REPORTS
OF
CASES

ARGUED and ADJUDGED in the COURTS of

King's Bench, Common Pleas and Exchequer:

To which are added

Some Special CASES in the Court of Chancery, and before the *Delegates*;

In the Reigns of

King *William*, Queen *Anne*, King *George* the First, and his present Majesty.

By the Right Honourable

Sir *JOHN COMYNS*, Knt.

Late Lord Chief Baron of his Majesty's Court of Exchequer.

WITH

Two TABLES, one of the NAMES of the CASES, the other of the PRINCIPAL MATTERS.

In the SAVOY:

Printed by HENRY LINTOT, (Assignee of *Edward Sayer*, Esq;) for D. Browne, at the *Black Swan* without *Temple Bar*; J. Shuckburgh, at the *Sun* in *Fleetstreet*; and C. Bathurst, at the *Cross Keys* in *Fleetstreet*. MDCCXLIV.

To the Right Honourable

Sir *WILLIAM LEE*, Knt.

Lord Chief Juſtice of *England.*

My Lord,

WHEN the Demands of the Profeſſion made it in a Manner neceſſary that theſe REPORTS ſhould from the Obſcurity of a private Study be introduced to the Publick, whatever Difficulties might ariſe in the Compliance, there ſurely could be no Room for a Moment's Heſitation to determine whoſe Patronage and Protection they ſhould claim; having I well hoped (and your Lordſhip's Indulgence ſince, has confirm'd me in that Sentiment) a double Title to your Lordſhip's, not only as one, for whom the Author in private Life was ever uſed to profeſs the higheſt perſonal Honour and Regard, but as the ſupreme Magiſtrate of the Common Law, preſiding with ſo great Reputation in that Court where they Date their Beginning.

The Difficulty of ſucceeding a Perſon ſo truly eminent as your Lordſhip's noble and learned Predeceſſor, was too apparent to all the World; but I may venture with as much Truth to add, that his Majeſty (whoſe great Regard and paternal Affection for his Subjects, can appear in nothing more than ſo worthily filling the Seats of Juſtice) never gratified them in a more ſenſible Manner, than when he conferred that Honour on your Lordſhip; for however excellent great Abilities, and profound Science are in themſelves, however ne-

ceſſary to Perſons intruſted with the publick Sword of Juſtice, they only become truly Valuable to the Reſt of Mankind, when governed and directed by the Rules of Honour, Virtue and Integrity. Thus regulated, My LORD, we are ſure they will be made ſubſervient to no bad Purpoſes; it is then, they are quick to detect, but at the ſame Time can for no ſiniſter Views be induced to palliate a Falſehood; and this, give me leave to add, is the Security, this the Satisfaction, the People of *England* at preſent enjoy under your Lordſhip's wiſe and worthy Adminiſtration; but I beg Pardon, for I fear this is an Inſtance, (tho' I am ſure it is the only one) where your Lordſhip would deſire the Truth ſhould be ſuppreſt; nor muſt I forget, that whilſt I am gratifying myſelf, I not only *Infirmo ſermone detero*, but run the Riſque likewiſe of offending that known Characteriſtick of your Lordſhip's, ſo juſtly compared by the ingenious Mr. *Addiſon* to the Shades in fine Colourings, which gives them all their due Luſtre, their ſeveral and peculiar Advantages.

Give me Leave therefore, My LORD, only to add, that as I rely upon your known Candour to excuſe the Treſpaſs, I could not omit this Opportunity of teſtifying my profound Reſpect for your Lordſhip, and ſubſcribing myſelf,

Your Lordſhip's

Moſt Obedient

And devoted humble Servant

J. COMYNS.

PREFACE.

THE Reader will obſerve, that ſome of the Caſes, particularly thoſe adjudged in the Court of King's Bench, and contained in the firſt Part of this Work, are already to be found in ſome late Reports, which put me at firſt in great Doubt, whether it would be ſo expedient to publiſh them again; but upon conſulting with my Friends of the firſt Eminence in the Law, I was adviſed that it was no Objection, where they did not appear to be in a Manner verbatim, and even then, in very ſolemn Caſes or nice Determinations, they would not be without their Uſe; for as in the firſt of theſe Inſtances, the Manner of Reporting the ſame Caſe by different Hands frequently throws a Light upon the Subject which would otherwiſe in ſome Parts remain dark and obſcure; ſo in the laſt of them it is a concurrent Teſtimony, and (as ſuch) muſt add Weight to the Authority; however (notwithſtanding theſe Motives to the contrary) it is certainly true, that many Caſes are omitted either where the Subject was thought too trite, or where the ſame Caſe has been reported in two or three Cotemporary Authors very near in hæc verba: So likewiſe it has been a Rule in general to ſtrike out thoſe Caſes where the Judgment of the Court does not appear; not but that I have thought myſelf obliged to deviate from this likewiſe in ſome few Inſtances, where the Points have been either extremely well argued at the Bar, or ſo far broke by the Bench, that their Opinion might be clearly collected, and nothing farther ever done in the Cauſe.

Reports (though it muſt be acknowledged already too voluminous) ſeem of all other Law Performances the moſt acceptable

acceptable to the Profeſſion, and therefore this Volume has been preſſed into Service: The Caſes in the Common Pleas and Exchequer being very much deſired.

Defects and Imperfections muſt be expected in all human Performances, and as the greateſt Part of the Original of this Work was in Law French, *it is poſſible that may in ſome Degree contribute to them, though I am the more unwilling to ſurmiſe or ſuſpect this, as I have been aſſiſted in the Tranſlation,* &c. *by Gentlemen of known Learning and Abilities in the Profeſſion, whoſe Service I cannot omit this Opportunity of acknowledging. However, ſure I am, that the Author (had he been living) would have ſent them forth to a better Advantage; for though a Report in the Nature of it, may be thought a Work as little likely to ſuffer from a Tranſlation as any other, yet as there are certain technical Terms and Idioms peculiar to every Language and Science, which appear beſt in their native Dreſs, ſo likewiſe are there ſome particular Expreſſions in the Original, which though the Author himſelf might have thought proper to alter, I fear the Editor could not be juſtified in doing it. If upon the whole any Thing in them contributes to the publick Advantage and Emolument, the Honour is due to his Memory, and I ſhall rejoice; whatever on the contrary appears in them either incorrect or imperfect, I hope the Reader will candidly impute to the Misfortune the Publick had in loſing him before they went to the Preſs.*

J. C.

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DE
Term. Sanct. Hill.
7 Will. III. in B. R.

Sir John Sommers, *Cuſtos Sigilli.*
Sir John Trevor, *Magiſter Rotulorum.*

Johannes Holt *Miles*, *Cap. Juſt.*
Will. Gregory *Miles*
Tho. Rookesby *Miles* } *Juſt. de B. R.*
Sam. Eyre *Miles*

Geo. Treby *Miles*, *Cap. Juſt.*
Edw. Nevil *Miles*
Joh. Powell *Miles* } *Juſt. de C. B.*
Joh. Powell *Miles*

Edwardus Ward *Miles*, *Cap. Bar.*
Nicholas Lechmere
Johannes Turton } *Barones de Scaccario.*
Littleton Powys *Miles*

Culliford and *Cardonell.*

Caſe 1.

IN Debt upon Bond the Defendant demanded Oyer, by which it appeared, it was made to render an Account to the Plaintiff of the Profits of an Office in the Cuſtom-Houſe, and to pay him the Half-Part of them; and afterwards pleaded, that by the Statute 5 & 6 *Ed.* 6. *cap.* 16. If any Perſon ſhall ſell any Office, or Deputation of any Office, &c. or take any Money, Bond, &c.

Security to account for the Profits of an Office, not a Sale within the Statute of *Ed.* 6. *cap.* 16.

for any Office, or Deputation of any Office, which concern Adminiſtration of Juſtice, *&c.* or any the King's Cuſtoms, *&c.* he ſhall forfeit Office and Right of Deputation, *&c.* and ſuch Bond ſhall be void: And that the Defendant was made Deputy to the Plaintiff in his Office in the Cuſtom-Houſe, who took his Bond corruptly for the Grant of ſuch Deputation. Upon which there was a Demurrer; and adjudged for the Plaintiff; for his Bond is not within the Statute of 6 *Ed.* 6. being only for Part of the Profits, which the Defendant receives, and is no more than if the Plaintiff make a Deputy and allow him a Salary; for here he allows the Defendant a Moiety of the Profits for his Salary, and the Security taken for the other Moiety is not a Sale or corrupt Bargain for the Deputation; otherwiſe if the Defendant had given a Sum in groſs at firſt, or had given Covenant for a certain Sum to be annually paid the Plaintiff.

Judgment for the Plaintiff.

Caſe 2.

Haines and *Jeffreys.*

Marriage of Baſtard within *Levitical* Degrees.

PRohibition was prayed to the Spiritual Court, where there was a Libel for an inceſtuous Marriage, for the Plaintiff had married a Baſtard of his Siſter. And Sir *Barth. Shower* urged, that this was not within the Degrees prohibited by the Statute of 32 *Hen.* 8. for a Baſtard was not the Daughter of any one. 1 *Inſt.* 123, 157. 6 *Co.* 65. A Baſtard is the Son of no one, nor has any Relation, but is the Fountain or Original of his own Blood, for he derives Blood of no one. 41 *Ed.* 3. 9. *b.* 1 *Bendl.* 102.

Dobbins on the other Side quoted the Argument of the Biſhop of *Worceſter*, and he ſays, the Words in *Leviticus*, which we tranſlate, *you ſhall not approach to your next of Kin*, in the *Hebrew* Tongue is, *you ſhall not approach to the Remainder of your Fleſh*; the vulgar *Latin* ſays, *ad proximam ſanguinis ſui*, by which it appears, that the Intent of the Prohibition was to prohibit an Approach to any that was of his Blood, and ſo the Expoſitors extend this Precept to Perſons who pro-

ceed as well from an illegitimate, as from a lawful Embrace. *Vide* 99 *Can.* 1603. 2 *Inſt.* 683. Lord Chief Juſtice held, and all the Court ſeemed to think, it would be very miſchievous if a Baſtard ſhould not be accounted within the Statute 32 *Hen.* 8. for by that Rule a Man might marry his own Daughter; and where it is ſaid, that a Baſtard is the Son of no one, this is in civil Reſpects, and where there is an Inheritance.

Petit and Petit, Executors of Richard Petit, and *Smith.*

Caſe 3.

PRohibition was moved for to the Spiritual Court, where it was attempted to make the Executors diſtribute according to the Statute of Diſtribution 22 & 23 *Car.* 2. *c.* 10. And upon a Conſultation it was urged, that Executors are only Truſtees of the Goods of the Teſtator, and have them to adminiſter according to the Intention of the Teſtator, and where they have paid his Debt and Legacies, then it is but reaſonable that they diſtribute the Surplus to the next of Kin to the Teſtator; and there was a Caſe cited of a Decree in Chancery between *Froſt, al' Forreſt,* v. *Munt,* where the Teſtator had made the Defendant his Executor, and deviſed to him as follows, *viz. I give unto my Executor the Sum of* 5 l. *only*; and it was decreed that the Executor ſhould be accountable for the Reſidue; for the Intent of the Teſtator appear'd to be, that his Executor ſhould have only 5 *l.* But the Court here inclin'd, that a Prohibition ſhould go; for the Caſe cited depended upon the ſpecial Words of the Will, and did not extend to the preſent Caſe.

Executors not obliged to make Diſtribution according to the Statute of 22 & 23 *Car.* 2.

At the End of Eaſter *Term* 7 *Will.* 3. *Sir* William Gregory, *one of the Juſtices of the King's Bench, died, and in the* Trinity *Term following Sir* John Turton, *one of the Barons of the Exchequer, was removed to the King's Bench, and took the third Seat in that Court.*

DE
Term. Sanct. Trin.
8 Will. III. in B. R.

Caſe 4.

Huſſey and *Jacob*.

When a Man ſhall avoid a Bill for Money loſt at Play by the Statute of 16 *Car.* 2.

Aſſumpſit. The Plaintiff declares upon the Cuſtom of Merchants, by which, if a Bill of Exchange is drawn upon a Perſon, and he accepts it, he is liable to pay it; that the Lord *Chandos* had drawn a Bill upon the Defendant for the Payment of 120 Pieces of Gold, called Guineas, to the Plaintiff, and the Defendant accepted thereof, and afterwards refuſed Payment. The Defendant pleads the Statute 16 *Car.* 2. *c.* 7. and that the Plaintiff had played with the Lord *Chandos* at a Game called Hazard, and that the Lord *Chandos* had loſt 120 Guineas, and this Bill was given for the Security of that Money. Upon which it was demurred: And argued by Sir *Barth. Shower* for the Plaintiff, that this Plea amounts to the General Iſſue; for on *Non aſſumpſit* pleaded he might give the Statute of 16 *Car.* 2. *c.* 7. in Evidence, and therefore he ſhall not be admitted to plead the Special Matter, where it may be given in Evidence upon the General Iſſue. *Sed non allocatur*; for in every Caſe, where the Defendant may avoid the Action of the Plaintiff for Matter of Law, he may there plead ſpecially, notwithſtanding that the ſame Matter may be given in Evidence upon the General Iſſue, and ſhall not be obliged to take the General Iſſue, and leave the Matter of Law to the Verdict of a Jury; as in an Action brought upon a Bond, the Defendant may plead that ſhe was under Coverture at the Time, although ſuch Matter may be given in Evidence upon *Non eſt factum* pleaded; and in Conſpiracy, the Defendant may well ſhew a probable Cauſe for his Suſpi-

cion in his Plea, and is not obliged to plead the General Iſſue. *Cro. Eliz.* 871, 900. 1 *Vent.* 2. 2 *Vent.* 295. 2*dly*, That the Defendant cannot have the Advantage of the Statute 16 *Car.* 2. *c.* 7. for the Money is not loſt by him, but the Action lies againſt him upon another Contract, for the Acceptance of the Bill makes the Defendant chargeable; and if a Man promiſes another, that if he will forbear to ſue him for ſo much Money, which was won at Play, he will pay at ſuch a Time; *Aſſumpſit* lies upon ſuch Promiſe, for there is another Conſideration, the Forbearance being the Cauſe of the Promiſe: And the Miſchief will be very great, if a Perſon may avoid Payment upon a Bill after his Acceptance of it, for that the original Cauſe of ſuch Bill was upon an uſurious Contract, or for Gaming, *&c.* If the Plaintiff had ſent his Bill to *Conſtantinople*, and it had been there accepted, ſhould it be avoided there for that it was given for Money won at Play? ſuch a Conſtruction will be very prejudicial to Trade; ſo in this Caſe it is not ſaid, that the Acceptance by the Defendant was for the Security of the Money which the Plaintiff won at Dice. *Sed non allocatur*; for the Acceptance by the Defendant was not upon another Conſideration, but was a better Aſſurance for the Money due from the Lord *Chandos*; and the Statute avoids all Contracts, Judgments, Bonds, Bills, *&c.* and other Acts, Deeds or Securities whatſoever given for Security or Satisfaction of ſuch Money; ſo that the Statute is not reſtrictive as to Securities made by the Party only who loſes the Money, but alſo for thoſe made by any other Perſon for him: And if a Man gives Security for Money that *A.* had loſt (at Play) it is void, as much as if he had given it himſelf: And altho' the Plea does not ſay, that the Defendant accepted the Bill for a further Security, *&c.* yet it is ſaid, that the Plaintiff had won 120 Guineas at Hazard of the Lord *Chandos*, who drew the Bill upon the Defendant for the Security of the ſame 120 Guineas, and the Defendant accepted of the ſame Bill; by which it appears, that it was for Security of the ſame 120 Guineas; and the Miſchief that has been urged is not within the preſent Caſe. And *Holt* C. J. thought, and it was not denied by any of the Judges, that if the Plaintiff had aſſigned his Bill to another Perſon for Satisfaction of a juſt Debt due to him from the Plaintiff, and the

Defendant had accepted it, this would have been a Lien upon the Defendant to ſuch third Perſon; as where a Man makes an uſurious Contract to *B.* for Payment of Money due to *B.* and *B.* is indebted in the ſame Sum to *C.* and *B.* for Satisfaction of the Debt which he owes *C.* makes the Man give his Bond to pay to *C.* the ſame Sum, which he owes to *B.* upon the uſurious Contract; ſuch Perſon ſhall not avoid the Payment to *C.* becauſe of the uſurious Contract made with *B.* But Sir *Bartholomew Shower* ſaid, that then if a Man loſes at Dice, and gives a Bill payable to the Winner, or Order, for the Money, and the Winner indorſes the Bill to another, he ſhall avoid the Statute 16 *Car.* 2. *cap.* 7. But *Holt* anſwered, that this was not the Caſe in Queſtion; but that his Opinion was, that if ſuch a Note was given to the Winner or Order, and the Winner indorſed it to a Stranger for a juſt Debt, and the Perſon upon whom the Bill was drawn, accepts of it in the Hands of the Stranger, the Acceptor would be liable.

3*dly*, It does not appear by the Plea, that the Lord *Chandos* and the Plaintiff played upon Tick or Credit, and the Statute does not avoid the Payment where the Plaintiff plays with ready Money. *Sed non allocatur*; for it is ſaid, that the Plaintiff and the Lord *Chandos* played together, and that the Lord *Chandos* loſt 120 Guineas, and that for Security of them the Bill was given, which ſhews that the Play was not for ready Money, and then it is within the Statute. And *Holt* C. J. ſaid, that it had been lately adjudged, that where an Agreement was made for an Horſe-race, to run four Heats at 40*l.* a Heat, and as many more as the Parties ſhould agree, and an Action was brought for the Money loſt upon two Heats only, which was within the Sum of 100*l.* yet it was within the Statute; for the Agreement was intire for four Heats, which amounts to above 100*l.* and although it happened that only two Heats were run, yet the Plaintiff ſhould not recover for them. See the Caſe now reported by *Ventris*, 1 *Vent.* 253. And Judgment in the principal Caſe here was given for the Defendant.

Stroud and *Birt.*

Caſe 5.

ERROR on a Judgment in the Common Pleas in an Action upon the Caſe, wherein the Plaintiff declared, that he was poſſeſſed of a certain antient Mill and certain Lands in *Shipton Mallet*, and ought to have Common in 100 Acres of Land, called *Mendip Foreſt*, for all commonable Cattle levant and couchant upon the ſaid Lands; and that the Defendant dug Coney-burrows, and ſtock'd the ſaid Common with Conies, by which he could not have the Uſe of the ſaid Common in ſo beneficial a Manner. Upon which the Defendant demurred; for that the Plaintiff had not ſhewn any Title to the Common, either by Grant or Preſcription: And judgment was given in the Common Pleas for the Plaintiff. And upon Error brought in *B. R.* the ſame Error was aſſigned; but the Judgment was affirmed by the whole Court. And *Holt* C. J. gave the Cauſes of their Judgment, *viz.* The Plaintiff is not obliged to ſhew any Title in himſelf to the Common in his Declaration. 1*ſt*, Becauſe this Action is founded only upon the Poſſeſſion, which is ſufficient to maintain the Action for the Plaintiff. 2*dly*, Title to the Common need not be alledged by the Plaintiff; for that it did not appear whether the Defendant who committed the Tort was Owner of the Soil or a Stranger; but if the Defendant had appeared to be Owner of the Soil, then the Plaintiff muſt have ſhewn a Title: As in Caſe the Plaintiff had brought an Action of Treſpaſs for the Taking of his Cattle, and the Defendant had juſtified the Taking for Damage-feaſant in his Freehold; there the Plaintiff in his Replication muſt ſhew that he had Common in the ſame Place, either by Grant or by Preſcription. 3*dly*, The Title of the Plaintiff is not traverſable by the Defendant, but if it were neceſſary, the Plaintiff might give it [the Title] in Evidence: And the principal Caſe upon which the Court relied was a Judgment of *Mich.* Term 27 *Car.* 2. between *St. John* and *Moody*, where in an Action on the Caſe the Plaintiff declared, that he was ſeiſed in Fee of twenty Acres of Wood, and that the Defendant ſtopp'd up a Way

Where the Plaintiff is not obliged in his Declaration to ſhew any Title in himſelf.

a Way which the Plaintiff had to the Wood, but did not ſhew any Title to the Way; and after Verdict for the Plaintiff, this was moved in Arreſt of Judgment; and by *Hale* C. J. and all the Court, Judgment was given for the Plaintiff; which is an expreſs Authority in Point; and although the Plaintiff in that Caſe declared that he was ſeiſed in Fee, it is no more than if he had ſaid that he was in Poſſeſſion; for it is not material to alledge a Seiſin in Fee, but where the Party makes Preſcription to a Common, a Way, *&c.* This Caſe was after a Verdict indeed; but *Hale* and the whole Court agreed, that the ſame Rule ſhould have been given in it if it had been before a Verdict; as *Holt* C. J. ſaid he well remember'd. And *Rookeby* Juſtice ſaid, that the Judges all agreed in the Judgment in the principal Caſe, for the Reaſons declared by the Chief Juſtice; and begg'd Leave to mention a Caſe adjudged in the Common Pleas between *Blockley* and *Slator*, *Hill.* 4 *&* 5 *W. & M. rot.* 1771. An Action of the Caſe was brought for ſtopping up a Way, and there was a Demurrer to the Declaration; and it was divers Times argued that the Declaration was ill, for that the Plaintiff had not ſhewn any Title to the Way; and after much Debate, it was adjudged for the Plaintiff; which he took to be the ſame Caſe with the preſent, except that there the Plaintiff claimed an Eaſement, and in the preſent Caſe an Intereſt. But *Holt* C. J. ſaid, that a Way to a Church, *&c.* was no more than an Eaſement, but that a private Way to a particular Eſtate ſeemed to be an Intereſt; and Judgment was affirmed by the whole Court. *Vide* 2 *Vent.* 186. 1 *Vent.* 274, 275. 2 *Vent.* 292.

Caſe 6.

Jones and *Bodingham.* In B. R.

Judgment, when it ſhall be taken upon the Plea, and when upon Confeſſion, or *Nil dicit.*

TReſpaſs for taking Cattle. The Defendant pleads, that upon a Tranſcript of a *Capias utlegatum* and Inquiſition from the Common Pleas, a *Levari facias* iſſued out of the Exchequer, teſted *Hill.* 6 *W. & M.* and a Warrant thereupon to the Defendant as Bailiff, by Virtue of which he took

the Cattle in ſuch Land of the Perſon outlawed. The Plaintiff replies, that the Cattle were taken in other Land, and traverſes the Taking in the Land where it was alledged by the Defendant; and this was found for the Plaintiff. And it was argued by *Northy* for the Defendant, that Judgment in this Caſe ought not to go for the Plaintiff upon the Verdict; for the Plea of the Defendant, that a *Capias* iſſued in *Hill.* 6 *W.* & *M.* is altogether void and nugatory, it being impoſſible that a *Capias* ſhould have iſſued *Hill.* 6 *W.* & *M.* inaſmuch as the Queen was dead before, *viz.* on the 28th Day of *December* 1694. and ſo there was no ſuch Term as *Hillary* the 6th of *William* and *Mary*, but *Hillary* the 6th of *William* the Third only; and whenever the Plea of the Defendant is altogether void, Judgment ſhall not be entered upon the Plea, but upon *Nil dicit* or Confeſſion, and a Writ of Inquiry ſhall be awarded; as in an Action of Debt brought againſt an Executor for 4 *l.* and he pleads, that the Teſtator was indebted to him in 40 *l.* and that Goods had come to his Hands to the Value of 10 *l.* the which he retained, &c. and no other Goods, &c. and the Plaintiff replies, that he was Executor of his own Wrong, and hath other Goods; & *hoc paratus eſt verificare*; notwithſtanding the Plaintiff's Replicaion concluding with an Averment is ill, (for he ought to have concluded to the Country) yet he ſhall have his Judgment upon the Confeſſion only of the Defendant. *Yelv.* 138. And this Diverſity was agreed *Cro. Eliz.* 227. Treſpaſs for taking five Horſes; the Defendant juſtifies by a Cuſtom to diſtrain the Horſe in the Poſſeſſion of a Perſon amerced at the Leet; Iſſue thereupon joined, and a Verdict for the Plaintiff, and Judgment for him; but it was reverſed, for that ſuch Preſcription is void, and ſo no Judgment could be upon the Verdict; it would be otherwiſe where the Plea contained Matter of Bar, and Iſſue was joined upon an immaterial Point. The ſame Diverſity is taken *Mo.* 867. Debt upon an Obligation, *Paſ.* 1 *Car.* the Defendant pleaded a Judgment againſt him as Executor the 5th of the now King, (where it ought to have been the 5th of King *James*,) and no Aſſets *ultra*, &c. the which is a void Plea; yet it is ſaid Judgment ſhall be for the Plaintiff, altho' not upon the Verdict.

Cro. Car. 25. And the ſame Diſtinction runs through all the Books; if the Plea of the Defendant is altogether void, Judgment ſhall go againſt him by Confeſſion or *Nil dicit*; but where the Plea of the Defendant would have been a good Bar, if it had been well pleaded, but is ill pleaded, and the Iſſue thereupon is tried, there the Judgment ſhall go upon the Verdict; as where the Defendant pleads Concord without Satisfaction, *Cro. Eliz.* 778. for Concord is a good Bar in Treſpaſs; but it is not well pleaded without Satisfaction; ſo in the Caſe there cited, Payment is a good Plea to Debt upon a ſingle Bill; but it is not a full Bar without Acquittance. In Avowry for the Penalty for Deſtruction of Deer upon the Statute 13 *Car.* 2. *c.* 10. to which the Defendant was abetting, That he did not abett is a proper Plea, for it denies the very Cauſe of Action; although the Defendant is eſtopped to plead this Matter by the Conviction, *Raym.* 458. and the Caſe there cited in an Action of Debt upon a Bond againſt an Executor, who pleads *Non eſt factum* generally, this is a proper Bar to Debt upon a Bond; but the Executor ought to have ſhewn that he denies the ſame Deed upon which the Action is founded.

Sir *Barth. Shower* on the other Side cited many Caſes to the ſame Effect with that in *Cro. Eliz.* 778. and ſaid there was no Difference between them and the Caſe at Bar; for the Plea at Bar was in Subſtance good, if it had been true and well pleaded; for if there were a *Levari facias* awarded, and a Warrant thereupon, and a Taking by Force of ſuch Warrant in the Land of the Perſon outlawed, this had been a good Juſtification for the Defendant. To which *Holt* C. J. and the Court inclin'd; becauſe the Verdict being found for the Plaintiff, the Merit of the Caſe appears on his Side: And *Holt* C. J. thought that the Diverſity taken by *Northy* was not maintainable; for in Ejectment, where the Defendant pleaded a Demiſe to himſelf for Years, and that he was poſſeſſed until the Leſſor of the Plaintiff diſſeiſed him, the Plaintiff traverſed the Diſſeiſin, and it was found that the Plaintiff did not diſſeiſe the Defendant; altho' the Plea in that Caſe was altogether void and impoſſible, yet Judgment went againſt the Defendant

dant upon his Plea. 2 *Cro.* 678. Entry without Expulſion is a void Plea in Bar of Rent, nevertheleſs Judgment ſhall be given thereupon. *Hob.* 326. And he ſaid, that in ſuch Caſe Judgment cannot be given upon *Nil dicit*; for Judgment by *Nil dicit* is no more than an implied Confeſſion; but where the Defendant takes upon himſelf to plead, and his Plea is void, it ſhall not be intended that he ſays nothing to the Action, for this would be to make an implied Implication; but whenever the Defendant has directly confeſſed the Action, there the Judgment ſhall be upon his Confeſſion, and not upon his bad Plea.

DE
Term. Sanct. Mich.
8 Will. III. in B. R.

Caſe 7. ——— *and Blackall* ver. *Heal and others.*

Where a Verdict aids a Fact alledged in the Declaration at a Day impoſſible, but not a Day between the Declaration and the Verdict.

TReſpaſs. The Plaintiff declares for a Treſpaſs committed on the firſt of *February* in the 8th of the preſent King, and the Declaration was delivered in *Eaſter* Term laſt, and Iſſue joined upon Not guilty pleaded, and a Verdict was found for the Plaintiff. And Sir *Barth. Shower* moved in Arreſt of Judgment, for that it appears that the Action was brought before the Cauſe of Action commenced; for the Plaintiff declares for a Treſpaſs committed on the 1ſt of *February* in the 8th of King *William*, but the Action is commenced in *Eaſter* Term the 7th of King *William*, and the Cauſe is tried in the 7th Year of King *William*; and ſo Damages are given for a Treſpaſs which appears by the Record not to have been committed at the Time of the Trial. *Sed non allocatur*; for *Northy* and the Court took this Diverſity, that where the Plaintiff hath declared for a Treſpaſs committed on a Day after the Filing of his Declaration, and before Plea pleaded, this is not aided by a Verdict; for the Jury has all that Time in their Conſideration, and ſo may aſſeſs Damages for the whole Time, as well as for the Day named in the Declaration, which muſt be ill for all the Time before the Action commenced; for a Man ſhall not have an Action before the Cauſe of Action ariſes; and this was the Reaſon of the Caſe 2 *Saund.* 169. *Hambleton* and *Vere* urged on the other Side; for there an Action on the Caſe was brought becauſe the Defendant had inticed away his Ap-

prentice, who was to ſerve him for nine Years, which were not all expired, *per quod ſervitium amiſit per totum reſiduum termini prædicti, &c.* and there was a Verdict for the Plaintiff, and intire Damages aſſeſſed, which was ill; for the Plaintiff declared for the Loſs of the Service for all the Time to come, but ought to recover only for the Time paſt; for his Apprentice might return and ſerve the Reſidue of his Term: But in the preſent Caſe the Plaintiff declared of a Day not yet come, which is as of no Day at all; for it is impoſſible that the Jury can give Damages for a Treſpaſs committed on a Day that never was; therefore of Neceſſity it muſt be that the Plaintiff proved in Evidence a Treſpaſs committed before the Action brought, otherwiſe he could not have had a Verdict for him; and ſo the Verdict hath aided this Miſtake of the Day; and ſo it hath been adjudged before in this Court, *Paſch.* 24 *Car.* 2. *inter Shorter* and —— And now Judgment was given for the Plaintiff.

And in another Caſe between *Wall* and *Duke* this Term, where the Plaintiff declared upon a Treſpaſs committed *diverſis diebus & vicibus*, without alledging any Day; after Verdict it was held to be aided by the Court.

After Judgment for the Plaintiff [in the principal Caſe], it was moved by *Northy*, that Judgment ſhould be entred of *Trinity* Term; for that one of the Plaintiffs had died between the laſt and the preſent Term, and the Act of the Court in taking Advice to this Term ſhould not prejudice the Party; but it was denied: For *per Holt* C. J. here is a Continuance by the *Curia adviſare vult* over to this Term, and therefore Judgment ſhall not be entered before.

The King and *Keate*. In B. R.

Caſe 8.
S. C. Raym. 138.

THE Defendant was indicted for Murder, and alſo upon the Statute 1 *Jac.* 1. *c.* 8. that takes away the Clergy from him who ſhall ſtab or thruſt any Perſon that hath not then any Weapon drawn, or that hath not then firſt ſtricken the Party who ſhall ſo ſtab or thruſt, *&c.* The Jury upon both

Homicide, when it is Murder.

both Indictments found ſpecially, that *Keate* [the Defendant] had hired one *Wells* to ſerve him as his Gardiner, and being minded to turn him out of his Service, ſends another of his Servants to *Wells* to bid him deliver up the Key of the Garden, who brought back Anſwer to his Maſter, that *Wells* would not deliver up the Key; *Keate* goes out of his Parlour, fetches his ſword and goes into the Kitchen where *Wells* was, and interrogates him why he would not deliver up the Key; *Wells* replies, that he might have it if he would; then *Keate* drew his Sword and cut *Wells* on the Head with it; *Wells* with a Slead, *viz.* the Handle of a Scythe which he held in his Hand, ſtrikes at his Maſter, but by the Rack in the Chimney the Blow was prevented; *Wells* punches his Maſter ſeveral Times with the Slead on his Belly, who retires back to the middle of the Kitchen towards the Door; then *Keate* runs *Wells* into the left Pap with the Sword, whereof he died: And if the Court adjudges this to be Murder, or within the Statute, they find *Keate* Guilty, *&c.*

And it was argued by *Cowper*, King's Counſel, that this was Murder; and he principally inſiſted, that where a Man kills another without ſufficient Provocation, it is Murder; for every Provocation doth not ſuffice to make it Manſlaughter. *Hale's Pleas of the Crown.*

As to the Indictment upon the Statute 1 *Jac. c.* 8. he ſaid, that if the Offence were only Manſlaughter, it ſhall nevertheleſs be within the Statute of 1 *Jac.* the Intent of which Statute was to take away the Benefit of the Clergy from him who ſhould kill another, who had not any Sword or other Arms for his Defence at the Time of the Aſſault; for if he be aſſaulted, and afterwards ſtrikes with a Candleſtick, Book, or other ſuch Thing which was in his Hand at the Time of the Aſſault, this ſhall not be a Weapon drawn within the Act; ſo the Slead which *Wells* had in his Hand ſhall not be ſaid to be a Weapon, and the Strokes which he gave to his Maſter, after the Stroke given by his Maſter with the Sword, ſhall not be within theſe Words [not having then firſt ſtricken]; for it is natural for any Perſon in the Apprehenſion of Death to take any Thing near at Hand to defend himſelf

ſelf from the Strokes of another; then it is not to be diſtinguiſhed from the Caſe of *Vincent Byard*, reported by Sir *William Jones* 340.

Sir *Barth. Shower contra.* By this Verdict it does not appear who ſtruck the firſt Stroke, for it is not ſaid that *Keate* had ſtruck his Servant before the Servant had punched his Maſter; but if the Verdict were certain, this cannot be within the Statute; for the Slead in the Hands of the Gardiner was a Weapon drawn within the Statute; ſo a Cudgel, *Style* 86. *Allen* 43. *Godb.* 154. And upon the other Indictment it ſhall not be Murder: True it is, that at Common Law all Homicide or Killing was capital until the Statute of *Marlb.* which ſays, *Murdrum de cetero non adjudicetur coram juſtic' ubi infortunium tantummodo adjudicat' eſt, ſed locum habet murdrum de interfectis per feloniam tantum, & non aliter.* 2 *Inſt.* 148. There it appears, that Homicide *per infortunium* was Murder; ſo *Se defendendo*, 21 Ed. 3. 176. 3 Inſt. 55. But at this Time, that alone is Murder which is committed *ex malitia præcogitata*, 3 Inſt. 57. Yelv. 105. for Homicide without Malice is no more than Manſlaughter: And it ſeems to me, that where there is a Quarrel, there Killing ſhall not be conſtrued to be Murder, if it be a ſudden Quarrel, and thereupon the Parties contend, and one of them is killed, but only Manſlaughter; but if a Challenge be ſent, there it ſhall be ſaid to be Murder. 1 *Bulſt.* 87. 3 *Bulſt.* 171. if a Quarrel ariſe at Play, and one kills another, it is but Manſlaughter. 12 *Co.* 87. So where a Man upon the Complaint of his Son, went and gave the Perſon who ſtruck his Son a mortal ſtroke, it was held to be only Manſlaughter. 2 *Cro.* 296.

Holt C. J. Whether it be Murder, or not, depends upon this Queſtion, *viz.* whether here was a ſufficient Provocation or not? And I am of Opinion, that the Refuſal to deliver the Key to the Servant ſent by *Keate* was not a ſufficient Provocation. Words are not a Provocation: There was a Caſe tried at the *Old Bailey*, 10 *Oct.* 1666. *Grey* a Blackſmith commanded his Apprentice to work in his Shop, and make ſuch a Thing in his (the Maſter's) Abſence; at the Return of his Maſter he and his Apprentice went to work together at their Trade,

Trade, and being at Work, *Grey* asked his Servant whether he had made the Thing ordered to be made by him in his Abſence? who anſwered, that he had not; the Maſter ſaid, that he would ſend him to *Bridewell*; the Servant replied, that he choſe to be in *Bridewell* rather than in his Service; and upon this the Maſter takes a Bar of Iron, and with it gives the Apprentice a mortal Stroke; and this was adjudged to be Murder. I have a Manuſcript written by *Kelynge* C. J. of a ſpecial Verdict given by the Jury in this Caſe, *viz.* A Man pretending to be a Preſt-Maſter came up to two Men and preſt one of them for the Marine Service, he who was preſt went quietly with the Preſt-Maſter; the other, conceiving that the Preſt-Maſter had not any lawful Authority, followed him, and demanded his Warrant, which the Preſt-Maſter ſhewed him; but this was not ſatisfactory, upon which he ſtruck the Preſt-Maſter, and gave him a mortal Stroke: And by *Hale* Chief Baron, and ſeven other Judges, this was adjudged in the Exchequer to be but Manſlaughter; for the Liberty of an *Engliſhman* concerns every *Engliſhman*; and the Reſtraint of ſuch Liberty is a Provocation to any one that ſhall ſee ſuch illegal Reſtraint: But they agreed, that if there had not been a Provocation it would have been Murder. But *Kelynge*, *Twiſden*, *Windham* and *Morton* held, that there was not a ſufficient Provocation, and for that Reaſon that the Crime was Murder. As to what hath been urged in the preſent Caſe, that *Keate* was punched with a Slead, and retired before ſuch Time as he killed his Servant; it is to be underſtood, that if a Man aſſault another with Malice, and afterwards is diſtreſſed, and flyeth to a Wall, and then kills the other, this is Murder: Several Perſons went into *Hyde-Park* with a Reſolution to hunt the Deer, and to kill all Opponents; the Keeper ſaw the Action, and commanded them to ſtand; thereupon they fled, and the Keeper ſhot after them; upon which they returned, ſhot the Keeper, and killed him; and this was adjudged Murder; for by the Statute *de Malefactoribus in parcis*, if a Perſon refuſe to ſtand, upon the Demand of the Keeper, he may ſhoot at him: In the preſent Caſe *Keate* was the Maſter of *Wells*; and it is objected, that where a Maſter gives a mortal Stroke to his Servant in the Correction of him, it ſhall not be Murder; as it was held in

Turner's Caſe; but that is where a Man properly corrects a Servant, and gives him by Accident a mortal Stroke; for ſo was *Turner*'s Caſe: The Servant of *Turner* had refuſed to do ſomething his Maſter had ordered him; the Maſter takes up his Wife's Clogg and ſtruck the Servant on the Head, of which ſtroke he died; this was accidental, and it cannot be imagined that he intended to kill him: But a ſword is an improper Inſtrument for Correction.

In *Holloway*'s Caſe, *Cro. Car.* 131. A Park-keeper found a Perſon in the Park with a Hatchet in order to cut Wood, he takes him and ties him to the Tail of his Horſe, and gives the Horſe two Strokes, the Horſe ran away and killed the Perſon; this was Murder, although the Keeper intended only to give him Correction for his Miſdemeanor, but he did it in an unreaſonable Way; but if the Verdict be uncertain, then there ought to go a *Venire facias de novo*; but to me it ſeems certain enough. I have heard that the Fact was more foul than it is found, and am not for having it tried over again. *Rokeby* and the other Juſtices gave no Opinion; for as *Rokeby* ſaid, *De morte Hominis nulla eſt cunctatio longa. Ideo adjornatur.*

Truelock and ——

Caſe 9.

DEBT. The Plaintiff ſets forth, that Letters of Adminiſtration were committed by the Official of the Dean, who had a Peculiar lawfully conſtituted, but does not ſhew how he was intitled, as it ought to be done in the Caſe of a Peculiar. *Cro. Eliz.* 791. Neither doth he ſay, that the granting Adminiſtration *adtunc pertinuit* to the Dean: And for theſe Cauſes the Defendant demurred. *Sed non allocatur*; In as much as the Plaintiff has ſet forth that Adminiſtration was granted by the Official of the Dean, to whom Right of granting Adminiſtration, *&c.* belonged, it is ſufficient.

Grant of Adminiſtration when well pleaded.

Case 10. ## *Barton, Administratrix of William Dobson,* and *Fuller.* In B. R.

If Letters of Administration are lost, new Letters of Administration may be granted after an Action brought.

THE Plaintiff's Declaration was of *Michaelmas* Term the 7th of King *William*, and sets forth, that Letters of Administration were granted 11th of *January* 7th of King *William*, which is after the Action commenced. The Court said, if Administration be granted, and the Letters of Administration are lost, new Letters of Administration may well be granted after the Action is commenced; but it is otherwise if they are then originally granted.

Case 11. ## *Johnson* and *Lee.* In B. R.

Prohibition to Spiritual Court, when granted for Fees there.

A Prohibition was prayed, upon Suggestion of the Statute of 23 *H.* 8. by which it is enacted, That none be cited out of his Diocese: That the Plaintiff was resident at *Hungerford* in the County of *Berks*, within the peculiar Jurisdiction of the Dean of *Sarum*, and that the Defendant had cited him to the Court of Arches for Fees expended in the Spiritual Court, which are the customary Fees. The Defendant shewed, that the Dean of *Sarum* requested the Dean of the Arches, *&c.* *Northey* argued, that the Suit out of the Diocese was ill; for the Request to the Dean of the Arches, upon which the Defendant relied, ought to have been made to the next Superior, who was the Bishop. *Hob.* 186. 1 *Sid.* 90. 2 *Roll. Rep.* 446, 448. *Secondly*, The Suit ought not to have been in the Spiritual Court for Fees; for Demands *pro opere & labore* are properly determinable at Common Law; and in this Case the Law implies a Promise in the Retainer. If it should be objected, that this Court hath not Cognisance of Fees in the Spiritual Court, by the same Reason it may be said, that no Action shall be brought here for Fees in a Court of Equity. But the Defendant says, that the Fees demanded are customary Fees due Time out of Memory; if so, it may be proved in Evidence; and although Suits here are not frequent for Proctors Fees, yet it makes nothing

againſt us, for Suits for them are in general Terms, *pro opere & labore. Vide* 2 *Roll. Rep.* 59. *Mod. Rep.* 167. where a Prohibition was granted for a Suit in the Spiritual Court; the like 27 *Car.* 2. by *Hale* C. J. upon a Motion.

Sir *Barth. Shower* was on the other Side; and he ſaid, that the Dean of *Sarum* had independant Juriſdiction, and therefore his Requeſt to the Dean of the Arches was good. *Secondly*, Fees are neceſſary in all Suits, and whoever hath Cogniſance of a Suit, may have it of the Fees incident thereunto: The Spiritual Court ſhall always determine Incidents; *Mar.* 45. ſhall have Cognizance of a Way to a Church, of Seats in the Church; ſo if *A.* is indebted to *B.* in 5 *l.* and bequeaths ſo much to *B.* the Spiritual Court ſhall determine of both. *Holt* C. J. A Dean, *quatenus* Dean, has no Juriſdiction; but as he hath a Peculiar he is exempt from the Ordinary; for that is the Import of a Peculiar. Then the principal Queſtion is, whether a Suit in the Spiritual Court ſhall be brought for Fees? It is granted, that a Suit may be commenced for them at Common Law, Fees cannot be ſettled by the Canon Law, but they [the Spiritual Court] give Coſts and Expences of Suit; but Debt doth not lie for ſuch Coſts at Common Law. *Rokeby* J. cited a Caſe between *Goſlin* and *Froggatt*, Churchwardens of the Church of *D.* in *Staffordſhire*, and —— in *C. B.* where at a Viſitation of the Arch-deacon a Preſentment was made (amongſt others) for Regiſter's Fees, and after ſeveral Motions a Prohibition was granted, and then the Matter was compounded.

Lately and *Fry.* In B. R. Caſe 12.

TReſpaſs *Quare clauſum fregit & blada ſua ibidem creſcen' ſuccidit & aſportavit.* The Jury, as to the breaking of the Cloſe and cutting of the Corn in the Blade, found the Defendant guilty, but as to the carrying away Not guilty. And it was moved by *Gould*, Serjeant, for full Coſts, (for the Damages given by the Jury were no more than 10 *s.* and by the Statute 22 & 23 *Car.* 2. *c.* 9. the Plaintiff ſhall have no more Coſts than Damages): And it was urged, that this Statute

Coſts when given upon the Statute 22 & 23 *Car.* 2.

Statute was intended for ſmall Treſpaſſes, as *pedibus ambulando, &c.* but here the Corn is cut down in the Blade, which is a great Deſtruction. And *Rokeby* J. ſaid, if a Man enters my Garden and cuts down my Trees, for which perhaps the Jury gives but ſmall Damages, although I ſuffer a great Inconvenience, it would be very miſchievous if I ſhould loſe my Coſts. But after ſeveral Debates the Court inclined to be of Opinion, that if any Thing had been carried away, full Coſts ſhould have been given; for the carrying away of any Cattle is without the Act of Parliament. *Vide* 2 *Vent.* 48. where if a Man enters claiming Title, there ſhall be full Coſts given; but where it doth not appear that the Treſpaſs was committed under Pretence of Title, or that any Thing was carried away, there we cannot make a Conſtruction contrary to the expreſs Words of the Act of Parliament.

Caſe 13. ## In the Houſe of Lords, the 13th of *January* 1697.

Between { *Sir Evan Loyd, Bart. and Mary his Wife, Sidney Godolphin, and Suſan his Wife,* Appellants,

Sir Richard Carew, Baronet, and Charles Tremain, Reſpondents.

Proviſo in a Deed for the Conveyance of an Eſtate for a certain Sum; if ſuch Perſon die without Iſſue, held good, notwithſtanding a Fine levied by them, where the Uſes were declared otherwiſe.

THE Caſe was this: *Rice Tanat*, Eſq; was ſeiſed of ſeveral Lands in the Counties of *Salop, Montgomery* and *Denbigh*, and dying left Iſſue *Mary, Penelope* and *Suſan*, his Daughters and Coheirs.

By Leaſe and Releaſe of the 24th and 25th of *July* 1674, upon the Marriage of *Penelope* with Sir *Richard Carew*, in Conſideration of 4000 *l.* paid by him to *Mary*, they the ſaid *Mary* and *Penelope* convey two Parts of the Lands aforeſaid

to Truſtees, in Truſt for Sir *Richard Carew* for Life, and afterwards for *Penelope* for Life, and afterwards to the Iſſue of their two Bodies, *&c.* Remainder to Sir *Richard Carew* and his Heirs; with a Proviſo, that if it ſhould happen that no Iſſue of the ſaid Sir *Richard Carew*, on the Body of the ſaid *Penelope*, ſhould be living at the Deceaſe of the Survivor of them, the ſaid Sir *Richard Carew* and *Penelope*, and the Heirs of *Penelope* ſhould, within twelve Months after the Deceaſe of Sir *Richard Carew* and *Penelope* without Iſſue as aforeſaid, pay to the Heirs or Aſſigns of the ſaid Sir *Richard Carew* 4000 *l.* then the Remainders and Truſts for the ſaid Sir *Richard Carew* and his Heirs ſhould ceaſe and be void, and the Fee-ſimple of the ſaid Premiſſes ſhould be to the right Heirs of the ſaid *Penelope* for ever. *Mary* afterwards was married to Sir *Even Lloyd*, and *Suſan* to *Sidney Godolphin.*

Sir *Richard Carew* and *Penelope* his Wife levy a Fine of the Land *in Com' Salop* to the Uſe of Sir *Richard* and his Heirs, and afterwards die without Iſſue; and the Appellants, as Heirs of *Penelope*, exhibited their Bill in Chancery againſt *Charles Tremain* the ſurviving Truſtee, and Sir *Richard Carew* Deviſee of Sir *Richard* the Husband of *Penelope*, to have a Conveyance of the Premiſſes to them and their Heirs, upon Payment of 4000 *l.* purſuant to the Proviſo. But the Bill was diſmiſſed by the Lord Chancellor *Sommers* 6 *Nov.* 1697. under Pretence that this Proviſo tended to a Perpetuity.

And now upon the Appeal to the Lords the Decree for the Diſmiſſion was reverſed, after hearing of the Judges and a long Argument; and afterwards by Order 24 *Mar.* it was added to the decretal Order, That on Payment of 4000 *l.* to Sir *Richard Carew*, or into the Court of Chancery for his Iſſue, the Appellants, as Heirs of *Penelope*, ſhould be let into Poſſeſſion of the Premiſſes in Queſtion.

DE
Term. Sanct. Hill.
8 Will. III. in B. R.

Caſe 14.

Gale and *Ewer.*

Turning of Cattle into Tithe makes it a fraudulent Severance.

A Prohibition was moved for to the Conſiſtory Court of *London*, where *Ewer* the Rector of *Ingateſtone* libelled for refuſing to ſet out Tithes, or if they were ſet out, ſuch Setting out or Severance was in the Abſence of, and without giving Notice to the Rector, and alſo that the Plaintiff after Severance, without Notice to the Rector, took the nine Parts, and turned his Cattle into the Meadows where the Tithes were, who deſtroyed and conſumed the Tithes: And upon a Suggeſtion, that by the Statute 2 *Ed.* 6. *cap.* 13. All the King's Subjects ought juſtly to ſet out their Tithes, *&c.* and that the Plaintiff had ſeparated them from the other nine Parts; and whereas the Expoſition of all Statutes belongeth to the Temporal Judges; and whereas Tithes divided from the nine Parts are Lay Chattels, and a Suit for Treſpaſs, *&c.* is merely Temporal, *&c.* this Motion was made.

And firſt it was urged, that the Spiritual Court ought not to proceed for refuſing to ſet out Tithes, but for the Subſtraction of them only: For by the Statute 2 *Ed.* 6. *c.* 13. it is enacted, that if any Perſon do ſubſtract or withdraw any Manner of Tithes, *&c.* the Party ſo ſubſtracting or withdrawing the ſame may or ſhall be convented or ſued in the King's Eccleſiaſtical Court, *&c.* And the Clauſe which gives the Suit in the Spiritual Court for the double Value ſays, If any Per-

ſon carry away his Corn before the Tithe thereof ſet forth, *&c.* ſo that the Suit in the Spiritual Court ought to be for the Subſtraction only, and not for refuſing to ſet the Tithe out: The Clauſe which provides, that all the King's Subjects ſhall duly ſet out their Tithes, gives the Penalty of treble Value; but the Remedy is by Action of Debt in the Temporal Courts. This Clauſe for the ſetting out of Tithes is introductive of a new Law; as it appears by *Co.* 2 *Inſt.* 649. and by Conſequence the Expoſition thereof appertaineth to the Temporal Courts, which ought to judge whether the Tithes were duly and without Fraud ſevered and divided; for the Manner of Tithing ought not to be governed by the Canon or Civil Law.

A Prohibition was granted *Trin.* 1 *W. & M.* upon a Suggeſtion, that Tithes were ſet out. 2 *Vent.* 48. But in the preſent Caſe the Court did not incline to do ſo; for the Clauſe which gives double Value for carrying away Corn, *&c.* before Tithes ſet out, gives the Spiritual Court Cognizance for refuſing to ſet out Tithes. 2 *Roll. Abr.* 299. *l.* 15.

2*dly*, It was urged, that the Spiritual Court ought not to proceed for the ſetting out of Tithes without Notice given to the Rector; for although the Eccleſiaſtical Law requires Notice to the Parſon when the Tithes are ſevered, yet the Common Law requires no ſuch Thing; as *Hutton* ſaith it has been adjudged. *Noy* 19. The Statute 2 *Ed.* 6. *c.* 13. ſays only, it ſhall be lawful for every Party to whom any of the ſaid Tithes ought to be paid, *&c.* to view and ſee the ſaid Tithes to be juſtly and truly ſet forth, and the ſame quietly to take and carry away, *&c.* and altho' it be that as to the taking and carrying, this Statute is declaratory, yet as to the View, it is introductory of a new Law; as it appears 2 *Inſt.* 650. And the Penning of this Act is, That it ſhall be lawful to view, *&c.* which ſhews the Intent of the Legiſlature was not, that the Pariſhioners ſhould give Notice thereof; and that no Notice is neceſſary hath been oftentimes adjudged: Thus 13 *Car.* 1. between *Chaſe* and *Ware*, in this Court, and afterwards affirmed in Error. *Style* 342. 1 *Rol. Abr.* 643. *l.* 30. So alſo *Trin.* 1 *W. & M.* 2 *Vent.* 48.

And

And of the ſame Opinion was the Court in the preſent Caſe; and a Prohibition was granted as to the Suit for not giving Notice of ſetting out the Tithe. It was urged on the other Side, that this Matter ought to have been pleaded in the Spiritual Court. But *Holt* C. J. anſwered to that, there was no Neceſſity that it ſhould be ſo pleaded; foraſmuch as it appears upon the Face of the Libel, that the Suit was for ſetting out Tithes without giving Notice; it would have been otherwiſe if the Suit had been for refuſing to ſet out Tithes. The Plea, That the Tithes were ſevered, is no good Cauſe for a Prohibition; unleſs they refuſe that Plea for Want of Notice given of the Severance. But *Holt* C. J. thought the Turning of Cattle to the Tithe made it a fraudulent Severance, and that a Suit might be maintained for it in the Spiritual Court.

Caſe 15.

The King and *Clerk*. In B. R.

A Cuſtom to commit for refuſing to come upon the Livery in the Vintners Company held good.

AN *Habeas Corpus* was brought for the Defendant, who was committed for his Refuſal to come upon the Livery in the Vintners Company of *London*. The Cuſtom was returned, that if any Member refuſe to take the Livery, *&c.* the Court of Aſſiſtants might commit him to the Officers of the City; that *Clerk* refuſed, and was committed to the Keeper of *Newgate*, but it was not ſaid, that he was an Officer of the City; and for this Cauſe the Return was ill: For the Return ought to ſhew that the Cuſtom was purſued; and the beſt Purſuit is for the Court judicially to commit him to the Sheriffs, who are the Officers of the City; therefore the Defendant was diſcharged. But the Court held the Cuſtom to be good; and they thought, that as there was Mention of a Warrant in Writing, ſuch Warrant ought to be returned *in hæc verba*.

Upſhare and *Aidee.* In B. R.

Caſe 16.

ACTION upon the Caſe brought againſt a Hackney-Coachman; and the Plaintiff declared upon the Cuſtom of the Realm as againſt a common Carrier. The Caſe upon Evidence appeared to be this: A Perſon had taken the Hackney-Coach, and had delivered his Goods to the Coachman to be carried with him, but in the Paſſage the Goods were loſt; and whether the Coachman ſhould be charged for them without an expreſs Contract was the Queſtion.

A Hackney-Coachman not a Carrier, to be charged upon the Cuſtom of the Realm.

And by *Holt*, C. J. at a Trial at *Guild-Hall*, it was held, that a Paſſenger ſhall not charge a Hackney-Coachman for Goods which he carries with him, if he does not give any Thing for the Carriage of them; but if he pays for the Carriage, then he may charge the Carrier; and in the preſent Caſe there was no expreſs Contract for the Carriage, but by the Cuſtom and Uſage of Stages every Paſſenger uſes to pay for the Carriage of Goods above ſuch a Weight, there the Coachman ſhall be charged for the Loſs of Goods beyond ſuch a Weight.

Anonymus. In B. R.

Caſe 17.

A Prohibition was prayed to the Spiritual Court, where the Dean of —— had libell'd for theſe Words, as *You are a Knave, a Knave, a Knave indeed.* 2 Rol. 297. Godb. 447. And it was urged by *Selby* for a Conſultation, that theſe Words of a Spiritual Perſon are defamatory, and a Libel may be maintained in the Spiritual Court for them; and he cited 2 *Vent.* 2. and a Caſe there cited, where a Prohibition was denied for theſe Words, *Sir Prieſt you are a Knave. Sed non allocatur*; for by *Holt* C. J. where the Words are ſpoken of the Function of a Spiritual Perſon, or charge him with Falſity in that Function, a Prohibition lies not; but for theſe Words, where there is no Relation to the Function, a Prohibition ſhall go; and after ſeveral Debates it was granted.

Where ſcandalous Words are ſpoken of the Function of a Spiritual Perſon, a Prohibition ſhall not go.

DE
Termino Paſch.
9 Will. III. In B. R.

Caſe 18.

Bennett and *Thalbois.*

TRESPASS *Quare clauſum fregit nec non venatus eſt, &c. exiſtente inferiore Artifice, Anglice* an inferiour Tradeſman, *ſcilicet pannario, Anglice* a Clothier; *& alia enormia, &c.* to the Damage of the Plaintiff, *&c. ac contra formam Statuti, &c.* And after a Verdict for the Plaintiff, and 2 *d.* Damages, it was moved in Arreſt of Judgment for preventing of Coſts, that the Plaintiff had founded his Action upon the Statute, but had not purſued the Statute; for it is ſaid that the Plaintiff being a Clothier *venatus eſt*, but a Clothier is one of the principal Tradeſmen of the Kingdom, and cannot be comprehended within the Words *Inferiour Tradeſman. Sed non allocatur*; for the Statute ſeems to prohibit all Trades; but if this Caſe were without the Statute, yet an Action lies againſt the Defendant at Common Law; and the Words *contra formam Statuti* ſhall be rejected; as in the Caſe between *Ward* and *Rich*, in an Action brought for taking away a Man's Wife, and detaining her *quouſque, &c.* the Plaintiff concluded *contra formam Statuti*, which Words were rejected, for there was no Statute in the Caſe. 1 *Ven.* 103. So in an Indictment againſt three, it was ſet forth that one, ſtabb'd, *&c.* and the others were preſent and aſſiſting, and the Concluſion was *contra formam Statuti*, where one only was within the Statute, and the others indictable at Common Law; and it was held that the Words *contra formam Statuti* ſhould be reſtrained to one, and ſhould not be extended to the others.

Where an Action lies againſt the Defendant at Common Law, the Words *contra formam Statuti* in the Declaration, ſhall be rejected as Surpluſage.

And although it was objected that in the preſent Caſe there was a Statute *contra venantes*, upon which this Action was founded; and therefore it came not within the Reaſon of the firſt Caſe where there was no Statute; and that this Action was founded upon a Statute, but the Statute was miſrecited, which made the Caſe different from that of an Indictment, where the Statute of Stabbing was well recited; and ſo the Words *contra formam Statuti* properly reſtrainable from it; yet Judgment was given for the Plaintiff *per totam Curiam.*

The King and *Thorp and others.* In B. R. Caſe .19

INformation that the Defendants *malicioſe, &c. procurârunt filium & hæredem decedere de domo patris ſui*, and then *perſuaſerunt compulſerunt & procuraverunt* him to be made Drunk, and ſo inveigled him to Marriage, *&c.* *Northey* argued that no ſuch Information lieth, for a Father hath no Action againſt a Perſon for perſuading his Son to marry. *Cro. Eliz.* 55. 1 *Leon.* 50. And Marriage is an honourable State, and for that Reaſon it is no Offence to perſuade any one to enter into it; ſo it is no Offence to the King to perſuade the Son of any Perſon to depart from his Father, without a ſpecial Allegation in what Manner, and an Information never was maintained before for a Matter of ſuch a Nature. *Wright*, Serjeant, *contra.* Here is a great Offence; for if a Man hath his Son and Heir inveigled into a Marriage with a Woman of ill Fame, by ſuch wrongful Ways his Family is ruined without Poſſibility of Reparation. And afterwards in *Mich.* Term 9 *W.* 3. it was argued by *Williams* of *Grays-Inn*, that an Information lay not; for the Information ſuppoſeth that the Infant married was under the Age of eighteen Years; and yet it is poſſible he may be above the Age of fourteen Years, which is the Age of Diſcretion, at which a Man may contract Marriage; or perhaps he may be under the Age of fourteen Years. If it be intended that the Infant was above that Age, then is he enabled to contract Matrimony, and it is lawful for him to do it; ſo then to perſuade him to that which it is lawful for him to do, is no Offence; the Acceſſary cannot be guilty where the Principal is Inno-

Inveiglement to Marriage.

Innocent; and this cannot be by Reaſon of the Law of Nature, that the Son is under Ward of the Father; for if it were ſo, the younger Son would be alſo under his Ward. But the Father can have no Action but only *Quare Filium & Hæredem rapuit*; but this is by our Law which gives the Guardianſhip until the Age of fourteen Years; and if the Heir was under the Age of fourteen Years, then the Marriage is voidable, and ſo no Prejudice. *Darnal*, Serjeant, on the other Side inſiſted, that the Father ſhall have the Guardianſhip of the Son until the Age of Twenty-one by the Law of Nature; and that ſuch an Inveiglement is an Offence although the Father had not his Action for it, *&c.*

Holt, C. J. told *Williams* that his laſt Point deſtroyed the Foundation of his firſt; for in the firſt he urged that the Son at the Age of fourteen Years had Power to contract Marriage, and for that Reaſon the perſuading him to do it, was no Offence; and in the ſecond, that ſuch perſuading is not an Offence under the Age of fourteen Years for that he hath then no Power to contract; but he ſaid that Marriage under the Age of fourteen Years is good if it is not diſagreed unto. And *Holt* ſaid that the Father is Guardian to the Son until the Age of Twenty-one Years by our Law which is founded upon the Law of Nature; but our Law gives Remedy only in the Caſe of an eldeſt Son, by Reaſon that it makes Proviſion only for him.

DE

Term. Sanct. Trin.

9 Will. III. in B. R.

Jones and *Moſely*. *Tr.* 4 *Jac.* 2. *rot.* 176. By the Name of *Jones* and *Morley*.

Caſe 20.

Deeds to lead the Uſes of Fines.

UPON a Special Verdict the Caſe was to this Effect: Baron and Feme ſeiſed in Fee in Right of the Feme, by Indenture dated 29 *Jan.* covenant to levy a Fine of the Lands of the Feme within *Hillary* Term next enſuing; and afterwards by another Indenture dated the 31ſt Day of *January*, between the Baron of the one Part and the Feme of the other, it was covenanted, concluded and agreed, that all former Contracts, Covenants and Agreements between them ſhould be void, until ſuch Monies according to their Marriage Settlement ſhould be paid, and then ſhould ſtand of Force. The Fine was acknowledged before the 29th of *January*, and paſſed the King's Silver the ſame *Hillary* Term, but after the 31ſt of *January*; and whether this Fine ſhould enure to the Uſes limited by the Deed of the 29th of *January*, or not, was the Queſtion in this Caſe between the Heir of the Baron and the Heir of the Feme? And it was argued by *Banniſter* for the Plaintiff, and Sir *Barth. Shower* for the Defendant. And after Argument *Holt* C. J. ſeemed of Opinion, that this Deed between the Baron and Feme was a void Deed; for (ſays he) it was of no Effect to bind the Baron, by Reaſon that he cannot covenant with his Wife; but if there were no other Deed upon which the Uſes of the Fine might ariſe, this might have been ſufficient for declaring the Uſes of the Fine; but here is another Deed

dated the 29th of *January* which does declare the Uſes: True it is, that this Fine varies in the Circumſtance of Time, for it is ſaid in the Indenture of the 29th of *January*, that the Fine ſhall be levied in *Hillary* Term next, and the Fine was really levied of *Hillary* Term then preſent; for that Indenture is dated within *Hillary* Term; and altho' a Fine cannot be averred to other Uſes than thoſe which are expreſſed in an Indenture precedent to declare the Uſes, (otherwiſe if the Indenture be ſubſequent, 9 *Co. Downham*'s Caſe,) yet if the Fine vary in any Circumſtance of Time, Place, or Quantity of Acres, it might, before the Statute 29 *Car.* 2. *cap.* 3. be averred to other Uſes; or if there were two Deeds to declare the Uſes of a Fine after levied, the laſt Deed ſhall be that upon which the Uſes ſhall ariſe; then it is to be conſidered, whether the Deed of the 31ſt of *January* can raiſe the Uſes of this Fine? And I think it cannot. *Vide poſt*, *Jones* and *Moſeley*.

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DE

Term. Sanct. Mich.

9 Will. III. in B. R.

Anonymus.

Caſe 21.

The Benefit of a Judgment againſt Huſband and Wife ſhall ſurvive to the Plaintiff.

THE Caſe was this; A Feme Sole recovered and had Judgment in Debt upon a Bond, and afterwards married; and the Huſband and Wife ſue out a *Scire facias* upon this Judgment, and have Execution awarded; but before Execution had the Baron dies, and his Executors ſue out Execution. Sir *Barth. Shower* urged, that the *Scire facias* brought by the Executor of the Baron lieth not, for the Debt was not veſted in the Huſband by the Award of Execution on the *Scire facias* brought by him and his Wife. If a Man takes a Wife to whom *J. S.* is bound in an Obligation, and the Huſband and Wife ſue the Obligor and get Judgment, and the Wife dies, the Debt is veſted in the Huſband; for that, which was before a Choſe in Action, *tranſit in rem Judicatam*, *&c.* and is of another Nature from what it was before the Coverture; but a Choſe in Action ſhall never veſt in the Huſband by the Coverture, if he does not gain the actual Poſſeſſion of it, or at leaſt alters it ſo that it be no longer a Choſe in Action: And it is for this Reaſon that, where Huſband and Wife have Judgment upon a Bond made to the Wife *dum ſola*, the Choſe in Action is altered, and no Action lieth afterwards upon the Bond, but Debt muſt be brought upon the Judgment; but where Huſband and Wife have Execution awarded in *Scire facias* upon a Judgment, they may afterwards bring Debt upon the ſame Judgment, but they never can have Debt on the Judgment in *Scire facias*,

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the *Scire facias* is no more than a Writ of Execution; for at Common Law, if the Plaintiff did not ſue out Execution within the Year, he could not do it afterwards, but ought to bring his Action of Debt upon the Judgment. And therefore the Statute of *Weſtminſter* 2. *cap.* 18. gives the *Scire facias*, which is but a Writ to have Execution after the Year, if the Party had nothing to ſay to the Contrary; and for this Reaſon, if Execution be awarded in the *Scire facias*, it does not alter the Nature of the Thing upon which the *Scire facias* is brought; if a *Scire facias* is brought upon a Recogniſance, and Execution is awarded, there may be another *Scire facias* upon the ſame Recogniſance. And this Caſe is different from that between *Obrian* and *Thomas*, adjudged in *B. R.*

There a *Scire facias* was brought againſt the Huſband and Wife upon a Judgment againſt the Wife *dum ſola*, and Execution awarded againſt them; and afterwards the Wife died, and the Huſband remained charged, for the Words were *Quod habeat Executionem verſus Eos.* But *Holt*, C. J. ſaid that he did not ſee any Difference, for that Judgment in the *Scire facias* was againſt Huſband and Wife for a Debt owing by the Wife, and upon the Death of the Wife the Charge ſurvived to the Huſband. And ſo in the preſent Caſe, as the Huſband and Wife have Judgment in *Scire facias* for a Debt due to the Wife, the Benefit thereof ſurvives to the Huſband, for the Judgment is joint, and for that Reaſon it ſhall ſurvive; if the Huſband outlives the Wife, he ſhall have the Benefit of it; if the Wife, outlives the Huſband, ſhe ſhall have the ſame Benefit. *Rokesby*, J. doubted, becauſe the Nature of the Debt in the preſent Caſe is not altered.

Caſe 22.

Turberville and *Stamp*. In B. R.

Where an Action of the Caſe lies for negligently keeping his Fire in his Cloſe, by which the Plaintiff was damaged.

AN Action of the Caſe, founded upon the general Cuſtom of the Realm, againſt the Defendant, for negligently keeping his Fire; and the Plaintiff declared that the Defendant in his Cloſe did light up a Fire to burn the Stubble, *& ignem ſuum tam improvide & negligenter cuſtodivit quod pro de-*

defectu debitæ Cuſtodiæ ignis ſui præd' the Clothes of the Plaintiff in the Cloſe adjoining were burnt. After a Verdict for the Plaintiff, *Gould* Serjeant moved in Arreſt of Judgment, for that this Action lay not, neither for the Matter of it, nor for the Manner; for an Action lieth not on Account of a Fire lighted up in a Cloſe, but only for Fire in a Houſe, for there a Man muſt take Care of his Fire at his own Peril, and it may properly be ſaid to be his own Fire, but out of his Houſe it cannot be ſaid to be his Fire, and where it is not his Fire an Action will not lie, as it ſeems 2 *H.* 4. 18. *a.* but if an Action would lie for the Matter, yet in the preſent Caſe it is ill brought, for the Plaintiff ought to have declared that the Defendant *exarſit vel ardebat* his Clothes, and not to have declared upon the General Cuſtom of the Realm. *Northey contra*: An Action lieth as well where the Fire is lighted in the Cloſe as in the Houſe of the Defendant; an Action was maintained lately for Fire in the Woodſtack of the Defendant; and then the Declaration is well enough, for the Plaintiff ſays that by the Improvident keeping of the Fire the Clothes of the Plaintiff were burnt, which is now found by the Verdict. *Holt*, C. J. the only Queſtion is, Whether the Plaintiff ought not to have ſhewn a ſpecial Negligence in the Defendant.

The Caſe was afterwards adjudged in favour of the Plaintiff by the whole Court; for the Action is as well for a Fire kindled in the Fields of the Defendant as in his Houſe, for it is the Defendant's Fire and kindled in his Ground, and he ought to have the ſame Care of a Fire which he kindles in his Field as of that which is made in his Houſe, for the Duty to take Care of both is founded upon this Maxim, *ſic utere tuo ut non Lædas alienum*; but if the Fire of the Defendant by inevitable Accident, by impetuous and ſudden Winds, and without the Negligence of the Defendant or his Servants, (for whom he ought to be anſwerable) did ſet Fire to the Clothes of the Plaintiff in his Ground adjoining; the Defendant ſhall have the Advantage of this in Evidence, and ought to be found Not guilty. But here the Verdict hath found Negligence in the Defendant. Therefore Judgment for the Plaintiff.

Caſe 23.

Sutton and *Moody.* In B. R.

When a Perſon may be ſaid to have a Property in what is called *Feræ naturæ.*

TReſpaſs *Quare clauſum fregit & in clauſo ſuo præd' venatus fuit & cuniculos ſuos ibidem invent' cepit & aſportavit, &c.*

After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Serjeant *Gould*, for that the Declaration was ill, for there it was ſaid *Cuniculos ſuos*, whereas a Man cannot have a Property in Conies; *ſed non allocatur*; for by *Holt*, C. J. he hath a Property in them whilſt they are in his own Ground. If a Man ſtart a Hare in his own Ground and courſe it to the Cloſe of another Perſon, and there takes it, the Hare belongs to the Owner of the Ground where it was firſt ſtarted; but if it was ſtarted in the Cloſe of another Man and there killed, it is the Hare of the Owner of the Cloſe where it was killed; but if the Hare ſtarts in another Man's Ground and is courſed out of it, it is the Hare of the Captor, for the Property reſts in the Owner of the Soil, *ratione loci*; but if ſhe runs beyond his [the Captor's] Ground (being *feræ naturæ*) he loſeth his Property; thus during the Time they are in his Soil the Plaintiff may call them his Conies; and it is the ſame Thing where Conies are in a Warren or Deer in a Park, as where they are in a Man's Field or Cloſe; for Warrens and Parks are Privileges, but do not give any Property. In the preſent Caſe the Plaintiff declares, *Quare clauſum fregit & Cuniculos ſuos ibidem invent', &c.* which ſhews the Conies to have been in his Cloſe at the Time of the taking; but if he had brought Treſpaſs generally *Quare vi et armis ſex Cuniculos cepit*, he could not ſay *ſuos*, and ſo it is agreed 22 *H.* 6. 59. *b.* Judgment was given for the Plaintiff.

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Smalcomb and *Owen Buckingham and Sir Edward Mills, Sheriffs of London, and Croſs.* In B. R.

Caſe 24.
Vide 5 Mod. 376.
1 Salk. 320.
Carth. 419.
S. C.

THE Caſe was this. *Croſs* had a Judgment and took out Execution thereon by a *Fieri facias* againſt one *Fox*, and delivered the Writ of *Fieri facias* to the Sheriffs, but did not ask for a Warrant upon it, nor deſire it to be executed, but only left it with the [Under] Sheriff at his Office; *Smalcomb* the Plaintiff alſo took out a *Fieri facias* upon a Judgment which he had obtained againſt *Fox*, and it was delivered to the Sheriffs on the ſame Day, but after the Delivery of the other *Fieri facias* to them by *Croſs*; and *Smalcomb* demanded Execution of his Writ, which was accordingly done for him; and the Sheriffs made Sale of the Goods and Chattels of *Fox* for the Debt due to *Smalcomb*; and afterwards *Croſs* and the Sheriffs took the ſame Goods in Execution upon that *Fieri facias* which was firſt delivered; whereupon *Smalcomb* brought an Action of Trover for them.

There may be an Execution of Goods after a firſt *Fieri facias* that has not been executed.

And it was urged for the Defendants at the Trial, that the firſt Writ bound the Goods, and that they could not be taken in Execution by the Plaintiff upon his *Fieri facias* which was laſt delivered. And *Holt* C. J. being in Doubt upon this Matter at the Trial, ordered that the Court ſhould be moved upon it. And now it was argued for the Defendants, that at Common Law the Goods were tied down by the *Teſte* of the *Fieri facias*. *Cro. Eliz.* 174. And if a *Fieri Facias* was taken out one Day, and another *Fieri facias* the next Day, and the Sheriff executed the ſecond Writ in the firſt place, it would have been avoided; and ſuch Conſtruction ought to be made of the Statute 29 *Car.* 2. *c.* 3. and is agreeable to the Order obſerved by the Common Law; and therefore the Writ firſt delivered ſhould have the Preference. And notwithſtanding that at Common Law, if two Writs of *Fieri facias* bear *Teſte* the ſame Day, that which is firſt delivered and executed ought to ſtand; for it cannot be decided

cided which iſſued firſt, for the Priority ought to be tried by the Record, which makes no Diſtinction between Writs that have the ſame *Teſte*; yet as it is enacted [by that Statute] That a *Fieri facias*, or other Writ of Execution, ſhall bind the Property of Goods from the Time of Delivery to the Sheriff, *&c.* and by Conſequence the Time of the Lien made ſubject to another Manner of Trial, [for this is Matter of Fact, and ſhall be tried by Jury, and may be proved] the Time of the Delivery is become the *Terminus* from which the Goods are bound; and the firſt Delivery of a Writ will ſo bind the Goods, that they can never be ſold by a *Fieri facias* delivered afterwards; and altho' there is no Fraction of a Day in Law, yet the Law rightly allows Priority of Time in the ſame Day, or Priority even in an Inſtant. There may be a Releaſe of an Obligation dated the ſame Day with ſuch Releaſe. *Cro. Eliz.* 161. And the Penning of this Statute of 29 *Car.* 2. ſeems to have Reſpect to this Objection; for the Statute does not ſay, that a *Fieri facias*, *&c.* ſhall bind from the Day, but from the Time of Delivery; and the Caſe in 1 *Sid.* 271. was cited, where a *Fieri facias* bore *Teſte* the 4th of *July*, the Defendant became a Bankrupt on the 6th of *July*; and in Trover it was found by the Verdict, that the Writ was purchaſed on the 11th of *July*; yet it was adjudged, that the Goods ſhould become liable from the *Teſte* of the Writ, which was on the 4th of *July*.

But on another Day Judgment in the preſent Caſe was given for the Plaintiff by the whole Court. And *Holt* C. J. declared their Reaſon to be, for that at Common Law, if there were two Writs of *Fieri facias*, the one bearing *Teſte* on ſuch a Day, and the other on the next Day, and the laſt Writ was firſt executed, ſuch Execution ſhould not be avoided, and the Party had no Remedy but againſt the Sheriff; for the Sheriff ought to make Execution at his Peril, and the Sheriff ſhall be excuſed if there was no Default in him; as if he who took the firſt Writ out conceals it in his Hand, the Sheriff may rightly make Execution on another Writ which bears the laſt *Teſte*, but came firſt to his Hands. And it hath been held, that if a Recognizance be extended, the Executor ought to ſatisfy that before a Judgment which is

not profecuted; and therefore in the preſent Caſe, as he who firſt brought his *Fieri facias* to the Sheriffs did not deſire that it might be executed, the Sheriffs might rightly execute the laſt *Fieri facias*, and ſuch Execution ſhall not be avoided. Judgment for the Plaintiff.

Winter and *Loveday*. In B. R.

Caſe 25. Vide 5 Mod. 378.

Power to make Leaſes when well purſued.

IN Ejectment, upon a Special Verdict, the Caſe appeared to be as follows: *George Pawlett*, ſeiſed of the Manor of G. and other Lands in Fee, upon the Marriage of his Son *Edward* conveys the Premiſſes to the Uſe of himſelf for Life, afterwards to the Uſe of *Elizabeth* the Wife of his Son for Life, then to the Uſe of *Edward* the Son in Tail, then to the Uſe of himſelf in Fee; in which Settlement there was the following Proviſo, *viz.* Provided always, and it is the true Intent and Meaning of all the Parties to theſe Preſents, that the ſaid *George* during his Life, and after that the ſaid *Elizabeth* during her Life, may make Leaſes, *&c.* if in Poſſeſſion, for one, two or three Lives, or for the Term of thirty Years, or for any other Number or Term of Years determinable upon one, two or three Lives, or in Reverſion for one or two Lives, or for the Term of thirty Years, or for any other Number or Term of Years determinable upon one or two Lives; ſo as the ſaid Leaſes be not made of ſuch Part of the ſaid Manor of G. as are the Demeſne Lands of the ſaid Manor, and ſo as the antient Rent be reſerved, *&c.* And it was found, that the ſaid *George* made a Leaſe (under which the Defendant claimed) of the Lands mentioned in the Declaration, which were Parcel of the Lands held of the ſaid Manor by Copy according to the Cuſtom; to hold after the Expiration of a former Leaſe determinable upon three Lives, for the Term of thirty Years abſolutely: And if the Leaſe be warranted by the Power, then the Jury find for the Defendant, otherwiſe for the Plaintiff. And after Argument at the Bar, it was now upon a ſolemn Argument adjudged for the Plaintiff. The whole Court agreeing, that the Leaſe was not warranted by the Power, but they differed in the Reaſons and Grounds for their Opinion: For by *Holt* C. J. *Turton* and

Eyre, it was held, that the Leaſe for thirty Years abſolutely was good within the Proviſo; for the Words of the Proviſo are, For one or two Lives, or for the Term of thirty Years, or for any other Number or Term of Years determinable on one or two Lives, *&c.* where the Repetition of the Particle [for] disjoins and ſeparates the Sentence and makes ſo many diſtinct Clauſes, ſo that *George Pawlett* had Power to make Leaſes either for one or two Lives, or for thirty Years, or for any Number of Years determinable on one or two Lives; he had his Election to make the one Leaſe or the other; if he could not leaſe but for thirty Years determinable on two Lives, the Prepoſition [for] in the Clauſe [for the Term of thirty Years] would govern the whole Sentence, which would have been penned in this Manner, *viz.* For the Term of thirty Years, or any Number of Years determinable, *&c.* or rather, for any Term or Number of Years determinable on one or two Lives; for if ſuch a Conſtruction were to be made, what Occaſion would there be for theſe Words, [for the Term of thirty Years]? they might be intirely omitted; but as the Sentence runs, For the Term of thirty Years, or for any other Number or Term of Years, ſuch Repetition or Reiteration makes them diſtinct Clauſes; and as the firſt [for] governs the firſt Clauſe, For the Term of thirty Years, ſo the laſt Prepoſition [for] governs the latter Clauſe, [for any Term or Number of Years determinable, *&c.*] and explains the Intent of the Parties to be, that *Geo. Pawlett* might make Leaſes for any Number of Years determinable on Lives, ſo in like Manner for thirty Years abſolute: And to prove this Difference the Chief Juſtice cited two Authorities; the firſt was *6 Co.* 39. *Finch*'s Caſe; where Dame *Katherine Finch* granted an annual Rent of 20 *l.* iſſuing out of the Manor of *Eaſtwell, &c. & meſſuagiis, terris, &c. dictæ Katherinæ, ſituat', &c. in parochiis de Eaſtwell & C.* in the County of *Kent*, or elſewhere in the ſame County, to the ſaid Manors or any of them belonging; and the Queſtion was, whether the other Lands of the ſaid *Katherine Finch* which were in the County of *Kent*, and did not appertain to the ſaid Manor, ſhould be charged with this Rent? And reſolved that they ſhould not; for the Words (*aut alibi*) do not inlarge the Lands charged with the Rent, but only inlarge the Vills in which

the Lands before charged did extend; but if the Grant had run, *Aut de terris alibi in eodem Com'*, there the Iteration of the Words *Lands and Tenements* would have inlarged the Lands and Tenements out of which the Rent was to have iſſued. The ſecond was, where the King granted the Manor of *S. nec non omnes terras & tenementa ſua in S. nec non omnes terras & tenementa ſua dicto manerio de S. pertinen'*; the Manor of *N.* which was in *S.* but not Part of the Manor of *S.* paſſed. 1 *Leon.* 119. And *Holt* C. J. explained what was the Nature of a Leaſe in Reverſion thus; In the moſt ample Senſe, that is ſaid to be a Leaſe in Reverſion which hath its Commencement at a future Day, and then it is oppoſed to a Leaſe in Poſſeſſion; for every Leaſe, that is not a Leaſe in Poſſeſſion, in this Senſe is ſaid to be a Leaſe in Reverſion. But this is not the Notion of a Leaſe in the preſent Caſe; if it were, then *George Pawlett* might have made Leaſes to commence forty Years afterwards; but a Power ought to be taken ſtrictly: And where any one is enabled to make Leaſes generally, this impowers him to leaſe only in Poſſeſſion. 2 *Cro.* 34. *Yelv.* 222. So where Mention is made of Leaſes in Reverſion in a Power, this ſhall be intended of Leaſes to commence after the End of a preſent Intereſt in Being; which is the ſecond Notion of a Leaſe in Reverſion. But here a Power is given to make Leaſes for one or two Lives in Reverſion, and to make Leaſes for Years; but a Leaſe for Life cannot be made to commence at a future Day; and for that Reaſon the very ſame Expreſſion (Leaſe in Reverſion) will have a different Signification in the ſame Conveyance; being applied to a Leaſe for Life, it ſhall be intended of a concurrent Leaſe, or a Leaſe of the Reverſion, *viz.* a Leaſe of that Land which is at the ſame Time under a Demiſe; and then it is not to commence after the End of the Demiſe, but hath a preſent Commencement, and is concurrent with the prior Demiſe; but being applied to a Leaſe for Years, it ſhall be intended of a Leaſe which ſhall take its Effect after the Expiration or Determination of a Leaſe in Being. And *Holt* C. J. added farther, that he thought that if a Power enabled any one to make Leaſes in Reverſion as well as in Poſſeſſion, he cannot make a Leaſe in Poſſeſſion, and another Leaſe in Reverſion of the ſame Land; but his

his Power to make Leaſes in Reverſion ſhall be confined to ſuch Land as was not then in Poſſeſſion: But in the Caſe in Diſpute, it is not found whether the Cuſtomary Land, of which the Leaſe in Reverſion was made for thirty Years, was in Poſſeſſion at the Time of this Marriage Settlement. But notwithſtanding that the three Judges were of Opinion, that the Power was well purſued by a Leaſe of thirty Years abſolutely; yet they held, that this Power did not warrant a Leaſe of Copyhold Lands held of the Manor; for the Qualifications of this Power are, "So as ſuch Leaſes be not "made of ſuch Part of the ſaid Manor of *G.* as are the "Demeſne Lands of the ſaid Manor, and ſo as the an-"tient Rent be reſerved"; but Cuſtomary Lands are Part of the Demeſnes of a Manor, and the Pleading is, that the Lord is ſeiſed of a Manor *in dominico ſuo ut de feodo.* A Manor conſiſts of Demeſnes and Services, and upon the Grant of a Manor the Tenants ought to attorn for their Services; but Copyholders have no Occaſion to make an Attornment; for their Tenements paſs by the Grant as Parcel of the Demeſnes. *Litt. Sect.* 556. and *Co. Lit. ibid.* And if a common Perſon grants all the Demeſne Lands of a Manor, the Copyhold Tenements held of the Manor paſs; for they are Parcel of the Demeſnes of a Manor. 1 *Co.* 46. *b. Alton Woods.* But it was objected from the Bar, that if Cuſtomary Tenements are Parcel of the Demeſnes of a Manor, then here is nothing that could have been demiſed, and yet it was intended that *George Pawlett* ſhould have Power to make Leaſes of ſo much of the Manor as was not the Demeſnes. To which it was anſwered by *Turton* and *Eyre*, that there are other Lands mentioned in the Conveyance to which the Power to make Leaſes may extend. But *Holt* C. J. thought that this was not a full Anſwer; becauſe it appears to be the Intent of the Settlement, that Part of the Manor may be demiſed; and was of Opinion, that the Rents and Services may be demiſed within this Power: And notwithſtanding that the other Qualification annext to the Power ſays, that the antient Rent ſhall be reſerved; and no Reſervation of a Rent can be upon a Leaſe of Rents and Services, out of which no Rent iſſues, yet the Rents and Services (he thought) might be demiſed within this Power; for it appears, that Part of the Manor was intended

to be comprized within this Power, but the Demeſne Lands are not to be comprized; then the Rents and Services muſt be; for the whole of the Manor conſiſts in Demeſnes, Rents and Services: And if a Man hath a Power reſerved to him of making Leaſes of two Things, and a Qualification is annexed to the Power, which cannot extend to one of theſe Things, he may make a Leaſe of that Thing, without any Regard to the Qualification; as where there is a Power to make a Leaſe of a Manor, and every Part thereof, ſo that ſuch a Rent be reſerved upon every Leaſe, as was paid for two Years before, and it happens, that ſome Part of the Land was not leaſed at any Rent within two Years before; a Man may make a Leaſe of ſuch Land reſerving what Rent he pleaſes; for the Intent appears to be, that he might make Leaſes of the whole Manor. 2 *Rol.* 26. *pl.* 10. And upon this Authority was founded another ſuch Reſolution, *Hill.* 27 *&* 28 *Car.* 2. between *Baker* and *Baker*, where a Man had Power to make Leaſes of a Rectory, Tithes and other Lands, reſerving the antient Rent; and it was held, that he might make Leaſes of Tithes, although no Rent can iſſue out of Tithes; but he might demiſe them without any Rent, if it had pleaſed him; for it appeared that Tithes were within the Power. *Rokeby* J. was of Opinion, that Judgment ſhould be given for the Plaintiff; but he differed in the Reaſons of his Reſolution from the reſt of the Judges: For he thought that by the Power in the Settlement *George Pawlett* might make Leaſes, but with theſe Reſtrictions, which are expreſſed or implied. Firſt, That no Land ſhould be demiſed which was uſed for the Maintenance and Suſtentation of the Family; for a Leaſe of ſuch Land is prohibited by theſe Words, "So "as the Leaſe be not made of any of the Demeſne Lands, *&c.*" By which Words it was intended, that *George Pawlett* ſhould not make Leaſes of ſuch Land as was in the proper Occupation of thoſe who ſhould be ſeiſed of the Manor; but it was not intended to reſtrain Leaſes of Cuſtomary Land held of the Manor. Secondly, That no Land ſhould be demiſed without Reſervation of the antient Rent; for it was intended that the antient Income and Revenue ſhould be preſerved according to the Cuſtom of Leaſes in the *Weſtern* Parts of *England*. Thirdly, That no Land ſhould be demiſed abſolutely,

but every Demiſe ſhould have its Determination upon Lives; which three Reſtraints are expreſſed in the Settlement. Then the Power annexed to the Eſtate ought to be expounded ſtrictly, and with a reaſonable Intendment; for every Power ſhall be taken with ſuch a Reſtriction, that the Eſtate it ſelf ſhall not be deſtroyed by it; ſo here there is a Reſtraint from making Leaſes of Cuſtomary Land held of the Manor not by the expreſs Words, ("ſo as it be not of the Demeſne "Lands", which Words by the Intent of the Parties do not extend ſo far,) but by Implication; for if the Cuſtomary Lands might be demiſed, the Manor will be deſtroyed; which could not be the Intent of the Parties. And ſo for theſe Reaſons, Firſt, Becauſe the Leaſe was for thirty Years abſolutely, without being determinable upon Lives, (in which he went contrary to the other three Judges); Secondly, For that a Leaſe of the Copyholds would by Conſequence deſtroy the Manor, *Rokeby* held that Judgment ſhould be given for the Plaintiff. Therefore by the whole Bench it was adjudged for the Plaintiff.

Caſe 26.

Richards and *Corneford.* In B. R.

An Avowant in Replevin may abate his own Avowry for Part of the Rent diſtrain'd for, before, but not after, Judgment.

ERROR of a Judgment in *C. B.* in Replevin, for Cattle taken the 26th of *September.* The Defendant avowed the Taking as a Diſtreſs for Rent reſerved on a Leaſe for Years, which was made under the Title of *Chriſtopher* late Duke of *Albemarle*; and for the Rent of two Years and an Half ending at *Michaelmas* the 29th of *September*, *&c.* he avowed. And this was now aſſigned for Error; for the Diſtreſs was made before *Michaelmas*, when the Rent was in Arrear; and notwithſtanding that it was urged by *Mountague*, that the Diſtreſs was well made for the Rent of two Years; yet the Court without Difficulty reverſed the Judgment; for the Avowry is for one intire Rent, and the Judgment accordingly; but before Judgment, the Avowant might have abated his own Avowry for the Half-Year, and prayed Judgment for the Reſidue, and this would have been good. Judgment reverſed *niſi Cauſa.*

But afterwards the Record was amended in *C. B.*

The King and *Gripe.* In B. R.

Caſe 27.

IN an Information of Perjury. The Information ſet forth that the Defendant being ſworn as a Witneſs, had depoſed (*to wit*) Maſter *George Stroud* about the Middle of *July* 1681, was at *Newnam* (*Domum ipſius Magiſtri Stroud vocat' Newnam apud Plimpton Stæ. Mar' in Com' Devon innuendo, ubi revera præd' Georgius Stroud circa medium Julii vel in aliqua parte ejuſdem menſis Julii non fuit apud Newnam præd'*). And after a Verdict for the King, the Judgment was arreſted by the Opinion of the whole Bench, after ſeveral Arguments at the Bar, for the Inſufficiency of the Information, becauſe the Information did not ſhew where *Newnam* was, only in the *Innuendo.*

An Information for Perjury ſhall not be ſupplied by the *Innuendo.*

Anonymus. In Chancery.

Caſe 28.

A. Gave a Bill of Exchange for Value received, *B.* aſſigns it to *C.* for an honeſt. Debt; *C.* brings an *Indebitatus Aſſumpſit* on this Bill againſt *A.* and had Judgment; on which *A.* brings his Bill to be relieved in Equity againſt this Judgment, becauſe there was really no Value received at the giving this Bill, and *C.* would have no Prejudice who might ſtill reſort to *B.* upon his original Debt: It was anſwered that *A.* might be relieved againſt *B.* or any claiming as Servant or Factor of, or to the Uſe of *B.* But the Chancellor held that *C.* being an honeſt Creditor and coming by this Bill fairly for the Satisfaction of a juſt Debt, he would not relieve againſt him, becauſe it would tend to deſtroy Trade which is carried on every where by Bills of Exchange, and he would not leſſen an honeſt Creditor's Security.

A Drawer of a Bill of Exchange, though given without Conſideration, ſhall not be relieved againſt a third Perſon to whom it was aſſigned for an honeſt Debt.

Dorn

Caſe 29.

Dorn and *Gaſhford.* In B. R.

Termor for Years cannot declare upon a *Que Eſtate.*

ACtion upon the Caſe for the Obſtruction of a Way brought by a Leſſee for Years; who declared *Quod ipſe & omnes illi quorum ſtatum ipſe habet in Meſſuagio præd' de Tempore cujus contrarii memoria hominum non exiſtit habuerunt & de jure habere conſueverunt quandam viam* to ſuch a Place; and after a Verdict for the Plaintiff, *Northey* moved in Arreſt of Judgment, and took the following Exceptions. Firſt, That a Leſſee for Years ought not to claim by a *Que Eſtate.* Secondly, Here is not laid any *Terminus a quo* the Way begins. *Wright* Serjeant anſwered to the firſt Objection, that it is true that a Leſſee for Years cannot claim by a *Que Eſtate,* but that the Declaration would have been ſufficient if the Plaintiff had ſaid only *quod ipſe habuit & de jure habere conſuevit quandam viam*; for in ſuch an Action for the Obſtruction of a Way the Plaintiff need not make any Title, as it was reſolved 2 *Cro.* 123. and between *St. John* and *Moody,* 1 *Vent.* 275. and between *Bloeby* and *Slater* in *C. B.* and then the Addition of [*omnes illi quorum ſtatum de tempore cujus, &c.*] is Surpluſage and ſhall be rejected after Verdict. To the ſecond Objection he anſwered, that the Plaintiff ought to ſhew a *Terminus a quo,* and this would have been ill upon Demurrer, but after a Verdict it is helped; for the Jury have found that the Plaintiff had a Way, and it is not material from what Place it begins.

A third Exception was taken to the Declaration; but the Court ſaid nothing to the ſecond or third Exception, but upon the firſt the Judgment was arreſted; for the Court agreed that the Declaration would have been good without the Allegation of any Title in the Plaintiff; as it was ſettled in the Caſe between *Stroud* and *Bird*; but as the Plaintiff hath ſet forth a Title by Preſcription, and failed in it, it is ill and ſhall not be aided: And *Holt,* C. J. ſaid, that in the Time of Lord Chief Juſtice *Hale* it was held ill, that the Plaintiff being a Leſſee for Years had declared that he was poſſeſſed of an antient Meſſuage; for an antient Meſſuage ſhall be

intended to be one Time out of Memory; yet there the Plaintiff had declared that he was poſſeſſed, and it was ſaid that it ought to be proved upon Evidence, as the Plaintiff had ſo declared upon Preſcription, otherwiſe the Plaintiff could not recover. And Judgment in the principal Caſe was arreſted.

Thompſon and *Leach.* In B. R.

Caſe 30.

EJectment on the Demiſe of *Charles Leach*; the Defendant pleaded Not guilty, and a Special Verdict was found to this Effect, *viz. Nicholas Leach* being ſeiſed in Fee of the Lands mentioned in the Declaration, by his Will dated the 19th of *December* 19 *Car.* 2. deviſed them to his Brother *Simon Leach* for Life, Remainder to the firſt Son of his Body begotten, and the Heirs Male of the Body of ſuch Son, Remainder to the ſecond and third Son, *&c.* in Tail Male; and for Default of ſuch Iſſue, Remainder to Sir *Simon Leach* and the Heirs Male of his Body, and for Default of ſuch Iſſue, Remainder to the right Heirs of *Nicholas* the Teſtator, who died ſeiſed, and after his Deceaſe, *Simon Leach* being *Non compos mentis*, 23 *Aug.* 25 *Car.* 2. executed a Deed of Surrender to Sir *Simon Leach*, (whether ſuch a Surrender was good without the Notice of Sir *Simon* was doubted in *C. B.* and there adjudged that it was not by three of the Judges againſt *Ventris*, ſee 2 *Vent.* 198. and this was afterwards affirmed in Error brought in *B. R.*) After ſuch Surrender, *viz.* 1 *Nov.* 25 *Car.* 2. *Simon Leach* had Iſſue *Charles Leach* the Leſſor of the Plaintiff; *Simon Leach* dies, and *Charles* his Son enters as in his Remainder, and Sir *Simon Leach* ejects him, *&c. Wright*, Serjeant, who argued for the Plaintiff, reduced the Caſe to two Queſtions; Firſt, Whether the Deed of Surrender made by *Simon Leach* Tenant for Life, he being *Non compos mentis*, was void or only voidable? Secondly, Admitting that it was only voidable, whether *Charles* the Leſſor of the Plaintiff could avoid it? But by *Northey* on the other Side, and the Court, it was agreed that the ſecond Queſtion could not in this Caſe come into Debate; for the Surrender of *Simon Leach* the Tenant for Life, made to Sir *Simon Leach* in the Remainder before the Birth of *Charles* the Leſſor of the Plaintiff, had deſtroyed the Contingent Remainder, the which *Charles* claims, if ever

Whether the Surrender of a Perſon that was *Non compos mentis* is abſolutely void.

ſuch Surrender was good, notwithſtanding even if it was afterwards avoided; for if the particular Eſtate be deſtroyed before the Contingency happens, the Contingent Remainder cannot veſt, for the Remainder ought to take Effect during the particular Eſtate, or *eo inſtante* that the particular Eſtate determines. If a Man grants or bargains and ſells the Reverſion to Huſband and Wife, ſeiſed for Life in Right of the Wife, the meſne Contingent Remainder is deſtroyed; yet the Wife may waive the Eſtate after the Death of her Huſband, 2 *Saund.* 386. for (as *Northey* ſaid) a future Right of Entry cannot ſupport a Contingent Remainder, but a preſent Right of Entry may: As where a Man who is Tenant for Life is diſſeiſed, the Contingent Remainder thereupon deſcendant is not deſtroyed. And *Northey* cited *Cro. Car.* 102. if a Feoffment is made to the Uſe of Huſband and Wife, Remainder to the Heirs of the Survivors, and the Huſband afterwards makes a Feoffment, the Contingent Remainder to the Survivor is deſtroyed. But *Holt* C. J. ſaid that was a very nice Caſe, for the Wife might avoid that Eſtate, and at the Death of the Huſband, as her Time to avoid it then happened, the Contingency alſo happened at the ſame Time. And *Holt* C. J. alſo ſaid, that if a Man who is Tenant for Life with a Contingent Remainder, makes a Feoffment with Condition, and afterwards enters for Breach of that Condition, the Contingent Remainder is deſtroyed, if the Contingency happened before the Condition broken; ſo alſo if the Contingency happens before the Entry, although it be after the Condition is broken; for a Title of Entry is not ſufficient to ſupport a Contingent Remainder, no more than a future Right; but if the Tenant for Life enters for Breach of the Condition and revives his Eſtate, and that before the Contingency happens; in ſuch Caſe the Contingent Remainder may veſt, for by the Re-entry of the Tenant for Life he is reſtored to his former Eſtate; and for the ſame Reaſon here in the preſent Caſe, if the Surrender of *Simon Leach* who was *Non compos mentis* was only voidable, the particular Eſtate was ſtill deſtroyed by ſuch Surrender for ſuch Time as it remained in Force; beſides the particular Eſtate was expired and determined by the Death of *Simon Leach*, and how can his Heir avoid an Eſtate which is executed? an Avoidance is of a Tortious

Act, and reſtores the Eſtate; but here the Surrender of the Tenant for Life was in Force during his Life, and after his Death it cannot be reſtored or revived, for it is abſolutely determined and hath no Eſſence or Being at all: Wherefore *Northey* was of Opinion, and the Court with him, that the ſecond Queſtion might be waived, and that this was the only Queſtion in the Caſe, *viz.* Whether the Surrender of a Perſon who was *Non compos mentis* was abſolutely void? *Northey* argued that it was not void, for he himſelf [*Simon Leach*] could not avoid it; and if it was void, it muſt be void to all Intents and Purpoſes, and how then can that Man's Deed be void which binds him himſelf? But *Holt*, C. J. inclined to the Opinion that his [*Simon Leach*] Deed was void, although it might have been in Force againſt the *Non compos mentis* himſelf, for that being in Force againſt himſelf is founded upon the Maxim, that no Man ſhall be admitted to diſable himſelf; the Deed of an Infant is void, although he cannot plead *Non eſt factum*; for when it hath all the Eſſentials of a Deed, it ſhall be intended that the Maker was of full Age, if he does not plead Nonage. *Sed adjornatur.*

Jones and *Moſely*. In B. R.

Caſe 31. Vide ante p. 29. Deeds to lead Uſes of Fines.

THE Caſe before mentioned was now argued by Mr. *Brodrick* for the Plaintiff, and by Mr. *Webb* for the Defendant: And *Brodrick* inſiſted that the Indenture of the 31ſt of *January*, although it might not be good as an Indenture, yet may be taken as a Deed Poll, and is ſufficient to declare the Uſes of the Fine, which not being levied purſuant to the Indenture of the 29th of *January*, but being variant from it in the Circumſtance of Time, any other Deed or Averment is ſufficient to declare the Uſes thereof, which for that Reaſon ſhall be governed here by the Deed of the 31ſt of *January*. *Webb* on the other Side ſaid, that the Deed of the 31ſt of *January* being between Huſband and Wife was void, (for the Huſband cannot make a Covenant with his Wife) and being void as an Indenture it cannot be taken as a Deed Poll. But he thought that the principal Point in this Caſe was, Whether the Indenture of the 29th of *January* was not ſufficient

ſufficient to govern the Uſes of this Fine? The Indenture recites, That whereas a Fine had been acknowledged, *&c.* the ſaid Parties ſhould levy the ſaid Fine of ſuch and ſuch Lands next *Hillary* Term; and the Fine was levied of the ſame Parcels and between the ſame Parties the ſame *Hillary* Term, for the Indenture bears Date within *Hillary* Term, which begins on the 23d of *January*; then it is to be conſidered whether the Words [next *Hillary* Term] ſhall be intended of *Hillary* Term next after the Caption of the Fine, or of *Hillary* Term next after the Date of the Indenture; the moſt benign Conſtruction in this Caſe ought to be made, *ut res magis valeat, &c.* And as the Word [next] may be applied either to the Caption of the Fine or to the Date of the Indenture, it ought to be applied here to the Caption of the Fine, foraſmuch as by ſuch Application the whole Conveyance will be good, but otherwiſe it will be deſtroyed.

DE
Term. Sanct. Hill.
9 Will. III. in B. R.

Anonymous.

Case 32.

ASSUMPSIT. The Plaintiff declares, that the Defendant, in Conſideration of 20 *l.* given to him by the Plaintiff, aſſumed on the 29th of *October* 1696. to aſſign 500 *l.* in Bank-Stock to the Plaintiff for the Sum of 365 *l.* at any Time when he ſhould be requeſted before the 10th Day of *May* then next enſuing; and the Queſtion aroſe upon the Statute of 8 & 9 *W.* 3. *c.* 32. by which it is enacted, That every Policy, Contract, &c. made or to be made by any Perſon or Perſons whatſoever, and which by the Tenor thereof is to be performed after the firſt Day of *May* 1697. upon which any Premium already is, or hereafter ſhall be given or paid for Liberty to put upon or to deliver, receive, accept or refuſe any Share or Intereſt in any Joint-Stock, Tallies, Orders, Exchequer-Bills, Exchequer-Tickets, or Bank-Bills whatſoever, (other than ſuch Contracts, &c. as are to be performed within three Days from the Time of the Making,) ſhall be utterly null and void to all Intents, &c. By which Statute, every Contract by the Tenor of it to be performed after the 1ſt Day of *May* 1697. is avoided: And whether this Contract which was made on the 29th of *October* 1696. by which the Plaintiff had Time to requeſt the Aſſignment of the Bank-Stock to be made to him until the 10th Day of *May* 1697. was within the Statute, and made void thereby, was the Queſtion in Debate. And *Northey* argued that it was not; for this is not a Contract, which by the Tenor of it is to be performed

A Contract performable as well before, as after a Day mentioned in the Statute of 8 & 9 *W.* 3. at the Election of the Party, is not within that Act of Parliament.

formed after the 10th Day of *May* 1697. For altho' the Plaintiff had Liberty to perform the Requeſt of the Aſſignment of the Bank-Stock to him until the 10th Day of *May* 1697. which was nine Days after the Act took Place, yet ſuch Requeſt might be made before the 1ſt of *May*, and ſo the Contract by the Tenor of it was not to be performed after the 1ſt Day of *May*; for a Contract to be performed after the 1ſt Day of *May* is intendable of ſuch a Contract which of Neceſſity ought to be performed after that Day, and cannot be performed before; but a Contract performable as well before, as after that Day, at the Election of the Party, is not within the Act of Parliament, but is *Caſus omiſſus*; and he compared it to a Caſe upon the Statute of 29 *Car.* 2. *c.* 3. of Frauds and Perjuries, by which it is enacted, that no Action ſhall be brought, *&c.* whereby to charge any Perſon, *&c.* upon any Agreement which is not to be performed within a Year from the making thereof, unleſs the Agreement be in Writing; and an Action was brought upon an Agreement by the Defendant to pay ſo much upon his Marriage, but without any Writing or *Memorandum* of the Agreement, and the Defendant did not marry within the Year: Upon the Trial at *Guild-Hall* before *Holt* C. J. he was in Doubt, whether that Agreement was within the Statute, and whether it ought not to have been by Writing? and ordered that the Opinion of the Judges of the Court ſhould be taken. And by the major Part of the Judges in *B. R.* it was reſolved, that this was *Caſus omiſſus*; for that the Defendant might have married within the Year; and ſo it was not an Agreement which was not to be performed within a Year, and by Conſequence was not ſuch an Agreement as was intended by the Act of Parliament; and he ſaid he did not ſee any Diverſity between the Caſes.

Caſe 33.

Ram and *Thacker*. In B. R.

Where an Act of Parliament ſhall have the Effect of a Recovery.

ERROR of a Judgment of the King's Bench in *Ireland*, depending here for many Years, and the Judgment was now affirmed. The Caſe was upon divers Acts of Settlement made in *Ireland*, by which every one who accepted Letters

Patent ſhall have thereby a clear Eſtate, and avoid all former Settlements, or to that Effect. *Waldron*, the Leſſor of the Plaintiff, was the Iſſue in Tail and Heir Male, who claimed under a Settlement made by his Anceſtor on Marriage, by which the Eſtate was intailed, and after ſuch Settlement made that Anceſtor ſurrenders his Eſtate, and takes out new Letters Patent: And whether ſuch Surrender and Acceptance of a new Patent had avoided the prior Settlement made a ſhort Time before was the Queſtion. And it was reſolved that they had avoided it; for by the Settlement he had an Eſtate-tail, which might have been docked; and therefore ſuch Surrender and Acceptance ſhall have the Force of a Recovery by the Operation of the Statute; and ſo the Eſtate-tail was barred, and the Eſtate deſcended to the Heir General, who was married to *Thacker* the Defendant.

Britton and *Cole*. In B. R.

Caſe 34

Outlawry. The Movables of a Stranger levant and couchant may be taken on a *Levari facias*.

TReſpaſs for the Taking of forty-three Ewes and two Lambs. The Defendant pleaded, that one *Chiſwick* was outlawed, and that after Outlawry an Inquiſition went; upon which it was returned, that *Chiſwick* was poſſeſſed of Lands, where the Ewes and Lambs were taken, to the Value of 55 *l. per Annum*, and afterwards a *Levari facias* iſſued out of the Exchequer, commanding the Sheriff to levy the ſaid Value out of the Iſſues of the ſaid Lands; upon which the Sheriff made out his Warrant to *A.* and *B.* to levy, *&c.* To whom the Defendant ſhewed the ſaid Ewes and Lambs, being levant and couchant upon the Land, and prayed them to make Execution, *&c.* which is the ſame Treſpaſs upon which, *&c.* Upon this Plea the Plaintiff demurred. And after divers Exceptions to the Pleadings, and divers Arguments to the Matter of Law, the Court now declared their Opinion. And *Holt* C. J. who ſpoke for the reſt of the Judges, declared, that the Court was of Opinion, as to the Matter of Law, with the Defendant; and this was the Caſe: *Chiſwick* was outlawed, an Inquiſition goes, upon which it is returned, that he had Land to the Value of 55 *l. per Annum*; afterwards, upon a *Levari facias*, the Cattle of a Stranger levant and couchant upon

upon the Land are taken and ſold: And it was the Opinion of the Court, that the Cattle of a Stranger may well be ſold in ſuch a Caſe, for they are the Iſſues of the Land; the Statute of *Weſtm.* 2. 13 *Ed.* 1. 39. explains what ſhall be accounted Iſſues of Land, (to wit) Rents, Corn, and all Moveables; the which Word [Moveables] extends to Cattle. The Cattle of the Owner of the Land are Iſſues without Queſtion, and ſo are alſo the Cattle of a Stranger levant and couchant; for the Statute makes no Diſtinction, and the Words of the Statute are general, *viz.* all Moveables. Another Reaſon why the Cattle of a Stranger may be taken upon a *Levari facias* is, becauſe the Land is the Debtor to the King; and if the Cattle of a Stranger could not be taken when they are levant and couchant, the King may be defeated of all the Profits; for the Perſon outlawed may make a Contract with a Stranger to depaſture his Cattle, and ſo avoid the Effect of the Outlawry; for ſuch a Contract cannot be diſcover'd, or if it be, there can no Levy be made by the King. The Writ of *Levari facias* commands the Sheriff, that he levy *de exitubus terræ*; and if there are not any Iſſues upon the Land, but only the Cattle of a Stranger, and thoſe cannot be taken, the King cannot be anſwered with any Profit. The Cattle of the Party outlawed cannot be the only Things to be taken, for he hath no Goods, all his Goods are forfeited to the King; and therefore if it were ſaid, that his Cattle only ought to be taken, it muſt follow that the King ſhould be ſatisfied out of his own proper Goods. But it ought to be conſidered what Proceſs iſſue out of the Exchequer, for the better Underſtanding of this Matter; the Proceſs of *Capias* extends to the Perſon; the Proceſs of *Fieri facias* extends only to the Goods and Chattels of the Perſon himſelf, but not to thoſe of a Stranger; another Proceſs is the *Extendi facias*, and this is only an Extent upon the Land; another Proceſs is called the *Long Capias*, the which contains all the precedent ones; for by this it is commanded, that the Sheriff take the Body, levy the Goods and Chattels, and extend the Land of the Debtor; but in none of theſe Proceſſes can the Goods of a Stranger be taken: But the *Levari facias* extends to the Iſſues of the Land; the Land is the Debtor, and all Moveables upon the Land may be taken; and therefore it is adjudged *Cro. Eliz.*

431. *Stafford* and *Bateman*, that upon a *Fieri facias* the Goods of a Stranger could not be ſold for a Debt to the Queen.

Goodwin and *Bearbank*. In B. R.

Caſe 35.

JUdgment againſt a Teſtator, and a *Scire Facias* was brought thereupon againſt the Executor, bearing *Teſte* the 24th of *October*, and returned *die lunæ prox' poſt mens' Michaelis*, which was in Truth the 31ſt of *October*; then the ſecond *Scire facias* bore *Teſte* the 31ſt of *October*, and was returnable *die lunæ prox' poſt Craſtinum animarum*, which was the 7th of *Nov.* And now it was moved by Sir *Barth. Shower*, that the *Scire facias* was erroneous; for there are not fifteen Days between the *Teſte* and Return of the *Scire facias*, but only fourteen. *Sed non allocatur.* For it was anſwered by *Broderick*, and agreed to by the Court, that it was right; for between the *Teſte* and the Return of the firſt *Scire facias* there are ſeven Days excluſive, and between the *Teſte* and Return of the ſecond *Scire facias* there are ſeven Days excluſive; ſo between the *Teſte* of the firſt and the Return of the laſt *Scire facias* there are fourteen Days excluſive, and fifteen Days incluſive, which are ſufficient; and ſo it was reſolved between *Levingſton* and *Stoner*, *B. R. Mich.* 34 *Car.* 2. which is reported 2 *Jon.* 228.

Fifteen Days between the *Teſte* and Return of two *Scire facias's* incluſive is ſufficient.

And in *Levingſton*'s Caſe the Court would not take Notice by the *Almanack* of the Day of the Month, in order to avoid the *Scire facias*.

DE
Term. Sanct. Mich.
10 Will. III. in B. R.

Caſe 36. *Vide* 1 Salk. 29. Carth. 470.

Heylin, Executor of Read, and *Captain Haſtings.*

A conditional Promiſe will avoid the Statute of Limitations.

INdebitatus Aſſumpſit for Goods ſold and delivered by the Teſtator to the Defendant. The Defendant pleaded *Non Aſſumpſit infra ſex annos,* and at the Trial before *Holt* C. J. at *Guild-Hall,* the Evidence for the Plaintiff was as follows, That the Goods were Sold and Delivered to the Defendant by the Teſtator in the Year 1688; that within three Years now laſt paſt (ſo more then ſix Years had elapſed ſince the Cauſe of Action had accrued) the Defendant promiſed, if the Plaintiff could prove his Debt, he would pay it; and whether this Evidence proved the Iſſue for the Plaintiff, *Holt* C. J. doubted at the Trial, and directed the Matter to be moved for the Opinion of the Court. And it was agreed by the whole Bench, that if a Man is indebted to another, and ſix Years elapſe afterwards, and then the Defendant promiſes Payment and acknowledges the Debt within ſix Years before the Action brought, Evidence of ſuch Promiſe and Acknowledgment is good to maintain an Action, where *Non Aſſumpſit infra ſex annos* is pleaded; but if a Man after the ſix Years acknowledges the Debt, but does not promiſe the Payment, it ſhall not charge him; by *Rokeby* J. But *Holt,* C. J. ſaid, that it had oftentimes been held that an Acknowledgment of the Debt without Promiſe of Payment by the Defendant was ſufficient to

charge him, and this he thought was good Law, but that it had been held otherwiſe alſo; and it was agreed by the Court, that if the Plaintiff had declared upon a ſpecial Aſſumption, *viz.* that his Teſtator having ſold ſuch Merchandize to the Defendant, the Defendant, in conſideration that the Plaintiff could prove the ſaid Debt, promiſed that he would pay and content the Plaintiff the ſaid Sum of Money, and had averred that his Teſtator had ſold the Goods; the Defendant upon ſuch ſpecial Declaration would have been chargeable, and the Plaintiff in ſuch a Caſe needs only to alledge that the Teſtator had ſold, for the Proof of the Debt will be brought in in the ſame Action. But the Doubt was upon ſuch a conditional Promiſe after the Action was barred by the Statute, whether that ſhould give an Action founded upon the firſt Contract; if it had been made before the ſix Years had been paſſed after the firſt Contract, *Holt* C. J. thought it would have been ſufficient although ſix Years had paſſed before the Action commenced; but here ſeems a Diverſity, for the Action is gone before this conditional Promiſe is made. *Sed adjornatur.*

And now *Holt* C. J. ſaid that he had talked with all the Judges of *England*, and that ten of them upon Conſideration agreed that ſuch a Parlance, as *prove it due and I will pay you*, after ſix Years elapſed, was ſufficient Evidence for the Plaintiff to maintain his Declaration, upon *Non Aſſumpſit infra ſex annos* pleaded. For the Defendant here makes an expreſs Promiſe *I will pay you*, but it is conjoined with this Condition *prove it due*; ſo he expreſly promiſes Payment upon Proof of the Debt, which Proof may be made in the ſame Action. And they all agreed alſo, that if a Man acknowledges a Debt after ſix Years elapſed, it is good Evidence of an *Aſſumpſit*, upon *Non Aſſumpſit infra ſex annos* pleaded, for the Jury to find a Verdict for the Plaintiff, but it is not a Matter upon which, if it were found ſpecially, the Court will give Judgment for the Plaintiff. And *Rokeby* reſembled it to the Caſe 10 *Co.* 57. *a.* Demand and Refuſal is Evidence of a Converſion, but if it is found ſpecially, the Court cannot adjudge it to be

be a Converſion; ſo this Term Judgment was given for the Plaintiff.

De Term. Sanct. Hill. 10 & 11 W. 3.

THIS Term Sir Henry Gould, *Knt. Serjeant at Law, received Letters Patent to be a Judge of the Court of King's Bench, in which Office he ſucceeded Sir* Samuel Eyre, *Knt. who in the Summer Aſſiſes died upon the Circuit.*

DE Termino Paſch.

11 Will. III. in B. R.

The Governors of the Bank of England and *Newman.* Caſe 37.

ASSUMPSIT for Money lent; and upon Motion for a new Trial, the Caſe appeared to be this: One *Bellamy* gives his Bill of Exchange to *Newman*, payable to him or Bearer on the 1ſt of *April* enſuing; before the 1ſt Day of *April* *Newman* diſcounts the Bill with the Governors of the Bank, who ſent the Bill after the Day to *Bellamy*, and he acknowledged it, but it was not paid; on the 8th of *June* enſuing, before Payment of the Bill, *Bellamy* becomes inſolvent; for which Reaſon the Bank came upon *Newman*, and brought this Action; and a Verdict was found at *Guild-Hall* for the Plaintiff. But the Court granted a new Trial for two Reaſons; Firſt, For that the Bank having diſcounted the Bill with Allowance, it was a Purchaſe in them of the Bill. Secondly, The Bill was not received at the Day when the Bill was good, and *Bellamy* ſolvent, which Delay was Laches in the Bank.

Bill of Exchange, where the Receipt of it ſhall be tantamount for the Receipt of the Money.

DE
Term. Sanct. Trin.
11 Will. III. in B. R.

Caſe 38.
Vide 1 Salk. 15.
An Action lieth not for a general Nuſance where a particular Damage to the Plaintiff is not laid.

