that is not the enacting Clause, but in the Proviso of the Statute; but here 'tis in the same enacting Clause, which makes the Difference. As to the Case of Smith and Kirfoot, it is the common Way of declaring upon an Award, and must come in upon Evidence, whether the Award be good; an Award is not as a Specialty. As to Saint John and Saint John's Case, the Statute is but directory, and if a Stranger takes upon him to be the proper Officer, an Action lieth. In the Case of Recusancy it must come on the other Side, for it is not intendible that one hath a lawful Excuse, unless he shews it. As to 2 Cro. 70. An Agreement with one is an Agreement with both. I think this would have been ill upon Demurrer.

Eyres J. Thought it was sufficient to declare in a summary Way, the Action being founded upon the Tort, and the Excuse put into the Defendant's Mouth. But admitting it to be ill upon Demurrer, then it was debated, whether it was aided by the Verdict. Note, It is said in Dr. Hussey's Case, 2 Cro. 414. that this is not such a Penal Law, but that the Statute of Jeofailes extends to it.

Holt Ch. J. If the Plaintiff could not recover without giving it in Evidence, it is help'd at the Common Law by the Verdict; here it is on the Defendant's Part; and tho' it was objected, that the Defendant might make Default at the Trial, and then the Plaintiff might recover on a faulty Declaration without such Evidence; if so, it must be the Defendant's own Fault, but however, the Plaintiff must duly intitle himself and prove his Cause of Action. In the Case of Bickerstaff and Purdney (which is reported after a Manner in Sid. 218.) Debt was brought by an Executor for Rent incurred after the Death of the Testator, upon non Detinet pleaded, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, that by common Intendment the Testator was Tenant in Fee, and a particular Estate shall not be presumed, yet it was held to be help'd by the Verdict, for it must have appeared at the Trial, so Want of Attornment is help'd by Verdict. Et Adjourn'.

And now Hall cited Mod. 14. Lee *versus* Edwards 42. Nosworthy *versus* Wildman. 1 Saund. 226. Stennel *versus* Hogg. Sid. 342. Coomber *versus* Watton 380. Fruen *versus* Porter, and applied them, that the Right being here tried, it cannot be intended after Verdict that there was any Agreement or Satisfaction.

Holt Ch. J. The not agreeing, &c. is a most material Part of the Declaration, but it is certain the Plaintiff could not have had a Verdict, if there had been any Agreement. He cited Buxton and Bateman's Case. Sid. 203. in Point.

Judgment affirmed nisi.

## Hawkſworth *and* Hawkſworth.

IT was moved for Error of a Judgment in Briſtol, that in one of the Continuances (idem dies datus eſt partibus præd.) 'tis not ſaid per Cur', but ruled to be well enough, being all as one Act, but it would be otherwiſe in the Verdict.

Continuances in inferior Court

## Davenport *and* Iſrael.

HOlt Ch. J. A Writ of Error depending upon the principal Judgment here is no Plea for the Bail.

Poſt. Bail can't plead a Writ of Error pending.

When a Poſtea is miſlaid, we often Order a new One to be made by the Notes in the Clerk of Aſſiſes-Book; here the Tranſcript of a Record upon a Writ of Error in the Exchequer-Chamber is miſlaid: You may either have a new Writ of Error of the antient Date, and have a new Tranſcript, or you may have a Scire Facias upon the Judgment here; indeed you'l looſe your Coſts, but that cannot be help'd.

Poſtea or Tranſcript on Writ of Error miſlaid.

The Officer of an inferior Court, tho' he receives his Fee for the Allowance of a Writ of Error, yet he is not bound to return it till the Plaintiff in Error calls for it, and if afterwards a Writ de executione Judicii be delivered before an alias, the Officer may grant Execution upon the Judgment.

Return of a Writ of Error by Officer of inferior Court.

A Mandamus was granted to a Steward of a Court-Leet to ſwear a Conſtable; he returned, that there was no Court held where he could ſwear him: It appears by Affidavits, that the Steward had omitted to hold a Court for that Purpoſe.

Mandamus to ſwear a Conſtable Ret', &c.

Holt Ch. J. He ſhould have ſaid how he is Steward, for, if he be not Steward by Patent, he could not hold a Court without the Lord's Direction, and then not in Contempt, make Oath, if you can, how he is Steward.

## Ann Frenely's *Caſe*.

SHE was removed by two Juſtices from Orpington to Chevening, thence by two Juſtices to Bromley, and ſhe voluntarily return'd to Orpington, and there bears a Baſtard-Child. Note, It was not ſaid in the firſt Order that the two were Juſtices.

Poor's Settlement.

Baſtardy.

Holt Ch. J. It ſhould be ſaid that they were Juſtices, and (Quorum unus) tho' the Quorum is often omitted, for it is a

ſpecial

special Authority out of Sessions; 'tis said she came to settle contrary to Law, but they should state the Fact, not the Law, for ex facto jus oritur, if there be any Fraud in conveying a Woman to bear a Child in any Parish, yet the Child may be sent with its Mother to the Place of last Settlement.

The Case was referr'd to the Judge of Assize.

Idem.

## Wale's *Case*.

IF a poor Person be removed from one Place, where not legally settled, to another, where not legally settled, the Sessions upon Appeal may quash the Order, but cannot remove her to a third Place. Per Holt.

Post.

Ejectment of one Messuage on a Tenant of Three.

An Ejectment was brought for one Messuage, and Notice served upon one, who was Tenant of three Messuages in the same Place by several Titles. It was ruled upon Motion, that the Plaintiff give Notice, which Messuage he will go upon at the Trial.

Declaration served on Sunday. Ante .

Service of a Declaration in Ejectment upon a Sunday was held good per Curiam, and not within Stat. Car. 2.

Outlawry ordered to be reversed by Clerk of the Peace.

Several Persons were indicted at the Sessions at York, one submits and pays the Fees to the Clerk of the Peace, and the Fine; the others remove the Indictment by Certiorari, which is returned, and no Notice taken of the Submission of one of them, whereupon all are outlawed: It is ordered that the Clerk of the Peace shew Cause upon Notice, why he should not reverse the Outlawry at his own Charge.

Indictment on 5 Eliz. of Trades, duodecem for duodecim, ill.

An Indictment sur Stat. 5 Eliz. for exercising a Trade, &c. per spatium duodecem Mens. was quash'd, because it was not duodecim, (sed quære per moy.)

Eyres J. said, they never hold quarterly Sessions in Corporations, but as they have Occasion.

## Haines's *Case*.

Poor's Settlements.

AN Order was made at the Sessions, that an Order of two Justices touching the Settlement of A. be discharged, and that A. be settled at B.

Cur'. They could only discharge the Order of two Justices, therefore let that Part be confirmed, but they could not appoint a new Place of Settlement, therefore let that Part be quashed,

Ante .
Post .

For the Court may confirm in Part and quash in Part, as is frequently done in Orders touching Bastard-Children. Ante . Order confirm'd in Part.

## *Rex & Regina versus* Home.

THE Court will not quash any Indictment for a Nusance, unless it appear upon the Indictment that it is really no Nusance, or not presentable, as here it was quash'd, because but a private Nusance. Indictment of Nusance.

## Ellenor Conred's *Case.*

SHE and her two Children landed at Harwich from Holland, and removing to another Place were sent back to Harwich by Order of two Justices. Poor's Settlement.

Darnel Serj. Landing makes no Settlement. Sir Barth. Shower, 'Tis within the Equity of the Act.

Eyres J. (absente Holt) You must keep them where you have them for ought I know, it seems to be casus omissus.

The Order was quash'd.

## Moulsworth's *Case.*

BILL upon the File, and the Defendant was arrested by the Name of Robert Moulsworth, and the Declaration delivered by the Name of Richard, and there was Judgment by Nihil dicit: Now the Court gave Leave to amend the Declaration by the Bill on the File. Misnomer amended.

Mr. Longuevill (at my Request) moved for a Mandamus directed to the Mayor of the City of Chester, to restore Richard Dyason to the Office of one of the four Serjeants at Mace in the said City, and it was granted. Mandamus for a Serjeant at Mace.

Eyres J. By the Course of the Court, the Plaintiff after Judgment against the Principal may sue out two Scire Facias's (both together) against the Bail, with Teste backward, so that there be fifteen Days between the Teste and Return of each Writ. Two Scire Facias's against Bail.

An Overseer chargeth the Parish with 3 l. for putting forth an Apprentice, and his Accounts are allow'd by two Justices, but revera the Apprentice was not put out at all: The Parish complains to the Sessions, and there they Order that the late Overseer should repay the 3 l. so fraudulently obtain'd, with Costs, &c. Overseer, by Fraud overcharges the Parish.

&c. And now Carthue moved to confirm this Order. But (per Eyres J.) it cannot be maintain'd, for the Sessions have no such Jurisdiction, but there may be another Remedy by Indictment, &c.

## *Rex versus* Wogan.

Forcible Entry and Restitution.

NOrthy moved to quash an Indictment of Forcible Entry, existen' liberum tenement', &c. and not said adtunc existen', and it was quash'd, and Re-restitution granted.

## *Rex & Regina versus* Taff.

Stat. 5 Eliz. of Trades.

HE was indicted for exercising the Trade of a Mercer, not having been an Apprentice: Exception was taken, that 'tis said that it was a Trade 13 die Februarii, 5 Eliz. whereas the Parliament began 12 Febr'. But the Court held it well enough, and it might have been omitted that it was a Trade, 5 Eliz. for that Exception is worn out.

Ejectment, Landlord and Tenant join'd as Defendants.

It was moved to join the Landlord to be Defendant in Ejectment with the Tenant in Possession; and at first the Court required an Affidavit that the Rent had been paid to him, but afterwards it was granted without an Affidavit.

Sheriff not to demand Fees; secus, of Charges.

In an Appeal of Murder, the Sheriff of York would not bring up the Defendant's Body without a Promise of 15 l.

Sir Barth. Shower. The Sheriff can't demand Fees beforehand in any Case, unless on the Habeas Corpus Act, which Holt Ch. J. seem'd to agree, but here he doth not demand it as a Fee, but as a necessary Charge, we'll refer it to Mr. Aston to examine what is reasonable for the Sheriff to have. He was not obliged to bring the Body without a Habeas Corpus by the common Practice, as in the common Case of a Cepi Corpus, the Sheriff should have the Body at the Return, but the Practice is otherwise.

Habeas Corpus.

Habere facias possessionem.

Turner moved to set aside an Habere facias possessionem, quia erronice emanavit, upon a Judgment against casual Ejector, by Reason of the Defendant's not confessing Lease, Entry, and Ouster; also there should have been four Days Time before Execution, for the Defendant might have no Notice of Trial, &c.

Holt Ch. J. The Course of the Court (per Astry and Aston) is to sign Judgment, and take out Execution in that Case as soon as the Postea is returned, which is the Warrant for the Judgment; perhaps 'tis fit to be alter'd, but the Execution must stand.

## *Rex & Regina versus* Lomas. Post.

HE was convicted by two Justices of Keeping a private Place for Strong-Waters; and Northy moved to quash the Conviction, because 'tis in English. Conviction in English.

Holt Ch. J. I see no Necessity that it should be in Latin any more than an Order for keeping a Bastard-Child (which is a Conviction and) usually in English.

## *Rex & Regina versus* Crosse.

EXception was taken to an Indictment for refusing an Apprentice: 1. Because it is not said, that the two Justices who lived in or near the Place. 2. As to the Matter in Law, that the Justices have no such Power. Indictment for refusing a poor Apprentice.

Holt Ch. J. conceived, as to the first, that the Statute was but directory; and, 2. It hath been settled that the Justices have Power to make such Order (tho' I was against it).

3. Exception. 'Tis not aver'd that the Parents were not able to maintain the Child.

Holt Ch. J. 'Tis at the Discretion of the Church-warden and Overseers (as appears by the Preamble) whom they shall think their Parents not able to maintain.

## Cox *and* Web.

IN this Case it was said by Holt Ch. J. If a Man die Intestate, having a Wife, the Ordinary may grant Administration, either to his Wife or next of Kin at his Election; but if the Wife die Intestate, the Husband must have the Administration, and none else. Duncomb and Mason in C. B. adjudg'd after Sir George Sands's Case in this Court. Administration to the Wife or next of Kin.

Sir Thomas Powis moved, that the Returns of two Mandamus's to the City of Chester may be filed, and that they may be made Conciliums, and granted. Two Mandamus's made Conciliums.

Per Holt Ch. J. No Prohibition, nor Trial at Bar, ought to be moved for the last Day of the Term, tho' sometimes granted. Motions.

When a Will is proved per Testes in the Spiritual Court, they must deliver the Will to the Executor, and a Mandamus lieth for that Purpose, if they refuse. Mandamus to deliver a Will prov'd per Testes.

A Fine was levied in Hillary-Term last, and an Ejectment brought upon that Title, and the Demise was laid before the Fine took Effect, and upon Motion it was ordered that the Demise be laid of Lady-Day last.

Note, Two or three several Demises from several Persons may be laid in one Declaration in Ejectment.

## Johnson *& al' versus* Streete *in Error, coram Just'* Cestr' *sur un Judgment in Ejectment en l' Portmote Court de Civit'* Cestr'.

ON a Case argued at Serjeant Powys's Chamber in Lincoln's-Inn.

General and special Occupancy.

It was found by the Jury, that the Dean and Chapter of Chester demised the Messuage in Question to Isaac Swift deceased, habend. to him, his Heirs and Assigns, for three Lives, and that he died seised thereof Intestate, Anno 1678. that Elizabeth his Widow is the surviving Life, and Administration of his Estate is granted to Elizabeth his Widow: That Isaac had Issue, William his eldest Son, Isaac his second Son, and Richard his third Son; that his three Sons survived him; that William, after the Death of his Father, attained the Age of twenty-one Years; that William did neither enter or claim the Messuage in the Declaration as Occupant: That he died without Issue in the Year 1686. Isaac his Brother and Heir survived him, and being of full Age died without Issue, Anno 1692. without Entry or Claim of the said Messuage as Occupant: That Richard an infant, Brother and Heir to Isaac, hath not entred or claimed, that Elizabeth the Administratrix, from the Death of the Intestate her Husband, continued in Possession, and received the Profits of the said Messuage; that an Action of Debt was brought by William Streete Alderman of Chester, Administrator to Davenport the surviving Obligee, upon a Bond of 200 l. from Isaac Swift the Intestate, and he obtained Judgment thereupon against the Administratrix, and upon a Fi. Fa. the Sheriffs of the City sold the Estate pur auter vie, by Bargain and Sale inrolled to the Lessor of the Plaintiff. And whether any Title was derived to the Vendee of the Sheriff, was the Question.

And it was adjudged in the Portmote-Court at Chester for the Plaintiff there, whereupon this Writ of Error was brought before the Chief Justice of Chester, and Council appointed to be heard at Serjeant Powys's Chamber, before Sir John Combs Ch. J. and himself, being Puisne Justice, and there,

Serjeant Birch and Mr. Cheshire appeared for the Plaintiff in Error, and the Serjeant argued, that if the Administratrix here gained any Estate, it must be as general Occupant, which could not be in this Case, because there was not vacua possessio, but it immediately vested in the Heir as special Occupant, and there needs no Entry, for Occupant is but a Term of Art in the Law, the Freehold is vested by the Descent. He cited Godb. 172. 2 Brownl. 202. 2 Roll. 151. 2 Cro. 554. 10 Co. 98. Bul. 135, 136. 3 Cro. 407. and said it was most clear upon Littleton's Text, Sect. 739. and Co. inde fol. 388. the Act of Frauds and Perjuries doth not alter the Case, only 'tis made Assets in the Hands of the special Occupant; and if there be none such, it goes to the Administrator.

Mr. Cheshire said, he agreed with the Serjeant, but could not enlarge upon it by Reason of his Indisposition.

Sir William Williams on the other Side said, the Statute was made in Favour of Creditors, and whoever will take the Estate as pernor, the Debt follows the Estate, and we could not know who else to sue.

But the Justices were clearly of Opinion, that the Judgment was erroneous, and accordingly at the Assizes following, viz. 8 Octobr', 1694. it was reversed.

Note, It seems to be admitted, that the Sheriff (since the Statute) may sell an Estate pur auter vie, upon a Fi. Fa.

# DE

# Term. Sancti Mich.

## Anno 6 Willielmi & Mariæ, Regis & Reginæ, in B. R.

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### Hooker *and* Tucker.

Words.

See 1 Lev. 276.

THese Words (He is a pitiful Fellow, and not able to pay his Debts) spoken of a Merchant, adjudged actionable without any Special Signification or Special Damage. Sid. 424, 425. Drake *versus* Hill. And per Holt Ch. J. It is not material, whether the Words import a Bankruptcy, but the true Reason is, because 'tis a Scandal to a trading Man; and there needs no Averment that he was no pitiful Fellow, and was able to pay his Debts.

### Edwards *and* Pierce.

Death of one Defendant after Verdict and before Judgment.

ERror in Fact coram vobis, that one of the Defendants died after Verdict, and before Judgment.

Holt Ch. J. If there had been but one Defendant, and he had died between the Day of Nisi prius and the Day in Bank, you might have entred Judgment; but this Case stands upon another Reason, for where two are Defendants, and one dies, the Party dead is intirely discharged. Quære.

Poor's Settlements.

A Man and his Wife and Family remove into a new Parish, the Minister, Church-wardens, and Inhabitants of the old Parish certify, that they own them and all the Children, which shall

be born of them, as their Parishioners. Nineteen Years afterwards two Justices make an Order to remove them to the old Parish with seven Children born since, reciting the Certificate, &c. this Order was confirmed at the Sessions.

And now both these Orders were quash'd, for per Curiam they have obtained a Settlement in the new Parish. See now the late Statute.

## Wilson *versus* Lawes.

IN an Appeal of Murder brought by the Brother and Heir of the deceas'd. The Defendant was attainted of this Murder at the King's Suit, and now appears by Habeas Corpus, the Sheriff of Middlesex returns the Attachment upon the Appeal, and the Defendant pray'd Oyer of the Writ and Return: and had it, and now prays Time to plead; but the Chief Justice said he ought to plead instanter, and told him the Attainder is no Plea since the Stat. H. 7. and if he took Advantage of any Thing in the Writ, he must plead over to the Felony. But it appearing, that he had but very short Notice and no Copy of the Writ, he was committed to the Marshal, to be brought by Rule on the Friday following, and then to plead. Afterwards the Defendant demurred generally to the Writ and Count, and pleaded over to the Felony. The Plaintiff divides the Plea and Demurrer, and saith quoad placitum præd. J. L. superius ad breve placitat. quod breve sufficiens, & quoad moration. ad Nar. dicit quod Nar. sufficiens. Exceptions to an Appeal of Murder.

Thompson Serjeant pro Defendente moved several Exceptions.

1. Circa horam primam post meridiem, which is too uncertain, the Time not being express'd as it ought to be by the Stat. of Gloucester, c. 3.

2. Percussit, &c. dans ei vulnus mortale in & super superiorem partem ventris juxta pectus & medium Corporis is too uncertain, and he cited Young's Case, 4 Co. or Long's Case, 5 Co. circiter pectus usq; ad ossa humeri was held too uncertain.

3. Tis not said, that the Defendant gave mortale vulnus, but only percussit, pupugit & perforavit dans ei vulnus mortale, and urged this to be no express Averment of the Fact.

4. Carthue pro Defendente added, that here is a Discontinuance, or at least a Miscontinuance, by Reason of the Plaintiff's dividing the Defendant's general Demurrer.

5. As to the Return of the Writ, the Writ commands quod attachiat, the Sheriff returns Attachiari feci, it is never returned Capi feci, but Cepi Corpus. Co. Entr. 56, 57, 59. Dy. 199.

6. Here

6. Here the Sheriff returns quod habeo Corpus parat. ubicunq; which is naught, for tho' the Writ requires to have the Body ubicunq; yet when the Return is made into Court, the Place is certain, and therefore should be only parat. habeo coram Domino Rege.

7. Here is no good Venue laid, 'tis in Parochia, whereas the Common Law and Statute of Gloucester require, that the Plaintiff should Name the Vill, unless in Cities, where the Parish is in Lieu of a Town.

But it was answered by Levinz and Shower, and resolved by the whole Court.

1. Circa horam primam is certain enough, for which the Reason is given. 2 Inst. 318. and also cited 1 Bulst. 83. Co. Entr. 59, 87.

2. A Wound in the Middle of the Body could not be better described, and 'tis nothing like Long's Case circiter pectus, where there was no Certainty beside.

3. Dans vulnus mortale is warranted by divers Precedents, and seems better than dedit.

4. A Demurrer is contain'd in the Word placitum, and as to the Writ and Return, it goes in Abatement; and as to the Count, 'tis in Bar, and must be taken distributively from the several Effects of it, and Plaintiffs could not reply jointly.

5. As to the Return Attachiar' feci, Holt at first thought it was ill, unless cured by the Defendant's Appearance. In the Case of Egerton and Morgan in this Court. It was resolved, that an ill Return was not cured by the Defendant's Appearance, and the Difference seems to be where the Defendant comes in voluntarily and demands the Plaintiff, there an ill Return is cured by Appearance; but where he is brought in to answer the Plaintiff, and so his Appearance entred, it may be otherwise, especially where he demurs for that very Cause. Roll. 780.

Holt said, if an Appeal abates for an ill Return, the Party may sue a new Appeal, and it is not like the Case of a Nonsuit; but in this Case, after some Debate, it was resolved, that the Return is well enough, and attachiari feci as well as attachiavi, for qui per alium facit, facit per se; and tho' it was objected, that the Sheriff could not command his Bailiff to do it (out of his Presence) without Writing, yet here it is said to be done prout interius mihi præcipitur. Upon a Levar. fac. the Sheriff is to levy as well as if it had been leves.

6. Ubicunq; answers the Writ in terminis, and can be but Surplusage.

7. A Parish is a Vill by Intendment of Law, unless the Defendant plead in Abatement, and shew specially that it contains more than one.

And the Demurrer was over-ruled and afterwards Laws made his Escape out of Prison.

In Scire facias upon a Recognizance against Bail the Defendants pleaded a Writ of Error brought by the Principal, &c. Cur'. 'Tis no Plea, for the Writ of Error upon the principal Judgment doth not affect the Recognizance.

Bail can't plead, Writ of Error pending. Ante .

Holt Ch. J. Yet I have known an Attachment against a Town-Clerk for proceeding in an inferior Court after a Writ of Error here; but I never took it to be right, for they are different Records.

It was moved to set aside a Supersedeas upon a Writ of Error in the Court of Exchequer-Chamber, of a Judgment in this Court by Original.

On Original in B. R. no Writ of Error lies in Cam. Scac.

Holt Ch. J. Let the Supersedeas be set aside, for it hath obtained that no Writ of Error lieth in the Exchequer-Chamber, where the Action was commenced here by Original, but I never understood the Reason of it, the Statute saith originally commenced here; but upon reading the Writ of Error, it is recited to be per billam; so that it is no Writ of Error in this Cause; you may take out new Execution notwithstanding the Supersedeas.

Supersedeas.

One Covenants with the Marshal, that A. B. shall be true Prisoner and make no Escape, with a Warrant of Attorney, that if he shall make any Escape, or the Marshal be damnify'd, then to confess a Judgment for this was given two Years ago, and now upon Motion the Court gave Leave to enter the Judgment, but said it is at the Attorney's Peril, if the Marshal has not been damnify'd.

Warrant to confess a Judgment, if A. escapes.

## *Rex & Regina versus* Howe *& al'.*

EYres moved that he might traverse the Sheriff's Return of a Rescous: But it was deny'd by Holt Ch. J. who said he had indeed known it allow'd in one Case; but there are many Authorities and the constant Practice to the contrary.

No traversing the Return of a Rescous.

Where the Plaintiff doth not declare within two Terms after Special Bail, the Defendant may enter a Non pros', but, if the Defendant accept of a Declaration after two Terms, he loseth that Advantage. Per Holt.

Non pros. for not declaring, &c.

## Warington *and* Mosely.

Lord of a Manor claims Toll, &c. by Prescription no Malum Tolnetum.

CAse for Non-payment of Toll claimed by Prescription, viz. for every Pack (Sarcina) of Manchester Wares bought within

within the Manor of to be paid by the Buyer, except Burgesses of Manchester.

This Case I suppose came in B. R. by Writ of Error. Sed quære.

Cheshire objected, this is malum tolnetum, for the Law requires some probable Reason of the Commencement of every Toll, that it may appear to be pro bono publico. 2 Roll. 522. 3 Cro. 710. Smith *versus* Shepheard. Mo. 574. S. C. Kelway 144. 148. 152. Mod. 231. Sid. 454. Hospnet and Willis. Mod. 47. S.C.

Here the Lord of the Manor claims this Duty from Strangers, which is as unreasonable, as in the Cases of Demand of a Heriot. 2 Roll. 265, 266. 3 Cro. 725. the Lord may impose Hardships on his Tenants, but here they are eas'd, and all the rest of Mankind oppressed.

Pro qualibet Sarcina is too uncertain, for the Court cannot judge what a Pack is, nor what is a Pack of Manchester Wares, so that it may appear to be reasonable. 2 Inst. 222, 223. 1 Roll. 134. 1 Cro. 380.

Here is no Consideration alledged for it, Manchester Wares may be the Product of another Place, it doth not appear that the Lord weighs or stamps, &c.

Northy contra. I observe there is not one Case cited that one may not claim Toll for Goods sold out of a Market, the Case of a Heriot is by Reason of the Tenure, and that there could be no Tenure between the Lord and a Stranger, Time and Usage are the Foundation of Prescription; it is not necessary to shew a reasonable Commencement, if the Thing be not unreasonable in it self.

That the Lord of a Manor may claim such Toll, he cited 2 Bulst. 195, 196. Hicks *versus* Gardiner. 1 Leon. 231. Ward *versus* Knight. I see no Reason why a local Custom may not bind Strangers, as well as one may prescribe that the Inhabitants of a Manor shall grind at his Mill, &c. Fitz. Nat. Br. 122. Reg. 153. 105. b.

Here the Buyer hath a Benefit by buying within the Manor.

The Rules about these Things are uncertain, as sometimes it hath been laid down, that there could be no Prescription where there could not be a Grant; but Toll turn cannot be by Grant.

Toll thro'.

There needs no Reason to be given, if it have been constantly paid, for Length of Time may have worn out the true Reason. Lord Coke, 2 Inst. 220. cites old Books, that no Property should be altered extra oppidum vel sine testibus, so the Toll-gatherer might be a standing Witness.

Sarcina is a Man's Burden, 'tis a customary Claim, and the Pack is there made certain by the Custom. Mo. 835. Hill *versus* Hawker.

Holt Ch. J. You should tell us what a Pack is according to the Custom.

I am not satisfied of the Prescription: Where Tenants or Inhabitants are bound to grind, it imports a Recompence, viz. to repair the Mill, otherwise an Action of the Case lieth for not Repairing it. Toll for passing thro' a Mill may be good, for it may be a nearer Way, and he who hath the Toll is bound to repair it; you must shew some Ground or some Advantage which the Subject hath, here 'tis in Restraint of Trade; the Case in Dyer about the Licence is a very hard Case.

I remember the Case of the Borough of Malden, they prescribed to repair the Haven, and to have 10 d. in the Mark upon all Purchases; they were forced to give a Reason, which was, for that the Value of Land was raised by it. Here no Reason can be given, so it seems to be an Incroachment.

Eyres J. Every Toll must import a Recompence, or you must shew one; the Case in Dyer, of a Licence to use a Trade, is a single Case. Adjourn'.

## Rolston *and* Mayn.

SHower moved for Direction to the Secondary to give Interest in Damages upon a Judgment by Default against an Executor in Debt 1500 l. upon a Bill.

Damages and Costs confounded in a Judgment by Default.

Holt Ch. J. Damages and Costs are confounded in a Judgment by Default, which puts a great Hardship upon the Executor, who for Want of Assets must answer de bonis propriis for what was in the Testator's Time; I think it were reasonable enough to alter the Form of the Judgment in such Cases.

2 Saund. 107.

## *Rex & Regina versus* Lomas. Ante 289.

NOrthy moved to quash a Conviction by Justices of the Peace for keeping a private Sellar for Low-Wines, because 'tis returned in English, whereas it ought to be in Latin for a Writ of Error. But the Court deny'd that a Writ of Error lies upon it, and it may be well enough in English.

Conviction in English.

## Gibbs *versus* Cope.

DEbt upon a Bond for performance of Covenants in an Indenture of Apprenticeship, several Breaches were assigned, and the Defendant demurred generally.

Breach of Covenant in Indenture of Apprenticeship.

Holt Ch. J. You could not take Advantage of the Assignment of several Breaches, even at Common Law, without shewing it for Cause. Note, Tho' there were the Words incerta & caret

Incerta & caret forma, but a general Demurrer.

caret forma, yet it was held but a general Demurrer, and therefore ill.

## *Rex & Regina versus* Pepper.

Bail on Suspicion of Murder discretionary.

CUR'. We are not bound to Bail a Man committed for Suspicion of Murder, where 'tis express'd that a Man was killed (no, tho' the Coroner's Inquest find it but Manslaughter) but we ought to have the Examinations before us, and if it appear to be a Case of Hardship, we may Bail.

Justices of Peace to commit, tho' only Homicide.

It is not proper for a Justice of the Peace to give Copies of Examinations about Murder. And, where 'tis found Homicide by the Coroner, yet he ought to commit the Criminal.

Repairing Church-yard Fences of spiritual Jurisdiction.

Holt Ch. J. said, The Spiritual Court have a Jurisdiction to proceed against Parishioners for not Repairing the Fence of the Church-yard; but if the Owner of the adjoining Ground be obliged by Prescription to repair, that is no spiritual Matter.

Eyres J. Why may not the Parson have an Action of the Case against the other Person for not inclosing, whereby he cannot make Profit of his Church-yard, as well as one private Person against another for not Repairing his Fence, ad quod non fuit responsum.

Attainder of Treason revers'd.

Upon a Writ of Error brought by the Heirs of Sir Thomas Armstrong, to reverse his Attainder of High Treason upon an Outlawry. Holt Ch. J. said, Sir Tho. Armstrong had a hard Case of it, for the Outlawry should have been reversed upon his coming to the Bar within the Year. Note, Tho' a Man attainted hath no Heir, yet the Law admits the next of Kin Heir to this special Purpose.

Next of Kin Heir.

## Newton *and* Richards.

Plene administravit pleaded generally by Administrator. Plaintiff demurs specially. Raym. 230. Sti. 56. Brown. 233.

SCire Facias upon a Judgment against an Administrator, who pleads fully administred generally, the Plaintiff demurr'd specially, and had Judgment upon the Authorities of 3 Cro. 575. Ordway and Godfrey. Allen 48. Mo. 858. Harcourt *versus* Wrenham, tho' the Chief Justice said the Precedents prevail'd more than the Reason of the Thing. 2 Kee. 736. 3 Kee. 258. were cited contra.

## Poole *and* Purdy.

PER Holt. Where the Plaintiff discontinues with the Leave of the Court, the Defendant ought to have his Costs (as upon a Nonsuit) which cannot be moderated.

On Discontinuances and Nonsuits Defendant to have Costs.

## Nurse *and* Frampton.

DEclaration, that it was agreed by a Note between the Plaintiff and Defendant, that there should be a Horse-Race, &c. and that a grey Nag bought by Frampton should run with, &c. upon the Forfeiture of 25 l. on either Side.

Declaration to shew that the Agreement was subscribed.

Shower. It doth not appear who were Parties to the Deed, nor whose Horse it was; and he cited 3 Cro. 56. Skidmore & al' *versus* Vandestoen. 2 Inst. 673. S. C.

Holt. That Case is upon another Reason, being by Indenture; but here it should be averr'd that the Note was subscribed by them; for tho' 'tis not necessary to the Essence of a Deed, yet here 'tis become necessary to shew who were Parties: But this appearing only to be the Default of the Clerk, it was afterwards amended (as in 1 Cro. 148. Forger *versus* Sales, in Debt against an Heir, where the Lien of the Heirs was omitted in the Declaration, yet held to be amendable after Verdict). And in the principal Case the Plaintiff had Judgment.

Amendment.

In Ejectment brought upon the Forfeiture of a Lease for Non-payment of Rent, if the Lessee will make Oath that his Lease is not expired, and bring all Arrears into Court, the Court will not compel him to plead on the common Rule.

Money brought in, &c on forfeiting a Lease.

An Administrator must give Bond to the Sheriff of Penalty of 40 l. for his Appearance at the Return of the Writ; and the Sheriff is not obliged to discharge him upon the Attorney's Promise to appear, but if an Attorney of this Court, or of the Common Pleas do make such Promise, the Court will compel him to perform it.

Attorney promising to appear, &c.

## White *versus* Briggs.

DEbt for an Escape, and doth not conclude prout patet per Recordum, and it was debated, whether this be Matter of Substance or Form only, and so help'd by the Statute upon a general Demurrer. Vide Hob. 233. Heard *versus* Baskervile. Sid. 308. Jevens and Harridge 429. Hancock and Prowt. 216.

Where prout patet per Record is only Form.

Thagget *versus* How. 2 Saund. 402. Slow and Wilmot. And it was resolved to be only Form, for the Record is not the Matter of the Action, but the Escape; otherwise non debet would be an ill Plea here: To what Purpose should he say prout, &c. when 'tis to be proved at the Trial. But, where the Record is the Foundation of the Action or Plea, 'tis otherwise.

Judicium pro Quer, nisi, &c.

Judgment amended, contra Beecher's Case.

Carthue moved to amend a Judgment, it being entred querens in Mia', instead of Defs' in Mia', and it was amended notwithstanding Beecher's Case.

## *Rex & Regina versus The Bishop of* London *and Dr.* Lancaster.

A Parson made a Bishop, the King to present to the Benefice.

Vide 3 Lev. 377. 4 Mod. 200. Parl. Cases 164.

QUare Impedit to recover the Presentation hac vice of the Vicarage of St. Martin's in the Fields, and sets forth, that Humphry Bishop of London was seised of the Advowson in gross, in right of his Church, and collated Dr. Lamplugh, who was afterwards created Bishop of Exeter, whereby the said Church became void, and King Charles the Second presented Dr. Lloyd, who was afterwards created Bishop of St. Asaph, and then the King presented Dr. Tennison, now made Bishop of Lincoln, whereby the said Church is become void, and it belongs to the King to present Jure Prærogativæ.

The Bishop of London demurs. Dr. Lancaster pleads in Bar, that he is Vicar by the Presentment of the Bishop of London, sets forth the Stat. 25 H. 8. concerning Dispensations; that Dr. Tenison, 20 Decemb. 91. was elected Bishop of Lincoln, that the 22d. the Archbishop granted that he might hold the said Vicarage in Commendam till the first of July following, which was confirmed by the King, &c. whereupon the Attorney-General demurs.

It was argued for the Defendants. 1. That the Law is not settled that the King hath such Prerogative to present in Case of an Avoidance by Cession, the Patron having committed no other Fault than in Presenting such a Parson, who deserved to be made a Bishop. Doct. & Stud. fol. 116. b. allows the Patron six Months Time to present in Case of Avoidance by Cession. 'Tis true, the King in antient Times did often present, where the Incumbent was made a Bishop, but that was where the Temporalties of the Bishoprick were in his Hands, or by Reason of Wardship; which Precedents have given the King a Colour of Title by Prerogative. Sed Vide Dy. 228. Co. 4 Inst. 356, 357. Owen 144. Wentworth *versus* Wright, and no mention of it in Prærogativa Regis.

2. Admitting the King hath such Prerogative, it is satisfied by this Commenda retinere, which exceeds six Months, and therefore is ex plenitudine potestatis & jure prærogativæ.

But it was answered and resolved by the Court, that the King hath clearly such Prerogative to present, which is established by constant Usage and many Authorities. Mo. 399. Wright's Case, upon great Deliberation. 3 Cro. 542. Armiger *versus* Holland 790. Sir Robert Basset *versus* Gee. 2 Roll. 343. Cro. (James) 691. Woodley *versus* The Bishop of Winchester. Vaugh. 22. Bro. Presentment al Esglis, pl. 61. 3. 14. Davies 81. Holt Ch. J. said it is not fit to be argued, nor is it necessary to assign a Reason, tho' it may suffice that the Church avoids by the King's Act; and with respect to a Patronage in Fee, 'tis no more than changing of a Life, and 'tis not so hard upon a Patron, as where the King's Tenant in Capite holds Lands by Knight-Service of another, there the King hath a Prerogative without Question. That in Dyer is but a sudden Opinion: True, it is not mentioned in Prærogativa Regis, nor is the King's Title to present by Lapse: Wheresoever the King hath a precedent Interest, he shall present by his Interest and not by his Prerogative. Before the Statute of 25 Ed. 3. of Provisors, the Bishop being the Creature of the Pope, the King could not have this Prerogative, and afterwards it was not submitted to of a long Time, for the Pope still usurp'd, till his Supremacy was taken away by H. 8. 41 Ed. 3. 5. (within sixteen Years after the Statute) Judgment was given against it, and for the Pope's Supremacy. Cotton Records 458.

2. That the Commenda retinere doth not serve the King's Turn, being more properly a Dispensation, which being granted before the Consecration suspends the Avoidance. Hob. in Colt and Glover's Case, and Vaugh. in Edes's Case, make no Difference between an original Cession and a Dispensation determined, for then 'tis as if it never had been, but if the Incumbent had died in the mean Time, it had avoided by Death. 2 Roll. 344. Commendam retinere.

Nota, 'Twas adjudged for the King and Queen. Hill. 1693.

## *Rex & Regina versus The Bishop of* London *and Dr.* Birch.

This Case is distinguish'd from Dr. Lancaster's Case in this Respect only, that this is to present to the Rectory of St. James's, which is a new Rectory created by Act of Parliament, and Dr. Tenison thereby made Parson, and that the Patronage shall be vested in the Bishop of London and his Successors, and the Lord Jermin and his Heirs, viz. that the Bishop shall have the first Turn, and the Lord Jermin the next, & sic alternis vicibus. That the King has the like Prerogative in Churches newly erected by Stat. as well as in the old, To present on making the Incumbent a Bishop.

It

See 3 Lev. 382. 4 Mod. 190. 1 Show. 164.

It was argued by Sir Barth. Shower and Mr. Finch for the Defendants, that the King cannot have such Prerogative in this Case, because the Act saith expressly, that the Bishop of London shall present after the Death of Dr. Tenison, or other Avoidance; so that here is no fix'd Patronage till after the Avoidance, 'tis rather like a Donative to Dr. Tenison, and there is no Precedent that the King's Prerogative shall hold Place, but where the Church is antecedently presentable: Suppose it had been enacted, that after the Death of Dr. Tenison, &c. the Presentation should be in A. and B. and that C. should Present? would the King have his Prerogative: Here the affirmative Words in a new Law do imply a Negative, and shall bind the King. 5 Co. 14. 11 Co. 68. Plow. 246. 2 Inst. 681. 169. If the Donors had named Dr. Birch to succeed Dr. Tenison, the King should not have prevented him by his Prerogative, and here 'tis Tantamount. How can the Bishop's Turn be served, before he hath any Turn at all.

'Tis true, the Grantee of the next Avoidance shall lose his Turn, for there the Grantor could not grant it otherwise, than subject to the King's Prerogative; but there is no Case, that if the King grants the next Avoidance, he shall defeat his own Grant by his Prerogative; but here 'tis stronger, being the King's Grant in Parliament.

But it was answered and resolved, that when an Act of Parliament makes a new Rector, it subjects it to the Rules of the Common Law, unless it be exempted by special Words; the Church at Covent-Garden was erected by Act of Parliament, yet, when the King promoted Dr. Patrick, he presented Dr. Freeman, who enjoys it to this Day. Statutes are to be construed according to the Intent of the Makers, who never intended here to meddle with the King's Prerogative; 'tis a Falacy to say that Dr. Tenison came in by Donation, 'tis more properly a Presentation, which may be without Institution and Induction, the Bishop being Party; the Church is plainly Presentative by the Act, which settles the ordinary Right of Presentation; and if it were granted that this were like the Case of the King's Grant of the next Avoidance of his own Parsonage, yet nothing of prerogative Right passeth by such Grant. Plowd. 331,332.b. 2 Roll. 195. 1 Co. 46. b. But this is more like the Case where the King is Patron, and grants the Patronage in Fee, yet Prerogative shall hold Place. In Case of a Donative, if the King makes the Incumbent a Bishop, he shall not Present, for they are not incompatible, but here the Right of Presentation vested immediately, and therefore the Bishoprick is incompatible; and if it makes an Avoidance to let in Dr. Birch, 'tis so to let in the King's Prerogative. Parsons put in in the Time of the Civil Wars were made good Incumbents per Stat. 12 Car. 2. yet they

were not presented, and no Doubt if the King promoted any of them he would Present, &c. Judicium pro Rege & Regin'.

Holt Ch. J. said, People ought to be plain in Indictments, and to call a Bawdy-house a Bawdy-house, and not a disorderly House. Bawdy-house.

## Walker *versus* Walker.

DArnel moved in Arrest of Judgment, that there being two Assumpsits, one whereof is a general Indebitatus for Money won at Play, which doth not lie, and the Verdict being taken upon the Whole, if one of the Promises be naught, the Plaintiff cannot have Judgment. Verdict on two Assumpsits, if one of 'em be ill the Plaintiff can't have Judgment.

Sir Barth. Shower contra cited Jackson and Holgrave, when Pemberton was Chief Justice affirmed in Error; and Eccleston and Lewin. 33 & 34 Car. 2. Rot. 534. he said the Cast of a Dye will alter the Property of Money. Property in Money, how altered.

Holt Ch. J. Ay, if it be staked, but not otherwise; in the one Case 'tis only Executory in the other Executed, and so we have held it that an Indebitatus lies not for Money won at Play, 'tis but as a Promise against a Promise: So it doth not lie on Acceptance of a Bill of Exchange: Every Consideration, that obligeth the Party by Way of Promise, will not raise a Debt. 1 Cro. 107, 193. Sands and Trevilian. An Indebitatus will lie indeed against a Holder of Stakes, because he receives it to the Use of him, that wins. No Indebitatus for Money won at Play, except staked, and then against the Holder. Consideration to raise a Debt.

Sir Barth. Shower. What if the Defendant had made an actual Promise? may not that be intended in this Case. Holt Ch. J. If it were so, that would not avail. Adjourn'.

## Skip *and* Chamberleyn.

IF an Award made a Rule of Court by Consent of Parties be bad in Point of Law, yet the Court will compel the Parties to perform it, unless there be some Corruption, or one Party not heard, &c. Per Holt. Award bad in Law, yet, &c.

## Jones (*Lessee of* Pride) *versus The Earls of* Mountague *and* Bath.

PER Cur'. Where a Trial at Bar is appointed, the Court will compel the Sheriff or Attorney to bring in the Venire; and here Affidavit being made that Sanderson the Attorney took the Writ from the Sheriff by Force, he was committed; but afterwards, upon Agreement of the Parties, he was discharged. Trial at Bar, Attorney committed for not bringing in the Venire.

Eyres

Ni. Pri.

Eyres J. said, the Justices of Nisi prius cannot commit the Attorney for not bringing in the Writ, but in Case of a Trial at Bar it is always done.

## Hellier *and* Condy.

Suit against Husband and Wife, she being arrested gives Bail, &c.

Attachment against the Bailiffs.

UPon a Writ against Husband and Wife, the Wife was taken and offered Bail for herself, but the Bailiffs insisted upon Bail for her Husband also (who was not taken) and committed her, and now an Attachment was granted against the Bailiffs; for tho' the Husband is compellable to give Bail for himself and his Wife, yet so is not the Wife, but for herself only.

Darnel. They threaten the Bailiffs with an Action.

Holt Ch. J. Nay, if we grant an Attachment, they shall not take an Action, they ought not to have two Remedies.

## *Rex & Regina versus* Bradford.

Indictment for erecting a Mountebank's Stage.

THE Defendant was indicted quod 1 die Julii, in quodam Communi Campo vocat. Moor-fields erexit quandam structuram de ligno vocat. a Mountebank's Stage, & dicto primo die Julii & diversis diebus tam antea quam postea permisit diversas otiosas personas ludere & jocare, per quod magnus tumultus & concursus Congregabantur.

It was moved to quash the Indictment, for that tam ante, &c. must be before the Stage built.

Holt Ch. J. I doubt all the Matter is, that he hath not a Licence, but it is an Offence, and tho' antea is naught, yet the Indictment may be good for the rest; you must plead or demur.

Presentments.

The Grand Jury should present those, that have Licences, as well as those that have not. Nota.

Post.

Indebitatus Assumpsit for Money received to the Use of the Plaintiff as Administrator.

Assumpsit for Money received to the Plaintiff's Use as Administrator.

Sir Barth. Shower pro Quer' cited 2 Saund. 208. Foxmyst and Tremayn. Our Intestate died in the Defendant's House, and the Defendant broke the Chest, and took away the Money.

Trover.

Holt Ch. J. It should rather be Trover, and if the Trover were first and Administration afterwards, he may either declare specially, or lay the Trover after Administration, and it will be good either Way.

Carthue cited Chapman and Derby, as Administrators, Judgment was affirmed; it is now every Days Practice.

Detinet.

Holt Ch. J. That was the first Case, and it was after a Verdict; if an Account be stated after the Death of the Intestate, Debt on this Account must be in the Detinet. Note,

2

Note, There are but three Cases wherein the old Way of Pleading is still used, and the Special Matter waved, viz. a Special Non est factum, Special Nil debet and Nil habuit in tenementis. Where the old Way of Pleading is still in Use.

## Clark's *Case sur* Habeas Corpus.

THE Defendant was committed (upon a Conviction for Deer-stealing) for a Year, and till such Time as he should be set in the Pillory, whereas the Act says for a Year only, and therefore he was discharged; and Serjeant Wright cited a Case where an Overseer (who by the Statute may be committed until he Account) was committed till he should be delivered by due Course of Law, and adjudged void, because it did not pursue the Law. Deer-stealing. Commitment. 2 ff 75.

## Jones *versus The Bishop of St.* Asaph *in Prohibition.*

THE Plaintiff declares, that the Office of Chancellor and Vicar-general is an antient Office grantable for two Lives, that Francis Bishop of St. Asaph granted the same to Dr. Lloyd and the Plaintiff for two Lives, and the Plaintiff survived, and that all Pleas of Trespass and Freehold belong to the Common Law, that the Bishop of St. Asaph had sued the Plaintiff in the Arches of Canterbury, for and concerning his Right of that Office, and had exhibited several Articles there, whereof one sets forth, that by the Canons none should be Chancellor but who was skill'd in Canon Law, and that the Plaintiff was a Doctor of Physick, and unskill'd, &c. and concluded, that Dr. Jones, by Reason of his Ignorance, &c. may be removed from the said Office. Grant of a Bishop's Chancellorship, &c.

The Defendant pleads quod non est prof. &c. & pro Consultatione, that the Qualifications for the said Office are conusable in the Ecclesiastical Court, and the Plaintiff punishable there.

The Plaintiff demurs: And it was resolved by the Court, that the Chancellor hath a Freehold in his Office by Grant (and not by Institution and Induction (as every Bishop and Parson hath) therefore in this Case the proper Remedy is an Assise. 8 Co. 47. b. in Jehu Webb's Case, 1 Cro. 55. Sir John Bennet's Case, and therefore a Prohibition lieth. 2 Brownl. 11. Robotham and Trevor. 2 Roll. 285. S. C. 'Tis true, the Party may forfeit it, or if he be not qualify'd, it is void, and Advantage may be taken of it more easily than by Suit in the Arches. The King cannot take Advantage without Inquisition or Scire Facias, but here the Bishop may grant the Office, as if the Lord of a Manor makes a Steward, who commits a Forfeiture, he

 may

may grant the Office to another, and the Right shall be try'd in the Temporal Court.

As to the Canon quod amoveatur, &c. what is a Freehold worth if they put him out of the Exercise of it; the Canon will not bind a Layman or Freeholder; if he be ignorant, a Jury shall try it, and so of any Judge in Westminster-Hall.

True, Dr. Sutton's Case is to the contrary, which is reported 2 Roll. 286. Latch. 228. 1 Cro. 65. Noy 91. Palm. 450. Godb. 390. But the Court now denied that Case to be Law. Eyres Sen. J. said, the High Commission Court at that Time bore all before it, no one durst speak against it but my Lord Coke, and it bore him down at last.

High Commission Court.

Holt Ch. J. They would Fine and Imprison, which is illegal, and yet by Habeas Corpus such Prisoners were remanded.

Et Adjournatur.

## Camphell *and* St. John.

Trover for argent' Anglice Plate, well.

TRover pro ducent. unciis argenti (Anglice Plate) the Defendant demurs and shews for Cause, that argent' (Anglice Plate) is too uncertein, but the Court held it certain enough, so ducent. ponderibus medicament. Anglice Drugs, hath been ruled well, then it was moved that the Cause is discontinued, for the Plaintiff, instead of joining in Demurrer, says placitum est insufficiens, and so demurs upon the Defendant's Demurrer; and Yelv. 137. Alexander *versus* Lane was cited, where the Defendant offered an Issue, and the Plaintiff replied, and concluded & hoc paratus est verificare, and the Defendant rejoin'd, it was held a Discontinuance.

Demurrer on Demurrer is a Discontinuance.

Holt and Eyres J. deny'd that Case in Yelverton to be Law, and said it was but Form and help'd by a general Demurrer: But the Chief Justice said, that the Plaintiff ought to have maintain'd his Declaration, and when he doth not do that in Effect nihil dicit, and then, when the Defendant rejoins, it seems a Discontinuance.

Declaration not maintain'd.

Sir Barth. Shower pro Quer'. If the Plaintiff offers an Issue & petit quod inquir' per Patriam, and the Defendant offers another Issue, & de hoc ponit, &c. is that a Discontinuance.

Holt Ch. J. Tell me any Case where a Demurrer is proper, and you are not bound to join. Sir Barth. Shower. In Case of a Demurrer to Plea in Abatement, one may demur upon that Demurrer. Holt Ch. J. That's where the Demurrer is not apposite, but if the Demurrer be proper and apposite you must join.

Where Demurrer is apposite, there must be a Joinder.

## Williams *versus* Ivey.

ERror, sur Assumpsit to pay Money at several Days, the Action was brought before the last Day and declared on both and laid a Breach of both, which he should not have done, but only on the first Breach, and therefore Reversetur.

Declaration in Assumpsit to pay at several Days.

## *Rex & Regina versus* Trubridge.

4 Mod. 345. S. C.

ERror. Upon an Indictment at the Quarter-Sessions for erecting a Cottage, 1. Decemb. 4 Will. & Mar. and not assigning four Acres of Land to it, and continuing it to the 25th of April prox.

Indictment for erecting a Cottage with Continuando; good for the Erecting, ill for the Continuance.

Sir Barth. Shower assigned for Error.

1. The Jury find for four Months, whereas it is laid for four Months and three Weeks, and non constat, which were the four Months, and the three Weeks might be in the Middle, but the Court did not much Regard this Exception; for tho' in Case of an Indictment for exercising a Trade, such an Exception might be material, yet here it could hardly be supposed that a Cottage could be pull'd down for three Weeks and then rebuilt.

2. Continuavit, but it is not said pro habitatione. Mod. 295. Nevil's Case, but this was over-ruled, for it sufficeth that 'tis according to the Statute.

4. Præsentatum existit quod erexit & ulterior presentant quod Continuavit, here is no nominative Case to præsentant, the Erection and Continuance are several Offences, the Indictment may be good for the Erection, tho' ill for the Continuance, if the Conclusion contra formam Statuti may be referr'd to the Whole, or that ulterior præsentant might be rejected: But Holt said, that could not be, for they are as several Indictments, and the first should have concluded contra formam Statuti, otherwise if it had been one entire Sentence. Ergo Reversetur.

## *Rex & Regina versus The Mayor and Citizens of* Chester.

UPon a Mandamus to restore nine Common-council-men by Name.

Return of a Mandamus to restore nine Common-council-men.

They return, that by Charter 24 H. 7. the Citizens were impowered to chuse forty Common-council yearly, that ante unum annum ultime præterit', the Persons named in the Writ were chosen and continued for the Space of one Year, which being

ended amot. fuer. & quilibet eor. amot. fuit per electionem alior. Civium Civit. præd.

Sir Thomas Powis took Exceptions to the Return.

1. That it doth not set forth when they were Chosen, or when they were removed, it might be forty Years ago; in an Action of the Case upon this Return we cannot fix the Time.

2. Anno suo inde finit. debito modo amot. fuer', &c. is ill, for it should be positive, not debito modo. Sid. 209, 210.

Holt Ch. J. There is a great Difference between debite amotus, and non debite electus or admissus, for non debite electus implies elected, and then must shew how: but 'tis otherwise here, besides they go further, and say per electionem alior. Civium, &c.

Sir Tho. Powis. We complain that we are now amoved, they Answer us, that we were long ago chosen and long ago removed, that is not the same Amotion.

Holt Ch. J. They should have set forth the Constitution of the City, that such a Time they were chosen, and such a Time the Year expired, and they were never chosen afterwards: But on the other Hand you should have brought several Writs, to which Eyres J. agreed, for they might be chosen at nine several Times; and it would be a very long Return, to set forth when every one was elected, &c. Common-council-men have no Freehold, and might be put out by Custom at Pleasure.

Sir William Williams offer'd a Trial at Bar next Term upon a feigned Action to be laid in Middlesex, but Sir Thomas Powis would not consent to it unless there might be the like Trial upon another Mandamus to admit Alderman Allen Mayor (which not being agreed) Sir Thomas Powis pray'd Judgment upon this Return.

Holt Ch. J. There ought to have been several Writs (and Sir Sam. Astry agreed the Practice to be so) Tenants in Common must sever in Actions. Bre. Cassetur.

Sir Tho. Powis said they had turn'd the World upside down, &c.

Eyres J. Such as the Persons put out would have turn'd the World upside down, as they shew'd themselves, when I was lately at Chester.

Then Sir William Williams told Sir Thomas Powis of his Labouring the Grand Jury at Chester to find the Bill against the Lord Delamere, &c.

## Allen *and* Syms.

Mod. 7. Reply to Plea of Misnomer, how to conclude. Post 311.

THE Defendant pleads, that his Name is Symons, the Plaintiff replies tam quam & hoc paratus est verificare; and it was ruled, that it is well either Way, whether the Plaintiff concludes to the Country, or with an hoc paratus, but where

the Defendant in his Plea traverseth absq; hoc, there the Plaintiff in his Replication must conclude to the Country. 347

## *Rex & Regina versus The Inhabitants of* Knightley, &c. *in the Isle of* Wight.

UPon an Order for Contribution to the Relief of a poor Parish, it was ruled, that the Justices may either Charge particular Persons or the whole Parish, and they to levy it, but here a Sum in gross was laid for a whole Year, which (it was objected) was unreasonable, for their Ability may change, nevertheless the Order was confirm'd. One Parish contributory to the Poor of another.

## *Rex & Regina versus* Wildbore.

INdictment for not assisting the Constable (upon Request) to execute the Warrant of two Justices, for Searching for Nets and other Engines to take Coneys, &c. was quash'd, for the Constable hath no Power to require whom he will to attend him on such Occasions. Constable Indictment.

## *Sir* Paul Pindar's *Case.*

HOmine Replegiando *versus* Mr. Williams (Son of Sir William) the Sheriff return'd Elongatus, a Withernam Issues, then an Appearance was entred for the Defendant by Attorney, and a Supersedeas was granted by S. Eyres Just. Homine Replegi.

Sir Tho. Powis moved, that the Supersedeas was irregular, for that he ought to appear in Person. But upon Inquiry, Mr. Aston reported, that the Defendant entred his Appearance with the Philizer two Days before the Return, and the Attorney on the other Side makes out a Capias in Withernam without going to the Philizer, the Elongatus not being then returned, which was irregular.

Holt Ch. J. The Sheriff returns Elongatus of Course, if he cannot find him, and so must do in a common Replevin, for he cannot falsify the Writ, but his Return is not conclusive. Eyres J. cited 17 E. 3. 1. that when he will plead Non cepit, he may appear by Attorney, to which Holt agreed, for he shall not in such Case put in Bail or gage Deliverance, but it is a Supersedeas to the Capias, and if upon non cepit it be found against him, there will be Damages given for the Detinue, and Capias in Withernam for the Execution. Ante

DE

# DE

# Term. Sancti Hillar.

## Anno 6 Willielmi III. Regis in B. R.

### Hains's *Case*. Post.

In Informations, Attachments, &c. Plea instanter.

IN this Case Sir Sam. Astry reported the Course of the Court, that where a Man is brought in Custody to answer an Information, he must plead Instanter, so upon an Attachment, if non est inventus be returned, and the Party comes in, he must plead Instanter; but if he is not taken, but comes in voluntarily before the Return of the Writ, it seemeth otherwise.

### Kiffin's *Case*.

Trover or Trespass against two, and one found guilty, Judgment nil capiat.

IN Trover against two, one pleads non Cul', the other pleads a Release of Actions, and it was found for the Plaintiff against the first, and for the Defendant upon the Release; and the Judgment was Quod quer' nil capiat per billam, for he made it joint; so if in Trespass against two, one pleads not guilty and the other claims Property, and 'tis found against the former and for the latter, the Plaintiff cannot have Judgment; and no Difference between Trespass and Trover. Sir William Williams pro Quer'.

A Discharge on poor Prisoner's Act to be pleaded.

The Court would not discharge a Man upon common Bail, that was discharged upon the Act for Release of Prisoners, (tho' the Words of the Act are so) but he must plead it, for non constat, that he gave due Warning to his Creditors.

## Curry *and his Wife Administratrix*, &c. *versus* Stevens.

INdebitatus Assumpsit for Money received by the Defendant to the Use of the Plaintiffs, the Defendant pleads Quod causa actionis non accrevit infra 6 annos. The Plaintiffs reply, that the Party died Intestate tali die, and that no Administration was committed till such a Time, and then Administration was committed to the Wife, & sic causa actionis accrevit, &c. and conclude to the Country, and (as it should seem) the Defendant demurred.

Assumpsit brought as Administrator, Stat. of Limitations pleaded. Reply, no Administration till such a Time, infra 6 Annos.

Holt Ch. J. It hath obtained, that an Indebitatus lieth in such Case, but it seemeth not proper to the Use of both, (tho' it may conclude ad dampnum ipsorum) for the Difference is where the Wife hath the Chose in Action in her own Right, and where en auter droit, in the one Case it shall survive, in the other not; in the one Case a Judgment alters the Property, in the other not; but where there is Judgment against a Feme sole, and afterwards a Scire Facias, and Judgment thereupon against Husband and Wife, and she dies, the Husband is bound. Quod Nota,

Ante . Where Husband and Wife may declare ad dampnum ipsorum. Where Scire Facias and Judgment against Husband and Wife, tho' she dies, he is bound.

Here the Plaintiff in his Replication ought to have concluded to the Country, for the Defendant might rejoin, that the Party made a Will, or died Intestate, and that Administration was committed to J. S. for if one dies Intestate, and first Administration is committed to one, and a Stranger receives Money, and then Administration is granted to another, the six Years shall be accounted from the first Administration; as where a Man of full Age hath Right of Entry, and dies, leaving an Infant, the Time shall run on. (Q.) Here the Special Matter is not waved by the Conclusion, it being in the Affirmative. Plow. 14, 15. He might either have omitted the Special Matter, and concluded to the Country, or he might plead the Special Matter, but then ought to conclude, Et hoc paratus est verificare; and he cited a Case. Hill. 22 & 23 Car. 2. in Debt upon an Obligation for Performance of Covenants, whereof one was, that the Defendant (being Clerk to the Plaintiff) should give him an Account, &c. the Defendant pleads Performance of the Covenants; the Plaintiff reply'd, that the Defendant had received 5 l. and not given him an Account thereof. Now the Defendant might either rejoin, that he had given him an Account, and conclude to the Country, or that Malefactors took it away without his Assent. Et hoc paratus, &c. And here in the principal Case Judgment was given for the Defendant.

Six Years, from what Time computed.

How the Replication to conclude.

Ante 308.

Lien

## Lien *and* Flannough.

Writ of Inquiry.

CAse upon several Promises, one upon an Account, the other for Money won at Play.

Ante .

Serjeant Wright moved to set aside the Writ of Inquiry, the Jury having found 65l. Damages upon the Account, and 1 d. upon the other Promise, for which an Action lies not (as the Court agreed) so that they have apply'd the whole to the Account, but that being a good Promise, Judgment pro Quer'.

## Meriel & Ux' *versus* Kendal.

Ante . Words spiritual.

A Prohibition was pray'd to stay a Suit in the Ecclesiastical Court for these Words, He is a Cuckold, with an Averment, that in that Country it signifies, that the Wife is a Whore, and Prohibition denied.

## *Rex versus* Terrel & *al'*.

Indictment on Stat. Ph & Mar. of Highways on not guilty no Evidence but Repair.

INdictment upon the Stat. Phil. & Mar. for not working at the Highways upon Notice. Holt said, the better Opinion hath been, that you can give nothing in Evidence upon not guilty, but that the Ways are in Repair.

## Tipping *and* Cosins.

Uses, and contingent Remainders.

EDward Cosins seised of Lands in Fee, makes a Settlement by Deed and Fine to the Use of himself and his Heirs, until a Marriage should take Effect, and then to the Use of his Wife during her Life, then to the Use of the Conusees and their Heirs during the Life of E. Cosins in Trust, to preserve the contingent Remainders, and that they should permit him to take the Profits, then to the Use of the first, second, third, and every other Son (by that Wife) in Tail, then to the Use of the Heirs Males of his Body, Remainder to the Heirs of his Body, Remainder to him and his Heirs for ever: The Marriage took Effect, E. Cosins hath no Issue Male by that Venter, but only one Daughter married to Tipping, and they had Issue Lucretia Tipping, the Lessor of the Plaintiff; but afterwards he had another Daughter by another Venter, and then levies a Fine with Warranty (but it was agreed the Warranty had no Effect in this Case, by Reason of Infancy, &c. and that the Estate pass'd

by the Fine was defeated by Entry; and the only Question was, whether Heirs of his Body be Words of Limitation or Purchase. And it was adjudged without Difficulty, that the Heirs of the Body take by Purchase, and therefore not barr'd by the Fine; for here no Use can result to E. Cosins, because it is expressly limited to the Conusees and their Heirs during his Life; in which respect it differs from the Case of Fenwick and Milford. Inst. 22. b. and Pybus and Mitford. 1 Mod. 159. because in those Cases the Party had not limited the Use out of him during his own Life, as here he hath done in express Terms; and it is too remote to imagine, that the Trustees, whose Estate is created to support the Remainders, should make a Feoffment to destroy their Estate, whereby to raise an Estate for Life by Implication in the Feoffor. 2 Co. 51. a. And whereas it was objected by Serjeant Wright, that the Trust for E. Cosins was executed by the Statute of Uses, for the Use limited to the Trustees is void, and they are in by the Common Law, as where a Man makes a Feoffment to certain Trustees and their Heirs, to the Use of them and their Heirs in Trust for J. S. this Trust is executed by the Statute. It was answered by the Chief Justice, that in this Case the Conusees take by the Statute of Uses, because the Limitation of the Use is different from the Estate of the Land, as where a Feoffment is made to the Use of the Feoffee for Life, Remainder to J. S. the Feoffee is in by the Statute. Feoffment to A. and his Heirs, to the Use of A. and B. and his Heirs, they are Jointenants; the Difference is, that where the last Fee-simple of the Use is limited to him, who hath the Estate of the Land, he is in by the Common Law, as in the Case Inst. 22. b. where a Feoffment is to the Use of the Feoffor in Tail, and after to the Use of the Feoffee in Fee. In the Case of Pybus and Mitford, Hale said, that if a Feoffment were made to the Use of the Heirs of the Body of the Feoffor, from and after the Death of J. S. there no Estate for Life would result till after the Death of J. S. He said, that whether Feoffees take by the Common Law or by the Statute, yet where the Use is once disposed of to them and their Heirs (whether the Statute executes it or not) there cannot be an Use upon an Use, nor a Trust upon such an Use to be executed by the Statute. Quod Nota. Judicium pro Quer'.

## Fusee *and* Rowe.

HOlt said, If the Defendant pleads in Bar of the Writ of Error, and hath Judgment, that the Plaintiff be barred, then the Defendant is to have no Costs; but where the Judgment is affirmed, the Defendant is to have Costs upon the Stat. 3 H. 7. 10. Ante Costs on a Writ of Error.

## Philips *and* Bury.

Judgment pro Def. on Error in Parliament revers'd.

JUdgment was given in this Court for the Defendant in Ejectment (Ante .) which being now reversed in Parliament: Pemberton pray'd Judgment here, quod Quer' recuperet terminum, for tho' there be no Precedent, yet the Reason is the same as where Judgments for the Defendant hath been reversed in the Exchequer-Chamber and returned hither, this Court hath given Judgment pro Quer'. Yelv. 76. Faldo and Ridge, 'tis true, the superior Court may give Judgment according to the Cases. Roll. 774. but they never do it in the House of Lords, and it is not of Necessity that they should. If a Bill in Chancery be dismissed, and the Lords in Parliament reverse the Dismission, the Chancery proceeds to give Relief. Dyer 373. b. that if a Judgment in Antient Demesne be reversed in the Court of C. B. the Plaintiff shall not have Judgment to recover Seisin of the Land, but only that he be restored to his Action.

But it was answered by Web, and resolved by the Court, that the Judgment ought to be given in Parliament, and cannot be given by this Court, for it were unreasonable to compel the Judges to give Judgment against their Opinions. In a Formedon in C. B. if the Defendant pleads in Abatement, and the Writ abates erroneously, and upon a Writ of Error here, that Judgment is reversed, the Plaintiff shall proceed in this Court, and so it is in Case of a Writ of faux Judgment of such a Judgment in Antient Demesne; if the C. B. adjudge, that the Writ shall not abate, they shall hold Plea and proceed, for which the Chief Justice cited Fitz. Nat. Br. 19. D. against the Case in Dyer 373. b.

If we reverse a Judgment given in C. B. for the Defendant in Ejectment, we give a new Judgment for the Plaintiff if the Merits warrant it. 1 Cro. 511. Mulcarry and Ayres. Roll. 774. and so it ought to be in the Exchequer-Chamber, but upon a Demurrer there they cannot award a Writ of Inquiry of Damages, but only Quod Quer' recuperare debeat, and then we proceed in B. R. And that the Court which reverseth the Judgment ought to give a new one. Vide 2 Saund. 256. 4 Inst. 72. 2 Cro. 534. 1 Saund. 180. Cook and Gerard. And in the Case of a Dismission in Chancery, if it be reversed by the Lords, they give Direction to give Relief, but in Case of Error of a Judgment at Law, they give the absolute Judgment, as was done in the Case of Noel and Nalson. 2 Saund. 225. where the Judgment given below was affirmed in Parliament: And in the Case of Robinson and Worley, Judgment was given in this Court for the Defendant in Ejectment, and reversed in the Exchequer-Chamber, but the Plaintiff did not there pray Judgment for him, and for that

Reason, tho' the Reversal was affirmed in Parliament, yet the Plaintiff could never get Judgment afterwards. Nota.

## *Rex versus* Larwood.

A Dissenter elected Sheriff pleads his not taking the Oaths, &c.

Carth. 386 Salk. 167 Ciffa 4 t. 45.

UPon an Information setting forth, that the City of Norwich is an antient City, and that the Inhabitants and Citizens thereof have Time out of Mind been a Body Politick, antiently called Citizens and Commonalty, and now, Mayor, Sheriffs, Citizens and Commonalty: That King Henry the Fourth Anno Regni sui quinto granted to the said Citizens and Commonalty, and their Heirs and Successors, that the said City should be a County of it self, and separated from the County of Norfolk, and that the Citizens and Commonalty should yearly chuse a Mayor and two Sheriffs (in Lieu of four Bailiffs, which they had antiently). And that King Charles the Second granted and confirm'd the Privileges granted them by H. 4. and that in the Election of Sheriffs, the Mayor, Sheriffs, and Aldermen, between the 24th of June and the of September, should chuse one Sheriff, and that the Citizens and Commonalty should chuse the other Sheriff: That the Defendant, Thomas Larwood upon the 9th of July was by the Mayor, Sheriffs, and Aldermen, duly chosen one of the Sheriffs for one Year, to begin the 29th Day of September then next, whereof the Defendant had Notice, and did not appear, but refused to take the Oaths and Office upon him, by Reason whereof the King's Business remain'd undone.

The Defendant pleads the Corporation-Act 13 Car. 2. and that he is, and at the Time of the said Election was one of his Majesty's Protestant Subjects dissenting from the Church of England, and had not received the Sacrament, &c. within one Year next before his Election, and therefore he was incapable of the said Office, and the Election void, and that he gave Notice thereof, &c. and that on the 9th of July, 1 W. & M. he took the Oaths and subscribed the Declaration 30 Car. 2.

The Attorney-General replies, that the Defendant, as a Member of the Church of England, ought to have received the Sacrament yearly, and not to take Advantage of his own Fault.

The Defendant rejoins, and sets forth the Stat. 1 W. & M. for exempting his Majesty's Protestant Subjects, dissenting from the Church of England, from the Penalties of certain Laws. And upon this there is a Demurrer for the King.

This Case was argued by Levinz and Pemberton for the King, and by Rotheram and Wright, Serjeants, for the Defendant: And it was urged for the Defendant,

 1. That

1. That he was not duly elected, for by the Charter of H. 4. the Privilege was vested in the Citizens and Commonalty, which could not be divested by any subsequent Charter, without either Surrender or Forfeiture; the Mayor and Aldermen are not capable of such a Grant, being but a Part of the Corporation. 12 Co. 120. the Case of Dungannon.

2. Admitting, that the Right of Election is good, here is sufficient Matter of Excuse; for it were vain for him to undertake an Office, which he could not execute, and this Disability could not be cured or removed by any after Act, but the Election it self is void; they cited the Case of the Mayor and Probi Homines de Gilford *versus* Clerk. (Vide S. C. 2 Ven. 247) and this differs from the Case of Sir John Read, who had incurred a Sentence of Excommunication at the Time when he was chosen Sheriff, for there he might have qualify'd himself by taking off the Excommunication, but this Election is void by a precedent Disability; and of that Opinion was Eyres jun. Just.

Holt Ch. J. and Eyres sen. Just. argued for the King, that the Defendant was duly elected; for where a Corporation takes a new Charter concerning antient Liberties, they may use it either by Way of Grant or of Confirmation. 2 Roll. 197, 198. Eyres said, the Words enure but by Way of Ordinance; and as the Corporation themselves might have committed the Execution to Part (as in 4 Co. 78. to a select Number) so the King might make such Constitution as they themselves might have done without him, but per Holt, the new Charter had been void if the Corporation had refused it; but when they except and put it in Execution, then 'tis good: Here the Commonalty had Notice, and agreed to chuse but one Sheriff, and the Election of the other by the Mayor, Aldermen, and Common-council, shews prima facie, that they accepted it, else the Defendant might have said they did not accept it; but now 'tis so admitted.

King's Charter.

2. The Defendant hath not pleaded a sufficient Excuse; it was agreed by all the three Justices, that upon this Pleading he cannot have Advantage of the new Statute; for he ought to have pleaded it at first, being a private Statute, and not as here by Way of Rejoinder, which makes a Departure from the Bar; but Holt and Eyres said, they would not now deliver any Opinion, whether the new Statute would have avail'd him if well pleaded: However, it is plain the Corporation-Act did not intend any Advantage to Dissenters, it makes the Election void quoad their holding the Office, but not quoad their Punishment. Every Subject is bound by Law to contribute to the Administration of the Government, and the King hath a natural Interest in every one of them for that Purpose, therefore he may restrain to go beyond Sea. Mo. 111. 'tis equal as if one were held by Tenure to do such Services as shall be required, if a Man not dignify'd hold

Departure.

hold by Grand Serjeanty to do a Service at the Coronation, the Meanels of his Quality shall not excuse him, but he must make an honourable Deputy. Inst. 107. So an Abbot, Tenant by Knight's Service must find a Man, for the Service must be perform'd. Inst. 99. b. A fortiori, a Disability which a Man lieth under by his own Default shall not avail him: Receiving the Sacrament being made a political Tesse, every Man is bound to qualify himself or incur the Punishment; the Office of Sheriff is a Royal Office. 3 Leon. 33. Savil 43. 9 Co. 46. b. Every one is obliged by the Rubrick and Act of Parliament to receive the Sacrament three Times a-year; one Fault cannot excuse another, nor is a Man allow'd to disable himself. (Note, Holt said it had been more proper to have made By-Laws among themselves, and to have brought Actions upon them). But it was adjudged for the King: And afterwards the City of Norwich obtain'd a Writ under the Great Seal of England, to enable them to supply the Vacancy by a new Election. Quod Nota.

## *Rex versus* Owen.

UPon a Mandamus to restore Owen to the Office of Clerk of the Peace of Kent, setting forth, that he was duly nominated by the Earl of Winchelsea, Custos Rotulorum; and upon the Return the Justices set forth the late Act of Parliament, 1 W. & M. that the Custos should appoint the Clerk of the Peace prout per l'Act, that the Earl of Winchelsea, Custos Rotulorum, appointed Owen during Pleasure, and then the Earl died, and the Lord Sidney was appointed Custos, who named Sanders to be Clerk of the Peace, and therefore they could not restore Owen; and it was adjudged a good Return, for the late Statute gives the Custos a particular Power to appoint the Person, Continuance, and Manner of holding the Office; and the Word (only) in the Act excludes the Power to name in any other Manner, therefore the Appointment during Pleasure being less than his Authority, and not warranted by it, was void.

## Aston's *Case*.

AN Indictment against a Justice of the Peace for not binding over Offenders, charged upon Oath with a Riot, was quash'd; for that such Indictment lieth not. Indictment against a Justice of Peace.

Roberts

## Roberts *and* Newbold.

Award, Guardian bound, that an Infant should submit.

DEbt upon a Bond for Performance of an Award; it was objected, that one of the Parties to the Submission was an Infant, who cannot by Law submit; and if no Submission no Award, and Shower cited March 141. Rudston and Yates. but the Court held, that tho' an Infant cannot submit, yet his Guardian may submit for him and bind himself, that the Infant shall perform the Award, as was done in this Case: And Eyres sen. J. said, that there are several Cases, that the Submission of an Infant is not void, but voidable, contra March 141.

## Tully *& Ux' versus* Marwood.

Error to reverse a Fine for Infancy, a Sci Fa. to the Tertenants.

ERror to reverse a Fine for Infancy. A Scire Facias was awarded against the Conusees, and the Sheriff return'd Scire Feci, and they made Default, nevertheless the Court would not grant Judgment without a Scire Facias to the Tertenants; for tho' not necessary in Point of Law, yet it is always required by the Course of the Court, and was so ruled in the Case of the Lord Pembroke; and Holt Ch. J. said, this Course came up since the Statute of Uses, for now the Conusees are but Instruments.

## Atkin *and* Urton.

Mortgagor Covenants for further Assurance, i. e. Absolute.

A Mortgagor Covenants after Default to make further Assurance, for the absolute sure Making, &c. Holt Ch. J. said, the further Assurance must be absolute, because the Estate is to be absolute; but this shall not oblige him to release his Equity of Redemption; and he said a Warranty is not to be inserted in such further Assurance.

Indictment Capt. ad Sess. tent. per Adjournament, well.

Shower moved to quash an Indictment, the Caption being ad Session' tent' per Adjournament', not saying when they began, nor whence adjourned. Sed non all', for this is the common Form, and well enough.

Divers Judgments pleaded, one is faulty, 'tis ill for the Whole.

Ante .

Holt Ch. J. said, If an Executor pleads diverse Judgments, and there is a Default in one, 'tis naught for the Whole. A Judgment binds the Executor because of the Goods, but doth not bind the Goods. There are some Cases, that an Executor may plead a Judgment upon a Debt by simple Contract in his own Time against a Debt upon a Bond; but I never took that to be Law.

## Kirkham *and* Wheeler.

DEbt qui tam against an Attorney of the Common Pleas, for exercising the Office of Under-sheriff longer than one Year: He pleads his Privilege, and it was allow'd; the Court said it would be otherwise in Case of an Information, but Debt qui tam is perfectly the Suit of the Party, tho' the Attorney-General may proceed for the King, if the Party release or become nonsuit. Note, He was admitted to plead to the Jurisdiction without making Defence; contra 1 Inst. 127. b.

Plea of Privilege.

No Defence.

## Wild *versus* Villers.

EJeatment in Court of Ely removed by Certiorari. Serjeant Wright demands Conusance for the Bishop of Ely, being a Royal Franchise, and Stone had a Warrant of Attorney for that Purpose: Holt said, there must be a new Declaration in this Court, and then, after the Defendant's Appearance, the Conusance is to be demanded, for the Defendant may counterplead the Conusance; but if he will not appear, you have a Procedendo; we must have a Roll made of it, that the Court be possessed, then we appoint a Day upon the Roll; and if you do not hold your next Assise you lose your Conusance, 'tis a Continuance [Discontinuance] of your Plea. Day was given to shew Cause why there should not be a Procedendo.

Franchises. Proceedings on demanding Conusance.

## Monger's *Case*.

THE Court denied to grant a Certiorari to the Old Baily, saying, they never do it, because the Judges sit there. Yet Quære, how this Court can legally take Conusance of Proceedings there without a Certiorari, the Old Baily being another Court, and possess'd of their own Records till remov'd by Certiorari, &c.

No Certiorari to the Old Baily.

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# Termino Paſchæ.

## Anno 7 Willielmi III. Regis, in B. R.

### Wickſly & al' verſus Strut.

Bail in the Admiralty ſuable there.

PER Holt Ch. J. Where one gives Bail in the Admiralty, the Bail may be ſued there upon this Recognizance in their own Court; contra 4 Inſt. 135. (and a Prohibition deny'd).

### Proberts *and* Edmunds.

Death of the Plaintiff before Verdict. Vide the late Statute.

ERror in Fact aſſigned, that the Plaintiff died before the Judgment, but the Judgment was affirmed niſi, &c. And Holt ſaid, he was not well ſatisfied with the Caſe of Dove and Darcen. Sid. 93. for there ſhould be a Scire Facias againſt the Executors or Adminiſtrators; and the Truth will appear upon the Sheriff's Return.

### Walton *and* Spark.

Poor's Settlements. Bond to ſave a Pariſh harmleſs, as to a Man, his Wife and Children; one of the Children marries and has Children, and then becomes Poor, &c.

DEbt upon a Bond, conditioned to ſave a Pariſh harmleſs from John Goſlin, his Wife and Children; the Defendant pleaded, that the Pariſh was not damnify'd, &c. The Plaintiff replies, that Joſeph Goſlin (Son of the ſaid John) became Poor, and that two Juſtices made an Order, that the Pariſh ſhould pay 2 s. per Week for the Maintenance of Joſeph, his Wife and Children, and by Virtue thereof the Overſeer, 14 Septemb. &c.

paid 2s. for one Week then past, and that 8 d. Part thereof, was for the Maintenance of Joseph. The Defendant rejoins, that Joseph was able to maintain himself absq; hoc, that 8 d. was paid for the Maintenance of Joseph, whereupon the Plaintiff demurs. And it was resolved by the Court,

1. That this Traverse was immaterial; for a Traverse should be always of such Part, as, if found for the Defendant, would destroy the Plaintiff's Action. Vaugh. 8. Here the Wife and Children of Joseph are Part of his Family, and Relief for them is Relief for him, for he is bound by the Laws of God and Nature to provide for them, and therefore he might become impotent by the Charge of his Children: If Joseph were dead, the Wife and Children are not within the Bond. Holt Ch. J. said, that if a Man marries a Grandmother with whom he hath any Estate, and she dies, he must maintain the Grandchildren, tho' the Relation be determin'd. Immaterial Traverse. Note. Dalt. J. 156. Children extends to Grandchildren, and Parents to Grandfather in Law.

Bulstr. Gerard's Case, and the Word Children in the Statute is extended to Grandchildren, because there is the same natural Affection; but not so here where the Circumstances of the Man were the Inducement, but it may include Children born afterwards.

2. The Traverse is too narrow, for if 6 d. had been for Joseph, or 1 d. the Bond is forfeited. Dyer 115. Inst. 282. 1 Saund. 269. Osborn and Rogers, and 312. Rex *versus* Kilderby. 1 Bulst. 116. Yelv. 225. Newhall *versus* Barnard. And Holt noted the Difference between the Case of Oaks. Inst. 282. And the Case of Osborn and Rogers, for in the latter the Plaintiff was to recover Damages pro tanto, but in the former, the finding for one Oak goes to the whole Forfeiture of the Bond, and so would any lesser Sum have done here; but he that pleads an Order to allow 8 d. cannot give in Evidence an Order to allow a less Sum, for it is an entire Thing, and therefore Holt said the Order should be traversed, as set forth, and not like the Case of the Oaks, where Waste or not Waste is the Substance. Traverse too narrow. Order to be traversed as set forth.

And whereas it was objected, that the Justices could not make such Order for Payment of a certain Sum weekly; the Court seem'd to be of the same Opinion, but said they do it all over England, & Communis Error facit jus; but however, that is not now the Question, for if the Parish paid it, it is a good Breach; and then the Breach being well assigned, the Averment of the 8 d. (which led the Defendant out of the Way) is Surplusage and Nugation. Justices Order.

Judicium pro Quer'.

## *Sir* Philip Egerton's *Caſe.*

Nonſuit on Trial, by Proviſo.

HE brought an Action againſt the Collector of the King's Tax, who brought it down to Trial by Proviſo, and there the Plaintiff was Nonſuit; and now the Defendant moved for Coſts in triplo. Note, The Judge could not certify in this Caſe, that the Defendant was ſued as Collector, becauſe the Plaintiff was Nonſuit before Evidence.

Holt Ch. J. It muſt appear then by Affidavits, and there muſt be a ſpecial Entry; quia ſuper exam' apparet Cur', &c. Quære, If it did not appear by the Record.

## Williams *and* Cary.

Caſe by Executor againſt a Sheriff for falſe Return, in undervaluing the Goods, &c.

CAſe for an Executor againſt the Sheriff for a falſe Return, viz. that he had levied 20 l. and had Goods in his Hands to the Value of 40 l. whereas the Goods were in truth worth 81 l. Verdict pro Quer'. And now upon a Motion in Arreſt of Judgment.

Northy objected, that the Action lies not for an Executor by the Stat. 4 E. 3. de bonis Aſportatis. 'Tis true, an Executor may have an Ejectione firmæ for Recovery of a Term; ſo Raviſhment de Gard, and Quare Impedit, but here 'tis a meer perſonal Tort and nothing taken from the Teſtator; and he cited 1 Roll. 913. Spurſtow and Prince.

Herring contra, That the Stat. de bonis Aſportatis is always extended by Equity. 5 Co. 27. Ruſſel's Caſe. An Executor brought Trover. Sid. 88. An Executor may bring Debt upon the Stat. 2 E. 6. for not ſetting out of Tithes per Twiſden. Hob. 207. Speak *verſus* Richards, that where the Sheriff levies Money upon a Fi. Fa. the Plaintiff hath ſuch an Intereſt therein, that he may releaſe to the Sheriff before the Return of the Writ. 2 Cro. 73. Ayr *verſus* Ayden. 2 Saund. 47. Wilbraham *verſus* Snow, that the Sheriff may bring Trover of Goods taken in Execution. He likewiſe cited the Caſe of Perkinſon *verſus* Gilford. 1 Cro. 539. Jones 430. S. C. That an Action of Debt lies againſt the Executors of a Sheriff for Money levied upon a Fi. Fa. being a Duty veſted, for the firſt Defendant was diſcharged of ſo much as was levied by the Sheriff, and therefore the Sheriff's Executors muſt anſwer for it. In the Caſe of Maſon *verſus* Dixon. Jones 173. and Latch. 167. The Court was divided, whether an Executor could maintain an Action againſt the Sheriff for an Eſcape upon meſne Proceſs in the Time of the Teſtator, but Jones there inclined, that it would lie in Caſe of Execution.

By Executors againſt a Sheriff for Eſcape.

Holt Ch. J. Indeed 'tis easier to maintain an Action against an Executor than for an Executor, but it was resolved in the Case of Perkinson and Gilford, that the bare Levying of Money by the Sheriff, without returning the Writ, intitles the Party to his Action of Debt; now the Giving an Action of Debt where Case lay before, doth not intitle the Executor more than before; so the Question is only, whether Case would lie upon the Stat. de bonis Asportatis: There is a plain Diversity between the Case upon mesne Process, which is meerly personal, and doth not go to the Right, and this Case upon Execution, which affects the Property of the whole Debt. When Goods are taken upon a Fi. Fa. the Property is divested out of the Defendant; but if the Sheriff returns nulla bona, both Parties are concluded and estopped, and thereby the Property is restored to the Defendant; and as an Action would lie in that Case, so here in the principal Case, it being found by Verdict, that the Goods were worth 41 l. over and above the 40 l. 'tis plain he return'd quoad resid. nulla bona. And I conceive, that the Executor may maintain this Action, for it is within the Equity and Reason of the Statute, and almost within the Words, and 'tis stronger than where the Body is taken.

Judicium pro Quer', nisi.

*Nota*, It must be intended in this Case, that it was proved to the Jury, that the Sheriff acted corruptly, and might then have had more Money for the Goods, else (it seemeth) the Action lieth not.

## St. John *and* Camphell. Vide ante.

SIR Barth. Shower moved to amend the Demurrer to the Demurrer.

Demurrer to a Demurrer a Discontinuance.

Holt Ch. J. That were by amending the Record to bring a Cause into Court, which is now out of Court, for it is a Discontinuance. Then Sir Barth. Shower pray'd a Repleader.

No Repleader after a Discontinuance.

Holt. That cannot be after a Discontinuance. (Northy, 'Tis all upon Record).

Sir Barth. Shower. I hope we may discontinue without Costs.

Holt. There is no Costs upon a Discontinuance in Law; otherwise where you discontinue by Leave of the Court.

No Costs upon a Discontinuance in Law; contra, if by Leave.

## *Rex verſus* Chaplin.

Juſtices can't turn over an Apprentice. Poſt.

JUſtices made an Order, that an Apprentice (whoſe Maſter was dead) ſhould ſerve the Remainder of his Time with his Maſter's Widow's ſecond Husband: And upon Motion the Order was quaſhed, for the Juſtices have nothing to do about turning over an Apprentice; and tho' he apply'd to them, that could not give them a Juriſdiction.

## Wood *and* Hill.

Spiritual Court. Prohibition as to depriving a School-maſter.

THere was a Libel in the Spiritual Court againſt Wood, as School-maſter and Rector: And a Prohibition was granted as to the Examination of any Matters relating to the Office of School-maſter, for when the Biſhop hath once granted his Licence, he hath executed his Authority (eſpecially in this Caſe where the School is of the Foundation of Queen Elizabeth, and the King's Chancellor is Viſitor) but they may proceed upon the Article againſt him, for being drunk, &c. which is contra bonos mores.

## *Rex verſus The Mayor, Commonalty, and Burgeſſes of* Colcheſter.

Mandamus to a Corporation return'd, but neither ſign'd nor ſealed.

Ante .

THey having made a Return to a Mandamus, neither ſigned nor under the common Seal. Coniers moved, that it might be ſigned, and cited Mo. 548. Scrogs *verſus* Spencer.

Holt ſaid, It is uſual for the Mayor to ſign it (tho' not legally neceſſary) therefore let him ſign it. Nota, Per moy, the Caſe in Mo. only requires the Name of the Office, but neither Chriſtian nor Surname to be ſubſcribed.

## Hains *and* Hughes.

In Treſpaſs, 2 d. Damages, yet full Coſts ſans Judges Certificate.

Poſt. .

TRespaſs for entring his Cloſe and cutting his Cable, whereby he loſt the Uſe of his Boat; 2 d. Damages were given by the Jury; and now it was moved, that there might be no more Coſts. But Holt ſaid, Forasmuch as the Judge doth not certify upon 43 Eliz. c. 6. that it was a frivolous Action; and it is not within the new Statute (ſemble que il intend 22 & 23 Car. 2. 9.) the Plaintiff muſt have his Coſts; but it were otherwiſe if the Action were for Breaking the Cloſe and Cutting his Rails, for they are fix'd to the Freehold. Batteries are excepted

in 43 Eliz. and therefore it seemeth the latter Statute was made to supply it; but it must be intended of such personal Actions, where the Judge can make such Certificate upon the Nature of the Thing.

## *Rex versus The Parish of* Trinity *in* Exeter.

## Belvin's *Case.*

Overseers of St. George's are to remove, and they of Trinity to receive, and an Order was directed to both Parishes to remove and receive, and therefore quashed, for it is entire: And tho' Prat said, here is a good Judgment, that they were last legally settled in Trinity Parish, yet the Court answered, that was but the Opinion of the Justices, and the Foundation of their Judgment, which is, that he be removed, &c.

Poor's Settlements.

An Overseer was indicted, quod cum such an Order was made he had disobey'd it, and now Grove moved to quash it, for the Incertainty of the quod cum; but Holt said it was well enough by Way of Recital, he confessed he had known an Order quash'd for that Exception, but 'twas always against his Opinion.

Overseers indicted for disobeying an Order, & quod cum, well. Ante .

## Lampton *and* Colingwood.

Error in Fact coram vobis upon a Judgment in Scire Facias against the Bail; the Scire Facias suggested, that Lampton survived, whereas in Fact the other survived: But per Cur', the Writ of Error lieth not in this Case, for the Merits of the Cause or Foundation of the Suit cannot be assigned for Error in Fact, but only Mistakes in Fact, pendente placito, which might hinder the Proceedings, as where an Infant appears by Attorney: But this being the very Gist of the Action, the Party can be relieved only by Audita Querela. And tho' Northy urged, that a Writ of Error had been allow'd for the Bail, where there was no Ca. Sa. against the Principal; and for that cited 4 Leon. pl. 76. Hunt and Gonnel, and pl. 99. 3 Cro. 730, 733. Yet Holt said, he did not approve those Cases, but preferred the latter Authority of Barcock *versus* Thompson. Sty. 281, 288, 323. Roll. 309. S.C. And afterwards the Plaintiff brought his Audita Querela in the principal Case; and tho' he was an Executor, yet because a Devastavit was return'd, he was held to Special Bail.

The Merits or Foundation of the Suit not assignable for Error in Fact, but must be reliev'd by Audita Querela.

Executor to give Special Bail where a Devastavit return'd. Ante 206

Per Holt. The Attorney-General cannot ex Officio, enter a Non pros. to an Information without a Warrant for that Purpose from the Crown.

No Non pros. to an Information sans Warrant from the Crown.

*Rex*

## *Rex verſus* Lammas.

Sheriff levies Money before levied by the Conſtable.

NOrthy moved, that Juſtices of the Peace made Warrant to a Conſtable to levy a Forfeiture upon the late Statute about Low-Wines, of the Defendant's Goods; the Money was levied by the Conſtable, and afterwards the Conviction was removed hither and affirmed, and thereupon this Court iſſued Proceſs to the Sheriff, who now threatens to levy it again. Holt. What can we do? I think you may plead it, tho' there be no Scire Facias, for there can be no Audita Querela againſt the King. Then Northy moved to quaſh the Conviction, being after Non Cul' pleaded and returned Engliſh. Sed non all', for 'tis a ſpecial Authority, &c. Adjournatur.

No Audita Querela againſt the King. Conviction return'd in Engliſh.

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# Term. Sanctæ Trin.

## Anno 7 Willielmi III. Regis, in B. R.

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## Smith *and* Butler *& Ux'*.

Time for Appearance, and Bail.

HOlt Ch. J. Where Appearance of Bail is not put in according to the Paper Act in eight Days, we muſt examine the Matter in Court and make a Record, and give Judgment: 'Tis a Queſtion, whether common Bail muſt be filed within eight Days after the Writ re-



turned,

turned, or after 'tis returnable; we'll hear the Defendant, but if he will not appear, we'll proceed by his Default.

Cheshire moved for an Attachment against Broad and others, for Breaking into a Room with Violence, &c. to arrest one James Barry Esq; who then lay ill of a Fever.

Bailiffs may open inner Doors to Arrest, not outer.

Holt. It appears the Bailiff found the outer Door open, and then he may open the inner Door; and tho' the Defendant was ill, I do not know that gives him any Protection. (Quære.)

The Mayor and Commonalty of New Sarum failed to perform an Award, which was made a Rule of Court by Consent, &c. and Gold moved for some Remedy against the Corporation. Holt Ch. J. If the Breach could be fix'd upon any particular Person, we'll attach him, as where a Mandamus is directed to a Corporation, and any particular Person be in Fault, we grant an Attachment, &c.

On Mandamus to a Corporation, the particular Defaulters attach'd.

## St. Leger *and* Pope.

4 Mod. 409. 5 Mod. 1, 4. Salk. 344, 484, 487.

Error of a Judgment in C. B. in Debt for 107 l. 10 s. in the Debet & Detinet, the Plaintiff declared, that 8 July, 91. the Plaintiff and Defendant were Playing at Back-Gammon, and a dispute arose, whether one was bound to play the Man he touch'd? whereupon the Plaintiff and Defendant laid a Wager of 100 Guineas, and whereas the Defendant by Writing sealed did acknowledge the said Wager, and bound himself to pay 100 Guineas to the Plaintiff, if the Groom-Porter should give Judgment against him, and says, the Groom-Porter gave his Judgment against the Defendant, in casu illo, &c. The Defendant pleaded the Statute against excessive Gaming; whereupon the Plaintiff demurred in C. B. and Judgment for him.

Debt on a Wager.

Stat. of Gaming plead, &c.

Holt Ch. J. said, that Guineas were coin'd at the King's Mint for 20 s. for there was a former Coin called an Unit, which was advanc'd by Proclamation to 1 l. 1 s. 4 d. and the Guinea was coin'd at 1 s. 4 d. less. But Eyres sen. J. said, that he did not understand, that any Value was put upon them, there having been no Proclamation; 'tis but a kind of Medal Coin, and the common Usage only gives the Value.

Post. See 2 Salk. 446.

Holt said, He knew not how to understand nummos, called Guineas, it had been better Pecias auri, vocat. Guineas. But it was agreed by all, that taking them as a foreign or medal Coin, having no certain legal Value, then the Plaintiff hath his Election, whether he will declare in the Detinet for the Guineas in Specie, or in the Debet & Detinet for the Value in English Money; but Northy urged, and the Court agreed, that in that Case there must be a Default in Payment of the foreign or medal Coin

How to declare for Guineas in Debt, or Case.

Rastal 158. b. Yelv. 135.

Coin in Specie, before the Party can bring Debt in the Debet & Detinet for the Value, for which Purpose he cited Popham 28. 1 Cro. 515. Bains and Brighton. And Holt held the Declaration ill for another Reason, for the Deed (Declaration) says there was a Wager, and that it was put into Writing by the Names A. B. and C. and upon that Writing it was submitted to the Groom Porter; now the Deed leading and referring to that, the Plaintiff ought to have set forth the Purport of that in his Case, tho' it need not be produced; 'tis true, upon an Assumpsit to do a Thing contained in a Writing, I may charge a Man for not doing the Thing it self, for 'tis all by Parol; but here 'tis by Deed under Seal, which refers to the Writing, else 'tis a different Case. So there is a Difference between an Agreement between A. and B. under their Hands, to convey Lands in D. and a Covenant to perform what the Agreement contained in a certain Writing, which is for conveying Lands in D. for there Covenant lieth not for not conveying the Lands, for that is not the same Covenant. Here the Defendant by his Deed acknowledgeth a Wager, but non constat, that 'tis this Wager; so there Wants an Averment, and that is made a Part of the Deed, which should have come in by Way of Averment as a Thing extrinsecal, and for these Reasons the Judgment was reversed.

Deed referring to a Writing, to be averr'd and made Part of the Plea.

Averment.

It was agreed, that if the Case was within the Statute against Gaming, the Defendant might aver against his own Deed. 2 Cro. 253. 2 Sid. 88.

Per Holt Ch. J. A Prohibition lies to the Admiralty, even in the Case of a Suit for Mariner's Wages in Point of Law; but the Court usually indulgeth the Seamen.

Prohibition to the Admiralty on Suit for Seamens Wages. Vide ante.

'Tis usual, when an Inquisition of a forcible Entry is quashed, to grant a Re-restitution; but the Court is not bound to do it ex merito justitiæ.

Restitution Forcible Entries discretionary.

## *Rex versus* Halford.

H. Was indicted, that he being a fit Person, &c. was tali die elected to be Constable, and afterwards, &c. had Notice, but from that Day to the Time of the Indictment non suscepit, &c. sed totaliter neglexit, &c.

Indictment for neglecting to take the Office of Constable, quash'd for Want of Summons.

Pemberton moved to quash the Indictment, for that he was not summoned to appear before a Justice of the Peace to take the Oath, &c. and cited Brig's Case. Allen 78.

Holt Ch. J. By the new Stat. 13 & 14 Car. Two Justices of the Peace may make a Constable in Default of the Leet; but then they should issue their Warrant, signifying that he was elected

Two Justices may make a Constable on Default of the Leet.

Constable, and requiring him to take the Oaths, &c. Quash'd, nisi.

## *By the Information of Mr.* Danvers.

A Case hapned, when I was absent, that a Defendant being committed to the Marshalsea for Want of Bail, upon mesne Process, and afterwards the Plaintiff having obtained Judgment against him, he continued in Prison (the Plaintiff not praying him to be in Execution) the Defendant brought a Writ of Error; And two Terms being passed pending the Writ of Error, the Defendant caused a Stranger to go as an Attorney to Thacker the Clerk of the Bails, and to file Common Bail, and procures Thacker's Certificate, which being brought to the Marshal, he discharged him of Course, for that he was not charged in Execution within two Terms, and so the Defendant got loose: The Defendant's Attorney was examined, who declared he did not file the Common Bail, and it appeared a strange Name was entred with the Clerk of the Bails. Holt Ch. J. at first thought, that the Marshal should not have discharged him without a Supersedeas, and to that Opinion Aston Secondary seemed to incline; but Sir Sam. Astry said, the constant Practice was for the Marshal to discharge the Prisoner upon such Certificate of Common Bail (he not being charged in Execution within two Terms). Holt said it would be necessary to make a new Rule, for otherwise any Prisoner after Judgment might bring a Writ of Error, and after two Terms file Common Bail, and procure such Certificate (the Clerk of the Bails not knowing of the Writ of Error) and so be discharged, and said he would consider of it, that the Practice might be altered.

A Prisoner on mesne Process, after Judgment, for Want of Bail, (the Plaintiff not praying him in Execution) brings Error, and by a Trick gets Common Bail filed and certified, and is thereupon discharg'd, as not being charged in Execution within two Terms.

It was said in this Case, that if a Defendant be committed upon mesne Process; after Judgment, the Plaintiff ought to ask the Marshal, whether he hath him in Custody; otherwise it is, where after Judgment the Defendant renders himself in discharge of his Bail; for there it shall be intended, that he is in Custody, and if he be not, it is an Escape in Judgment of Law, even before the Plaintiff hath pray'd him in Execution.

Diversity where one is committed on mesne Process, and where after Judgment he renders in Discharge of his Bail.

## Ward *and* Everard.

REplevin. The Defendant made Conusance, that Sir Robert Car granted an Annuity of 100 l. per Annum to five Persons, habend. the said Annuity of 100 l. to them and their Assigns respectively, viz. to each of them 20 l. yearly, and if one die, then to be paid equally to the other four; and so if another

Conusance, &c. in Replevin.

 die,

Tenants in Common, &c.

die, then to the Three; and when it comes to Two, then no Survivor to be between them; and if the Annuity should be unpaid for ten Days, then to be lawful for them respectively to enter and distrain; and sets forth, that the Five being so severally seised, three died, and for the Arrears in the Lives of the Three, and after their Death, he made Conusance, &c. The Plaintiff in his Replication sets forth an Act of Parliament, that all Things done by Sir Robert Car after the Year 1639. should be void, and that this was so, upon which Issue was taken, and found for the Avowant upon a Trial at Bar; yet now Judgment was arrested, and the Defendant ordered to replead and avow de novo, for,

Habendum or viz makes a Severance.

1. It was adjudged, that the five Grantees were Tenants in Common; and tho' the Habend. be first of the first of the whole 100 l. yet the subsequent viz. distributes it. And Holt said, he knew not why a Videlicet might not make a Severance as well as the Habendum, but here 'tis in the Habend. the Case of Stutely and Butler in Hob. is not determined, 'tis but Lord Hobart's own Argument, and the very Point of the viz. is otherwise reported in Moore 880.

2. The Appointment of the Survivorship doth not inforce a Jointenancy, for this is a Rent de novo, which the Grantor may make to rise and fall as he pleaseth, for every Variation from the ordinary Rules operates as a new Grant.

Conusance good for Part.

3. That the Arrears do not survive, but must go to the Executors of the Party deceas'd, and therefore the Avowry is ill; and likewise because it is joint for the Arrears in their own Time; and tho' a Conusance may be good for Part, Hob. 133. Howel *versus* Sambach, yet here, they being Tenants in Common from the Beginning, the Whole is bad.

*Nota*, Justice *Giles Eyres* died 2 *Junii*, 1695.

## Read *and* Waldron.

Infant suing by Prochein Amie, and no Entrance of the Admission, not Error.

ERror of a Judgment after a Verdict in the Common Pleas.

Ward assigned for Error, that whereas the Plaintiff is an Infant, and sues by Prochein Amie, there is no Entry of the Admission of the Prochein Amie, 2 Cro. 640. Simpson *versus* Jackson, Palm. 269. S. C. 2 Inst. 261. and, for the Form of such Entries, he cited Hern 504. Aston 413. Fitz. Nat. Br. 39.

Ante .

Holt Ch. J. at first doubted, whether the Admission be necessary in Point of Law, tho' 'tis a Caution of the Court. The Court seldom admits a Guardian, unless the Infant be there in Person, but they may do it, and it hath been done: At another

Day he cited 1 Cro. 86. Yong *versus* Yong. (Vide Het. 52. S. C. Hutt. 92. S. C. Jones 177. S. C.) where an Amendment was made in the like Case after Verdict: To which Ward answered, that this could not be supply'd by Evidence, therefore not aided by the Common Law, nor yet by the Statute, because the Record is imperfect. 1 Roll. 796. pl. 29. The Words any other Matter or Thing in Stat. Stat. Car. 2. refers only to Faults of the Clerk; but this is not a Mis-entry, but a total Omission, and not amendable. 1 Roll. 208.

Sir S. Astry said. A Guardian is always admitted before a Judge, and that Admission carried to the Clerk of the Rules, who enters the Rule; but the Court usually examines a Prochein Amie. Then Holt said, if there be a Rule of Court in C. B. 'tis enough, their Rules are entred in Parchment-Rolls.

Guardian, and Prochein Amie, how admitted.

Nota, A Precedent was read, Hill. 41 El. Rot. 417. where a special Certiorari issued to certify the Court of the Practice in C. B. concerning Admission of Guardians and Prochein Amies; and 'twas certify'd, that they used to enter such Admissions upon Record (this is said to be in English, in Hern) whereupon the Court would now be informed of the Practice since; and it was certify'd (as it seemeth) that the Admission was entred on the Issue-Roll, which Ward said would not do, and he pray'd a Certiorari for the Original, and said a Certiorari had been granted to reverse a Judgment in the Case of Web and Penton. But Holt said, after in nullo est erratum pleaded, a Certiorari is grantable only to affirm a Judgment, and not to reverse it, for 'tis ex gratia Curiæ, and the Court will not make an Error; and tho' some Cases may be found to the contrary, yet he said the Law had been so settled for all the Time he attended at the Bar.

Practice of C. B certified to B. R.

Certiorari after in nullo est erratum pleaded is only to affirm, and not to reverse a Judgment.

Then Ward objected, that in the Record of Nisi prius the Parties are said to appear per Attornat. suos infra Content', whereas in the other Record the Infant appears per Prochien Amie.

Northy said, they appear right in Bank, and 'tis but a Discontinuance. (2 Cro. 250. Car and Barker. Yelv. 97. Harrington *versus* Lansdown) which is cured per Stat. H. 8. after Verdict.

But per Cur', 'tis a void Appearance of the Plaintiff, and the Defendant's Appearance only is sufficient; 'tis true, if the Defendant had demanded the Plaintiff, he might have been Nonsuit for not coming at first; but otherwise the Court doth not call him until the Jury are about to give their Verdict, and not then neither but only for his Advantage, for the Judges of Nisi prius have Authority to take the Verdict without demanding the Plaintiff, and there is no Entry of his being demanded, nor is it Error if he be not.

Of Calling the Plaintiff for a Nonsuit, either by the Defendant or Court.

Affirmat. Judicium Nisi, &c.

Plea amounting to the General Issue.

Per Holt. A Plea which amounts to the General Issue is not always good Cause of Demurrer, as if it confesseth and avoideth. In Debt for Rent a Release is a good Plea, yet it might be given in Evidence upon the General Issue, & sic de simil'.

Hue and Cry, &c. Venire Facias.

In an Action upon the Statute of Hue and Cry; the Venire facias must be de prox' Hundred'; and if the Action be laid in one Mill, yet it may be proved within any other Mill in the same Hundred.

## Strike *and* Dikes.

Judgment against a Feme Covert.

A Feme Covert brings a Writ of Error of a Judgment against herself during Coverture, and the Judgment was affirmed, because she might have pleaded it to the Action; otherwise if the Husband had joined in the Writ of Error.

Trustee not to be join'd with the Tenant as Defendants in Ejectment, sans Consent.

Serjeant Darnel moved, that the Duke of Devonshire might be made Defendant in Ejectment to be joined with the Tenant in Possession, but the Court would not grant it, unless the Duke himself would desire it, for that it appeared he was but a Trustee, and the Defendant may shew a Title in any one.

## Coxal *versus Manucaptors de* Colcroft.

Habeas Corpus. The Causes return'd without the Body, supply'd by the Defendant's Appearance.

Upon a Habeas Corpus cum causa, the Cause was returned (without the Body) viz. an Action upon the Case to the Damage of 100l. the Defendant appears and gives Bail upon the Habeas Corpus, the Plaintiff delivers two Declarations, one in Trover, the other an Assumpsit (there having been no Declaration below) and now, after Judgment in the Trover and Scire Facias against the Bail, it was ordered, that Proceedings should stay upon the Scire Facias against the Bail, for the Uncertainty, tho' the Plaintiff made Oath that he intended to proceed on the Trover below. Nota, Holt said, the Return of an Habeas Corpus usually concludes, quod hæc est causa captionis & detentionis, &c. where the Defendant is out upon Bail, and tho' here the Cause is returned without the Body, yet that is supply'd by the Defendant's Appearance, and Bail entred here.

## Long *and* Kelsal.

PER Cur'. Where the Defendant in Replevin pleads in Abatement of the Writ, it is necessary for him to make Avowry per returno habend'; for otherwise, or if such Avowry be insufficient, tho' the Writ be abated, yet he shall not have Return.

On Plea in Abatement in Replevin, an Avowry must be, to have a Retur- no habendo.

## *Sir* John Darlston *versus* Hianson.

THE Plaintiff declares against a Carrier upon the Custom of the Realm, for Loss of Goods by his Negligence, and likewise lays a Trover in the same Declaration: And now Cheshire moved in Arrest of Judgment, that this Action of the Case and Trover may not be joined in one Declaration, and for that he rely'd upon the Case of Matthews and Hopkins. Sid. 244.

Case, and Trover join'd against a Carrier for Loss of Goods.

Holt at first seem'd very clear, that they might be joined, because the same Plea of Non cul. goes to the Whole; and Northy said, It is every Days Practice.

Cheshire said, It is no certain Rule, that where the same Plea goes to the Whole, Actions of several Natures may be joined. Hob. 249. Bird *versus* Snell. Ejectment and Battery were joined; and after a Verdict pro Quer. and intire Damages, as it seemeth by that Book, the Judgment was stayed: But as that Case is reported, 1 Brownl. 235. the Damages were several, and the Plaintiff released the Damages for the Battery, and had Judgment for the rest; but here the Damages are entire, for which Reason Holt then inclined to stay Judgment here; and at another Day he said, he had look'd upon his Notes of the Case of Matthews, which agreed with the Report in Sid. that Judgment was stayed for that very Reason, because they could not be joined, but he said, that he saw no Inconvenience on the other Hand, and that the Plaintiff ought not to be held too strait.

Joinder of Actions.

Darnel and Northy pro Quer. cited a Case Trin. 24 Car. 2. B. R. Owen or Bowen *versus* Lewis, where Trover and Action of the Case were joined; and upon Infancy pleaded per Cur. the Actions may be joined, tho' it might have been a Question upon Demurrer. 3 H. 4. 13. Debt and Detinue were joined. Bro. Joinder in Action 97. Sid. 223. Wright *versus* Berle. (But Holt said, that Report of that Case is no Authority at all.)