Iveſon and *Moor.*

ACTION upon the Caſe. The Plaintiff declares that he was poſſeſſed of two Coal Mines in *B.* and had provided a large Stock of Coals, and the Defendant *malicioſe intendens proficuum carbonum præd' totaliter perdere & deprivare altam Regiam viam per quam emptores Carbonum in Carbonar' præd' carriare præd' carbones ire & tranſire uſi fuerunt cum lapidibus obſtupavit, per quod* the Plaintiff loſt divers Cuſtomers, who *Carbones præd' emere voluerunt & præd' carbones multum damnificati & depretiati fuerunt ad damnum, &c.* Upon Not guilty pleaded and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action was not well brought. And after Argument at the Bar, the Caſe was ſolemnly argued by the Bench; and *Turton* and *Gould* Juſtices, were of Opinion that Judgment ſhould go for the Plaintiff, and it was granted by them, that for a general Nuſance an Action of the Caſe lay not, but here is a ſpecial Damage alledged. The only Queſtion is, Whether this ſpecial Damage is ſufficiently alledged in that which follows the *per quod*, where it is not ſaid what Cuſtomers the Plaintiff had in certain, or that he had any Cuſtomers at all? And it was held by thoſe two Juſtices that the Damages were well alledged after the *per quod, &c.* and that there was ſufficient Certainty, for there is no need of more Certainty than what is ſufficient to ſhew that the Plaintiff is damnified. In an Action upon

the Caſe for diverting the Water-Courſe of a Mill, *per quod proficuum molendini ſui amiſit*, this ſufficeth without an Allegation that he had any Cuſtomers who would have ground at his Mill; and *Gould* J. took a Diverſity between ſuch Caſe where the Damage accrues by one particular Act, (for there it ought to be alledged with Certainty) and where by divers Acts, for in the laſt Caſe there cannot be any ſuch Certainty; as here the Plaintiff cannot well know what Cuſtomers he loſes, and perhaps did not know all his Cuſtomers, and cited a Caſe between *Baker* and *Moor*, *Hill.* 8 *W.* 3. *rot.* 316. in *C. B.* where it was held that the Plaintiff need not aſſign in Certain what Perſons could not come to his Houſe, for the Plaintiff declared that he had a Houſe and a Way to it, which the Defendant ſtopped up, *per quod* the People could not come to his Houſe, *&c.* but for another Reaſon, Judgment in that Caſe was given for the Defendant; and he cited 2 *Jones* 156. *Hob.* 284. 2 *Cro.* 510. And *Gould* J. was of Opinion with the Plaintiff for another Reaſon, which was, becauſe this Action was againſt a Wrongdoer, and compared this Caſe to thoſe of *St. John* and *Moody* and *Stroud* and *Birt.* (*Vide ante*). But if this Declaration would not have been good upon Demurrer, yet it was held by both of them that the Verdict had aided it; and many Caſes were cited where a Verdict had aided Things not certainly expreſſed. *Allen* 22. 1 *Leon.* 236. 1 *Roll.* 63. 1 *Vent.* 13. 2 *Vent.* 114. But by *Holt* C. J. and *Rokeby* J. Judgment in this Caſe ought not to be for the Plaintiff, by Reaſon that for a general Nuſance an Action upon the Caſe lieth not, (as it is granted) and the Offence here is a general Nuſance; and, as *Holt* C. J. ſaid, the Offence being in the Highway, that made it a general Offence, and although the Plaintiff inhabits near the Highway, yet it does not give him a Property in ſuch Way; and in all the Caſes where an Action upon the Caſe lieth the Plaintiff hath a Property, as in the Action for diverting the Water-Courſe to a Mill, the Plaintiff had a Property in the Water-Courſe; ſo in the Caſe between *Baker* and *Moor*, that was a private Way in which the Plaintiff had Right; and he cited 3 *Cro.* 664. 2 *Saund.* 115. And *Rokeby* J. ſaid the Reaſons why an Action lieth not for a general Nuſance are, firſt, becauſe the King is intruſted with the

the Remedy for a general Nuſance. Secondly, For the Avoidance of Multiplicity of Suits. But it is objected that here is a ſpecial Damage, which was denied by *Holt* and *Rokeby*, for the Damage in general was done in the Highway; and as the Plaintiff ſuſtained Damage, all thoſe who paſs that Way have Damage alſo; the Plaintiff may have more Inconvenience, but hath no other Damage but what is common to others. In an Indictment for a Nuſance in the Highway, it is laid *Ad commune nocumentum omnium per viam illam euntium & tranſeuntium*; and the preſent Caſe is, that the Defendant had made an Annoyance to all that paſs in the Way where he had thrown down his Rubbiſh; the Plaintiff hath not any particular Damage. And *Holt* C. J. ſaid, that the Damage on which an Action is founded in ſuch a Caſe, ought to be one peculiar and extraordinary Damage. And *Rokeby* J. ſaid, that it ought not only to import a Damage but a Tort alſo; and as to the Caſe 27 *H.* 8. where a Man had a Houſe on the one Side of the Highway and Land on the other Side, and had not any Paſſage from his Houſe to his Land, but only croſs the ſaid Highway, there the Highway being ſtopped, *Fitzherbert* held that he might have an Action, but *Baldwin* was of a contrary Opinion; and *Holt* C. J. ſaid, that the Law hath been according to the Opinion of *Baldwin* ever ſince, and denied the Caſe 2 *Jones* 156. to be Law as it is there reported; and theſe two judges agreed that if an Action were maintainable, the Declaration here is not ſufficient, for the Damage ought to be certainly alledged, that the Court may Judge in what the particular Tort and Damage conſiſt; if the Declaration had ended at *per quod*, it had not been ſufficient, then the Allegation afterwards is not ſufficient, for the Cuſtomers are uncertain and not known. And *Holt* C. J. denied the Caſe 1 *Roll's Abr.* 63.

Caſe 39. *Juxon & Ux'* and *Naylor*. In B. R.

Amendment, where it ſhall be.

A *Fieri facias* bore Teſte on a Day out of Term, and whether it was amendable, or not, was the Queſtion; and it was granted, that a Writ of Enquiry is amendable, *Godb.* 78. for there is the Roll by which it may be amend-

ed; ſo a *Venire facias, &c.* for there is an Award by which it may be amended, and in the preſent Caſe the Court would amend the *Fieri facias* if it could; but there is no Award upon the Roll for the *Fieri facias* by which the Amendment can be made.

The King and *Harris.* In B. R.

Caſe 40.

AN Indictment upon the Statute of 8 *H.* 6. for a Forcible Entry, was found before the Juſtices of the Peace, but no Reſtitution was awarded at the Time of the Conviction, but at the End of two Years and a half Reſtitution of the Poſſeſſion upon this Indictment was awarded to the Party ouſted; and now upon a Motion (after Deliberation) Reſtitution was granted by the whole Court; for as the Indictment was found, Reſtitution ought to have been awarded immediately, for the Intent of the Statute was to give a preſent Remedy, and for that Reaſon does not delay it till the Quarter-Seſſions, but impowers a private Juſtice to put the Act in Execution; but if he does not reſtore the Party ouſted, he does not put the Act in Execution as required. And *Holt* C. J. grounded his Opinion upon 8 *Co.* 120. *Bonham*'s Caſe towards the End: If a Man is Impriſoned upon the Statute of 14 *H.* 8. by the Cenſors of the College of Phyſicians, he ought to be committed immediately, and there it is ſaid that the Juſtices of the Peace upon their View ought to commit the Offenders immediately, and for the ſame Reaſon ought they upon 8 *H.* 6. to make Reſtitution immediately.

Reſtitution ought to be made immediately upon a Conviction of a Forcible Entry.

DE
Term. Sanct. Hill.
11 Will. III. in B. R.

Caſe 41.
Vide 1 Salk. 232.
Remainder, when it is contingent, and when it veſts.

Badge and *Floyd.*

THE Caſe was this: *John Floyd* ſeiſed of the Land in Queſtion in Fee, upon the Marriage of his Son ſettles it to the Uſe of himſelf for Life, afterwards to the Uſe of *John* his Son for ninety-nine Years, if he ſo long lived, afterwards to the firſt, ſecond, third and fourth Iſſue of *John* the Son in Tail Male; Remainder to the Heirs Male of the Body of *John* the Son; Remainder to *John* the Father, and the Heirs Male of his Body; Remainder to the right Heirs of *John* the Father: Afterwards *John Floyd* the Father makes his Will, and thereby deviſes, (he having Iſſue *John* the Son by one Venter, and three Sons by another Venter, *viz. Thomas, Paul* and *Peter*,) that the ſame Land, after the Death of *John* his Son without Iſſue Male, ſhould go to *Thomas* his Son, and the Heirs Male of his Body; and if *Thomas* ſhould die without Heirs Male of his Body, to *Paul* and the Heirs Male of his Body; and if *Paul* ſhould die without Heirs Male of his Body, his Brothers then not being living, then to *Peter* and the Heirs Male of his Body; then takes Notice, that he would have the Eſtate continue in his Name and Poſterity; but if there ſhould be no Heirs Male, then he limits it to the Heirs Female, *&c.* In the Year 1669 *Paul* dies without Iſſue; in the Year 1674 *Thomas* dies and leaves Iſſue, under whom the Defendants claim; in the Year 1679 *Peter* dies, having Iſſue the Leſſor of the Plaintiff; in the Year 1684 *John* dies without Iſſue, but had firſt ſuffered a Reco-

very to the ſame Uſes as are limited by the Will; this ſeemed to be the Effect and Subſtance of the Caſe; in which the Queſtion was between the Son of *Peter*, the Leſſor of the Plaintiff, and the Aſſignees under *Thomas*. And *Holt* C. J. gave Judgment for the Plaintiff, and delivered the Opinion of the whole Court for the Plaintiff. And the firſt Queſtion was, whether the Remainder limited to *Peter* was a Contingent Remainder, or a Remainder veſted? If it were a Contingent Remainder, Judgment would have been for the Defendant. And it was objected from the Bar, that the Remainder to *Peter* was contingent, for that the Words limit it to him after the Death of *Paul* without Iſſue Male, his Brothers then not being living; ſo that *Peter* was not to have the Land if his Brothers were living, when *Paul* died without Iſſue. But the Court held this to be a Remainder veſted; for the Words [his Brothers then not being living] are no more than a Repetition of what was before expreſſed; the Deviſe was to *Thomas* and the Heirs Male of his Body, then to *Paul* and the Heirs Male of his Body, then to *Peter* and the Heirs Male of his Body; ſo that *Peter* could not take if his Brothers were living, for *Thomas* and *Paul* muſt be dead before the Eſtate could come to *Peter*; then though it be expreſſed in direct Terms, that *Peter* ſhall not have the Eſtate, but only after the Death of *Paul* without Iſſue, his Brothers then not being living, which was implied, (for the Eſtate of *Thomas* and *Paul* could not be determined during the Time that they were living,) ſuch Expreſſion or Repetition of Words which were contained in the prior Limitations ſhall not make the Remainder to *Peter* to be contingent; then ſuppoſe the Remainder to *Peter* were upon a Contingency, when *Paul* died without Iſſue Male, his Brothers then not being living, the Contingency would have happened, and the Eſtate of *Peter* ought then to veſt: But put the Caſe, that *Thomas* had died leaving a Son, and *Paul* had then died without Iſſue, the Brothers of *Peter* then not being living; if ſuch Conſtruction be made, that the Eſtate of *Peter* then would have veſted, Violence would be done to the firſt Words of the Will, which give an Eſtate to *Thomas* and the Heirs Male of his Body; but the Eſtate of *Thomas* did not determine during the Life of his Son, and yet the Eſtate of *Peter* commenced in the

Life

Life of the Son of *Thomas*; if it was to commence when the Contingency happened, ſo as to make the Eſtate of *Peter* to commence upon a Contingency, this would contradict the expreſs Limitation and Words in the former Part of the Will. Beſides, the Intent of the Teſtator appears to be, that the Eſtate ſhould continue in his Name and Poſterity; and by ſuch Conſtruction, as makes this to be a Contingent Remainder, it might happen that the Heirs Female, who are not of the Name of the Deviſor, might inherit before the Heirs Male are extinct (for the Limitation is to the Heirs Female in the laſt Clauſe of the Will): As put the Caſe; *Peter* having a Son and a Daughter, *Paul* dies without Iſſue, *Thomas* ſurviving, who afterwards dies without Iſſue; here the Contingency does not happen; for *Thomas* was alive when *Paul* died without Iſſue, and ſo the Limitation to *Peter* and his Heirs Male will never take Effect, contrary to the expreſs Intent of the Deviſor. And *Holt* C. J. cited *Cro. Car.* 185. *Spalding* and *Spalding*, which is an expreſs Authority in Point; there a Man had three Sons, and deviſed Lands to *John* and the Heirs of his Body, after the Death of *A.* and other Lands to *William* and the Heirs of his Body, and other Lands to *Thomas* and the Heirs of his Body; and if *John* died during the Life of *A.* then his Land to go to *William*, *&c.* *John* did die in the Life-time of *A.* but left a Son of his Body; and it was reſolved, that *William* ſhould not have the Land; becauſe *John* did not die without Iſſue; for by the Limitations to the other Sons it appears that the Deviſor intended an Eſtate-tail to all of them, and it was not to be conſtrued a Contingent Remainder, or Limitation to *John*, to abridge the expreſs Limitation to him of an Eſtate-tail. So when a Man deviſed his Houſe after the Death of his Wife to his Son, then as follows, " And if my three Daughters, and either of them, " over-live their Mother and Brother, and his Heirs, then " they to have it, and after them *J. W.* and *R. W.* *&c.* and whether this was a Contingent Eſtate, and whether it were performed, two of the Daughters dying in the Life-time of their Brother, were the Queſtions? And it was reſolved, that this was no Limitation Contingent, but ſhews when it ſhall commence. 2 *Cro.* 416.

But an Objection was made by *Wright* Serj. That here was an executory Deviſe to *Thomas* and his Heirs Male, to commence after the Death of *John* without Iſſue Male, and therefore it is void; for the Limitation made by the Teſtator is this, "After the Death of my Son *John* without Heirs Male "of his Body, I give the ſaid Lands to *Thomas* and the Heirs "Male of his Body, *&c.*" ſo that *Thomas* could have no Eſtate until *John* was dead without Iſſue Male. And it was agreed by the Court, that if a Man ſeiſed in Fee in Poſſeſſion deviſes his Land to another after the Death of *A.* without Iſſue, it is a void Deviſe; for the Law will never expect ſuch a remote Contingency, as the Death of another without Iſſue, and therefore the Deviſe upon ſuch a Contingency is void: But here is not an executory but a preſent Deviſe; for *John Floyd* the Father was ſeiſed in Fee of the Reverſion after the Death of *John* his Son without Iſſue Male, which Reverſion he had Power to diſpoſe of by his Will; then as he deviſed that to *Thomas* and the Heirs Male of his Body, after the Death of *John* without Iſſue Male, ſuch Deviſe was an immediate Deviſe, which was then veſted in the Deviſee; and the Words [after the Death of my Son *John* without Heirs Male of his Body,] only ſhew when the Deviſe ſhall take Effect in Poſſeſſion. And he compared it to the Caſe 10 *Co.* 107. A Leaſe was made for ninety-nine Years, if the Leſſee ſo long lived; and afterwards the Leſſor granted the Land demiſed to another for Life, *Habendum* after the Death, Surrender or Forfeiture of the Leſſee; this was adjudged a good Grant for Life, and the *Habendum* only ſhewed when it was to come into Poſſeſſion. It was alſo objected by *Wright* Serj. that here *John Floyd* the Father had but an Eſtate-tail, and ſo could not make a Deviſe of it; for by the Marriage Settlement the Eſtate was limited to *John* the Elder for Life, then to *John* the Son for ninety-nine Years determinable on his Life, then to the firſt, ſecond and third Son of *John* the Son in Tail Male; then to *John* the Son and the Heirs Male of his Body; Remainder to *John* the Father, and the Heirs Male of his Body; Remainder to the right Heirs of *John* the Father; ſo *John* the Father was ſeiſed for Life, with a Remainder to him in Tail Male, the Remainder to him in Fee,

and by Conſequence the Deviſe made by him was void. And it was agreed by the Court, that if *John* the Father had no more than a Remainder in Fee, his Deviſe would be void; for he would have given no Eſtate by the Will, but what the Deviſees would have had by Force of the Eſtate-tail; for upon the Death of *John* the Son without Iſſue Male, by Force of the Eſtate limited to *John* the Father in Tail Male, the Land would deſcend to *Thomas* and the Heirs Male of his Body, then to *Paul* and the Heirs Male of his Body, then to *Peter* and the Heirs Male of his Body, in the ſame Manner as it is deviſed to them, and afterwards to the Heirs General of the Deviſor; then they would not have taken by the Will, but by Deſcent. But in this Caſe *John* the Father had not the Fee in him by Way of Remainder, but it was in him as his old Reverſion; then as he deviſed that to *Thomas* and the Heirs Male of his Body, *Thomas* had an Eſtate-tail *hors* the Reverſion; for when a Man creates an Eſtate-tail, the Tenant in Tail holds of him in the Reverſion, who holdeth of the Lord paramount; and therefore after this Deviſe *John* the Son ſhould hold of *Thomas*, to whom the Reverſion was deviſed; and if the Lord avow, he ought to avow upon *Thomas* as his true Tenant, and not upon *John*; and for the Reaſon, that the Deviſor had the Reverſion in him, and not the Remainder, the Deviſe is good. And this Diverſity between a Reverſion and Remainder is agreed 2 *Co.* 51. *a.* If there be Tenant in Tail, Remainder in Tail, and he in the Remainder grants his Eſtate during the Life of the Tenant in Tail, the Grant is void; for his Grantee cannot have any Benefit by it; but if there be Tenant in Tail, Reverſion in Fee, and he in the Reverſion grants his Eſtate during the Life of the Tenant in Tail; this is good, for the Grantee ſhall have the Services which the Tenant in Tail ought to perform; but if the Will could not ſtand with the Rules of Law, the Recovery ſuffered by *John* the Son, being to the ſame Uſes as the Deviſe, will make the Eſtate good to the Leſſor of the Plaintiff. And therefore Judgment was given for the Plaintiff.

Gage and *Acton*. 9 *Will.* 3. *rot.* 293. In B. R.

Caſe 42. Vide 1 Salk. 325. Carth. 511.

Where Marriage ſhall diſcharge a Bond to a Feme Obligee.

DEBT for Rent againſt the Defendant as Adminiſtratrix due in the Life-time of the Inteſtate. The Defendant pleaded, that the Inteſtate in his Life-time entered into an Obligation to her of 2000 *l.* when ſhe was Sole, which was not yet ſatisfied, and that ſhe had not Aſſets *præter, &c.* which ſhe retained for the Debt upon that Obligation. And upon the whole the Caſe appeared to be, that the Inteſtate entered into an Obligation to his Wife *dum ſola* in her own proper Name; the Condition of which was, that if the Inteſtate, with whom a Marriage was then intended by the Defendant, ſhould leave her worth at the Time of his Deceaſe the Sum of 1000 *l.* in Goods and Chattels, or if his Executors or Adminiſtrators ſhould pay her 1000 *l.* within ſix Months after his Deceaſe, then the Obligation to be void. Afterwards the Obligor and Obligee intermarried, the Husband died, and the Wife took out Adminiſtration; and to the Action brought for Rent on Leaſe due from the Inteſtate, the Defendant pleaded Retainer to ſatisfy this Obligation. And the Queſtions were two; Firſt, Whether an Adminiſtrator could plead a Retainer for Debt upon a Bond to an Action of Debt for Rent? Second, Whether the Obligation was not diſcharged by the Intermarriage of the Obligor and the Obligee? As to the firſt Queſtion the whole Court agreed, that an Executor or Adminiſtrator might plead a Retainer for Satisfaction of a Debt on Bond to an Action of Debt for Rent, for they are of equal Degree; and then a Man may retain for the Satisfaction of a Debt due to himſelf againſt another Debt not being of an higher Nature; and ſo *econtra*, a Man may retain a Debt due for Rent againſt an Action for a Debt on Bond; but the Caſe of *Godfrey* and *Newport*, 2 *Vent.* 184. is good Law; for if an Action be brought for Rent due from a Teſtator, the Executor ſhall not plead a Bond made by him not yet ſatisfied, nor *econtra*; for being of an equal Degree, one cannot be a Bar to the other; and in ſuch Caſe there is no Difference

rence between Rent due upon a Leaſe by Parol and a Leaſe by Indenture; for in both Caſes the Rent is of the ſame Quality, and the one may be retained againſt a Debt due upon Bond, as well as the other. [*Vide* the Caſe *Paſ.* 5 *Ann. in C. B.* between *Stonehouſe* and *Ilford* accordant.] As to the other Point, it was reſolved by *Turton* and *Gould* Juſtices, that the Marriage in this Caſe was not a Diſcharge of the Obligation. *Gould* J. admitted, that the Feme before Marriage might have releaſed the Obligation; and that by the Marriage ſhe made a Releaſe or Extinguiſhment of all preſent Contracts to be performed *in futuro*, *in præſenti*, or upon a Contingency: But they ſaid, that here was not any Thing to be performed during the Coverture; and the Obligation could not be ſued during the Coverture, then the Marriage muſt be only a Suſpenſion, and not an Extinguiſhment of the Debt due by Virtue of the Obligation; for it does not become due till after the Death of the Husband; the Condition is Parcel of the Obligation, and by the Condition it appears, that nothing is due until after the Death of the Husband, and the Obligation cannot be put in Suit until the Condition is broken. 28 *H.* 8. 31. Beſides, here it was the expreſs Intent of the Parties, that the Obligation ſhould be of Force after the Death of the Husband; the Marriage is mentioned in the Condition, and *Modus & conventio vincunt legem.* And this is not like the Caſes which make the Marriage to be a Releaſe of a Debt, and which are founded upon an abſolute Contract, for here the Contract is qualified; and they relied upon the Caſes 26 *H.* 8. 7. *b.* If a Man gives Bond to his Wife when Sole, and they marry, and are afterwards divorced; Debt lies after the Divorce. A Man promiſes a Woman, that if ſhe ſurvives him he will leave her 100 *l.* and afterwards they intermarry, and the Wife ſurvives; ſhe ſhall recover in *Aſſumpſit* againſt the Executor of the Husband, for the Law will not make a Releaſe againſt the Intent of the Parties; and the Marriage, which was the Cauſe, does not deſtroy the Promiſe created by it. *Hob.* 24. *b.* *Hutt.* 17. And altho' *Hobart* differed in Opinion, yet he agreed, that an Obligation ſhould be in the ſame Caſe as a Promiſe; and in Caſe of ſuch a Promiſe, it was alſo reſolved, that the Marriage is not

a Releaſe; and this was affirmed in the Exchequer-Chamber. 2 *Cro.* 571. In every Caſe Marriage doth not releaſe the Action of the Wife; for if a Man marries the Executrix of the Obligee, the Action is only ſuſpended, not releaſed, for after the Death of the Husband it revives. But *Holt* C. J. *contra* ſtrongly; who ſaid, that the other Judges termed this a qualified Contract, plainly contradicting the Text of *Littleton*, who ſays, that an Obligation with a Condition future is *debitum in præſenti*, tho' payable at a future Day, and may be releaſed by the Words "All Demands"; and the Words of the Lien are in the preſent Tenſe, *cognovit ſe teneri*, and not in the future, and for that Reaſon the Marriage is a Releaſe. For firſt, A Man cannot be indebted to his Wife. Secondly, As by the Condition the Payment is not required during the Coverture, yet an Obligor may pay before the Condition is forfeited; and the Husband in ſuch a Caſe might pay the Penalty in Diſcharge of his Obligation before the Day, but he cannot pay it to his Wife. 11 *H.* 4. 40. Thirdly, Marriage is an actual Payment; for if a Stranger was bound to the Woman, Payment to her after Coverture would not have been lawful Payment, but it ought to have been made to the Husband. Fourthly, The Husband acquired it by the Marriage; for if a Stranger had been bound to the Wife, the Husband might have releaſed it; and he ſaid, that the Caſes cited do not warrant the contrary Opinion; the Marriage of the Obligor with the Executrix of the Obligee is not a Releaſe, becauſe ſhe had it *in auter droit*, to the Uſe of the Teſtator; and for this Reaſon, if a Man poſſeſſed of a Term either as Executor, or in Right of his Wife, purchaſes the Inheritance, the Term is not merged; otherwiſe if he were poſſeſſed of the Term in his own Right. Where the Man and his Wife were divorced, as the Caſe was 26 *H.* 8. the Marriage was avoided; and he ſaid, that he agreed to the Caſes 2 *Cro.* 571. *Hob.* 216. But there is as much Difference between thoſe and the preſent Caſe, as there is between a Condition precedent and ſubſequent; for though the Promiſe is made *in præſenti*, yet the Action or the Duty thereupon is future and contingent, and until a Breach happens no Action or Duty ariſes; but in an Obliga-

tion the Lien or Duty is immediate; and if ſuch a Promiſe had been made by a Stranger, the Husband could not have releaſed it, for no Poſſibility of a Duty was accruant to the Haſband. But if the Wife had a future Right, which by Poſſibility might happen during the Coverture, there the Husband might releaſe, becauſe of ſuch a Poſſibility; and as to what was advanced, that the Intent of the Parties was accordant, the Intent of the Parties ought not to change the Efficacy of lawful Acts; therefore he was of Opinion for the Plaintiff. But the other Judges for the Defendant.

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DE

Termino Paſch.

12 Will. III. in B. R.

The King and *The Inhabitants of Chalbury.* Caſe 43.

UPON a *Certiorari* the Caſe appeared to be this: An Order was made for the Removal of a *Pauper* by two Juſtices of *Warwickſhire* to *Chalbury* in *Oxfordſhire*, which Pariſh did not appeal to the Order, but obtained another Order of two Juſtices to remove the *Pauper* from *Chalbury* to *Farringdon* in the County of *Berks*; and now it was moved to quaſh the ſecond Order. And *Holt* C. J. and *Gould* were of Opinion that the ſecond Order was ill, as thereby the Party was removed to a new Pariſh; for *Chalbury* not appealing to the Order made by the Juſtices of *Warwickſhire*, who ſent the *Pauper* to them as to the laſt Place of Settlement, is concluded from ſaying that *Farringdon* is the laſt Place of Settlement, for if it were, *Chalbury* would have the Advantage of it upon the Appeal. But *Turton* doubted, and it was adjourned.

Order of Removal not appealed from concluſive to all the World.

Aſhmede and *Ranger.* *Trin.* 11 *W.* 3. *rot.* 752. In B. R. Caſe 44.

Vide 2 Salk. 638.

TReſpaſs *Quare clauſum fregit & arbores ſuccidit.* The Defendant pleaded *Son frank Tenement*; the Plaintiff replied that the Land was Copyhold granted to him and his Heirs in Fee; that by Cuſtom a Copyholder ſhall have Timber for Repairs; that his Tenement wanted to be repaired, and

If a Lord of a Manor cut down Trees where a Copyholder may take them for Repairs, Treſpaſs lieth.

and that there was not ſufficient Timber for Repairs. To which it was demurred; and *Northey* argued that the Lord of a Copyhold may cut down the Trees without a Cuſtom allowing him ſo to do, for the Copyholder is but a Tenant at Will, and cannot cut down Trees but for neceſſary Repairs, and conſequently the Lord may cut them down, otherwiſe Nobody can have the Benefit of them. But in this Caſe where the Copyholder by Cuſtom may fell for Repairs, if the Lord take ſo many Trees as not to leave ſufficient for Repairs, perhaps an Action of the Caſe lies, but not Treſpaſs. But the Court thought that the Lord could not without Cuſtom cut down the Trees of his Copyholder, and if he did ſo, Treſpaſs would lie againſt him for it.

Caſe 45. Vide 1 Salk. 241. Where the ſame Eſtate is deviſed to a Man which he would have taken by Deſcent, he ſhall be in by Deſcent, notwithſtanding the Poſſibility of a Charge.

Clarke and *Smith.* In C. B.

EJectment. Upon Not guilty pleaded a ſpecial Verdict was found to this Effect. A Man ſeiſed in Fee deviſes Land to his Wife for Life, and after her Deceaſe to his next Heir at Law and to his or her Heirs; provided ſuch Heir ſhould pay 100 *l.* to ſuch Perſon or Perſons as his Wife by Will or other legal Writing ſhould appoint, and his Land ſhould ſtand charged with the ſaid 100 *l.* The Deviſor dies, and left a Daughter who had one Son and died. The Wife dies without making any Appointment to whom the 100 *l.* ſhould be paid; the Son of the Daughter enters and dies without Iſſue; and the Diſpute was between the Heir Maternal of the Son who brought the Ejectment and the Heir Paternal who was the Defendant (the Son being Dead without Iſſue); therefore whether the Son took by the Will [*i. e.* by Purchaſe] or by Deſcent, was the Queſtion. And it was reſolved by the whole Court, that Judgment ſhould be for the Plaintiff, for the Heir took by Deſcent, and not by the Will; and it would be miſchievous if every little Legacy ſhould alter the Courſe of Deſcent, upon which the Heir might plead to the Obligation of his Anceſtor *Riens per Deſcent*; and here the Legatee would have had no Prejudice, and the Land was charged in the ſame Manner as if Conſtruction were to be made that the Heir ſhould take by Purchaſe,

chaſe, and the Legatee would have the ſame Remedy in Chancery. And *Treby* Chief Juſtice ſaid that this Proviſo makes neither a Condition nor a Limitation; not a Condition, for the Deviſe is to the Heir; not a Limitation, for the Wife might make an Appointment to a Perſon not capable, and the Intent was not that ſuch Perſon ſhould have the Land, for it is deviſed to the Heir; and this Reſolution is warranted by the Caſes 1 *Roll.* 626. 3 *Leon.* 64. And *Gilpis*'s Caſe 1 *Cro.* 161. That if a Man deviſes Land to his Heir in Fee upon a Condition, his Heir ſhall take by Purchaſe, and the Opinion 2 *Mod. Rep.* by two Judges, that if a Man deviſes Land to his Heir, paying 20 *l.* the Heir ſhall take by the Will and not by Deſcent, are unintelligible and ill reported. For if a Man deviſes Land to his Heir charged with a Rent iſſuing out of it, the Son ſhall take by Deſcent. Judgment for the Plaintiff.

DE
Term. Sanct. Trin.
12 Will. III. in B. R.

Caſe 46.

Anonymus.

Plaintiff ought to pay the Coſts of one Nonſuit only, where a *Latitat* was awarded againſt the Defendants, though they appeared ſeverally by different Attornies, where the Nonſuit was for not declaring againſt them in two Terms.

A *Latitat* was awarded againſt four Defendants, who were arreſted thereupon, and gave their Appearances ſeverally by different Attornies, and afterwards the Plaintiff was nonſuited by every one of them ſeverally, for not declaring againſt them in two Terms, and 30 *s.* Coſts awarded to every one of the four Defendants; but it was held ill: For by *Holt* C. J. though the Plaintiff might declare againſt them ſeverally, yet as the Writ was awarded againſt them jointly, and the Plaintiff was nonſuited before any Declaration, there ought to be but one Nonſuit for all of them.

Caſe 47.

Day and *Snelgrave.* In B. R.

Prohibition ſhall go to the Admiralty in a Suit for the Wages of a Maſter of a Ship.

A Prohibition to the Admiralty was moved for, for that the Libel there was againſt a Ship for Wages due to the Maſter; and it was ſuggeſted, that the Wages of the Maſter accrue upon a Contract within Land. *Northey contra*; That the Maſter is but a Mariner, and the Ship is liable for his Wages; and that no Prohibition will lie for them in the Caſe of a Maſter, no more than in the Caſe of the Mariners; at leaſt the Party who prays a Prohibition ſhall be compelled to give ſpecial Bail to the Action here. But the Court thought that a Prohibition ſhould go; for a Libel there is allowable for the

Wages of the Mariners only, and not of the Maſter. *Raym.* 3. And if a Prohibition ought to be granted *ex debito juſtitiæ*, the Court will not compel the Party to find ſpecial Bail, if it is not conſented to.

Preſgrave and ——. In B. R.

Caſe 48.

IN an Information or Action upon a penal Statute, brought by a Perſon *Qui tam, &c.* the Defendant need not find ſpecial Bail, if it is not upon the Statute of 11 & 12 *Will.* 3. for an Offence in the Exportation of Wool; and then not only the Penalty, but the Cauſe of Action ought to appear in the Writ, and the Defendant ought not to be arreſted upon a general *Latitat* with an *Ac etiam billæ, &c.*

Special Bail need not be given in an Information or Action *Qui tam* on a penal Statute.

Gregory and *Walcup*. In B. R.

Caſe 49. Vide 1 Salk. 129.

ACTION upon a Bill of Exchange; and the Plaintiff declared, that one *Milburn* drew a Bill of Exchange upon *George Walcup* in *London*, to be paid to the Plaintiff's Order at double Uſance at *Amſterdam*, (and the Bill was dated the 26th of *October* 1699. and by that the double Uſance expired the 26th of *December*, and by the Cuſtom of Merchants the Perſon upon whom a Bill is drawn hath three Days of Grace for the Payment in *England*, and eight Days of Grace in *Holland*). The Bill was tendred to *Walcup* on the 30th of *December*, who accepted of it, by which he became liable; *& ſuper hoc præd'* (the Defendant) *eiſdem die & anno ſuper ſe aſſumpſit quod ipſe præd' denarios in eadem billa content' eidem G. bene ſolvere & contentare vellet ſecundum tenorem & effectum billæ præd'*. And it was moved that this was ill by Sir *Barth. Shower* and *Dee*; for the Bill was not tendered or accepted until the 30th of *December*, which was the laſt Day for the Payment; then as the Defendant promiſed (as it was alledged) on the ſame Day, according to the Effect of the Bill, it was a Thing impoſſible, for the Payment was to be at *Amſterdam*, which could not be on the ſame Day, and therefore the Plaintiff had not declared well; for he ought to have ſaid,

Bill of Exchange, how it ſhall be accepted.

ſaid, that by the Cuſtom of Merchants, if a Bill was accepted, the Acceptor obliged himſelf to make Payment to the Perſon who tendered it, *&c.* And Sir *Barth. Shower* ſaid, that it was proved at the Trial by a Publick Notary, that if a Man accepts a Bill payable at *Amſterdam*, he ought to aſſign a Houſe where the Money ought to be paid, otherwiſe it is not a good Acceptance, but the Bill may be proteſted; and if this Bill had been tendered within the Term of the double Uſance, and no Houſe for the Payment at *Amſterdam* aſſigned, it might have been proteſted; but after the Uſances were expired, he doubted whether ſuch Proteſts could be made. But it was ſaid on the other Side, and reſolved by the Court, that Judgment ſhould be for the Plaintiff; for the Allegation of any Promiſe for Payment was not needful, for the Acceptance is an actual Aſſumption, and the Declaration need not alledge more; and altho' ſome Houſe where the Money ought to be paid at *Amſterdam* ſhould be named, otherwiſe the Party may proteſt the Bill, yet if it is accepted, the Acceptor becomes liable thereby.

And *Holt* C. J. ſaid, that if a Bill of Exchange is drawn upon a Man, who refuſes it, a Stranger may accept it, for the Honour of the Drawer, and by ſuch Acceptance he becomes liable.

And it was agreed in the ſame Caſe, that a Bill of Exchange, payable to the Order of a Perſon, ſhall be paid to him or his Order, for it is tantamount.

Caſe 50.

Carth. 491. 1 Salk. 396. S. C.

Dr. Groenvelt and *Dr. Burwell and others, Cenſors of the College of Phyſicians.*

Power of the Cenſors of the College of Phyſicians.

ACTION for Treſpaſs in Aſſault, Battery, Wounding and falſe Impriſonment.

The Defendants, as to the Beating and Wounding, plead Not guilty, and as to the Reſidue of the Treſpaſs they juſtify; for that by Letters Patent dated the 23d of *September*

10 *H.* 8. the King granted, that they, *viz.* the Doctors of Phyſick in *London*, ſhould be a Body and perpetual Community, *per nomen Præſidentis & Collegii ſive communitat' facultat' medicin' London', &c.* and that they might make By-Laws; *& quod quatuor ſingulis annis eligerenter qui haberent ſcrutinium, correctionem & gubernationem omnium & ſingulorum dictæ civitatis medicorum & aliorum medicorum forinſecorum facultate illa utentium infra eandem civitatem & ſuburbia, ac infra ſeptem milliaria in circuitu ejuſdem, ac punitionem eorundem pro delictis ſuis in non bene exercendo, &c. per fines, amerciamenta & impriſonamentum corporum ſuorum*; and that theſe Letters Patent were confirmed by an Act of Parliament of 14 *H.* 8. And that the 1ſt of *January* 8 *Will.* 3. the Plaintiff exerciſed the Art of Phyſick in *London*, and that he adminiſtred bad and unwholſome Phyſick to one, and that the ſaid Woman and her Husband complained to the Defendants, being then the Cenſors of the ſaid College; upon which Complaint the Plaintiff was ſummoned before them, and upon Examination they found him guilty in adminiſtring unwholſome Phyſick, by Means of which the ſaid Woman languiſhed; and thereupon they fined the Plaintiff 20 *l.* and made a Warrant under their Hands and Seals to —— who was alſo a Defendant, to take the Plaintiff, who took him purſuant to ſuch Warrant, and conveyed him to Priſon, which is the Reſidue of the Treſpaſs of which the Plaintiff complains. The Plaintiff replies *Proteſtando*, that there are no ſuch Letters Patent, and no ſuch Act of Parliament; and *Proteſtando*, that the Plaintiff did not adminiſter ſuch unwholſome Phyſick; that the Defendants of their own Wrong committed the Treſpaſs; *abſque hoc quod*, that the Plaintiff was taken and committed by Force of the ſaid Warrant: And to this it was demurred. And this Caſe was divers Times argued, and many Exceptions were taken to the Plea and to the Replication; and now this Term Judgment was given for the Defendants. And *Holt* C. J. delivered the Opinion of the Court; and ſaid, that the reſt of the Judges were agreed, that the Replication of the Plaintiff was ill, and that the Plea of the Defendants was good. The Plaintiff in his Replication traverſes the Taking by the Warrant mentioned in the Plea of the Defendants; and this is ill both in Subſtance and in Form; for in Point

of Form he ought not to traverſe the Taking by Force of the Warrant, but that there was not any ſuch Warrant; for if it were neceſſary that the Arreſt of the Plaintiff ſhould be by the ſame Warrant that was mentioned before in the Pleading, then, if the Defendants had ſhewn in their Plea another Warrant than that which was ſhewn at the Time of the Arreſt, the Plaintiff ought not to have ſaid, that he was not taken by this Warrant, but that there was not any ſuch Warrant. But the Replication is not good in Point of Subſtance; for the Plaintiff ſeems to intend, that the Warrant by which he was arreſted was not a good Warrant, for which Reaſon he would take Advantage of it: But admitting that the Warrant upon which the Plaintiff was arreſted was unlawful, yet the Plaintiff ſhall not have Advantage of it, if there was another Warrant which was lawful to take him at the ſame Time; for if there are two Warrants, the one lawful, and the other unlawful, and the Party is taken upon the illegal Warrant, yet he who apprehends him may juſtify himſelf by the Authority of the legal Warrant; and this appears by the Caſe *Mich.* 34 *Ed.* 1. *Fitz. Avowry*, 232. cited 3 *Cro.* 26. *a.* If a Man takes a Diſtreſs for a Thing for which he had not good Cauſe of Diſtreſs, but had good Cauſe of Diſtreſs for another Thing; if a Replevin is brought, and he comes into Court, he may avow for which Thing he pleaſes.

Then it was conſidered, whether the Plea of the Defendants was good; to which it had been objected that it was ill for the Uncertainty; for the Cauſe of the Commitment being traverſable ought to be alledged with Certainty. Secondly, That by the Plea it appears, that the Plaintiff was fined and impriſoned alſo; the Cenſors [of the College of Phyſicians, the Defendants,] have Authority to impoſe a Fine, and to impriſon for Non-payment of that Fine, or they may impriſon for the Offence; but they cannot both fine and impriſon for the ſame Offence, as in this Caſe; for it does not appear that the Impriſonment was for Non-payment of the Fine, but the Plaintiff was both fined and impriſoned, and ſo was twice puniſhed for one Offence. Thirdly, The Plea does not ſhew that the Plaintiff was one of the College. Fourthly, The Plea makes no Anſwer to the Aſſault; it does not ſhew

that there was any Aſſault, or ſet forth any Juſtification of it. But *Holt* C. J. ſaid, that the Court held the Plea to be good, for it goes to the whole Declaration; as to the Battery and Wounding the Defendants plead Not guilty, as to the Reſidue of the Treſpaſs they juſtify; and the Reſidue of the Treſpaſs comprehends the Aſſault, and every other Part of the Declaration to which the Plea (of Not guilty) does not extend: And there is no need that the Plaintiff ſhould be of the College; for it appears that he exerciſed his Faculty within *London*, and the Cenſors have Juriſdiction within *London* and the Suburbs, and ſeven Miles in Circumference; and it appears by the Words of the Charter, that the Cenſors have Power to puniſh by Fine and Impriſonment; and how they exerciſe that Authority we do not inquire, as it will be apparent afterwards in the Anſwer to the firſt Objection, and which is the moſt material one. In Anſwer to the firſt Objection then, we ſay, Firſt, That the Cauſe of the Commitment is not traverſable. Secondly, If it were traverſable, it is ſet forth with Certainty enough. That the Cauſe of Commitment is not traverſable appears by the Authority which the Cenſors have by the Act of Parliament; for by it they are conſtituted Judges of Fact, what is a Male Adminiſtration [of Medicines] and what is not: And they are Judges of Record, for they have Authority to impoſe Fine and Impriſonment; and when a new Authority is conſtituted, with Power to fine and impriſon, the Perſons inveſted with ſuch Authority are Judges of Record; for that very Thing proves a Court to be a Court of Record, *viz.* the Power of Fining or Impriſoning; for Courts which are not of Record can neither ſet a Fine nor commit any one to Priſon. 8 *Co.* 38. *b.* And there it is proved, that the Leet can impoſe a Fine, becauſe it is a Court of Record; and foraſmuch as the Statute *W.* 2. 11. impowers the Auditors to commit the Accountant to Priſon, the Auditors are thereby made Judges of Record; as is obſerved 10 *Co.* 10. 3. *a.* 2 *Inſt.* 218. Then the Cenſors being conſtituted Judges of the Matter, that which they have done as ſuch they ſhall not be anſwerable for; and that a Judge ſhall not be anſwerable for an Act done by him as a Judge, appears by 12 *Co.* 24. and the Caſes there cited. True it is, that if a Juſtice of Peace iſſue his Warrant to impriſon the

the Party, or to arreſt him until ſuch Time as he can be brought before him, or if the Commiſſioners of Bankrupts commit a Witneſs for refuſing to be examined, it may be determined in an Action, whether they have purſued their Authority or not; for their Act in this Reſpect is only miniſterial; and the Commitment is not intended as a Puniſhment, but only as a meſne Proceſs to bring the Party to Juſtice, or to make him do his Duty. My Lord *Coke*, it is true, ſays in Dr. *Bonham*'s Caſe, 8 *Co.* 121. *a.* that the Cauſe of Commitment was traverſable; but this Opinion was there given *obiter*, and was not eſſential to the Caſe in Judgment; for there the Queſtion was, for practiſing without the Licence of the College, for which the Party could not be impriſoned; and Dr. *Bonham* being a Graduate in the Univerſity, my Lord *Coke* was carried away by his Affection to his *Alma Mater* ſo far as to make a Reſolution in the preſent Point, which was not in the Caſe before him: But my Lord *Coke* ſays, that upon a Conviction by the Cenſors, they ought to make a Record of it, which admits that they are Judges of Record; and then by his own Rule there in the Caſe of a Juſtice of Peace who made a Conviction of a Force, and the Caſes in his other Works, their Acts [the Acts of the Juſtices of the Peace] cannot be traverſed; and my Lord *Coke* does not cite any Authority in Support of his Opinion [as to the Point now before us]. The Reaſon which he gives why the Party has no Remedy by Writ of Error or otherwiſe, is of no Weight: I grant that a Writ of Error lies not; for the Cenſors having a new Authority by a ſpecial Act of Parliament, and their Proceedings being directed to be in a ſummary Way, there is no need for them to purſue the Forms and Methods of other Courts; and it is ſufficient for them to make ſuch ſummary Proceeding as Juſtices of the Peace in many Caſes may do; yet the Party is not without Remedy; for he may have a *Certiorari* to remove the Record of Conviction, and then it may be examined and reviewed, to ſee whether it be purſuant to their Authority; for in every Caſe, where a new Juriſdiction is ſet up for a ſpecial Purpoſe, this Court by Virtue of its original Power may award a *Mandamus* to make them put their Authority in Execution, and a *Certiorari* to look into their Proceeding, whether it be conformable to their Authority, or not.

Thus a *Certiorari* lies to remove an Indictment for Felony before the Juſtices of Peace (*Cro. Eliz.* 487. *Long*'s Caſe), to remove Orders before Commiſſioners of Sewers, or by Juſtices of the Peace who have Authority to make Conviction of a Force in their Preſence, or for Deer-ſtealing; but although no *Certiorari* did lie (in the preſent Caſe) it is not Conſequential that the Cauſe of their Commitment is traverſable; for if the Parliament intruſts them with a Power ſo great that no Act of theirs ſhall be reverſed or reviewed, there is the leſs Reaſon that their Proceeding ſhould be examined or traverſed in an Action; a Jury is not finable for giving a Verdict againſt Evidence; and though there are many Caſes where Jurymen have been fined, yet *Buſhel*'s Caſe, in which all the others are cited, is ſufficient to controul all the Reſt. 1 *Vaug.* 135. And if a Juror ſhall not be fined or impriſoned or otherwiſe puniſhed, for refuſing to find a Man guilty upon apparent and plain Evidence, much leſs ſhall a Judge be liable to Cenſure. In the Caſe of *Hammond* and *Powel*, *P.* 29 *Car.* 2. an Action for falſe Impriſonment was brought after the Reſolution in *Buſhel*'s Caſe for his Impriſonment, (for *Hammond* was one of the ſame Jury with *Buſhel*,) and fined 40 *l.* and impriſoned for it at the ſame Time, and notwithſtanding that the Fine and Impriſonment were illegal, yet it was adjudged that the Action did not lie for falſe Impriſonment againſt the Judge or the Officer; ſo a Fine impoſed by a Judge of a Court is not traverſable as an Amercement is. 7 *H.* 6. 13. *a.* As to the Caſe between *Terry* and *Huntington*, *Hard.* 380. which may be objected, that is good Law; for there an Action was brought againſt the Commiſſioners of Exciſe, who had charged a Man for the Duty upon ſtrong Waters, where the Liquor made by him was Low Wine of the firſt Extraction, and the Action well lay, for they had exceeded their Juriſdiction; for Low Wines of the firſt Extraction were not chargeable within the Act of Parliament; and as they had charged a Duty upon a Liquor not chargeable with it, they were not to be excuſed for having named it ſtrong Waters. If a Juſtice of Peace commits a Man irregularly for being the Father of a Baſtard Child, no Action lies againſt the Juſtice if the Man was the Father of a Baſtard, otherwiſe if he had no Baſtard at all. So

the Caſe between *Nichols* and *Walker*, *Cro. Car.* 394, is good Law, for there an Inhabitant of *Tottridge* was charged to the Poor of *Hatfield*; and the Juſtices of Peace have Power to award a Diſtreſs, where a Perſon is aſſeſſed to the Poor of the Pariſh where he hath Land or is an Inhabitant; but where he is charged to the Relief of another Pariſh, there the Caſe is beyond their Juriſdiction. But if the Cauſe of the Commitment were traverſable, yet the Plea of the Defendants here is good, for it ſhews with Certainty in what the ill Adminiſtration of the Phyſick conſiſted, *viz.* in the Uſe of unwholeſome Drugs: And although it is not ſaid what Drugs he uſed, it is no Matter, for how ſhall we be informed whether he hath ſhewn them. In an Action againſt a Surgeon for an inartificial Cure, the Plaintiff does not ſhew what Plaiſters the Defendant uſed. As to what hath been ſaid, that the Plea doth not ſhew for what Malady the Medicines were given; it was anſwered, that it would be ſo much the worſe if the Medicines were given when the Party had not any Malady at all. And although it is not ſaid that the Witneſſes upon whoſe Teſtimony the Fine was impoſed were upon Oath, yet the Plea is ſufficient; for it may be that it was not neceſſary that they ſhould be ſworn, or if it were needful, the Omiſſion of it is not ſuch as will make their Proceeding void. In ſuch a ſpecial Juriſdiction, in which the Proceeding is to be in a ſummary Manner, it is not needful to obſerve all the Circumſtances which are neceſſary in other legal Proceedings. Judgment for the Defendants.

Caſe 51.
1 Salk. 233.

Nottingham and *Jennings*. In B. R.

What Words will make an Eſtate-Tail in a Deviſe.

EJectment. And upon a ſpecial Verdict, the Caſe appeared to be as follows:

A Man ſeiſed of Land in Fee had Iſſue three Sons, *John*, *Francis* and *William*, and Deviſes his Land to *Francis* and his Heirs, and for Default of Heirs of *Francis* to the Heirs of the Deviſor; and whether *Francis* had a Fee-Simple or an Eſtate-Tail, was the Queſtion; which *Holt* C. J. who tried the Cauſe, directed to be brought before the Court in reſpect of

the Caſe of *Hearn* and *Allen*, *Cro. Car.* 57. And it was objected by Mr. *Carthew*, that this Caſe is ſtronger than the Caſe of *Hearn* and *Allen*, and differs from the Caſe of *Webb* and *Hering*, 2 *Cro.* 415. for in the preſent Caſe after the Deviſe to *Francis* there is no Deviſe at all, for the Limitation to the Heirs of the Deviſor makes no Deviſe to any Perſon certain; for if it be intended that the eldeſt Son were deſigned under the Words [Heirs of the Deviſor], yet the eldeſt Son ſhall take nothing, for he takes by Deſcent. But it was anſwered by *Northey*, and reſolved by the Court, that the Deviſe to *Francis* gives only an Eſtate-Tail. And *Holt* C. J. ſaid, that ſuch was the Caſe of *Hearn* and *Allen*, which differs not from the preſent Caſe, and if that Caſe is good Law, the Deviſe here muſt give a Fee-ſimple; but he was of Opinion that the Authority of that Caſe was not great, being only upon the Opinion of three Judges againſt two, and it was contradicted by the Caſe 2 *Cro.* 415. of *Webb* and *Hering*, which was ſtronger than the other; and that although the Deviſe to the right Heirs of the Deviſor paſſes no Eſtate to the eldeſt Son, who takes the Reverſion by Deſcent, and not the Remainder by Purchaſe; yet it is ſufficient to ſhew the Intent of the Deviſor, that the Words of the Deviſe "To *Francis* and his Heirs, and for want of ſuch Heirs", meant Heirs of his Body. And as the Deviſor ſays, That his own right Heir ſhall take after the Death of *Francis* without Heirs, although the Deviſor's right Heir takes nothing by this Deviſe (for he takes by Deſcent); yet it appears that the Teſtator intended that when *Francis* was Dead without Iſſue, the eldeſt Son ſhould take, and the Word *Heirs* cannot have any other Conſtruction but Iſſue, becauſe he could not die without an Heir as long as the Teſtator had an Heir; and for that this Caſe differs from the Caſe where the Limitation for Default of Heirs is made to a Stranger, (this being made to one who is the Heir of the Deviſor) Judgment ſhall be for the Plaintiff, who claimed under the right Heir of the Deviſor.

Parker

Caſe 52.

Parker and *Keck.* In B. R.

1 Salk. 75.

Surrender of a Copyhold to the Deputy of a Deputy Steward out of Court, is good.

EJectment. In which upon a ſpecial Verdict the Caſe appeared to be as followeth:

A Man ſurrenders his Copyhold to the Uſe of his Will, (and this Surrender was made out of Court into the Hands of a Perſon who had a Deputation *pro hac vice* from the Deputy of Sir *Samuel Keck*, who was the Steward of the Manor) and afterwards makes his Will, and deviſes this Copyhold to his Wife for Life, *&c.* and whether this Surrender to the Uſe of his Will, made to the Deputy of a Deputy Steward out of Court was good, was the Queſtion between the Defendant, who was the Deviſee, and the Heir at Law, who was the Leſſor of the Plaintiff. And it was urged by Mr. *Weld* for the Plaintiff, that the Deputy of a Deputy had not any Authority; for although a Steward may make a Deputy (the which Point may be diſputed ſince the Caſe of the Earl of *Shrewsbury*) yet a Deputation made by ſuch a Deputy is void, [which was granted by *Northey* on the other Side]. Then the Queſtion is, Whether the Act of one who had not any Authority ſhall be to the Prejudice of a Copyholder? And for this Purpoſe he took a Diverſity between an Act done by a Man at the Place of Office, and an Act done by a Man in another Place, and therefore agreed to the Caſe, *Cro. Eliz.* 533. where an Agreement at the Cuſtom-houſe for Merchandize imported with the Deputy of a Deputy was ſufficient, becauſe it was made at the Cuſtom-houſe with one who officiated there. So if there are joint Stewards by Patent, and one of them holds the Court and takes Surrenders, *&c.* it is good; or where the Clerk of a Steward holds the Court, *&c.* it is good, *Mod.* 112. for the Acts are done in Court, where the Tenants are compellable to come and perform their Services, and cannot examine the Authority of the Steward; but when a Surrender is made out of Court, the Surrenderor takes upon himſelf the Notice of the Authority of the Perſon who takes the Surrender, and if he hath not any Authority it ſhall be at the Sur-

renderor's Peril; and if a Surrender is made to a Sub-Deputy, it is of no more Effect than if it had been made to a meer Stranger. And he ſaid that of common Right a Man may make a Surrender to the Lord or his Steward, and ſuch Act as the Lord or his Steward can do of Right, he can do by Attorney; according to the Rule laid down, 9 *Co.* 75. *Combs*'s Caſe. A Copyholder may make a Surrender in Court by Attorney, ſo the Lord or his Steward may accept a Surrender by Deputy, who is *quaſi* an Attorney to the Steward; but a Surrender out of Court cannot be made by Attorney without a ſpecial Cuſtom, nor for the ſame Reaſon can it be made out of Court to a Deputy Steward without a Cuſtom to warrant it. *Northey* on the other Side ſaid, that the Place where the Surrender is taken makes no Diverſity, for the Thing to be conſidered is, whether it turns to the Prejudice of the Lord, or not. A Grant by a Diſſeiſor, or of one who hath not any Right, is good upon a Surrender, for the Diſſeiſee hath not any Prejudice thereby; but voluntary Grants [of a Diſſeiſor, *&c.*] are not good; ſo in the preſent Caſe the Lord hath not any Diſadvantage whether the Surrender be made to the Steward or his Deputy, in Court or out of Court, and therefore the Act of ſuch Deputy or of his Sub-Deputy ſhall not turn to the Prejudice of the Tenant, and there is no Colour for a Difference, be the Act done in Court or out of Court, [though in the preſent Caſe the Surrender was taken within the Manor, and the Coming of a Copyholder to make a Surrender, makes *quaſi* a Court]. And therefore he took the Caſe *Cro. Eliz.* 533. to be a Caſe in Point, and the Court inclined to be of the ſame Opinion; *ſed adjornatur.* And afterwards it was reſolved that the Surrender was good.

Caſe 53. ## *The King* and *The Inhabitants of* ——. In B. R.

Order of Juſtices to remove a Man and his Family is ill.

ORDER of two Juſtices made for the Removal of a Man and his Children, and removed hither by *Certiorari*, was quaſhed; for the Removal of a Man and his Family hath been adjudged uncertain, for the Family may comprehend thoſe who having another Settlement ought not to be ſent to the Place where the Maſter of it is ſettled; ſo in the preſent Caſe the Children ought to be removed to the Place of their Settlement, for they may have a Settlement diſtinct from that of their Father; and therefore the Order to remove the Children to the Place of the laſt Settlement of the Father is ill.

Caſe 54. ## *The King* and ——. In B. R.

A *Certiorari* lies to remove an Order of Juſtices of the Peace upon a private Act of Parliament.

A *Certiorari* lies to remove an Order made by the Juſtices of Peace concerning the Repair of a Bridge and Wear, purſuant to a private Act of Parliament; and the Juſtices ought to return the private Act upon which their Order is founded. And a *Certiorari* was granted accordingly by the Court.

Caſe 55. ## *The King* v. *Corporation of Rippon.* In B. R.

An Action lies againſt Members of a Corporation by their private Names for a falſe Return to a *Mandamus* by their Corporate Name.

BY *the Court.* An Action lies againſt any of the Members of the Corporation of *Rippon* in *Yorkſhire* by their private Names, for a falſe Return to a *Mandamus* directed to the Corporation by their Corporate Name. And ſo, as *Holt* C. J. ſaid, it had been held in an Action for a falſe Return to a *Mandamus* directed to the Corporation of *Canterbury.*

Pett and *Pett.* In B. R.

Caſe 56.

1 Salk. 250. S. C. There ſhall be no Repreſentation after Brothers and Siſters Children.

A *Mandamus* to the Spiritual Court was moved for, to make Diſtribution according to the Statute 22 & 23 *Car.* 2. *c.* 10. and the Caſe appeared to be this: A Libel was exhibited againſt the Adminiſtrator, ſetting forth, that the Inteſtate had two Brothers, who had Iſſue and died; the Iſſue of one of the Brothers had Iſſue a Son and a Daughter, and then the Inteſtate dies; and his Grand Nephew and Grand Niece, the Son and Daughter of the Iſſue of one of the Brothers, wanted to have Diſtribution with his Niece, the Iſſue of the other Brother: But the Spiritual Court had denied it; for that there is a Proviſo in the Act of Parliament, that there ſhall be no Repreſentatives admitted after Brothers and Siſters Children; which occaſioned the Motion for a *Mandamus*. But it was denied for the Reaſons given in the laſt Caſe of *Raymond's Reports*.

Rock and *Layton.* In B. R.

Caſe 57.

1 Salk. 310. S. C. Judgment againſt an Adminiſtrator by Confeſſion or Default *pendente lite*, is an Admiſſion of Aſſets, and he is eſtopped to ſay the contrary on a *Devaſtavit* returned.

AN Action againſt the Sheriff for a falſe Return, and the Declaration ſet forth, that an Action was brought againſt the Plaintiff as Adminiſtratrix, and Judgment by Default. The Defendant [*ſcil.* in that Cauſe] *pendente lite* confeſſed a Judgment to another Creditor, and ſatisfied that Debt; yet the Sheriff, upon a *Fieri facias* iſſuing upon the ſecond Judgment, returned, that he had Aſſets to the Value of the Money paid upon the Judgment confeſſed *pendente lite*; and for this Return the preſent Action againſt the Sheriff was brought, ſuppoſing that this Return was falſe, for the Plaintiff had not Aſſets ſufficient in his Hands, for that it was lawful for him to ſatisfy the firſt Judgment; but here the Sheriff took upon himſelf to adjudge a *Devaſtavit*, by which Practice the *Scire fieri* Inquiry will be taken away. But by the Court the Action lieth not, for the Sheriff has done his Duty; for when a Judgment is given againſt an Executor or Adminiſtrator, it is given of all Aſſets which he had at the Time of the Commencement

mencement of the Action; and if an Executor or Adminiſtrator hath paid off a Judgment *pendente lite*, it cannot be given in Evidence upon *Plene adminiſtravit* pleaded, for it ought to be pleaded ſpecially; and if a Judgment is ill pleaded, the Executor ſubjects himſelf to the Value of it; ſo if an Executor hath Aſſets to the Value of 100 *l.* and two Actions are brought againſt him for 100 *l.* a-piece, and Judgment in both, he ſhall be charged to each Judgment with Aſſets of 100 *l.* and ſhall be compelled to the Payment of 200 *l.* without Poſſibility of avoiding it; ſo here the Plaintiff had Time to plead the Satisfaction of the firſt Judgment; and as ſhe did not plead it, ſhe is liable to anſwer for all the Aſſets ſhe had in her Hands at the Time when the Action commenced, and the Sheriff hath made a right Return. And *Holt* C. J. cited a Caſe between *Gilbert* and *Clerk*, which is imperfectly reported in *Sid.* Judgment againſt Tenant in Tail in Debt, and a *Scire facias* iſſued againſt the Heir and the Tertenants; and the Iſſue was returned as Tertenant, and a *Scire feci* againſt him; upon which there was a Judgment and an *Elegit*; upon that a Moiety of the Eſtate-tail was extended, and the Iſſue brought an Ejectment: And it was reſolved that he had no Remedy, for he could not give the Eſtate-tail in Evidence, becauſe he had had his Time upon the *Scire facias*; otherwiſe if the *Scire facias* againſt the Iſſue had heen return'd *Nichil.*

Caſe 58.

Fiſher and *Wicks*. In B. R.

1 Salk. 391. S. C. there called *Fiſher* and *Wigg*.

A Copyhold Eſtate ſurrendered to ſeveral, equally to be divided, and to their reſpective Heirs, is not a joint Eſtate, but an Eſtate in Common.

EJectment; and upon a Special Verdict the Caſe appeared to be as follows: A Man ſeiſed of Copyhold Lands to himſelf and his Heirs, according to the Cuſtom of the Manor, having Iſſue two Sons and three Daughters, ſurrenders it to the Uſe of *Grace* his Wife for Life, Remainder to his five younger Children to be equally divided, to them and their reſpective Heirs; and whether they were Tenants in Common or Jointenants was the Queſtion. Mr. *Williams* argued, that they are Tenants in Common; for ſo they would be in the Caſe of a Conveyance of a Freehold; and *a fortiori* in Caſe of a Copyhold; and the Judges ought always to make ſuch

Conſtruction as will beſt ſupport the Intent of the Parties; and here the Intent of the Party is manifeſt that they ſhould be Tenants in Common; for the Words " to be equally di- " vided", divides the Eſtate of the Grantor, and the Words, " and their reſpective Heirs", ſhew the Intent to be, that the Inheritance ſhould alſo be divided; no particular Form of Words is neceſſary to make a Tenancy in Common; if the Intent appears to be, that the Grantees ſhould take in Common, it is ſufficient. The Diverſity between the Words " into " three Parts divided", and the Words " into three Parts to " be divided", is exploded; for when a Gift is made to any Perſons " equally to be divided", thoſe Words make them Tenants in Common; the ſubſequent Words explain the firſt; as a Bill of Exchange payable to the Uſe of *B.* and *C.* equally to be divided, is not joint but ſeveral. *Cro. Eliz.* 729. Thoſe Words in a Will ſhall make a Tenancy in Common, and Words in the Surrender of a Copyhold Eſtate are conſtrued favourably, as well as in a Will; and he cited *Stile* 434. 2 *Vent.* 365. *Broderick contra*; The Words of the Surrender are to five Children, which gives them a joint Eſtate, and the ſubſequent Words " equally to be divided" do not make it ſeveral, until a Diviſion be made; and the Conſtruction of Surrenders ought to be according to the Conſtruction of other Conveyances, and not according to the Conſtruction of Wills. And he cited *Stile* 211. 2 *Rol.* 19, 60. *Poph.* 52. 2 *Cro.* 239. 5 *Co.* 119. *Dyer* 300. See more *poſtea p.* 92.

Harman and *Ouden*. In B. R.

Caſe 59.
1 Salk. 140. S. C.

Aſſumpſit to deliver Oatmeal on board a Veſſel (to be brought by the Plaintiff) on or before the 18th of *January*; Breach, that he did not deliver upon the 18th is good after Verdict.

ACTION upon the Caſe upon an *Aſſumpſit*, in which the Plaintiff declared, that in Conſideration of 70*l.* paid by him to the Defendant, the Defendant aſſumed to deliver ſo many Quarters of Oatmeal at *Newhaven* aboard a Veſſel, to be there prepared by the Plaintiff, on or before the 18th Day of *January* next following; and it was aſſigned for Breach, that the Defendant did not deliver the Quarters of Oatmeal upon the ſaid 18th Day of *January*, at *Newhaven*, to his Damage, &c. After a Verdict for the Plaintiff in the County of *Suſſex*, it was moved in Arreſt of Judgment, that here the Breach was not

not well aſſigned; for the Plaintiff laid in his Declaration the Promiſe to be to deliver the Oatmeal on or before the 18th Day of *January*, ſo that the Defendant had Liberty to tender or deliver it before that Day, as well as at that Day; the Breach is, that the Defendant did not deliver it at the Day, but it is not ſaid, that he did not deliver it before. But *Holt* C. J. gave the Opinion of the Court, that the Declaration was ſufficient, for the 18th Day of *January* was the proper Day for the Delivery; for if the Defendant had tendered the Quarters of Oatmeal at any Time before that Day, and the Plaintiff had not been there to accept of the Tender, the Tender had not been good; and in an Action brought by the Plaintiff, the Defendant cannot avoid the Payment by ſuch Tender; and this appears by the Caſe *Cro. Eliz.* 14. A Man was bound by Obligation to pay Money on the 29th of *September* or before, and he tendered the Money at the Place on the 28th of *September*, the Obligee not being there to receive it; and it was held by the Court, that the Tender was not good; for it ought to have been made on the laſt Day, *viz.* on the 29th of *September*. Here in the principal Caſe the 18th Day of *January* was the laſt Day for the Delivery, and the Defendant could not make Delivery or Tender before that Time to the Plaintiff, if he were not preſent to accept; but if the Plaintiff had been preſent at a Day before, and had received the Oatmeal, yet the Declaration is good after a Verdict; for the Defendant might give ſuch Acceptance in Evidence, and then the Iſſue would be for the Defendant; but when the Iſſue is found for the Plaintiff, the Verdict aids the Declaration, and ſhews that there was no Delivery at or before the 18th Day of *January*; and for that Purpoſe he cited the Caſe 2 *Saund. Peters* and *Opie*.

Caſe 60. ## *Hilliard* and *Jennings*. In B. R.

ACTION upon the Caſe, upon a feigned Iſſue directed by the Court of Chancery, to try whether a Deviſe of Lands in the County of *Somerſet* was good. And upon a ſpecial Verdict the Caſe appeared to be this: *Thomas Jennings*, Husband of the Defendant, being ſeiſed in Fee, by his Will

dated the 27th of *December* 1679. deviſes in theſe Words, *I give to my Son* Thomas Jennings *my Lands in* Somerſetſhire, *and to his Heirs, and if my ſaid Son* Thomas *die without Iſſue of his Body, or before his Age of twenty-one Years, I give the ſame Lands to my two Daughters, equally to be divided,* &c. Afterwards the Teſtator dies, leaving Iſſue *Thomas* his Son and two Daughters; the Son attained the Age of twenty-one Years, and then made his Will in Writing, which was executed in the Preſence of *A.* and *B.* and *William Hilliard* the Plaintiff, and thereby deviſes the ſame Lands to *William Hilliard* the Plaintiff, and afterwards dies without Iſſue. And it was argued by *Carthew* for the Plaintiff; and he inſiſted, Firſt, That *Thomas* the Son had an Eſtate in Fee, which he might deviſe.

A Deviſee not a ſufficient Witneſs to a Will, within the Statute of Frauds.

Secondly, That the Will was well executed, altho' the Plaintiff who claimed by the Will was one of the Witneſſes to it.

And as to the firſt Point he inſiſted, that the Deviſe to *Thomas* the Son (by the Father's Will) and if he died without Iſſue, or before his Age of twenty-one Years, was an Eſtate in Fee, and not in Tail; for the Word (or) ought to be taken conjunctively as (and); and the Words are tantamount, as if he had ſaid, " If my Son *Thomas* die without Iſſue before " his Age of twenty-one Years"; and it was reſolved in the Caſe of *Sowle* and *Gerrard, Mo.* 422. *Cro. El.* —. That if a Man deviſe to his Son and his Heirs, and if he dies before the Age of twenty-one, or without Iſſue, to *B.* the Word (or) ſhall be taken (and); and ſo in the preſent Caſe.

As to the ſecond Point he inſiſted, that here are three credible Witneſſes according to the Words of the Statute; for although the Plaintiff cannot be examined as a Witneſs in his own Cauſe, yet the Will being proved by other Witneſſes, he is a credible Witneſs to the Will, although not in this Cauſe; and there is a Diverſity between a Perſon who is infamous and incapable to be a Witneſs at all, and ſuch a one who may be a Witneſs, but in a particular Caſe is not allowed to be examined in reſpect of his Intereſt; and he inſiſted that the Statute, which was made for the preventing

of

of Frauds and Perjuries, ought to be expounded favourably, as in Sir *George Sheer*'s Caſe, where the Witneſſes [to a Will] had ſubſcribed their Names in another Room, and becauſe the Teſtator, if he had been raiſed in his Bed, might have ſeen them thorough a Glaſs-Door, it was held an atteſting in his Preſence. *Vide poſtea p.* 94.

Caſe 61.

Fiſher and *Wigg*. In B. R.

Vide ante 88.

IT came afterwards for the Opinion of the Court. And by *Turton* and *Gould* Juſtices, they are Tenants in Common as well as if the Eſtate had been given by Will, for a Surrender is made to a Uſe which hath as favourable a Conſtruction as a Will, and the Intent here ſeems to be, that the Iſſue ſhould take the Eſtate in Common, the Profits to be equally divided; and there are not any preſcript Forms of Words for making a Joint-Eſtate or an Eſtate in Common; but where the Intent of the Party appears to be for the one or for the other, ſuch the Eſtate ſhall be accordingly; and therefore if a Man gives an Eſtate to two, *Habend'* one Moiety to the one, and the other Moiety to the other, this makes an Eſtate in Common. *Co. Lit.* And *Gould* cited a Caſe *P.* 32 *Car.* 2. between *Smith* and *Johnſon*, where a Man made a Feoffment to two, equally to be divided, and to their Heirs (which is the ſame Caſe with that before us). And *Scroggs* C. J. and *Dolbin* inclined to the Opinion, that thoſe Words made an Eſtate in Common (and not a Joint-Eſtate) as well in a Deed as in a Will. But *Jones* J. was of a contrary Opinion, that it was a Joint-Eſtate, and upon ſearching the Roll it appears that no Judgment was entred. *Holt* C. J. *contra fortiter*, That they are Joint-Tenants, for the eſſential Difference between Joint-Tenants and Tenants in Common is, that Joint-Tenants claim by one and the ſame Title, and Tenants in Common by ſeveral Titles; and here all the Iſſues claim under the ſame Surrender. True it is, that if a Feoffment be made to two, *Habendum* the one Moiety to the one, and the other Moiety to the other, the Feoffees are Tenants in Common, for although they claim by one Deed, yet they are in by ſe-

veral Titles, for the Livery muſt be ſeveral, and if Livery were made to one *ſecundum formam & effectum chartæ*, the other would take nothing. Secondly, The Words *Equally to be divided* make nothing more than what was expreſſed before, for between Joint-Tenants the Profits ought to be equally divided.

But Judgment was given according to the Opinion of the other two Judges. 1 *Salk.* 392.

Hunt and *Bourne*. In B. R.

Caſe 62.

1 Salk. 57, 244, 339. S. C.

Fine levied of Lands in Antient Demeſne, what Effect it will have.

ERROR of a Judgment in *C. B.* The Caſe was this: A Man ſeiſed of an Eſtate-Tail with Remainder over of Land in Antient Demeſne, levies a Fine in the Court of Antient Demeſne for three Lives on the 25th of *May* 22 *Car.* 1. according to the Cuſtom of the ſaid Manor, before *A.* the Deputy of *Walter Earle*, Steward, and *R.* Attorney, and *B.* and *S.* Attornies of *C.* a Suitor in the ſame Court, in a Plea of Covenant *come ceo, &c.* to *Nurſe* for Life, rendering Rent with Warranty, and the Jury found that this Land had not been uſually demiſed, and that the Rent was not the Cuſtomary Rent; and afterwards the ſame Tenant in Tail levied a Fine with Warranty 24 *Car.* 1. to the Uſe of himſelf and his Heirs, and afterwards bargained and ſold the ſame Land to *Pain* and his Heirs, under whom the Defendant claimed. The Tenant in Tail dies in 1663. *Nurſe* dies in 1693, and *Richard Guillam*, the Heir in Tail of *Thomas Guillam* his Grandfather who levied both the Fines, enters, and whether his Entry was lawful, or not, was the Queſtion.

And it was argued by *Eyre*, that the Fine in Antient Demeſne made a Diſcontinuance of the Eſtate-Tail, of which the Conuſor of the Fine was ſeiſed. By the Common Law a Fine might be levied of Land in Antient Demeſne in the Court of Antient Demeſne, as well as a Fine in *C. B.* might be levied of Freehold Land; and the Statute 18 *Ed.* 1. *de modo levandi Fines* does not alter the Caſe, for that Statute

was only Declarative of the Common Law; but by the Statute *De donis conditionalibus* a Fine of an Eſtate-Tail was declared Null, after which a Fine as well in Antient Demeſne as in *C. B.* was not a Bar but only a Diſcontinuance until the 4th of *H.* 7. when a Fine with Proclamations was made a Bar, but this Statute of the 4th of *H.* 7. does not extend to Fines in Antient Demeſne; and therefore Fines there as they do not make any Bar, yet they make a Diſcontinuance to the Iſſue in Tail; and ſo it was held 1 *And.* and it is not any Objection that the Court of Antient Demeſne is not a Court of Record; as to the Objection, that here if there be a Diſcontinuance, it diſcontinues the Fee, becauſe a Fine *ſur Conuſance come ceo, &c.* conveys the Fee without the Word *Heirs*, and I grant that the old Books ſay ſo, but this is doubtful ſince the Statute 18 *Edw.* 1. *de modo levandi Fines*, ſince which Statute there ought to be an *Habendum* of the Eſtate to the Heirs in Fines as well as in other Feoffments and Grants, *&c.* *Vide poſtea.*

Caſe 63.

Almanzor and *Davilak.* In B. R.

Where the Plaintiff hath been Nonſuited for a Defect in the Declaration, the Defendant ſhall be admitted to Common Bail in a new Action brought.

THE Plaintiff was nonſuited for a Fault in the Declaration, and afterwards commenced a New Action. And *Holt* C. J. ſaid, that it had been ruled that the Defendant in ſuch Caſe ſhould be admitted to common Bail.

Caſe 64.

Hilliard and *Jennings.* In B. R.

Vide ante 90.

THE Caſe above having been argued by *Carthew* for the Plaintiff was now argued by *Pratt* Serj. on the other Side; and he inſiſted, that *Thomas* the Son took no more than an Eſtate-tail by the Will of his Father; for the Words "If my Son die without Iſſue of his Body" make an Eſtate-tail, and then the Words "or under the Age of twenty-one Years" are reſtrictive, and make the Eſtate-tail determinable on his Death under that Age; ſo that in either Caſe the Daughters ought to take; the Word *or* is disjunctive in its proper Signification,

fication, and ought not to be taken otherwiſe, where it is not neceſſary; and the Caſe of *Sowle* and *Gerrard* allows that the Son had an Eſtate-tail: But to this Point no Opinion was given by the Court. And *Holt* C. J. was not for allowing the Caſe of *Sowle* and *Gerrard*; as to the other Point he agreed, and it was held by the Court, that the Will was not well executed, for the Plaintiff was not a credible Witneſs, as he himſelf was to take by the Will; for the Intent of the Statute was to prevent any Practice by Perſons intereſted in the obtaining of a Will; and if he who is to take by a Will may be a good Witneſs, it will be an Encouragement to ſuch Practice. But by the Importunity of Counſel it was adjourned.

DE
Termino Paſch.
13 Will. III. in B. R.

Caſe 65.
1 Salk. 38.
S. C.

A Mandamus does not lie to the Spiritual Court after Adminiſtration granted.

Blackborow and *Davis.*

A Motion was made for a *Mandamus* to the Spiritual Court after an Adminiſtration granted to the Grandmother, that another Adminiſtration ſhould be granted to the Aunt, for by the Statute of 21 *H.* 8. the Spiritual Court ought to grant it to the next of Kin, and if it is granted to another the Grant is void, and this Court hath Power to direct and command it to be granted to the Perſon who by our Law is next of Kin, and ſhe is the Aunt and not the Grandmother; as to the Objection, that there may be an Appeal, that is no Cauſe why a *Mandamus* ſhall not go to the Spiritual Court; for if the Temporal Court will not grant one, after an Adminiſtration is granted there, the Statute will be eluded, for an Adminiſtration will be granted [on an Appeal] before a Motion can be made for a *Mandamus.* But the Court was of a contrary Opinion, for by the Statute of 31 *Edw.* 3. Adminiſtration ſhall be granted to ſuch Perſon as the Ordinary pleaſes; then the Statute of 21 *H.* 8. requires to make Grant of the Adminiſtration to the Wife or to the next of Kin who requires it; but if the Ordinary does not grant it to the next of Kin, but to a meer Stranger, yet the Adminiſtration is not void, but was good upon the Statute of 31 *Edw.* 3. and therefore if an Adminiſtration be repealed upon a Citation, the Acts by the firſt Adminiſtration are good. 6 *Co. Packman's* Caſe. But thoſe Acts could not be good, if the Grant to a Man not of the next of Kin was abſolutely

ſolutely void, and therefore the Remedy for the Plaintiff is by Appeal; and if fourteen Days elapſe by Citation or before Adminiſtration, if the Ordinary proceeds to grant it to an improper Perſon, a Prohibition ſhall be granted. And *Holt* C. J. cited a Caſe of Sir *George Sands*, if Adminiſtration be granted to the next of Kin of the Huſband, the Wife cannot repeal it, but if it is granted to the next of Kin to the Wife, the Huſband may repeal it. *Vide poſtea.*

The King and *The Inhabitants of Graveſend.* In B. R.

Caſe 66.

A Motion was made to quaſh an Order of Seſſions. Firſt, Becauſe an Order was made by two Juſtices to ſend *J. Goodberry* from *Graveſend* to *Lawton* her Maſter in *Chadwell* (with whom ſhe was hired as a Servant for a Year) until ſhe ſhould be diſcharged; and afterwards the 21ſt of *November*, (the firſt Order being made the 6th of *November* by the Juſtices of *Graveſend*), another Order was made by two Juſtices of the County of *Eſſex*, to ſend the ſame Perſon from the Pariſh of *Chadwell* to the Pariſh of *Graveſend*; and it was inſiſted that the ſecond Order was ill, being made before any Appeal from the firſt Order, or diſcharged from the Service. *Sed non allocatur*; For the firſt Order was to ſend the Perſon to her Maſter, from which Order no Appeal lies, and not to ſend her to the Pariſh of *Chadwell* as the Place of her Settlement. Secondly, It was objected that the ſecond Order was ill, for that the Words are, *Theſe are to order you to remove* J. Goodberry *to the Pariſh of* Graveſend, *and to deliver her*, &c. *there to be provided for according to Law, unleſs ſhe be able to provide for herſelf*, and theſe laſt Words refer to all the ordering Part, and make the Order conditional; and ſo if ſhe was not able to provide for herſelf, ſhe ought to be removed, and if ſhe was, ſhe ought not to be removed. *Sed non allocatur*; for thoſe Words are only explanatory of the former Words, when ſhe ought to be provided for.

Order of Removal ill, becauſe the *Pauper* was thereby ſent to the Maſter, and not to the Pariſh where ſettled.

Caſe 67.

Thorpe and *Thorpe*. In B. R.

1 Salk. 171. S. C.

It is ſufficient to maintain an *Aſſumpſit*, if the Conſideration was a Benefit to the Defendant, or a Prejudice to the Plaintiff.

ERROR of a Judgment in the Common Pleas in *Aſſumpſit*, in which the Plaintiff declared, and ſet forth an Agreement that he was to releaſe the Equity of Redemption to a certain Copyhold Eſtate, upon which the Defendant agreed to the Payment of ſeven Pounds, and although the Plaintiff had performed his Part of the Agreement, yet the Defendant had not paid, *&c.* The Defendant pleaded the Releaſe of the Equity [in which were general Words of Releaſe *of all Demands*] in Bar, and the Errors aſſigned were, Firſt, An Equity of Redemption is not valuable, being a Thing that is only in Chancery, and of which the Common Law takes no Notice. Secondly, That the Plaintiff ought to ſhew how he was intitled to the Equity of Redemption, for it may be that he hath an Equity, and yet the Releaſe of it be of no Value, although it were true that generally an Equity is valuable; and this Caſe is like the Caſe of *Barber* and *Fox*, 2 *Saund.* 134, 136. *Aſſumpſit* againſt an Heir upon a Promiſe to pay a Debt due by Bond from his Father, held ill, becauſe it was not ſhewn that the Heir was bound by the Obligation, which ſhall not be intended ſo. *Stile* 245. Thirdly, That this Releaſe of the Equity of Redemption, having Words in it ſufficient to diſcharge the Promiſe, may be pleaded in Bar to an *Aſſumpſit* founded upon the Promiſe, becauſe this Action is not founded upon the making of the Releaſe, but upon a Promiſe to do another Thing; and ſo it appears *Mar.* 75. *Hob.* 48. *Cro. Eliz.* 303, 703, 889. And if the Action is not founded upon the mutual Promiſe, but upon the making of the Releaſe, then it ought to be averred that the Plaintiff had made a Releaſe; and it is not ſufficient to ſay that he had performed all on his Part, as appears by the Reaſon of the Caſe in *Cro. Car.* 19.

But it was objected, that the general Words of the Releaſe, which was intended for a particular Purpoſe, *viz.* to releaſe the Equity of Redemption, ſhall be reſtrained to the ſubject

Matter. To which Mr. *Cooper* anſwered, that it is true where the Words are all in one Sentence, as in the Caſes cited, it ſhall be ſo. But here are different Clauſes, for firſt he releaſes his Equity; and then begins another Sentence, " I do alſo releaſe all other Actions, Demands, *&c*".

To the firſt Error aſſigned it was anſwered, That an Equity of Redemption is within the Notice of the Court, which takes Conuſance of Truſts and other Acts.

To the ſecond Error, That if it do not appear that it [the Equity of Redemption] is not valuable, it ſhall not be intended; the Caſes of a Surrender of a Leaſe at Will, *&c.* are of Things apparently of no Value, and therefore they make no Conſideration; but it is ſufficient to maintain an *Aſſumpſit* if the Conſideration was a Benefit to him that was the Defendant, or be of any Trouble or Prejudice to the Plaintiff. And by *Holt* C. J. the Releaſe of an Equity of Redemption is a valuable and a good Conſideration for an *Aſſumpſit*; then if the Thing done is Good, Conſiderable and Valuable, the Promiſe to do it is a ſufficient Conſideration, for although this Action is founded upon the Promiſe, yet an Act to be done purſuant to ſuch Promiſe is the Ground of the Aſſumption; as where a Man promiſes to deliver a Horſe, and another promiſes 20*l.* the 20*l.* is to be paid for the Horſe, and the Delivery of the Horſe is to be preſumed purſuant to the Promiſe.

And as to the Declaration, if a Man covenants to do ſeveral Things, and alledges Performance generally on his Part, though he ought to have alledged the Performance of ſeveral Things, yet this is aided by the Appearance and Plea of the Defendant. *Sed adjornatur.* Afterwards the Judgment was affirmed. 1 *Salk.* 172.

Lane

Caſe 68. 1 Salk. 17. S. C.

Lane ver. *Cotton and Sir Thomas Franklin.* In B. R.

Caſe of the Poſt-Maſter General for Exchequer-Bills loſt out of a Letter delivered at the Poſt-Office at *London.*

ACTION upon the Caſe; the Plaintiff declares upon the Statute of 12 *Car.* 2. *c.* 35. by which the Poſt-Office is erected, and "one Maſter appointed by the King under his "Letters Patent, called the Poſt-Maſter General, who and "his Deputy ſhall appoint Poſts for all Letters"; that 26 *May* 12 *Car.* 2. by Letters Patent the Poſt-Office was erected; that by Patent bearing Date the firſt Year of *W.* & *M.* the Office of Poſt-Maſter General was granted to the Defendants, with all Profits, *&c.* with a Fee of 1500 *l. per Ann.* to be paid by the King; that the Plaintiff incloſed Exchequer-Bills in a Letter directed to *J. Jones*, at *Worceſter*, and delivered the Letter to the Defendants in the Office, *&c.* Upon Not guilty pleaded a Special Verdict was found to this Effect: That there was ſuch an Act of 12 *Car.* 2. as was ſet forth in the Declaration; that a Poſt-Office was erected between *London* and *Worceſter*; that a Grant of the Office of Poſt-Maſter General was made to the Defendants, as was ſet forth in the Declaration, with a Clauſe that they ſhould not be charged by the Default of a Deputy or other Perſon, but only by their own Default; that ſuch Letter, as was ſet forth with Exchequer-Bills incloſed, was delivered to —— an under Agent at the Poſt-Office, and was there opened, and the Bills taken out, and if, *&c.* for the Plaintiff, *&c.*

Gould J. was of Opinion, that Judgment ought to go for the Defendants. Firſt, From the Nature of the Office, which was for the Carrying of Letters; and then, if the Caſe is conſidered in Parts, I hold, that for the Miſcarriage of a Letter only an Action will not lie, for the Damage is not of any Value; but if there ſhould be any ſpecial Damage by Miſcarriage of a Letter, I determine nothing.

Secondly, if an Action will lie, it muſt be in Conſideration of a Contract, expreſs or implied; no expreſs Contract is alledged, and no Contract can be implied; for the Office

was erected by Act of Parliament, and by the Words of the Act a Truſt is repoſed in the Deputies, *&c.* by which it appears, that the Intent of the Act was not to make the Poſt-Maſter General chargeable; and therefore if the Poſt-Maſter dies the Office continues, which ſhews that the Office does not depend upon the Poſt-Maſter; and who ſhall be charged if ſuch an Accident happens in the Time of a Vacancy?

Thirdly, Here the King is the Head and Principal of the Office; all the Miniſterial Part is intruſted with the Poſt-Maſter, his Deputies and Agents, but all the Profits and Revenue appertains to the King; by the Paragraph of this Act the Penalty upon Carriers, *&c.* who carry the Letters is to be divided between the King and the Informer. So in Paragraph 6.

Fourthly, In this Caſe it is impracticable to take Care of all the Agents, and impoſſible to take Care for the Security of thoſe Agents who travel by Night and by Day, and out of the Kingdom; and the Caſe of *Morſe* and *Slue* goes upon this Reaſon, that the Maſter of a Ship may take Security and ſufficient Care of all under his Command: In the Caſe of an Inn-keeper, 8 *Co.* —. *Callis* —, the Hoſtler is anſwerable when the Goods are purloined within the Inn, but not if they are ſent abroad; as a Horſe to Paſture, *&c.* for then the Inn-keeper cannot ſecure himſelf. A Factor is not ſubject to account for Goods purloined. As to the Caſe of *Morſe* and *Slue*, 1 *Vent.* 190, 238. where it was reſolved, that a Maſter of a Ship was liable for Goods taken out of a Ship in Port, it was for three Reaſons. Firſt, He receives Part of his Wages and Salary by Contract. Secondly, He is the Perſon known by the Law, for he may pawn the Ship. Thirdly he may make a ſpecial Contract and Caution for the Carriage; but all theſe Reaſons fail in the preſent Caſe. But if the Poſt-Maſter General were generally chargeable, yet he is not ſo in the preſent Caſe; for the Delivery of Exchequer-Bills is a Matter out of his Province, and the Servant ought not to have received them; he was not intruſted for that Purpoſe, and by Conſequence the Maſter is not liable; and it is found

by the ſpecial Verdict, that he was intruſted for the Carriage of Letters, and not for that of other Things.

Powys J. Poſt-Maſters before the Statute of 12 *Car.* 2. who of their own Heads ſet up Poſts, were liable as common Carriers, if Letters which they carried miſcarried; for it was a voluntary Undertaking of their own, tho' the *Premium* was of little Value; and this is agreeable to the Reaſon of *Southcot's* Caſe, 4 *Co.* 84. *a.*

But I am of Opinion, that in this Caſe the Action does not lie againſt the Defendants. I admit, that Exchequer-Bills are not properly Treaſure, nor different from other Bills, but in Circumſtances which incourage their Currency, but do not compel it; and the Verdict finds only that the Plaintiff was poſſeſſed of eight Bills of Credit: But if they were Treaſure I do not ſee any Diverſity; for by the Statute all Packets are to be carried without Diſtinction, the Words are, "Every "Packet of Letters and other Things ſo much *per* Ounce"; ſo that if a Man ſends Gold, Jewels or other Treaſure, I apprehend that ſuch Packet is of the ſame Nature with a Packet of Letters.

Then it is to be conſidered, whether the Defendants in this Caſe are liable without their actual Default, by the Neglect of their Agents, (for on an actual Neglect or Default in the Defendants themſelves I hold that they are liable); but here the Verdict finds, that the Bills were taken by a Perſon unknown, and therefore I am of Opinion that the Defendants are not liable. The Statute doth not directly charge them, and yet the Rates of Letters and Packets are fixed, and the Poſt-Maſter cannot alter them; but before the Statute he might have fixed what Rates he pleaſed. The Letters are received in the Night of Perſons unknown, delivered out to Boys, who cannot give ſufficient Security; they muſt (as it happens) be carried by the Poſt on the *Sunday*, when the County cannot be ſued if the Mail be robbed; they muſt be carried to Parts out of the Realm; the Statute ſays nothing of the Value of Things to be carried, it takes Notice of the Quantity and Weight, but not of the Value; which ſhews,

that the Legiſlature did not intend that Parcels of great Value ſhould be conveyed by the Poſt; and if ſuch an Action as this were to be allowed the Office would be deſtroyed.

Then the principal Point to be conſidered is, whether the Poſt-Maſter ſhall be chargeable for a Miſmanagement in the Office; and I am of Opinion that he ought not; for by the Letters Patent by which the Office is granted to the Defendants it is provided, that they ſhall not be liable but for their own Default; for they are not Officers for their own Benefit, but for the Benefit of the King; the Defendants are only allowed a Salary, and are obliged to manage the Office according to the Inſtructions which they from Time to Time receive from the King; the Security taken by them of inferior Officers is taken in the Name and for the Uſe of the King; and the Wages of thoſe inferior Agents are paid by the King, and limited by the Commiſſioners of the Treaſury.

If it is objected, that in this Caſe a Wrong is done without a Remedy; it is frequent that Damage happens where a Man cannot come at any Remedy. The Verdict ſays, that the Damage was done by a Perſon unknown; if the Perſon were known, no Doubt an Action on the Caſe will lie againſt him.

Turton J. The Action lieth not againſt the Defendants; for the Poſt-Maſter General is not liable for the Default of his Officers and under Agents; for this is not an antient Office, as appears *Latch* 81. and if it is a new Office, it is not within the Reaſon of the antient Offices; and this Caſe differs from the Caſes of the ſame Nature in moſt of the Circumſtances mentioned before: And further, Exchequer-Bills are now made a Species of the Money of *England*, which was never intended to be conveyed by the Poſt.

Holt C. J. This is the Caſe: Sir *Robert Cotton* and Sir *Thomas Franklyn* are conſtituted Poſt-Maſters General by Letters Patent of the 3d of *May* the 3d of *William* and *Mary*, purſuant to the Statute of 12 *Car.* 2. and thereby have Power to make Deputies, &c. but are and ought to purſue Directions received, &c. and have a Salary limited, &c.

Upon

Upon which Caſe I hold that an Action lieth for the Plaintiff; I do not deliver any Opinion, whether an Action lieth when a Letter is loſt upon the Road, for that differs much from the preſent Caſe: But the Reaſon upon which I rely in the preſent Caſe is, that by the Statute of 12 *Car.* 2. a ſpecial Truſt is repoſed in the Poſt-Maſter General for the Safeguard of Letters; the Statute extends the Benefit of the Subject in the ſafe and ſpeedy Conveyance of them.

Secondly, The Office is erected in a certain Place, *viz.* in *London.*

Thirdly, The Poſt-Maſter General hath the general Care and Government of the whole Office committed to him, all others are his Deputies; and this Office differs nothing from the Office of Marſhal of the King's Bench, or thoſe of other Officers. 23 *H.* 6. A Gaoler is chargeable for an Eſcape, altho' the Priſon be broke open by Rebels, and this even in the Caſe of Priſoners for Debt, in which the Statute gives a *Capias*, and where there was no Impriſonment by Common Law; as appears by 3 *Co.* 12. Sir *W. Herbert*'s Caſe.

Here is a Conſideration, and Hire paid by the Subject for Letters carried; and that is the Foundation of the Charge upon an Inn-keeper. 2 *Co.* 70, 188. But if Goods are left at the Inn by a Stranger [not a Gueſt] he is not liable, for there accrues no Benefit to him; but for a Horſe left in the Livery Stable he is liable; and ſo in the Caſe of a Hoyman. *Hob.* 8.

I do not allow any Difference between an Office conſtituted by Statute, and one at Common Law, for without Doubt an Officer ſhall be charged in the one Caſe, as well as in the other; and this without Contract expreſs or implied: But it is objected, that the Poſt-Maſter hath not any Benefit by the Carriage; I anſwer, that the Party pays a *Premium*, and that is the Reaſon why he ſhall have a Remedy, which cannot be but by the General Officer. But here the Poſt-Maſter General hath a Benefit, for he hath a Salary of 1500 *l.* a Year,

and that out of the Profits of the Office, and therefore this Caſe is like the Caſe of *Morſe* and *Slue*, 1 *Vent.* of a Maſter of a Ship, and it is there ſaid that the Maſter of a Ship may refuſe to take the Goods aboard till the Time of the Voyage; ſo may a Common Carrier until the Time of his ſetting out, but if he takes them into the Warehouſe before, he ſhall be charged.

This Caſe is founded upon the ſame Reaſon with all the other Caſes of the ſame Nature, *viz.* of a Carrier, Hoſtler, *&c.* who are not charged unjuſtly, but with the higheſt Equity, *viz.* becauſe of the Impoſſibility of the Proof of a ſpecial Damage, for a Carrier may be Confederate with evil Perſons, and the Proof of ſuch Confederacy will be impoſſible, and therefore by the Law of all Nations, a Man in ſuch Caſes ſhall be charged, and whenever our Law agrees with the Civil Law, it ſhall be intended to be founded on the ſame Reaſon.

But it is ſaid that a Carrier rob'd may ſue the County, but this is by the Statute of *Wincheſter* 13 *Edw.* 1. and an Action lay againſt the Carrier before by the Common Law.

It is objected that an Inn-keeper hath Servants to watch in his Houſe all Night; ſo may the Poſt-Maſter General; but then it is objected, that the Poſt-Maſter manages his Office by Night, and this is uſed as an Argument in Excuſe of the Poſt-Maſter, which is an Argument for the Charge upon an Inn-keeper.

But although I compare this Caſe to the Caſe of a Common Carrier, yet it is not ſaid by me, that the Poſt-Maſter ſhall be charged for Miſcarriage upon the Road (for I give no Opinion in ſuch a Caſe) and there is much Diverſity, for a Carrier is bound ſafely to keep and ſafely to carry, but the Poſt-Maſter is bound ſafely to keep, not to carry but to ſend. So in the Caſe of *Morſe* and *Slue*, it was agreed that the Maſter of a Ship ſhall not be charged for a Robbery on the High-Sea, nor an Inn-keeper for a Horſe ſent to Paſture; but if a Man orders the Hoſtler to ſend his Horſe to

Paſture when he is cool, and before that he is ſtolen, the Inn-keeper ſhall be charged.

The Poſt-Maſter cannot refuſe the Acceptance of a Thing which is proper for his Carriage, but an Action lieth againſt him for ſuch Refuſal, as well as againſt a Smith for refuſing to Shoe a Horſe.

Then Exchequer Bills are proper to be ſent by the Poſt as well as Bills of Exchange, and the Statute doth not reſtrain the Poſt-Maſter to the Carriage of any Thing in particular.

It hath been objected that Exchequer Bills have been inſtituted ſince the Statute of 12 *Car.* 2. but if they are proper to be ſent by the Poſt, though they are newly created, they are within the Statute made before, as in 4 *Co.* 4. *b. Vernon's* Caſe. A Deviſe to a Wife for a Jointure by Force of the Statute of 32 *H.* 8. is a good Jointure within the Statute of 23 *H.* 8. made before.

With the ſame Reaſon it may be ſaid that Trover does not lie for Exchequer Bills taken from the Poſſeſſion of one by another and converted, as that Exchequer Bills are not to be carried within the Statute of 12 *Car.* 2. Bills of Exchange payable to Bearer are good Bills and ought to be paid, but Bills payable to Order are for the Convenience of Indorſement, for every Indorſor becomes liable.

It is objected that nothing is to be paid for a Bill of Exchange, and therefore the Poſt-Maſter is not liable for it; but Payment is made for the Letter which incloſes the Bill of Exchange, although it is not inlarged in reſpect of the Bill, and the Letter ſhall be intended to be in reſpect of the Bill; a Gueſt pays nothing for the Cuſtody of his Goods, but the Inn-keeper ſhall be charged for them, in reſpect of the Benefit which he hath for the Diet of his Gueſt; or if the Poſt-Maſter hath no Benefit for Bills of Exchange, yet being a publick Officer intruſted with them, he ſhall be charged for the negligent Cuſtody of them; it is granted that a Poſt-

Maſter before the Statute of 12 *Car.* 2. was chargeable with the Miſcarriage of Letters or Goods. Then that Statute does not alter the Nature of the Office, but only confines the Carriage of Letters to certain ſpecial Perſons; as before the Act of Parliament he was liable, and now that Act obliges all Perſons to ſend by the Poſt-Maſter, ſhall the Subject by the ſame Act be ouſted of his Remedy?

Another Objection is, That an Action may be brought againſt the Sub-Agents, but for Neglect the Principal muſt anſwer for his Inferior Officers.

The Poſt-Maſter hath the whole Management of the Office; if he makes a Deputy, although for Life, he may turn him out. *Mo.* 556. 39 *H.* 6. 1. He hath the ſole Power to make and turn out his Deputies, and therefore muſt anſwer for his Deputies and all his Officers.

Another Objection is, That they are all but fellow Servants and all receive their Salaries of the King, but they are retained by the Poſt-Maſter and under his Command, and then they are his Servants; but ſuppoſe it granted that they are not the Servants of the Poſt-Maſter, then the Caſe will be, that the Defendants who are intruſted by Virtue of an Act of Parliament with the Management of an Office, employ Perſons in that Office who are not their Servants, and who imbezil Goods brought thither, and then the Defendants muſt be anſwerable for them.

Another Objection is, That the Act of Parliament of 12 *Car.* 2. never intended that the Poſt-Maſter General ſhould be anſwerable for the Neglect of his Deputies and Servants; but that does not appear, and is only *Gratis dictum*, and it ſeems to me that the Act of Parliament did intend it, for when an Act of Parliament makes a new Officer, and intruſts him with the Property of the Subject, it is to be preſumed that the Act of Parliament intends to make him chargeable as other Officers of the ſame Nature are: and the Statute ſays that he is conſtituted for the ſafe Diſpatch of Letters; and by another Clauſe it appears that the Act of

Par-

Parliament intended to make him anſwerable for his Servants and Deputies, for it is provided that the Poſt-Maſter and his Subſtitutes ſhall provide Poſt-Horſes, *&c.* and for Default the Poſt-Maſter ſhall pay 5 *l. &c.* the Poſt Maſter, without Mention of his Deputies.

Another Objection is, that the Office by this Means will be deſtroyed; but ought we to preſerve the Office to the Prejudice of the Subject? the Office will be more careful, and if it takes ſufficient Care it cannot be deſtroyed.

Another Objection is, that Exchequer-Bills may be ſent by another Way; but a Man has a Right to make his Election by which Way he will ſend them: Shall an Inn-keeper anſwer for Goods ſtolen in his Inn, when the Gueſt might have been entertained in another Inn? Certainly he ſhall; but Exchequer-Bills cannot be ſent by any other Way with ſo much Speed.

It hath been asked by Way of Objection, ſhall the Poſt-Maſter be anſwerable [for Things of great Value] when he hath ſo ſmall a *Premium?* Certainly he ſhall, if he is charged by the Law, and he accepts of the Office upon ſuch Terms. Another Objection is, that the Patent of the Defendants ſays, that they ſhall not be anſwerable for their Subſtitutes in any Default, but only for their own proper Neglect; but this Clauſe regards only the Imbezilment of the Revenue. And yet Judgment was given by the Opinion of three Judges for the Defendants.

Caſe 69. ***Blackborow*** and ***Davies.*** In B. R.

Vide ante 96.

IT was now urged, that the Grandmother was in equal Degree with the Aunt; and ſo thought the Court; for the Mother is nearer of Blood than the Brother, (and therefore the Statute of 1 *Jac.* 2. *c.*—. was made to give Diſtribution to the Brother with the Mother) and by Conſequence the Grandmother is in equal Degree with the Aunt; the Deſcent to an Uncle is not immediate, but mediate, and the Pleading

of ſuch a Deſcent ought to ſhew how he is Heir. And the *Mandamus* was denied by the whole Court.

The King and *Eller.* In B. R.

Caſe 70.

INformation againſt the Defendant for Counterfeiting ſeveral Receipts of ſeveral Perſons, to whom Sums of Money were due out of the Exchequer, by Means of which Receipts he, without the Privity of the Perſons to whom the Money was due, did receive the Sums aforeſaid. The Defendant, as to the Counterfeiting of the Receipts or Knowing them to be counterfeit, pleaded Not guilty; and as to the Reſidue of the Information he pleaded, that he received the ſaid Receipts of one *Smith*, a Solicitor, and received the Money; and after Diſcovery of Fraud in *Smith* he gave Notice to the Perſons, and paid the Money to them, without Prejudice to the Exchequer. To which it was demurred, for that this Plea amounts to the General Iſſue. But the Court would not hear any Argument concerning the Plea before Trial of the Iſſue.

When the Court will not hear any Argument about the Plea on a Demurrer before the Trial of the Iſſue.

The King and *Tyler.* In B. R.

Caſe 71.

APPEAL for Murder. The Defendant (*Proteſtando*, that the Writ is not ſufficient, for that there are not fifteen Days between the *Teſte* and the Return of it) pleads, that he was formerly indicted for the Murder, and found guilty only of Mauſlaughter; whereupon he prayed the Benefit of the Clergy, and had it. To which there was a Demurrer. And as to the Writ, it was ſaid by the Counſel for the Plaintiff, that this Matter [of the *Proteſtando*] was pleadable in Abatement; but as the Defendant hath not pleaded it, but only taken hold of it by *Proteſtando*, the Appearance aids the Writ.

Writ, when aided by Appearance of the Defendant.

Holt C. J. ſaid that it appears upon the Record; and altho' a voluntary Appearance aids the Defect of Form in the Writ, yet an Appearance by Coertion does not aid it; and by the Law there ought to be fifteen Days between the *Teſte* of

the Writ and the Eſſoin-Day; but here the Appeal was teſted the 9th Day of *October*, returnable *quinden' Mich.* and the Day of Eſſoin happened on the 20th of *October*. *Sed adjorn'.*

Caſe 72.

Freke and *Thomas*. In B. R. *Rot.* 102.

Vide Hill. 7 Ann. Adminiſtration *durante minore ætate* of one intitled to the Adminiſtration doth not determine until the Infant hath attained the Age of twenty-one.

DEBT by the Plaintiff as Adminiſtrator *durante minore ætate* of *Dutton Stede*, upon a Bond for 40 *l.* made to Sir *Edwin Stede* the 1ſt of *March* 1693. which was not paid to Sir *Edwin* in his Life-time, nor to the Plaintiff afterwards, to whom Adminiſtration of all and ſingular the Goods and Chattels of the ſaid Sir *Edwin*, to the Uſe and Benefit, and during the Minority of the ſaid *Dutton Stede* a Minor, which ſaid *Dutton Stede* is now under the Age of 21 Years, to wit, of the Age of 18 Years, and no more, was committed, by *Thomas* by Divine Providence Archbiſhop of *Canterbury*, *&c.* after the Renunciation of all the Executors of the Will of the ſaid *Edwin* by *G.* and *E.* the Executors of the ſame Will, in due Form of Law. To which Declaration the Defendant demurred; for that the Adminiſtration granted to the Plaintiff had ceaſed. I, of Counſel with the Defendant, inſiſted, that the Declaration was ill; for it appears that *Dutton Stede*, during whoſe Minority the Adminiſtration was granted, had attained the Age of ſeventeen Years before the Action commenced, and then the Authority of the Adminiſtrator ceaſes, according to *Pigot*'s Caſe, 5 *Co.* 29. *a.* *Cro. Eliz.* 602. But a Diverſity ſeems to be underſtood on the other Side, between where an Adminiſtration is granted during the Minority of an Executor, and where it is granted during the Minority of one who is intitled to have Adminiſtration; for the Declaration takes Notice, that the Executors of Sir *Edwin Stede* refuſed, and that *Dutton Stede*, during whoſe Minority the Adminiſtration was granted, was the principal Legatee, and ſo (as it ſeems) intitled to the Adminiſtration: But I think this does not make any Difference; for the Reaſon why the Authority of an Adminiſtrator *durante minore ætate* ceaſes, when the Infant attains the Age of 17 Years, is, that by the Spiritual Law, at that Age he is capable of making a Diſpoſition of the Goods of the Deceaſed for the Good of the Deceaſed,

and to take the Adminiſtration upon himſelf. But this Reaſon is of the ſame Weight, as well when the Minor is an Adminiſtrator, as when he is Executor, for the Power of the one and the other is the ſame; and an Adminiſtrator in the Civil Law is called *Executor dativus*; the Perſon from whom the Authority to adminiſter is derived, who is the Deceaſed, or the Ordinary, is not regarded, but that Perſon only to whom ſuch Authority appertains, whether he be of Age ſufficient to adminiſter; and therefore if an Adminiſtration is granted during the Minority of a Woman, and ſhe takes a Husband of the Age of ſeventeen Years, the Adminiſtration ceaſes; as it was held 5 *Co.* 29. *b. Prince*'s Caſe; by which it appears, that no more Regard is had of a Perſon appointed to take the Adminiſtration by the Deceaſed, than there is of a Stranger. And this Diſtinction was not known to *Vaughan* C. J. for he thought, that an Adminiſtrator *durante minore ætate*, if he brought an Action, ought to aver, that the Adminiſtrator or Executor was under the Age of ſeventeen Years. *Vaugh.* 93. *Edgcomb* and *Dee.* There an Action upon the Caſe was brought againſt an Adminiſtrator *durante minore ætate* of *Charles Everrard*, the Son of the Inteſtate: The Defendant pleaded ſeveral Judgments againſt himſelf, and no Aſſets *ultra.* And upon a Demurer to the Plea an Exception was taken, that the Judgments pleaded did not appear to be againſt him as Adminiſtrator *durante minore ætate.* But the Exception was not allowed; for that there is no need, in an Action brought againſt an Adminiſtrator *durante minore ætate*, for the Plaintiff to ſhew that the Adminiſtration is not determined; but in an Action brought by an Adminiſtrator *durante minore ætate* he ought to aver, that the Adminiſtrator or Executor is under the Age of 17 Years; and an Adminiſtration hath been granted to a Perſon in his Infancy. *Cro. Eliz.* 541. *Bade* and *Starkey.* If it is objected, that by the Statute of 22 & 23 *Car.* 2. *c.* 10. Ordinaries in granting Adminiſtration ſhall and may take of the Perſon to whom Adminiſtration is granted ſufficient Bond, *&c.* which Bond an Infant cannot give; it is to be obſerved, that the Statute does not intend to make any Alteration in the Perſons to whom Adminiſtration is to be granted, but only to require a Caution of the Adminiſtrator, which if he cannot give, it ought to be taken

of

of his Surety in his Stead; and it muſt be obſerved, that an Adminiſtration *durante minore ætate* granted after the Infant is ſeventeen Years of Age is void. 5 *Co.* 29. *a. Pigot's* Caſe. But Judgment was given for the Plaintiff; for there was always a Diverſity between the Caſes where an Adminiſtration is granted during the Minority of an Executor, (which ceaſes at the Executor's attaining the Age of ſeventeen Years) and where it is granted during the Minority of one who is intitled to the Adminiſtration, the which endures until the Infant attains the Age of twenty-one Years; and ſo it was adjudged between *Atkinſon* and *Corniſh*, and between *Dubois* and *Dubois*.

Caſe 73. *Feltham* and *Cudworth*. In B. R. *Paſch. ult. Rot.* 97.

Compoſition made by Virtue of the Statute againſt Bankrupts how to be pleaded.

SCIRE facias upon a Judgment for 800 *l.* againſt the Defendant, who pleaded as to Execution againſt his Lands and Tenements, Goods and Chattels, he could ſay nothing to avoid it, but as to Execution againſt his Body, he pleaded a Compoſition with Two Thirds in Number and Value of his Creditors, and therefore he was exempt from Execution as to his Body. To which it was demurred. And *Dee* Common Serjeant made the following Objections to the Plea. Firſt, By the Act of Parliament the Agreement ought to be by Deed; for the Statute ſays, by Writing under their Hands and Seals, which in Conſtruction of Law is by Deed; and therefore the Defendant ought to have pleaded it as a Deed; and it is not ſufficient for him to purſue the Words of the Act of Parliament in this Caſe; but it would have been ſufficient if he had ſaid, by a certain Deed under their Hands and Seals, or by Writing under their Hands and Seals, and afterwards delivered; and he ought in Pleading to have ſhewn that the Compoſition was by a Deed. Secondly, Then if the Compoſition was by Deed, there ought to have been a *Profert hic in Cur'*. Thirdly, It is not ſufficient, that the Compoſition was for the equal Benefit of all the Creditors, but it ought to appear to be for their equal Benefit; but here is 2 *s.* in the Pound allowed to the Creditors who ſubſcribe,

but it is not ſaid, that it was for the Benefit of the others who did not ſubſcribe. Fourthly, It does not appear when the 2 *s.* in the Pound ſhall be paid; for by the Agreement it does not appear that he ever was in Priſon, and by the Agreement the Payment is to be made within five Years after his Diſcharge; and for that it doth not appear that the Defendant ever was in Priſon, it does not appear that the Compoſition ſhall ever be paid. *Sed non allocatur*; for as to the firſt Objection, it is ſufficient to purſue the Words of the Statute, and as to the ſecond, there is no need to have a *Profert hic in Cur'*. *Mod. Ca.* 58. And if the Compoſition be made to the equal Benefit of all the Creditors, it is good, altho' it be not ſaid in the Agreement that the Payment ſhall be to all; for thoſe who ſubſcribe cannot bind thoſe who do not ſubſcribe; but the Act of Parliament requires the ſame Payment to be made to all, as is agreed to be paid to the Subſcribers. And *Holt* C. J. ſaid, that the Compoſition upon the Act of Parliament is in the Nature of a Defeazance, and the firſt Security was in Force; and therefore if there were a Bond for 100 *l.* and a Compoſition for 2 *s.* in the Pound, an Action might be brought upon the Bond, and the Bond would be defeazanced by the Compoſition; but as to the laſt Objection, that there appears to be no Day of Payment, *dubitatur*; and therefore it was adjourned.

Gree and *Rolls*. In B. R. *Hill.* 8 *W.* 3. *Rot.* 664.

Caſe 74. *Greeves* and *Rolls*, 2 Salk. 456. S. C.

In an Ejectment againſt ſeveral, if one only confeſs Leaſe, Entry and Ouſter, and the others do not, how the Verdict ſhall be.

EJectment. On a Special Verdict the Caſe was attempted to be moved, but was ſtopped by Mr. *Broderick*; for here was a Declaration againſt two Defendants, Sir *John Rolls* and Mr. *Newell*; at the Aſſizes one of the Defendants did not appear, and a *Nolle proſequi* was entered againſt him, and the other did appear, and a Verdict was brought in, which could not be right in an Ejectment, where the Term is joint, for then, by the Default of one of the Defendants, the whole Term would be recovered againſt the other: It may be otherwiſe in Treſpaſs, where the Treſpaſs is ſeveral, and each Party muſt anſwer for himſelf; but that cannot be in Ejectment

ment according to the Caſe 2 *Leon.* 199. *Drake* and *Holland.* But in ſuch Caſe *Holt* C. J. ſaid, that if one Defendant appeared and confeſt Leaſe, Entry and Ouſter, and the other did not appear, he would direct the Jury to find as to the Defendant who did not appear, Not guilty, if nothing was proved againſt him. *Sed adjornatur.*

Caſe 75. 1 Salk. 72. S. C.

Baily and *Cheeſely.* In B. R.

Submiſſion to an Award good, tho' only Conditional.

IT was moved to make a Submiſſion to an Award a Rule of the Court, upon an Affidavit that it was ſo agreed at the Time of the Submiſſion; and the Bond of Arbitration being produced, it appeared to be with Condition that the Party ſhall ſtand to the Award, and will conſent to have it made a Rule of Court, otherwiſe the Condition to be void. And it was inſiſted that there was no Conſent, but only a Penalty in caſe he would not conſent afterwards, and by the Statute it ought to be a preſent Conſent; and if it was not ſo at the Time of the Submiſſion, it never can be made ſo. But the Court was of Opinion that this Condition was a Conſent, otherwiſe it was of no Signification, and that if there was not a Conſent to make the Award a Rule of Court, there is no Submiſſion, for the Submiſſion is contained alſo within the Condition of the Obligation.

Caſe 76.

Warner and *Green.* In B. R.

Declaration in an Action on the Caſe for a Way, when help'd by a Verdict, where the particular ſort of a Way is not ſhewn.

ACTION upon the Caſe for ſtopping up a Way, and the Plaintiff declared that he was ſeiſed of eighteen Meſſuages in St. *Buttolphs Aldgate*, and preſcribed for a Way from every one of thoſe Meſſuages over a certain vacant Piece of Ground, *&c.* to ſuch a Place; and after a Verdict for the Plaintiff, it was objected that it was not ſhewn what ſort of a Way he had, whether a Foot-Way, Horſe-Way or Cart-Way. *Sed non allocatur*; for it is ſaid that he had a Way *ire & redire*, *&c.* and after a Verdict it ſhall be intended a general Way for all Purpoſes.

Sterling and *Tanner.* In B. R.

Caſe 77.

ERROR of a Judgment in *C. B.* and the Plaintiff aſſigned for Error, Want of an Original, and then the Courſe is, that the Defendant ſhall give a Rule to the Plaintiff to get a Certificate whether there was an Original, upon which the Plaintiff ſhall take out a *Certiorari* to inquire whether there was any Original of that Term of which the *Placita*, *&c.* are entered, which in the preſent Caſe was *Trinity* Term. But here in this Caſe the Defendant did not give any Rule, but at his own proper Charge took out a *Certiorari*, and procured a Certificate of an Original. But by the Court this is ill, for the Error is not compleatly aſſigned until the Certificate is returned, by which it appears that there was no Original in the Caſe.

Error for want of an Original, is not compleatly aſſigned until the Certificate is returned.

Lamplugh and *Shortridge.* In B. R.

Caſe 78.
1 Salk. 219.
S. C.

COvenant. Defendant pleaded a Releaſe and Confirmation, *&c.* to which it was demurred *Quia duplex & caret forma.* But by the Court, This is a General Demurrer, for the Demurrer ought to ſhew in what the Duplicity conſiſts, and upon a General Demurrer, Duplicity is not fatal.

On a General Demurrer Duplicity not fatal.

Palmer and *Stavely.* In B. R.

Caſe 79.
1 Salk. 24.
S. C.

INdebitatus Aſſumpſit for Money had and received by the Defendant for the Plaintiff, *ad uſum ipſius* the Defendant, where it was intended to have been "To the Uſe of the Plaintiff"; and after a Verdict, it was moved in Arreſt of Judgment, for that the Plaintiff had declared of Money had to the Uſe of the Defendant, and therefore had no Cauſe of Action of his own ſhewing, for the Money being received to the Uſe of the Defendant the Plaintiff cannot recover it. *Sed non allocatur*; for after a Verdict for the Plaintiff, the Words *ad uſum Defendentis* ſhall be rejected, for

After a Verdict the Words *ad uſum Defendentis*, inſtead of *ad uſum querentis*, ſhall be rejected.

for a Verdict could not have been found for the Plaintiff, if Evidence had not been given that the Monies had been received for his Uſe; and the Declaration further ſays that the Monies were received for the Plaintiff, and ſo the ſubſequent Words, *To the Uſe of the Defendant*, ſhall be rejected; and to this Purpoſe were cited the Caſes between *Norworthy* and *Wildman*, 1 *Mod. Rep.* 42. 1 *Sid.* 306. and a Caſe in this Court between *Pattiſon* and *Milton*, — *W.* 3. where a Declaration that the Plaintiff aſſumed to the Plaintiff was aided after a Verdict.

Caſe 80.

May and *King*. In B. R.

Declaration where help'd by the Verdict.