Holt said, that to an Action for a Neglect, they did not antiently plead not guilty, but answered specially to the Neglect; but the modern Plea of not guilty is well enough, because the

Neglect

Neglect seems to be an Affirmative. Debt upon a Bond, simple Contract, and for Rent, may be all joined in one Præcipe, tho' the Issues be several; but in an Action of the Case they are several in the Original, and tantamount, as if several Præcipe's, 'tis strange that Debt and Detinue should be joined, because they require several Pleas and several Issues; yet, upon the Whole, the Court seem'd to incline for the Plaintiff.

Sed adjournatur.

Special Assumpsit against a common Carrier.

Nota. Per Holt, One may turn an Action against a common Carrier into a Special Assumpsit, (which the Law implies) in respect of his Hire, viz. that in Consideration of a Sum to be paid he undertook to carry, &c.

## Broom *and* Pine.

Touts temps prist not pleadable after Imparlance. 2 Cro. 627.

INdebitatus Assumpsit, the Defendant imparls, and afterwards pleads a Tender & touts temps prist, in Bar of the Action.

Holt Ch. J. The Case in Dyer 300. is good Law: A Tender is not material in any Case but where there is a Penalty. In Debt upon a single Bill, or for Rent, the Plaintiff declares, that the Defendant hath not paid him licet sæpius requisitus, the Defendant may plead, that he was always ready, and still is ready, and pray Judgment of Damage, then the Plaintiff (if he will have Damage) must reply and shew a special Request.

Post Lutw. 227.

A special Request (en le Nar. come jeo intend) is, as Hob. saith, a Matter alledg'd out of Time, and need not be regarded.

Tender and Refusal, no Plea in Assumpsit. Ven. 322.

Touts temps prist after Imparlance is a Contradiction. Tender and Refusal is no Plea in Assumpsit, but the Defendant must pay the Plaintiff when he'l have it. Indeed a Tender may excuse from Damages for the Delay, but not as to the principal Damage.

Judgment pro Quer'.

## *Rex versus* Kemp.

K. Grants an Office of Freehold to commence in futuro, not good.

UPon a Scire Facias to repeal a Patent, the Case upon Demurrer appeared to be, that King Charles II. granted the Office of Searcher of the Port of Plimouth to John Martin, during the King's Pleasure; and afterwards by another Patent recites that Grant, and Grants the same Office to William Fryer, habend. from and immediately after the Death, Surrender, or Forfeiture of the Estate granted to Martin, for the Life of Fryer. Fryer surrenders his Patent; and, in Consideration of that Surrender, the King grants the same Office to Henry Kemp, from, and after the Death, Surrender, Forfeiture, or other Determination

nation of the Estate of Martin, for the Life of Henry Kemp, and from and after the Death, Surrender, or Forfeiture of Henry Kemp, and also of the Estate to Martin, or howsoever else it should come to the Hands or Disposition of the King, his Heirs or Successors, then to William Kemp.

And the main Question was, whether the Grant to Fryer was void, for if that were void, then Kemp's Grant (in Consideration of the Surrender of Fryer) would be void also; and it was argued on several Days by Pemberton and Gold, Serjeants, and Sir Barth. Shower, for the King, that Fryer's Patent was void, because an Estate of Freehold in the Office could not be granted to commence in futuro, especially in such a Manner, after the Death, Surrender, or Forfeiture of the Tenant at Will, whose Estate (as was urged) could not be surrendred or forfeited, and might be determined otherwise, without either Death, Surrender, or Forfeiture, so that the King was deceived in his Grant.

But it was argued by Levinz, Sir Thomas Powis, and Northy, for the Defendant, and resolved by the Court (after great Deliberation, the Cause having long depended) that the Grant to Fryer was good, tho' it be not to commence upon any Determination of Martin's Estate; but only by Death, Surrender, or Forfeiture, for Death is certain. An Estate at Will in Lands between common Persons is not surrenderable, for their needs no such Formality; but where the King Grants an Office at Will, 'tis not in the Power of the Grantee to determine his Estate without Surrender; 'tis not at the Will of both Parties; but if he refuseth to hold and execute his Office, he is fineable: So Hale Ch. J. of this Court surrendred that Office, which he held at Will, else the King must have declared his Pleasure under the Great Seal; so that it is proper enough, that it may commence after the Surrender of Martin; and as to the Word Forfeiture, the King's Tenant's at Will may forfeit, and it may be, the King will not determine his Will till it appears the Party hath committed a Forfeiture by Misdemeanour, and so found by Inquisition, and when that is returned of Record, 'tis a Forfeiture, Sir John Savage's Case; and there needs no Scire Facias. But in this Case, if the King had determined Martin's Estate otherwise, Fryer's Patent would have had no Effect, but that doth not make it void ab initio.

This Grant to Fryer for Life, to commence in futuro, is good; there is a Difference between Lands and Tenements, which are always demandable, and therefore the Freehold cannot expect; and the Case of an Office where the King's Grant in futuro doth not create a particular Estate in himself. Again, there is a Difference between an Office once granted out in Fee, whereof there is an Inheritance existing; and such as this, which is only capable of being so granted. The King cannot grant

Note.

grant the Office of Marshal of this Court to make the Freehold commence in futuro, for 'tis an Office of Inheritance; but every new Grant of such an Office, as was never granted in Fee, is a new Creation, like to the Case of a Rent de novo, which being the Grantor's own Creature, may commence upon what Contingency he pleaseth. 1 Co. 87. Action of the Case 5 E. 2. est cite. And in the Earl of Salop's Case, 9 Co. 47. it was not objected, that the Freehold was to commence in futuro. Note, Here it is not a Remainder, being granted at a different Time, nor is it a Reversion, because no Estate of Inheritance pre-existing. Lord Rutland's Case, 8 Co. 561. Wherefore the principal Case was adjudged for the Defendant.

## Walter *and* Rumbal.

Goods distrain'd for Rent in two Hundreds, yet not replevied in five Days.

TRover. It was found specially, that J. S. demised Lands, Part in the Hundred of K. in the County of W. and Part in the Hundred of A. in the County of S. and for Rent-arrear, a Distress taken, and Notice thereof given the same Day to the Plaintiff, according to the Statute, and the Plaintiff did not replevy in five Days; and after the five Days the Defendant with the Constable of the Hundred of K. in the Presence of the Constable of the Hundred of A. appraised the Goods and sold Part of them and took the rest away to sell cum opportune esset: And it was resolved,

Notice how to be.

1. That Notice to the Plaintiff (who was Owner of the Goods) secundum formam Statuti, was very good: In a Special Verdict, the Party hath Election to give Notice either to the Tenant or Owner; and Holt said, personal Notice answers the Meaning of the Statute, tho' it appoints local Notice, for personal Notice is better.

The Constable of either Hundred may Appraise and Sell.

2. The Constable of K. only may do it, for it is one continued Taking in both Hundreds, and one Appraisement and Sale satisfies the Act. Where Land lies in several Counties, and one Distress taken for an intire Rent of some Cattel in one County and some in the other, the Landlord may drive them altogether, and impound them in either County (notwithstanding the Statute of Marlbridge, that a Distress shall not be driven out of the County) and the Officer in either County is within the Meaning of the late Act of Parliament.

Nota. Per Holt, the Continuance (or Driving) in either County is a Taking there; for which he cited Latch. 60. and so it is within the Letter of this Act.

Officers of inferior Courts, not suable as present in Court.

An Officer of the Palace Court was sued by Bill there, as present in Court; and now, upon Error brought, Holt said, that

Way of Proceeding cannot be good in an inferior Court, tho' perhaps it be good in a County Palatine. Et Adjourn'.

An Attorney brought an Indebitatus Assumpsit for Fees, and doth not say in what Court the Fees were, and yet it was held good; for pro opere & labore hath been allow'd.

Suit for Attorney's Fees, not saying in what Court, good.

*Rex versus* Hains *Alderman of* Worcester. Ante .

UPon an Information against him, for executing his Office of Alderman and Justice, &c. not Taking the Oaths within three Months after his Election to be Alderman: He pleaded not guilty, and it was now to be try'd at the Bar; several of the Jury were challenged on both Sides, but no Cause was shewn, because a full Jury was left without Exception.

Information against an Alderman and Justice not Taking the Oaths, &c.

Holt Ch. J. No Witnesses should be asked how the Defendant stands affected; but if the Defendant give Evidence of a general Reputation, it may be answered by particular Instances on the other Side for the King.

No Witness to be asked how the Defendant stands affected, &c.

Mr. Savage (a Barrester) Town-Clerk of Worcester, proved the Defendant was chosen Alderman at the usual Election in Worcester, the Monday next after St. Bartholomew's Day; Then a Copy of an Entry in the Court-Book of Worcester was offered in Evidence for the King, which being opposed, Holt said, A Copy of any Original is Evidence wherefoever the Original is Evidence, i. e. if prov'd a true Copy; but the Copy of the Probate of a Will in the Ecclesiastical Court is no Evidence, because that is but a Copy of a Copy. I remember Hale at Huntington Assizes, allow'd a Copy of a short Note of a Judgment in an inferior Court as good Evidence, tho' the Judgment was not entred upon Record. Matters of Evidence arise from constant Usage as well as from what is strictly legal: Copies of Court-Rolls or Proceedings in Ecclesiastical Courts, &c. are good Evidence: We know it is not usual for inferior Courts not to draw up their Records, but only short Notes, and Copies of these short Notes being publick Things are good Evidence; otherwise of private Things, for Copies of Rent-Rolls are no Evidence, but the Original must be produced. Here to prove, that the Defendant acted as an Alderman and Justice; you must not only shew the Record (for perhaps he is not concluded by that Entry in a criminal Case) nor can you prove it by Witnesses only, for then the Defendant may object, here is the Record, so that it must be proved both Ways.

Copy of an original Evidence, where the Original is.

What Copies good Evidence.

Then a Copy of the Entry in the Court-Book was read.

Nota, By their Charter the Court is to be held before the Mayor and Aldermen, and by this Copy of the Book the Names of the Persons before whom the Court was held are not set down; and Holt said, It could not therefore now be proved by Parol, who sate as Judges; but if it had been said coram A. Major. & B. & C. Ald. & cæteris Aldermanis, it might have been supply'd by Parol-Evidence; so in C. B. coram Georgio Treby Mil. & Sociis suis; but here non constat, before whom the Court was held, for there is not one named; and Sir Sam. Eyres Just. being sent to the C. B. to advise with the Justices there upon this Point reported, that they were all of the same Opinion, that it ought not to be admitted as Evidence.

Then they gave Evidence of an Order for Relief of the Poor under Alderman Hains's Hand, which was proved.

Note, It appears, that the Mayor, &c. adjourned the Session of the Peace from the 8th to the 22d of January 93, and then did not keep it at the Adjournment.

Trevor Attorney General said, the Defendant did not receive the Sacrament within three Months, so could not take the Oaths secundum formam Statuti, for Taking the Oaths signifies nothing, unless a Certificate be produced of receiving the Sacrament, &c.

Want of a Certificate equally Penal with not Receiving the Sacrament.

Holt Ch. J. Want of a Certificate is equally Penal, but it is a distinct Offence, with which the Defendant is not charged by this Information: He might have taken the Sacrament after the 8th of January (which was the first Day of the Session (if within the three Months) and before the 22d of January; for tho' the Session be all but one Day, yet they may, and often do enter their Adjournments, Sessio Inchoat. tali die & continuat. usq; tal. diem.

*Nota*, This Alderman *Hains* is said to have made an Interest at *Worcester*, for Mr. *Swift* to be Member of Parliament, in Opposition to Mr. *Cox*, my Lord Keeper's Brother-in-law.

He was acquitted by the Jury.

Sheriff amerced for returning Cepi, and not having the Body.

A Defendant was arrested, and Bail given, and the Sheriff return'd a Cepi; the Defendant did not appear at the Return of the Writ; the Sheriff (as it is said) at first refused to assign the Bail-Bond, but afterwards offer'd to assign the Bail-Bond, and the Plaintiff refused to accept it, and proceeds by Amerciaments against the Sheriff; the Writ was returnable in Easter-Term, and Bail now put in and justify'd. Northy opposed the Discharging of the Amerciaments, saying, He hoped in the Exchequer to get them apply'd towards his Client's Debt, who was old, and not likely to live to Charge the new Bail: But Holt said, that is never done in the Exchequer; and when Bail is put in here, the

Putting in Bail discharges the Amerciaments, nisi.

the Sheriffs Amerciaments are always discharged, unless there be some special Reason, which is not in this Case, for the Action is laid in Surrey, and could not be try'd till next Assizes there. Let the Amerciaments be discharged.

## Williams's *Case*.

AN Order of Sessions was returned, that whereas he was bound Apprentice to a Widow, who married, and after died, the Justices at Sessions ordered, that he should serve out his Time with the Husband. Holt Ch. J. doubted of the Matter, and said it was fit to be considered.

Sessions. Ante Apprentice to a Widow charged on her second Husband after her Death.

## Jones *Lessee of* Pride *versus* Carwithen *in Ejectment*.

HOllis moved, that the Lord Bath should not be made a Defendant with the Tenant in Possession, because the Tenant pays his Rent to the Earl of Mountague; yet, because it might shake the Lord of Bath's Title, who claims the Land (or the Reversion at least, after the Death of the Dutchess of Albemarle, by Deed) therefore the Court thought reasonable to admit him a Defendant, and said there may be several Costs notwithstanding.

A Peer interested made Defendant in Ejectment with Tenant in Possession.

Costs several.

## *Rex versus* Lewis.

HE was convicted of forging a Warrant of Attorney from Sir John Sweetaple; and now it was moved, that it should be cancelled or delivered up. Holt Ch. J. said, there had been some Doubt of Wymark's Case; When upon a Non est factum 'tis found for the Defendant, the Bond should be lodged in Court, least the Judgment be erroneous à fortiori here, for Sir J. S. was no Party, so it was ordered to lie in Court.

A forged Bond or Warrant of Attorney to lie in Court.

In an Order to remove a poor Person, 'tis sufficient to say, that he doth not Rent a House of 10 l. per Annum, or is likely to be chargeable, and either is sufficient. Per Holt.

Post. Poor's Settlement.

*Note.* *Holt* Ch. J. and Sir *S. Eyres* J. were the only Judges who sate in the Court of King's Bench all this Term past, Sir *G. Eyres* being dangerously ill the Beginning of the Term, so that he died in Term, and Justice *Gregory* (being still infirm) had not been in Court for three or four Terms past.

## *At the Sitting in* Middlesex coram Holt *Chief Just.* 13 Junii, 1695.

Indebitatus Assumpsit lies against a Holder of Stakes, on Notice, &c.

INdebitatus Assumpsit was brought against a Holder of Stakes (upon a Wager of a Foot-Race) the Defendant would give Evidence, that he paid it to the Winner, then the Plaintiff shews the Defendant had Notice that it was a Cheat, for it was agreed, that without such Notice the Action lies not.

Then one was offered as a Witness, who had betted of the same Race.

One laying a Wager.

Holt Ch. J. I remember a Trial at Bar where Oath was made, that one, who was produced as a Witness, had laid a Wager about the Merits of the Cause; yet it was said, that a Witness cannot by Act of his own deprive the Party of his Evidence. But presently afterward he said, it influenceth his Testimony very much, whereupon the Witness was examined upon a Voyer dire, and deny'd that he got or lost, and then examined as to the principal Matter.

Or charged with Subornation, a good Witness.

Then one produced as a Witness was charged upon Oath with Suborination of Perjury, yet he was admitted a Witness, for such a Charge goeth only to his Credit, and he shall be permitted to answer it; otherwise if he were convicted.

Ibid. Post. Meridiem.

## Astley *versus* Child.

Assignment of a Lease to Plaintiff's Lessor good Evidence without the original Lease.

EJectment. The Plaintiff produceth an Assignment of a Lease from Foster to his Lessor; and it was allow'd to be read for Evidence, without producing the original Lease.

Assignment voluntary Evidence of Fraud.

The Case was, that one Golding, 11 Martii, 1692. in Consideration of a personal Estate brought by his Wife as Widow of a former Husband, to Part whereof her Children were intitl'd, Assigns to Barton, in Trust for his Wife during her Life, and after for the Children. And he 23 Martii mortgageth to the Defendant for good Consideration, and after for more Money releaseth the Equity of Redemption. Holt Ch. J. said, It was very strong Evidence of a Fraud, it was but voluntary, for the Children were not bound by such Assignment, nor barr'd of their Shares of the personal Estate.

Quer' non pros'.

## *At* Guildhall, London, 14 Junii, 1695.

AN Indebitatus Assumpsit was brought for Money received to the Plaintiff's Use, and the Plaintiff gives in Evidence, that he is a Burgess of Westminster, and the Defendant Bailiff there, and that the Plaintiff gave the Defendant 9 l. to be excused from Fines for Non-appearance at the Court, and from the Offices of Constable and Scavenger, which the Defendant took, promising to excuse him, and at the next Court the Plaintiff was fined.

No Indebitatus Assumpsit on a Bargain, or Bribing Contract, or for a Duty, &c. Sed Quære.

Holt Ch. J. Away with your Indebitatus, 'tis but as a Bargain, and no Indebitatus lieth.

Shower pro Quer'. Where a Custom-house Officer hath taken a Bribe not to make a Seizure, it hath been often ruled, that an Indebitatus Assumpsit lieth.

Holt. Never by me. I think it hath been carried too far, and I will retrench them. I confess, where a Man is over-reach'd, upon an Account, &c. and pays more than is due, it hath prevail'd, that an Indebitatus lieth, and that is as far as it ought to go. I would discourage such foolish Bargains as this.

Shower. It hath been resolved, that if A. pays Money to B. for the Use of C. and B. fails to pay it over, either A. or C. may bring an Indebitatus.

Holt. Ay! but that's not like this Case. I have known an Indebitatus brought pro diversis Amerciamentis, but 'tis most certain no Indebitatus lieth for a Duty.

Ante

Quer' non pros'.

## Dewbery *and* Chapman.

INdebitatus Assumpsit for Money received to the Plaintiff's Use: The Case was, the Defendant took the Plaintiff's Son Apprentice, and received 30 l. and was to teach him the Trade of a Goldsmith, and make him free of London (the Defendant himself being a Foreigner) so he was bound also to a Freeman for that End, but by the Custom of London he cannot have his Freedom without actual Service with such Freeman. It was ruled by Holt, that an Indebitatus lieth not, the Defendant hath cheated the Plaintiff of his Money, and the Plaintiff hath no Remedy, unless by special Action of the Case for not making him a Freeman.

No Indebitatus Assumpsit lies for Money got by a Cheat or Trick. Quære.

London Customs.

East-

East-India *Company versus* Skinner *& al'* (*Trespass*).

Collectors break Doors for the King's Tax.

THE Defendants being Collectors of the King's Tax pleaded the General Issue, and upon Evidence it was objected, their Warrant was to break open, &c. in Case of Opposition, &c. and this Warrant was granted before any Default, which ought not to be, no more than a Warrant to distrain for Poor's Rates before demand made; for the first ought to be only a Confirmation of the Assessment for the Poor: And afterwards upon Refusal, &c. A new Warrant is to be made for Distress, &c. And Holt said, strictly it was so, but the Practice having been in this Case of Taxes, to grant such a conditional Warrant to distrain, Communis Error facit jus. And he said it was clear, they might distrain Money as well as Goods; and tho' they took more than was due, yet it sufficeth, that they return the Overplus when they have sold it, &c.

Communis Error, &c. Vide ante.

Executor charged with all Debts in the Inventory, i. e. bad and good, and with sperate Debts, as Money.

Upon a Plene administravit Holt said, If an Inventory be produced where there is one Particular of good and bad Debts, the Defendants shall be charged with the Whole, because he doth not distinguish them, unless he can discharge any Part of it by Special Evidence. Note, Here the Executor put in a second Inventory somewhat different from the former, and would offer that, sed non allocatur, no more than one shall produce his own Answer in Chancery as Evidence for himself, but a Creditor may charge him with which Inventory he pleaseth. And it was ruled, that the Defendant must not only prove Payment without Abatement or Collusion in Discharge of Bonds, but also, that there was a real Debt, for which the Creditor's Oath sufficeth, or if Evidence be given, that the Testator acknowledged so much due by Bond, that may be allow'd, for it would have been good Evidence against himself.

Evidence of Payments.

Note. Sperate Debts shall be reckoned as Money in Pocket, because 'tis supposed the Executor may have them when he will. Here was 150 l. charged for the Testator's Funeral, out of which Holt said, at least 140 l. ought to be deducted, for 10 l. is enough to be allow'd for the Funeral of one in Debt.

Longuevill said, that Baron Powell in his Circuit, would allow but 11 s. 6 d. in the like Case, which he said was all the necessary Charge.

# DE

# Term. Sancti Mich.

## Anno 7 Willielmi III. Regis, in B. R.

### *Rex versus* Kendal *and* Rowe.

They were committed to Newgate by Warrant from the Secretary of State for High Treason, in assisting to the Escape of Sir James Montgomry, who was committed for High Treason, and being brought hither by Habeas Corpus.

Commitment by a Secretary of State for High Treason, the Species of it not express'd, is ill.

Levinz and Shower urged, 1. That the Secretary of State qua Secretary hath no Power to commit, for he cannot Administer an Oath, sed non allocatur, for a Conservator of the Peace had Power to commit at Common Law, and by Consequence might give Oath, &c. and that the Secretary hath Power to commit seems to be admitted in Hellyard's Case. 2 Leon. 175.

But forasmuch as it was not expressed in the Commitment what was the Species of Sir James Montgomry's Treason; and these Persons are to be charged with the same Species, therefore the Court held they were bailable. Holt said, the Resolution in And. 297. was by all the Judges upon a Meeting to assert the Liberties of the Subject, and was entred in the Council-Book for their Direction; the Difference in 1 Leon. 70, 71. was taken to be good Law then; but now, since the Habeas Corpus Act, the Cause must be inserted, tho' the Commitment be by the whole Council. And he said, there was a Gaol-Delivery at the Common Law, and the Justices might impanel a Grand Jury, and therefore might commit Precedent to any Indictment (as hath been the constant Practice) notwithstanding what is said by Lord Coke

Coke in the Case of Marshalsea, that Justices ought not to issue a Warrant to take a Man's Body before Indictment. Sed Quære. The Prisoners were bailed.

Church Repairs, &c.

A Prohibition was granted to stay a Suit in the Ecclesiastical Court, the Libel setting forth, that a Rate was made for Repair of a Church and Chancel in Exeter; for the Parish is not to be rated to the Repair of the Chancel, and the Rate being intire the Prohibition must be so too, for it is a void Rate in toto. Holt was of Opinion, that if there be publick Notice given to the Parishioners, and they will not come, the Church-wardens may make a Rate without them.

Degg 137.

## Herbert *and* Walter.

On Nonsuit in Replevin, treble Damages not assess'd, a Writ of Inquiry to supply it. So if the Jury forget to Inquire on a Verdict for the Plaintiff in Detinue. On a Demurrer to Evidence, the Jury are as much discharg'd as on a Nonsuit.

Replevin. The Defendant avows for a Poor's Rate sur 43 Eliz. Plaintiff replies, de injuria sua propria, Issue was joined, and the Plaintiff was Nonsuit at the Trial, and the Jury did not assess treble Damages (as Holt said they might and usually do in Replevin) and now, upon Debate the Court granted a Writ of Inquiry to supply it. Holt cited 1 Roll. 272. Bampton's Case. Sid. 380. Sheaf and Ward *versus* Culpeper. 1 Cro. 143. Darose *versus* Newbol. Upon a Demurrer to Evidence, where the Jury is as much discharged as upon a Nonsuit. He remembred a Case about 13 Car. 2. where was a Verdict for the Plaintiff in Detinue, and the Jury forgot to inquire of the Damages, yet a Writ of Inquiry was granted, tho' it seems contrary to 10 Co. 119. Cheney's Case.

## Gately *and* Green. Post.

Order about an Apprentice not under Hands and Seals of four Justices.

Exception was taken to an Order for discharging an Apprentice, that it was not under the Hands and Seals of four Justices, as the Statute directs, sed non allocatur, for it sufficeth that it is said in the Record, that the Order was under their Hands and Seals, the Order it self being deliver'd to the Master for his Indemnity.

## Redshaw *versus* Hester.

Riens per Discent pleaded in Debt. Reply Assets before the Bill, unde satisf. potuit.

Debt against an Heir, who pleaded Riens per Discent; the Plaintiff replies, that he had Assets after the Death of the Ancestor, and before the Bill exhibited, unde satisfecisse potuit & petit Judicium, &c. It was objected by Rotheram, that the Replication was ill, for that,



1. He

1. He should have concluded to the Country: sed non all', for 'tis in Nature of a new Assignment.

2. He hath confounded both the Debt and the Value of the Land in the Replication: It is true, the Value was not material at Common Law; but now by the new Act the Judgment must follow the Value of the Land; suppose in this Case there were Lands, but not sufficient, Judgment must be against the Plaintiff, because his Plea is falsify'd, whereas the Act intends in that Case he should recover pro tanto.

Per Cur'. The Replication is well, and could not have been better, the Statute was made and framed not to create, but to prevent Difficulties in Pleading.

Judicium pro Quer'.

## Clayton *and* ------

Where it appears on the Record, &c. the Ejectment is brought before Title accrued. No Judgment against casual Ejector.

Ejectment was brought as of the last Term, and the Demise was laid in October, the Tenant doth not appear. Holt said, He would not grant Rule for Judgment against the casual Ejector, where it appears upon the Record, that the Ejectment was brought before Title accrewed, tho' the Practice may have been so.

Where Authority to two Justices intends in the Sessions.

Per Holt. Where Authority is given to two Justices of the Peace, without mention of any Appeal, there an Order may commence at the Session, else not.

## Wilson *versus* Crablington.

Stat. for Bail, &c. on Capias utlagat.

A Bail-Bond was given upon a Capias utl', according to the new Statute, and the Defendant had put in Special Bail in the Country, before the Outlawry reversed, which Northy urged was regular; for by the new Statute he must give Bail at the Return of the Writ, which must be before the Outlawry reversed, otherwise 'tis impracticable.

Holt said, He did not understand the new Statute very well, but said the first Original is determined by the Outlawry, which must therefore be reversed before the Defendant can be heard, and he would not now determine, whether Special Bail might not be given in the Country after the Reversal of the Outlawry.

Stat. against malitious Informations.

Holt said, He took it, that where the new Act against malitious Informations in B. R. speaks of a Certificate to be made by the Judge, that there was probable Cause of such Information, it is intended, that such Certificate shall be entred upon the Postea, else the Defendant being acquitted must have his Costs tax'd.

Q. 5 Mod. 77.

## Johnson *versus* Bane.

Avowry for Part, not shewing how the rest was discharg'd, ill.

REplevin. The Defendant avows for Part of an Annuity, not setting forth how the rest was paid, and therefore the Avowry was held ill. Holt cited 1 Cro. 103. Holt and Sandbach, and Eyres J. cited 1 Cro. 436. Clotworthy and Clotworthy; and tho' it was objected by Sir Barth. Shower, that in Case of Distress it was warrantable, if any Part be unpaid, wherein it differs from Contract or Specialty, for a Debt of 20 l. will not warrant a Demand of 10 l. Yet the Court held the Reason to be all one, or rather stronger in Avowry, else if a Man distrained twenty Cattle for 20 l. he might apply one Beast to one 20 s. another to another, &c. The Case of Holt and Sandbach is in Avowry. It was a Mischief before the Stat. Car. 2. that, if a Distress was too little, one could not distrain again (be the Demand never so great) but the other might plead levied per Distress, which shews that Distresses could not be split.

Et Adjournatur.

## Vincent's *Case*.

A Fi. Fa. may be continued for a Year, sans, Sci. Fa.

HOlt said, He took it for a Rule, that when one Writ of Fi. Fa. is actually taken out, it may be continued upon the Roll, without a Scire Facias, but if there be only an Award upon the Roll, that will not warrant it.

Aston said, That after one Writ taken out it may be continued for seven Years without a Scire Facias, but Sir Sam. Astry thought there should be a new Writ taken out within every Year; and afterwards the Court inclined to that Opinion.

5 Mod. 86.
2 Salk. 627.

## Young *and* Rud.

Satisfaction and Acceptance pleaded in Assumpsit, and Issue on the Acceptance, well.

IN Case. The Defendant pleaded, that he gave the Plaintiff a Bever-Hat in Satisfaction of the Promise, which he accepted; the Plaintiff replies protestando, that the Defendant did not give it pro placito dicit, that he did not accept it in Satisfaction; and it was objected by Northy, that the Plaintiff hath taken the material Part of the Plea by Protestation, his Acceptance cannot govern the Defendant's Delivery in Satisfaction. Pinnel's Case. Sed non all'. For per Cur' the Replication is good, and either the Giving or Accepting is traversable.

Judicium pro Quer'.

## Masters *and* Lewis.

5 Mod. 75, 92.

Captain Masters went a Voyage to the East-Indies for the East-India Company, and died there; the Ship returned; the Company lodged Money in the Defendant's Hands, for the Seamen and Captain. Gospright levies a Plaint in London against the Archbishop of Canterbury, and by Foreign Attachment attaches the Goods in the Defendant's Hands; and tho' the Custom of London was strongly urged, and that there had been many Precedents of such Proceeding, yet the Court held it irregular, for the Ordinary hath no Right in him, nor can he be sued, unless he actually intermeddles.

London Customs. Money attach'd in the Ordinary's Hands, ill.

## Stedman *and* Page.

5 Mod. 141.

There was a Demise for Years rendring Rent, the Lessor dies, the Reversion descended to two, and the Defendant makes a Conusance for a Moiety in Right of one Parcener; which per Holt is ill, for they ought to join in Avowry, they make but one Tenant to the Præcipe, and must join in Mortdancestor, Writ of Entry, &c. If two Coparceners join in a Lease, 'tis the Lease of both, the Case in Hob. is not Law.

Parceners must join in Avowry, &c.

## Cudmore (*or* Shepheard) *versus* Tripe.

Error of a Judgment Exeter, in Case upon several Promises, Indebitatus Assumpsit, Quantum meruit, and Insimul computasset, there was a general Verdict and entire Damages, and now assigned for Error by Prat, that the Quantum meruit was in these Words, Cumq; etiam præd. H. postea scilicet tali die hic apud Civit. Exon. præd. infra jurisdictionem hujus Cur. in Cons. quod præd. J. ad special. instanc. & requisitionem of H. had sold and delivered to the said H. divers Goods, &c. super se Assumpsit, so that it doth not appear that the Goods were sold within the Jurisdiction, for the Place relates only to the Assumpsit, and for that Reason the Judgment was reversed.

Assump. infra Jurisdictionem, but not the Sale, &c. ill.

Sir F. Winnington and Sir Barth. Shower moved for a Mandamus to restore the Water-Bailiff of the River Severn, (a Patent Officer) and they said a Mandamus had been granted to restore the Clerk of a Company; likewise to restore the Surveyor of the New River Water, because it concerns the Publick, but the Mandamus was deny'd: Holt said, he was not for granting a Mandamus where an Assise lieth.

No Mandamus where Assize lies, as for Water-Bailiff of Severn by Patent.

Mandamus.

Note. In Hillary-Term following, in one Stamp's Case. A Mandamus was granted to restore him to the Office of Clerk of the Company of Masons, London.

## *At the Sitting in* Middlesex, coram Holt *Ch. J.* 29 Novemb. 95.

### Blackelor *and* Crofts.

Attorneys Bill, tho' not signed, Evidence for his Executor as well as for himself.
2 † 257.

CAse for the Executrix of an Attorney for Fees and Solicitation; the Plaintiff gave in Evidence a Bill made by the Testator in his Life-time. Serjeant Wright pro Defendente objected, that it was not signed by him, neither could it have been given in Evidence for him in his Life, and therefore shall not be Evidence for his Executrix. But Holt said, that the Book of a Man that makes regular Entries might be Evidence for him, and perhaps several of these Things could not in their Nature be proved by Record. (The Bill is examined by an At-Attorney in Court, and reported reasonable) the Testator's Hand to the Bill is not necessary.

### Orlabar *and* Harwar.

Executor or Administrator shall not avoid a fraudulent Bill of Sale, except they are Creditors. Q.

AN Issue was directed out of Chancery, to try whether two Bills of Sale were fraudulent; Orlabar was bound with and for Hardwick to Baxter, in an Obligation of 2000 l. for Payment of 1000 l. the Plaintiff pays the Debt, and takes an Assignment of a Judgment against Hardwick, and then takes Administration of the Goods of Hardwick as Principal Creditor.

Holt. There's no Doubt an Executor or Administrator as such shall not avoid a fraudulent Bill of Sale, but when he is a principal Creditor, then it may be doubtful, but however that will be considered in Equity, not here.

Badge of Fraud.

Note. One of the Bills of Sale was made by the Sheriff, which Holt said might be fraudulent, if upon a fraudulent Judgment, and the Leaving Goods in the Possession of Hardwick, and his Disposition of some of them (both which were proved) is a strong Evidence and Badge of Fraud.

*Sitting at* Guildhall London, coram Holt *Ch. J.* 30 Novemb. 95.

*Sir* Willoughby Aston *versus* Roper.

INdebitatus Assumpsit for Money lent, Money received to the Plaintiff's Use, & insimul computasset, and Plaintiff gives in Evidence only a Letter, whereby the Defendant promiseth shortly to pay him 130l. which he ow'd him.

A Letter promising to pay 130l. he owed him, will not maintain Indebitatus Assumpsit, &c. Quære.

Holt Ch. J. This will not do, for it might be due upon Bond, or otherwise; 'Tis true a Note to pay a Sum of Money upon Demand is Evidence of Money lent prima facie, unless the contrary appear, but it is not so here.

Quer. non Prof.

Hereford *and* Powell.

IT was ruled by Holt, that, where a Factor at the Canaries deserves Money for Factorage, he cannot bring an Action for his Factorage, unless the Principal refuse to come to accompt; and if it appears, that the Factor hath Money in his Hands, he may detain, and cannot bring an Action for his Factorage; but if he were directed to vest all the Produce of the Adventure in Wines (as here) then he may bring an Action for his Factorage and Pains, because he cannot detain and hath no other Remedy. Quod Nota.

Factor not to bring Action for Factorage till his Principal refuses to Account.

DE

# DE

# Term. Sancti Hillar.

## Anno 7 & 8 Williel. III. Regis in B. R.

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### Fletcher *versus* Ingram.

Constable elected by the Leet, refusing, &c. but a Custom must be to Distrein for it.

REplevin. The Defendant makes Conusance as Bailiff to Rowland Frith Gent. who prescribes to hold a Court-Leet for the Manor of and that the Jury used to elect a Constable for one Year; and that the Person so elected used to take upon him the Office, and take the Oath of a Constable upon a reasonable Penalty. That at Court-Leet, 9 Oct. 5 W. & M. the Plaintiff was elected Constable, and the Jury ordered, that he should take the Office upon him, whereof statim postea he had Notice, and refused to take the Office upon him, for which Refusal they imposed the Penalty of 40 s. the Plaintiff demurs.

Serjeant Wright pro Quer' argued; 1. That the Custom is uncertain to chuse pro uno anno, and 'tis not said prox. sequen. where no Time is appointed to take the Oath, the Law gives Time during Life.

2. That by the Common Law the Steward is to name the Constable, and this being contrary to the Common Law must be taken strictly; here is no one by the Custom to administer the Oath, or accept it from him, so that it is not in the Party's Power to qualify himself. In Griesley's Case. 8 Co. 38. The Custom was, that the Jury elected the Constable for one Year next following, to be sworn before the Steward, so that the Time and the Person were certain.

3. Here is a Penalty upon him, and yet the Custom doth not provide, that he shall have Notice. Allen 78. Prig's Case. And here

here he ought to alledge a Custom to distrain. 11 Co. 42. 3 Kee. 163. A Distress is not incident to such an extraordinary Duty.

Shower and Northy contra insisted chiefly in Answer to the last, that this is not like a Distress pro Cert. Letæ, and it is said in Godfrey's Case, that where a Pain is imposed by the Court or Jury, 'tis otherwise; this is but a reasonable Pain imposed by the Jury, and 'tis partly the Act of the Court, tho' grounded upon the Custom.

Holt Ch. J. The Custom to serve for a Year is well enough.

2. A Constable is to be elected of common Right at the Leet or Tourn, sometimes the Steward claims it, sometimes the Jury; it hath been held, that the Homage are to elect of common Right, without Doubt the Steward may impose a Fine whoever elects, for the Custom goeth only to the Manner of Election; if the Party be not present, then the Neglect being out of Court should be presented at the next Leet and amerced, for the Steward cannot Fine out of Court. If the Man be there, the Steward may swear him, and upon Refusal may Fine without alledging a Custom.

Constable, how elected, &c. The Steward may Fine.

Neglect, if absent, to be presented.

3. Here the Penalty precedent is perfectly a customary Duty, therefore you ought to alledge a Custom to distrain. As to Notice, every Inhabitant above twelve Years old must be present at the Leet, or essoined. When the Court is adjourned or dissolved, the constant Practice is for a Justice of the Peace to swear the Constable; for tho' Justices were made within the Time of Memory, yet they have the same Power as Conservators had at Common Law, that is the true Reason; and if the Conservators might do it (as it must now be intended) Justices may do it. At the Common Law sometimes the King chose the Conservators, sometimes a Writ issued out of Chancery to chuse them as a Coroner is chosen. When a Person absent is chosen Constable, the Steward is to appoint him within such a Time to take his Oath before a Justice of the Peace.

Notice.

Conservators, how chosen.

Note, By the Confessors Laws all civil and military Officers were eligible.

Sir Barth. Shower. By what Authority can the Steward appoint a Time? What if he appoints ten Days, and he swears the 11th Day?

Holt said only, that it must be in convenient Time, the Justices could not have made a Constable before Stat. Car. 2. but they might have sworn him.

Rookby J. agreed, that the Custom was defective, because not said before whom to be sworn, so for the Distress, &c.

Judicium pro Quer', nisi, &c.

*Lord*

## *Lord* Gerard *versus Lady* Gerard *(Dowager)*.

Dower of Caput Baroniæ.

ERror of a Judgment in Dower in C. B. where the Demandant claimed Dower of the capital Messuage of Bromley-Hall, and many other Lands. The Tenant pleaded, that the capital Messuage, and Acres of Land, were called by the Name of Gerard's Bromley, that Sir William Gerard, the Tenants Ancestor, had by Letters Patents the Honour of Baron Gerard of Gerard's Bromley, and to the other Part the Tenant either confessed the Action or pleaded, so that Judgment final was against him & quod sit in Mia'. And it should seem there was a Demurrer as to the Caput Baroniæ, and Judgment against the Tenant for that likewise, and another Amerciament upon it. Now two Questions were made, 1. Whether she be dowable of this Caput Baroniæ. 2. Whether the Tenant ought to have been twice amerced.

Twice amerced.

To the 1st Point, Sir Barth. Shower cited Inst. 31. b. 2 Inst. 17. that a Woman should not be endowed of a capital Messuage, which was Caput Baroniæ, for the Order and Honour of Nobility; but in this Point he was presently over-ruled, for that Privilege was only when the Barony was by Tenure, and Land was annex'd to the Honour, for which Relief of 100 Marks was paid, be it more or less.

2. That the Tenant ought not to have been doubly amerced, he cited 8 Co. 61. where the 6th Resolution is in Point, 5 Co. 58. b. and he compared it to the several Cases of Damages. 2 Roll. 103. one of which is in Debt upon Contract and Obligation, if the Defendant confess the Obligation and wage Law upon the Contract, there shall be Judgment presently for the Debt upon the Bond, but not for Damages, until the Wager of Law determined, for he shall not have twice Damages upon one Original. 2 Saund. 300. Dean and Chapter of Windsor *versus* Gover, there was but one Mia' at the last.

But it was answered by Northy and resolved by the Court, that where final Judgment is given, there ought to be an Amerciament, and the Tenant might be doubly amerced for the double Delay. Roll. 769. (b) In Ejectment, where the first Judgment is given upon Demurrer quod recuperet termin', 'tis Error, if there be not Capiatur before Judgment for the Damages. Roll. 213. In an Action of Debt upon a Bill and emisset, if the Defendant as to the Bill plead Non est factum, and as to the emisset, nil debet, and both found against him, and Judgment quod Capiatur upon the first, yet it is Error if there be not a Mia' upon the latter, 'tis the Case of Eltonhead and Deerman, where several Delays are, there ought to be several Amerciaments. 2 Leon. 186.

Capiatur & Mia'.

For several Delays several Amerciaments.



The

The Authorities cited for the 6th Resolution in Beecher's Case, 8 Co. 61. do not warrant that Resolution.

Holt said, the Cases in 2 Roll. 103. about Damages are not Law, for you may sever the Damages for several Causes, as for two Trespasses. So, where there is a Demurrer for Part, and Issue for Part: Quia conveniens est quod fiat unica taxatio damnor' is to be understood, that it must be done by the same Jury, whether it be joint or several Damages.

Damages severed, &c. Post. 355.

Judicium Affirmatur.

An Order of two Justices for removing of a poor Man was returned in Paper, and the Court ordered that it should be put into Parchment, else 'tis not a good Return, for all Records should be in Parchment.

Returns of Orders, &c. must be in Parchment.

## *Rex versus The Inhabitants of* St. Giles's Cambridge.

TWO Justices remove a poor Man from St. Giles's Cambridge to Stanton in Com. Cantabr. then two Justices of the County by another Order remove him again from Stanton to St. Giles in Cambridge, and both these several Orders were returned upon two several Certiorari's: The second Order appears to be an original Order, not reciting the former Order, and therefore at first the Court doubted, whether they could quash the latter Order as contradictory to the former; but afterwards per Cur', we will take Notice of both Orders, being before us, and the former seven Days before the latter.

Poor's Settlements.

Court takes Notice of Orders Prior and Posterior.

## *Rex versus* Gateley.

AN Order was returned, made by four Justices of Middlesex at the Quarter-Sessions, for discharging a Surgeon's Apprentice; and it was strongly debated, whether the Trade of a Surgeon be within the Statute, for the Words are, If any such Master misuse his Apprentice, which Word [such] must refer to the Trades before express'd in the Statute (but that of a Surgeon is not mentioned there) 'tis true, an Action would lie against a Surgeon for using the Trade, not having been an Apprentice, because that Clause is general and absolute, but this is relative and restrain'd.

Sessions Power to Discharge an Apprentice. 5 El. cap. 4. sect. 35.

Holt Ch. J. at first inclined, that it being a remedial Law, this Case might be within the Equity of the Statute, tho' not within the Words; but Northy answered, If the Justices cannot by Equity bind to another Trade, neither can they discharge him that is so bound.

Or Assign him.

Servants Wages.

Sir Barth. Shower urged the constant Practice to relieve in Case of Houshold Servants, &c. and 1 Saund. 313, 314. Hawksworth and Hillary, in the Case of a Merchant's Apprentice this Exception was not taken.

Coachmen, &c.

Northy said, It was ruled in Lewknor's Case since the Revolution, that a Coachman's Wages are not within the Statute; the Clause of the Statute relates to such as are compelled to serve in Husbandry, &c.

Holt. Compulsion is not material, for there is no Occasion to go to a Justice of Peace with one that will serve voluntarily. But at last the Order was quash'd, because the Statute doth not extend to a Surgeon's Apprentice.

## *The Case of* Marlborough.

Poor's Settlements. Ante .

UPon Mr. Harcourt's Report (after search, &c.) Holt said, That in Orders for removing poor Persons the Practice hath been not to mention, that they do not rent a House of 10l. per Annum, and therefore the Court doth not allow that Exception; but as to the other Exception, viz. that the Order doth not set forth, that it was made upon the Complaint of the Church-wardens or Overseers, we think the Order is naught for that Omission, for without such Complaint the Justices have no Power to remove them, for perhaps the Parish may be willing to entertain them: And tho' they do return here ex post. facto, that the Order was made upon the Complaint of the Church-wardens and Overseers of the Poor, yet that cannot supply it, for not being Part of the Order it is but a bare Suggestion without any Authority.

## Walker *and* Stocoe.

Judgment against five, four bring Error, and assign Death of the 5th.

THere was Judgment against five, and four of them bring a Writ of Error, and assign for Error the Death of one of the Five before Judgment; the Defendant pleads in nullo est erratum, which Northy urged was a Confession of the Matter of Fact. Yelv. 57. King *versus* Andrews. But Holt conceived otherwise, and that in Case of Error in Fact it doth amount to a Confession, tho' it is the only Form of a Demurrer, but herein he did not express himself very clearly. Northy said, the Plaintiff in Error ought to have concluded, Et hoc paratus est verificare, but it was ruled, that it was but Matter of Form.

(Hoc paratus, &c. Matter of Form.)

Then the Plaintiff moved to quash his own Writ, for that it is brought by Four (of a Judgment against Five) without alledging that the 5th is dead; and the Defendant pray'd it might be amended. And it was resolved,



1. That

1. That this is not amendable, it is a Fault in the Writ without Question, the Cursitor hath been examined, his Instructions were, that one was dead; but the Stat. of H. 6. of Amendments is to support Judgments and not to reverse them, and an Original was not amendable at Common Law. Not amendable.

2. If it were amendable, that is not to be done at the Defendant's Prayer, no Man is to amend his Adversary's Writ, nor can the Defendant in Error direct the Plaintiff in what Manner he shall bring his Writ. 1 Leon. 134. that no Statute gives Amendment, but in Affirmance of Judgments or Verdicts; besides, it seems rather to be the Unskilfulness of the Clerk than his Misprision; he thought it was not necessary to set forth, that one of the Five was dead, wherefore the Writ was quashed. Defendant not to amend the Plaintiff's Writ. Q.

## Shepheard *versus* Hutchins & *al'*.

TRespass against three, they jointly plead Non Cul', and were found guilty, and several Damages assessed for several Parts of the Trespass, viz. 3 l. *versus* A. and B. and 20 s. *versus* B. and C. A Fieri Facias issued against all pro Dam' recuperat. and the whole was levied upon B. And now upon Serjeant Gols's Motion the Execution was superseded, quia erronice, &c. for tho' B. is chargeable with the Whole, yet not upon such a Writ, for if a Scire Facias were brought upon the Judgment, they cannot plead levied per Vic. upon this Execution. Vide 1 Cro. 54. Three Guilty in Trespass several Damages, &c. Ante 353.

## Carpenter *versus* Fortune & *Ux'*.

THE Husband being in the King's Bench Prison, and the Wife at large; he receives a Declaration against both, and suffers Judgment by Default, and now the Wife was taken in Execution, but the Court superseded the Execution as irregular, for there ought to have been a new Writ against the Husband and Wife, and the Wife must have found common Bail (she must have given a Bail-Bond to appear) and so you might have proceeded against both in Custodia Mar'. A Prisoner receives a Declaration against himself and Wife, and she taken in Execution, but superseded, &c.

Holt said, When the Wife is taken without her Husband, and discharged upon common Bail, there goeth out a new Capias *versus* l'Baron & idem dies given to the Wife.

## Hardiftey *and* Barney.

On Execution of Judgment awarded against Teftator, no need of Revivor against the Executor. Two Scire Facias's, Simul. What Clothes, &c. may be taken on Fi. Fa.

HOlt said, Where a Judgment is revived by Motion against Teftator, if there be an Award of Execution against him, there needs no new Rule to revive the Judgment against his Executors, but a Scire Facias lieth of Course. And Astry and Aston agreed the Practice to be, that two Writs of Scire Facias may be taken out together; and the Return of the First being past, the Second must lie eight Days in the Sheriff's Hands, which the Court thought to be an unreasonable Practice and fit to be reformed, tho' it was allow'd in this Case. Holt said, upon a Fieri Facias the Sheriff may take any Thing but Wearing Clothes; nay, if the Party hath two Gowns, he may take one of them.

## Culliford *and* Cardinel.

Bond to pay by a Deputy half the Profits, &c. not within Stat. Ed. 6.

A Man makes a Deputy in an Office of the Customs (which Office is within the Stat. E. 6.) and takes Bond for accounting for the Profits, and that the Deputy shall pay him one Half of the Profits. Per Cur' this Bond is not void by the Statute, nor is it a corrupt Agreement; otherwise if it were to pay a Sum in Gross. See 6 Mod. 234, 235.

## Hains *and* Jefcot.

A Man marries his Sister's Bastard Daughter.

See 2 Lev. 254, 255.

SIR Barth. Shower moved for a Prohibition to the Ecclesiastical Court to stay Proceedings there against a Man for marrying his Sister's Bastard Daughter; but it was deny'd, for the Court must Judge what is God's Law, being mentioned in an Act of Parliament, viz. 32 H. 8. and, by God's Law there, is meant the Levitical Law, which prohibits Marriage with a Man's Sister's Daughter: The Child of a Concubine among the Hebrews was not illegitimate, Bastards are by particular Constitutions and Laws deprived of the Privilege of Children, qui ex damnato Coitu nascuntur, &c. Yet the Reason of the Prohibition seems yet to remain, if there be any Morality in the Law, 'tis as morally unlawful to marry a Bastard Issue as legitimate Issue: It must be sanguis naturalis, and not legalis, or civilis, else a Woman might marry her Bastard Son. (Holt said obiter in all Cases, except suing out of the Diocess, if the Ecclesiastical Court have no Jurisdiction, they may be prohibited as well after Sentence as before. Roll. . Friswel's Case is no sound Doctrine.)

Prohibition after Sentence.

## Burman *versus* Shepheard.

PER Holt Ch. J. Where the Plea is to the Damages, you cannot bring Money into Court; otherwise where the Plea is to the Ground of the Action, as Non Assumpsit. It may be allow'd in Trover where you bring the Goods in Specie into Court, but rarely where only Part of them are brought in. I remember the first Time the Rule was made for bringing into Court, &c. the Plaintiff may have certain Cause of Action for Part, and probable Cause for the Residue; 'tis hard to put him to the Hazard of trying only for the Residue. Darnel cited the Case of Draper and Banks in Pemberton's Time in Trover for many particulars, the Defendant was permitted to bring one Thing into Court; but Holt said, He had deny'd the like upon debate.

Where Money may be brought in, or not.

When the Sheriff hath taken a Bail-Bond upon mesne Process, he hath executed his Authority, and the Defendant cannot render himself to the Sheriff or Bailiff.

On Bail-Bond taken, the Sheriff's Power is determined.

Note. The Writ was returnable 23 Oct. the Defendant procures himself to be turned over to the King's Bench by Habeas Corpus 22 Oct. the Sheriff returns Cepi, it seemeth the Bail-Bond is forfeited, tho' the Defendant be in Custody, if he do not appear according to the Course of the Court; but it might be otherwise if he had been turned over on the very Day of the Return of the Writ.

Per Holt. One may plead Puis darein Continuance, that the Plaintiff brought a second Action for the same Cause, and recover'd, tho' he might have pleaded the former, in Abatement to the Second.

Plea Puis darein Continuance.

## Ann Ash *versus Lady* Ash.

ASsault, Battery, and False Imprisonment. The Lady Ash pretended, that her Daughter the Plaintiff was troubled in Mind, and brought an Apothecary to give her Physick, and they bound her, and would have compelled her to take Physick. She was confined but about two or three Hours, and the Jury gave her 2000 l. Damages.

False Imprisonment.

Sir Barth. Shower moved for a new Trial for the Excessiveness of the Damages.

New Trial for excessive Damages.

Holt Ch. J. The Jury were very shy of giving a Reason of their Verdict, thinking they have an absolute despotick Power, but I did rectify that Mistake, for the Jury are to try Causes with the

Juries Duty. Quære.

the Assistance of the Judges, and ought to give Reasons when required, that, if they go upon any Mistake, they may be set right, and a new Trial was granted.

Evidence.

Nota. Rookby J. said obiter, that he had known some Things given in Evidence under the Words al' enormia, which were turpia, and not fit to be mentioned in a Declaration.

## Bagg *and* Robinson.

Entry of Judgment in C. B.

ERror of a Judgment in C. B. the Entry was, quod recuperet damna sua ad pro mis. & custag. suis, and held to be well enough, and the common Form in C. B. dam. pro mis. & custag. literally.

## *Rex versus* Youngman.

Sessio adjornata fuit, for est, ill.

AN Indictment was quash'd, because it was said Sessio adjornata fuit per Just. instead of Adjornata est.

## Sounder *and* Ruler.

Extortion.

COmplaint was made, that a Bailiff had made a Bill, and reckoned five Guineas for executing a Writ of Fieri Facias.

Bailiff's Fees included in the Sheriff's Poundage.

Smith, Under-sheriff of Middlesex, said in Court, that 6s. 8d. is the usual Fee to the Clerk for Writing a Bill of Sale upon a Fieri Facias, and that the Bailiffs have usually some reasonable Fee, over and above the Poundage for executing the Writ.

Holt Ch. J. The Bailiffs Fees are included in the Poundage; but let Mr. Aston examine what is reasonably due; and what the Bailiff hath exceeded he shall pay double, according to the Statute.

## *Rex versus* Pain.

Libel.

UPon an Information for Making and Publishing a scandalous and seditious Libel, in these Words, Mary's Epitaph: Here lies King *James*'s disobedient Daughter, who was addicted, *&c.*

Cross Examination of Evidence.

The Attorney-General offers the Examination of one Brereton, taken upon Oath before the Mayor of Bristol (he being dead) But after long Debate and Conference with the Justices of the

Common Pleas (by Justice Eyres) The Court would not allow it to be given in Evidence, for two Reasons.

1. It appears, that the Defendant was not present when the Examination was taken, so that he could not cross-examine him.

2. There is a Difference between capital Offences and Cases of Misdemeanour, for in Case of Felony the Justices are by the Stat. 1 & 2 Ph. & Mar. 13. and 2 & 3 Ph. & Mar. 10. to take the Examinations in Writing, and certify them to the Gaol-Delivery, &c. and if the Party be dead or absent, they may be given in Evidence. Hale's Pl. Cr. 263. Indeed in the Case of the Lord Cornwallis for Murder, it was held, that Examinations were not Evidence, but that was not Right; it was agreed in that Case, that Depositions before the Coroner may be given in Evidence upon an Indictment for the King, but not in an Appeal for that Murder. In the Lord Macquair's Case in Rushworth's Coll. which was in Treason, the Information of a Witness that could not be had was allow'd: But in a late Case upon an Information against Monger, the Depositions of one, whom it was suspected the Defendant had sent away, were not allow'd.

It was strongly urged by the Attorney-General, that before the Statutes as well as since, Justices of the Peace (and Rookby J. said, Conservators at the Common Law) might take Examination as well for Misdemeanors as Felony; and the Attorney said, the Statutes alter not the Case as to Evidence. Sir Barth. Shower contra cited 4 Inst. 177. where Coke saith, that a Justice cannot make a Warrant to take a Man for Felony before Indictment, and (tho' that hath been over-ruled, yet) the Justices had no Power before those Statutes to take Examinations, until something were depending. Holt said, the fourth Institute had not my Lord Coke's last Hand, the Judges have not allow'd that so much as the other Parts, tho' 2 Inst. be a Posthumous Work, yet it is more perfect. He said, A Justice of the Peace may commit without Oath, but he is not wise if he doth so, for then he must make out the Cause of Commitment at his Peril, but if Oath be made he is safe.

Power of Justices and Conservators to examine, &c.

[It seemeth that the Stat. Ph. & Mar. with the Practice since, have made the Difference between Felony and Misdemeanour.]

Holt Ch. J. If a Libel be made in Writing, and afterwards burnt, and one remembers the Contents, and dictates to another, who writes it, the Writer is Maker of a Libel; He that takes a Copy of a Libel in Writing, tho' he be not the Author, is guilty of making a Libel, but at the Instance of the Council it was found specially, that he wrote it from the Mouth of a Person unknown; and if he be Cul. of Making, Writing, and Composing, then they find him guilty thereof, or of so much thereof as the Court shall be of Opinion he is guilty of, and as to

What Writing or Copying makes a Libel.

to the Publishing not guilty. The Jury mov'd for Charges, Ad quod non fuit Respons'.

*Rex versus The Inhabitants of* Moreton, Hamstead.

Bastard Settlement. Post.

IF a Woman be settled in a Parish and got with Child of a Bastard, and perswaded when near her Delivery to remove into another Parish, and there is delivered, 'tis good Reason for the Justices to return her, but that must be to the Place of her last Settlement (with her Child come semble.)

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# DE

# Termino Paschæ.

## Anno 8 Willielmi III. Regis, in B. R.

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*Rex versus* Dean.

Person contracted no Witness on a matrimonial Contract nor in an Information thereon.

Nor any Person interested, tho' in a criminal Case.

THere was first a Verdict upon a Contract of Matrimony, and afterwards, upon an Information of Forgery, the contracted Wife was sworn as a Witness for the King, which Holt said she ought not to have been, to avoid her own Contract, and therefore inclined to grant a new Trial, for he said he was not satisfied, that a Person interested can be Evidence in any Case, tho' in a criminal Matter. So in the Case of Rex *versus* Tipping about two Years ago he held, that Cosins could not be a Witness to perjure one that had been

been Witness against him. In Hody's Case, after two Nonsuits upon a Bond, there was a Verdict for it; Hody made Affidavit, that it was not his Deed, and the Court granted a new Trial, and then another Verdict pro Quer. who exhibited an Information against Hody; and tho' Hody had satisfied the Judgment, yet the Plaintiff could not be Evidence. He likewise cited a Case of the King against Jackson in Lord Hale's Time.

## Roberts *qui tam versus* Wetherhead.

ACtion upon the Statute for encouraging Navigation, Detinue quod reddat 36 Barrels of Olive-Oil, &c. forfeited. Sir Barth. Shower moved in Arrest of Judgment, that Detinue lieth not, unless the Plaintiff hath an antecedent Right, whereas here can be none until Information or Seisure. Sed non all'. For as where the Statute gives Forfeiture of 100 l. one half to the King, the other to him that will sue, and not say how, Debt lieth; so here, when the Goods are so forfeited, Detinue lieth, and that without Seizure; as at Common Law, if a Villain acquired Goods, the Property was absolute in the Villain, none in the Lord till Seizure; but if these Goods were distrained, the Lord might have Replevin. Inst. 145. b. for that is tantamount to a Claim and a Seizure, which is a Case in Point.

Detinue lies of Goods forfeited by the Navigation-Act.

Debt upon an Obligation, to be paid upon Request, yet the bringing an Action is a sufficient Request; so of a Rent-charge to distrain if not paid upon Demand, the Distress it self is a Demand. Rookby J. said in the principal Case, the very Offence divests the Property, tho' not then in the Plaintiff; yet when the Action is brought, 'tis in him by Relation.

Request and Demand.

Judicium pro Quer'.

## Howard *and* Jennison.

CAse. The Plaintiff made six several Counts for Work done, &c. laying them all the same Day: The Defendant pleads Nonage: The Plaintiff replies, quoad tertiam & quartam Assumptionem Defs' fuit plenæ ætatis tempore Confectionis promission' præd. and as to the rest, that they were for necessaries, unde petit judicium & dam', &c. Sir Barth. Shower moved in Arrest of Judgment, that the Defendant could not be of Age and not of Age the same Day: Sed non allocatur, for the Plaintiff may well divide it in his Replication, if there be four several Causes of four several Days, the Plaintiff may lay them all of one Time, and if he be forced from his Day, 'tis no Departure. Note, He doth not say that the Promise was made afterwards,

Six Counts, all laid the same Day, Nonage pleaded to all, Replication to the 3d and 4th full Age, & resid. pro necessariis.

wards, viz. tali die, for that had been ill, but he says at the Time of the making the Promise, &c.

Petit Judic. & Dam. sufficient, sans occasione promission.

2. Exception. Petit judicium & damag', &c. is too short, he should say, occasione non performationis promission. præd. Sed non allocatur, for 'tis usually so, and well enough, the Court is to give the proper Judgment, and Damages are mentioned in the Declaration.

Judicium pro Quer'.

## Stevens *and* Squire.

A. sues B. C. and D. B. promises, if A. stays, to pay, 'tis good.

THE Plaintiff had a former Action against the now Defendant and two others; and now declared, that in Consideration, quod cessarent omnes ulterior' processus, in that Action the Defendant promised to pay him 10 l. &c. Sir Barth. Shower moved for a new Trial, and insisted that it was within the Statute against Frauds and Perjuries, for the Debt, Default, or Miscarriage of another Person.

Holt Ch. J. No, 'tis an original Promise, and himself was liable.

Shower. What if himself had not been a Party, then it were plainly within the Statute.

Holt. Put that Case when it comes, but if A. saith, do not go on against B. &c. this being to be performed within a Year, it will bind him; 'tis like the Case of buying Goods for another Man, which is every Day's Practice. But if A. saith, do not go on against B. and I'll give you 10 l. in full Satisfaction of that Action, that might be within the Statute; but here he appears to be a Party concerned in the former Action, wherefore a new Trial was deny'd.

## *Rex versus* Noel, Pepper, *and* Cooper, *Defendants, on three several Informations.*

Three Informations against three, for hiring a Ship, and endeavouring to go to France.

FOR hiring a Ship to go to France, and endeavouring to go on Board ea intentione ad hostes & inimicos Domini Regis proditorie auxiliand', and they being severally convicted.

Now Sir Barth. Shower and Mompesson moved in Arrest of Judgment, that the doing an Act towards that which is malum in se, or an Offence at Common Law, as Felony, &c. is Penal; but where there is a new Offence by Statute, an Act done in Order to it is no Offence. The Charge of falso & malitiose can never make a lawful Thing unlawful. 1 Cro. 608. and so was it adjudged in Cam. Scacc. in the Case of Bernardiston and Soames,

 and

and affirm'd in Parliament in this Reign, contrary to the Judgment in this Court. (To which Holt said, It is lawful for a Man to prosecute for Felony, but not when falso & malitiose, there it specificates the Action.)

Cooper pro R. At Common Law to hire a Ship to put the King's Subjects into the Power of a Foreign Enemy, is an Offence, but here is an Intent to commit High Treason.

If a Man prepare a Plate in Order to counterfeit the Great Seal, and is discover'd and prevented, 'tis a Misdemeanour: So if a Man lie in wait with a Design to make an Attempt upon the Queen Consort, or to murder or rob any one. It is a Misdemeanour to desire to meet one with an Intention to fight. Sid. 186. Darcy's Case 230. Bacon's Case. 3 Inst. 158. Quando aliquid prohibetur, prohibetur & omne per quod, &c. As to the falso & malitiose: Here is a substantial Crime, he was intercepted in the very Act and Endeavour to commit Treason; the Case mentioned in 1 Cro. 608. of drinking Water, can never shew any Intention to lessen the King's Revenue; here the Act shews it: And he said, he saw no Reason why an Attempt to commit a Statute-Law Treason, should not be a Misdemeanour as well as in Case of Treason at the Common Law.

The Court would give no Opinion as to the Difference between an Attempt to commit a Statute Law Treason, and an Attempt to commit Treason at the Common Law; for they said, 'tis ea intentione ad hostes & inimicos Domini Regis proditorie auxiliand', which is an Offence at the Common Law, it is almost Treason; and the Prisoners were ordered to come again to be fined.

## Eaton *and* Barker.

SIR Francis Winnington moved for Leave to discontinue after a general Verdict pro Quer. because the Damages were but small; and said it had been allow'd sometimes after the Opinion of the Court was discovered in the Case of the Earl of Oxford in Cro. and several Cases in Saunders.

No Leave to discontinue after general Verdict; contra, if special.

Holt Ch. J. Per Stat. H. 4. the Plaintiff shall not be Nonsuit after Verdict, and shall we suffer him to discontinue after a general Verdict? Indeed it may be granted after a Special Verdict.

Where one makes Oath before a Justice of the Peace, that his Goods are stolen, the constant Practice is now to grant a a Warrant to search, else many Felonies might go unpunished. (Per Holt.)

Warrant to search, on Oath Goods are stolen.

## Inter *The Duke of* Banbury *and The Pariſh of* Broughton *in the County of* Oxon.

Poor's Settlements. Ante .

HOlt Ch. J. Where a Child is brought from the Pariſh of A. to the Pariſh of B. without legal Authority, they of B. may by Warrant of two Juſtices return the Child to A. tho' not the Place of laſt Settlement, becauſe they have done the Wrong. Where the Child is firſt known to be, that Pariſh muſt provide for it till they find another.

## Wilcocks *verſus* Powel *& al' Treſpaſs.*

One Defendant put in, in Order to make no Defence, to prevent the Plaintiff's paying Coſts.

MOnday moved, that one Defendant was put in by Fraud on Purpoſe, that he might make no Defence, but to ſecure the Plaintiff from paying Coſts; and therefore pray'd, that if the Plaintiff were Nonſuit, or the other Defendant had a Verdict, he might have his Coſts.

Holt Ch. J. I fear we cannot do it in any Caſe, unleſs in Ejectment, and there we'll not compel the Defendant to confeſs Leaſe, Entry, and Ouſter, unleſs the Plaintiff conſent. Vide Stat. 8 & 9 W. 3. cap. 10.

## *Rex verſus* Knightley.

Indictment of Treaſon, Plea of not guilty withdrawn, and a Confeſſion entred.

ALexander Knightley Eſq; was brought to the Bar to be try'd upon an Indictment of High Treaſon, to which, upon his Arraignment he had pleaded not guilty; and now, before the Jury were called, he confeſſed, that he was unhappily ſurprized into the Deſign to aſſaſſinate the King, tho' at the ſame Time he did abominate the Thing itſelf; but when he was once engaged in it, he knew not how to retire without an Imputation of Cowardice: He deſired the Chief Juſtice (as a Privy Councellor) to repreſent him to the Lords Juſtices of England, as an Object of Mercy, with this Circumſtance, that he was the firſt that diſcover'd Harris, who is one of the Witneſſes againſt him; and he deſired he might withdraw his Plea and confeſs the High Treaſon, which was allow'd; and Holt ſaid, It was reſolved by all the Judges at Serjeant's-Inn, in the Caſe of the Regicides, that it might be ſo done, ſo he pleaded guilty, and was remanded to Newgate. for per Cur. he ought to have four juridical Days to move in Arreſt of Judgment, if there be ſo many in Term, or elſe as many as the Term will allow (Judgment was once given immediately, but it was erroneous).

Holt said (obiter) He understood that Exceptions had been taken lately at the Old Baily to an Indictment of High Treason after Jury sworn, which should not be; but the Exceptions ought to be before Plea pleaded, for 'tis improper for a Man to except against the Indictment after he hath put himself on the Country; and the late Act, which allows a Copy of the Indictment for that Purpose, five Days before Trial, intends only, that Exceptions may be taken in such Manner as by Law they might in other Cases.

Knightley afterwards received Judgment as in Cases of High Treason.

## Marsh's *Case*.

Where an Appeal lieth to the next Quarter-Sessions. If the Appeal be then received and lodged, there 'tis sufficient, and the Justices may proceed upon it at the next Sessions after.

Appeal to Sessions. Post.

## Thwait & *Ux. versus Lady* Ashfeild.

Debt for Rent, the Issue was tried by Record and found for the Plaintiff, but he had delivered 8 l. more than the Arrears of Rent amounted to, according to the Demise laid in the Declaration, wherefore he released the Overplus; and whether that set it Right, was the Question?

Judgment for what is Right, and Non pros. for the Residue.

Selby objected, that there is a Difference between Debt and Covenant; in the former, if he demands more than is due, it is Error; but in the latter, Damages only are to be recovered and to be struck off for the Overplus, for which he cited 3 Bul. 155, 156. Farrar *versus* Snelling.

Northy contra cited Hob. 178. Andrews *versus* Delahay, which the Court said was a very strong Case. 3 Cro. 68. Frith's Case. Hob. 133. Howel *versus* Samback. 2 Cro. 104 Woody's Case, 2 Cro. 103. Sty. 175. Barber *versus* Pomeroy. Roll. 785. S. C. which Holt said was in Point. 1 Saund. 282. Baskervil *versus* Mayo. 11 Co. 45. b. where the Rule is taken, that if one demand two Things, and the Action is not proper for one of them, it is gone for the Whole; but where he can have no other Action, the Court may give Judgment for what is Right. Here, if they had pleaded it in Abatement, it might perhaps have abated the Whole, but the Court is not bound to do it ex officio, but (even without a Release) may give Judgment for what is Right: If we had gone to Trial by Jury, and they had found how much was really due, that would have set it Right certainly, which Rookby J. agreed.

Diversity where Action is for two Things, and not proper for one, &c.

Upon

Upon Conſideration of the Caſe, the Court conceived the Plaintiff might enter Non proſ. for the Surpluſage, and take Judgment for what was Right.

*Sittings at* Guildhall London, *coram* Holt *Ch. Juſt.* 27 Maii, 1696.

Obrian *and* Sevil.

Million Bank. Contract to ſell Stock, not in his Poſſeſſion.

THE Plaintiff declares, that whereas there was a Diſcourſe between Plaintiff and Defendant, concerning the Selling and Diſpoſing of 1500 l. in the Million Bank, in Conſideration that the Plaintiff would convey 1500 l. in the Million Bank, within ſix Months, at 60 per Cent. to the Defendant, if required; the Defendant promiſed to pay him 3 l. per Cent. and the Plaintiff avers, that he was ready to have convey'd, &c. yet the Defendant hath not paid him the 3 l. per Cent. videlicet 45 l. the Defendant pleads Non Aſſumpſit; and now at the Trial the Plaintiff gives no Evidence, that he had any Share or Intereſt in the Million Bank at that Time, and therefore it was urged the Contract was void. Holt ſaid, It doth not make the Bargain void, but 'tis a Breach on his Part eo inſtante, as where one Covenants to convey ſuch a Houſe wherein he hath nothing.

Sir Barth. Shower. 'Tis uſual here to ſell Bales of Coffee before the Ship comes in.

Holt. In ſuch Caſes it ſhould be laid by Way of Agreement to ſell. I may indeed ſell the Profits of my Land before grown, becauſe 'tis in potentia; but it is fit it ſhould be ſettled, wherefore it was found ſpecially.

Dockwray *and* Dickenſon.

Trover for a Ship by the ſurviving Part-Owner.

TRover for a Ship and Cargo belonging to the Plaintiff and one J. S. whom the Plaintiff ſurvived; the Caſe was, that the Ship called the Ann of London, was ſent upon the interloping Account to Guinea, in the Year at which Time there were ſeveral Interlopers abroad, and the Royal African Company obtained an Order from King Charles II. under his own Hand, directed to the Defendant, then Commander of his Majeſty's Ship the Hunter, requiring him to Sail to the Coaſts of Africa, and to ſeize any ſuch interloping Ships as he ſhould meet with there navigated by his Majeſty's Subjects, and to bring the Ships, &c. to be proceeded againſt in the Engliſh Admiralty, by Colour of which Commiſſion the Defendant ſeiſed the Plaintiff's

tiff's Ship and Goods upon the Coasts of Africa. The Bill of Lading was produced in Evidence to prove the Particulars of the Cargo; and Exceptions were taken by Sir Barth. Shower, that tho' it might be Evidence against Captain Fincham himself, the Master of the Ship, who signed it, yet it is not Evidence against the Defendant, who is a Stranger; sed non allocatur, for it being proved, that such Goods were provided for the Voyage, and Captain Fincham being now dead, and his Hand proved, it doth not differ from the common Case, where Witnesses to a Bond are dead, it sufficeth to prove their Hands; so here, for Captain Fincham would have been a good Witness himself, if living. Evidence.

One, that was Master of the Ship Hunter under the Defendant, was produced as a Witness. Witness.

Shower objected against him, for that a Recovery in this Action against the now Defendant might be pleaded in Bar to another Action against this Witness, who was particeps Criminis, but he was allow'd to be a Witness; for where many are concerned in the Taking, it becomes necessary to allow the Evidence of one of them in some Cases, as in Robbery, the very Plaintiff himself may be Evidence ex necessitate rei. Nota, Upon Reading the Bill of Lading, it was shipped for W. Dockwray and J. S. and Company. Shower urged, if others were concerned, 'tis against the now Plaintiff, who takes no Notice of the rest. Vide ante contr.

Holt. If it were so, that should have been pleaded in Abatement, you cannot take Advantage of it upon the General Issue; one Part-Owner of a Ship may bring Trover for the whole Ship. It was so adjudged in my Lord Hale's Time, upon a Writ of Error of a Judgment at Chester, which was reversed, and a new Judgment given for the Plaintiff for that very Reason.

Holt, in his Direction to the Jury said, some Respect was to be paid to the Order of King Charles II. but the Command was illegal, and therefore the Subject must take Care how he executes it at his Peril. Nota, The Jury found pro Quer', and gave him above 2600 l. Damages. Note.

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DE

# Termino Sanctæ Trinitatis.

## Anno 8 Willielmi III. 1695. in C. B.

### Lovel & al' versus Gill.

On Accedas ad Curiam Maner. de W. the Sheriff returns a Plaint, call'd a Majus jus.

AT the Request of my Friend Mr. Masterson, I attended the Success of this Case in C. B. Upon an accedas ad Cur. Maner. de Whitchurch in Com. Salop: The Sheriff returns the Certificate of the Suitors, that there is no such Plaint in the Court-Baron there, but that there is another customary Court, of and for the Copyholds and Copyholders there; and the Steward returns a Plaint entred in that Court, called, A Majus jus, viz. L. dat. dom. Maner. pro Fine 2 s. ad habend. 12 probos & legal. homines customar. Tenentes ejusdem Maner. ad inquirend. & super sacr'um suum recognoscend. utrum L. &c. habet majus & melius jus, &c. in duobus Mess. &c. infra Maner. præd. quam præd. G. habet, &c. & de quibus eis deforc. & ei conceditur, &c.

Custom to try the first Day by Jury, sans Pleading to Issue, not good.

Serjeant Birch moved for a Procedendo, and cited 1 H. 5. 11. b. 12. a. Fitz. Cause de Remov. Plea 23.

But the Court inclined, that the Custom to try by Jury the first Day, utrum, &c. without Pleading to Issue, &c. was not good, for perhaps the Tenant might have a Release to plead in Bar, or a Recovery in a former Action, or a private Act of Parliament, and by this Means is ousted of his Plea. And a Jury the first Day is not allow'd in any Case, but an Assise, which is festinum Remedium; and Powel J. said, by the Word Recogn', this looks like an Assize, but the Form of it is more like a Writ of Right, and the Tender of the 2 s. like the Tender of the Demymark, and this is returned for a Plaint, which is not properly any Plaint at all.

Assize.

Nota, The Court gave no Opinion upon the Authorities cited per Serjeant Birch, but gave Rule, that the Plaintiff below should shew Cause why they should not try it in Ejectment at next Shrewsbury Assizes.

# DE

# Term. Sanctæ Trin.

## Anno 8 Willielmi III. Regis, in B. R.

### *Rex versus* Walcot.

Parl. Cases 127.

ERror to reverse the Father's Attainder of High Treason, and the principal Error insisted on was in the Judgment, where it is said, that his Entrails should be taken out, it is not said ipso vivente, which Words the Court held to be essentially necessary: Judgments in capital Cases are stated and settled by the Common Law, no Court can alter them. (Rookby said, Judges are like the Officers of the Mint, who must not vary from the Standard, either in Weight or Fineness) and here being no Act of Parliament in the Case, the Common Law must be taken from the Precedents, and from the Time of H. 4. they run all with ipso vivente, and the three Judgments cited to the contrary tempore Charles II. were all of the same Sessions, and probably by the same Managers, and therefore make but one Precedent. This Omission is in the most severe Part of the Judgment, for he's cut down while alive, to the very Intent that his Bowels may be taken out while he is living; therefore, if this were affirmed, all, that have ipso vivente in, ought to be reversed, for both cannot be Right.

Attainder of Treason revers'd by the Heir, &c. Vide ante.

Carthue prayed, that it might be amended by the Notes or Minutes upon the Indictment, for a very formal Judgment was entred on the Back of the Indictment, with ipso vivente. Holt said, If it was amendable, the Court below must amend it before it could be amended here; but in criminal Matters there can be no Amendment; the antient Way to have an Amendment upon a Writ of Error out of the Common Pleas, was by a Writ

Amendment.

of Diminution, and upon that Ground they have allow'd a shorter Way by Amendment in this Court: But no Diminution lieth in criminal Matters, therefore no Amendment, because the Reason of Amendment fails. The Reversal was pronounced by Rookby J. tho' note, the Judgment for High Treason is always pronounced by the Chief Justice.

5 Mod. 225.

## Newman *and* Lun.

Stat. 23 H. 6. against Extortion on Arrests, &c.

DEbt upon the Stat. 23 H. 6. c. 10. against a Bailiff in this Court by a common Informer. Northy objected, that it ought to have been in the proper County, else the Stat. 21 Jac. will be evaded.

Holt Ch. J. It was adjudged in the Case of Barns and Ews, that Debt lieth in this Court; and it was since so adjudged in the Exchequer. Indeed, my Lord Hale adjudged it otherwise in Nichols's Case: It is not yet settled. Et Adjourn'.

## Burk *and* Strowd.

In Declaration for Digging Conyburrows, &c no need of shewing Title.

Whether the Plaintiff or a Stranger be Owner of the Soil.

Right of Common not traversable. Quære.

IN Trespass. The Plaintiff declared, that he was legitime Possessionatus of a certain Tenement, containing a Fulling-mill, a Close of Pasture, and a Piece of Land called D. and that habuit & habere debuit common of Pasture in 1000 Acres in Mendam Forest, for all Beasts levant and couchant, tanquam ad tenementa præd. pertin', that the Defendant minding to disturb him of his Common did dig and make Coney-Burrows there: The Defendant demurred to the Declaration, and Judgment was given for the Plaintiff in C. B. and now upon a Writ of Error in this Court, it was resolved, 1. That there needs no Title to be set forth in the Declaration, it being grounded upon the Possession, and the Title but Inducement to the Action, which is founded upon a Tort.

2. It need not be shewn, whether the Defendant be Owner of the Soil, or a Stranger; if in Trespass for chasing or distraining Cattel, the Defendant sets forth his Freehold or Lease for Years, and that he took them Damage-fesant, then the Plaintiff must prescribe for Common.

3. Tis not traversable, for all Right of Common must be proved upon not guilty, else the Plaintiff cannot maintain his Action.

The Court relied principally upon the Cases of St. John and Moody. Mich. 27 Car. 2. true, it was after a Verdict, but Hale and the whole Court held it was a good Declaration without the Help of the Verdict; and Blockley *versus* Slater in C. B. Hill. 4 & 5 W. & M. Judicium Affirmatur.

## Martin & Ux' *versus* Fuller.

HOlt Ch. J. In Case of an Executor, if he hath the Probate at the Time when he declares, it is well; but it is otherwise in the Case of an Administration: Here it appears by the Declaration, that the Letters of Administration were granted after the Suit commenced, which is ill.

Probate to be before Declaration, but Administration before Suit begun.

Holt Ch. J. Where a Ship is lost by the Master's Neglect, Trover lieth not against him, but a special Action upon the Case; the Storm by which the Ship was lost cannot be material in Trover, but if the Defendant sold the Share of the Ship before the Storm, then Trover well lies, tho' the Master were appointed by the Part-Owners.

Case, and not Trover, lies for a Ship lost by Neglect; secus in a Storm.

## Winter *and* Loveder.

S C. 2 Salk. 537.

IN this Case Hatsel obiter cited 2 Cro. 76. Baugh *versus* Hains (which is the same with the Case of the Dean and Chapter of Worcester. 6 Co. 37.) and Marvin's Case there cited, that Tenant in Tail by Copy may make a Lease for three Lives, by Indenture of Lands usually demised by Copy; to which Holt said, then Tenants in Tail may destroy the Copyhold for ever, that deserves to be further considered.

Q. If Tenant in Tail by Copy may make a Lease for three Lives.

Hatsel. That's for the Lord's Advantage; in the Wastes they frequently chuse to destroy them.

Holt Ch. J. Because they want Money, that's the true Reason.

## *Rex versus* Brane & al'.

CArthue moved two Exceptions to quash an Indictment for a Riot.

1. 'Tis said Jur. onerat. ad inquirend. pro Domino Rege only, whereas they should be charged to inquire of Riots by the Statute.

2. The Indictment concludes contra formam diversor. Statutor. whereas there is but one Statute against Riots, the rest give Penalties on Sheriffs Juries, &c.

Indictment of Riot, good, tho' the Jury not sworn to inquire of Riots, and tho' concluding contra formam diversor' Statut. where only 1 Stat.

To the first Holt said that a Riot is an Offence at Common Law, but the Act makes Forcible Entry as such an Offence. To the Second, He said Barretry was an Offence at the Common Law, yet an Indictment, that concluded contra formam diversor. Statutor', was held well, (but Note, there are several Statutes

against it). The Statute of Stabbing doth not make the Offence, but only takes away Clergy from Manslaughter so circumstantiated; yet the Indictment may conclude contra formam Statuti, but 'tis good without such Conclusion. H. P. C. 58.

## *Rex versus* Taylor.

On Error to reverse Outlawry of Murder.

HE was outlawed for a Murder committed eighteen Years ago, and now brought to the Bar, and ask'd why Execution should not be awarded.

A Scire Fa. must go to the Lords mediate and immediate.

Morley pro Prisoner. We have brought a Writ of Error, and assign for Error, that the County-Court was not held for the County.

Holt Ch. J. You must have a Scire Facias to the Lords mediate and immediate, returnable next Term (as in Case of Common Recoveries to the Tertenants) tho' they cannot plead to hinder the Reversal, but only in Bar of Restitution, if they have any other Title, as by Release, &c. 'tis the Caution of the Court.

Bail deny'd, tho' the Fact 18 Years since.

Then Morley moved, that he might be bailed in the mean Time, but it was deny'd.

## *Rex versus The Inhabitants of* Banbury.

Poor's Settlements.

A Constable without a Warrant, brought a Child from Broughton to Banbury, and two Justices of Banbury make an Order (reciting the Fact) to return the Child to Broughton, there to be provided for according to Law.

Part of an Order quash'd.

The Court held the Order good for returning the Child to the Wrong-doers, and therefore that Part was affirmed; but it ought not to be said to be there provided for, &c. but they are to be left to take their Course according to Law, therefore that Part was quash'd.

## Robinson *versus* Groscot.

London Custom to make By-Laws.

UPon a Habeas Corpus it was returned, that the City of London was an antient City, and that there was a Custom temps dont, &c. to make By-Laws where there was not sufficient Remedy; that at a Common-council Sept. 6 Will. & Mar. an Order was made, reciting, that the Company of Minstrels were an antient Company, and that great Mischief and Debauchery, &c. happen'd, for that several Foreigners had set up Dancing-Schools; wherefore it was ordered, that all Persons using those Arts, not being free of that Company, should

upon Notice by Summons of the Beedle, accept their Freedom, and if they fail'd so to do, then after such a Day to forfeit 10 l. to be sued for in the Name of the Chamberlain, and one Half of the Forfeiture to be to the Mayor and Commonalty, and the other Half to the Company of Musick-Masters. They set forth, that their Customs were confirmed by Parliament, and particularly by the Stat. R. 2. And that the Plaintiff brought an Action of Debt in the Lord Mayor's Court upon this By-Law.

(Nota, The Action was brought upon another Branch of the By-Law.)

The Court held the By-Law to be naught to oblige Dancing-Masters to be of the Company of Musitioners. Holt said, the Musitioners were no Corporation, they are a Brotherhood or Club to meet and drink and talk together, that's all; the City might make a Guild or Fraternity of Dancing-Masters (tho' they cannot make a Corporation) and then it were reasonable to oblige the Dancing-Masters to be of that Company, but not of a foreign Company; a Dancing Master might be of another Company before, which tho' it were not this Case, yet if any such Case may happen, the By-Law is not good. The By-Law should be mended throughout, the City hath nothing to do to set Rates and Prices for Dancing.

## Wolf *and* Davison.

In Debt for Escape. Q. If one outlaw'd after Judgment (on a Ca. Sa. within the Year) and taken on a Cap. Utlag. after the Year, can be in Execution for the Plaintiff, sans Prayer.

UPon a Special Verdict in Debt for an Escape, the single Point was, whether one outlawed after Judgment (upon a Ca. Sa. within the Year) and taken upon a Capias utlagat. after the Year could be in Execution for the Plaintiff without Prayer.

Northy pro Quer. rely'd upon Garnon's Case, 5 Co. 88. that where there are no Laches in the Plaintiff, and the Defendant is taken by a Capias Utl. he is in Execution without Prayer, and he said, if there were Laches, yet if he be taken by Capias Utl. he is in Execution for the Plaintiff, if he will, at his Election. 3 Cro. 909. Jennings *versus* Harley. Yelv. 19. S. C. It is true, that in the Case of Shaw and Cutteris. 3 Cro. 850. In Debt upon a Judgment, where the Defendant pleaded, that his Intestate was taken by a Cap. Utl. after Judgment, and died in Prison, it was held no Bar, because he is not in Execution, but at the Plaintiff's Election; but here the Plaintiff hath made his Election by this Action: And Note, after Outlawry the Plaintiff can have no other Execution.

Sir Barth. Shower pro Defendente urged, that if Capias Utl. issueth within the Year after Judgment, then indeed the Defendant shall be in Execution for the Plaintiff without Prayer; but if

if after the Year, not so, till the Plaintiff prays it; and if he Escape before such Prayer, the Plaintiff can only have an Action upon the Case, for which he cited 5 Co. 89. Frost's Case.

Holt Ch. J. If the Defendant be taken by Capias Utl. within the Year, all Books agree, that he is in Execution without Prayer: Now the Sheriff hath no more Notice if he be taken within the Year, than if after; but suppose, upon a fresh Prosecution Ca. Sa. issueth within the Year, but the Capias Utl. after the Year, there needs no Scire Facias without total Laches of a Year; yet if there were above a Year's Laches after the Outlawry, he having made Choice of his Execution, to what Purpose should he bring Scire Facias, then why should he be always renewing the Capias Utl. till he can do it with Effect, to find the Defendant: What good doth Outlawry, if he be still bound to continue the Process? There never is a Scire Facias after a Capias Utl. I never understood the Difference taken in the Cases within the Year, or after: It was taken suddenly.

Rookby J. It is equally hard upon the Sheriff, whether within the Year or without: And the Court inclined to give Judgment pro Quer', but (because Serjeant Levinz was to argue).

Adjourn'.

## *Rex versus* Hummings.

Overseer indicted at Sessions for not making up his Accounts. 1 Mod. 340.

An Overseer was indicted for not making his Accompt. It was objected, that this was a new Offence, for which a special Remedy was given by the Stat. 43 Eliz. and therefore not punishable by Indictment. 2 Cro. 643. Castel's Case, and Rookby J. inclined to that Opinion.

Holt said, That upon an Indictment for selling Ale without Licence, Judgment was stayed, because the Statute gave a special Remedy, tho' indeed that Case had not final Determination.

Commitment by Justices.

Here they are to commit specially, according to their Power, till the Party do accompt, and not till deliver'd by due Course of Law (for if so committed, we should discharge him upon a Habeas Corpus).

Both Action and Indictment on a prohibitory Stat.

Where a Thing that is an Injury to a particular Person is prohibited by Act of Parliament, the Party may have his Action, but yet 'tis indictable also; so of the Stat. de Scand. Magnatum, so of the Statute of Marlbr. for distraining of Cattel in the Highway; but it is not so here.

At another Day Holt said, where a Statute gives an Authority to two Justices of the Peace, why may not they do it at the Sessions, unless it be where an Appeal lieth afterwards. An Indictment at Sessions seems to be within the Direction of the Statute.

## South *versus* Allen.

5 Mod. 63.
1 Salk. 228.

Devise of the Rents and Profits to A. to be paid by the Executors, is a Devise of the Lands.

UPon a Special Verdict in Ejectment; the Case was, A Man devised to his Sister Sarah, Wife of A. B. the Profits and Rents of his Lands in C. during her natural Life, to be paid by his Executors (and then a Remainder over).

Holt Ch. J. (at First) said 'tis a Devise to the Executors by Implication of Law, else the Will cannot be performed, and the other Justices agreed with him; but afterwards Holt said, the Devise of the Rents and Profits is a Devise of the Land to the Wife, and then the subsequent Words, to be paid, &c. are void, and cannot exclude the Husband; the Man was mistaken in the Law: But all the other Judges retain'd the contrary Opinion, and said, that a Devise of the Rents and Profits is not always a Devise of the Land, for which they relied on the Case of Griffith *versus* Smith. Mo. 753, 754. And it was adjudged for the Defendant against the Opinion of the Chief Justice.

## Scilly *and* Arundel.

Plea in Bar or Abatement to an Avowry.

THE Plaintiff in Bar to an Avowry pleaded a Distress for the same Duty in other Lands chargeable. Holt said, the Plea was naught, for it should have been pleaded in Abatement of the Avowry, that a former Replevin was depending (if the Truth was so) or if determin'd, then levied per Distress, & issint riens arere:

Judicium pro Avowant.

## Feilding *versus* Serrat.

Plaint on two Bills in Portmote Court of Chester, pleaded to Case on one Bill of Exchange here, &c.

CAse against the Drawer of two Bills of Exchange; the Defendant pleads, that in the Year 1689, the Plaintiff levied a Plaint against him in the Portmote-Court of Chester, and declared thereupon, that the Defendant promised to pay to Sarah Dod, or her Order, &c. if Kant and Collar'd (upon whom the Bills were drawn) did not pay them, and that Sarah Dod ordered them to be paid to the Plaintiff; and that there was a Verdict and Judgment in the Portmote-Court for the Defendant; and he avers them to be the same Bills and same Cause of Action, &c. The Plaintiff demurs, Acherly for him urged, that none but Sarah Dod, or her Executors, could bring the Action upon the Promise laid in the Declaration below, but this Declaration is of another Nature upon an implicit Promise to the Plaintiff, the

Pro-

Promises are of a different Nature, the Plaintiff could have no Attaint below, it did not concern him, whether Serrat made such Promise to Sarah Dod, or not: He cited Raym. 472. Put and Hardy *versus* Sir William Rastern and others, that a Judgment for the Defendant in Trespass was not pleadable in Bar to an Action of Trover for the same Goods.

Authority deny'd.

Holt Ch. J. That Case must not stand for Law; Saunders and I argued that Case, and he agreed to me the Law was otherwise, and it was ruled otherwise in C. B. afterwards.

Sir William Williams pro Defendente said, tho' the Judgment might be avoided by Error, yet the Bills being averr'd to be the same, &c. 'tis pleadable while in Force.

Holt. It doth not appear upon Record, that the Action below was upon the Bills, the Law raiseth two several Promises upon the two Bills, but you declare below upon a joint Promise to pay tam the one quam the other (if Kent and Collard did not pay them) which could not be maintain'd without an express Promise.

Williams. The Foundation of the Promise below was several, so the Law will divide it.

Promise in Law, and express.

Holt. Promise in Law is a Word used, but I hold the Drawer makes an express Promise by Giving the Bill. Sure a Man might have really made such a Promise as is laid below jointly; and if he could prove no more than the two Bills, there he must needs fail. Moreover the Plaintiff could not bring such an Action below upon the Promise to Sarah Dod, he is barr'd upon such an Action as he could never recover upon; indeed one may have an Action on the Case upon a Bill of Exchange, without a Promise; but when such a Promise is laid, it is material.

Judgment pro Quer'.

## Griffin *versus* Cromwell.

A Feme Covert may plead by Attorney.

THE Defendant pleaded by Attorney, that she was a Feme Covert, which Holt Ch. J. seem'd to allow, because she is charged as a Feme Sole; and it stands indifferent, whether she be Sole or Covert, it would be very hard, that she should come (100 Miles perhaps) to appear in proper Person.

Mompesson pro Quer' said, that by all the Precedents she should appear in proper Person. 2 Brownl. 138. Brownl. lat. Red. 203. Placita Rediviva 8.

Rookby J. A Feme Covert cannot make an Attorney. Quære.

Et Adjourn'.

## Hayward *and* Wilson.

TRespass, for taking and carrying away, &c. continuando totam transgressionem præd. and it was moved by Carthue, that there could not be any Continuance as to the Caption. Holt Ch. J. said, It was resolved in the Case of Butler and Hodges in this Court, that no Damages should be intended to be given for that which is void; so here as to the Caption, which will not admit of a Continuando.

Trespass, with an impossible Continuando, Damages for Part.

Carthue. I can gather no such Matter from that Case, as 'tis in Sid. 319.

Ante .

Holt. Ay, many good Cases are spoil'd in Siderfin, neither reported with that Truth, nor with that Spirit which the Case required (the Case of Opy and Thomasius is much abused, scarce intelligible there). Here he hath declared but of one Taking, with an impossible Continuance, which could not mislead the Jury; and there is no Difference, whether it be upon a Writ of Inquiry, as in this Case, or after Verdict, as in the Case of Butler and Hodges.

Siderfin censured.

## *Rex versus* Johnson.

THE Defendant appeared to be fined upon an Indictment for seducing and lying with another Man's Wife. Northy moved to charge him with an Action, but the Court would not suffer that now he comes to submit to a Fine.

Fine on Indictment for lying with another's Wife prevents an Action. Q.

## *Sir* Stephen Evans *versus* Powel.

DEbt upon an Obligation of 2800 l. and upon Oyer, it appears the Condition was for Payment of 1400 l. with Interest to the Plaintiff on such a Day, according to the Intent of a certain Proviso or Covenant mentioned in an Indenture bearing even Date, &c. made between the same Parties: The Defendant recites a Deed of the same Date made between the Plaintiff and Defendant, whereby in Consideration of 1400 l. secured to be paid by an Obligation of the same Date; and in Consideration of 5 s. paid to Sir Stephen Evans, Sir Stephen did assign to the Defendant a 20th Share of Lead Works in Cardiganshire, and saith he hath paid the Money secundum formam provision. in Indenturam præd. mentionat. the Plaintiff replies, that the Defendant did not pay the Money, &c. Verdict pro Quer.

Bond to pay, &c. according to an Indenture, Defendant pleads a Deed to the same Intent, as a Security of the Money, not traversing the Indenture, &c.

Lloyd moved in Arrest of Judgment, that the Defendant hath mistaken the Deed, for there is no such Covenant in the Deed set forth, therefore it is a void Issue, and therefore there ought to be a Repleader, and to that Opinion the Court inclined. Then Holt said, the Defendant is estopped to say there is no such Deed, therefore he should set forth such a Deed, else he's gone, and must pay the Money; he might have pleaded Payment, secundum formam conditionis, and well, for the Indenture is but a further Description of the Agreement.

Estoppel.

Afterwards Holt Ch. J. said, the Defendant hath recited as much of the Deed as he thought fit, yet there might be such a Covenant in the other Part.

1. The Defendant is estopped to say, there is no such Indenture.

2. He says he hath paid it according to the Proviso and Covenant in that Indenture.

Lloyd. What if we set out the whole Indenture, and there is no such Covenant?

Holt. 'Tis your Fault then to say so in the Condition.

Judicium pro Quer. (cæteris tacentibus).

## Petit *versus* Smith.

Executors having Specifick Legacies are but Trustees of Residue for the next of Kin.

ONE Petit made his two Brothers Executors (his Daughter having married Smith without his Consent) and leaves a Legacy of 5 l. to his Executors: The Defendants apply to the Spiritual Court upon the Authority of Munt's Case in Chancery, to have Distribution of the Residue, and that that Court would compel the Executors to distribute, because they have a specifick Legacy.

Sir Barth. Shower prays a Prohibition, for however the Chancery may adjudge them to be Trustees, yet the Spiritual Court hath no such Power.

Prohibition lies for the Plaintiff here, notwithstanding his Appeal to the Delegates.

It was said (on the other Side) that in Munt's Case, there was a Legacy to the Daughter, and yet it was decreed, that the Executor was but a Trustee for the Daughter, and so it was ruled in the House of Lords: And 2 Inst. 33. was cited, that the Executors ought to distribute as well as Administrators; and it was said the Plaintiff hath appeal'd to the Delegates, and therefore ought not to have a Prohibition.

Sir Barth. Shower cited Tucker's Case, Hob. 191. and 1 Cro. 63. S. C. That a Prohibition lieth notwithstanding the Appeal. In the Case of Hill and Mills, about two Years ago in this Court, a Prohibition was granted, that the Spiritual Court should not revoke a Probate by an Executor, upon Pretence of his being Bankrupt.

Holt Ch. J. This is in Nature of a Distribution, which they never pretended to before in the Case of an Executor; they practised it in the Case of an Administrator, but (an Administrator being in the Nature of an Executor) it was against Law till the Statute of Distributions: And the Case in 2 Inst. 33. is erroneous. And a Prohibition was granted Nisi; but the Council for the Daughter said they would not move it again, intending, it seems, to seek Relief in Chancery.

Stat. of Distributions.

## Jones *versus* Bodinner.

TRespass for Breaking his Close and Taking his Cattel; the Defendant pleads, that the Plaintiff was outlawed, and a Capias utlagatum issued, and an Extent thereupon, and then a Writ of Levari. Hill. 7 W. & M. reciting the Outlawry, and commanding to levy from the Day of the Taking upon the Extent, that this Writ was delivered to the Sheriff, who made a Warrant, by Virtue whereof the Defendant took the Cattel in those Lands.

Outlawry and Process of Execution thereon pleaded to an Action of Trespass, Replication, and the Lands, where traversed, and Verdict pro Quer'. Quære, If he shall have Judgment on the Verdict or on the Declaration, and Plea or a Repleader.

The Plaintiff replies, that the Defendant took them upon other Lands of the Plaintiff absq; hoc, that he took them upon those Lands; whereupon Issue was joined, and Verdict pro Quer'.

It was now debated by Sir Barth. Shower pro Quer' and Northy pro Defendente, whether the Plaintiff should have Judgment upon the Verdict or upon the Declaration, and the Defendant's Confession of the Trespass by his Plea, or that there should be a Repleader; for it was agreed on all Hands, that the Bar was ill, for there could be no such Writ. Hill. 7 W. & M. (for the Queen was then dead) and the Issue seem'd immaterial.

The Issue being immaterial, Judgment was on the Plaintiff's Confession. Vide infra, and the Verdict set aside.

Sir Barth. Shower pro Quer', that where the Plea contains Matter of Bar, tho' not a good Bar, and Issue is taken upon it is holpen by the Verdict. 3 Cro. 228. Lovelace and Grimsden, 3 Cro. 455. Chamberlain and Nichols. Mo. 692. S. C. where in Debt upon a single Bill, the Defendant pleaded Payment without an Acquittance, yet Issue being taken and found for the Plaintiff, he had Judgment. 3 Cro. 778. Dighton *versus* Bartholomew, in Trespass and Assault the Defendant pleaded a Concord, but without Satisfaction; and after Issue and Verdict pro Quer', it was adjudged, that it was help'd by the Statute. Mo. 867. Tasker and Salter, Hob. 326. Reynolds *versus* Buckle. Raymond 458. Spathurst *versus* Overind.

Northy agreed, the Rule laid down by Sir Barth. Shower; but here is no Matter of Bar at all, because there could be no such Writ.

Holt Ch. J. There might be a Writ out of the Exchequer; and if it had been well pleaded, it had been a good Bar, sure it

hath the Countenance of a Plea in Bar. 2 Cro. 678. Jones *versus* Ridler, in Ejectment, where the Defendant pleaded an ill special Plea (for sometimes they pleaded specially in those Days) it was held he could not take any Advantage of his own ill Plea, but the Plaintiff might if the Verdict had been against him.

Hob. 326. deny'd.

I take the Case of Reynolds, Hob. 326. to be mis-printed, for the Entry is no Bar. Expulsion makes the first Part of the Bar, and holding out the rest, the Book saith, It was found for the Defendant, which could not be, the Judge must direct the Jury otherwise. 3 Cro. 367. Stokes *versus* Annesby. In the Case of Tasker and Salter the Judgment was reversed.

And the Court inclined to give Judgment for the Plaintiff upon the Verdict, but afterwards Holt cited 3 Cro. 214. Lacy *versus* Reynolds, and 2 Roll. 99. S. S. and the Court agreed, that the Plaintiff should have Judgment in this Case upon the Defendant's Confession of the Trespass, the Issue being immaterial, so that the Jury could not give Damages, but there must be a new Writ of Inquiry. Per Holt, 1 Cro. 25. Knight *versus* Harvey (tho' not clearly reported) is home to the Purpose, only in that Case being in Debt, there needed no Writ of Inquiry. 22 E. 4. 46. a. (tho' before the Stat. of Jeofails) yet goes to the Reason of the Thing.

The Verdict was set aside, and Judgment pro Quer'.

See the Entry in such Case at large. 2 Roll. 99.

Judges.

*Nota*, 30 *Junii*, 1696. *Turton* (who was one of the Barons of the Exchequer) took his Seat the first Time in *B. R.* being made one of the Justices there upon the Death of Justice *Gregory*.

## *Rex versus The Inhabitants of* Luckington.

Poor's Settlements.

HOwel and his Wife were settled at Luckington, and came clandestinely into the Parish of St. Austins (in Bristol come semble) and there a Child was born; the Father dieth in the King's Service; the Question was, who shall keep the Child.

Northy. It is settled where Born, they cannot send it to the Father when he is dead, Luckington hath no Right to this Child, but as a Consequence of the Father's Settlement, which fails when he is dead.

Holt Ch. J. The Death of the Father doth not alter the Child's Settlement; must a Posthumous Child become a Vagrant? Birth gives no Settlement (as if a Child were born in the House of Correction) indeed 'tis a Settlement for a Bastard-Child, because he is nullius filius: The Mother must be settled where Father was last settled; so for the Child.

Northy. A Child cannot be removed from the Place of his Birth, unless to his Parent.

Holt. Hæsitavit. The Case is considerable, the Child may be sent to the Mother, but Quære who shall maintain it.

Broderick cited a Case between the Parish of Heston and St. Andrew's-Holborn, for the Child of Mr. Dockwray being Born in Holborn, it was ruled the Child should continue there, tho' the Father had been last settled at Heston.

Holt. 'Tis difficult in this Case of a legitimate Child. Suppose a Man is legally settled, and hath a Child, and afterwards some Estate descends to him in another Parish, whither he removes (as he cannot be hindred) where shall this Child be settled, which Parish shall contribute, shall the Discent of a Rood of Land charge a Parish with ten Children, I think they shall follow the Parent for Nurture and Education, but the Parish where they were Born shall contribute to their Relief.

We'll advise upon the principal Case, and I'll hear it when I come to Bristol upon the Circuit.

## Ball *versus* Hesketh.

### *At the Sitting at* Guildhall London, coram Holt *C. J.* (*The Relation of Mr.* Danvers.)

Ruled, that where the Defendant under Age borrowed Money of the Plaintiff, and afterwards at full Age promised to pay it him, this is a good Consideration for the Promise, and the Defendant shall be charged.

Infant borrows Money, and at full Age promises Payment, he is bound.

## Anonymus.

A. and B. agree upon a Price for twenty Packs of Goods which are mark'd, and A. promiseth to deliver them to B. paying so much Money for them, B. tenders the Money, and A. refuseth to deliver the Goods, B. brings a special Action upon the Case, upon the Promise to deliver the Goods, setting forth a Tender of the Money.

Where Trespass or Trover lies for Goods sold, &c.

Holt held, that it was a Bargain for the Goods, and the Plaintiff upon Tender of the Money should have brought Trover for the Goods, the Property being altered; but here an express Promise was proved to deliver the Goods which maintain'd the Declaration, &c.

Hob 41, 42.

Banco

Banco Regis.

Poor's Settlement.

Notice, where necessary.

PER Holt. If a poor Man hath been relieved several Years in a Parish, I should presume Notice in Writing; but 'tis but Evidence to the Justices. A Servant, or one that Rents 10 l. per Annum, need not give Notice, for they may not be disturbed. Here the Justices, by their Order, have determin'd it to be a clandestine Habitation, and we must take it to be so, tho' the Party did live six Years in the Parish.

*Rex versus* Corne.

Indictment on the Custom of Worcester, that no unfree Man should keep Shop there.

AN Indictment against him, setting forth the Custom of the City of Worcester, that no Person, not free, should keep any open Shop, & quod custodivit Shopam apertam pro Mercery-Wares, and sold them. Quash'd.

*Sitting in* Middlesex, coram Holt *Chief Justice.* 2 July, 1696.

*Rex versus* Shedrach Cook *and* Will. Snatt *Clericos.*

Indictment for absolving Traitors.

UPon an Indictment setting forth, that Sir John Freind and Sir William Perkins being attainted and about to be executed at Tyburn for High Treason, &c. the Defendants conspiring and intending (as much as in them lay) to justify, or at least to extenuate and lessen their Crimes, and to induce his Majesty's Subjects to believe, that they died rather as Martyrs than as Traitors; and to incite the King's Subjects to commit the like Treasons, they did take upon them to absolve, and did pronounce a Form of Absolution of them the said Sir William Perkins and Sir John Freind, without any Repentance, or any signs of Repentance by them given.

It was proved, that the Defendants asked the Criminals the several Questions directed by the Rubrick in the Office of Visitation of the Sick, and Mr. Cook pronounced the Words of Absolution of one of the Traitors, Mr. Snatt and one Mr. Collier (who is not now indicted) laying their Hands upon his Head, and after the Words pronounced, saying Amen, and Mr. Collier pronounced the Words as to the other Traitor, they all three laying on their Hands, &c. It was proved, that the Defendants were earnestly requested by Sir William Perkins and Sir John Freind, to assist them at the Place of Execution, and therefore the Jury

were directed to acquit them of the Conspiracy (tho' the Attorney-General said the Indictment was not for Conspiracy, and Conspirantes was put adjectively only to introduce the other Matter, and therefore was not material) and Holt directed the Jury, that this Proceeding of the Defendants was certainly scandalous and irregular, for if the Criminals had before made a private Confession, the Absolution should have been private likewise; but if they would give a publick Absolution, they ought to have required as publick a Confession, and particularly with respect to those Crimes for which they were attainted, being so notorious, &c. However, if the Jury were of Opinion they did it only ignorantly, and by Mistake (in which Case it is properly Conusable in the Spiritual Court) then to acquit them; but if they did it with a Design to affront the Government, and to vilify the Justice of the Nation, then to find them guilty; but at the Instance of the Defendants Council, it was directed to be found specially, that Snatt laid his Hand on the Head, and was assistant while the other pronounced the Words of Absolution, and afterwards Snatt said Amen (it being said quod pronuntiaverunt). And accordingly the Jury acquitted them of the Conspiracy, and found Cook guilty of the rest, and as to Snatt, ut supra.

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| Attorney-General,<br>Solicitor-General,<br>Coniers,<br>Cooper,<br>Mountague, | pro Rege. | Sir Will. Williams,<br>Sir Fr. Winnington,<br>Broderick,<br>Phips,<br>Mompesson, | pro Defendentibus. |

## *Sitting at* Guildhall London, coram Holt *Chief Just.* 3. July, 1696.

### Christopher Hyat *versus* William Hare.

HOlt. If there be two Partners in Trade, and one of them buy Goods for them both, and the other dieth, the Survivor may be charged by Indebitatus Assumpsit generally, without taking Notice of the Partnership, or that the other is dead, and he survivd.

Two Partners, one buys Goods and dies, the other chargeable, and how.

### John Taylor *versus* Mary Seed *in Ejectment.*

THE Plaintiff's Lessor had leased a House in London to the Defendant for seven Years, and, after the seven expired, had accepted a Quarter's Rent, whereby a Tenancy at Will was created; and it was proved by an antient City-Book in

Acceptance of Rent after the Term ended, makes a Tenancy at Will.

in French (called Liber albus) that by the Custom of the City of London, every Tenant at Will of above 40s. per Annum, in the City, ought to give or have Half a Years Warning; and if under 40s. a Quarter's Warning, and the Lessor of the Plaintiff had given no such Warning (the House being above 40s. per Annum) to the Defendant before the Ejectment brought.

It was urged for the Plaintiff, that this Custom doth not alter the Nature of an Estate at Will, as to the Determination of it, for then instead of being an Estate at Will, it would become a fix'd Estate for half a Year, &c. but the Meaning is, that if the Landlord ousts his Tenant without such Warning, he may have his Remedy upon the Custom, and to that Opinion Holt inclined.

Sir Barth. Shower and Darnel contra. That the Custom would be of little Use, if the Interest might be divested without such Warning, and the Party grieved put about to take his Remedy upon the Custom; and Shower said, he still continued Tenant at Will, but the Determination must be so qualify'd, as at the Common Law a Lessee cannot determine his Will near the End of a Quarter, whereby to prejudice the Lessor of his Rent, so, &c. and he cited a Case where the Landlord had recovered his half Year's Rent in London, where the Tenant had left the House, &c. without such Warning: But Holt seem'd still to retain the contrary Opinion; but there was a Verdict pro Quer', but the Postea was staid by Consent, and a Case was drawn for the further Opinion of the Chief Justice. And afterwards Mr. Acherly who was of Council pro Quer') informed me, that the Council of both Parties attended Holt Ch. J. at his Chambers, who told them, he had consulted all the Judges of England, and that Treby Ch. J. of C. B. was of his Opinion, that the Custom did not give any fix'd Estate to bar the Landlord in Ejectment, but gave a Remedy, if disturbed by collateral Action upon the Custom: But he said all the rest of the Judges were of the contrary Opinion, and that the Landlord could not recover in Ejectment against such a Tenant at Will, unless he had given half a Year's Warning. Wherefore the Plaintiff finding the Majority of the Judges against him, did not proceed.

Inland Bill of Exchange.