ASSUMPSIT, the Plaintiff declared that in Conſideration that he had delivered to the Defendant a Chariot, and had agreed to permit him to have the Uſe of it for one Year, the Defendant promiſed to pay 200 *l.* but it was not alledged that the Defendant had the Uſe of the Chariot for a Year; and this after a Verdict for the Plaintiff was moved in Ar- of Judgment. *Sed non allocatur*; for after a Verdict it ſhall be intended that he had the Uſe of it for a Year, as it appears that the Chariot was delivered to him.

Caſe 81.

Lancaſhire and *Kellingworth, Executors of* —— In B. R.

Tender and Refuſal, how to be pleaded.

THE Caſe appeared to be this upon the Declaration: The Teſtator covenanted with the Plaintiff, upon the transferring ſo much Stock in the *Hudſon-Bay* Company, to pay 2000 *l.* and the Plaintiff avers that he was ready and offered to make a Transfer, but that the Defendant was not willing to accept of it. And *Holt* C. J. delivered the Opinion of the whole Court, and he ſaid, if a Man is to pay Money upon an Act done, and there is a Tender of doing it, and the Party refuſes, it is *tantamount* as if it had been done; but here the Tender is not well alledged, for the Plaintiff ſays, that he was ready, and the Defendant was not willing to ac-

cept, and whenever a Man pleads a Tender, he ought to plead a Refuſal alſo. 1 *Sid.* 13. 2 *Saund.* 350. *Vent.* 105.

Then if the Defendant was not preſent, and for that Reaſon he could not refuſe; the Plaintiff ought to ſhew that the Defendant had Notice, and that the Plaintiff was ready, and no Defendant came, *&c.* *Yelv.* 38. 1 *Cro.* 754.

And if it is pleaded that the Defendant had Notice and did not come, it ought to be ſhewn when and what Time the Plaintiff was ready, *viz.* that he attended to the laſt Part of the Day. 5 *Co.* 114. *Wade's* Caſe.

And in ſuch Caſes the later Way of pleading is, that the Defendant did not come, nor any other for him, though this is not of neceſſity; for if a Man pleads a Tender and Refuſal, it is ſufficient to ſhew the Refuſal, without ſaying at what Time the Refuſal was, for a Refuſal by the Party at any Time or Place is ſufficient; but if a Man pleads Notice given, by which it appears that the Defendant was not preſent when the Act ought to have been done, then the Plaintiff muſt ſay that he was ready at ſuch a Time, *viz.* to the laſt Part of the Time when the Thing was to be done, and that the Defendant or any for him did not come; and the Reaſon of all thoſe Caſes is, that when the Plaintiff himſelf is to do an Act, and that Act is not done, he ought to ſhew to the Court that he had done every Thing that was in Power. *Hob.* 107. 1 *Cro.* 694. 8 *Co.* 92. And therefore Judgment was given for the Defendant by the whole Court.

Parſons and *Gill.* In B. R.

Caſe 82.

Execution bearing Teſte before the Judgment ſigned, when good.

IT was moved to refer the Regularity of a Judgment in Debt; the Declaration was of *Hillary* Term, and Judgment by Confeſſion which was ſigned after the Term, and after the Signing, *viz.* the 10th of *April*, the Defendant died, and the Execution bore Teſte the 23d of *January*; and it was inſiſted that it appeared that the Execution was before the Judgment. *Sed non allocatur*; for Execution may be ſued out

after the Death of the Defendant, except againſt a Purchaſor, and the Writ of Execution may bear Teſte of the precedent Term, even of the firſt Day of that Term.

Caſe 83. ***Sir Richard Levin*** and —— In B. R.

Error for want of an Original; another Original allowed by the Court of Chancery.

ERROR of a Judgment in *C. B.* in Covenant. The Plaintiff in Error aſſigned for Error Want of Original, and had a *Certiorari* upon which it was certified, that there was no Original; afterwards the Defendant applied to the Court of Chancery, and upon Affidavit that Inſtructions were given to the Curſitor for an Original, but they were loſt, the Court of Chancery allowed that the Original ſhould be ſupplied; upon which the Defendant in Error prayed another *Certiorari*, and an Original was certified of the ſame Term in which the Default of an Original was certified before; and now it was moved by Mr. *Broderick* that this was irregular, for before the ſecond *Certiorari* was returned, the Defendant ought to have given a Copy of the Original to the Attorney of the Plaintiff; and the Maſter informed the Court that the Courſe was ſo, when the ſecond Original certified was of another Term; but it being in this Caſe of the ſame Term, the Motion was not allowed.

DE
Term. Sanct. Trin.
1 Annæ. In B. R.

Machell and *Clerk.*

Case 84.

1 Salk. 619. S. C. Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life, with Remainders, and afterwards ſuffers a Recovery to other Uſes; the Uſes on the Recovery held good.

ERROR of a Judgment in *C. B.* in Ejectment; where upon a Special Verdict the Caſe appeared to be this: *John Machel* ſeiſed of the Land in Queſtion in Tail, by Indenture covenants to ſtand ſeiſed thereof to the Uſe of himſelf for Life, and after to the Uſe of his eldeſt Son and the Heirs of his Body, then to his ſecond Son, and ſo to all his Iſſue ſucceſſively in Tail, and the 25th of *January* then next following he covenants to ſuffer a Common Recovery to other Uſes in Fee, which Recovery was had accordingly; in which *A.* was Demandant againſt *John Machell* Tenant, who vouched the Common Vouchee; and whether this Recovery was good was the Queſtion; for if by the Covenant to ſtand ſeiſed to the Uſe of himſelf for Life, *&c.* he was only Tenant for Life at the Time of ſuffering the Common Recovery; then that Recovery did not bar the Eſtates of his Iſſues, becauſe it was ſuffered with a ſingle Voucher only, *John Machell* not being Vouchee, but only Tenant to the *Præcipe*; but if the Covenant to ſtand ſeiſed did not alter the Eſtate-tail, but that *John Machell* after ſuch Covenant, and at the Time of the Recovery, remained ſeiſed of the Eſtate-tail, the Recovery was ſufficient to bar the Iſſue in Tail. And after Judgment for *Clerk* (who claimed under the Recovery) in the Common Pleas, it was ſeveral Times argued in *B. R.* And now *Holt* C. J. delivered the Judgment of the Court, that the Judgment in *C. B.* ſhould be affirmed. And he ſaid, that all the Judges of the Court, *viz. Littleton,*

Powys

Powys and *Gould*, agreed with him, that the Judgment ſhould be affirmed: As to the Reaſons of their Judgment, he had not conferred with them, but that he thought it very reaſonable, that the Reaſons and Grounds of his own Opinion ſhould be declared in this Caſe; and he was of Opinion, that if a Tenant in Tail bargains and ſells, or makes a Leaſe and Releaſe to another in Fee, that the Bargainee or Releaſee hath a baſe Fee, and his Eſtate is not determined by the Death of the Tenant in Tail, but deſcends to the Bargainee or Releaſee and his Heirs, till that Eſtate is avoided by the Entry of the Iſſue in Tail; and herein he relied upon *Seymour*'s Caſe, 10 *Co.* 96. If a Tenant in Tail bargains and ſells to one and his Heirs, the Bargainee hath an Eſtate to him and his Heirs; and if afterwards the Tenant in Tail levies a Fine to the Bargainee, it corroborates the Eſtate of the Bargainee; ſo that altho' before it was determinable by the Iſſue after the Death of Tenant in Tail, after the Fine the Iſſue in Tail cannot avoid it; and upon the Caſe of Fines, 3 *Co.* 84. and the common Caſe demonſtrates it: If Tenant in Tail makes a Leaſe for Years and dies, the Leaſe is not void, but only voidable; for if the Iſſue in Tail confirms it by the Acceptance of Rent, it is good for the Time, and cannot afterwards be avoided: Then if his Leaſe conveys an Eſtate which is not determined by his Death, there cannot be any Reaſon to ſay, that his Leaſe and Releaſe ſhall not convey an Eſtate which will have a Continuance until it is avoided by his Iſſue; and this is not inconſiſtent with the Statute *De donis*; for although that Statute ſays, that a Tenant in Tail ſhall not alien, yet by his Feoffment he made a Diſcontinuance, and put the Iſſue to his Action of *Formedon*; and the Intent of the Statute is anſwered, when the Alienation may be avoided by the Action of the Iſſue. The Bargain and Sale, or Leaſe and Releaſe of a Tenant in Tail, does not make a Diſcontinuance; but it may amount to an Alienation of the Inheritance which was in him, notwithſtanding the Statute; for as the Statute *De donis* is ſatisfied when the Alienation by the Feoffment is avoided by the *Formedon* of the Iſſue; by the ſame Reaſon it is ſatisfied when the Alienation by Bargain and Sale or by Leaſe and Releaſe is avoided by the Entry of the Iſſue. The Caſe was: Tenant in Tail bargained and ſold

an Advowſon to one and his Heirs, and afterwards died; the Eſtate of the Bargainee was not abſolutely determined, altho' it was of a Thing which lay in Grant. 3 *Co.* 84. As to the Caſe of *Litt.* —. and the Caſe of *Took* and *Glaſſcock*, 1 *Saund.* 261. where it was reſolved, that nothing paſſed but for the Life of the Tenant in Tail; *Littleton* there is repugnant to himſelf, and *Hobart* ſaid he confounded himſelf; and the Caſe 1 *Saund.* afterwards reſolved, That if a Tenant in Tail, after a Bargain and Sale to another and his Heirs, levies a Fine to a Stranger, ſuch Fine avails to make the Eſtate of the Bargainee good to him and his Heirs; but how can a Fine to a Stranger enure to the Benefit of the Heir of the Bargainee, if the Bargain did not give a baſe Fee to the Bargainee and his Heirs.

But in the Caſe in Queſtion, where Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life, the Remainder to his Iſſues in Tail; this is abſolutely void, for the Covenant to ſtand ſeiſed to the Uſe of himſelf for Life cannot be of any Avail, only as it was neceſſary to ſupport the Remainders dependant thereupon: But the Remainder here limited after his Death is abſolutely void; as if a Tenant in Tail made a Leaſe to commence after his Death, the Leaſe would be abſolutely void, altho' a Leaſe for Years made by him *in præſenti* hath Continuance after his Death, if it be not avoided by his Iſſue.

And if there is a Covenant to ſtand ſeiſed to the Uſe of another and his Heirs; this is good, and paſſes a baſe Fee to the *Ceſtuy que Uſe.*

And if a Tenant in Tail by Bargain and Sale, or by Leaſe and Releaſe, conveys to another and his Heirs, to the Uſe of himſelf for Life, Remainder to another; the Remainder is good, becauſe of the Tranſmutation of the Poſſeſſion.

So if he covenants to ſtand ſeiſed to the Uſe of *A.* for Life, Remainder to *B.* and his Heirs; it is a good Remainder, altho' the Tenant in Tail dies during the Life of *A.* until it is avoided by the Iſſue.

But if he covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to another; that Remainder is void in the Commencement, and nothing paſſes by the Covenant; and therefore the Recovery here was good. And the Judgment was affirmed by the whole Court.

Caſe 85.

Smith and *Walgrave.* In B. R.

Plaintiff in Replevin ſhall not pay Coſts when the Writ abates.

REplevin. The Plaintiff declares for the taking of his Cattle in a certain Place called *B.* The Defendant pleads in Abatement, that he took them in a certain Place called *C. abſque hoc, quod cepit in præd' loco vocat' B. prout, &c. & pro returno habendo* he avows, *&c.* The Plaintiff confeſſed the Caption to be in *C.* and thereupon the Avowant had Judgment that the Writ ſhould abate, and for the Return of the Cattle. And now it was moved by *Eyre*, that the Avowant ſhall have his Coſts. But it was reſolved by the Court, that he ſhould not have Coſts; for the Statute of 21 *H.* 8. *c.* 19. does not extend to this Caſe, but gives Coſts only when the Plaintiff is nonſuited; and the Statute of 7 *H.* 8. *c.* 4. gives Coſts only when the Plaintiff is barred; but here the Plaintiff is neither barred nor nonſuited, but the Writ only abates; and he may have a new Writ, and is not put to his ſecond Deliverance.

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Term. Sanct. Hill.
1 Annæ. In B. R.

Redding and *Royſton.*

Caſe 86.

Vide 1 Salk. 242. S. C.

Where an Heir at Law ſhall take by Deviſe, and not by Deſcent.

THE Caſe was: A Man ſeiſed of Lands in Fee, had Iſſue two Daughters, one of which had Iſſue a Son and died; the Grandfather makes his Will, and thereby deviſes the Land to the Son of that Daughter and his Heir; then the Deviſee dies, leaving his Aunt and Grandmother; the Grandmother enters and enjoys a third Part of the Land as for her Dower, and pays one Moiety of the Reſidue of the Profits to the Iſſue of the Deviſee, and the other Moiety to the Iſſue of the other Daughter, and dies. The Son of the Deviſee enters, and claims the Whole by the Deviſe, and therefore brought his Ejectment againſt the Son of the other Daughter, who claimed the Moiety by Deſcent; and whether by this Deviſe the Lands ſhould go to the Heir of the Deviſee, or deſcend to him, [as to one Moiety] with his Couſin, the Iſſues of the two Daughters as Copartners, was the Queſtion. And it was inſiſted, that when an Eſtate is deviſed to the Heir, it deſcends and does not paſs to him by the Deviſe. But it was reſolved by the Court, that the Eſtate paſſed by the Deviſe, and not by Deſcent, for the Reaſon why an Heir, to whom Land is deviſed by his Anceſtor, takes by Deſcent and not by Deviſe, is, becauſe the Deviſe was not neceſſary, foraſmuch as the ſame Eſtate is given by the Will, that would have deſcended; but when the Eſtate deviſed is altered in Quantity or Quality, the Heir takes by Deviſe; now by this Deviſe there is an Alteration of the

the Eſtate, for if the Land deſcended, both the Daughters would be but one Heir and would take as Copartners; but when a Deviſe is made of all to one or the Son of one of the Daughters, then the Deviſee takes by Purchaſe in a different Manner from what would be in Caſe the Land had deſcended; then it was urged that the Plaintiff was barred by the Statute of Limitations, for the Profits of Part of the Eſtate was enjoyed by the Son of the other Daughter above twenty Years. *Sed non allocatur*; for here was no Ouſter, and the Statute of Limitations does not extend to this Caſe.

Statute of Limitations where it does not extend.

Caſe 87.

Hunt and *Bourne*. In B. R.

Vide ante 93.

THE Caſe was now argued *ſeriatim* by the Court. And *Gould* J. was of Opinion that the Judgment ſhould be affirmed, and as to the Objection, that by the Verdict it is not found, that there was a Writ of Right, he was of Opinion that it was not needful, for in all ſpecial Verdicts all neceſſary Circumſtances ſhall be intended. *Lan.* 15. 9 *Co.* 51. As to the principal Caſe he was of Opinion, that by the firſt Fine there was a Diſcontinuance for the three Lives, for notwithſtanding the Statute 18 *Edw.* 1. *De modo levandi Fines*, a Fine may be well levied by Antient Demeſn, for this Statute does not extend to it. *Hob.* 47. 2 *Inſt.* 106. *Dyer* 373. True it is that it cannot be a Bar to the Iſſue in Tail upon an Eſtate-Tail made by the Statute *De donis Conditionalibus*, for a Fine is no Bar to ſuch an Eſtate, but by the Statute of 4 *H.* 7. and 32 *H.* 8. But it is objected, that a Fine is levied upon a Writ of Covenant which is a perſonal Action, and cannot be brought in Antient Demeſn; but I am of Opinion, that a Writ of Covenant for a Fine is a real Action, and here the Fine is levied according to the Cuſtom upon a Writ of Right cloſe, *Fitzh. Nat. Brev.* 11. but it is objected, that a Court of Antient Demeſn is not a Court of Record, yet a common Recovery there binds the Eſtate.

But I am of Opinion, that this Diſcontinuance determines with the three Lives: If Tenant in Tail makes a Leaſe for

the Life of the Leſſee, this is a Diſcontinuance of the Eſtate-tail; but if the Leſſee dies, the Diſcontinuance determines. *Co. Lit.* — and I am of Opinion, that the ſecond Fine does not make a Diſcontinuance. 3 *Co.* 88, 89. *Co. Litt.* —.

I alſo am of Opinion, that the Right of Entry is not loſt by the twenty Years; the Statute of Limitations does not bar the Right, but only the Remedy; if a Leſſee for Life levies a Fine, the Leſſor ſhall have five Years after his Death; for the Right of the Leſſor is not barred by the Non-claim of the Leſſee, or by that of himſelf, during the Life of the Leſſee.

Powys J. was of Opinion that the Verdict was good; for it is found, that by the Cuſtom a Fine may be levied upon a Writ of Right Cloſe, and that a Fine was levied there according to the Cuſtom.

He thought alſo, that a Fine may be levied in the Court of Antient Demeſne, eſpecially, it being found by the Verdict, that it was levied according to the Cuſtom beyond Time of Memory. *Hob.* 48. 1 *And.* 71. *Dy.* 372. There it was alſo ſaid, that a Fine in Antient Demeſne bars an Eſtate-tail; but 2 *Inſt.* —. takes Notice of this Caſe, and ſays, that a Fine there does not bar the Tail, but admits that a Fine may be levied there.

He alſo was of Opinion, that the Fine in Antient Demeſne made a Diſcontinuance, but it made a Diſcontinuance only for three Lives. And he held alſo, that the ſecond Fine did not make a Diſcontinuance, for that it doth not take Effect for the Life of the Conuſor; and this is like the Caſe, *Co. Lit.* — and the Section — there, altho' it is not the Text of *Littleton*, yet it is good Law, and founded upon good Reaſon; and is allowed for Law, 1 *Jon.* 109. *Latch* 69. in the Caſe of *Euſtace* and *Scawen*.

He was of Opinion alſo, that the Ejectment is not barred by the Statute of Limitations, altho' the Conuſor died in the Year 1656.

Then the Iſſue might have a *Formedon*, but now this Remedy is barred by the Statute of Limitations; for there was a Diſcontinuance for the three Lives, and the Entry of the Iſſue was taken away thereby, ſo that he could not have an Ejectment until the Determination of the three Lives, when the Diſcontinuance ceaſed, which was within twenty Years.

Powell J. I am fully of Opinion, that a Fine in Antient Demeſne makes a Diſcontinuance; for the Statute of 18 *Ed.* 1. *De modo levandi Fines* was only a Declaration of the Common Law, and does not reſtrain Fines in Antient Demeſne; for a Fine in the Common Pleas levied of Land in Antient Demeſne makes it a Frank-Fee, and is reverſable by the Lord in a Writ of Diſceit; and it would be a hard Conſtruction of the Statute 18 *Ed.* 1. *De modo levandi Fines* (even if it was introductive of a new Law, and much more ſo as it is only declaratory of the Law) to make it reſtrictive to Fines in Antient Demeſne, which cannot be levied any where elſe. Fines were leviable before the Juſtices in *Eyre*, and before *Magna Charta*, *c.* 11. in *B. R.* *Raſtal's Entries* 585. *b.* but the Statute of 18 *Ed.* 1. intends only the Reſtraint of Fines in inferior Courts upon Bill or Plaint there. The Caſe 44 *Ed.* 3. 38. is not Law; and no other Caſe denies the Power of levying Fines in Antient Demeſne; and this Caſe is founded upon the Miſtake, that a Writ of Covenant for a Fine is a perſonal Action, when it is a real Action. *And.* 71. 4 *Inſt.* 207. *Kel.* 90. *b.* Then this Fine in Antient Demeſne is a Diſcontinuance, but it is a Diſcontinuance only for the Lives; for although a Fine *come ceo*, *&c.* paſſes a Fee generally, yet it is not ſo, when there is an expreſs Limitation for Life. *Bro. Fine*, 12.

Then the ſecond Fine cannot make a Diſcontinuance when the Eſtate was diſcontinued before.

Holt C. J. I hold, that a Fine in a Court of Antient Demeſne is good, notwithſtanding it is not a Court of Record; for this Court can hold Pleas in a Writ of Right, and give a final Judgment there, and join the Miſe upon the mere Right;

for upon a Writ of Right Cloſe the Plaintiff ſhall make Proteſtation to proſecute it in the Nature of a Writ of Right, *Dyer* 111. Then if it hath Cognizance of a Writ of Right, which is an Action of the higheſt Nature, why ſhall it not levy a Fine, which is not of ſo high a Nature? It may be objected that *London*, and other antient Cities and Burghs, may hold Plea in a Writ of Right, but cannot levy a Fine; but the Cuſtom and Uſage are to be conſidered in this Matter; for they hold Pleas by Reaſon of a Grant or of a Preſcription, which ſuppoſes a Grant of all Pleas real, perſonal and mixt; but by ſuch a Grant before the Statute of 18 *Ed.* 1. *De modo levandi Fines*, the Power of levying Fines did not paſs; for it is a particular Manner of Action, which does not paſs by a general Grant. Then the City of *London* holds Pleas in the ſame Manner as the King's Bench or Common Pleas upon Original Writs; and if before the Statute 18 *Ed.* 1. the City of *London* could levy a Fine, yet at the ſame Time it might be levied in *C. B.* but a Fine of Land in Antient Demeſne could not, even before that Statute, be levied in *C. B.* then in the Courts of *London*, *&c.* If a Plea there conuſable be carried elſewhere, and the Parties admit the Juriſdiction, it is good; but if Land lies in Antient Demeſne, altho' the Parties admit the Juriſdiction of *C. B.* yet the Fine ſhall be reverſed: Beſides, if a Tenant in Antient Demeſne cannot levy a Fine in the Court of Antient Demeſne, he will be under a greater Diſadvantage than other Subjects are; for he cannot levy a Fine in *C. B.* and the Power of levying Fines is a great Advantage, becauſe thereby Purchaſers are effectually ſecured; and it hath been a conſtant Practice to levy Fines there, tho' in ſome old Books it is made a Doubt of; as in 44 *Ed.* 3. 37. for a Fine muſt be levied on a Writ of Covenant, which is a perſonal Action; but that is a falſe Foundation, for a Writ of Covenant for a Fine is a real Action. *Fitzh. Nat. Brev.* 146. And a Fine may be levied upon any Writ whatſoever. 5 *Co.* 39. *a.* *Kelw.* 90. *b.* That Fines may be there levied it is agreed. 2 *Inſt.* 514. *Dyer* 373. And there the Diſpute was only, whether ſuch Fine barred the Eſtate-Tail.

And

And it is to be conſidered what will be the Effect of a Fine in Antient Demeſn, and I am of Opinion that it ſhall have the ſame Effect at Common Law as a Fine of Land that is Frank-Free would have at Common Law in *C. B.* and therefore a Fine by a Tenant in Tail ſhall make a Diſcontinuance in Antient Demeſn as well as in *C. B.* For a Recovery againſt Tenant in Tail puts the Iſſue to its *Formedon* in Antient Demeſn as well as in *C. B.* 7 *H.* 4. 3. *b.* 7 *H.* 7. 10. And if a Recovery there in a Writ of Right or other Action hath the ſame Force with a Recovery in *C. B.* why ſhall not a Fine there have the ſame Operation with a Fine in *C. B.*

Then the Force of a Fine levied there for three Lives is to be conſidered. A Fine *ſur Conuſance de droit come ceo, &c.* ſuppoſes that the Conuſor hath a precedent Eſtate by the Livery of the Conuſee, and therefore a Fine is improperly called a Feeoffment upon Record, for there is a great Diverſity between a Fine and a Feoffment. If a Man being diſſeiſed enters to make a Feoffment and Livery, this amounts to an Entry, and paſſes the Eſtate to the Feoffee, but a Fine by one out of Poſſeſſion paſſes nothing to the Conuſee, but only extinguiſhes the Right of the Conuſor. 2 *Co.* 56. *a. Buckler's* Caſe.

But it may be objected, that the Fine was levied before the Steward and Attornies, when the Suitors are Judges of the Court; but the Tenants who are Suitors may make Attornies by the Statute of *Merton*, 20 *H.* 3. and thoſe Attornies may ſit as Judges there.

Then it hath been objected, that a Fine *Sur conuſance de droit come ceo, &c.* imports a Conveyance in Fee, and this being for three Lives is a Contradiction, yet a Fine *come ceo, &c.* may be qualified to a leſs Eſtate, as appears by 41 *Ed.* 3. 14. *a.*

I alſo hold that this Diſcontinuance determines with the three Lives, for the Lives make the Diſcontinuance, then

the Eſtate being diſcontinued by the firſt Fine, cannot be more diſcontinued by the ſecond, and this is without Queſtion, according to *Littleton.*

I alſo held, that the Diſcontinuance by the firſt Fine continuing, the ſecond Fine cannot make a Diſcontinuance, although it is a Warranty; for if Tenant in Tail, Reverſion in Fee, makes a Leaſe for Life, and afterwards the Reverſion is granted with Warranty, yet this does not make a Dicontinuance.

Then as to the Statute of Limitations, it is to be conſidered whether the Iſſue in Tail was ever bound by the Statute of Limitations.

And I am of Opinion, that the *Formedon* was not barred, but if it was barred, yet when the three Lives determined, a new Right accrued to the Iſſue, and he might enter and have his Ejectment, for it is not of any Conſequence, that upon Suppoſition that he was barred of his *Formedon*, to which he had a Right, that therefore he muſt be barred of his Right of Entry, which at that Time he had not.

Judgment affirmed by the whole Court.

And in this Caſe it was declared by *Holt* C. J. as his Opinion *obiter*, That if a Copyhold was intailed by Cuſtom, a Common Recovery in the Lord's Court, would bar the Iſſue in Tail, and thoſe in the Remainder, for if the Intail of a Copyhold is allowed, a Common Recovery to dock it ought alſo to be allowed.

That the Privileges of Lands in Antient Demeſn muſt in their Original have been conferred by Act of Parliament, for they could not commence by Grant or Preſcription.*

If a Tenant in Tail grants *Totum ſtatum ſuum*, the Eſtate-Tail is not in Abeyance, as *Littleton* and *Coke* ſpeak, for if the Grant be to the Grantee and his Heirs, it paſſes a baſe Fee; ſo if Tenant in Tail releaſes all his Right to a Man and

his Heirs, a Fee determinable upon his Life paſſes; ſo alſo if a Tenant in Tail bargains and ſells to a Man and his Heirs, and if the Tenant in Tail afterwards levies a Fine to the Bargainee, this does not make a Diſcontinuance, for the Baſe Fee was before veſted in the Bargainee. 10 *Co. Seymour's* Caſe. If Tenant in Tail makes a Leaſe of three Lives purſuant to the Statute, with Warranty to the Leſſee and his Heirs, this does not make a Diſcontinuance, but the Leaſe is good notwithſtanding the Warranty, and whenever the Warranty makes a Diſcontinuance, the Diſcontinuance ceaſes by the Releaſe or Extinguiſhment of the Warranty.

DE
Termino Paſch.
2 Annæ. In B. R.

The Queen and *Burnaby.*

Caſe 88.

1 Salk. 181. S. C. In a Conviction on the 43 *Eliz.* *c.* 7. for cutting down Trees, the Number and Quantity of the Trees ought to be mentioned expreſly.

CONviction before Juſtices of Peace on the Statute of 43 *Eliz.* *c.* 7. againſt ſuch Perſons as ſhall cut Wood, Underwood, break Hedges, *&c.* for cutting down ſeveral Trees called Lime-Trees; and an Exception was taken, that the Conviction ſtiles the Defendant Gentleman; which ſhews that the Defendant was a Gentleman, and the Statute was intended againſt mean and diſorderly Perſons only; and ſo he who hath Ability to anſwer Damages ought not to be convicted upon this Statute, where he is ouſted of a Trial by a Jury, and hath not Opportunity to make out his Title if he claimed Property; and the Stile and the Preamble of the Act, and alſo the Statute of 15 *Car.* 2. ſhew that thoſe Acts were intended againſt lewd and pilfering Perſons, and then a Gentleman ſhall not be intended to be compriſed within the Meaning of them. *Sed non allocatur*; for the Court cannot diſtinguiſh between the Ability of Perſons, and there is no certain Rule or Limit to determine by who are able to anſwer Damages and who not; and if a Gentleman does a baſe or inferior Act, his Quality is not any Excuſe, but an Aggravation of his Offence: And the Court thought, that if the Defendant claimed Property before the Juſtices, they ought not to have made the Conviction; and if they proceeded to do it a Prohibition lies, either before or after the Conviction; and by the Opinion of ſome, if Property were alledged before the Juſtices, who afterwards made the Conviction, and awarded

awarded Damages, an Action would lie againſt him who took the Damages. But here the Conviction being removed by *Certiorari*, a Prohibition cannot be. But by *Holt* C. J. The Defendant may make a Suggeſtion upon the Roll of his Property, by way of Plea, and thereupon it ſhall be tried; and *St. John*'s Caſe, 5 *Co.*—. does not make to the contrary. But the other Judges ſeemed to be of a contrary Opinion in this Point.

Another Exception was, That the Offence is alledged at *Bampton* in the County of *Huntingdon*, and afterwards it is ſaid, that the Defendant *apud Bampton præd'*, *&c.* and *Bampton præd'* does not import *Bampton in Com' præd'*, for *Bampton* may extend to two Counties, and Part of it may be in *Huntingdonſhire*, and Part in another County. *Sed non allocatur*; for altho' it may be in two Counties, yet *Bampton præd'* is no other than that *Bampton* which was before mentioned in the County of *Huntingdon*.

The third Exception was, that the Conviction was for cutting down ſeveral Trees, and Damages to 20 *l.* given, but does not ſhew the Number of the Trees, which ought to be the Meaſure of the Damages; and if an Action ſhould be brought for the Treſpaſs, this Conviction cannot be pleaded in Bar, for it will not appear that the Conviction was for the ſame Trees; and therefore the Number and Quantity of the Trees ought to be mentioned expreſly in the Conviction, as well as in an Action for the Treſpaſs; as in 5 *Co. Plater*'s Caſe.

And for this Cauſe the Court was of Opinion that the Conviction was ill.

Caſe 89.

Sir Charles Hale and *Owen*. In B. R.

A Sheriff ſhall not take Advantage of his own Irregularity to excuſe himſelf in an Action.

ACTION for a falſe Return of a Citizen to ſerve for the City of *Coventry*, and ſeveral Exceptions were taken after a Verdict to the Declaration.

1

Firſt,

Firſt, That the Declaration mentions, that the Writ iſſued out of Chancery (*Recitando*), *&c.* and after the Recital, then it ſays *Præcepit, &c.* and ſo there does not appear any Nominative Caſe to the Word *Præcepit. Sed non allocatur*; for the King is before mentioned, and ſhall be the Nominative Caſe to the Verb *Præcepit*; ſo in a *Præcipe quod reddat, præcipe A. quod reddat B.* 10 *l. quas ei debet & injuſte detinet ut dicit*; there is no Nominative Caſe, yet it is good *Latin*; and *A.* ſhall be the Nominative Caſe to the Words *reddat & debet*; and *B.* is the Nominative Caſe to the Word *dicit*; ſo in pleading, *Et hoc paratus eſt verificare unde petit Judicium & dampna ſua, &c.* no Nominative Caſe appears to the Words *paratus eſt & petit.*

Other Exceptions were taken to the Declaration, for that the Plaintiff had ſet forth the Proceedings of the Sheriff in his Election, by which it appears that the Sheriff did not proceed regularly to an Election, and therefore there was no Election, and then no Action can be for a falſe Return. *Sed non allocatur*; for the Sheriff ſhall not take Advantage of his own irregular Proceeding to excuſe himſelf from an Action. But by *Holt* C. J. it was ſufficient for the Plaintiff in this Caſe to have ſaid, that ſuch a Writ iſſued, and was delivered to the Sheriff, upon which he proceeded to an Election *ſecundum exigentiam Brevis*, and that the Plaintiff was *debito modo* elected.

But yet Judgment was given for the Plaintiff by the whole Court.

Coggs and *Barnard.* In B. R.

Caſe 90.

1 Salk. S. C.

ACTION upon the Caſe; in which the Plaintiff declares that the Defendant *ſuper ſe Aſſumpſit* to carry ſafely a Hogſhead of Wine, and that by the Default of the Defendant the Wine was loſt; and after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration did not ſhew that the Defendant was a Common Carrier, or that for any Sum of Money *ſuper ſe Aſſumpſit*, and

Where an Action on the Caſe lieth on Bailment or Undertaking.

ſo no Appearance of any *Premium* given to the Defendant, and therefore no Actions lies.

And it was reſolved by all the Judges of the Court, that the Action lay, for here is a ſpecial Undertaking. And although the Defendant might have refuſed to carry the Wine, yet as he made a voluntary Undertaking to carry it ſafely, if he does not do it he ſhall be puniſhed for the Damage which the Plaintiff ſuffers by his Neglect.

There are ſix Sorts of Bailments which are ſufficient for the Maintenance of an Action.

Firſt, A naked Bailment, when a Man delivers Goods to another to keep.

Second, When a Man ſends Cattle to another which are profitable, *gratis.*

Third, When a Man delivers Goods or Cattle to another for Hire.

Fourth, When Goods are delivered to another as a pledge.

Fifth, When Goods are delivered to another to be carried for Hire.

Sixth, When Goods are delivered to another to be conveyed, or for a particular Purpoſe without Hire.

If a Man hath Goods upon a naked Bailment, he is not chargeable if they are loſt, *&c.*

Neither is he chargeable for a common Neglect, and therefore *Southcott*'s Caſe is not good Law, which ſays that a Man ſhall be charged in an Action on a general Bailment, and it hath been the general Practice for twenty Years laſt paſt. If a Man hath Goods to keep, and they are ſtolen, although there be a Neglect in him, as if he

omits to ſhut the Door, *&c.* he ſhall not be charged with them if he keeps them with the ſame Care as he does his own.

So if a Man makes Bailment to another, and he makes an expreſs Promiſe to keep the Things ſafely, yet he is not chargeable without his wilful Default, for ſuch Promiſe ſhall not charge him further than he was chargeable before; it would not do ſo if it was in Writing, and for the ſame Reaſon it ſhall not do it, if it is by Parol.

The Second Species of Bailment obliges to a ſtrict Care, for if a Man permit another to have his Horſe into the *Weſt*, and he rides to the *North*, and the Horſe dies, the Bailee ſhall be charged for him.

But if ſuch Horſe is ſtolen out of the Stable without any Fault in the Bailee, he ſhall not be charged.

Otherwiſe if he permit the Door to be open and the Horſe is ſtolen, for then he ſhall be charged.

The Third Species of Bailment is when Goods are left with the Bailee to be uſed by him for Hire, and in this Caſe the Bailee is obliged to take the utmoſt Care, and to return the Goods when the Time of hiring is expired.

The Fourth Species of Bailment is as a Pledge, and if the Uſing of the Thing will hurt it, the Bailee muſt not uſe it.

But if the Uſing will not hurt the Things pledged, the Bailee may uſe them, as Jewels, *&c.* but if the Bailee uſe them and they are loſt, he ſhall anſwer for them, but if he does not uſe them, but keeps them in his Cheſt, and they are ſtolen, he ſhall not anſwer for them.

If the Keeping of the Pledge is chargeable, then the Bailee may uſe it, as if a Cow is pledged, the Bailee ſhall have the Milk.

But

But when the Money is tendered for the Goods pledged, and the Bailee refuſes to deliver them, then his ſpecial Property is determined, and he by the Detainer is a Wrong-doer; and if the Goods are afterwards ſtolen, he ſhall anſwer for them.

The fifth Species of Bailment is, for carrying for Hire; as where a Man delivers Goods to them who have a common or publick Truſt, as a common Carrier or Hoyman, *&c.* if theſe are robbed by Enemies of the King, they ſhall not be anſwerable; otherwiſe if they are robbed by the Violence of Robbers.

So if the Delivery be to a common Factor, altho' he hath Hire, he ſhall not anſwer for an Act done without his Default; as if the Goods are ſtolen he ſhall not be chargeable.

So in our Caſe, according to the ſixth Sort of Bailment, he (the Defendant) ſhould not be chargeable by an Act which did not happen by his own Default; as if any other had pierced the Hogſhead of Wine, he ſhould not be anſwerable for it.

When a Man acts by Commiſſion, it obliges the Perſon to that Care, and he ſhall be anſwerable for Goods which are loſt by his Neglect.

For the Neglect is a Deceit upon the Perſon who truſts him; the Party who intruſts expects Diligence and Fidelity of him who is truſted, and for Breach of Truſt an Action lies; as *Godb.* 64.

If the Defendant had only offered himſelf to carry, there he would not have been chargeable, it would only have been a *Nudum pactum*; but here, as he *ſuper ſe aſſumpſit*, the Word *Aſſumpſit* imports an Undertaking; and when a Man undertakes to do a Thing, and miſdoes it, an Action lies againſt him for that, tho' no Body could have compelled him to do the Thing; and to prove this was cited 19 *Hen.* 6. 49. 11 *H.* 4. 33. *Yel.* 4. 128. 2 *Cro.* 667. And Judgment was given for the Plaintiff.

DE

Term. Sanct. Mich.

2 Annæ. In B. R.

Ewer and *Jones*.

Caſe 91.
Mod. Ca. 25.

Where a Prohibition to the Admiralty Court on a Libel there for Seamens Wages, ſhall not go.

A Prohibition was moved for to the Admiralty Court in a Suit there for Mariners Wages, and the Defendant pleaded that it appeared by the Libel, that the Contract upon which the Libel was founded was above ſix Years before, and therefore by the Statute of Limitations the Plaintiff was barred; this Plea was there refuſed. And now on the Motion for a Prohibition it was urged, that a Suit in the Admiralty for Seamens Wages is allowed there only for the Convenience of their joining in the Suit; but if the Admiralty Court will not admit a Plea of the Statute of Limitations, which is a Bar at Common Law, the Defendant there will be greatly prejudiced; and this Court will grant a Prohibition.

The Court was of Opinion, that although in a Cauſe originally ſuable in the Admiralty, that Court ſhall proceed according to their own Law, yet when the Admiralty Court refuſes to allow a Plea in Bar or Proof pleadable and allowable at Common Law, this Court hath a Juriſdiction to prohibit them from proceeding; but in this Caſe the Statute of Limitations is not well pleaded, for it ought to ſay that the Cauſe of Action did not ariſe within ſix Years, and it does not appear to this Court, for what Cauſe the Plea was diſallowed there. And therefore a Prohibition was not granted.

Caſe 92. ***Ward*** and ***Sir Stephen Evans.*** **In B. R.**

Mod. Ca. 36. 2 Salk. 442. S. C. Where a Bill drawn upon a Perſon who becomes a Bankrupt the next Day, ſhall not be deemed good Payment.

ACTION upon the Caſe, in which the Plaintiff declared upon an *Indebitatus Aſſumpſit* for Money had and received to the Uſe of the Plaintiff; and upon the Evidence at the Trial, a Caſe was referred to the Judgment of the Court, and appeared to be this: *Fellows* was indebted to the Plaintiff upon Bill of 60 *l.* who ſent his Servant to *Fellows* for the Money, who gave him a Note of Sir *Stephen Evans*'s for 100 *l.* the Servant carried the Note to Sir *Stephen Evans*'s, whoſe Servant indorſed 60 *l.* off the 100 *l.* Note, and for the 60 *l.* gave the Plaintiff's Servant a Bill of 60 *l.* 10 *s.* on one *Wallis*, a Goldſmith, and the Servant of the Plaintiff paid to Sir *Stephen*'s Servant the 10 *s.* Difference, and the next Morning went to *Wallis's* who had failed, and was a Bankrupt, although for all the precedent Day he had anſwered and paid Bills; and when the Plaintiff's Servant found that *Wallis* was a Bankrupt, he delivered back the Bill upon *Wallis* to Sir *Stephen Evans*, who refuſed to take it, and inſiſted that the Acceptance of the Bill upon *Wallis* was Payment of the 60 *l.*

And it was now reſolved by the Court in Favour of the Plaintiff; that the Indorſement of the 60 *l.* off the Bill of 100 *l.* was Evidence of the Receipt of ſo much Money by Sir *Stephen Evans* for the Uſe of the Plaintiff; for the Caſh of *Fellows* lay at Sir *Stephen Evans*'s, and his Indorſment of 60 *l.* off from the 100 *l.* Bill (upon which the Bill of the Plaintiff for 60 *l.* upon *Fellows* was delivered up and cancelled) made a new Receipt of ſo much Money to the Uſe of the Plaintiff; then the Delivery of the Note upon *Wallis* for 60 *l.* 10 *s.* to the Servant of the Plaintiff, is not Payment to the Plaintiff, for he ordered his Servant to receive the Money, and not a Bill, and then the Receipt of a Bill without the expreſs Authority of his Maſter ſhall not bind the Maſter.

DE
Termino Paſch.
4 Annæ. In C. B.

Anne and Richard Fitzgerald, Executors of Richard Fitzgerald, and *Cragg.*

Caſe 93.

IN Debt upon Bond made to the Teſtator; after Oyer of the Obligation and Condition, by which it appeared, that the Defendant and two others were named to be jointly and ſeverally bound to the Teſtator, the Defendant pleaded in Bar a Covenant made by the Teſtator to him, that he ſhould not be ſued upon this Bond that was made by the Defendant and two others. The Plaintiffs reply, *Non eſt factum teſtatoris*; whereupon Iſſue was joined, and a Verdict for the Defendant. And now Serjeant *Pratt* moved, that the Defendant might plead over again; for that he could not plead this Covenant of the Teſtator's in Bar, but could only take Advantage of that by Action of Covenant; and the Difference was, where a Man makes a Bond to a ſingle Perſon, and he makes a Covenant that he will not ſue the Obligor; this may be pleaded in Bar, for it amounts to a Releaſe and Diſcharge of the Action; but where there are more Obligors, and the Obligee covenants that he will not ſue one of them, this will not amount to a Releaſe, for then all the Obligors would be diſcharged; but the Defendant might have Covenant if he be ſued; and ſo it was reſolved in the Caſe of *Tracy* and *Kenaſton* in *B. R. Trin.* 13 *W.* 3. which was entred *Mich.* 11 *W.* 3. *Rot.* 193. and ſo it ſeemed to be allowed by the Court. But *Trevor* C. J. objected, that it did not appear by the Record, that the two others executed the Bond; for

Action upon a joint Obligation will be bad, if it does not appear that all executed it.

for tho' by Oyer of the Bond it appears, that they are named in the Obligation, yet if they did not ſeal and execute it, it will not avail; and this ſhould appear by Averment, or otherwiſe upon the Record; for if it does not appear, it ſhall not be intended: So it was adjourned. And afterwards in *Hill.* the 4th of the Queen, it was urged that the Deed, in which the Covenant was, recites, that the Defendant and the two others were jointly and ſeverally bound to the Teſtator, and thereupon he covenants not to ſue the Defendant upon the ſaid Bond, and that Defendant was bound by the Recital, as a Leſſee would be eſtopped by Recital in a Leaſe; but the Court did not much regard this. Then it was urged, that the Covenant was not to ſue upon the ſaid Bond, *viz.* upon the Obligation, in which the Defendant and two others were jointly and ſeverally bound; that the Defendant, in pleading this Matter to the Action of the Plaintiff upon this Bond, allowed it to be a Bond in which the Defendant and two others were bound, otherwiſe the Covenant would not extend to it; and for this Cauſe it was ordered he ſhould plead again.

DE
Term. Sanct. Hill.
4 Annæ. In C. B.

Barker & ux' and *Palmer.*

Caſe 94.

Plea without ſhewing the Place of any Thing material is bad.

IN a *Scire facias* upon a Judgment in the Common Pleas by the Wife whilſt ſhe was ſole, Defendant pleaded a Releaſe; and an Exception was taken that no Place was alledged where the Releaſe was made, and it would be material upon a General Demurrer. Reſolved *Cro. Eliz.* 78, 98. *Adm. Cro. Car.* 225. that the Omiſſion of a Place is Subſtance, and the Caſe of *Kerby* and *Whitelow*, *Lutw.* 1501, is ſtronger. In Treſpaſs, for taking three Meaſures of Barley at *Wallingford*, Defendant pleaded that *Wallingford* was an antient Burrough and Corporation, and had a Market and Toll of one Pint of Grain for every Comb of Grain ſold there by any Foreigner; that *John Ferren* a Foreigner brought five Quarters of Barley there to ſell, and ſold them to the Plaintiff; and becauſe it was not ſaid that he ſold them there, and no Place was alledged where the Sale was, Judgment was given for the Plaintiff for the Default in the Plea. So if Defendant plead a Submiſſion to an Award, and does not alledge the Place where Submiſſion was made, it is bad. Reſolved upon Demurrer, *Cro. Eliz.* 66. and without Difficulty Judgment was given for the Plaintiff.

Caſe 95. ## *Barker* and *Lamplugh.* In C. B.

Diſcharge of a Promiſe when a good Plea.

IN *Aſſumpſit* upon ſeveral Promiſes, Defendant pleads, that after the taking upon himſelf the Payment of the Money, one *Theopla Judd* took upon himſelf to pay it to the Plaintiff for the Defendant; which Promiſe the ſaid Plaintiff accepted, and intirely diſcharged and releaſed the Defendant. Plaintiff demurred, for that the Plea in the whole or many Parts of it was bad.

Firſt, No Place was alledged where the Promiſe was made; as above.

Secondly, The Promiſe of a Stranger cannot be pleaded in Bar of the Promiſe of the Defendant; if it ſhould be intended as one Agreement, it is not good without Satisfaction. 9 *Co.* 79. *Peitoe's* Caſe, *&c.* and one Promiſe cannot be a Satisfaction for another; a ſmall Sum is not a Satisfaction for a great one on the ſame Day. *Co. Litt.* 213. 5 *Co. Pinnell.*

Alſo here the Promiſe is not ſaid to be by Writing; and by Statute 29 *Car.* 2. no Action ſhall be brought to charge any Perſon for the Debt, *&c.* of another, unleſs ſome Note of it be in Writing; and without Difficulty Judgment was given for the Plaintiff.

Caſe 96. ## *Poulton, Attorn', &c.* and *Anne Goddard, Executrix of Thomas Goddard.* In C. B.

Plea, that the Defendant fully adminiſtred *ante exhibitionem billæ ipſius* the Plaintiff, where it ought to have been *ante impetrationem brev' de attachiament'*, held bad.

IN an Action upon the Caſe for Money due to him as Attorney, for the Buſineſs of the Teſtator, Defendant pleads *Plene adminiſtravit ante exhibitionem billæ ipſius* the Plaintiff. Plaintiff replies, that Defendant had done Waſte; and upon Demurrer it was allowed, that the Replication was bad; but then the Plaintiff took Exception to the Plea, becauſe that

the Plaintiff ſued by Writ of Attachment of Privilege, and the Defendant ſays, before the Exhibition of the Bill of the Plaintiff ſhe had fully adminiſtred, where it ought to be before the iſſuing out of the Writ of Attachment of the Plaintiff; and therefore in the Caſe *Lutw.* 633. *Royſton*, Executor of *Royſton*, ver. *Barton*, in Debt upon Bond to the Teſtator, Defendant pleads a Compoſition by Two Thirds of the Creditors in Number and Value, according to the Statute 8 *W.* 3. and alledged that the Compoſition was made before the Exhibiting the Bill of the Plaintiff, where the Suit was in *C. B.* by Original Writ; and therefore the Plea ought to have been, before the Suing out of the Original Writ; and for this Cauſe Judgment was given for the Plaintiff; and it makes no Difference that here the Suit be by an Attorney who does not ſue by Original Writ; for the Suit by Writ of Attachment is in the Nature of an Original: For as againſt other Perſons the Original is by Summons in Debt and by Attachment, only in Treſpaſs and other Actions which are *Vi & Armis*, ſo the Attornies and other Miniſters of *C. B.* have Privilege to ſue at all Times by Attachment. It is true, that it is uſually ſaid, that Attornies, *&c.* ſhould ſue by Bill; and when an Attorney of *C. B.* pleads his Privilege, he ſays it is the Cuſtom, that no Attorney is compellable to anſwer any one upon Original Writ, but by Bill only. *Lut.* 195. *b.* and 4 *Inſt.* 99. It is ſaid, that *C. B.* can hold Plea by Bill againſt Officers of the Court, and other Perſons privileged; and I allow, if the Suit had been againſt an Attorney, the Plea had been well; for he may ſue by Original Bill, as is cited in *Lut.* 228. and ſo if in *B. R.* the Suit commenced by Bill of *Middleſex*; for a *Latitat* always ſuppoſes a Bill of *Middleſex*, that is in the Place of an Original there; for all Perſons there ſued by Bill are ſuppoſed to have Privileges of the Court, being in the Cuſtody of the Marſhal, or preſent in the Court, as Attornies or Officers there: So in a Suit againſt an Attorney of the Common Pleas, who is ſuppoſed to be preſent in Court, the Suit commences by Bill, and the Entry is as in *B. R.* That the Plaintiff brought —— or, That the Plaintiff exhibited his Bill againſt the Defendant. 1 *Bro. Ent.* 33. But in a Suit by an Attorney, he may ſue by

Writ

Writ of Attachment of Privilege, that is the firſt Proceſs for him; and when the Defendant is brought into Court by this Writ, he declares againſt him in like Manner as other Perſons declare upon an Original Writ; as appears by the Precedent *Lut.* 343. 2 *Bro. Ent.* 8. *Raſt.* 552. in Treſpaſs; and if a Man declares in the Common Pleas *per Queritur*, and not upon an Original Writ, Original Bill, or Writ of Attachment of Privilege, it is Error; as was ruled *Lut.* 227, 228. *Dimock* verſus *Witherell*, an Attorney of this Court; and Judgment was there againſt the Plaintiff for this Cauſe only.

DE
Termino Paſch.
5 Annæ. In C. B.

Stonehouſe and *Ilford.*

Caſe 97.

IN Debt for Rent incurred in the Life-time of the Teſtator againſt the Defendant, Executor of *A.* upon Leaſe made by Parol to *A.* for one Year, and ſo from Year to Year, as long as both Parties ſhall pleaſe; The Defendant pleads, that the Teſtator was in Debt to him upon two ſeveral Bonds, the one for 200 *l.* the other for 40 *l.* and that he had not Aſſets, only 20 *l.* which he retained towards Satisfaction of his 240 *l.* aforeſaid; and upon this there was a Demurrer. And now it was argued by Serjeant *Cheſhire*, that the Plea did not avail. Firſt, Becauſe that Debt for Rent that favours of the Realty is of an higher Nature than Debt upon Bond; and therefore Retainer for Debt upon Bond cannot be pleaded to Debt for Rent; it was agreeable to the Caſe between *Godfrey* and *Newport*, 2 *Vent.* 184. where it was reſolved in the Common Pleas, and afterwards affirmed in Error in *B. R.* that a Man cannot plead Debt upon Bond to deny ſatisfying an Action of Debt for Rent. Secondly, Defendant cannot plead a Retainer for Part of his Debt, for he ought to plead a Retainer for his whole Debt, otherwiſe it does not avail; for he ought to have Debt for the whole againſt the Executor, or for the whole againſt the Heir; but how can he have Debt againſt the Heir, if he retains for Part as Executor: Alſo he ought to have pleaded, that he agreed to retain before the Action commenced; for when Teſtator is in Debt to his Executor, and he agrees to retain for his

Executor may plead Payment of Rent to Debt upon Bond, & *e-contra.*

own Debt, this is Adminiſtring for ſo much, but it is not Adminiſtration till his Aſſent to make Retainer; for then he might give it in Evidence upon *Plene adminiſtravit*; and if the Defendant pleaded, that the Teſtator was indebted to him, without more, this would be bad; but for that Reaſon ſuch Plea ſhould be inſufficient, if the Law would imply an Adminiſtration for ſo much as the Teſtator was indebted to him, without his Aſſent to make a Retainer for ſo much for his Satisfaction; and therefore it was reſolved by all the Juſtices, between *Burditt* and *Pix*, 2 *Brownl.* 51. where the Defendant pleaded a Retainer for his own Debt, that the Plea would not avail; becauſe that he did not ſhew, that he had made Election before the Action commenced to retain the Goods for Satisfaction of his own Debt; which ſeemeth, as he ſaid, an expreſs Reſolution in Point. But by the whole Court it was reſolved, that the Plea was good, for Debt for Rent and upon Specialty are in equal Degree; and ſo it was reſolved between *Acton* and *Gage*, *Paſch.* 9 *Will.* 3. and there it was alſo reſolved, as Serjeant *Girdler* who argued for the Defendant ſaid, that the Retainer may be for Part of the Debt towards Satisfaction; and ſo it was here agreed by the Court without Difficulty. And by the Court, it was not a neceſſary Allegation, that he elected to make a Retainer before the Action commenced; for when Teſtator is indebted to his Executor, Retainer is Adminiſtration for ſo much, and can be given in Evidence upon *Plene adminiſtravit.*

Vide his Reports, p. 39.

Caſe 98.

Dummer ver. *Birch.* In C. B.

In Covenant, Breach aſſigned ought to be poſitive and certain.

IN Covenant. Plaintiff declares, that *inter alia* the Defendant covenants, that he would diſcharge all Duties and Charges due before the firſt of *October* next; and the Plaintiff aſſigned for Breach, that the Defendant did not pay or diſcharge all Duties and Charges for which theſe Premiſſes were chargeable. To which there was a Demurrer; and argued, that the Breach was neither within the Words, nor purſuant to the Intent of the Covenant; for the Intent was, that the Defendant ſhould diſcharge all Arrears of

Rent which incurred before the firſt of *October*, but here the Breach is, that he did not diſcharge all Charges for which the Land was chargeable, which may be extended to many other Charges; as appears in 1 *Leon.* 92, 93.

Secondly, The Breach is uncertain, for no Anſwer can be given to ſuch particular Charge; Breach, *quod tenementum fuit ruinoſum & in decaſu in diverſis partibus pro defectu reparationis*, bad for Uncertainty. *Bend.* 62. *pl.* 110.

The Plaintiff ſhould ſhew how the Party was diſturbed or interrupted, to which direct and poſitive Anſwer might be given; and if this is not done the Breach is not well aſſigned. *Yelv.* 30. *Cro. Eliz.* 914. So he ſhould ſhew a Breach directly within the Words and Intent of the Covenant. 1 *Lev.* 246.

Sed adjornatur.

Anonymus. In C. B.

Caſe 99.

When Proof of a Suggeſtion in Prohibition is neceſſary.

PRohibition, upon a Suggeſtion that the Suit in the Spiritual Court was for Tithes of Heath and barren Ground improved, within ſeven Years after the Improvement, contrary to the Statute; and a Rule was prayed for a Conſultation, becauſe he had not proved his Suggeſtion within ſix Months, for the Words of the Statute of 2 & 3 *Ed. 6. c.* 13. are general, In caſe the Suggeſtion for a Prohibition be not proved in ſix Months, *&c.* the Party ſhall have a Conſultation without Delay; and tho' there need no Proof of the Suggeſtion, where the Suit is for Tithes contrary to common Right, or where the Contract of the Party is ſuggeſted; yet in other Caſes it ought to be, as well as upon the Suggeſtion of a *Modus*. *Cro. Car.* 208. *Jones* 231. and ſuch Suggeſtion was proved. *Dy.* 170. *b.* And to this the Court inclined.

DE
Term. Sanct. Trin.
5 Annæ. In C. B.

Caſe 100.

Anonymus.

In an immaterial Iſſue Defendant ſhall plead again, tho' after a Verdict for the Plaintiff.

IN Debt upon Bond for the Payment of Money the 9th of *February*, the Defendant pleads, that he paid it the 9th Day of *January* preceding; and Iſſue, that he did not pay it the ſaid 9th Day of *January*; and upon that a Verdict for the Plaintiff. And now it was moved to plead again; for notwithſtanding this Verdict the Plaintiff may be paid after the 9th Day of *January*, and before the 9th Day of *February*, when the Condition was that the Money ſhould be paid, and therefore the Bond perhaps was not forfeited, nor the Plaintiff any Title of Action: And it was argued by *Parker*, Queen's Serjeant, that it was an immaterial Iſſue, notwithſtanding it was aided by the Statute. And therefore it was ordered they ſhould plead again.

Caſe 101.

Harding and *Harding*. In C. B.

IN Dower, to the Return of a Writ of Summons the Tenant caſt an Eſſoin, that was adjourned *ad Craſt' Martini*, and then the Tenant made Default, and upon that a Grand *Cape* ought to Iſſue, but a Petit *Cape* was entered, and afterwards an *Alias* returned *a die Paſch.* in 5 *Sept.* and afterwards final Judgment was entered, but the Plea upon Record in which Judgment was entered was in *Trinity* Term; and it was moved that Judgment was irregular; Firſt, becauſe that Petit

Cape was awarded where Grand *Cape* ought to have been awarded. Secondly, No Continuance was entered in *Eaſter* Term when the *Alias* was returnable, and *Trin.* Term in which Judgment was entered; and upon this it was inſiſted that theſe Miſpriſons might be amended, for they are only Miſpriſons of the Clerk; for when the Eſſoins Roll, which is the Warrant for entering the Eſſoin, is inſpected, it appears that the Eſſoin was to the Return of a Writ of Summons before Appearance, and then a Grand *Cape* and not a Petit *Cape* ought to iſſue; but here the Entry is as if the Eſſoin was caſt before Appearance; Miſentry of Eſſoin in *Aſſumpſit* was amended 30 *H.* 6. 1. and the Omiſſion of entering an Eſſoin was amended by Common Law. 8 *Co.* 156. *b.* So in *Formedon* where Tenant was admitted to proſecute by his *Prochein Amy*, and that was entered upon Remembrance-Roll, but upon Philazer's Roll Entry was, that *quod Demandant obtulit ſe quarto die per J. S. Attornatum ſuum*; but this was allowed to be amended. *Lit.* 60. *Young*'s Caſe.

In this Caſe the Attorney for the Demandant went to the Philazer, and ſaw that the Tenant had not appeared, and upon this prayed a Grand *Cape*, and this was ſufficient Warrant to the Philazer to make the Entry, *acc' Yelv.* 155. Debt againſt three Executors, and Judgment by Default, and Continuance was for all, where only one appeared, and it was directed to amend if it appeared that all appeared, otherwiſe not. So the Non-entry of a Cognizance upon Record, if it be an antient Roll. 35 *H.* 6. 24. *b.* So Bail omitted to be entered ſhall be entered if it appears to be allowed. So Attachment for Summons on Declaration, for it appears by Original. 2 *Cro.* 108. *Cro. Car.* 21. 1 *Roll.* 207, 814. 3 *Bulſt.* 181. So *Habeas Corpus in placito Comp'*, for *placito Deb'*, 28 *H.* 6. 3. *a. Oſtene quare non fecerit.* 8 *Co.* 160. *a.* And the Entry of the Petit *Cape*, for the Grand *Cape* is only one Proceſs for another, which is within the Statute 32 *H.* 8. which aids Miſconveying of Proceſs. And where an Omiſſion of a Continuance entered *Eaſter* and *Trinity* Term, this was the Default of the Clerk, 1 *Roll's Abr.* 200. *pl.* 27. 2 *Cro.* 528. and therefore it ſhould be entered after Judgment or Error. 1 *Roll.* 209. *l.* 5. *Hard.* 505. But by the Court the Amendment was not allowed.

DE
Term. Sanct. Mich.
5 Annæ. In C. B.

Caſe 102.

Anonymus.

Executor may traverſe the Deviſe of an Executorſhip to another.

Payment to an Executor having a Probate, if the Probate is afterwards repealed, does not diſcharge the Party againſt the legal Executor.

INdebitatus Aſſumpſit by Plaintiff as Executor of for Money due from the Defendant to his Teſtator. The Defendant pleads, that *A. B.* was appointed Executor to the Teſtator and proved his Will, and that the Defendant afterwards paid him ſo much Money, being Part of the Debt, in Satisfaction of the Whole, and that he on the Receipt diſcharged the Defendant. Plaintiff replied, that the Probate granted to *A. B.* was afterwards, upon Appeal, annulled by the Sentence of the Eccleſiaſtical Court, and the Will by which *A. B.* was made Executor was adjudged to be forged, and the Will by which the Plaintiff is appointed Executor allowed, *abſque hoc*, That the Teſtator made ſuch Will by which *A. B.* was appointed Executor; and upon this Replication a Demurrer.

In this Caſe two Points were argued by the Serjeants at the Bar.

Firſt, If the Traverſe was good, for that the Defendant having pleaded, that the Teſtator made a Will by which *A. B.* was appointed Executor, which was proved in the Spiritual Court, the Probate there is concluſive and cannot be traverſed; as was reſolved 1 *Sid.* 359. 1 *Lev.* 235. in the Caſe of *Noel* and *Wells*, That if the Probate of a Will be given in Evidence, that concludes the Parties, that nothing can afterwards be given in Evidence in Contradiction to the Probate,

as that there was no ſuch Will, or that the Teſtator was not *Compos*, but only Matter conſiſtent with it, as that the Party had *Bona notabilia*, that the Probate was forged, *&c.*

Secondly, If the Payment to an Executor who was Executor *de facto*, and had Probate of the Will, was good to bind the rightful Executor.

And Judgment was given upon both Points for the Plaintiff; and *Trevor* C. J. gave the Reaſons of the Judgment for the whole Court; and as to the ſecond Point he ſaid, that an Executor derives all his Authority from the Teſtator himſelf, and that he of himſelf, as being Executor without any Thing more, has the Power of diſpoſing of the Eſtate of the Teſtator, of releaſing a Debt due to the Teſtator, *&c.* True it is, before an Action brought a Probate is neceſſary, but that is only requiſite to aſcertain the Court that the Plaintiff is Executor, and has a Right to bring his Action, not to give the Plaintiff any Title or Intereſt to the Eſtate of the Teſtator. If the Teſtator appoints no Executor, or dies Inteſtate, the Adminiſtrator is appointed by the Ordinary, and derives his Authority from him; and therefore if Adminiſtration is granted, all Acts by him as long as the Adminiſtration continues in Force are good, and even though it be afterwards repealed. But there is a Difference taken when an Adminiſtration is repealed upon a Citation, or upon an Appeal. 6 Co. 18. *b. Packman*'s Caſe. If it is upon an Appeal, which ſuſpends the Adminiſtration, all Acts after ſuch Suſpenſion are void; if it is repealed upon a Citation, all the Acts of the Adminiſtrator, till the Repeal, are good, for by the Citation the Grant of the Adminiſtration is not ſuſpended, therefore if the Adminiſtration be repealed, all Acts done by an Adminiſtrator, which a rightful Adminiſtrator might have done, ſhall be allowed, for in them he acted in the Place of the rightful Adminiſtrator.

But it is otherwiſe in the Caſe of an Executor, for the Probate of the Will gives no Authority at all to him, and therefore if he is not the rightful Executor he has no Authority at all, and it would be unreaſonable that a Perſon, who

who has no Authority, ſhould diſpoſe of the Intereſt of another; the rightful Executor has not only a Truſt or Authority to adminiſter the Goods of the Teſtator, but alſo an Intereſt annext to the Truſt; and therefore the Property of all the Goods after Adminiſtration is compleatly veſted in him; and conſequently the Diſpoſition of the Goods of the Teſtator, or Releaſe of his Debts, is a Diſpoſition of the Intereſt of the rightful Executor, and therefore ſuch Diſpoſition does not bind him; and ſo it was reſolved *Rol. Abr.* 719. which Caſe was never denied, that I heard of. And this Caſe is not like the Caſe of an Officer, who officiated without legal Authority; as the Deputy of the Deputy of a Steward, *&c.* for rightful Acts done by him are good; for he is an Officer *de facto*, and in the immediate and open Execution of his Office, and the Parties did not know whether he had Authority or not.

In this Caſe of an Executor ſome Miſchief may poſſibly happen, but it would be a more general Inconvenience, if a tortious Executor ſhould be allowed to diſpoſe of the Right and Intereſt of a rightful Executor.

As to the Traverſe, I think it good; for whether a Will, or no Will, is a Queſtion triable by a Jury; as is agreed 8 *Co.* 134. *Mer. Treſham*'s Caſe, 9 *Co. Abbot de Strata Marcella*'s Caſe; and the Reaſon is, becauſe the Spiritual Court had not the original Juriſdiction of the Probate of Wills, and becauſe as to Trial the Temporal Courts have *quaſi* a concurrent Juriſdiction; and this is not like the Caſes 1 *Sid.* 359. and 1 *Lev.* 235. That the Probate of a Will concludes a Perſon from ſaying there was no ſuch Will; but notwithſtanding this Matter may be brought to Trial; for the producing a Will under Probate is only Evidence that there was ſuch a Will; and tho' it is Evidence of ſo ſtrong a Nature that no Evidence ſhall be admitted againſt it, yet to plead that ſuch a Will was proved, is no Reaſon why this Matter ſhould not be tried. Therefore Judgment was given for the Plaintiff.

DE
Termino Paſch.
7 Annæ. In C. B.

Higginſon and *Sheif.*

Caſe 103.

Officer chargeable for an Eſcape of a Perſon, where Action ariſes out of the Juriſdiction of the Court by whoſe Proceſs he was taken.

ACTION on the Caſe for the Eſcape of one *Wall* taken by the Defendant, Bailiff of the Liberty of the Temporal Court of the Archbiſhop of *Canterbury*, by Virtue of a Precept iſſuing out of the ſaid Court, upon a Plaint there exhibited in Debt for the Plaintiff againſt the ſaid *Wall* for Debt which was alledged to be within the Juriſdiction of the ſaid Court; and the Plaintiff declares, that the ſaid *Wall*, was indebted to the ſaid *Roger Higginſon* in 200 *l.* in the Pariſh of St. *Dunſtan*, within the Juriſdiction of the Court aforeſaid; and being ſo indebted the Plaintiff exhibited his Plaint in the aforeſaid Court of Record of the Archbiſhop, and that upon the Plaint aforeſaid a certain Precept iſſued, directed to the Bailiff of the Liberty aforeſaid, returnable 17 *April* 5 *Annæ*, and was delivered to the ſaid Defendant 8 *April* 5 *Annæ*, to be executed in due Form of Law; by Virtue of which Precept the Defendant afterwards, (*viz.*) the ſaid 8th Day of *April*, in the Pariſh of St. *Dunſtan* aforeſaid, arreſted, and afterwards, (to wit) 17 *April*, ſuffered him to go at large, *per quod* he loſt his Debt. The Defendant, *Proteſtando*, that the ſaid *John Wall* was not indebted to the Plaintiff within the Juriſdiction aforeſaid, nor that he did arreſt the ſaid *John Wall*, for Plea ſays, that the Cauſe of Action upon which the Plaint was exhibited did ariſe in *London*, and not within the Juriſdiction aforeſaid, of which the ſaid Defendant afterwards, and before the Return of the ſaid Precept, *viz.* 15 *April*, in the Pariſh

of St. *Dunſtan* aforeſaid, had Notice. To which the Plaintiff demurred, and Defendant joined in Demurrer.

And it was argued by Serjeant *Hall* for the Plaintiff, and by me for the Defendant; and I did inſiſt, that the Plaintiff by his Demurrer here confeſſes that the Cauſe of Action ariſes out of the Juriſdiction of the Court, and that the Defendant had Notice of it before the Return of the Writ; and then tho' an Action upon the Caſe does not lie againſt the Judge, Officer or Plaintiff, in an inferior Court, when the Cauſe of Action ariſes out of the Juriſdiction of the inferior Court, as was reſolved *Lut.* 934, 664. *Gwynne* ver. *Pool & al'*, yet there it was agreed, that if the Judge or Officer had or might reaſonably have Cognizance that the Cauſe of Action aroſe out of the Juriſdiction, and they afterwards proceed, Actions on the Caſe would lie againſt them. *Lut.* 1566. By *Magna Charta, nullus capiatur, nullus impriſonetur niſi per legem terræ*; but by Law none ought to be arreſted on the Plaint of another for Debt, Covenant or Treſpaſs, in inferior Courts, where the Cauſe of Action ariſes out of the Juriſdiction. By Statute of *W.* 1. 35. Great Men and their Bailiffs ſhall not on the Plaint of another attach any one paſſing through their Juriſdiction, for Contract, Covenant or Treſpaſs, which does not ariſe in their Power and Juriſdiction, and for ſo doing ſhall pay double Damages; which Statute, as to the Thing prohibited, was but an Affirmance of the Common Law, tho' as to the Remedy, it was introductive of a new Law.

If then the Arreſt was illegal, the not detaining him ſhall not be penal.

It is true, that upon this Statute the Remedy ſhall be by Prohibition before the Suit commenced, or by Prohibition after the Suit commenced; and ſuch Prohibition after the Suit commenced ſhall not be granted, but after Plea to the Juriſdiction tendered upon Oath before Imparlance; for if the Defendant in his Plea, or by Imparlance, admits the Juriſdiction of the Court, there is no Reaſon that he afterwards, upon a bare Suggeſtion, ſhould ouſt the Court of the Juriſdiction which he had admitted; ſo if he comes before Plea,

upon a bare Surmiſe, to ouſt the inferior Court of the Juriſdiction, there is no Reaſon that a Judge of a Superior Court ſhould grant a Prohibition, upon the bare Surmiſe of the Defendant, that the Cauſe of Action ariſes out of the Juriſdiction, as this is denied by the Suggeſtion of the Plaintiff in his Declaration, that it was within the Juriſdiction of the Court; and therefore the Caſes, which ſay a Prohibition will not lie upon ſuch a bare Surmiſe of the Defendant, do not prove that the Officer might not by ſuch bare Information take Notice of this, without being ſubject to an Action for an Eſcape.

If an Action for falſe Impriſonment was brought againſt an Officer, for an Arreſt upon a Precept out of an Inferior Court, when the Cauſe of Action ariſes out of its Juriſdiction, this perhaps would not lie; and ſo it was reſolved between *Olliet* and *Beſſy*, 2 *Jon.* 214. But it does not follow, that an Action would lie for not arreſting, or for Eſcape after Arreſt; and ſo ſeems 2 *Jones* 214. where it is ſaid, that it was agreed by the Court, that if a Man is arreſted tortiouſly, and afterwards delivered to the Gaoler, and he afterwards is informed of the tortious Taking (without any Fraud in the Caſe) he ought nevertheleſs to detain the Priſoner delivered to him on the Arreſt, tho' the Execution of it was illegal; for if ſuch Information be falſe, and he lets the Priſoner go, he is liable to be ſued for an Eſcape; but this ſtrongly imports, that if the Information had been true, no Action for an Eſcape would lie; and if a Man may juſtify the Detainer, it does not follow that he ſhall be ſubject to an Action for an Eſcape, if he does not detain the Perſon.

If a new Sheriff has Notice by Parol of a Priſoner's being in Execution, he may detain him; but if he does not accept ſuch Notice without Indenture of the old Sheriff, and permits the Priſoner to go at laage, he ſhall not be ſubject to an Action for an Eſcape. 3 *Co.* 73. If a Man be taken in Execution after the Writ of *Capias* awarded, and before it be delivered to the Sheriff, the Sheriff may detain him; but if he does not, he ſhall not be liable for the Eſcape. 1 *Rol.* 902. But *per Cur'*, Judgment muſt be given for the Plaintiff; for

as

as the Officer might juſtify the Detainer, if he does not detain him he ſhall be liable for the Eſcape, for he ought not to take upon himſelf to judge or examine this Matter; and *per Tracy* the Notice here is not well pleaded, for he ought to have ſaid he had Notice before the Eſcape, and it is not ſufficient to ſay that he had Notice before the Return of the Writ; and a Caſe was cited by Serjeant *Richardſon* to have been reſolved in the King's Bench between *Lucking* and *Benning*, — *Annæ*, where in an Action for an Eſcape againſt a Serjeant of the Counter, upon Not guilty pleaded, it was given in Evidence for the Defendant, that the Cauſe of Action aroſe out of the Juriſdiction of the Court, and that the Defendant had Notice of it; and this Matter being found Special, Judgment was given for the Plaintiff, for the Officer ſhall not take upon himſelf to examine that Matter, 1 *Salk.* 201. and in the preſent Caſe Judgment was given for the Plaintiff without further Argument. *Vide* 2 *Mod. Rep.* 30. where the Contrary was reſolved by three Judges. 3 *Keb.* 849.

Caſe 104.

Landon and *Beſſingham.* In C. B.

If a Plea be to an Action brought by one as Adminiſtrator, that *A.* made an Executor, he ought to traverſe that *A.* died Inteſtate.

DEBT by an Adminiſtrator; Defendant pleaded in Abatement, that *A.* made his Will, which after Adminiſtration granted was proved by the Executor; upon which Plaintiff demurred. And the Queſtion was, If the Plea was good without the Traverſe, *abſque hoc*, that *A.* died Inteſtate?

Serjeant *Cheſhire*: Here the Defendant has confeſſed and avoided the Matter alledged, and then there is no Occaſion for the Traverſe, 6 *Co.* — *Heliar*, for the Title upon which the Plaintiff relies, is that he is Adminiſtrator. But the Plea that *A.* made his Will, which was proved by the Executor, deſtroys his Title as Adminiſtrator; if *A.* made a Will he could not die Inteſtate, if the Will continues in Force, as it appears to be, otherwiſe it could not be proved. If Iſſue had been joined, that *A.* died Inteſtate, and the Plaintiff had produced his Letters of Adminiſtration, and the Defendant had produced a Will under Probate, that had been concluſive

Evidence againſt the Plaintiff that *A.* did not die Inteſtate; and here if that Matter had been traverſed, nothing further could have been given in Evidence to prove the Traverſe than what is now pleaded. I grant it was reſolved *Yelv.* 115. that a Traverſe was neceſſary in this Caſe, but the Caſes there cited are Part *pro* and Part *con'*. But it was reſolved in this Caſe by the Court without any Difficulty, that the Plaintiff ought to have traverſed, *abſque hoc*, that the ſaid *A.* died Inteſtate, for the Plea is not a full Confeſſion and Avoidance of the Plaintiff's Title without ſuch Traverſe; for as the Plaintiff alledges himſelf to be Adminiſtrator of *A.* and the Defendant ſays that *A.* made his Will, which was proved, this is not an abſolute Avoidance of the Plaintiff's Title, but only by Argument or Implication, and perhaps the Probate was afterwards revoked or another Will made, of which the Plaintiff ſhall have the Advantage upon the Iſſue tried, and though the Producing the Will under Probate is concluſive Evidence againſt the Plaintiff who cannot prove that there was no ſuch Will, or that it was forged, yet it is but Evidence; and there are many Caſes where what is ſufficient Evidence to prove a Thing, is not ſufficient to be pleaded, as in Trover a Demand and Refuſal is ſufficient Evidence of a Converſion, but will not be ſufficient to be pleaded.

James and *Matthews.* In C. B.

Caſe 105.

IN an Action of Treſpaſs, the Defendant demanded *Oyer* of the Original, and on the Original there appeared a Fault in the Addition of the Defendant, which the Defendant pleaded in Abatement; Plaintiff replied and ſhewed another Original, and concluded with the Traverſe, *abſque hoc*, that the Action was founded on the other Original; upon which the Defendant demurred. Firſt, For that the Traverſe was of a Matter not alledged by the Defendant's Plea, for the Original ſhewn upon the *Oyer* is no Part of the Defendant's Plea, but the Court gives the *Oyer*. Secondly, For that the Plaintiff ought to have concluded *Et hoc parat' eſt verificare per Recordum*; for, as the Plaintiff alledges an Original which warrants his Action, Defendant had nothing to ſay but that

Plea in Abatement ſhall not be avoided by another Original.

there was no ſuch Original, which being Matter upon Record ought to be tried by the Record. Thirdly, That the Replication concludes with a Demand of Damages. And for theſe Reaſons Judgment was for the Defendant.

Caſe 106.

Athol & al'. In C. B.

A Perſon is chargeable to the Militia Levy, tho' it was not exerciſed.

REPLEVIN. The Defendants plead, that the Plaintiffs have ſuch an Eſtate in Common, for which they were charged to contribute to find a Horſe in the Militia, and that a Warrant was granted by the Deputy Lieutenant of the County againſt the Plaintiffs, to ſummon them at ſuch a Day to ſhew Cauſe why they did not pay the Sum charged upon them, but that the Plaintiffs did not appear at the Day; upon which a Warrant was directed by the Deputy-Lieutenant to the Defendants, to levy the Sum charged upon the Plaintiffs by Diſtreſs; by Virtue of which the Defendants juſtify themſelves. Plaintiffs replied, that the Militia did not Exerciſe that Year, and upon that Defendants demurred, and Judgment was given for the Defendants by the whole Court; for the Defendants being Officers have a Warrant directed to them by the Deputy-Lieutenants who have Cogniſance of the Matter, and it is nothing to the Purpoſe that the Militia was not Exerciſed that Year, for perhaps a Sum was charged upon the Plaintiffs to be paid Annually, for when the Militia is Exerciſed, he who finds the Horſe will be at great Expence, and thoſe who are Contributory pay a ſmall Sum Annually for their Proportion; then as the Plaintiffs had a Day upon the Summons and did not appear, the Warrant afterwards was for their Default, and ſufficient to juſtify the Defendants.

DE
Term. Sanct. Trin.
7 Annæ. In C. B.

Edmund, Adminiſtrator (during the Minority of Anne his Wife) of Patience Maud, ver. *Shaler.* Caſe 107.

Adminiſtration during the Minority of another ſhall not ceaſe till his Age of twenty-one Years.

IN Debt upon Bond for 400 *l.* againſt the Defendant, Plaintiff as Adminiſtrator aforeſaid averred, that *Anne* his Wife was under the Age of twenty-one Years. Defendant pleads in Bar, that *Anne* was above the Age of eighteen Years. Plaintiff demurs. And it was urged by Serjeant *Pratt*, that Adminiſtration during Minority determines when the Perſon for whoſe Minority it was granted is ſeventeen Years of Age. But Serjeant *Cheſhire* on the other Side urged, that there was a Difference between Adminiſtration granted during the Minority of an Executor, and Adminiſtration granted during the Minority of one who is intitled to the Adminiſtration; for in the firſt Caſe the Adminiſtration determines when the Executor attains the Age of ſeventeen Years; for at that Age the Executor, by the Spiritual Law, is able to take the Executorſhip upon himſelf, of which our Law takes Notice; but in the Caſe of an Adminiſtration that is granted by the Authority of the Statute 31 *Ed.* 3. *c.* 11. the Perſon who has Adminiſtration granted to him, ought to be capable by our Law, by which the legal Age is twenty-one, and conſequently Adminiſtration granted to another during his Minority, does not determine till his Age of twenty-one Years; and this Diſtinction was agreed in the Caſe of *Thomas* and *Freeke*,

Freeke, 13 *W.* 3. *Rot.* 102. and in other Caſes there cited, the Court ſeemed at firſt to doubt; and I mentioned, that it was ſo reſolved in the Caſe of *Thomas* and *Freeke*, which Caſe I argued; and the Court of King's Bench principally relied upon this Reaſon, that Adminiſtration was granted by Virtue of the Statute 31 *Ed.* 3. *c.* 11. and conſequently the Age when an Adminiſtrator ought to take the Adminiſtration upon himſelf muſt be the full Age allowed by our Law.

The Court took Time to conſider, but afterwards being attended with the Record of the Caſe of *Thomas* ver. *Freeke*, and being informed by ſome of the Spiritual Court, that for forty Years paſt the Uſage there was to grant Adminiſtration only to Perſons of the Age of twenty-one, and to grant Adminiſtration till the Perſon intitled to it attained his Age of twenty-one, Judgment was given for the Plaintiff.

Note; The Age of ſeventeen Years allowed to be the Age when an Executor may take the Executorſhip upon himſelf, is in Conformity to the Spiritual Law, which allows an Infant of ſeventeen Years to be Proctor or Agent for another.

Caſe 108.

Abbot ver. *Burton.* In C. B.

Settlement by Heir on the Part of the Mother, to the Uſe of himſelf in Fee, ſhall be to the old Uſe.

IN Ejectment upon a Special Verdict the Caſe appeared to be this:

Stone ſeiſed of Lands as Heir on the Part of his Mother levies a Fine and ſuffers a Recovery, and declares the Uſe to himſelf for Life, and then to his Wife for Life, then to the firſt and other Sons in Tail, Remainder to his own right Heirs; and if the Fee was in him as the old Uſe, and ſhould deſcend to the Heirs of the Part of his Mother, or ſhould deſcend to the Heirs of the Part of the Father, was the Queſtion. And after Argument it was now reſolved by the whole Court, that it was the antient Uſe, and ſhould deſcend to the Heirs of the Part of the Mother; and *Trevor* C. J. gave the Opinion of the Court.

DE
Termino Paſch.
8 Annæ. In C. B.

Thomas Harvey, Executor of R. Harvey verſus *William Richardſon & ux', Executrix of R. Burgeſs.* Caſe 109.

DEBT upon a Bond 1 *Oct.* 1675, in which *Joſ. Burgeſs*, and *Richard Burgeſs* the Teſtator of the Defendant, were bound to *Richard Harvey* the Teſtator of the Plaintiff in the Sum of 160 *l.* The Defendant demanded *Oyer* of the Bond and Condition, which recites that *Samuel Leach* by Will 11 *December* 1674 gave to his two Sons *Samuel* and *John* 30 *l.* a-piece, to be paid at their reſpective Ages of 21 Years, and to his Daughter *Mary* 20 *l.* to be paid at her Age of 18 Years or Marriage; and if any of his Children died before his Legacy became due, the ſame ſhould be divided amongſt the Survivors, and of ſuch Will made *Elizabeth* his Wife Executrix; that a Marriage was intended between the ſaid *Elizabeth* and *Joſeph Burgeſs*, whereby the perſonal Eſtate of *Samuel Leach* being eſtimated at 400 *l.* would come to his Hands, if therefore the ſaid *Joſeph Burgeſs*, his Executors, Adminiſtrators or Aſſigns, ſhould perform the ſaid Will as to the ſaid Legacies of 30 *l.* a-piece given to *Samuel* and *John*, and as to the ſaid Legacy of 20 *l.* given to the ſaid *Mary* the Children, then the Obligation ſhould be void. And upon this the Defendants pleaded, that the ſaid *Joſeph Burgeſs* did well and truly perform the ſaid Will as to the ſaid Legacies of 30 *l.* therein given to the ſaid

Plea of the Performance of a Will generally, is bad.

Samuel and *John*, and the ſaid Legacy of 20 *l.* given to the ſaid *Mary*, according to the Form and Effect of the Condition aforeſaid; to which Plea the Plaintiff demurred, and ſhewed for Cauſe, that the Defendants do not ſhew how the ſaid *Joſeph Burgeſs* performed the ſaid Will, nor whether he paid the ſaid Legacies or not, and that the ſaid Plea is uncertain and informal, upon which Iſſue cannot be joined; and the Defendants joined in Demurrer.

And now it was argued by Serjeant *Cheſhire* and Myſelf for the Plaintiff, and reſolved by the Court, that the Plea is bad, for it is too General, upon which the Plaintiff could not join in Iſſue, for it does not appear whether the Legacies were paid, or whether any one was Dead, whereby his Legacy ſhould be given to the Survivors, nor when, or in what Manner they were paid; and therefore the Plea was bad upon the Reaſons of the Caſes 2 *Cro.* 360. 2 *Bulſt.* 266. *Lutw.* 420. and though the Replication might have aided the Plea, yet that is not neceſſary; but the Incertainty of the Plea being ſhewn for Cauſe of the Demurrer, Judgment muſt be given for the Plaintiff. Serjeant *Hall* of Counſel with the Defendants would have taken a Diſtinction where the Obligation recites the Certainty of the Legacy, and where not, as in 2 *Cro.* 360. it does not appear how much was given for the Legacy. *Sed non allocatur.*

Caſe 110. ## *Hole & ux' Executrix of A.* verſus *King.* In C. B.

Where Executor ſhall pay Coſts in Trover.

IN an Action of Trover, the Plaintiff declared that the Teſtator was poſſeſſed of the Goods in Queſtion, and being ſo poſſeſſed made his Will, and the Plaintiff Executrix, and died, after whoſe Death the Goods came to the Hands and Poſſeſſion of the Defendant by his finding them, who converted them to his own Uſe. Not guilty pleaded, and the Plaintiff was nonſuited. And now it was moved by Serjeant *Pratt*, that the Plaintiff ought not to pay Coſts, for he does not ground his Action upon his own Poſſeſſion of the Goods, and therefore though the Converſion was in his Time,

yet the Plaintiff never had an actual Poſſeſſion of the Goods, but only a Poſſeſſion in Law, and therefore ought not to pay Coſts; and this ſeems to be within the Reaſon of the Caſe of *Hunt* and *Balloe* now lately ſettled and reſolved in this Court, where an Action of Trover was brought by Plaintiff as Executor, of Goods of his Teſtator, which the Defendant had taken and converted to his own Uſe, and it was there adjudged, that the Plaintiff ſhould not pay Coſts, and the Reaſon ſeems to be, for that the Executor never had the Poſſeſſion of the Goods.

But the Court reſolved here, that the Plaintiff ſhould pay Coſts, for his Teſtator died poſſeſſed, and then the Property and Poſſeſſion was veſted in his Executor, and the Trover and Converſion by the Defendant was in his Time, and therefore he might have had an Action in his own Name without alledging himſelf Executor. But in the Caſe of *Hunt* and *Balloe*, tho' the Trover and Converſion was alledged in the Time of the Executor, yet there it appeared that the Teſtator did not die in Poſſeſſion of the Goods, and therefore there is a Difference between the Caſes.

DE
Term. Sanct. Trin.
8 Annæ. In C. B.

Caſe 111. Vide Salk. 239. Deviſe, when it gives an Eſtate in Fee.

Hopewell ver. *Ackland.*

IN Ejectment upon a Special Verdict the Caſe appeared to be this:

John Ackland, ſeiſed in Fee of the Lands in Queſtion, made his Will in Writing to this Effect:

Whereas I have given Bond to leave my Manor of *Buckley* to the Daughter of my Brother *James Ackland*, and the Heirs of her Body, if ſhe live to attain the Age of 21 Years, but if ſhe die before ſhe attain that Age, then it is to return to me again; if therefore my ſaid Brother's Daughter ſhall happen to die before ſhe attain her Age of 21 Years, I give the ſaid Manor to my Brother *Richard Ackland* and his Heirs; alſo I give to my Brother *Richard Ackland* all my Land, Tenements, Hereditaments whatſoever; alſo I give to my Brother *Richard Ackland* all my Goods, Chattels, Monies, Debts and whatſoever elſe I have in the World not before by me diſpoſed of, he paying or ſecuring to be paid all my Debts and Legacies, and I make my ſaid Brother *Richard Ackland* my whole and ſole Executor of this my laſt Will, and deſire *B.* to be Overſeer thereof, and to ſee that my ſaid Executor and his Executors pay the ſaid Debts and Legacies; and by the ſame Will he deviſed ſome ſmall Annuities for Life, and others to Charities in Fee, and died. The Daughter of his elder Brother attained the Age of 21, and claimed not

only the Manor of *Buckley*, but alſo all the other Lands of the Teſtator after the Death of *Richard Ackland*, who was now Dead. The Queſtion was, Whether by this Will *Richard Ackland* had an Eſtate in Fee in thoſe other Lands, or only an Eſtate for Life? For it was agreed, that if he had but an Eſtate for Life, then the Leſſor of the Plaintiff, who was Heir at Law of the Teſtator, had a good Title; but if he had an Eſtate in Fee, then the Title was with the Defendant, who was Son and Heir of *Richard Ackland* the Deviſee. This Caſe was argued laſt Term by Serjeant *Pratt* for the Plaintiff, and by Serjeant *Parker* for the Defendant, and now by Serjeant *Powis* for the Plaintiff, and by Serjeant *Cheſhire* for the Defendant.

And it was inſiſted for the Plaintiff, that *Richard Ackland* the Deviſee had but an Eſtate for Life; for the firſt Clauſe which relates to the Manor of *Buckley*, and the ſecond Clauſe which gives all his Lands, Tenements and Hereditaments, and the third Clauſe which diſpoſes of his Perſonal Eſtate, are all diſtinct and independent Clauſes.

The firſt Clauſe is particular, and recites, That whereas he had given Bond to leave his Manor of *Buckley* in ſuch a Manner, if therefore his Brother's Daughter died before her Age of 21 Years, then he gave his Manor of *Buckley* to his Brother *Richard* and his Heirs; if it ſhould be attempted to couple this Clauſe with the ſubſequent Clauſe, they muſt be taken together throughout, and then not only the Manor of *Buckley* will be deviſed to his Brother upon the preceding Condition, *viz.* If the Daughter dies under Age, but alſo all the other Lands will be deviſed upon the ſame Condition; for it is plain and manifeſt that the Manor of *Buckley* is deviſed upon that Condition; then if this Clauſe governs the ſubſequent Deviſe of all his Lands, Tenements, and Hereditaments, and limits them alſo to his Brother and his Heirs, then it muſt neceſſarily be that all his Lands, Tenements and Hereditaments, are deviſed to him only in Caſe the Daughter dies under the Age of 21 Years; for the Defendant ſhall not take only Part of this Cauſe and annex it to the ſubſequent Clauſe, but muſt join the whole

precedent Clauſe with the ſubſequent one, or nothing; and if the whole is conjoined, the ſubſequent Deviſe will be upon Condition that the Daughter die under Age of 21 Years, as well as the former; which Conſtruction the Defendant will hardly approve of, for the Daughter did attain her Age of 21 Years, and then *Richard Ackland* will take nothing by the Will. It was likewiſe obſerved that the Teſtator in the firſt Clauſe had taken Notice of what Words were neceſſary to create a Fee, for there he deviſes the Manor of *Buckley* to his Brother and his Heirs.

It was inſiſted that the ſecond Clauſe is diſtinct from the firſt, and no way relates to it, nor is to be governed by it, for the ſecond Cauſe commences *de novo.* Alſo I give to my Brother *Richard Ackland* all my Lands, Tenements and Hereditaments, without adding the Copulative *And*; the Word *Alſo* imports no more than *Item*, and is of the ſame Signification as *moreover*, and cannot be conſtrued *in like manner*, as if the Deviſor had ſaid, I give my Manor of *B.* to my Brother and his Heirs, in like Manner I give him all my Lands, Tenements and Hereditaments whatſoever. But this ſubſequent Clauſe is diſtinct and ſtands by it ſelf, and there is a manifeſt Difference where the firſt Clauſe is compleat, and the ſecond is Attendant upon it, and muſt be conſtrued with it, and cannot be conſtrued by itſelf, there the ſecond Clauſe ſhall be governed by the firſt; as if a Man deviſes Blackacre to *A.* and his Heirs, and alſo Whiteacre, there the Deviſee ſhall have Whiteacre alſo in Fee, for there are no Words which can make the ſubſequent Words a diſtinct and compleat Clauſe; and therefore they muſt be governed by the Words of the firſt Clauſe; but where the ſecond Clauſe repeats the Words, by which it may have a Conſtruction by itſelf, then it is a diſtinct and compleat Clauſe and has no relation to the former; as where a Man deviſes Blackacre to *A.* and his Heirs, and alſo I deviſe Whiteacre to *A.* there by the ſecond Clauſe *A.* has only an Eſtate for Life; for there the Verb *I deviſe*, and alſo the Name of the Deviſee is repeated, and therefore it is a diſtinct Clauſe, and does not depend upon the precedent Clauſe; and in this Diſtinction the Caſes are agreed. *Mo.* 52. is ſtronger, for there a Man by

his Will deviſes Land to *Henry* his Son; *Item*, I give to my Son *Henry* and his Heirs; and there the Doubt was, whether by the firſt Clauſe *Henry* had a Fee? And it was reſolved by three Judges, that he had not, for that they were diſtinct Clauſes. But *Weſton* differed, becauſe the latter Clauſe had the Word *Heirs*, which he thought was applicable to the whole; but he agreed, that if the Word *Heirs* had been in the firſt Clauſe, it would be otherwiſe; and therefore three Judges have agreed the Law to be as we contend for in a Caſe ſtronger than ours, and the whole Court agreed it to be ſo in a Caſe the ſame as ours.

Then if the ſecond Clauſe be conſidered by itſelf, I give all my Lands, Tenements and Hereditaments to my Brother *Richard Ackland*, that can paſs only an Eſtate for Life; for it is the known Rule, that a Deviſe to one indefinitely, without limiting any Eſtate to him, gives him only an Eſtate for Life. It is true, if a Man deviſes to another all his Eſtate in ſuch Lands, this paſſes the Fee; ſo if he deviſes to him all his Inheritances; but no one can think it is ſo intended by a Deviſe of all his Hereditaments, who conſiders the Difference between the two Words *Hæreditas* and *Hæreditamentum*; for the Word *Hæreditas* imports the Eſtate which a Man has in the Land; *Hæreditamentum* the Land it ſelf which may be inherited; and therefore cannot be applied to the Eſtate in the Land, eſpecially when it is coupled, as here, with other Words of the ſame Import; for the Deviſor gives to his Brother all his Lands and Tenements; no one will ſay that thoſe Words import more than the Things themſelves; when therefore the Deviſor adds, *and all his Hereditaments whatſoever*, that denotes only ſuch Things as were not comprehended under thoſe other Words *Lands and Tenements*, but cannot be extended to the Eſtate in thoſe Hereditaments, any more than the other Words can be extended to the Eſtate which the Deviſor had in the Lands and Tenements.

Then if the third Clauſe be conſidered, Alſo I give to my Brother *Richard Ackland* my Goods, Chattels, Debts, Monies, and whatſoever elſe I have in the World; the Words, *whatſoever elſe I have in the World*, are very extenſive; but if thoſe Words

Words were ſingly by themſelves, it would be hard by ſuch general Words to paſs Lands, which could not be deviſed by Common Law, but only by the Statute, or by Cuſtom; and therefore the Heir, who by the Common Law could not be diſinherited by any Deviſe, ſhall not now be diſinherited, but where the Words are plain and manifeſt for that Purpoſe.

The Rule in *Vaugh.* — is, that the Heir at Law ſhall not be diſinherited by Implication, except where the Implication is neceſſary; it is not ſufficient that it be poſſible or probable; and all that can be ſaid in this Caſe is, that it is poſſible, or at moſt that it is probable, that the Teſtator here intended to give all his Lands to the Deviſee. Where a Man deviſed *All to his Mother*, thoſe Words were as large and comprehenſive as the Words *All I have in the World*, yet it was reſolved nothing paſſed but the perſonal Eſtate. *Raym.* 97. 1 *Sid.* 191. 1 *Lev.* 130.

But whatever Conſtruction might be put upon thoſe Words, if they are by themſelves, yet as they are here coupled with perſonal Things, they ſhall not be extended to Words of another Nature.

There are many Caſes where Words very general and indefinite ſhall be conſtrued in Conformity with and Analogy to other Words in the ſame Caſe. 5 *Co.* —. 2 *Co.* 46.

But on the other Side it was inſiſted for the Defendant, that the ſeveral Clauſes, each by itſelf, or at leaſt taking them altogether, gave a Fee to the Defendant *Richard Ackland*; and in *Hill.* Term 8 *Anne*, Judgment was given by the whole Court for the Defendant. And *Trevor* C. J. delivered the Opinion of the whole Court, and ſaid, that the firſt Clauſes cannot be joined, for as the Deviſor gives to his Brother *Richard Ackland*, and his Heirs, his Manor of *B. &c.* and afterwards adds, Alſo I give to my Brother *Richard Ackland* all my Lands, Tenements and Hereditaments, the laſt is a diſtinct Clauſe; the Caſe in *Mo.* 52. — does not come up to this, for there the Name of the Deviſee was not repeated in the ſecond Clauſe

Clauſe, and therefore it neceſſarily muſt be coupled with and conſtrued with the firſt.

Then the ſecond Clauſe, by which he gives all his Lands, Tenements and Hereditaments to his Brother, gives him but an Eſtate for Life.

But the laſt Clauſe by which he deviſes to his Brother All his Goods, Chattels and perſonal Eſtate, and whatſoever elſe he has in the World, theſe laſt Words, Whatſoever elſe he he hath in the World, import more than was ſaid before, All his Goods and Chattels, (for thoſe Words contain all his perſonal Eſtate) and therefore the additional Words muſt go to ſomething elſe.

If a Man deviſes all the Reſt and Reſidue of his Eſtate, that is ſufficient to give the Deviſee, not only his Lands not before diſpoſed of, but alſo the Eſtate not diſpoſed of, (*viz.*) the Remainder and Reverſion of Land deviſed to another for Life, *&c.*

And the Words, Whatever elſe he hath in the World, are tantamount, eſpecially when the Deviſe is, paying or ſecuring to be paid his Debts and Legacies, and ſome of the Legacies were in Fee, and not properly payable out of the perſonal Eſtate. Judgment for the Defendant.

Fitzherbert verſus *Chancellor and Scholars of the Univerſity of Oxon and Reeves, Clerk. Hill.* 7 *Annæ,* in C. B. *Rot.* 337.

Caſe 112.

QUARE *Impedit* by *Jane Fitzherbert* for the Church of *Swinnerton in Com' Stafford.* The Plaintiff declares, that *Bazil Fitzherbert* was ſeiſed in Fee of the Manor of *Swinnerton*, with the Advowſon appendant, and by Indentures 7th and 8th of *January* 29 *Car.* 2. conveyed the ſame to the Uſe of himſelf for Life, and after to the Plaintiff his Wife for Life; that *Bazil Fitzherbert* afterwards preſented *John Plant*, Clerk,

Conviction of a Papiſt where good. Avoidance of a Church before Conviction, forfeited by the Conviction.

and died; that the Church afterwards became void by the Death of the ſaid *John Plant*, by which the Plaintiff had a Right to preſent, but the Defendants diſturbed her. The Chancellor and Scholars by their Plea confeſs that *Bazil Fitzherbert* was ſeiſed, conveyed, and died, and that the Advowſon became void, *ut ſupra*; but that by the Statute 23 *Eliz.* it was enacted, That every Perſon who ſhould forbear to repair to Divine Service contrary to the Statute 1 *Eliz.* and ſhould be thereof convict, ſhould forfeit 20 *l.* of which the Juſtices of Aſſiſe, Oyer and Terminer and Gaol-Delivery, and Juſtices of Peace at their Quarter-Seſſions, ſhould have Cognizance; that by the Statute 28 *Eliz.* it was enacted, that for the more ſpeedy Conviction of ſuch Offenders, if upon Indictment of ſuch Offenders Proclamation ſhould be made at the Aſſizes, *&c.* that ſuch Offender ſhould render himſelf before next Aſſizes, and if he ſhould not appear at the next Aſſizes, on the Recording ſuch Default the Offender ſhould be convict. That by the Statute 3 *Jac.* it was enacted, that every Popiſh Recuſant during his remaining convict, from and after the End of that Seſſion of Parliament, ſhould be diſabled to preſent to any Benefice, *&c.* and that the Univerſity ſhould preſent to every ſuch Benefice, and in the County of *Stafford*, *&c.* which ſhould happen to be void during ſuch Time as the Patron thereof ſhould be and remain a Recuſant convict. That by the Statute 1 *W. & M.* it was enacted, that any two or more Juſtices of the Peace, who ſhould ſuſpect or be informed that any Perſon was a Papiſt, ſhould tender to ſuch Perſon the Declaration in the Statute 30 *Car.* 2. and if he ſhould refuſe to repeat and ſubſcribe ſuch Declaration, or to appear before the Juſtices of the Peace upon Notice left at his moſt uſual Place of Abode by any Perſon authoriſed thereto by Warrant under the Hands and Seals of ſuch Juſtices of the Peace, ſuch Perſon ſhould thereafter be diſabled, and become liable to the Penalties and Diſabilities of a Popiſh Recuſant convict, and the Juſtices ſhould certify the Name and Abode of every Perſon ſo refuſing to the next Quarter-Seſſions there to be recorded. That by the Statute 1 *W. & M.* it was enacted, that every Perſon who ſhould refuſe to repeat and ſubſcribe the ſaid Declaration, or to appear, *&c.* as in the laſt Act is directed, whoſe Name and

Abode ſhould be thereon certified and recorded at the General Quarter-Seſſions, from and after the Time of ſuch Record made ſhould be diſabled to make any Preſentation, *&c.* of any Benefice, *&c.* as fully as if he had been a Popiſh Recuſant convict, and that the Univerſity ſhould preſent, *&c.* That 27 *Mar.* 7 *Annæ Ralph Bucknal & Richard Dyett, duo Juſt' ad pacem, &c. informat' fuer' quod quer' ſuſpect' fuit fore Papiſt', quodq; notic' inſcript' per quend' R. A. authorizat' virt' Warrant' ſub manib' & ſigill' dict' duor' juſt' relict' fuit pro quer'; ſed præd' quer' non comperuit,* and that the Juſtices certified the Default to the Quarter-Seſſions, which was there recorded; *per quod & vigor' ſtat' prædict'* the Chancellor and Scholars to the Church *per mort' prædict' Joh' Plant vacant' & adhuc vacant' exiſten', prædict' quer' inhabil' virtute ſtat' prædict' ad præſentand' remanen', præſentaverunt* the Defendant *Reeves*, &c. The Defendant *Reeves* pleaded the ſame Plea. Plaintiff replied, that the Church *vacavit per mort' prædict' Joh' Plant* 29 *April* 6 *Annæ*, and that the Plaintiff 7 *June prox'* did preſent to the Biſhop of *Litchfield* and *Coventry idoneam perſonam, (viz.) quend' Joh' Walforne*, but the Biſhop *admittere penitus neglexit & recuſavit ac prædict' Cancell' & Scholar' & prædict' Reeves* (Defendants) *eundem (Quer') in præſentatione illâ injuſte impediebant, de quo quidem impedimento poſtea & infra ſex menſes, &c. ac diu antequam prædict' certificatio in placito præd' mentionat' recordat' fuit, &c. (viz.)* 23 *Jul'* 6 *Annæ, breve ſuum original', &c. impetravit, &c. & ſuperinde narravit pro impedimento prædict' verſus prædict' defend'.* To this Replication the Defendants demurred, and the Plaintiff joined in Demurrer. Serjeant *Pratt* inſiſted, that though the Plaintiff had preſented to this Advowſon, yet ſhe being convict for Recuſancy before Inſtitution and Induction, the Univerſity had Title to preſent. For the Statute 1 *W. & M. ſeſſ.* 1. *cap.* 8. which ſays, that a Perſon ſuſpected to be a Papiſt ſhall have Notice, *&c.* and if he refuſe to appear, *&c.* ſuch Default ſhall be recorded, and from and after the Time of ſuch Record made ſhall be diſabled to make Preſentment, relates to the Statute 3 *Jac.* 1. *cap.* 5. and ſhall be conſtrued as if the Statute of 3 *Jac.* 1. *c.* 5. was expreſly repeated, and the Statute 3 *Jac.* 1. *c.* 5. ſays, that every Popiſh Recuſant, during his remaining convict, from and after the End of that Seſſions

Seſſions of Parliament ſhall be diſabled to preſent to any Benefice, *&c.* by which it appears, that every Perſon convict for Recuſancy is diſabled from preſenting to any Benefice, and there is no Difference where the Perſon is convicted before the Avoidance happens, or after, for in both Caſes the Law excludes his Power of preſenting, and intruſts the Preſentation with the Univerſity.

And admitting the Univerſity be intitled to the Preſentation when the Patron is convict for Recuſancy after the Avoidance, then the Caſe will not be altered becauſe the Plaintiff had preſented before Conviction, and being diſturbed in her Preſentation by the Univerſity, had brought her *Quare Impedit* for ſuch Diſturbance before her Conviction was recorded; for though the Diſturbance was before the Title of the Plaintiff was avoided, yet if the Title of the Plaintiff be avoided before the Plaintiff recovers, ſhe cannot recover, nor have Damages for the Diſturbance; for the Diſturbance does not prejudice the Title of the Plaintiff, which is afterwards avoided by Act of Parliament, before the Plaintiff could have recovered upon that Title. The Plaintiff ſhall not have Damages for the Diſturbance till he has Judgment; and no one ſhall have Judgment for Damages in *Quare Impedit* when he cannot have a Writ to the Biſhop. *Co. Litt.* 362.

And notwithſtanding the Objections in this Caſe, it appears there was a regular Conviction according to the Directions of the Statutes. The firſt Objection is, that it does not appear that the Plaintiff was duly ſummoned, and refuſed to appear before the Juſtices, but only, that Notice, *&c.* was left at the Manſion-Houſe of the Plaintiff, without ſaying it was at that Time *tunc Domus Manſional'* of the Plaintiff; but when Notice is given at his Manſion-Houſe, that is not true, if it is not then his Manſion-Houſe, and *Manſional' Domus* imports that it was ſo then. The ſecond Objection is, that it does not appear that the Perſons before whom the Conviction was were then Juſtices of the Peace; for it is only ſaid, that Information was given to ſuch and ſuch *Juſt' Domini Regis ad pacem, &c.* without ſaying *tunc exiſten' Juſt' ad pacem, &c.* but when the Conviction is before Juſtices of Peace, who

act in their judicial Capacity, it ſhall be intended that they have then a good Authority, when it appears that they ever had an Authority; for their Authority ſhall not be preſumed to be determined, but to have Continuance till the contrary appears; and though there are many Caſes in Indictments, where it muſt be alledged they were *tunc Juſt'*; yet they do not extend to Pleas in Bar, which are ſufficient to a common Intent.

And it was argued by Serjeant *Weld*, and now by Serjeant *Lloyd* for the Plaintiff, who inſiſted, that the Conviction was not till after the Avoidance happened; and therefore the Avoidance was a Chattel veſted in the Plaintiff; and ſhe had executed her Authority to the Preſentation before the Conviction, and therefore the Conviction cannot by Relation defeat what was abſolutely executed *quoad* the Plaintiff before. The Words of the Statute are, That from and after the Certificate of the Default recorded, ſuch Perſon ſhall be adjudged a Perſon diſabled to make a Preſentation; but there the Preſentation was made before ſuch Certificate. To which Serjeant *Pratt* replied, that though a Perſon could not be adjudged *inhabilis* till the Certificate is recorded, the Queſtion is, whether, when he is adjudged diſabled, this does incapacitate him from preſenting to Avoidances which happened before the Certificate recorded, as well as to Avoidance after.

Afterwards in *Michaelmas* Term 8 *Annæ*, this Caſe was again argued by Sir *Thomas Powis* primier Serjeant for the Plaintiff, and by Serjeant *Cheſhire* for the Defendant. And for the Plaintiff it was inſiſted,

Firſt, That by this Plea there did not appear to be a legal Conviction, and he did not wave the Exceptions taken to the Conviction by the Counſel who argued before him, *viz.* that the Plea ſhewed that Information was given to *R. Bucknall* and *R. Dyett*, two Juſtices of the Peace, that the Plaintiff was a Papiſt, that ſhe had Notice by *A. B.* by Warrant of the ſaid Juſtices, but does not ſay *adtunc Juſtic'*; and perhaps they were not then in Commiſſion, though they were at the Time of the Plea: Alſo that it is ſaid, Notice was left *ad*

Manſional' Dom' of the Patron, without ſaying *adtunc Dom' Manſional'.*

Secondly, That it does not appear, that the Plaintiff refuſed to appear before the Juſtices according to the Summons; for the Summons was to appear before the ſaid two Juſtices *& al' Juſt'*; and it is alledged only, that ſhe did not appear before the ſaid two Juſtices; but perhaps ſhe appeared before the others.

Thirdly, That it does not appear, that the Plaintiff refuſed to appear, but only ſays *quod non comperuit.*

Fourthly, That it does not appear that the Church was void at the Time of the Plea, but only that it was vacant by the Death of *Plant*, and ſo remained to the Time of the Information to the Juſtices.

But the Exceptions which he principally enforced were, that here it does not appear by the Plea, that the Juſtices of the Peace were preſent at the Time and Place, when and where the Plaintiff was ſummoned and appointed to appear before them; and when a Man pleads a Matter which ſhews a Default in another, he ought to ſhew that all the Particulars were obſerved which render that Default inexcuſable; as if a Man pleads a Default of a Tender of Rent, it is not ſufficient to ſay that the Rent was demanded, and there was no Body ready to pay it; but he muſt alledge, that he was at the Time and Place of Payment, and continued there a reaſonable Time, (*viz.*) till Sun-ſet, ready to receive it.

So in Covenant for levying a Fine, *&c.* it is not ſufficient to ſay, that the Party did not levy it, but he muſt ſhew that he on the other Part took out a Writ of Covenant, *&c.* and did all that was to be done on his Part; and it is here to be conſidered who ought to do the firſt Act; for if he does not do all on his Part, *it ſhall not turn to the Diſadvantage* of the Defendant, that he did not do his Part: And therefore, where the Juſtices of the Peace ſummon another to appear before them at a certain Time and Place, it ought to be alledged

in the Plea, that the Juſtices were ready at the Time and Place aſſigned to tender the Oaths and Declaration required; and it is the ſtronger, that the Juſtices are not a Court which have a certain fix'd Time to aſſemble, but have an Authority for this particular Purpoſe only.

Secondly, The Plea ought to ſhew that the Plaintiff refuſed to appear before the Juſtices which granted the Summons and before any other Juſtices, for this Statute 1 *W. & M.* refers, as to the Manner of Conviction, to another Act of the ſame Seſſion *cap.* 8. by which it appears that any Juſtice of the Peace has Power to tender the Oath and Declaration; then when the two Juſtices ſummon the Party before them or any other Juſtices, if the Party appears before other Juſtices, it is as well as if ſhe appeared before the two Juſtices who granted the Summons.

But if there appeared upon the Plea to be a good Conviction, yet it was too late; for it appears upon the Record, and is now confeſſed by the Demurrer, that the Plaintiff at the Time of the Preſentation, at the Time of the Diſturbance, at the Time of the Action commenced was not convict, nor ſummoned before the Juſtices, for the Declaration in *Quare Impedit* was in *Mich.* Term — the Information before the Juſtices, upon which the Plaintiff was ſummoned to appear before them, was not till *March* following.

The Caſe of the Chancellor of *Oxford* 10 *Co.* 53. *b.* is not parallel to the preſent Caſe, and I do not obſerve it to be urged on the other Side; for there the Statute 3 *Jac.* 1. *cap.* 5. which avoids Grants of the next Avoidance by the expreſs Words of the Statute, has relation to the Time of the Seſſion, and there is a Reaſon for it; for if the Grant of a Benefice ſhall not be void till Conviction, yet upon the Summons in order to a Conviction, the Perſon ſo ſummoned would grant the Advowſon, which Miſchief cannot follow in the preſent Caſe.

The Patron here then at the Time of the Preſentation was a Perſon qualified to preſent, when the Avoidance happened;

pened, ſhe had an Intereſt or Right veſted in her to preſent, and when ſhe had preſented a fit Perſon, ſhe had performed her Office and had nothing farther to do. When an Avoidance happens, that the Intereſt in that is veſted in the Patron, is manifeſt, for if the Patron after the Avoidance happens dies, his Executor or Adminiſtrator ſhall preſent.

If there be Tenant *pur auter vie* of an Anvowſon, which becomes void, and before Preſentation *ceſtuy que vie* dies, yet the Tenant *pur auter vie* ſhall preſent.

So if there be a Guardian of an Infant ſeiſed of an Advowſon, and there is an Avoidance, and before Preſentation the Infant comes of Age, yet the Guardian ſhall preſent.

But in our Caſe not only an Intereſt was veſted in the Patron before the Conviction, but the Patron had executed her Power by an actual Preſentation of a Perſon *qui fuit idonea Perſona*, and ſo it here appears upon Record.

It was ſaid that a Preſentation is not an Execution of the Authority of the Patron, for he may revoke his Preſentation at Pleaſure, and for that were cited the Caſes in *Latch* 191, 253. 2 *Roll. Abr.* 353, 354. But this I deny.

It is true the King may revoke his Preſentation by his Prerogative, *Fitz. Nat. Brev.* — *Hob.* 214. But there being Caſes which take Notice that it is the Prerogative of the King to do this, imports that a common Perſon cannot revoke his Preſentation, and ſo it is expreſly ſaid, *Fitz. Nat. Brev.*

The Civil Law takes Notice that an Eccleſiaſtical Perſon cannot revoke his Preſentation, but a Lay Perſon may *variare Præſentationem* or *accumulando variare*, as ſome Books ſay, but it is not ſaid by the Civilians that a Lay Patron can revoke his Preſentation, but can vary it, that is can preſent another, or *accumulando variare*, that is preſent one and another *toties quoties*, and then the Biſhop may take one Pre-

ſentee or other which he pleaſes; which ſhews that by their Notion the Lay Patron cannot revoke, but only vary, which does not amount to a Revocation of the firſt Preſentation, for then the Biſhop could not take the firſt Preſentee. And this is all which *Roll* ſays.

He takes Notice that by the *Scotch* Law an Eccleſiaſtical Patron cannot vary his Preſentation, but a Lay Patron may *variare* or *accumulando variare*, and for that quotes *Skeen's Reg. Majeſt.* — which is ſo; and then concludes, that by our Law a Lay Patron cannot revoke, which is an expreſs Authority for us.

When the Patron has preſented *Idoneam Perſonam*, he has done all that belongs to him to do. *Goldsb.* 103. ſays, that to an intire and complete Plenarty are required the Act of the Patron, *viz.* to preſent a fit Perſon, and when he has ſo done *funct' eſt Officio*, the Act of the Ordinary to give Inſtitution, and the Act of the Incumbent to procure Induction; and by this Rule when the Patron has preſented, he has done all that lay in him to do.

And by ſuch Preſentation an Intereſt is veſted in the Perſon himſelf who is preſented; it is true that *Quare Impedit* muſt be brought in the Name of the Patron and not the Incumbent, but the Incumbent may ſue in the Spiritual Court to get Admiſſion by *duplex querela*, though perhaps the Temporal Courts would upon ſuch a Suit grant a Prohibition.

But if the Plaintiff here could not have a Writ to the Biſhop, yet the Suit in *Quare Impedit* being well commenced, he may proceed for Damages; and I deny the Rule laid down on the other Side, that the Plaintiff ſhall not have Damages in a *Quare Impedit*, where he cannot have a Writ to the Biſhop. The Caſe *Co. Lit.* only ſays, that the Defendant cannot have Damages, becauſe he cannot have a Writ to the Biſhop; but the Plaintiff may have Damages, though he cannot have a Writ to the Biſhop. If there be a *Quare Impedit* againſt the Diſturber and the Incumbent, without naming

the Biſhop, and pending the Writ ſix Months paſs, upon which the Biſhop collates for the Lapſe (as he may do in ſuch a Caſe) though the Plaintiff has Judgment, he cannot have a Writ to the Biſhop to admit his Clerk, for the Church is full, but he ſhall have Damages; and the Statute *Weſt.* 2. which gives Coſts in *Quare Impedit* provides expreſly for ſuch Caſe, for by that Statute it is enacted, that the Jury inquire of four Points, if the Church be full, and whoſe Preſentation, *&c.* if it be not full, the Plaintiff ſhall have only Half a Year's Value, if it be full, he ſhall have two Years Value, Damages.

In the preſent Caſe the Avoidance happened, and the Intereſt in it veſted in the Plaintiff before Conviction; the Plaintiff upon that preſented, being then capable of preſenting, and by her Preſentation had executed her Power, and if the Preſentee had been then inſtituted and inducted, it would without Queſtion have been good, and therefore the Diſturbance was an Injury to the Plaintiff, and alſo to the Preſentee who had an Intereſt by the Preſentation to him, and being *Idonea Perſona* ought to have been admitted, and upon the Refuſal of him, a *Quare Impedit* was brought, and all this before the Conviction for Recuſancy; and for theſe Reaſons he prayed Judgment for the Plaintiff.

If after a *Quare Impedit*, and Judgment for the Plaintiff, any Thing happens, that the Biſhop cannot admit the Clerk, he may make a ſpecial Return of that Matter upon the Writ directed to him.

And upon this Record the Plaintiff in the preſent Caſe can make no other Preſentation, for by her Replication ſhe ſhews that ſhe has preſented ſuch a Perſon, and upon the Refuſal of him, this Action appears to have been commenced, and therefore if the Plaintiff recovers, the Writ ſhall be confined to the ſame Perſon.

To this it was obſerved by Serjeant *Cheſhire*, that in *Quare Impedit* if the Plaintiff be outlawed pending the Writ, that

Outlawry gives the King the Title, and the Plaintiff cannot recover if that appears. *Cro. Eliz.* 44. *Sav.* 89.

Which Caſe was allowed to be ſo, but that it imported no more than that an Avoidance (though only a Choſe in Action) was forfeited to the King by his Prerogative upon an Outlawry; and therefore if Tenant to the King has an Advowſon which becomes void, and the Tenant dies, his Heir within Age and in Ward of the King, the King ſhall preſent by his Prerogative, and not the Executor of the Tenant, as it would be if the Heir was in Ward to any common Perſon, and therefore a Caſe of Prerogative ought not to be compared to the Caſe of a common Perſon.