Mr. Davys tells me there was another Case after I went away, wherein Holt ruled it upon Evidence, that if an inland Bill of Exchange be accepted, and not paid at the Time; and the Party to whom 'tis payable do not give Notice thereof to the Drawer within three Days, if in Town, or within a reasonable Time, if in the Country, the Drawer shall be discharged, for it is not fit the Party to whom the Bill is payable should be the Judge what Remedy the Drawer might have against the Party, upon whom 'tis drawn, if he had timely Notice. Sed

Quære de hoc, for Cheshire and Acherly tell me, if he make fresh Pursuit, and sue the Accepter, he may at any Time resort to the Drawer, where he could not recover it from the Accepter, and that without his Default.

# DE

# Term. Sancti Mich.

## Anno 8 Willielmi III. Regis, in B. R.

### Hunt's *Case*. (*By Information of Mr.* Doiley.)

Scire Facias against Bail on a Commitment for Treason.

HUNT being committed for Suspicion of High Treason, was bailed to appear here the first Day of this Term, and now his Bail moved, that the Recognizance might not be estreated, alledging by Affidavits, that he was violently taken out of his House in the Night by a Party of French, and carried into France.

The Attorney-General opposed it, and said it would be made appear this was done by his own Contrivance to avoid the Risque of a Trial.

Holt. If it can be made out, that he himself was consenting, the Recognizance is forfeited; yet if we should estreat it now, they will afterwards come and controvert it in the Exchequer, therefore the better Course is to award a Scire Facias against the Bail, whereupon the Merits of the Cause will be finally determin'd; for it will be a good Plea, if true.

## Curring's *Case*. (*By Information of Mr.* Doiley.)

In Ejectment, Tenant for Life suppos'd dead, yet kept in Possession, tho' Verdict, &c. for him in Remainder.

CUrring was Tenant for Life, Remainder to B. B. brought an Ejectment, and at the Trial by Nisi Prius produced a Witness, who swore he saw the said Curring dead at the Battel at Landen, and that he stripp'd him of the Stockings, which he (the Witness) then had on in Court, whereupon B. had a Verdict. Curring soon after returned into the Kingdom, and appearing in Court upon the Return of the Postea pray'd a new Trial; but Shower said, his better Way was to pray, that Judgment might be stayed till B. moved for it upon Notice, for when this Matter appears to the Court, they will not grant him Judgment, to which the Court agreed, and so Curring keeps his Possession without the Trouble and Charge of a new Trial.

## Smith's *Case*.

Coroner's Inquest find a Post the only Cause.

A Coach and Horses having beat down a Post stuck in the Ground, which struck a Man so, that thereof he soon died, the Coroner's Inquest would only find, that the Post moved to his Death, which Presentment the Coroner having refused to receive, he adjourned them to several Places, and at last to the Assizes; but nothing could prevail with them to make any other Presentment. The Coroner moved the Court to know what he should do, for if he returned the said Presentment, it would appear upon the Face of it, that he could not have accepted it, and thereupon an Information would lie against him, and the Clerks of the Crown said the Practice was so. But per Cur. (absente Holt) that is unreasonable, for the Coroner hath no Remedy, but ought to accept such Presentment as the Jury makes.

He moved, that four or five of the Jury might be ordered to attend, that the Court might examine their Reasons for making such a Return. Sed non allocatur.

Nota. Holt was present when this Case was first moved, and said the Coroner should not have adjourned them to Places at great Distance, by Way of Punishment, but to the Assizes was well, where the Judge will inform them better.

## Linsey *versus* Clerk. (*By Information of Mr.* Doiley.)

PER Stat. 5 & 6 W. & M. the Capiatur pro Fine is taken away, and it was said, that the Entries in C. B. are Nihil de fine quia remittitur per Statutum. But per Holt, no Mention at all is now to be made of the Fine, because the Law is changed, and 'tis not like the Case where the Cause of a Fine is pardoned, for there the Law is not altered, but mitigated as to one particular Person; so nihil de fine quia pardonatur, to which the Court seem'd to agree.

No Entry of Capiatur. Fines in B.R. since the Stat. 5 & 6 W. & M.

## Smith *and* Page.

PER Cur'. Whatever may pass by Deed without Surrender (tho' it be required, that the Deed be inrolled in the Lords Court) can be no Copyhold. And whatever may pass by Surrender in the Lords Court secundum consuetudinem Manerii, (but not secundum voluntat. Domini) is no Copyhold.

Lands pass'd by Deed sans Surrender, no Copyhold, so Lands passing by Surrender secundum consuetud. only.

A. suggested by Affidavit, that he was in Execution for 50 l. upon a Judgment at the Suit of B. and that he had tendred the same to B. which B. refused to accept, but still detain'd him in Prison, so pray'd, that upon bringing so much into Court, he might be discharged.

B. opposed it, setting forth, that after the said Judgment and Execution, A. put him to considerable Charges in Chancery concerning the same, and that he had Costs assess'd him upon the said A. and therefore pray'd, that he might remain in Prison till he paid both; but the Court said they would take no Conusance of the Costs in Chancery, and therefore granted A. his Motion.

A Prisoner discharg'd on bringing in the Debt and Costs in B.R. sans regard to Costs in Chancery.

## Dickson *and* Willows. (*By Information of Mr.* Doiley.)

2 Salk. 446. S. C.

INdebitatus Assumpsit for nine Guineas, amounting to 13 l. 10 s. Wright Serjeant moved in Arrest of Judgment, that Guineas are of no certain Value in our Law, they were never made Current by Proclamation, so cannot be said to amount to any certain Sum; but the Action should have been for so many Pieces of Gold, vocat' Guineas.

Indebitatus Assumpsit for Guineas.

Holt Ch. J. Our Law takes Conusance of Guineas, and they are current for 20 s. for before Guineas were coined there was a

Ante

20s. Piece of Gold, which by Proclamation was raised to 21 s. 4 d. whereupon Guineas were coined at 1 s. 4 d. less, and provided any Piece have the King's Stamp, and be coined at the Mint, it shall be current without Proclamation in Proportion to its Value; the Plaintiff needed not to set forth they were Guineas, but so much Money received to his Use, &c.

## Oldham *and* Pickering. (*By Information of Mr.* Doiley.)

If an Administrator shall distribute an Estate pur auter vie, &c.

IN Prohibition to the consistory Court of Chester; the Question was, whether an Administrator be compellable to make Distribution of an Estate pur auter vie, after Debts paid.

Ward, that he shall. For a later Statute may be within the Equity of a former, and such Estate being by 29 Car. 2. made Assets in the Administrator's Hands, is thereby made subject to all the Qualities of other Assets, and from a Freehold is sunk to a Chattel, for upon a Plea of Plene administravit, which is only omnia bona & catalla, &c. if such an Estate remain'd, it would be found against the Administrator, it passeth without Livery, 'tis in the Ordinary's Power by granting Administration. In a Fi. Fa. which is only de bonis & catallis, upon a Judgment in Debt against the Administrator, 'tis sellable. A Legatee must sue such Administrator in the Spiritual Court, tho' he hath no other Assets than such Estate. Besides, admitting it a Freehold, it may be included in the Word Goods, which is used in the Statute of Distribution, for bona, by the Canonists and Civilians, is any Thing wherein one hath a Property, and the Ordinary, under whose Controul such Distributions are, is guided by those Laws. 31 Ed. 3. and 21 H. 8. which orders Administration to be granted, mentions only bona, yet Terms for Years are within those Statutes, moreover 22 Car. 2. Orders the Distribution of the Estate, &c. and certainly 'tis within those Words, and 'tis more reasonable there should be such Distribution among the next of Kin, than that one should run away with all: And there is no Inconveniency in it.

Cheshire contra. The Statute 29 Car. 2. whereby such Estate is made Assets, is an affirmative Statute introductive of a new Law, and consequently implies a Negative of all Matters not necessarily incident to such Innovation; thence it is, that Plene administravit would be false if such Estate remain'd, that it passeth without Livery, that it is sellable upon a Fi. Fa. for it could not be Assets unless it had those Properties; but to make it distributable is a new Quality, not at all included in the Notion of Assets; for before the Statute there were Assets without any such Distribution, and the whole Intent of the Statute is comply'd

with, without any such Quality, for the Statute says, It shall be Assets for the sake of the Payment of Debts; now the Making it distributable assists nothing to such Payment, for it comes after all Debts paid. The Statute of Distributions doth not say, all Assets shall be, &c. but says Goods and Chattels; and this Estate, tho' it be Assets, yet it remains still a Freehold, and the Administrator is Tenant to the Præcipe. A Statute may make a Fee-simple Assets, and whether such Estate be Assets for Legacies, unless it be expressly chargeable therewith Quære. Here 'tis Assets in the Hands of the Heir as a special Occupant, but not for such Debts where the Ancestor did not bind himself and his Heirs; and where there is no such special Occupant, it goeth to the Executor or Administrator as Assets for Payment of Creditors, and for no other Purpose. 'Tis dangerous to subject a Freehold to the Power of the Ordinary, without express Words or a necessary Consequence, and here is neither as to the Giving him Power to distribute this Estate: And so it was adjudg'd per totam Cur', for the Plaintiff in the Prohibition.

Nota. The Council seem'd to doubt, whether such Estate should go to an Administrator de bonis non.

Nota. Mr. Cheshire declared to me, that he argued against his own Opinion, and wondred the Court should give Judgment for his Client so suddenly; and further said, that Mr. Finch was of Opinion against the Judgment.

Ideo Quære bene, for 'tis probable such Estate would be distributable in Chancery.

Hucusq; ex Relatione Magistri *Doiley*.

## Langston *versus* Grant.

A having a Judgment for 100l. against B. they came to an Agreement, that B. should pay A. per Annum, and that A. should release the Judgment, which he accordingly did, A. dieth, and the Judgment not being vacated, his Executor assigns it over to a Prisoner in the Fleet, who (after a Scire Facias) took out Execution; and it was moved, that the Court would stay the Goods in the Sheriff's Hands for a Week, that the Plaintiff might have Time to bring his Audita Querela, urging, that the Sheriff was an Officer of the Court, that the Audita Querela was an equitable Writ, and that if the Goods once come to the Hands of the Assignee, Audita Querela will prove but an ineffectual Remedy.

Holt. When Execution is once begun, we cannot stay it, unless there appears an Irregularity. An Audita Querela is no Supersedeas; 'tis true, when the Deed is produced in Court and proved or confessed, a special Supersedeas may issue, but not to stop

Execution begun, can't be stayed. Audita Querela no Supersedeas.

stop the Sheriff from selling; 'tis like the Case upon a Writ of Error. 2 Cro. 73. Ayer and Ayden, and Yelv. 44. S. C. it is differently reported; but the better Opinion is, that the Execution once begun shall proceed, and the Sheriff may sell, tho' discharged; but the Goods were stayed by Consent.

## Duress *and* Moor.

Stat. for discharge of poor Prisoners mistaken in its Commencement.

THE Statute for Relief and Discharge of poor Prisoners was pleaded 24 Oct. 22 Car. 2. whereas the Session commenced in May before. Hall pray'd leave to amend it.

Holt. No, it cannot be granted. The Parliament was not prorogued, but adjourned. You should always search the Roll, there is no trusting to the printed Books. Nota.

## Duncomb *and* Church.

Warden of the Fleet pleads his Privilege to Debt for an Escape.

DEbt for an Escape. The Defendant pleads his Privilege as Warden of the Fleet; the Plaintiff replies, that he was in Custodia Marescalli ads. J. S. (a Clerk of the Court) de placito debiti, and so he declared against him in Custod. Mar'. The Defendant demurs.

Holt Ch. J. If the Plea be allow'd, the Judgment must be quod billa Cassetur. I cannot find any Precedent of a Judgment upon a Plea to the Jurisdiction, but in Rastal Antient Demesne; there the Judgment is quod billa Cassetur. But here the Defendant was only in Custodia Mar. upon Common Bail perhaps, that will not divest him of his Privilege, unless in actual Custody.

A privileged Person arrested, must give Bail, and plead, &c.

When a privileged Person is arrested, he must give a Bail-Bond, and must appear and file Common Bail before he can plead his Privilege.

At last it was discontinued without Costs by Consent.

## Bracy's *Case*.

Commitment by Commissioners of Bankrupts, until.

HE was committed by Commissioners of Bankruptcy, and the Conclusion of the Commitment was, until he conform himself to our Authority, and be thence delivered by due Course of Law.

Cowper, Shower, and Northy, for the Prisoner, that the Conclusion of the Commitment ought to have been, until he shall submit himself to be examined upon Interrogatories, according to the Intent and Meaning of the Act, for being a special Authority

to commit, the Words must be pursued. Here the Commissioners required Bracy to tell all that he knew touching the Estate of the Bankrupt, and (that being too general) they ask'd when, and in what Manner did you aid or assist in embezilling the Estate of the Bankrupt (not whether he did aid or assist) and for not answering they committed him.

Examination touching the Bankrupt's Estate.

Holt Ch. J. The general Questions may be well, if he cannot recollect any Thing, 'tis a fair Answer: Now, if any of the Questions were fair, there was just Cause to commit for not answering them. He is not to answer any Thing criminal, 'tis criminal to embezil any Goods after the Bankruptcy, but not before. But hold, if a Man hath intermedled honestly and fairly, without craft, he may and ought to discover it to avoid the Penalty, it may be the Word Embezilment may be too hard, but there is Latitude enough for other Questions tantamount; but here the Prisoner must be discharged, for the Conclusion of the Commitment is ill; so where Justices committed Overseers until they should be delivered by due Course of Law (where the Statute says, until they Account) we discharged them: Here the Conclusion should have been, till he shall submit and be (or to be) examined touching the Premisses, or (as Mr. Cooper said) upon Interrogatories.

Answers thereto.

Nota. Something was said at the Bar of an Action of False Imprisonment.

Holt Ch. J. There is no Colour for an Action of False Imprisonment, where an Officer commits such a Mistake or Slip.

Upon a Certiorari to remove an Indictment, the Justices of the Peace return specially, that the Defendant pleaded non Cul', and a Jury was returned, and sworn to try the Issue before the Certiorari was delivered, and pray the Judgment of the Court, whether they should return the Indictment.

Certiorari to remove Indictments, not to be delivered, &c. after the Jury sworn, &c.

Holt Ch. J. No indeed, it should have been delivered before.

## Byron *and* Elms.

Case for Words. What did you go to *London* for but to drop your Slink (with an Averment, that Slink means a Bastard in that Country) she went to London last Winter big with Child, and to my Knowledge several People have lain with her.

Words, &c. actionable sans special Damage.

Skinner moved in Arrest of Judgment, that the Action lies not without temporal Damage, the Case of 1 Roll. 35. Medhurst and Balam is denied in Siderfin, and several other Books; that which is said in Ann Davis's Case, 4 Co. 17. b. seems to be but the

the Opinion of the Lord Coke; and he cited 1 Cro. 436. Salter *versus* Brown, that it must be such a Child as is likely to be chargeable to the Parish, else she is not punishable by the Stat. 18 Eliz. this Case is not brought within the Statute. To say a Woman hath had a Bastard, is no more than to say she is a Whore, which will not bear an Action, unless by Custom or Tenure dum Casta vixerit.

Holt Ch. J. The Reason of the Resolutions is, because the Ecclesiastical Court hath Conusance: Having a Bastard is but an Evidence of Fornication, and that in Ann Davis's Case hath been often deny'd. If the Case were new, perhaps we should think an Action lies (without alledging Loss of Marriage) as well as for Words tending to the Discredit of a Tradesman, for it toucheth her in the most tender Part, and is a manifest Loss.

Marriage is the very End of her Creation for ought I know; if it were actionable, then there must be a Prohibition in such Case, for the Party must not be liable to Ecclesiastical Censures and temporal Damages too.

## Yeoman *versus* Bradshaw.

Bill of Exchange. Case by Administrator against the Drawer.

CAse by an Administrator against the Drawer of a Bill of Exchange: The Defendant pray'd Oyer of the Administration (which appeared to be granted by the Bishop of Durham) and then pleads in Abatement, that he was at London at the Time of the Intestate's Death, and ever since.

Hall pro Quer. A Bill of Exchange is a Security for Money, and equal to a Specialty by the Law of Merchants; therefore the Administration taken in Durham, where the Bill was, is good.

The Bill but a simple Contract, and draws the Administration to the Place of the Debtor.

Selby pro Defendente cited 3 Cro. (472) Byron *versus* Byron. Office of Executor 66. (which Rookby J. said, was Writ by Justice Dodderidge and good Authority) Dy. 305. 1 Roll. 908. that all Debts upon simple Contract (as this is) draw the Administration to the Place where the Debtor lives.

Holt Ch. J. Tho' it be in Writing, it is but as a simple Contract. If there be one Action against an Executor upon a simple Contract, and another upon a Bill of Exchange, and Judgment upon the simple Contract, that may be pleaded in Bar to the other. If an Award be to be in Writing, yet that doth not alter the Nature of the Action of Debt upon the Award, shall that draw the Administration to the Place where the Award is, no certainly.

Judicium quod billa Cassetur.

## Tyne *versus The Bishop of* Worcester.

EJectment against seven Defendants, but upon the Nisi prius Roll, two of the Defendants were omitted in the Issue, and so only five were found guilty, and so returned upon the Postea; and now it was moved, that the Nisi prius Roll might be amended by the Issue-Roll, for that it doth not alter the Verdict. 3 Bul. 311. Cranfeild 311. Cranfeild *versus* Turner, Dyer 260. and Northy urged, that the Distringas here is right, and therefore it is amendable, for which he cited 3 Cro. 258. Cottingham *versus* Griffith & al'. 1 Cro. 275. and 278. Le-merchant *versus* Rawson. Roll. 203. (11). On the other Side were cited 3 Bul. 161. Cook *versus* Lancaster. Roll. 202. S. C. and it was said, tho' the Distringas sends the Jury, yet it is the Nisi prius Roll which gives the Judge his Authority.

Ejectment and Issue against seven, but the Nisi prius Roll was against five only. The Nisi prius Roll amended by the Issue-Roll.

Cur'. True, it is all seven are Parties to the Suit, but two do not plead on the Nisi prius Roll, so there is no Record nor Warrant to the Judge as to them two; and if it were amended it would alter his Return. But at another Day they said, here five Defendants plead non Cul', and it appears by the Jurata and Distringas, that there was but one Issue between the Plaintiff and seven Defendants. In Blackamore's Case, it is said a Record of Nisi prius shall not be amended, unless it appears by express Words, or be imply'd, that the Judge had Authority to try the Cause. Now here 'tis strongly imply'd, that there could not be a different Issue between the Plaintiff and the Five, and the Plaintiff and the Two. In the Case of Cook and Lancaster. 3 Bul. 161. (which is well abridged. Roll. 202. (5). It was not amendable, for 'twas quite another Issue, and would attaint the Jury: Here 'tis the same Issue. Besides, this must be considered as an Ejectment, where they enter into Rule to confess Lease, Entry, and Ouster, and nothing is to come in Question but the Title; and Rookby J. said, the Rule implies a Consent, that it should be amended.

## Hartop *and* Holt.

JUdgment in Case upon a Bill of Exchange was affirmed upon a Writ of Error in Cam. Scacc. and remitted hither; and then a Scire Facias issued, and Judgment thereupon, that the Plaintiff should have Execution; then Holt brought a Writ of Error in Cam. Scacc. tam in redditione judicii quam in adjudicatione executionis, the Writ was allow'd, yet the Plaintiff was taken in Execution, whereof Complaint was made to the Court, but without Relief; for per totam Cur', no Writ of Error lieth in

Execution, tho' Error pending.

1 Cro. 286, 464. Sid. 320. Hob 72. Yelv. 157.

in Cam. Scacc. in such Case, and therefore the Execution is well taken out.

No Error of a Judgment in Scire Facias.

Holt, It is an old Point debated, whether a Writ of Error lieth in Cam. Scacc. upon a Judgment in Scire Facias. Twisden held strongly, that no Writ of Error lieth, for a Scire Facias is none of the Actions wherein a Writ of Error is given in the Exchequer-Chamber: But Hale thought it was within the Equity of the Stat. (Mod. 79.) Here the Writ is clearly naught, for the principal Judgment, for they cannot examine their own Judgment, yet possibly it might be good for the Judgment in Scire Facias, if it lay in such Case at all, which I think it doth not, neither by the Letter nor Meaning of the Statute, for it is not influenced by the Merits of the Cause, but something since. Vide 1 Ven. 168. Skinner *versus* Webb.

## Swain *versus* Carter.

Resignation-Bonds Smell of Simony.

HOlt Ch. J. A Resignation-Bond comes as near Simony as can be, for 'tis easy to secure a round Sum by such a Bond. I do not approve the Giving or Taking such a Bond, a worthy Man will not give such a Bond to resign.

## Texel *and* Hooper.

Plaintiff replies Indigena to Plea of Alien nee.

HOlt Ch. J. Where Alien nee is pleaded in Abatement, and the Plaintiff replies Indigena, he may either take Issue, or conclude & hoc paratus est verificare, but if in Bar, he must take Issue, and that is the Reason of the Difference in the two Precedents in Rastal.

## *Sir* Roger Pulefton, *Lessee of* John Levet *& Ux' versus Sir* Peter Warburton *& al' in Ejectment, for Lands in* Staffordshire.

A Settlement suppos'd, revoked because the Possession varied from it.

THE Plaintiff's Title was thus, Sir William Brereton seised of these Lands in Fee, Anno 1655. by Lease and Release, convey'd to the Use of himself for Life, and afterwards to his Executors, until they should have paid his Debts and Legacies out of the Profits, then to the Use of Susan Brereton, his Daughter, and her Heirs for ever (the Release was in Consideration of natural Love and Affection) Susan married Lenthal, and by him had Issue the Feme, Lessor of the Plaintiff. All the Executors of Sir William renounced their Executorship, having first assigned their Interest to Sir T. Brereton, for Payment of



Debts,

Debts, (Holt said, they might well renounce, notwithstanding the Assignment, for they do not take as Executors, 'tis but a Description of the Persons.) Nota, Holt would not allow any Proof of a Will in Writing, without producing the Will it self.

No Proof of a Will in Writing, but the Will it self.

Sir William Brereton died in sixty-one, and Possession hath been with the Lessor of the Plaintiff till now lately.

Holt Ch. J. If the Lessor of the Plaintiff had Possession for above twenty Years, tho' now he hath lost his Possession, yet 'tis a sufficient Title by the Statute, they have jus Possessionis.

Possession of 20 Years good Title. Salk. 421.

The Defendant's Title was as followeth: Sir Randle Brereton, 10 April, 7 Jac. convey'd the Lands in Question by a Fine and Recovery, and Deed declaring the Uses, viz. to himself for Life, Remainder to his Brother Richard, and 1st, 2d, and 10th Son in Tail male, and so to his Brother Thomas, and then to his Cousin William Brereton, Remainder to his Daughter Mary, the Wife of Sir Richard Egerton, and the Heirs of her Body; Richard, Thomas, and William, are all dead without Issue Male; Sir Richard Egerton and Mary his Wife, had Issue three Sons, Ralph, Richard, and Thomas, and one Daughter Elizabeth, who married Sir Peter Warburton, who by her had Issue George, who had Issue Sir Peter, the now Defendant: Richard Egerton (called Colonel Egerton) being married to Sir William Brereton's Sister) by Bargain and Sale, 13 Car. 1637. conveys to Sir William Brereton, but Colonel Egerton was but Tenant in Tail, which is since determin'd; for Ralph was first dead without Issue: Colonel Richard Egerton died in 1663, without Issue; Thomas had Issue Ralph, who recovered these Lands in Ejectment, Anno 1692. by the Male Line, but he is since dead without Issue, whereby the Defendant's Title accrew'd.

Mr. H. Lloyd proves, that it was proved at the Trial in 1692, that Thomas made Entries in 1666. Holt Ch. J. That would wipe of the Time before, but then the new twenty Years being attach'd in the Father, would proceed in the Son. But Cotton proved, that it was proved at the former Trial, that Ralph made Entries in the Year 1676.

At last the Jury found pro Quer', because the Possession did not go along with the Settlement (and therefore they supposed it might be revoked, according to a Power reserved).

Holt Ch. J. said, It was a very strange Cause, and of great Difficulty upon the Jury, and he could not say they gave an ill Verdict.

Nota. The Demise in the Declaration was laid of a Day to come, and therefore the Plaintiff did not proceed upon this Verdict, for Mr. Cheshire, who was Counsel in the Cause, assured me they were satisfied it was a fatal Error, and that it is not amendable. Vide H. 23. Biscoe *versus* Blake.

Demise laid of a Day to come, ill.

## Smith *and* Taylor.

Debt on Judgment after a Cesset Executio, ill.

UPon a Cesset executio per Consens. the Plaintiff brings Debt upon the Judgment in the mean Time.

Holt Ch. J. We'll not allow it, let the Proceedings stay: If a Man be bound with Condition to deliver a Bond by a certain Day, and in the Interim he sues the Bond and obtains Judgment, and then delivers up the Bond, this is no Performance.

## *Rex versus The Inhabitants of* Ireton *in* Cumberland.

Evidence on Indictment for not repairing Highways.

UPon an Indictment against a Parish for not Repairing a Highway, they can give nothing in Evidence upon a Not guilty, but that the Way is in Repair; but if it be against a particular Person, he may give Evidence, that others ought to repair it.

## Etherick *and* Brewell.

One in Execution after a voluntary Escape.

PER Holt Ch. J. If there be a voluntary Escape in the Officer, who takes the Party again in Execution (which he ought not to do) yet the Plaintiff may have him in Execution, if he Will.

## Bull's *Case*.

Ante . Poor's Settlement.

TWO Justices make an Order to remove him to D. they Appeal to Sessions, where it is ordered, that he be removed to a third Place, which is ill, for they can but affirm or reverse, and the Order of Sessions reversed.

## *Rex versus* Chalk.

Mandamus to restore a Burgess: Return a Power to remove.

UPon a Mandamus to restore to the Place of a Burgess of Winton, it was returned, that they were a Corporation by Prescription, and that Power was in the Mayor and Burgesses to remove any Burgess, that should do any Thing contrary to his Oath, or to the Detriment of the Corporation upon Proof of the Offence, that he had put out several Officers contrary to the Custom, and had rased the Corporation-Book, putting out one Name and putting in another.

Northy excepted against the Return, that a Corporation cannot (without special Custom) disfranchise without Proof of the Offence by Trial at Law: Here it is not laid, that it should be proved before them; so that it should be by Conviction upon a Trial. 11 Co. Bagg's Case.

2. They say he was removed in Common-Council, which is but a Part of the Corporation (but that was soon over-ruled, for Holt said, the Power is laid in the Mayor and Burgesses to remove, and it cannot be worse for being done in Common-Council. Northy, But the Common-Council is a distinct Body. Holt, It may be not.)

Common-Council implies the Corporation.

Sir Barth. Shower contra. These Things are not properly triable at Law. 1 Ven. 19.

Holt Ch. J. If a Man be guilty of Perjury, Forgery, &c. he is not to be removed before Conviction, but here the Rasing the Corporation-Book, &c. is not only an Offence at Common Law, but against the Duty of his Place; but Northy urging Bagg's Case, Holt Hæsitavit, and said (to Shower) why did you not indict him? and 'twas adjourned.

Indictment lies for razing a Corporation-Book, &c.

## Beaumont *and* Peirce, *Executors of* Peirce.

DEbt sur Obligation for Performance of Covenants. The Plaintiff was Colonel, and the Testator Agent to his Regiment, and covenanted to pay all such Money as he should receive upon the Account of the Regiment, in such Manner as the Plaintiff should Order; the Breach assigned was, that the Testator between such a Day and such a Day received 500 l. which the Plaintiff ordered him to pay to Mr. Harriot, Goldsmith, and he did not pay it: The Defendant demurred, for that it is not certain enough, but the Plaintiff should have named a particular Day, for the Receipt is traversable; but the Court held it well enough.

Breach on Obligation to perform Covenants.

Ante 377.

Et Judicium pro Quer', nisi, &c.

## Villers *versus* Parry.

SCire Facias upon an Award of Execution upon a Recognizance in C. B. entred into by Two as Bail; the Award was quod E. haberet. Executionem *versus* præd. F. & G. de præd. separal. summis de 2000 l. and 2000 l. Now the Scire Facias is to shew Cause why Execution should not be against each of them for the several Sums of 2000 l. and 2000 l. And there is a Demurrer to the Scire Facias.

Sci. Fa. (on Award of Execution on a Recognizance in C.B. against Two, as Bail) joint or several.

Holt

Holt Ch. J. 'Tis joint and several, the Plaintiff hath Election to sever it, he may have one Scire Facias and Judgment severally thereon (so held in this Court in the Case of one Sir Francis Thane; Execution was there awarded severally, and removed hither by Certiorari, because the principal Judgment was removed hither and affirmed) why cannot they have one Scire Facias upon the Award of Execution as well as upon the principal Recognizance. In Scire Facias against several Tertenants in the same County, tho' they sever in Pleading, but one Elegit goes. And whereas it was objected by Northy to be improper, that one should speak or answer for the other, yet that is to be taken distributively; so in Debt on Obligation *versus* two for 2000 l. if one pays it (or an Elegit be against one) the other is discharged. Northy said, that is in Equity, or to be relieved upon an Audita Querela; but Holt seem'd of Opinion it might be pleaded upon a Scire Facias (Sed hoc hæsitanter). Here the Scire Facias doth distribute it, but indeed it should pursue the Award of Execution, which seems to be joint, but he inclined it might be well enough, reddendo singula singulis. Vide Sid. 39. Sed Adjornatur.

One Sci. Fa. on Award of Execution against Two.

One Elegit against several Tertenants in the same County, tho' they sever in Pleading.

Reddendo singula, &c.

## Bret *and* Bagill.

New Judgment on a former (for Plaintiff) reversed.

IN Replevin, if the Judgment for the Plaintiff be reversed, such new Judgment must be given as the Court should have given before, which cannot be for the Avowant, unless upon the Merits of the Avowry; and if that be naught, it must only be Nil cap. per billam.

## Coward *versus* Redwood.

Inferior Courts, Judgment Assident for Assidunt, or Precept. est in the Venire, omitting per Cur', yet well.

ERror of a Judgment in the Palace-Court. Gold Serjeant assigned for Error, that the Award of the Venire Facias is præceptum est, without saying per Cur'.

2. 'Tis Assident pro Assidunt.

Holt Ch. J. As to the First, if it be said ad eandem Cur', 'tis well (and so it was) else this would not be help'd by the Verdict, but as to the other Exception, adjornatur.

At another Day, per Curiam, neither assident nor assidunt are very proper, but the one makes as good Sense as the other, and therefore may be as well in Law.

Judicium affirmatur.

## Hicks *versus* Harvey.

PER Holt Ch. J. There is no Difference between the Date of a Deed and the Making of it, for the Making is the Delivery, notwithstanding 1 Inst. 46. b. And Sir Barth. Shower said, that it was held by all the Court of C. B. that to hold from the Date, or from the Making, is all one.

No Difference between the Date and making of a Deed.

## Collins *and* Lawley.

There being Oath against Oath upon the Question, whether a Plea came in in Time, it was referred to a Trial at Law upon a feigned Issue, to satisfy the Conscience of the Court, and in the mean Time the Judgment to stand.

Oath against Oath tried on an Issue.

## *Rex versus* Owen.

RUle was made for the Defendant, who was served with a Mandamus and an Alias to return the Writ, which required him to deliver the Mace & insignia Majoratus, to one Bennet the new Mayor: Serjeant Wright moved to discharge the Rule, because the Mandamus doth not say, vel causam nobis significes, and said the mandatory Writs must pursue the Form of the remedial Writs, as Ostensurus quare non fecerit.

Mandamus to deliver Insignia, &c.

Holt Ch. J. You may shew Cause upon it however, but you connot move this till the Writ be returned, when you may pray Judgment upon the Writ; in the Case of St. John's College, several Precedents were cited without those Words vel causam, &c. yet being returnable, they might shew Cause.

Nota. Upon the Alias an Affidavit was made of the Nature of the Thing to obtain the Rule for returning the Alias, else a Pluries should have gone.

## Blachley *versus* Fry.

TRespass for Breaking his Close, and Cutting and Carrying away his Corn; the Defendant was found guilty of Breaking the Close and Cutting the Corn only; and the Question was, whether the Plaintiff should have full Costs.

Trespass, if the Title be in Question, full Costs; so if any Thing carried away.

Gold urged the great Mischief, if a Man might come and cut down all ones Fruit, Trees, &c. and not pay Costs. 2 Ven. 215. In Serjeant Stroud's Case, a Man came into his Close and

and digg'd a Turf, claiming Title; Stroud brought Trespass, and at the Trial the Defendant did not appear, yet the Judge certify'd the Title to be in Question.

Holt Ch. J. That might be if it appeared upon Evidence, and if the Title be in Question, then full Costs, tho' never so small Damages, or if any Thing be carried away, then full Costs, because Trespass lieth at Common Law for Taking the Things away, as Chattels; but here I know not how to help you, we must keep to the Law.

Gardiner's Case, full Costs for breaking Windows. Q.

Gold cited one Gardiner's Case about four Years ago in this Court, in Trespass, for breaking and entring the Plaintiff's House and breaking his Windows, the Defendant was found guilty of Breaking the Windows only; and the Plaintiff had full Costs, for the Court said, the Statute extended only to involuntary Trespasses. But Holt said, he did not see that the Statute warranted any such Distinction, nor did he remember any such Case. Adjournatur.

Ante Post.

## Green *and* Pope.

A peremptory Mandamus on a false Return.

Pemberton moved for a peremptory Mandamus, an Action having been brought in C. B. for the Falsity of the Return, and Judgment for the Plaintiff upon Demurrer there.

Holt Ch. J. I Doubt whether Judgment upon a Demurrer, which may be upon a Slip in Pleading, doth falsify the Return.

Pemberton. Then we shall never have it, for they will always demur.

Quære, If Judgment on a Demurrer in C. B. will falsify a Return.

Holt Ch. J. I think we should have the Record, which falsifies the Return here in this Court, we cannot judge upon their Records; you read only a short Rule in the Cause in C. B. that Judgment be entred pro Quer', perhaps there is no Inquiry of Damages, no final Judgment; it might be arrested there, or perhaps we should reverse it upon a Writ of Error.

Poor's Settlements.

Brewer excepted against an Order of two Justices, to remove a poor Person.

Exception to Justices Orders.

1. That it is not said in the Order, that the Man did not Rent 10 l. per Annum.

2. That it doth not appear, that one of the two Justices was of the Quorum.

Holt said, the first Exception had been solemnly over-ruled, but for the second Exception, the Order was reversed: And then the Order of Sessions falls to the Ground.

And the next Day, in Pool's Case, Holt said the Order should begin, Whereas Complaint hath been made unto us two Justices, &c. Quorum unus. By, &c.

## Honiton *and* South Beverton *Parishes.*

TWO Justices remove a Man from Honiton in the County of Devon, to South Beverton in the County of Somerset; they Appeal to the Sessions in the County of Devon, where the Order is reversed. Now two Justices in the County of Somerset, may by Order remove him to Honiton again, for 'tis but an Execution of the Order of Session, which could not otherwise be done, because it is out of the Jurisdiction of the Court of Session.

Justices Order. Poor's Settlements.

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## *Sitting in* London, 2 *Decemb.* 1696.

PER Holt Ch. J. Where a Bill of Exchange is payable to a Man's Order, that is to himself, if he makes no Order; and if the Party underwrites the Bill presented such a Day, or only the Day of the Month, 'tis such an Acknowledgment of the Bill as amounts to an Acceptance. And this by the Jurors was declared to be the common Practice.

Bill of Exchange payable to Order, &c. Underwriting is an Acceptance.

## *At the* Old Baily, 16 *Jan.* 1696.

### *Rex versus* Segar *and* Potter.

They were indicted for Burglary, in breaking and entring the Dwelling-house of one Denham, and taking Money and Plate thence, to a considerable Value: And upon the Evidence it appeared, the Fact was done in the Day-time; so Ward Chief Baron, directed the Jury to acquit them of that Indictment, and they should be indicted a-new upon the Stat. 18 Eliz. for Breaking the House in the Day-time, and Taking to the Value of 5 s. no one being therein, and another to be indicted as Accessary before the Fact, from whom Clergy is taken away by the late Stat. 3 & 4 W. & M. 9. But Turton J. and Powel J. held, that if the Jury acquitted them generally upon this Indictment, they could not be indicted a-new for the same Fact; and if they were found guilty of simple Felony they would have their Clergy, and therefore said the Way was to discharge the Jury of them upon this Indictment; and so it was done, tho' Ward Chief Baron said, he had known Persons indicted a-new after a general

Indictment of Burglary in the Day-time, ill.

Accessaries to House-breakers ousted of Clergy.

Kee. 26, 47, 82.

general Acquittal in such Cases. Turton said, he had known and practised the contrary.

Note. Quære (per moy) & Vide 1 Inst. 227. b. that a Jury sworn and charged in Case of Life or Member cannot be discharged by the Court or any other, but they ought to give a Verdict. (Vide Trials per Pais 419.) But Note, tho' found guilty or acquitted, upon an Indictment notoriously Faulty, as here, they may be again arraigned on a good Indictment.

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# DE

# Term. Sancti Hillar.

## Anno 8 & 9 Williel. III. Regis in B. R.

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### Derry *versus The Dutchess of* Mazarine.

Action against a Feme Covert.

SLoan pro Defendente moved for a new Trial, she being a married Woman, and proved at the Trial to be so.

Holt Ch. J. 'Tis worthy of Consideration, if this be not like the Case of Weyland J. 1 Inst. 133. a. He was exiled, yet his Wife might bring an Action, for the Husband could not return; so here the Duke is an Alien Enemy, and the Dutchess hath lived here for many Years under the Protection of the Government. Et Adjournatur.

## Trygarn *versus* Fletcher.

ERror of a Judgment in Replevin in the Grand Sessions at Denbigh. The Defendant made Conusance as Bailiff to Jane Griffith, that Robert Griffith was seised in Fee, and devised to Thomas Griffith in Tail; and that a Common Recovery was suffered against him, to the Intent that Jane should have a Rent of 40l. per Annum, after the Death of Thomas, and that there was a Deed after the Recovery, declaring the Uses, &c. which was held to be ill pleaded, for he should not have set forth the Deed, but have pleaded according to the Construction of Law, that the Recovery was to such Uses at the Time, &c.

Conusance in Replevin.

Recovery to Uses, how pleadable.

## *Rex versus Sir* Charles Tyrrel *nuper Vic.* Essex.

ROokby J. said obiter, Malefactors ought to be committed to, and kept in the County-Gaol; but as to other Prisoners, where the Sheriff is to answer for Escapes, he may keep them where he pleaseth.

Prisoners, where to be kept.

## Hicks *and* Woodison.

IN Prohibition, upon a Suggestion, that the Hundred of Hunsbyton in the County of Somerset is an antient Hundred, that there hath been a Custom Time out of Mind, that the Inhabitants of that Hundred have been discharged of the Tithes of barren Cattel, Issue was taken upon the Custom, and Verdict for the Plaintiff, but Judgment was staid.

Custom of Non Decimando in a Hundred, void. Q.

1. Tithe is due for Agistment of barren Cattel of common Right, and at the Common Law it is 2s. per l. but the Custom governs it as to the Sum. Vide Fitz. Nat. Br. 53. G.

Tithes for agisting barren Cattle.

2. It was urged, that a County, and by the same Reason a Hundred may prescribe to be quit of Tithes of Wood, or any other Tithes, as appears by Dr. & Stud. 166. 2 Inst. 645. Roll. 653 and 654. 12, 13.) but Holt Ch. J. said true, it is a Hundred is as capable of such a Custom as a County, Wild, or Country; and whereas it was said for the Defendant, that the Hundred of H. contains no more than the Parish of H. and if it cannot be discharged as a Parish, it is not capable of such a Discharge as a Hundred: Holt said, if that were so, the Plaintiff should have shew'd it in his Replication: A Hundred, when it is granted out to a Subject, exempt from the County, with a Hundred-Court, then it is a Liberty, else it is not, but the Sheriff is to execute Writs there; If he direct a Warrant Ballivo Hundredi,

Hundreds, their Original, &c.

dredi, 'tis his Execution, unless he saith, cui Executio brevis pertinet. Co. 1 Inst. 121. saith, a Que Estate is a good Prescription to a Hundred for the Title to a Leet, that is in Debt for an Amerciament; but in a Quo Warranto, must set forth the Title to a Leet; several Hundreds have no Courts-Baron; Abbots, &c. had Hundreds; when dissolved, the King might either lay them open to the County or continue the Franchise; 'tis said in the Mirror, that Hundreds are divided into Mills and Parishes, and if it were otherwise here, as an extraordinary Case, it should come on the other Side, if it were material: But here I think the Custom is ill to be discharged of Tithe-Herbage, which is due of common Right, tho' it be generally put in Dr. & Stud. 166. that a County may prescribe to be discharged of any Tithe, yet I find no Instance of it in any other Case than Tithe-Wood (except one in Roll. 654. which I am not satisfy'd with). Now Tithe-Wood doth not seem to be due of common Right, because it doth not renovare annuatim, but the Church had got Possession of it, and the Statute de silva Cædua, 45 Ed. 3. cap. 3. is but in Affirmance of the Common Law, and, where they have obtained it, it is to be paid as a customary Tithe, and yet in the Case of Wood the Parson need not lay a Custom in his Libel; but if the Country be discharged by Custom, it must come on the other Side (contra 13 Co. 13.) The Case of Ridden and Edwards. Roll. 654. cannot be right, it is against the Statute of Articuli Cleri. The Case of a Tithe-Wood is somewhat like the Case of Tithe of Mills; the Church claimed Tithes for all Mills; and by the Statute of Articuli Cleri, cap. 5. de molendino de novo erecto, a Prohibition lieth not, but yet of an old Mill a Man may now prescribe generally in non decimando.

Tithe Wood not due of common Right, but payable as a customary Tithe.

13 Co. 13. deny'd.

Tithe of Mills.

A Consultation was granted, and the Court directed, that it should be specially entred, because it appears that the Custom is void and against Law.

## Roe *and* Gatehouse.

Several Promises govern'd by the nominative Case in the first.

CAse upon several Promises, the second Promise is, that in Consideration that the Plaintiff, at the Defendant's Request, had provided Meat, Drink, &c. super se assumpsit, Verdict pro Quer', and entire Damages given occasione infrascript; and now it was moved in Arrest of Judgment, that it is not said, who made the Promise, for which were cited 3 Cro. 913. Law *versus* Saunders. Noy 50. S. C. On the other Side were cited Sid. 306. Bedford *versus* Uffington. 2 Ven. 196. Haslewood and Mansfield 143. Trethewy. And it was said in the Case of Law, a third Person was named, but here none but the Plaintiff and Defendant. Holt said, Damages are given for no Promises but what are made by the Defendant; and if this is not so, 'tis void.

Northy answered, occasione infrascript refers to the Whole: Holt thought that the nominative Case in the first Promise might govern the Second, and inclined, that the Plaintiff should have Judgment.

Sed Adjournatur.

## *Rex versus* Barney, *and* Cowen *her Mother.*

AN Indictment was found at the Sessions at Norfolk against them, the one for Murther, the other for Petty Treason in Poisoning her Husband Mr. Barney.

Sessions can't indict for Petty Treason.

Holt Ch. J. Can the Session indict for Petty Treason, no sure.

Nota. Here the Matter slept for near twelve Months: A Letter was read, whereby one Mrs. Clopton, the Prosecutrix, demands several Things of them, and saith, she will not be quiet till they comply. They were bailed, and a Rule of Court made, that the Justices take Examinations and send them to the Assizes, and bind over Witnesses to prefer Indictments at the Assizes, and let the Record be certified thither.

Bail therein, and the Record certified to the Assizes. H. P. C. 166.

Per Holt Ch. J. In Gerard's Case of Westminster, who married the Grandmother of a poor Person, tho' she died, and so the Relation was determined, yet the Statute was construed by Equity, that he was a Grandfather within the Statute.

A Grandfather in Law to maintain a poor Child.

It seems reasonable if a Master, who is bound to keep an Apprentice, turns him out, whereby he is likely to become chargeable to the Parish; upon Complaint of the Church-wardens, the Justices may order the Master to take him again; and it seemeth, that the Remedy must be by Way of Indictment.

Justices may Order a Master to maintain a poor Apprentice or indict him.

## *Rex versus* Swanson.

EYres moved to quash an Indictment at the Sessions for keeping an Alehouse without Licence: It is not indictable, a particular Punishment and Prosecution being directed by the Statute 5 & 6 E. 6. In one Maryot's Case about two Years ago, Judgment was arrested.

Ante Indictment for keeping an Alehouse sans Licence.

Holt Ch. J. That I think was not settled, this Point hath often been stirred, and not yet settled.

Rookby J. Castel's Case, 2 Cro. is so.

Holt. 'Tis more for the Benefit of the Party to be indicted, than by the other summary Way. Demur to it.

Rex

## *Rex versus* Keate.

Two Indictments of Murder and Stabbing.

UPon two Indiaments, the one for Murther, the other upon the Statute of Stabbing: It was found specially, that before 15 Junii, (which was the Time laid in the Indiament, &c.) the Prisoner hired Wells, now killed, into his Service as a Gardiner, that 15 Junii, Wells being then in his Service, the Prisoner sent another Servant to Wells to fetch the Key of his Garden, with an Intent to discharge Wells from his Service; Wells refused to send the Key, the other Servant told Keat, that Wells refused, &c. super quo Keat fetched his Sword, came into the Kitchen and expostulated with Wells concerning the Key, Wells said he should have it if he would; upon this Keat drew his Word and struck Wells, and cut him on the Head with it; Wells endeavoured to have struck Keat with a Sney'd (or Handle) of a Scythe, but the Rack of a Chimney was in the Way, but he punch'd him with the Sney'd, and followed him into the Middle of the Room punching at him, then Keat run him thro' the Body, whereof he died. If Murther, then, &c.

No Time express'd in the Verdict. Vide infra.

Cowper pro Rege. The Verdict is not well as to the Time, but I must take the several Facts to succeed one another in the same Order as they are set down in the Verdict.

This is Murther, for there was some stale Malice, some hidden Displeasure, for which he would discharge him; and if there be an old Malice mix'd with a new Provocation, 'tis sufficient to make it Murther: Here is Malice imply'd, for several of the Passages were deliberate. A sudden Killing, without a Provocation (or without a Provocation sufficient to make it Manslaughter) is Murther; the only Provocation here is the Answer, that he should not have the Key, which is slighter than that of distorting one's Mouth and Laughing at another. Brain's Case, H. P. C. 45. Keat could not be sure that Wells had sent such an Answer; upon Expostulation, he said, he should have the Key if he would, tho' Wells punch'd him with a Sney'd, that was no Part of the Provocation, being after the Assault.

As to the other Verdict: The Killing a Man that hath not then a Weapon drawn, or that hath not then first strucken, is within the Statute.

1. Wells did not here strike first, it is true he had strucken before the mortal Wound; but the Words first strucken, must be intended of the first Blow: And so it was resolved in the Case of Vincent Byard, Jones 340. by the Opinion of ten Judges against one. I know that Case hath been doubted, but I think 'tis good Law, else the Word first would be superfluous. The Intent of the Statute was to preserve defenceless Persons; if a

Man unarmed will strike first, it is at his Peril; otherwise if he be first strucken, else the Statute might be evaded; for if I know a Man defenceless, I'll give a dry Blow to him, who I know will return it, and then I can kill him securely, 'tis scarce possible to kill so, but that there may be some Time to defend one self; here was a mortal Weapon first drawn, and a Wound given, which makes it stronger than Byard's Case.

2. As to the Weapon drawn, I know it hath been held, that a Candlestick or Bottle is a Weapon drawn, but I do not think the Law to be so; for so a Book in my Closet may as well be called a Weapon drawn, the Law means a Weapon sufficient for Defence.

Sir Barth. Shower contra.

'Tis found indefinitely, that the Prisoner struck, but not found, who struck first; the expressing one Thing first, doth not make it first in Time; the one struck with the Sword, the other punch'd, this doth not make the Verdict imperfect, so as to vitiate and quash it, because here is sufficient found for Manslaughter; go teach and baptize, sure Teaching is not to precede Baptism.

The Words qui adtunc non prius percussit must relate to the Time of the Stabbing. Here was a Weapon drawn, viz. a Sney'd. Godb. 154. A Cudgel was held a Weapon drawn. Sty. 467. In Morgan's Case, 1 Bul. 87. It is said to have been Popham's Opinion, that the Statute of Stabbing was but declaratory of the Common Law. Jones 430. Williams's Case, where he threw a Hammer at one Man and killed another with it, not within the Statute.

Malice prepense shall not be intended where any other Occasion appears. 3 Inst. 57. where two strive for the Wall, and the one kills the other, 'tis but Manslaughter. Inst. 287. b. Yelv. 205. the Word Murdravit (without adding ex malitia præcogitata) shall be intended of Manslaughter. Mich. 13 Jac. Rex *versus* Newbury. Barker and Newbury being friends were at Bowls, the one killed the other with a Bowl upon fervent Words, and held but Manslaughter. Here the Design to discharge him shews no Malice, they might part Friends.

Mr. Turner, a Gentleman at the Bar, upon his Wife's Complaint, that the Boy had not clean'd her Clogs, took up a Clog and kill'd him, without other Provocation, and held but Manslaughter. Anno 1666, One Bury had impress'd a Stranger, who made no Resistance, Hopkin Hungate finding the Press-master had no Warrant, would rescue him, and drew his Sword, and so did the Press-master, and they pass'd at one another, and Hopkin Hungate kill'd him; held but Manslaughter. If a Man comes to commit a Trespass, and a Quarrel ariseth and one is killed, it is scarce Murther; I can scarce agree to the Case,

3 Inst.

3 Inst. 56. that if one shooteth at a Deer (in another's Park) and the Arrow glanceth and killeth a Boy, that this can be Murther, 2 Roll. 120. shews the Reason of the Lord Dacre's Case, else 'tis hard. 2 Cro. 296. Royley's Case. 12 Co. 87. S. C. 2 Roll 460. Sir Charles Blunt's Case is the strongest Case that I know. If the unlawful Act be deliberate, and with Intent of personal Hurt, 'tis Murther, else it is but Manslaughter.

Vide supra.

Cooper reply'd, when no Time is expressed, what Rule can be observed, but the Order in which the Facts are found; go teach and baptize, Teaching should preceed Baptism, were it not controlled by other Parts of Scripture; but here is nothing in this Verdict to direct any Transposition.

In Turner's Case, the Clog was so small there could be no Intention to kill.

In Royley's Case, there was great Allowance for paternal Affection.

On a faulty Verdict a Venire Fac. de novo.

Holt Ch. J. If there be a Defect in the Verdict, we can give no Judgment, but a Venire Facias de novo must be awarded, for tho' they have found the Killing, yet if it be so uncertain that the Court cannot judge whether Murther or no, I should not be much against a new Venire. In a Case of Felony the Notes cannot be altered, but here he fetch'd his Sword, and upon the Expostulation and the Answer tunc he drew, so 'tis first; and it seems certain enough, the Question is, whether the Refusal be a sufficient Provocation, and surely 'tis no Provocation: If a Servant gives Occasion to be corrected, it must be done with a proper Instrument, as a Cudgel, and if Death ensue, 'tis per infortunium, bare Words are no Provocation to draw a Sword and kill.

Gray's Case, 10 Octob. 1666. was thus: Gray was a Smith and had ordered his Servant to do some Business, and when the Master returned they fell to work; the Master asked him if he had done what he ordered, the Servant said he had not done it, then the Master said, if you be not more diligent I'll have you sent to Bridewell; the Servant said, I had as good go to Bridewell as continue in your Service; the Master takes up a Piece of Iron and kills him, and upon a Special Verdict it was adjudged Murther in Kelynge's Time.

In Hopkin Hungate's Case he saw the Press-masters in Possession of the Man, who made no Resistance, Bridgman, Hale, and six more, (contra Kelynge Ch. J. Wyndham and Moreton) that it was but Manslaughter, because the Restraint without legal Warrant was a sufficient Provocation to an Englishman; but if there had been no Provocation, then 'twas agreed it had been Murther, tho' Blows exchanged.

In Mr. Turner's Case it was an unlikely Thing.

Barbarity will make Malice in many Cases, as 1 Cro. 131. Holloway's Case.

At another Day Serjeant Wright argued for the King to the same Effect with Cooper, and insisted, 1. That the Act was unlawful. 2. That there was no Provocation, and so Malice imply'd; and he cited 1 Sid. 277. but said he would not trouble the Court upon the other Indictment upon the Statute of Stabbing. And Holt said, that Indictment might have been spared.

Levinz contra. Here is no Malice imply'd, for sawcy Language is a Provocation, I agree; 'tis not a sufficient Provocation to justify the Cutting him upon the Head; upon an Action brought by the Servant. 9 Co. 67. says, without any Provocation, none of the Books say, without sufficient Provocation, but without any.

In Gray's Case there was no Provocation at all.

In Brain's Case, 3 Cro. 778. and H. P. C. 45. there was fighting for three Days before, indeed 'tis said the Court adjudged it only upon making a wry Mouth, but sure there was some Consideration of what had pass'd before, and Noy 171. Reports it adjudged on the whole Matter; here the Prisoner could not intend to kill by such a slight Wound at first; Indeed 3 Inst. 56. puts it generally, that killing upon an unlawful Act is Murther, but that doth not consist with his Case of two Men going to fetch Swords, which is an unlawful Act. If one Shoots at a Hen, and by Mischance killeth another, it is said there to be Murther, but the Cases there cited do not warrant it. H. P. C. 31. puts the very Case of Shooting at a Deer and Killing a Boy to be but Manslaughter. I take the Book for Authority, for I think it was my Lord Hale's Vademecum upon his Circuits. In Sir Charles Blunt's Case, 2 Roll. 120. It was an unlawful Act to enter another Man's House, yet because but sudden Affray, it was but Manslaughter. H. P. C. 48.

Serjeant Wright. It hath been often resolved, that Words are no Provocation: Mr. Turner said, the Boy called him a Son of a Whore: Twisden said, did those Words draw any Blood of you.

Holt Ch. J. In the Case of Killing the Hen, my Lord Coke is too large, there must be a Design of Mischief to the Person, or to commit a Felony or great Riot.

It is a good Rule in Numbers, where one strikes with Iron, there was no City of Refuge.

Rookby J. was not satisfied, that the Stroke on the Head was before the using of the Sney'd, and said, in Case of Life he would not take any Thing by Intendment.

Adjournatur.

## Foston *and* Dalbury *Parishes, or* Blood's *Case.*

Poor's Settlements.