And Serjeant *Cheſhire* on the other Side inſiſted, that the Exceptions to Pleading the Conviction could not avail, for it is expreſly ſaid that Information was given to *R. Bucknel* and *R. Dyet, juſt' ad pacem*, which Notice was left at the Manſion-Houſe of the Plaintiff, but the Propoſition is falſe, if they were not then Juſtices of the Peace, and if it was not then the Manſion-Houſe of the Plaintiff.

Secondly, This Caſe is not to be compared to Pleading upon a Forfeiture or Breach of Covenant, when the Party, who would take Advantage of ſuch Forfeiture or Breach of Covenant, muſt ſhew preciſely that he has done every Thing on his Part, and therefore he agreed that the Pleadings ſhould be as were mentioned, where a Man takes the Advantage of Non-payment of Rent, or the not Levying a Fine, *&c.* But the Juſtices here have a ſpecial Authority by Act of Parliament, and when it is ſhewn that they have proceeded in all reſpects as the Words of the Act direct, it ſhall be intended that they have done all that thoſe Words import or require them to do.

Thirdly, He inſiſted, that by the Act, after Summons to the Party to appear, *&c.* he ought to appear before the ſame Juſtices and no other.

As

As to the Matter of Law he inſiſted, that by the expreſs Words of the Statute 1 *W. & M.* — that every Perſon convict for Recuſancy is diſabled from preſenting; and though in the ſecond Clauſe, which gives the Preſentation to the Univerſity, the Words are *from and after ſuch Record made, &c.* yet it is manifeſt that in all Caſes where the Patron is diſabled from preſenting for Recuſancy, the Univerſity has the Preſentation, and therefore ſuch a Conſtruction ought to be made as may reconcile both Clauſes of the Act, and anſwer the Intent of it.

The Conviction, though after the *Quare Impedit* commenced, may be pleaded in Bar, and compared it to Caſes where Matter ſubſequent, and which happens pending the Writ, may be pleaded in Abatement to the Writ; and cited many Caſes to that Purpoſe, and relied on the Caſe in *Cro. Eliz.* where in *Quare Impedit* Outlawry of the Plaintiff gives Title to the King; he denied that the Plaintiff could not revoke her Preſentation, or that it is confined to this particular Preſentee, if ſhe recover, or that the Preſentee of the Plaintiff had any Right or Intereſt veſted in him by this Preſentation. *Adjornatur.* *Vide poſtea* 181.

Caſe 113.

Hammond verſus *Hill.*

What ſhall be adjudged a good Breach of Covenant.

DEBT upon a Bond, where the Condition was, that the Defendant ſhall keep harmleſs the Plaintiff from all Jointures, Dowers, Annuities, Damages, Claims and all other Incumbrances, and ſhall perform the Covenant in the Indenture 2 *May* 1702, whereby the Defendant conveys to the Plaintiff and his Heirs a Meſſuage and Lands, called *Little Brinsby* in the County of *Suſſex*; and by the ſame Deed the Defendant covenanted, that the Plaintiff ſhould have, uſe, poſſeſs and enjoy the Premiſſes aforeſaid quietly and peaceably without any Impediment from the Defendant, his Heirs or Aſſigns, or any other Perſon, and that clearly acquitted and exonerated of and from all former and other Grants, *&c.* Rents, Rent-charges, Arrears of Rent,

Statutes, *&c.* Charges and Incumbrances whatſoever. The Plaintiff aſſigns for Breach, that the Tenements aforeſaid were charged and chargeable with one annual Rent, *viz.* a Rent of 11 *s.* 6 *d.* to be paid to the Lord of the Manor of *W.* in the ſaid County, of whom the ſaid Tenements then and before were and are held under the ſaid Rent and other Services. The Defendant by his Rejoinder ſays that the Rent of 11 *s.* 6 *d.* aforeſaid was payable to the Lord of that Manor as a Quit-Rent, incident to the Tenure of thoſe Lands, and that the Plaintiff was not moleſted, *&c.* for any Arrears of that Rent payable before the making of the Indentures aforeſaid. The Plaintiff maintained his Replication, and the Defendant his Rejoinder; and upon this there was a Demurrer; and the Queſtion was, If this Covenant was broke? And reſolved by the whole Court without any Difficulty, that it was. For the Defendant had expreſly covenanted with the Plaintiff upon his Purchaſe, that he ſhould have the Lands diſcharged of all Rents, and therefore they ought to be diſcharged of this Rent as well as of others, for a Quit-Rent is a Rent.

Judgment for the Plaintiff.

Fitzherbert verſus *Chancellor and Scholars of the Univerſity of Oxford and Reeves.* In C. B.

Caſe 114.

THIS Caſe came now for Judgment, and *Trevor* C. J. delivered the Opinion of the Court, and he conſidered, Vide ante 169.

Firſt, If the Statute 3 *Jac.* 1. *cap.* 5. extends to Avoidances before Conviction, or only to Avoidances before Conviction for Recuſancy.

Secondly, If it extends to Avoidances after Conviction in this Caſe, where upon the Avoidance a Preſentation was made, and for not admitting the Clerk preſented, *Quare Impedit* was brought before Conviction.

Thirdly, If the Conviction in this Caſe was legal?

And the Court thought that the Statute 3 *Jac.* 1. *cap.* 5. extends to all Avoidances as well before as after Conviction; for the Words of the Act are general, and the ſubſequent Words, *when it ſhall become void, &c.* are Words of Inlargement and extend the Gift of the Avoidances of Recuſants to the Univerſity *toties quoties* the Advowſon becomes void, and Words which were intended to inlarge ſhall never be conſtrued to reſtrain the former Words. Avoidances before Conviction are alſo within the ſame Miſchief as the Avoidances after, and it would be a hard Conſtruction, that general Words ſhall not be extended to remedy all Caſes which are within equal Miſchief.

Secondly, All Avoidances being within the Statute 3 *Jac.* 1. *cap.* 5. though the Patron had preſented, and upon Refuſal of his Preſentee had brought a *Quare Impedit* before Conviction, yet in ſuch Caſe Judgment ſhall be for the Defendant; for after the Preſentation the Right remains in the Patron; and as before Induction the King may revoke his Preſentation, ſo a common Perſon, till his Preſentee is inſtituted, may at leaſt vary his Preſentation, and upon ſuch Variation the Biſhop may admit the firſt Preſentee or the laſt; this Power then to vary the Preſentation remains in the Patron till the Church be full. But by this Preſentation, nor by by the *Quare Impedit* is the Church full, for *Quare Impedit* would not lie if the Church was full by his own Preſentation. At the Time then of the Conviction this Power or Right of varying his Preſentation remained in the Patron, and why ſhall it not be given to the Univerſity after the Conviction? This Power, if the Patron dies, ſhall go to his Executor or Adminiſtrator, if he be outlawed, ſhall be forfeited to the King, *Sav.* 89. and for the ſame Reaſon ſhall be transferred to the Univerſity; then when the Chancellor and Scholars of the Univerſity after the Conviction preſent an Incumbent to the Biſhop, and the Patron before Conviction had preſented another, the Biſhop has the Election to take one Preſentee or the other, and therefore when the Biſhop admits and inſtitutes the Preſentee of

the Univerſity, the Patron ſhall not maintain a *Quare Impedit*, for that there was no Diſturbance; for it was in the Biſhop's Power to accept which he would: But if the Biſhop had admitted the Preſentee of the Patron, and the Univerſity had brought a *Quare Impedit*, if that would be maintainable would be another Conſideration.

As to what was inſiſted, that the Plaintiff here had a Right to maintain *Quare Impedit* for Damages; Damages in *Quare Impedit* are but Acceſſary, and follow the Right of Preſentation; and therefore if the Plaintiff had no Right to preſent, ſhe ſhall not have Damages, for her Right was not diſturbed.

Thirdly, The Conviction here is legal; for when the Party was ſummoned before the Juſtices of the Peace to take the Oaths, *&c.* the Party ought to attend at the Day; and here it is alledged, that ſhe refuſed, and did not come before the Juſtices, *&c.* It is true, that the Juſtices ought to be preſent at the Time appointed, and if they are not there, it would be a good Excuſe for the Party; and upon Rejoinder *Quod non recuſavit*, if the Fact appeared to be ſo, the Iſſue would be with him, and the Party if he pleaſed might plead ſpecially, that he attended at the Time, but the Juſtices were not preſent, *&c.* And in ſuch Caſe the Juſtices are not obliged to do the firſt Act, for there is no Neceſſity that the Juſtices ſhould be preſent if the Party does not come; but it is ſufficient if they leave one at the Place to give them Notice if the Party comes; and the Party himſelf is obliged to do the firſt Act, (*viz.*) to attend at the Time and Place appointed. Therefore Judgment for the Defendant.

Shelf and *Baily*. In C. B.

Caſe 115.

When one undertakes to ſubmit to an Award for another, where it ſhall be adjudged good or not.

DEBT upon Bond; the Condition recites, that a Replevin was depending between the Defendant and one *Webb*, who made Conuſance as Bailiff to the Plaintiff, for Rent due on a Demiſe from the ſaid *Iſaac Shelf* and *Margaret* his Wife; and then goes on, that the Plaintiff *Shelf* and Defendant *Baily* ſhall ſtand to the Award of Arbitrators, *ita quod* the Award

Award be made *de præmiſſis* by ſuch a Day. The Defendant demands Oyer, and pleads No Award made. The Plaintiff ſhews the Award, which recites, That *Baily* had brought a Replevin for taking his Cattle againſt *Webb*; to which the Defendant *Webb* had made Conuſance as Bailiff to *Iſaac Shelf* and *Margaret* his Wife, and ſets forth, that *A.* being ſeiſed of the Place where, in Fee, deviſed the ſame to *Margaret* his Wife, who demiſed the Premiſſes to *B.* for ſeven Years, and after married the Plaintiff *Shelf*, and for Rent Arrears the Avowant as Bailiff to *Shelf* and his Wife took the Cattle levant and couchant in the Place where *nomine diſtriction'*; to which Plaintiff had replied, that *B.* and all thoſe whoſe Eſtate he hath in the Place where, uſed to repair the Fences between the Place where, and *Baily*'s Cloſe adjoining, *& pro defectu reparation' inde* the ſaid Bailiff's Cattle eſcaped to the Place where; and Iſſue was joined on the Right to repair; and it was recited, that it appeared to the Arbitrators, that *B.* and thoſe whoſe Eſtate he hath, ought not to repair the ſaid Fences, but a Stranger ought to repair them, and then awards, *de & ſuper præmiſſis* and all Matters in Difference between the ſaid Parties, that all Proceedings in the ſaid Replevin ſhall ceaſe; that *Baily* ſhall pay 7 *l.* 10 *s.* for the Rent Arrear to *Shelf*, and 10 *l.* for Coſts, and *Shelf* ſhall give him a general Releaſe. Upon this there was a Demurrer. And now it was argued that the Award was void; for that *Webb* was a Stranger to the Submiſſion, and that by this Award the Action between *Baily* and him was to ceaſe; that ſo much was to be paid to *Shelf*, and he was to give a Releaſe, whereas *Webb* is intitled to Coſts if the Plaintiff does not proceed; and the Releaſe of *Shelf* does not diſcharge the Plaintiff *Webb*, being a Stranger to the Submiſſion, and the Award being void as to him.

To which it was anſwered, that *Shelf* here was the Party concerned in Intereſt, and a Perſon may ſubmit to an Award for another.

And the Court inclined, that if a Perſon ſubmits to an Award on the Part and Behalf of a Stranger, that his Bond ſhall be forfeit if the Stranger does not do what the Award requires him to do; but here it does not appear that *Shelf* undertook for *Webb*, or ſubmitted on the Part or Behalf of him.

DE

Term. Sanct. Mich.

8 Annæ. In C. B.

The Viſcounteſs Bodmyn verſus *Sir Richard Child.*

Caſe 116.

Tenant in Dower ſhall not have Execution of a Reverſion after a Term.

SCire Facias reciting, *Cum Sara Vicecomitiſſa Dotiſſa de Bodmyn, quæ fuit uxor Roberti Roberts Ar', Vicecomit' de Bodmyn, Trin.* 1 *Jac.* 2. *recuperaſſet verſus Abr' Vandenbendy & Johan' Rotheram ſei'am de tertiâ parte ſext' part'* of ſeveral Honours, Manors, *&c. in Com' Eſſex, in Reman' poſt termin'* 99 *Annor' incipien'* 1 *Maii* 28 Car. 2. limited to *Geo. Mountague, Francis Butler,* and *Gul' Jeſſop, ut dotem ſuam, cumque præd' Abr' & Johan' ſunt mortui, & Ric' Child, Bar' in ſext' part' præd', unde dos præd' recup'at' fuit, ingreſſus eſt prout ex inſinuacon', &c. Præcipe Vicecomit' Com' Eſſex' quod per probos, &c. Scire fac' præfat' Ric' Child & omnib' tenen' ſext' part' præd' quod eſſent hic quinden' Paſchæ oſtend', &c. quare præd' Vicecomitiſſa Execution' & ſei'am ſuam de tertia parte præd' (ita tamen quod occupator' & poſſeſſor' præd' termini Annor' de & in eadem tertiâ parte adhuc ventur' a poſſeſſion' ſuâ inde non amoveant') habere non debet juxta formam Recuperation' præd'.*

Sir *Richard Child* appeared, and by his Attorney demanded Oyer of the Record, *& ei conceditur in hæc verba, Eſſex, ſſ. Sara Vicecomitiſſa, &c.* by which it appeared, that ſhe demanded Dower againſt the Defendants; who pleaded, that before the Marriage of the Demandant with her Husband, *Charles* Earl of *Warwick* was ſeiſed of the ſaid Honours, Ma-

nors, &c. in Fee, and being ſo ſeiſed, by Leaſe and Releaſe 26 & 27 *Aug.* 14 *Car.* 2. conveyed the ſaid Eſtate to the Uſe of himſelf for Life, then to *Charles* Lord *Rich*, his Son and Heir apparent, for for Life; then to Truſtees, till his firſt Heir on the Body of *Anne* his Wife ſhould attain the Age of twenty-one; then to the firſt, ſecond and other Iſſue Male of the ſaid Marriage in Tail Male ſucceſſively; then to the firſt and other Iſſue Male of the ſaid *Charles* Lord *Rich* by any other Wife in Tail; then to the Heirs Male of the ſaid *Charles* Lord *Warwick*, and for Default of ſuch Iſſue, to the ſaid *George Mountague*, *Francis Butler* and *William Jeſſop*, for 99 Years; then to *Hatton Rich* for 100 Years if he ſo long lived; then to Truſtees to preſerve Contingent Uſes, then to the firſt and other Sons of the ſaid *Hatton Rich* in Tail Male; then to the Heirs Females of the Body of *Charles* Earl of *Warwick* and *Charles* Lord *Rich* equally in Tail; then as to one ſixth Part of the ſaid Eſtate, to the Uſe of the ſaid *Robert Roberts* and his Heirs.

That the ſaid *Charles* Earl of *Warwick*, *Charles* Lord *Rich* and *Hatton Rich*, died without Iſſue, *viz.* 1 *May* 23 *Car.* 2. by which Means the ſaid *George Mountague*, *Francis Butler* and *William Jeſſop devener' poſſeſſionat'* of the ſaid Term for 99 Years, the Remainder as to the ſaid ſixth Part to the ſaid *Robert Roberts* and his Heirs, and his Eſtate in the ſaid Remainder. The Defendants then aver, *quod prædict' Termin' 99 annorum nondum fuit finit' ſive determinat' quodque ipſi nihil habent nec unquam habuer' in præd' ſexta parte, &c. niſi in Remanere poſt præd' term' 99 annor' inde; & hoc, &c.*

Et præd' Vicecomitiſſa pet' judicium & ſei'am de Remanere ill' ſibi adjudicari, &c. ideo conſid' eſt quod præd' Vicecomitiſſa recuperet ſei'am ſuam verſus præfat Abr' & Johan' Rotheram de tertia parte Remanere præd'.

After *Oyer* Sir *Richard Child pet' judiciu' de præd' brevi de Scire facias pro eo, quod præd' Sara per breve ill' pet' execution' & ſei'am de præd' tertiâ parte, &c. ante determination' præd' termini annor' tam in Recordo judicii quam in præd' brevi de Scire facias mentionat', ac pro eo quod non apparet quod præd'*

termin' ullo modo determinat' exiſt', ac pro eo quod præd' Sara per breve præd' petit execution' & ſei'am al' quam per judiciu' præd' ei adjudicat' fuit.

Et præd' Comitiſſa, pro eo quod præd' Ric' Child tant' pet' judiciu' de brevi de Scire facias, &c. abſque aliqua cauſa rationabili &c. ac pro eo quod Ric' nihil in præcluſion' execution' & ſei'æ ipſius Comitiſſæ, &c. dic', ita quod eadem Comitiſſa remanet verſus eum inde quodammodo' indefenſ', ipſa ut prius pet' Execution', &c.

To this the Tertenants demurred, and ſhew'd for Cauſe, *quod præfat' Comitiſſa per Replication' ſuam pet' Execution' & ſei'am ſuam, &c. et non reſpondet ad placitum ipſius Ricardi in caſſation' brevis præd' ut præfert' placitat'.*

And it was argued that the Plea in Abatement was good, for the *Scire facias* is a judicial Writ, founded upon the Judgment, and ought to purſue it, but the Judgment is only that the Demandant recover Seiſin of the third Part of a Remainder after a Term for 99 Years, but the *Scire facias* prays an Execution and Seiſin immediately, without ſhewing that the Term for Years is determined; nay it rather ſhews that the Term is ſubſiſting, for it ſays that it commenced 1 *May* 28 *Car.* 2. and therefore it cannot be determined by the Effluxion of Time, and conſequently ſhall be preſumed to have a Continuance if the Contrary does not appear; and then during the Continuance of the Term the Demandant cannot have Seiſin. And though the Writ has a Clauſe (*ita quod poſſeſſor' ſive occupator' termin' non amoveant'*) this will not aid it, for it is a Contradiction, ſince the Demandant cannot have Seiſin of the Lands without ouſting of the Termor, for Seiſin imports the Poſſeſſion, *Co. Lit.* 153. *a.* and Livery of Seiſin cannot be made when a Term is in Poſſeſſion. If a Man grant an Eſtate to *A.* for Years, Remainder to *B.* for Life, and *A.* enters before Livery, it cannot be made afterwards, becauſe the Termor has the Poſſeſſion, and before *A.* entered, it could not be made to *B.* in Remainder, for the Poſſeſſion did not belong to him, but it muſt be made to the Termor himſelf. *Co. Lit.* 48. *b.* and 369. *b.* This

ſhews

ſhews that the Sheriff upon a *Hab. fac. ſei'am* cannot deliver Poſſeſſion to the Demandant without ouſting the Termors, and therefore this Clauſe is repugnant and contradictory.

If there be a *Scire facias* for the Execution of a Fine *ſur Grant & Render* by him in Remainder, after an Eſtate for Life or in Tail, it muſt ſay, that the Tenant for Life is dead, or that the Tenant in Tail is Dead without Iſſue; ſo are all the Precedents. *Off. Bre.* 268, 276. *Reg. Jud.* 12. *b.* 1 *Brownl. Ent.* 328.

And if it was not made ſo, it might be pleaded in Abatement. 40 *Edw.* 3. 16. *b.* 44 *Edw.* 3. 39. *b.*

But Serjeant *Pratt* anſwered, and the Court thought, that the Demandant in Dower ſhould have Judgment of the Reverſion and Rent, and then ſhe ought to have Execution of that Judgment, according to *Co. Lit.* 32. where it is ſaid, that the Sheriff ſhall give Execution of a Reverſion by Metes and Bounds and of a third Part of the Rent, and Execution ſhall not ſtay during the Term. And ſo it was agreed 1 *Roll* 678. *L.* 20. *Cro. Eliz.* 564. *Wheatly* verſus *Beſt*, it was reſolved accordingly, and there it is ſaid that the Execution ſhall be ſpecial, that the Sheriff ſhall not ouſt the Termor, and tho' it was urged that there is a Diſtinction where Rent is reſerved upon the Term and where not; for in the firſt Caſe the Sheriff might give Poſſeſſion of the Rent in the ſame Manner as where Dower is demanded of a Rent, of which the Wife is dowable; but where no Rent is reſerved, as in the preſent Caſe, Execution ſhall be ſtayed during the Term, as was agreed 1 *Roll.* 678. *L.* 22. for then the Execution would be of no Effect; yet there does not ſeem to be any Difference, for the Judgment ought to be executed in the one Caſe as well as the other, and the Termor can have no Prejudice; and the Chief Juſtice thought that if the Clauſe (*ita quod poſſeſſor'*, *&c.*) had been omitted, the Writ would have been good, for the Clauſe is only an Expreſſion of that which would have been underſtood.

It was then inſiſted that here was a Diſcontinuance, for the Plea *pet' judiciu' de brevi*, and the Demandant by her Replication *pet' judiciu' & ſei'am*, whereas ſhe ought to have prayed that the Tenant *reſpondeat ouſter*, for if the Plea was bad ſhe might have demurred to it; if ſhe does not demur, ſhe ought to reply to the Matter of the Plea, and conclude with praying that the Tenant might anſwer, not with praying Seiſin and Execution; for Tenant might plead other Matter in Bar of the Execution, as a Releaſe, *&c.* and therefore ought not to be precluded ſuch Matter; and therefore where a Defendant pleaded in Abatement, and the Plaintiff by his Replication concluded with praying Judgment and Damages, it was adjudged to be a Diſcontinuance. *H. 1 W. & M. B. R. rot.* 217. Between *Bliſs* and *Harcourt*, *Show.* 155. 3 *Mod.* 281. *Sed non allocatur*; for the Plea in Abatement is in Nature of a Demurrer, it being on Matter appearing in the Writ, not on any Fact *dehors*, and when the Tenant has made the firſt Default, the Demandant may well pray Execution and Seiſin.

But it was adjourned, and afterwards Judgment was given by the whole Court, That the Plaintiff ſhould not have Execution upon this *Scire facias*, there being no Rent reſerved upon the Term, and therefore it would be vain for the Plaintiff to have Execution before the Term was ended.

Judgment for the Defendant.

DE
Term. Sanct. Hill.
8 Annæ. In C. B.

Caſe 117.

Bird and *Line.*

Action of the Caſe does not lie for a malicious Suit *pendente lite.*

ACTION upon the Caſe, in which the Plaintiff declares, *Quod prædict' defend' malitioſe machinans & intendens ipſam Eliz'* (Plaintiff) *minus rite prægravare, opprimere, impriſonare & depauperare, ex malitia ſua præhabit' 16 die Junii anno Annæ Reg' 8. levavit quandam querel' in Cur' Palatii apud Weſtm' verſus ipſam Eliz', & querel' ill' in Cur' prædict' proſecut' fuit ſine aliqua cauſâ rationabili, donec prædict' quer' virtute cujuſdam brevis de Cap' extra eandem Cur' ad ſect' ipſius def' 21 Junii prædict' capt' ac arreſtat' fuit, & in priſonâ ejuſdem Cur' pro defectu manucapt' detent' & impriſonat' fuit per ſpacium 30 dier', ipſe prædict' def' bene ſciens ſeipſum nullam legitim' cauſam action' verſus quer' habere.* Defendant demurred generally.

I inſiſted for the Defendant, that this Action does not lie; for though an Action on the Caſe lies againſt one who ſues in an improper Court, where there is no Juriſdiction of the Cauſe, knowing it, *Lut.* 1571. and againſt one who ſues in a proper Court, but proceeds there vexatiouſly; as by taking out a *Fieri Fac'*, knowing that a *Fieri fac'* had been executed before; *Hob.* 205. ſo where one ſues out irregular Proceſs, or purſues legal Proceſs for an illegal Purpoſe; 3 *Lev.* 310. or where Proceſs is iſſued ſo clandeſtinely that the Defendant had no Notice of it till he was outlawed; or where ſo great Damages are alledged, that the Defendant cannot put in Bail;

1 *Sid.* 424. yet where a Man brings an Action, and proceeds regularly in a Courſe of Juſtice, though the Suit be without Cauſe, yet an Action on the Caſe will not lie; for if the Plaintiff does not recover, he ſhall pay Coſts. And this was agreed by all the Judges of *England*, 2 *R.* 3.9. *b.* No Man ſhall be puniſhed for ſuing out the King's Writ, be it of Right or Wrong. *F.N.B.* 429. And the ſame Rule is agreed *Co. Lit.* 161. *a.* And the ſame Thing was reſolved by all the Judges. *Cro. Eliz.* 794. And it was ſo reſolved by the whole Court in an Action upon the Caſe for ſuing for Tithes in the Spiritual Court after Payment to the Party himſelf. *Cro. Eliz.* 836. 1 *Rol. Ab.* 102. *Noy* 37. And ſo it was reſolved by the whole Court in an Action upon the Caſe for ſuing in the Spiritual Court for Tithes of Groſs Trees. 2 *Cro.* 133. 1 *Rol. Ab.* 34. And to this *Hale* agreed. *Hard.* 169.

And in theſe Caſes, where it is reſolved, that an Action upon the Caſe lies where there is any Colluſion in the Proceedings or Abuſe of the Proceſs, it is generally agreed, that if a Suit be brought without any Cauſe, where there is no other Ingredient or Circumſtance in the Caſe, an Action upon the Caſe does not lie for that.

And I appehend it cannot be contended, that an Action upon the Caſe will lie where the Plaintiff declares, that the Defendant commenced an Action againſt him without any reaſonable Cauſe, and upon which the Defendant in the firſt Cauſe was by the Proceſs of the Court arreſted, and carried to Priſon for Want of Bail, without ſaying any more; for the ſame Declaration might be upon every Suit in *Weſtminſter-Hall.*

And therefore if the other Words, *malitioſe machinans ipſam opprimere, &c.* or *ſciens ſeipſum legitim' cauſam action' non habere*, do not alter the Caſe, the Action here does not lie. But as to the firſt Words, *Malitioſe machinans & ex malitia præhabita, &c.* which are added of Courſe, they cannot render the Action maintainable if the Fact alledged in the Declaration be not in its own Nature, or has a Tendency towards being illegal, covenous or oppreſſive. *Vide* 1 *Rol. Abr.* 111. So the Words *Sciens ſeipſum non habere legitim' cauſam action'* cannot

cannot render the Action maintainable; and upon this I would offer this Diſtinction: Where the Fact alledged in the Declaration appears to have a Tendency to Vexation or Oppreſſion, there the Allegation, that the Defendant knew the Fact, may make the Action maintainable, which otherwiſe would not lie; for there the Fact is provable and triable, and that Notice of this was given to the Party may be well proved; and therefore if there be an Action in an Inferior Court for a Cauſe of Action ariſing out of the Juriſdiction, there the Allegation, that the Party was *ſciens* of that, may make the Action maintainable; for there the Limits of the Juriſdiction is Matter of Fact, and alſo the Notice which the Party had, that the Action aroſe out of thoſe Limits, is a Fact which may be well proved and tried; ſo perhaps if a Declaration alledges, that the Defendant brought his Action for ſuch a Sum *ſciens* that it was paid, or brought his Action upon a Bond *ſciens* it was forged, the Action may be maintained; for the *Sciens* is alledged of a Fact which may be well proved. But where the *Sciens* goes to a Thing which lies ſolely in the Mouth of the Party, as in the preſent Caſe, if the Action is not otherwiſe maintainable, the *Sciens* will not maintain it; for if the *Sciens* renders the Action maintainable, it ought to be traverſable, and capable of Proof and Trial. But how ſhall it be proved that the Party knew he had no legal Cauſe of Action? If he was ſo informed, perhaps that Information did not perſwade him; if he himſelf declared ſo, perhaps he was afterwards convinced to the contrary: This is a Thing ſecret in his own Mouth only, which cannot be proved; then how ſhall it be tried? Can a Jury determine what ſhall be a legal Cauſe of Action? *Ad quæſtion' facti reſpondent juratores, ad quæſtion' juris reſpondent judices.* This is not like to an Action upon the Caſe in the Nature of a Conſpiracy for an Indictment *abſque probabili Cauſâ*; for there the Indictment is Matter of Fact, and the Matter for which the Party was indicted is a Fact which ſhall be tried by a Jury if he was guilty or not; and therefore the Jury may well try if there was a probable Cauſe for ſuch Indictment or not. But if the Action in this Caſe ſhould lie, the Plaintiff does not ſhew that the Action in the Inferior Court was determined; per-

haps it is not yet determined that Judgment there ſhall be for the Plaintiff.

Serjeant *Parker contrà* argued, that the Caſes cited only prove, that an Action upon the Caſe does not lie for ſuing in a Courſe of Juſtice; but if a Man, who knew that he had no Cauſe of Action, commences a Suit in an Inferior Court, where Bail cannot be taken, and declares that this was for Vexation, and to detain him in Priſon without Bail, when there never were any Dealings between them, *as the Caſe now is to be underſtood,* will not an Action then lie? And this may be well proved; for it is admitted, that if an Action be commenced for Money which is paid, or on a Bond which is known to be forged, an Action on the Caſe will lie; and why cannot it be proved that an Action was commenced for Vexation, and with an Intent to impriſon, as well as that it was commenced after the Payment of the Money, *&c.*? In the Caſe 3 *Lev.* 310. it was agreed for the Plaintiff, that an Action lies for a vexatious Suit; and *Levins* only doubted, becauſe it was not alledged *Quod fuit ſciens* that he had no Cauſe of Action; and *Hob.* 267. expreſly ſays, if a Man ſue in a proper Court, yet if his Suit be without any Ground of Truth, and that certainly known to himſelf, the Plaintiff may have his Action on the Caſe for it, tho' the Suit in itſelf be legal.

And *Trevor* C. J. inclined to think that an Action on the Caſe would lie; for the Declaration ſays, that *fuit abſque rationabili Cauſa,* as well as that the Defendant *fuit ſciens* that there was no Cauſe of Action. But *Blencoe* J. obſerved, that it was not alledged here, that the Cauſe in the Inferior Court was determined. To which the Chief Juſtice and the whole Court agreed, and for that Reaſon were of Opinion againſt the Plaintiff, but did not give any expreſs Opinion that the other Matter would be for the Plaintiff; and therefore the Plaintiff was permitted to diſcontinue his Action.

Caſe 118. ## *Dighton* and *Tomlinſon.* In C. B.

A Deviſe to one for Life, and then to be at her Diſpoſal, provided ſhe diſpoſed of the ſame after her Death to any of her Children; held only an Eſtate for Life in the Mother.

EJectment upon the Demiſe of —— Upon Not guilty pleaded, at the Trial at *York* Aſſizes, the Jury found a Special Verdict to this Effect: (*viz.*) That *John Tomlinſon* being ſeiſed in Fee, by his Will dated 19 *Feb.* 1668. deviſes to his Wife *Margaret* all the Reſt of his Freehold Lands and Tenements in *York* for Life, and then to be at her Diſpoſal; provided that ſhe diſpoſe of the ſame after her Death to any of her Children, *&c.* After the Teſtator's Death the Wife having Iſſue a Son and a Daughter married again, and ſhe and her Husband by Leaſe and Releaſe conveyed the Lands to the Uſe of herſelf for Life without Impeachment of Waſte, after her Death to her Daughter in Tail, and for Want of ſuch Iſſue, to her Son and his Heirs, with a Power of Revocation; and if, *&c.*

Serjeant *Pratt* argued for the Plaintiff, who claimed under the Daughter, and inſiſted,

Firſt, That by this Deviſe *Margaret* had a Fee; and it is not material whether it was upon a Truſt, or upon Condition; I agree, if a Man deviſes, that *J. S.* ſhall diſpoſe of his Lands, nothing paſſes but a Power, and no Eſtate; but if Lands are deviſed to one upon an Intent or Condition, which cannot be performed without an Eſtate of Inheritance in the Deviſee, there the Deviſee has a Fee; as if there be a Deviſe to any Perſon to ſell, here then, if the Deviſor had given his Lands to *Margaret* his Wife to be at her Diſpoſal, without mentioning the Words *for Life*, ſhe would have had a Fee. The Statute of Wills ſays only, that a Man may diſpoſe at his Will and Pleaſure; and there never was any Doubt but that he might by this Expreſſion give a Fee. If a Man deviſe to another and his Aſſigns, it will be a Fee. A Man deviſes for Life, and after to be at the Diſcretion of his Father; and held to be a Fee. 1 *Leon.* 283. *Genner* and *Hardy.* A Man deviſes to *Edith* his Wife for Life, and after for her Diſpoſal; held that the Wife had a Fee; which is the

ſame Caſe as here; and the Caſe *Dal.* 56. is ſtronger. It is true, if a Man deviſe to *A.* for Life, and after that he diſpoſe to any particular Perſon, there may be a Doubt if this be not tantamount to a Deviſe to ſuch particular Perſon; but here the Power of Diſpoſition is general both as to Perſon and Eſtate.

The Caſe 1 *Mod. R.* 189. *Saltenſtal* verſus *Lith* is nothing to our Caſe; but as it is reported *Carter* 232. makes for us.

If then the Words (for Life) had been omitted, the Deviſe would have been in Fee; but the Addition of the Words does not alter the Caſe.

But if ſhe had but an Eſtate for Life, with a Power of diſpoſing, ſhe has well executed that Power. The Law does not require any preciſe Conveyance for the Execution of a Power, a bare Appointment is ſufficient. 1 *Mod.* 189. *Lith* and *Saltenſtall. Litt. Sect.* 169. Executors may ſell, though they have not the Eſtate. *Covenant to ſtand ſeiſed,* 1 *Lev. Leaſe and Releaſe,* 1 *Lev.* 150.

But it may be objected, that here the Leaſe and Releaſe muſt operate as a Conveyance, and afterwards as an Appointment. 1 *Roll,* 309. *Dige* ver. *Lith*; it may be ſo.

But it was objected, that the Appointment ought to be by Deviſe, and not to any Perſon who would perhaps then not be *in Eſſe*: But Certainly ſuch Conſtruction ſhould be made as may be agreeable to the Nature of the Caſe; ſhe could not make the Diſpoſition after her Death; and if ſhe did it in her Life, why might ſhe not do it by an Act executed, as well as by Will? It was ſaid, that a Will is revocable; but here ſhe has added a Clauſe of Revocation, which anſwers all the Purpoſes of a Will.

Then tho' ſhe has limited to herſelf an Eſtate without Impeachment of Waſte, that is not material; for it is no Part of the Execution of her Power, but an Addition to her own Eſtate; and the Addition is void if ſhe had but an Eſtate for Life;

Life; as in the Caſe 1 *Roll. Abr.* 313. where there is a Licence to a Copyholder to make a Leaſe; if he leaſes purſuant to the Licence, and adds any other Circumſtance not warranted by the Licence, the Addition is void. If an Executor aſſent to a Legacy with Condition, the Aſſent is good, but the Condition void. *Cro. Eliz.* So if a Woman aſſign her Dower with a Condition, the Aſſignment is good. Then the Huſband joining in the Execution does not vitiate the Execution of the Power. 1 *Roll. Abr.* 369.

If one who has no Eſtate in the Land join in a Leaſe with him who has the Eſtate, this is the Leaſe of him who has the Eſtate, and is but the Confirmation of the other. *Co. Lit.* 45. *a.*

It will be no Objection, that ſhe has not given a Fee but only in Tail, for the Power to make a greater warrants a leſſer Eſtate. 1 *Roll's Abr.* 330.

Serjeant *Wynne* argued for the Defendant, who claimed under the Son and Heir at Law.

This Caſe was afterwards argued by Serjeant *Cheſhire* for the Plaintiff, and Serjeant *Parker* for the Defendant; and it was inſiſted for the Defendant, firſt, that the Wife by this Deviſe had only an Eſtate for Life with a Power to diſpoſe; and ſecondly, that this Power was not well executed.

Upon the firſt Point the Court unanimouſly held that the Wife had only an Eſtate for Life; but upon the ſecond Point three of the Judges held the Power well executed; ſo Judgment was given for the Plaintiff; which was afterwards affirmed upon a Writ of Error in the Queen's Bench.

Peate and *Ougly*. In C. B.

Caſe 119.

Where a Will is well executed within the Statute of Frauds, &c.

IN Ejectment upon the Demiſe of *Oliver St. John*, at a Trial at *Guild-Hall* after Term before Lord C. J. *Trevor*. The Caſe upon Evidence appeared to be as follows, *viz.* *Oliver* Earl of *Bolingbrooke* before the Statute 29 *Car.* 2. *viz.* 1668-9, wrote his Will with his own Hand on a Sheet of Paper, and the Writing went to the Bottom of one Side and half Way on the Backſide, which Will at the End of it had the Name and Seal of the Earl ſubſcribed, and Notice was taken in his own Hand of ſome Interlineations. At a very little Diſtance at the Backſide of the ſame Paper, a Codicil was written which extended almoſt to the Bottom of the ſame Backſide of the Paper, and was dated 1679, which was after the Statute 29 *Car.* 2. and had the Name of the Deviſor ſubſcribed and his Seal affixed; in which Codicil a Legacy as to a Houſe in *Ludgate-ſtreet*, *&c.* was revoked, and the ſame was thereby deviſed to Sir *Andrew St. John* for Life, and after to his Brothers ſucceſſively, but Notice was not taken of the Names of his Brothers in the Codicil, but they were named in the Will; at the Top of the Will was written (ſigned, ſealed and publiſhed as my laſt Will and Teſtament, in the Preſence of, the ſame being written here for want of Room below); this was likewiſe written by the Teſtator's own Hand, and then the Names of the three Witneſſes were ſubſcribed; two of thoſe Witneſſes were dead, and the Third was produced at the Trial, who teſtified that he was Servant to the Teſtator *Oliver* Earl of *Bolingbrooke* four Years, and about 27 or 28 Years ago, he and the other two Witneſſes were called up in the Night and ſent for into the Earl's Chamber, who produced a Paper folded up, and deſired him and the others to ſet their Hands as Witneſſes to it, which they all three did in his Preſence, but they did not ſee any of the Writing, nor did the Earl tell them it was his Will, or ſay what it was, but he believes this to be the Paper, becauſe his Name is there and the Names of the other Witneſſes, and he never witneſſed any other Deed or Paper for the Earl. And though the Earl did not ſet his Name or Seal to the Will in

their Preſence, yet he had often ſeen the Earl write, and believes the whole Will and Codicil to be of his Hand-writing. Upon this Evidence, firſt, it was inſiſted for the Defendant, that it does not here appear that the Codicil was well executed according to the Statute, for it is not proved that the Codicil was wrote when the Witneſſes ſubſcribed their Names to the Will.

Secondly, The Execution of the Will is not good within the Statute 29 *Car.* 2. (and therefore, if the Codicil was wrote then, it is good for nothing) for it is not ſufficient that the Witneſſes write their Names in the Preſence of the Teſtator without any Thing more, but they muſt atteſt every Thing, *viz.* the Signing of the Teſtator, or at leaſt the Publication of his Will; but here the Teſtator neither ſigned the Will in their Preſence, nor declared it to be his laſt Will before them.

Thirdly, If the Codicil was well executed within the Statute, yet the Deviſe to the Brothers ſucceſſively is void for the Uncertainty which ſhall take firſt in the Succeſſion, as a Grant or Leaſe to *A. habendum* to him and two others ſucceſſively is void, for the Incertainty which ſhall take. *Hob.*

On the other Part it was inſiſted, that upon this Evidence it is apparent that the Codicil was wrote before the Execution of the Will, for otherwiſe there was no Reaſon that the Witneſſes ſhould write their Names at the Top of the firſt Side of the Will, and the Words wrote by the Teſtator's own Hand, as the Reaſon of it, had been falſe if the Codicil had not then been upon that Paper, for there would have been ſufficient Room below the Will for the Witneſſes to atteſt it. The Witneſs alſo ſays that the Execution was about 27 or 28 Years ago, which Time is ſubſequent to the Codicil.

The Execution is ſufficient within the Statute, for there is no Neceſſity that the Witneſſes ſee the Teſtator write his Name, and if he writes theſe Words, *ſigned, ſealed and publiſhed* as his Will, and prays the Witneſſes to ſubſcribe their Names to that, it will be a ſufficient Publication of his Will,

though the Witneſſes do not hear him declare it to be his Will. And Sir *John Hollis* mentioned a Caſe determined by Lord Chancellor *Shaftsbury* before the Statute 29 *Car.* 2. where a Man wrote his Will with his own Hand, and alſo theſe Words, *ſigned and publiſhed in the Preſence of*, and no Witneſſes had ſubſcribed it, it was held to be a ſufficient Publication.

And *Trevor* C. J. inclined that here was ſufficient Evidence to find the Codicil well executed, and the Jury found it accordingly.

But as to the Matter of Law, the C. J. permitted it to be found ſpecial, and therefore the Jury brought in their Verdict as to all except a Meſſuage in *Ludgate-ſtreet*, Not guilty; and as to that, that *Oliver* Earl of *Bolingbrooke* was ſeiſed of that in Fee, and being ſo ſeiſed by his Codicil 1679 deviſed it *prout*, *&c.* That Sir *Andrew St. John*, had two Brothers *Rowland* and *Oliver* the Leſſor of the Plaintiff; that *Rowland* died in the Life of Sir *Andrew*, and Sir *Andrew* died about two Years ago. And after his Death *Oliver* entered and demiſed to the Plaintiff. That the Defendant claimed by Purchaſe for a valuable Conſideration from *William* now Earl of *Bolingbrooke*, who was Heir at Law to the Teſtator. v to Mod 103

Dr. Pelling and *Whiſton, before the Delegates.*

Caſe 120.

In a Libel for Hereſy, the Refuſal of a Citation by the Dean of the Arches, held a good Cauſe of Appeal to the Delegates.

DR. *Pelling* being minded to exhibit Articles of Hereſy againſt Mr. *Whiſton*, who dwelt within the exempt and peculiar Juriſdiction of the Dean and Chapter of St. *Paul's*, Dr. *Harwood* by Letters of Requeſt 18 *Nov.* 1712, requeſts Dr. *Betteſworth*, Official of the Arches, to call the ſaid Mr. *Whiſton* before him, and hear and determine the ſaid Cauſe.

Dr. *Betteſworth* by Letter dated 19 *December* 1712, recommended it to him to proceed in this as in other Cauſes of Eccleſiaſtical Cogniſance, there being no Suggeſtion of any Reaſon

Reaſon why the Cauſe ſhould not be brought before the proper Ordinary.

14 *Feb.* 1712, Dr. *Harwood* by new Letters of Requeſt (for it may be doubtful whether he as Commiſſary of the peculiar Juriſdiction can proceed to a final Hearing, or inflict proper Puniſhment, *&c.*) appeals his Requeſt to Dr. *Betteſworth*, Official, *&c.* to call Mr. *Whiſton* before him, and determine the ſaid Cauſe.

Before this, *viz.* 26 *January*, Dr. *Pelling* prays a Citation from the Court of Arches againſt Mr. *Whiſton* for Hereſy; Dr. *Betteſworth* takes Time to conſider of this Prayer till the next Court.

At the next Court, *viz.* 4 *February* Dr. *Betteſworth* orders his Anſwer to the Letter of Requeſt of Dr. *Harwood* to be ſent to him.

At the Court 16 *Feb.* Dr. *Pelling* prays again a Citation, and Counſel is heard thereon 25 *February*, when Dr. *Betteſworth* decrees, that Letters of Requeſt from Dr. *Harwood* lie not before him, becauſe in a Caſe of Hereſy the Biſhop of the Dioceſe hath Juriſdiction in Places otherwiſe exempt within his Dioceſe, and notwithſtanding the Statute of Citation an Heretick may be cited to appear before him upon Letters of Requeſt from the Judge of the Peculiar, or by Proceſs *ſub mutuo*, *&c.* and therefore he cannot decree a Citation, *&c.*

2 *March* Dr. *Pelling* appeals to the Delegates, upon which the Queen appoints a Court of Delegates upon the 1ſt of *July* 1713; the Matter came to be heard before the Delegates, and it was inſiſted on by Dr. *Paul* and Sir *Peter King*, that a ſuperior Judge is not obliged to accept Letters of Requeſt, for no Law ſaith that he is ſo obliged, and it would be inconvenient ſince the Fees would all belong to the inferior Judge, and unreaſonable ſince the ſuperior Judge cannot oblige the inferior to grant ſuch Letters of Requeſt, and therefore ought not to be obliged to accept them.

Secondly, The Inferior Judge in this Caſe had no Juriſdiction, for he cannot excommunicate, degrade or deprive. *Stat.* 2 *H.* 4. *c.* 15. ſpeaks of the Biſhop of the Dioceſe, and ſo is 10 *H.* 7. *c.* 17. *Lind.*

Thirdly, The Biſhop of the Dioceſe hath Juriſdiction in Caſe of Hereſy in Places exempt.

Fourthly, There was no Cauſe depending before Dr. *Harwood*, and the Arches have Juriſdiction only in Caſe of Appeals by Patent.

But it was anſwered by Sir *Nathaniel Loyd*, myſelf, and Dr. *Henchman*, and ſo reſolved by the Court of Delegates, that the Refuſal of the Citation by Dr. *Betteſworth* was a Fault for which this Appeal was proper. For firſt, Dr. *Harwood*, the Judge of the Exempt Juriſdiction, had a Juriſdiction in the Cauſe, tho' he could not inflict the Cenſures of Degradation or Deprivation.

Secondly, The Biſhop of the Dioceſe had no Juriſdiction in this Caſe; for by 23 *H.* 8. *c.* 9. no Perſon ſhall be cited to appear before any Ordinary, Archdeacon, Commiſſary, Official or other Judge Spiritual, out of the Dioceſe or Peculiar Juriſdiction where the Perſon cited is inhabiting at the Time of Citation; unleſs, firſt, For any Spiritual Offence omitted or committed by Biſhop or other Spiritual Judge.

Secondly, For Cauſe of Appeal.

Thirdly, In caſe the Biſhop or other immediate Judge do not or will not convene the Party.

Fourthly, Or be Party directly or indirectly.

Fifthly, Or in caſe the Biſhop, or other Inferior Judge by Right or Commiſſion make Requeſt to the Biſhop, or other Superior Ordinary, to determine in Caſes where the Canon

Law or Civil Law affirm Execution of ſuch Requeſt to be lawful.

Therefore the Biſhop by the expreſs Words is reſtrained in all Caſes, except thoſe five, from citing any to appear before him dwelling in Peculiars; and conſequently in Caſe of Hereſy, as well as any other. *Cro. Car.* 162. *Cadwallader* ver. *Brian.*

But by a Proviſo in this Statute every Archbiſhop may cite any Perſon dwelling in any Dioceſe within his Province for Cauſe of Hereſy, if the Biſhop or other immediate Ordinary conſent, or do not his Duty in puniſhing the ſame; and this is agreed *H. P. C.* 5.

It is true, the Biſhop upon Requeſt from an Inferior Judge may cite, *&c.* but ſuch Inferior Judge muſt be ſubordinate to him: But the Dean and Chapter of *St. Paul*'s, having an Exempt Juriſdiction, are not ſubordinate, but in an equal Degree with the Biſhop; the Perſon exempt, as *Linwood* — expreſſes it, *Vices gerit Epiſcopi*; and therefore the Letters of Requeſt from Dr. *Harwood* ought to be to the Archbiſhop, who is his Superior Ordinary, and not to the Biſhop of *London.*

If a Man have *Bona notabilia* in ſeveral Peculiars, Adminiſtration ſhall be granted by the Archbiſhop, not the Biſhop. *Per Twiſden* and *Windham*, 1 *Lev.* 78.

A Suit in the Arches againſt any in the Dioceſe of *London* is good; for there was an antient Compoſition between the Biſhop and Archbiſhop, which amounts to a general Licence. *Cro. Car.* 339. *Dub. Ray.* 91.

And when a Suit is in the Archdeacon's Court, Requeſt ſhall be made to the Biſhop, for the Power of Archdeacon was derived from him, and not to the Archbiſhop *per ſaltum. Hob.* 16, 186.

So where a Peculiar is ſubordinate to the Biſhop, as it may be. *M.* 14 *Car.* 2. *Tull* ver. *Oſberſon.*

Since then the Arches, which is the Court of the Archbiſhop, is the Superior Ordinary, to whom the Cauſe ought to be tranſmitted from the Peculiar of the Dean and Chapter of *St. Paul*'s, the Judge of the Arches by refuſing a Citation, *&c.* denied Juſtice.

Whereupon the Delegates reverſed the Sentence, and ordered a Citation for Mr. *Whiſton* to appear before them, which was ſerved; and Mr. *Whiſton* put in an Allegation to the Juriſdiction, that the Delegates are not *Judices Competentes*, being impowered by their Commiſſion only to hear and determine a Cauſe of Appeal between Dr. *Pelling* and Dr. *Betteſworth*, to which Mr. *Whiſton* was no Party; and that they had no original or ordinary Juriſdiction by their Commiſſion, *&c.*

DE

Termino Paſch.

10 Annæ. In C. B.

Caſe 121.

Parſlow and *Cripps.*

Where Corn taken in Execution may be diſtrained.

ACTION upon the Caſe, for reſcuing a Diſtreſs taken for Rent, contrary to the Statute 2 *W. & M.* Upon a ſpecial Verdict, the Caſe appeared to be this: Tenant at Will had a Judgment and Execution againſt him by *Fieri facias*, and upon the *Fieri facias* the Sheriff ſeiſed the Corn growing on the Land, and ſold it to the Defendant, and after the Return of the *Fieri facias* was paſſed, the Defendant ſevered the Corn from the Land; and during the Time the Corn lay upon the Land in Ricks and Swarfs, the Plaintiff being Leſſor of the Land, diſtrained the Corn lying on the Land for Rent Arrear; then the Defendant took and carried away the Corn, upon which the Plaintiff brought this Action againſt him upon the Statute *W. & M.* for a Reſcue. And if this Taking was a Reſcue, the Jury found for the Plaintiff, otherwiſe for the Defendant.

It was argued for the Plaintiff, that by this Statute Corn is made Diſtrainable upon the Land, and therefore this Diſtreſs is warranted by the expreſs Words of the Statute. But before this Statute, Corn could not be taken in Execution by the Sheriff upon a *Fieri facias*, if it was not ſevered before the Return of the Writ, for the Corn till Severance is Parcel of the Land, and goes with the Land in all Caſes, except where the Tenant has an uncertain Intereſt, and his Intereſt determines by the Act of God or of the Leſſor, or otherwiſe

without his Default. If Leſſee at Will determines his Will himſelf, he ſhall not havethe Emblements, but his Leſſor ſhall have them. *Co. Lit.* — And therefore, if after Execution and Sale by the Sheriff in this Caſe the Leſſee had determined his Will himſelf, the Leſſor would have had the Emblements; and it would be inconvenient if the Sheriff upon an Execution ſhould ſell Goods in which the Party had no Property; for perhaps the Property might be in the Leſſor: The Corn likewiſe at the Time of the Sale was not in the ſame Plight as at the Time of the Severance, for it received Nouriſhment and Increaſe afterwards from the Land; and if the Sheriff ſhould be allowed to ſell upon an Execution immediately after the Sowing, he would ſell Goods which were not then in the Defendant, againſt whom the Execution was, but which afterwards received their Nouriſhment and Value from the Lands of another: But if the Sheriff may ſell the Corn upon a *Fieri facias*, yet the Vendee ſhall not be in a better Condition than a Grantee of the Tenant or Stranger; and therefore if the Vendee permits the Emblements after Severance to lie on the Ground, they are diſtrainable for the Rent of the Land, as well as they would be after the Sale of them by the Leſſee himſelf, or as the Goods of a Stranger, if found upon the Land, may be diſtrained.

Fyſon and ——. In C. B.

Caſe 122.

INdebitat' Aſſump'. Defendant pleads, that ſince the 1 *June* 1705. *& ante impetr' orig'* he became a Bankrupt within the ſeveral Statutes concerning Bankrupts, *quodque Cauſa action' accrevit* before the Defendant was a Bankrupt, *& de hoc pon' ſe ſup' patriam.* Upon this Plaintiff demurred, and ſhewed for Cauſe, firſt, That it did not appear when the Cauſe of Action aroſe. Secondly, That the Plea concluded to the Country, whereas it ought to have been with an Averment.

Bankruptcy, how it ſhould be pleaded.

But without any Regard to theſe Reaſons the Court held the Plea bad; becauſe it did not ſhew the Defendant was intitled to this Plea within the Statute 4 & 5 *Annæ, c.* 17. for

the Plea is bad at Common Law, and when a Statute allows ſuch a Plea, the Defendant muſt ſhew that he pleads it *Vigore Stat.* and it is not like the Caſes where a Statute gives Liberty to plead the General Iſſue and to give the Special Matter in Evidence; for here the Statute does not give any Authority to plead the General Iſſue, but to plead generally in ſuch Manner, and therefore he muſt ſhew that he pleads in ſuch Manner by virtue of the Statute.

Caſe 123.

Chambers and *Shaw.* In C. B.

If an Executor pleads Bonds and Judgments, and no Aſſets *ultra* the Judgments, and the Plaintiff replies that the Bonds were fraudulent, and it is found againſt him, he cannot have Judgment, though the Aſſets are found to be *ultra* the Judgment pleaded.

IN an Action againſt an Executor, who pleads ſeveral Bonds due from the Teſtator, and ſeveral Judgments againſt himſelf as Executor, and that he had not Aſſets *ultra* what was ſubject to the Judgments recovered, the Plaintiff replies as to the Bonds, that they were obtained by Fraud, and that Defendant had Aſſets *ultra* the Judgments; and upon this Iſſue joined; and upon the firſt Iſſue the Jury found for the Defendant; and upon the other for the Plaintiff; and it was now moved that the Plaintiff might have Judgment. But *per Cur'* he cannot; for though the Iſſue is found that the Defendant had Aſſets *ultra* the Judgments, yet when it is found for the Defendant upon the other Iſſue, then it appears that the Bonds were given for true Debts, and the Plaintiff cannot recover if there are not Aſſets more than will ſatisfy thoſe Bonds as well as the Judgments.

Thornby and *Fleetwood. Int. Trin. 9 Annæ, Rot.* 1842. In C. B.

Caſe 124.

EJectment upon the Demiſe of the Duke and Ducheſs of *Hamilton*; and upon a Trial at Bar in the Common Pleas, there was a ſpecial Verdict to this Effect.

Thomas Lord *Gerrard ob'* 1617. had Iſſue,

Gilbert ob' 1623, who had Iſſue *Dutton, ob'* 1640, who had *Charles, ob'* 1667, who had *Digby, ob'* 1684, who had *Elizabeth*, Ducheſs of *Hamilton.*

and *Alice* married to *Roger Owen*, who had *Thomas Owen*, who had *Roger Owen* now living.

John, ob' 1673, who had *Richard, ob'* 1679, who had four Sons, *viz.* *Charles, William, Philip, Joſeph*, and one Daughter *Frances*, married to Defendant.

Charles, William and *Joſeph* died without Iſſue. *Philip* is now living.

A Recovery ſuffer'd by a Perſon bred a Papiſt, and inſtructed in a Seminary or College of Jeſuits beyond Sea in the Popiſh Religion, held good, notwithſtanding the Stat. 1 *Jac.* 1. *c.* 4 & 6. 3 *Jac.* 1. *c.* 5. and the 3 *Car.* 1. *c.* 2.

Charles Lord *Gerrard* was ſeiſed in Fee of the Lands in Queſtion, and by Settlement the 28th and 29th of *November* 12 *Car.* 2. on his Marriage with *Jane* Digby, ſettled them to the Uſe of himſelf for Life, Remainder to his Wife for Life, then to the firſt and other Sons of that Marriage in Tail Male, Remainder to himſelf and the Heirs of his Body; Remainder to the Heirs Male of the Body of *Thomas* Lord *Gerrard* his Great Grand-father, Remainder to his own Right Heirs.

That *Charles* Lord *Gerrard* died leaving *Digby* Lord *Gerrard* his Son and Heir, who died 8 *Nov.* 1684 without Iſſue Male, leaving *Elizabeth* now Ducheſs of *Hamilton* his only Child and Heir.

That *John*, the Younger Son of *Thomas* Lord *Gerrard*, and *Richard* his Heir, died before *Digby* Lord *Gerrard*, and that *Richard* in his Life placed his Sons *Charles*, *William* and *Philip*, at St. *Omers* beyond the Seas, under the Obedience of the King

King of *Spain*, to be educated in the Popiſh Religion; that they reſided there for five Years in a Seminary or College of Jeſuits, and were inſtructed in, and there profeſſed the Popiſh Religion. That *Charles* returned *Anno* 1681, and after the Death of *Digby* Lord *Gerrard*, entered as Heir Male of the Body of *Thomas* Lord *Gerrard*, and *Paſch.* 1 *Jac.* 2. ſuffered a Common Recovery, and by Indenture 22 *May* 1685, declared the Uſes to himſelf and his Heirs, and afterwards made a Settlement on his Marriage, and after the Death of Lady *Jane* the Wife of *Digby* Lord *Gerrard*, *viz.* — 1703, ſuffered another Recovery to the Uſe of himſelf in Fee; that *William* and *Joſeph* died without Iſſue, and then *Charles* died the 27th of *April* 1707, having always profeſſed the Popiſh Religion, but that *Philip* is now alive and profeſſes the Popiſh Religion.

That *Roger Owen*, who is deſcended from *Alice*, is his next of Kin, being a Proteſtant.

That after the Death of *Charles* without Iſſue, the Defendant in Right of *Frances* his Siſter entered, upon whom the Duke and Ducheſs of *Hamilton* entered, and being ouſted by the Defendant, brought their Ejectment.

This ſpecial Verdict came on to be argued *Trin.* 11 *Annæ* by Serjeant *Hooper* for the Plaintiff, and by Serjeant *Pengelly* for the Defendant, and the *Mich.* following by Serjeant *Pratt* for the Plaintiff, and Serjeant *Selby* for the Defendant, and the *Hillary* Term following by Sir *Thomas Powis* for the Plaintiff, and Serjeant *Cheſhire* for the Defendant; and now *Trevor* C. J. delivered the Opinion of the Court, who all agreed Judgment ſhould be given for the Defendant. Upon which a Writ of Error was brought in the King's Bench upon a Judgment given in the Common Pleas for the Defendant in this Caſe, *Eaſt.* Term 11 *Annæ*, and for the better underſtanding the Arguments on the Writ of Error, I ſhall give the Reſolution of the Court of Common Pleas, which was delivered by Ch. J. *Trevor* when Judgment was given there for the Defendant.

And he ſaid that the Title of the Leſſors of the Plaintiff was upon the Conſtruction of the Stat. 1 *Jac.* 1. 4 *&* 6. 3 *Jac.* 1. *c.* 5.

and 3 *Car.* 1. *c.* 2. for the Leſſors of the Plaintiff cannot have any Title to the Lands in Queſtion, if there is not ſuch a Diſability by Reaſon of thoſe Statutes, as to make the Recovery ſuffered by *Charles* Lord *Gerrard* void, and the Eſtate-tail determined, or at leaſt ceaſe; for the Leſſors claim in Remainder, and if the Recovery be good, their Remainder is barred; or if the Recovery is not good, yet if the Eſtate-tail is not determined, *Philip* is Heir in Tail, and alive, and may have Iſſue inheritable to the ſame Eſtate-tail; and then the Leſſors, who claim by Force of a Remainder ſubſequent to ſuch Eſtate-tail, cannot enter.

And he ſaid, that the Counſel for the Plaintiff had only inſiſted upon the Statute 1 *Jac.* 1. 4. for the ſubſequent Statutes could not give him any Title; and the Queſtion upon them was, if they had altered the Statute 1 *Jac.* 1. 4. and therefore the Counſel for the Plaintiff had argued, that by 1 *Jac. c.* 4. there was ſuch a Diſability in *Charles* Lord *Gerrard* that his Recovery was void, and that *Philip* being diſabled in the ſame Manner, and no other Perſon being *in Eſſe*, who could take the Eſtate-tail, the Leſſors of the Plaintiff by Conſequence were intitled as if the Eſtate-tail was actually determined; for it was not inſiſted on (neither was there any Colour for it) that by the latter Statutes the Leſſors of the Plaintiff had any Title; for the 3 *Car.* 1. *c.* 2. gives the Forfeiture upon Conviction to the King for the Life of the Convict; and therefore all that was urged by the Plaintiff's Counſel in reſpect of thoſe Acts was, that by them 1 *Jac.* 1. *c.* 4. was not altered, but inforced; and therefore the only Matter to be conſidered is,

Firſt, What would be the Operation and Effect of the Statute 1 *Jac.* 1. *c.* 4. if the others had not been made.

Secondly, If 1 *Jac.* 1. *c.* 4. be inforced, or repealed, or altered by the ſubſequent Statutes.

As to the Operation and Effect of 1 *Jac.* 1. *c.* 4. by which it is enacted, That every Perſon, *&c.* who ſhall go or ſhall ſend any Child, *&c.* beyond Sea, to the Intent to enter into

any College, Seminary, Houſe of Jeſuits, *&c.* to be inſtructed in the Popiſh Religion, *&c.* the Perſon ſending, *&c.* ſhall forfeit 100 *l.* and the Perſon paſſing with ſuch Intent, *&c.* ſhall in reſpect of himſelf only, and not of his Heirs or Poſterity, be diſabled to inherit, purchaſe, take, have or enjoy any Manors, Lands, *&c.* and that all Eſtates, Terms, and other Intereſts hereafter to be made, ſuffered or done, to or for the Uſe or Behoof of ſuch Perſon, *&c.* ſhall be void, and any in ſuch Seminary, *&c.* who ſhall not return in a Year and ſubmit, *&c.* ſhall in reſpect of himſelf, and not of his Heirs or Poſterity, be diſabled to inherit, have or enjoy any Manors, Lands, *&c.* Provided if any Perſon ſo ſent, ſending or being in ſuch Seminary, *&c.* ſhall after become conformable, *&c.* he ſhall be diſcharged of all ſuch Diſability.

Upon this Statute it was difficult to tell the Effect of this Clauſe, what was the Conſequence of the Diſability, and who ſhould have the Land of a Perſon diſabled during his Diſability.

The Counſel for the Plaintiff have inſiſted, that where the Eſtate deſcended before the Diſability incurred, he was only diſabled from taking the Profits; but where the Deſcent was after the Diſability incurred, there the Diſability prevented him from taking the Deſcent. But it would be a hard Conſtruction of the ſame Words, to make here a different Interpretation, which will not ſerve all Caſes upon this Act, tho' it ſerves the Caſe of the Plaintiff in the preſent Queſtion: For if an Eſtate in Fee was to deſcend to a Perſon diſabled, if he could not take it by Deſcent, who ſhall take the Lands? His Heirs cannot have them, for *non eſt hæres viventis*, and he cannot claim as Heir to him in his Life; and therefore by ſuch a Conſtruction none can take them at all; and then the Perſon diſabled ſhall have the Lands from Neceſſity, for no one can take them from him. If the Perſon diſabled ſhall purchaſe Lands, his Heir ſhall not have them, as his Heir, till after his Death; and therefore the Purchaſer muſt have the Lands, for no one can recover them from him.

The Diſability in this Act is not like the Diſability of a Monk, or a Man profeſſed, for he is dead in Law; but a

Perſon diſabled by this Act is not dead in Law, nor ſubject to an abſolute Incapacity, for he ſhall enjoy the Lands after Conformity.

And therefore the natural Conſtruction of the Words is, That he ſhall be diſabled from taking the Profits of the Lands; and when this Conſtruction is allowed, where the Deſcent was prior to the Diſability incurred, it will be reaſonable that the ſame Words ſhould have the ſame Conſtruction, where the Deſcent is ſubſequent to the Diſability.

And this is not only the natural, but alſo the legal Conſtruction of the Words; for when the Act gives a Forfeiture of the Profits of the Land, and does not ſay who ſhall have the Forfeiture; this being for a publick Crime and Offence againſt the Government, the Law will give the Forfeiture to the King: For though for a private Wrong the Penalty ſhall ſometimes by way of Recompence belong to the Party grieved, yet for a publick Offence the Law will give the Forfeiture to the King, as the Head of the Publick; ſo it was reſolved 2 *Vent.* 269. So in other Caſes, if the Statute does not ſay to whom the Forfeiture ſhall belong, it ſhall of Neceſſity belong to the King; for it cannot belong by Implication to one Subject more than to another.

So upon the Statute 1 *Jac.* it was uncertain whether the King was intitled to the Penalty before Conviction. But all thoſe Doubts are explained by 3 *Car.* 2. *c.* 2. The Statute 3 *Jac.* ſeems to be intended for another Purpoſe; for by that it was enacted, That if the Children of any Subject, to prevent good Education, or for any other Cauſe, be ſent or go beyond Sea without Licence, *&c.* they ſhall take no Benefit by Gift, Conveyance, Deſcent, Deviſe or otherwiſe of or to any Lands, *&c.* till he being eighteen take the Oaths, *&c.* But in the mean Time the next of Kin not being Recuſant, *&c.* ſhall enjoy, *&c.*

This Statute 3 *Jac.* was not intended to repeal 1 *Jac.* and does not prohibit the ſame Offence; for by 1 *Jac.* the Perſon ſent

ſent to be educated in Seminaries, *&c.* was reſtrained from taking, *&c.* By the Statute 3 *Jac.* any Perſon going beyond Seas without Licence, *&c.* though he never was in any Seminary, *&c.* and tho' he goes for any Cauſe whatſoever, *&c.* and therefore *Tredway*'s Caſe, *Hob.* 73. does not relate to 1 *Jac.*

But by the Statute 3 *Car.* the Intention appears to be for the ſame Purpoſe as the Statute 1 *Jac.* for the Title is to reſtrain the Paſſing or Sending any to be popiſhly bred beyond Sea.

So the Preamble takes Notice, that divers have ſent Children to be bred up in Popery, notwithſtanding the Reſtraint by the Statute 1 *Jac.* and therefore it enacts, that the Statute of 1 *Jac.* be put in due Execution, and it extends to all Offences reſtrained by 1 *Jac.* and more; for any ſent into popiſh Families to be inſtructed, *&c.* will be within 3 *Car.* 1. as well as Perſons ſent to Colleges, *&c.* So it extends to all Monies, *&c.* ſent for the Relief of any ſuch Children, *&c.* which was not within the Statute of 1 *Jac.* ſo it gives the ſame Penalty againſt any Perſon ſending, *&c.* (who by the Statute of 1 *Jac.* was only to forfeit 100 *l.*) as againſt the Perſon ſent; ſo it gives the Penalty only upon Conviction by Indictment or Information, which was not declared before by 1 *Jac.* ſo it gives all the Penalties mentioned in 1 *Jac.* and alſo that the Offender ſhall not ſue nor be a Legatee, *&c.* ſo it ſays he ſhall forfeit, *&c.* (in the ſame Words as are uſed in 1 *Jac.*) to the Crown, *&c.* which was not expreſſed in the Statute 1 *Jac.*

So it requires Conformity in ſix Months, which by the Statute 1 *Jac.* might be at any Time, and upon Conformity reſtores the Party to his Lands, and does not diſcharge the other Diſabilities, whereas the Diſcharge by 1 *Jac.* was general.

The Statute of 3 *Car.* 1. *c.* 2. therefore does not repeal, but enlarges and enforces 1 *Jac.* by which it appears, that the Meaſure of the Diſability in the Statute of 1 *Jac.* muſt be governed by 3 *Car.* 1. *c.* 2. and tho' Offences before 3 *Car.* continue puniſhable by the Statute 1 *Jac.* yet all Offences ſince the

Statute 3 *Car.* are to be puniſhed according to the Direction of 3 *Car.* and conſequently the Diſability and Forfeiture upon the Statute 1 *Jac.* and 3 *Car.* will be, that the Perſon diſabled ſhall loſe all his Lands to the King upon Conviction during his Life, if he does not afterwards conform.

And for theſe Reaſons Judgment was given for the Defendant in the Common Pleas.

But it was now argued in the King's Bench, upon a Writ of Error, by Sir *Thomas Powis* King's Serjeant,

Firſt, That by the Statute 1 *Jac.* 1. 4 *&* 6. *Charles* Lord *Gerrard* was a Perſon diſabled from taking the Eſtate, and that his Brother *Philip* being under the ſame Diſability, could not take the Eſtate-tail in Remainder limited to him, and conſequently the Remainder in Fee to the Leſſors of the Plaintiff ſhall take Effect, and the Eſtate veſt in them.

Secondly, That 3 *Jac.* 1. and 3 *Car.* make no Alteration in the Conſtruction of the Statute 1 *Jac.* 1. 4 *&* 6.

Thirdly, That the Recovery ſuffered by *Charles* Lord *Gerrard* will of Conſequence be void.

As to the firſt Point he argued, that the Statute 1 *Jac.* was made at a critical Juncture, when there was a great Conteſt between the Papiſts and the Proteſtants, and therefore the Legiſlature without Doubt intended a ſevere Penalty upon thoſe who educated their Children in Popery. The Statute 27 *Eliz. c.* 2. §. 5. which prohibits ſending Relief to any Jeſuit, *&c.* or any other in Seminaries, was but a temporary Law; and therefore by 1 *Jac.* the Reſtraint was poſitive and perpetual, and the Offender is put under a Diſability to inherit, purchaſe, take, have or enjoy any Manors, Lands, *&c.* which Words import he ſhall be diſabled to inherit, purchaſe, or take any Lands, *&c.* ſo as that Lands ſhall never veſt in him, if the Diſability was incurred before Deſcent or Purchaſe; that he ſhall be diſabled to have or enjoy them, if they were veſted before the Diſability incurred.

And that by theſe Words Lands never can veſt in ſuch Perſon who is not capable of taking, is evident from the Words themſelves, and was ſo reſolved 11 *Co.* — Lord *Delaware's* Caſe, that *William* was not Baron, but only an Eſq; by which it appears, that the Barony never veſted in or deſcended to him.

So by the Statute 11 & 12 *W.* 3. the Words are in the Statute 1 *Jac.* by which the Perſon diſabled, who cannot inherit, purchaſe or take, cannot take by Diſſeiſin, or by a tortious Entry take or gain any Freehold, for if he could, the Act would be evaded: So in Caſe of Simony the Perſon is quite diſabled for ever.

If it be objected, that by ſuch a Conſtruction the Heir will be defeated, though it appears by the Act that he ſhall take; that is a Miſtake; for when the Right of the Heir is ſaved by the Act, he ſhall take by Deſcent, though the Eſtate never veſted in his Anceſtor; as in the Caſe of Lord *Delaware* it was held, that the Son took the Barony by Deſcent, though it never was in his Father; and it would be unreaſonable to make ſuch a Conſtruction of the Statute in order to preſerve the Right of the Heir or Poſterity, which is but the ſecondary Intention of the Statute, as would defeat the primary Intention of the Statute, (*viz.*) the Diſabling the Offender.

With Regard to the Proviſo, that the Offender ſhall be diſcharged from his Diſability upon his Conformity, without any Words of Reſtitution, it ſeems to be added for the Satisfaction of ſome ignorant Burgeſs, or ſhall ſerve the Heir in Pleading to make his Deſcent.

The Words of the Act, that he ſhall be incapable to take any Lands, Manors, &c. cannot be ſatisfied by a Diſability to take the Profits of the Land; and if the Intent of the Statute had been ſuch, it would have been ſaid in expreſs Words, and another would have been named to take the Profits in the Interim, as it was in the Statute 3 *Jac.* and the

Omiſſion of one to take the Profits in the Interim was proper, where the Eſtate never veſted in the Party. If it be ſaid that the King ſhall take the Profits, yet it would be in the Power of the Party to prevent the King by Alienation, and therefore ſuch a Conſtruction, as does not allow the Eſtate to veſt, anſwers better to, and promotes the End of the Statute, which would be avoided if the Party could diſpoſe of his Eſtate, which he might do if it veſted in him; and ſuch Conſtruction will the better deter Parents from ſending their Children to be educated beyond Sea, when they find it to be ſo penal; and Judges ought by their Intepretation to make Laws for the Promotion of Religion anſwer their Deſign, though the Words may be imperfect for that Purpoſe. *Hob.* 157. 11 *Co.* 70, 71. more eſpecially when the Words are plain and poſitive, as here; and penal Laws have been conſtrued by Intendment, 11 *Co.* 34. and it cannot be denied but that the Miſchief intended to be remedied by this Act is very great with regard to Religion. It is alſo a Rule in Conſtruction of Statutes *in dubio* to adhere to the Words, and by the Words no common Perſons can think any Thing elſe was intended but that the Offending Party ſhould never take any Lands, *&c.* The Conſtruction on the other Side is advanced only to preſerve the Eſtate to the Heir, but there is no Neceſſity that the Heir ſhall be excluded by our Conſtruction, for in Lord *Delaware*'s Caſe it was reſolved, that the Heir ſhould take the Barony, though it never veſted in the Anceſtor.

But it is asked, in whom ſhall the Eſtate be, if it is not in the Party? Surely it ſhall not be in him, if it can be in any other, for the Statute ſays expreſly to the Contrary; *& Viperina eſt Conſtructio quæ corrumpit viſcera textûs.* All that is a neceſſary Conſequence of a Statute, is as ſtrong as if it was in the Statute itſelf. *Hob.* 293. *Brook Coron.* 204. If a Statute ſays a Man ſhall loſe *vitam & membra*, it will be Felony, tho' the Statute does not name the Offence Felony. And therefore Judges ought to inlarge the Conſtruction of a Statute in Favour of the Intention, and not oppoſe Rules of Law to defeat the Intent. In whom then ſhall the Eſtate be? It cannot go to the King, if it never was in the Party; it cannot

not go to the Iſſue in Tail, for *Non eſt hæres viventis.* 1 *Inſt.* 13. *a.* And therefore of Neceſſity it muſt go to him in Reverſion. It is then objected, How ſhall it return to the Party upon his conforming? For the Statute has no Words of Reſtitution. To which I anſwer, that the Intent of the Act is not clear, that the Eſtate which is gone to another ſhall reveſt upon Conformity; but if the Intent be ſo, the ſame Act which makes the Incapacity makes it reveſt, and therefore there is no Neceſſity for any Words of Reſtitution; as where a Statute repeals another Act of Repeal, the former Statute is revived without any Words for that Purpoſe; and it is no new Caſe, that an Eſtate ſhall ceaſe for a Time by Virtue of an Act of Parliament, and afterwards revive, as appears by the Prince's Caſe, 8 *Co.* So *Raym.* 355. in the Earl of *Darby*'s Caſe, it is ſaid that the Judges ought not to conſtrue the Limitations of an Act of Parliament made for a particular Purpoſe by the ſtrict Rules of Law, for the Parliament can controul the Rules of Law, can make a Freehold ceaſe as if the Party was dead. 13 *Co.* 64. So by 21 *H.* 8. the Freehold of a Perſon who accepts a ſecond Benefice with Cure ceaſes. 6 *Co.* 40. *b.* Conſtruction of Statutes ought to be according to the Rules of Reaſon and Convenience, *Hob.* 346. for Laws are made *ſecundum æquum & bonum*, agreeable to the Rules of natural Equity, which is *Lex legum*, *Hob.* 224. and therefore where the Intention of a Law cannot be attained by a Conſtruction according to the uſual Rules of Common Law, the Judges ought to intend that the Parliament waived them, as in the Prince's Caſe, 8 *Co.* 16. Where the Dukedom of *Cornwall* was limited *Eidem duci & ipſius & hæred' ſuor' Regum Angl' filiis primogenit' & dicti loci ducib' hæredit' ſucceſſuris*; upon which it was reſolved that the Dukedom ſhould deſcend to the eldeſt Son of the King, and ſuch King who is Heir to Prince *Edward*, who ſhould take in the Life of his Father, which could not be by the Rules of Law.

There are many Caſes where by Act of Parliament an Eſtate may ceaſe for a Time, and afterwards revive, ceaſe as to one, and revive as to another; as in *Beaumont*'s Caſe,

8 *Co.* 138. *Hob.* 257. So where Baron and Feme are Tenants in Tail, to them and the Heirs of their Bodies, and the Baron levies a Fine and dies, the Eſtate revives as to the Wife, who ſhall be Tenant in Tail, and then ceaſes as to the Iſſue, who ſhall be barred by his Father's Fine.

So an Eſtate may be in Abeyance for a Time. 1 *Inſt.* 345. *a. Lit.* § 646, 647, 649, 650. So a Perſon in Being ſhall be paſſed over as if he was Dead, as a Man profeſſed. 2 *Ro. Ab.* 150. *b.* So an Eſtate may go to him in Reverſion, and afterwards return; as if Tenant in Tail dies without Iſſue born, and his Wife is *enſeint*, if a Son be afterwards born, he ſhall take by Deſcent. 7 *Co.* 8. *b. Bro. Divorce* 18. And therefore when the Statute 1 *Jac.* 2. made an Incapacity to take,

The next Thing to be conſidered is, whether any ſubſequent Statutes have altered the Law in this Point, and ſo taken off the Diſability.

It is not contended on the other Side, that there ever was any expreſs Repeal of this Statute, but the moſt they inſiſt on is, that it is inconſiſtent with the ſubſequent Statutes, and ſo implicitly repealed, according to the Rule, *Leges poſteriores priores contrarias abrogant.*

But before he enters upon the Conſideration of the Conſiſtency or Inconſiſtency of the Statute, he obſerved that Repeals by Implication are to be uſed very tenderly, becauſe they infer a very high Reflection upon the Law-makers, as if careleſsly and unknowingly they made inconſiſtent Laws. 11 *Co.* 63. 1 *Ro.* 91.

It was given up in the Common Pleas, and agreed in this Court, that the Statute of 3 *Jac.* relates to different Perſons and different Offences than 1 *Jac.* and therefore he ſhould paſs it by and take no Notice of it.

The Statute 3 *Car.* is that which is ſet up by the other Side to be the governing Act and implicit Repeal of 1 *Jac.*

notwithſtanding it enacts it to be put in due Execution; which is ſufficient to ſhew it was not intended as a Repeal.

It was ſaid upon a former Argument, that 1 *Jac.* was made upon a Pinch, and when the Bent of the Nation was againſt the Papiſts; and it being very ſevere upon them, 3 *Car.* was made to mitigate thoſe Penalties.

In order to anſwer this Pretence, he reſumed the hiſtorical Part of the Caſe, and conſidered the Circumſtances of the Nation at the Time of making the latter Statute. During Queen *Elizabeth* and King *James*'s Reign, the People were very jealous of the Deſigns of the Papiſts, and therefore we ſee by ſeveral Acts of Parliament endeavoured to fence againſt them as well as they could. Upon King *Charles*'s Acceſſion to the Throne, their Suſpicions were rather increaſed than diminiſhed; the King was then newly married to a Daughter of *France*, a *Roman* Catholick, and ſeveral Favours were at that Time ſhewn to the Papiſts; this occaſioned great Uneaſineſs and Diſquiet to thoſe of the Proteſtant Reformed Religion, which afterwards broke out into an open Rebellion, and ended in the Murder of that Prince and the Baniſhment of his Sons.

It is very well known, that the Parliament which enacted this Law was far from being acceptable to the Court, and therefore it was ſuffered to continue but a ſhort Time, and then followed the long Intermiſſion of Parliaments.

As this Parliament was not in the Intereſt of the Court, ſo they were highly incenſed againſt the Papiſts, who they began to fear were likely to gain Ground of them; and therefore they ſet themſelves at Work to attack them in that which was their weaker Place, namely, in taking away the Eſtates that were veſted before the Offence committed. 1 *Jac.* incapacitated them to take, and 3 *Car.* to keep.

As to which the former Statute was doubtful; if it ſhould be conſtrued that the Meaſure of all theſe Diſabilities muſt be by 3 *Car.* then that Parliament, inſtead of diſtreſſing the

Papiſts, as was intended, has rendred their Condition more eaſy; for on 3 *Car.* a Conviction is requiſite, to avoid which they may keep Abroad, and have the Profits of their Eſtates tranſmitted to them; for they will be out of the Reach of any Proceſs neceſſarily previous to a Conviction.

But the main End and Deſign of this latter Statute (which has not been mention'd) was to lay a heavier Puniſhment on the Perſon ſending, who before forfeited 100 *l.* only; the Childſent, who was the moſt innocent, bore all the Reſentment of the Statute, whereas now both are put upon the ſame Level, and ſome new Diſabilities are created; as being Executors, *&c.* and it likewiſe extends to private Schools, which the other did not.

Thirdly, He came then to conſider, what Influence the Common Recoveries and the Life of *Philip* will have in Prejudice of the Ducheſs's Title.

Now as to this Point he inſiſted, that what he ſet out with will principally govern it; for if the ſecond *Charles* never had the Eſtate in him (as according to my former Reaſoning he never had) then the Recoveries will be void, as ſuffered by a Perſon out of Poſſeſſion; as if the Iſſue in Tail ſhould ſuffer a Recovery in the Life-time of his Father.

A Fine indeed he may, but that is by the expreſs Proviſion of the Statute 32 *H.* 8. *c.* 36. As to the Life of *Philip*, his Objections, as to the Eſtate's being in Abeyance, and the Way he had ſhewn how he or his Iſſue may be reſtored on Conformity, will be ſufficient to remove that Obſtacle.

But to come cloſer, ſay they, whilſt there is Iſſue the Reverſioner cannot enter.

He denied that, in this Caſe Iſſue muſt be Heir of the Body. *Hob.* 346. *Dy.* 332. *Plow.* 560. and he muſt be Iſſue inheritable, which *Philip* is not; he is diſabled, and cannot call for the Eſtate according to 1 *Ven.* 417. He is to be conſidered in Conſanguinity, but not as Heir; and if he himſelf

ſelf cannot take, his Iſſue cannot, (admitting him to have Iſſue, which is not found, and is not ſo in Fact; ſo that the Argument is only from a Poſſibility of his having Iſſue) for it is not enough, that he has Iſſue, unleſs ſuch Iſſue be Heir of the Body to claim the Intail; and Heir of the Body he cannot be in the Life of *Philip*, for *nemo eſt hæres viventis.* My Lord *Coke* 1 *Inſt.* 377. *a.* puts the Caſe of Tenant in Tail, to him and the Heirs Male of his Body, and he has Iſſue a Daughter, who has Iſſue a Son; a Grandſon, ſays he, ſhall not keep out the Reverſioner, though he be Heir of the Body, becauſe he does not derive his Deſcent thro' Males; 'tis ſaid of an Exile, or one baniſhed, *quod perdidit patriam*, and it will found as well of *Philip*, *quod perdidit patrimonium.*

We are not obliged to wait for the Poſſibility of his Conformity; ſhall an Eſtate ſtand ſuſpended, becauſe 'tis poſſible an Alien may be naturalized, or a Monk be derained? *Cro. Eliz.* 422. 29 *Aſſ. pl.* 61. 1 *Inſt.* 391. *Plow.* 557. indeed ſays, there might be an Occupant in that Caſe; but this was ſaid only *arguendo*, and 'tis contrary to *Yelv.* 9. 2 *Rol. Ab.* 151, 152. for he muſt claim by a *Que Eſtate.*

If an Advowſon be granted to *A.* for the Life of *B.* and *A.* dies before a Vacancy, the Grantor ſhall preſent, and there ſhall be no Occupancy.

The next Thing relied upon by the Defendants is the Act of 2 *W. & M.* of a General Pardon, which, ſay they, has cured all. This has been ſufficiently anſwered by thoſe who have argued before; as there are Exceptions in it, and as it is not found, the Court cannot take Notice of it. *Hale's Pl. Cor.* 252. *Cro. Eliz.* 125. 1 *Keb.* 20. 1 *Lev.* 26, 76. *Br. Char. of Pardon*, 46. *Pleading*, 124. 8 *E.* 4. 7. 4 *H.* 7. 8. the general Words might pardon the Offence, but would not reſtore the Forfeitures without ſpecial Words. 1 *Lev.* 120. 1 *San.* 362. If Simony be pardoned, yet that does not operate ſo as to reſtore the Offender to the Living. 5 *Mod.* 15.

The laſt Thing they object is, that *Charles* was in Poſſeſſion all his Life, and therefore the Recoveries are good; but was

this any other Poſſeſſion than that of a Wrong-doer? A Monk might be a Diſſeiſor, and yet it will not be pretended he had any legal Eſtate in him; no, he was but an Occupant at beſt; and in this Caſe *Charles* was no more; he had, 'tis true, a Pernancy of the Profits, but that is all; he had not ſuch a Poſſeſſion and Freehold, as to enable him to bar the Remainder by coming in as Vouchee in a Recovery.

He deſired to know, whether it will be pretended, that if a Papiſt at this Day, ſince the Statute of *W.* 3. ſhould get into Poſſeſſion, and receive the Profits of any Eſtate, whether he can be deemed to be in legal actual Poſſeſſion? Certainly he cannot; he cannot take Advantage of his own Wrong; and no more ſhall the tortious Entry of *Charles* (for ſuch it was) enure to his Benefit, and turn to the Prejudice of us who are in Reverſion.

He ſaid there was one Thing more which they preſs upon him, and that is, that he could ſhew no Inſtance where this Act has been put in Execution in the Manner he was contending for, or indeed in any other Manner.

But he thought he might retort the Argument upon them, and demand to know if they can produce any Caſe which ſeems to look their Way, and ſo much as countenance the Conſtruction they have ſet up; the Truth in the Matter is ſtill at large, and no Argument can be drawn by either Side.

Many Statutes there are in full Force upon which there are no Footſteps of any Proceedings for many Years; and as to this particular Statute, he could give them a very good Reaſon why it was never yet drawn in Queſtion; they of the ſame Religion will never take Advantage of it, and theſe are People who moſtly have it in their Power; though in our Caſe indeed the Reverſioner is a Proteſtant; beſides, 'tis very difficult to prove a foreign Education, and a being ſent abroad with the Intent; for the Jeſuits, though they were caught in this Caſe, will never be caught again.

None but a Man of Duke *Hamilton*'s Application and Intereſt could have brought them over; but now they know the Conſequence, they will never be prevailed with to give the ſame Teſtimony; and as this is the firſt Caſe upon the Statute, ſo in all Probability it will be the laſt.

Sir *Edward Northey cont'*: I ſhall not need to go about to prove a Title upon this Record for the Defendants; for they have a prior Poſſeſſion, and that is ſufficient againſt the Plaintiff, who muſt recover upon his own Strength.

The Plaintiff relies on the Statute of 1 *Jac.* only, but in my Argument I ſhall put them all together, and admit them to be conſiſtent; for my Lord *Coke* ſays, where there are ſeveral Statutes relating to the ſame Matter, one muſt not be ſingled out from the reſt, but the Conſtruction muſt be uniform upon them all.

The three Statutes now in Queſtion were all made with the ſame View, and to prevent the ſame Miſchief; that was to be brought about by laying Puniſhments upon the Offenders, and thereby oblige them to conform.

There are two Sorts of Offenders, thoſe who ſend, and thoſe who are ſent; and theſe latter forfeit only the Profits of their Eſtate; and that was taken to be the Conſequence of the Statute at the Time of making it; and therefore 3 *Jac.* does not make any new Law, when it ſpeaks of the Profits, but only directs the particular Application of them to the next Proteſtant of Kin, which under 1 *Jac.* the King, as *Pater patriæ*, was intitled to. 2 *Vent.* 187. *Woodward* and *Fox.*

The Plaintiff does not make the Caſe on 1 *Jac.* which reſpects only the Intent, but has brought it within the Words of 3 *Car.* for it is found, that they were actually educated; which is carrying the Intent to the Education.

I ſhall put every Thing out of the Way but the Operation of the Statutes, as to Deſcents; I would fain know, if this

were an Eſtate in Fee deſcended, who ſhould have it; the Heir according to their Maxim cannot; and ſhall it eſcheat to the Lord, as tho' the whole Eſtate was ſpent; can it be thought the Statute intended to favour the Lord or Reverſioner more than the innocent Iſſue? he muſt be prejudiced, unleſs it be conſtrued that the Profits only are forfeited.

The Conſtruction muſt be, that the Anceſtor ſhall take no Benefit; that is, he ſhall not take for the Benefit of himſelf, but he ſhall take for the Benefit of his Poſterity.

The Statute 11 & 12 *W.* 3. has the Words, *be diſabled to inherit or take*; but yet in the Caſe of *Pye* and *Gorge*, 1 *July* 1709. *in Canc'*, it was held, that the ſubſequent Words had controuled the former, and only carried away a Pernancy of the Profits, but that the Eſtate deſcended notwithſtanding.

A Man may take for the Benefit of another, as a Man attainted for the Benefit of the Crown. 1 *Inſt.* 2. *b.* 2 *Rol. Ab.* 88.

I put all the Rules of Law out of the Caſe, and come now to the Proviſo for Conformity; and I take it, that upon Conformity the Offender is to be *in ſtatu quo*; and if ſo, how can the Eſtate be reveſted; there is no Proviſion for it in the Statute, and that is an Argument it was never intended the Eſtate ſhould go over.

My Lord *Delaware*'s Caſe, cited by the other Side, is a Caſe which has Room enough in it to hold us both; it ſays, that *Thomas* ſhall claim from *William*, and not through him.

Now the Word *from* implies he was ſeiſed, for otherwiſe he could not claim from him; here the Eſtate-tail is not ſpent, and therefore the Reverſion cannot be let in.

It is objected, that the Freehold ſhall not be in Abeyance.

I anſwer, that it is not, it is in the Offender; and the Statute has Power for to controul that, or any other Rule of the Common Law.

It

It is ſaid *Philip* has no Iſſue, and the Reverſioner muſt not be obliged to wait upon that Contingency.

I anſwer we muſt provide for what may be, as well as what is; the Law never ſees any Impoſſibility of having Iſſue, and therefore upon a general Intail there can never be a Tenant in Tail after Poſſibility; there is a Poſſibility of *Philip*'s having Iſſue, and therefore the Eſtate muſt continue to ſerve that Poſſibility when ever it arrives.

Another Objection is, that if we have the Eſtate we may perhaps alienate it.

I anſwer that the Statute never intended to put the Iſſue out of the Power of the Anceſtors, but only that he ſhould not be hurt by the Diſability of the Anceſtor, he ſhall be diſabled as to himſelf, he ſhall not be diſabled as to his Heir.

We don't now lie on the Recoveries, but ſet up the Life of *Philip* againſt the Plaintiff; I agree if Tenant in Tail leaves Iſſue an Alien, there the Remainder-Man may enter, becauſe ſuch Iſſue is as none.

If therefore the Eſtate veſts, and the Profits are only forfeited during the Diſability, then the Leſſor of the Plaintiff can have no Title.

Sir *Thomas Powis* replied. In Lord *Delaware*'s Caſe it is ſaid the Title never was in *William*, he was only an Executor, and this deſtroys the Inference from the Word *from*.

As to the Caſe of *Woodward* and *Fox*, it is a Caſe *primæ impreſſionis*, and a long while after this Statute, ſo that the Law-makers could not know the Profits would go to the Crown of Courſe, it not being a Caſe ſettled till that Caſe; in *Delaware*'s Caſe the ſame Conſtruction was made without the Words, which we make with the Words.

I know no Body to whom the Eſtate could have gone, in caſe this had been a Deſcent in Fee, but to the Lord by Eſcheat; and it is no new Doctrine to deveſt Eſtates eſcheated, as on the Birth of a poſthumous Heir, or Reverſal of an Attainder, 3 *Inſt.* 231. and the ſame may be done on *Philip*'s Conformity.

The Court took Time to conſider, and afterwards in *Mich.* Term 7 *Geo.* 1. they were divided in Opinion, the Lord Chief Juſtice *Pratt* and Mr. Juſtice *Forteſcue* being of Opinion that the Judgment below was erroneous and ought to be reverſed; Mr. Juſtice *Powis* and Mr. Juſtice *Eyre* being of the contrary Opinion; whereupon at the Requeſt of the Ducheſs, and for her Expedition, the Judgment was affirmed; and ſhe bringing a Writ of Error in Parliament, the Judgment was affirmed there likewiſe by the Advice of ten Judges againſt two.

DE
Term. Sanct. Trin.
1 Geo. In C. B.

Caſe 125.

Hunt and *Coles & al'.*

If a Truſtee has conveyed Lands before Execution ſued, tho' he was ſeiſed in Truſt for the Defendant at the Time of the Judgment, the Lands cannot be taken in Execution.

EJectment on the Demiſe of *Jacob Boardman.* The Defendant pleaded Not guilty; and on a Trial at the Aſſizes in the County of *Eſſex*, before Mr. Juſtice *Tracy*, the Caſe appeared to be this, (*viz.*) *Benjamin Stock* was ſeiſed in Fee of the Lands in Queſtion, and by Indenture 11 *Oct.* 1682. conveyed them in Conſideration of 1270 *l.* to *Hen. Soursby* and his Heirs, who was only a Truſtee for *Peter Chamberlain* and *Anne* his Wife, and their Heirs, and by Indenture 11 *Dec.* 1682. between the ſaid *Hen. Soursby* of the one Part, and the ſaid *Peter Chamberlain* and *Anne* his Wife, and *Hope Chamberlain* their Son, of the other Part, it was agreed, that *H. Soursby* ſhould ſtand ſeiſed of the Premiſſes, to the Intent that *Peter Chamberlain* and *Anne* his Wife ſhould take 40 *l.* a Year for their Lives, and that the reſt of the Profits ſhould be paid to *Hope Chamberlain* and the Heirs of his Body.

Trin. 7 *W.* 3. 1695. *Jam. Boardman*, Leſſor of the Plaintiff, being Executor of *Jer. Boardman*, recovered Judgment againſt *Hope Chamberlain* for a Debt of 160 *l.* due on a Bond from *Hope Chamberlain* to *Jer. Boardman*; 26 *July* 1699. *Anne Chamberlain* and the ſaid *Hope Chamberlain* borrow 600 *l.* of the Defendant *Coles*, and for a Security for that Sum the ſaid *H. Soursby* by their Direction mortgaged the Premiſſes to the ſaid *Coles* for 500 Years; *Trin.* 1714. the Leſſor of the Plain-

tiff obtained Judgment on a *Scire facias* upon the firſt Judgment, and upon this took out Execution by *Elegit*, and the Sheriff, after an Inquiſition which found that *Hope Chamberlain* was ſeiſed in Fee, extended one Moiety and delivered it to the Leſſor of the Plaintiff; and the Doubt was, if he had any Title by the Statute 29 *Car.* 2. *c.* 3. by which it is enacted, that after 24 *June* 1677. it ſhall be lawful for every Sheriff, *&c.* to whom Writs ſhall be directed, on Judgment, *&c.* to deliver Execution to the Plaintiff of all ſuch Lands, *&c.* as any other Perſon ſhall be ſeiſed of, *&c.* in Truſt for him againſt whom Execution is ſued, like as he might have done if the ſaid Defendant had been ſeiſed of ſuch Lands, of ſuch Eſtate as they be ſeiſed of in Truſt for him at the Time of the ſaid Execution ſued. And after Argument by Sir *Conſtantine Phipps* and myſelf for the Plaintiff, and Sir *Edward Northey* for the Defendant, it was determined by Mr. Juſtice *Tracy*, that the Execution was not good; for the Words, *at the Time of the ſaid Execution ſued*, refer to the Seiſin of the Truſtee; and therefore if the Truſtee has conveyed the Lands before Execution ſued, though he was ſeiſed in Truſt for the Defendant at the Time of the Judgment, the Lands cannot be taken in Execution. And Sir *Edward Northey* ſaid, that ever ſince the Act ſuch Conſtruction had been thought agreeable to the Statute, though he did not know it had ever been judicially determined. And a Caſe was mentioned by Mr. Juſtice *Tracy* from Serjeant *Cheſhire*'s Notes, where this Opinion ſeemed to be allowed by Lord *Trevor*, and was not contradicted by the Court,' *Johnſon* ver. ——, in the Common Pleas, — *Annæ.*

DE
Term. Sanct. Mich.
2 Geo. 1. In C. B.

Caſe 126.

Anonymus.

There muſt be a particular Act ſhewn by which the Plaintiff is interrupted, otherwiſe the Breach of a Condition for a quiet Enjoyment, is not well aſſigned.

ACTION upon a Bond, with a Condition, reciting, That whereas the Obligor had purchaſed a Copyhold Tenement from the Dean and Chapter of if therefore, during the Continuance of his Right, Eſtate and Intereſt therein, he ſhall permit the Obligee to have and enjoy a Moiety of all the Profits of the ſaid Tenement, then, *&c.* After *Oyer* the Defendant pleaded the Condition performed; to which the Plaintiff replied *quod te'ntum præd', unde præd'* Obligor was ſeiſed by Grant for the Term of his Life, *fuit in poſſeſſione Johnſon virtute dimiſſion' ei fact' per præd' oblig', & quod* Obligor did not permit him to have and enjoy the Moiety of the Profits according to the Condition, *ſed ipſe recepit tot' reddit' te'nti præd' pro anno finit' ad Feſt' Sancti Michaelis.* The Defendant demurred to the Replication, *quia duplex & caret Forma.* And Serjeant *Pengelly* inſiſted that the Replication was bad; firſt, becauſe it did not appear that the Tenement mentioned in the Replication was the ſame Tenement which is recited in the Condition; in the Condition there is no Notice taken what Eſtate or Intereſt the Obligor had purchaſed, but only ſaid that the Obligor had purchaſed a Copyhold Tenement: then when he ſays *te'ntum unde præd'* Obligor was ſeiſed for Life, *non conſtat* that it is the ſame Tenement which is mentioned in the Condition. Secondly, There is no good Alle-

gation of the Demiſe to *Johnſon*, for he alledges that *Johnſon* was in Poſſeſſion *virtute dimiſſion'*, and the *Virtute* is not traverſable. Thirdly, The Breach is double, for he ſays that the Obligor did not permit him to enjoy the Moiety of the Profits according to the Words of the Condition, and then he ſhews that he received all the Rent for ſuch a Year, which will be another Breach.

To which it was anſwered by Serjeant *Brainthwaite*, and reſolved by the Court, that the Replication here was good, for the Recital *quod te'ntum unde* he was ſeiſed for Life, is only an Inducement to the ſubſequent Matter, and not traverſable, for the Defendant is concluded by the Condition from ſaying that he had not ſuch Tenement, and if he had pleaded *Nul tiel Tenemen'* it would have been a bad Plea; then it is immaterial to ſay it was granted to him for Life, for it had been ſufficient to have ſaid *Quod te'ntum præd' fuit dimiſſ'* to ſuch a one, and that the Defendant had received all the Rent.

As to the Breach it is well aſſigned; if it had been double that muſt be ſhewn particularly for Cauſe of Demurrer, and in what Point the Duplicity conſiſts, and it ſhall not be held bad upon a general Demurrer; but here the Aſſignment of the Breach is not double; for when he ſays that the Defendant did not permit him to enjoy the Moiety of the Rent according to the Words of the Condition, this would not have been ſufficient without ſhewing ſome Act done which amounts to a Diſturbance, and therefore it was neceſſary for him to go further, and ſhew that the Defendant received all the Rent, without which the Breach would not have been complete; and ſo it was reſolved in *Frances*'s Caſe, & *Co.* — where it is agreed that there muſt be a particular Act ſhewn by which the Plaintiff was interrupted; otherwiſe the Breach would not be well aſſigned. For theſe Reaſons Judgment was given for the Plaintiff.

Caſe 127.

Southgate verſus *Chaplin.* In C. B.

A Covenant to enjoy without Diſturbance generally, ſhall be conſtrued a Diſturbance by legal Title; but where a Man covenants expreſly againſt thoſe who claim or pretend to have a Right, the Breach is well aſſigned tho' the Diſturber has no legal Right.

DEBT upon a Bond, with Condition that the Obligee ſhall enjoy without Interruption by any Perſon having or claiming or pretending to have any Right of Common; Defendant pleaded Condition performed; the Plaintiff aſſigned for Breach, that he was interrupted by *Jer. Bye*, who claimed Common in the Cloſe aforeſaid *ut ad te'ntum ſuum de tempore cujus contr' memoria hom' non exiſtit pertinen'*; and upon a Demurrer it was urged by Serjeant *Brainthwaite* that here is not ſhewn by the Replication any Title to Common in *Jer. Bye*, and the Condition ſhall not be extended but to legal Titles; and many Caſes were cited to this Purpoſe. To which it was anſwered by Serjeant *Reynolds*, and reſolved by the Court, that the Covenant here extends by the expreſs Words to thoſe who claim a particular Intereſt, (*viz.*) in this Land; and not only to thoſe who have a Right of Common; for where a Man covenants that another ſhall enjoy without Diſturbance generally, that ſhall be conſtrued of a Diſturbance by legal Title; for in other Caſes he has his legal Remedy; but where a Man covenants expreſly, not only againſt thoſe who have Right, but againſt thoſe who claim or pretend to a Right (and the Words here are *by any Perſon having, claiming or pretending to have*) not a Right in general, but Common, which is a particular Intereſt; and then the Breach is aſſigned in the Words of the Covenant that he was interrupted by *Jer. Bye* who claimed Common, *ut ad te'ntum præd' de tempore cujus, &c. pertinen'*, for here the Obligee ſhews that the Claim was not by any Title ſubſequent to his Title, but by a Title which was Time out of Mind, *&c.* and whether the Title be Right or Groundleſs, yet it was the Intent of the Parties that the Obligor ſhould indemnify the Obligee againſt all Claims of Common.

Judgment for Plaintiff.

Prideaux ver. *Roberts.* In C. B. Caſe 128.

DEBT upon a Bond with Condition for performing an Award: And upon Oyer demanded the Condition was intire in theſe Words, *Whereas the above-bounden* J. P. (who was Plaintiff) *and the above-named* J. P. *had ſubmitted themſelves*, &c. The Defendant pleaded No Award made; upon which the Plaintiff replied, and ſhewed the Award, and aſſigned the Breach; and the Defendant demurred. And for the Defendant it was inſiſted, that it did not appear that the Defendant had ſubmitted, for the Submiſſion is by the Plaintiff only. To which Serjeant *Pengelly* anſwered, that it would be good notwithſtanding this Miſ-recital; for when he ſays *the above-bounden* (who was the Defendant, and by the Bond it appears that the Defendant was bound) then the ſubſequent Words *J. P.* which was the Name of the Plaintiff himſelf, ſhall be rejected as repugnant; for it would be ſufficient to ſay, *whereas the above-bound and the Plaintiff had ſubmitted themſelves*, &c. as where a Bond is upon Condition, *that if the Obligor pay ſuch a Sum, then the Obligation ſhall ſtand in Force*; theſe laſt Words ſhall be rejected as repugnant to the Intent of the Parties, which was, that if the Obligor paid, &c. the Obligation ſhould be void; and there the Miſtake was in reciting the Condition of the Counter-bond. The Court inquired if he could ſhew any Authority for rejecting the Name of the Party in ſuch a Caſe; and becauſe he could not it was adjourned.

Whether Words in the Condition, which are repugnant to the plain Intent of the Parties, ſhall be rejected.

Yalden ver. *Hubburb.* In C. B. Caſe 129.

ACTION upon the Caſe for diverting a Water-Courſe 1 *Jan.* 1 *Georgii*, and continuing it to *March* 1715. *per quod* Plaintiff loſt the Benefit of the Water-Courſe *abinde* till *Apr. tunc prox' ſequen'*. And after Verdict for the Plaintiff, Serjeant *Pengelly* moved in Arreſt of Judgment, that intire Damages were given, when Part of the Time was to come at the Time of the Trial; for as he alledges Continuance till *March*

Judgment ſhall not be arreſted after a Verdict where intire Damages are given, though Part of the Time was to come at the Time of Trial.

March 1715. which is not yet paſſed, and the Damages are given for the Time till *April prox' ſequen'*, that is till *April* next, and ſo the Jury in their giving Damages had Conſideration of a Time not paſſed at the Time of their giving the Verdict; and it was likened to the Caſe of *Hambleton* ver. *Vere*, 2 *Saund.* 169. Action upon the Caſe againſt an Apprentice for relinquiſhing his Service before the End of his Term, *per quod Servitium amiſit per tot' reſid' termini præd'*, when only two Years of the five, for which he was bound, were paſt. And after Verdict Judgment was arreſted, for that Damages were given for the Loſs of his Service during the whole Reſidue of a Term, of which Part was not then incurred. *Sed non allocatur*; for *per Cur.* the Time mentioned *March* 1715. not being then incurred, it was impoſſible; for at the Time of the Action it was not poſſible that the Diverſion of the Water-Courſe had continued till a Time then not come; and therefore when he alledges, that he loſt the Benefit of the Water-Courſe till *Apr' prox' ſequen'*, that is alſo impoſſible, and therefore the Jury could not have any Conſideration of it.

Judgment for the Plaintiff.

Caſe 130.

Right ver. *Hammond & al'.* In B. R.

Where there is no Deviſe antecedent, the firſt Son of the Wife cannot take by Way of Remainder.

EJectment on the Demiſe of *Bucknall* and his Wife, *Horſeley* and his Wife, *Colbourne* and his Wife, and *Sarah Came*, againſt the Defendant, for ſome Tenements in *Woolwich* in the County of *Kent*. And on the Trial at the Aſſizes in *Kent* before Lord Chief Juſtice *King* the Caſe was this:

Thomas Came being ſeiſed of the Premiſſes, by Indentures 3 & 4 *June* 1668. ſettled theſe Tenements to the Uſe of *Thomas Came* his Son for Life, Remainder to *Mary* his Wife for Life, Remainder to the right Heirs of the Son, and dies. *Thomas Came* the Son by his Will 20 *Oct.* 1673. deviſes in theſe Words, (*viz.*) " My Lands by *Woolwich* my Wife is to " enjoy for her Life, after her Death of Right it goeth to " my Daughter *Elizabeth* for ever, provided ſhe hath Heirs;

" if my ſaid Daughter ſhould die before her Mother, or " without Heirs, and my ſaid Wife *Mary* ſhould marry again, " and have an Heir Male, I bequeath him all my Right to " that Eſtate, not thinking I can ſufficiently reward her " Love; if my ſaid Wife marries again, and fails of Heirs " Male after her Deceaſe, and my Daughter ſhe failing of " Heirs, I bequeath 50 *l. per annum* of that Eſtate to my " Brother *Joſeph Came*, and to his Heirs; 20 *l. per annum* to " my Siſter *Sarah Maddeſon* and her Heirs, provided it come " not into the Hands of her Husband; 30 *l. per annum* more " I bequeath to my Brother *William Came* and his Heirs; and " the Reſidue I leave to the Diſpoſal of my Brother *Joſeph* " *Came.*

Thomas Came the Son died without Iſſue Male, having only one Daughter *Elizabeth*, who died without Iſſue, and the Leſſors of the Plaintiff are Heirs at Law to her, (*viz.*) *Elizabeth*, *Mary*, *Katherine* and *Sarah*; the Leſſors are the Coheirs of *John Came*, Brother of the ſaid *Thomas Came.*

Mary, the Wife of *Thomas Came* Junior, after his Death married *Thomas Hammond*, by whom ſhe had Iſſue the Defendant.

A Caſe was made for the Conſideration of the Judge, who afterwards ſent it to the Court of King's Bench, where it was argued by myſelf for the Plaintiff, and by Serjeant *Pengelly* for the Defendant; and afterwards by Mr. *Lutwyche* and Mr. *Reeve* for the Plaintiff, and by Sir *Thomas Powis* and —— for the Defendant.

And for the Plaintiff it was inſiſted, that the Leſſors of the Plaintiff are the Heirs at Law to whom the Eſtate belongs, if it is not diſpoſed of otherwiſe by the Will of *Thomas Came.*

That by this Will nothing paſſed to the Defendant; for he could not take but by way of Remainder, or by way of executory Deviſe; and he could not take by way of Remainder,

becauſe nothing is deviſed to *Elizabeth* the Daughter, for the Will does not give her any Eſtate but only recites the Eſtate which ſhe had before, for it ſays his Wife ſhall enjoy for her Life, and after her Deceaſe of Right it goes to his Daughter for ever, provided ſhe have Heirs, which is only a Narration or Recital of the Eſtates as they were by the Marriage Settlement.

And afterwards Judgment was given for the Plaintiff upon the firſt Point, that here was no Deviſe to *Elizabeth*, and then the firſt Son of the Wife by her ſecond Husband could not take by Way of Remainder. And afterwards in another Caſe between the ſame Parties in Chancery, *Mich.* 9 *Geo.* for an Eſtate in *Eſſex* which was purchaſed by *Thomas Came* in the Name of Truſtees, purſuant to his Marriage Articles, and which was to be ſettled according to the Limitations in the Indentures 4 *June* 1668, and which after the Death of *Thomas Came* 1675, upon a Bill exhibited by *Mary* his Wife and *Elizabeth* his Daughter, was ſettled upon *Elizabeth* in Tail, and for Default of ſuch Iſſue to *Mary* in Tail; and it was now prayed upon the Bill exhibited by the Heirs at Law of *Elizabeth*, that the Eſtate in *Eſſex* ſhould be conveyed to them; for the Decree 1675 directed the Settlement to be purſuant to the Will of *Thomas Came*; but according to the Judgment of *B. R.* the Will of *Thomas Came* did not alter the Eſtate of *Elizabeth*, and therefore the Settlement to *Elizabeth* in Tail, and then to her Mother in Tail, was an irregular Execution of the Decree, and therefore the Truſtees ought to convey to the Plaintiff. And the Maſter of the Rolls was of the ſame Opinion, for he thought that *Elizabeth* did not take any Eſtate by the Will of *Thomas Came*, which did not make any Deviſe or Gift to her, but only recited that his Wife was to enjoy it for her Life, and that after her Death of Right it was to go (not that he gave it) to his Daughter.

DE
Term. Sanct. Hill.
2 Geo. 1. In C. B.

Steward & ux' ver. *Allen & ux'*. Caſe 131.

PLAINTIFF prayed a Prohibition to the Conſiſtory Court of *London*, on a Suit there for Defamation; and the Suggeſtion charged, that there was a Libel againſt the Defendant in the Spiritual Court, for that the Wife of the Defendant ſaid of the Wife of the Plaintiff, *That ſhe picked up a Man in* Fleet-ſtreet *and carried him home, and carried him up Stairs into her Bed-chamber, where he threw her down on the Bed and put his Finger* ſuper ejus ſecreta, &c. And the Cuſtom of *London* was alledged, by which a Whore was to be carted; and therefore when there is a Libel for calling a Woman a *Whore*, a Prohibition will be granted; and the Words in this Libel are tantamount, and therefore it was prayed here. *Sed non allocatur*; for Words which do not directly charge the Party with being a Whore, are not ſuch whereon the Juriſdiction of the Spiritual Court ought to be diſallowed; and therefore a Prohibition was denied.

Words which do not directly charge the Party with being a Whore, are not ſuch whereon the Juriſdiction of the Spiritual Court ought to be diſallowed.

And the Authority of the Caſe in *Lut.* — *Houblon* ver. *Millner* was much relied on; and though the Chief Juſtice mentioned a Caſe in the King's Bench, where a Prohibition was granted upon a Libel for Words which did not directly charge the Party with being a Whore by expreſs Words, and that the Caſe in *Lut.* —— was there cited; yet it appeared that Caſe was not much conſidered, and therefore upon the Authority in *Lut.* — the Prohibition was now denied.

Lutham

Caſe 132.

Lutham ver. *Jarrett.*

Opus & Labor may ſignify Buſineſs or Task, as well as Work and Labour.

Indebitatus aſſumpſit. After a Writ of Inquiry executed, Serjeant *Hall* moved that the Writ of Inquiry ſhould not be filed; for when the Plaintiff declares *Quod cum ipſe præd' Johannes Jarrett indebitatus fuiſſet eidem Thomæ Lutham pro diverſis operib' & laborib' ipſius Johannis in & circa ejus negotia ad ſpecial' inſtanc' & requiſition' ipſius Johannis per ipſum Thomam ante tunc fact' & performat'*, here appears no Conſideration for the Promiſe of the Defendant, for it is ſaid that he was indebted *pro operib' & laborib' ipſius Johannis*, and the Work and Labour of the Defendant himſelf was not any Conſideration upon which a Promiſe could ariſe or enure to the Plaintiff. And upon this a Rule was obtained *niſi, &c.*

And I now inſiſted, that taking all the Words together there appeared a ſufficient Conſideration; for if the Conſtruction now put upon the Words prevails, then the Words (*per ipſum Thomam ante tunc fact' & performat', &c.*) muſt be rejected; for it is impoſſible that the Work and Labour done by the Defendant (if the Words are underſtood in that Manner) could be performed by the Plaintiff; but *pro operib'* does not ſignify only for the Work, but the Buſineſs alſo; and that is a Signification well known and allowed; if it be underſtood in that Senſe, then all the Words may well ſtand; for then the Declaration is, that the Defendant was indebted to the Plaintiff *pro diverſis operib'*, (*viz.*) for ſeveral Buſineſſes of the Defendant *circa ejus negotia*, and at his Requeſt performed by the Plaintiff; and the Court was of that Opinion, and the firſt Rule was diſcharged. As to the Word *Laborib'*, that might be either rejected, or it may ſignify alſo Task or Enterpriſe, as well as Labour.

5

John

John Earl of Clanrichard ver. *Bourk & al'.* Caſe 133.
In the Houſe of Lords.

A Perſon reſtored after an Attainder for High Treaſon, ſhall have the ſame equitable Intereſt in every Part of his Eſtate, as he had before the Attainder.

William late Earl of *Clanrichard* was ſeiſed in Fee of the Barony of *Dunkelling*, and other Manors and Lands in the Kingdom of *Ireland*, ſubject to a Debt of 20000 *l.* and to other Debts to the Value of 10000 *l.* and being ſo ſeiſed upon his Marriage with *Ellen*, now Counteſs Dowager of *Clanrichard*, made a Settlement of the ſaid Barony, Manors and Lands on her for her Jointure, Remainder to the Heirs Male of the Family; and afterwards died without Iſſue, and without having ſatisfied the Incumbrances charged on the Jointure. Afterwards, upon a Reference by the Parties intereſted in the Debts and the Eſtate, it was agreed, that the Counteſs ſhould have 900 *l. per annum*, Earl *Richard*, who was the Heir Male, 700 *l. per annum*, and that the Reſidue of the Profits ſhould be applied to pay the Debts; and after Debts and Incumbrances ſatisfied the Counteſs ſhould have 1500 *l. per annum.* In the Reign of King *William* the Perſons in Remainder became attainted for High Treaſon, and by the Statute 11 & 12 *W.* 3. all Eſtates forfeited, *&c.* in *Ireland* were veſted in Truſtees for the Benefit of the Publick.

After this Statute the Counteſs claimed her Jointure before the Truſtees, and her Claim was allowed; and the Creditors, who had Incumbrances on the Jointure-Eſtate, made their Claims for their reſpective Debts, which were alſo allowed.

By the Statute 1 *Annæ*, —— *John* Earl of *Clanrichard* was reſtored to his Honour and Eſtate in the ſame Manner as if he had not been attainted. Then a Bill was exhibited in the Court of Chancery in *Ireland*, to be quieted in Poſſeſſion of ſuch Part of the Eſtate as was allowed to him by the Award. To which the Defendant pleaded the Statute 11 & 12 *W.* 3. and the Claim allowed to the Jointreſs of the Eſtate limited to her in Jointure, in Bar to the Demand by the Award; and

the Plea was allowed with Coſts. From which Decree the Earl appealed to the Houſe of Lords here.

And I inſiſted, that by Allowance of the Jointreſs's Claim by the Truſtees all equitable Demands upon the Jointure were conſequently allowed and revived, though no expreſs Claim was made of them. If the Jointreſs had made a Mortgage of the Eſtate limited to her for her Jointure, or had agreed to grant a Leaſe of Part of the Lands, the Mortgagee or Leſſee, or the Perſon with whom ſuch Agreement had been made, need not claim their Intereſt, but by the Allowance of the Jointreſs's Claim their Demands of her would be revived; and the Caſe would be the ſame where Incumbrances made before the Jointure affect the Eſtate limitted in Jointure, and an Agreement is made touching the Manner in which thoſe Incumbrances ſhall be ſatisfied.

When the Claim was allowed, the Claimant was to enjoy her Jointure as againſt the Publick, but not as againſt thoſe who had any Claim or Title paramount; and the Decree of the Truſtees ſays, that the Claimant ſhall have her Jointure-Eſtate according to the Intent of the Settlement in 1676. by which the Jointure was ſettled, and by that Settlement it was ſubject to the Payment of Debts; and therefore the Decree is tantamount to ſaying, that ſhe ſhall enjoy it ſubject to her Proportion of the Incumbrances; which Proportion was fixed and aſcertained by the Award.

And the Statute 1 *Annæ*, —— does not vary the Caſe; for the Appellant does not take his Eſtate as a Purchaſer under that Statute, but he is reſtored to it in his antient Right, as if he had never been attaint, and ſo are the expreſs Words of the Statute; and therefore he ſhall have the ſame Benefit and Advantage as if he had never been attaint.