ROBERT Blood and his Wife were removed by two Justices to Foston, where he had exercised the Trade of a Smith for one Year, and worked for, and was constantly employ'd by most of the Inhabitants of Foston, and by the Lord of the Manor and the Justices of the Peace there; this Order was reversed at the Sessions, and now both Orders were returned hither, reciting the special Matter, that he was an Apprentice in Dalbury, and that he had not given any Notice in Writing, nor was assessed, nor bore any publick Office in Foston; and now the Order of Sessions was confirmed; for tho' such Things might have been allow'd for Notice before the late Act, yet now it being an explanatory Act, must not be enlarged by Equity, we are confined to it.

Paying Land-Tax a Settlement.

Holt said, Payment of the Land-Tax hath been held a sufficient Notice, where charged and paid in a parochial Limit, tho' not a parochial Tax.

## Armstrong *versus* Lisle.

Appeal of Murder after a Conviction of Manslaughter.

THE Defendant was brought by Habeas Corpus, and it was returned, that at the Gaol-Delivery for the City of Carlisle he was indicted for the Murther of Richard Armstrong, and was found guilty of Homicide, and was presently charged with an Appeal of Murther.

Levinz pray'd, that the Clergy might now be allow'd him at the Bar; for when he was convicted of Manslaughter, he desired Clergy, and was deny'd, and then charged with an Appeal.

Holt Ch. J. I do not understand the Reason why Clergy should be delay'd to charge a Man with an Appeal: The Judges at the Common Law did usually delay the Indictment (tho' they might chuse) till the Year and Day were past, because the Prosecution in the Appeal was more vigorous; but if indicted before and acquitted, it was a good Bar to the Appeal; shall it be in the Discretion of the Court whether they'l hang a Man or no? It was argued in the Case of Goreing and Deering, but it is fit to be argued again.

Levinz cited H. P. C. 101. That Justices of Gaol-Delivery may Bail one convicted of Manslaughter, that hath Pardon under Seal, tho' not pleaded; and Sty. 93. Rex *versus* Andrews, that one attainted by Outlawry may be bailed pending a Writ of Error, which Holt admitted, and said in the first Case, the Bail is special to appear and plead his Pardon (it being first produced under the Great Seal) but would not Bail the Defendant,

for he said that were to contradict many former Judgments upon a Motion.

Note. The Entry upon the Record of Gaol-Delivery was, that he pray'd Clergy before he was arraigned upon the Appeal, and then being arraigned placitare vel respondere recusavit, which Holt said was impertinent, for they should have given Judgment against him; most Books are, that it must be the principal Judgment in Appeal, and not Pain fort & dure, but that he said is out of Doors now, for he must be arraigned a-new, and if he had pleaded there, all had been discontinued. Judgment on standing Mute in Appeal.

It was moved for the Appellant, that he might be admitted to appear, &c. by Attorney, but of that the Court doubted, because it must appear to the Court, that the Indictment was for the same Offence where Battel lieth not per Stat. H. 7.

The Council for the Appellant would have assigned Error in the Conviction; but Holt said, that they could not do, for none but the King or the Prisoner can do that: Here the Appellant is not before us, unless he comes in voluntarily, or by Scire Facias, for by the Certiorari the Appeal is put sine die, so that there can be no Nonsuit without a Scire Facias ad prosequend'.

At another Day Holt said, the Court ought to allow the Prisoner his Clergy; the Stat. 3 H. 7. 1. requires a Determination. He should have had his Clergy at the Assizes; they might have adjourned it till the Appeal had been try'd the same Assizes, but no longer. Et Adjournatur. Afterwards being demanded by Sir Sam. Astry, what, &c. he pray'd the Benefit of his Clergy, and the Book was delivered by Mr. Smith, the Ordinary of Newgate. Holt asked the Ordinary if this were within his Diocess, or within the Peculiar of the Dean and Chapter of Westminster; but Smith said, he had done the same Office here several Times before, and so was now admitted, and reported Quod legit; and the Prisoner was burnt in the Hand. Ordinary.

## *Rex versus* Clark.

Upon a Habeas Corpus to the Keeper of Newgate, it was returned, that the City of London is an antient City, and that there have been Time out of Mind several Societies, &c. whereof the Vintners are one, and in that, as all other Societies, certain Freemen called Livery-men, used to be chosen by the Society, which Livery-men so elected, having no reasonable Excuse, have used to take upon them and execute the Office of Livery-men, and to pay and contribute to the Charge of the Company; that a Court of Record is holden every Tuesday and Thursday for Government of the Companies; and by Custom, if any Complaint be made to that Court in Writing, or ore tenus, that any London Customs of choosing Livery-Men, &c. and imprisoning Refusers. Court of Record for governing the Companies.

any Freeman duly chosen to be of the Livery, doth refuse, &c. then the Court used to summon such Person and admonish him, and if he obstinately refused, &c. then to commit him to the Sheriff or any other Officer of the said City, until he should consent and declare, that he will take upon him the same Office, that the Defendant was duly chosen to be of the Livery, and had Notice, &c. and refused, &c. that Complaint was made by the Company, &c. Clark was convened and admonished, and refused, whereupon the Mayor and Aldermen, by Warrant in Writing under their Hands and Seals, according to the Custom, did commit him to Fells, Keeper of Newgate, until he should consent and declare, that he would take upon him the Office, or should be discharg'd by due Course of Law.

Northy pro Defendente took several Exceptions to the Return.

1. That the Gaoler ought to set forth his Warrant by Stat. 31 Car. 2. here he saith, they did commit according to the Custom, shall it lie in the Mouth of the Officer to amend the Warrant and conclude the Party, if the Warrant it self be insufficient. If Condition of a Bond be to make a sufficient Release, 'tis not enough for him to say in Pleading, that he did make a sufficient Release, but he must set it out, that the Court may adjudge of it; so here.

2. The Custom is to commit to the Sheriff or any other Officer of the City, and it is not shewn that the Keeper of Newgate is an Officer of the City, which the Court cannot take Knowledge of judicially.

To the first, it was answered by Sir Barth. Shower and resolved by the Court, that where one is committed in a Court of Record for a Contempt, the Warrant need not be set forth in hæc verba, for the Act of the Court is upon Record. And Holt said, take it not as a Contempt but as a Remedy directed by the Custom; yet if the Commitment were to an Officer attending, it were well, as where upon a Judgment in Execution to the Marshal in this Court, or to the Sheriff attending in other Courts, but here they make a Warrant in Writing to the Keeper of Newgate, tho' not present, it should rather have been to the Sheriffs of London, with a special Conclusion according to the Custom, tho' perhaps the Addition (till he be delivered by due Course of Law) may not hurt it. And when the Habeas Corpus is directed to the Gaoler (as it may be by the Habeas Corpus Act) he should return, that the Party was committed to the Custody of the Sheriffs, and he as their Minister detains him. (Note, The Consent to take upon him the Office must be effectual, viz. the actual doing it.)

Habeas Corpus.

Per Curiam the Custom is good, for otherwise the Government of the City cannot be preserved, for the Livery men are Persons

Custom adjudged good.

of Eminency, they chuse the great Officers of the City and Members of Parliament; and if they had not Power to punish such Persons in a summary Way, farewel to their Government. By Magna Charta Civitas London & cæteri Burgi habeant Libertates suas illesas.

But forasmuch as the Custom is alledged to commit to an Officer of the City, and they say he was committed to the Keeper of Newgate, but do not shew he is an Officer of the City, therefore the Return was held naught. Holt Ch. J. said, that in the Case of the Statute which prohibited Nonconformists from coming within five Miles of any Corporation that sends Burgesses to Parliament, and one was committed for coming within five Miles of London, but upon the Return, because it was not averr'd, that London sends Burgesses to Parliament, he was discharged, for it did not appear judicially to the Court, tho' they knew it. But the Return ill.

The best Way for the Future will be to commit by Order and Judgment of the Court to the Sheriffs, who are Officers of the City.

The Defendant was discharged, with an Admonition to submit himself to the Government of the City, &c.

## *Rex versus* Call.

PER Holt Ch. J. It is true generally, that an Act of Parliament commenceth the first Day of the Session, if nothing appears to the contrary; but there was an Act to dissolve the Marriage between Campbell and Mrs. Wharton, tho' the Marriage was after the first Day of the Session. Acts of Parliament relate to the first Day of Session, except, &c.

## Ann Jervis's *Case*.

TWO Justices Order her to be removed to Weston in the County of Somerset, being the Place of her last Settlement, as they are credibly informed; but upon an Appeal, upon hearing both Sides, the Order was confirmed, which per Holt supplies that Defect, and credibly informed, may be that Way which the Law appoints, viz. by Examination of Witnesses; but at another Day he said, they might be informed so at an Alehouse, and therefore he held the Order ill, but by Consent it was referr'd to the Judge of Assise upon the Merits. Poor's Settlement, an ill Order, tho' confirm'd on Appeal, not made good.

*Rex*

## *Rex versus* Penny.

Indictment for Words of a Justice Quash'd.

AN Indictment for saying of one Martin, a Justice of the Peace, I do not care if all the *Martins* had been hang'd seven Years ago, and for the Justice, he is now turn'd out of Commission. Quash'd.

## Bredon *and* Gill.

An Appeal from the Judgment of Commissioners of Excise to Commissioners of Appeals, who allow'd the former Depositions to be read, and well, and Prohibition deny'd.

THere was Judgment against Bredon before the Commissioners of Excise, that he should forfeit 50l. for keeping a private Store-house, upon the Statute 12 Car. 2. He appeals to the Commissioners of Appeals, there they offer to read, and would allow for Evidence the Depositions taken by the Clerk before the Commissioners of Excise.

Sir Barth. Shower moved for a Prohibition to the Commissioners of Appeals upon a Suggestion, that they ought to adjudge upon the Party's Confession or Evidence of Witnesses upon Oath, and not upon written Depositions taken before the Commissioners of Excise, for

By the Statute, the same Words are used for the Commissioners of Appeals as for the Commissioners of Excise, where it is left at large; the Rule of the Common Law must be the Measure either by Jury or by Witnesses; a Witness may revoke, 'tis true, he may die also, but that always goes in Advantage of the Criminal, who is supposed to be innocent. In Cases of Settlements and Bastard-Children, the Sessions always examine a-new.

The Commissioners of Excise are not commanded, nor compellable to put them into Writing, then 'tis hard if the Commissioners of Appeals are bound to take them as they transmit them; what if they put some into Writing, and not all, there ought to be some general Rule for all Cases.

In the Court of Delegates and Chancery, they are originally taken as Depositions in Writing, they do not (generally speaking) examine viva voce, as the Commissioners of Excise do; there are Appeals in the Country, there they never use to transmit Depositions in the Case of Excise to the Quarter-Sessions. They examine the Collectors, Gaugers, &c. Indeed it is not necessary upon a Writ of Error to examine Witnesses again, because they have been more solemnly examined by a Jury. Your Lordship granted a Prohibition in the Case of Release of a Legacy proved by one Witness, tho' they have a Jurisdiction of the Subject Matter, yet if they err in the Manner of Proceeding, as if they would examine without Oath, a Prohibition lieth.

Yelv. 93. 1 Cro. 333.

A Mandamus lieth to Justices to discharge poor Prisoners, to sign Poor's Rates, &c.

If they exceed their Authority, they are prohibitable as well as if they had no Authority at all. When the Court of Chancery exceeds its Jurisdiction, it becomes inferior.

Northy ad idem. Where a final Appeal is given by Act of Parliament, 'tis upon Fact as well as Law. If the first Judgment were given by Default or by Surprize, shall the Party be deprived of his cross Examination before the Commissioners of Appeals.

Attorney-General contra. This is not to be resembled to a Proceeding at Common Law (tho' there is no such Thing as re-examining Fact at the Common Law) but 'tis more like Proceedings in the Civil Law, where Appeals are more usual; if there be any particular Grievance, the Commissioners of Appeals are to examine that, but not else; the Mischief would be great, if the Defendant's Witnesses might be instructed to supply their Evidence.

I do not Doubt but the Commissioners of Appeal may examine viva voce, but the Question is, if they have not an Election. The Matter is within their Jurisdiction, then this Court will trust them with the Method of their Proceeding, if not contrary to Law; in the Case of the Release of a Legacy proved by one Witness, it hath been much controverted in our Books, whether the Spiritual Court might be prohibited, for why should they be bound to admit that for Evidence, which by their Law is none, they having Conusance of the Matter.

In Dr. Bury's Case, the Judgment given by this Court was reversed, for this Court ought not to examine the Proceedings of the Visitor, where he had Jurisdiction.

Serjeant Gold and Cooper ad idem. Cooper said, the Nature of an Appeal implies, that the superior Jurisdiction should judge, whether the inferior did the Appellant right as his Case appeared then, not as it might be represented. No better Way of transmitting Evidence than by Writing.

Holt Ch. J. How doth the Common Law require, where the Trials are not by Jury, that the Depositions should not be taken in Writing. In Chancery, the Evidence is supposed to be delivered viva voce in Court in Judgment of Law, and committed to Writing for a Memorial thereof, tho' now the Course is altered for Convenience, and done before the Examiner. If this be the Method where Trials are by Witness, why may not they judge here on Depositions in Writing? How shall it appear, that the Party is aggrieved by the Judgment of the inferior Court, unless they have gone contrary to Evidence, which cannot appear, unless the Depositions be transmitted, so that 'tis very fair, 'tis not properly in the Nature of an Appeal to try de novo.

novo. In Attaint you can give no other Evidence than was given to the Petit Jury. (Nota, Sir Barth. Shower said, that is because of the Punishment, &c. but there they are examined de novo) Any other collateral Matter, as rejecting of Evidence, &c. may properly be examined upon the Appeal propter gravamen. If they exceed their Authority, Trespass may lie, as in the Case of Terry and Huntington. Hardress 480. where Low-Wines were adjudged Strong-Waters, the Judgment was void.

As to the Case of a Legacy, when the Defendant pleads Payment, if it be true, the Spiritual Court have nothing more to do, for those Courts have no other Jurisdiction, than what the Law of England hath allow'd; and therefore in the Case of Shorter and Frend (ante .) a Prohibition was allow'd, where they would not admit of Proof by one Witness: But it is otherwise of Things originally Spiritual, as if a Will in Writing be revoked by a nuncupative Will; if they require two Witnesses, we'll not prohibit them.

Rookby and Turton Justices agreed with Holt, and Eyres hæsitavit.

## *Rex versus* Barnard.

Indictment for refusing the Office of Constable.

UPon an Indictment setting forth, that the Defendant (tali die) being then, and long before, a Resident of the Town of Southampton, and a fit Man, was duly chosen by the Mayor, Bailiffs, and Burgesses of Southampton, according to the Custom of the said Town, to be Constable for one Year, and until he should be lawfully discharged, that 4 Oct. notitiam habuit & requisit' fuit per Justiciar' præd' ad præstand' Sacr'um, &c. and from the 4th of October, had refused to take upon him the Office.

Northy moved several Exceptions to quash the Indictment.

1. 'Tis præsentatum extitit pro existit. Holt said, that was a common Error heretofore, but now held good; but,

2. The principal Exception was, that they should set forth a Custom, Time out of Mind, else they have no Power, for it ought to be done at the Leet.

Constables by Common Law to be elected at the Leet or Torn, which is the County Leet. A Corporation may elect, but it must be by special Custom, &c.

Holt Ch. J. It should be Debito modo secundum consuetudin' Vill' (hæsitanter) In some Places People are to be Constables by House-rows: Demur to it, if you will.

And afterwards it was argued upon a Demurrer to the Indictment; and then per Cur', All Constables are to be elected at the Leet by the Common Law, if there be any Leet, if none, then at the Turn, which is the general Leet of the County. A Corporation may have Power to elect, but that must be by special

Custom, and so laid, for a Corporation, as such, hath no such Power. Judicium pro Defendente.

Turton J. If the Steward refuseth a Constable elected at the Leet, can the Sessions examine the Qualifications of the Person, and refuse him?

Northy. They have done it.

Holt Ch. J. They could not do it before the late Statute.

## *Rex versus* Morgan Rice.

A Mandamus was directed to an Archdeacon to swear a Church-warden, who returned, that he was a poor Dairyman, and a Servant, & minus habilis & idoneus ad exequend. Officium præd. And this Return was held insufficient, for the Archdeacon hath no such Power: Here is a Custom laid, that the Parish should chuse, and the Archdeacon hath nothing to do but to admit. Church-wardens are a Corporation by Law, and the Successors may maintain an Action against them for the Goods of the Parish; they are temporal Officers by Law, and intrusted with the Goods of the Parish, therefore the Parish are fittest to have the Choice and Approbation of them.

Mandamus to swear a Church-warden.

Church-wardens, a Corporation, &c.

## Lovey *and* Arnold.

TRespass, for that the Defendants twenty Tuns of Timber, Mortar, and Bricks, super terram ibidem de novo erect. erga confectionem Domûs prostraver. ceper. & in Mare dejecer'.

Throwing down a Nusance, justifiable.

The Defendants pleaded, that the Materials were erected, erga confectionem Domûs upon the King's Highway, and that they threw it down, & per prostrationem præd. it roll'd and tumbled into the Sea.

Holt Ch. J. The Question is, whether this be an Answer to the Throwing it into the Sea.

Northy pro Defendente. If we had pleaded Not guilty to that, and it had appeared, that we threw them on the Ground, whereby they roll'd into the Sea, it would have been our Throwing, &c. which Holt seem'd to agree, and that the Throwing down of the Nusance was justifiable. Vide 1 Cro. 184. James *versus* Hayward. Jones 222. S. C. He said, if it were so near to the Sea, they need not take such mighty Care as to prevent any Bricks, &c. from falling into the Sea, but he said he was not satisfied with the Declaration, it should have been Part of a House.

## Hooker *and* Peirce.

Award of all Matters to the Time thereof, good. Ante .

IN this Case it was adjudged, that where an Arbitrator awarded, that the Parties should seal general Releases to the Time of the Award; this doth not vitiate the Award.

1. It is not intendible, that any new Matters arose between the Submission and Award.

2. If there did, yet it is void as to all such new Matters, and a Release of all Matters to the Time of the Submission is a good Performance. Vide Hardr. 399.

No Exceptions to Orders for Bastard Children, except the Party excepting be in Court.

It was said by Mountague at the Bar, and not deny'd by the Court, that if one comes to quash an Order for maintaining a Bastard-Child, the Person charged ought to be present in Court, to enter into Recognizance to abide the Order of Justices, if adjudg'd against him. And now the Court would not hear any Exceptions, because the Father was not present. And so Pasch. 97. in the Case of one Bathurst, the Court would hear no Exceptions, without his personal Appearance (tho' Affidavit was made of his great Age and Infirmity, &c.) for if the Order be affirmed, he must be committed till he find good Security to perform it, &c.

## *Rex versus* Curnock.

Order to maintain his Son's Wife. Indictment at General Sessions, not saying, quarterial, ill.

HE was indicted for Non-performance of an Order of Sessions, requiring him to relieve and maintain his Son's Wife; and now the Indictment was quash'd, because 'tis only said, ad General. Session. and not said Quarterial. as it should be per Stat. 43 Eliz. they may hold other General Sessions, but are required to hold four Quarter-Sessions per Stat.

## Inter *the Parishes of* Cockfield *and* Boxon *in the County of* Suffolk.

Sessions Order.

AN Order was made at the Sessions upon an Appeal, afterwards at a subsequent Sessions, they set aside the former Order of Sessions, being of Opinion, that it was obtain'd by Surprize.

Dalt. Just. cap. 185. pag. 518. Ante .

Holt Ch. J. Indeed we must set this Order aside, for they have no such Authority.

Northy. The Order of the two Justices is 2 Apr. and the Sessions held per adjornament. 27 April. it doth not appear to be the next Sessions, unless they shew the Beginning of it.

Holt. It may be, the next Sessions might begin the Day before, they do not use to shew the Commencement.

## *Rex versus* Edwards.

PER Holt Ch. J. Amendment is allowable after a Writ of Nisi prius seal'd, nay, after a Jury sworn, sometimes a Juror is withdrawn on Purpose, that there may be an Amendment, if it be not entred on Record. We do give Costs for not going on to Trial against the Prosecutor of an Information or Indictment; tho' in the Case of an Indictment, the Prosecutor perhaps is not named nor indorsed (for the Clerks of the Crown Office say, they do not indorse the Name of the Prosecutor, but only of Witnesses) then Affidavit must be made who is the Prosecutor, and he must pay Costs upon the Amendment of the Replication, &c.

Amendment after a Writ of Nisi prius seal'd, or Jury sworn, &c.

Costs against Prosecutors for non Trials.

## *Rex versus* Slatford.

A Mandamus was granted to the Mayor, &c. of Oxon, to admit the Defendant to the Place of Town-Clerk. They returned, that by the Charter granted to them by King James the First, one discreet Person was to be elected Common Clerk, to hold that Office during the Pleasure of the Mayor, Bailiffs, and Commonalty; they likewise certify the Statute of 13 Car. 2. which requires the Taking the Oaths of Allegiance, &c. and the late Statute appointing other Oaths: That the Defendant (tali die & anno) was elected Common Clerk, and (tali die & anno) & non antea, took the Oath of his Office before the Mayor, &c. and did not at the same Time take the other Oaths before us. In this Case it was resolved,

Mandamus for a Town-Clerk of Oxon, return elected during Pleasure, and not taken the Oaths.

1. That the Party is obliged at his Peril to take the Oaths to the King, &c. at the same Time when he takes the Oath of his Office, tho' they were not tendred. Vide Thacker's Case, N. Jones 121. but Holt said, the Mayor was obliged ex officio to tender the Oaths at the same Time, but Rookby thought not, unless the Party desired it. Nota, The best Way is for the Party to take these Oaths before he takes the Oath of his Office.

Corporation Oath to be tendred.

2. Where a Man is elected to hold at Will, in which Case he may be removed at Pleasure, without Cause shewn. Sid. 461. Dighton's Case, 1 Vent. 77, 82. S. C. yet if it doth not appear, that the Corporation hath declared their Will to remove him, this Court may grant him Restitution. Quære, If a Removal by the Corporation be not a Declaration of their Will.

3. It was moved, that the Return is insufficient, for that he might have taken the Oaths before two Justices of the Peace; and of that Opinion was Holt Ch. J. for, says he, the 10th Paragraph of the Stat. 13 Car. 2. gives a general Authority, that in Default of such as by the Custom of the Corporation ought to administer the Oath of the Office, two Justices of the Peace may do it; and the 12th Paragraph requires the other Oaths to be taken at the same Time (not say before whom) so it must be before such as have Authority by the former Clause, for the Parliament did not intend to trust Mr. Mayor only. But Rook[illegible] J. thought the Justices had no such Power.

Two Justices of Peace may tender it.

Holt. This is a Mandamus to admit and swear him, they return by Way of Excuse, that the Person is not qualified, which is no good Cause.

A Peremptory Mandamus granted, Nisi, &c.

Special Usage to hold Sessions preserved by the Statute.

Per Holt Ch. J. Where the Usage hath been before the Statute (which appoints the Days for four quarterly Sessions) to hold Sessions at other Times, 'tis well, as at Leicester, they hold their Sessions at Whitsuntide, in London and Middlesex, it varies according to Trinity-Term, and hath been held well within the Meaning of the Statute: And it sufficeth to say, ad General. Quarterial. Session. without setting forth the Custom.

Ante . Pulling up and throwing down a Hedge, no more Costs than Damages.

Trespass for pulling up and throwing down a Hedge, whereby Cattel of Strangers unknown enter'd and eat the Grass: The Court would grant no more Costs than Damages, there being no Asportation, tho' it was objected, that he could not pull it up and throw it down, without removing it.

## Bennet *and* Talbois.

Declaration in an Action at Common Law, concluding contra Statut. where ill, or not.

TRespass quare clausum fregit & herbam pedibus ambulando consumpsit ac etiam al. herbam vaccis porcis bobus & bidentibus, &c. nec non in Clauso præd. venatus fuit eodem (Defendente) existen. inferior. Artifice, Anglice, an inferior Tradesman, scilicet pannario, & al. enorm. &c. contra formam Statuti, &c. Verdict pro Quer'.

It was moved in Arrest of Judgment, that the Conclusion contra formam Statuti goes to the Whole, and vitiates the Declaration, for Trespass lieth at the Common Law, for which were cited 2 Sid. 32. 2 Inst. 200. 1 Vent. 103, 104. Ward and Rich. 2 Leon. 188. Perchal's Case, 4 Leon. 49. S. C. 3 Cro. 231. Penhallow's Case.

Mountague pro Quer'. No Statute qualifies a Man to commit a Trespass; a Qualification to keep a Gun or Dog, is only

ly to hunt in a Man's own Ground: We have brought our selves within the Statute; and the Conclusion, which might have been omitted, is but Surplusage. Ven. 13. Burgen's Case.

Holt Ch. J. In Penhallow's Case, upon an Indictment for Striking in the Church-yard, where there was but a bare Assault, the Conclusion contra formam Statuti spoil'd all, because it appear'd they went (not) upon the Statute.

Rookby J. In the Case of Ward and Rich, there was nothing in any Statute about it; but there is a Statute which doth say somthing in this Case, viz. Stat. 5 W. & M. That if an inferior Tradesman do hunt, &c. the Owner of the Soil may bring Trespass, and shall recover his Damage and full Costs, whereas by a former Statute he should have had no more Costs than Damages in that Case.

Holt Ch. J. If an Action lieth at the Common Law, and concludes contra formam Statuti, which in Grammar goes to all, but in Law goeth only to the Hunting; may not we apply it to the Hunting, and reject it as Surplusage for the rest. Allen 43. Adjournatur.

Afterwards Termino Pasch. sequen. it was adjudged for the Plaintiff upon the Reason given by Holt Ch. J. that the Conclusion should refer only to that which would reasonably bear it, and upon the Authorities of Allen 43. and 1 Vent. 104.

## *Rex versus The Earl of* Ailsbury.

A Peer committed for Treason, bail'd on a Suspension of the Habeas Corpus Act.

He pray'd by his Council, that he might be bailed, having entred his Prayer the first Week of this Term; he was committed in March last, but the Habeas Corpus Act was suspended by a late Statute till 1 Septemb. and by another Statute till 1 Decemb. so that he could not come sooner to enter his Prayer; and per Cur', when the Power of the Court was taken away from Bailing, it was not necessary to enter his Prayer, because to no Purpose. If he doth not make his Prayer the first Term, when the Law is open, he cannot do it afterwards upon the Habeas Corpus Act; but when the Act is suspended, it must be understood, that he must do it the first Term after the Suspension determin'd, and so we held it upon the former Act of Suspension.

Attorney-General. However, the Habeas Corpus Act provides, that upon an Affidavit that the King cannot have his Witnesses, the Court may continue the Prisoner in Custody longer. And here an Affidavit was read, that Cardel Goodman is a material Witness, and hath absented himself, &c.

It was objected for the Prisoner, that the Affidavit doth not say, when Goodman went away, nor when he is likely to return.

Holt

Affidavit.

Holt Ch. J. This is not like a common Affidavit for putting off a Trial, if it be pursuant to the Habeas Corpus Act, it sufficeth, but several Affidavits being read of my Lord's Indisposition, and the Danger of his Health. Per Cur', If it is reasonable to bail him, upon the Power which the Court hath at the Common Law, he having lain so long, his Health being in Danger, and it not appearing when the Witness will return: And accordingly my Lord Ailsbury was bound in 10000l. and and his four Sureties, viz. the Lords Chesterfield, Thanet, Weymouth and Ferrers 5000l. each, for his Appearance the first Day of the next Term.

## Lidleston *versus The Mayor, Bailiff, and Commonalty of* Exeter.

Return of a Mandamus, no Hand or Seal necessary. Ante .

Upon a Mandamus, Darnel objected, that there was neither Hand nor Seal to the Return.

Holt Ch. J. It needs not, it is received as a Record, it hath been so ordered, but never by me; I know when it began, and when they began to put the common Seal to it, which was not necessary. Before the Statute of York the Sheriff needed not to have put his Name.

You may bring an Action for a false Return, either against the Corporation or against the particular Person that procured it.

Mandamus to two several Jurisdictions to make Poor's Rates.

A Mandamus was granted to the Justices of the Peace, and to the Church-wardens and Overseers of the Poor for the Precinct of the Cathedral Church of Norwich (which is a distinct Jurisdiction) to make Rates for the Relief of the Poor.

No Procedendo on Error till the Record comes in, but Writ de Executio Judicii.

Mr. Acherly moved, that if the Plaintiff in a Writ of Error of a Judgment in the County Palatine of Cestr. do not return the Record in a short Time, there might be a Procedendo.

Holt. We cannot grant a Procedendo, for there is nothing before us; but upon a Certificate, that the Record is not come in, you must have a Writ de executione judicii out of Chancery.

# DE

# Termino Paſchæ.

## Anno 9 Willielmi III. Regis, in B. R.

*Rex verſus* Ingram *& al'.* (*By Information of Mr.* Mather.)

Conviction on an Inquiſition of Riot, &c.

THE Defendants were convicted 10 Sept. by Inquiſition before three Juſtices of the Peace of Berkſhire, of a Riot committed there 9 Auguſt next before. And it being removed in B. R. by Certiorari.

It was moved in Arreſt of Judgment, that by 13 H. 4. 7. ſuch Inquiſitions ought to be before the Sheriff as well as the Juſtices: And by 19 H. 7. 13. The Sheriff ought to make Certificate of the Worth of the Jurors returned, and whether there was any Embracery or Maintenance among them; and there is a Penalty upon him if he do it not.

2. The Inquiſition ought to be within a Month after the Riot committed (which in this Caſe it is not). 1 Sid. Rex *verſus* Curſon.

To the firſt it was anſwered, that the Stat. 13 H. 4. doth not require the Sheriff's Attendance but when there is a View; that he may raiſe the Poſſe Comitatûs to ſuppreſs the Rioters, which needs not when they are diſperſed, the Juſtices having a lawful Juriſdiction.

To the Second, the Stat. 13 H 4. doth Command the Juſtices to take Inquiſitions of this Nature within a Month, under a Penalty, ſo that the Time is only mandatory; and if it be elapſed, it is diſcretionary in them to inquire of ſuch Offences at any Time after; and ſo agreed all the Court, wherefore Judgment for the King.

DE

# DE

# Term. Sanctæ Trin.

## Anno 9 Willielmi III. Regis, in B. R.

### Brewster *versus* Kitchin.

Covenant, to pay, &c. free of all Taxes.

A Rent was granted Anno 1652, with a Covenant, that it should be for ever paid, free from all Taxes; and the Court doubted, whether the Tenant might lawfully detain for the Tax of 4s. per l. the first Clause in the Statute chargeth every Hereditament, but after 'tis said Tenant to pay and deduct; and there is another Clause not to make void any Agreement between Landlord and Tenant, or any others.

Sir Barth. Shower, 5 Co. Jeffery's Case reacheth only to Landholder; a Rent-Charge is not subject to any such Charge, so that free from Taxes must be intended Parliamentary.

Serjeant Wright contra. Here is nothing to hinder the Tenant from deducting: Rents are expressly mentioned in 43 Eliz. so in 23 H. of Sewers; both Plaintiff and Defendant are Parties to the Act of Parliament; and it is not to be intended, that Men covenant against future parliamentary Taxes. Ven. 223. Davenant's Case 175. Lucy *versus* Levington.

Holt Ch. J. The Case of Lucy is not for Brother Wright, yet it doth not seem to make any Thing against him. If an Attainder be reversed by Act of Parliament, a Patentee shall not answer for mesne Profits, otherwise if reversed by Writ of Error, 3 H. 7. I make a great Question, whether it be good, unless it be expressly mentioned Taxes imposed, or to be imposed by Act of Parliament. As to Jefferey's Case, 'tis by the antient Law and Custom of England, that Parishioners do contribute; it is not so by the Civil Law, for the Parson hath the Freehold.

I thought this feigned Issue had been directed out of Chancery, else I would not have try'd it; do you bring fob Actions to learn the Opinion of the Court?

Sir Barth. Shower. One of the greatest Cases in my Lord Coke's Reports was so.

Holt. Ay, Corbet's Case, which was only a preparative for Mildmay's Case (which was the Real one) but I have heard my Lord Chancellor Finch say (when at the Bar) that it was not known to be so till too late, and then Anderson was very angry; they should bring a proper Action. Vide Residuum Post 4 .

## Williams *and* Lacy. 9 Junii 1697. C. B.

UPon a Special Verdict in a Formedon, it was found that a Præcipe was returnable Quindena Martin', in order to suffer a common Recovery, and then there was no Tenant to the Præcipe. but after the Return of the Præcipe, and before the Return of the Sum. ad Warrantizand. there was a good Tenant to the Præcipe made, and whether this was a good Recovery, &c. was the Question. And the Court held that it was a good Recovery.

2 Salk. 568. 1 Show. 347. Lutw. 1549.

Powel J. said. It is true, upon a Non-tenure the Writ shall abate, if not then Tenant; but if he comes to the Land by his own Act, pending the Writ, if he hath not pleaded Non-tenure, he hath made good the Writ by his own Act; but it is otherwise when by Act in Law, as if a Father or Tenant for Life dies pending the Writ against the Son or Remainder-man; but if he accept a Surrender, then 'tis his own Act. If he comes to the Land by his own Act before Judgment, 'tis Time enough, for till then the Writ is depending, but not properly till after the Return of the Præcipe; and tho' in a Dedimus upon a Fine, 'tis said cum breve de conventione pendeat, that is in a vulgar Sense as Quare consanguineum & hæredem cepit. 45 Ed. 3. 5. is full in Point. 5 H. 5. 9. Noy 126.

Gold Serjeant, cited the Case of Samborn and Bent. Hill. 3 W. & M. B. R. in Error upon a Common Recovery, it was assigned for Error, that there was no Tenant to the Præcipe at the Time of the Writ purchased, nor before the Return. Holt Ch. J. said, that was no Error, for it was sufficient if he was made Tenant after Voucher, and before Judgment. Sed Adjournatur. And afterwards it was adjudged a good Recovery. A Writ of Error was brought, and the Court of B. R. (Trin. 11 Will. 3.) inclined to affirm the Judgment. Vide 2 Salk. &c. supra.

## Hayward *versus* Davenport. 10 Junii 1697. C. B.

Assumpsit in inferior Court.

UPon a Writ of false Judgment to a Court-Baron. Upon a Quantum meruit for Goods sold; the Jurors found quod defend. indebitatus fuit modo & form prout quer. allegavit, but do not say, quod defend. assumpsit; yet it was held, that the Verdict was sufficient in that Point, tho' unformal, the Substance of the Issue being found, for the Promise follows the Debt; and therefore Powel J. said it hath been held, that upon an Indebitatus Assumpsit, Nil debet is a good Issue after a Verdict. When Goods are sold for so much as they are worth (and Note, the very Taking up the Goods implies such a Contract) the Value may be ascertained by Averment; and tho' you cannot in that Case generally declare in Debt, yet with the Help of such an Averment, Debt well lieth; and so it is in the six Carpenter's Case; where a Taylor makes a Garment, &c. and so for the same Reason such a Debt may be forfeited by Outlawry.

Allen 77.

Averment.

Præceptum, &c.

2. Præceptum est in eadem Cur', and not said per Cur', which Powel J. said was ill, for it might be by the Cryer; and per Treby Ch. J. per Cur' would have been ill here, for that is by the Suitors, whereas it should be per Senescallum.

Scire.

3. Scire for Sciri. Powel J. Twisden us'd to say the Words of the Statute direct the Form, which should not vary; and several Judgments have been reversed in B. R. for that Error.

Summons.

It was moved obiter, whether a Summons upon an Action in an inferior Court, ought not to be to the Person. Powel J. It should be personal in a personal Action, but in a real Action, the Tenant may be summoned by any Thing upon the Land.

Treby Ch. J. I believe the Precedents in Kitchen, &c. are nihil habet in Balliva mea unde sum. potest nec est inventus, &c. which Powel J. agreed, and hæsitavit. Ideo quære.

## *In* C. B. 11 Junii, 1697.

Trespass, with a Continuando, for throwing down twenty Perches, &c. ill.

TRespass, quod prostravit twenty Perches of Fence, with a Continuando, which (it was objected in Arrest of Judgment) cannot be, for when they are once prostrated it cannot be continued; otherwise if it had not been said twenty Perches.

Treby Ch. J. Thought it was well enough, for if it were a total Prostration it could not be continued, and then Damages were given for the rest of the Trespass; but if but a partial Prostration, then it lies in Continuance, and well enough. 2 Kee. 407. But,

Powel J. said, It must be intended, that twenty Perches were actually prostrated, which cannot be continued; and if it be repugnant, the Verdict cannot help it, therefore in old Books, they did always Arrest the Judgment where laid so; if the Verdict helps it, it helps it at Common Law as much as now.

Treby. 'Tis a Bis petitum, it would be ill upon Demurrer; but I think the Oxford Act helps it. Powel. Indeed the Oxford Act hath been largely construed. Et Adjournatur.

Note. Powel J. said, where Corn, &c. is taken away at several Days, the true Way is to lay it tali die & diversis diebus & vicibus inter talem diem & talem diem; for, otherwise, if it be laid on a certain Day, with a Continuando, they can give in Evidence but one Day (tho' they may chuse their Day) for that which is done on one Day cannot be continued. And Treby Ch. J. agreed, they must either do so, or make several Counts for the several Days.

Continuand. where ill.

Vide 2 Roll. 549.

## Russel's *Case in* B. R.

SHE pray'd a Supplicavit against several Persons in Nottingham, upon Articles exhibited and Oath made. Harcourt Secondary said, the Course is, that upon the Supplicavit, the Parties are to give Security by Bond to the Sheriff to appear in this Court, and when they come here, they enter into Recognizance.

Supplicavit, the Course thereon.

Holt Ch. J. Then shall we give seven or eight Persons the Trouble to come up; why did you not go to the Justices of the Peace in the Country. Russel, I could not have Justice there, they are Relations. Whereupon it was granted, sed Hæsitanter.

Salk. Cas. 288

## Hays *and* Barnaby.

EYres moved, that whereas a Judgment was set aside as irregular, and the Money paid into More the Defendant's Attorney's Hands; before he could carry it away, it was attach'd at the Suit of one Kinham, upon an Action entred in the Counter.

Attachment of Money in an Attorney's Hands, ill. Q.

Holt Ch. J. Let the Plaintiff in the Action in the Counter attend, 'tis a Trick.

1 Lev. 2.

## Godfrey *and* Matthews.

IN this Case Holt said, the Ecclesiastical Court cannot try a Modus, tho' the original Suit be for a Modus, because the Prescription differs; but if the Question be Payment or Non-payment, then they may proceed.

Spiritual Court can't try a Modus.

## Estob *and* Thorowgood *in* C. B.

On Stat. of Limitations pleaded, an Infant Executor Plaintiff can't take Benefit of a Suit commenced by an Administrator during his Minority. Qu. contra if by Executor durante minoritate.

INdebitatus Assumpsit by an Executor, the Defendant pleaded Non Assumpsit infra sex annos; the Plaintiff reply'd, that he was an Infant at the Death of the Testator, and that Administration during his Minority was granted to J. S. who within six Years impleaded the Defendant for the same Cause, and pending that Suit the now Plaintiff became of the full Age of twenty-one Years, and shortly afterwards commenced this Action, to which there was a Demurrer (come semble).

Treby, Powel, and Nevil, were all of Opinion, that the Plaintiff could not take Advantage of the Suit brought by the Administrator Durante minori ætate, which seem'd hard, there being no Default in him. Powel J. said, it could not be by Way of Journeys Accounts, for that is always between the same Parties. If a Quare Impedit be well commenced, and the Plaintiff die after the six Months, the Heir cannot bring a new Writ by Journeys Accounts.

Levinz pro Quer' urged, that the Demand made by the Administrator, and fresh Pursuit might save them from the Statute, but the Court held the contrary, tho' they said it is a new Case, and no Authorities in Point; they held the Privity was not material.

Powel J. said, the Administration Durante minori ætate determined, when the Infant was seventeen; and it did not appear but he might be of that Age when the Administrator brought the Action, which the other Justices held to be a good Exception; and it was not answered by Levinz, but afterwards upon looking into the Record, it appeared, that the first Action was brought by an Executor Durante minori ætate, which Powel said, altered the Case, for they make but one Executor successively, and such Executorship continueth till the Infant comes to twenty-one, and then he may well have the Advantage of the Prosecution of the Executor during his Minority, and so out of the Statute.

## Smallcorn *versus Vic.* Lond.

### *At the Sitting at* Guildhall, London, *coram* Holt *Ch. J.* 15 *Junii*, 1697.

Two Fi. Fa. delivered the same Day the Sheriff had Election.

THE Question was, where two Writs of Fi. Fa. were delivered to the Sheriff the same Day, whether the Sheriff might prefer the last. Holt Ch. J. ordered it to be made a Case, whereupon to have the Opinion of the other Judges; but he inclined,

clined, that the Statute of Frauds makes the Day of the Delivery (which is to be signed per Vic. &c.) to be just as the Teste was at Common Law; and where two Writs had the same Teste, the Sheriff had the Election to prefer either of them, and so in this Case. Sed Quære now the late Statute. Post.

## Jones *versus* Morley *in* B. R.

A Deed by Husband and Wife, a good Declaration of the Uses of a Fine.

Husband seised in Fee in Right of his Wife; they by Indenture between them and Trustees (reciting their Marriage Agreement) Lease and Release the Lands in Question, to the Use of the Wife and her Heirs, till the Husband should settle other Lands, &c. then to the Use of the Husband in Fee. By another Indenture, the Husband seised in right of his Wife, agrees with Trustees, that they will levy a Fine, &c. but before the Fine levied, the Husband and Wife came to an Agreement (reduced into Writing under their Hands and Seals) to make void all their former Agreements. A Fine was levied, but not at the Time mentioned in the Deed.

Sir Barth. Shower argued, that this Agreement between the Husband and Wife doth not alter the Uses of the Fine, because it hath no Relation to the Fine, but the Uses arise upon the first Indenture; for the Wife cannot be bound by any Deed, but as it hath Relation to the Fine. He agreed it might amount to a Declaration of Uses of the Fine, if there was no other, but not after an Indenture well formed, which hath a Relation to the Fine; the Husband alone hath good Power to declare the Uses. 2 Co. 57. Beckwyth's Case. A Declaration of Uses, and Fine subsequent, make but one Conveyance in Garret and Week's Case. Trin. 36 Car. 2. it was adjudged, that the Deed made no Alteration of it self till the Fine, but both together made a good Revocation according to the Power. And in Herring and Brown's Case, Hill. 1 & 2 Jac. 2. the Fine was first, yet adjudged, that it wrought no Forfeiture nor Extinguishment of the Power. Vide ante 10. S. C.

Holt Ch. J. Without Question, a Writing between the Husband and Wife is a good Declaration of Uses of a Fine. Suppose before the Statute of Frauds and Perjuries it were levied at another Time and to other Parties, yet if nothing appears to the contrary, it should be to the same Uses, yet there it admits of a parol Averment to the contrary; but if it exactly agree, there can be no Parol Averment.

In Hillary-Term following it was resolved by the Court, that the last Writing, tho' not a Deed, amounts to a sufficient Declaration of Uses upon the Fine, being levied at a Time different from the Deed. Holt said, If a Declaration of Uses be subsequent to a Fine or Recovery, it is good; but there may

Estoppel.

may be an Averment, that they were to other Uses, but with this Difference, that where the Declaration is subsequent, there the Heir of the Conusor is estopped to aver other Uses, but a Stranger is not. But where the Deed is precedent, there neither the Heir nor a Stranger is estopped to aver other Uses in Case the Fine varies in any Circumstance; but if the Fine were levied pursuant to the Deed; no Proof whatsoever, either by Writing or Parol, shall be admitted, that the Fine was to other Uses than what are contained in the Deed, that being an Estoppel to the Parties.

Indebitatus Assumpsit against the Sheriff for Money levied.

If the Sheriff levy Money upon a Fi. Fa. the Plaintiff may have an Indebitatus Assumpsit against him for so much Money received to his Use. Per Holt Ch. J.

## Norris *versus* Mawdit.

Action for false Return of a Member to Parliament.

Writ to the Chancellor of the County-Palatine of Lancaster, to charge the Sheriff to elect, &c.

ERror of a Judgment in C. B. where Mawdit brought an Action of Debt (qui tam) upon Stat. 23 H. 6. for 40 l. against the Mayor and Bailiffs of Liverpool, and declared, that Liverpool is an antient Borough, and had Burgesses in Parliament temps dont, and recites the Writ 13 Nov. 6 Will. & Mar. that there wanted a Burgess in the Place of the Earl Rivers, commanding the Chancellor of the County-Palatine to give in Charge to the Sheriff of Lancashire, that he make his Precept, &c. returnable in Cancellariam suam, sets forth the Chancellor's Writ, &c. that they proceeded to an Election, and that Mawdit was debito modo electus, but was not return'd, but that they returned one Brotherton. Judgment was given in C. B. per defalt.

Serjeant Wright takes Exceptions to the Declaration.

1. The Writ by which the Burgess is elected is under Seal of the County-Palatine. 50 Ed. 3. the King made his Son John Duke of Lancaster, and made it a County-Palatine sicut Cestria, but still the King's Writ ought to run into the County-Palatine for electing Members of Parliament, for the County-Palatine had no such Power, 1 H. 4. when the County-Palatine came to the King, and was merged, it was by Act of Parliament made a separate Jurisdiction; now the King is in the same State as the Duke was; and, as in the Time of the Duke, such Writs ought to have been under the Great Seal, so now. I confess the Usage hath been contrary for some Time, but if it were res integra, it were very hard to maintain it.

2. Here the Writ to the Chancellor is perfect Nonsence quod darent in mandatis, that is, for the King; It should be daret for the Chancellor.



3. The

3. The King's Writ is, quod Certificaret in Cancellaria' sua', the Chancellor's Writ requires him to certify it in Canc' Com' Pal'; in this Point the Return into a County-Palatine is void, it should be into Chancery, else the Parliament cannot take Notice of it.

4. The Plaintiff says, he was a free Burgess; but per Stat. 8 H. 6. he must be a free Burgess and Inhabitant, tho' the House of Commons would hold the Election good, yet here in Course of Law he must shew himself qualified.

5. If he hath not certainly shew'd the Return of another Man, he fails, now he says, they returned the Precept, with an Indenture specified to be made; He should say, made positively, and so are the Precedents.

6. This Action is founded upon 23 H. 6. 15. He mentions 7 H. 4. 15. for he says, Proclamation was made secundum formam Statuti, which is 7 H. 4. then says, actio accrevit virtute Stat. præd. which is uncertain to which Statute it relates.

7. This Action is brought tam pro Domino Rege quam pro seipso, whereas the Forfeitures to the King and to the Party are distinct, the Precedents are without a Qui tam. Plowd. Sir Rich. Bulkley *versus* Thomas. Rastal 446. Placita Rediviva 72. Gray and Coleby. Here the King hath no Part of the Penalty given to the Party. Where a certain Penalty is appointed, the Court can give no other Judgment for the King than the Statute directs.

Levinz contra to the first, relied upon the Usage.

To the Second, that they cannot take Advantage of Error in the Writ.

To the Third, the Sheriff cannot return any where but into the Chancery of the Dutchy.

To the fourth, We aver we were a Burgess, & debito modo electus.

To the Fifth, Specificat' is as much as the Sheriff could say.

To the Sixth, Contra formam Statuti; inspecto Recordo, 'tis Statut' præd'.

To the Seventh, Joining qui tam is for the Contempt to the King, who hath a Disappointment by it. Rastal 126. Vet. Entries 52. Culliford and Blanford affirm'd in Cam. Scacc. was so, (but Holt said obiter, that Exception was not stirr'd in that Case) Rast. 354. 433. 593. Prohibitions are tam pro Domino Rege quam pro seipso. 3 Cro. 877. this is not a form'd Writ in the Register, but upon the Statute, according to the Nature of the Case.

Serjeant Wright. Where no Penalty is given to the King, yet for the Contempt he hath a Fine, as in the Cases cited, but here is a distinct Penalty to the King.

Holt

Holt Ch. J. Upon the Statute of Winchester, one may have Debt, or one may declare upon the Statute for Damages; the first barely creates a Duty, for which the Party hath an Action by Consequence, but in the other Case (come jeo intend.) qui tam is well enough. Where a Statute gives a certain Sum for the Benefit of the Party, it is never qui tam, nor ought there to be a Capiatur, but a Mia' as it is here; but if it be an Action of Trespass and Contempt against the Statute, there must be a Capiatur: The general Rule in Beecher's Case hath been often deny'd.

Capiatur, & Mia'.

But here the Exception doth not lie, because the Original is not certify'd, for how can we judge of it, only by the Recital in the Record. Suppose there be Error upon an Original in Debt, and 'tis returned, quod attachiatus fuit, yet there can be no Advantage taken of it, unless the Original be here, and therefore I have known Judgment affirm'd in such Case, because the Original not here.

Levinz. Upon Stat. 25 Car. 2. Two Actions have been tam pro Domino Rege.

Wright. We agree, where the King hath no certain Penalty there may be a Capiatur. Holt. I doubt that.

Sheriffs made by Counties Palatine.

Holt. Before the Stat. 27 H. 8. which resumes the Privileges of the Counties-Palatine; the Sheriff was made by the County-Palatine. An antient County-Palatine had no Members in the English Parliament; but Lancashire had such Privilege before it was made a County-Palatine, which being vested in them, continued. The Earl of Chester could not send Barons to English Parliament. The Baron of Kinderton, &c. was nothing out of the County-Palatine.

All Writs out of the Chancery are to go to the Chancellor of the County-Palatine: As to the fifth Exception, specificat is well enough; but as to the Second, what Authority hath the Chancellor, unless given him under the Great Seal. There was a Case against Sir John Lenthal, the Marshal, upon a Judgment against him in Debt for an Escape; he was taken in Execution in Oxfordshire, and used some Means to get off from the Sheriff; Debt was brought against the Sheriff of Oxon. for his Escape; and it appeared the Writ was Teste out of Term, and therefore the Action did not lie, for the Writ was void, tho' it would justify the Officer in Taking him. This Case I heard cited by Twisden.

Nota. Heretofore Cheshire moved another Exception, viz. that the Plaintiff hath set forth the Writ, wherein is a Clause, Nolumus quod tu vel al' Vic. so that the Authority being limited, it ought to appear, that he was no Sheriff; so if there were a Clause, that he should not chuse a Lawyer (as was once, whence called indoctum Parliamentum) the Party must aver, that he was no

Lawyer: There is a Difference indeed, where it is in the Purview, and where by Proviso.

Holt. I think, if a Sheriff be chosen to Parliament, he ought to serve, those Words are but directory. My Lord Coke, while Sheriff of Bucks, was chosen for Norfolk, and it was held a good Election. Adjournatur.

## Barker *versus* Slater.

Northy. IN Sheldon's Case in Vaughan, 'tis resolved, that an executory Devise, to commence after the Death of one without Issue, may be good. Executory Devise.

Holt Ch. J. That cannot be, it never went further than Pell and Browne's Case, where the Contingency is to happen within the Compass of a Life, else it might be a perpetual Cloud over a Man's Estate.

## Raworth *and* Villers.

UPon a Reference to Mr. Aston to examine the Regularity of a Ca. Sa. he reports, that it was Teste 23 Febr. which is out of Term, and therefore void (ut supra in Sir John Lenthal's Case) but if the Writ were really taken out in Term, the Court will give Leave to amend the Teste. Afterwards he reported, that it was seal'd within Term; but Holt doubted, Whether the Statute of Amendments extend to a Writ of Execution. A Ca. Sa. tested out of Term ill, and not amendable, tho' sealed in Term, &c.

## Gips *versus* Wollicot. Post.

TRespass for Fishing in his several Fishery, and free Fishery. The Jury find specially, as to the free Fishery, that the Locus in quo is Part of the Manor of D. whereof the Plaintiff is Lord, and conclude specially, if the Lord of the Manor may have Liberam Piscariam in his own Soil, and may bring Trespass for Fishing in his free Fishery, then pro Quer'; and the Question was, whether one can have a free Fishery in his own Soil? Libera Piscaria in a Man's own Soil.

Hooper pro Defendente said, Free Fishing is properly a Liberty of Fishing in another Man's Soil. Every Man hath a Right to put his own Cattle into his own Ground, non sequitur, that he hath Common there; a Man may as well prescribe to stop his own Lights. 'Tis true, there is one Sort of Writ for Fishing in libera Piscaria, another in separal. Piscaria, another in Vi- Ante

 variis.

variis. A Man may have granted his Water, and the Grantee may have granted liberam Piscariam, but that doth not appear.

Northy pro Quer'. We are upon a special Conclusion, if it be possible for a Man to have liberam Piscariam in his own Soil, 'tis with me; sure Tenant for Years of a Manor may grant liberam Piscariam to the Lord.

Holt Ch. J. The Owner of the Soil may perhaps only have Liberty of Fishing: Trespass lieth not for hindring a Commoner of his Common; bringing Trespass for Fishing in libera Piscaria seems to imply a Right in the Soil.

Rookby J. If one hath Right in the Soil, and others have Liberty of Fishing, may not he bring Trespass against a Stranger? Separal. Piscaria is where no one else hath libertatem Piscandi.

## Mackfey *and* Mazey.

Words.

NOrthy moved for a Prohibition to stay a Suit in the Ecclesiastical Court, for these Words, (He is a Whore-master, and hath had and now hath a Bastard) for that he is now punishable by the Statute 18 Eliz. which the Court deny'd, unless it were chargeable to the Parish; and a Prohibition was deny'd.

1 Salk 395, 408. 5 Mod. 109, 112, &c.

## Britton *versus* Cole. Vide post.

Cattle of a Stranger levant and couchant on Lands of a Person outlawed, taken and sold on a Levari Facias. If A. requests B. to take Goods, &c. A. is a Trespassor.

TRespass for taking forty-two Sheep and two Lambs; the Defendant justifies by Virtue of a Writ of Levari facias, upon an Outlawry directed to the Sheriff, who thereupon made his Warrant to Anthony Powel and Joseph Powel, and because the said forty-two Sheep and two Lambs were then upon the Lands, &c. levant and couchant, the Defendant requisivit Anthony Powel and Joseph Powel to take them, ad fiend. de reddit. exit. & profic. super quo præd. Johannes Powel and Joseph. Powel took them, &c. the Plaintiff demurs.

The Point in Law is, whether the Cattle of a Stranger may be taken and sold by the Sheriff upon a Levari Facias: But Shower and Northy pro Quer', moved several Exceptions to the Plea: 1. That the Defendant here pleads only the Writ of Levari, and the Execution thereof, which is indeed sufficient to justify the Officer, but a Stranger, who commands the Bailiffs to do Execution, ought to set forth the Outlawry, &c.