But by the Statute of 1 *Annæ*, a Proviſo is added, that all Adjudication and Decrees of the Truſtees are confirmed in the ſame Manner as if the ſaid Act had never been made; but this Proviſo does not give thoſe Decrees any Validity which they had not before, but only puts them in the ſame

Plight and Condition as they were upon the Statute 11 & 12 *W.* 3. and therefore every Body ſhall have the ſame Advantage upon the Eſtate allowed by any Claim, as they might have had by the ſaid Act 11 & 12 *W.* 3.

And this is ſo *a fortiori* becauſe no Claim could have been made for the Benefit of the Award, which does not give any of the Parties an Intereſt out of the Eſtate, but only apportions and aſcertains the Payment of Debts to which the Eſtate was ſubject before.

For theſe Reaſons the Decree in *Ireland* was reverſed, and the Appellant was allowed the Benefit of the Award.

DE
Term. Sanct. Trin.
2 Geo. 1. In B. R.

Caſe 134.

The King verſus *Osborn.*

An Information ſhall go againſt the Mayor, where Perſons, intitled to their Freedom and demanding Admittance, are refuſed.

AN Information in the Nature of a *Quo Warranto* was prayed againſt the Defendant, who claimed to be Mayor of the Borough and Port of *Hythe* in the County of *Kent*, and upon the Affidavits the Caſe appeared to be this: The uſual Day for the Election of a Mayor of this Borough and Port is the 2d of *February*, and upon the 2d of *February* laſt a Court was aſſembled by *Stokes* the late Mayor for that Purpoſe. At the firſt Meeting the Orders of the laſt Court were read, by which it was ordered, that one *Lake* ſhould be admitted to his Freedom of the ſaid Borough, paying 50 *s.* for his Fine, and *Lake* being then preſent paid the 50 *s.* and was admitted a Freeman of the ſaid Borough; the Right to the Freedom of the ſaid Borough was either by Birth, Service, Marriage, or Redemption, (*viz.*) The Son of a Freeman born ſince the Admiſſion of his Father within the Borough, and being of full Age, and being Inhabitant and Reſiant within the Borough, has a Right to the Freedom. So whoever married the Daughter of a Freeman, born within the Borough ſince the Admiſſion of her Father to his Freedom, being of full Age, and Inhabitant and Reſiant within the Borough. So whoever had ſerved an Apprenticeſhip to a Freeman, and whoever had been allowed by the Corporation to be admitted to their Freedom upon a Fine. Theſe being the Titles to the Freedom of the Borough, after the Orders read, and *Lake*, admitted to his Freedom according to the Cu-

ſtom, *Stokes* laid down his Staff, and then a Horn was ſounded to ſummons the Freemen to the Election of a new Mayor; upon which all who were before admitted to their Freedom came, and ſix others who were not admitted but who claimed Title to be admitted either by Birth or Marriage, came and prayed to be admitted; upon which *Stokes* informed them they came irregularly, and that there ſhould be no Admiſſion that Day. Upon which they declared their Votes for one *Auſtin*, and then departed.

The others proceeded to an Election, and upon the Poll *Osborn* had 24 Votes and *Auſtin* 20; ſo that *Osborn* had the Majority of Votes admitted to their Freedom, and *Auſtin* the Majority, if the Votes of thoſe ſix, who demanded their Freedom and were refuſed, were good.

And upon the Opinion of *Parker* Ch. J. *Powis* and *Pratt*, an Information was directed againſt *Osborn*, for that if the ſix were intitled to their Freedoms, and demanded and were refuſed, all that could be done on their Part was performed, and they ought not to be deprived of their Votes by the Tort of the Mayor who would not admit them. But J. *Eyre*, *econtra*, for by ſuch a Conſtruction all *Mandamus's* for their Admiſſion would be ſuperfluous, and though they have by Birth or Marriage a Qualification to be admitted to their Freedom, yet no Right to it is veſted in them till their Admiſſion, and till they have performed all that a Freeman ought to perform to complete his Freedom.

And therefore it is not like the Caſe of an Heir of a Copyhold upon whom a Copyhold deſcends, and he may maintain Ejectment and make Surrender before Admittance.

But by the three other Juſtices the Information was granted; but *Parker* Ch. J. thought that if there had not been a direct Refuſal, it would have been otherwiſe.

Afterwards in the ſame Term, according to a Propoſal of the Court, and by the Conſent of the Parties, feigned Iſſues were directed to try if theſe ſix, or any of them, were in-

titled to their Freedom, and whether *Auſtin* or *Osborn* were duly elected, and Proceedings upon the Information were ſtaid till the Trial of theſe Iſſues. *Vide poſtea* 243.

Caſe 135.

Daw verſus *Newborough*. In C. B.

A Conveyance cannot operate by Way of Covenant to ſtand ſeiſed, where the Intent of the Party who conveys appears to be contrary to ſuch a Conſtruction.

IN Ejectment upon a ſpecial Verdict found at the Aſſiſes before Baron *Price*, the Caſe appeared to be this: The Dean and Chapter of *Briſtol* were ſeiſed of the Rectory of *R.* and granted a Leaſe to *J. C.* for three Lives, the Leſſee by Leaſe and Releaſe conveys to his eldeſt Son *Thomas* and his Heirs, in Conſideration of natural Love and Affection, and for divers other good Cauſes and Conſiderations, to the Uſe of the ſaid *Thomas* for Life, then to the Uſe of the Heirs Male of his Body, and in Default of ſuch Iſſue to the Uſe of his Son *Joſeph* for Life, Remainder to his Heirs Male, and in Default of ſuch Iſſue to the Uſe of the Leſſor of the Plaintiff.

The Leſſee had Iſſue *Thomas* and *Joſeph*; *Thomas* had Iſſue *Mary* who was married to the Defendant, and died without Iſſue Male; *Joſeph* died without Iſſue Male; by which Means the Leſſor of the Plaintiff claims; and if this was a good Conveyance to the Leſſor of the Plaintiff by Way of Covenant to ſtand ſeiſed was the Queſtion.

And Serjeant *Pengelly* argued that this Conveyance operated as a Covenant to ſtand ſeiſed; and that the Exility of the Eſtate of the Leſſee, who was only Tenant for three Lives, did not obſtruct the Title of the Leſſor of the Plaintiff.

And afterwards *Trin.* 3 *Geo.* the Court gave Judgment, that this did not operate by Way of Covenant to ſtand ſeiſed. And *King* Ch. J. delivered the Reaſons of that Judgment, that a Conveyance cannot operate by Way of Covenant to ſtand ſeiſed, where the Intent of the Party who conveys appears to be contrary to ſuch a Conſtruction, for the Intention of the Party is eſſential to the Direction of the Uſes. But here the Intent of *J. C.* appears to be, that the Eſtates

which he limits by Way of Uſe ſhould ariſe out of the Eſtate limited to *Thomas* and his Heirs, and then they can never enure by Way of Covenant out of the Eſtate of the Covenantor; and to this Purpoſe are the Reſolutions in *Cro. Eliz.* 401. 1 *Sid.* 82. 2 *Vent.* 318. And when the Eſtate is limited to *Thomas* and his Heirs, to the Uſe of, *&c.* the Uſe muſt of Neceſſity ariſe out of the Eſtate of the Feoffee, *&c.* to the Uſe, *&c.* and therefore, if it be to the Uſe of *Thomas* and his Heirs, and after to the Uſe others, this will be an Uſe upon an Uſe which will never be allowed by the Rules of Law; for the Uſe is only a Liberty or Authority to take the Profits, but two cannot ſeverally take the Profits of the ſame Land, therefore there cannot be an Uſe upon an Uſe.

But this is now allowed by Way of Truſt in a Court of Equity.

Auſtin verſus *Osborn.*

Caſe 136.

IN an Action upon the Caſe, the Plaintiff declared on a feigned Iſſue directed by the Court of King's Bench, and the Iſſue was, whether the Plaintiff or Defendant was duly elected Mayor of the Port and Borough of *Hythe*, one of the Cinque Ports in the County of *Kent*; and upon the Trial at the Aſſiſes at *Maidſtone July* 1716, before the Lord Chief Juſtice *Parker*, the Caſe appeared to be this: By the Charter granted to Corporation of the *Hythe* 14 *March* 17 *Eliz.* the Election of the Mayor is to be on the 2d of *February* annually, *& ſi aliquis Major obierit ante finem anni, proximo die poſt notitiam, &c.* a new Mayor ſhall be elected for the Reſidue of the Year. 9 *Auguſt* 1715 Mr. *Deeds* then Mayor died, *& eodem die circiter undecimam Horam* the Horn was blown, which was the uſual Notice of ſummoning the Court, and the Officer was alſo ſent to ſummon all the Burgeſſes of the Corporation; upon which 20 were aſſembled, and elected *Stokes* Mayor for the Remainder of the ſaid Year.

Vide ante 240. Where Perſons have a Right to their Freedom, the tortious Refuſal of the Mayor does not make their Votes void, for Admiſſion is but a Ceremony.

Upon

Upon the 2d of *Feb.* next enſuing, when the annual Election of the Mayor is appointed by the Charter, *Osborn* and *Auſtin* were Candidates, and the Election is to be *per Jurat' & Communitat'*.

After the Court was aſſembled, one *Lake* (who at a former Court had been ordered to be admitted to his Freedom upon the paying a Fine of 50 *s.*) paid his Fine and was ſworn in a Freeman, and took the Oaths of Allegiance and Supremacy, and then the other Officers of the Corporation were continued and ſworn in, and then *Stokes* the Mayor ſaid that he would proceed to the Election of a new Mayor. Some Perſons preſent ſaid that there were others who would take up their Freedom; to which *Stokes* replied, that he would not do any Buſineſs that Day except electing a new Mayor, and then laid down his Mace, and the Horn was blown to ſummons the Freemen to the Election of a Mayor.

Then *Tournay*, *Brockman*, *Geo. Kennet*, *Rich. Kennet*, *Symonds* and *Rand*, who claimed a Right to be admitted to the Freedom of the Port and Borough of *Hythe*, entered the Court and demanded their Freedom, and tendered 15 *d.* which was the uſual Fine paid for Admittance, and prayed to be admitted, but *Stokes* refuſed them; upon which thoſe ſix Perſons declared their Votes for *Auſtin*, and were excluded the Court.

The Right to the Freedom was by Birth, by Marriage and by Fine; and it was allowed that *Geo. Kennet* had a Right to his Freedom, and though the Right of the others was controverted, yet by a Verdict found the ſame Day upon a feigned Iſſue in another Action it was found that they all had Right to their Freedom.

After excluding thoſe ſix the Court, they proceeded to the Election of a Mayor, and there were 24 Votes for the Defendant *Osborn*, and 20 for the Plaintiff *Auſtin*, beſides thoſe ſix who were excluded, ſo that if thoſe ſix were good Votes *Auſtin* was elected, otherwiſe *Osborn* was elected, and after

it was conſented that a Caſe ſhould be made, and this Matter argued, the Chief Juſtice delivered his Opinion, that thoſe ſix ought to be reckoned as good Votes for *Auſtin*, and that he was duly elected.

And the Chief Juſtice ſaid that it was not improper to take Notice how *Stokes* became Mayor; for the Queſtions here are whether there does not appear in this Caſe ſuch a Partiality as to make the Election of the Defendant void?

Secondly, If the Votes of the ſix ought not to be allowed, by which the Election of the Plaintiff would be good?

As to the firſt Matter, the Election of *Stokes* was not made purſuant to the Direction of the Charter, and though his Election was not void, yet his being elected in ſuch a Manner, ſhews the Intention of continuing the Office in one Party.

As to the other, the ſix Votes excluded ought to be allowed; for it does not appear that there was any Doubt of their Right to be admitted Freemen, but it appears that they were intitled to their Freedom; and there did not appear to be any Doubt of it on the 2d of *Feb.* for the Mayor does not give that as a Ground for refuſing them, but ſaid he would do no more Buſineſs that Day; then if they had a Right to their Freedom, and the Court had no Doubt of it, if they had done all that was in their Power in order to be admitted, the tortious Refuſal of the Mayor does not make their Votes void, for Admittance is only a Ceremony introduced and uſed for more Order and Regularity.

The Caſe of a Tender and Refuſal, which amounts to Payment, is very appoſite to this Matter.

If a Copyholder, to whoſe Uſe a Surrender is made, prays to be admitted in Court and is refuſed, he ſhall be Tertenant againſt the Lord, tho' the Lord does loſe his Fine.

If a Man approaches as near as he can to the Lands, this amounts to a Livery.

And the Caſe here is ſtronger, for it appears that the Corporation had at that Time Power to perform the Ceremony, and there can be no Reaſon why they did not perform it.

This is not properly to be conſidered as between the Plaintiff and Defendant, but between the Perſons excluded and the Corporation, and then what Cauſe can there be for refuſing their Votes till Admittance?

On the Part of the Corporation nothing but Matter of Decency; on the other Part it would be manifeſt Injuſtice if their Votes ſhould be rejected; and where the Competition is between a Defect in Point of Decency on the one Part, and manifeſt Injuſtice on the other, there can be no Queſtion which ought to prevail.

But the Chief Juſtice, after declaring his Opinion, ſaid he would not preclude the Defendant from taking the Opinion of the Court, and therefore as he was of ſuch Opinion he could not in Juſtice permit the Defendant to continue in his Office, yet he would order that, if upon Motion by the Defendant in Court the firſt Week of the Term the Court ſhould be of a contrary Opinion, the *Inſignia* of the Office which were now by Rule delivered to the Plaintiff ſhould be redelivered to the Defendant; and a Rule was made accordingly.

This Matter was touched on in Court upon a Motion for an Information, *Trin.* 2 *Geo.* and then Chief Juſtice *Parker*, Juſtice *Pratt* and Juſtice *Powis* were of the ſame Opinion which the Chief Juſtice now delivered, but Judge *Eyre* was of a contrary Opinion.

Mich. 3 *Geo.* the Poſſeſſion of the Office and *Inſignia* of Mayor being reſigned to the Plaintiff according to the Rule, and the Court in *Trin.* Term being of the ſame Opi-

nion with the Chief Juſtice, the Defendant would not be at the Charge of arguing this Point, but ſubmitted, that Judgment ſhould be given againſt him; and upon ſuch Submiſſion the Chief Juſtice ſaid, that the Matter was worthy of being argued; and he ſhould be ſatisfied to have it argued; but he had conſidered the Caſe, and was of the ſame Opinion now as he was at the Aſſizes.

Loveday ver. *Soloman Mitchell.* In C. B. Caſe 137.

REplevin. The Defendant avows the Taking of the Goods as the Goods *ipſius Solomonis*, and concludes with *Petit judicium & retorn', &c.* To which the Plaintiff demurred, and ſhewed for Cauſe, that the Defendant did not traverſe the Property of the Plaintiff. And Serjeant *Cheſhire* urged, that he ought to make ſuch Traverſe; for when the Plaintiff had alledged a Property in himſelf, if the Defendant afterwards alledges Property in himſelf, or in a Stranger, this denies the Property of the Plaintiff only by Inference and Argument; but he ought to deny the Plaintiff's Property in direct Terms, and ſo are all the Precedents; with this Difference, that in ſome Caſes the Defendant alledges Property in himſelf or another, with a direct Traverſe; and in ſome Caſes the Plea is, that the Property is in the Defendant, and not in the Plaintiff, which is tantamount to a Traverſe; for the Words *& non* make a Traverſe. 1 *Sand.* Serjeant *Selby* replied, that the Precedents were both Ways. *Hern's Plead.* 4. 1 *Brown's Ent.* — *Pl. Gen.* — *Mod. Int.* 300. And *per Cur'*, It will be good both Ways, and there ſeems to be no Difference; for the Defendant might have pleaded Property in Abatement or in Bar, and it would have been good without a Traverſe, and upon that Iſſue ſhould have been joined. And therefore when the Defendant makes Cognizance, or avows that the Property is in the Defendant, it ſeems to be ſufficient; for the Defendant cannot conclude to the Country, but the Plaintiff ought to reply, and upon that Replication Iſſue ſhall be joined, and the Property of the Plaintiff muſt be proved.

When the Defendant in Replevin makes Conuſance, and avows, that the Property is in himſelf, it ſeems to be ſufficient without a Traverſe.

Anonymus.

Caſe 138.

Anonymus. In C. B.

If the Jury is diſcharged at the Aſſizes for a View, there is no need of a *Venire facias de novo.*

THE *Poſtea* returned ſaid, that ſeven Jurors of the principal Panel appeared, and five *Tales* were added, and then *Quod jurator' ſimul cum aliis de circumſtan' jurat' ex aſſenſu partium & per mandat' juſticiar' jur' præd' a veredicto ſuper exit' præd' dand' certis de cauſis exonerent' & Alexander Saunders ultimus jur' præd' retrahet'.* Afterwards there was a *Diſtringas* with *Decem Tales* for the ſame Jury at the next Aſſizes, and at the next Aſſizes the Iſſue was tried by the ſame Jury.

And it was moved in Arreſt of Judgment, that here was a Miſ-trial, for there ought to have been a *Venire fac' de novo,* and not a *Diſtringas* with *Decem Tales* for the ſame Jury; for by the Statute 7 & 8 *W.* 3. there ſhall be a *Venire de novo,* unleſs in Caſes of a View.

Secondly, The Jury here were totally diſcharged, and then there muſt be a *Venire fac' de novo*; for the Words are expreſs, that the whole Jury ſhall be diſcharged, and the ſubſequent Words *quod ult' jur' retrahater* are impoſſible, for all were before diſcharged, and then none of them could be afterwards brought back again.

Thirdly, The Entry is upon the latter *Poſtea,* where *Abrahamus Saunders* is mentioned, not *Alexander Saunders,* and ſo one was withdrawn who was never ſworn.

For which Serjeant *Cheſhire* anſwered, that the Cauſe was ſent to a View, and therefore was within the Words of the Statute.

And tho' the Entry be *Quod certis de cauſis* the Jury was diſcharged, and it does not appear by the Entry that this was intended for a View; yet this may be explained to the Satisfaction of the Court, and need not be mentioned in the Entry; for the Entry is in the ſame Manner as the Entry was before the

Statute; for it is ſufficient to ſay, *Quod certis de cauſis exonerent'*, without mentioning what Cauſe; but here by the *Ven' fac'* it appears, that a View was intended at firſt, for the *Venire* ſays *Quod habeat' jur'* (*quod ſex vel plur' habeant Viſum*) by which it appears, that this *Ven' fac'* was agreeable to the Statute of 4 & 5 *Annæ*, *c.* 16. which allows a View before Trial; but becauſe only two of the Jurors had viewed the Premiſſes, as appears by the Return of the Sheriff upon the *Venire fac'*; it was agreed, that the Cauſe ſhould be ſent to a View, as appears by the Rule of Aſſize, now made a Rule of Court. This then being the Reaſon of the Withdrawing a Juror; and the Diſcharge of the others will be within 7 & 8 *W.* 3. which allows a *Diſtringas* with *Decem Tales* in Caſes of View; and then the Entry here *Quod ult' jur' retrahetur* ſhall be tranſpoſed, and placed before the Words which diſcharge the Jury. And *per Cur'*, If Iſſue is joined, and at the Aſſizes when the Iſſue comes to be tried, and View is conſented to, and one Juror withdrawn, and the others diſcharged, for that Reaſon, by the Statute 7 & 8 *W.* 3. there need not be a *Venire fac' de novo*, but it is ſufficient to have a *Diſtringas* for the ſame Jury with *Decem Tales* at the next Aſſizes. Then when the Statute 4 & 5 *Annæ*, *c.* 16. allows a View before Trial, and directs a *Venire fac'* for that Purpoſe, and there be no View had, there may be a View afterwards by Conſent at the Aſſizes; and if the Jury is diſcharged for that Reaſon, there is no need of a *Ven' fac' de novo*. But it is proper that the Entry upon the Roll ſhould be, that the Jury was diſmiſſed for that Reaſon; and as the Uſage has been otherwiſe ſince the Statute, that may excuſe the Omiſſion here; yet the Court ordered, that for the Time to come ſuch Entry ſhould be made.

As to the other Objection, the Court thought the Words ſhould be tranſpoſed, and conſtrued that a Juror was withdrawn, and the reſt of the Jury diſmiſſed; for if they were all diſcharged at firſt, it would be impoſſible that any of them ſhould be withdrawn afterwards: And for theſe Reaſons the Exceptions were diſallowed by the Court.

Caſe 139. ## *Johannes Abrahat* ver. *Johannem Bunn.* In C. B.

A Miſpriſion of the Plaintiff's Name inſtead of the Defendant's amendable after Verdict without Defence.

DEBT upon Bond, with Condition that the Defendant ſhould pay 50*l.* to one *Eyres* on ſuch a Day, and ſhould indemnify the Plaintiff, who was bound with the Defendant in another Bond to *Eyres* for the Payment of the ſame Sum.

The Defendant pleaded *Solvit ad diem.* The Plaintiff replied, *Quod præd' Johannes Bunn non ſolvit prout idem Johannes Bunn ſuperius allegavit, & hoc petit quod inquirat' per patriam, & præd' Johannes Abrahat ſimiliter*, where it ſhould have been *præd' Johannes Bunn ſimiliter.* After Verdict for the Plaintiff, without any Defence made by the Defendant upon whom the Iſſue lay, it was moved in Arreſt of Judgment by Serjeant *Selby*, that they relied on that Miſpriſion, and therefore made no Defence; and that the Statute 17 *Car.* 2. *c.* 8. does not extend to this Caſe, for that aids a Miſtake of the Name where Plaintiff or Defendant has been right named before, only where that might be ſhewn for Cauſe on a Demurrer; but that could not be done here. To which the Court agreed.

But it was amendable by 8 *H.* 6. — and 32 *H.* 8. — and for that was cited 1 *Rol. Abr.* 199. *pl.* 27. 2 *Cro.* 502, 587. And of that Opinion was the Court, and it was amended.

Caſe 140. ## *Piggott* ver. *Sir Henry Penrice & ux'.* In Canc'.

The ſame Circumſtances ought to be proved to be performed to make a good Revocation in Equity as at Law, unleſs prevented by the Perſon intereſted.

UPON a Bill brought for an Account of the real and perſonal Eſtate of —. The Caſe appeared to be this:

Sir *John Spencer* died without Iſſue and Inteſtate, by which Means his Eſtate deſcended to his four Siſters, *Elizabeth Gore* (Mother of the Defendant's Wife, which *Elizabeth* was dead, and the Defendant's Wife her Heir) *Suſanna*

Nelſon, *Anne Meredith* and *Alice Piggott*, Wife of the now Plaintiff. After the Death of Sir *John Spencer*, *viz.* 9 *Feb.* 1712. *Suſ. Nelſon* made and duly executed her Will in the Preſence of three Witneſſes, and thereby deviſed in theſe Words, *I make my Niece Executrix of all my Goods, Lands and Chattels*, and died; after her Death the Plaintiff and *Alice* his Wife being ſeiſed of one fourth Part as Parcener, of a third Part of *S. Nelſon*'s Share as Coheir to her, (for the Siſters *Anne* and *Alice*, and the Wife of the Defendant, being the Daughter of *Elizabeth Gore*, the other Siſter, were Coheirs to *S. Nelſon*, if no Eſtate paſſed by her Will,) levied a Fine of the third Part of the Manor, *&c.* which was the Eſtate of Sir *John Spencer*, and by Deed declared the Uſes to the Plaintiff and his Wife for their Lives, Remainder to the right Heirs of the Plaintiff, with a Proviſo, that the Plaintiff and his Wife, or the Wife alone notwithſtanding her Coverture, by Deed or Writing atteſted by three Witneſſes, not being menial Servants, might revoke the Uſes of the Inheritance after the Life of the Plaintiff, and limit new Uſes. Afterwards *Alice Piggott* being ſick wrote a Letter, dated 24 *Jan.* 1713. to Mr. *Edwards*, who prepared the Settlement according to the Fine, and deſires that he will prepare a Deed with Speed; that ſince ſhe hath a Power of Revocation, and was unwilling the firſt Deed ſhould be made as it is, and uſed Arguments againſt it, and was diſſatisfied in Conſcience about it, there might be an Alteration, till when ſhe ſhould not die ſatisfied; for we all know my Siſter *Nelſon*'s Meaning, *and I give the Inheritance of that Part to my Niece* Gore, who was the Daughter of my Eldeſt Siſter; and on the Back indorſes that he ſhould keep it ſecret.

This Letter was ſent to Mrs. *Meredith*, with a Deſire that ſhe would read it, then ſeal it up; and then it was delivered to Mr. *Edwards*. About the End of *January* Mr. *Edwards* communicated the Contents to the Plaintiff, and in the Beginning of *February* ſent a Letter to Mrs. *Piggott*, by which he deſired to know, whether ſhe would have the Eſtate limited to her Niece and her Heirs; if ſhe ſhould die without Iſſue, or under Age, if ſhe would not in that Caſe augment her Charities, (for by the Letter ſhe ſaid alſo, that ſhe would leave 20 *l. per annum*

annum to augment the Poor living of *Offley*, and 10 *l. per annum* for the poor Apprentices.) 26 *Feb.* Mr. *Edwards* wrote another Letter to Mrs. *Piggott*, to let her know that the Deeds were prepared for the Charities, and desired to know who should be the Trustees. 10 *Mar.* Mrs. *Piggott* died, and Mr. *Edwards* in his Examination deposed, that when he acquainted Mr. *Piggott* with the Contents of the Letter he received from his Wife, Mr. *Piggott* did not, as he knows, propose any Method, or use any Means to hinder any Revocation or new Deed of Settlement; and that he received no other Orders, and no Answer to either of his Letters.

It was now insisted upon, that the Words, *I make my Niece Executrix of my Goods, Lands and Chattels*, amounted to a Devise of the Lands to her, for otherwise the Word *Lands* would have no Signification, for the Testatrix was possessed of no Leases; and it was urged, that her Intention appeared by her Declaration to the Witnesses, to whom she said, that if she had never so much, the whole should go to her Niece, and that Mrs. *Piggott* and Mrs. *Meredith* should not be a Groat the better for what she left; and this was confirmed by Mrs. *Piggott*'s Letter; and though parol Declarations shall not be allowed to inlarge the Words of a Will, yet they may explain Words which are otherwise ambiguous. But on the other Side it was insisted, that no Intention here appeared further than to make her Niece Executrix; and an Heir shall not be disinherited but by express Words. That the Addition of *Goods, Lands and Chattels*, is only an Enumeration of the Particulars which she shall have as Executrix; and the Word *Lands*, being inserted among personal Things, shall be construed only of Things which she could take as Executrix; as in the Case of *Wilkinson* versus *Merryweather*, *Cro. Car.* 447, 449. And if the Testatrix had no Leases, yet she might intend to have some; or if not, the Import of the Word may be, that she should have the Rents and Emblements of the Land; as where there is a *Levari fac' de terris & catallis*, the Sheriff may take the Corn upon the Ground and other Chattels; and a parol Declaration shall never be allowed in the Exposition of a Will.

And of this Opinion was the Maſter of the Rolls, but would have allowed a Trial at Law if Mr. *Cowper* and Mr. *Vernon* would deſire it, but they did not.

It was then inſiſted, that this Letter of Mrs. *Piggott* amounted to a Revocation in Equity, for it ſhewed her Intention that there ſhould be a Revocation, which ſeems to have been obſtructed by the Plaintiff; for Mr. *Edwards* was his Agent, and was deſired by the Letter to be ſecret; afterwards he communicates it to the Plaintiff, and though he depoſes that he doth not know that Mr. *Piggott* did propoſe any Method or uſe any Means to hinder, *&c.* yet the Manner of penning his Depoſition is ſuſpicious; and when he was deſired to prepare a Deed for the Revocation with ſpeed, he did nothing, nor wrote any Anſwer till *February*, and then deſired to know if the Eſtate ſhould be to the Defendant and her Heirs, when the Letter had mentioned that the Inheritance ſhould be ſettled on her Niece; and it does not appear whether his Letter ever came to Mrs. *Piggott*; but the Delay ſeems to be affected, and Mr. *Piggott* muſt neceſſarily be ſuppoſed the Cauſe of it. But the Maſter of the Rolls would not allow this to be a Revocation, for there was no Proof that Mr. *Piggott* hindered the Execution of the Revocation if his Wife would execute it, but at the ſame Time he declared that Mr. *Edwards* was culpable; and if it had been proved that Mr. *Piggott* had hindered any Body from coming to his Wife, or prevented the Execution, or obſtructed the Ingroſſing of the Deed of Revocation, he would have allowed it as a good Revocation againſt him; but this not being proved, the ſame Circumſtances ought to be proved to be performed to make it a good Revocation in Equity, as were requiſite to make it a Revocation at Law, for if all the Circumſtances of the Power are not purſued, it will not be a good Revocation in Equity or at Law; and ſo it was reſolved in the Caſe of *Bath* and *Mountague*.

Afterwards 19 *May*, *Eaſter* Term following, this Cauſe was heard before Lord Chancellor *Cowper* upon an Appeal, and the former Decree affirmed. As to the Deviſe in theſe

Words, (*viz.*) *I make my Niece Executrix of my Goods, Lands and Chattels*, he thought there was no Ground in any Court to conſtrue that a Deviſe of the Land, or to ſubject Land to the Payment of Debts; for the Will begins with an Expreſſion improper for a Deviſe of Lands, (*viz.*) *I make my Niece Executrix*, which has nothing to do but with the Perſonal Eſtate; then when ſhe adds *of all my Goods, Lands and Chattels*, that is only an Enumeration of the Particulars which ſhe ſhall take as Executrix. And the Term *Lands* is not inſignificant, for it imports that ſhe ſhall take the Rents of the Lands, but does not amount to a Deviſe of the Inheritance of the Land, for the Law will not permit an Heir to be diſinherited by Implication.

As to the Revocation, the Letter does not amount to that, for though perhaps her Intention was to favour her Niece, and there was a Delay or Neglect in the Agent Mr. *Edwards*, with a Deſign to favour his Friend Mr. *Piggott*, yet this Endeavour of hers without any Thing done in Purſuance of it, and without purſuing the Circumſtances of the Power, will not amount to a Revocation; when a Perſon confines his Power to particular Circumſtances, it is done with a Deſign to prevent his being ſurpriſed.

If a Deed of Revocation had been prepared and ready to have been executed, but three Witneſſes who were not Menial Servants could not have been got, and this by Mr. *Piggott's* Means, perhaps it might under ſuch Circumſtances have been allowed a Revocation.

DE

Term. Sanct. Hill.

3 Geo. 1. In Scacc.

James St. Amand ver. *Barbara Counteſs Dowager of Jerſey, Adminiſtratrix of Edward Earl of Jerſey, & al'.*

Caſe 141.

A voluntary Conveyance bad againſt Bond-Debts contracted afterwards, in a Court of Equity.

A Bill in the Exchequer was brought by the Plaintiff on Behalf of himſelf and other Bond-Creditors of *Edward* Earl of *Jerſey*, againſt the Defendant his Adminiſtratrix, *William* Earl of *Jerſey* his Son; *Hen. Villers*, Eſq; his younger Son, an Infant, by his Guardian and other Truſtees for the ſaid Infant, ſetting forth, that *Edward* Earl of *Jerſey* was indebted by Bond 30 *May* 1707. to Plaintiff in the Penalty of 7000 *l.* for Payment of 3500 *l.* and Intereſt, and to *Eliz. Harris* by Bond 20 *May* 1709. in 400 *l.* for Payment of 200 *l.* and Intereſt, and being (or one *Richard Topham* in Truſt for him) ſeiſed in Fee of two Fee-Farm Rents, one of 40 *l.* 3 *s.* 4 *d.* the other of 2 *l.* 5 *s.* 8 *d.* ſubject to 40 *l.* Annuity to *Rachel Maſon* for her Life, he and his Truſtees by Leaſe and Releaſe 1 & 2 *June* 1710. for natural Love to the ſaid *H. Villers* convey the ſaid Fee-Farm Rents to his eldeſt Son Lord *Dartmouth* and Lord *Bathurſt* and their Heirs, in Truſt, after the Death of *Eliz. Maſon*, to ſell, and the Money raiſed by the Sale to diſpoſe of in an Annuity or Place for the ſaid *Henry Villers* for his Life, and if he died before any Sale could be, in Truſt for himſelf and his Heirs.

After

After this Settlement *Edward* Earl of *Jerſey* becomes indebted to others on Bond, and died *Sept.* 1711. without perſonal Aſſets ſufficient for Creditors; and the Scope of the Bill was, to ſubject the ſaid Fee-Farm Rents to the Bond-Creditors in like Manner as if they had deſcended to the Heir.

Mr. *Vernon* by his Opinion 9 *Feb.* 1716. had declared, that the Conveyance being voluntary, and for the Benefit of a Child, will be deemed fraudulent as againſt Bond-Creditors; and the Statute made for Relief of Bond-Creditors againſt fraudulent Deviſes goes upon the Suppoſition, that a voluntary Conveyance made would have been fraudulent at Law. That if there had been no Bond-Creditors at the Time of the Conveyance, it might have created a Doubt, whether it had been done to defeat Bond-Creditors; but there being Debts then owing by Bond, he thought it would be void, even againſt Bond-Debts contracted after, or that if it were otherwiſe, it would come to the ſame Thing, ſince the Eſtate in Queſtion is not to anſwer the Bond-Debts prior to the Conveyance; and if neceſſary, the latter Bond-Creditors would be admitted to ſtand in the Place of the prior Bond-Creditors, and the Aſſets ſo marſhalled, that all might receive a Satisfaction as far as the Aſſets will extend.

And agreeable to this Opinion 22 *Feb.* 1716. the Court decreed, that the Fee-Farm Rents ſhould be ſold for the Benefit of the Bond-Creditors, and that the Truſtees ſhould all join in any Conveyance to be made for that Purpoſe.

DE

Termino Paſch.

3 Geo. 1. In B. R.

Reeves ver. *Trindle* alias *Trundle.*

Caſe 142.

Where the Court quaſhes all Proceedings on a Writ of Appeal for Murder, Appellant may be admitted to proſecute his Appeal by Bill againſt Appellee *in Cuſtod' mar'.*

AN Appeal of Murder was brought by the Plaintiff, as Brother and Heir of *Gerard Reeves*, by Writ againſt *William Trundle*, returnable in the King's Bench *a die Paſch. in quind' dies*, and teſted 22 *Martii*; and on the firſt Day of the Term, the Plaintiff being an Infant was admitted by his Guardian; and becauſe the Sheriff of *Suſſex* did not return his Writ, nor had the Body of the Appellee in Court, a Rule was granted againſt him to make a Return of his Writ, and on the next Day, (*viz.*) the ſecond Day of the Term, a *Habeas Corpus* was granted by Rule of Court to have the Priſoner *cum cauſa capt' & detention'* returnable *die Martis prox' poſt menſem Paſch.* and upon the Day of the Return of the *Habeas Corpus*, the Priſoner was brought into Court, and the Writ of Appeal and *Habeas Corpus* with the Returns to them, were delivered into Court by the Sheriff and read; and becauſe the Return to the Writ of Appeal was *Paratum habeo*, which referred to the firſt Day of the Term when the Writ was returnable, though the Priſoner was brought into Court upon the *Habeas Corpus die Mart' poſt menſem Paſch.* the Court directed that the Priſoner ſhould be brought to the Bar again by Rule two Days after, and in the mean Time the Court would conſider whether it would not be proper to return on the Writ of Appeal, *languidus in priſonâ*, and to have a *Habeas Corpus licet languidus* returnable on a Day appointed by Rule of Court, to bring the Priſoner

to the Bar again; but on Conſideration it was thought properer that on the Writ of Appeal the Return ſhould be *Paratum habeo, &c.* for the whole Term is but one Day in Law, and therefore when the Priſoner is brought into Court by the Sheriff, that has relation to the Day of the Return; and tho' a *Habeas Corpus* was granted, upon which he was brought into Court, yet that was not any regular Proceſs in the Action upon which the Appellee was brought into Court, for when he appeared he appeared on the Writ of Appeal.

And a Precedent was cited — *Annæ*, when *Holt* was Chief Juſtice, where the Proceedings were in the ſame Manner, *viz.* The Writ was returnable the firſt Day of the Term, and the Priſoner not being then brought into Court, a *Habeas Corpus* was granted for a Day ſubſequent, and on the Return of that, the Priſoner came into Court, and the Sheriff returned to the Writ of Appeal *Parat' habeo* as here, and then the Priſoner was arraigned; and the ſame Manner of Proceeding was now approved of by the Court, and the Priſoner being brought to the Bar was arraigned in *French* on the Writ of Appeal.

The Defendant by his Counſel demanded *Oyer* of the Writ and the Return, and had Time given him by Agreement of the Party, to conſider of his Plea till the laſt Day of the Term.

On the laſt Day of the Term the Priſoner was at the Bar, and the Appellant and his Guardian being called to appear in Court, the Priſoner pleaded in Abatement of the Writ, that his Addition of Degree or Myſtery was omitted; and having alſo demanded *Oyer* of the *Habeas Corpus* and the Return demurred to the Count, and pleaded over to the Felony.

But this ſeems to be improper, for the *Habeas Corpus* was not any Proceſs in the Action, neither had the Appellant made any Count, for the Defendant was only arraigned.

But becauſe there was that Miſpriſion in the Writ of Appeal, in which the Appellee was named *William Trindel* alias *Trundel de F. in Com' Kent*, without any Addition for his State,

Degree or Myſtery, it was prayed that the Writ and the Proceedings thereon might be quaſhed, and that the Defendant who was before committed to the *Marſhalſea*, might be now charged by Bill as *in Cuſtod' Mar' B. R.* for by the Statute 1 *H.* 5. *c.* 5. in Writs Original, Appeals and Indictments, there muſt be given to the Name of the Defendant the Addition of his State, Degree or Myſtery, and the Town or Place and County where reſident; and if any be outlawed when ſuch Addition is omitted, the Outlawry ſhall be void, and the Proceſs before Outlawry ſhall be abated on the Exception of the Party; and therefore where ſuch Omiſſion appears to the Court, and the Party takes Exception for want of ſuch Addition, the Court may *ex Officio* quaſh and abate the Proceſs where ſuch Omiſſion is. And here the Court quaſhed all Proceedings on the Writ of Appeal by Rule.

And afterwards the Appellant was admitted by Guardian to proſecute his Appeal by Bill againſt the Appellee *in Cuſtod' Mar'*, and the Appellee was arraigned in *French per* Bill, and the Defendant had Time allowed him to conſider of his Plea till the 2d Day of the next Term, *tunc pro nunc*, for there could be no Imparlance.

And this Proceeding ſeems to be warranted by former Caſes, for an Appeal may be purſued by Writ or by Bill in the King's Bench. *Stamf. Pl. Co.* 646. *b.* *H. P. C.* 179. 2 *Inſt.* 420. *Stat.* 3 *H.* 7. And therefore if it be commenced by Writ, but the Proceedings on the Writ are annulled within a Year, and the Party be in the Cuſtody of the Marſhal of the King's Bench, the Appellant may afterwards proceed againſt him by Bill; and ſo was the Caſe between *Wales* and *Brains*, where the Appeal was by Writ directed to the Warden of the Cinque Ports, returnable in the King's Bench, againſt the Appellee, for a Murder committed in the Cinque Ports, and therefore it was directed to the Warden, and not to the Sheriff; the Writ was quaſhed, and the Appellant proſecuted the Appellee by Bill, as in the Cuſtody of the Marſhal; upon which Bill he was tried and hanged. *Cro. Eliz.* 6. *Yelv.* 13. *Co. Ent.* 59. So where an Appellee was arraigned upon Bill before the Juſtices of

Gaol-

Gaol-Delivery and removed here, the ſame Proceedings being irregular were quaſhed, and the Priſoner was arrigned *de novo* by Bill *in Cuſtod' Mar', Paſch.* 8 *Annæ, B. R. Smith* verſus *Bowen*, vide *Armſtrong* verſus *Liſle*, 1 *Salk.* — and though it was denied when there was a Declaration againſt the Appellee before the Juſtices of Gaol-Delivery, yet then it was agreed it might have been ſo, if they had not declared. 2 *Roll.* 478. So in *Holland's* Caſe, *Cro. Eliz.* 605. where it was denied, it was chiefly inſiſted on as the Reaſon, for that the Appellee was not in the Cuſtody of the Marſhal, and if there is not a Declaration by Bill againſt him cannot be.

Caſe 143. ## *Huſſey* verſus *Huſſey & al'.* In C. B.

Plea in Abatement held bad and repugnant, where it ſays that there are two Perſons *in Com' Devon'* of the ſame Name without Diſtinction.

QUare *Impedit* againſt *John Huſſey* and *John Bagwell*, Clerk for the Church of *D.* in *Devonſhire*: The Defendant *Bagwell* pleaded in Abatement, that in the County of *Devon*, there were two Perſons named *John Bagwell*, Sen. Clerk, and *John Bagwell*, Jun. Clerk, and that there is no Diſtinction made; and by the Affidavit according to 4 & 5 *Ann. c.* 16. *John Bagwell* of *A.* in the County of *Cornwall*, Clerk, maketh Oath that he hath a Son *John Bagwell* of *D.* Clerk, *&c.*

And it was now moved, that this Plea ſhould be rejected as frivolous, for by the Statute 4 & 5 *Ann.* 16. Dilatory Pleas ſhall not be received in any Court of Record, unleſs the Defendant by Affidavit ſhew the Truth thereof, or ſhew ſome probable Matter to the Court to induce them to believe that the Fact of ſuch Plea is True; here the Fact of the Plea is, that there are two Perſons in the County of *Devon* named *John Bagwell*, Clerks, but the Affidavit only ſays, that *John Bagwell*, Clerk, hath a Son named *John Bagwell*, Clerk, but the Father is named of *A.* in the County of *Cornwall*, and it does not appear that he was of *Devonſhire*, but only that the Son is there.

Secondly, This Plea is not pleadable in this Action, for there need not be a Diſtinction of Names but in Actions where Proceſs of Outlawry lies, or in Aſſiſe where an Attachment goes againſt the Defendant, and the Recognitors appear the firſt Day of the Return of the Writ, and the Defendant, who pleads that there is no Diſtinction of the Name given him, pleads alſo to the Aſſiſe, and therefore there is no Delay.

But where the Action gives ſuch a Deſcription of the Defendant as diſtinguiſhes him from all others of the ſame Name, there is no need of any Diſtinction of Senior or Junior, as in Debt upon a Bond; for the Defendant is diſtinguiſhed by the Execution of the Deed, and if he did not execute it, he may plead *Non eſt factum.* *R.* 9 *H.* 7. 21. *b.*

So in Dower, or *Præcipe quod reddat*, there is no need of the Diſtinction, for the Summons muſt be of the Tenant of the Land, and if another be ſummoned he may diſclaim. *L.* 5 *Ed.* 4. 25. *a.*

So here the Summons is only againſt the Diſturber or Clerk inſtituted to the Church, and if he be not truly ſummoned, the Judgment upon the Grand Diſtreſs will be avoided. *Searle* ver. *Long*, *Mod. Rep.* 248. If he be ſummoned he receives no Prejudice, and he is ſufficiently deſcribed by his being the Diſturber.

So there is no need of any Diſtinction when the Defendant himſelf appears, as here. 39 *H.* 6. 46. 27 *H.* 8. 1.

But upon this Matter the Court gave no Opinion, but for want of a proper Affidavit the Plea was rejected; and the Chief Juſtice ſaid that the Plea was in another Reſpect repugnant, becauſe it ſays, two Perſons in the County of *Devon* were named *John Bagwell* Sen. and *John Bagwell* Jun.

N. B. There is no need of any Diſtinction but where there is Father and Son of the ſame Name. 44 *Ed.* 3. 34. *b.* 33 *H.* 6. 33, 44. 39 *H.* 6. 46. *a.*

Anonymus.

Caſe 144.

Words, *That I never forged any Man's Hand, but you are a forging Rogue*, when ſpoke of an Attorney, held actionable.

ACTION for Words, (*viz.*) *I never forged any Man's Hand, but you are a forging Rogue.*

And it was moved in Arreſt of Judgment, that the Words were not actionable though ſpoke of an Attorney, and a Verdict found for the Plaintiff.

For to ſay *you have forged my Hand* without any Thing more is not actionable; by *Gawdy* and *Wray*, 2 *Leon.* 231. So if a Man ſays you are a Forger, without ſaying what you forged.

And in all Caſes where the Words do not ſhew an Accuſation for ſuch a Forgery, that an Indictment or Information might be maintained thereon if the Words were true, yet an Action will not lie.

And here when it is ſaid, *I never forged any Man's Hand*, admitting it to be tantamount to ſaying *you forged a Man's Hand*, yet it does not appear that he forged it to any Writing for which an Indictment or Information would be maintainable, and an Indictment for forging a Man's Hand without any Thing more is not maintainable.

If then the Words are not of themſelves actionable, neither will they be actionable though ſpoke of an Attorney, for there is no *colloquium* concerning his Profeſſion alledged, and therefore *Hob.* 305. *Powel* verſus *Wynde*, theſe Words ſpoken of an attorney are not actionable, (*viz.*) Mr. *H.* hath found Forgery againſt him, and can prove it, for no Certainty appears of what this Forgery was.

But it was reſolved by the whole Court, that the Words were actionable, for by the common Intendment of the Hearers it would be taken as a great Reproach and Defamation, to ſay of one who was an Attorney that he forged another Man's Hand, and therefore is a forging Rogue; and this is the Import of the preſent Words, for when the Defendant ſays *I never forged any Man's Hand, but you are a forging Rogue*, the Antitheſis by common Intendment and in the Apprehenſion of the Hearers amounts to a Charge that the Plaintiff did what he denied of himſelf, and theſe Words ſpoken of another import Scandal and Defamation on him; and the Plaintiff had his Judgment.

DE
Term. Sanct. Mich.
4 Geo. 1. In C. B.

Caſe 145.

Field ver. *Workhouſe.* In C. B.

Sheriff cannot take Bail-Bond upon an Attachment for a Contempt.

DEBT upon Bond. The Defendant pleaded *Stat.* 23 *H.* 6. which makes all Bonds, *&c.* taken by a Sheriff *colore officii* void, and ſaid, that an Attachment iſſued out of this Court againſt *A.* for a Contempt, and upon that the Sheriff took this Bond from the Defendant *colore officii* for the Appearance of *A.* To this the Plaintiff demurred.

And the Queſtion was, whether the Sheriff could take a Bail-Bond upon an Attachment for a Contempt? And it was reſolved that he could not; and *King* Chief Juſtice delivered the Opinion of the Court, and ſaid, that upon an Attachment of Privilege, Attachment upon a Prohibition, Attachment in Proceſs upon a penal Statute, the Sheriff might take Bail; but not upon an Attachment for a Contempt, for that is not within the Words or the Intent of the Statute.

Judgment for Defendant.

Powell ver. *Bull & al'.* In C. B.

Caſe 146.

IN an Action of Treſpaſs, upon Not guilty pleaded, a Caſe was ſtated before Lord Chief Juſtice *King*, at the Aſſizes at *Chelmsford* in *Eſſex*, and afterwards argued in Court, by which it was ſtated, that the Plaintiff was Rector of *St. Botolph*'s in *Colcheſter*, That by the Statute 9 & 10 *W.* 3. intitled, *An Act for erecting Hoſpitals and Workhouſes within the Town of* Colcheſter *in the County of* Eſſex, *for the better maintaining the Poor thereof*, it was enacted, That after 24 *June* 1698. there ſhall be a Corporation in the Town of *Colcheſter*, conſiſting of the Mayor and Aldermen, and forty-eight other Perſons to be choſen out of the four Wards in the Town, (*viz.*) twelve out of each Ward, by Votes of Inhabitants paying or rated at 1 *d. per* Week, or more, towards the Poors Rate, according to the uſual Way of rating in the ſaid Town. That they ſhall hold Courts or Aſſemblies on the ſecond *Tueſday* of every ſecond Month, for the Ends in the ſaid Act mentioned. That the Corporation at every ſuch Court may make Rules, &c. for the governing the ſaid Corporation and the Poor of the ſaid Town, to erect Hoſpitals, Workhouſes, to provide Neceſſaries to ſet on Work the Poor, &c. ſend to the Houſe of Correction, &c. put out Apprentices, &c. That for the better carrying on ſo charitable a Work, the ſaid Courts may aſcertain what Sum is needful for the Maintenance and Imployment of the Poor, ſo as it does not exceed what was paid to the Poor in any of the three laſt Years; and ſo as the Poor of all the Pariſhes in the ſaid Town unable to work be provided for thereout, to the Intent no other Levy or Aſſeſſment be made for the Poor of the ſaid Town; And may proportion out, rate and aſſeſs the ſaid Sum or Sums of Money on the reſpective Inhabitants or Occupiers of Lands, Houſes, Tenements, Tithes impropriate, Appropriation of Tithes, and all Perſons uſing Stocks and perſonal Eſtates in the ſaid Town or Liberty of the ſame, in equal Proportion, according to their reſpective Value, to be levied by Diſtreſs and Sale, &c.

The Word *Tenement*, mentioned in 9 & 10 *W.* 3. for the Workhouſe Corporation of *Colcheſter*, extends to a Rectory.

That the Plaintiff was aſſeſſed according to the ſaid Statute for his Tithes, Parcel of the ſaid Rectory, and that by a Warrant, *&c.* the Defendant took the Goods in the Declaration for ſuch ſaid Aſſeſſment; and if the Tithes, Parcel of the ſaid Rectory, might be aſſeſſed, was the Queſtion.

And it was agreed, that an Eccleſiaſtical Perſon was bound by Acts of Parliament, if the Words extend to him, and therefore he is chargeable by 43 *Eliz. c.* 2. as an Inhabitant; for the Statute ſays, Every Inhabitant, Parſon, Vicar or other, *&c.* So to ſend his Teams to the Highway. 1 *Vent.* 273. 2 *Lev.* 139. *Lut.* 1563. So in 2 *Inſt.* it was agreed, that an Eccleſiaſtical Perſon would be within 27 *H.* 8. 24. by which it was enacted, that Purveyors might provide Victuals, *&c.* within Liberties, or without, if he had not been within the Proviſo of the ſame Statute, (*viz.*) Provided that the Statutes in ſuch Caſes provided be obſerved; and therefore Eccleſiaſtical Perſons being exempt from a Purveyance by *Mag. Charta*, 9 *H.* 3. 21. and other Acts, are within the Proviſo, otherwiſe they would have been liable to the Purveyors. 2 *Inſt.* 3. And the ſole Matter inſiſted on was, that Tithes were not liable to be aſſeſſed within any Words of this Act; and it was inſiſted, that the Plaintiff could not be charged to the Poors Rate of *Colcheſter*, if he was not within the Words of this new Act, though he was chargeable by the Statute 43 *El. c.* 2. in which he was expreſly named; but by the Words of this Act the Plaintiff was not ratable to the Poor for his Tithes; perhaps, as Inhabitant, he might be aſſeſſed for his perſonal Eſtate; but this Act, being introductive of a new Law, ſhall be taken ſtrictly, and therefore if the Words do not expreſly deſcribe him, they ſhall not be extended to him. A Parſon was not chargeable to Temporal Charges by the Common Law; and therefore an Act of Parliament, if the Words and Intent are not plain and manifeſt, ſhall not extend to charge him; but this Act only charges the Occupiers of Lands, Houſes, Tenements, Tithes impropriate, and Appropriation of Tithes; the Plaintiff cannot be charged as an Occupier of Tithes impropriate, for theſe Words mean only the Patentees of the King, where Tithes are in Lay Perſons;

ſons; and Appropriation of Tithes was where Tithes were appropriated to a Religious Houſe; or perhaps a Portion of Tithes in another Pariſh, which belonged to the Parſon of St. *Botolph*'s, might be aſſeſſed in that Pariſh, from whence the Portion of the Tithes iſſued or aroſe, but could not be charged here in the Pariſh of St. *Botolph*; to which the Court agreed. Then the Words *Houſes and Lands* do not extend to Tithes, nor the Word *Tenement*, which import only what may be held by ſome Service.

To which it was anſwered and reſolved by the whole Court, that the Word *Tenement* extends to a Rectory, for that may be held in *Frankalmoine*, and the Word *Tenement* extends not only to that which may be held by ſome Service, but comprehends all that a Man may be ſeiſed of *ut de libero Tenemento*, *Co. Lit.* 6. *a.* and that a Rector has the Frank-tenement of his Rectory appears by *Co. Lit. Sect.* 647.

Judgment for Defendant.

Upton and *Pinfold & ux'.* In C. B. *Intr.* *Trin.* 3 *Geo. Rot.* 850.

Caſe 147.

IN an Action upon the Caſe for Words, the Plaintiff declared that the Wife of the Defendant 20 *Sept.* 3 *Geo. eadem Jana adtunc & ibidem colloquium haben' cum quodam Johan' Auſtin ſervo quer' dixit de quer' verba ſequen'*; you (*præd' Auſtin innuendo*) are a great Rogue and Raſcal, as great a Rogue, as your Maſter (*præd' quer' Magiſt' dict' Johan' Auſtin adtunc exiſten' innuendo*) who (*præd' quer' innuendo*) is a Rogue, for that your Maſter and Dame (*præd' quer' & A. uxor' ejus Magiſtrum & Magiſtram ipſius Johan' Auſtin innuendo*) ſtole Ruggs and Quilts. Upon Demurrer to the Declaration it was objected,

An Allegation in an Action for Words, that *præd' Jana adtunc & ibidem colloquium habens cum ſervo quer'*, is ſufficient, for the *adtunc* refers to the whole Clauſe.

Firſt, That by thoſe Words *non conſtat de perſona*, for the *Colloquium* is alledged with *John Auſtin, ſervo quer'*, and perhaps he was his Servant at the Time of the Declaration, but it does not appear that he was his Servant at the Time of the Diſcourſe;

courſe; for it is not ſaid *adtunc ſervo*, and then the *Innuendo Quer' adtunc Magiſt'* is not ſufficient, for an *Innuendo* may explain, but can never enlarge the Words.

Secondly, *De quer'* is not a ſufficient Allegation (without alledging a *Colloquium de quer'*) that the Words were intended of him; and therefore in an Action for Words alledged to be ſpoken of a Plaintiff to a Wife, (*viz.*) *Thy Husband and his Maſter* (*innuendo* the Plaintiff) *ſtole my Wood*, it was reſolved it was not maintainable without an expreſs Averment, that the Plaintiff was Maſter or Husband. 1 *Rol.* 80. *pl.* 4. 2 *Bul.* 81. *Mo.* 63. *Dal.* 66. So if Words were ſpoke to a Father or Mother of a Plaintiff, *Thy Son* (*innuendo* the Plaintiff) *ſtole*, *&c.* 2 *Cro.* 635. 1 *Roll.* 84. *pl.* 4. *Cro. Car.* 442. *per Croke* and *Whitlock*, *Cro. Car.* 177. and there two Judgments cited by *Croke* accordingly; but *Hyde* C. J. and *Jones* doubted, and therefore it was adjourned. So if *Colloquium de quer'* was added, it was doubted of, *Cro. Car.* 420. 1 *Rol.* 84. *pl.* 1. So where the Words were, *Thy Father* (*innuendo* the Plaintiff) if it does not appear that the Son was preſent (though a Converſation concerning the Father is alledged). 1 *Rol.* 84. *pl.* 9. *Sed non allocatur*; for the Allegation, *Præd' Janâ adtunc & ibidem colloquium habente cum Johanne Auſtin ſervo quer'* is ſufficient; for the *adtunc* refers to the whole Clauſe, and imports, that he was then his Servant when the Diſcourſe was between them.

Thirdly, It was objected, that here the Words themſelves are uncertain; for it does not charge him directly with Felony, but it is only given as a Reaſon why ſhe called him Rogue, *for that he ſtole*, *&c.* and does not ſay *they were the Goods of a Stranger.* So the Words, *You are as bad as thy Wife when ſhe ſtole my Cuſhion*, were adjudged not actionable, without an Averment that the Felony was committed. 2 *Cro.* 331. 1 *Rol.* 78. *pl.* 1. *Sed non allocatur*; for there the Words were *when ſhe ſtole*, and without an Averment that the Goods were taken away there does not appear to be any Charge; and therefore Judgment for the Plaintiff.

4

Parry

Parry ver. *Berry.* In C. B.

Caſe 148.

A By-Law to reſtrain Perſons from exerciſing a Trade, not being free of a Borough, held void.

TRESPASS. The Defendant pleads, that by Letters Patent of 1 *Jac.* 1. the Inhabitants of *Chippen-Cambden* were incorporated by the Name of the Bailiffs and Burgeſſes; that there were 12 Capital Burgeſſes and 12 Common Burgeſſes, and that the Bailiff and Capital Burgeſſes had Power to make By-Laws; that the 8th of *March* 1 *Jac.* 1. the Bailiffs and Burgeſſes made a By-Law, that no Perſon inhabiting out of the Borough, or not free of the Borough, ſhould ſet forth Goods to Sale, except Victuals on Market-Days, in any Market within the Borough, *&c.* that the Plaintiff not being free of the Borough kept a Shop and ſet forth Goods, not being Victuals, in the Market of the Borough on a Market-Day; and therefore, for the Penalty of the By-Law the Defendant, being an Officer within the Borough, took the Plaintiff's Goods in the Declaration mentioned. Upon Demurrer it was reſolved, that this By-Law was void; for without a Cuſtom ſuch a By-Law, to reſtrain Perſons not being free of the Borough from exerciſing a Trade, cannot be maintained; and it was ſo ruled in *Norris* verſus *Staples*, *Hob.* 211. *Mod.* 869. *Hutt.* 5. *Noy* 19. 1 *Brownl.* 49. 1 *Ro. Rep.* in *Waggoner*'s Caſe. 8 *Co.* 125. 2 *Roll.* 202. *Cart.* 68, 114. and therefore this By-Law by a Corporation is void. But this exceeds all By-Laws made in *London* or elſewhere, for it not only excludes Perſons from uſing their Trade within the Borough, but alſo from reſorting to the Market.

Secondly, It was made by the Bailiffs and all the Burgeſſes, where it ought to be by the Capital Burgeſſes only.

Judgment for the Plaintiff.

Caſe 149. *Saunders, qui tam,* ver. *Stevens.* In C. B.

A Term for Years held a Qualification for a Commiſſioner of the Land-Tax.

DEBT for 200 *l.* The Plaintiff declared, that by the Statute 1 *Geo.* — intitled, *An Act for rectifying Miſtakes in the Names of the Commiſſioners of the Land-Tax for the Year* 1714, *&c.* the ſeveral Perſons after named were authoriſed to put in Execution the Act made in 12 *Anne*, for granting an Aid, *&c.* by a Land-Tax for the Service of the Year 1714. as Commiſſioners for the Land-Tax, in the ſame Manner as if enabled or named Commiſſioners by the ſaid Act, being nevertheleſs ſubject and liable to the Qualifications and Penalties in the ſaid Act appointed and required.

That by the ſaid Act 1 *Geo.* the Defendant was named a Commiſſioner for the County of *Surry*; that by the Statute 12 *Annæ, fo.* 156. it was provided and enacted, that no Perſon ſhall be capable of acting as a Commiſſioner in the Execution of this Act in or for any County at large within *England* or *Wales*, (*Merioneth, Cardigan, Carmarthen, Glamorgan, Montgomery, Pembroke* and *Monmouth* excepted) or in or for any of the Ridings of the County of *York*, unleſs ſuch Perſons be ſeiſed of Lands, Tenements or Hereditaments which were taxed or did pay in the ſame County or Riding for the Value of 100 *l. per annum*, or more, of his own Eſtate, by Virtue of a preceding Act 12 *Annæ*, for granting an Aid, *&c.* for the Year 1713.

That the Defendant acted as a Commiſſioner for the County of *Surry*, by Signing Duplicates, *&c.* not having Lands or Tenements which were taxed to the Value of 100 *l. per annum de proprio ſtatu*, according to the precedent Statute of 12 *Annæ*, for the Service of the Year 1713.

After *Nil debet* pleaded at the Trial it appeared upon the Evidence, that the Defendant had not Lands of Freehold more than 10 *l. per annum*, but was poſſeſſed of Lands of 100 *l. per annum* for the Remainder of a Term of thirty Years, which were taxed to the Value of 100 *l. per annum*

the precedent Year; if he was qualified to be a Commiſſioner was the Queſtion; and if he was not, whether this Action was diſcharged by the Act of General Pardon 3 *Geo.*

As to the firſt Queſtion it was urged, that this Statute requires that every one who acts as a Commiſſioner ſhould be ſeiſed of Lands or Tenements of 100 *l. per annum*; therefore a Term for Years does not make a good Qualification, the Word *ſeiſed* imports a Freehold at leaſt; and he who has but a Term for Years is not ſaid to be ſeiſed of it, but only poſſeſſed. *Co. Lit.* 17. And therefore, where the Statute of 27 *H.* 8. *c.* 10. ſaith, that where any Perſon, *&c.* ſtands or is ſeiſed, or ſhall hereafter be ſeiſed of any Lands, Tenements or other Hereditaments, to the Uſe, Confidence or Truſt of another, *&c.* the Perſon who hath the Uſe ſhall be deemed to be in the Seiſin or Poſſeſſion of the ſame Lands and of the ſame Eſtate which he had in the Uſe.

If a Term of Years be aſſigned to *A.* to the Uſe of *B.* this ſhall be a Truſt for *B.* and not an Uſe executed; for *A.* is not ſeiſed, and therefore it cannot be an Execution of an Uſe by the Force of the Statute 27 *H.* 8. and ſo it was reſolved by all the Juſtices, *Dyer* 369. *a.* which is cited and allowed *Mo.* 614. So where by the Statute 8 *H.* 6. *c.* 9. it is enacted, that, upon Complaint of any Forcible Entry or Detainer, the Juſtices of the Peace ſhall cauſe to be reſeiſed the Lands ſo entred upon or holden.

If a Termor be ouſted, he is not within the Statute 8 *H.* 6. for a Juſtice of Peace cannot cauſe him to be reſeiſed who never was ſeiſed, *Mo.* 614. and therefore a Remedy was given for Copyholders and Leſſees, *&c.* by 21 *Jac.* I. *c.* 15.

But in *Mich.* 4 *Geo.* I. the Court gave Judgment unanimouſly for the Defendant; and held, that he had a ſufficient Qualification to act as a Commiſſioner; but they alſo held, that ſuppoſing him not qualified, the General Act of Pardon would not have excuſed him.

Walker

Caſe 150.

Walker ver. *Holyday.* In C. B.

Where Tenant in Common declares againſt another as Receiver, it ought to be ſhewn by whoſe Hands he receives it, otherwiſe he ought to be charged as Bailiff.

AN Action of Account was brought againſt the Defendant as Bailiff, and alſo as Receiver for the eighth Part of the Profits of Lands which the Plaintiff and Defendant and others held in Common, and which the Defendant had received, and for ſo much Money which the Defendant had received to his own Uſe. As to the Account againſt him as Bailiff, the Defendant entered into the Account; as to the Account againſt him as Receiver, the Defendant demurred, and ſhewed Cauſe, that the Plaintiff did not ſay by whoſe Hands he received it. It was urged, that this Exception was now taken away by 4 & 5 *Annæ, c.* 16. by which one Jointenant or Tenant in Common may have an Account againſt the other for receiving more than comes to his Proportion, *&c.* and therefore when it appears here by the Declaration, that the Plaintiff and Defendant are Tenants in Common, it is ſufficient, without ſaying by whoſe Hands the Profits were received. *Sed non allocatur*; for *per Cur'*, by the Statute one Jointenant or Tenant in Common cannot charge the other but as Bailiff; for by the Common Law an Action of Account lay not by one Tenant in Common againſt his Companion, but where there was an expreſs Authority given to take his Part of the Profits, and then he was chargeable as Bailiff, but now by this Statute he may be charged. If he receives his Companion's Share of the Profits, though it be without his Privity, yet he ought to be charged as Bailiff by the expreſs Words of the Statute, and cannot be charged as Receiver; and therefore, as the Declaration charges him as Bailiff, and alſo as Receiver in declaring againſt him as Receiver, it ought to be ſhewn by whoſe Hands he received it, as it ought by the Common Law; and this being aſſigned for Cauſe of Demurrer, Judgment was given for the Defendant.

I

DE
Termino Paſch.
4 Geo. 1. In C. B.

Anonymus.

Caſe 151.

In an Action founded upon an Injury, every Thing that ſhews that the Defendant did what he lawfully might do, may be given in Evidence upon Not guilty

IN an Action on the Caſe, by which the Plaintiff declared that he was ſeiſed in Fee of an antient Meſſuage in *London*, in which there had been Time out of Mind an antient Light, and that the Defendant by erecting a new Houſe contiguous to it, had ſtop'd up the ſame to his Damage, *&c.*

The Defendant pleaded Not guilty, and upon the Trial before *King* C. J. at the Sittings after laſt Term it was given in Evidence, That by the Cuſtom of *London* every Citizen upon an antient Foundation may build a Houſe as high as he pleaſes; that the Defendant had an antient Houſe contiguous to the Plaintiff's Houſe, and rebuilt it upon the antient Foundation and of the ſame Dimenſions, and that he ſtopped up the Plaintiff's Window, which before was higher than the Defendant's Houſe; whereupon the Defendant had a Verdict.

And Serjeant *Darnel* moved for a new Trial.

Firſt, Becauſe the Cuſtom is not good.

Secondly, If the Cuſtom be good, it ought not to be given in Evidence upon Not guilty.

As to the Cuſtom he inſiſted, that it was unreaſonable by a new Building to ſtop another Perſon's Window, for which there cannot be any good Reaſon given, and although ſuch Cuſtom be mentioned by *Calthrop* —— yet the Reaſons there given for it are weak. *Sed non allocatur.* For the Cuſtom there was not diſallowed, and it was upon good Reaſons, for by the Common Law every one may make what Erection he pleaſes upon his own Soil; then if one builds an Houſe upon his own Soil, another may erect a Meſſuage upon his Soil adjoining to it, and ſtop all his Windows which are towards his Soil. 1 *Syd.* And in a City where there are divers antient Meſſuages it is reaſonable that if one raiſes his Houſe higher than his Neighbours, that the other may at any Time afterwards raiſe his Houſe as high as he pleaſes, and the Advantage or Diſadvantage is equal to one as the other; then as to the Pleading of ſuch General Cuſtom, the Chief Juſtice ſaid that Evidence upon the General Iſſue had of late been allowed in many Caſes, which in former Times would not have been admitted, and therefore in an Action upon the Caſe, which is founded upon an Injury done by the Defendant to the Plaintiff's Damage, every Thing which ſhews that the Defendant did what he lawfully might do, may be given in Evidence upon Not guilty pleaded; for that proves that he had done no Injury; and a new Trial was denied for theſe Reaſons.

Caſe 152. ## *Marriott* verſus *Shaw & al'. Intr. Mich.* 4 *Geo. Rot.* 400 *or* 343.

A Conviction *ſuper præmiſſis* for three Penalties of five Pounds each, for killing three Hares, where it appears it was done the ſame Time, is bad, for the Statute does not give five Pounds for every Hare, it being but one Offence.

REplevin was brought by *John* and *Richard Marriott, quare ceperunt bona & catalla ipſor' Richardi & Johannis (viz.) unum dolium piperis Jamaici, quatuor al' Dolia & un' al' parcell' ſebi ad Valent', &c. apud Mansfield, &c.* The Defendant *Rowland Shaw ut Conſtabularius de Mansfield in Com' Nott' præd' bene advocat,* and the other Defendants *ut ſervien' ipſius Rowlandi bene cogn', &c. quia dicit quod* 17 *Oct'* 2 *Geo. apud*

Mansfield præd' William Toone ven' coram J. Digby Ar' un' Juſt' Domini Regis ad Pacem, &c. in Com' præd' & dedit Information' præfat' Juſt' quod præd' Richardus Marriott Tallow Chandler *infra tres Menſes ult' (viz.)* 15 *Oct'* 2 *Geo. adtunc exiſtens perſona per leges Angliæ minimè qualificat' ſeu allocat' ad cuſtodiend' aliquem canem leporar' ad occidend' & deſtruend' feras, &c. apud E. in Com' præd' un' canem lepor' ad occidend' & deſtruend' feras, & apud C. in Com' præd' un' al' canem leporar' ad occidendum & deſtuenrdum feras illicite cuſtodivit contr' form' Stat' in hujuſmodi Caſu edit' & proviſ', quodq' præd' Richardus Marriott apud E. & C. præd' eodem* 15 *die Oct' uſus fuit canibus præd' & cum eiſdem canibus un' leporem apud E. præd' & duos lepores apud C. præd' eodem* 15 *Oct' illicite interfecit contr' form' Stat' in hujuſmodi caſu edit' & proviſ', & ſuperinde poſtea, (viz.) præd'* 17 *Oct'* 2 *Geo. quidam C. Palmer & C. D. exiſten' teſtes credibiles, &c. depoſuer' quod præd' R. Marriott* 15 *Oct' tunc exiſtens perſona minimè qualificat' un' canem lepor' apud E. & un' al' canem lepor' apud C. illicite cuſtodivit contra form' Stat', quodq' præd' R. Marriott dicto* 15 *die Oct' un' leporem apud E. præd' & duos lepores apud C. præd' illicite interfecit, &c. ſuper quo præd' R. Marriott poſt ſummonitionem, &c. coram præfat' Juſt' comperuit, &c. & quia, &c. præfat' Juſt' conſtitit quod præfat' R. Marriott fuit culpabilis, &c. ideo cons' quod præd' R. Marriott convict' eſt de præmiſſis, &c. Record' cujus Convictionis Dominus Rex in Cur' Domini Regis coram ipſo Rege nuper certis de cauſis mitti fecit, prout per Record' ill', &c.*

And the Defendants *ulterius dicunt quod* 7 *Jan.* 2 *Geo. præd' J. Digby tunc Juſt', &c. de & ſuper præmiſſ' fecit quoddam Warrant' in ſcript' Conſtabular' de Mansfield direct' ad levand' de bonis & Catallis præd' R. Marriott* 25 *l. per ipſum ut præfert' forisfact', virtute cujus Warranti* 9 *Jan'* 2 *Geo. præd' Rolandus Shaw tunc Conſtabular' & præd' Chr' & Jos' ad requiſition' & in auxilium præd' Rowlandi ceper' bona & catalla, &c. ad levand' de medietate præd' R. Marriott* 15 *l. de præd'* 25 *l. pro tribus Offenſis, viz. interfectione trium leporum præd', de præd' quinque offenſis unde præd' R. Marriott convict' fuit.*

The Plaintiff in Bar to the Avowry ſays, *quod dicto* 15 *Oct' & ante & continue poſtea, &c. idem R. Marriott ſeiſit' fuit, &c.*

&c. ut de feodo in ſuo proprio jure de & in terris & tenementis in D. in com' præd' clari annui valoris 100 *l. per annum & ultra, ac eâ ratione tempore quo, &c. fuit perſona per leges hujus Regni qualificat', &c. unde præd' J. Digby ante conviction' præd', &c. notitiam habuit, & quod convictio illa omnino vacua in lege exiſt', & hoc, &c.*

The Defendants in Reply *dicunt quod præd' J. Digby non habuit notitiam, &c.*

To which it was demurred; becauſe the Defendants traverſe a Matter not alledged, not traverſable, not triable.

The Defendants join in Demurrer.

It was argued by Serjeant *Pengelly* for the Plaintiff, and Serjeant *Cheſhyre* for the Defendants.

And it was inſiſted for the Plaintiff, firſt, That the Defendants ought to juſtify, and not avow, for *Rowland Shaw* took the Goods but as an Officer, and had not any Intereſt in them. 1 *Roll.* 319. *S.* 4. 318. *L.* 45. 320. *L.* 5. 2 *Cro.* 436.

To which it was anſwered, that in the Caſes cited the Defendant could not avow or juſtify, at his Election; but if he juſtifies, he ſhall not have a Return; ſo reſolved 3 *Lev.* 204. And this ſeems to be but Form, which ſhall be aided upon a general Demurrer; as if a Defendant avows, where he ought to make Conuſance, it is but Form. 2 *Cro.* 372. And here an Avowry ſeems more proper; for the Defendant ought to levy by Diſtreſs and Sale, and therefore ought to have a Return, that he may ſell.

But as to this Point the Court determined nothing.

Secondly, That after the Conviction ſhewn the Defendant ſaith, *Record' cujus conviction' Rex nuper ceri' de cauſis coram juſt' de B. R. mitti fecit*, whereby the Conviction was ſuſpended. To which it was anſwered, that the Conviction was 19 *Oct.* 2 *Geo.* the Warrant upon it 7 *Jan.* 2 *Geo.* and the

Declaration was *Mich.* 4 *Geo.* then when the Defendant ſays, *nuper mitti fecit*, this refers to the Time of the Plea, not to the Time between the Warrant and Conviction, which was two Years before; but by 5 *Ann.* 14. a *Certiorari* does not reſtrain Execution but where Security is not given for Payment of Coſts.

Thirdly, That the Conviction does not ſhew five Offences, yet the Warrant ſays, that he ſhall pay 25 *l.* and thereupon the Defendant levied 15 *l. de præd'* 25 *l.* for three Offences *de offenſis præd'*, (*viz.*) *pro interfection' trium leporum præd'*. To which it was anſwered, That the Conviction ſays, that the Juſtice was informed, and the Witneſſes depoſed, *quod R. Marriott* 15 *Oct.* 2 *Geo. apud E. cuſtodivit canem leporar' ad occidend' & deſtruend' feras, quod cuſtodivit apud C. un' al' canem leporar' ad occidend', &c. contra form' ſtat', quod eodem* 15 *Oct' uſus fuit canibus præd' & occidit un' leporem apud E. præd' & duos al' lepores apud C. contra form' ſtat'*. Then the Warrant commands, that they levy 25 *l. ſic ut præfert' forisfact'*, and the Defendant levied 15 *l. de præd'* 25 *l. pro tribus offenſis de offenſis præd'*, (*viz.*) *pro interfection' præd' trium leporum*; and therefore the Conviction has determined that there are five Offences, and then the Conſtable may levy for any of the Offences; for tho' all the Offences are compriſed in the ſame Conviction, it ſhall be a ſeveral Conviction for every Offence, and the Officer may levy for a Part, *tho' not for all*; and if the Juſtice had determined theſe to be five ſeveral Offences, tho' they are not, this is Error in the Juſtice; but the Officer ſhall not be liable for the Miſtake of the Juſtice, where the Thing is within his Juriſdiction.

Fourthly, That the Plaintiffs are Partners, and the Defendant took the Goods of both of them.

To which it was anſwered, that he muſt take the Goods of both to levy out the Moiety of one Partner. 1 *Salk.* 392. *Show.* 173.

As to the Matter of Law, it was inſiſted, that the Plaintiff in Bar to the Avowry ſays, that he had 100 *l. per an-*

num at the Time of the Offence and Conviction, and for that Reaſon was qualified, *&c.* of which the Juſtice had Notice; and if he was qualified, which is now admitted by the Demurrer, then the Juſtice had no Juriſdiction of the Subject Matter; and if the Thing be out of his Juriſdiction, the Officer ſhall not be excuſed, for all the Proceeding is null and void, *& coram non judice.*

To which it was anſwered, that here it was alledged in the Conviction, *quod fuit perſona minimè qualificat'*, and then if he does not alledge his Qualification, and inſiſt upon it at the Time of the Conviction, or when he appeared before the Juſtice, he ſhall not plead it afterwards to maintain his Action againſt the Conſtable.

If a Cauſe in an inferior Court be alledged *infra juriſdiction' Cur'*, though it be out of the Juriſdiction, if the Defendant does not plead to the Juriſdiction he ſhall not have a Prohition afterwards. 1 *Vent.* 88, 181. 1 *Sid.* 464. *Raym.* 189. 2 *Mod.* 271. Nor can it be alledged for Error in Fact. 1 *Vent.* 236. Nor ſhall he have an Action upon the Statute of *W.* 1. 35. 2 *Inſt.* 230. So Treſpaſs lies not againſt the Officer, reſolved 2 *Mod.* 58, 196. tho' Plaintiff pleads, that the Cauſe of Action aroſe out of the Juriſdiction. *Lut.* 935. 1 *Salk.* 281. But Eſcape lies againſt an Officer, though he knew the Matter aroſe out of the Juriſdiction. 7 *Ann. C. B. Higginſon* verſus *Sheif.*

But afterwards the Court gave Judgment for the Plaintiff upon the third Objection, without determining the Matter of Law; for that by the Conviction there is not any Number of Offences alledged, for he is convicted *ſuper præmiſſis*, and it appears that it was only one Offence; for the Statute does not give 5 *l.* for every Hare, and all was done the ſame Day, and ſo was only one Offence.

5

Philips

Philips ver. *Smith.* In the Exchequer-Chamber, 11 *May*, 3 *Geo.*

Caſe 153.

A Writ of Error was brought in the Exchequer-Chamber upon the Statute 27 *Eliz.* on a Judgment in *B. R. Trin.* 2 *Geo. Rot.* 465. in an Action of Debt, in which the Plaintiff declared againſt the Defendant *Ballivum burgi de Ivelcheſter in com' Somerſet pro eo, videlicet, quod cum villa de Ivelcheſter eſt antiqu' burgu', quodque duo burgenſes ejuſdem burgi ad quodlibet Parliament' Domini Regis & anteceſſor' ſuor' Regum & Reginar' Angl' ad veniend' a tempore cujus, &c. electi fuer' ac eligi conſuever' per burgen' & inhabitan' ejuſdem burgi en eâ parte voces & ſuffragia haben', cumque quoddam breve Domini Regis nunc extra Canc' ſuam apud Weſt' in Com' Midd' 17 die Jan' anno Regni ſui primo, gerens dat' eiſdem die & anno, emanâſſet vic' Som' direct' per quod, &c. prout breve, &c. quod quidem breve poſtea, ſcilicet, 26 Jan' primo Geo. apud Ivelcheſter præd' deliberat' fuit cuidam J. T. adtunc vic' Som' præd' exiſten' in formâ juris exequend', Virtute cujus brevis idem vic' poſtea, ſcilicet, dicto 26 Jan' primo Geo. ibidem fecit quoddam præcept' ſuum in ſcript' ſigillo officii ſui vic' ſigillat' ballivo dicti burgi de Ivelcheſter in com' præd' direct', de & pro election' infra burg' ill' duor' burgen' burgi præd' ſecundum formam & effect' præd' brevis, quod quidem precept' poſtea, ſcilicet, dicto 26 Jan' primo Geo. apud Ivelcheſter præd' deliberat' fuit præfat' Tho' Smith tunc ballivo burgi ill' exiſten', cui quidem ballivo execut', &c. Virtute cujus præcepti poſtea, ſcilicet, 2 Feb. 1 Geo. apud Ivelcheſter præd' proceſſ' fuit ad election' duor' burgen' pro eodem burgo de Ivelcheſter ad idem Parliament' veniend' ſecundum formam & effectum brevis præd', & ſuperinde idem E. Philips & quidam J. B. Miles, W. B. Ar' & J. H. Ar' fuer' & ſteter' candidat' ad election', &c. Et pro manifeſtation' election' ill' numerat' capit', Anglice* a Poll, *ſuffragan' ill' de hujuſmodi election' per quoſdam eorum requiſit' exiſten', adtunc & ibidem in ſcript' capta & habita fuit, coram præfat' T. Smith tunc ballivo burgi ill' exiſten', & ipſe idem T. Smith eandem numeration' capit' adtunc & ibidem recepit & habuit, & poſt numeration' capit' ſuffragan' de, in & pro*

Tender, that the Plaintiff was ready to pay what was due for the Copy of a Poll, till the Officer demands ſomething certain, held a good Tender.

pro election' capt' & habit', ac finit', ſcilicet, 10 Feb' primo Geo. apud Ivelcheſter præd' idem E. Philips requiſivit præd' T. Smith ballivum burgi præd' tunc exiſten' ad deliberand' eidem E. Philips copiam numeration' capit', Angl' a Copy of the Poll, *ſuffragan' de eadem election' capt', & adtunc & ibidem parat' fuit & obtulit ad ſolvend' præfat' T. Smith aliquam rationabil' denarior' ſummam pro ſcription' inde quam ipſe proinde requireret, præd' tamen T. Smith ballivus burgi præd' ut præfert' exiſten', cui executio præcept' præd' de election' burgen' ut præfert' adtunc pertinuit, debit' officii ſui ballivi ejuſdem burgi in hac parte ac ſtat' in hujuſmodi caſu edit' & proviſ' minime ponderans, &c. adtunc vel poſtea non deliberavit eidem E. Philips copiam, &c. ſed ill' ei deliberare adtunc & poſtea voluntarie penitus recuſavit, cont' form' ſtat' ill', per quod, &c.*

The Defendant pleaded *Nil debet*, and thereupon Iſſue was joined.

Upon which a *Venire facias* was awarded and continued *per Vic' non miſit breve* till 15 *Mart'*, and then a *Venire facias* was awarded returnable *Oct' pur'*.

But the *Venire* taken out was teſted 23 *Jan'* returnable *Oct' pur'*, upon which a *Diſtringas* iſſued, omitting the Word (*Vic'*) in the Direction of the Writ. Upon the Trial at the Aſſizes there was a Verdict for the Plaintiff, and Judgment thereon.

And now there were theſe Errors aſſigned.

Firſt, That the Plaintiff's Attorney had no Warrant of Attorney.

Secondly, That there was no *Ven' facias*, as is ſuppoſed by the Record.

Thirdly, That there was no ſuch Writ of *Diſtringas*.

Fourthly, That no Bill was filed which warranted the Declaration and Judgment.

Fifthly, The general Error, that the Judgment was for the Plaintiff, whereas it ought to have been for the Defendant. And upon a *Certiorari* returned it appeared, that the *Ven' fac'* iſſued teſted 23 *Jan'*, whereas it was awarded 15 *Mar.*

That the Warrant of Attorney for the Plaintiff was, *E. Philips po' lo' ſuo H. G. attorn' ſuum uſus T. Smith ballivum burgi de Ivelcheſter.*

That the *Diſtringas* was *Georgius Dei Gra' Somerſet ſal'tem*, omitting (*Vic'*). That the Bill was filed *Paſch.* 1 *Geo.* without any Continuance entered till *Paſch.* 2 *Geo.* when the Declaration was entered upon Record.

After Error aſſigned as before mentioned, the Court of King's Bench was moved, that the Record might be amended.

Firſt, That in the Warrant of Attorney the Word *Bugi* be made *Burgi*; for the Warrant of Attorney was not filed till *Trin.* 2 *Geo.* though the Bill was filed *P.* 1 *Geo.* and the Declaration was *Paſ.* 2 *Geo.* and it is ſufficient that the Warrant of Attorney be filed in the ſame Term in which the Iſſue was joined, and therefore the Warrant of Attorney here was filed in due Time. By the Statute 32 *H.* 8. 30. All Perſons ſhall deliver their Warrants of Attorney to be entered on Record, *&c.* in the ſame Term when the Iſſue is entered, *&c.*

Then the Warrant of Attorney here not being filed till *Trin.* 2 *Geor.* and the Plaintiff having before appeared and declared by the ſaid *H. G.* his Attorney againſt the Defendant *T. Smith ballivum burgi de Ivelcheſter*, it appears that *H. G.* was his Attorney againſt the ſame *Tho. Smith ballivum burgi de Ivelcheſter*, and therefore when the Entry is *po' lo' ſuo H. G. attorn' ſuum verſus Tho. Smith ballivum bugi de Ivelcheſter*, this was a Miſpriſion of the Clerk, who wrote *Bugi* for *Burgi*, and ought to be amended by the Record, in which the Entry was well made.

And though it was objected that the Bill and the Declaration were ſubſequent to the Warrant of Attorney, and therefore the Entry cannot be amended by them, yet it was amended.

Secondly, That the Teſte of the *Venire facias* which was 23 *Jan.* ſhould be amended and made 28 *Nov.* for the *Venire facias* was awarded by the Court 15 *Mart'* which was the laſt Day of *Mich.* Term, and this was a Warrant to the Clerk to make the Writ bear Teſte the ſame Day, and if he did not do it, his Miſpriſion ſhall be amended by Stat. 8 *H.* 6. *c.* 12. which enacts that Judges may examine, and in Affirmance of Judgment amend what to them ſeems the Miſpriſion of the Clerk in any Proceſs, *&c.* and therefore where a *Venire* was teſted after the Return of the Writ, (*viz.*) 12 *Feb.* which was the laſt Day of *Hill.* Term, and the Return was 15 *Hill'* it was amended, *Yelv.* 64. 2 *Cro.* 442. *Cro. Car.* 38. after a Writ of Error in the Exchequer Chamber on a Judgment in an Action of Debt.

So if a *Venire* be teſted the Day before Iſſue joined or Plea pleaded, it ſhall be amended, for the Roll was the Warrant for it. 2 *Cro.* 64.

So if the Teſte be the ſame Day with the Return, ſo ruled *Mo.* 599. 2 *Brownl.* 102.

So if the Teſte be upon a *Dies non Juridicus*, as upon a *Sunday*, as is reſolved 2 *Cro.* 64. *Cro. Eliz.* 183. *Mo.* 684. *Cro. Eliz.* 203. 2 *Cro.* 162.

Or if it be teſted on a Day out of Term. *Cro. Eliz.* 203, 467. *Mo.* 465. *Noy* 57.

So where the Return of the *Venire* was not made purſuant to the Award on the Roll, it was allowed to be amended. *Cro. Car.* 38. 1 *Roll.* 200. *pl.* 35. *Ow.* 6. 2.

And though it has been adjudged, that where the *Venire* is teſted either before the Bill filed, or before the Iſſue, or before the Plea, or after Judgment, that this ſhall be aided by the Statute of 32 *H.* 8. as a Miſconveying of Proceſs, and that the Court will not intend it to be the *Venire* in the ſame Cauſe. 2 *Cro.* 458. *Cro. Car.* 90. *Cro. Eliz.* 767, 820. *Hard.* 321.

Yet by the other Caſe it appears that it may be amended, and there is no Authority to the Contrary, that in ſuch Caſes it ſhall be aided by the Statute of *Jeofails*, and need not be amended; in other Caſes it is uſual to amend Writs by the Roll, as where the *Diſtringas* omits the Day and the Place of the Aſſiſes, 3 *Mod.* —— *Jackſon* ver. *Warren*; ſo where a *Fieri facias* on a Judgment in *Hill.* 27 *Car.* 2. was teſted 27 *Feb.* 26 *Car.* 2. it was amended, though the Execution might be varied by it, 2 *Jones* 41. and after the Court had conſidered of it, it was amended by a Rule of Court.

Thirdly, That the *Diſtringas* might be amended, for the Omiſſion of the Word (*Vic'*) was but the Miſpriſion of the Clerk, for the *Venire* was awarded and directed *Vic' Somerſet*, and upon this a Panel of the Jurors was returned; then this Writ of *Diſtringas* commanded *quod Diſtringas* the ſame Perſons, who were returned upon the Panel annexed to the *Venire*, *ad comparend' apud Weſtm' niſi Judices Aſſiſ' prius apud Taunton in Com' tuo venerint*, &c. which was the ſame as if the Writ had been directed *Vic' Somerſet*, for this cannot be directed to any Sheriff but of the ſame County, and the Clerk ought to have made the *Diſtringas* agreeable to the *Venire*; for when the prior Proceſs goes to the Sheriff of *Somerſet*, the ſubſequent Proceſs ought to go accordingly. Where a *Venire* was awarded to the Sheriff, omitting the County, yet it was amended, for where the Iſſue ariſes in a County where the Action is brought, the *Venire* ought to be to the Sheriff of the ſame County, and the Omiſſion is but a Miſpriſion of the Clerk. *Yelv.* 69. So where in a *Venire* (*Vic'*) was omitted, as here. *Cro. Car.* 595. 1 *Roll.* 205. *pl.* 12. So where the *Venire* was *Vic' Warwick*, and the *Diſtringas* was

Vic'

Vic' Notting' which is another County, it was amended. 3 *Mod.* 78. And it was inſiſted that there is no Reaſon for denying the Amendment becauſe this Action is founded upon a Penal Statute, for though it is true that the Statute 8 *H.* 6. *cap.* 12. excepts Appeals, Indictments for Treaſon or Felony, and Outlawries for the ſame, and that the Statute 32 *H.* 8. aids only in Actions or Suits at Common Law, and 18 *El.* 14. extends not to Actions or Informations on any Popular or Penal Statute, and therefore every criminal Proſecution is out of the Statute of *Jeofails*; yet Actions remedial, tho' founded upon Penal Statutes, have been allowed the Benefit of thoſe Statutes; and therefore in an Action *qui tam, &c.* upon 31 *Eliz.* for ſelling Horſes in *Smithfield* not tolled, it was ſaid that a Diſcontinuance ſhall be aided by 32 *H.* 8. 30. 3 *Lev.* 375.

So in an Action *qui tam* upon the Statute of Uſury it was allowed by *Holt* C. J. that the Information by the Party agrieved ſhall be within thoſe Statutes, though not common Informations. 1 *Salk.* 324.

So Debt upon 2 *&* 3 *Edw.* 6. was allowed to be amended. *Cro. Car.* 275, 278. *Jones* 302. 1 *Roll.* 202. *pl.* 7. 1 *Roll.* 205. *pl.* 3. So an Action *qui tam, &c.* upon the Statute of *Winton*, 1 *Roll.* 203. *pl.* 12. 1 *Brownl.* 156. and afterwards upon Conſideration the Court allowed the *Diſtringas* to be amended.

Fourthly, That the Continuances be entered upon the Bill which was filed *Paſch.* 1 *Geo.* and nothing done afterwards till *Trin.* 2 *Geo.* when the Plaintiff declared, and the Defendant pleaded to Iſſue, and Iſſue was joined.

For the Continuances by the Courſe of the King's Bench need not be entered before Iſſue joined, but any Time between the Iſſue and the Judgment is ſufficient; and if they be not entered before Judgment, it is the Fault of the Clerk, which may be amended. 1 *Roll.* 199. *pl.* 27. Sir *Geo. Trencher.* So after Error brought. 1 *Roll.* 205. *pl.* 6. And at firſt the Court doubted, becauſe Continuances are the Act of the

Court, which may be amended at any Time before Judgment, or in the ſame Term that Judgment is given, but not after. 8 *Co.* 156. *b.* *Blackmore's* Caſe. *Style* 339. *Friend* ver. *Baker.* But after Conſideration the Court was of Opinion that it might be amended, for it appears that Continuances may be entered at any Time before Judgment, and if they are omitted it is the Fault of the Clerk, which ſhall be amended before Judgment by the Common Law, 3 *Lev.* 431. and every Thing which was amendable before the Judgment by the Common Law may be amended after Judgment by the Statute of *Jeofails*, and *Pratt* Ch. J. ſaid that they had inquired into the Courſe of the Common Pleas, and were informed that after Judgment they were entered of Courſe by the Clerk, unleſs reſtrained by Rule of Court; ſo they are always amendable of Courſe in the King's Bench.

And there ſeems to be a Difference where there is a Miſentry of a Continuance and where the Entry is omitted, 8 *Co.* 156. *b.* the Continuance was *per Jur' inter B. & C.* (which was between Tenant and Vouchee) in ſuch a Plea *ponitur in reſpect'*, whereas it ought to be *Jur' inter W. & C. quem B. vocavit ad Warrant'*, and it was amended by the Court.

So *Style* 334. The Continuance was from *Paſch.* to *Mich.* leaving out a Term.

So *Cro. Eliz.* 618. *Yelv.* 155. where the Continuance was given to a Stranger or to one who did not appear.

But the Court agreed it to be amendable when the Continuance was given to one where it ought to be given to two. *Cro. Eliz.* 618.

So after Verdict. 2 *Cro.* 211. 2 *Mod.* 216. So Continuances upon a *Fieri facias* or a *Latitat.* 1 *Syd.* 53, 59.

And upon the General Iſſue aſſigned, Exception was taken to the Declaration.

Firſt, Becauſe it is ſaid *quod Villa de Ivelcheſter eſt antiquus Burgus, & duo Burgenſes de tempore cujus, &c. electi fuer' & eligi conſuever' per Burgen' & Inhabitan', &c.* and doth not ſay that it is a Borough Time out of Mind, *&c.* nor doth it alledge any Preſcription in the Corporation to ſend Burgeſſes. To which it was anſwered, that where Title is not made to the Thing itſelf, but to a Privilege or Liberty within it, it is ſufficient to ſay *quod eſt antiqua Civitas, Villa, &c.* without ſaying *de Tempore cujus, &c.* as where a *Modus decimandi* was alledged for Lands in a Park, it is ſufficient to ſay *quod fuit antiquus parcus, Hob.* 44, 118. otherwiſe it is if Title was made in a *Quo Warranto* to the Park itſelf. So if a Man makes Title to an Office, he ought to preſcribe for it, but if he makes Title to any Thing appendant or incident to the Office, it is ſufficient to ſay *Quod eſt antiquum Officium.* 10 *Co.* 596. *Dyer* 71.

In this Caſe it is but an Inducement to the Action, which is founded upon a Refuſal to deliver a Copy of the Poll, and the mentioning the Title to ſend Burgeſſes to Parliament is not neceſſary, for it could not be traverſed in this Action, and therefore it would have been ſufficient if he had begun the Declaration *Quod cum per quoddam breve Domini Regis intra Canc', &c.* as in an Action for a falſe Return upon an Election for Members of Parliament. *Lutw.* 82.

In an Action for refuſing a Poll at an Election for Bridgmaſter, it was ſaid as here, *Quod Civitas Lond' eſt antiqua Civitas, &c.* and hath uſed Time out of Mind, *&c.* to elect two Officers called Bridgmaſters, *&c.* 2 *Vent.* 25.

Secondly, It is ſaid *duo Burgenſes eligi conſuever', &c.* but the Declaration doth not ſhew that the Plaintiff was a Burgeſs of the ſaid Borough, and if he was not, he was not qualified to be elected. But it was anſwered, that the Declaration ſaith that a Precept was delivered to the Defendant, *cui executio, &c. pertinuit, &c. cujus præcepti prætextu idem Def' ad Election' duor' Burgenſium pro eodem Burgo proceſſit*

ceſſit, quodq; the Plaintiff and three others were Candidates *ut ex illis duos Burgenſes eligerent.*

Thirdly, The Right of Election is alledged to be *per Burgenſes & Inhabitan'*, and it is ſaid *quidam Burgenſes pro quer' vociferati ſunt*, but it does not appear that they were Inhabitants. To which it was anſwered, that it was ſaid *quod quidam Burgenſes in ea parte voces & ſuffragia habentes*, but it was not neceſſary to ſhew how the Election was, for the Right of Election was not in Iſſue.

Fourthly, It is not ſaid that Notice was given of the Time and Place of Election.

To which it was anſwered, That the Words in the Writ of Summons, *Proclamatione facta de loco & tempore præd'*, relate to the Election of Knights of the Shire in the County Court, and though the Statute — *W.* 3. requires that the Officer in a Borough, *&c.* give Notice of Election, yet it is not neceſſary in this Declaration; it is the Duty of the Officer, and he ſhall not excuſe himſelf by his own Neglect.

Fifthly, That it doth not ſhew any Demand of the Copy of the Poll taken at the Time of the Election; for it ſays *Quod requiſivit Copiam, &c. de eadem Electione capt'*, which might be, though it was not taken at the Time of the Election.

To which it was anſwered, That it is expreſly ſaid that he took the Poll at the Election, *quod poſt præd' capitum numeration'*, *Anglice* Poll, *ſuffragan' de, in & pro Electione illa capt'*, the Plaintiff *requiſivit copiam ſuffragan' de eadem Electione capt'*, and no other Poll is mentioned, therefore it is neceſſarily to be intended that the Demand was of a Copy of the Poll taken at the ſame Election.

Sixthly, That there was no Tender of any Sum certain for the Copy of the Poll, but that the Declaration only ſays that the Plaintiff *parat' fuit & obtulit ad ſolvend' Def' aliquam*

quam rationabilem denarior' ſummam pro ſcriptione inde quam ipſe requireret.

That in pleading a Tender of Amends they ought to tender a Sum certain, and ſhew the Sum tendered, for an Officer can't demand any Sum, for if he demands more than is reaſonable he will be liable to be indicted for Extortion, and therefore it would be unreaſonable to ſubject the Officer to it.

To which it was anſwered, That the Words of the Statute are *Paying only a reaſonable Charge for Writing thereof*, and therefore the Officer ſhall give the Charge, and make a Demand of what he thinks reaſonable before the Plaintiff can pay it; and it would be impoſſible for the Plaintiff to tender any Thing certain before he has the Copy, for the Charge varies according to the Difficulty and Length of the Writing, and the Plaintiff cannot put a Price upon another Perſon's Labour. This Clauſe was deſigned for the Benefit of the Officer, and therefore he ought to do the firſt Act, and make a Demand before the Plaintiff can know what he ought to pay; and if it be a Condition precedent, then it ſhall be intended that it was proved that he did all that was neceſſary for him to do to maintain his Action, otherwiſe there could not have been a Verdict for him. And the Court made no Difficulty as to any of the Objections, but with regard to the Tender; but upon talking a little together, they agreed the Tender was good, for till the Officer demands ſomething, or delivers a Copy of the Poll, the Party cannot know what to tender. As where there is a Demand of a Copy of a Commitment, *&c.* upon the Statute 31 *Car.* 2. it is only neceſſary to ſay that he was ready to pay for it; and the Judgment was affirmed by all the Judges, and afterwards it was affirmed in Parliament.

DE
Term. Sanct. Mich.
5 Geo. 1. In C. B.

White ver. *Collins.*

Caſe 154.

A Writ of falſe Judgment was brought upon a Judgment in Ejectment given in the Court of *Havering atte Bower in Com' Eſſex*, being a Court of Antient Demeſne of the Manor of the King, in which *White* declared on the Demiſe of *Carew Harvey*, alias *Mildmay*, for one Meſſuage, one Barn, one Garden, one Orchard, forty Acres of Land, forty Acres of Meadow, and fifty Acres of Paſture, with their Appurtenances, in *Hornchurch infra juriſdiction' Cur'*. Upon Not guilty pleaded, at the Trial the Jury by Conſent found a ſpecial Verdict to this Effect:

A Limitation to one to take and enjoy the Profits of an Eſtate during his Life, and after his Deceaſe to the Heir Male of his Body, would make an Eſtate-Tail, where nothing appears that explains the Teſtator's Intent to the contrary; otherwiſe not.

That *Francis Harvey*, al' *Mildmay*, Eſq; was ſeiſed in Fee of the Lands in Queſtion, (which were the Antient Demeſne of the Crown) and by his Will dated 26 *July* 1701. deviſed to his eldeſt Son (who was Leſſor of the Plaintiff) two Fields for Life, and after his Death, *I give thoſe two Fields to the Heir Male of his Body lawfully begotten, during the Term of his natural Life; and after the Death of ſuch Heir Male, I give the ſaid Fields, and all the Lands and Tenements not ſold by my Executors and Truſtees, to my Son* Francis Mildmay *during his Life; and to the Heir Male of his Body lawfully begotten, during the Term of his natural Life; and for Want of ſuch Heir Male, I give thoſe two Fields and all my Lands not ſold,* &c. *to*

my Son Carew Mildmay *during his Life; and after his Death, to the Heir Male of his Body lawfully begotten, during the Term of his natural Life; and for Want of ſuch Heir Male, I give the ſaid Fields and Lands amongſt all my Daughters which ſhall be alive at my Death.*

And by another Clauſe in the ſaid Will he deviſes the Lands in Queſtion by theſe Words, (*viz.*) *I give to my Son* Frank Mildmay *my Farm called* Eaſt-Houſe Farm, &c. *to enjoy the Rents and Profits thereof during the Term of his natural Life, with Power to make a Jointure of all or Part if he ſhould marry; and after his Death and Jointure, if any be made, to the Heir Male of his Body lawfully begotten, during the Term of his natural Life; and for want of ſuch Heir Male, I give the ſaid Farm to my Son* Carew Mildmay *during his Life; and after his Death, I give it to my Grandchild* Carew Mildmay *during his Life*; and after he gave it to his Grandchildren *Edward* and *Richard Mildmay*, equally to be divided.

The Jury further found, That the Teſtator died leaving *Carew Mildmay* his eldeſt Son, and *Francis* his ſecond Son; that the eldeſt Son, at the Time of the Will made and the Death of the Teſtator, had Iſſue *Carew, Edmund* and *Richard*, but *Frank* the ſecond Son was not married, nor had any Iſſue; that *Frank Mildmay* entered, and by Deeds of Leaſe and Releaſe dated 9 & 10 *July* conveyed the ſaid Lands, called *Eaſt-Houſe Farm*, to *Robert Coleman* and his Heirs, to make him Tenant of the Freehold, againſt whom a Common Recovery might be had, to the Uſe of *Frank Mildmay* and his Heirs; and afterwards, at the Court for the Manor of *Havering atte Bower* 22 *July*, upon Writ of Right Cloſe teſted 23 *Jan.* a Recovery was ſuffered, in which *Frank Mildmay* was Vouchee, who afterwards by his Will dated 8 *March* 1714. deviſed the ſaid Lands to his younger Brother, &c. and died; the younger Brother entered and was ſeiſed *prout lex poſtulat*; upon whom *Carew Mildmay* the Leſſor of the Plaintiff entered, and demiſed to the Plaintiff; and if, &c.

The common Error was aſſigned, and the principal Queſtion upon this ſpecial Verdict was:

If by this Deviſe to *Frank Mildmay* he was Tenant in Tail, or for Life only?

For if he was only Tenant for Life, his Recovery is of no Avail, and the Leſſor of the Plaintiff will have a good Title; but if he was Tenant in Tail, his Recovery has barred, or at leaſt diſcontinued the Remainders limited by his Father's Will, and then the Leſſor of the Plaintiff has no Title or Entry. I held, that the Common Recovery barred the Intail. *Kit.* 97.

I argued, that by this Deviſe of *Francis Harvey*, al' *Mildmay*, his Son *Frank Mildmay* had an Eſtate-tail; and for the better apprehending this, it will be neceſſary to conſider the Words of the Deviſe.

If the Deviſe had been, *I give to my Son* Frank Mildmay, *and to the Heir Male of his Body*; this would without Queſtion have been an Eſtate-tail, though the Word *Heir* is in the ſingular Number; for the Word *Heir* is *Nomen Collectivum*, and comprehends all the Heirs which ſhall deſcend from his Body; and ſo it was agreed by all the Juſtices in the Caſe of *Clark* ver. *Day*, *Cro. Eliz.* 313. *Owen* 148. though in the principal Caſe there the Court was devided.

In a Conveyance at Common Law thoſe Words make an Eſtate-tail. *Co. Litt.* 22. *a.* cites the Caſe 39 *Aſſ.* 20. where the Grant was to Baron and Feme *& uni hæred' de corpore ſuo procreat', & uni hæred' tantum, &c.* In an Aſſiſe brought by the Donor againſt the Heir, who pleaded their Grant in Bar to the Aſſiſe, the Plaintiff inſiſted, that the Baron and Feme had but an Eſtate for Life; but it was held by all the Juſtices, that the Plaintiff had no Cauſe of Aſſiſe, and was nonſuited.

So *Reg. Jud.* 6. a *Scire facias* was brought to execute a Fine by the Heir of him in Remainder, where the Eſtate was rendered to *R.* for Life, and after his Death to *G.* and the Heirs of his Body, *& ſi obierit ſine hærede maſculo de corpore*

corpore ſuo procreat', remaneret to his Brother *J. & hæred' maſculo de corpore ſuo, &c.*

There is no Neceſſity to cite Caſes to prove that the Word *Heir* is *Nomen Collectivum*, many are mentioned in 2 *Roll. Abr.* 253.

Secondly, if the Words of the Deviſe had been, *I give to my Son* Frank, *and to enjoy the Rents and Profits thereof during the Term of his natural Life, with Power to make a Jointure of all or Part, if he ſhould marry; and after his Death and Jointure, if any be made, to the Heir Male of his Body lawfully begotten*, without ſaying any Thing more, this would have been an Eſtate-tail.

If there be a Deviſe to a Man for Life, and after his Death to the Heirs of his Body; it is fully agreed by the Law-Books, that this makes an Eſtate-tail. In *Wild*'s Caſe, as reported by *Mo.* 397. *Popham* ſays, that if there be a Deviſe to a Man for Life, and afterward to his Heir Male, this makes an Entail; and cites a Caſe — *Bend.* 4 *Eliz.* where it was adjudged, that a Deviſe to one for Life, and after his Death to the Men-Children of his Body, was held an Eſtate-tail.

Sandys's Caſe, 9 *Co.* 127. was this, *Merrick* ſeiſed in Fee, and having five Sons, *William, Samuel, Thomas, Richard* and *Daniel*, deviſed to his Wife for Life, and after her Death his Son *William* to have it; and if his Son *William* marry, and have any Male Iſſue, *&c.* then his Son to have the Houſe; if he have no Male Iſſue, *&c.* to his Son *Samuel in totidem verbis*; and if *Samuel* have no Iſſue Male, then his Son *Thomas* to have the Houſe; if *Thomas* marry, having a Male Iſſue of his Body lawfully begotten, then his Son to have the Houſe after his Deceaſe; if he have no Male Iſſue, then to *Richard*, and then to *Daniel* in the ſame Words; and if any of his Sons or their Heirs Male, Iſſue of their Bodies, go about to alien, *&c.* the next Heir to enter, *&c. William* and *Samuel* die without Iſſue Male; and it was adjudged, that *Thomas* had an Eſtate-tail; and therefore his Recovery good,

though the Limitation was, if *Thomas* marry, having a Male Iſſue, in the ſingular Number, and though it was ſaid that ſuch Son (not Iſſue) ſhall have it after his Death; for upon the whole of the Words it appears that *Richard* was not to have it, but in Default of Iſſue Male of *Thomas*.

A Man Deviſes to *R.* his eldeſt Son for ever, and after his Death to the Heir Male of his Body for ever, *& pro defectu talis hæredis maſculi* (all in the ſingular Number) to *E.* his other Son for ever, (for the Book is wrong printed, *eldeſt Son*, whereas it ought to have been *other Son*) adjudged by this Deviſe *R.* had an Eſtate-Tail, not for Life only. *Trin.* 11 *Jac. B. R. Welkins* verſus *Whiting*, 1 *Rol. Abr.* 836. *pl.* 11.

And it was adjudged without any Difficulty, that a Deviſe to *A.* for Life, upon Conditions mentioned in the Will, and after his Deceaſe to the Uſe of the Heirs of his Body, makes an Eaſtate-Tail in *A.* though limited to him expreſly for Life only. *Hill.* 18 & 19 *Car.* 2. *C. B. Randal* ver. *Ely*, *Cart.* 171.

The Caſe of *King* and *Melling*, 24 *Car.* 2. is ſtronger; *Robert Melling* deviſes to his Son *Barnard Melling* (who had then a Wife named *Elizabeth*) for Life, and after his Death in theſe Words, (*viz.*) *I give the ſame to the Iſſue of his Body lawfully begotten on the Body of any ſecond Wife he ſhall happen to marry, and for want of ſuch Iſſue, to my Son* John Melling *and his Heirs, provided* Barnard *may make any ſuch ſecond Wife a Jointure which ſhe may enjoy for her Life*; in this Caſe it was ſtrongly urged, that the Deviſe being to *Barnard* expreſly for Life with a Power to make a Jointure, that Iſſue being a good Name of Purchaſe, comprehending all the Iſſue of the ſecond Marriage, to which the Teſtator appears to have an equal regard, and that they ſhould all take; if it be taken to be a Name of Purchaſe, *Barnard* by this Deviſe ſhall take only an Eſtate for Life with contingent Remainder to the Iſſues of the ſecond Marriage in Tail; Remainder to *John Melling* in Fee; and in the King's Bench two Judges were of the ſame Opinion, and *Hale* C. J. ſaid, that at firſt he was of the ſame Opinion, but upon great Conſideration

of the Caſe, and the Conſequences of it, and on a thorough Examination of the Will and the Authorities, he held that *Barnard* had an Eſtate-Tail, and ſo it was reſolved by all the Judges in the Exchequer Chamber upon a Writ of Error. 1 *Vent.* 225. 2 *Lev.* 58. *Poll.* 101.

And *Ventris* 230. ſays that C. J. *Hale* in his Argument cited *Buckley*'s Caſe 43 *Eliz.* where there was a Deviſe to *A.* for Life, Remainder to his next Heir Male, and in Default of ſuch Heir Male, Remainder to another; adjudged that *A.* had an Eſtate-Tail; and *Vent.* 232. ſays he alſo cited the Caſe of *Hanſey* verſus *Lowther*, adjudged 1651, where a Copyholder ſurrendered to the Uſe of his Will, and thereby deviſed it to his eldeſt Son for Life, and after his Deceaſe to the Heir Male of his Body, *&c.* Reſolved, That the Son had an Eſtate-Tail.

This laſt Caſe ſeems to be the ſame as is mentioned 2 *Rol. Abr.* 253. *pl.* 4. between *Pawſey* and *Lowdell*, *Paſch.* 1651, and reported by *Stile.*

Roll ſays that the Deviſe was to *B.* for Life, and after his Death to the Heir of his Body begotten for ever, and that it was reſolved to be a Fee executed in *B.* but by *Stile* it appears to be reſolved that it was an Eſtate-Tail, and ſo it is cited *Poll.* 108.

By all theſe Caſes it appears that if there be a Deviſe to one for Life, and after his Death to the Heir, Iſſue or Children of his Body, this makes an Eſtate-Tail, as well as if it had been limited to him and the Heir or Iſſue of his Body directly, without the Words *for Life or after his Deceaſe*; that if the Limitation be to the Heir Male of his Body in the Singular Number, it has the ſame Effect as if it had been to the Heirs Male, *&c.* in the Plural Number.

And by the Reſolution in the Caſe of *King* verſus *Melling*, it appears that a Power to make a Jointure makes no Difference, for as *Hale* ſays *Vent.* 232. Tenant in Tail cannot make a Jointure out of his Eſtate without diſcontinuing,

or merging or deſtroying the Eſtate-Tail. But in the preſent Caſe, to enforce this Conſtruction, that the Teſtator intended his Son *Frank* an Eſtate of Inheritance, and not an Eſtate for Life only, I muſt obſerve that the Words are not, *I give to my Son* Frank *my Farm, called* Eaſt-houſe Farm, *for his Life, but I give to my Son* Frank *my Farm*, &c. *to enjoy the Rents and Profits thereof during the Term of his natural Life, with Power to make a Jointure, and after his Deceaſe and Jointure, to the Heir Male of his Body*, &c. Therefore the Words *I give*, which begin the Sentence, govern the whole Clauſe; the Bequeſt or Gift is not made to the Heir Male after the Death of the Father, but only to the Father and his Heir Male. The Heir Male cannot take by any ſubſtantive Clauſe of Deviſe to him, but only by virtue of the Deviſe to his Father; and then the Words *to enjoy the Rents and Profits during his Life*, do not import that the Teſtator intended him only an Eſtate for Life, but that the Teſtator took Notice of the Effect and Conſequence of the Eſtate by him deviſed; he gave this Farm to his Son *Frank*, and the Heirs Male of his Body, with Power to make a Jointure, in Conſequence of which Deviſe, his Son muſt enjoy the Rents and Profits during his Life, the Jointreſs after him, if any Jointure be made, and after the Death of the Father and Jointreſs the Heirs Male; this ſeems to be the obvious Conſtruction and Intent of the Words, and the Words, if there is Occaſion, may be tranſpoſed to ſupport the Intent.

Secondly, It is to be obſerved that the Limitation is to his Son *Frank* and the Heir Male of his Body lawfully begotten, which is the uſual Phraſe and Expreſſion in limiting an Eſtate-Tail, and gives ſome Ground to imagine the Teſtator had ſuch an Eſtate in his Intention.

Thirdly, The Limitation is to the Heir Male of the Body of *Frank*, and in Limitations by Will it is material to obſerve from whoſe Body the Heir who is to take, is to proceed, in order to the better determining in whom the Eſtate-Tail is to be fixed; for where the Limitation is to one and the Heirs of his Body generally the Eſtate-Tail veſts in him, for the Rule laid down *Co. Lit.* 22. *b.* that where the Anceſtor takes an Eſtate for Life, and afterwards there is a Limitation

tion to his right Heirs, the Heir ſhall not be a Purchaſer, obtains in the Conſtruction of Wills.

If a Feoffment be made, or a Fine levied, or Recovery ſuffered to the Uſe of *B.* for Life, and after his Deceaſe to the Heirs of the Body of *B.* to be begotten; Remainder to *D.* in Fee; *B.* takes an Eſtate-Tail executed in himſelf, and the Heir of his Body cannot take by Purchaſe; ſo in a Will, if a Deviſe be to one for Life, and afterwards a Limitation of the ſame Eſtate is made to his right Heirs, or to the Heir, or Heirs of his Body, or Iſſue, or Children of his Body; the Father ſhall have the whole Eſtate, and his Heir or Iſſue ſhall take by Deſcent, and not by Purchaſe.

Fourthly, It is to be obſerved that the Limitation by the Teſtator to his eldeſt Son was in Default of ſuch Heir Male, the Deviſe was to *Frank* and to the Heir Male of his Body lawfully begotten; and therefore when the Deviſe over to the eldeſt Son is for want of ſuch Heir Male, it is tantamount to ſaying, *and for want of Heir Male of the Body of my Son* Frank *lawfully begotten, I give the ſaid Farm to my Son* Carew Mildway, which ſhews apparently the Intent of the Teſtator that *Carew* ſhould not take while there was any Iſſue of the Body of *Frank.*

Theſe Words of themſelves are ſufficient to create an Eſtate-Tail, as *Hale* obſerves *Vent.* 230. and for that Purpoſe cites *Robinſon*'s Caſe 4 *Jac.* where a Man deviſes to *A.* for Life, and if he dies without Iſſue, then he deviſes over; it was reſolved that *A.* took an Eſtate-Tail, which ſeems to be the Caſe mentioned in 1 *Roll's Abr.* 837. *pl.* 12. *Mod.* 682. *Robinſon* verſus *Miller, in B. R.* though there it is ſaid to be *Trin.* 7 *Jac.* and is there more reſtrictive; If a Man deviſes to his Wife for Life, and afterwards to his Son for Life, and if he die without Iſſue, having no Son, that *B.* ſhould have it. Reſolved that the Son took an Eſtate in Tail Male.

The latter Words then are to be conſidered, (*viz.*) *during the Term of his natural Life,* if theſe make any Difference

in the Conſtruction of the Will, *I give to my Son* Frank, *and the Heir Male of his Body lawfully begotten, during the Term of his natural Life, and for want of ſuch Heir Male, I give the ſaid Farm to my Son* Carew, *&c.*

If *Frank* took an Eſtate-tail, then his Heir Male (when it deſcended to him) would alſo take an Eſtate in Tail, and his Eſtate would not determine with his Life.

And that he did take an Eſtate-tail, beſides the Reaſons and Authorities before-mentioned, may be collected from the general Intention of the Teſtator, who takes Notice, that *Frank* had no Iſſue, nor was married, and therefore provides for him that he may make a Jointure, and provides for the Iſſue Male of that Marriage; but ſuch Proviſion would be defective if he provided only for one of ſuch Iſſue, and for him only for Life; *all the Sons of* Frank *and their Deſcendants* requires a Proviſion; and it ſeems more agreeable to the Deſign of the Teſtator, that all ſhould be the Objects of his Care.

It will be alſo more agreeable to his Expreſſions in other Parts of the Will, for as to another Clauſe in the Will, it is found by the ſpecial Verdict, that the Teſtator gives to his Son *Carew* two Fields for his Life; and after his Death, I give thoſe two Fields to his Heir Male of his Body lawfully begotten, during the Term of his natural Life; and after the Death of ſuch Heir Male, I give thoſe Fields and all my Lands not ſold, *&c.* to my Son *Frank*, during the Term of his natural Life, and to the Heir Male of his Body lawfully to be begotten during his Life; and for want of ſuch Heir Male, I give thoſe Fields and Lands to my Son *Carew* for Life, and to the Heir Male of his Body, *&c.* during his natural Life; and for want of ſuch Heir Male, to his Daughters.

By which Clauſe, though the Inaccuracy of the Teſtator appears, and though the Words *Heir Male of his Body lawfully begotten* are uſed for the Deſignation of any Son of *Carew*, who ſhould be his Heir after his Death, yet it is apparent, firſt, that he makes a Diſtinction in the Uſe of the ſame

Phraſe; for his Intent appears to be, that *Carew* ſhould have the two Fields for his Life, and his eldeſt Son (whom he afterwards takes Notice of in his Will by Name,) ſhould alſo have them after the Death of his Father for Life; that *Frank* ſhould have the other Lands not ſold by his Executors (except the two Fields) immediately after the Death of the Teſtator, and the two Fields alſo after the Death of *Carew* and his eldeſt Son, to him and the Heirs Male of his Body; and that in Default of ſuch Iſſue the two Fields, and the other Lands not ſold, ſhould go to *Carew* and the Heirs of his Body; and for Want of ſuch Iſſue to the Daughters of the Teſtator: And therefore the two Fields intended for *Carew* and his eldeſt Son for Life are limited, and *after the Death of ſuch Heir Male*, not *for want of ſuch Heir Male of* Frank, which ſhews that he made a Difference between thoſe Expreſſions; the two Fields are deviſed to *Carew* for Life, then to his Heir Male, (which was *Carew* the Grandchild of the Teſtator) for Life, and after his Death to *Frank*; and for Want of Heir Male of *Frank* to *Carew* again; by which it appears, that there was a manifeſt Difference (according to the Teſtator's Apprehenſion) between the Words, *after the Death of ſuch Heir Male*, and the Words, *for want of ſuch Heir Male*; for the Phraſe, *for want of ſuch Heir Male*, imports *Failure of Iſſue Male*. And this is the more evident, becauſe after the Failure of Iſſue Male of *Frank*, and Failure of Iſſue Male of *Carew*, he deviſes all the Lands to his Daughters; and for the ſame Reaſon the Words *Heir Male of his Body begotten*, applied to the Son of *Carew* who was then *in eſſe*, are *deſignatio perſonæ*; and *Heir Male of the Body of* Frank *to be begotten* are Words of Limitation.

But if in this Clauſe the Diſpoſition to *Frank* for Life, and after his Deceaſe to the Heir Male of his Body lawfully to be begotten for Life, and for want of ſuch Heir Male to *Carew*, *&c.* make an Eſtate-tail, as it muſt, unleſs we ſuppoſe, that he diſpoſes of all his Lands to his Daughters before Failure of his Iſſue Male, then *de congruo* the ſame Words ſhall have the ſame Conſtruction in the Clauſe which deviſes the Lands in Queſtion.

5

But

But then the Queſtion remains, What the Teſtator intended by theſe Words, *during the Term of his natural Life?* It may be, the Teſtator having uſed that Expreſſion in the Beginning of the Diſpoſition of his Lands, was of Opinion, that the Repetition of them was neceſſary to each Limitation; or as Lord *Hale* ſaid, 1 *Vent.* 232. perhaps the Teſtator apprehended, that the Deviſee had but an Eſtate for Life, (for Tenant in Tail has only an Eſtate for Life in many Reſpects,) or intended that each Deviſee ſhould have only an Eſtate for Life; but his Intention was inconſiſtent with the Rules of Law; and in Wills where Words are added inconſiſtent with the Eſtate which the Teſtator has deviſed, they ſhall be rejected. In all Caſes where there is a Deviſe to one for Life, and after his Death to the Iſſue or Heirs of his Body, the Words *during the Term of his Life* ſhall be rejected.

In all Languages and Authors it is frequent to find Words which are abundant, and cannot be taken into the Conſtruction conſiſtent with the Scope and Deſign of the Author; it is therefore leſs to be wondered at that it ſhould be ſo in Wills, where the Teſtator is *Inops Concilii*, and by Reaſon of his Infirmities many Times cannot attend to the Accuracy of the Expreſſion; and therefore there are frequent Inſtances of this Nature, where ſome Words are to be paſt by or rejected.

In the Caſe of *Newton* and *Bernardine*, *Mo.* 127. in Debt for Rent the Caſe appeared to be this:

Coſham having Iſſue *Thomas*, *Richard* and *Gilbert*, deviſed twenty Nobles to the Child of *Thomas* (who was dead, and his Wife *enſient*) for twenty Years; and if my Son *Richard* die before he hath any Iſſue of his Body, ſo that my Land deſcend to *Gilbert* before he come to twenty-one, my Executors ſhall occupy it till *Gilbert* come to twenty-one Years of Age. Reſolved, that *Richard* had an Eſtate-tail; for the Words *before he hath any Iſſue* are tantamount to *without Iſſue*, and then the ſubſequent Words cannot prejudice.

So

So *Tilly* ver. *Collier*, 2 *Lev.* 162. *Remnant* having three Daughters, *Suſan*, *Anne* and *Elizabeth*, deviſes his Lands to his Wife till his Heir be twenty-one, and gives 740*l.* to *Anne* and *Elizabeth*, and if *Suſan* his Heir die without Heirs before twenty-one, ſo that the Lands come to *Anne*, her Portion ſhall go to *Elizabeth*. Adjudged that *Suſan* had an Eſtate-tail, and that the Words *before twenty-one* ſhould be rejected.

So if Lands be deviſed to *A.* and the Heirs Male of his Body during the Term of 500 Years, it ſhall be an Eſtate-tail in *A.* and the Words *during the Term of* 500 *Years* ſhall be void; *Lovice* ver. *Goddard*, 2 *Cro.* 62. *Mo.* 773. It is true, that *Cro.* ſays, that *Anderſon* and *Warburton* held the Words *for* 500 *Years* to be void; but *Daniel* and *Walmſly* held the Words not merely void, but to have ſuch Conſtruction, that the Eſtate-tail ſhould ceaſe on the Expiration of the 500 Years; yet *Mo.* ſays, that it was agreed by all the Juſtices, that the Limitation for Years was void. A Writ of Error was brought on this Judgment, and the firſt Judgment reverſed, which is reported 10 *Co.* 78. And though it is there ſaid, 10 *Co.* 87. that the Chief Juſtice held, that this was a Deviſe of a Term for Years, and not of an Inheritance; to which *Wynch* agreed, and that the Term determined on the Dying without Iſſue: There is no Reſolution given by the Court upon this Point, being controverted between the Judges of the Common Pleas and the King's Bench, in the firſt Cauſe upon the ſame Will; the Difference ſeems to be, that ſome of the Judges would tranſpoſe the Words to make all conſiſtent, and then it would be a Deviſe for 500 Years, if *A.* and the Heirs Male of his Body ſhould ſo long live; but all the Judges, who took the Intention of the Teſtator to be to give an Eſtate-tail, held, that the Words *during the Term of* 500 *Years* ſhould be rejected.

But in the preſent Caſe, the Words *during the Term of his Life* cannot be tranſpoſed conſiſtently; for they cannot receive a Conſtruction with any Propriety, except where they are placed by the Teſtator; and there, if the prior

Words grant an Eſtate-tail, they ought to be paſſed by as of no Efficacy.

This Caſe was afterwards argued by Serjeant *Selby* for the Plaintiff in Error, and by Serjeant *Cheſhyre* for the Defendant, *Paſ.* 5 *Geo.* 1. and the Judgment was affirmed by the Court; for it was agreed, that the Limitation to *Frank* to enjoy and take the Profits during his Life, and after his Deceaſe, to the Heirs Male of his Body, would make an Eſtate-tail; ſo if it had been, to the Heir Male of his Body, in the ſingular Number, where nothing appeared which explained the Intent to the contrary; but here the Intention appeared to be, that ſuch Heir Male ſhould have the Lands only for Life, which ſhews that the Teſtator did not intend thoſe Words ſhould be taken as Words of Limitation; and nothing appears in the Nature of the Expreſſion, which imports that they ſhould be taken ſo.

Heir Male or *next Heir Male* (which are Words of the ſame Import, for a Man cannot be Heir Male if he be not next Heir Male) are Words of Purchaſe. In *Archer*'s Caſe, 1 *Co.* 66. the Deviſe was, to his right and next Heir Male, and tho' there his Son was then *in eſſe*, that made no Difference, for if he had not had a Son *in eſſe*, it would have been a contingent Remainder; if he had one, it was a Remainder veſted. But the Reaſon, upon which it was reſolved in *Archer*'s Caſe, that the Deviſe to *Robert Archer* for Life, and after his Deceaſe to his right and next Heir Male and the Heirs Male of his Body, was not an Eſtate-tail in *Robert Archer*, but only an Eſtate for Life, with Remainder to his Son in Tail, was, that the Words of Limitation being added to the Deviſe to his next Heir Male, ſhews that he did not intend the Words *next Heir Male* as Words of Limitation, but as a Deſcription of the Perſon who was to take in Remainder; and therefore in this Caſe, where the Deviſe is to *Frank*, and after his Deceaſe to the Heir Male of his Body during his Life, the expreſs Limitation during his Life, ſhews that he intended his Son ſhould have it in Remainder for his Life only; and there ſeems to be no Difference between their Caſe and *Archer*'s Caſe; and when he deviſes it over for want of ſuch Heir

Male to *Carew Mildmay*, &c. this does not import that *Carew* ſhould not have it till *Frank* died without Heirs Male generally, but for want of ſuch Heir Male who was to have it for Life.

Caſe 155. ## *Newland* ver. *Collins.* In C. B.

Inducement to a Traverſe inſufficient, where the Traverſe is a Thing immaterial.

REplevin. The Defendant avows, for that *Tho. Collins* his Father was ſeiſed in Fee, and being ſo ſeiſed 24 *May* demiſed to the Plaintiff for twenty-one Years, to commence after *Michaelmas* then next enſuing, at the yearly Rent of 8 *l.*

That *Thomas Collins* 1 *Dec.* 1710. died ſeiſed of the Reverſion, which deſcended to the Defendant as his Son and Heir, who for Rent arrear avowed, *&c.*

The Plaintiff in Bar to the Avowry ſaid, that *Thomas Collins* was ſeiſed in Tail, *abſque hoc, quod fuit ſeiſit' in dominico ſuo ut de feodo.* To which the Defendant demurred, and ſhewed for Cauſe, that the Traverſe was a Thing immaterial, and the Inducement to the Traverſe inſufficient; and it was underſtood to be agreed, that the Plaintiff might traverſe the Title alledged by the Avowant, tho' he need not alledge ſuch Title to maintain his Avowry. *Dy.* 365. 2 *Cro.* 44. *Yel.* 54. 2 *Cro.* 681. But then there ought to be a proper Inducement to the Traverſe, to ſhew the Matter contained in the Traverſe is material; for though the Inducement to the Traverſe is not traverſable generally, yet it ought to be ſuch as, if true, will defeat the Title of the other Party, otherwiſe the Traverſe amounts to a Negative pregnant. *Hob.* 321. And therefore in a Prohibition, where Plaintiff ſuggeſts that the Prior, *&c.* was ſeiſed in Fee, and inſiſts upon the Unity of Poſſeſſion Time out of Mind till the Diſſolution 31 *H.* 8. *ratione cujus* he was diſcharged of Tithes; the Defendant pleads, that by Agreement 1 *May* 1422. between the Maſter of the Hoſpital of *Burton Legars* and the Prior, that Tithes ſhould be paid in the Hands of the Tenants, *&c. abſque hoc*, that he was diſcharged of Tithes.

It was held that the Inducement to the Traverſe was bad, for it did not ſhew any Title which the Maſter of the Hoſpital had to make ſuch Agreement, and to the ſame Purpoſe are the Caſes *Cro. Car.* 335. *Dyer* 305. 6 *Co.* 24. 2 *Cro.* 681.

And therefore here, though *Thomas Collins* the Father was ſeiſed in Tail only, yet his Leaſe might be good, eſpecially where the Son being the Iſſue in Tail, has affirmed it by his Diſtreſs and Avowry for the Rent.

Biſhop ver. *Brooke.* In C. B.

Caſe 156.

DEBT upon a Bail-Bond given by the Defendant to the Sheriffs of *London*, for the Appearance of *Humphry Evans* at the Suit of the Plaintiff, and which upon the Forfeiture was aſſigned by the Sheriffs to the Plaintiff, according to the Statute of 4 & 5 *Ann. c.* 16. And the Plaintiff in his Declaration declares, that the Defendant by Obligation *conceſſit ſe teneri, &c.* to the Sheriffs *ſub cond' quod ſi præd' Humph. Evans compareat, &c. quod quidem ſcript' obl' capt' fuit virtute Stat.* 23 *H.* 6. *c.* 10. *Virtute brevis de cap' ad reſpond' quer', &c.* but does not ſay that *Evans* was arreſted by Force of the ſaid Writ. The Defendant pleads *Non eſt factum*; and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that by 4 & 5 *Anne* it is ſaid, If any Perſon ſhall be arreſted after the firſt Day of *Trin.* Term by any Writ, *&c.* out of any of her Majeſty's Courts of Record at *Weſtminſter*, at the Suit of any common Perſon, and the Sheriff take Bail from ſuch Perſon, *&c.* the Sheriff at the Requeſt and Coſts of the Plaintiff ſhall aſſign to him the Bail-Bond, *&c.* and therefore it ought to appear that the Defendant was arreſted, otherwiſe the Sheriff has no Authority to aſſign the Bail-Bond, for by Common Law it was not aſſignable, being only a *Choſe in Action*, and therefore when the Statute enables it to be aſſigned if any Perſon be arreſted, *&c.* it ought to appear by the Declaration that he was arreſted, otherwiſe the Action fails, and this ſhall not be aided by a Verdict upon *Non eſt factum*,

Upon *Non eſt factum* pleaded to a Bail-Bond, the Defendant admits all other Matters againſt him, and depends upon that for his Defence.

factum, becauſe this Matter could not be tried upon ſuch an Iſſue.

To this I anſwered, that the Intent of the Statute 4 & 5 *Anne* was, that all Bail-Bonds in Perſonal Actions ſhould be aſſignable, and by the Statute 23 *H.* 6. *c.* 10. the Sheriff had Authority to take Bail of all Perſons by them arreſted, or being in their Cuſtody, by Force of any Writ, Bill or Warrant in any Perſonal Action, or by Cauſe of Indictment of Treſpaſs. And the Statute 4 & 5 *Anne* does not mean that Bail-Bonds taken upon *Capias* on Indictments ſhould be aſſignable; yet all the Bonds taken of Bail in Perſonal Actions were intended to be aſſignable; but by Statute 23 *H.* 6. the Sheriff had no Power to take Bail but of Perſons arreſted by them or in their Cuſtody (that is in Arreſt by their Predeceſſors); and therefore the Declaration, which ſays the Bail-Bond was taken by Force of 23 *H.* 6. and which was upon a *Capias* againſt *Evans* at the Suit oft he Plaintiff, imports, that *Evans* was arreſted by the Sheriff at the Suit of the Plaintiff, for otherwiſe he could not take a Bail-Bond for his Appearance by Force of that Statute, and therefore there the Averment that he was arreſted is ſufficient. Upon Demurrer perhaps it might be made dubious, but here, after *Non eſt fact'* pleaded, the Defendant has admitted all other Matters againſt him, and depends upon this for his Defence.

If the Defendant had pleaded *Nil debet*, it ought to be plainly proved on the Trial, that the Defendant gave the Bail-Bond, that *Evans* was arreſted upon a *Capias* againſt him, upon which ſuch Bail-Bond was given to the Sheriff, and afterwards aſſigned to the Plaintiff, and upon this Declaration ſuch Proof was neceſſary, and therefore upon *Nil debet* pleaded, after Verdict for the Plaintiff he ſhould have his Judgment; for the Imperfection of the Declaration is aided by the Verdict, becauſe the Arreſt muſt be proved; ſo for the ſame Reaſon when the Defendant waives the General Iſſue *Nil debet*, upon which the ſpecial Matter might be proved, and relies upon this that the Bond was not his Deed, he allows all the other Matters againſt him; as in an Action of Covenant, if a Breach is not well aſſigned, and the Defendant pleads *Non eſt factum*,

he admits a Breach, and after a Verdict that it was his Deed, Judgment ſhall go againſt him. 2 *Cro.* 369. *Muſcett* ver. *Ballett.*

So in an Action upon a Bond with Condition to ſtand to an Award, though the Plaintiff generally ought to aſſign a Breach in his Replication; yet if the Defendant after *Oyer* pleads *Non ſe ſubmiſit*, and that is found againſt him, the Plaintiff ſhall have Judgment though no Breach appears. Reſolved, 1 *Syd.* 290. admitted *Lutw.* 528. *Yelv.* 78.

So in an Action for an Eſcape brought by a Plaintiff *Durante minoritate H. Stanhope*, if the Defendant pleads a Removal by *Habeas Corpus* and a Commitment to the *Fleet*, and that Matter is traverſed, the Defendant cannot afterwards take an Exception that the Plaintiff had not alledged *H. Stanhope* to be within 17 Years of Age, for he has admitted an Authority in the Plaintiff to ſue. *Lutw.* 627, 632.

There is a Difference where the Plaintiff by his Declaration ſhews ſomething which diſcovers that he has no Cauſe of Action, and where he only omits that which was to maintain his Action; in the firſt Caſe the Declaration ſhall not be aided by Reaſon of the Bar, in the other Caſe it ſhall.

After Conſideration, the Court gave Judgment for the Plaintiff; for the Defendant by his Plea of *Non eſt factum* has relied upon this particular Matter; and this being found againſt him the Plaintiff ſhall have Judgment.

Hedgethorn ver. *Thurlock.* In C. B.

Caſe 157.

DEBT upon Judgment in *C. B.* and the Declaration was *Eſſex, ſcil'*, though the Judgment was at *Weſtminſter*, and therefore the Action ought to have been brought in *Middleſex.*

The Statute 4 & 5 *Annæ* does not give any Remedy upon Demurrer, but in Matters of the ſame Nature with thoſe which are there ſpecified.

Upon a General Demurrer to the Declaration it was urged, That this ſhall be aided by Statute 4 & 5 *Annæ*, *c.* 16. which enacts that the Judges ſhall proceed to Judgment according to the very Right of the Action, notwithſtanding any Default, Omiſſion or Defect, &c. But the Laying the Action in a County where it ought not to be laid goes only to the Form and Courſe of Proceeding, not to the Right of Action, it is a Matter proper to be alledged in Abatement of the Writ, and by Common Law could not be pleaded in Abatement in Debt in this Caſe, for *Debit' et contract' ſunt nullius loci*, and though by the Statute 6 *R.* 2. *c.* 2. in Debt, &c. if it appears by the Declaration that the Contract was made in another County the Action ſhall abate; yet this is but for Convenience; and if a Bond be given or Debt ariſes in *Middleſex*, and an Action is brought thereupon in *Eſſex*, the Court ſhall not examine where the Action ariſes, though in the Time of *H.* 6. it was done; and if the Defendant pleads that the Obligation was entered into in *Middleſex*, it will not be a good Plea, for if the Plaintiff demurs to it, by which the Fact is confeſſed, yet the Plaintiff ſhall have Judgment, *All.* 17, becauſe it appears that this doth not go to the Right of the Action, for then Judgment would be for the Defendant; if a Trial had been in this Caſe by a Jury of the County of *Eſſex*, it would have been good after a Verdict; yet the Statute 16 & 17 *Car.* 2. aids only ſuch Defects as do not hinder the Court from giving Judgment according to the Right of the Action. *Sed non allocatur.* For 4 & 5 *Annæ* does not give any Remedy upon Demurrer, but in Matters of the ſame Nature with thoſe which are there ſpecified. Judgment was given for the Defendant; but the Plaintiff was afterwards allowed to diſcontinue upon Payment of Coſts.

Moore ver. ——. In C. B.

Caſe 158.

Aſſumpſit. The Defendant pleaded in Diſability of the Plaintiff, that he was a Recuſant convict, and ſays, that the Plaintiff was ſummoned to appear at ſuch a Day and Place to take the Oaths before the Juſtices of the Peace according to the Statute;

In a Plea of Diſability of the Plaintiff, that he was a Recuſant convict, that he did not take the Oaths at the Quarter-Seſſions; it is not enough to ſay *& hoc parat' eſt verificare*, unleſs he adds *per record'*.

That he made Default, and the Juſtices certified to the Quarter-Seſſions, that he was duly ſummoned, and made Default, and ſuch Default was recorded *prout patet per record' coram juſtic'*, *&c. remanen'*, *&c.* and that he did not afterwards take the Oaths either at the ſame Seſſions, or elſewhere; *& hoc parat' eſt verificare.* The Plaintiff demurred to the Plea, and for Cauſe of Demurrer ſhewed, that the Defendant did not ſhew the Record of the Conviction *ſub pede ſigilli*; and Defendant joined in Demurrer.

And it was argued by Serjeant *Reynolds*, and afterwards by Serjeant *Darnell*, for the Plaintiff, that the Defendant ought to ſhew the Record of the Conviction *ſub pede ſigilli*, and this ought to be by *Certiorari* and *Mittimus*; as if Outlawry be pleaded in Abatement, it muſt be pleaded *ſub pede ſigilli*; and ſo Excommunication. *Co. Litt.*

And ſo it was reſolved in the Caſe of *Woodcroft* ver. *Lord Petre*, where Recuſancy was pleaded; and reſolved, that it ought to be pleaded *ſub pede ſigilli.*

To which Serjeant *Cheſhyre*, and afterwards Serjeant *Pengelly*, replied, that a Plea of Recuſancy need not to be *ſub pede ſigilli*; for the Record itſelf is pleaded, and Reference is made to the Record; and the Plaintiff may reply *Nul tiel record*, and the Court may write to the Juſtices for the Record. When Outlawry is pleaded in Abatement, the Writ of Exigent, upon which the Outlawry is returned, may be ſhewn

ſub

ſub pede ſigilli, (*viz.*) the Writ itſelf under Seal may be produced. So Excommunication muſt be certified under the Seal of the Ordinary, and may be ſhewn under the Seal of the Ordinary teſtifying it; but the Record itſelf cannot be certified under the Seal of the Court where the Record remains.

Another Reaſon why Outlawry and Excommunication ought to be *ſub pede ſigilli*, is, to aſſure the Plaintiff of the Verity of the Plea; but if the Plaintiff accepts the Plea, it is then too late to make this Objection: If it was not ſo, it was a Reaſon for refuſing the Plea, and the Plaintiff might ſign his Judgment; but if he receive the Plea, he cannot demur for this Defect; and ſo it was ſaid by *Holt* C. J. and afterwards between *Creamer* and —— *Mich.* 11 *Annæ*, as Serjeant *Pengelly* ſaid it appeared by his Note of the ſame Caſe, which is reported in 1 *Salk.* but this Matter does not appear there.

And as to the Objection, that when this is ſhewn for Cauſe of Demurrer, it amounts to a Refuſal of the Plea; for how could he refuſe it, if he did not ſubmit it to the Court, whether this be not a bad Plea for this Cauſe; Serjeant *Pengelly* replied, that a Plea in Abatement is not aided by 4 & 5 *Annæ*, *c.* 16. which was intended to aid thoſe Pleas only which go to the Right of the Action; and therefore the ſhewing this Matter for Cauſe of Demurrer does not avail any Thing; for if it was neceſſary to make the Plea good, it would be ſufficient to object it, without ſhewing it for Cauſe of Demurrer; and if it was not ſuch a Reaſon as would render the Plea bad, if it had not been ſhewn for Cauſe of Demurrer, the ſhewing it for Cauſe of Demurrer will not give it any Advantage; as where by 4 & 5 *Annæ*, no dilatory Plea ſhall be received unleſs Affidavit be made of the Truth, or ſome probable Cauſe be ſhewn of it to the Court; if the Plea be received, it cannot be ſhewn for Cauſe of Demurrer, that there was no Affidavit made of the Truth of it.

But the Court did not give any Opinion, whether it was neceſſary to plead it *ſub pede ſigilli*. The Chief Juſtice ſaid,

it was pleaded without ſaying *ſub pede ſigilli*; but in *Woodroffe*'s Caſe it was ſaid that it ought to be ſo; and *Tracy* ſaid the Precedents were ſo. *Clift's Ent.* 3.

And if it was a bad Plea for this Defect, why ſhould not Advantage be taken of it, when it is ſpecially aſſigned for Cauſe? But the Chief Juſtice ſaid, they would not give any Opinion as to that Point. But the Court gave Judgment that he ſhould anſwer over upon another Point, (*viz.*) The Plea ſays, that the Plaintiff was duly ſummoned, and made Default, which Default was recorded *prout per record' ibidem reſiden' pat'*; and then alledges as Matter *in pais*, that he did not take the Oaths at the Quarter-Seſſions, or afterwards, *& hoc parat' eſt verificare*, without ſaying *verificare per Record'*, whereas there is no Conviction till the Refuſal of the Oaths at the Seſſions; for if he had not appeared before the Juſtices who ſummoned him, but had afterwards appeared and taken the Oaths at the Seſſions, he could not have been convict, and therefore it ought to have been ſaid, that he was convict *prout patet per record'*, *&c. & hoc parat' eſt verificare per record'*; and if the Statute 4 & 5 *Annæ* does not extend to Pleas in Abatement, then this Omiſſion is not aided.

Hall ver. *Downes*. In C. B.

Caſe 159.

A Prohibition was granted (*niſi*) to the Spiritual Court, where there was a Libel by *Downes*, Vicar of *Painſwick* in the Dioceſe of *Glouceſter*, for theſe Words, *Thou art, or he is falſe, forſworn or perjured.* And it was now inſiſted, that by the Libel it appears, that the ſaid *Downes fuit infra Sacros Ordines*, and Vicar of the Church of *Painſwick* in the Dioceſe of the Biſhop of *Glouceſter*, *quodque ad infamiam, læſion', derogation' & diminution' ſtatus, nominis, bonæ famæ, ſacræque ſuæ function' ſonantia verba diffamatoria ſequen' dixit*, (*viz.*) *Thou art, or he is* (*præfat' Johannem Downes innuendo, ſeu de eodem lequendo*) *falſe, forſworn or perjured*; and when a Libel is for Words ſpoken of a Clergymen with Regard to his Function, though in other Caſes for the ſame Words a Prohibition may be granted, as for Words of Paſ-

Prohibition ſhall be granted to the Spiritual Court where a Libel is for Words ſpoken of a Clergyman, though they immediately regard his Function.

ſion, or actionable by Common Law, yet in the Caſe of a Clergyman no Prohibition ſhall be granted.

I agree, that if there be a Libel in the Spiritual Court for puniſhing any one for Perjury, or for Words which charge a Layman with Perjury, or perhaps a Clergyman with Perjury, which appears to be committed in a Temporal Court, a Prohibition will be granted.

But here the Charge is general, and therefore if the Spiritual Court can take Cognizance of the Offence with which theſe Words charge him, it ſhall take Cogniſance alſo for the Defamation with which he is charged.

That the Spiritual Court has Cogniſance of Perjury appears from *Lind.* 96. *v. Hujuſmodi*, 315. *v. Perjurio*, eſpecially if it be Perjury by a Spiritual Perſon; and therefore Perjury is Cauſe of Deprivation. *Lind.* 114. *v. Canonice diſpenſatum*; and if a Libel be for Diſcovery whether he be perjured, in Order for Deprivation, no Prohibition lies. 1 *Sid.* 217. And it is agreed by Chief Juſtice *Holt*, that the Spiritual Court has Juriſdiction over their own Members, and in Perjury in the Eccleſiaſtical Court in Spiritual Matters. 1 *Salk.* 134.

If then the Spiritual Court has Cogniſance of this Offence, it ſhall alſo have Cogniſance of the Words which charge him with this Offence; and though the Words are, *is falſe, forſworn or perjured*, the Words being in the Disjunctive muſt be intended to be ſynonymous to *falſe and forſworn*, and ſuch Perjury as the Spiritual Court has Cogniſance of; for *Lind.* ſays, *Perjurium fit tribus modis, jurando contra conſcientiam, jurando illicit', veniendo contra juramen'. Lind.* 56. *v. Perjurio*; and therefore this Libel being in the Disjunctive, ſhall be conſtrued only of ſuch a Falſity as is called Perjury by the Eccleſiaſtical Law, and not ſuch as is made Perjury by the Common Law.

And if it were ſuch, the Suggeſtion is not ſufficient; for it ought to be ſuggeſted, that the Words were ſpoke in Re-

ference to an Oath taken in a Temporal Court, *&c.* and that he had pleaded that Matter there, and the Plea refuſed, and of which an Affidavit ought to have been made; as in 1 *Vent.* 10. a Prohibition was refuſed to a Suit in the Spiritual Court for theſe Words, *you are an old Thief and old Whore*; upon a Suggeſtion that if the Words were ſpoke, they were all at the ſame Time, for that ought to have been pleaded to the Juriſdiction there. *Lutw.* 1043, 1054.

Sed non allocatur. For a Prohibition lies where the Suit is for Words actionable at Common Law, and to ſay he is Perjured is actionable, and if there be a Suit for ſuch Words in the Spiritual Court a Prohibition lies. 2 *Inſt.* 493. 2 *Rol.* 297. *Golds.* 113. And when the Words appear to be actionable, there is no occaſion to plead that in the Spiritual Court; and therefore the Rule for the Prohibition was made abſolute, unleſs the Defendant *craſtino die* would accept a Declaration in Prohibition, upon which this Matter might be farther Conſidered.

More ver. *Manning*. In C. B. Caſe 160.

An original Bill payable to one and his Order, is aſſignable afterwards to whomſoever it is indorſed, though the Words *or his Order* be omitted.

Aſſumpſit. Upon a Promiſſory Note given by *Manning* to *Statham* and Order; *Statham* aſſigns it to *Witherhead*, and *Witherhead* to the Plaintiff; and upon a Demurrer to the Declaration an Exception was taken, becauſe the Aſſignment was made to *Witherhead*, without ſaying *to him and Order*, and then he cannot aſſign it over, for by this Means *Statham* who had aſſigned it to *Witherhead*, without ſubjecting himſelf to his Order, will be made liable to be ſued by any ſubſequent Indorſee. And to this the Chief Juſtice at firſt inclined, but afterwards it was reſolved by the whole Court, that it was good.

For if the Original Bill was aſſignable (as it will be if it be payable to one and his Order) then to whomſoever it is aſſigned, he has all the Intereſt in the Bill, and may aſſign it as he pleaſes, for the Aſſignment to *Witherhead* is an abſolute Aſſignment to him, which comprehends his Aſſigns, and there-

fore

fore nothing is done when the Bill is aſſigned but indorſing the Name of the Indorſor, upon which the Indorſee may write what he will, and at a Trial when a Bill is given in Evidence, the Party may fill up the Blank as he pleaſes.

Caſe 161.

The King ver. *Pond.* In B. R.

A *Nolle proſequi* may be granted upon an Indictment againſt a Surgeon for refuſing to be Conſtable.

INdictment againſt *Pond* a Surgeon, for refuſing to be Conſtable; and it was now moved to *Raymond* Attorney General, that a *Nolle proſequi* might be granted; for by the Statute 5 *H.* 8. *c.* 6. upon the Petition of the Warden and Company of Surgeons, it was enacted, That the Suppliants be not chargeable of Conſtableſhip, Watch-Office, bearing Arms and Inqueſts in the City of *London*, and by 32 *H.* 8. *c.* 42. all Perſons of that Corporation were exempt from bearing Arms or putting on to Watch or Inqueſt, and therefore by their Charter 2 *Jac.* 1. they are exempt.

And though it was held that Phyſicians are not exempt, 1 *Syd.* 431. 1 *Mod.* 22. 2 *Keb.* 578. Yet it is ſaid by *Keble*, that Surgeons may be exempt, and by the Equity of thoſe Statutes and Cuſtom of the Realm, all Surgeons have been allowed the ſame Privilege, and therefore a *Nolle proſequi* was allowed, unleſs Cauſe; and no Cauſe was ſhewn as ever I heard.

Caſe 162.

Gilbert, Earl of Coventry, ver. *Anne, Counteſs Dowager of Coventry. Intr. Hill.* 3 *Geo. Rot.* — In B. R.

Of the Execution of Powers in regard to the making of Leaſes.

THIS was an Iſſue directed out of the Court of Chancery to try the Validity of five Leaſes made by *Thomas* Earl of *Coventry*, Husband of the Defendant.

Firſt Leaſe by Indenture 30 *May* 1701, to *S. Shepheard* and *H. Crow* for 99 Years from the Death of Sir *Thomas Haſlewood*, Bart. if the Defendant ſhould ſo long live, rendering

5 3 *l.*

3 *l.* 8 *d. per Annum* after the Death of the ſaid Sir *Thomas Haſlewood.*

Second, By Indenture 14 *July* 1710, to them for 99 Years from the Death of *Neſt. Biſhop*, if the Defendant and *Richard Leggs* ſhould ſo long live, rendering 4 *l.* 14 *s.* 2 *d. per Annum*, after the Death of the ſaid *Neſt. Biſhop*, and a Heriot or 4 *l.* upon every Death.

Third, By Indenture 15 *July* 1710, to them for the ſame Term, from the Death of *Armell Green*, at the Rent of 18 *s.* 8 *d.* and a Heriot or 4 *l.* *&c.*

Fourth, 17 *July* 1710, for the ſame Term.

Fifth, 22 *July* 1710, for the ſame Term.

Upon the Trial before J. *Blencow* at the Aſſiſes at *Worceſter* a ſpecial Verdict was found,

That *Thomas* Lord *Coventry* made a Leaſe of the Lands in the ſecond Leaſe to *William Biſhop* for 99 Years, if he, *Robert Biſhop* his Son, and *Neſt. Biſhop* his Daughter ſhould ſo long live, rendering 4 *l.* 14 *s.* 2 *d. per Annum*, and a Heriot or 4 *l.* for every Death, and doing Suit, *&c.*

That he or his Anceſtors leaſed the Lands in the other Leaſes for 99 Years, if three lives ſo long lived.

That *Thomas* Lord *Coventry* being ſeiſed of the Reverſion expectant upon theſe ſeveral Leaſes, upon the Marriage of *Thomas* his eldeſt Son with the Defendant, by Indenture 20 *Jan.* 1690 conveyed the ſaid Lands to the Uſe of himſelf for Life; Remainder to *Thomas* his eldeſt Son for Life; Remainder to his firſt and other Sons in Tail Male; Remainder to *Gilbert* his ſecond Son, the now Plaintiff, for Life, *&c.* with a Power to make Leaſes in theſe Words, *Provided it ſhall be lawful for every Perſon, who ſhall be actually ſeiſed of the Freehold of the Premiſſes herein before limited to him in Uſe, to make Leaſes of any Part thereof which hath been uſually letten*

by Leaſe for Lives or Years, of which he ſhall be ſo actually ſeiſed by virtue of the Limitations aforeſaid, by Indenture for any Term not exceeding 21 *Years, or determinable on one, two or three Lives, ſo as on every ſuch Leaſe be reſerved and made payable, during the Continuance of ſuch Leaſe, the accuſtomed Rent, or more, or as much as can be reaſonably got for the ſame, ſo as no ſuch Leaſe be made diſpuniſhable of Waſte, and ſo as there be not any Part of the Premiſſes ſo leaſed at any one Time any more or greater Eſtate or Eſtates, than for* 21 *Years, or for three Lives, or for any Number of Years, determinable on three Lives.*

That *Paſch.* 3 *W. & M.* a Fine was levied of the Lands to the ſame Uſes.

That the Lord *Coventry* died, and *Thomas* the Husband of the Defendant entered, and was ſeiſed for his Life, and made the firſt Leaſe 30 *May* 1701. That the Rent reſerved was the antient and accuſtomed Rent. That all the Lives, except the Life of Sir *Thomas Haſlewood*, were determined at the Time of making this Leaſe; that Sir *Thomas Haſlewood* attorned Tenant purſuant to this Leaſe; that he afterwards made the ſeveral other Leaſes, upon which the antient Rents were reſerved, and that no prior Eſtate continued *in eſſe* in any of them except a Term, for 99 Years determinable upon a ſingle Life.

And the ſingle Queſtion upon this Special Verdict was, Whether theſe Leaſes were purſuant to the Power?

And I argued that theſe Leaſes were purſuant to the Power, that they were made by the Husband of the Defendant who was then ſeiſed of the Freehold by virtue of the Limitations in the Settlement; that they were made of Lands uſually leaſed for Lives or Years; that they were made by Indenture for a Term of Years determinable upon one or two Lives, rendering the accuſtomed Rents, not diſpuniſhable of Waſte, and that there are not upon any of the Lands demiſed more or greater Eſtates, than Eſtates for Years determinable upon three Lives.

The principal Objection is, that the Leaſes made by the Earl of *Coventry* are Leaſes in Reverſion.

And I argued, that where a Power is annexed to the Eſtate of one in Poſſeſſion to make Leaſes, without ſaying in Reverſion, he can make a Leaſe in Poſſeſſion only, and not a Leaſe in Reverſition to commence *in futuro*. 6 *Co.* 33. *a.* *Mo.* 199. 2 *Cro.* 318. *Yelv.* 222.

So if the Power be to make Leaſes for one, two or three Lives, he cannot make a Leaſe for a Life not *in eſſe*. *Ray.* 163, 247.

But if the Power be annexed to a Settlement of Lands, Part in Poſſeſſion, and Part in Reverſion, to make Leaſes in Poſſeſſion or Reverſion, he may make a Leaſe in Reverſion of Lands not in Poſſeſſion. 8 *Co.* 69. *b.* 80. *Whitlock Winter* and *Loveday*, *Sal.* 533.

So if the Power to make Leaſes, annexed to a Settlement of Eſtates demiſed for Life or Years, be expreſly confined to make Leaſes in Poſſeſſion, a Leaſe in Reverſion or *in futuro* is not warranted by ſuch Power. *Carth.* 18. 1 *Sid.* 101, 260. 1 *Lev.* 168.

So where a Man has Power to make a Leaſe purſuant to a Power, he ſhall not make a ſecond Leaſe to commence purſuant to his Power. 1 *Lev.* 36. 3 *Lev.* 71. *Salk.* 537.

But where a Man makes a Settlement of the Reverſion of Lands demiſed for Lives or Years, to the Uſe of *B.* for Life, with Power to make Leaſes generally, he may make a Leaſe during the Continuance of a former Leaſe, to commence after the former, otherwiſe his Power would be ineffectual; and this was agreed in Marquiſs of *Northampton*'s Caſe, 1 *Lev.* 36. 3 *Lev.* 71. *Dy.* 537. *a.* 2 *Roll.* 261. *pl.* 8. 1 *Lev.* 168. 1 *Sid.* 260.

The

The Intent of this Power ſeems to be, that the Party having ſuch Power ſhould fill up the Lives as they drop; and if he had done this upon a Surrender of the former Leaſe, without Doubt it would have been good; and if this is done by another Leaſe of the Reverſion, it ſeems to be the ſame Thing in Effect, for the Eſtate of him in Remainder is not prejudiced more in one Caſe than the other; for if a Leaſe, upon the Surrender of a former Leaſe, was to be made determinable upon three Lives, it would be of equal Duration, and equally diſadvantageous to him in Remainder or Reverſion, as if there were two Leaſes which both determined upon the ſame Lives.

And it would be unreaſonable, that the prior Leſſee ſhould have the Power to defeat the Execution of a Power by his ſurrendring up his Leaſe, or not.

And it ſeems to be agreeable to the Intent of the Power in this Caſe, that he who had the Freehold by Virtue of the Limitations in the Settlement ſhould be enabled to make Leaſes; for it is the ſole Qualification required in him for exerciſing the Power; and all the other Requiſites, as to the Manner of exerciſing his Power, are found by the Verdict to be obſerved.

There can be no Doubt but upon this Requiſite, ſo as there be not at any one Time any more or greater Eſtates than for twenty-one Years or for three Lives, or for Years determinable on three Lives; and theſe Words ſhew that it was not the Intent of the Power to confine the Party that he ſhould make but one Leaſe; for it appears by the Words in the plural Number, that ſeveral Eſtates were allowed at the ſame Time, but all were to be determinable on three Lives.

As to the Objection, that in ſome of the Leaſes the ſame Heriots are not reſerved as were before;

I anſwer, that the Power requires only that the antient and accuſtomed Rent be reſerved; and if this be reſerved, the Reſervation of Heriots or other caſual Profits, is not neceſſary. *Co. Lit.* 44. *b.* 6 *Co.* 37, 38. 2 *Cro.* 76. *Mo.* 759.

If it be objected, that this Leaſe is not a Leaſe of the Reverſion, but a Leaſe to commence at a future Day, for each Leaſe is for ninety-nine Years to commence from the Death of the remaining Life in the former Leaſe; that will make no Difference, for the one Leaſe as well as the other is to take Effect at the ſame Time when the other determines; and tho' it be to commence after the Death of the remaining Life, and the prior Leaſe may determine before by Forfeiture or Surrender, yet Forfeiture or Surrender ſhall not be preſumed.

A Leaſe to commence from the Death of a prior Leſſee for Life will be good.

And after many Arguments the Court was of Opinion, that theſe Leaſes made by *Thomas* Earl of *Coventry* were good, purſuant to the Power given him by the Settlement.

DE
Term. Sanct. Mich.
6 Geo. 1. In C. B.

Caſe 163.

Ellerton & ux' ver. *Gaſtrell.*

Marriage of the Daughter of the Wife's Siſter held within the *Levitical* Degrees; ſo Prohibition denied to Spiritual Court, where a Libel for that Purpoſe was exhibited.

A Prohibition was granted *niſi cauſa, &c.* to the Court of the Arch-deacon of *Richmond* in the Dioceſe of *Cheſter*, where a Libel was exhibited for the Marriage of *Ellerton* with his now Wife, being the Daughter of the Siſter of his former Wife, upon a Suggeſtion that it was not within the *Levitical* Degrees.

And for Cauſe I inſiſted, that the Marriage was within the *Levitical* Degrees.

The Statute 28 *H.* 8. 7. enacts, that no Perſon marry within the Degrees before rehearſed; and if any be married within the ſaid Degrees, the Perſons ſo unlawfully married ſhall be ſeparated by Sentence of the Archbiſhops, Biſhops, or other Miniſters, *&c.* within the Limits of their Juriſdictions and Authorities.

The Marriages prohibited, and which are to be diſſolved by Sentence of the Spiritual Court, are all within the Degrees there mentioned, though they are not expreſly mentioned in the Statute; and therefore when the Statute mentions as unlawful the Marriage of the Son with the Aunt, being his Father's or Mother's Siſter, or with his Uncle's Wife who is his Aunt by Affinity, the Marriage of the Niece with her Uncle by Conſanguinity or by Affinity (which is the preſent

ſent Caſe) is within the ſame Degree, and conſequently diſallowed by this Statute.

So in *Leviticus, ch.* xviii. *verſe* 12, *&c.* the *Jews* are forbid to uncover the Nakedneſs of the Father's or Mother's Brother or Siſter, (*viz.*) the Uncle or Aunt by Father or Mother, and an Uncle or Aunt by Affinity, though not named, are within the ſame Degree with the Perſons there mentioned.

So in the Table of Kindred and Affinity, who by Scripture and our Laws cannot intermarry, which was publiſhed by Authority 1563. and which by the 99th Canon made in Year 1603. is allowed,

A Man cannot marry his Wife's Siſter's Daughter; and the Canons of 1603. were eſtabliſhed in the Convocation, which had a Licence under the Great Seal to agree to ſuch Canons as they approved, and which were afterwards ratified by the King under the Great Seal, and therefore are allowed as the Eccleſiaſtical Law of this Realm. And by Canon 99. all Marriages prohibited by God's Law, and expreſſed in this Table, are declared inceſtuous and unlawful, and no Perſon ſhall marry within the Degrees prohibited and expreſſed in the ſaid Table, *&c.*

In the Caſe of *Mann*, who had married the Daughter of the Siſter of his former Wife, it was held by the High Commiſſion to be unlawful; and though a Prohibition was granted, *Mo.* 907. *Cro. Eliz.* 228. yet a Conſultation was afterwards awarded; for a Prohibition ought not to be granted, if it is within the *Levitical* Degrees. *Cro. Eliz.* 228. *Vaugh.* 247, 321. 4 *Lev.* 16.

So in *Pearſon*'s Caſe, upon ſuch a Marriage a Prohibition went; but a Conſultation was afterwards granted. *Vaugh.* 248, 323. And this perhaps is the Reaſon why that Caſe, which was mentioned as having a Prohibition granted by the Common Pleas, in the firſt Edition of *Co. Lit.* 235. *a.* without mentioning the Conſultation, was totally omitted in the ſubſequent Editions.

Hob.

Hob. 181. in the Caſe of *Howard* ver. *Bartlett*, ſpeaks of *Rennington*'s Caſe, who had married the Daughter of the Siſter of his former Wife, for which he did Penance by Order of the High Commiſſion, 16 *Jac.* and after his Death ſhe claimed her Free-Bench; and it was allowed, becauſe there was no Divorce *a Vinculo Matrimonii*, though *Hob.* ſays there was Cauſe. So 2 *Inſt.* 683. Lord *Coke* ſays, that though the Marriage of the Nephew with his Aunt be prohibited, *Lev.* 18. and the Marriage of the Uncle with his Niece be not there prohibited by expreſs Words, yet ſuch a Marriage is prohibited, *qui aeandem habet rationem propinquitatis cum eis qui nominatim prohibentur, & ſic de ſimilibus.* So by *Vaughan* it is expreſly agreed, that the Marriage of the Uncle with his Niece, or with the Niece of his Wife, is within the *Levitical* Degrees. *Vaugh.* 323.

So in the Caſe of *Wortley & ux'* ver. *Watkinſon*, 33 *Car.* 2. in *B. R.* on a Prohibition it was ſtrongly argued by *Wallop*, that ſuch a Marriage was lawful; yet a Conſultation was granted. 2 *Lev.* 254. 2 *Jones* 118.

And afterwards in the like Caſe between *Watkinſon* ver. *Margatren* in *B. R. Paſ.* 34 *Car.* 2. a Prohibition was denied. *Ray.* 464.

Trin. 5 *W. & M.* between *Hanour* and *Bradſhawe*, a Prohibition was granted, in order that the Plaintiff might declare on ſuch a Caſe; but *Levinz* ſays, he heard no more of it. 3 *Lev.* 364.

But in the Caſe of *Snowling and his Wife* ver. *Nuwey*, after two or three Arguments, it was reſolved by *Trevor* and all the Court, 1 *Annæ*, that a Conſultation ſhould be granted. *Lut.* 1077.

The ſame Matter was moved in *B. R.* between *Clement* and *Beard*, and *Holt* ſaid there, that he took that Queſtion to be ſettled, for if it was the Daughter of his own Siſter, there could be no Queſtion; and if it was the Daughter of the

Wife's Siſter it is the ſame Relation by Affinity, and therefore within the *Levitical* Degrees. 5 *Mod.* 448. Upon which the Rule in this Caſe was diſcharged.

Huddy & ux', Adminiſtrators of William Gifford, ver. *J. Yate Gifford.* In C. B.

Caſe 164.

IN an Action of Debt upon a Bond given by the Defendant to the Inteſtate 29 *Apr.* 1707.

Upon a Writ of Error brought after Judgment, Execution ought not to be ſtayed, if Bail be not found.

Upon Oyer of the Bond it appeared, that the Condition recites, that *William Gifford* was bound with the Defendant for a Debt of the Defendant's by Bond of the ſame Date, to pay 51 *l.* 10 *s.* to *Lat. Ridley*, 30 *Oct.* next; if therefore the Defendant pay to the ſaid *Latimer Ridley* the ſaid 51 *l.* 10 *s.* on the ſaid 30 *Oct.* in Diſcharge of the ſaid recited Obligation, then, *&c.* The Defendant pleaded *Quod ſolvit præd'* 51 *l.* 10 *s. præd' Lat. Ridley ſuper* 30 *Oct. in exoneration' recitat' oblig.* The Plaintiff replied *Quod non ſolvit*; to which there was a Demurrer, and Judgment for the Plaintiff.

After Judgment the Defendant brought a Writ of Error, and did not find Bail; upon which the Plaintiff ſued out Execution, for that by the Statute 3 *Jac. c.* 8. it was enacted, that no Execution ſhall be delayed by Writ of Error, or *Superſedeas* thereon, for reverſing any Judgment in any Action or Bill of Debt upon any ſingle Bond for Debt, or upon any Obligation with Condition for Payment of any Money only, or upon any Action or Bill of Debt for Rent, or upon any Contract, in any Courts of *Weſtminſter*, *&c.* unleſs the Perſon, in whoſe Name Error is brought, with two Sureties firſt become bound by Recognizance, *&c.* to him for whom Judgment is given, in double the Sum recovered, to proſecute the Writ of Error with Effect, *&c.*

And it was inſiſted by Serjeant *Whitaker*, that Bail was not required here, for that this Obligation was in Nature of

an Obligation to indemnify, which would not be within the Statute, which ought to be taken ſtrictly; and therefore, if Error be brought in Action of Debt upon a Bond for Performance of Covenants, Bail is not required, neither in Debt upon a Bond for Performance of an Award, or for Payment of 300 *l.* upon the Return of a Ship; *Show.* 14. and for the ſame Reaſon it is not required in this Caſe; for if the Defendant had tendered the Money to *Ridley* on the Day of Payment, in an Action of Debt brought by *Ridley* againſt him upon the Bond, he might have pleaded this Tender and Refuſal; but to this Condition he could not plead it. *Co. Litt.* 207. And this Point was determined in *B. R. Hill.* 1 *Geo.* between *Hammond* and *Webb*, when the Condition recited a former Bond given by the Defendant to *A.* and then goes on, if the ſaid *Webb* ſhall pay the ſaid Sum of 100 *l.* to the ſaid *A.* on the ſaid 25th of *Apr.* then, *&c.* in the ſame Words as the preſent Caſe. And the Court were of Opinion, that Bail was not neceſſary, for it was of the ſame Nature with a Bond to indemnify, though no Judgment be entered up in that Caſe, becauſe the Plaintiff affirmed his Judgment on the Writ of Error.

But on the other Side it was urged, that this Bond is only for the Payment of Money, and ſo without Doubt within the Letter of the Statute: But Bonds for Performance of Covenants, Awards, *&c.* or for Payment of Money upon the Return of a Ship on a Bottomree-Contract, or to indemnify, are out of the Letter of the Act, and therefore good Reaſon that Bail ſhall not be required upon a Writ of Error on ſuch Actions.

But where the Bond is within the Words of the Statute, this Statute has been conſtrued beneficially for the Subject; and therefore where there was a Condition for the Payment of ſuch a Sum of Money to *B.* as *A.* ſhould declare to be due from the Defendant to him, upon an Account ſtated between the Plaintiff and Defendant, it was reſolved, that Bail was neceſſary in a Writ of Error, by three Judges againſt *Kelyng.* 1 *Lev.* 117.

So in an Action againſt an Executor or Adminiſtrator, if Judgment is generally againſt him *de bonis propriis*, and he brings a Writ of Error, he muſt find Bail. 2 *Cro.* 350. 1 *Sid.* 368. And the Caſe between *Hammond* and *Webb* was not determined, for no Judgment was given, and therefore nothing appears but that the Court doubted upon this Point.

The Ch. J. *King* ſeemed to think that this Caſe was within the Letter of 3 *Jac.* and he thought that this Statute ought to have a liberal Conſtruction; but becauſe the Judges of the King's Bench doubted, and inclined to the contrary Opinion, that there might be one uniform Opinion in the two Courts, it was agreed to be put off till the Court could talk with the Judges of the King's Bench.

And in the laſt Day but one of the Term the Chief Juſtice delivered the Opinion of the Court, and ſaid,

That this Court was agreed that Execution ought not to be ſtayed in this Caſe, if Bail was not found, for the Statute ought to be conſtrued liberally, and for the Benefit of him who had obtained Judgment, and that no Judgment was given in the Caſe of *Hammond* and *Webb*, and therefore the Rule for ſtaying Execution was diſcharged.

Salmon ver. *Denham & al'.* In C. B. Caſe 165.

EJectment, upon the Demiſe of *Stephen Saunderſon*, and a ſecond Demiſe alledged by *Thomas Saunderſon*,

What Words in a Will ſhall make an Eſtate in Fee, what not.

Upon Not guilty pleaded, the Jury at *York* Aſſiſes on the ſecond Demiſe found the Defendant Not guilty.

As to the firſt Deviſe they found ſpecially, that *John Little* being ſeiſed in Fee had three Siſters, *Elizabeth*, *Dorothy* and *Jane*; that *Jane* married *William Brown*, by whom ſhe had Iſſue *William*, *John*, *Hannah*, *Mary* and *Dorothy*; that *Hannah* married *Stephen Saunderſon* the Leſſor of the Plaintiff, by whom

whom ſhe had Iſſue *Thomas Saunderſon* the ſecond Leſſor, now alive; that *John Little* being ſeiſed, by his Will 26 *Sept.* 1674 deviſed other Lands to *Thomas Chappell* his Siſter's Son and the Heirs of his Body; Remainder to *William Brown*, *John Brown*, *Thomas Mitchel* and *George Scarf* his Siſters Sons and their Heirs, paying 5 *l.* Yearly to *Elizabeth Scarf* during her Life; other Lands he deviſed to *William Brown* and the Heirs of his Body, and for want of ſuch Iſſue to *John Brown*, *Thomas Chappel*, *Thomas Mitchell* and *George Scarf* and their Heirs.

Then he adds theſe Words, *Item, I give my Houſe and Lands* (which were the Lands in Queſtion) *to* John Brown, *the ſaid* William Brown *paying to* Elizabeth Scarf 3 l. *Yearly during her Life, and the ſaid* John Brown *paying to the ſaid* Elizabeth Scarf 2 *l. yearly during her Life.*

Other Lands he deviſed to *George Scarf* and the Heirs of his Body; Remainder to *William Brown*, *John Brown*, *Thomas Chappell*, *Thomas Mitchell* and their Heirs.

Then he deviſes ſeveral Legacies, and deviſes ſeveral Lands to be ſold for the Payment of his Debts and Legacies, and afterwards adds this Clauſe.

If the Lands I have aſſigned to be ſold, and my perſonal Eſtate, will not hold out to pay my Debts and Legacies, what ſhall be unpaid ſhall be paid out of the Proportion of the Lands I have given to *William Brown*, *John Brown* and *Geo. Scarf.*

The Jury found that *John Little* died, and his Siſters *Elizabeth* and *Dorothy*, and *William Brown* the Son and Heir of *Jane* the other Siſter, were his Heirs.

That *Elizabeth* died, having Iſſue now alive, that *Dorothy* died without Iſſue, that *William Brown* Heir of *Jane* died without Iſſue, and afterwards *John Brown* died without Iſſue, and after his Death *Stephen Saunderſon*, in Right of *Hannah* his Wife, entered on the Lands deviſed to *John Brown*,

and that afterwards *Hannah* died, *Dorothy* and *Mary* being now living.

That the Lands in Queſtion deviſed to *John Brown* are 10 *l. per Annum* and no more, and if upon the whole the Court be of Opinion for the Plaintiff, they find for the Plaintiff, otherwiſe for the Defendant.

And after Argument by Serjeant *Pengelly* for the Plaintiff, and Serjeant *Wynne* for the Defendant, it was now argued by myſelf for the Plaintiff, and by Serjeant *Cheſhire* for the Defendant.

And for the Plaintiff it was inſiſted, that the Leſſor of the Plaintiff had Title *quacunque via*; for if *John Brown* had only an Eſtate for Life, he was only intitled to a fifth Part of the Reverſion; if he had an Eſtate in Fee, he was intitled to a third Part.

And it was argued that the Leſſor of the Plaintiff ought to have a third Part, for that *John Brown* by this Deviſe took an Eſtate in Fee; for if a Man deviſes Lands without limiting any Eſtate, the Deviſee paying a Sum in Groſs, this ſhall be by Conſtruction an Eſtate in Fee. This is ſettled, *Bro. Eſtates* 28, *Teſtaments* 8. *Cro. Eliz.* 204. 3 *Co. Wellock* and *Hammond*, 6 *Co.* 16. *Collier's* Caſe, 2 *Cro.* 527, 591, 599, 600. 1 *And.* 38. 1 *Rol.* 834. and in many other Caſes.

And though in this Caſe the Deviſe to *John Brown* is, paying 5 *l. per Annum* to *Elizabeth Scarf* during her Life, this makes no Difference, for it is a Sum in Groſs, and is to continue during the Life of *Elizabeth Scarf*, and therefore it muſt be in Fee, otherwiſe the Eſtate deviſed might determine before the Life of *Elizabeth*, to whom the 5 *l.* a Year is payable.

In the Caſe of *Webb* and *Herring*, 2 *Cro.* 415. there was a Deviſe to his Son, and if his three Daughters outlive his Son and his Heirs, they to have for Life; and then I give the ſame to my Siſters, they to pay 6 *l.* 10 *s.* yearly to

the *Merchant-Taylors* Company, and if they deny Payment the Company to enter.

It was adjudged that the Sifters had a Fee; ſo 2 *Cro.* 527. 2 *Rol.* 80. *Spicer* ver. *Spicer*, a Deviſe to his Wife for Life, paying 3 *l.* *per Annum* out of the Profits to *Thomas* for his Life, and if ſhe die before *Thomas* to his Son *Richard*, he likewiſe paying 3 *l.* a Year to *Thomas* for his Life, and 20 *s.* to his Sifters. *Roll* reports it that it was 20 *s.* yearly to *L.* for Life; and it was reſolved that *Richard* had a Fee, for the 20 *s.* is a Sum collateral, and does not Iſſue out of the Land, and the Value is not material; for if it was only a Penny to be paid, it being a collateral Sum which does not iſſue out of the Profits, the Deviſee, ſhall have a Fee; *Houghton* ſaid for this Reaſon, becauſe the Deviſee, who is to pay to *L.* during his Life, muſt have an Eſtate to continue during the Life of *L.* and therefore muſt have a greater Eſtate than for his own Life, for *L.* may ſurvive him.

So in the Caſe 27 *Car.* 2. *Read* ver. *Hatton*, *Poll.* 399. 2 *Mod.* 25. a Deviſe to *Robert* his Son, upon Condition that he pay 5 *l.* a Year to his Sifters, the firſt Payment to be made at the firſt of the uſual Feaſts which ſhall happen next after his Death, ſo it be a Month after his Death, though the Eſtate deviſed was 16 *l.* a Year; yet it was adjudged that *Robert* had a Fee. So *Lee* and *Withers*, 2 *Jon.* 107. *Pollexf.* 545. a Deviſe to *James* conditionally, that he allow his Son *Nicholas* Meat, Drink, Waſhing and Lodging, during his Life; tho' it was urged, that the Word *allow* imported it to be out of the Profits, yet it was reſolved that it was a Fee.

And the Difference is only where the Payment is limited to be paid out of the Profits, and where it is not limited; for this is the Diſtinction taken 6 *Co.* 16. in *Collier*'s Caſe, a Deviſe, paying a Sum in Groſs, ſhall be a Fee; paying therefore 20 *s.* yearly ſhall be only for Life, which alludes to the Caſe *Dy.* 371. *b.* where a Deviſe to the Wife after the Death of his Father, paying therefore to the right Heirs of my Father 40 *s.* yearly during her Life, was adjudged only a Deviſe for Life. So *Anneſley* ver. *Chapman*, *Cro. Car.* 157. *Jon.*

211. A Deviſe to his Sons, and they to bear Part and Part alike going out of the Lands for Life, this was only an Eſtate for Life.

But if there was any Doubt whether this Clauſe gave *J. Brown* a Fee, yet it would be removed by the Clauſe which ſays, that if the Eſtate to be ſold and his perſonal Eſtate will not hold out to pay his Debts and Legacies, what is unpaid ſhall be paid out of the Proportion of the Lands given to *William Brown*, *J. Brown* and *Geo. Scarf*, for a Deviſe of Lands to pay Debts and Legacies will carry a Fee; ſo *Dy.* 371. *b.* a Deviſe of Lands to a Man's Siſter, except my Manor, which I appoint to pay my Debts, will be a Deviſe of the Manor in Fee.

So a Deviſe to perform a Man's Will, and to pay Debts and Legacies, was reſolved by all the Juſtices in *C. B.* to be a Fee. *Bend. pl.* 66. And ſo it was decreed in Chancery. *Ca. Chan.* 196.

And afterwards in the ſame Term Judgment was given for the Plaintiff by the whole Court; for the Chief Juſtice ſaid, that they were all clearly agreed in their Opinions, that *J. Browne* had by this Deviſe an Eſtate in Fee upon the whole of the Will; though if it had been put upon the firſt Words only, *paying* 5 *l.* per annum *to* El. Scarf *for her Life*, they had not been all ſo clear in their Opinions.

William Vaiſey ver. *Hundred of Whiſton in Com. Glouceſt.* In C. B.

Caſe 166.

ACTION upon the Statute 13 *Ed.* 1. in which the Plaintiff declares *de placito quod quidam malefactor', &c. in quoſdam Johannem Goodman & Robertum Capell ſervien' ipſius quer' inſult' fecer' & 67 l. conſiſten' de diverſis peciis auri cuſi vocat'* Guineas, *& diverſis peciis auri cuſi vocat'* Half Guineas *de denar' ipſius Gul' Vaiſey propriis, in manibus & cuſtod' præd' Johannis*

In an Action upon the Statute 13 *Ed.* 1. for a Robbery, it ought to appear that the Plaintiff has the whole Property in the Money of which the Robbery was committed; or otherwiſe, if intire Damages be given, it will be bad *in toto*.

Johannis invent' exiſten', ac viginti peciis auri cuſi vocat' Guineas, *in manibus & cuſtodia præd' Roberti invent' exiſten', de eiſdem Johanne & Roberto felonice ceper', aſportaver' & abduxer', &c. in Domini Regis nunc contempt' & grave damnum ipſius Gulielmi & contra form' ſtat', & unde idem Willielmus qui tam &c. quer' quare cum quidam malefactor', &c. ut prius.*

Upon Not guilty pleaded a Verdict was found for the Plaintiff, and Damages were aſſeſſed at 88 *l.*

And now Serjeant *Cheſhyre* moved in Arreſt of Judgment, for that the Plaintiff had declared only for 67 *l. ut de denar' ipſius Willielmi propriis*, but it does not appear by the Declaration that the 20 Guineas were the Money of the Plaintiff; for though they were in the Poſſeſſion of his Servant (which, when the Maſter is preſent, is ſufficient to ſhew that they are the Maſter's Money, for the Poſſeſſion of the Servant is the Poſſeſſion of the Maſter, where the Maſter is preſent,) yet it is not of Conſequence that they are the Money of the Maſter who was abſent, and therefore intire Damages being given, it will be bad *in toto.*

Afterwards the Chief Juſtice ſaid, that all the Juſtices were agreed that the Plaintiff muſt have the Property in the Money of which the Robbery was committed; and he and *Tracy* thought that it did not appear here that he had the Property in the 20 Guineas. But *Blencoe* and *Dormer* being of the contrary Opinion, Judgment was not arreſted.

Caſe 167.

Thomlinſon ver. *Arriskin.* In C. B.

An Award held good, notwithſtanding ſome Objections in Point of Form.

TReſpaſs for taking away and detaining the Wife for four Months againſt the Conſent of the Plaintiff her Husband, *per quod conſortium amiſit, &c.* The Defendant after Imparlance *quoad vi & armis* pleaded Not guilty, *quoad reſid' transgr' dicit action' non, &c. quia dicit quod tranſgr' præd' unde præd' quer' ſuperius ſe modo quer' fact' fuit tam per ipſum def' quam per quendam Hug' Martin, quodque poſt tranſgr' præd' & ult' contin'* (*viz.*) 27 *May* 5 *Geo.* the Plaintiff, Defendant and *H. Martin* ſub-

mitted

mitted to the Arbitration of *R. Wallas*, *H. Wallas* and *H. Richardſon*, *ad arbitrand' de tranſgr' præd' inter quer' & eoſdem def' & H. Martin & de diverſis ſect' inde inter eos tunc penden'*, *& illi primo Jun'* 5 *Geo. arbitraver' quod defen' & H. Martin ſolverent quer' aut offerrent* to his Uſe 7 *l. ſuper tertium diem Jun' ac duas integr' tertias part' omnium cuſtag' ipſius quer' in & circa ſect' præd' ſolubil' tam attorn' quam ballivo ſu'is poſtquam billa inde product' foret, &c. quas* 7 *l.* they tendered on the 3d of *June*, and the Plaintiff refuſed, *quodque nulla billa cuſtag' hucuſque product' fuit, &c.* To which the Plaintiff demurred, and ſhewed for Cauſe, that the Plea was pleaded in Bar of the Action, whereas it ſhould have been *in Barram ulterior' manutention' action' ill'*, and the Defendant joined in Demurrer. And it was inſiſted for the Plaintiff, firſt, That this Award is not a Bar, for that the Submiſſion was only *de tranſgr' inter quer' & defen' & quendam Hug' Martin & de diverſis ſect' inter eos tunc penden'*, which could not extend to a Suit againſt the Defendant only; and though it is averred, *quod tranſgr' unde quer' ſe querit' fact' fuit tam per Hug' Martin quam per defen'*, that is impoſſible, for though *H. Martin* might have been aiding to the Defendant, and in Treſpaſs all are Principals, and may be charged either jointly or ſeverally, yet the Declaration charges the Defendant for a particular Fact of his own, (*viz.*) that he took the Plaintiff's Wife *& per quatuor menſes detinuit & adhuc detinet*, and the Detainer by the Defendant could not be committed by *H. Martin*; therefore the Suit againſt the Defendant for that Fact could not be a Suit *inter eos dependen'*.

Sed non allocatur; for the Submiſſion ſhall be conſtrued to be of all Actions between them, or any of them.

Secondly, It was inſiſted, that the Award being, that the Defendant ſhould pay two Thirds of all the Plaintiff's Coſts to his Attorney or Bailiff *in & circa ſect' præd'*, is altogether uncertain; for tho' an Award to pay Coſts, to be taxed by the Prothonotary, has been allowed, 1 *Sid.* 358. yet here no Perſon is named who is to tax the Coſts; and therefore an Award to pay Coſts of Suit in an inferior Court is void. 1 *Salk.* 75. And here it is to pay Coſts to the Bailiff; and therefore is

like the Caſe in 3 *Lev.* 413. to pay all reaſonable Expences in ſuch a Suit, which was held to be void.

Sed non allocatur; for an Award to pay Coſts in ſuch a Suit is ſufficient, without ſaying any Thing more, for they may be aſcertained. *Vide* 2 *Vent.* 242. 3 *Lev.* 18.

Thirdly, The Award is on one Side only; for it directs, that 7 *l.* and Coſts ſhall be paid by the Defendant, and directs nothing as to the Plaintiff, nor does it ſay that all Suits, *&c.* ſhall ceaſe, or that this ſhall be in Satisfaction of the Plaintiff's Demands, or any Thing to that Effect; and though an Award, which expreſſes that it was made *de & ſuper præmiſſis*, may be conſtrued to be made in Satisfaction of all Differences or Demands, yet this, being only averred by the Plea, ſhall not be conſtrued in ſuch Manner.

Sed non allocatur; for here the Award is a parol Award, in which the very Words need not be expreſſed, but the Effect and Subſtance of it; and therefore when it is ſaid *Quod arbitrat' de & ſuper præmiſſis arbitraver' & determinaver'*, it is tantamount to ſaying, that the Arbitrators for the Concluſion of all Differences between the Parties accorded, *&c.*

And therefore Judgment was given for the Defendant.

Caſe 168.

Wall ver. *Fulwood & al'.* In C. B.

An argumentative Plea not good.

TRESPASS, *quod* 19 *Sept.* 3 *Geo.* Defendants *Vi & armis un' ſpadon' quer' abſque cauſâ rationabili ceper', percuſſer', fugaver' & imparcaver', & ſpadon' ſic imparcat' per ſpacium trium dierum detinuer', necnon* 20 *Sept.* 3 *Geo. un' al' ſpadon' quer' ceper' & abduxer'.*

The Defendants *quoad Vi & armis, necnon tot' tranſgr' in nar' præd' mentionat' præter caption', percuſſion', fugation' & imparcation' un' ſpadon' ſuper* 19 *diem Sept. & ſpadon' ſic imparcat' per ſpacium trium dierum detention', Non cul'*; *& quoad un' ſpadon' ipſius quer' caption', percuſſion', fugation' & imparcation'*

& ſpadon' ill' ſic imparcat' per præd' ſpacium trium dierum in nar' præd' mentionat' per eoſdem Defen' fieri ſuppoſit' dicunt quod ante præd' tempus quo, &c. Ricardus Fulwood was ſeiſed in Fee of *Cheſter Cloſe*, and that for Damage-feaſant there the Defendants *ſpadon' præd' ceper', &c.*

Plaintiff replies, That he is Rector of *Renſlinch* in the County of *Worceſter*, of which Rectory a Meſſuage and fifty Acres of Land are Parcel; that in the Pariſh of *Renſlinch quidam campus exiſtit conſiſten' in part' de terr' arabil' in part' de prato vocat' Weſtfield de quo Cheſter Cloſe in quo, &c.* is Parcel; that the Rectors of the ſaid Rectory have Time out of Mind had Right of Common in that Part of *Weſtfield* called the Arable Part, of which *Cheſter Cloſe in quo, &c.* is Parcel, *pro omnibus averiis coi'nabil' in & ſuper Meſſ' & quinquaginta acr' præd' levan' & cuban' in quolibet anno quo campus præd' cum grano in debito tempore ſecundum conſuetud' agricultur' ibidem ſeminat' fuit a tempore quo tot' gran' ſic ſeminat' aſportat' fuit' quouſque aliqua pars campi præd' cum grano reſeminat' fuit', & in anno quo jacet friſcus & ad Worcet' per tot' ann' ill', quod anno tertio Geo. præd' Weſtfield in part' vocat' pars Arabilis inde cum grano ſeminat' fuit & ante præd' tempus quo, &c. nullum gran' in eodem campo remanen' fuit per quod quer' poſuit ſpadon' præd' ſuper Meſſ' & quinquaginta acr' terr' præd' levand' & cuban' in Cheſter Cloſe ad co'ia ſua ibidem utenda, &c.*

Defendant rejoined, *quod ſex acr' terr' vocat' Pratts Nathan prope Radford Bridge ſunt parcel' de Weſtfield, & anno ſecundo Geo. cum grano ſeminat' fuer' & tempore quo, &c. duo carectat' viciar' eodem anno ſecundo ſeminat' fuer' remanen' in præd' ſex acr' terr', & duob' carectat' ill' ſic remanen' quer' de injuriâ propriâ poſuit præd' ſpadon' in Cheſter Cloſe præd'.*

To which the Plaintiff demurred, and Defendant joined in Demurrer.

And it was inſiſted, that the Rejoinder was bad, for that the Rejoinder ought to anſwer to the Replication which preſcribed for Common in *Weſtfield*, of which *Cheſter Cloſe in quo, &c.* is Parcel, *a tempore quo tot' gran' aſportat' fuit quouſque aliqua pars campi*

campi præd' reſeminat'; if the Defendant would not traverſe the Preſcription, but only the Time of uſing his Common, he ſhould have denied *quod tot' gran' aſportat' fuit*; upon which the Iſſue would have been well joined; or afterwards upon ſuch an Inducement as this ſhould have traverſed *abſque hoc quod tot' gran' fuit aſportat'*; for the Iſſue was upon the Affirmative and the Negative, and one ought to commenſurate to the other, but here the Denial of the Defendant is not ſo.

Secondly, The Rejoinder of the Defendant is not a direct Denial of the Matter alledged by the Plaintiff, but by Inference; the Plaintiff ſays, that all the Grain was carried off the Ground: The Defendant ſays, that *Pratt's Nathan* was Parcel of the Field where two Lands of Vetches remained; this is Evidence, and by Conſequence infers, that all the Grain was not carried, but is not a direct Negative to the Matter alledged by the Plaintiff; and a Plea which is argumentative is not good. *Co. Lit.* 303. *Dy.* 357. *b. Yelv.* 223.

Thirdly, If this is a Negative to the Plaintiff's Affirmative, then the Defendant ought to have concluded to the Country; for when there is a direct Negative and Affirmative, there is a full Iſſue, and the Concluſion ought to be to the Country. *Yelv.* 137. 2 *Sand.* 190, 1337.

Fourthly, The Plaintiff cannot anſwer any Thing to this Rejoinder, for if he ſays, that two Lands of Vetches did not remain upon *Pratt's Nathan tempore quo, &c.* this would be a Departure; for by his Replication he had ſaid that all the Grain was carried out of all the Field, now that it was carried out of one Part only; and if it were found that the two Loads of Vetches were carried, this Verdict would be immaterial, for there may be Grain growing on other Parts of the Field.

Mudge ver. *Mudge.* In C. B.

Caſe 169.

THE following Caſe was referred by the Lord Chancellor to the Judges of the Common Pleas for their Opinions.

A Covenant, tho' good in its Creation, may be extinguiſhed afterwards by the Death of the Covenantor, to whom the Covenantee was Heir.

Firſt, If any and what Eſtate aroſe to *Joan Mudge.*

Secondly, If the Covenant was a binding Covenant.

Edmund Mudge by Indenture 30 *January* 1692. between himſelf on the one Part, and *Joan Mudge* his Wife of the other Part, for natural Love to the ſaid *Joan Mudge* his Wife, by theſe Preſents doth give, grant and confirm unto the ſaid *Joan Mudge* all that his fourth Part of *Averges, &c.* Part of the Manor of *King's Barſwell* in the County of *Devon*, for and during her natural Life, and after her Deceaſe unto *William Mudge* his Son, and to his Diſpoſing, all that his Right, *&c.* in the Premiſſes, that he the ſaid *Edmund Mudge* ſtandeth ſeiſed and poſſeſſed of in an Inheritance in Fee-ſimple; but if it happen that the ſaid *William Mudge* die without Iſſue, then the Inheritance ſhall remain to *Joan Mudge* and her Heirs, to have and to hold the ſaid granted Premiſſes unto *Joan Mudge* for Life, and after her Deceaſe to *William Mudge*, and to his Diſpoſing; but if he happen to die without Iſſue, then to *Joan Mudge* his Wife and her Heirs, to be holden of the Chief Lord of the Fee.

And the ſaid *Edmund Mudge*, for himſelf, his Heirs and Aſſigns, doth covenant and grant to and with the ſaid *Joan Mudge* his Wife, and *William Mudge* his Son, their Heirs and Aſſigns, that the ſaid *Edmund Mudge*, notwithſtanding any Act, *&c.* is, and at the Time of executing of an Eſtate of the Premiſſes unto the ſaid *Joan Mudge* his Wife, and to the ſaid *William Mudge* his Son, and their Heirs, ſhall be ſeiſed of the Demeſnes as of Fee, to them and their Heirs, of and in the

Premiſſes, without any Uſe, *&c.* to alter, *&c.* and ſhall continue and be ſo ſeiſed thereof until an Eſtate of and in the Premiſſes ſhall be lawfully executed unto the ſaid *Joan Mudge* and *William Mudge* their Son, and their Heirs; and that the ſaid *Edmund Mudge* now hath good Right and Title, *&c.* to convey, *&c.* and that the ſaid *Joan Mudge* and *William Mudge* ſhall and may from Time to Time quietly enjoy, and without the Lett, *&c.* and that the ſaid *Edmund Mudge*, his Heirs and Aſſigns, ſhall and will, at the Coſts of the ſaid *Joan Mudge* and *William Mudge*, their Heirs and Aſſigns, at any Time in five Years do any further, *&c.* for the better Aſſurance, *&c.*

It was inſiſted, that this amounted to a Covenant to ſtand ſeiſed to the Uſe of *Joan Mudge* for her Life; for though a Man cannot covenant with his Wife, *Co. Litt.* 112. yet this Deed ſhall be conſtrued to be a Deed Poll, as was held 4 *Mod.* 261. *Caſ. Parl.* 140. Then when a Man by Deed Poll covenants with his Wife, and *William Mudge* and his Heirs, though the Covenant be void as to the Wife, it ſhall be a good Covenant with *William Mudge* the Son, with whom the Father might make a Covenant. So if a Covenant be entered into with a Man and his Wife, the Husband may declare upon the Covenant to him only; and by the ſame Reaſon the Covenant here made with the Wife and the Son ſhall be conſtrued to be a Covenant with the Son only. 2 *Cro.* 383. 2 *Mod.* 217.

Then if *Edmund Mudge* by Deed Poll covenants for himſelf and his Heirs, with his Son and his Heirs, that he grants, releaſes and confirms the Tenement in Queſtion to the Uſe of his Wife for Life, and after to his Son; and if he dies without Iſſue, to his Wife and her Heirs; and covenants, that he is ſeiſed, and will continue to be ſeiſed till an Eſtate be executed to them and their Heirs; this ſhall be conſtrued as a Covenant to ſtand ſeiſed, *&c.* for it is evident, that the Eſtate was intended for the Wife, *&c.* and Words which cannot otherwiſe take Effect, ſhall amount to a Covenant to ſtand ſeiſed. 3 *Lev.* 370, 372. 2 *Lev.* 226. 2 *Jon.* 105.

But on the other Side it was inſiſted, that this was intended as a Grant, and being a void Grant, the Covenants afterwards that he was ſeiſed, and for quiet Enjoyment, and further Aſſurance, ſhall not be conſtrued as a Covenant to ſtand ſeiſed. 3 *Lev.* 306.

And it was agreed by all the Judges of the Common Pleas, that no Uſe aroſe to *Joan Mudge* by this Deed.

And as to the Covenant, they all delivered their Opinions, that the Covenant was good in its Creation, but afterwards by the Death of *Edmund Mudge* was extinguiſhed, the Covenantee being the Heir of the Covenantor.

Sir Edward Bettiſon ver. *Savage.*

Caſe 170.

A Prohibition was granted to the Eccleſiaſtical Court, upon a Libel there againſt the Plaintiff and ſome other Juſtices of the Peace in the County of *Kent*, for a Diſturbance made by them in the Pariſh-Church of *Chiſlehurſt* in the Time of Divine Service; upon a Suggeſtion, that the Plaintiff acted as a Juſtice of the Peace in ſuppreſſing a Riot made by ſeveral Perſons in the ſaid Church, for which the Rioters were indicted at the *Kent* Aſſizes, and found Guilty.

Upon a Writ of Enquiry executed after Judgment by Default in Prohibition, Plaintiff ſhall have his Coſts.

And after declaring in Prohibition, the Defendant, *quoad* any Proceeding ſince the Writ of Prohibition delivered, pleaded Not guilty, *& pro conſult' habend'* demurred; and Judgment for the Plaintiff upon the Demurrer; and upon a Writ of Enquiry for the Damages in that Iſſue the Jury found 2 *d.* Damages: And it was now moved by Serjeant *Whitaker*, that the Plaintiff might have his Coſts; for when a Plaintiff in Prohibition recovers Damages, he ſhall alſo have Coſts. 1 *Rol.* 516, 575. *Cro. Car.* 559. 1 *Jon.* 447.

If Iſſue be joined, whether the Defendant has proceeded ſince the Prohibition granted, and Verdict be for the Plaintiff,

tiff, the Plaintiff ſhall have Damages. 2 *Jon.* 128. *Ray.* 387. 1 *Vent.* 348, 350. It was reſolved that the Plaintiff in Prohibition ſhould have his Coſts where the Judgment was by Default, and 100 *l.* Damages found thereupon in *Ireland*, and though it was ſaid by the Court, that it was not uſual after Judgment in Prohibition to proceed to execute a Writ of Inquiry, yet it is admitted, that if a Writ of Inquiry be executed, and the Jury thereupon give Damages, the Plaintiff ſhall have his Coſts.

And it appears by the Caſe in *C. B. Paſch.* 5 *W. & M.* that where a Writ of Inquiry was executed after Judgment by Default in Prohibition, that in ſuch Caſe the Plaintiff ſhall have his Damages and Coſts. 3 *Lev.* 360.

And the Court was of Opinion the Plaintiff ſhould have his Coſts, and a Writ of Error was brought in the King's Bench, and Judgment affirmed, and afterwards a Writ of Error in Parliament; but there was no Proceeding thereupon upon my Perſuaſion that it was reaſonable and agreeable to the Authorities in Law, that the Plaintiff ſhould have Coſts.

DE
Termino Paſch.
6 Geo. 1. In C. B.

Scott verſus *Alberry*. *Intr. Trin.* 3 *Geo.* *Rot.* 1153. Caſe 171.

EJectment upon the Demiſe of *John Scrape* for Lands in *Walthamſtow* in the County of *Eſſex*. A Deviſe of all his Eſtate whatſoever comprehends all that a Man has, real or perſonal, and when there is a Surrender to the Uſes of his Will, a Copyhold Eſtate will fall under the ſame Conſtruction.

The Defendant pleaded Not guilty, and at *Eſſex* Aſſiſes before Juſtice *Powis* a ſpecial Verdict was found to this Effect; That *James Scrape* was ſeiſed in Fee of the Lands in Queſtion, being Copyhold held of the Manor of *Waltham Holy-croſs*, and 5 *June* 1693 made a Surrender in the Court of the ſaid Manor, *ad tales uſus, intention' & propoſita qual' fuer' aut forent per Teſtament' & ult' voluntat' ſuam in ſcript' limitat' declarat' & expreſſ'*; that he made his Will 16 *May* 1694, and thereby deviſed in theſe Words, *As touching the Worldly Eſtate it hath pleaſed God to beſtow upon me, I give the ſame in Manner following.* Item, *I give to my Couſin* Thomas Scrape *all that my Parcel of Land lying in* Waltham-Abbey (being the Lands in Queſtion). Item, *I give to my ſaid Couſin* Thomas Scrape *my Wearing Apparel, Linen, Books, with all other my Eſtate whatſoever and whereſoever, not herein before given and bequeathed, and him the ſaid* Thomas Scrape *I make the ſole Executor of this my Will for performing the ſame.*

Thomas Scrape was admitted, and afterwards deviſed to the Leſſor of the Plaintiff and his Heirs, and if *Thomas Scrape* by this Deviſe had an Eſtate for Life or in Fee, was the Queſtion.

And the Court took Notice that by this ſpecial Verdict it is not found that the Defendant had any Title as Heir at Law or otherwiſe, and then the Leſſor of the Plaintiff being admitted, he ought to recover againſt him that had no Title.

And this was admitted by the Counſel for the Defendant, and therefore he would have moved to amend, but was reſtrained by this Doubt in Point of Law.

And therefore the Court heard Counſel as to the Queſtion on the Will; and Serjeant *Selby* argued, That *Thomas Scrape* had by this Deviſe an Eſtate in Fee; for it appears that the Teſtator intended to diſpoſe of all his Eſtate; as to the Worldly Eſtate, *&c. I give the ſame as follows*, and though a Deviſe to a Man generally paſſes only an Eſtate for Life, yet when the Deviſor adds, that he intends him all his Eſtate whatſoever and whereſoever, this carries him a Fee. Where a Man deviſed all his Eſtate to his Wife, it was adjudged ſhe had a Fee. 1 *Rol.* 834. §. 12. So 3 *Mod.* 45. So in the Caſe of *The Earl of Bridgwater* ver. *The Duke of Bolton*, a Deviſe of all his Real and Perſonal Eſtate was held a Fee. *Salk.* 236. So in *Hopewell* and *Ackland*, *Salk.* 239. The Deviſe was of his Manor of *B.* if his Daughter died without Iſſue, to his Brother and his Heirs. Item, *I give to my Brother all my Lands, Tenements and Hereditaments.* Item, *I deviſe all my Goods, Chattels, Money, Debts and whatſoever elſe I have in the World not before diſpoſed of, to my Brother* A. *paying my Debts and Legacies*; and though the laſt Clauſe was coupled with perſonal Things, yet it was reſolved that theſe Words, *whatever elſe I have in the World*, gave the Fee and Inheritance of all his Eſtate.

To which the Counſel for the Defendant anſwered, that the Caſes mentioned were conſiſtent with the preſent Caſe,

though the Deviſe to *Thomas Scrape* ſhould be conſtrued only an Eſtate for Life; for by the Caſe 1 *Roll.* 834. it appears, that the Deviſe was of all his Eſtate to his Wife, paying his Debts and Legacies, and that his Debts amounted to 40 *l.* and his perſonal Eſtate but to 5 *l.* and then without Doubt it would be a Deviſe in Fee. So the Caſe 3 *Mod.* 45. was, that *J. Reeves* by his Will ſaid, *I hear* J. Reeves *is inquiring after my Death, but I am reſolved to give him nothing but what his Father hath given him by his Will; I give all my Eſtate to my Wife*; and the Reſolution in this Caſe was founded upon the Antitheſis in theſe Words, *I am reſolved to give nothing to* J. Reeves, who probably was his Heir at Law. So in the Caſe of the Earl of *Bridgwater*, *Sal.* 236. *Mod. Ca.* 106. The Court took Notice of the Words *all my Eſtate real and perſonal*; for *Holt* ſaid, the Word *Eſtate* is *Nomen Generaliſſimum*, which is ſubdivided into two Species, Real and Perſonal; and therefore when he enumerates both Species, though the Words are conjoined with perſonal Things, all paſſes; but there it ſeems to be agreed, that if the Eſtate had been mentioned generally, being coupled with Chattels only, nothing would have been compriſed but perſonal Eſtate.

And therefore the Caſe *Cro. Car.* 447. was urged by the Counſel for the Heir at Law; where a Man deviſed all the Reſidue of my Goods, Leaſes, Mortgages, Eſtates, Debts, Houſhold-ſtuff, Bonds and other Things whatſoever of which I am poſſeſſed, to my Wife; and it was reſolved, that his Mortgages in Fee paſt to her but for Life; and this Caſe was agreed to be Law, for the Word *Eſtate* was mentioned without the Difference of Eſtates, as here. *Mod. Ca.* 108.

So the Caſe of *Hopewell* ver. *Ackland* was founded upon this Reaſon, that the Teſtator had given to his Brother *all his Goods, Chattels and Debts*, which comprehend *all his perſonal Eſtate*; and therefore when he adds, *whatſoever elſe I have in the World*, that imports ſomething more than his perſonal Eſtate; and there he deviſes many Legacies in Fee for Charities, and therefore when he deviſes to his Brother, he paying his Debts and Legacies, it was probable he intended the Inheritance for him, who was to pay the Charities for ever.

And

And therefore it was urged, that the preſent Caſe went farther than the Caſe mentioned; for here he gives only his Apparel, Linen, Books, with his other Eſtate, which muſt be conſtrued with his other Eſtate of the ſame Nature, and not an Eſtate of a higher Nature; as in the Caſe 2 *Co.* 46.

Monaſteries, Colleges, *&c.* ſurrendered or forfeited, or which by other Means ſhould come to the Crown, did not extend to thoſe which came afterwards to the Crown by Act of Parliament. So Colleges, Deans and Chapters, *&c.* and other Eccleſiaſtical Perſons, by Statute 13 *Eliz.* does not extend to Biſhops.

Then here the Eſtate was Copyhold, which paſſes by the Surrender, not by the Will; and when he ſurrenders to ſuch Uſes as ſhould be declared and expreſſed by his Will, and in the Clauſe by which he deviſes the Copyhold, he gives it to *Thomas Scrape* only, without ſaying any Thing of his Heirs; it would be a forced Conſtruction, that the Words, *with my other Eſtate not before bequeathed,* ſhould inlarge the Eſtate before expreſly limited to *Thomas Scrape*; and after theſe Words he adds, *and him I make my Executor for performing my Will,* which Words import, that he intended nothing for him by this Clauſe, except ſuch Eſtate as belonged to an Executor.

But the Court held, that when he gave all his Eſtate whatſoever, that comprehended all that he had, real or perſonal Eſtate; and when he had ſurrendered to the Uſes declared by his Will, the Will ſhall have the ſame Conſtruction as if it had paſſed the Land it ſelf. *Adjornatur.*

But afterwards the Plaintiff was admitted to take Judgment.

4

Wagſtaff

Wagſtaff ver. *Rider and Travell. Intr. Trin. 5 Geo. Rot.* —— In C. B.

Caſe 172.

IN an Action upon the Caſe the Plaintiff declared, *Quod cum idem quer' tertio Maii 1713. fuiſſet & adhuc eſt poſſeſſionat' de & in uno meſſuagio in Newport, ac ratione inde per tot' tempus præd' habuit & de jure habere debuit communiam paſtur' in quodam communi campo vocat' Buryfield pro duobus ſpadon' a tertio die Maii uſque feſt' Sanct' Mich' prox' ſolvend' pro quolibet ſpadon' 1 s. 8 d. proprietar', firmar' vel occupator' ejuſdem campi; Cumque præd' campus vocat' Buryfield contigue adjacet al' campo vocat' Pitwellfield, cumque defend' dicto tertio die Maii fuerunt & hucuſque ſunt tenen' & occupator' præd' communis campi vocat' Buryfield, ac ipſi & omnes al' tenen' & occupator' præd' campi vocat' Buryfield, a tempore, &c. reparaver' fenſur' int' Buryfield & Pitwellfield ne averia perſonar' in Buryfield communiam habentium evaderent in Pitwellfield & exinde in terras adinde adjacen', prædicti defend' prædicto tertio die Maii & abinde hucuſque ſepes int' Buryfield & Pitwellfield permiſer' fore in decaſu, per quod duo ſpadon' ipſius quer' quarto die Maii 1713. & abinde hucuſque inter præd' tertium diem Maii & Mich' quolibet anno diverſis diebus & vicibus depaſcen' & communia ſua præd' in formâ præd' uten' e Buryfield in Pitwellfield præd' & abinde in al' campos diverſor' perſonar' prope adjacen' evaſer' & damnum ibidem fecer', &c.* To this Declaration the Defendants pleaded *quod non fuer' tenen' ſeu occupator' præd' campi vocat' Buryfield.* To which the Plaintiff demurred, and ſhewed for Cauſe, that this was a Plea amounting to the General Iſſue; and the Defendants did not maintain their Plea, but took Exceptions to the Declaration, that the Plaintiff did not ſhew any Title to Common by Preſcription, but only ſays, *habuit & habere debuit communiam paſtur', &c.* for tho' this is ſufficient in an Action on the Caſe by one who has Right of Common againſt a Wrong-doer, yet when the Plaintiff charges the Defendant for Nonfeaſance of a Thing againſt common Right, it is not ſufficient to ſay the Defendant ought to do it, but by what Right he is bound to do it; as

No one can maintain an Action on the Caſe for incloſing Common but thoſe who have a particular Right, or ſhew ſpecial Damage; and tho' he hath ſpecial Damage, he hath no Right to his Demand, without alledging a Preſcription.

in an Action upon the Caſe for not repairing Fences, it is not ſufficient to ſay, *quod def' reparare debet*, but the Plaintiff muſt alledge an expreſs Preſcription for the Repairs; and ſo it was reſolved 1 *Salk.* 335. *Starr* ver. *Roodsby.* And though here a Preſcription were alledged for the Defendant to repair the Fences between *Buryfield* and *Pitfield*, yet this Preſcription runs only between the Owners of thoſe two Fields; the Owner of *Pitfield* may demand, that the Defendant ſhall repair the Fences between him and *Buryfield*, but the Plaintiff who has Common in *Buryfield* cannot demand it, at leaſt if he has Right of Common only by Licence or Contract with the Defendant; for it does not appear that he has any more Right of Common than at the Will of the Defendant or ſome other. A Commoner cannot have a *Curia claudenda. F. N. B.* 128. For this Action does not lie but for him who was Tenant of the Freehold, and alſo Tenant of the Soil; and therefore the Plaintiff here cannot maintain an Action of the Caſe againſt the Defendants, without ſhewing an expreſs Lien between the Plaintiff and the Defendants to incloſe the Common for the Benefit of the Commoner. Every one who would maintain an Action on the Caſe muſt have a particular Right, or ſhew ſpecial Damage. By *Holt*, *Salk.* 15. An Action upon the Caſe does not lie for the Owner of an Antient Meſſuage in a Vill, who claims by Preſcription to have a Paſſage in the Ferry Toll-free, againſt him who is to repair the Ferry; for he has no Right to demand it without ſpecial Damage. 1 *Sal.* 12. And here the Plaintiff, though he hath ſpecial Damage, hath no Right to his Demand without alledging a Preſcription for it.

And afterwards Judgment was given for the Defendants.

DE
Term. Sanct. Mich.
7 Geo. 1.

Gally ver. *Serjeant Selby.* In Canc'. Caſe 173.

Charles Stafford ſeiſed in Fee of ſeveral Lands in the County of *Bucks* and of the Advowſon of *Warrenden* in Groſs, by Leaſe and Releaſe 23 and 24 *April* 1696, conveyed the Lands to Truſtees and their Heirs, to raiſe 500 *l.* for *Samuel Stafford* his Brother and his other Brothers and Siſters, and afterwards by Leaſe and Releaſe bearing Date 29 and 30 *March* 1696 (but executed after the before mentioned Conveyance to the Truſtees for raiſing Portions for his Brothers and Siſters) conveys the ſame Lands, and by Indenture 3 *April* 1696, conveys the ſaid Advowſon to Serjeant *Selby* and his Heirs.

A Mortgagee ſhall not be allowed to preſent to a living that becomes vacant, becauſe nothing can be taken for it, but ſhall be look'd upon as a Truſtee for the Mortgagor or his Grantee, and ſhall preſent ſuch Perſon as they ſhall name.

10 *March* 1705, *Charles Stafford* grants the next Advowſon to *Peter Gally*; in 1706 *Charles Stafford* died, and *Samuel Stafford* exhibited his Bill in Equity againſt *Selby* to be let into a Redemption of his Eſtate. *Selby* inſiſted that he was an abſolute Purchaſer; but upon hearing the Cauſe 1707, it was decreed that *Selby* was only a Morgagee, and that *Samuel Stafford* ſhould ſtand in the Place of the aforementioned *Charles Stafford* and ſhould be admitted to redeem, and that *Selby* ſhould account for the Profits received by him ſince the Conveyance, and that Security ſhould be given to Redeem, *&c.*

4 *July* 1709, *Gardiner* articled to pay 18000 *l.* for the Lands and the Advowſon, which were conveyed to *Selby*, but the

the Account was not then ſettled by the Maſter; and now the Church being become vacant by the Death of *Cowne* the laſt Incumbent, *Gally* the Plaintiff, the Grantee of the next Avoidance, preſented his Clerk; *Selby* alſo preſented his Clerk, and *Gardiner* alſo preſented his Clerk. Upon this *Gally* exhibited his Bill in Equity againſt *Selby* and *Gardiner*, and *Gardiner* alſo exhibited his Bill againſt *Gally* and *Selby*, alledging that he was a Purchaſer for a valuable Conſideration, without Notice of the Grant to *Gally*.

The Bill of *Gally* againſt *Selby* (*Gardiner* now making Default) came on to be heard.

And it was inſiſted for the Plaintiff, that *Selby* was a Mortgagee, and was by the former Decree to be redeemed; the Equity of Redemption then being in *Charles Stafford*, he would have been admitted to preſent to the Advowſon which became void, pending a Suit for Redemption, and of Conſequence his Grantee ſhall be admitted here; for the Preſentation not being to be accounted for in Value the Mortgagee ſhall not be allowed to preſent, becauſe nothing can be taken for it or accounted for it, but the Mortgagor ſhall preſent.

And it was agreed that the Caſe would be ſo in a common Mortgage, but it was ſaid that here *Selby* was a Purchaſer, and continued a Purchaſer at the Time of the Grant made of the next Avoidance, *viz.* 10 *March* 1706, though by the Decree after he was directed to account, by which he became in the Nature of a Mortgagee *quoad* the Plaintiff in that Suit, *viz. Samuel Stafford*, but not *quoad Charles Stafford*, for he was no Party to the Suit, therefore as to him the Purchaſe continued abſolute; then the Plaintiff *Gally*, who took nothing from *Samuel Stafford*, nor claimed under him, nor gave any valuable Conſideration for his Grant, ought not to preſent; but *Selby* who has the legal Intereſt ought to preſent without the Interpoſition of a Court of Equity. But it was decreed by the Lord Chancellor, that *Selby* was only a Mortgagee from the beginning, and though *Samuel Stafford* was Plaintiff in the Suit, yet he came in under *Charles Stafford* who had the Equity of Redemption, and therefore when

the Church became vacant he was to have the Advantage of Preſenting, and as he had granted the next Avoidance his Grantee ſtood in his Place, and *Selby* is only a Truſtee for him; and it is not material whether he is a Purchaſer of the Grant, or not; for if the Grant were without any Conſideration, it would be good and ſufficient to intitle him to the Preſentation; and therefore it was decreed that the Preſentation by *Selby* and alſo by *Gardiner* were void, and that *Selby* ſhould preſent to ſuch Perſon as the Plaintiff ſhould name.

I was Counſel for the Plaintiff.

Anonymus. In Canc.

Caſe 174.

A Man ſeiſed in Fee made a Settlement of Lands to Truſtees and their Heirs, upon Truſt that they ſhould ſell the Lands and pay out of the Money ariſing therefrom ſuch particular Sums to ſuch particular Perſons, and the Reſidue (after the Sum of 200 *l.* to be paid to ſuch Perſon as he by any Writing under his Hand ſhould direct) to *B.* his Executors or Adminiſtrators, and afterwards died without any Direction for the Payment of the 200 *l.* It was reſolved that *B.* ſhould not have the 200 *l.* but the Heir of him who made the Settlement.

Upon a Settlement of Lands to be ſold in Truſt for ſeveral Purpoſes, the Reſidue is given to *B.* and his Heirs, reſerving only 200 *l* to be paid to ſuch Perſon as the Donor ſhould by Writing under his Hand direct, who died without any ſuch Direction, the 200 *l.* will go to this Heir, and not to *B.* or his Aſſigns.

Taſhmaker qui tam', &c. ver. *Hundred of Edmonton.* In C. B.

Caſe 175.

ACTION upon the Statute 13 *Edw.* 1. againſt the *Hundred of Edmonton de placito quod cum præd' Taſhmaker fuit poſſeſſionat' de duabus peciis auri cunit' vocat'* Guineas *valor'* 1 l. 1 s. *ſeparatim, ac fuit poſſeſſionat' de bonis & catallis ſequen' ut de bonis propriis,* (*viz.*) a Silver Watch, a Gold Watch and Chain,

An Action lies upon the Stat. 13 *Ed.* 1. againſt the Hundred for a Robbery committed on a *Sunday*, notwithſtanding 29 *Car.* 2. if it appears that the Perſon robbed was only going to his Pariſh Church.

a Pair of Ear-rings and a Diamond Necklace, *& ſic poſſeſſionat' exiſten' quidam malefact' ignot'* 10 *Apr' apud Edmonton infra præd' Hundred de Edmonton inſult' fecit in ipſum Taſhmaker & Juditham uxor' ejus tunc præſen' & præd'* two Guineas *de eodem Taſhmaker & prædicta bona & catalla de præd' Taſhmaker & Juditha uxor' ejus tunc præſen' felonice cepit, &c.*

Upon Not guilty pleaded at the Trial before *King* Ch. J. 30 *Nov.* at *Weſtminſter*, it appeared by the Evidence that *Taſhmaker* married the Daughter of Mr. *Gould* who lived at *Edmonton*, and had continued with his Wife at the Houſe of Mr. *Gould* from the firſt of *March* precedent, and that upon the 10th of *April*, being a *Sunday*, *Taſhmaker* and his Wife, and Mr. *Gould* were in his Coach, going from Mr. *Gould*'s Houſe to *Edmonton* Church, two Miles diſtant, and by the Way were robb'd, and the Goods before mentioned taken from *Taſhmaker* and his Wife.

And it was inſiſted, that the Action was not maintainable ſince the Statute 29 *Car.* 2. *cap.* 7. which enacts That if any travelling on the *Lord*'s Day be robb'd the Hundred ſhall not be charged for the Robbery, *&c.*

But it was anſwered, That going to the Pariſh Church could not be called a Travelling within that Statute, which was made for the better Obſervation of the *Lord*'s Day, and confirms the Statutes made for the publick Exerciſe of Religion, and by the Stat. 1 *Eliz.* every one is to reſort to his Pariſh Church on the *Lord*'s Day.

But the Travelling prohibited by this Act was ſuch as tended to the Profanation of that Day, and the Hundred by the Statute is liable to the King, though the Party could not have an Action where he was robb'd on Travelling, *&c.* and therefore the Bar to the Action was intended as a Penalty, but ſuch Penalty can never be ſuppoſed to be intended againſt a Man who is going to his Pariſh Church.

And afterwards upon a Motion the Court declared, that the Action well lay; though perhaps it might have been otherwiſe if he had been travelling for his Pleaſure.

Eaſt-India Company ver. *Atkyns.* In Canc'. Caſe 176.

1 W. 1688 &c

THIS was a Bill for a Diſcovery of a private Trade carried on by the Defendant, who was Supercargo of the *Stringer Gally*, ſent by the Company on a Voyage to *Canton* in *China* 1715. and from thence to return to *England*, and ſetting forth, that it was agreed between them and the Defendant, that he ſhould go Supercargo for the Company in the ſaid Ship, called the *Stringer Galley*; that he ſhould take ſeveral Goods from the Ship called the *Purſton Gally*, and then to proceed to *China*, and there take in Goods for the Company, &c. and that the Defendant covenanted, that he would not uſe any private Trade during the Voyage, and that if any Bill in Chancery ſhould be brought againſt him, that he would anſwer thereto, and not plead the Acts of Parliament which create any Penalty or Forfeiture in Bar to ſuch Diſcovery; and then charges, that he ſailed to the *Downes*, and there took in Goods for the Company from on Board the *Purſton Gally*, and from thence proceeded to *Canton* in *China*, where he privately ſold the Company's Cargo, and with the Produce of ſuch Cargo bought other Goods, and diſpoſed of them in his Return at *Liſbon* in *Portugal*, and Part was carried by the *Succeſs*, and Part by the *Lemon Galley* to *Holland*, &c. And offering to waive all Penalties, &c.

A Man may waive a Privilege, if it is not what the Law prohibits; though he is not obliged to diſcover what will ſubject him to a Penalty.

The Defendant, as to ſo much of the Bill as ſeeks a Diſcovery of Goods exported without Licence, or ſold before the Return of the Ship at *Liſbon* or elſewhere, pleads the Statute 9 & 10 *W.* 3. *c.* 44. and 6 *Annæ*, *c.* 3. by which, if Bulk be broke before the Return of the Ship the Ship, and Goods ſhall be forfeited, &c.

And Mr. *Vernon* argued, that this Plea was ſufficient; for by 9 *W.* 3. the Penalty is the Loſs of Ship and Goods, and the

the double Value of the ſame, one fourth Part to the Proſecutor, and the other three Fourths to the *Eaſt-India* Company, and therefore though the Waiver might be ſufficient, as to the Part given to them, yet as to the other fourth Part of the Ship, and double the Value, the Plaintiffs are not intitled: This they ſeemed apprehenſive of, and for that Reaſon alledge, that they have exhibited Informations, without ſaying when, or for what Goods, which they ought to have ſhewn particularly, and expreſly ſetting forth the Informations themſelves, to ſhew they were for the Goods in the Bill inquired after, if they would have intitled themſelves as Proſecutors to the other fourth Part; but if they ſhould be intitled to the Forfeitures upon 9 *W.* 3. *c.* 44. yet the Forfeiture by 6 *Annæ*, *c.* 3. is given, one Moiety to the Crown, and the other to them who will ſue or ſhall ſeiſe, *&c.* wherefore to this Penalty they appear not to be intitled; and then we are in the common Caſe, where a Diſcovery is prayed which will ſubject the Defendant to a Penalty, in which Caſe the Court will not oblige the Defendant to anſwer; a Court of Equity will not ſubject Perſons to Penalties, for it relieves againſt them.

But it is ſaid here the Defendant covenants to anſwer to any Bill in Equity, and not to plead or demur; but ſuch Covenants are of dangerous Conſequence, and here will ſubject the Party to the Payment of 90 *l. per Cent.* to the Company by way of Damage, (for ſo the Covenant runs) which is a Mulct as great as the Forfeiture.

The Manner of obtaining it was hard; when the Defendant was ready to ſet ſail, he muſt then execute this Charter-party, or not go. But this is ſaid to be no more than what the Company has always practiſed; yet there is alſo a Covenant, that if the Ship miſcarries the Party ſhall loſe his Wages; which as often as brought into Queſtion has been ſet aſide, for they are intitled from Port to Port to receive Wages, to ſuch Port where the Cargo was unladen, and ſuch Covenant is unreaſonable.

No Conſideration is pretended for this Covenant, but the Company's Undertaking that they ſhall not be ſubject to any Forfeitures, which the Company is not able to make good.

The Perſon covenanting here doth not pretend or pray to have Relief againſt his Covenant; but the Plaintiffs would have a ſpecifick Performance of it, which is not ſo proper in a Court of Equity; for a Difference hath always been taken between a Circumſtance of Fraud to be relieved againſt a Covenant, and the Praying a ſpecifick Performance of it. If a Man makes a Mortgage, and covenants not to bring a Bill to redeem, nay, if he goes ſo far as in *Stiſted*'s Caſe, to take an Oath that he will not redeem, yet he may redeem.

If a Man borrows Money, and covenants, that if the Intereſt be not paid at the Day, it ſhall carry Intereſt, yet a Court of Equity will relieve; tho' he may be ſaid as much to waive the Benefit of a Court of Equity in thoſe Caſes as here.

It is indeed a Covenant of an extraordinary Nature, that he ſhall not make Part of his Defence; if he may be abridged of one Part of his Defence, why not of the whole.

Indeed, in a Covenant to ſuffer a Common Recovery, it is agreed what Defence ſhall be made, and what the Parties ſhall do; and if this be allowed, the Defendant may another Time be obliged to make Default, that the Bill may be taken *pro confeſſo*.

The Covenant is, that the Defendant ſhall not plead nor inſiſt on the Penalties, to avoid a Diſcovery. But ſuppoſe he does, is the Court bound? Will they refuſe to regard his Plea, and paſs over the Merits which the Law allows him to inſiſt on? What has a Court of Equity to do with a Covenant, unleſs it be executory, to pray a ſpecifick Performance of it, but can there be a ſpecifick Performance here?

The Defendant covenants not to plead this Matter, but he has pleaded it; the Plaintiffs may take what Advantage they can at Law, but a Court of Equity will not interpoſe, eſpecially to do what is contrary to the Deſign of a Court of Equity, (*viz.*) to relieve againſt Forfeitures and Penalties.

The Rule, that no Perſon ſhall be compelled to ſubject himſelf to Penalties and Forfeitures, is founded on natural Right and Juſtice: It is a Rule which hath been obſerved inviolably without Exception, till this Attempt; therefore, as we cannot be acquitted by the Company from theſe Forfeitures, it would be a monſtrous Thing in a Court of Equity, to ſubject us to them; and the rather, where it is a Strain upon the Allegation of the Plaintiffs, who alledge, that they are apprehenſive of an Injury from the Defendant, though the Proceedings ſhew that they never made a better Voyage, having gained 200 *l. per Cent'* Profit. Their whole Complaint is conjectural and groundleſs, and ſeems to have no Foundation, and hath no Oath to ſupport it.

If they have any Ground, they have their Remedy at Law, and the Defendant asks no Relief in Equity againſt the Covenant.

Sir *Thomas Powis* on the other Side argued, that the Defendant was not within the Penalty of 9 *W.* 3. which prohibits all Perſons except the Company, and their Servants or Agents, to trade or carry Goods to the *Indies*; the Defendant is the Servant of thoſe who may trade, and ſo not ſubject to the Penalty of that Act.

But if, in reſpect to thoſe Goods exported, they be looked upon not as Servants, but as Traders, and ſo within the Penalties of the Act;

Yet three Fourths of the Penalty being given by that Act to the Company, and the other Fourth to the Informer, they may alledge they have exhibited an Information, whereby they will be intitled to that Fourth, and then waiving

the Benefit of the Penalties they are intitled to, they are in the common Caſe; as where a Perſon waives the Forfeitures of the treble Value, and prays a Diſcovery of Tithes; or where a Man waives the Penalty of the Statute, and prays a Diſcovery of Timber felled. And if the Penalties of this Act can be waived, and a Diſcovery of the outward-bound Voyage prayed, then the Plea, which covers the Diſcovery of this, is ill.

As to the Diſcovery prayed by the Bill in relation to the homeward-bound Voyage, that ſtands upon the Statute 6 *Annæ*, *c.* 3. where the Moiety of the Penalty is given to the Crown, which therefore will ſtand upon the Covenant of the Defendant, not to inſiſt on this Matter by way of Plea.

And may not a Man covenant not to commit a Fraud, or to diſcover it when committed?

It is founded on the Conſideration of being admitted to the Benefit of all the Profits he may be intitled to as Supercargo; ſo that it is a lawful Covenant, and founded on a Conſideration. Then it is a Covenant that goes along with a Truſt, and ſuch a Truſt as none would commit to another, unleſs he could come to the Knowledge how it is performed; but it cannot be known without the Diſcovery of the Defendant, it is a Tranſaction in a Ship at Sea.

A Mortgage is in its Nature redeemable, and therefore a Covenant not to redeem is unlawful. So is a Covenant to pay Intereſt upon Intereſt, for ſimple Intereſt is a reaſonable Compenſation; but this Covenant hinders no one of his Right, but only tends to prevent the Defendant from defrauding the Plaintiffs.

It is ſaid a Man hath a Right to plead or demur, but may he not waive ſuch Right? may he not covenant to give Judgment by Default, to releaſe Errors, to ſuffer a Recovery by Default, and will not a Court of Equity compel the Performance of theſe?

Lord

Lord Chancellor : The Plaintiffs ſhew not when any Information was exhibited, or for what, but the Defendant muſt take their Word for it ; if a Perſon pleads a former Suit depending, he muſt ſhew when and for what, that the Court may ſee it is for the ſame Cauſe.

But as to the Covenant it muſt be conſidered, that it is in a Caſe where it is morally impoſſible to get a Diſcovery but from the Defendant himſelf, and it is the more reaſonable to get it, ſince it relates to a Fraud where the Plaintiffs are prejudiced by the Defendant, and ought to have Amends ; and the Defendant had an Opportunity of doing the Wrong by Reaſon of the Truſt repoſed in him by the Plaintiffs. It is not a Covenant to reſtrain a Court of Juſtice from doing Right, but enables it to do Right, for it cauſes the whole Truth to be laid before the Court.

And there is a Difference between a Defence upon an Anſwer and a Plea.

The Plea is not a Defence to the Juſtice of the Cauſe, but to the Inquiry, that the Defendant may conceal the Truth, therefore not like the Caſe of a Covenant not to redeem a Mortgage.

It is a negative Privilege which the Law allows, that a Man is not obliged to diſcover what may ſubject him to a Penalty, but it is not a natural Right, for then a Diſcovery, if he pleaſed to make it, would invade that Right ; but ſure a Man may waive ſuch a Privilege, it is not what the Law prohibits, but the other Party hath no Right to oblige him to it, but if he will diſcover he may, there is no Law or Right againſt it.

If the Defendant hath not acted againſt his Duty, his Anſwer does him no harm, and why ſhould the Court protect him if he hath plaid the Knave ? Though the Law doth not oblige any one to ſubject himſelf to Penalties, yet he may if he will, if he thinks it for his Advantage. Remedy at Law

is vain where there can be no Proof, and the Bill is to diſcover what Goods were carried, for that is the Meaſure of their Damage.

The Plea over-ruled.

N. B. There was afterwards an Appeal to the Houſe of Lords, but the Matter was compounded.

Fowler ver. *Blackwell & al'.* In C. B. Caſe 177.

IN Ejectment tried at *Eſſex* Aſſiſes before Juſtice *Eyre*, upon the Demiſe of one *Edward Pate*, the Caſe was this: *Richard Warner* ſeiſed in Fee of the Lands in Queſtion had two Sons *Richard* and *George*, and by his Will deviſed in theſe Words, (*viz.*) *I give to my Wife* Jane *all my Freehold Lands in* Canenden *in the County of* Eſſex, (being the Lands in Queſtion) and after ſome other Bequeſts he ſays, *I give to my Son* George *my Freehold Lands in* Canenden *after my Wife's Deceaſe; and if it ſhall happen that my Son* George *ſhould die before he attain the Age of* 21 *Years, then the ſaid Lands ſhall deſcend to my Son* Richard *and his Heirs for ever*; *Richard* was the eldeſt Son and Heir of the Teſtator, *George* was his younger Son by a ſecond Wife; *George* attained his Age of 21, and by his Will deviſed the Lands to his Siſter, the Wife of the Defendant, and her Heirs, and then died in the Life of *Jane* his Mother.

No one ſhall take againſt the Heir without an expreſs deviſe to him.

The Leſſor of the Plaintiff claimed under *Richard*; and it was referred to Mr. Juſtice *Eyre*, whether *George* had an Eſtate in Fee or only for Life; and it was inſiſted that *George* took a Fee, for if he had only an Eſtate for Life he took nothing, and the Deviſe that *Richard* his Heir ſhould take if *George* died under Age, imports that he ſhould not take if he did not die under Age; and ſo was the Opinion of *Saunders* 2 *Saund.* 388. Deviſe to the Heir after the Death of *B.* gives an Eſtate to *B.* by Implication. 13 *H.* 7. 13. *b.* *Vau.* 262. 1 *Leo.* 257. *Dal.* 44. 3 *Lev.* 55.

But by J. *Eyre* here is no Deviſe to the Heir of *George*, and no one ſhall take againſt the Heir without an expreſs Deviſe to him.

Judgment for the Plaintiff.

Caſe 178. ***Pickering*** ver. ***Appleby.*** **In C. B.**

Whether a contract for ten Shares of Stock, is within the Stat. 29 *Car.* 2. which enacts, That no Action ſhall be brought upon any Contract, not to be performed within the Space of one Year, unleſs ſuch Agreement or *Memorandum* be in Writing, and ſigned by the Party, *&c.*

Aſſumpſit, for 580*l.* for ten Shares in the Stock of the Governors and Company of the *Copper-Mines* in *England*, transferred and ſold by Plaintiff to Defendant.

And there was another Count in the Declaration for Goods and Merchandiſes ſold and delivered.

And another Count, that the Defendant, in Conſideration that the Plaintiff took upon himſelf to deliver and transfer ten Shares of the ſaid Stock to the Defendant the next Transfer Day, *ſuper ſe aſſumpſit ſolvere* 580 l. *ſuper tranſlation' inde, &c.*

The Defendant pleaded *Non Aſſumpſit*; and upon the Trial there was Proof made of a Contract for ten Shares of the ſaid Stock for 580*l.* But there was no *Memorandum* in Writing of the Contract or any Earneſt paid; and there was a Doubt upon the Words of 29 *Car.* 2. whether the Plaintiff ſhould recover. The Statute ſays, That no Action ſhall be brought to charge any Perſon upon any Agreement in Conſideration of Marriage, or upon any Contract for Sale of Lands, Tenements or Hereditaments, or any Intereſt in or concerning them, or upon any Agreement not to be performed within the Space of one Year from the making, unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome *Memorandum* or Note thereof, ſhall be in Writing and ſigned by the Party to be charged therewith, or ſome other Perſon thereunto by him lawfully authoriſed; and in another Clauſe, No Contract for the Sale of any Goods, Wares and

Merchandiſes for the Price of 10 *l.* or upwards ſhall be allowed to be good; except the Buyer ſhall accept Part of the Goods ſo ſold, and actually receive the ſame, or give ſomething in Earneſt to bind the Bargain, or in Part of Payment, or that ſome *Memorandum* or Note in Writing of the ſaid Bargain be made and ſigned, *&c.* as above.

And upon the Trial before *King* C. J. it was doubted, whether the Shares in the Stock of this Company were within the Purview and Intent of that Statute; and therefore it was made a Caſe, and argued before the Court of Common Pleas; and afterwards at *Serjeants-Inn* before all the Judges of *England.*

And I inſiſted at *Serjeants-Inn*, that the Words of the Statute extend to all Contracts for the Sale of Goods, Wares or Merchandizes, and Shares in ſuch a Corporation are Merchandize. *Merx eſt quicquid vendi poteſt*; every perſonal Thing for which Merchants traffick may be called Merchandize.

Trover lies for Muſcheats, Monkeys, Parrots, for they are Merchandize. 2 *Cro.* 262. 1 *Bulſt.* 95. And for Negroes, for the ſame Reaſon. 2 *Lev.* 201. 3 *Lev.* 366.

And though there was a Doubt whether Trover lay in the Caſe of *Smith* and *Gould*, yet the Doubt aroſe only on the Nature of the Property of a Negro. So the Word *Goods* is of a large Extent; if a Man grants *omnia bona ſua*, all his perſonal Chattels paſs. 2 *Roll.* 58.

Emblements not ſevered may be levied upon a *Fieri fac' de bonis & catallis.* So Trover lies for a Bond. 2 *Cro.* 638. *Cro. Car.* 262. 1 *Roll.* 5, 20. and for Letters Patent. *Hard.* 111. And the Plaintiff may declare, that he was poſſeſſed *de bonis & catallis ſequen'*, (*viz.*) *uno ſcript' obligat'*, *uno warranto*, *&c.* 4 *Mod.* 156. But it cannot be denied, that theſe Shares are perſonal Eſtate, they may be attached.

If a Man trades in them, he ſhall be a Bankrupt; ſo ruled in *B. R.* in Sir *John Wolſtenholm*'s Caſe; and tho' this Judgment was declared illegal by the Statute 13 & 14 *Car.* 2. *c.* 24.

that

that ſeems to be becauſe Sir *John Wolſtenholm* did not traffick in them, but only had a Stock in the *Eaſt-India* Company, as any other Gentleman might have.