2. It doth not appear, that the Writ was delivered to the Sheriff, nor the Warrant to the Office. 1 Saund. 18. 'tis pleaded deliberat. Co. Entr. 42. 160. 665.

3. Here is a Request to Anthony and Joseph (to whom the Warrant is directed) super quo John and Joseph took them; whereas John was not named before, so that here is no Trespass confessed, as there ought to be, before it can be justified.

To the first, Holt Ch. J. said, there seems to be a Difference between one that comes under the Officer, and one that sets the Officer on Work; as if there be no Judgment, the Officer is safe, but not the Plaintiff who sets him on Work; if Judgment be set aside for irregularity, the Officer is safe, but not the Plaintiff who intermeddles; for which he cited the Case of Turner and Felgate, Anno 1655. (2 Sid. 125. S. C.) If there be Judgment against one that is no Tertenant, the Demandant that recovered is a Disseisor, but not the Sheriff; so perhaps here you should not only shew, that there was a Process, but also that there was an Outlawry. If there be Judgment against a casual Ejector, and Execution thereupon, 'tis a good Warrant to the Sheriff; yet if the Plaintiff enters, Trespass lieth against him, if he hath really no Title.

To the Second, it is plain enough, that the Writ was delivered to the Sheriff, tho' that hath been held not necessary to be alledged. 1 Saund. 298. and I think the Delivery of the Warrant to the Bailiffs is not necessary. If Cole himself takes out the Warrant, and tells the Bailiffs he hath such a Warrant, but it is at home, and Requests them to execute it, if they do it the Warrant is good; a sworn and known Bailiff needs not shew his Warrant. (Northy objected, then six Bailiffs might execute a Fieri Facias in six several Places at once; and Shower said, what if a Bailiff arrest a Man de son tort, and there happens to be a Warrant seal'd 100 Miles off?) Holt. If a second Writ comes to the Sheriff, tho' the Bailiff hath no Notice of it, yet if he discharge the Prisoner upon the first Writ, 'tis an Escape in the Sheriff, therefore let them take Care how they make so many Deputies, there ought to be Inquiry made at the Sheriff's Office before any Prisoner be discharged.

To the Third, As to John it is Surplusage, so then here is a Command to A. and B. to take Cattle, super quo B. and C. took them. If a Writ be directed to two jointly, I doubt whether one may execute; it is true, if a Warrant be directed to four jointly and severally, two may execute it, Inst. 181. b. but this Case differs, for here perhaps the Sheriff would not trust one Bailiff.

Wright Serjeant. If a Writ be directed Coronatoribus, yet one of them may execute it.

Holt. In Norfolk there were two Coroners, the one Substantial the other Poor, who arrests a Man without the other's Privity, and he escaped, Debt was brought against both, and I (by Consent of Parties) signed a Bill of Exceptions to save the

Execution by one Coroner Q. If by both.

Charge of a Special Verdict, and I hear it hath been argued in C. B. 'tis very difficult and and very hard, for I fear, if Execution by one be Execution by both, the Escape will be so too, 'tis mischievous.

At another Day he said, the Requiring of the Bailiff is a Confession of the Trespass, but the Justification is ill, for the Writ justifies only the Officer, and those that come in aid of him; but (to Shower and Northy) This is a hard Case, when you see the Merits are against you, to take Advantage of a Slip. I'll hear you to the Point in Law.

Sir Barth. Shower pro Quer'. The Cattle of a Stranger in the King's own Lands jure Coronæ cannot be seised, much less where he is not intitled to the Lands, but only to Pernancy of the Profits. Bro. Utlagary 36. 9 H. 6. 20. 21 H. 7. 7. the King cannot be in a better Condition than the Subject would have been, tho' he hath better Means to recover his Rights. Bro. Issues 1. 3 Cro. 431. Stafford *versus* Bateman, 2 Roll. 159. S. C. 15 H. 7. 2. Bro. Prærog. 29. S. C. in Point.

The Word Issues must mean the same Thing with Rents and Profits. Tho' the Cattle do eat up the Profits, it doth not follow that the Party should lose them, but only that the King should have a Remedy for the Trespass. If I agist my Cattle upon another's Land, I hire the Land for that Time, and he is intitled to the Rent; and when the King is intitled by Outlawry, he comes in the Party's Place and ought to have the Rent: It hath been a Question, whether the King can distrain for an Amerciament. 2 Cro. 255. Gomersal's Case, Yelv. 194. S. C. but he cannot sell. Commissioners of Sewers may sell a Distress. Allen 92. Combs *versus* Cheney. but not the Cattle of a Stranger. Sty. 13. Whitley and Fawcet. Dy. 199. Mo. 109. And. 95. several Interests of the King are enumerated, that of Profits of Lands of one outlaw'd, as of Lands of a Fugitive, &c. but in none of those Cases can the Beasts of a Stranger be sold. If the Cattle come rightfully, the King is intitled to the Rent, if wrongfully, Trespass lieth: Some of the Barons and Practisers of the Exchequer say, the Course of that Court is with me, but the Practice of Sheriffs doth not make the Course of the Court.

Solicitor General pro Defendente. This hath been frequently practised and not complain'd off; if the Cattle of a Stranger may not be sold, the King will make little of Lands extended, for the Sheriff cannot manure them himself. The Issues are omnia mobilia of the Person per Stat. Westm. 2. cap. 39. but here the Writ is not to levy Issues of the Person outlawed, but of the Land. In the Case of a Custom to take the Beasts of any Person for a Heriot, that cannot be good at first by Reservation, and therefore not good by Custom, for the Agreement of

Lord and Tenant cannot bind a Stranger. Inter Serjeant Stroud and Merry, Merry was outlawed, and his Lands extended, the Sheriff took the Beasts of a Stranger and would have sold them for the full Value. I moved the Court of Exchequer, and it was granted, that upon Payment of the extended Value the Cattle should be discharged, and it was said, so is the Course. Course of Exchequer on Extents.

Holt Ch J. 1. He only justifies the Taking and Carrying away by Virtue of a Levari Facias, no selling mentioned (Shower, 'tis to levy, which can't be without Sale) now whether prima facie they should not be taken to be the Cattle of the Tenant, which are Issues, and so the Sheriff may be justify'd, and the Party put to make his Title. The Course of the Exchequer is to levy de exitibus terræ, any Cattle found there are prima facie Issues; this is not like a Levari facias for a Subject at the Common Law, but 'tis Levar. fac. de exitibus terræ.

2. Whether they may be sold. If the King be intitled by a false Office, the Officer is justify'd. If the Person outlawed makes a Lease before his Outlawry, the Cattle of the Lessee for Years are not seisable, but then he ought first to plead his Lease, or that it be found by Inquisition, else his Cattle are seisable, and the Officer is justified; but Quære whether he may falsify in a collateral Action since Stat. E. 6.

Admitting they are not sellable, may not the Party plead it.

Turton J. The Sheriff is charged with the extended Value, and he cannot discharge himself otherwise than by swearing, that there was nothing upon the Land whereby, &c. and then 'tis charged to the next Sheriff.

Holt Ch. J. Where Tenant for Life forfeits Issues and dieth, they shall be levied upon him in Reversion. Dr. and Stud. that is a hard Case too.

Sir Barth. Shower. How shall a Stranger come and plead, or get his Money out of the Exchequer, when his Beasts are sold, or if restored, how shall the Sheriff come off.

Holt Hæsitavit. People must have a Care whom they deal with, it is of great Consequence.

Adjournatur.

Per Holt. When Bail is given in an inferior Court, and Judgment there, and a Writ of Error brought, this suspends all against the Bail; but when Judgment is affirmed here, then all is let loose again against the Bail. Vide ante. Proceedings against Bail in inferior Courts suspended by Error.

## Estcourt *versus* Warry.

A Man possessed of a Term devised it to an Infant in Ventre sa mere, provided it be a Son; and if the Child be a Son, and die in its Minority, then to the Defendant; the Executor Devise to Infant in Ventre sa mere, if a Son, &c.

ecutor assented, but the Child being a Daughter, it was adjudged upon a Special Verdict, that the Defendant cannot take, because here is a Condition precedent, which never happen'd, and the Executors assent is not material, where there is no Devise.

Thompson *and* Leach. Post.

Deed by an Ideot is void.

COpyhold Lands were settled upon an Ideot for Life, Remainder to his first Son in Tail, Remainder to the right Heirs of the Ideot. The Ideot, before the Birth of his Son, makes a Surrender to the Use of the Defendant and his Heirs. Afterwards a Son was born, under whom the Plaintiff claims.

Carthue pro Quer'. This Surrender is void, as to the Son and Heir of the Ideot, who is privy in Blood as well as in Estate; the Authorities in the Case of Infancy will hold in this Case of Ideocy, only with this Difference, that an Infant may avoid his own Acts in some Cases, but so cannot an Ideot. There is a Diversity between a Feoffment made by an Infant and meer Matters in Pais, which work no Discontinuance, for which he cited Perk. Grants 13. 1 Cro. 303. in Blundel and Baugh's Case, 8 Co. 43. in Whittingham's Case, 4 Co. 125. a. in Beverley's Case. This Deed of Surrender executed by the Ideot is void ab initio, as to the Lessor of the Plaintiff. 34 Ass. 10. 5 Co. Russel's Case, if the Release of an Ideot or Infant be void, so shall his Surrender. Perk. 13. an Infant grants a Rent-charge, if the Grantee distrains, the Grantor may bring Trespass. 2 Inst. 673. Bargain and Sale by an Infant is void. 1 Cro. 502. Lloyd and Gregory is in Point, Poph. 38, 39. Bullock and Dibler. In the principal Case of Darcy and Jackson. Palm. 254. it was held, that Privies in Estate might take Advantage of Infancy, &c. and there Doderidge deny'd the Opinion of my Lord Coke, 8 Co. 43.

Sir Barth. Shower pro Defendente. Tho' the Reversion be to the right Heirs of the Ideot, yet here, if the Lessor of the Plaintiff take any Thing, it must be an Estate-tail, which he cannot have, because the Defendant's Estate intervenes. This might have been avoided by the King, by Office, but not by any other Person.

Holt Ch. J. The Estate which you talk of avoiding is determin'd by his Death. If an Ideot, Tenant for Life, with Remainder in Tail to his first Son, with Remainder over, makes a Feoffment before the Son born, and the next Remainderman enters, the contingent Remainder is destroy'd. 1 Cro. 102. Bigot and Smith, there being not so much as a Right of Entry; before the Contingent happen'd, the contingent Remainder was destroy'd; but if the Feoffment were by Letter of Attorney, tho' himself be estopped, yet the Estate remains in him to support the contingent Remainder, and this



seems

seems to be the same Case; for the Surrender of an Infant hath been adjudg'd void; and if this be so, any one but himself may take Advantage of it.

The Reason of the Maxim, that a Man shall not stultify himself is, because Care shall be taken of him: But Rookby J. added another Reason, viz. It is a Contradiction for a Man to say, that he was an Ideot, because it implies, that he had Reason enough to know that he had no Reason at all, which is absurd. Adjournatur.

Vide Residuum. Post.

## *Rex versus* Peckham.

Upon a Conviction for Deer-stealing; Northy took Exception, that whereas by the Statute the Offender ought to be prosecuted within twelve Months, which must be understood Lunar Months: Here the Offence was 14 Augusti 7. the Conviction 13 Augusti 8. indeed it is said ipso P. debito modo prosecut. infra 12 Mens. post. offens. Exception to a Conviction of Deer-stealing.

The Court seem'd to allow the Exception. Holt said, Here is a special Jurisdiction newly set up, and not known in Law before, and therefore the Act must be strictly pursued, and it must appear to be so, they need not set forth every Step of their Proceedings, but so much, that it may appear to be debito modo in respect of Time, &c. for perhaps they might construe twelve Months to be all one with a Year.

## Bacon *and* Dubarry.

1 Salk. 70.

Debt upon a Bond of 600 l. conditioned, that whereas several Differences were had and moved between the Plaintiff Bacon, and the Defendant as Attorney to Durutter; if the Defendant on the Part of Durutter should stand to the Award of A. B. and C. then the Bond to be void. The Defendant pleads Nul agard fait. The Plaintiff sets forth an Award, that the Defendant, for and on the Behalf of Durutter, should pay to the Plaintiff 345 l. 6 s. 10 d. and that Plaintiff and Defendant, ex parte Durutter, should seal and deliver mutual Releases ad usum alterius eorum, of all Matters relating to the said Accounts, and Assigns a Breach, that the Money was not paid, whereupon the Defendant demurr'd; and in this Case it was resolved, Awards. Submission by an Attorney for his Principal, good to bind the Attorney.

1. That the Submission is clearly good, for a Man may bind himself as Attorney to another, to stand to an Award of all Differences between his Principal and another; and if the Principal doth not perform it, the Attorney forfeits his Bond. (So for an Infant.) Ante

2. That

Award void, because nothing to be done by one Party.

2. That this Award is void, for here is nothing to be done by Bacon, for and on Behalf of Durutter; the Release given by Bacon to Dubarry will not discharge Durutter, it should have been awarded to Durutter; it might have been said to be delivered to Dubarry; the Court at first inclined to understand it, that the Release should be made to Dubarry for the Benefit of Durutter, but those Words ad usum alterius eorum tie it up.

Award made De & super premissis is ill, except it appear to be so.

Sir Barth. Shower pro Quer' insisted, that the Award being made de & super præmissis, the Payment of the Money is a good Discharge to Durutter, and consequently the Award is mutual without Respect to the Releases; and for this he cited 2 Roll. 1. Maw *versus* Samuel, Roll. 253. S. C. Roll. 254. Raymond and Popley. Sed non allocatur, for per Holt, here it is said, they took upon them and made an Arbitration de præmiss. but in the Award it self, it is not said de & super præmiss. as in the Case of Maw and Samuel; but if it had been so, they do not rest there, the Arbitrators do not rely upon the Payment of the Money as a Satisfaction; but there is something else to be done, viz. Releases 1 Roll. 254. Capel and Allen, Sty. 44. S. C. where it was awarded, that one Party should pay a Sum of Money, and the other should pay for the Writings, adjudged an ill Award; and Roll said, the Words super præmiss. would not help it: And so is Roll. 254. Hall and Massey. If it had been said, that the 345 l. should be in Satisfaction of all Accounts, or for the Money due, it had been well. Roll. 255. Burbidge and Raymond, pro eo made it good.

Judicium pro Defendente.

1 Salk. 69.

## Freeman *and* Barnard.

Assumpsit, Award pleaded in Bar, that mutual Releases should be given. &c. and that semper paratus fuit.

Assumpsit, upon an Agreement for the Delivery of fifteen Bags of new Hops, at 34 s. per C. at a Day certain, said by Way of mutual Promises: The Defendant pleads in Bar an Award, whereby the Plaintiff and Defendant were to give each other mutual Releases, and that the Defendant was always ready to have executed a Release to the Plaintiff, &c. the Plaintiff demurs.

Exception was taken to the Plea, for that the Defendant doth not say he hath performed his Part, but that he was always ready.

How pro Defendente answered, that there is a Difference between an Award and an Accord; the former may be pleaded without actual Performance, but not the later. Dy. 75. b. where a Time is limited by the Award, perhaps it is necessary to plead Performance; but where no Time limited, then, if to be done upon Request, the Request must precede, so it is sufficient to say, always ready. 45 E. 3. 16. 7 H. 4. 30, 31.

Holt Ch. J. Either it must be done in convenient Time, or during Life, unless hastned by Request; if the latter, 'tis sufficient to say semper paratus; but if the former, then you ought to plead a Tender. Antiently, if Money was awarded, it was held a good Plea without Performance, because the Party had a Remedy for the Money; but if to do a collateral Act, then 'twas held no Plea without Performance, because no Remedy; but now it is held, that a mutual Submission implies a mutual Promise (an Action upon mutual Promises was not antiently found out). I have known Actions upon such Arbitraments, and Rule of Court good Evidence; if the Submission be by Deed, the Award it self is sufficient for a collateral Matter. There is a Difference between awarding a Sum of Money, or a Horse in Satisfaction, and the Awarding the Release of an Action; the one raiseth a new Duty, with a Remedy for it, the other only Orders a Method to discharge the Action, which the very Award would do, if so intended; but here must be something more, viz. a Release before Action discharged.

Where semper paratus, or Tender must be pleaded.

Roll. 258.

He inclined pro Quer', but said it is a frivolous Action, for the Plaintiff should have given or tendered a Release, and must answer Damages in another Action for not doing it, tho' he recover in this. Judgment was given pro Quer'.

## Pennoyer *and* Brace.

Mountague moved for a Supersedeas to stop an irregular Execution after a Writ of Error returned in Cam. Scacc. The Case was, there were four Plaintiffs in Error; one of them died pending the Writ of Error; the Defendant in Error takes out Execution, (which sets forth, that one of them was dead) ad satisfaciend. the Damages recovered against them three, and the fourth Person deceased: And in this Case three Points were resolved.

Error by three, abated by Death of one.

1. That by the Death of one of the Plaintiffs in Error, the Writ was abated; and so is Yelv. 208. Spencer and Woodward *versus* The Countess of Rutland. But the Chief Justice said, what is said in that Case of bringing a Scire Facias against the Executor of him that's dead, is not Law. Nota, There is a Diversity between the Death of a Plaintiff in Error and the Death of a Defendant in Error, for where the Defendant dies it doth not alter the Judgment, which is only affirmetur vel reversetur (tho' now Costs are superadded by the Statute) but where a Plaintiff dies, Judgment cannot be given according to the Writ.

2. There needs no Scire Facias in this Case, for the Distinction is, where any new Party is to have Advantage of, or to be charged

Scire Facias

charged with Execution, there must be a Scire Facias, else not, as appears by Mo. 367. Isham's Case (which the Chief Justice said was ill reported) Noy 150. 2 Inst. 471. 21 H. 7. 16. b. Carter 193. (tho' the Chief Justice said, he did not know that Carter, nor would allow that Report for any Authority).

Supersedeas. 3. This Execution is irregular, for when once the Hands of the Court are ty'd up by a Writ of Error, it ought to appear how they are loosed again; and to that End there should be a Suggestion on the Roll, that one of the Plaintiffs is dead, with a Quia non dedicit, or Quia apparet Cur. super Examinationem, &c. and the Chief Justice said, he must return to the Judges in Cam. Scacc. that one of the Plaintiffs in Error is dead, and therefore he doth not certify the Record; and this Case differs from the Case of Hartop and Holt, ante . for there the Writ of Error did not lie. Here a Supersedeas was granted to the Execution, quia improvide, &c.

2 Salk. 663.
2 Mod. 154.

## Prince *and* Moulton.

Judgment arrested, because more Damages given than ought.

THE Plaintiff declares, that 2 Julii, sexto Regni Regis, he was possessed of a Close called the Meadow, and of another Close called the Pingle, and that the Defendant 3 Augusti, anno sexto præd. a certain Water-mill did erect, and the Foundations thereof ulterius solito did extend, by Reason whereof the Plaintiff lost the Use and Profit of his said Closes, from the said 2d of July, sexto. The Defendant pleaded Not guilty, and a Verdict was given at the Assizes at Chester for the Plaintiff, and entire Damages assessed: And now it was moved in Arrest of Judgment, that the Jury were inveigled to give Damages from the 2d of July, which was before the Mill built; the Jury indeed might have help'd it in their Verdict, but now it is too late. Hob. 189. Harbin and Green. Mo. 887. S. C.

Northy contra. One may lose the whole Year's Profits by an overflowing in Harvest-time. Pasch. 4 Regni Regis, Horner *versus* Bridges, Trespass tali die, with a Continuando from a Day which was before, yet held good; so in an Action for Words spoken at several Times; if the Words spoken at one of the Times were not actionable, but only in Aggravation; if entire Damages given, they shall be intended only for what is actionable; so Roll. 577. (5) Gosse and Pangnel, about assigning over his Trade.

Ward ad idem, cited Allen 22. Syms and Gregory. Hob. 282. Hunt and Lawring.

Cheshire ad idem, That if the Plaintiff could lose the Use and Profits of his Lands from the 2d of July, then Damages are well given; if not then the Jury could not consider it.

Sir Barth. Shower pro Defendente. As to the Case, Roll. 577. the Forbearing to exercise his Trade was held a good Consideration; Continuando's indeed are rejected when impossible or inconsistent, because the Defendant is not bound to answer the Continuando; the Case of Syms and Gregory is answered by that of Hambleton and Veer. 2 Saund. 169. if a Man brings an Action in Michaelmas-Term for Words spoken in November, it might be said there to be impossible, and help'd by Intendment, but always held ill. Contiauando

Holt Ch. J. Where the Day is not material, as in Trespass, &c. if you lay a Day in the Declaration, which is really after the Action brought and before the Trial, the Judge of Nisi prius will suffer you to give in Evidence any Day before the Action brought, but the Defendant may take Advantage of it in Arrest of Judgment; but if you lay a Day, which is impossible, as the 30th of February, or a Day which is not come at the Time of the Trial; there you may likewise give in Evidence any Day before the Action brought, and there the Defendant shall never take Advantage of it in Arrest of Judgment, because the Court will intend, that the Plaintiff must have given in Evidence a Time before the Trial, else he could not have had a Verdict, and the Fault in the Declaration is cured by the Verdict.

In the principal Case, it is true, the Plaintiff might lose the Profits of the whole Year by an overflowing in Harvest-time; but here is the Word usum, which is impossible, and yet the Jury might compute according to the Declaration. I cannot distinguish it from the Case of Harbin and Green. Hob. 189.

Judicium Arrestetur. S. C. Vide 2 Mod. 154.

## Giles *and* Hart.

INdebitatus Assumpsit, and a special Request, with the Time and Place laid in the Declaration. The Defendant pleads a Tender of the Money at a certain Day, and that the Plaintiff refused it; and from that Time to this he hath been ready, and now brings it into Court. Indebitatus Assumsit tout temps prist, with Tender and Refusal pleaded.

The Plaintiff demurred, and Northy said, the special Request ought to have been traversed, but that was not regarded by the Court; but whether the Defendant was bound to Answer the Time between the Promise and the Tender, was the Question. Lutw. 227. Ante

Sir Barth. Shower pro Defendente, Payment before the Action brought is a good Bar, and may be either pleaded or given in Evidence; now Tender and Refusal, with an uncore prist, is all one with Payment; and it shall not be intended, that he was in Laches before in the one Case more than the other, they might have reply'd that antecedent to the Tender they requested.

Acceptance is in Satisfaction.

Holt Ch. J. The Acceptance of the Money it self goes in Satisfaction of all; but here I think you should say, that at all Times after the Promise you were ready, & tali die tendred, &c. for you might have been in Laches before.

Rookby J. I think the Plaintiff ought to set that forth by his Replication; this Plea doth not go to bar the Plaintiff's Duty, but the Damages only. Adjournatur.

But (per Mather) this Case was adjudged in this Term for the Plaintiff, upon the Reason given by Holt Ch. J. He said, If a Promise were to pay Money on a particular Day, there a Tender with a touts temps prist from that Time is good enough, but 'tis otherwise where the Money is to be paid upon Request, for there might be Laches before the Tender.

## Ashton *versus* Sherman & *Ux'*. Post.

Administrator pleads five Judgments, 'tis imply'd, he has Assets above four.

THE Defendant being an Administrator pleaded several Judgments in Bar: The Plaintiff replies as to every one of them severally, and concludes to the Country. The Defendant demurred.

Carthue pro Quer', rely'd on the Case 1 Saund. 337. Hancock *versus* Prowd, and 2 Saund. 48. Trethewy *versus* Ackland, where the Replication is just as it is here; and the Court seem'd now to incline, that the Replication was good; for the Chief Justice said, where an Administrator pleads five several Judgments, 'tis imply'd, that he hath Assets above four, so if one of them fails, he is gone; and this is an anomalous Case out of the Rules of double Pleading.

## *Rex versus* Brome.

King's Patent, with Letters of Mart.

THE African Company had a Patent from the King, which contains Letters of Mart to take Prizes; they set out Brome, who took a French Ship near St. James's Island, and carried her into that Island, and there she was condemned as Prize. Brome being sued here in the Admiralty to make Satisfaction to the King for the Value, and after Sentence against him, and Appeal to the Delegates, he now prays a Prohibition, suggesting, that the Ship was taken super terram in partibus transmarinis; but it was deny'd, for per Holt, the Taking being at Sea, that gives the Admiralty a Jurisdiction, and the subsequent Conversion is to be coupled with it, are Sid. 320. Thompson *versus* Smith, and 2 Saund. 255. Radley *versus* Egglesfeild is a much stronger Case. 2 Roll. 157. Barns's Case, Palm. 96. S. C.

Admiralty's Jurisdiction.

## *At the Sitting for* Nisi prius *in* Middlesex, *coram* Holt *Ch. J.* 21 Junii, 1697.

### Sandwell *versus* Sandwell.

CAse for scandalous Words. Holt Ch. J. said, where a Witness swears to a Matter, he is not to read a Paper for Evidence, tho' he may look upon it to refresh his Memory; but if he swears to Words, he may read it, if he swears he presently committed it to Writing, and that those are the very Words.

Witness not to read a Paper, except to Words.

A Condition to pay Money when a Man is able, is to pay it presently, for the Law supposeth every Man ought to pay what he is able to pay. Vide ante 440.

Condition to pay intends presently.

Where a Copyhold is in Fee, a Surrender may be for 1000 Years, and 'tis very good if the Lord will admit; but if he refuse, there is no Remedy but in Equity; and Equity will not compel the Lord to admit upon such an unreasonable Surrender, for the Executors should pay no Fine for Admittance.

Copyhold Surrenders.

### Jerrison's *Case*.

JErrison lived with Sir Paul Jenkinson as his Foot-Boy for three Years, without any certain Retainer or Wages, then Sir Paul put him to a Barber to be taught to Shave, and he lived with the Barber in another Parish for one Year; and this Matter being specially returned in an Order of Sessions in the County of Derby.

Poor's Settlements.

Holt Ch. J. The Service to Sir Paul Jenkinson for one Year, as his Foot-Boy, seems to be a good Settlement, tho' he had no Wages; and tho' not hired for any certain Time, but at Will and Pleasure. Upon Stat. 1 Jac. 2. Notice was intended to be to a Person disturbable, they cannot disturb a Servant: But the Question is upon the Words in the late Statute (if hired for a Year, such Service, &c.) now suppose he serves forty Days, is not that a Settlement, for the Act refers to 13 Car. 2. but yet if it be so, then the Words of the late Statute are to no Purpose, so that I am more in doubt since the explanatory Act, than before.

But per Cur', his Living with the Barber makes no Settlement, for he was there only for his Education, and was not under any Obligation to serve the Barber.

At

## *At the Sitting for* Nisi prius *in* Guildhall, London, *coram* Holt *Ch. J.* 22 Junii, 1697.

### Lambert *versus* Cameret.

Evidence of Death of Plaintiff before Action brought, tho' admitted by Plea to be alive after Issue join'd.

AN Action was brought in B. R. in the Name of Cameret against Lambert, and Verdict and Judgment for the Plaintiff in that Action; now Lambert brings a Writ of Error coram vobis, and assigns Error in Fact, that C. died before the Trial of that Issue, viz. tali die, &c. The Defendant in Error per A. B. Attornat. suum saith, that he was alive, & adtunc in plena vita existit & hoc petit quod inquiratur per patriam. And now the Plaintiff in Error gives in Evidence, that the Defendant being a Seaman died several Years ago before the Action brought.

Holt Ch. J. 'Tis bungling Pleading, that the Defendant comes by his Attorney, it should be (come semble) that the Attorney pro (Magistro suo dicit). But here you are estopped to give in Evidence the Plaintiff's Death before the principal Action brought, for then by your Plea you admitted him to be alive.

Lutw. 14, 15

Sir Barth. Shower pro Quer'. We are indeed estopped to plead, that he died before the Action brought; but sure we may give it in Evidence to the Jury, for if he were dead before the Action, he must needs be dead before the Trial.

Holt Ch. J. contra. You are estopped in Evidence; and he cited a Case where Tenant in Tail had acknowledged a Judgment or Recognizance, and died; upon a Scire Facias against his Heir and Tertenant, the Sheriff return'd a Scire Feci, and there was Judgment by Default: And in Ejectment it was ruled, that the Issue in Tail could not give in Evidence, that the Conusor was only Tenant in Tail, because he might have pleaded it to the Scire Facias. But here the Defendant in Error, saying, & adhuc in plena vita existit & hoc, &c. seems to have let the Plaintiff loose from the Estoppel, whereas if he had said absq; hoc, that he died between the Action brought and the Trial, he had hamper'd him.

So the Evidence was admitted and left to the Jury.

### In B. R.

Constable.

PER Holt Ch. J. A Constable is an Officer but for his own particular Will; and tho' he may execute Warrants in any other Part of the County (as any other Person may) yet he is not

compellable to do it, tho' the contrary is practised in London by Custom.

Holt Ch. J. An Indebitatus Assumpsit hath been carried too far. There was one before me for Money received to the Plaintiff's Use; and it appeared it was upon a Bond, and the Plaintiff would suggest the Contract was usurious, but I would not allow it.

Where Indebitatus Assumpsit lies, or not.

Where, upon a Reckoning, a Man receives more Money from me than he ought, an Indebitatus will lie; nay, it hath prevail'd further, where Money was paid for Fees which were not justly due (tho' it is hard to maintain that) but where there is a Bargain, tho' a Corrupt one, or where one sells Goods that were not his Own, I will never allow an Indebitatus.

Not for a Debt or Duty due on Bond, &c.

Where one devised a Lease for Years to A. for Life, Remainder to the Heirs of the Body of A. It was lately adjudged in the House of Lords (in the Case of one Potter) that after the Death of A. his eldest Son should take it by Purchase. Quod mirum. The Information of Mr. Webb of the Inner-Temple.

Devise of a Term to A. for Life, and the Heirs of his Body in Remainder. A.'s eldest Son is a Purchasor.

## *Rex versus* Harris (*one of the Lord* Mountague's *Witnesses.*)

Holt Ch. J. Sir Sam. Astry tells me, there never was a Writ to the Sheriff to take any Man up that was at large, and to put him in the Pillory; therefore, I think, we cannot give any such Judgment (in the Absence of the Party) which cannot be executed. If he be in Court we deliver him to the Marshall, and an Entry is on the Roll, that the Marshal do Execution periculo incumbente. And if we were to send him into Somersetshire, there is to be a Writ of Assistance to the Sheriff; but if he came from Newgate hither, then if he be remanded, there goes indeed a Writ to the Sheriff, but then constat de Persona. There was the Case of one Read, who was convicted of Perjury upon the Testimony of three Witnesses, and afterwards those three Witnesses were convicted of Perjury for convicting of him, and yet Read could not be relieved but by the King's Pardon.

No Judgment of Pillory, &c in the Party's Absence.

Writ of Assistance on sending the Party into another County.

Sir William Williams. Could this Man say any Thing if he were here, or should he be asked what he had to say. In my own Case, I was sent for indeed when the Court was to give Judgment against me; they did not ask me what I had to say, but fined me 10000 l. there was no Committitur indeed (which was a special Favour, for which Complaint was made to the King) and a private Capias ex officio was made out against me, tho' there was no Committitur, and so there might be Judgment here.

Holt

Note. Holt Ch. J. I never knew a Judgment for a corporal Punishment, unless the Party were present, except the Case of one Mrs. Buckridge, which was irregular.

Ante. You may outlaw him by next Term, for in criminal Matters there is but one Capias before the Exigent.

## Chicken *and* Dickson.

Prohibition, where after Sentence, or not. Holt Ch. J. For suing out of the Diocese, if you admit the Jurisdiction, you shall not have Prohibition after Sentence. So if it appear upon all the Proceedings in the Ecclesiastical Court, that the whole was of Ecclesiastical Conusance, a Prohibition lieth not after Sentence; but if a Custom was pleaded there, a Prohibition may well lie after Sentence. Vide infra.

Ante. Joint Prohibition, but several Declarations. Nota. Where several join in a Suggestion, there may be one joint Prohibition, but they must declare severally.

Extortion. Per Holt Ch. J. On Affidavit of Extortion, tho' the Course be to take a Recognizance to answer Interrogatories; yet in Cases of great Oppression, the Court may commit the Party, and he must answer in Vinculis.

## Browne's *Case*.

Orders of Bastardy. Two Justices of the Peace in Northamptonshire make an Order upon him as Father of a Bastard-Child, he appeals to the next Sessions save one. Holt Ch. J. first said, that the Appeal ought to be to the next Sessions; but it being said, that he had no Notice till after next Session: Holt inclined, that the Appeal might lie to the next Session after Notice. Wheresoever it doth appear, that there might be an intervening Session by Law, it lieth upon the Party to prove that he had not Notice till after the next Session; nay, it seemeth it should appear so in the Order of Session.

Note. The Justices cannot Order a Sum for putting out the Child an Apprentice.

Both the Orders were quashed.

## Gibbons's *Case*.

Prohibition after Sentence. If a Prohibition be granted before Sentence in the Spiritual Court, and not delivered till after Sentence, the Matter being of Ecclesiastical Conusance, the Court will grant a Consul-

tation, for it is a Prohibition after Sentence. Vide supra & ante 1, &c.

## *By Information of Mr.* Mather.

If an Original be filed against a Feme Sole, and before Return thereof she marries, you may declare against her without taking Notice of her Husband, for her Intermarriage is no Abatement of the Writ in facto per Holt Ch. J. but makes it only abateable. So if an Attorney brings an Action in the Name of J. S. who is dead, the Defendant ought to plead his Death in Abatement; else if Judgment be given against him, he shall never assign for Error that J. S. was dead before the Teste of the Original.

Original versus a Feme sole, her Marriage no Abatement.

Simile.

## Ashton *versus* Sherman. Ante 444.

Debt upon a Bond against the Defendant as Administratrix: The Defendant pleads five several Judgments in Bar, and that she had not Assets ultra. The Plaintiff replies, quoad the first Judgment, præcludi non, for that that Judgment was satisfied and kept on Foot by Fraud: And so makes special Replications to the other Four, and concludes specially, with a Quoad to every one. The Defendant demurs.

Pleading of five Judgments is a Confession of Assets to above four.

It was objected, that the Replication was double, because it contains five distinct Matters, whereas it had been sufficient to avoid any one of the Judgments to intitle the Plaintiff to his Action. Sed non allocatur, for it is the surest Way to answer every particular; for tho' the Replication to one be false, yet if it be good for any of the rest, the Plaintiff shall recover, for the Defendant shall not take Advantage of her own Wrong.

2. The Plaintiff to every Replication concludes with a Quoad, whereas there ought to be but one Conclusion to all: Sed non allocatur, for it is better thus. Vide 1 Saund. 237. Hancock *versus* Prowd, and 2 Saund. 49. Trethewy *versus* Ackland.

## Shore *versus* Meddison. Post.

Debt upon the Stat. 9 Eliz. for not appearing as a Witness, being served with a Subpœna, whereby the Plaintiff was Nonsuit. Judgment here for the Plaintiff, and whether he should have Costs, was the Question; and resolved, that he ought to have his Costs, for where a Statute gives a Sum certain to the

In Debt for not appearing as a Witness, Plaintiff to have Costs.

Party grieved, there he shall recover Costs; otherwise of a common Informer. 1 Roll. 574.

Note. Note. In this Case the Plaintiff may declare for 10l. Debt, and likewise such Damages as the Court shall give.

Subornation can't be sans actual Perjury.

Per Holt Ch. J. A Man cannot be guilty of Subornation of Perjury, unless Perjury be actually committed; but I have known one set in the Pillory for endeavouring to suborn, it being a great Offence. Vide 2 Show. 1, 2.

Assault laid in A. and prov'd in B. well, if in the same County.

And by him, If in an Information, the Assault be laid in the Parish of A. and proved in the Parish of B. in the same County, it sufficeth, for the Venue is not material.

## *At* Guildhall, 15 May, 1697. *Per* Mather.

### Garbrand *versus* Allen.

Feme Covert purchases Lands, the Husband may have Trover for the Money, contra of Necessaries.

If a Feme Covert purchase Lands without the Consent of her Husband, he may have Trover for the Money; but if she buys Land or any Thing else pursuant to an Authority given by him, he cannot avoid it afterwards, tho' he might countermand it before. But if she buy Necessaries for her self, House, and Family, tho' without her Husband's Privity, yet he shall be bound, because by Presumption of Law she understands as well how to purchase them as her Husband doth.

### Curteis *versus* Bridges.

Seamens Wages.

If the Master of one Ship takes a Servant that belongs to the Master of another Ship, whatsoever Wages he receives from the King upon his Account, shall be to the Use of his first Master, being acquired by the Labour and Industry of his Servant.

### Boulton *versus* Hillesden.

Merchant's Apprentice draws a Bill and charges the Master.

If a Merchant's Apprentice draws a Bill, (as, I do Promise to pay such a Sum for my Master) to charge the Master with this Note, there ought to be either an Authority precedent or a Consent subsequent, or that the Master had intrusted him with his Affairs; otherwise the Master shall not be chargeable by Action with the Note of his Servant.

Northy. If a Servant usually buys Goods for his Master, and he pays for them, he shall be chargeable for all Things of the like Nature that the Servant buys, tho' they never came to his Use: But if he had never any Authority, tho' he buys in his Name, he shall not be liable.

Holt Ch. J. I remember the Case of Sir Robert Wiseman, who allow'd his Servant so much per Week to furnish his House with Victuals and other Necessaries, and every Saturday Night an Account was made of the Expence of the Week, and Allowance for the same, and no Authority given to the Servant to run on Score with any one; yet it was held, that the Master was chargeable with all Debts contracted by the Servant for Things usually bought, for none ought to receive Prejudice by the Servant of another; especially since they were not conusant of the particular Agreement between the Master and Servant.

Master charged with Debts contracted by the Servant.

## *Die Mercurii post. Term.* Paschæ.

## *At* Guildhall, Lond'. (*Per* Mather.)

Die Merc. post Term. Paschæ.

If a Widow, after the Death of her Husband, seise his Goods without taking Letters of Administration, altho' she afterwards dispose of them by Will, or otherwise, yet he that takes out Letters of Administration to the Husband, may bring Trover for these Goods; for,

A Widow takes her Husband's Goods sans Administration.

An Administrator may have Trover for Goods taken after the Death of the Intestate, and before Administration committed; and altho' he declares of Goods taken out of his own Possession, whereas they were taken before he was Administrator, yet it is good enough, for the Administration shall have Relation to the Death of the Intestate; per Holt Ch. J. tho' he thought it a hard Case.

Administrator may have Trover, &c.

If a foreign Bill be drawn upon an English Merchant, payable at so many Days Sight, tho' the Days incur without any Notice given to the Party on whom it is drawn; yet that Bill, according to the Custom of Merchants, may be protested, and thereby Recourse had to the first Drawer for the Money, which Holt Ch. J. thought unreasonable, because the Drawer ought not to lie at the Mercy of him that hath the Bill, &c.

Foreign Bill of Exchange protested.

Per Shower. If a Bill be drawn for like Value received, and this is protested, an Indebitatus Assumpsit lies against the Drawer.

## Petit *versus* Benson.

Bill accepted by Indorsement.

A Bill was drawn upon the Defendant, who accepts it by Indorsement in this Manner (I do accept this Bill to be paid, half in Money and half in Bills): And the Question was, whether there could be a Qualification of an Acceptance; for it was alledged, that his Writing upon the Bill was sufficient to charge him with the whole Sum: But 'twas proved by divers Merchants, that the Custom among them was quite otherwise, and that there might be a Qualification of an Acceptance, for he that may refuse the Bill totally, may accept it in Part: But he to whom the Bill is due may refuse such Acceptance, and protest it so as to charge the first Drawer; and tho' there be an Acceptance, yet after that he hath the same Liberty of Charging the first Drawer, as he before had.

Two Fi. Fa.'s delivered to the Sheriff the same Day.

In Trover it appear'd, that the Plaintiff and Defendant had each of them a Judgment against J. S. the Defendant takes out a Fieri Facias, and delivers it into the Sheriffs Office, but pays no Fees for the same; subsequent to this on the same Day, the Plaintiff takes out a Fi. Fa. and delivers it to the Sheriff, who executes it, and makes a Bill of Sale of the Goods taken in Execution, and delivers them to the Plaintiff. The Defendant takes them out of his Possession per quod, &c.

It was argued, that the Defendant hath a good Title to them, for since the Statute of Frauds, Goods are bound by the Delivery of the Writ. But Holt Ch. J. doubted thereof, because both Writs were delivered on the same Day, so that (the Law allowing no Fraction of a Day) the Election may be in the Sheriff to execute which he pleased, this he thought a Point worthy of Consideration, and ordered the Council to make a Case of it.

Ante .

Sale to the Plaintiff.

It was holden in this Case, that upon a Fi. Fa. Goods may be sold to the Plaintiff, who sues out the Writ, tho' not actually delivered to him.

Where a Fi. Fa. executed may be return'd nulla bona.

2. If a Sheriff executes a Fi. Fa. he may afterwards return nulla bona, upon Appearance of a Writ of Prerogative subsequent, or upon better Information, that the Defendant had no Property in the Goods taken.

## *At the Sitting in* Middlesex, 25 Junii 1697. *coram* Holt *Ch. J.*

### Park *versus* Fifeild.

THE Plaintiff is an Inheritrix, and the Defendant her Lessee for Years; the Action is Trespass for Cutting down Trees, being excepted in the Lease; but upon Evidence it appears, that some of them were cut in the Life of the Plaintiff's late Husband.

Trespass by a Feme Inheretrix for cutting Trees, excepted in a Lease by the Husband.

Holt Ch. J. The Plaintiff's Husband having Issue was intitled to be Tenant by the Curtesy, and therefore for so many as were cut down in his Time, he being Tenant for Life, the Action doth not lie, but if he had had no Child, the Action would survive to the Wife.

Nota. The Trees being excepted, &c. tho' they became Dotards during the Lease, yet that cannot divest the Property of the Lessor. Per Holt.

### Bell *and* Clarke.

A Delivery of a Declaration in Ejectment is a sufficient Entry for Recovery of mesne Profits, because the Party is estopped by the Verdict, but it is not an Eviction in Law, so as to be given in Evidence to bar a Demand for Rent.

Ejectment; delivering Declaration an Entry, but not an Eviction.

### Meggot *and* Watson.

TRover by the Assignee of Commissioners of Bankrupt against the Defendant, who pretends to have seiz'd the Goods for Rent.

Trover by Assignees of Commissioners of Bankrupts.

Note. The Commission must be shew'd, and the Assignee must prove an Act of Bankruptcy as well as the Assignment by the Commissioners; and prima facie it shall be intended, that the Assignment was executed at the Time it bears date (which is but two Days before the Action brought) the Witnesses not remembring the precise Day; but it appearing that the Date was rased, Holt said he expected better Proof, and then another Witness swore to the precise Day.

# DE

# Term. Sancti Mich.

## Anno 9 Willielmi III. Regis, in B. R.

Gray *versus* Tench *& al'.* (*Per* Mather.)

Suit for a Probate by Executors, and Mandamus to grant Administration to next of Kin, and a Supersedeas thereto.

SUit was in the Ecclesiastical Court for Probate of a Will, whereof the Defendants were named Executors; and Plaintiff, as next of Kin, was cited there, to shew Cause why the Will should not be allow'd, but he did not appear and was in Contempt there, but afterwards by his Council obtain'd a Mandamus from this Court to grant Administration to him upon a Suggestion, that he was next of Kin, and that the Ecclesiastical Court ought not to grant Administration to any other. But now upon Motion, a Supersedeas was granted to the Mandamus, because they of the Ecclesiastical Court are the proper Judges, whether a Will or no Will, and howsoever they determine, it is conclusive at Law; for if an Executor bring an Action, and the Defendant pleads, that he is not Executor, the Probate of the Will is good Evidence at the Trial, that he is Executor. Per Curiam, If the Ecclesiastical Court grant Administration to one that is more remote, and refuse him that is nearest of Kin: Upon Suggestion of this Matter a Mandamus is grantable; but in the principal Case it doth not appear, that ever the Plaintiff requested it, but rather withstood the Process of that Court to a Contempt, which if this Court had been truly informd of, the Mandamus would not have been granted.

Where such Mandamus may be.

## Woodyer *versus* Gresham.

A Feme Sole obtain'd Judgment, and afterwards married with the now Defendant, and then they bring a Scire Facias and have an Award of Execution upon that Judgment: The Wife dies, and the Husband after the Year sues out another Scire Facias against the now Plaintiff, and hath Execution awarded: The now Plaintiff brings Error in adjudicatione Executionis, pretending, that by the Death of the Wife the Husband had no Right to have Execution, especially after the Year lapsed. And it was argued by Shower, that the Property of this Debt was not altered by the Award of Execution upon the Judgment, for Debt still lies upon the first Judgment. 2 Leon. 14. And so Error lies still upon the first Judgment. 2. A Scire Facias doth not give a new Right, but only intities one by the Statute of Westm. 2. to that which before he had lost by Lapse.

A. a Feme Sole gets Judgment, then marries B. and both bring a Sci. Fa. and Execution is awarded; she dies, and he after the Year sues a second Sci. Fa. and has Execution awarded, the Debt is attached in him.

Hall contra. All Debts are given to the Husband, if recovered during the Coverture. A Scire Facias is an Action, for a Release of all Actions is a Bar of a Scire Facias, which is given by the Statute in Lieu of a new Original, and therefore Judgment upon the Scire Facias shall have the same Effect as upon a new Original; and of that Opinion was the Court, for (per Holt Ch. J.) as in the Case of Obryan and Ram, ante . The Husband, who was not Party to the original Judgment, yet, being made Party by the Scire Facias against him and his Wife, became chargeable: So here, being joined with her in the Scire Facias, the Debt is attach'd in him jointly with his Wife, so that tho' the Award of Execution doth not alter the Nature of the Debt, yet it alters the Property. Sed Adjourn'.

Scire Facias is an Action.

## Tonford *versus* ------

Judgment was obtain'd in this Court against the Defendant, who thereupon brings Error in the Exchequer-Chamber, and puts in Bail to answer the mesne Profits and all Damages the Defendant in Error may sustain, in Case the Judgment be affirmed, pending which the Plaintiff in the original Action brings Trespass against the Defendant for the mesne Profits; and now it was moved by Cheshire, that the Plaintiff hath no Title to this Action, pending the Writ of Error, for by this Means the Defendant may be doubly charged; and should the Plaintiff get Judgment in Trespass before the Writ of Error be determined, we have no Remedy (in Case the Judgment be reversed) for the Damages recovered against us in Trespass: But it was answer'd by three Judges Holt absent) that this Writ of Error in the Er-

Error in the Exchequer-Chamber, &c.

Exchequer-Chamber is no Supersedeas of the Judgment, as it would be in this Court upon a Judgment in C. B. And we think he may as well have this Action for the mesne Profits, as Debt upon the Judgment, notwithstanding the Writ of Error; and there is no Inconvenience to the Party thereby, for the Damages upon the Trespass are a good Bar to the Plaintiff in any Action brought for them, after the Affirmance of the Judgment; wherefore this Action must proceed.

## Selsby *and* Russel.

Debt lies not on Bond to perform an Award not final.

DEbt upon a Bond for Performance of an Award: The Defendant pleads no Award made; the Plaintiff replies, and sets forth the Award in hæc verba. 1. That all Suits in Law and Equity between the Parties should cease. 2. That the Defendant should pay 5 l. to the Plaintiff. 3. That if the Plaintiff did upon Account prove certain Articles against the Defendant, that then he should pay so much as the Plaintiff was damnified thereby. 4. That if the Plaintiff make out upon Oath before a Judge any Disbursements laid out for the Defendant, that the Defendant should pay them likewise, but in Case the Plaintiff do not prove these Matters within a certain Time limited, then they Award general Releases.

The Defendant makes an ill Rejoinder and now takes Exception to the Award, that it is void, not being final, because it refers to a future Examination of that, which the Arbitrators should have determined.

Holt Ch. J. It will be a difficult Matter to make this Award good, for the Arbitrators have not pursued their Authority, having not made an End of all Matters in Difference, for they cannot do any future Act, unless it be by referring the Matters in Difference to a Master of a Court to tax Costs, &c.

Sed adjournatur.

S. C. 5 Mod. 221. 3 † 25.

Information for conspiring to marry an infant Heir, &c.

## *Rex versus* Thorp *&* *al.*

AN Information was brought against the Defendant for Conspiring and Endeavouring to take one Edward Mitchel, an Infant under the Age of eighteen, and to marry him to one Cornelia Holton, a Woman of ill Fame and no Fortune; and that pursuant thereto he did (tali die & anno) persuade him to hate his Father, to leave his School, and to drink Strong-Waters, thereby making him drunk, and then brought the said Cornelia Holton into his Company, and compelled him to marry her: Upon Not guilty pleaded, the Jury find him Not guilty, as to the Compulsion, but guilty as to all the rest. Now,

It was moved in Arrest of Judgment, that an Information lies not in this Case: If the Infant were under fourteen, he might dissent, and so not bound by the Marriage; if above fourteen, then he is of Age to contract Matrimony; and as it is no Crime in him to marry, so it is no Crime to perswade him to marry, for where there is no Principal there can be no Accessary. Nor is there any Wrong to the Father, for he hath not the Custody of his Heir till twenty-one by the Law of Nature, for then an alien Father would have it, being as much a natural Father as he that is a Subject born, sed Vide Inst. 84. b. that the Issue shall be in Ward in that Case for the Lands of his Mother: And if the Law of Nature gave the Father the Custody of his Heir, then our Law which gives the Father a Remedy by Action for taking away his Heir, would give him the same Remedy, if any of his Children were taken from him (they being as much his by Nature as his Heir apparent) but that he cannot have, for the Writ says, quare filium & hæred. rapuit. The Common Law takes more Notice of the Relation between Master and Servant, than it doth of that between Father and Son, for if the Servant kills his Master, it is Petit Treason, but not so if the Son kills his Father. Besides, it doth not appear in the Information, that the Son is disparaged by this Marriage, or that he is Heir apparent. If the Lord had disparaged the Heir, no Action lies against him, much less against a Stranger. 3 Cro. 55. Gray *versus* Jefferys (1 Leon. pl. 63. S. C.) The Father cannot bring an Action for Beating his Son, whereby he was disparaged in Marriage. And if he cannot bring an Action, an Information will not lie: And this Case differs from the Case of Twisleton. Sid. 387. and that of Designy, Raymond 474. for there is no Force found in this Case, as there was in those Cases.

Serjeant Darnel contra. An Information lies against a Cheat. Ven. 234. Rex *versus* Thody, Rastal 263. 27 Ass. pl. 73. And this Crime is of the same Nature. The Father hath the Custody of his Heir till twenty-one, for the Guardian in Chivalry shall have the Land till that Time, but if the Father be living, he shall not have the Body, which proves that it belongs to the Father; nay, had the Father been Guardian, yet he shall have the Custody as Father, and not as Guardian. Guardians may punish any Person who medled with the Infant. Register 163. and if it be an Offence against a Guardian, sure it will be so against a Father.

Holt Ch. J. The Nonage of the Infant to avoid the Contract, will not excuse the Defendant but aggravates his Crime. Besides, this Information is not brought for the Injury done to the Infant, but for that done to the Father, for he is to have the Custody of the eldest Son; and the Reason is, because the Common Law gives him the Estate, and makes no Provision for

younger Children: And therefore 'tis fitting the Father should have the Care of him to see him well provided for: Now, if the Common Law excludes the Guardian from the Custody of the Body during the Life of the Father, sure it will exclude all Strangers from having any Thing to do with him, especially in such a Manner as this. It is a great Crime and worthy to be punished, and shall be so, if we can any Way come at it. Therefore adjournatur.

S.C. 1 Salk. 206.

## Shore *versus* Muddison. Ante 449.

Exceptions.

THree Exceptions were moved: 1. That 'tis said in the Statute, that the Party being served shall appear, &c. in any Cause depending in any of his Majesty's Courts; and 'tis not shew'd that any Cause was here depending. 2. 'Tis not averr'd, that the Defendant could testify any Thing. 3. The Action is brought only for 10 l. whereas the Statute gives 10 l. and sufficient Recompence, which is not shewn to be satisfied.

It was answered by Parker to the first, that a Cause cannot be otherwise in Court than as it is depending, therefore that was imply'd. 2. We need not shew what the Party could testify, for if we could do that, there would be no Occasion for his Testimony. 3. The Action may be brought either Way. 3 Cro. 130. Sed Adjournatur.

2 Salk. 556.

## Sutton *versus* Moody.

A has a Property in Things Feræ Naturæ kill'd in his own Ground.

TRespass for Breaking his Close, Entring his Warren and his Wood, and that in the said Close the Defendant did Hunt and Kill several of his Conies. Upon Non Cul. pleaded, and Verdict pro Quer', It was moved in Arrest of Judgment, that the Plaintiff hath no Property in Conies in a Close, but only in Warren, which is the most proper Place for such Creatures, and in Fitz. Nat. Br. 86, 87. There are two distinct Writs for Conies kill'd in a Warren and those kill'd in a Close: But it was adjudg'd good enough, for a Man by having a Warren hath not a greater Property in the Conies than he that hath them in a Close; for so long as they remain there, the Owner of the Soil hath a possessory Property, and he may well call them suos. In this Case were cited Vent. 122. Pollexfen and Ashford *versus* Crispin, Rastal 490. b. Register 93. Thelwall's Digest. &c. 196. 26 H. 6. 59. b.

## Turbervil *versus* Stamp.

1 Salk. 13.

Case for negligent keeping his Fire in his Close.

THE Plaintiff declares upon the general Custom of the Realm, that every one ought to keep his Fire so as no Damage may ensue by it to his Neighbour, then sets forth, that he was possessed of a Close of Heath adjacent to one of the Defendants, and that the Defendant such a Day did set Fire of the Heath in his own Close & tam improvide custodivit ignem suum, as that it burnt the Heath in the Plaintiff's Close, ad dam', &c. Upon Not guilty pleaded, there is a Verdict for the Plaintiff: And now moved by Serjeant Gold in Arrest of Judgment, that the Action would not lie, for tho' every one is obliged to take Care of his Fire made in his House, yet he is not so in a Field, the first is per Negligentiam, this per Infortunium, 2 H. 4. 24. In the one the Master shall be liable for the Default of his Servant, in the other not. If a Bonefire be made, which by Accident burns down the House of another, they who made it are not answerable; and it was compared to the Case of an Hostler, who is liable by Law to indemnify his Guest from all Damage that may happen to them during their Residence in his House, for then they are within his Power and Jurisdiction, yet for their Effects in the Field he is not.

Northy contra. This Action well lies, Old. Entr. 218. An Action was brought, that the Defendant tam negligenter Custodivit ignem suum in a and allow'd good, so for the setting a Faggot-Stack on Fire, whereby Damage ensues.