But there the Proviſo is, that every Perſon who ſhall trade, traffick or merchandize, in other Way or Manner than in the ſaid Royal Fiſhing, *Eaſt-India*, or *Guinea* Company, ſhall be liable to a Commiſſion of Bankrupt.

And in the 9 & 10 *W.* 3. *c.* 44. *ſ.* 74. a Clauſe is inſerted, that no Member of the *Eaſt-India* Company eſtabliſhed by that Act, ſhall be liable to be a Bankrupt in Reſpect of his Stock there only; and that no Stock in that Company ſhall be liable to a Foreign Attachment; by which Clauſes it appears the Parliament thought it reaſonable by expreſs Words to avoid ſuch a Conſtruction, as otherwiſe might have been made concerning Perſons who traffick in ſuch Stocks; for if a Man does not traffick, but deals only on a particular Occaſion, this does not make him a Bankrupt.

As if a Man provides for the victualling of the Navy, 1 *Vent.* 170. or has a Part in a Ship, but does not freight it. 1 *Vent.* 29. 1 *Sid* 411.

The Intention of the Act was to prevent Frauds and Perjuries, which was equally hazardous in Contracts for Stock, as for Land or any other Thing; and therefore the Intention of the Legiſlature ſeems to be aimed at all Contracts; if made for Lands, by the prior Clauſe it is provided, that the Agreement or ſome *Memorandum*, or ſome Note thereof, ſhall be in Writing, *&c.* and by the latter Clauſe it is provided for in all Contracts for Goods, Wares and Merchandizes; in which Words it may be well preſumed, that all Contracts were intended to be included; and it is the more probable that Stocks were meant to be included, becauſe traffick in them was uſed many Years before that Act.

And in the Caſe of *Nunns* againſt *Scipio*, *Hill.* 8 *Feb.* 1715. in Chancery, it was expreſly declared by Lord Chancellor *Cowper*, that a Plea of the Statute to a Bill for Performance of

a Contract for 4000 *l. S. S.* Stock ought to be allowed; which Reſolution is in Point.

Serjeant *Whitaker econtra* inſiſted, that all Contracts were not intended to be compriſed within that Statute; for the Words make Contracts above 10 *l.* void, except the Buyer accept Part of the Goods ſold, and actually receive the ſame, or give Earneſt, or ſome *Memorandum* of it be in Writing; and therefore though one or other Part is ſufficient, yet the Statute does not extend to Contracts where neither one nor the other Part can be performed; and therefore, where Part of the Goods cannot be delivered or accepted, it cannot be a Contract within the Statute, which extends only to ſuch Things Part whereof may delivered or accepted.

Transfer of Stocks at the Time of that Statute made was unuſual, and therefore it is not probable that the Legiſlature had that in View; and although all Goods, Wares and Merchandizes, are mentioned in the Statute, yet it does not follow that the Statute ſhall extend to Contracts for all Sorts of Goods; for there are Goods of which Felony cannot be committed, and it is not probable that it ſhould extend to them.

This Statute is introductive of a new Law, and therefore is to be taken ſtrictly, and ſhall not be conſtrued to extend to Stocks, or other Choſes in Action which cannot be aſſigned.

To which it was replied, that though the Statute ſays the Contract ſhall be void, unleſs the Buyer accept Part of the Goods, or give Earneſt, or there be ſome *Memorandum* in Writing; yet it is not neceſſary that the Thing contracted for muſt, by this Statute, be ſuch as can be delivered into the other Party's Hands; it is ſufficient that Part of the Goods be accepted, or that there be Earneſt, or ſome *Memorandum* be in Writing; and therefore if the Goods cannot be delivered, if there be Earneſt, or a *Memorandum* in Writing, it is ſufficient. If there be a Contract for Goods to be imported in ſuch a Ship, ſhall not the Contract be within the Statute, becauſe the Goods cannot be delivered till the Arrival of the Ship?

But if the Delivery of the Goods is neceſſary, the Aſſignment is a Delivery; and the Declaration ſays for ten Shares *vendit' & tranſlat'*; if an Aſſignment was made it may be accepted, and till Acceptance the Transfer is not compleat; and though it is ſaid, that a Choſe in Action cannot be aſſigned, yet it does not follow that it is not of the Nature of Goods of Merchandize.

A Choſe in Action may be aſſigned by the King. *Dy.* 16. 2 *Cro.* 82, 179. 2 *Rol.* 198. or may be attached. 3 *Lev.* 236. *Cro. Eliz.* 184, 713. 1 *Rol.* 553. 1 *Sid.* 327.

But the Judges being divided in Opinion it was adjourned.

Caſe 179. ***The King*** ver. ***Biſhop of Hereford & al'. Intr. H. 5 Geo. Rot.*** —— **In C. B.**

In *Quare Impedit* Biſhop pleads, that he claims nothing but as Ordinary, held bad, for want of alledging Notice of the Refuſal, though in a Caſe where the Crown preſented.

IN a *Quare Impedit* for the Preſentation to the Vicarage of *Aymſtry in Com' Hereford*, the Biſhop pleaded, that the Vicarage was within the Dioceſe, and that he claimed nothing but as Ordinary of the ſaid Church; that the King by Letters Patent under the Great Seal preſented *Geo. Herbert* to be inſtituted, *ſuper quo idem Epiſcopus ut Eccleſiæ præd' ordinar' præd' Geo. Herbert ſic præſentat' de habilitat' & idoneitat' ſuâ tam de moribus quam ſcientiâ in hac parte ſecundum Leges Eccleſiaſticas adtunc & ibidem examinavit ut de jure debuit, & ſuper hujuſmodi examination' idem Epiſcopus adtunc & ibidem invenit & per ſacr'um diverſar' perſonar' fide dign' ſibi manifeſte apparuit quod præd' Geo. Herbert tempore præſentation' præd' fact' & diverſis annis tunc ult' elapſis fuit Ebrietati datus, Anglice* a common Drunkard, *& communis dejurat', Anglice* a common Swearer, *ac ea occaſion' per Legem Sanctæ Eccleſiæ fore inhabilem & perſonam minime idoneam fore admiſſ' ad aliquod Beneficium cum Curâ Animar', per quod idem Epiſcopus ut Eccleſiæ ill' ordinar' recuſavit admittere præd' Geo. Herbert ad Vicariam Eccleſiæ præd' prout ei bene licuit; & hoc parat', &c.*

To this Plea the Attorney General demurred, and the Biſhop joined in Demurrer, and Exceptions were taken to the Plea.

Firſt, That the Biſhop ſays *quod ipſe nihil clamat in eâdem Eccleſia*, whereas it ought to be *in eadem Vicar'*. *Sed non allocatur*; for he adds *niſi admiſſion', inſtitution' & induction' Vicar' ad Eccleſiam' præd'*; for though the Word *Eccleſia* imports the Rectory, and *Quare Impedit præſentate ad Eccleſiam* is not good for a Preſentation to a Vicarage, *F. N. B.* 326. yet the Reference here is to the Ordinary, who if he is Ordinary of the Rectory, is alſo Ordinary of the Vicarage preſentative derived therefrom. And ſo are the Precedents 2 *Brow.* 225, 226. *Raſt.* 524.

Secondly, There is no certain Averment that he was a common Drunkard. *Sed non allocatur*; for *Ebrietat' dat'* with an *Anglice* is ſufficient.

Thirdly, The Averment that he was, is not certain, but only *quod ſuper examin' Epiſcopus invenit & per Sacr'um perſonar' fide dign' manifeſte ſibi apparuit quod fuit, &c. Sed non allocatur*; for *Dyer* 368. 2 *Rol.* 591. it was allowed to be good, where the Certificate of the Ordinary ſaid *diligentem & celerem fieri fecimus inq' per quam luculent' comperuimus & invenimus quod, &c.*

So a Certificate of Baſtardy was allowed, which ſaid *quod fuit mulier prout per inq' invenit'*, *Fitz. Baſt.* 2. and there *Rolf* ſaid that it had oftentimes been allowed.

So *per quam inq' invenimus eſſe Baſtard* was allowed. *Raſt. Baſt.* 4. *Specot*'s Caſe 5 *Co.* 57. The Plea was *ſuper examination' Epiſcopus invenit præfat' H. fore ſchiſmaticum, &c.* So in the Caſe of *Hele* ver. *The Biſhop of Exeter. Lutw.* 1095. So *Co. Ent.* 520.

Fourthly, For that the Biſhop does not ſhew that he gave Notice of the Refuſal; and it was argued by me, that there is a Diſtinction between the Refuſal of a Clerk of a common

mon Perſon and a Clerk of the King. In the Caſe of a common Perſon Lapſe incurs if he does not preſent within ſix Months, and therefore Notice is neceſſary. *Hern. Plead.* 539. *Townſ. Tables* 232. *Co. Ent.* 520.

But *nullum tempus occurrit regi*, and therefore it is ſufficient that he now informs the King of his Refuſal. The ſole Ground for requiring Notice is the Danger of a Lapſe, as appears by *P.* 18 *H.* 7. *Keil.* 49. *b.*

And therefore a Patron may preſent before Notice. 4 *Co.* 75. *b.* The Plea is only an Excuſe for the Defendant that he be not judged a Diſturber, and though upon a Plea that the Biſhop claims nothing but as Ordinary, generally the Plaintiff may have a Writ to the Biſhop preſently, and the Biſhop ſhall not be amerced, but the Plaintiff for falſe Clamour. *Hob.* 198.

So where the Biſhop pleads ſpecially, that he claims nothing but as Ordinary. 38 *Ed.* 3. 2.

But it was reſolved, that the Plea was bad for want of Notice alledged.

Caſe 180.

Depaba ver. *Ludlow.* In C. B.

When Inſurance is, Intereſt or no Intereſt, the Plaintiff has no occaſion to prove his Intereſt, for Defendant can't controvert that.

Aſſumpſit upon a Policy of Inſurance, where the Defendant inſured the Plaintiff, Intereſt or no Intereſt, againſt all Enemies, Pirates, Takings at Sea, and all other Damages whatſoever. And upon Trial it appeared that the Ship was taken by a Pirate of *Sweden*, and was in his Poſſeſſion for nine Days, and then was retaken by an *Engliſh* Man of War, and after the Suit commenced, brought into *Harwich*. And the Queſtion was, Whether in ſuch Caſe the Defendant was reſponſible?

And it was reſerved by the Chief Juſtice for the Opinion of the Court; and after Argument by Serjeant *Whitaker* for

the Plaintiff, and by Dr. *Henchman* for the Defendant, it was determined for the Plaintiff.

For though it was objected, that the Inſurer was only reſponſible where the Plaintiff had a Property, and that the Term of Inſuring Intereſt or no Intereſt was introduced ſince the Revolution; yet it was ſaid that ſuch Inſurance was good, and the Import of it is, that the Plaintiff has no Occaſion to prove his Intereſt, and that the Defendant cannot controvert that.

And though the Ship was here retaken, yet the Plaintiff received a Damage, for his Voyage was interrupted; and the Queſtion is not whether the Plaintiff had his Ship and did not loſe his Property, but what Damage he ſuſtained.

The King ver. *The Biſhop of Durham, the Chancellor, Maſter and Scholars of Cambridge, Edward Fenwicke, John Ward and Edward Fenwick, Jun. Clerk. Intr. Trin.* 7 *Geo. Rot.*

Caſe 181.

A grant of a Manor with all Advowſons, &c. thereunto belonging, will not extend to an Advowſon ſevered in antient Times, tho' it was appendant to the Manor 300 Years ago.

QUare *Impedit*, in which the Attorney General declared, *Quod Eliz. Regina ſeiſit' de Eccleſia de Simondbourne in Com' Northum' ut de uno groſſo in jure Coronæ præſentav' J. Hodges, quodq' Advocatio deſcendebat Jacobo Primo, &c. qui ſuper mortem J. Hodges præſentavit Cuthbert Ridley*, and that from him it deſcended to King *Charles* the Firſt, who upon the Death of *Ridley* preſented *William Kember*, and from him it deſcended to King *Charles* the Second, and upon the Death of *Kember*, *John Rippon* and *Thomas Algood*, by Uſurpation, preſented *Majors Algood*; that the Advowſon deſcended to King *James* the Second, and upon his Abdication to King *William* and Queen *Mary*; and that upon the Death of *Algood*, the Chancellor, Maſters and Scholars of *Cambridge*, by Uſurpation, preſented *William Stainforth*; that afterwards the Advowſon deſcended to Queen *Anne*, and from her to his preſent

Majeſty King *George*, to whom upon the Death of *Stainforth* the Right of Preſentation appertained.

The Biſhop pleaded, that he claimed nothing but as Ordinary.

Edward Fenwicke, ſen. pleaded, That Queen *Elizabeth* was ſeiſed of the Manor of *Wark* to which the Church of *Symondbourne* was Appendant, and preſented *Hodges*, and that the Manor *ad quod*, *&c.* deſcended to King *James* the Firſt, who preſented *Ridley*, and by Letters Patent 11 *Jan.* in the 11th Year of his Reign granted the ſaid Manor *cum pertin'* to *Elizabeth Howard* Wife of *Theophilus* Lord *Howard*, afterwards Earl of *Suffolk* and her Heirs, and that upon the Death of *Ridley* the Earl of *Suffolk*, in Right of his Wife, preſented *Kember*, and the Manor deſcended to *James* Earl of *Suffolk*, who by Indenture 9 *July* 1664 inrolled, *&c.* bargained and ſold to Sir *Francis Ratcliff*, afterwards Earl of *Derwentwater*, in Fee, who by Deed 4 *Sept.* 1665 granted the next Avoidance to *J. Rippon* and *Thomas Algood*, who upon the Death of *Kember* preſented *M. Algood*, and that by the Statute 3 *Jac.* 1. *cap.* 5. the Univerſity ſhall preſent to the Benefice of a Recuſant convict, and that the Earl of *Derwentwater* being a Convict, upon the Death of *Algood* the Univerſity preſented *William Stainforth*. That the Advowſon deſcended to *James* Earl of *Derwentwater*, who by Indentures 15 *Aug.* 12 *Anne*, granted the next Avoidance to the Defendant *Edward Fenwicke* ſen. to whom the Preſentation upon the Death of *Stainforth* belonged, *&c. abſque hoc*, That Queen *Elizabeth* was ſeiſed in Groſs. *Edward Fenwicke* jun. pleaded that he claimed nothing but upon the Preſentation of *Edward Fenwicke* ſen.

The Chancellor, Maſters and Scholars of the Univerſity of *Cambridge* pleaded, that *Edw.* 2. was ſeiſed of the Manor of *Wark*, *ad quod*, *&c.* that it deſcended to *Edw.* 3. why by Letters Patent 9 *May* 25 *Edw.* 3. granted the Advowſon to the Warden and College of the Chapel of *Windſor* and their Succeſſors, and ſo derived the Advowſon to Queen *Elizabeth* who preſented *Hodges*, and upon his Death King *James* 1.

preſented *Ridley*, and having the Manor of *Wark* alſo, he by Letters Patent 12 *Jan.* in the 11th Year of his Reign granted *tot' ill' caſtr', honor' & maner' de Wark, &c. ac omnes Advocation', &c. omnium & ſingular' Eccleſiar', &c. infra Com', &c. in eodem Litt' Pat' ſpecificat' vel alibi præd' maner', &c. ſpectan', pertin', &c. aut ut memb', &c. unquam ante tunc habit', cognit', reputat', &c.* to *Elizabeth* the Wife of *Theophilus* Lord *Walden* Heir apparent to the Earl of *Suffolk* and her Heirs, by which ſhe was ſeiſed of the Manor and of the Advowſon, and upon the Death of *Ridley* preſented *Kember*, and ſo derived the Advowſon to *Edward* Earl of *Derwentwater*, who being a Recuſant convict, the Univerſity upon the Death of *Algood* preſented *Stainforth*, and then derived the Advowſon to *James* Earl of *Derwentwater* an Infant, and that by the Statute 12 *Anne, Seſſ.* 2. *cap.* 14. every Papiſt or Perſon profeſſing the Popiſh Religion, and every Infant of ſuch Papiſt not being a Proteſtant, and every Mortgagee, Truſtee, *&c.* of ſuch, is diſabled, *&c.* and the Univerſity ſhall preſent, *&c.* upon which the Earl of *Derwentwater* not being a Proteſtant, but Son of a Papiſt, *&c.* the Preſentation belonged to the Univerſity, who preſented the Defendant *Ward, abſque hoc*, that King *James* 1. died ſeiſed of the Advowſon.

Defendant *Ward* pleaded that he did not diſturb, *&c.*

To the Pleas of the Biſhop, *Edward Fenwicke* jun. and *Ward*, the Attorney General replied, and prayed Judgment with a *ceſſat executio, &c.*

To the Plea of *Edward Fenwick* ſen. the Attorney General demurred, and for not joining in Demurrer took Judgment.

To the Univerſity's Plea the Attorney General demurred, and ſhewed for Cauſe, that the Traverſe is not material, and that the Defendant did not ſhew any Title to the Advowſon; and the Univerſity joined in Demurrer.

And it was argued, that by the Letters Patent 11 *Jac.* 1. the Advowſon of *Symondbourne* did not paſs, for it is not expreſly named

named in the Patent, and by 17 *Edw.* 2. *Prærog. Regis* 15. Advowſon Appendant does not paſs by the Grant of a Manor *cum pertin'*, if it be not expreſly mentioned. And though it is admitted by the Pleadings, that this Advowſon was Appendant to the Manor of *Wark* in the Time of *Edw.* 2. and the Grant by the Letters Patent is *inter al'* of the Manor of *Wark*, with all Advowſons, *&c. penden' aut ut membr', parcel' eorundem Maner', &c. unquam ante hac habit', cognit', accept', occupat', uſitat' reputat' exiſten', &c.*

Theſe Words cannot paſs an Advowſon ſevered from the Manor 300 Years, though it was *ante tunc* appendant to the Manor.

In the Caſe of *Imber* ver. *Wilking*, *Dyer* 362. *Co. Ent.* 380. A Grant of a Manor with all Woods, *&c. ſpectan' aut ut membrum, parcell' eorundem Maner', &c. antehac cognit', accept', habit', uſitat' ſeu reputat' exiſten'* does not extend to Woods which were not Parcel thereof at the Time of the Grant, they ought to be Parcel thereof in Reputation Time out of Mind, *&c.* So 2 *Roll.* 186. *Co. Ent.* 38. A Grant of a Manor with all the Lands, Woods, *&c. ſpectan' aut ut membr', parcel', &c. ante tunc habit', cognit', accept', ſeu reputat'*, may extend to Woods in the Hands of the King, and Parcel of the Manor within 17 Years, but not to Woods ſevered in antient Times.

And ſo it was reſolved by the Court.

Judgment for the King.

DE

Term. Sanct. Mich.

9 Geo. 1. In B. R.

Rogers ver. *Wilſon.*

Caſe 182.

DEBT upon a Bond dated 24 *July* 7 *Geo.* for 200*l.* The Defendant prayed Oyer; upon which the Condition appeared to be this.

In a Contract for Stock, it muſt appear by the Regiſter itſelf to whoſe Uſe the Contract was made.

Whereas *Ph. Brooke*, as Executor of *F. Brooke*, being poſſeſſed of 4000*l.* Lottery Annuities, 6 *July* agreed to ſell them for 4600*l.* to be aſſigned and payed for before 6 *Aug.* next; and whereas ſoon after the ſaid *Ph. Brooke*, at the Requeſt of the Plaintiff and Defendant, tranſcribed them in his own Name into the *South-Sea*.

Now if the Defendant, in Conſideration of a valuable Conſideration, ſhall transfer to the Plaintiff a Moiety of the ſaid Stock allowed by the *South-Sea* Company for the ſame, then, *&c.* And then pleaded, that the Contract between the Plaintiff and Defendant was for Sale of *South-Sea* Stock, which was neither performed nor compounded before the 29th *Sept.* 1721. and that neither the Bond, with the Condition and Contract therein contained, or any Abſtract or Memorial thereof, was regiſtered before 1 *Nov.* 1721, *&c.*

The Plaintiff replied, that he by Deed dated 27 *Oct.* 1720. aſſigned the Bond and all Benefits of the Stock, *&c.* in the Condition mentioned, to *William King* for his own proper Uſe,

who regiſtred it, *&c.* and Iſſue was joined upon the Regiſtring. And on the Trial at *Guild-Hall* 27 *Nov.* 1722. before Lord Chief Juſtice *Pratt*, it appeared upon the Regiſter of the Aſſignment produced, that the Aſſignment was regiſtered, and not the Bond; and the Chief Juſtice ſaid, that the Bond and Condition which contained the Contract ought to have been regiſtred. Then a Regiſter of the Bond and Condition was produced, but it did not appear to whoſe Uſe the Contract was made; and it is not enough that it is ſaid in the Aſſignment, that it was to the Uſe of the Plaintiff, though the Aſſignment was alſo regiſtred, for that is only a Recital in the Deed of Aſſignment; but by the Statute, it muſt appear by the Regiſter itſelf to whoſe Uſe the Contract was made. And to this Opinion the Chief Juſtice adhered; but on the Plaintiff's Importunity permitted a Caſe to be made, which was never argued; but the Plaintiff commenced a new Action in the Common Pleas, upon which a ſpecial Verdict was found.

Caſe 183. *Stedman, qui tam, &c.* ver. *Hay.* In C. B.

When a Preſcription for a Seat in a Church is found by the Verdict, the Repairing, which is only a Circumſtance requiſite to ſupport the Preſcription, is of Neceſſity included.

PRohibition upon a Libel in the Spiritual Court by the Defendant, for that the Plaintiff ſat *in primo & tertio locis in ſedili*, in the Church of *Abberley* in *Worceſterſhire*, which Places the Defendant claimed, one as belonging to a Meſſuage or Tenement named *Crowlands*, the other to a Meſſuage or Tenement named *Nurtons*.

The Plaintiff in his Declaration in Prohibition declares, that all Preſcriptions ought to be determined by Common Law; that *J. Farmer* and *Suſan* his Wife, in Right of the Wife, were ſeiſed of a Meſſuage and Lands called *Southalls* in *Netherton* in the ſaid Pariſh of *Abberley* in Fee, and that Time out of Mind there had been an antient Seat *in Boreali parte Eccleſiæ de Abberley*, and that the ſaid *Farmer* and his Wife, and all, *&c.* preſcribed *habere uſum primi & tertii loci in ſedili præd'* (the ſecond Place belonging to the Defendant as Tenant of *Nurtons*) and becauſe the Plaintiff, as Tenant of

Southalls, uſed thoſe Seats, the Defendant libelled againſt him in the Spiritual Court.

The Defendant pleaded, that he had a Faculty granted for thoſe Places, and traverſed *abſque hoc quod Farmer & uxor & omnes, &c. a tempore, &c. habuer' uſum præd' primi & tertii loci in ſedili illo.* Iſſue was joined upon the Traverſe, and a Verdict for the Plaintiff.

And now Serjeant *Pengelly* moved in Arreſt of Judgment, that the Plaintiff did not allegde in his Declaration any Uſage to repair the Seats; for of common Right all the Seats in the Church belong to the Pariſhioners in general, who are bound to repair the Church; but for the better Order, and to prevent the Confuſion which would follow, if every Pariſhioner ſat where he pleaſed, the Ordinary has been allowed to diſpoſe of the Seats, and no Prohibition ought to be granted in ſuch Caſe: But where a Man has always repaired a particular Seat, he may preſcribe for that, and the Uſage of Repairing is the Foundation of ſuch Preſcription, without which it would be void; and ſo it was reſolved 2 *Cro.* 366. *Noy* 104. (which ſeems to be the ſame Caſe) that if a Man Time out of Mind had uſed to repair a Seat in the Iſle of the Church, and to ſit and bury there, the Iſle ſhall be peculiar to his Meſſuage, and he ſhall not be diſplaced by the Ordinary, Parſon or Church-wardens. But Uſage of Sitting and Burying, without Uſage of Repairing, does not give any Property.

And therefore no Body can preſcribe for a Seat in the Body of the Church, for it is always repaired by the Pariſhioners. *Mo.* 878. But where Sir *Bernard Whetſtone* had Time out of Mind uſed to repair a Pew in the Body of the Church, he was allowed to preſcribe for it. *Hob.* 67. So a Cuſtom for the Church-warden to diſpoſe of the Seats in the Body of the Church was diſallowed, where the Pariſhioners repair'd the Church. 2 *Lev.* 241. So where the Iſle, *&c.* had always been repaired at the common Charge of the Pariſhioners, the Seats there ſhall be diſpoſed of by the Ordinary, as well as in the Body of the Church. 2 *Cro.* 366. And in antient Times, Cuſtom to repair was alledged in an Action on the Caſe

Caſe for diſturbing a Man in his Seat in the Church. 2 *Cro.* 605. But of later Times it has been held, that there is no Occaſion to alledge it in the Declaration, but that it is ſufficient to give it in Evidence at the Trial; and after Verdict it ſhall be preſumed to be well proved, otherwiſe the Verdict could not have been for the Plaintiff. 1 *Sid.* 88, 203. And the Diſtinction there was taken, between an Action upon the Caſe and a Prohibition; for in a Prohibition it was ſaid, that Cuſtom to repair muſt be alledged in the Declaration. And *Hale* thought there was good Ground for that Diſtinction, for an Action upon the Caſe is againſt a Wrong-doer and Stranger; a Prohibition, againſt one who *prima facie* has a Right. And this Diſtinction was cited and agreed to 2 *Jon.* 4. 3 *Lev.* 73.

And it was agreed on the other Side, that Uſage of Repairing was neceſſary, without which there could be no Preſcribing for a Seat in a Church; and perhaps if the Defendant had demurred to the Declaration, it would not have been good; but when the Defendant has pleaded, and traverſed the Preſcription which is found for the Plaintiff, which could not have been found unleſs a Cuſtom of Repairing had been proved, the Declaration ſhall be aided; as in Treſpaſs and other Actions, where the Declaration is uncertain or inſufficient, it ſhall be aided by the Plea of a collateral Matter, and Verdict for the Plaintiff. *Lut.* 1382, 1392, 1492. *Salk.* 662, 663.

And the Cuſtom to repair is only a Circumſtance requiſite to ſupport the Preſcription, and when the Preſcription is found, the Repairing is of Neceſſity included.

Afterwards *P.* 9 *Geo.* Judgment was given for the Plaintiff; for after Verdict it ſhall be preſumed that a good Preſcription was proved.

Hughs ver. *Clubb & al'.* In B. R.

Caſe 184.

A Man deviſes to his Wife in Tail General, Remainder to *J. S.* in Fee, and the Wife with a ſubſequent Husband ſuffers a Recovery; held good againſt the Heir of the Deviſor, notwithſtanding the Statute 11 *H.* 7. *c.* 20.

EJectment upon the Demiſe of *Herbert Watts*; to which the Defendant pleaded Not guilty; and upon the Trial in *Kent*, before *Pratt* Chief Juſtice, the Caſe appeared to be this:

John Watts, the Anceſtor of the Leſſor of the Plaintiff, and to whom the Leſſor was Heir, by his Will 30 *Sept.* 1684. deviſed the Lands in Queſtion, of which he was ſeiſed in Fee, to *Elizabeth* his Wife, *habend'* to her and the Heirs of her Body.

Elizabeth married a ſecond Husband —— *Cox*, and ſuffers a Common Recovery, and by Indenture 2 *Oct.* 1689. declared the Uſes to —— *Cox*, her ſecond Husband for Life, afterwards to herſelf for Life, Remainder to the Heir of the Survivor.

Elizabeth ſurvived, and afterwards married *Edward Clubb*, and ſettled this Eſtate to him in Fee, and died without Iſſue, and the Defendant claimed under this Settlement.

The Queſtion was, whether the Recovery ſuffered by the Wife was not void in this Caſe by 11 *H.* 7. *c.* 20. which enacts, That if any Woman hath or ſhall have any Eſtate in Dower for Life, or in Tail to herſelf or for her Life, in any Land, *&c.* of the Inheritance or Purchaſe of her Huſband, and ſhall ſole, or with an after-taken Husband diſcontinue or ſuffer Recovery, *&c.* ſuch Recovery, *&c.* ſhall be void.

And this Caſe was reſerved for the Opinion of the Chief Juſtice, and by him determined, that it was not within the Statute; for though it is within the Letter, it is not within

the Intent of the Statute, which extends only to Caſes where the Husband ſettles Lands upon his Wife by Way of Jointure, to which the Iſſue between them ſhall be inheritable.

And therefore if a Husband ſettles Lands upon himſelf and his Wife in Fee, though it be a good Jointure, 4 *Co.* 3. yet her Alienation is not reſtrained by 11 *H.* 7. *c.* 20. *Dyer* 248. So it was reſolved *Cro. Eliz.* 524. and accordingly in *Mo.* 716.

And in 1 *Leo.* 261. *Cro. Eliz.* 2. it was reſolved, that if a Man ſeiſed in Fee deviſe to his Wife in Tail General, Remainder to *J. S.* in Fee, and the Wife with a ſubſequent Huſband levy a Fine, this bars the Iſſue; for though it is within the Words of the Statute, it is not within the Intent of it; which was deſigned to prevent a Wife advanced by her Huſband from prejudicing the Iſſue of her Husband; and that is of the ſame Import with the preſent Caſe.

DE
Term. Sanct. Trin.
9 Geo. 1. In C. B.

Robinſon verſus *Mead.*

Caſe 185.

TRESPASS for an Aſſault and Battery of the Plaintiff's Wife, *per quod conſortium amiſit.*

Plea in Abatement, that Defendant was a Mercer, and no Gentleman, as named in the Writ, held good.

The Defendant pleads in Abatement, that he was a Mercer, and no Gentleman, as he was named in the Writ; to which the Plaintiff demurred, ſuppoſing that the Exception was taken to the Addition, in regard that the Plaintiff had miſtaken his Degree, for that he ought to have ſhewn of what other Degree he was, and that it was not enough to ſay that he was of ſuch a Myſtery. *Sed non allocatur*; for here the Defendant denies abſolutely the Addition given him by the Writ, and then *non conſtat de perſona*, for *Thomas Mead* Mercer, and no Gentleman, cannot be *Thomas Mead* Gentleman. It is true the Statute 1 *H.* 5. *c.* 5. requires only that in Original Writs an Addition ſhall be made of the Defendant's Eſtate, Degree or Myſtery, and therefore it is ſufficient where a Defendant has ſeveral Additions to give him one or other, or to give him the Addition of his Degree or Myſtery or both; but when the Defendant has no ſuch Addition as is given him by the Writ, he may plead as here, *quod non eſt generoſus, nec ſuſcepit, nec fuit de gradu generoſi*; which the Plaintiff confeſſed by his Demurrer; and when by his Plea in Abatement the Defendant denies the Addition given him by the Plaintiff, he is obliged by the Rules of good pleading to ſhew

his

his Addition, by which he might be ſued; and therefore 28 *H.* 6. 26. the Defendant pleaded that he was a Merchant, & *non generoſus*, and held good.

Judgment for the Defendant.

I was of Counſel for the Defendant.

Caſe 186. ## *Walter* ver. *Drew & al'.* In C. B.

A Deviſe, that if *William* the eldeſt Son of the Teſtator ſhould happen to die without Iſſue, that then, and not otherwiſe, after *William*'s Death, he deviſed it over to his Son *Richard* and his Heirs; held that *William* took an Eſtate-tail by Implication.

EJectment upon the Demiſe of *Richard Weeks*; and upon the Trial at the Aſſizes in *Cornwall*, before Mr. Baron *Price*, the Caſe appeared to be this:

Richard Weeks, Grandfather of the Leſſor of the Plaintiff, being ſeiſed in Fee, and having two Sons, *William* his elder and *Richard* his younger Son, by his Will 10 *March* 1664. deviſed in theſe Words:

It is my Will, that if William Weeks *my Son ſhall happen to die, and leave no Iſſue of his Body lawfully begotten, that then in that Caſe, and not otherwiſe, after the Death of the ſaid* William *my Son, I give and bequeath all my Lands of Inheritance in* Lawliſſick *unto the ſaid* Richard *my Son, to have and to hold the ſame, after the Death of the ſaid* William, *to him and his Heirs.*

The Teſtator died the 19 *March* 1664. *William* his Son and Heir entered, and in *Michaelmas* 1692. ſuffered a Recovery; and by Indenture 30 *June* 1692. declares the Uſes of the Recovery, to the Uſe of *J. Foot* and his Heirs, till Payment of a Sum of Money, and then to himſelf and his Heirs.

Afterwards by Leaſe and Releaſe 8 & 9 *June* 1697. he conveyed the Equity of Redemption to *J. Foot* and his Heirs, under whom the Defendant claimed.

9 *Jan.* 1721. *William Weeks* died without Iſſue, and 12 *November* 1715. *Richard Weeks* died, leaving *Richard Weeks* the Leſſor of the Plaintiff his Son and Heir, who upon the Death of *William* brought his Ejectment; and the Queſtion was,

Whether he was barred by the Common Recovery ſuffered by *William*? Which was argued before Mr. Baron *Price* at his Chambers in *Serjeants-Inn.*

And I inſiſted, that the Deviſe to *Richard* the younger Son was an executory Deviſe; for he could not take by way of Remainder, for a Remainder cannot be without a particular Eſtate; but here no Eſtate is deviſed to *William*, but the Teſtator ſuffers his Eſtate to deſcend to him, and only makes a Deviſe to *Richard*, if *William* died and left no Iſſue of his Body, and therefore *Richard* cannot take at all, if he does not take by way of an executory Deviſe.

A Man cannot take by Deviſe, if there are not Words which give the Eſtate to him: A Man deviſeth to his Son after the Death of his Wife, 2 *Leo.* 226. 2 *Jon.* 98. 2 *Lev.* 207. reſolved that the Wife took nothing.

And the Caſe in *Vaugh.* 259, 262. *Gardiner* ver. *Sheldon* was: A Man deviſed, that after the Death of his Son and Daughters without Iſſue; and if it ſhall happen my Son *Geo.* and *Margaret* and *Katherine* my Daughters die without Iſſue, then all my Freehold Lands ſhall go to my Nephew *Roſe* and his Heirs; and it was agreed, that his Daughters took nothing at all by his Will.

It is true, that in this Caſe in *Vaugh.* it is ſaid, that *Roſe* did not take by way of executory Deviſe, becauſe the Eſtate given to him was to take Effect after the Death of the Son and Daughters without Iſſue, which was a Contingency too remote for the Law to allow.

But here the Contingency was to take Effect upon the Death of *William*, for the Words are not, *if* William *die without Iſſue*, but *if he die and leave no Iſſue*, which are tantamount to ſaying, *if he die not having Iſſue at the Time of his Death*; and this is inforced by the ſubſequent Words, *If* William *die and leave no Iſſue, then in that Caſe, and not otherwiſe, after the Death of the ſaid* William, *I give the ſame to* Richard, *to hold after the Death of the ſaid* William, *to him and his Heirs*; by which it appears, that his Intention was, that *Richard* ſhould have the Lands immediately upon the Death of *William*.

Serjeant *Cheſhyre econtra*: No one ſhall take by executory Deviſe, but he who cannot take any other Way, and here he may take by Remainder; for by the Words it appears to be the Teſtator's Intention, that *William* his eldeſt Son ſhould take in the firſt place; and I know no Rule for the Conſtruction of a Will, but the Intention of the Deviſor, and here his Intention is manifeſt that *William* ſhould take. 9 *Co.* 127. Where a Man deviſed to his Wife, and then ſays, *after her Death my Son* William *is to have it, and if he die, his Son is to have it*; it was held that *William* took an Eſtate-tail.

So *Mo.* 127. there were no Words of Gift, yet it was held a good Deviſe. So 1 *Rol.* 836. 2 *Cro.* 415. And in this preſent Caſe the Recovery was ſuffered upon the Opinion of Serjeant *Pemberton* and *Levinz*, that *William* by this Will took an Eſtate-tail, Remainder to *Richard*.

To which the Baron inclined;

And afterwards upon further Conſideration gave his Opinion, that *William* took an Eſtate-tail by this Will; for the Words ſhall not be conſtrued to give an Eſtate by way of executory Deviſe, but where the Deviſee cannot take any other Way.

But here *William* took by the Will, for it is a neceſſary Implication, that he ſhall have it to him and his Heirs of his Body, for the Heir ſhall take by the Will though he is not expreſly named, or there be no Deviſe to him by expreſs Words.

As 9 *Co.* 128. A Deviſe to the Wife for Life, and after her Deceaſe *William* is to have it, and if he die his Son is to have it.

It was adjudged *William* took an Eſtate-Tail.

So no Deviſe expreſly to the Son, yet he took. *Mo.* 127. 1 *Rot.* 836. 2 *Cro.* 415.

DE
Term. Sanct. Mich.
10 Geo. 1. In C. B.

Caſe 187.

Walker ver. *Leſter.*

The Plaintiff in the Record of *Niſi Prius* omitted the Words, *Et præd' quer' ſcilicet*; but it was held amendable by the original Record.

DEBT for Money lent at a Play called *All-Fours.*

The Defendant pleaded *Nil debet.*

The Plaintiff in the Record of *Niſi Prius* omitted the Words *Et præd' quer' ſcilicet.*

And after Trial before *King* Chief Juſtice in *Suſſex*, and Verdict for the Plaintiff, Judgment was arreſted. And now the Plaintiff moved, that the Record of *Niſi Prius* ſhould be amended by the original Record. And *per Cur'*, It ſhall be amended, for the Omiſſion was only the Miſpriſion of the Clerk; 2 *Cro.* 502. *Harriſs*'s Caſe, and *Salk.* 47. are Caſes as ſtrong as the preſent Caſe.

Caſe 188.

Walker ver. *Prieſtly.* In C. B.

In Covenant, the Plaintiff by his Replication aſſigns ſeveral Breaches, to which the Defendant does not rejoin; though the Plaintiff cannot waive the Breaches, (being enter'd on the Roll) yet he may take Judgment for want of the Rejoinder.

DEBT upon a Bond, which upon Oyer appeared to be conditioned for Performance of Covenants.

Defendant pleads Covenants performed.

Plaintiff replies, and aſſigns ſeveral Breaches.

The Defendant did not rejoin; upon which the Plaintiff ſigned Judgment.

And now Serjeant *Cheſhyre* moved to diſcharge the Judgment, for that the Plaintiff had not executed a Writ of Inquiry; for the Plaintiff here purſues his Remedy by Aid of the Statute 8 & 9 *W.* 3. *c.* 11. which enacts, That a Plaintiff may aſſign as many Breaches as he pleaſes, and the Jury on Trial of ſuch Action, ſhall and may aſſeſs not only ſuch Damages and Coſts as have hitherto been uſually done in ſuch Caſes, but alſo Damages for ſuch of the Breaches ſo to be aſſigned as he ſhall prove to be broken; and if Judgment ſhall be given on Confeſſion, Demurrer or *Nihil dicit*, the Plaintiff may ſuggeſt on the Roll as many Breaches as he thinks fit; upon which ſhall iſſue a Writ to the Sheriff to ſummon a Jury to appear before the Juſtices of Aſſize or *Niſi Prius*, to inquire of the Truth of every one of theſe Breaches, &c. and therefore, when he takes the Benefit of the Statute to aſſign ſeveral Breaches, he ought to purſue the Direction of the Statute throughout; and as the Defendant did not rejoin, he ought to have taken out a Writ of Inquiry, &c.

Sed non allocatur; for the Plaintiff has his Election to proceed upon the Statute or at Common Law; and therefore when the Defendant *Nihil dicit in barram*, or confeſſes the Action, or demurs, the Plaintiff may ſuggeſt upon the Roll ſeveral Breaches, but there is no Neceſſity for it; and when the Defendant pleads, and the Plaintiff by his Replication aſſigns ſeveral Breaches, to which the Defendant does not rejoin, though the Plaintiff cannot waive the Breaches aſſigned, (for by the Practice of the Court they muſt be entered upon the Record) yet he may take Judgment for want of a Rejoinder, and need not inquire of the ſeveral Breaches aſſigned; for this Writ is not a Writ of Inquiry before the Sheriff, but before the Juſtices of *Niſi Prius*, which would be a very great Delay to the Plaintiff.

Caſe 189. *Keld & al', Aſſignees of Cholmley, Bailiff of the Liberty of Whitby in the County of York,* ver. *Harding.* In C. B.

Where a Bailiff is charged directly with a Tort, it ought to be ſhewn that he is Bailiff of a Liberty who has Return of Writs; but otherwiſe it is ſufficient to ſhew generally, that he is ſuch a Perſon as has Authority to take Bail.

DEBT upon a Bail-Bond in the Penalty of 200 *l.* and the Declaration alledged, *quod cum Jana Hudſon poſt Trin.* 1706. (*viz.*) 30 *Maii* 8 *Geo.* — *apud Whitby infra libertat' præd' per H. Cholmley tunc capital' ſen' libertat' de Whitby præd' arreſtat' fuit virtute cujuſdam warranti per tunc vic' com' Ebor' eidem capital' ballivo libertat' præd' direct' ſuper breve de Cap' ad reſpond' e Cur' de Banco emanat' & eidem vic' com', &c. direct' pro captione ejuſdem Janæ, ita quod idem vic' com' præd' haberet corpus ejus coram juſt' apud Weſt' a die Sancti Mich' in tres ſept' prox' ad reſp' Ric', Johanni & Will'o Keld in placito tranſgr' ac etiam in placito debiti ſuper* Demand 100 *l. eâdemque Janâ in cuſtod' præd' H. Cholmley virtute brevis & warrant' præd' exiſten' ipſa & W. Hill & Th. Harding def'* 30 *May* 8 *Geo.* — *per præd' ſcript' obligat' conceſſer' ſe teneri, &c. præd' H. Cholmley tunc ballivo libertat' præd' per nomen officii ſui in præd'* 200 *l.* for her Appearance, *&c.*

Sed præd' Jana non comperuit, per quod, &c.

Defendants demurred to the Declaration, and the Plaintiff joined in Demurrer.

And it was objected by Serjeant *Wynne*, firſt, That it does not appear when the Writ iſſued, and the Writ ought to be fully ſhewn, for the Party may ſay *Nul tiel record. Sed non allocatur*; for it is ſufficient to ſhew it generally; the Statute 4 & 5 *Annæ* ſays, If any Perſon ſhall be arreſted, *&c.* by any Writ, Bill or Proceſs iſſuing out of any of her Majeſty's Courts of *Weſtminſter*, at the Suit of any common Perſon, and the Sheriff or other Officer taketh Bail, *&c.* and here it appears, that the Writ iſſued out of the Common Pleas againſt *Jane Hudſon* at the Suit of the Plaintiff *in placito tranſgr' ac etiam in placito deb'* 100 *l.* and though it did not

appear when it was teſted, tho' it was objected that that was neceſſary, the Court did not ſeem to think it of any Weight, for it ſhall not be preſumed to have an irregular Teſte.

Secondly, That it is not ſaid, that the Warrant was under the Seal of the Office of the Sheriff. *Sed non allocatur*; for it was not the Warrant of the Sheriff if it was not under the Seal of his Office.

Thirdly, That it does not ſay, that a Warrant was made by the Sheriff. *Sed non allocatur*; for ſhe could not be arreſted unleſs a Warrant was made out.

Fourthly, That the Bail-Bond was given to the Bailiff of the Liberty, and not to the Sheriff, and it does not appear that he had any Return and Execution of Writs, *&c.*

And *primâ facie* it ſhall be preſumed that every Place in a County is under the Sheriff.

By 2 *Edw.* 3. *cap.* 12. Hundreds and Wapentakes ſhall not be ſevered from the County.

And by the 14 *Edw.* 3. *cap.* 9. they are reannexed to the County.

And 4 *Inſt.* 267. ſays, That all Grants of the Bailiwick of a Hundred ſince thoſe Statutes are void. So *Cro. Car.* 330. *Myn* ver. *The Bailiff of the Liberty of the Dean and Chapter of Weſtminſter*, in an Action for an Eſcape, it was reſolved, that the Declaration did not ſhew of what Liberty the Defendant was Bailiff, or that he had Execution and Return of Writs, and was therefore bad, for that ought to be ſhewn expreſly. So in an Action on the Caſe by the Bailiff of a Liberty againſt the Sheriff for entering into his Franchiſe. 1 *Vent.* 399.

So if a Warrant to a Bailiff of a Liberty is pleaded, it is ſhewn that he had Return, *&c.* of Writs. *Lutw.* 594. *Sed non allocatur*; for though where a Bailiff is charged directly with a Tort, it ought to be ſhewn that he is Bailiff of

a

a Liberty, who has *Returna brevium*, yet here it is ſufficient to ſhew generally that he is ſuch a Perſon as had Authority to take Bail.

And by the Statute 23 *H.* 6. *c.* 10. the Sheriff, Under-Sheriff, Sheriff's Clerk, Steward or Bailiff of a Franchiſe, Servant, or Bailiff or Coroner, are reſtrained from taking under Colour of their Office more then 4 *d.* for a Return or Copy of a Panel, *&c.* then in the Clauſe which relates to taking Bail, it is enacted, That the Sheriff and all other Officers, as aforeſaid, ſhall let out of Priſon all Perſons by them arreſted, *&c.*

And that no Sheriff, nor any the Officers or Miniſters aforeſaid, ſhall take any Obligation for any Cauſe aforeſaid, but only to themſelves, of any Perſon, nor by any Perſon in their Ward, *&c.* but by the Name of their Office, *&c.* And therefore the Bailiff of a Franchiſe has Power to take a Bail-Bond, and muſt take it to himſelf, and by the Name of his Office.

And by 4 *&* 5 *Annæ, cap.* 16. Sheriff or other Officer who takes Bail may aſſign, *&c.* So the Queſtion here remains, Whether it does not ſufficiently appear by the Declaration, that *H. Cholmley*, to whom the Bond was given, was Bailiff of a Franchiſe.

And the Court were of Opinion that this appeared to a common Intent.

For it is ſaid that the Plaintiffs are Aſſignees of *H. Cholmley, cap' ballivi libertat' de Whitby.*

That *Jane Hudſon* was arreſted at *Whitby, infra libertat' præd', per præd' H. Cholmley adtunc cap' ballivum libertat' de Whitby.*

That *Jane Hudſon* being in his Cuſtody gave the Bond to him, *eidem H. Cholmley adtunc cap' ballivo libertat' præd' exiſten' per nomen officii ſui præd', &c.* And therefore Judgment was given for the Plaintiff.

Acherly and his Wife, Siſter and Heir of Thomas Vernon, ver. *Bowater Vernon & al'.* In Canc'.

Caſe 190.

Mod cas in Ch. 69

Thomas Vernon by his Will 17 *Jan.* 1711, deviſed to *Mary* his Wife 1000 *l. per Ann.* for her Life, to iſſue out of his Real Eſtate, his Capital Meſſuage in *Hanbury, &c.* To *Elizabeth* his Siſter 200 *l. per Ann.* for her Life; and 1000 *l.* to *Letitia* her Daughter for her Portion; and after other Legacies he deviſed the Reſidue of his Real and Perſonal Eſtate to *Roger Acherly, George Vernon, George Wheeler, J. Bencroft* and *Richard Vernon*, and their Heirs, Executors and Adminiſtrators, on Truſt to veſt the Reſidue of his Perſonal Eſtate in Lands of Inheritance, and that his Truſtees ſhall ſtand ſeiſed and poſſeſſed of his Real and Perſonal Eſtate to the Uſes of his Will during his Wife's Life, and after her Deceaſe, if he ſhould die without Iſſue, to the Intent that his Freehold and Leaſehold Eſtate, and the Lands to be purchaſed, ſhould be ſettled to the Uſe of the Defendant *Bowater Vernon* for 99 Years.

A Codicil ſigned and publiſhed in the Preſence of three Witneſſes, held a Republication of the Will, and that both made but one Will.

Then to his firſt and other Sons in Tail Male, *&c.*

Thomas Vernon purchaſed ſeveral Fee-Farm Rents, Aſſart Rents, and other Lands and Tenements; and then by a Codicil 2 *February* 1720, being two Days before his Death, he recites,

That he made a Will dated 17 *January* 1711, and then ſays,

I hereby ratify and confirm the ſaid Will, except in the Alterations hereafter mentioned.

The Portion to my Niece Letitia, *Daughter of my Siſter* Acherly, *ſhall be made up* 6000 *l. and what I have given to*

my

my Siſter and Niece ſhall be accepted by them in Satisfaction of all they may claim out of my real and perſonal Eſtate, and on Condition they releaſe all Right, &c. *to my Executors and Truſtees in my Will named; and thus having provided for my Siſter and Niece, I deviſe all the Lands by me purchaſed ſince my Will to my Truſtees and Executors in my Will named, to the ſame Uſes and ſubject to the ſame Truſts to which I have mentioned to deviſe the Manor of* H. *and the Bulk of my Eſtate.*

And I revoke that Part of my Will whereby I appoint Roger Acherly, Geo. Vernon *and* Edward Vernon, *three of my Truſtees in my Will; and I deſire my Brother* Fran. Keck *and* John Nichols *to be two of my Truſtees, and deviſe my ſaid real Eſtate to them accordingly.*

Lord Chancellor *Macclesfield* 20 *Nov.* 1723. decreed, that the Will was confirmed by the Codicil; that the Teſtator ſigning and publiſhing his Codicil in the Preſence of three Witneſſes was a Republication of his Will, and both together made but one Will; and by the ſaid Will and Codicil his Fee-Farm Rents, Aſſart Rents, and Lands contracted to be purchaſed, and all his real and perſonal Eſtate (except the Copyhold purchaſed before his Will) did well paſs.

The Plaintiff appealed to the Houſe of Lords.

Firſt, For that the Fee-Farm Rents and Aſſart Rents being purchaſed ſince the Will made, the Words of the Codicil (*all my Lands*, &c.) are not ſufficient to paſs them.

Secondly, The Words of the Codicil do not extend to the Lands which the Teſtator had agreed to purchaſe, but were not conveyed to him.

Thirdly, The Deviſe to the new Truſtees, without ſaying *and their Heirs*, gives them only an Eſtate for Life.

Fourthly,

Fourthly, That no Truſt of the new Purchaſe being expreſly declared after the Death of the Truſtees, they ſhall reſult to the Heir.

Fifthly, That the Codicil being by a ſeparate and diſtinct Inſtrument, does not amount to a Republication of the Will.

But the Decree was affirmed.

And in the Argument, as to the Republication, four Caſes were cited for the Plaintiffs.

Firſt, *Lytton* ver. *Viſcounteſs Falkland*, which Caſe was this:

Sir *William Lytton* by his Will 25 *March* 1700. deviſed all his Lands to his Nephew *Lytton Strode* and his Heirs, and directed, that he ſhould take the Surname of *Lytton*; and his perſonal Eſtate he deviſed to Dame —— *Ruſſell* his Siſter, and *Lytton Strode*, and made them Executors.

After his Will made, Sir *William Lytton* purchaſed the Equity of Redemption of ſome Mortgages in Fee, which were mortgaged to him before he made his Will.

And 13 *Jan.* 1704. by a Codicil atteſted by three Witneſſes, he ſays,

I make this Codicil, which I will ſhall be added to, and be Part of my laſt Will which I have formerly made.

And the Lord Chancellor *Cowper*, aſſiſted by Sir *John Trevor* Maſter of the Rolls, Lord Chief Juſtice *Trevor*, and Mr. Juſtice *Tracy*, 16 *June* 1708. decreed, that this was not a Republication; for ſince the Statute 29 *Car.* 2. there can be no Deviſe of Lands by an implied Republication; for the Paper, in which a Deviſe of Lands is contained, ought to be re-executed in the Preſence of three Witneſſes.

Second,

Second, *The Attorney General* ver. *Brains*, 3 *Ch. Rep.* 8, 152.

Third, The Caſe of Serjeant *Maynard*'s Will. He by his Will 6 *Mar.* 1689. wrote with his own Hand, ſigned by him, but not before any Witneſſes, deviſed Lands, *&c.* He afterwards wrote a Codicil, with his own Hand upon the ſame Paper, and ſigned it, and it was atteſted by three Witneſſes.

And the Queſtion was, whether this was a Republication of the Will, ſo that the Lands mentioned in the Will ſhould paſs by it.

And upon a Trial at Bar a ſpecial Verdict was found, but no Judgment was ever given, becauſe the Will was eſtabliſhed by Act of Parliament.

Fourth, *Penphraſe* ver. *Lord Lanſdown & al'*, in Ejectment, *Hill.* 11 *Annæ*, *Rot.* 620. a ſpecial Verdict was found,

That *John* Earl of *Bath* by his Will 11 *Oct.* 1684. only executed, took Notice, that his Lands were ſettled upon his Sons *Charles* and *John* in Tail Male, and then deviſed in theſe Words,

In Caſe my Sons ſhall have no Iſſue Male, then for the Preſervation of my Name and Family, I deviſe my ſaid Lands unto my Brother Bernard *Granville and the Heirs Males of his Body iſſuing.*

Bernard Granville died in the Life of the Teſtator, having Iſſue the Defendant *George*, then Lord *Lanſdown*, by which the Deviſe to *Bernard Granville* in Tail Male lapſed. 15 *Aug.* 1701. The Teſtator ſent for ſeven Perſons, and ſaid, *I ſent for you to be Witneſſes to my Will, and ſometimes to be Witneſſes to the Republication of my Will*; and then took a Codicil dated 15 *Aug.* 1701. in one Hand, and the Will in the other, he ſaid, *This is my Will, whereby I have ſettled my Eſtate, and I publiſh this Codicil as Part thereof*; and then ſigned the Codicil

(which lay upon the Table with the Will) in the Preſence of the Witneſſes, who ſubſcribed it in his Preſence.

By this Codicil he deviſed in theſe Words, *Whereas I heretofore made my Will dated* 11 *Oct.* 1684. *which I do not intend wholly to revoke, but in regard to the many Accidents and Alterations to my Family and Eſtate, I by this Codicil, which I appoint to be taken as Part of my Will, deviſe as follows*, and then deviſed divers Manors, *&c.* to his Son *Charles* and his Heirs, and 100 *l. per annum* to his Nephew, then Lord *Lanſdown*, for Life.

He then put the Will and the Codicil together in a Sheet of Paper, and ſealed them up in the Preſence of the ſame Witneſſes, but the Will was not unfolded in their Preſence, nor did any of them write their Names as Witneſſes on or under the Will, or on the ſame Paper, but on the Codicil only.

And by *Parker* C. J. and the whole Court, this was held no Republication; for ſince the Statute 29 *Car.* 2. there ſhall be no Republication by Implication, but the Will muſt be re-executed, otherwiſe a Deviſe of Lands ſhall not be good.

But at the Importunity of the Defendant a ſpecial Verdict was found.

DE
Term. Sanct. Trin.
12 Geo. 1.

Caſe 191.

Dean ver. *Coward.* In C. B.

A Miſtake in a Recovery whereby two of the Vills were omitted, allowed to be amended by the Deed that had the Uſes.

A Motion was made to mend a common Recovery. The Caſe was:

That *Richard Bigg* ſeiſed in Fee, upon the Marriage of *J. Bigg* his Son, ſettled Lands to the Uſe of *John Bigg* for 99 Years, if he ſo long lived; then to Truſtees and their Heirs for the Life of *John Bigg*; Remainder to his firſt and ſecond and other Sons in Tail Male; Remainder to the ſecond and other Sons of *Richard* in Tail Male; Remainder to the right Heirs of *John Bigg*.

The Lands ſettled lay in *Sunning*, *Hurſt*, *Hurley*, *Clever*, *Wookingham*, *Wargrave* and *Wallingford* in *Berkſhire*.

By Indentures 8 and 9 *June* 1696, *Richard Bagley* Couſin and Heir of *Thomas Bagley* the ſurviving Truſtee for the Contingent Uſes in the Settlement, for *Richard Bigg* and *John Bigg* the eldeſt Son of the ſaid *John Bigg*, in the Life of the Father, conveyed the Lands in *Sunning*, *Hurſt*, *Hurley*, *Clewer*, *Wookingham*, *Wargrave* and *Wallingford*, to *James Coward* and his Heirs, to make him Tenant to the Precipe for a common Recovery, which was to be to the Uſe of *John Bigg* the Father for 99 Years, if he ſo long lived, then to Truſtees for 1000 Years, upon Truſt to make Mortgages by the Di-

rection of *John Bigg* the Son; Remainder to *John Bigg* the Son and his Heirs.

Trin. 8 *W.* 3. a Recovery was ſuffered, but the Vills *Wargrave* and *Wallingford* were omitted in all the Proceedings of the Recovery.

John Bigg the Son by his Will 15 *June* 1723 deviſed all his Lands to his Uncle *Lovelace Bigg* in Fee; and *William Bigg* younger Son of *John Bigg*, upon whom the Settlement was made by *Richard Bigg*, claimed the Lands in *Wargrave* and *Wallingford*, by Virtue of the Intail in the ſaid Settlement; and upon this a Motion was made that the Recovery ſhould be amended by the Deed 9 *June* 1696, and a Rule *Niſi* granted, which in *Michaelmas* Term following was made abſolute; and many Precedents were cited and Rules produced for this Purpoſe; particularly,

Trin. 13 *Car.* 1. *Wrightwick and others* ver. *Maſters*, on the Motion of Serjeant *Clarke*.

Mich. 13 *Car.* 1. *Broke and others* ver. *Biddulph*, on the Motion of Serjeant *Heath*.

Mich. 2 *Car.* 2. *Parker and Jolly* ver. *Cotton & ux'*, on the Motion of Serjeant *Clarke*.

Paſch. 24 *Car.* 2. *Tregeare* ver. *Nich. Genngs.*

Mich. 4 *W. & M. Grange* verſus *Treby*, on the Motion of Serjeant *Pemberton*.

DE
Term. Sanct. Mich.
13 Geo. 1. In Scacc'.

Caſe 192.

The King and *Clark.*

Extent ſhall go for the King's Money againſt any one that imbezils it, but not where Money due to the King is paid, and his Security cancelled before Bond given by Deputy to Principal for Ballance in his Hands.

Edward Paunceford, being appointed Caſhier to the Commiſſioners of Exciſe, imployed *Nich. Clark* to be his Billman or Receiver, who by his Obligation of the 14th of *March* 1715. was bound to the King in 1000 *l.* with a Condition to ſatisfy, pay and deliver each Day unto the ſaid *Edward Paunceford*, his Agent, Executors or Aſſigns, all ſuch Sums Bills, Bonds, Notes and other Papers, as the ſaid *Nich. Clark* ſhall receive by Virtue of any Bills of Exchange, Notes, *&c.* relating to the Exciſe, or on any Accounts belonging to his Majeſty, or to the ſaid *Edward Paunceford* on his own Account, and ſhall due Accounts make with the ſaid *Edward Paunceford* of or concerning any Bills of Exchange, *&c.* belonging to his Majeſty, or relating to the ſaid *Edward Paunceford*, and ſhall follow all ſuch Orders, *&c.* as he ſhall receive from the ſaid *Edward Paunceford*, *&c.*

And by another Obligation of the ſame Date *Nich. Clark* and others were bound to the King in 500 *l.* upon Condition to the ſame Intent and Purpoſe.

Upon Motion of the Attorney General, and Affidavit that *Nich. Clark* had received 1876 *l.* ariſing from the Revenue of the Exciſe, and had paid only 398 *l.* and the Reſidue 1478 *l.* was by him imbeziled and converted to his own proper Uſe, and that a Commiſſion of Bankruptcy then was awarded

againſt him, it was ordered by the Court, that a Writ of Extent ſhould immediately be awarded, to extend the Eſtate and Effects of the ſaid *Nich. Clark*, bearing Date the 26th of *October*, (which was the Day of the Motion) but that it ſhould not be executed till four Days after Notice given to him and the Commiſſioners of Bankruptcy.

And then it was moved to diſcharge this Order, becauſe it did not appear, that the Debt to the King remained due; and it was ſhewn by Affidavit, that the King was paid all his Dues by *Edward Paunceford*, who ſettled Accounts with *Clark*, and took his Obligation for the Ballance, and paid all the Debt due to the King; and on the 3d of *July* 1724. had the Bond reſtored to him, which the ſaid *Edward Paunceford* had given to the King; and it was inſiſted, that this Obligation was made for the Benefit of *Paunceford* himſelf, and the King's Prerogative ought to be uſed only for the King's Debts. *Hard.* 404. It is ſaid by Chief Baron *Hale*, that it would be unreaſonable, inconvenient and miſchievous to the Subject, to make the King's Prerogative inſtrumental for obtaining the Debts of the Subject; and by a Rule 3 *Jac.* 2. 1687. no Extent ſhall iſſue where a Bond is not due and brought into Court, and Affidavit made, that the Debt to the King is ſtill due; and it was alſo ſaid, that an Extent ſhall not be upon an Obligation with Condition, without *Scire facias*. *Sav. pl.* 95. 2 *Leo. pl.* 74. *Owen* 46.

And on the other Part it was inſiſted by the Attorney General and others, that an Extent ſhall iſſue upon a Bond, as here; and ſo it was adjudged 1721. between *The King* and *Yale*, referred to the Chief Juſtices *Pratt* and *King*, and afterwards affirmed in Parliament, where the Condition was to the ſame Effect as this is; if a Man be bound to the King with Sureties, and the Principal prove inſolvent, upon which the Sureties pay the Debt to the King, it would be very miſchievous if they could not have the Prerogative Proceſs againſt their Principal.

If Monies due to the King are delivered to a common Carrier, who loſes or imbezils them, Extents ſhall iſſue

againſt him for the Recovery of theſe Monies; and if the Receiver die indebted to the King, and his Executors pay the Debt, they ſhall have the Prerogative Proceſs for the Recovery of the Debts due to their Teſtator; as to the Caſe *Hard.* 404. it was mentioned by Chief Baron *Hale* in regard of Debts in Aid, and the Rules made 3 *Jac.* 2. were never inrolled, and regard only Extents in Aid. But it was never doubted before, that if a Man be indebted by Bond to the King, an Extent might iſſue before it be proved that the Debt remains unſatisfied.

And it was agreed by the Court, if a Man be Receiver for the King, and employ others as his Agents or Deputies, that he can take their Obligation in the King's Name for the King's Monies which ſhall come to their Hand, and to me it ſeems that it was never denied that if it be added to the Condition that they ſhall account alſo to the Receiver for the proper Monies that they have received, that this ſhould not vitiate, but if the Obligor imbezils or converts the King's Monies, an Extent ſhall be iſſued upon ſuch Obligation.

It was alſo agreed, that if a common Carrier imbezil the King's Monies, Extent may Iſſue againſt him; ſo if the principal Debtor to the King fail, and his Sureties pay, it was agreed by Baron *Carter* and my ſelf, and not denied by the others, that the Sureties ſhall have the Prerogative Proceſs againſt the Principal.

But in the Principal Caſe this Rule was diſcharged, upon Conſideration chiefly of the Circumſtances of this Caſe; for when this Obligation was made 1715, by which *Nath. Clark* was bound to pay each Day ſuch Sums, *&c.* as he ſhould receive, the Monies then due were converted by him many Years paſt; and after an Account was ſettled between *Paunceford* and *Clark*, and the Monies due to the King by *Clark* were paid by *Paunceford*, and he had his Security given to the King cancelled and reſtored to him, and then took an Obligation of *Clark* for the Ballance upon that Account, ſo did not rely upon the Bond given by *Clark* to the King.

And the Chief Baron added, that by the Condition of the Obligation *Nath. Clark* was not bound to pay to the King or account to the King for the Monies by him received, but to pay to *Paunceford* and account to him, not only for the King's Monies, but alſo his own proper Monies, and therefore the King's Name ſeems to be uſed ſolely on Truſt for *Paunceford*, but the King cannot be Truſtee for another Perſon.

Evans and *Viſcounteſs Dowager Faucon-berg.* In Scac'. Caſe 193.

DEBT for Rent, and Plaintiff declared, that by Indenture of the 27th of *Sept.* 1723 he demiſed to the Defendant a Meſſuage in *Bond-ſtreet* for ſeven Years at 160 *l. per Ann.* by Virtue of which Demiſe Defendant entered, and was from thence in Poſſeſſion to the Day of the Feaſt of the Annunciation of the Bleſſed *Virgin* 1726, and for a Year's Rent due at the ſaid Feaſt this Action was brought, *&c.*

If Defendant pleads *Nil habuit in Tenementis* to an Action of Debt for Rent brought upon an Indenture of Leaſe for ſeven Years, it is a good Cauſe of Demurrer.

Defendant pleaded, that before the Demiſe, *viz.* 24 *Jan.* 1722, the Plaintiff was poſſeſſed of the ſame Meſſuage for the Term of 99 Years to come, and the ſame Day aſſigned his Term to *Anne Colwell*, who afterwards, *viz.* 25 *July* 1723 entered, and was and is ſtill in Poſſeſſion; and this ſhe is ready to prove; to which the Plaintiff demurred, and ſhewed for Cauſe that the Plea doth not confeſs and avoid, nor deny the Matter in the Declaration, that it doth not ſhew Expulſion of the Defendant, and that it is Argumentative, *&c.* Defendant joined in Demurrer.

And it was argued by Serjeant *Whitaker*, that the Plea is a ſpecial *Nil habuit in tenementis*, and therefore the Plaintiff ought to have replied, and relied upon the Eſtoppel, and not demurred. *Co. Ent.* 103. *Hob.* 200. And perhaps Plaintiff had an Intereſt, and therefore Defendant might confeſs and avoid. *Co. Lit.* 47. *Cro. Eliz.* 700. *Sed non allocatur*; for upon a Plea of general *Nil habuit in Tenementis* Plaintiff might de-

demur, where the Eſtoppel appears in his Declaration. 3 *Lev.* 146. *Salk.* 277. *A fortiori* in a ſpecial *Nil habuit, &c.* and Defendant here does not ſhew that Plaintiff had an Intereſt that could be avoided, and alſo the Defendant did not anſwer to the Poſſeſſion as he ought. 2 *Vent.* 67. And therefore Judgment was given for the Plaintiff.

Caſe 194. ## *Bokenham* and *Bentfield.* In Scacc'.

Leaſe of Parſon void for Non-reſidence, when pleaded to a Bill brought by Leſſee for Tithes.

BILL by Leſſee of the Parſon of — for Tithes againſt the Defendant, a Pariſhioner; to which the Defendant pleaded the Statute 13 *Eliz.* 20. by which it was enacted, That no Leaſe of any Benefice or Eccleſiaſtical Promotion with Cure, or any Part thereof, ſhall endure any longer than while the Leſſor ſhall be ordinarily Reſident, and ſerving the Cure of ſuch Benefice without Abſence above 80 Days in any one Year, but that ſuch Leaſe immediately upon ſuch Abſence ſhall ceaſe and be void, *&c.* and that the Leſſor was abſent above 80 Days in ſuch Year, whereby his Leaſe to the Plaintiff did become void; and the Plea being admitted to be heard according to the Rules of Court, no one then appeared to defend or maintain the Title of the Plaintiff, for it was ſaid by the Counſel for the Defendant that ſuch Plea was formerly allowed, that it was allowed 5 *Feb. Hil.* 12 *Geo.* between *Mills* and *Etheridge.*

That it was allowed alſo *Paſch.* 12 *Geo.* between *Quinter* and *Meſſendon*, and between *Quinter* and *Downes*, that the ſole Queſtion in thoſe Caſes was, if the Defendant ſhould not anſwer to the Quantities and Values alledged by the Bill at the ſame Time he tenders his Plea, ſo as where the Defendant inſiſts on a *Modus* as a Diſcharge of his Payment of Tithes in Specie, yet the Defendant ought to anſwer to the Quantity and Value of the Tithes charged in the Bill; otherwiſe if it were afterwards found there was no ſuch *Modus*, the Plaintiff cannot have Decree againſt the Defendant, becauſe it does not appear how much is due by him for his Tithes to the Plaintiff. But it was then reſolved by the Court, that upon ſuch Plea of Non-reſidence of the Leſſor the Defendant need

not anſwer to the Quantities and Values, for ſuch Plea goes to the Right and Title of the Plaintiff, but where *Modus* is alledged, that admits the Title of the Plaintiff to take Tithes of the Defendant, but only goes to the Manner of Payment, if Tithes ſhould be paid in Specie, or not.

And upon all thoſe Authorities alledged, the Plea in the preſent Caſe was allowed.

Harriſon and *Hart and Franks.* In Scac'. Caſe 195.

BILL for an Account of the Produce of 20000 *l. South-Sea* Stock transferred by the Plaintiff to the Defendant *Hart*, for the Security of 70000 *l.* and Intereſt, and after Deduction of Principal and Intereſt, that *Hart* pay the Ballance to the Plaintiff, and alſo that the Defendant *Franks* ſhall account to the Plaintiff for the ſaid 70000 *l.* which was paid to him to be diſpoſed of for the Uſe of the Plaintiff.

An Account directed for all Monies received on the Sale of Stock pledged, notwithſtanding the Day of Redemption was paſt; it not appearing that the Defendant had ſufficient Stock at the Day.

And the Bill ſuggeſted that the Plaintiff applied to the Defendant *Hart* 25 *May* 1720, for a Loan of 30000 *l.* who advanced that Sum to the Plaintiff, and for Security the Plaintiff agreed to give his Bond, and alſo to transfer to him 10000 *l. South-Sea* Stock, and accordingly the Plaintiff was bound the 25th of *May* 1720 in a Penalty of 60000 *l.* under the Condition that the Plaintiff pay to *Hart* 30000 *l.* on the 25th of *September* next with Intereſt, after the Rate of 5 *l. per Cent.* being the ſame Sum mentioned in a Defeazance of the ſame Date made between the Plaintiff and Defendant *Hart.*

That the ſame Day the Plaintiff transferred to the Defendant *Hart* or his Order 10000 *l. South-Sea* Stock, and by a Defeazance dated the 25th of *May* 1720, between Defendant *Moſes Hart* on the one Part, and Plaintiff *Thomas Harriſon* on the other Part, reciting the ſaid Obligation and Transfer, it was agreed that the 10000 *l.* Stock ſo transfer-

red was tranferred to the Intent that the ſame ſhall and may remain and be as and for a collateral or further Security for the more ſure Payment of the ſaid Sum of 30000 *l.* according to the Condition of the ſaid Bond.

And by the ſame Deed, Defendant *Hart* covenants that if the Plaintiff ſhall pay the ſaid 30000 *l.* *&c.* he will on Payment of the ſaid Sum transfer the ſaid 10000 *l.* Stock to the Plaintiff and deliver up the Bond.

And Plaintiff covenants that he will pay all Calls, *&c.* upon the ſaid Stock, till Payment of the Money become due, and authoriſes Defendant (if Money be not paid) to ſell and diſpoſe abſolutely of the ſaid Stock, and keep the Monies ariſing by the Sale towards Payment of the ſaid Sum of 30000 *l.* Intereſt and Charges, returning the Overplus, which Defendant agrees to do.

And it is agreed that all Gains, Dividends, Intereſt and Advantage, which ſhall ariſe by Reaſon of the ſaid Stock in the ſaid Company from the Date hereof, ſhall be for the only Uſe and Benefit of the Plaintiff, unleſs Default ſhall be made in Payment of the ſaid 30000 *l.* *&c.*

And if the Stock of the Company, before the 30000 *l.* ſhall grow due as aforeſaid, ſhall fall in Value, ſo as to be ſold at or under the Rate of 350 *l.* *per Cent.* in *Exchange-Alley*, the Plaintiff on three Days Notice ſhall give further Security, *&c.* or in Default thereof it ſhall be lawful for Defendant *Hart* to ſell the ſaid Stock, and keep the Money ariſing by Sale towards Payment of the ſaid 30000 *l.* though not then due, according to the Bond, returning the Overplus, if any, to the Plaintiff.

That the Defendant 10th of *June* 1720 advanced 40000 *l.* more to the Plaintiff who gave his Bond in 80000 *l.* with Condition to pay, *&c.* on the ſaid 25th *Sept.* and another Defeazance was executed in the ſame Terms as the former, ſave that Power of Sale was given if Stock leſſened to 500 *l.* *per Cent*', *&c.* That the Defendant *Hart* after diſpoſed of

this Stock for great Prices, for which he ought to account; that the whole 70000 *l.* was paid into the Hands of Defendant *Franks*, for which he ought to account to the Plaintiff.

The Defendant *Hart* by his Anſwer confeſſes the Loan of 30000 *l.* the 25 *May* 1720. and the Bond and Defeazance accordingly; and another Loan 10 *June* 1720. and the Bond and Defeazance accordingly; and ſaith, that he hath, and always had in his own Hands, or in the Hands of others in Truſt for him, ſufficient Stock to anſwer the Plaintiff's Demands, which the Defendant kept on Purpoſe, without making any Sale or Diſpoſition thereof, ready to be transferred to the Plaintiff or his Order, when he ſhould require, on his Payment of the 30000 *l.* and 40000 *l.* and Intereſt, *&c.*

And by his ſecond Anſwer to the original Bill, and three other Anſwers to the amended Bill, it appears, that on the 25th of *May* 1720. when the firſt Loan, was made the Tranſfer of the firſt 10000 *l.* by the Plaintiff was in this Manner,

		l.
2000 *l.* was transferred to *Benj. Collier* for 9600 *l.*		
2000 *l.* to *Rob. Sawbridge* at 482 *l. per Cent'*, 9640 *l.*		24040
1000 *l.* to *Wolfe* — —— at 480 *l. per Cent'*, 4800 *l.*		
5000 *l.* to Defendant *Hart* himſelf, who paid to Plaintiff only		5960
		30000

That on the ſecond Loan 10th of *June* 1720. the Tranſfer of the ſecond 10000 *l.* *South-Sea* Stock was made by the Plaintiff in this Manner, *viz.* 1000 *l.* to *Robert Mann* at 745 *l. per Cent'*.

	For	*l.*
1000 *l.* to Count *Naſſau*, at 735 *l. per Cent'*,	7350 *l.*	22200
1000 *l.* to *John Mark*, at 740 *l. per Cent'*,	7400 *l.*	
That the remaining 7000 *l.* was transferred by Plaintiff, or Order, to *Moſes Hart*, who paid		17800
		40000

And

And it appears by the Depoſitions of *James Travers* and *Benjamin Periam*, two Witneſſes examined in the Cauſe, that *Moſes Hart* had raiſed by the Sale of the 20000 *l.* *South-Sea* Stock transferred to him by the Plaintiff 25 *May* and 10 *June* 1720. the full of 86291 *l.* 17 *s.* 8 *d.* ½

	l.	
Viz. By Sale of 5000 *l.* to *Collier*, *Sawbridge* and *Wolfe*,	24040	
By Sale 30 *May* 1720. of 4000 *l.* to *Jac. Sawbridge*, at 520 *l. per Cent'*, of which 3659 *l.* 4 *d.* was the Plaintiff's Stock, (for he had only 340 *l.* 19 *s.* 8 *d.* of his own proper Stcok) the Sum of	19026	17 8
By Sale 3 *June* 1720 of 500 *l.* Stock of the Plaintiff's, at 520 *l. per Cent'*, (for the Defendant had then no other Stock in his own Name)	2700	
By Sale 10 *June*, as above, to *Mann*, Count *Naſſau* and *Mark*,	22200	
By Sale 15 *June* 1720. to *William Dale* 500 *l.* at 750 *l. per Cent.* for *M. Hart* had not Stock in his own Name, only 1000 *l.* purchaſed of Lord *Grimſton* for 8000 *l.* of which he had ſold 100 *l.* to *Cha. Goodwin*, and 400 *l.* to *Bart. Zolocaſtre* 10 *June* 1720. and then ſold 1000 *l.* to *William Dale*, of which 500 *l.* muſt be of the Plaintiff's Stock,	3750	
By Sale 15 *June* to *Hen. Hankey* 1000 *l.* at 700 *l. per Cent'*,	7000	
By Sale 20 *June* to *William Bateman* 500 *l.* at 765 *l. per Cent'*,	3825	
And to *Jo. Baker* 500 *l.* at 750 *l. per Cent'*,	3825	
5	Total 86291	17 8 ½

So

So by the Depoſitions of the ſame Witneſſes it appears, that Defendant *Moſes Hart* had in his own Name upon 25 *May* 1720. no Stock, except 340*l.* 19*s.* 8*d.* and the Annuity Stock.

That upon the 25 *Sept.* 1720. he had no Stock in his own Name, except 20885*l.* 1*s.* 7*d.* and the Annuity Stock.

That 4400*l.* Part of the 20885*l.* 1*s.* 7*d.* was pledged to *Hart* by Lord *Hillsborough.*

That 9100*l.* another Part of the ſame, appears to be in Truſt for the *South-Sea* Company; for on the 16 *Sept.* 1720. the Sum of 48140*l.* was delivered to *Hart* by *Robert Knight*, Caſhier to the *South-Sea* Company, with Intent to purchaſe Stock for the Uſe of the Company, and that *Hart* with this Sum made a Purchaſe of 9100*l.* *South-Sea* Stock, and the 27 *Sept.* 1720. 9100*l.* of this Stock was transferred by *Hart* to the *South-Sea* Company.

So by the Depoſitions of *William Walmſly*, another Witneſs, it appears, that Lord *Newburgh* ſaid to him 24 *Aug.* 1720. in *Exchange-Alley*, that *Hart* had purchaſed 2000*l.* *South-Sea* Stock for him of *Iſaac Fernandez Nunes* at 850*l.* *per Cent'*, to be transferred the next Transfer-Day after *Michaelmas*, and for his Security upon the 26 *Aug.* 1720. the aforeſaid Lord transferred to *Hart* 1000*l.* *South-Sea* Stock in Truſt for himſelf, and in a ſhort Time after the Expiration of the Time to perform the Bargain the ſaid Lord *Newburgh* gave Satisfaction to *Hart*, who detained the 1000*l.* Stock in Part thereof.

By the Depoſition of Sir *William Stapleton* it appears, that 23 *June* 1720. he purchaſed of *Hart* 1000*l.* *South-Sea* Stock, and of *Walter* 600*l.* *South-Sea* Stock, at 1000*l.* *per Cent'*, which *Hart* took to himſelf upon the 27 *Sept.* at 400*l.* *per Cent'*.

By the Depoſition of *Tho. Edwards* it appears, that *Hart* upon the 20 *Aug.* 1720. purchaſed for him 500*l.* *South-Sea*

Stock, at 800 *l. per Cent'*, and kept it in Truſt for him for two Years following, when *Hart* took the ſame Stock for Part of the Monies due to him by *Edwards*; which ſeveral Parcels of Stock, *viz.* 4400 *l.* 9100 *l.* 1000 *l.* 1600 *l.* and 500 *l.* with *Midſummer* Dividend for the two laſt Parcels, amount to 16810 *l.* and reduce the Stock, which Defendant *Hart* had in his own Right upon the 25 *Sept.* 1720. to 4075 *l.* 1 *s.* 7 *d.*

By the Depoſition of *Geo. Harriſon*, Brother to the Plaintiff, it appears, that upon the 19 *Aug.* 1720. *Hart* contracted to ſell him 1000 *l. South-Sea* Stock at 910 *l. per Cent'*, to be transferred to him within a Month after the next Opening of the Books, and depoſited for Security of his Performance of the Contract one Subſcription Receipt of the Value of 3000 *l.* and *Hart* alſo had contracted to deliver to the Lord *Newburgh* the 2000 *l.* Stock mentioned in the Depoſition of *William Walmſley* for 850 *l. per Cent'*, upon the 22 *Sep.* 1720. and to Col. *Lumley* another 2000 *l.* at the ſame Time, and for the ſame Price.

That by the Statute 6 *Geo.* enabling the *South-Sea* Company to increaſe the Capital Stock, Power was given to the Company to take in the Annuities, *&c.* and by a Reſolution of the 19 *May* 1720. the Company agreed to make Allowance for each 100 *l.* of Long Annuities, ſubſcribed before the 27 *May* 700 *l. per Cent'*, and 575 *l.* in Monies, and *South-Sea* Bonds, and for each 98 *l. per annum* of the 14 *l. per Cent'* Annuities, and 511 *l.* in Monies and Bonds.

That *Hart* upon 28 *April* 1720. ſubſcribed 1460 *l. per ann.* of the Long Annuities, and 1040 *l. per ann.* of the 14 *l. per Cent'*, and by the Hands of *Edward Harris* 200 *l. per ann.* Long Annuities, and by the Hands of *Wymondſell* the ſame Sum, for which he was allowed 700 *l. per Cent'*, *viz.*

	l.		
For 1860 *l.* Long Annuities,	13020		
1040 *l.* of 14 *l. per Cent'*,	7428	11	5
Midſummer Dividend,	2044	17	1
In all	22493	8	6

That by an Order of the *South-Sea* Company, the Books were not opened for Transfer of the *South-Sea* Stock till the 5th of *Oct.* 1720.

And on the Part of Defendant *Hart* it was proved by the Depoſition of *Lazarus Simon*, *Moyer Wagg*, and *Iſaac Franks* the other Defendant, that on or about the 10 *June* 1720. the Plaintiff diſcourſing with Defendant *Hart* (who ſaid, that perhaps he could not re-transfer to him at the Time agreed, the 20000 *l.* Stock in other than Annuity Stock, having ſold to others the ſaid 20000 *l.*) declared, that he well knew he could not have the ſame Stock, and would be content with Annuity Stock, for he did not regard which Stock he had, and knew well the Sufficiency of the Defendant.

That Annuity Stock was equal in Value to the other, and was apprehended to be transferable before the 25th of *September*, and ſome Parcels were actually transferred before the ſaid Day.

And *Franks* added, that ſince the Loan of the ſaid Sums, when Stock was conſiderably advanced in Price, the Defendant *Hart* adviſed the Plaintiff to ſell all his Stock, by which he would acquire a great Eſtate, and therefore offered to him to deliver the whole 20000 *l.* Stock, with the Dividends, but the Plaintiff refuſed, ſaying, that Stock would riſe to the Price of 1500 *l.* or 2000 *l. per Cent'.*

And *Simon Lazarus* added, that he being directed by Sir *John Lambert*, a Director of the *South-Sea* Company, to purchaſe Stock, offered to the Plaintiff to give 900 *l. per Cent'* for all the 20000 *l.* that *Hart* had of him, and to take the Security which was given to *Hart* for it.

And *Iſaac Helbert* added, that he offered to *Hart*, by Order of *Knight* and *Grigsby*, for all his Stock, Annuity Stock and other Stock, 950 *l. per Cent.* who refuſed to depart with all his Stock by reaſon of his Engagement with the Plaintiff.

As

As to the Defendant *Franks*, he admitted by his Anſwer that he received for the Uſe of the Plaintiff the 30000 *l.* and 40000 *l.* of *Hart*, and ſuch others, to whom the Plaintiff tranſferred the 20000 *l.* Stock, but ſaith, that he diſpoſed of it purſuant to the Orders of the Plaintiff in *South-Sea* Stock or Subſcriptions, and from Time to Time gave to the Plaintiff an Account in Writing how he had diſpoſed of it, which Writing the Plaintiff peruſed, and it was left with him, and after declared his Approbation of the Account; and after all the Monies diſpoſed of for the Plaintiff, a Ballance of 56 *l.* remainded due to the Defendant *Franks*, which was demanded of the Plaintiff, who admitted ſuch Sum due, and promiſed Payment; that by Fire the 17th of *January* 1723. all his Papers and Accounts were deſtroyed or loſt, wherefore he could not now Account.

And it appeared, that *Franks* was not made Defendant to the original Bill of the Plaintiff filed *Michaelmas* 1721. but afterwards in *Michaelmas* Term 1722. *Franks* was made one of the Defendants.

And by the Depoſition of *Abraham Solomon*, who was employed to purchaſe the Stock and Subſcriptions for the Plaintiff, it appeared, that he delivered an Account to the Plaintiff in Writing of all the Sums for him expended, and of all the Stock or Subſcriptions for him purchaſed in the *South-Sea* Company or other Companies, and apprehended the Account was juſt; that the Plaintiff peruſed them, and about two Days after the Delivery of each Account the Plaintiff declared, that he had inſpected, and was ſatisfied; and *Abr.* and *Benedict Solomon* teſtify, that the Plaintiff promiſed Payment of the Monies demanded as the Ballance due upon thoſe Accounts to the Defendant *Franks*, and the Sum demanded exceeded 50 *l.*

Upon this Caſe it was inſiſted by the Attorney General, and other Counſel with the Plaintiff, that the Defendant *Hart* ought to render Account to the Plaintiff for all the Monies which he had raiſed by the Sale of any Part of the 20000 *l.*

alledged to be transferred to him by the Plaintiff, and after Deduction of the principal Sums and Intereſt, to anſwer for the Reſidue of the Profits to the Plaintiff.

Firſt, This ſeems agreeable to the Nature of the Tranſaction, for when a Pledge of Stock is made by the Plaintiff to the Defendant, it is conſonant to Law and Reaſon that the Defendant ſhall render to the Plaintiff upon mutual Payment of Monies the Stock and all the Profits ariſing from it. If a Man diſtrain his Tenant and labour the Diſtreſs, he ſhall give Damages to the Party to the Value of the Labour.

So by the Civil Law the Fruit and Profit ariſing from a Thing in Pledge ought to be accounted for to the Debtor, and after Deduction of its Principal and Intereſt, the Surplus ariſing from the Sale of the Pledge ought to be reſtored to him. *Domat.* 1 *Vol.* 345. *De Depoſito L.* 3. All that ſhall ariſe or accrue from the Thing that is mortgaged, or that ſhall augment it, accrues to the Mortgagor. So Tit. 3. §. 15. *Cum ſortis nomine & uſurarum aliquid debetur ab eo, qui ſub pignoris nomine pecuniam debet, quicquid ex venditione pignoris recipiatur primum uſuris quas jam tunc deberi conſtat, deinde ſi quid ſupereſt, ſorti accepto ferendum eſt.*

So in the Caſe of a Mortgage the Mortgagee ſhall anſwer for all caſual Profits; if a Man pledge a Diamond for 100 *l.* and it is ſold for 500 *l.* ſhall not he have an Account given him of the Surplus? By Common Law he that receives a Pledge has no other Property in it than to detain it till his Debt is paid, nor can he uſe or ſell it. 2 *Cro.* 244. So by the Canon Law. *Lind.* 60. The Canon of Pledges ſaith, *Inhibemus ne pignus retinere quiſpiam contendat poſtquam de fructibus ſortem perceperit, deductis expenſis, quoniam uſura eſt.*

And it ſeems to be confirmed by a Reſolution in this Court, in the Caſe between *Mercer* and *Tutt*, which was afterwards affirmed by Parliament upon an Appeal 2 *March* 1725. *Mercer* had borrowed 1100 *l.* of *Tutt*, and for his Security gave his Bond for Payment, and alſo pledged a ſecond Subſcription N° 195. and it was agreed that if *Mercer*

paid the Money *Tutt* ſhould reſtore the Subſcription, and if he did not pay it, that *Tutt* might ſell; afterwards *Tutt* ſold the Subſcription; whereupon *Mercer* exhibited his Bill in this Court for an Account of the Money raiſed by the Sale. The Defendant inſiſted, that he had preſerved another ſecond Subſcription N° 194. in Lieu of that; and upon Debate concerning the Subſcription pledged, Trial was directed, and Verdict found for the Plaintiff; whereupon an Account was decreed.

So in the Caſe of *Merrick* and *Spark*, *Mich.* 1723, Stock was mortgaged by *Merrick* for 1000 *l.* the mortgagee after this Mortgaged it for 1200 *l.* whereupon *Merrick* exhibited his Bill for an Account of the Overplus, and an Account was decreed.

Secondly, This was the expreſs Agreement of the Parties, for by the Defeazance it is ſaid that the Stock ſhall be and remain a further Security for Payment, which ſhews the Intent was not that it ſhould be ſold, for then it would not continue a Security, and it was pledged only as a collateral Security for the Obligation, which was principally intended for the Security of the Defendant.

Therefore by the ſame Defeazance Defendant *Hart* covenanted upon Repayment, *&c.* to transfer the ſaid Stock to the Plaintiff, and the Plaintiff covenanted to pay all Calls upon the ſaid Stock; but if the Stock was intended to be ſold it could not be transferred to the Plaintiff, nor could there be any Calls upon it; and it appears more fully by the Covenant and Agreement, which ſays that all Gains, Dividends, *&c.* ariſing by the ſaid Stock ſhall accrue to the Plaintiff, and by the ſubſequent Covenant, which ſhews in which Caſes it ſhould be ſold, *viz.* if it fall to 350 *l.* but in that Caſe the Defendant is to account for the Overplus, and when the Parties expreſly agreed that upon ſuch Diminution in Value it ſhall be ſold, and that in ſuch Caſe the Defendant ought to account for the Sale, it can never be intended that in any other Caſe it may be ſold without Account. If the Plaintiff ought to have an Account of the Profits that ariſe

from the Sale, when the Sale was allowed by the Conſent and Agreement of the Parties, ſhall it be ſaid that he is not accountable for the Sale when ſold by himſelf, and in Breach of the Truſt repoſed in him?

Thirdly, This Conſtruction of the Articles is very reaſonable; for if the Plaintiff would ſell the Stock, he might have ſold it himſelf; it would be very dangerous that he to whom the Stock is pledged might traffick with it; where ſhould the Stock have been found if the Defendant had become a Bankrupt? Whilſt the ſpecified Stock remained in his Hand, the Plaintiff in Caſe of Bankruptcy could reſort to it and take the Stock out of the Hands of the Commiſſioners or Aſſignees, but if it be ſold, what Remedy ſhall he have? And it is therefore neceſſary that the Party be ſtrictly bound to his Agreement. The Agreement in Writing ſhould always be the Rule of the Action, but is more neceſſary in Things which fluctuate in the Manner that Stock fluctuates, and is more requiſite in the Caſe of a Broker, who by Act of Parliament is to be ſworn and ought not to intermeddle with Stock, and therefore when he acts contrary, he ought to be ſtrictly obliged to the Letter of his Agreement.

Fourthly, If it be ſaid the Agreement in Writing is varied by the ſubſequent Tranſactions, becauſe the Plaintiff himſelf transferred Part of his Stock to others, therefore the Defendant *Hart* reſerved other Stock for the Performance of his Contract. It does not appear that he apprehended the Perſons to whom the Plaintiff transferred his Stock were other than Truſtees for *Hart*; and Plaintiff by his Anſwer ſwore he took them to be his Truſtees; but if it made any Variation, can an Agreement in Writing be varied by Word?

Fifthly, As to the Allegation that *Hart* reſerved equal Quantity of Stock at all Times, out of which he could anſwer to the Plaintiff, it was agreed by Mr. *Cowper* that if the Allegation was true, it was a good Anſwer; for if a Man having 10000 *l.* takes other 10000 *l.* on Pledge, and then diſpoſes of 10000 *l.* only, it is not any Inconveniency to the Party, and

and it cannot be known if the Plaintiff's Stock be transferred or his own Stock.

But it was inſiſted, that upon the 25th of *May* 1720 Defendant *Hart* had only 340 *l.* in his own Name, and upon the 25th of *Sept.* 1720, although he had 20885 *l.* in his own Name, yet he was only Truſtee for others as to the greateſt Part of it, and the Annuity Stock ought not to be regarded, becauſe it was not transferrable till the fifth of *October* 1720, and therefore could be of no Uſe to anſwer the Demand of the Plaintiff upon the 25th of *September* preceding.

Sixthly, The Defendant *Hart* himſelf was conſcious that he had ſold the Plaintiff's Stock contrary to his Agreement, and that he had not ſufficient Stock of the ſame Nature whereby he could anſwer the Plaintiff, as it appears by his varying Defences and by his varying Anſwers; for by his firſt Anſwer he ſaith that he has always had in his own Hands or others in Truſt for him ſufficient to anſwer the Plaintiff's Demands, which he kept on Purpoſe, without making any Sale or Diſpoſition thereof, ready to be transferred to Plaintiff or his Order; by which every one ſees the Intent was, that the Defendant ſhould have all the while Stock ſufficient to anſwer to the Plaintiff 20000 *l.* Stock pledged by the Plaintiff, and that he never had ſold or diſpoſed of any Part of this Stock.

But by his ſecond Anſwer the contrary appears, for then he confeſſes he had ſold the Plaintiff's Stock immediately after the Transfer to him, and that he had no Stock of his own, only 340 *l.* 19 *s.* 8 *d.* which he immediately diſpoſed of, and had no proper Stock for a long Time; but then by his third Anſwer, he makes his Refuge to the Annuity Stock, for he ſays, he had ſubſcribed in *South-Sea* Stock the 28th of *April* his Annuities, for which he was allowed in the *South-Sea* Company 20448 *l.* 11 *s.* 5 *d.* which with the *Midſummer* Dividend was augmented to 22493 *l.* 8 *s.* 6 *d.* and that he had alſo other Stock in his own Name to the Value of 20885 *l.* 1 *s.* 3 *d.* but upon Examination it appeared the

Annuity Stock was not transferrable till the 5 *Oct.* and that his other Stock was for the moſt part in Truſt for others; and that for the Reſidue he had made Contracts for Sale of that to others, ſo that he had no Stock, or only a very ſmall Quantity of Stock, upon the 25 *Sept.* with which the Plaintiff could be ſatisfied; and this Matter being manifeſt, he by his fourth and fifth Anſwer would reſort to the Act of Parliament, by which he ſays, that the Annuity Stock was in its Nature transferrable from the Time it was tranſcribed to the *South-Sea* Company, by Force of the Statute 6 *Geo.*

As to the other Defendant, it was urged by the Attorney General and others of Counſel with the Plaintiff, that it was a plain Caſe that *Franks*, who had received 70000 *l.* for the Uſe of the Plaintiff, as he himſelf admits, ſhould be accountable to the Plaintiff for that Sum.

And his Pretence, that he had given the Plaintiff an Account each Day in Writing to him delivered, that does not amount to a ſtated Account, and an Account current never was allowed to be a Bar to a Bill exhibited in Equity againſt any Perſon to have an Account.

And his Excuſe, that he had loſt his Books and Papers by the Fire *Anno* — is a mere Subterfuge; for although his firſt Anſwer was ſworn to after ſuch Fire, yet he makes no Mention of his Books then loſt till his ſecond Anſwer; and if it were true, yet it is no Bar to the Account, only it ſhall be an Argument for a ſpecial Direction of the Court for the Manner in which his Account ſhall be taken.

But by Mr. *Reeves*, and others of Counſel for the Defendant *Hart*, it was inſiſted, that the Defendant *Hart* was not accountable to the Plaintiff for the Monies raiſed by the Sale of this Stock pledged and transferred to him by the Plaintiff; but the Bill of the Plaintiff to ſuch Intent ought to be diſmiſſed, for the Arguments deduced from the Canon and Civil Law are not material, to which Stocks could not be known; but by Common Law, which is the moſt proper Guide in this Caſe, the Pawnee has a ſpecial Property in the Goods

pledged to him, and may ſell them, if it be without Prejudice to the Pawner. *Salk.* 522. And if he be robbed, he ſhall have an Action againſt the Pawner for the Monies lent to him, for he is not bound to take more Care than of his own Goods. In the Caſe of *Cogs* and *Bernard*, 2 *Annæ*, *B. R. Salk.* 523.

And therefore this Caſe cannot be like a Mortgage of Lands, which naturally produce Profits, which are intended for the Satisfaction of the Mortgagee; but Stock is only an equitable Intereſt, out of which no Profits ariſe, only the Dividends or Intereſt; the caſual Advance of the Price is the Effect of Fancy, for it has no intrinſick Value; and therefore the Plaintiff who is not Party or privy to the Tranſaction in the Traffick by Sale of the Stock, as he will not be charged with any Damage that *Hart* might thereby ſuſtain, therefore he ſhall not anſwer to him for the Benefit or Gain.

In the Caſe of *Mercer* and *Tutt*, the ſecond Subſcription N° 194. and the ſecond Subſcription N° 195. were both ſold; but N° 195. was ſold for a great Sum; and the Defendant would have given him the Monies obtained by the Sale of the N° 194. and placed his Defence upon this, that this Number was the Subſcription pledged to him by the Plaintiff, and that being found by Verdict to the contrary, the Defendant was decreed to anſwer for the N° 195.

The Caſe of *Merrick* and *Spark* was a Mortgage made of Land, and doth not come up to the preſent Caſe; nor can any Caſe be ſhewn in which the Court hath ordered an Account of the Diſpoſition of Stock, that was allowed to be diſpoſable in its Nature.

As to the Contract in this Caſe, it doth not appear to be the Intent of the Parties, that *Hart* ſhould be reſtrained from the Diſpoſal of the Stock of the Plaintiff transferred to him.

For although Streſs is laid upon the Words of the Agreement, yet the Words are not to be regarded; for it appears to be a printed Form, and not drawn to anſwer the particular Intent of the Parties at this Time; but by the Words of

the Agreement it cannot be collected, that the ſame Numerical Stock ſhould be transferred to the Plaintiff upon the 25 *Sept.* which was transferred by him the 25th of *May*, without Variation; the ſame in Quantity and Quality ſatisfies the Words, the ſame ſhall remain and be as and for a collateral and further Security of the ſaid 30000 *l.* and that upon Payment, *&c.* he ſhall transfer the ſaid Stock to the Plaintiff, *&c.* and by the ſame Argument it may be ſaid, that the ſame numerical Money ſhall be repaid, for the Words are for Repayment of the ſaid Sum of 30000 *l.* and although *Hart* covenanted to anſwer for all the Dividends, *&c.* it imports only he ſhall anſwer for the Stock given in Pledge, with all Augmentation of the Value, for the Dividends, *&c.* are equally allotted to all the Stock in that Company, and makes each Share ſo much more in Value; and although Liberty was given to ſell the Stock when the Price ſhould be diminiſhed to 350 *l. per Cent.* the Intent was, that the Defendant then might make an abſolute Diſpoſition of all Stock the Plaintiff ought to have upon the 25 *Sept.* and that then he ſhall Account for the Monies ſuch Sale produced, not that the Defendant ſhould be reſtrained from Negotiation with the Stock of the Plaintiff in the Interim.

And it cannot be collected, that the Plaintiff intended to reſtrain the Defendant from Negotiation with the Stock to him transferred, by any Part of the Tranſaction between them; for the Plaintiff himſelf 25 *May* transferred 5000 *l.* Stock (Part of the 10000 *l.* made Security for the 30000 *l.*) to *Collier*, *Sawbridge* and *Wolfe*, to whom *Hart* had ſold ſome Stock before; and the Plaintiff himſelf ſigned the Receipt to them for the Monies paid by them for the 5000 *l.* ſo ſold; and in the ſame Manner Plaintiff himſelf 10 *June* transferred 3000 *l.* Part of the ſecond 10000 *l.* Stock to *Mann*, Count *Naſſau* and *Mark*, to whom Defendant *Hart* had before ſold ſo much Stock, and Plaintiff himſelf ſigned the Receipt for the Monies by them paid for ſuch Stock to them reſpectively ſold; which ſhews the Plaintiff knew well that his Stock transferred was not to be kept by *Hart* in his own Name; and although it be then pretended the Plaintiff conceived thoſe Perſons to whom the Plaintiff transferred his Stock to be

be Truſtees for *Hart*; yet it ſeems impoſſible to be conceived when the Stock was not only transferred to them, but they paid alſo for it; and the Payment was made to the Plaintiff himſelf, who gave to them his Receipt for the Monies; and it all amounts to a Demonſtration, that thoſe Perſons could not be taken for Truſtees for *Hart*; and if it be conſidered at what Time the Loan of this great Sum was made to the Plaintiff, without any *Premium*, only the Intereſt at 5 *l. per Cent.* it cannot be imagined that the Stock was intended to be uſeleſs for ſo long a Time; the Plaintiff did not expect his Stock until the 25th of *September*, and it was indifferent to him in what Hands it was during that Time, if he had ſo much Stock on ſuch a Day.

And the Words are ſtronger, for it doth not ſay on or before the 25 *Sept.* but on the 25 *Sept.* and therefore if the Plaintiff had ſo much Stock transferred to him at ſuch a Time, it ſufficeth; and although it be objected, the Agreement in Writing cannot be explained by Words in Evidence; yet it is always allowed to take into Conſideration the Circumſtances of the Caſe by the Expoſition of a Fact. Between *Wilkins* and *Elkin* Agreement was made to take Leaſe for nine Years, and that the Leſſee ſhould pay 9 *l.* for Rent; Trial was directed, to know the Value of the Land; and upon that it was decreed the Leſſee ſhould pay 9 *l.* a Year, and not 9 *l.* for the whole Term; tho' the Words are ſo in Lord *Cheyne's* Caſe, 5 *Co.* 68. Where a Man had two Sons named *John*, he deviſed Lands to his Son *John*; Proof may be admitted to ſhew which Son was intended. So if a Fine be levied of the Manor of *D.* and there be two Manors of the ſame Name. *Pl. Com.* 856. 2 *Rol. Abr.* 676.

Then if *Hart* by the Intent of the Agreement was not prohibited the Sale of the Stock, ſo that he had ſufficient to reaſſign to *Harriſon* upon the 25 *Sept.* here it appears plainly that he had ſufficient at that Time, for he had Annuity Stock ſufficient without Doubt; and though by Order of the *South-Sea* Company the Stock allowed for Annuities, *&c.* ſubſcribed to the Company, was not to be transferred till the 5 *Oct.* yet it was in its Nature transferrable; and then the Order of

the Company cannot controul. The *South-Sea* Company was erected by Statute 9 *Annæ* 21. and every Proprietor of any any Share in joint Stock of the Company had Power to transfer his Share to another; then by the Statute 6 *Geo.* when Proprietors of Annuities have ſubſcribed, the ſame Proprietors were to have and enjoy ſuch Shares as were allowed them by the Company, in lieu of Money for the Annuities, *&c.* by them ſubſcribed, and in reſpect of ſuch Shares were to be taken as Members of the Company, and ſhall in Proportion to the ſame Shares be intitled to the ſame Benefits, Powers, Privileges and Advantages, as other Members of that Company ought to enjoy in reſpect of their Shares of the Capital Stock; and all ſuch Proprietors from the Time of their agreeing by Contract, Subſcription or otherwiſe, to accept ſuch Stock in lieu of their Annuities, *&c.* ſhall have Credit in the Books of the Company for their Proportion or Share in the Stock of the Corporation, and in all Dividends and Advantages to attend the ſame.

And therefore the Annuity Stock, being ſubſcribed in the Time limited by the Act, ought to have all the Advantages allowed by the Act that the original *South-Sea* Stock had, and by Conſequence was ſufficient to anſwer to the Plaintiff for the Stock pledged by him to the Defendant.

But if this Annuity Stock was not ſufficient for ſuch Purpoſe, yet he had other Stock in his own Name to the Value of 20885 *l.* 1 *s.* 7 *d.* out of which he could ſatisfy to the Plaintiff the 20000 *l.* by him pledged upon the 25 *Sept.* 1720. and although he was under Contracts with others, and had purchaſed Part of this Stock with an Intent to transfer it to the *South-Sea* Company, and it was transferred accordingly; yet upon the 25 *Sept.* all was at his Diſpoſal, and if he had transferred it to the Plaintiff, no other had Demand upon it againſt the Plaintiff, nor could purſue his Remedy againſt the Plaintiff in Law or Equity, to recover any Part of the Stock ſo transfered to the Plaintiff; and it is not to be omitted, that it appears by ſeveral Depoſitions, that the Plaintiff himſelf always declared he ſhould be content with Annuity Stock.

And there is one Circumſtance conſiderable in a Court of Equity, that the Defendant *Hart* had perſuaded the Plaintiff to ſell his Stock when the Price was at 900 *l. per Cent.* and had offered him to furniſh all the 20000 *l.* Stock at ſuch a Time, and that Defendant *Hart* was offered 950 *l. per Cent.* for all his Stock, but refuſed to take that Price, in regard he was obliged to retain 20000 *l.* for the Demand of the Plaintiff the 25th of *September* 1720.

As to the Defendant *Franks* it was inſiſted by Mr. *Lee*, Serjeant *Sheppard* and others of Counſel with him, that as to the Charge that he was Confederate with Defendant *Hart* it was denied by the Defendant, and not proved by the Plaintiff; and for all the reſt upon the ſecond Charge againſt him, that he ought to account for the ſeveral Sums which he admits to have received for the Plaintiff, *viz.* the 30000 *l.* and 40000 *l.* as to that the Defendant by his Anſwer ſays, that he had diſburſed all thoſe Sums for the Uſe of the Plaintiff, and had given to the Plaintiff from Time to Time an Account in Writing how the Defendant had diſburſed thoſe Sums, which the Plaintiff had inſpected and approved, and after declares that a Ballance of 56 *l.* remained due to the Defendant *Franks* upon this Account, for which Sum he, the Plaintiff, acknowledged himſelf indebted to Defendant *Franks*, and promiſed to pay that Ballance to him.

And ſuch general Anſwer ſufficeth where the Charge by the Bill is ſo general, for the Bill charges that the Defendant had received thoſe Monies, and had disburſed ſeveral large Sums in the Purchaſe of *South-Sea* Stock and Subſcriptions, but ſome Part remained not disburſed, by which the Plaintiff admits that the Defendant had diſcharged Part of thoſe Sums, and yet demands an Account of the Whole, and doth not ſpecify for what Part he had accounted, and for what Part he had given no Account.

And eſpecially when the Defendant acts as Servant or Agent for the Plaintiff, and if the Plaintiff employ his Servant

in the Purchaſe of ſeveral particular Things, who immediately gives an Account of his Expences to his Maſter, he ſhall not afterwards demand an Account of ſuch Particulars. And the Bill in this Caſe was not originally exhibited againſt Defendant *Franks*, but againſt the Defendant *Hart* only, but after, when *Franks* was to be examined as a Witneſs for *Hart*, to prevent his Teſtimony the Bill was amended, and *Franks* added as a Defendant; and after his Papers were loſt by Fire it would be very hard to require a particular Account how thoſe Sums were disburſed, without charging any Error or Miſpriſion in the Particulars of the Account before delivered to the Plaintiff.

The Court delivered no Opinion, but directed an Iſſue to be tried.

And after, upon Appeal to the Houſe of Peers, this Order was repealed, and the Lords directed an Account for all the Monies received by *Hart* upon Sale of the Stock pledged by *Harriſon*, and if the Principal and Intereſt were ſatisfied, the Reſidue of the Monies to be paid, and Reſidue of the Stock not ſold ſhould be transferred to *Harriſon*.

Privilege from Arreſt ſhall not extend to a Perſon who attends his own Cauſe, after his Departure from *Weſtminſter*.

Harriſon, after his Attendance in Court upon the Cauſe aforementioned, went about 3 o'Clock in a Coach from *Weſtminſter* to *Chancery-Lane* with his Solicitor and others, to give Inſtructions for Procedure in the Cauſe, and there continued till 10 or 11 o'Clock, and then was arreſted by a Bailiff upon a *Ca' Sa'*, upon a Judgment in *Scire facias*, upon a Judgment againſt him in Common Pleas; and now it was moved that he ſhould be diſcharged, for each Party has Privilege to attend his Cauſe, and if he be arreſted in going or returning, it ſhall be Contempt of the Court, upon which the Officer ſhall be puniſhed and the Party diſcharged; but it was not allowed; for here it does not appear that there was any Contrivance by the Defendants or any concern'd in the Cauſe to procure this Arreſt, in which Caſe the Court perhaps will extend its Power againſt the Procurors; nor does it appear that the Officer knew he had attended his Cauſe at *Weſtminſter*, for his Warrant was dated before the Arreſt, and there

there was another *Ca' Sa'* taken in *Trinity* Term preceding, returnable in *London* where the Action was brought, and a *Teſtat' Cap'* afterwards in *London* the firſt Return of this Term before the *Ca' Sa'* upon which he was then taken, and the Arreſt here was not in his Attendance upon that Cauſe, but he had continued many Hours in another Place; and if the Court ſhould diſcharge him, how ſhall the Sheriffs be defended againſt an Action for the Eſcape? 1 *Brownl.* 15. *Wilſon* and *The Sheriffs of London*, in Action for Eſcape, it was ſaid, that the Court can diſcharge if the Arreſt was in View of the Court, otherwiſe not; and *Salk.* 644. where a Man went to confeſs Indictment in the King's Bench, and was arreſted in his Journey, the Court would not diſcharge, for he went of his own Head; and there is a Difference where a Man attends upon the Court by Proceſs and when not.

Caſe 196. *Frances Weſt and Mary Weſt, by their Father John Weſt, Eſq; Plaintiffs,* and *Frances Eriſey, Mary Weſt and Thomas Barrable, an Infant, by his Guardian, Defendants.* In Scacc'.

Marriage Articles ſhall be carried ſtrictly into Execution.

BILL was exhibited in *September* 1725, by which it was alledged, that on a Treaty of Marriage between *Richard Eriſey* and *Frances* the Daughter of Sir *Peter Killigrew*, it was agreed by Articles 23 *December* 1685, between *James Eriſey* Uncle of the ſaid *Richard*, and the ſaid *Richard Eriſey*, of the one Part, and Sir *Peter Killigrew* of the other Part, that in Conſideration of the ſaid Marriage and 1700 *l.* Marriage Portion, *James Eriſey* would ſettle Lands in the Counties of *Cornwall* and *Devon*, to the Uſe of *Richard Eriſey* for Life, without Impeachment of Waſte, and to the Heirs Male of his Body on the ſaid *Frances* to be begotten; and for want of ſuch Iſſue, to the Heirs Male of his Body by any other Woman; and for want of ſuch Iſſue, to the Heirs Female of his Body by *Frances*, and after to his Heirs Female by any other Wife; and for want of ſuch Iſſue, to *Charles Vivian*, &c. with divers Remainders over. And by

ſame Articles the Lands in *Devon* were to be ſettled to *James Eriſey* for Life, without Impeachment of Waſte; Remainder in Part to *Mary* his Wife for Life; Remainder of the Whole to *Richard Eriſey* as aforementioned; and by the ſame Articles it was agreed that *James Eriſey* might nominate Counſel for ſettling the ſaid Eſtates and Jointure, and that Sir *Peter Killigrew* might adviſe likewiſe with his Counſel, ſo that the ſame may be effectual in Law. By Indenture 23 and 24 *March* 1685, 2 *Jac.* 2. between *James Eriſey* of the firſt Part, *Hugh Boſcowen* and another Truſtee of the ſecond, and *Richard Eriſey* of the third Part, *James Eriſey* in Conſideration of Love to *Mary* his Wife, and for confirming and ſettling her Jointure, and for Love to *Richard Eriſey*, and conveying and ſettling the Lands and Tenements after named in his Name and Blood, and in Purſuance and Performance of the ſaid Articles, conveys the Lands and Tenements in the County of *Devon* to the Uſe of himſelf for Life without Impeachment of Waſte, then as to the Barton of *Eriſey*, *&c.* to the Uſe of *Mary* his Wife for her Life, for her Jointure, and in Satisfaction of Dower, and as to the ſaid Barton, *&c.* after her Deceaſe, and as to the Reſidue of the Premiſſes from and after his own Deceaſe, to the Uſe of the ſaid *Richard Eriſey* for Life, without Impeachment of Waſte, and from and after his Deceaſe to the Uſe of his firſt and other Sons to be begotten on the Body of *Frances* his Wife in Tail Male, and for want of ſuch Iſſue, to the Uſe of his firſt and other Sons by any other Wife in Tail Male, and for want of ſuch Iſſue, to the Uſe of himſelf and the Heirs of his Body on the Body of the ſaid *Frances* to be begotten; and in Default of ſuch Iſſue, to the Uſe of the Heirs of his Body, and for want of ſuch Iſſue, to the Uſe of *Charles Vivian*, *&c.* and gave Power to himſelf and *Richard Eriſey* to make Leaſes, *&c.* And by Indenture of Leaſe and Releaſe 25 and 26 *March* 1686, 2 *Jac.* 2. (that were the enſuing Days) *James Eriſey* ſettled the Lands in *Cornwall* to the Uſe of *Richard Eriſey* in Poſſeſſion for Life without Impeachment of Waſte, with ſuch Remainders as before, and gave him Power to make a Jointure for another Wife, and to make Leaſes, *&c.* and *James Eriſey* covenants for him and his Heirs, that the Truſtees ſhall be ſeiſed to the ſame

Uſes according to the Intent of ſuch Leaſes and Eſtates, and after Determination of ſuch Leaſes and Eſtates, to the Uſe of ſuch Perſons and for ſuch Eſtates, and in ſuch Manner, as the ſame Lands were ſettled before.

In the Deed of this Settlement produced ſeveral Lines were eraſed, and *Memorandums* made of it.

April 1686. the Marriage took Effect between *Richard Eriſey* and *Frances Killigrew*, by whom he had Iſſue *Mary* only, afterwards married to *John Weſt*, Father of the Plaintiffs; for the Plaintiffs were Daughters and Heirs of *John Weſt* and *Mary* his Wife, the Daughter and Heir of *Richard Eriſey* and *Frances* his Wife; and in two Years after the Marriage *Frances* the Wife of *Richard Eriſey* abſented herſelf from her Husband.

After the Death of Sir *Pet. Killigrew* and *Jam. Eriſey*, by Indenture of the 18th and 19th of *January* 1697. 9 *W.* 3. *Mary* late Wife of *James Eriſey* conveyed to *Richard Eriſey* and his Heirs, during his Life, the Premiſſes ſettled to her for her Jointure, in Conſideration of an Annuity for her Life purſuant to Articles between them 17 *Jan.* 1697. and afterwards *Richard Eriſey* (having the Freehold of all the Eſtate in him) did by Indenture of Leaſe and Releaſe bearing Date 25 and 26 *April* 1698. 10 *W.* 3. grant and convey the whole Eſtate to two Perſons, to make them Tenants to the *Præcipe*, in Order for a Fine and Common Recovery, and in *Eaſter* Term 10 *W.* 3. a Fine was levied and Common Recovery ſuffered accordingly, and by that Deed the Uſes are declared to *Richard Eriſey* in Fee.

After this Recovery *Richard Eriſey* alienated in Fee ſeveral Parcels of the Eſtate, and by his Will 20 *Dec.* 1722. deviſed the Reſidue of the Eſtate to the Defendant *Mary Eriſey* in Fee.

Jam. Eriſey who made this Settlement had two Brothers *Richard* and *William*, *James* died without Iſſue, *Richard* had no Iſſue Male, but left a Daughter *Mary* then alive, and *William*

liam had Iſſue *Richard Eriſey*, upon whom the Settlement was made. And now the Plaintiffs *Frances* and *Mary*, Infants, exhibit their Bill, and by it pray, that ſuch Part of the Eſtate as was not ſold by *Richard Eriſey* their Grandfather be ſettled upon them, according to the Intent of the Articles; and that the Defendant, as Executrix and Deviſee of *Richard Eriſey*, ſhall make them Satisfaction out of her perſonal Eſtate for the Value of the Eſtate ſold by him in his Life-time.

The Defendant pleaded the Marriage Settlement, the Fine and Common Recovery, the Deed which lead the Uſes of them, and the Will of *Richard Eriſey*, in Bar of the Relief prayed by the Bills; but the Plea was ordered to remain for an Anſwer, with Liberty to except to it; and then the Cauſe was heard upon the Merits. And it was inſiſted for the Plaintiffs, that the Intent of the Articles was, that Proviſion ſhould be made for the Iſſues Male and Female of this Marriage; that no Proviſion was made for Iſſues Female, only by the Limitation in the Articles to Heirs Female of the Body of *Richard Eriſey*; and therefore when thoſe Articles were put in Execution, the Settlement ought to have been made in ſuch Manner that the Iſſues Female might have the Benefit of the Proviſion intended for them; and then the Eſtate ought not to have been limited to the Heirs Female of *Richard Eriſey*, by which it was in his Power to bar his Daughters by Fine and Recovery, but ſhould have been to all and every the Daughters of the Body of the ſaid *Richard Eriſey* on the Body of *Frances* his Wife to be begotten, and then it would not have been in the Power of *Richard Eriſey* to bar *Mary* his Daughter, to whom the Plaintiffs are Heirs.

That the Settlement was intended in Purſuance and Performance of the Articles, and then, when the Intent is not well purſued, it ought to be rectified in Equity, and the Plaintiffs, who are intitled by the proper Limitation, may enforce the Execution of the Articles; and it is the conſtant Experience in Courts of Equity, that if the Settlement in Purſuance

ſuance of Marriage Articles is contrary or defective, it ſhall be reformed by the Court.