Holt Ch. J. The Faggot-Stack is Part of a Man's House, and therefore the Action lieth: In this Case there ought to appear a special Neglect in the Party that made the Fire, and then there must be Restitution for the Damage. It differs from the Case of a House, for every one ought to take Care of that; and tho' I am not bound by the Act of a Stranger in any Case, yet if my Servant doth any Thing prejudicial to another, it shall bind me, where it may be presumed that he acts by my Authority, being about my Business.

Sed Adjournatur.

## *Rex versus* Greep.

2 Salk. 513.

Information of Perjury.

UPon an Information of Perjury, setting forth, that there was a Replevin brought in the Common Pleas between A. and B. and that B. the Defendant in that Trial did produce Indentures of Lease and Release, the Lease bearing Date the 15th, and the Release the 16th of July, 1681. supposed to be exe-

Innuendo may explain or apply, but can't add to enlarge or alter the Sense.

cuted at Albemarle-House, by the then Duke of Albemarle, and that one Richard Stroud Esq; was produced as an Evidence to prove the said Deeds, being a Witness to them, and present at the Execution of them: The Defendant Greep, to invalidate and confront his Evidence, swore that Mr. Stroud, about the Middle of July in the same Year, was at Newnam, innuendo quendam domum vocat. Newnam in Parochia de Plimpton in Com. Devon. ubi revera & in facto he was not then at Newnam præd'. Upon this Information the Defendant was found guilty, and Exceptions moved in Arrest; and after many Arguments at the Bar, the Court now delivered their Opinions seriatim; but I transcribe only the Effect of the Argument of Holt Ch. J. which in Effect comprehends all that was delivered by the rest, who all agreed with him.

Holt Ch. J. Three Things are to be considered in this Case.

1. The Sufficiency of the Information without the Innuendo.

2. As it stands with the Innuendo.

3. How far the Assignment, with the Ubi revera, &c. can help it.

As to the first, had the Information been generally, that the Defendant swore Mr. Strowd was at Newnam, ubi revera he was not at Newnam præd', it would not have been good, for Newnam being generally alledged must be intended a Vill or Hamlet: And wheresoever you plead a Vill or Hamlet, it ought to be set forth in Pleading, in what County they are 34 H. 6. 49. 4 H. 7. 8. for without that they are only individua vaga, and not to be taken Notice of judicially; for tho' we take Notice of Counties we cannot of Towns: So if Newnam be uncertain where it lieth, the Assignment apud Newnam præd. is not good, having Reference to that which was uncertain before.

As to the Second, The Innuendo cannot supply the Incertainty of that which is uncertain of it self, had not the Innuendo been put in, for here the Innuendo signifies something otherwise than what was intended by the Matter of the Oath, and is an Addition to it. An Innuendo cannot reduce that to a particular, which before would bear a more large Construction. In every Innuendo there must be something precedent to induce it, something whereby it may be apply'd, that the Man meant so as the Innuendo would have him, Hob. 6. Miles and Jacob. 4 Co. 17.

There is the same Certainty required in Indictments and Informations, as there is in Actions upon the Case; and the same in Indictments as Declarations. Inst. 303. Then suppose Strowd had brought his Action against one, that said Strowd had no Title to Newnam, and declared, as here, innuendo quendam domum mansionalem in Parochia de Plimpton in Com. Devon. it would not have been good.

This Information is in Effect to charge him, not for what he swore, but what he meant: But had it been alledged in the Information (before the Innuendo) that a Debate did arise, whether Strowd was at Newnam in the Parish of Plimpton, &c. and that the Defendant swore Strowd was not at Newnam, Innuendo as before, it would have been good, for there it refers to something certain before 1 Roll. 78. 1 Cro. 321. Allen 32.

3. As to the Assignment ubi revera & in facto, Mr. Strowd was not at Newnam præd. 'tis naught, for it restrains it to the Newnam mentioned in the Innuendo, the Word præd. according to Grammar Construction, referring to the last antecedent: The Oath is general at Newnam, the Assignment particular at Newnam in the Parish of Plimpton, therefore it is not good. It was objected by Mr. Cowper, that it appears that Newnam is another Place and different from Albemarle-House, and sworn in Contradiction to that which was given in Evidence, and therefore Perjury. I Answer, had Newnam been ascertain'd where it lay, the Objection had been material, but here it is not. And I hold, that if any Oath hath an Relation to the Issue, it is Perjury: Therefore I differ from my Brother Turton, where one swore that a Witness was in a blue Coat at a Time when he was present to the Fact, he was to give in Evidence, whereas he was in a Red one, that it is not Perjury, I hold it is, tho' it be but circumstantial, yet it tends to prevent the Discovery of the Truth, as to swear to the Credit of a Witness, if it be false, it is Perjury: But if he swears that a Witness, in coming to Town to give Evidence, lay at one Inn, whereas he lay at another, it is not Perjury, for it is altogether immaterial. 2. Obj. An Innuendo can do no Harm, therefore may be laid aside. Answ. If no Use could be made of it in this Inference, it would do no Harm; but here it is pinn'd up by the Assignment to that Newnam mentioned in the Innuendo. In Palm. 358. The Innuendo is repugnant, but the Action lay without it, but here it is not good without it nor with it, because of the Assignment. 3. The Office of an Innuendo is to interpret and explain doubtful Words, Yelv. 21. 1 Cro. 378. Answ. That is where there is sufficient Matter before alledged, as Yelv. 21. observes. In 1 Cro. 102. The Innuendo is good there, because the Words were spoke of the Plaintiff's Servant. 4. Obj. The Verdict hath found the Defendant guilty, and what Place he intended. Answ. The Jury cannot find the Intention of a Man, for it cannot be proved abstracted from a particular Fact, 4 H. 4. 8. 5 Co. 77. The Statute doth not create a new Perjury, but adds a greater Punishment to that which was so before: It was as infamous a Crime by the Common Law, and Informations by the Common Law ought to be as certain as by the Statute. All the Difference I find is, between an Action for Perjury and an

Prædict' refers to the last Antecedent.

Innuendo, its Use, &c.

an Indictment, in the first he must shew how he is damnify'd, but not in the latter; for an Indictment lies, tho' a Verdict be found for him, but an Action lies not, 2 Leon. 201.

Judgment was arrested.

Ante. What Acts good on Sunday.

The Delivery of a Declaration in Ejectment upon a Sunday is good per Cur. It was likewise held, that to have an Attachment for Non-performance of an Award, there must be personal Service, which if it be on a Sunday, tho' it is not good to have an Attachment for Non-payment on that Day, yet it is for Refusal on any other.

Execution before Entry of Judgment.

Execution may be taken out upon a Judgment before Entry, if it be the same Term, otherwise not.

## Tremoulin *versus* Sands.

Admiralty Jurisdiction.

SAnds Libels in the Admiralty-Court for the Caption of a Ship generally, not shewing, that it was upon the High Sea. The Defendant puts in a Plea, whereby he sets forth the Taking to be upon the Sea. Sentence was given there for Sands: And now a Prohibition moved for, because it appears not in the Defendant's Libel, that the Taking was at a Place, that did intitle the Admiralty-Court to Jurisdiction: And the Admittance of the Defendant, nay, tho' he confesses it to be taken at Sea, shall never give the Court a Jurisdiction which originally it had not, for that, which intitles them to the Cause, is the Libel.

Northy contra. Tho' it doth not appear in the Body of the Libel, that it was taken at Sea, the Libel setting forth only, that Vi & Violentia a possessione capta fuit, yet it is indifferent, and may be as well there as any other Place. If there be a Suit in an inferior Court, A Prohibition is not grantable upon a Suggestion, that it doth not appear in the Declaration to be within the Jurisdiction. Besides, here is a Sentence, and it appears upon the Face of the whole Proceedings, that the Caption was at Sea; and tho' this Motion perhaps might have been proper for a Prohibition, by Reason of the Defect of the Libel before Sentence, yet it is not so now, for by that all the Proceedings are at an End.

Holt Ch. J. It doth not appear here in the Libel, that the Admiralty-Court hath any Jurisdiction: And where-ever they have not original Jurisdiction of the Cause, tho' there arise a Question in it that is proper for their Conusance, yet that alters not, nor takes away the Power of the Common Law: But if they have Jurisdiction of the Original, tho' a Question ariseth proper

for the Common Law, yet they shall try that; and after Sentence, if it appear that the Matter contain'd in the Libel is triable at Common Law, we will grant a Prohibition.

Prohibition after Sentence.

At another Day, it being moved again, Holt and Rookby were for a Prohibition, Turton and Eyres contra.

## Hill. 97.

If a Trader within the Statute against Bankrupts contracts Debts, and after leaves of his Trade, he is still subject to a Commission of Bankruptcy for those Debts that were so contracted, but not for those which were contracted afterwards. And if a Man, whilst a Trader, owes a Debt of 100 l. to A. and leaving of his Trade, borrows another 100 l. of the same Person, and then pays him one of the Hundred Pounds, not mentioning whether it be in Satisfaction of the former Debt or the latter, yet it shall be apply'd to the former, so that the Creditors shall never charge him with a Commission of Bankrupcy for that which remains. These Points resolved per Holt Ch. J.

A Trader leaving off Bankrupt for Debts contracted while a Trader.

A Man contracts to pay 100 l. upon the Day of his Marriage, this needs not be put in Writing, not being within the Intent of the Statute of Frauds, the Words whereof are, that every Contract not to be performed within one Year after the Making, shall be put into Writing, so that the Design of the Stat. was, that only those Contracts, that were impossible to be performed within that Time, &c. Now this Contract depends upon a Contingency, that may or may not be performed within the Year, and therefore is Casus omissus out of the Statute, as was resolved by most of the Judges. By Information of Holt Ch. J.

Contract to pay on Day of Marriage need not be in Writing, as not being within the Statute of Frauds.

By putting in Bail at any Time pendente placito, tho' in a subsequent Term, the Declaration (Plea) is made good ab initio.

Plea made good by putting in Bail.

D E

# DE

# Term. Sancti Hillar.

## Anno 9 & 10 Williel. III. Regis in B. R.

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### Gips *versus* Wollicot. Ante 433.

One may have libera Piscaria in another's Soil.

TRespass for Fishing in libera Piscaria & separali Piscaria, and Taking and Carrying away 500 Salmons to the Value of 20l. Upon Non Cul. pleaded, the Jury, quoad the Fishing in separali Piscaria, find the Defendant Not guilty; and quoad the Fishing in libera Piscaria, they find him guilty of Taking twenty Salmons, and that the libera Piscaria is Part of a Manor whereof the Plaintiff is seised in Fee, and then make the common Conclusion, if for the Plaintiff, for the Plaintiff, &c. And the single Question upon this Special Verdict was, whether a Man can properly be said to have free Fishery in his own Soil.

Shower urged pro Defendente, that tho' perhaps by the Grant of a Piscary the Soil should pass, yet in Pleading it is otherwise. Register 93. Kelw. 53. 10 H. 7. 26. But it was answered per Holt Ch. J. The Action well lies, for if a Man hath a River, and other Persons have a Right of Fishing; he may have an Action Quare clausum fregit & piscatus fuit in aqua sua, and to say libera Piscaria, where others have a Right of Fishery, seems to be as proper.

Declaration of Pisces, &c. ill, not saying suos.

Then Exception was taken to the Declaration, that the Plaintiff doth not say Pisces suos cepit, but only that the Defendant cepit 500 Salmons. For tho' the Defendant did break his Close and Fish in his Piscary, yet he might take the Salmons in another Place; and it ought to be ibidem existen. or abinde, or suos cepit, &c. for if Trespass be brought Quare clausum suum

fregit & equum cepit, without saying suum, it is not good; and for this Reason the Declaration was held clearly ill, and Judgment given for the Defendant. Ante

## Sparks *versus* Crofts.

Ill Declaration in Debt against Administrator, who pleads a faulty Plea, and Respond. ouster, he is estopp'd to plead any Thing in Avoidance of the Administration.

DEbt upon a Bond against the Administrator of T. H. generally; the Defendant pleads in Abatement, that Administration was granted to him during the Minority of his Wife, but doth not aver that she was then living, which he ought to have done; for tho' he was a special Administrator at the first, yet if his Wife were dead, he might be Administrator generally, as the Declaration supposed, and therefore upon this there was a Respondeas Ouster awarded; and then he pleads, that Administration was granted to him during the Minority of his Wife, and that she is dead since the bringing of the Action.

Shower. This Plea is not good, for by the Judgment of Respondeas Ouster, the Defendant is estopped to say any Thing to avoid the Administration, otherwise than as the Plaintiff hath declared, and that is as Administrator generally, to which he is obliged to Answer; for the first Plea being ill, for not averring that his Wife was living, he hath thereby admitted himself to be Administrator generally, which by a subsequent Plea he shall not avoid: And so it was agreed per totam Curiam, and Judgment pro Quer', nisi, &c. It was resolved by Holt in this Case,

Administrator may retain to pay Debts attach'd, tho' his Power determin'd.

1. If an Action be brought against a special Administrator, and the Administration determines pending the Action, he ought to retain Assets to satisfy the Debt, which is attach'd on him by the Action.

Plaintiff need not aver Administration committed to Defendant.

2. If an Action be brought against an Administrator, the Plaintiff need not aver in his Declaration, that Administration was committed to the Defendant, contra 2 Ven. 84. Bracton *versus* Lister. Et Nota bene, for per Mather in an Anonymus Case in C. B. Mich. 98. It was held to be ill upon Demurrer, but cured by the Defendant's Pleading over, whereby he admitted himself a rightful and lawful Administrator.

Persons privileged have no Imparlance.

A Person privileged in Court shall not have an Imparlance, neither can a Bill be filed against him in Vacation, because it cannot have Reference to the precedent or subsequent Term, but it must be filed sedente Curia, and if there be a joint Cause of Action against an Attorney and another Person, you cannot declare as against one in Custodia and the other by Bill, but against both as in Custodia: And the same Practice holds in C B. you must proceed there by Original against both. Per Holt Ch. J. Sir S. Astry and the Officers of the Court agreeing the constant Practice to be so.

## Crane *versus* Hall.

Judgments in Counties Palatine, how entred.

IN the Entry of a Judgment in a County-Palatine Ideo consideratum est is sufficient, without saying, per Curiam. But 'tis otherwise of inferior Jurisdictions. Per Holt Ch. J.

## Coggs's *Case* (*in* C. B.)

Diversity between Bills payable to Bearer or to Order.

IF a Bill be drawn payable to J. S. or Bearer, the Bearer cannot bring the Action; but if it be to J. S. or Order, the Indorsee may, and so resolved between Hodges and Steward in B. R.

1 Salk 198.
2 Salk. 615.

## Brewster *versus* Kitchin. Ante 424.

Covenant to discharge from Taxes, extends to Taxes imposed by subsequent Acts of Parliament.

HOlt Ch. J. Now delivered the Resolution of the Court in this Case, viz. that the Covenant shall extend to such Taxes as are imposed by subsequent Acts, as well as those that were in being at the Time of the Covenant made, for these Reasons:

1. Because Taxes are to be intended parliamentary Taxes. Bro. Quinzimus.

2. Because, at the Time when this Covenant was made, being in the Year 1649. there were Taxes of this Nature in being, which shows the Intent of the Parties, that it should extend to them: But had it been in the Year 1640, when no such Taxes were in Use, then it would not have extended to those Taxes, which were of another Nature, and afterwards imposed.

3. Because Taxes have a virtual Existence in the Constitution of the Government, before any Act is made for the raising of them: And for that Reason, the King by his Letters Patents may exempt any one from Taxes that hereafter shall be imposed. Dy. 52. pl. 1. 38 H. 6. 10. b.

4. The Reason why this Covenant extends to future Acts of Parliament is, because the Rent is to be paid to her and her Heirs, and should not the Heir be exempted from Payment of Taxes as well as his Ancestor, it would prove ineffectual as to him, and would fall short, even of the very Words of it. And those Provisoes that are put into Acts of Parliament for the raising of Taxes to be paid by the Tenant, and that it shall be lawful for him to deduct, &c. (Provided, that it shall not extend to any Covenant, &c.) are only cautionary and not of any Force or Effect in the Law; for had the Proviso been left out, it would not have repeal'd the Covenant, for it is the Tax that the Covenant

works upon. 2. The Act is made for the Benefit and Advantage of the Tenant, and therefore it is not unlikely that he would abridge himself of the Benefit and Privilege that he would have received by it; and as he may abridge himself from the Privilege of a Law that is made, for the same Reason he may deprive himself of the Advantage of a Law that is to be made. 3. It is no Violation of the Covenant, if he pays without Deduction; for if a Man covenants to do an Act that is lawful, and an Act of Parliament comes and makes it unlawful, this is a Repeal of the Covenant: But if the Covenant were not to do an Act unlawful, and an Act of Parliament makes it lawful to do that Act, the Covenant is still binding.

A second Question was moved, whether the Assignee of the Land in this Case, can be charged with the Covenant of the Grantor, for it is not a Covenant that runs with the Land, but collateral to it: But upon the first Point Judgment was given for the Plaintiff. Q.

## Matthews *versus* Temple.

Limitation to Uses for several in Remainder, good to the last, tho' vested in the former before the other had a Capacity to take.

IN a Trial this Point was started: A Conveyance being made to the Use of the Husband for Life, Remainder to the Wife for Life, Remainder to all the Issues Female of their two Bodies, and to the Heirs Male of the Bodies of such Issues Female, the Husband and Wife have Issue a Daughter, whether the Remainder in Tail be so attach'd in her, as not to be divested for a Moiety by any after-born Daughter; and resolved, that it was not, for this Limitation, being by Way of Use, springs out of the Estate, according to the Capacity of the Persons in whom it is to rest; and therefore a Limitation to A. for Life, Remainder to the Use of J. S. and J. N. tho' J. S. dies first before J. N. yet the Heirs of J. N. shall take, tho' it be vested in one before the other hath a Capacity to take, but had the particular Estate determined after the Death of J. S. and before that of J. N. there perhaps the Heirs of J. N. should never take. And in this Case they are Jointenants for Life and Tenants in Common of the Inheritance; for where-ever two Persons claim an Estate by one and the same Title, tho' they come to it at different Times, yet they are Jointenants. Inst. 188. a. And as to the Inconvenience, that in Case the eldest Daughter should marry and have Issue, and die before there is any other Issue inheritable, that it will not be known of what Estate she died seised, that Point is not now before us, tho' it is worthy of Consideration. Q.

Jointenants for Life, and Tenants in Common of the Inheritance.

It was resolved likewise, that a Counsel might be a Witness, if he voluntarily agreed to depose the Truth, but he is not com-

Counsel may be a Witness, if voluntary.

pellable so to do, (tho' it hath been held otherwise formerly) by three Judges contra Holt.

## Tranter *versus* Duggen.

Prohibition to the Grand Sessions of Wales, for a Person living out of their Jurisdiction, tho' the Land in Controversy was within it.

THE Plaintiff prays a Prohibition to the Grand Sessions of Wales, for that the Defendant had brought a Bill against him there, to discover a Deed concerning his Title, and supposed to be in the Possession of the now Plaintiff; and suggests, that he lives out of the Jurisdiction of the Court, and ought not to be sued there; and it was moved, that this was no Cause for a Prohibition, because the Substance of the Bill is concerning a Title of Land which is local, and ought to be tried where the Land lieth, which being within the Jurisdiction, and lying in the same County where the Sessions are kept, the Trial ought to be there: But a Prohibition was granted, for this being in the Nature of a Chancery Suit, the Process is personal by Summoning of the Person, which they cannot do, he living in another County and out of the Jurisdiction, for by that Means you would run a Man to Contempt, and thereby grant a Sequestration of his Lands, that is no way under your Authority, or subject to the Observance of your Power.

## Thompson *versus* Leach. Ante 187, 438.

The Heir need not sue a Sci. Fa. to avoid the Feoffment of his Ideot Ancestor, but may enter without it, contra of the King.

Deed of an Ideot is void, Bond of an Infant only voidable.

Yet an Infant's Letter of Attorney is void.

HOlt Ch. J. There's no Necessity for the Heir to have a Scire Facias to avoid the Feoffment of his Ancestor made during his Lunacy, he may enter without it; because by the Death of the Ancestor the Title which the Feoffee claimed under him is determin'd, but the King cannot, during the Life of the Non Compos, avoid the Feoffment, without a Scire Facias, because the Non Compos is then alive, in whose Right he enters: But if an Infant grants a Rent-charge, and the Grantee distrains, he may have Trespass, which plainly proves that the Grant is void, for if only voidable, that requires some Act to be done to avoid it, and the same Law holds in Case of a Non Compos. The Reason why the Bond of an Infant is only voidable, is, because he shall not plead Non est factum, all Things being done that are necessary to make it good, as Sealing and Delivery; but as to the Operation of it, it is void, tho' he must shew the Special Matter to avoid it. If an Infant make a Letter of Attorney, it is agreed to be void, and yet he cannot plead Non est factum: And the Difference taken, that the Deed of an Infant whereby he gives an Authority is void, but where he passeth any Interest, only voidable, is not agreeable to Reason, for

by that Means the Infant would be more prejudiced in Passing his Estate, than he would in giving a bare Authority, which cannot be maintain'd; but the Reason why the Feoffment of an Ideot or Non Compos is only voidable, is because of the Solemnity of the Livery being done upon the Land, and in View of the Country, and the Feoffee might have afterwards a Confirmation of his Title by Way of Release, with Warranty. So it is in Case of a Feoffment by Tenant in Tail, or for Life, it turns all Remainders dependent upon their Estates to a Right; but if they had made a Bargain and Sale, or Surrender, &c. nothing had passed but that which lawfully might: Therefore I hold the Surrender in this Case to be void, and the particular Estate still continues to support the contingent Remainder: And so was the Opinion of the whole Court, and Judgment pro Quer'.

Note.

Livery and Seisin.

## Britton *and* Cole. Ante 434.

1 Salk. 395, 408.

Holt Ch. J. Now delivered the Resolution of the Court, viz. That the Cattle of a Stranger, being Levant and Couchant upon the Land of the Person outlawed, may be taken by Virtue of a Levari Facias for the King; for,

Cattle of a Stranger, Levant and Couchant on Lands of a Person outlaw'd may be taken by Levari Facias for the King: For,

1. The Writ commands the Sheriff to levy this Duty out of the Issues and Profits of the Land; and these Cattle being Levant and Couchant are Issues, for omnia mobilia upon the Land are Issues. W. 2. cap. 29. 2 Inst. 453. Fleta, lib. 2. 68.

1. The Cattle are Issues, &c. within Westm. 2.

2. The Land is Debtor to the King, and that makes the Cattle liable to be taken, and if he should not have this Privilege, it would lie in the Breast of the Owner of the Land by any special Agreement of his, to defeat the King of all the Benefit he is to reap by the Outlawry, for he can have no Remedy upon the Record of the Outlawry against a Stranger to recover the Money upon the Agreement, it being a Sum in gross and collateral to his Interest. If the Person outlaw'd had alien'd his Estate, and the Feoffee had put in his Cattle, they should have been subject to a Seizure by the King, the Feoffee having the Estate in the same Plight and Condition as the Feoffor had it, and tho' the Feoffment be good, yet it destroys not the King's Title; so the Issues of a Juror shall be levied by Levari upon the Cattle of the Feoffee after Alienation: But if before Judgment of Outlawry the Land be alien'd, that prevents the King from the Pernancy of the Profits. 19 H. 7. 39. But if after the Inquisition found it will not, for 'tis by the Inquisition that the Interest is vested in the King, and before that he hath nothing at all. Hardr. 101. Raym. 17.

2. The Land is Debtor, &c. to the King.

It hath been objected, that the Goods of the Person outlawed are the Issues, which are to be levied by the Levari, but that can-

cannot be, for those are the King's without Inquisition, and that makes out the Difference between Chattels real and personal; the one being leviable by Levari, the other not. For ought appears by the Record, the Plaintiff here may be Feoffee, or claim any other special Interest upon the Land before the Outlawry committed; but if he were, that will not avail him, since he hath shewn his Title by Way of Replication, for the Plea in Bar is good, the Defendant averring, that the Beasts were Levant and Couchant; and suppose the Plaintiff had a Title to the Land prior to the Inquisition, yet if that Title be not particularly found therein, he cannot justify by it in Action of Trespass, but ought to go into the Exchequer, and by Way of Monstrance de droit, shew his Right there. If these Cattle came upon the Land by Trespass, the Owner shall have no greater Advantage than the Feoffee or Alienee, but they shall still be liable to be taken, for if he that hath Title to the Land hath no Remedy upon such a Seizure, à fortiori, he that hath no Title can have none. The Case in 3 Cro. 431. is good Law, where it is said, that no Goods shall be taken upon the Land but the Goods of the Debtor, not the Goods of a Stranger; and the Reason is there, for that being a Fieri Facias gives the Sheriff Authority to levy only de bonis & catallis of the Owner, and therefore differs from a Levari Facias, which gives Authority to levy de exitibus terræ. The Writs of Execution for the King are a Ca. Sa. to take the Body, Fi. Fa. to take the Goods, extendi Fa. to take the Lands; and the long Writ in the Exchequer, which comprehends them all: Now, even by that Writ, the Goods of a Stranger cannot be taken, because the Sheriff hath no such Authority thereby, but otherwise it is of a Levari Facias de exitibus terræ. The Word Issues chargeth the Inheritance, for if Tenant for Life dieth before they are levied, they shall be levied upon the Inheritance, the Land being the Debtor; if any Officer for Life forfeit Issues, it is a Charge upon the Inheritance, and the Reversioner in Fee is liable to them: But if Tenant for Life be outlawed, there may be a Doubt, whether the Arrears of Issues may be levied upon him in Reversion, because they proceed from the Default and Neglect of the Tenant for Life; but in the Case of an Officer it is otherwise. If the Lord of a Manor forfeit Issues, they shall be levied not only upon the Freeholders but Copyholders likewise. 2 Roll. 157. And tho' the Cattle of one Tenant in Common shall not be taken upon the Outlawry of another. Lane 79. especially where it is found by Inquisition, that the Party outlawed had only a Moiety, and the Levari commands the Sheriff to levy Issues only of a Moiety, as in that Case; yet the Cattle of a Stranger that come in by Wrong should be liable to be taken; but if the Inquisition had found a Title generally for the King, without taking Notice of the Tenancy in

Common, even the Beasts of the other Tenant in Common might be taken upon the Levari, and he hath no Remedy, but as aforesaid, by Pleading his Title in the Exchequer by Monstrance de droit. So a Commoner's Cattle are not upon a special Inquisition liable to be taken upon a Forfeiture of Issues, by him that hath Pasture in the Land, but otherwise upon a general Inquisition for the Reasons aforesaid. The Cattle of a Stranger are distrainable for Rent-Service, and if Levant and Couchant, for a Rent-Charge, which is against common Right, because the Land is the Debtor, which Case differs not in Reason from the Case before us: Therefore as to this Point Judgment must be for the Defendant. But

The Defendant in his Plea ought to have shewn the Record of the Outlawry, being a Stranger, and not justifying under the Command of the Sheriff, his Precept being directed to Anthony Powell and Joseph Powell: And for this Cause his Plea is naught, he only taking Notice of the Outlawry in the Recital of the Writ, which is not sufficient; but had he justify'd under the Command of the Sheriff, or his Bailiffs, then it were well enough. For if a Writ of Execution be directed to the Sheriff, whereas there is no Judgment obtain'd, and the Sheriff commands his Bailiffs to do Execution, which they do accordingly, they are justifiable, for they need not take Notice whether there be a Judgment, or no, nor is it necessary for them to plead it in Actions of Trespass; but otherwise it is of a Stranger; for in Trespass he cannot justify that he procured the Plaintiff to be taken in Execution, without shewing the Judgment; but if he justifies by Command of the Officer, then he would be in the same Condition as they: And in Trespass such Command is traversable, 1 Leon. 150. 2 Leon. 215. 1 Roll. Rep. 46. But otherwise in a Replevin. In an Avowry for Damage-feasant, the Demand is traversable.

Wherefore, because the Defendant hath not by his Plea made a good Justification.

Judgment pro Quer'.

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# Termino Paſchæ.

## Anno 10 Willielmi III. Regis, in B. R.

### *Lady* Calverley *verſus Sir* Richard Leving.

Covenant and ſeveral Breaches laid, one being local, tried out of the County, yet aided after Verdict.

COvenant laid at Tarvin in the County of Cheſter, upon a Demiſe of a Houſe ſituate in the City of Cheſter. And ſeveral Breaches were aſſigned, viz. for Non-payment of the Rent, and for not Keeping the Houſe in Repair. The Defendant, as to the Rent, pleaded Riens arrear, and that he had kept the Houſe in good Repair, &c. Whereupon ſeveral Iſſues were joined, and the Cauſe was tried by Mittimus before the Chief Juſtice of Cheſter at the laſt Aſſizes, where the Plaintiff obtained a Verdict and ſeveral Damages upon the ſeveral Iſſues: And now it was moved by Sir Barth. Shower, that this was a Miſ-trial as to the Repairs, for it appears the Houſe is ſituate in the City of Cheſter, which is a diſtinct County, and the Iſſue being local, could not be try'd by a Jury de Vicineto de Tarvin in Com. Ceſtr', and to that Opinion the Chief Juſtice at firſt inclined; but afterwards the whole Court held, that it was aided after the Verdict by the Stat. 16 & 17 Car. 2. being try'd by a Jury of the County where the Action was laid.

### Challenor *verſus* Clayton.

The Title in an Avowry is to be travers'd.

IN Replevin, the Defendant avows for Rent, and declares, that he was poſſeſſed of a Term for ſeveral Years then, and yet to come, and made a Leaſe to the Plaintiff, rendring Rent. The

Plaintiff replies, Nil habuit in tenementis, to which the Defendant demurs, because he ought to have traversed the Title set forth in the Avowry, it being necessary in this Action to set forth a Title, and therefore it differs from an Action of Debt for Rent, for that being a personal Action, the Title need not be set forth, and if it should, would be unnecessary; and therefore need not be answered, as it ought to be in this Case. And the Case of Symons *versus* Pashley, 2 Jac. 2. was cited as Authority in Point: And the Court inclined to that Opinion.

Post 476.

Ante 47.

Sed adjournatur.

## Jones & Ux' *versus* ———

In Assault and Battery by Baron and Feme. The Defendant pleads, ne unques accouple in loyal Matrimony; to which the Plaintiff demurr'd, and it was held, that the Plea was naught, for it cannot be try'd at the Common Law, the Jurisdiction whereof ought not to be taken away in personal Actions.

In Battery by Baron & n'unque accouple, no Plea, as not triable per Pais.

## Butcher *versus* Andrews.

Assumpsit. The Plaintiff declares, that the Defendant, in Consideration the Plaintiff would lend his Son 10 l. promised to pay it: Upon Non Assumpsit pleaded, and Verdict pro Quer', It was moved in Arrest of Judgment, that the Promise of the Father wanted a sufficient Consideration: And this Difference was taken by Holt Ch. J. Where the Promise of the Father is in Consideration, that the Plaintiff would lend Money, &c. and where it is in Consideration, that he would pay Money to his Son. In the former Case an Indebitatus Assumpsit lies not against the Father, for it is a collateral Promise, and ought to be in Writing, according to the Stat. of Frauds: But in the other Case, Payment to the Son upon the Request of the Father is in Law a Payment to the Father, who is the only Debtor, and therefore shall be liable to the Action.

Assumpsit (in Consideration the Plaintiff would lend the Defendant's Son 10 l.) the Defendant promis'd to pay it, is only a collateral Promise, &c.

## Kingston *versus* Read (*at* Guildhall).

In Trover the Defendant cannot give a Release in Evidence, but ought to have pleaded it.

It was likewise resolved by Holt Ch. J. That an Answer in Chancery shall not be admitted as Evidence at Common Law, unless it be proved to be sworn by him against whom it is produced, for it might be sworn by another in his Name before a Master

In Trover Release no Evidence, but must be pleaded.

Where Answer in Chancery is Evidence.

ſter in Chancery. 2. It ought to appear, that that Part of it which is given in Evidence be pertinent to the Matter contained in the Bill, for else it should be accounted void and superfluous.

2 Salk. 444.

## Martin *verſus* Crump.

Bailiff to two, one dies, Action lies for the Survivor.

ACcount against the Defendant as Bailiff, who pleads in Abatement, that he was made Bailiff to the Plaintiff and J. S. Joint Merchants in Trade, and that the said J. S. is dead and the Plaintiff survived, and therefore the Action ought to be brought by the Plaintiff and the Executor of J. S. and not by the Plaintiff only.

The Plaintiff demurs, and Shower argued for him against this Plea, for tho' by the Law of Merchants there be no Survivorship as to the Stock. 1 Inst. 172, 182. yet that is to be understood with Relation to the Interest and not to the Remedy: The Survivor shall have the Action, tho' the Executor of the Merchant deceased shall have a Share in that which is recovered. 28 Cor. 2. 2 Lev. 188. S. C. Hall *verſus* Huffam, 3 Kee. 737. 798. Reg. 135. 3 Leon. 264. where the Penalty of a Bond shall go to the Benefit of the City of London, and yet the Chamberlain have the Action. In a Rationabili parte bonorum, the Administrator must have the Action; and it must be agreed, that the Executor and the surviving Merchant cannot be sued so as to be made joint Defendants, and for the same Reason cannot join as Plaintiffs; and this is not disagreeable to the Rules of the Common Law, where one shall enter for a Condition broken, and another take the Benefit of it. Inst. 12. 202. And tho' I admit that the Executor may have an Accompt against the surviving Merchants, 3 Leon. 264. yet he cannot sue a Stranger. 2 Cro. 410. Hackwell *verſus* Enstman.

Northy pro Defendente. Tenants in Common must join in personal Actions; and since there is no Survivorship among Merchants, the Executor and Survivor are Tenants in Common, and therefore must join. Reg. 135. b.

Holt Ch. J. The Contract with the Bailiff is entire and joint, and by the Death of the one survives to the other. Now, suppose the Factor should bring his Action for his Wages, it must be against the Survivor only. It is a little preposterous for one to sue in his own Right and the other in Right of another; for should they recover and have Judgment and then one die, should the Survivor have the Whole, or must there be a Division proportionable to their Interest? Ad quod non fuit Responsum.

Adjournatur.

## Atkinson *versus* Cornish.

5 Mod. 395.

IN this Case Holt Ch. J. took this Difference between an Administration granted durante minori ætate of an Infant Executor, and where it is granted durante minori ætate of an Infant Administrator. In the former Case it ceaseth at the Age of seventeen, in the other not till twenty-one; because an Executor by the Civil Law may take that Office upon him at seventeen: But an Administrator being created by Statute, the Time of his full Age must be granted by the Common Law.

Diversity between Administration durante minoritate of an Infant Executor and of an Infant Administrator.

## Carter *versus* Shepherd.

2 Salk 507.

THE Plaintiff having a Bill of 100 l. upon the Defendant, a Goldsmith, he came to receive it, and after 50 l. Part of the 100 l. was told out, the Plaintiff took it and put it into his own Bag, and while he was telling the other 50 l. the Bag was stoln off the Counter; the Question was, whether the Plaintiff or the Goldsmith should bear the Loss. And it was resolved upon a Reference to the Judges, that the Plaintiff must bear it, for by putting up the Money into his own Bag, he had thereby gained a Property in it, and appropriated it to his own Use; and if the Detinue had been brought for the Money in the Bag, it must be against the Plaintiff, and not the Goldsmith. Wherefore, &c.

A. telling Money after a Goldsmith and putting Part of it into his Bag, which while he is telling, the Residue is stollen; A. must bear the Loss.

## Oldham *versus* Pickering.

2 Salk. 642.

IT was moved for a Prohibition to the Chancery-Court of Chester, upon a Suggestion that the Defendant had first libelled in the Ecclesiastical Court against the now Plaintiff, as Administrator, &c. to have Distribution of an Estate pur auter vie, which being not distributable by the Rules of the Common Law, a Prohibition was granted to stay that Suit, notwithstanding which the Defendant had exhibited his Bill in the Exchequer at Chester for the same Matter which was contained in the Libel. And a Prohibition was granted, nisi.

Prohibition, no Distribution of an Estate pur auter vie.

## Hains *versus* Soper.

ASsumpsit. The Plaintiff declares for Money lent 25 Martii, Anno Domini Regis Gulielmi nono, but omits the Word Regni, so that it might be taken (as was said) for the ninth Year

Declaration Anno Dom. Regis Regni implied.

of his Life as well as of his Reign. But per Holt Ch. J. it must be intended the ninth Year of his Reign, by Reason of the Word Regis, which must have Relation to his politick Capacity as King, and not to his natural Capacity.

Judicium pro Quer'.

## Scilly *verſus* Dalby.

In Avowries the Commencement of particular Eſtates muſt be ſhewn, and any of the meſne Aſſignments are traverſable.

Ante 473, &c.

REplevin. The Defendant avows under the Executor of J. S. and ſets forth, that J. S. was poſſeſſed of the Locus in quo, for the Term of 500 Years, and demiſed to the Plaintiff for 499 Years, rendring Rent, and that ſo much Rent was arrear. The Plaintiff demurs to this Avowry; and it was argued by Carthue for the Plaintiff, that the Commencement of the particular Eſtate of J. S. ought to be ſhewn, Inſt. 303. b. Here the Title comes in Queſtion, and therefore differs from the Caſes of Debt for Rent, where the Title is only Inducement. 1 Cro. 571. Scavage *verſus* Hawkins, 1 Cro. 138. Skevil *verſus* Avery. Yelv. 147. Witham *verſus* Barker. And he cited the Caſe of Langford *verſus* Webber, which vide ante .

Northy pro Defendente. That an Avowry is in Nature of a Count. In Avowry for Damage-feaſant, need ſay no more, than that the Locus in quo is liberum tenementum, &c. Owen 51. Dy. 171. b. and he ſaid, that in the Caſe of Paſhley *verſus* Seymour, 2 Jac. 2. This Pleading was allow'd to be good, because it did not appear, that the Plaintiff did pretend to any Title. But,

Ante 27.

The Court held the Avowry to be ill, for he ought to ſhew the Commencement of the particular Eſtate, as that ſuch a one was ſeiſed in Fee, and demiſed, &c. that it might appear, that the Eſtate out of which it was derived is ſufficient to ſupport it, for that Seiſin in Fee might be traverſed; and tho' there may be twenty Aſſignments, which it would be tedious and difficult (and (if any of them were loſt) impoſſible) to ſet forth, yet that will not be a ſufficient Reaſon to alter an eſtabliſh'd Rule in Pleading, for here the Avowry is in the Realty, and any of the meſne Aſſignments is traverſable, but the Poſſeſſionatus cannot be traverſed; and it was agreed, that there is a Difference between a Declaration and Avowry, for in Debt for Rent the Commencement of the Eſtate need not be ſhewn in the Declaration, not being material. And the Ch. J. ſaid obiter, that upon a Nil habuit in tenementis, if the Plaintiff replies he was ſeiſed in Fee, and proves an Eſtate ſufficient to ſupport the Leaſe, it is well enough, that being but meer Matter of Form.

Diverſity between a Count and Avowry.

Ante 473.

4 Judicium pro Quer' niſi.

Barrett

## Barrett *versus* Scrimshaw.

REplevin. The Defendant in his Avowry pleads, that the Beasts taken belong to a third Person, and not to the Plaintiff, and therefore prays a Return: To this the Plaintiff demurs, for on the Avowant's own shewing he ought not to have return, having admitted the Property of the Beasts to be in another; but Judgment was given for the Defendant, for the prior Possession was in him, and he hath a Right against all others but the right Owner, and the Plaintiff by his Demurrer hath admitted, that he hath no Property in them.

Demurrer to a Plea in Avowry (that the Beasts belong'd to a third Person) admits that the Plaintiff had no Property.

Judgment for the Avowant.

## *Rex versus* Dove.

UPon an Information for sending a Challenge to a Commissioner of the Land-Tax, in order to deter others from executing the said Office pursuant to an Act of Parliament, &c. The Defendant demurred, and Judgment was given for him, by Reason of a Mis-recital of the Statute; for tho' this were an Offence punishable at the Common Law, yet being ty'd up by a particular Relation to the Statute, as done to a Commissioner created by that Stat. If there were no such Stat. there could be no such Commissioner, and consequently no Offence.

Information for sending a Challenge to an Officer, whereby he was deterr'd from executing an Act of Parliament, ill, for mis-reciting the Stat. tho' an Offence at Common Law.

## Cromwell *versus* Grimsdale.

DEbt upon a Bond against the Defendant as Administrator of one Erlwin, and declares, that the Intestate primo die Julii, Anno Dom. 1674. per quoddam scriptum suum obligator. cujus dat. est eodem die & anno concessit se tener. præfat. (quer.) in quadragint. libr. per hæc verba in quadrans libr'. The Defendant pleaded Non est factum; and the Jury find, that the Intestate seal'd and deliver'd quoddam scriptum in hæc verba noverint, &c. obl. A. B. in Com. præd. Mid. in quadrans libr. &c. dat. Anno Regni Regis Caroli secundi, 1674. and doubted if this were the Intestate's Deed modo & forma. Note, Also it was found, that the Intestate in the Body of the Bond was called Erlin, and subscribed Erlwin, and he was sued as Administrator of Erlin alias Erlwin: But as to that, Holt said, the subscribing the Name was not essential, and the Name in the Bond was only material.

Bond Quadrans for Quadragint. good.

5 Mod: 281
2 Salk: 462

After

After several Arguments at the Bar, and many Cases cited, the Chief Justice delivered the Resolution of the Court for the Plaintiff, tho' he said this Bond was as inartificial as any could be; yet it appearing plainly by the Condition, that it was the Meaning of the Parties, that it should be a Bond of 40 l. for Payment of 20 l. 12 s. and Quadrans being somewhat like four, they thought it might be allow'd as well as Sessanta (Hob. 19. Parker *versus* Kenedy) for Sexaginta, and other Cases cited; and the Date being impossible, any Date may be alledged, and they relied upon Yelv. 193. which upon Search agrees with the Roll, and tho' the Plaintiff seems to tie it up, by saying cujus dat. est, yet the Ch. J. said, that Date may be taken for the Delivery, but if it had been geren. dat. it had been incurable, which Difference seem'd very nice.

Differ. inter dat. & geren. dat'.

Judicium pro Quer'.

Poor's Settlement.

An Order made by two Justices of the Peace saith, that such Men, (by Name) with their Wives and Children, were lately come, &c. and then Orders, that they and their Families should be removed, which Holt said was too incertain, for it may comprehend more than came in, and therefore he inclined to quash it. He said,

Justices may make one Order to remove several Families, and upon Appeal to Sessions they may reverse it quoad one.

A poor Man ought to have Notice and to be heard before he be removed; if it can be, 'tis fit it should be so, but not absolutely necessary.

A Servant well settled, being with a Master removeable, cannot be removed with him, by 43 Eliz. but the Master may complain upon the Retainer.

Mandamus to sign a Poor's Rate.

A Mandamus to sign a Poor's Rate was directed to the Justices of the Peace of the Precinct of the Cathedral Church of Norwich. They return, that for several Years past Complaint was made, that the Poor's Rates were unequal, and that upon Examination they found, that they did not assess by an equal Pound Rate; and they give several Instances of the Inequality of one Assessment: And that one of the Overseers brought another Rate, which they thought more equal, and signed that.

Mountague moved for a peremptory Mandamus, and cited Sid. 337. Case of Peterborough. He said the Church-warden and Overseer may fix the Rate by their Discretion, and 'tis not necessary to be by Pound-Rate, they might have respect to the Number of the Family, &c. Dalton, cap. 73. fol. 149. and the Person grieved hath Remedy by Appeal: And as to this Point the Court agreed, that the Rent is no standing Rule, for Circumstances may differ, and there ought to be regard ad statum & faultates.

Then it was urged by Sir Barth. Shower for the Justices, that the Mandamus should not have been to sign a Rate already made, but to put the Act of 43 Eliz. in Execution; 'tis to be by and with the Consent of the Justices, in like Manner as the Church-wardens are to have the Consent of the Parishioners; there is no such Word in the Act as signing it; what if the Justices be of Opinion, that it is unequal (whether it be so or not) shall they be compelled to sign it?

Holt Ch. J. Hæsitavit, and said it is to be a reasonable honest Discretion, not Humour, sure the Justices are under an Obligation to consent; and this Mandamus had been better, if it had been to consent. But here the Rate refused was made by one Church-warden and Overseer, and the Justices have confirmed another made by another Church-warden and Overseer; perhaps neither was good, but why had not the Justices Election.

## Benner *and* Hill.

Where one pleads in Abatement a Matter of Fact, and the Plaintiff replieth and traverseth the Matter of the Plea, he may conclude either Judicium si actio, or Quod respondeat ouster, for if the Defendant joins Issue, it will be final, if demur, it will be Respond. ouster, but if the Joinder in Demurrer conclude in Bar, 'tis ill. Per Holt Ch. J.

Replication to Plea in Abatement.

Where a Rule is entred into by Consent to refer a Matter to the Judge of Assise, there needs no Motion to make his Order a Rule of Court, for the former Rule gives it a Sanction.

Rule by Consent a Rule of Court.

## Hall *versus* Jackson.

Error of a Judgment in Boston Court, where the Defendant pleaded a foreign Plea; the Plaintiff replies, that the Defendant had before taken an Imparlance, and ought not to be admitted to plead such Plea, and thereupon a Respondeas ouster. Then Judgment is given in Chief by Nihil dicit. Parker assigned for Error.

Inferior Court foreign Plea there after Imparlance.

1. They have allowed the foreign Plea, and entred it upon Record, so that they ought not to have proceeded.

2. The Judgment is Consideratum fuit for Consideratum est.

Cur'. The first is no Error at all, for the Plaintiff might well estop him after Imparlance, but the second Error of Consideratum fuit is fatal.

Consideratum fuit ill.

Reversetur nisi.

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# Term. Sanctæ Trin.

## Anno 10 Willielmi III. Regis, in B. R.

1 Salk. 15, 16, 17.

### Iveson *versus* Moor.

Case for stopping a Way leading to his Colliery, per quod he lost his Customers, is ill, not shewing a special Damage.

ACtion upon the Case. The Plaintiff declares, that he was seised in Fee of a certain Colliery, and the Defendant fraudulently intending to deprive the Plaintiff of the Sale of his Coal, and to seduce his Customers from buying the said Coal, did stop up a certain Highway leading to the said Colliery, per quod the Plaintiff lost divers Customers. And now, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Action lies not, for this is a publick Nuisance presentable in the Leet. Inst. 56. 5 Co. 73. Williams's Case, 9 Co. 113. 27 H. 8. 27. 2 Cro. 446, 491. Mo. 180. and here, if the Action lay for one, it would lie for every one, which would be inconvenient; and they cited the Case of Pain and Partridge, Pasch. 2 Will. & Mar. Rot. 43. where a Custom was laid in a Mill to be free of Toll in passing over a Ferry, and an Action brought by one of the Inhabitants against the Defendant for not keeping the Ferry-boat: The Defendant pleaded, that he had erected a Bridge, which was more convenient; and it was held, that the Custom was good, and the Justification ill; but because the Injury was publick, adjudg'd not actionable. (But Holt Ch. J. said, if the Ferry had been up, and the Defendant had exacted Toll of an Inhabitant, an Action would have lain.)

For the Plaintiff it was urged, that where there is a particular Damage to one more than another, the Action well lies, whether the Damage be personal to himself, or by the Loss of his

Horse, &c. (for as to that the Books make no Distinction) And here the Plaintiff hath alledged special Damages in the Loss of the Sale of his Coal. W. Jones 156. The Stopping a Highway, whereby the Plaintiff was forced to carry his Tithes a further Way about, adjudg'd actionable, tho' the Damages were but consequential (which seem'd a strong Case). If I have a Fair, by Reason whereof Toll is due to me, if I am obstructed from the Receipt of it, an Action lies. 2 Cro. 43, 122. So where I or my Servants are hindred by Threats from digging in my Quarry of Stone. 2 Cro. 567. So for erecting a Nusance, whereby an Inn-keeper loseth his Customers. 1 Cro. 510. Roll. 88. S. C.

The Court inclined, that there being no particular Injury in this Case, but only a particular Damage consequential to the general Injury done to the Publick, the Action would not lie; but however, that the Action here was not maintainable without special Damage, for the Obstruction of the Way is not the Cause of Action, but the Consequent which ariseth from it: And where the Action lieth not without special Damage, the per quod ought to be certain and particular, but where the Action lieth without special Damage, (as in the Case cited 1 Cro. 510.) there the per quod is only for Aggravation, and needs not be so precise. Per quod.

Adjournatur.

Nota. In this Case Holt Ch. J. cited a Suffolk Case of Bertue and Bourn, where the Plaintiff contracted with the Defendant, to bring Timber in the Plaintiff's Cart, and deliver it in the Defendant's Yard. It was brought in a cold Day; the Defendant refused to come and unload it, whereby the Horses got cold, and two of them died, for which the Plaintiff brought his Action, but could not obtain Judgment.

## Roswell *and* Prior.

2 Salk. 459, 460.

Action upon the Case. The Plaintiff declares, that he was possess'd of a Messuage and twenty Lights. per quæ lux inferri consuevit & adtunc debuit; and that the Defendant did build a House so near the Plaintiff's House, that thereby he stopt the said Lights. And after Verdict pro Quer', it was moved in Arrest of Judgment, that the Plaintiff did not shew any Title to the Lights by Prescription, or saying, that it was antiquum Messuagium. 1 Cro. 325. In Case for stopping Lights it ought to be shewn, they were antient, &c.

But it was answered by Northy, that the Possession is sufficient to support the Action against the Wrong-doer: And these Authorities were cited Fitz. Tit. Entry 87. Tit. Writ 674. Br. Hors de son Fee 1. 2 Cro. 43. Ow. 109. 3 Cro. 335. 9 Co. 53. b.

1 Cro. 499. 3 Cro. 419. 1 Roll. 393. 1 Ven. 237. Poph. 168, 170. 2 Cro. 256, 257. 3 Mod. 48. 2 Cro. 605. 1 Cro. 575. 2 Jo. 148. And (in Michaelmas-Term following) it was adjudg'd, that Want of Antiquum Messuagium was help'd by the Verdict, and said Consuevit imports a Prescription, but it would have been naught upon Demurrer; for the Defendant might not be a Wrong-doer, resting upon his own Ground, &c.

Consuevit imports Prescription. Q.

## *Dr.* Groinvel's *Case.*

Commitment for a Bastard-Child, Justices of Peace's Power to be strictly restrain'd in Commitments.

HOlt Ch. J. said in this Case obiter. If a Justice of the Peace commits one as a reputed Father of a Bastard-Child, and afterwards it appears, that the Child was no Bastard, he must Answer it; otherwise if the Order were only reversed, because another were Father: So the Case of Terry and Huntington. Hardr. 481. the Officer had been no Trespasser if the Liquor had been excisable.

## Toms *versus* Lloyd.

CAse. The Defendant pleads his Privilege as Clerk to the Clerk of the Pells, and upon a Demurrer had Judgment, but was deny'd to have Costs; for per Curiam, this is out of the Meaning of the late Act of Parliament against frivolous and vexatious Suits, which gives Costs to Defendants upon Judgment upon Demurrer; for in this Case, if the Plaintiff had Judgment, he should not have Costs. We cannot take it for a vexatious Suit, where the Defendant hath Judgment only upon a Plea in Abatement.

Q. 5 Mod. 368.

## Ellis *versus* Ellis.

No Difference where Money is lent an Infant and he buys Necessaries, and where the Necessaries are bought for him. Quære de hoc.

INdebitatus Assumpsit for 50 l. Money lent, the Defendant pleads Infancy; the Plaintiff replies, that the Money lent was laid out for Necessaries for the Defendant and his Family; to which the Defendant demurs, and it was objected, that the Contract of the Infant upon the Lending of the Money was void, and by Matter ex post facto, could not be made good; also a Difference is in the Cases where Money is laid out for the Use of an Infant; and where it is lent him, in the one Case it is left to the Discretion of the Infant to judge what is necessary, in the other not. But it was resolved as to this Point, that there is no Difference, whether the Infant himself buy the Necessaries, or a Stranger for him; for in both Cases it will come in Issue

upon the Trial, whether the Goods were convenient for his Degree and Quality; and if they were so, he shall be chargeable, as well for the Money lent him to buy them, as he should have been for the Price of the Goods themselves. But because the Plaintiff had laid the Venue where the Money was lent, and not where the Necessaries were bought. Judgment was given against him.

Venue ill laid.

## Owen *versus* Bulkley.

DEbt upon a Bond. The Defendant pleads the Condition for the Payment of three several Sums at three several Days, and that he hath paid two of them at the Days limited, and the Third is not yet come, and concludes in Abatement; and it was argued, that this ought to be pleaded in Bar, and not in Abatement; for in every Plea in Abatement, the Defendant ought to shew the Plaintiff how to bring a better Writ, and here he shews, that he ought to have none at all, the Day of Payment of the third Sum not being yet come, as in an Action for an Attorney's Fees, if the Defendant pleads, that the Plaintiff deliver'd no Bill of them to him, he ought to conclude in Bar. It was answered, that it is well enough, as a Receipt in Part after the Action brought may be pleaded in Abatement. 34 H. 6. 1. Mod. 214. But notwithstanding it was adjudg'd per Cur' no good Plea in Abatement, for it ought to be pleaded in Bar for the Reasons aforesaid.

Matter in Bar pleaded in Abatement, ill.

Plea in Abatement to give a better Writ.

Judicium quod Respondeat Ouster.

A Mandamus being granted to the Justices of Nottingham to sign a Poor's Rate for the Parish of St. Mary; they pretend some Tenements are assessed which are out of the Parish.

Mandamus to sign a Poor's Rate.

Holt Ch. J. If the Justices return, that you have assessed some Places out of the Parish, you are at a full Stop: Who can bring any Action?

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## Sherington *versus* Andrews *in Scaccario*.

NOta. Mr. Mynshul informs me, that in this Case it was at first decreed, that whereas a Tenant was easily assess'd to the King's Tax, he should deduct with his Landlord only pro Rata, for what he actually paid; but afterwards in Scaccario, between Sir John Werden and Pickering, the Defendant demurred to

Tenant under assess'd deduct with the Landlord pro Rata only.

to the Plaintiff's Bill in the like Case; and the Demurrer was allow'd, for it should not be intended, that the Tenant paid less than the 4 s. per l. according to the Act of Parliament. Mr. Cheshire likewise acquainted me of these Cases, and said he conceived for the same Reason, that the Demurrer was allow'd in the latter Case; the Court ought not to have permitted such an Examination in the former Case.

*FINIS.*

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