Trevor and *Trevor* in Chancery, 5 *June* 1719. and afterwards affirmed in the Houſe of Peers *Feb.* 1719. is a Caſe expreſly to this Purpoſe; for there by Articles in 1669. made by Sir *John Trevor*, late Maſter of the Rolls, upon his Marriage it was covenanted to make Settlement of Lands to the Value of 250 *l. per ann.* within two Years, to the Uſe of himſelf for his Life, without Impeachment of Waſte, and after to the Uſe of his Wife for her Life, and then to the Uſe of his firſt, ſecond and other Sons by ſuch Wife in Tail, *&c.* And in Caſe no Settlement was made in two Years after the Marriage, the Perſons ſeiſed ſhould ſtand ſeiſed to the ſame Uſes; after the two Years he ſuffered a Recovery, and diſpoſed of the Eſtate by Will; but all was ſet aſide, and the Conſtruction made was, that the Articles ſhould have been executed ſo as not to have enabled the Maſter of the Rolls to defeat the Children of the Marriage; and although it was inſiſted, that by the Covenant to ſtand ſeiſed the Eſtate was now executed to the Limitations as expreſſed in the Articles; it was held, that ought to make no Alteration.

But *Pengelly* Chief Baron, *Hale*, *Carter* and *Comyns*, Barons, held that it was dangerous to ſet aſide Settlements made upon great Deliberation; for though according to the Caſe of *Trevor* and *Trevor*, if Articles are made to ſettle an Eſtate to a Man and the Heirs Male of his Body, a Settlement in Purſuance of ſuch Articles will be decreed in Equity to be made in common Form, to him for Life, and to Truſtees to preſerve the contingent Uſes, and then to the firſt and other Sons ſucceſſively in Tail; yet the Rule does not hold with reſpect to Females, who are leſs regarded, becauſe the Name of the Family will not probably be preſerved by them; and by theſe Articles the Daughters of this Marriage are poſtponed to the Sons of a ſubſequent Marriage; ſo the Bill was diſmiſſed without Coſts.

But upon an Appeal to the Houſe of Lords the Decree of Diſmiſſion was reverſed in *Feb.* 1727. principally becauſe the Settlement, being expreſly mentioned to be made in Purſuance and Performance of the Articles, ſhewed, that the Parties did not intend to vary the Agreement; and the Lords held, that the Expreſſion of Heirs Female in Marriage Articles ſhould have the ſame Conſtruction in Favour of Daughters, as Heirs Male ſhould in Favour of Sons, eſpecially as no other Proviſion was made by the Settlement for Daughters. And the Lords decreed a Conveyance to Truſtees, to the Uſe of the Appellants and the Heirs Females of their Bodies, as Tenants in Common, with Croſs Remainders to them in Tail Female; and the Appellants were to have an Account of Profits, and of the Purchaſe Money for the Premiſſes ſold, and Intereſt; the Principal Money to be laid out in Land to the ſame Uſes, but the Intereſt to be paid to the Uſe of the Appellants; all Writings to be brought into the Court of Exchequer, and Poſſeſſion delivered to the Appellants.

DE
Term. Sanct. Hill.
13 Geo. 1.

Caſe 197.

Piper and *Thompſon.* In Scacc'.

Amendment when allowed.

SCire *facias* upon a Recognizance by Bail after Judgment againſt Principal, recited the Judgment in Manner following, *viz.* Whereas *Thomas Piper* lately, that is to ſay, in *Michaelmas* Term laſt paſt, recovered againſt — as well a certain Debt upon Bond, as alſo a Sum of — Shillings for his Coſts, *&c. in hâc parte, &c.* And upon this there was a Demurrer, and ſhewn for Cauſe for that the Defendant in the Judgment ought not to be condemned for Coſts *in hâc parte,* but it ſhould have been *in eâ parte, &c.*

And now it was moved that it might be amended, being only the Miſpriſion of the Clerk, which was amendable by Statute of *Jeofails* in Writ Original or Judicial, and *Scire facias* was a Judicial Writ, and therefore 1 *Rol. Abr.* 795. S. 2. where Bail ſued an *Audit' Querel'* and *Scire facias* upon it, which recited the *Audit' Querel',* the *Capias* againſt the Principal in the Time of Queen *Elizabeth,* and the Return upon it, but recited the *Capias* to be by Writ of our Lady the Queen of *England* to our Sheriff Greeting directed, which imports the Writ ſhould be directed to the King's Sheriff, and was held to be Error in Common Law, but then amendable; ſo Writ of Inquiry is amendable being a judicial Writ. *Cro. Eliz.* 761. 2 *Cro.* 372. And though *Salk.* 52. in the Caſe of *Buckskin* and

Hoskins, where *Scire facias* upon Writ of Error in the King's Bench upon Judgment in the Common Pleas *ad aſſignand' Error' quare execution' non*, *&c.* in Ejectment of two Meſſuages, *&c.* where Judgment was in Ejectment of one Meſſuage, *&c.* it was held it was not amendable, for the Writ was good although improper in this Caſe, and Plea of no ſuch Record, is true; the Court by Amendment ought not to make the Plea falſe; ſo *Vavaſor* and *Baile* in the ſame Book and Folio, where in *Scire facias* upon Judgment the Name of the Plaintiff omitted by the Defendant was not amended, for there might be ſuch Judgment, but the Reaſon of theſe Caſes ſhewed that in other Circumſtances a *Scire facias* might be amended. *Sed non allocatur*; for it ſeems to me, all that by Statute 8 *H.* 6. 12 and 15. the Judges are impowered to amend in Writ Original and Judicial, is, what ſeems to them the Miſpriſion of the Clerk in Affirmance of Judgments, if it is not done in Affirmance of Judgment, it is not amendable; ſo a Writ of Error could not be amended till the Statute 5 *Geo.* 13. as appears 5 *Mod. R.* 16, 69, *&c.* and what is not a Miſpriſion of the Clerk is not now amendable; and I know of nothing that was taken as a Miſpriſion of the Clerk only Words of Form, which ought to be added of Courſe without Information of Party, which is the Deſcription of the Matter of Form given by Lord *Coke*, 5 *Co.* 35. *b.* where Words which are not purſuant to that which ought to be the Direction or Inſtruction of the Clerk, and therefore in Writ of Inquiry, Miſpriſion, which is not purſuant to the Award of the Writ upon the Roll can be amended, for the Roll is the Warrant for a Writ of Inquiry, which the Clerk ought to purſue, as appears in the Caſes cited, *Cro. Eliz.* 761. 2 *Cro.* 372. ſo 3 *Mod.* 112. where *per Sacr'um probor' & legaliu' hom'* were omitted in a Writ of Inquiry, but if the Roll does not warrant an Amendment no Miſpriſion ſhall be amended; as if the Roll awarded a Writ returnable on *Friday prox' poſt craſt' aſcenſion'*, Writ of Inquiry of ſuch Return, although after Term, was refuſed by the Court to be amended. 1 *Show.* 61.

So

So in the Caſe 1 *Rol. Abr.* 797. the *Capias* upon the Roll being *tempore Eliz.* and directed to our Sheriff Greeting, was directed to the Queen's Sheriff, therefore a Recital of the *Capias* in *Scire facias* upon *Audita Querela tempore Jacobi* might be amended by the Roll, for the *Capias* recited was not by Writ of Queen *Eliz.* to our Sheriff, *viz.* directed to the King's Sheriff, but to the Queen's Sheriff, and this appears in the ſame Book. 1 *Rol. Abr.* 797. S. 1. If there be an *Habeas Corpora* to ſummon a Jury ſummoned in Court late the Queen's, and *Diſtringas* was for the Jury ſummoned in our Court, Judgment was reverſed thereby 3 *Jac.* ſo S. 3. in Dower, for third Part of one Meſſuage, one Stable, one Granary, *&c. Petit Cape*, omitting one Stable, it was not amendable; an original Writ, if it varies from the Inſtructions, may nevertheleſs be amended, but not otherwiſe; and therefore it was anſwered by the Court that the Writ was not amendable. But afterwards

It was agreed by the Court that there needed no Amendment in this Caſe, for though *in ea parte* ſeemed properer by way of Recital, yet when it is ſaid *in hac parte*, that ſufficeth, for it had relation to the Judgment mentioned in this ſame Writ, and therefore it might well be ſaid that the Plaintiff recovered his Debt by Judgment, and alſo his Coſts appointed in the Judgment here mentioned, and there are Precedents both Ways.

Caſe 198.

Barnes and *Otway*. In Scacc'.

Within what Time Error in Parliament may be brought.

ERROR of Judgment in the Exchequer Chamber, returnable the firſt Day of Parliament, *viz.* the preſent Seſſions; and now it was moved that Plaintiff. in Error might tranſcribe the Record within eight Days, otherwiſe that Execution might be taken upon the Judgment, and a Rule was made to ſhew Cauſe upon this Matter; but now the Rule was diſcharged, for by Order of the Lords in Parliament 13 *July* 1678, all Perſons upon Writs of Error in Parliament ſhall bring in their Writs in 14 Days after the firſt Day

of the Seſſion in which ſuch Writs ſhall be returnable, otherwiſe ſuch Writs ſhall not be received unleſs it be upon Judgments given during the Seſſion, which ſhall be brought within 14 Days after Judgment given; and therefore ſuch Motion within 14 Days after the Beginning of the Seſſion is too haſty, for it is not reaſonable that a Plaintiff in an original Cauſe ſhould take Execution within the Time allowed by Order of the Lords to bring ſuch Writ into their Houſe; but if the Plaintiff in Error ſhould exceed the Time allowed by the Lords, in ſuch Caſe, it would then ſeem reaſonable that the Plaintiff ſhould be at Liberty to take Execution upon the firſt Judgment; and thus it was ſaid to be formerly determined in this Court in the Cauſe between *White* and *Roberts*.

DE
Termino Paſch.
2 Geo. 2. In Scacc'.

Caſe 199.

The King and *Huggins.*

In an Action for an Eſcape, Defendant allowed to plead double.

ACTION for Eſcape for the Debt of the King againſt Defendant late Warden of the *Fleet.* Mr. *Ward* moved, that the Defendant might be allowed Liberty of pleading *Non debet, & recent' inſecutus eſt,* for by Statute 4 *Annæ* 16. it ſhall be lawful for any Defendant, *&c.* with Leave of the Court, to plead as many ſeveral Matters as he ſhall think neceſſary for his Defence; and this Statute extends to the King's Suit as well as to that of the Subject; for *Sect.* 24. it is ſaid, this Act and all Statutes of Jeofails ſhall extend to all Suits for Recovery of Debt immediately owing, or any Revenue belonging to her Majeſty, her Heirs or Succeſſors, and to all Courts of Record in County Palatine of *Lancaſter, Cheſter, Durham* and Principality of *Wales,* and all other Courts of Record in this Kingdom.

And ſo it was agreed in this Court.

And afterwards, upon Affidavit that the Eſcape was not voluntary, (for otherwiſe by Statute 8 & 9 *W.* 3. 26. Plea of Freſh Purſuit is not allowable) the Defendant was allowed to plead both Pleas.

DE
Term. Sanct. Hill.
6 Geo. 2.

Attorney General and *Young and others.* Caſe 200.
In Scacc'.

INformation by the Attorney General *ex relatione* of Sir *Thomas Hanmer* and others, ſetting forth that *John Sutton* by Will dated — *July* 1696, taking Notice that he was ſeiſed of the *Chequer-Inn* in the Pariſh of St. *Andrew Holbourn*, and that he had a Mortgage upon a Farm called *Cooper's Farm* in the Pariſhes of *Brockley* and *Whepſtead* in the County of *Suffolk* for 200 *l.* by Indenture of 1665, of which he afterwards purchaſed the Inheritance in the Name of his Brother *Thomas Sutton*, and the Conveyance was executed to *Thomas Sutton* and his Heirs, in Truſt for himſelf in Fee, appoints that all his Eſtate Freehold and Copyhold, his Leaſes, Chattels and perſonal Eſtate be ſubject to the Payment of his Debts, and alſo charged with the Annuities and Legacies deviſed, *&c.* as after is expreſſed.

Whatever a Truſtee does to prevent the Intention of his Teſtator is a Breach of Truſt and ought to be ſet aſide.

Then he directs his Nephew *Thomas Sutton*, Son and Heir of his Brother *Thomas Sutton*, to convey the ſaid Term to his Truſtees after named, their Heirs and Aſſigns for ever, upon the ſeveral Uſes, Truſt and Purpoſes aftermentioned. Which if he refuſe to do, or to declare the Truſts thereof by ſome Deed, *&c.* in ſuch Manner as his Truſtees in his Will named ſhould reaſonably think fit and require, within 12 Months after his Deceaſe, then from ſuch Refuſal he wills, That all the Legacies, *&c.* given by the ſaid Will to his

Nephew

Nephew *Thomas Sutton* and the Heirs Male of his Body, ſhould ceaſe and be void.

Then he deviſes as follows, *I give to my ſaid Nephew all my Freehold and Copyhold Lands in* Brockley *and* Whepſtead, *during the Term of his natural Life; and immediately after the Death of my Wife, I alſo give to him the* Chequer-Inn, &c. *during his natural Life; and from and after his Deceaſe, I give the ſame to the firſt Son or Iſſue Male of his Body, and to the Heirs Male of the Body of ſuch firſt Son; and for Default of ſuch Iſſue, to the ſecond Son or Iſſue Male of the Body of my ſaid Nephew, and to the Heirs Male of ſuch ſecond Son for ever.*

Then he gives to his Siſter *Elizabeth Sandford* an Annuity of 20*l. per annum*; to his Niece *Bridget Care* 8*l. per annum*, for their reſpective Lives; *Provided that my ſaid Nephew* Tho. Sutton *or his Aſſigns, and the Heirs Male of his Body, ſhall not do or ſuffer any Waſte*, &c. and ſhall not defeat or obſtruct the Payment or Performance of any the Annuities, Legacies or charitable Bequeſts in his ſaid Will; then he deviſes, that after the Deceaſe of either of his Siſters, the like Annuities as to them given ſhall be paid for Relief of ſix poor Men, *&c.* in *Bury.*

Afterwards follows this Clauſe, *And immediately after the Death of my Wife, and the Death of my ſaid Nephew* Tho. Sutton *without Iſſue Male of his Body, or after the Death of ſuch Iſſue Male, I deviſe to my ſaid Truſtees, and their Heirs, the ſaid* Chequer-Inn *and Farm in the County of* Suffolk, *on Truſt to pay* 30 l. per annum *for ever, for Relief of ſix other poor Men*, &c.

Then Information ſhews, that *Tho. Sutton* the Nephew dies, that ſome of the Defendants pretending to be his Heirs at Law, and others to be Deviſees under his Will, refuſe to execute any Conveyance purſuant to the Will of the firſt Teſtator, and prays that they may do ſo, and account for the Profits, and deliver Poſſeſſion to the Truſtees, *&c.*

To this Information Defendants plead, that the Nephew *Tho. Sutton*, being Tenant in Tail by Virtue of the ſaid Deviſe to him in his Uncle's Will, did in *Mich.* Term 12 *Ann.* ſuffer a Recovery of the *Suffolk* Eſtate, and two other Recoveries of the *Chequer-Inn*, Part lying in *Middleſex*, and Part in *London*, and by Indenture of Leaſe and Releaſe dated 9 & 10 *Oct.* 1712. declared the Uſes to himſelf in Fee, and after by Will dated 27 *April* 13 *Ann.* deviſed the Premiſſes and ſeveral Sums of Money out of them to ſeveral of the Defendants, and by Codicil —— 1727. deviſed ſeveral other Eſtates to Defendants, and then died without any Iſſue; and this is ſet up in Bar of the Relief prayed by the Bill.

This Plea was allowed by the Court of Exchequer. But after, on Appeal to the Houſe of Lords, that Decree was reverſed.

And now it was inſiſted, that *Tho. Sutton* the Nephew was by this Will of his Uncle not Tenant for Life, but Tenant in Tail, and conſequently enabled to ſuffer the Recoveries, and bar the ſubſequent Bequeſts to the Truſtees for charitable Uſes.

It was admitted, that the Nephew *Tho. Sutton* did take at firſt only an Eſtate for Life, Remainder to his firſt and ſecond Sons ſucceſſively in Tail, but then by the ſubſequent Words, *and immediately from and after the Death of my ſaid Nephew without Iſſue Male*, &c. he had an Eſtate-Tail; then a Deviſe to one for Life, and after to his Iſſue by a ſecond Wife, gives an Eſtate-Tail; and ſo it was reſolved in the Caſe of *King* and *Melling*, 1 *Vent.* 214, 225.

That the Caſe of *Langley* and *Baldwin* is a Caſe in Point, which was this: *A.* by Will deviſes Lands to *Henry* his eldeſt Son for Life, and after his Deceaſe to *Jonathan* his Grandſon for Life, without Impeachment of Waſte, and after to the firſt Son of *Jonathan* and the Heirs Male of his Body, and for want of ſuch Iſſue to the ſecond, and ſo on to the third, fourth, fifth, and ſixth Son of *Jonathan*, and the Heirs Male

of their reſpective Bodies. And in Caſe *Jonathan* dies without Iſſue Male, then he deviſes over to another. This Caſe was by Lord Chancellor referred to the Conſideration of the Court of Common Pleas, and by them reſolved to be an Eſtate-Tail in *Jonathan*.

That the Clauſe *he ſhould not do or ſuffer Waſte*, could not vary the Caſe, for ſo it was in the Caſe of *King* and *Melling* and *Langley* and *Baldwin*, and it was fit to reſtrain it with regard to his firſt and ſecond Sons.

That the Caſe of *Popham* and *Bramfield*, 1 *Salk.* 236. would indeed have been contrary, if it had been as there reported; but that Report doth not truly ſtate the Caſe, for the Limitation did not go only to the tenth Son, and reſt there, it was limited to every other Son and Sons, *&c.*

That the Clauſes, *if he refuſe to convey, &c.* or *did endeavour to defeat or obſtruct the Performance of the charitable Bequeſts, &c.* were Arguments that the Teſtator intended an Eſtate-Tail to his Nephew rather than otherwiſe; for it is ſaid, that the Legacies, *&c.* deviſed to his Nephew and the Heirs Male of his Body ſhall ceaſe, *&c.* and if he and the Heirs Male of his Body ſhall commit or ſuffer Waſte, *&c.* which ſhew the Teſtator apprehended what he deviſed to his Nephew would go to him and the Heirs Male of his Body; and from Clauſes of that Kind, though in themſelves void and of no Effect, the Intent and Meaning of the Teſtator may be collected, as appears in *Sunday*'s Caſe, 9 *Co.* 127.

It can be no Objection to this Conſtruction, that the Truſts of the Eſtate barred by his Recovery were for charitable Uſes; for the ſingle Queſtion is, whether *Thomas Sutton* the Nephew had an Eſtate-Tail in him whereof he might ſuffer a Recovery or not? if he had, all Eſtates depending upon that Intail will be equally barred, whether they were given to Charity or not.

Nor will there be any Difference between the *Chequer-Inn*, of which the Teſtator was ſeiſed in Fee, and the Eſtate in

Suffolk, whereof he had only the equitable Intereſt; for the Conſtruction of the Words of a Will muſt be the ſame in a Court of Equity, as in a Court of Law; and the Deviſe of an Equity muſt be governed by the ſame Rules that the Deviſe of the legal Eſtate is governed by. A Recovery of an equitable Intereſt or Truſt, hath the ſame Conſideration in a Court of Equity as if the Perſon who ſuffered it had had the legal Eſtate in the ſame Manner, and had ſuffered a common Recovery, ſuch Recovery would be conſidered in a Court at Law. It would make a ſtrange Confuſion, if the ſame Words applied to two different Inheritances, one a legal, the other an equitable one, ſhould give the ſame Perſon an Eſtate-Tail in one, and only an Eſtate for Life in the other.

But it was inſiſted on the other Side, and determined by the Court, that as to the *Chequer-Inn*, whereof the Deviſor was ſeiſed in Fee, the Queſtion was proper at Law, and therefore the Court would not determine, but leave to either that was out of Poſſeſſion a Liberty of trying at Law his Title; that what was urged, and the Caſes cited, ſeemed very good Law; for if a Man deviſe to *A.* for Life, and after his Death to the Iſſue of his Body, or as *King* and *Melling*'s Caſe, to the Iſſue of his Body by a ſecond Wife, it would not now be doubted, but that *A.* hath an Eſtate-Tail, although he ſhould be reſtrained from Waſte, or have Power given to make a Jointure. That in like Manner the Caſe of *Langly* and *Baldwin* ſeems good Law; for when a Man gives Land to *A.* for Life, and after his Death to his firſt Son and the Heirs of his Body, and ſo on to the ſixth or tenth Son, and then adds, but if he die, without Iſſue Male of his Body, then I give the Land to *B.* in Tail; theſe latter Words will create an Eſtate-Tail in *A.* ſubſequent to the Limitation to his Sons particularly expreſſed; for it is the plain Intent of the Teſtator, that *B.* ſhould not have the Land till a total Failure of Iſſue Male of *A.* be they never ſo many, ſhould firſt happen; but as all the Sons not particularly ſpoken of muſt take by Way of Deſcent, there being no Words of Purchaſe with Reſpect to them, conſequently, in Order to make good the manifeſt Intention of the Deviſor, ſuch Conſtruction will be made as in Caſe of Limitation of

Uſes

Uſes to the right Heirs of him that conveys, where an Uſe reſults to the Grantor, ſince by a Maxim in Law he cannot make his right Heirs Purchaſers.

But ſuch Conſtruction is not made but where it is made neceſſary by the plain and evident Intention of the Teſtator; and therefore where *Clement Frenchman* deviſed to his Wife for Life, then to his Couſin *Clement* and the Heirs Male of his Body, *& ſi contingat* (and if it happen) his Couſin *Clement* die without Heirs of his Body, then to his Couſin *Alex. F.* and to the Heirs Male of his Body for ever; *Clement* left Iſſue a Daughter, and died without Iſſue Male; and it was inſiſted, that by the ſubſequent Words, if *Clement* die without Iſſue generally, without ſaying Iſſue Male, or ſuch Iſſue, or any Words of like Nature, the Couſin *Clement* muſt take an Eſtate in Tail general, which would go to his Daughter. But it was reſolved by the whole Court without Difficulty, that he ſhould only take an Eſtate in Tail Male, for the latter Words ſhould be governed by the former. *Dy.* 171. *Bendl. pl.* 114. 1 *And.* 8. *Mo.* 13.

The preſent Caſe may perhaps be a middle Caſe between theſe two; it is ſure the Caſe of *Langley* and *Baldwin* doth not come up to it exactly; for there was a plain Intention of the Teſtator, that till a total Failure of Iſſue Male of *Jonathan* the Eſtate ſhould not go over to others; and it was in Nature of a Condition precedent to the other's taking; but here it is plain through the whole precedent Part of the Will, that *John Sutton* ſhould take but for Life; he takes Care he ſhould not do or ſuffer Waſte, that he ſhould not refuſe to convey according to the Truſt, *&c.* that he ſhould keep the Premiſſes deviſed in Repair, and ſhould not impeach, queſtion or endeavour to defeat, avoid, deſtroy, invalidate or obſtruct the Payment or Performance of all or any of the Annuities, Legacies or charitable Bequeſts in his Will; therefore it may ſeem unreaſonable to think the Teſtator meant in the very next Words to give him ſuch an Eſtate as might enable him to defeat or deſtroy, or to put ſuch a Conſtruction upon them, unleſs there be an abſolute Neceſſity for it. But where is that Neceſſity? The Words are not penned in the

Nature of a previous Condition, as in the Caſe of *Langly* and *Baldwin*, but rather are deſigned to denote the Time when the charitable Bequeſts ſhould take Effect, *from and immediately after the Death of my Wife, and the Death of my Nephew* Tho. Sutton *without Iſſue Male of his Body, or after the Death of ſuch Iſſue Male, I deviſe to my ſaid Truſtees*, &c. And as there appears no Intent of the Teſtator to give his Nephew any other Eſtate than before, ſo the Words may be ſatisfied with a different Conſtruction; for the Words *from and immediately after* ſeem relative to the Deviſes before, immediately after the Eſtates already given, *I deviſe to my Truſtees*, and then after the Death of the Nephew without ſuch Iſſue Male, as before mentioned; or it may mean no more than this, if at the Death of my Nephew he have no Iſſue Male living, or if he have, when they die the Eſtate ſhall immediately go to his Truſtees; and in Caſe ſuch Conſtruction be not made, the Words *or after the Death of ſuch Iſſue Male* muſt be rejected, and are intirely uſeleſs.

What is ſaid, that the Words recited in the reſtraining Clauſes, which were deſigned to prevent his defeating his Charities, *then the Bequeſts to him and the Heirs Male of his Body ſhall be void, if he and the Heirs Male of his Body do waſte, &c.* import the Eſtate-Tail was intended to the Nephew by the Teſtator, do not neceſſarily conclude ſo far, ſince they may be ſatisfied by the Bequeſts given before to him and his Sons; and it would make Wills very uncertain, if every uncautious and incorrect Expreſſion *in tranſitu* ſhould be laid hold on, to determine the Teſtator's Meaning to be different from what ſeems to be ſo upon the Conſideration of the whole Will. It is true, every ſuch Expreſſion may be made uſe of to illuſtrate the Teſtator's Intention, and that was all done in *Sunday*'s Caſe, 9 *Co.* 127. where, upon the whole Complexion of the Will, the Teſtator's Will was held to be, that all the Children ſhould have the like Eſtate, and not ſome to take in Tail, and others only for Life.

Theſe Things were mentioned, not to deliver the Opinion of the Court upon this Point one Way or other, but to ſhew that it might deſerve Conſideration, and being a Queſtion

at Law was fit to be left to a Trial, and not determined in Equity, eſpecially ſince it appeared there had been ſome Doubt in the Caſe; for when the Exchequer allowed the Plea, they muſt conclude that *Tho. Sutton* the Nephew took an Eſtate-Tail by the Will; and when the Houſe of Lords reverſed their Decree, it argued at leaſt, that they thought it doubtful, and to deſerve further Conſideration.

As to the Farm and Eſtate in the County of *Suffolk*, whereof the Deviſor had only an equitable Intereſt, and the legal Eſtate was in *Tho. Sutton* the Nephew, that ſtood upon a different Foot, and was proper for a Court of Equity to determine.

The Court clearly agreed, that there was no Difference in the Conſtruction of the Words of the Will in a Court of Equity from what they would have in a Court of Law; and therefore if a Deviſe of Lands was made by him who had only an equitable Intereſt, or was but *Ceſtui que Truſt*, the Deviſee would take the ſame Eſtate in all Reſpects as he would have done from the ſame Words if the Deviſor had been ſeiſed in Fee of the legal Eſtate; nor will any Difference ariſe in the Conſtruction of the Words of the Will from the Remainders being limited or diſpoſed for charitable Uſes, than what would ariſe if the ſame Remainders had been diſpoſed to private Perſons.

But in this Caſe the Bill is, that the Heir and Deviſees of *Tho. Sutton* the Nephew may be decreed to convey purſuant to the Directions of the Will. He in the firſt place charges and ſubjects all his Eſtate to the Payment of his Debts, and to the Annuities and Legacies given by his Will; then, taking Notice that the legal Eſtate of this Farm in *Suffolk* was in his Nephew *Tho. Sutton*, he directs him to convey the ſame to the Truſtees afternamed and their Heirs, upon the ſeveral Uſes, Truſts and Purpoſes after limited and appointed, or elſe to declare the Truſt thereof by Deed, *&c.* in ſuch Manner as the ſaid Truſtees ſhall reaſonably think fit and require, in 12 Months after his Deceaſe. Now in Caſe the Bill or Information had been exhibited within the twelve Months to

enforce ſuch Conveyance or Declaration of Truſt, would not the Court have enforced a ſtrict Execution of the Conveyance, ſuch as might not have left it in the Power of the Truſtee preſently to defeat it? It is apparently the Intent of the Teſtator, that the Lands in *Suffolk* ſhould go to his Nephew for Life only; that after Failure of his Children and their Iſſues, it ſhould go to the Charities ſpecified in the Will; that the Nephew ſhould not defeat them; that on his Refuſal to declare the Truſts, he ſhould loſe all the Benefit given him by the Will; would the Court then have enabled him immediately to have defeated them? No ſurely, they would have put it out of his Power to do ſo. The ſubſequent Uſes, Truſts and Bequeſts in the Will are only Specifications of the ſpecial Uſes and Truſts the Teſtator deſired to have perpetuated and take Effect; and therefore the Conveyance or Declaration of the Truſt muſt have been directed in ſuch Manner as that they might take Effect; it was to be done in ſuch Manner as the Truſtees ſhould reaſonably think fit and require; would it have been reaſonable to require ſuch a Conveyance as might immediately have been defeated, and the Truſtees barred of the Eſtate and Intereſt intended them? The Conveyance in this Caſe muſt have been directed agreeably to what would have been done in the Caſe of Marriage Articles. And the utmoſt that could have been asked from the Words, *after the Death of my Nephew* Tho. Sutton, *without Iſſue Male of his Body begotten, or after the Death of ſuch Iſſue Male*, would have been, that an Eſtate ſhould be limited to any other Sons the Teſtator ſhould have, in the ſame Manner as it was given by the Will to his firſt and ſecond Son, not that it ſhould be limited to him and the Heirs Male of his Body, ſo as to defeat all ſubſequent Limitations.

That this is now the conſtant Method of Courts of Equity in the Execution of Conveyances upon Marriage Articles or other Agreements; the Caſe of *Trevor* and *Trevor* was ſolemnly debated and conſidered, and afterwards affirmed in the Houſe of Lords. There the Maſter of the Rolls, Sir *John Trevor*, had agreed by Marriage Articles to ſettle an Eſtate on himſelf for Life, then to his Wife for Life, then to the Iſſues Male of his Body by ſuch Wife; and in Caſe no

Settlement

Settlement was made in two Years after the Marriage, the Perſons ſeiſed ſhould ſtand ſeiſed to the ſame Uſes; after the two Years he ſuffered a Recovery, and diſpoſed of the Eſtate by Will; but all was ſet aſide, and the Conſtruction made was, that the Articles ſhould have been executed ſo as not to have enabled the Maſter of the Rolls to defeat the Children of the Marriage. And although it was inſiſted, that by the Covenant to ſtand ſeiſed the Eſtate was now executed to the Limitations as expreſſed in the Articles, it was held that ought to make no Alteration.

So in the Caſe of *Papilion* and *Bois*, determined by the Maſter of the Rolls, and after agreed to by the Lord Chancellor, it was directed, that where a Perſon deviſed Monies to be laid out in the Purchaſe of Lands, to be ſettled upon *A.* for Life, and after to the Heirs Male of the Body of *A.* it was held, that ſuch Settlement ſhould be made as might effectually ſecure the Eſtate for the Benefit of the ſeveral Iſſues of *A.* But by many Caſes of like Nature in Courts of Equity, it ſeems to be juſt, that where Conveyances are to be carried into Execution purſuant to the Direction of Articles or a laſt Will, the ſame ſhould be executed in ſuch Manner as may ſecure to every one the Eſtate or Benefit intended him, if it may be done conſiſtent with the Rules of Law; and not executed in ſuch a Way as will enable one Perſon to defeat the Eſtate of another, if it can be properly prevented. And ſuch Execution as would have been decreed againſt the Nephew, if living, or if the Information had been exhibited in twelve Months after the Teſtator's Deceaſe, the ſame ought to be executed by his Repreſentatives now; and whatever the Truſtee hath done to prevent it, is contrary to the Duty of a Truſtee. And therefore the Court declared, that the Common Recovery ſuffered by *Tho. Sutton* the Nephew, of the Eſtate in the County of *Suffolk*, and the Deed leading the Uſes of it, were a Breach of Truſt, and ought to be ſet aſide; and that the Heir and Deviſees ſhould join in executing a Conveyance to the Truſtees named in the Will, or ſuch others as ſhould be appointed Truſtees according to the Direction of the Will, upon the Uſes and Truſts not yet determined which were mentioned in the Will; that they ſhould

likewiſe deliver Poſſeſſion, and account for the Profits they had reſpectively received ſince the Relators were intitled; and that the Bill ſhould be retained for a Year, and either Side at Liberty to try the Title at Law, for that Part which was not the Truſt-Eſtate, and then reſort to the Court for further Directions, and that the Plaintiffs ſhould have their Coſts.

Attorney General and *Elizabeth White, Executrix of James White.* In Scacc'.

Caſe 201.

INformation of Debt was exhibited *Trin.* 29 *June* 12 *Geo.* 2. againſt the Defendant for 1140 *l.* for the Duties of 3600 Gallons of Brandy imported by her Teſtator 10 *Feb.* preceding. On *Nil debet* pleaded, the Jury find the Teſtator imported theſe Brandies in the Years 1719 and 1720, in Caſks containing but 12 Gallons each, and that he before the Duties paid, which came to 1140 *l.* died 20 *Feb.* 1725, having made his Will and his Wife, the Defendant, Executrix.

If the King's Debtor dies, he may purſue his Remedy againſt his Executor at any Time

On this Verdict it was inſiſted on Behalf of the Defendant, that ſince by Statute 4 & 5 *W.* & *M.* 5. *S.* 8. the Importation of Brandy in ſmall Veſſels and Caſks not containing each 60 Gallons at leaſt was prohibited on Pain of Forfeiting the ſaid Brandy or Value thereof, *&c.* the King ought in this Caſe to have ſued for the Forfeiture, and not by Way of Debt for the Duties or Cuſtoms, which would have been payable in Caſe the Brandy had been fairly imported.

At leaſt the Duty in this Caſe ariſing *ex delicto* from the unlawful importing of the Brandy in ſmall Caſks, however the King might have diſpenſed with the Forfeiture, and demanded the Duty againſt the Teſtator, he cannot do ſo to charge the Executrix, againſt whom in this Caſe Debt is not maintainable.

And it was argued by Mr. *Ward* and Mr. *Bootle* Counſel for the Defendant, that where Goods were abſolutely prohibited to be imported, the Importation occaſioned a Forfeiture of the Goods, which the King could not diſpenſe with; that

there was a wide Difference between Goods on which a Duty was laid, and a Forfeiture given as a Penalty for Non-payment of the Duty, and Goods that were prohibited to be imported, and forfeited in Caſe they were ſo. In the firſt Caſe it was not much controverted but that the King might waive the Penalty and accept of the Duty, and if they were carried into the Cuſtom-Houſe, the Duties might there be accepted, but if prohibited Goods were carried to the Cuſtom-Houſe, the Forfeiture ſtill continued.

When Goods are prohibited the Intent of the Law is, That no Duty ſhould be paid for them becauſe they are not to be imported at all; but if upon the Importation a Duty may be accepted inſtead of the Forfeiture, the Importation would be encouraged, and the Intent of the Law-makers defeated.

But in Caſe the King could diſpenſe with the Forfeiture and take the Duty, he ought to make his Election to do ſo in the Life of the Party, otherwiſe it would be highly inconvenient; for as the King's Debt muſt be firſt ſatisfied, it may happen after a Merchant has been dead 20 or 30 Years, and his Executor had adminiſtred, paid all his Debts, and diſpoſed of all his Aſſets, a Claim might be ſet up for Duties upon Goods imported which the Executor has no Knowledge of, and can make no Defence againſt, and every Thing turned round, or the Executor ruined on Pretence of a *Devaſtavit.*

The Proceeding by Way of Information for Debt in the Caſe of the Crown was introduced by Sir *Edward Northey*, when Attorney General; for before the Informations uſed to be founded upon the Statute; but if ſuch Proceedings be likewiſe carried on in the Caſe of Executors, it muſt be much more Miſchievous, eſpecially in Caſes of this Nature, where the Matter charged is a Perſonal Tort done by the Importer, whoſe Offence dies with his Perſon; and therefore in all Caſes of Penalty, Forfeiture or Wrong committed or done by any, no Action lies for it againſt his Executor. Action lies not againſt Executors on Stat. 1 & 2 *Edw. 6.* 13. for not ſetting out Tithes.

So *Cro. Eliz.* 251. If the Tenant be amerced in the Manor Court, and die before it be levied, the Amerciament is loſt.

Debt lies not againſt Executors where the Teſtator might Wage his Law.

Nor upon an Award made upon a Submiſſion by the Teſtator to a Reference, although the Award be in Writing.

And no Inſtance or Precedent can be ſhewn, where ſuch an Information was maintainable againſt an Executor.

Attorney and Solicitor General *econtra* inſiſted, that the Statute 12 *Car.* 2. 12. grants to the King the Duties of Tunnage and Poundage, *viz.* ſo much *per* Ton on all Wines imported, *&c.* ſo that it is a Duty for which the King may have Debt, and the ſubſequent Acts which augment the Duty are worded in the ſame Manner. Stat. 4 *&* 5 *W. & M.* 5. for further Supply, *&c.* gives and grants to the King the additional Rates, Impoſitions, Duties, *viz.* for every Gallon of Brandy imported, *&c.* two Shillings. Now wherever the Common Law or Cuſtom creates a Duty, Debt lies for it; *per Hale, Hard.* 486. And it muſt be the ſame where an Act of Parliament creates the Duty, when a Statute enacts any Thing for the Advantage of another, the Perſon will have a Remedy given him by the ſame Statute; *per Holt* C. J. *Mod. Ca.* 26. Thus on Stat. 28 *Eliz.* 4. the Sheriff may have Debt for his Fees, *Mod.* 853. *Salk.* 209, and on Statute 2 *&* 3 *Edw.* 6. 14. for not ſetting out Tithes; on Stat. 14 *H.* 8. 5. for the Practice of Phyſick in *London* without Licence, though no ſuch Action is expreſly given.

But it was chiefly objected, that by the Proviſo in Stat. 4 *&* 5 *W. & M.* 5. *S.* 8. if Brandy be imported in Caſks under 60 Gallons each, it is forfeited, and then the Action is not to be maintained for the Duty. To which it was anſwered by Mr. Attorney, that this Prohibitory Clauſe does not extinguiſh the Duty, but the King may take Advantage of either as he pleaſes. It will not be ſaid, becauſe by Stat. 1 *Anne* 14.

it

it is enacted, if any import or land Goods, *&c.* before Duty paid or ſecured, or be aiding, *&c.* he ſhall forfeit the Goods and double the Value, that therefore the King can have no Remedy for the Duties. And what Difference, when ſuch Forfeiture is given in the ſame or ſome other Act? And as to what was ſaid that the King ſhould make his Election in the Life of the Party, no Caſe is cited to warrant it; in Debt or *Aſſumpſit* the Executor may elect either, as well as the Teſtator.

Hale cited 2 *Mod.* 128. which ſaith, if in an Act of Parliament there be a prohibitory Clauſe, and another which gives a Penalty, an Information lies on the prohibitory Clauſe, and the Party may decline to proceed for the Penalty. 1 *Rol. Rep.* 383. Debt was brought by the Farmers of the Cuſtoms on Stat. 1 *Jac. cap.* 33. for the Duty of Poundage for Goods landed without paying the Cuſtoms; ſo upon this very Statute 4 *&* 5 *W. & M.* 5. it hath been held in this Court that Debt lies for the Duties.

Chamberlain and *Hobbs.*

And again *Doe qui tam* ver. *Cooper*, 2 *Geo.*

As to the ſecond Point, on which the moſt Streſs ſeems to be laid, it muſt be admitted that in all Caſes where Money becomes due by Contract or Agreement with the Teſtator, an Action is maintainable on ſuch Contract againſt the Executor, unleſs where the Teſtator could Wage his Law; ſo where the Money grows due upon a Default or Miſdemeanour, if reduced to a Certainty by a Matter of Record, *&c.* as for Iſſues forfeited by the Teſtator, or Fine on him by Juſtices at *Weſtminſter*, Aſſiſes, Quarter-Seſſions, Commiſſioners of Sewers, Bankrupts or Stewards of Leets, *&c.* *Offic. Ex'* 161.

It is true no Action lies againſt an Executor or Adminiſtrator for any perſonal Wrong or Injury to the Perſon, Lands or Goods of another, as Treſpaſs, Battery, Falſe Impriſonment, Waſte, *&c.*

Nor upon a Statute which gives Remedy by Debt againſt the Teſtator himſelf for his Miſdemeanour, as Debt for an Eſcape, for not ſetting out Tithes, *&c.* 41 *Aſſ.* 15. *Dyer* 322. 2 *Inſt.* 382, 650. *Off. Ex.* 183.

But the Law gives further Remedy againſt Executors in the Caſe of the Crown than in the Caſe of a Common Perſon; for as by the Common Law the King had Remedy for any Thing due to him againſt the Perſon, Land and Goods of his Debtor, 3 *Co.* 126. 2 *Inſt.* 19. *Godb.* 290. *&c.* ſo if his Debtor died, he might purſue Remedy againſt his Heir or Executor. 2 *Rol. Abr.* 156, 162. And he might oblige the Executor to give Security for the King's Debt before he adminiſtred. 2 *Rol.* 158. *S.* 2. 45. So the King might have Remedy againſt the Executor for Debt on ſimple Contract, for the Executor could not wage his Law againſt the Crown. *Co. Lit.* 295. 9 *Co.* 88.

So by the King, Account lay againſt the Executor of his Accountant, though not in the Caſe of a common Perſon for want of Privity, till the Statute 4 *&* 5 *Annæ* 16. *R.* 11 *Co.* 90. 2 *Rol.* 161.

So where the Teſtator was chargeable only to the King as an Intruder, Treſpaſſor for Waſte, or other Matter that is of Profit or Value, although not for a mere Perſonal Wrong. *Sav.* 40.

So for the Duty of Priſage Wines, *per* 3 *Inſt.* 3 *Bulſt.* 1. *Ad.* 26. 1 *Rol.* 135.

And as to the Inconvenience to Executors or Adminiſtrators, in Caſe an Information be brought againſt them after they have paid away all their Aſſets to ſatisfy other Debts, it ſeems not greater than what in all Caſes they muſt ſubmit to, they muſt take the beſt Care they can, not to pay Debts of an inferiour before thoſe of a ſuperiour Nature.

It is true the King muſt be firſt ſatisfied Debts on Record, as Judgments, Statutes, Recognizance, and it would be a *Devaſtavit* in the Executor to pay other Debts before him; ſo Obligations to the King, for they are of the Nature of a Statute Staple, by Statute 33 *H.* 8. 30. 1 *And.* 129. So Debts for Fines or Amercements in the King's Courts of Record. *Off. Ex.* 194.

But Debts due to the King which are not of Record ſeem not neceſſary to be ſatisfied before Debts due to other Perſons, where there is no Notice given of the King's Debt; as where Money is due to the King for Wood, Tin, Eſtrays, *&c.* or for Amercements in Court-Baron or other Court not of Record. *Off. Ex.* 191. 2 *Rol.* 159. *pl.* 8. So Debt for Arrears of Rent from the King's Leſſee. *Off. Ex.* 193. Or due to a Perſon Attaint or Outlawed, if not found by Office. *Off. Ex.* 192. So if in Debt on a Bond the Defendant be Outlawed before Judgment till actual Seiſure, this Debt need not be firſt paid. *Salk.* 8. Or if Debt be aſſigned to the King. *Lane* 65.

And by the Opinion of three Barons Judgment was given for the King. *Thompſon* contra.

DE

Term. Sanct. Mich.

7 Geo. 2. In Scacc'.

Lord Viſcount Falkland and *Phipps.* Caſe 202.

ACTION of *Scandalum Magnatum* brought by *Lucius Charles* Lord Viſcount *Falkland* againſt *Nathaniel Phipps*, Butcher, as one of the Peers of *Great Britain*, for theſe Words, *Go fetch your Lord out, G—d D—n him, I will kill him, he is a Villain and a Villanous Rogue*, and for other Words, *He is a Scrub and Scoundrel*, to the Damage of 5000 *l.* Defendant pleads Not guilty. Verdict for Plaintiff. Damage 50 *l.*

Peers of *Scotland* after the Union ſhall be intitled to an Action of *Scandalum Magnatum.*

But it was inſiſted on the Trial, and reſerved for Conſideration, that the Plaintiff ought to prove himſelf a Peer. *Sed non allocatur*; for the Plaintiff in his Declaration gives himſelf that Denomination, Lord Viſcount *Falkland*, one of the Peers of *Great Britain*, and if he was not ſo, the Defendant ſhould have pleaded the Miſnomer, but by the Plea in Bar he admits the Plaintiff to be what he calls himſelf.

2. That the Plaintiff being only a Peer of *Scotland* was not intitled to an Action of *Scandalum Magnatum* on the Statute 2 *R.* 2. 5. unleſs he had been a Peer of Parliament, for the Precedents of Actions of this Nature are *Vocem & Locum in Parliamento haben'*. *Vid. Ent.* 63, 74.

Sed non allocatur; for by the Statute of Union 5 *Annæ* 8. *Art.* 23. All Peers of *Scotland* after the Union ſhall be Peers of

of *Great Briton*, and have Rank and Precedency, *&c.* be tried, *&c.* and enjoy all Privileges of Peers as fully as the Peers of *England* now do, or hereafter may enjoy, except the Right and Privilege of Sitting in the Houſe of Lords and the Privileges depending thereon, and particularly the Right of Sitting upon the Trial of Peers.

Now the Statute 2 *R.* 2. 5. or 12 *R.* 2. 11. does not confine the Remedy thereby given for ſpeaking falſe News, Lies or other falſe Things, to Words ſpoken only againſt the Peers of Parliament, but extends to falſe Words againſt other Nobles or Great Men of the Realm, and therefore when the Peers of *Scotland* are by Act of Parliament made Peers of *England* or *Great Britain*, they are Nobles of the Realm. There was no Viſcount at the Time of the Statute 2 *R.* 2. the firſt Viſcount being *John Beaumont* who was created Viſcount 18 *H.* 6. yet when created Noble, though by a new Title, he was intitled to his Action on this Statute.

And though ſome Precedents may add, *Vocem & Locum in Parliamento haben'*, this is not neceſſary for the Maintenance of the Action, and ſeveral Precedents omit them, as *Hern. pl.* 200, 201. 2 *Bro.* 16. *Brownl. R.* 21. So *Vid. Ent.* 61, 72.

Caſe 203. ## *Caſe of Kennet Lord Duffus.* In the Houſe of Lords.

When the Legiſlature puts Terms upon an Offender, no inferiour Court can hold any other Terms to be an Equivalent.

BY Stat. 1 *Geo.* 42. it was enacted, That whereas *George* Earl of *Mariſchall*, *Kennet* Lord *Duffus*, and ſeveral others to the Number of 50, did on or before 13 *Nov.* 1715 in a Traiterous Manner levy War, *&c.* and are fled to avoid Proſecution, *&c.* if they render not themſelves to one of his Majeſty's Juſtices of the Peace on or before the laſt Day of *June* 1716, every of them not rendering himſelf as aforeſaid, ſhall from the ſaid 13th Day of *Nov.* 1715 ſtand and be adjudged attainted of High Treaſon, *&c.*

15 *May* 1716. Lord *Duffus* wrote to Sir *Cyril Wyche*, deſiring to throw himſelf at his Majeſty's Feet, and to make a Viſit to him for that Purpoſe; and did ſo at *Hamburgh*, where Sir *Cyril* was then reſident as a Publick Miniſter for the King.

2 *June* 1716. he ſet out for *England* by Ship from —— and came to *Hamburgh*, where on the 29th Day of *June* he was ſeiſed and taken into Cuſtody about — o'Clock in the Evening, and was after ſent into *England*, and committed to the *Tower*, but pardoned by King *George*.

Upon this Caſe Lord *Duffus* petitioned the King, who referred it to the Houſe of Lords, that his Peerage might be allowed. And it was inſiſted by his Counſel at the Bar of the Houſe of Lords, that *Kennet* Lord *Duffus* his Father was not attainted by this Act of Parliament, ſince he was minded to render himſelf, and coming into *England* for that Purpoſe, but was prevented by the King's Miniſter abroad, who ſeiſed and detained him at *Hamburgh*, from whence he was ready to ſet ſail for *England* in order to render himſelf there to a Juſtice of Peace according to the Direction of the Act of Parliament.

That he had an Intention to render himſelf according to the Act, appears by his Application to the King's Miniſter for that Purpoſe the 15th of *May*; and accordingly he ſet out the 2d of *June* 1716, in order to come to *England*, and was got as far as *Hamburgh* in his Journey, till he was ſeiſed by the King's Miniſter there; which was the ſame as if he had been taken into Cuſtody by the King himſelf, whereby his Render was prevented, and made impoſſible by the Act of the Crown, of which no Advantage ought to be taken.

And by Law it was urged, it is a ſufficient Performance of a Condition if it be performed in Subſtance, although every Circumſtance is not purſued; and in this Caſe, although he could not render himſelf to a Juſtice of Peace, yet he had rendered himſelf to one of the King's Miniſters, and

was after ſent over, and might have been tried, which was all the Deſign and End of the Act of Parliament; and conſequently the Subſtance of the Condition required by the Act of Parliament being complied with, it was ſufficient to prevent the Attainder from taking Effect. Suppoſe he had rendered himſelf to one lately put out of the Commiſſion of the Peace, of which he had received no Notice, would not the Act have been ſufficiently complied with? And many other Caſes might be put, where it would be extremely hard the Party ſhould not be excuſed, ſince it would be equivalent to a literal Performance of the Condition.

Secondly, It was ſaid, that in all Caſes where the Condition becomes impoſſible to be performed by the Act of God, or of the Law, or by the Act of the King, or Perſon on whoſe Behalf the Condition was made, the Condition is diſpenſed with, and need not be performed: And therefore in this Caſe, when the Lord *Duffus* was taken into Cuſtody by the King's Miniſter, which was the Act of the King, it was impoſſible for him to come into *England*, and render himſelf to a Juſtice of Peace.

And it being objected, that his Intention to render himſelf was not very evident, ſince his Application by Letter to Sir *Cyril Wyche* at *Hamburgh* was the 15th of *May*, but he took not Ship till the 2d of *June*, and was no farther than *Hamburgh* on the 29th of *June*, whence it was from the Evening of that Day impoſſible to come into *England* Time enough to render himſelf to a Juſtice of Peace on the laſt of *June*, which was the next Day; a Witneſs was produced, who ſaid it was poſſible to come from *Hamburgh* to *England* in the Time, ſince it was but — Leagues, and with a good Wind a Perſon might ſail — Leagues in an Hour.

But taking it for granted, that the Lord *Duffus* meant to render himſelf, and might come from *Hamburgh* to *England* Time enough, yet there being a poſitive Act of Parliament, which made every Perſon attaint that did not render to a Juſtice of Peace by ſuch a Day, it muſt be ſtrictly complied with, and the Non-performance could not be diſpenſed with

by any Inferior Judge or Court, or by any Authority but that which made the Act of Parliament.

And this Matter of Law was referred to the Opinion of the Judges preſent, who were the Chief Juſtice *Eyre* and myſelf, and we were of Opinion, that this was not a Compliance with the Act of Parliament, nor could any Inferior Court, if the Lord *Duſſus* had been arraigned before them, conſtrue it ſo to be; for all he could ſay for himſelf had been, that he had ſurrendered himſelf according to the Act; which Fact, if it had come to be tried, muſt have been determined by a Jury, who upon this Evidence could not juſtly ſay, that he did render himſelf to a Juſtice of Peace as the Act directs; or if they had found the Matter ſpecially, the Court could not adjudge it to be a Render according to the Intent of the Act; for the Legiſlature may put upon an Offender what Terms it pleaſes, nor can an Inferior Court hold any other Terms to be equivalent to them; that muſt be the Act of the Legiſlature itſelf.

And I mentioned the Caſe *M.* 8 *H.* 4. 12. which was this: Sir *Thomas Brooks* coming to the Parliament 5 *H.* 4. one *John Savage* fell upon *Richard Chedder* his Servant, who was attending him, and having grievouſly wounded him he fled, upon which *de adviſamento procerum ad requiſitionem communitat' ordinatum fuit* 18 *Mart' in dicto Parliamento*, that Proclamation ſhould be made at the Place where the Fact was done, and if *John Savage* did not render himſelf to the Juſtice of the King's Bench within a Quarter of a Year after, he ſhould be convicted of the Offence, and pay double Damages to the Party.

Proclamation was made in *Eaſter* Term 5 *H.* 4. and he not rendering himſelf within the Time, a *Capias* was awarded againſt *Savage* returnable *M.* 6 *H.* 4. and he not appearing *Chedder* ſued for the double Damages; and *Savage* in Bar ſaid, that he had rendered himſelf to the King at *Pomfret* within the Time, in the Preſence of the Biſhop of *Ely* then Lord Chancellor; and the King committed him to the Cuſtody of the Duke of *Lancaſter* Lord Steward, whereby he could not render

render himſelf to the Juſtice of the King's Bench; but the Court ſaid, the Order of the Parliament could not be varied by any Inferior Court, therefore his Surrender of himſelf to the King, ſince he did not render himſelf to the Juſtice, as the Proclamation required, was of no Avail.

Talbot Lord Chancellor, and Lord *Hardwick*, approved the Opinion, and the Lords rejected the Petition.

Caſe 204. ## *Caſe of John Pitt, Eſq;* In Serjeants-Inn.

How far Privilege of Parliament after Diſſolution ſhall be extended.

THE Caſe referred to the Conſideration of the Judges aſſembled at *Serjeants-Inn* was thus: *John Pitt* was Burgeſs in Parliament for the Borough of *Camelford*, and 17 *May* 1734. the Parliament was prorogued by the King to the — of *June* next, and the enſuing Day, *viz.* 18 *May*, it was diſſolved by Proclamation.

1. The firſt Queſtion was, if *John Pitt* was intitled to the Privilege after the Diſſolution? And it was agreed by all the Judges, that Members of Parliament have Title to the Privilege *Eundo, Morando & Redeundo.* *Appendix* to *Reg.* 1. A Writ for the Abbot of *Malton* againſt thoſe who had arreſted him in his Return home, recited, that whereas the Nobles in going to Parliament and ſtaying there, and returning from thence, *&c.* A Citizen of *Exeter* being condemned on ſeveral Informations in the Exchequer during the Seſſions of Parliament, 17 *Ed.* 4. an Act was made, that he ſhould have as many *Superſedeas's* till he ſhould come home. *Cot. Records* 704. it was ſaid, that the Commons claim Privilege forty Days before and forty Days after every Seſſion; but the Commons never have aſcertained the Time of their Privilege.

Although it was declared by the Chancellor upon Conſultation of the Lords, that Peers have only twenty Days before and after each Seſſion, and that their Privilege commences from the Date of the Writ of Summons. 2 *Lev.* 72.

So the Privilege of a Burgeſs begins but at his Election; for if he be arreſted before, he ſhall not have Privilege. *Mo.* 340.

Second Queſtion, How long the Privilege continued? It was ſaid, that the Lords have determined their Privilege to have Continuance for twenty Days before the Beginning, and twenty after the Ending of the Seſſion; but the Commons claim forty Days. 2 *Lev.* 72. as before.

But all the Judges ſeemed to think that the Commons ought to have a reaſonable Time before and after the Seſſion, but what Time was reaſonable never had been by them expreſly determined; yet this Arreſt ſeemed two haſty, and within the Time that ought to be allowed for his Return.

The third Queſtion was, How Advantage ſhall be taken of the Privilege? And it appeared to ſeveral, that he ought to plead, or at leaſt to ſue a Writ of Privilege, before the Court can take Notice that he is intitled to it. But after Conſideration, it was agreed by ten Judges, that although a Writ of Privilege was more proper before *Stat.* 12 & 13 *W.* 3. 3. yet after this Statute no Plea of Privilege could be well pleaded, for ſuch Plea concludes *Si curia cognoſcere velit.*

But by this Act it was enacted, that if any have Cauſe of Action againſt any of the Knights, Citizens or Burgeſſes, or other Perſon intitled to Privilege of Parliament, he may proſecute, *&c.* by Summons and Diſtreſs infinite, or by Original Bill and Summons, as Attachment and Diſtreſs infinite, *&c.* provided the Act extend not to ſubject the Perſon of any intitled to Privilege of Parliament to be arreſted during the Time of Privilege; and therefore no Plea can be to the Suit, but only to the Manner of Proceeding; but a Plea was never known to Proceſs, for Irregularity of the Proceſs is aided by Appearance of the Party, and each Plea ſhall go to the Writ or Action as to a Bill or Plaint; but the Bill here is well.

And therefore being only an Irregularity againſt this Act (which is a publick Act and expreſly provides, That no Perſon intitled, *&c.* be arreſted during Time of Privilege) it ſeems reaſonable that it ſhall be remedied by the Court upon Motion, and due Proof of the Fact by Affidavit, as if one arreſted the Servant of an Ambaſſador contrary to the Statute 7 *Annæ*, or upon a *Sunday* againſt the Statute 29 *Car.* or in other Caſes of Privilege, as when a Juror or Witneſs, or the Plaintiff himſelf be arreſted in going to, or returning from the Court, which are all diſcharged upon Motion; and by Lord *Hardwick* Chief Juſtice, Writ of Privilege was not here uſual, only where Privilege was pleaded.

Caſe 205. ## *Dame Dorothy Blunt* and *Japhet Crook and Thomas Hawkins.* Before the Delegates.

Where Parties are diſſatisfied with what two Delegates do *in actis ordinariis*, ſuch as ſettling Allegations, *&c.* the Matter may be brought under the Conſideration of the Condelegates.

ON Appeal to Delegates the Caſe was, That *John Hawkins* made his Will in Favour of Appellant his Niece, and after made another Will, as pretended, in Favour of *Japhet Crook* and *Thomas Hawkins*, and a Libel was exhibited to diſcover the fraudulent Contrivances of *Crook* to obtain the laſt, and to ſet it aſide and eſtabliſh the firſt Will. *Crook* made evaſive and inſufficient Anſwer, to which Exceptions were taken, but over-ruled by the Judge of Prerogative Court, and thereon an Appeal to the Delegates.

The Delegates reverſe the former Decree, and retain the Cauſe, and order *Crook* to anſwer *de novo*, who puts in another evaſive Anſwer, upon which the Appellant, before Sight of any Depoſitions, gives in further Allegations to explain Facts *Crook* had not clearly anſwered, and containing Facts diſcovered pending the Suit. In *Trinity* Term theſe Allegations were rejected by two of the Delegates at *Doctors-Commons*, on which the Appellant applied that the Matter be reheard before all the Delegates.

But it was objected, that no ſuch Rehearing was ever allowed; that the Delegates are all in equal Authority, and their Meeting at *Doctors-Commons* makes as much a Seſſion as at *Serjeants-Inn*, and the other Delegates might have been preſent if they had pleaſed. That by the Commiſſion the Delegates areauthoriſed ſo that *in actis ordinariis duo, in ſententiâ definitivâ quinque concurrant*, ſo that the Determination by two in this Matter, which is an Ordinary Act, is final and concluſive.

On the other Side it was inſiſted, and ſo determined by the Delegates, that admitting generally two of the Delegates may ſettle the Allegations, upon which the Proofs in the Cauſe may be taken, and this may be well, if all the Parties acquieſce in what they think proper; but if the Parties are diſſatisfied with it, it will be hard to bind them down to what two ſhall determine, which would in its Conſequences be to make them intire Judges of the Cauſe; for if they rejected all the Allegations one Side thought moſt material, the other Delegates could have no other Evidence before them, on which they could form a Judgment, but ſuch as the two Delegates admitted.

It ſeems fitting therefore, that where the Parties are diſſatisfied with what the two Delegates have done, the Matter may be brought under the Conſideration of the Condelegates, which is not to bring an Appeal or Writ of Error on their Judgment, as is inſinuated, before others that are but co-ordinate in Authority with them; but it may be better compared to a Court's reviewing or reconſidering the Act of one of themſelves, or their own Act, as where Matters of Order or Regularity are ſettled by a Judge at his Chamber, or in Court, when but one or two there, it is frequent to draw it into Examination again, when the Court is full; and this may be more proper, where Allegations are admitted, than when rejected improperly.

DE
Term. Sanct. Trin.
8 Geo. 2.

Caſe 206. ***Ruſhworth*** and ***Maſon and others, Inhabitants of Coventry.*** Before the Delegates.

Where Articles in the Spiritual Court are declared null, Parties may object below again originally.

ON Appeal to the Delegates, the Caſe appeared to be, That 16 *July* 1733, *John Ruſhworth* was elected by the Mayor and Common Council of *Coventry* to be Uſher of the Grammar School at *Coventry*; but it being required by Canon 77. made *Anno* 1603, that none teach School without Licence from the Biſhop of his Dioceſe, 3 *Oct.* 1733, a *Caveat* was entered with the Regiſter of the Biſhop againſt his obtaining ſuch Licence.

23 *Oct.* the Caveator, he that entered the *Caveat*, was called to know what he had to object againſt the Granting ſuch Licence, and the Proctors on each Side exhibited their Proxies in the Conſiſtory Court of the Biſhop of *Litchfield* and *Coventry*. *Hand* for *Ruſhworth* the Appellant, *Fletcher* for *George Maſon*, *Nath. Alſop* and *W. Grove*, three Inhabitants of *Coventry*, who prayed Time to exhibit Articles, and a Day is aſſigned for that Purpoſe.

Oct. 26. Articles exhibited, but no Title or Head to them, and no Prayer annex'd.

6 *Nov. Hand* prays Articles to be diſmiſſed, and Day is given to conſider them.

20 *Nov.* four of the ſixteen Articles admitted.

Viz. The Third, for ſoliciting the Chaſtity of a Woman.

The 10th, That he was paſſionate and pulled his Mother out of Bed.

The 11th, That he beat his Wife inhumanly after the Sacrament, *&c.*

The 12th, That being Vicar of *Filongly* he beat his Servant, *&c.*

And the 13th Article, which was for exacting Subſcriptions, and abuſing his Pariſhioners by ill Language, Threats, Striking, *&c.* ordered to be reformed.

4th *Dec.* 19, Additional Articles given in, which were admitted 11th *Dec.*

Upon this *Ruſhworth* appeals to the Court of the Arches *in querela nullitatis*, for the four Articles admitted, and prays that the 13th which was ordered to be reformed ſhould be rejected.

29th *April* 1734, Appeal conſidered and adjourned.

7th *May* Dr. *Betteſworth* Dean of the Arches, rejects the *Querela nullitatis*, orders the Head or Title of the Articles to be reformed, and the Prayer to be extended, and the 13th to be farther reformed.

From this Sentence of the Dean of the Arches the Appeal is now to the Delegates.

It was inſiſted for the Appellant by Serjeant *Birch*, Doctor *Andrew* and Doctor *Cottrell*,

1. That *Maſon*, *Alſop* and *Grove*, being Inhabitants of *Coventry* are no proper Perſons to complain of Acts done by the Corporate Body, for they are concluded by their Determination, otherwiſe a Minority may defeat an Act of the Majority.

2. That it was improper to proceed in this Manner, for upon the Caveator's being ſummoned to ſhew what Objection he had againſt the Biſhop's giving a Licence, they ſhould have proceeded in a ſummary Way not by Way of Libel and Article.

3. That on the Appeal the Court could not reform the Head of the Articles, which is to make a new Cauſe, nor extend the Prayer, which is to vary intirely the Nature of the Proceeding; the Proceeding was in a Criminal Way, it is now altered to a Civil Cauſe.

4. That if this could be done, it could not be after Sentence for the Admiſſion of the Articles.

5. That the Articles are foreign to the Matter complained of, which charge him with Miſdemeanours in his Spiritual Function of Vicar, when the Matter was only whether he ſhould have a Licence to teach School.

6. It is not too late to inſiſt on this Matter, for we ſay there was a Nullity in the Proceeding, which may be objected at any Time after an Appeal allowed, and after thirty Years, *&c.*

And all the Articles and Proceedings from the beginning were declared to be Null, and the Parties might object below originally, if they had any Thing to object againſt the Party's being licenced to teach School as an Uſher.

William Limbery and *Samuel Maſon and Hen. Hyde.* Before the Delegates.

Caſe 207.

UPON a Commiſſion of Review after an Appeal to the Delegates where the Sentence below was affirmed, the Caſe appeared to be this; *Samuel Maſon* made his Will dated 23 *June* 1729 marked Letter *A.* whereby he deviſed his Real and Perſonal Eſtate, and made *Maſon* and *Limbery* his Executors, and made a Duplicate of it marked *B.* which he left with *Limbery* one of his Executors, and left likewiſe a Letter with him, ſhewing where his Perſonal Eſtate was.

A Will ſufficient to paſs a perſonal Eſtate will not amount to a good Revocation of a former Will, whereby the real Eſtate is deviſed according to the Statute of Frauds.

July 1730, Mr. *Maſon* told *Hyde* he had made his Will, but not to his Mind, but he would make a new one, and his Son Executor, if he would accept of it.

Auguſt 1730, Mr. *Hyde* telling him he had ſpoke to his Son, who would accept to be Executor, he ſaid he would then go about it as ſoon as he could.

The Part of his former Will in his own Cuſtody marked *A.* he obliterates in many Places and many Lines together, and makes Interlineations with his own Hand, but did not tear off his Seal or otherwiſe cancel it, but ſoon wrote over the Paper *C. D. E.* with his own Hand, which was in the Main agreeable to the Paper *A.* ſo blotted and interlined, but not exactly agreeable, there being ſome Additions and Alterations to what he had there interlined, and 25 *Sept.* 1730 told *Hyde* he had wrote his Will with his own Hand, and when he had finiſh'd it would ſhew it him, but never did ſhew it him, dying the 2d of *Oct.* 1730, and leaving Paper *C. D. E.* in looſe Sheets without being Signed or Sealed by him, and had began a Paper *F. G.* which ſeems as if intended to be a Duplicate of *C. D. E.* and under the Paper *C. D. E.* was wrote by him *in Witneſs whereof I have hereto and a Duplicate thereof ſet my Hand and Seal*, though no Hand or Seal was put, nor Duplicate wrote.

On

On this Caſe two Points were made.

1. Whether the Paper *C. D. E.* was a good Will, at leaſt as to the Perſonal Eſtate.

2. If not a Will ſufficient to paſs the Perſonal Eſtate, if it amounted to a good Revocation of the firſt Will, ſo that he died Inteſtate.

And it was inſiſted, that it was a good Will of the Perſonal Eſtate, which needs not the ſame Solemnities that are requiſite to a Will of Land, it need not be Sealed, it needs no Witneſſes, if the Teſtator write it for his Will it is ſufficient. In the Caſe of *Worlich* and *Pollet*, *Anno* 1711, *Mary Pollet* ſent for a Perſon to make her Will, gave him Inſtructions to do ſo, when he had wrote it he read it to her, ſhe approved it, declared it to be her laſt Will, ſent for Witneſſes to ſee her execute it, *ſigned and ſealed* was written, but ſhe died before any other Execution, yet it was held a good Will, for though the firſt Sentence for it was reverſed upon an Appeal, yet it was afterwards affirmed before the Delegates.

So in the Caſe of *Wright* and *Walthoe*, three Teſtamentary Schedules, whereof one was without Date, the Second was wrote in Witneſs, but no Witneſs, the Third concluded abruptly, yet being wrote by *Richard Helman*, they were declared to be his Will *March* 1710.

So in the Caſe of *Loveday* and *Claridge* 1730, *Loveday* intending to make his Will, pulled a Paper out of his Pocket, wrote down ſome Things with Ink, ſome with a Pencil, and though it had no Concluſion, but appeared to be a Draught he intended after to finiſh, for it was not ſigned, but had at the End a Calculation of his Effects, an Account of his Tea-table, and an Order to pay to Sir—*Hankey* a Dividend of Stocks, yet it was held a Will.

So in a Caſe, where the Teſtator gave Inſtructions to make his Will of his real and perſonal Eſtate, and when it was brought to him he made ſeveral Alterations, and then wrote the whole over as altered with his own Hand; this found in his Study, though not ſigned or ſealed, was held a good Will. It is true, the firſt Sentence was, that he died Inteſtate; but that was reverſed by the Delegates 18 *July* 1704.

And in *Sid.* 304. a Will was held good, although in looſe Sheets.

So in the Caſe of *Brown* and *Heath and Pocklington*, 1721. a Will of real and perſonal Eſtate was prepared in Order to be executed, though ſeveral Blanks in it, and the Teſtator died before Execution; yet it was held a good Will for the perſonal Eſtate.

And though more was intended to be done, yet it ſhall ſtand good for what is done; as in *Butler* and *Baker*'s Caſe, 3 *Co.* If a Will be Part writ in the Teſtator's Life, though more was intended to be written, it ſhall be good as far as was writ.

Then as to the ſecond Point, it was inſiſted, that this Paper *C. D. E.* whether a ſubſiſting Will or not, was a Revocation of the former Will *A.* If it was a good Will, there could be no Doubt but it was a Revocation; but if not ſufficient to ſubſtantiate the Deviſe, yet it might be ſufficient to revoke the former. A teſtamentary Will is ſufficient to revoke a Will ſolemnly executed, though it hath not the like Solemnities. *Vinius*, *l.* 2. *tit.* 17. *S.* 7. *fo.* 379, 380.

By the Statute 29 *Car.* 2. A former Will may be revoked by an Obliteration made by the Teſtator himſelf; and this is ſo; the Teſtator obliterated that Part *A.* and the Cancelling of one Part is a Cancelling of the Duplicate; ſo it was held in Sir *Edward Seymour*'s Caſe, who died 18 *Feb.* 1708. a little before his Death he ſent for his Will out of his Scrutore in

the Preſence of ſeveral Perſons, cancelled it, and ſaid, *I cancel my Will*, and deſired them to bear Witneſs of it; and the next Day told his Phyſician, he was hot in his Body, but eaſy at his Heart, and this was looked upon as a ſufficient Cancelling the other Duplicate that he had not by him.

But on the other Side it was argued, that the Paper *C. D. E.* in this Caſe did not amount to a Will ſufficient to give the perſonal Eſtate, nor did it amount to a Revocation of the former Will.

It was agreed, that in Caſe the Will marked *A.* had been compleatly cancelled, the Duplicate had been thereby likewiſe revoked.

It was agreed by moſt, that the Paper *C. D. E.* might have amounted to a good Will of the perſonal Eſtate, if there had been no former Will (although Judge *Page*, one of the Delegates, doubted of that). But the Matter now to be conſidered was, whether this Paper, not being a compleat Will to paſs his Eſtate, as it was intended to be, ſhould amount to a Revocation of his former Will, which was compleatly executed. And it was ſaid, that upon all the Circumſtances of the Caſe, it did not appear to be the Intention of the Teſtator to die Inteſtate; but being willing to make ſome Alterations of his former Will, he was preparing the Draught of another; but it ought not to be preſumed the firſt was deſigned by him totally to ceaſe, till his other was finiſhed. There is no Doubt but the Teſtator by any Writing directly deſigned for that Purpoſe, and executed as the Statute 29 *Car.* 2. directs, or by any Cancelling, Obliteration, *&c.* deſigned merely to diſannul the former Will, might have revoked it without more, but he deſigns to do it by a new Will; and unleſs ſuch Writing be effectual to operate as a Will, it ſhall not amount to a Revocation.

And this was agreeable to the Rules of the Civil Law, as well as to the Reſolutions at Common Law made ſince the Statute of Frauds. In the Civil Law the Rule is laid down, *Tunc*

prius teſtamentum rumpitur cum poſterius perfectum eſt, L. 2. *ff. de injuſt' ruptur' irrit' fact' Teſtament'.*

So *Mantuan.*

So *Vinius.*

So *Swinburn.*

And *Domat.* 2 *part, l.* 3. 39. *S.* 5. *Article* 3. A firſt Teſtament made in due Form cannot be annulled by a ſecond, unleſs the ſame be likewiſe made in due Form. *Vide Art.* 12, 21.

It is true a Will may be revoked by a Military Will, which requires not the Solemnity in the Execution that other Wills have, but is executed in ſuch due Form as ſuch a Kind of Will requires.

So at Common Law in the Caſe of *Edleſton* and *Speak*, 2 *W. & M.* it was Reſolved that *Anne Speak* having made a ſecond Will, and ſigned it in the Preſence of three Witneſſes, yet they not having atteſted it in her Preſence, whereby it was not a Will ſufficient to diſpoſe her Real Eſtate, as intended by her, it was not a ſufficient Writing to revoke her former Will, although it had all that was required by Statute 29 *Car.* 2. to a writing of the Revocation of a Will. *Show.* 79. *Carth.* 80.

So in the Caſe of *Hyde* and *Hyde*, 6 *Annæ*, *Equi. Ca.* 409. Where a Man having made and duly executed a Will of his Real and Perſonal Eſtate, had a Mind to change a Truſtee, and make ſome Alterations, and for that Intent ſent for a Scrivener, gave him Inſtructions for a new Will, who drew up another Will purſuant to them, read it over to the Teſtator, it was approved and ſigned by him, and then he took the old Will out of his Pocket, tore the Seal off from eight Sheets of it, but before he had torn off the Seal from the 9th and laſt Sheet, the Scrivener aſked what he did, the ſecond was not yet perfected, and he died before it was ſo. And it was held that

that the laſt not being executed according to the Statute 29 *Car.* 2. and conſequently not ſufficient to paſs his Real Eſtate, was no Revocatiun of the former Will, and though the Seals were torn off from eight of the Sheets of the firſt Will, in order to cancel it, yet that not being done with the Intent of cancelling, unleſs the ſecond Will was good, ſhould not amount to a Cancelling.

It is true the Eccleſiaſtical Court allowed the ſecond Will to be good for the Perſonal Eſtate, which the Chancellor could not controul.

So in the Caſe of *Onyon* and *Tryers*, *H.* 1716, *Eq. Ca.* 408. 2 *Vern.* 741. Teſtator having a Mind to alter the Truſtees to his former Will, ordered it to be wrote over, Signs it in Preſence of three Witneſſes, then tears Seal from former Will, but the ſecond not being atteſted in his Preſence, it was held no Revocation.

The Caſe of *Burkit* and *Burkit*, 2 *Vern.* 498. is to the ſame Effect; and all the Delegates but one concurred in that Opinion, whereby the Sentence of former Delegates was affirmed.

DE

Term. Sanct. Mich.

8 Geo. 2. In Scacc'.

Makepiece and *John Leech Fletcher, and others.* Caſe 208.

EJectment on the Demiſe of *John Lees* and *Geo. Ridings* 1 *July* 4 *Geo.* 2. and upon another Demiſe of *Tho. Illingworth.* Upon Not guilty a ſpecial Verdict was found to the following Effect: *Robert Weild* being ſeiſed in Fee of the Lands in Queſtion, by Indenture 1 *Nov.* 6 *Car.* 1. in Conſideration of his Affection to his two Daughters, *Anne* and *Mary*, and to the Intent that his Tenements ſhould deſcend to them, and continue in his Blood and Progeny, covenanted to ſtand ſeiſed to the Uſe of himſelf for Life, and after his Deceaſe, to the Uſe of the Heirs Male of his Body; and in Default of ſuch Iſſue, to the Uſe of *Mary* his younger Daughter, and the Iſſue of her Body, for the Term of ninety-nine Years, from the Time of the Death of the ſaid *Robert Weild*; and in Default of ſuch Iſſue, and at the End of ſuch Term, to the Uſe of *Anne* his eldeſt Daughter, and the Iſſue of her Body; and in Default of ſuch Iſſue, to the Uſe of *Helen* his other Daughter, and the Iſſue of her Body; and in Default, *&c.* to the Uſe of the Heirs Male of *John Weild* his Brother; and in Default, *&c.* to the Uſe of his Siſters *Eliz. Hall* and *Mary Woolmer*, and the Iſſues of their Bodies; and in Default, *&c.* to the Uſe of his right Heirs. Entry tolled by Deſcent and Non-claim.

Afterwards *Rob. Weild* by his Will 9 *Nov.* 1630. deviſed, that his ſaid Tenements ſhould be left and diſpoſed to ſuch Uſes, Intents and Purpoſes, as he had limited by the ſaid Indenture of the 1ſt of *Nov.* 1630. and died 13 *April* 1631. without Iſſue Male, but left his ſaid three Daughters *Anne*, *Mary* and *Helen*.

21 *Sept.* 1641. *Anne* the eldeſt Daughter married *Tho. Illingworth*, who at their Death left *Rob. Illingworth* their eldeſt Son and Heir, who had *Tho. Illingworth* his Son and Heir, who is one of the Leſſors, and died 11 *Oct.* 1699.

14 *April* 1631. after the Death of the Teſtator, *Mary* his younger Daughter entered, and married *John Sandford* 18 *Feb.* 1646, and died 7 *Nov.* 1667. leaving *John Sandford* her Son and Heir, who afterwards entered and was ſeiſed, and during his Seiſin *Robert Illingworth*, Father of *Tho. Illingworth* the Leſſor, after the Death of *Anne* and her Husband, by his Deed of the 13th of *Oct.* 1683. releaſed all his Right and Eſtate in the Premiſſes to the ſaid *John Sandford* and his Heirs.

5 *May* 1717. *John Sandford* the Son died, having Iſſue *John* and other Iſſues, and *John* his Son and Heir entered and was ſeiſed, and by Indenture 16 & 17 *Sept.* 1710. leaſed and releaſed to *John Lees* the Defendant and his Heirs, upon which *Tho. Illingworth* the Leſſor 15 *April* 1730. entered, and demiſed to the Plaintiff; whereupon *John Lees*, and the other Defendants by his Direction, entered and ouſted him. But whether they are guilty, or not, is ſubmitted to the Court.

And it was inſiſted, that by the Indenture of 1 *Nov.* 6 *Car.* 1. *Anne* the eldeſt Daughter was Tenant in Tail after the Term of ninety-nine Years given to *Mary* was expired, (which expired 13 *April* 1730.) and therefore upon the 15th of *April* 1730. *Tho. Illingworth* the Leſſor might well enter, as Iſſue of the Body of the ſaid *Anne*, and make the Leaſe to the Plaintiff.

It was admitted, that by Conveyance at Common Law a Limitation to *A.* and the Iſſues of his Body does not make *A.* a Tenant in Tail, that the Word *Heirs* is neceſſary to make an Eſtate of Inheritance; otherwiſe where a Limitation is by Way of a Uſe, and therefore it is ſaid 1 *Co.* 100. *b.* That if a Man has by Bargain and Sale conveyed his Lands for Monies paid to another before the Statute 27 *H.* 8. the Bargainee ſhould have a Fee-ſimple without thoſe Words *his Heirs*, which was warranted by the Caſes there cited, and in the Caſe of *Leigh* and *Brace*, *Carth.* 383. 5 *Mod.* 266. it was reſolved that a Conveyance by Way of Uſe ſhall be always conſtrued as a Will according to the Intention of the Parties, and ſhall not be confined to the ſtrict Rules of Conveyances at Common Law; and therefore where *Walter Brace* makes Feoffment to the Uſe of himſelf for Life, and afterwards to the Uſe of *Thomas Brace* and his Heirs for ever, and if *Thomas* dies without Iſſue of his Body, to the Uſe of his Right Heirs, it was reſolved (as before it was in Common Pleas, 2 *W.* & *M.* in a Caſe upon Ejectment there) that *Thomas* had only an Eſtate-Tail.

2. It was inſiſted, That if *Anne* had not an Eſtate-Tail by the Deed ſhe would have it by the Will of *Robert Weild*, who deviſed that his Lands and Tenements ſhould be diſpoſed to ſuch Uſes as he had limited and appointed by the ſaid Deed indented, dated 6 *Nov.* 1630, and this amounts to a Diſpoſition of the Lands to the Uſes in the Deed which is as much as if the Uſes were mentioned in his Will; and if Deviſe was to *Anne* and the Iſſues of her Body, without doubt it would be an Eſtate-Tail in *Anne*; as where a Man deviſeth, *I Will my younger Children not married ſhall have ſuch ſeveral Annuities, as be expreſſed in ſeveral Writings ſigned and ſealed by me, according to the true Meaning of the ſaid Writings*; it was reſolved, That the Will deviſing ſuch Rents as are mentioned in ſuch Writings was a good Deviſe of the Rents. So *Salk.* 225. *Show.* 350. Where a Man having by Deed agreed to levy a Fine to ſuch Uſes, and after by his Will before a Fine levied, deviſeth all his Lands granted by his Settlement, and all Eſtates, to his Son according to the Deed;

Deed; it was agreed that the Lands paſs to the Son to the Uſes in the Deed.

But it was argued *econtra*, That no Eſtate-Tail was given to *Anne* by the Deed, but only for Life, for the Word *Heirs* is neceſſary to make an Eſtate of Inheritance in Gifts in Tail, as well as in Feoffments and Grants. *Co. Lit.* 20. *a.* 2 *Inſt.* 334. 1 *Rol.* 837. And the Caſes cited do not contradict it, for the Caſe cited 1 *Co.* 100. *b.* was before the Statute 27 *H.* 8. And the Caſe of *Leigh* and *Brace* makes the ſame Conſtruction of the Word *Heirs* in the Charter of Feoffment, as would be made in a Will, where the Word *Heirs* was explained by the ſubſequent Words for Default of Iſſue of his Body, to be underſtood of the Heirs of his Body, and not of his Heirs generally.

And if by the Deed *Anne* did not take an Eſtate-Tail, ſhe could not take it by the Will, for the Teſtator deviſeth nothing that was not granted by the Deed, nor limits no new Uſe or Eſtate, only that which was limited by the Deed, and therefore if *Anne* by the Deed took only an Eſtate for Life, ſhe ſhall not take a greater Eſtate by the Deviſe. It is true, where a Deed is not effectual, and afterwards the Teſtator by his Will deviſes to the Uſes of the Deed, the Eſtate may paſs by the Will, though it ſhall not paſs by the Deed, as if the Will deviſe with Reference to a Feoffment where no Livery was, or to a Bargain and Sale where no Inrollment was, or to a Deed by which a Fine is agreed to be levied to ſuch Uſes, and no Fine is levied, there the Eſtate paſſes by the Will, which has Reference to the Deed (as the Caſe was *Salk.* 225.) although it could not otherwiſe paſs, but no other Eſtate ſhall paſs, only ſuch as would paſs, if Livery or Inrollment had been made, or a Fine levied.

But if *Anne* was Tenant in Tail, *Thomas Illingworth* the Leſſor had no Title of Entry, for it is found by Verdict, that *John Sandford* after the Death of his Father and Mother entered, and was ſeiſed of the Tenements, and it is not found that he was Executor, therefore it ſhall be intend-

ed he was not; and his Mother *Mary* having only a Term of ninety-nine Years, his Entry not being as Executor or Adminiſtrator, was a Diſſeiſin; and when he after, *viz.* 15 *May* 1717. died ſeiſed, and a Deſcent was caſt upon his Son and Heir, who continued five Years in Poſſeſſion, without Entry or Claim by *Robert Illingworth*, or *Tho. Illingworth* the Leſſor, the Entry of the Leſſor was tolled by Statute 32 *H.* 8. and by Conſequence before Recovery by a *Formedon* he could not make a Demiſe, upon which an Ejectment might be maintained.

And in *Hillary* Term following it was argued by Serjeant *Chapple*, that the Eſtate limited to *Helen* by Indenture 6 *Nov.* 6 *Car.* not being to commence till the Death of *Anne* without Iſſue, the Eſtate was in the Interim in the Teſtator, and he by his Will could make to *Anne* an Eſtate-Tail, altho' by the Deed ſhe had only an Eſtate for Life. But it was anſwered, that the Will does not give other Eſtate, or limit other Uſes, only that which was limited by the Deed, and if *Robert Weild* had the Eſtate in the Interim (he had it only as a Uſe, and not to diſpoſe of) which deſcended to his Heir, and the three Daughters being his Heir, the Part of *Anne* paſſed by the Leaſe and Releaſe made by *Rob. Illingworth* the Father to the Leſſor.

And all the Court agreed, that *Anne* had not an Eſtate-Tail but for Life only; and that if ſhe had, the Entry of *Tho. Illingworth* was barred by Deſcent and Non-claim.

DE
Termino Paſch.
8 Geo. 2.

Caſe 209. *Naiſh* and *Eaſt-India Company.* In Scacc'.

Not reaſonable to decree a Depoſit back which is made by way of Security to any one, where the Perſon had a proper Power and Authority to make it.

BILL in Equity againſt *Eaſt-India* Company to Account for 20000 *l.* and Intereſt depoſited in their Hands by the Plaintiff's Wife. And the Caſe appeared to be this:

The Plaintiff was appointed *Supra-Cargo* to four Ships of the Company bound for *China*; and by Articles between him and the Company dated 6 *Nov.* 1729, the Company was to allow him 25 *per Cent. per* Month of the Freight, *&c.* to allow him an Adventure of 2000 *l.* and to carry out any Sum not exceeding 200 *l.* for his own Uſe.

By the ſame Articles *Naiſh* covenanted to be faithful to the Company, and perform the Truſt repoſed in him, to inveſt their Treaſure in Goods, *&c.* to keep true Books of Accounts, and true Journals, not to charge for Goods that he bought more than he paid, nor to ſet down for Goods that he ſold leſs Prices than he ſold them at, not to load or bring home any Gold in his own Name, or in the Name of any other at any Time during the Voyage, *&c.*

That in 1731. by order of the Company which ſent out other Ships, *Naiſh* then in *China* was continued in their Service as *Supra-Cargo.*

Naiſh before his Voyage made a general Letter of Attorney to his Wife, dated 20 *Nov.* 1729. giving her Authority to receive, ſue for, and diſcharge Debts, to ſettle Accounts, pay and diſburſe whatever Sums ſhe ſhould think proper, and do every Thing for him that he himſelf if preſent could do, *&c.*

Naiſh when in *China* ſends home 300 Pieces of Gold, as appears by his own Letter dated at *Canton* 10 *Dec.* 1730. directed to Captain *Digby Dent*, to take them on board, and deliver them at *Erith*; and the next Day, as by Letter 11 *Dec.* 1730. ſends 64 Pieces of Gold more.

6 *July* 1731. Mrs. *Naiſh* receives this Gold of Captain *Dent*, *prout* her Receipt.

14 *July* 1731. Mr. *Arbuthnot*, who was another *Supra-Cargo*, and was with Mr. *Naiſh* at *Canton* in *China*, gives Information to a Committee of the Directors of the *Eaſt-India* Company in Writing, that Mr. *Naiſh* had acted contrary to his Truſt and Duty, and ſet down greater Prices for the Tea and Coffee he bought than what he gave, *&c.* He exhibited a Diary of his Proceedings under his Hand, ſaid he could ſwear, that all he informed was true, but could make no Proof of them.

Upon this the Court of Directors took Time to conſider, and having likewiſe been informed of the Gold brought over on 13 *Aug.* 1731. the Court came to ſeveral Reſolutions.

1. That it appeared, Mr. *Naiſh* had carried out great Quantities of Silver, and had ſent home great Quantities of Gold.

2. That he had broken his Truſt, violated his Covenants with the Company, *&c.*

3. That an Information ſhould be filed againſt him, and a Bill in Chancery, *&c.*

4. That

4. That the Chairman, Sir *Matthew Decker*, ſhould be requeſted to take ſuch Meaſures as he ſhould think fit, to ſecure his unlicenſed Goods, and bring his Perſon to Juſtice.

After theſe Reſolutions taken, it was diſcourſed about the *Eaſt-India* Houſe, that a Ship was to be ſent to the *Cape*, or *St. Helena*, to ſeiſe the Effects of *Naiſh* on board the Company's Ships, and bring him Priſoner to *England*, to anſwer his Miſmanagement in the Company's Service.

Ingr. Lloyd ſays to *Int.* 4. It was agreed in the Court of Directors to do ſo. *Hall* to *Int.* 4. That the Court threatened, and were come to a Reſolution to ſend a Ship to ſeiſe his unlicenced Goods, and arreſt him and bring him by Force to *England*, *&c.*

Woodford, who was Solicitor to the Company, ſpeaks to *Hall* as a Friend of *Naiſh*, asks what his Wife intended to do to prevent a Ship's being ſent to ſeiſe her Husband; if ſhe took no Care in the Affair, it would be ſent; *Hall* ſaid, if he would have him, he would ſpeak to her; *Woodford* replied, not from me, but as a Friend of her Husband you may tell her. *Hall* tells Governor *Harriſon*, who was a Friend of *Naiſh*, this Diſcourſe; he bids him tell the Wife; ſhe in Concern and Terror on this News for her Husband's Life, who was a Man of Spirit, ſaid, ſhe would do any Thing to prevent it, and talked with Sir *Matthew Decker* the Chairman; who ſaid, the only Way to prevent it was to depoſit a Sum of Money; and on ſeveral Meetings, and Propoſals of 10, 12, 15000 *l.* ſaid nothing leſs than 20000 *l.* would do; *Woodford* conſulted how it muſt be done, and ſaid ſhe muſt write a Letter to the Company, and offer the Depoſit; a Letter was drawn by Governor *Harriſon*, altered by Mr. *Barnard* her Solicitor, approved by Sir *Matthew Decker*, and by his Advice ſhewn to *Woodford*, who made ſeveral Alterations, but (as Sir *Matthew* ſaid) it was as well before, but *Woodford* muſt be pleaſed. The Letter thus ſettled, and offering a Depoſit of 20000 *l.* was ſent 29 *Sept.* 1731. the Propoſals accepted by the Company, and the 20000 *l.* after paid in to them at three

Payments, 5 *Oct.* 19 *Oct.* 17 *Nov.* 1731. but as *Hall* believes with Reluctance, and from her Apprehenſions of the Threats and Reſolutions of the Company to ſend ſuch Ship, *&c.* and then the Court of Directors reſolved Mr. *Naiſh* ſhould have free Liberty to come to *England* as propoſed.

19 *May* 1732. Information was filed againſt *Naiſh* for the Gold by him ſent ever.

1732. *Arbuthnot* died.

July 1732. Mr. *Naiſh* returned to *England*, declared he was well pleaſed with what his Wife had done.

7 *Sept.* 1733. Mr. *Naiſh* by Letter to the *Eaſt-India* Company demands the 20000 *l.* by his Wife depoſited, as made by her without Authority.

On Trial of the Information for the Gold, Verdict was againſt *Naiſh* for 26864 *l.* but found the Caſe ſpecially, which is not yet determined, nor brought on to be argued.

On this Caſe the Chief Baron was of Opinion, that the Defendants, the *Eaſt-India* Company, ought to account for the 20000 *l.* and Intereſt.

He thought many Things inſiſted on ought to be laid aſide in the Conſideration of the Caſe.

As 1. The Misbehaviour of Mr. *Naiſh* in *China*, his Breaches of his Covenants, *&c.*

2. His Approbation of what his Wife had done in depoſiting the Money.

3. Nor need it be inquired, whether Sir *Matthew Decker* had any Authority from the Company to act in what he did.

4. He ſaid it was to be admitted, that the Depoſit was made on the Terms propoſed by the Letters of Mrs. *Naiſh.*

5. As alſo that ſhe had Authority ſufficient to do what ſhe did.

But the Chief Baron inſiſted on it, that this Depoſit was drawn from her artfully, and inſidiouſly, and by falſe Repreſentations, and that was the only Conſideration to be made in this Caſe, whether ſhe was fairly induced to make it or not.

That where a Perſon threatens ſuch Uſage to another as he cannot legally do to him, but by Violence may act againſt him, and thereby prevails on him to do what otherwiſe he was not bound to do, the Act ſo done ought to be ſet aſide in a Court of Equity.

That in this Caſe it appears, what Mrs. *Naiſh* did was thro' the Terror and Threats uſed to ſend a Ship to the *Cape* or *St. Helene* to ſeize her Husband's Effects, and to ſeize his Perſon, and to bring him a Priſoner to *England* by Force: This is what they could not do by Law, but this is what they threatened to do, and the Terror of it was artfully inſinuated to her, that it would be done.

It was agreed, as *Ingr. Lloyd* ſays, to be done in the Court of Directors; it was generally whiſpered and diſcourſed that it would be ſo about the *Eaſt-India* Houſe. Mr. *Woodford*, who was Solicitor to the Company, deſired *Hall* to tell her it would be ſo, if ſhe did not take Care to prevent it; and when he bids him tell her, but not from him, it looks like an artful Contrivance to make the deeper Impreſſion upon her to draw her to a Compliance.

Then Governor *Harriſon* who was a Director, Sir *Matthew Decker* who was Chairman of the Committee, all contribute their Endeavours to the ſame End, and perſwade her to do ſo. Sir *Matthew Decker* ſaith, Reſolutions were taken to do it, nothing could prevent it but a Depoſit of a Sum of Money; Governor *Harriſon*, Sir *Matthew Decker* and *Woodford* join to perſwade her to make an Offer of ſuch Depoſit by Letter; frame

a Letter for that Purpoſe, it muſt be 20000 *l.* *Woodford* varies the Letter, that it may be expreſs and poſitive, and not appear as if ſhe was frightned into it; and by theſe Means ſhe was induced to do what otherwiſe ſhe was no ways obliged to do, ſhe was prevailed on to do it by the Arts and Contrivances of Agents of the Company, and they had the Benefit of what their Agents did, the Money was by theſe Means drawn into the Company's Stock, who ought conſequently to repay the Money with Intereſt.

Baron *Carter* concurred in Opinion.

I differed in Opinion, apprehending it was not fit in Conſcience, conſidering the Circumſtances of the Caſe, to decree the Company to repay the 20000 *l.* depoſited by Mrs. *Naiſh*, unleſs Mr. *Naiſh* had made the Company ſafe againſt his Imbezilments in their Service, or had ſhewn there was no probable Ground to apprehend he had committed any.

It appears that Information was given to the Company that Mr. *Naiſh* had miſbehaved in their Service; that he had ſet down higher Prices for Tea, Coffee, *&c.* bought for them, than what he really gave, which was a direct Breach of his Covenants; that he gave in the Diary and Journal he had kept of his Proceedings, and could ſwear all he informed was true, although he could produce no other Proof of the Matter.

Upon this Information which was 14 *July* 1731, the Company took Time to conſider what was fit for them to do, and in the mean Time diſcovered that *Naiſh* had put on board Captain *Dent*, and brought Home 364 flat Pieces of Gold or Shoes, as they call them, worth near 50000 *l.* though by the Abſence of the Witneſs, who had taken the exact Weight, the Jury on the Trial found but 26800 and odd Pounds; this appeared evidently true by Mr. *Naiſh*'s own Letters to Captain *Dent*, dated 10 and 11 *Dec.* 1730, and by Mrs. *Naiſh*'s Receipt for them, dated 6 *July* 1731, all now in Proof before the Court.

Upon

Upon this Diſcovery what has the Company done? 13 *Aug.* 1731, in a Court of Directors it was reſolved, That Mr. *Naiſh* had been guilty of a Breach of Truſt and Breach of Covenants; that an Information ſhould be filed againſt him for the Gold, and a Bill of Equity to bring him to an Account for his other Imbezilments; and Sir *Matthew Decker* their Chairman was deſired to take ſuch Meaſures as he ſhould think fit, to ſecure his unlicenſed Goods, and bring his Perſon to Juſtice.

What is there in theſe Reſolutions that was improper or unreaſonable for the Company to do, or what is there in any Degree illegal? here is ſtrong Proof or Preſumption at leaſt, that the Plaintiff was guilty of groſs Abuſes in the Company's Service; if true, what more fit than to ſecure his unlicenſed Effects, and to bring him to anſwer for his Faults in a Court of Juſtice? if they could, no Body can ſay it was improper, or that it was unlawful for them to do it.

It may be proper to conſider what Power or Authority the Company has in ſuch a Caſe; by their Charter read in Evidence, 10 *W.* 3. the Company hath Power to ſeize in *England*, *Eaſt-Indies* or elſewhere, all Ships, Goods, Bullion, *&c.* forfeited by Statute 9 *W.* 3. or ſeizable for want of Entry, or falſe Entry in Books of the Company, or for Nonpayment of Duty of 3 *per Cent.* or for unlawful Trading, or other Offence againſt the ſaid Act, whereupon that might be forfeited, or ſeized by Virtue of the ſaid Act.

By Statute 3 *Geo.* 2. 14. all Powers granted by any of their Charters are confirmed.

So that the Company have undoubtedly a Power to ſeize or ſecure any unlicenſed Goods carried to or brought from the *Eaſt-Indies*, and every Subject or Body Politick of the Realm hath Power to bring the Perſon that injures him to Juſtice; and when the Company authoriſed Sir *Matthew Decker* the Chairman to do ſo by ſuch Meaſures as he ſhould think fit, that means, and is always underſtood, by all lawful Means.

Wherever any Thing is referred to the Wiſdom, Judgment or Diſcretion of another, it is always to be intended and interpreted according to Law and Juſtice. 10 *Co.* 140.

So that nothing appears in this Caſe to have been done by the Defendants, but what was lawful, reaſonable and proper for them to do.

But it has been inſiſted, that upon the Foundation of theſe Reſolutions, the Agents of the Company, Mr. *Woodford* their Solicitor, Sir *Matthew Decker* their Chairman, and Governor *Harriſon* have artfully ſpread abroad terrifying Reports of ſending a Ship to ſeize the Goods and Perſon of Mr. *Naiſh*, and bring him by Force to *England*; and by inſinuating cunningly theſe Menaces and Deſigns to Mrs. *Naiſh* induced her to make a Depoſit, which ſhe was not obliged to do, and unleſs ſhe had been artfully wrought upon by ſuch Contrivances would not have done it.

But firſt, If the Agents of the Company had done any Thing unlawful, which the Company did not authoriſe them to do, they ought to be anſwerable for it, and not the Company; nothing is a more certain and known Rule in Law, than that if I command a lawful Thing, and my Servant do it in an unlawful Manner, he muſt be anſwerable for the Treſpaſs or Miſdemeanour, and not the Maſter; this Mr. *Naiſh* was ſenſible of, for he at firſt brought his Bill againſt Sir *Matthew Decker* as well as the Company, though before Hearing he thought fit to diſmiſs it as to him.

And although Sir *Matthew Decker* and the others were Members of the Company, yet it is well known, that the Law doth not charge any Corporate Body with any Act done by them, who are Members of it, but they are anſwerable for all ſuch Acts perſonally, and in their natural Capacity, unleſs they act by expreſs Authority from the Corporation, which can't be given but by ſome authentick Deed or Writing of theirs. Now there is no Pretence that there was any other Reſolution or Act of the Company, but what has been read: *Ingr. Lloyd* indeed in his Depoſition expreſſes himſelf, that

it was agreed in a Court of Directors, that a Ship ſhould be ſent, *&c.* but what he means by its being agreed *non conſtat*, it might poſſibly be the Sentiment of ſome of the Directors, that this might be done, and they might talk or agree to do it, but there is not the leaſt Proof or Colour that this came to be the Sentiment, much leſs the Reſolution of the Court of Directors, or that any ſuch Determination was ever made by them; without which it can never be eſteemed or imputed as the Act of the Company. Whatever ſome of the Directors might think as to their Power in that reſpect, it is manifeſt the Determination was to refer it to ſuch Meaſures as Sir *Matthew Decker* ſhould think fit to take, that is, as he ſhould be adviſed would be proper for him to proceed in upon this Occaſion.

2. Theſe that are called Agents to the Company acted really as Friends to Mrs. *Naiſh*, and were conſulted with and adviſed with by her as ſuch; what Mr. *Woodford* mentioned to *Hall* was mentioned by him as to a Friend of Mr. *Naiſh*, and although he deſired Mr. *Hall* to ſpeak to Mrs. *Naiſh* as of himſelf, and not from him (which is urged as a Piece of Art and Cunning in Mr. *Woodford* to communicate what he ſaid would be done in an underhand Way, in order to make the greater Impreſſion upon her,) yet there is no Proof that he had any Orders from the Company or any of its Members to do ſo; and in Reality he not only appeared to be a Friend in it to Mrs. *Naiſh*, but did, as far as I can ſee, a real Piece of Friendſhip to the Plaintiff; it was what the chief Friends of Mrs. *Naiſh* thought well of, and adviſed her to it, for Mr. *Hall* did not immediately tell her what *Woodford* ſaid, till he had firſt adviſed with Governor *Harriſon*, who tho' he was a Director, yet was conſulted as a particular Friend of the Plaintiff, and really acted with Friendſhip for him, as did likewiſe Sir *Matthew Decker* who was conſulted as a Friend, and although they ſeverally perſuaded her to depoſit 20000 *l.* as a Security for her Huſband's coming to *England*, and abiding what the Company ſhould charge him with, yet this was what ſeems to me very kind and friendly Advice.

3. For what is it they adviſed her to do? Mr. *Naiſh* was evidently guilty of ſeveral Breaches of his Articles with the

Company; they had reſolved to proſecute him for thoſe Breaches, to take the beſt Methods their Chairman Sir *Matthew Decker* upon Conſultation ſhould think fit to purſue, to ſecure his unlicenſed Effects, and bring him to Juſtice.

It can't be denied but that they might have ſent a Ship to the *Cape* or St. *Helena* to ſeize his unlicenſed Goods on Board the Company's Ships; this is warranted by the Power of their Charter, confirmed by Statute 3 *Geo.* 2. 14.

By Statute 9 & 10 *W.* 3. 44. *S.* 64. No Member of the *Eaſt-India* Company ſhall Trade, but in the Joint Stock of the Corporation, of which they are Member; and no Perſon that ſhall have the Management, *&c.* of the Voyages or Affairs of the Company, ſhall be allowed to Ship or ſend from the *Eaſt-Indies* any Goods, *&c,* till ſworn to be faithful to the Company, *&c.*

And by Stat. 7 *Geo.* 21. all Goods Shipped for the *Eaſt-Indies* (not licenſed) or taken out of any Ship in her Voyage homeward from *Eaſt-Indies* to *England,* ſhall be forfeited with double the Value, *&c.*

By Statute 9 *Geo.* 14. a *Capias* may iſſue as the firſt Proceſs upon any Information filed for any Offence mentioned in any Act for ſecuring Trade to and from the *Eaſt-Indies, &c.* upon which the Offender ſhall be obliged to give Bail to anſwer ſuch Proſecution, and pay all the Penalties and Forfeitures incurred by ſuch Offence, if convicted, or yield his Body to Priſon.

So that not only Mr. *Naiſh*'s unlicenſed Goods might have been ſeized, but on filing ſuch Information as was ordered by the Court of Directors, a *Capias* might have been taken out againſt his Perſon, upon which he might have been ſeized or arreſted as ſoon as he came *infra Corpus Comitatûs,* and detained in Cuſtody till he found Bail to anſwer the Forfeitures or Penalties incurred.

What

What then do her Friends adviſe her to do to prevent this Proceeding? Why to make a Depoſit of 20000*l.* to abide what the Company ſhould by Law or Arbitration recover from him; is any Thing unjuſt or unreaſonable in this? No, it was what Mr. *Naiſh*, if preſent, ought in Juſtice, in Honour, in Conſcience to have done; and what if he had refuſed to do, he might have been compelled by Law to do, which would have made the Company equally ſecure, tho' with more harſh Uſage, more Diſhonour and Diſgrace to himſelf.

But it is urged, that they inſinuated and inculcated to Mrs. *Naiſh*, that they would ſend a Ship to the *Cape* or St. *Helena* to ſeize his Perſon as well as his unlicenſed Goods, and bring him a Priſoner to *England* by Force, which was more than they could lawfully do, whereby ſhe was put in Fright and Concern for the Life of her Huſband, and thereby induced with Reluctance to make the Depoſit, which otherwiſe ſhe would not have done; the Depoſit being therefore drawn from her artfully and unfairly by falſe Repreſentations, ought to be looked upon as null and void in itſelf.

But to me there ſeems a conſiderable Difference, where the Thing prevailed to be done is a Thing juſt and reaſonable in itſelf, and where it is an Act in itſelf unjuſt, unreaſonable and tortious to him that does it. In the firſt Caſe many Inſtances might be given, where the Thing ſhall ſtand good, notwithſtanding ſome Irregularity in the obtaining of it; *quod fieri non debuit, factum valet.*

But to make what has been done in this Caſe to amount to a Fraud and Impoſition upon Mrs. *Naiſh*, is to preſume what does not appear in Proof, and yet it is a known Rule, that Fraud is never to be preſumed; the Circumſtances, that muſt help out the Court to determine the Proceedings of the Defendants the *Eaſt-India* Company in this Caſe to be a Fraud upon the Plaintiff, muſt be all extended by Preſumption, for there is no poſitive Proof of them with regard to the Defendants. It is ſaid, the *Eaſt-India* Company came to a Re-

ſolution of ſending a Ship to bring the Plaintiff a Priſoner to *England* by Force, in order to influence Mrs. *Naiſh* to make a Depoſit; but no ſuch Reſolution appears, it is only preſumed, becauſe there was ſuch Diſcourſe about the *Eaſt-India* Houſe; and *Lloyd* ſays, it was agreed in the Court of Directors, but by whom or when it does not appear; it is ſure no ſuch Determination appears upon the Company's Books, or other authentick Act of the Company.

It is ſaid, *Woodford*, Governor *Harriſon*, and Sir *Matthew Decker*, treated as Agents of the Company, but no Authority given to them by the Company appears; it may as well be preſumed they acted as Friends to the Plaintiff.

It is preſumed, that theſe Agents raiſed the Rumours of ſending a Ship for the Plaintiff by Concert and Contrivance with the Defendants, to terrify and intimidate Mrs. *Naiſh*; but it may as well be preſumed, that the Talk aroſe from Miſtake and Miſapprehenſions of the Law in this Matter: By the Statute 9 *Geo.* 26. made to prevent his Majeſty's Subjects from trading to the *Eaſt-Indies* under Foreign Commiſſions, it is ſaid, all Offenders may be ſeized and brought to *England*, and committed to Gaol till they have found Security to anſwer the Offence, and not go out of the Court or the Kingdom without Leave of the Court.

And by Statute 5 *Geo.* 2. 21. it is provided, that if any of his Majeſty's Subjects ſhall go to or be in the *Eaſt-Indies*, contrary to the Laws now in Being, it may be lawful for the Company to arreſt and ſeize ſuch Perſon where found in the Limits aforeſaid, and to ſend him to *England* to anſwer the Offence, *&c.* This Act cannot extend to the Plaintiff, who went by Licence, and as Servant to the Company; but it is poſſible, nay not improbable, it might be at firſt apprehended to do ſo, till upon maturer Conſideration or better Advice they became convinced of the contrary; ſo that all the Diſcourſe and Talk of ſending a Ship, *&c.* was not the Effect of any fraudulent Contrivance to impoſe upon the Plaintiff, but mere Ignorance or Inadvertency; and then the Caſe will be exactly parallel to that of *Frank* and *Frank*, 17 *May* 19 *Car.* 2.

where a Man ſeiſed of Copyhold in Fee, and of Freehold in Tail, with Remainder to his elder Brother, deviſes the Freehold to his younger, the Copyhold to his elder Brother; the Brothers came to an Agreement in Writing, that each ſhould enjoy the Lands according as deviſed by the Will; and to draw on ſuch Agreement the younger Brother pretended the Teſtator had ſuffered a Recovery, but there was really no Recovery on Record, but only a Commencement of a Recovery, which might have been perfected, if the Party had lived; the elder Brother being intitled to the Freehold, there being no Recovery, and to the Copyhold as Heir, there being no Surrender to the Uſe of his Will, it was inſiſted in Chancery this Agreement was founded on a Fraud, there being a Pretence of a Recovery when there was none. But by Decree at the Rolls, *&c.* after by the Chancellor on an Appeal, the Agreement ſtood. *Ca. Chan.* 84.

And as there appears no Fraud in the preſent Caſe, ſo there appears no Impoſition upon Mrs. *Naiſh*; in what ſhe did ſhe was appriſed of the Law, as well as the Defendants, and of the Reſolutions of the Court of Directors, had Time to adviſe on what ſhe did, and did long adviſe and deliberate about it; it was plainly propoſed what was deſired, and ſhe formed her Letter not only on Conſultation of Governor *Harriſon* her Friend, but with *Hall* and Mr. *Bernard* her own Solicitor, ſo there cannot be the leaſt Colour of Surpriſe or Impoſition upon her.

4. But what ſhe did was not only approved by her Friends, but by her Husband himſelf after his Return to *England*, who declared himſelf well pleaſed and ſatisfied with what his Wife had done. Now indeed when he has been permitted to return home, and continue here undiſturbed till he has diſpoſed of and ſettled all his Affairs, and all his illicit Effects, when there is a Verdict ſtanding out againſt him for 26800*l.* he would willingly get the 20000*l.* Depoſit out of the Defendants Hands, as well as the Gold which by the Abſence of a Witneſs they could not prove the Value of.

S

If

If indeed the Plaintiff had given Security to abide the Event of the Proſecutions againſt him, if there had appeared no Ground for any ſuch Proſecution, or in Caſe the Proſecutors had groſsly delayed their Proceeding, there might be ſome Pretence for the Deſire of having up the Depoſit. The firſt Pretence for the Plaintiff's bringing this Bill was, that his Wife had no Authority from him to make it, it was upon that Foot he made his Demand of it from the Company; but his Letter of Attorney to his Wife being now diſcovered, whereby it appears ſhe had full Power from him to act as ſhe did, he now puts it upon the Foot of Fraud and Impoſition; but as there does not appear any Thing done by the Defendants, but what they might lawfully do; nor any Thing done by *Woodford*, Sir *Matthew Decker* and Governor *Harriſon*, but in Friendſhip and Service to Mrs. *Naiſh*; nor any Thing done by her but what was juſt and reaſonable in it ſelf, and advantagious to her Husband, and approved of by him, and what he was bound in Honour and Conſcience to have done, or to give Security to the Company to anſwer their Demands againſt him; I cannot think it agreeable to Equity and Conſcience to take this Money out of the Hands of the Defendants, and pay it to the Plaintiff, who approved the Depoſit, and has already enjoyed the Advantage on his Part of the Terms upon which the Depoſit was made; unleſs he give Security to abide the Event of the Defendants Proſecution againſt him, or it appear there is not any reaſonable Ground for ſuch Proſecution.

In caſe there be any real Fraud or Impoſition upon Mrs. *Naiſh*, that would avoid what ſhe did at Law as well as in Equity, the Plaintiff may bring his Action againſt the Defendants for ſo much Money received by them to his Uſe; in caſe the Money was extorted from her by illegal Means, by Menaces, Threats or Impoſitions, without any reaſonable Conſideration. But if the Plaintiff cannot recover at Law, I do not ſee any juſt Cauſe why Equity ſhould interpoſe to annul an Act juſt and agreeable to Conſcience, unleſs the Plaintiff would do what Conſcience and Equity require, which is to make the Defendants ſafe in reſpect to any Frauds committed

mitted by him in their Service. He that expects Equity ſhould do Equity.

What is ſaid, that it is hard the Plaintiff ſhould be kept out of ſo large a Sum of Money, proceeds from not conſidering that Mrs. *Naiſh* had received the 364 Shoes, or flat Pieces of Gold, near three or four Months before her Depoſit, ſo that ſhe was enabled out of this illicit Treaſure to raiſe the whole Money before it was paid; and that there is now found a Verdict againſt the Plaintiff for more than that Sum which was depoſited, which, if Judgment be againſt the Plaintiff upon that Verdict, the Defendants might ſeek for as they could, when the Plaintiff has given no Security to anſwer their Proſecution; that if in the Event of theſe Proceedings, it ſhall appear there is nothing due from the Plaintiff to the Defendants, the Plaintiff will be reimburſed the Money depoſited with Intereſt.

Baron *Thompſon* thought that the Defendants ought to be charged with all the Acts of *Woodford*, Sir *Matthew Decker* and Governor *Harriſon*, ſince they acted for them and their Benefit, and muſt be ſuppoſed to do ſo by Authority, ſince Sir *Matthew Decker* acted by their Order, and declared the Company had come to Reſolutions to ſend a Ship to ſeize the Plaintiff; and *Lloyd* ſaid it was ſo agreed in the Court of Directors. But he gave his Opinion againſt the Defendants returning the Depoſit to the Plaintiff at preſent.

The Court being divided in Opinion upon this Caſe, the Decree was ſuſpended till Sir *Robert Walpole* the Chancellor of the Exchequer could be at Leiſure to hear it, and give his Opinion therein, which he did in *Michaelmas* Term following; when the Caſe was again argued by the Counſel on both Sides before him and the Barons, and after hearing the Arguments of the Counſel, the Barons delivered their Opinions *ſeriatim* as before; after which the Chancellor gave his Opinion as follows:

He was of Opinion, that the Money was not proper to be repaid by the Company; that he ſhould think the Company

ought to be bound by the Act of the Agents of the Company; but in this Caſe he apprehended, that the Tranſaction between the Company and Mrs. *Naiſh* began 29 *Sept.* 1731. that then ſhe by Letter made a Propoſal of a Depoſit of 20000 *l.* to ſecure her Husband's Return to *England*, and abide the Determination of all Diſputes at Law, or by Arbitration; provided they would give Aſſurance that he ſhould not be arreſted, nor his Perſon ſecured. This Propoſal was accepted, and the Aſſurance given; all that preceded was a Treaty to bring on this Accommodation; the Friends of Mrs. *Naiſh* did the beſt they could for her, Mr. *Hall*, Mr. *Bernard* and Governor *Harriſon*, formed a Letter for her to write to the Company; Mr. *Woodford* and Sir *Matthew Decker* acted on Behalf of the Company, did the beſt they could for them, altered the Letters as might beſt ſuit them; Mr. *Woodford* and Mr. *Bernard* for ought I hear were of equal Abilities, and each was willing to aſſiſt his own Client.

That the Letter of Mrs. *Naiſh* was for two Purpoſes, to ſecure her Husband's Return to *England*, and his Abiding the Iſſue of all Suits there, when returned. It is evident the laſt is not yet fulfilled, Informations were ordered, and good Ground for them; whether all the Evidence appeared then which is now produced, appears not; but whether it did or not, the Company had then Information of Frauds committed by the Plaintiff, which are now verified and made plain by Letters under his own Hand. It was their Duty upon ſuch Diſcovery to order a Proſecution, they could not otherwiſe anſwer it to the World, nor diſcharge their Truſt to the Company; this therefore is done, an Information was filed, is now depending; he hath given no other Security to anſwer the Company's Demands; and as this Depoſit of 20000 *l.* is the only Security they have, and Mrs. *Naiſh* had Power to make it, I think it not reaſonable to take this Security from them.

Chief Baron and Baron *Carter*. Then the Plaintiff's Bill ought to be diſmiſſed; which being objected to by the Counſel for the Plaintiff, the other Barons were for retaining it till the End of the Suit depending. To which I ſaid, that the Opinion of the Chief Baron and Baron *Carter* being, that

the 20000 *l.* ſhould be repaid by the Company with Intereſt, I and Baron *Thomſon* were againſt the Repayment, at leaſt till the Event of the Information now depending appeared, upon which poſſibly more than that Sum might be recovered from the Plaintiff. But ſince it was then objected, that the Detainer could not be decreed on that Bill, and the Plaintiff may by new Bill (having made the Company ſafe) be relieved, I am not againſt the Diſmiſſion.

Caſe 210. ## *The King* and *Frances and others.* Before all the Judges at Serjeants Inn.

On a ſpecial Verdict in an Indictment for a Robbery on the Highway, the Words *then and there immediately* do not ſufficiently aſcertain the Time to find the Priſoners guilty.

AT the Aſſizes held at *Wells* for the County of *Somerſet*, 31 *July* 7 *Geo.* 2. before Chief Baron *Reynolds*, *John Frances* and five others were indicted for a Robbery in the Highway upon one *Samuel Cox*; and the Chief Baron being doubtful upon the Evidence, whether the Offence amounted to Robbery, directed it to be found ſpecially.

And it was found, that *Samuel Cox* travelling on the Highway toward *Somerton* Fair ſaw the Priſoners in the Road ſtanding in Company together, ſave that one of them was lying in the Road upon the Ground; *Cox* paſſed by them, but one of the Priſoners called to him, and deſired him to change Half a Crown, that they might give ſomething to a poor *Scotchman*, meaning the Perſon that was lying upon the Ground; that thereupon *Cox* came back, and putting his Hand in his Pocket intending to pull out Money to change the Half-Crown, pulled out ſome Pieces of Gold, *viz.* four Moidores, and a *Portugal* Piece Value 3 *l.* 12 *s.* that *Cox* having the Pieces of Gold in his Hand, the Defendant *John Frances* (he and all the other Priſoners being in Company together) gently ſtruck his Hand, whereby the Pieces of Gold fell on the Ground; that *Cox* got off from his Horſe, and ſaid he would not loſe his Money ſo; that *Cox* offering to take up the Pieces of Gold then lying on the Ground in his Preſence, the Priſoners ſwore, that if he touched them they would knock out his Brains, whereby *Cox* was put in bodily

Fear of his Life, and deſiſted from taking up the ſaid Pieces of Gold.

And the Jury further find, That the ſaid Priſoners then and there immediately took up the ſaid Pieces of Gold and rode off with them, that *Cox* immediately purſued and rode after them about half a Mile, and then the Priſoners ſtruck him, and his Horſe, and ſwore if he purſued them any farther they would kill him, upon which *Cox* ceaſed to continue his Purſuit any farther, *Et ſi ſuper totam materiam, &c.*

Upon this ſpecial Verdict the Juſtices of the King's Bench were doubtful whether the Verdict had found the Fact ſo certainly that they could determine it to be a Robbery, and therefore they deſired the Opinion of the other Judges who met at *Serjeants-Inn Hall*; and it was argued by Counſel for the Crown, and for the Priſoners; and upon Conſideration the Judges ſeemed generally to think, that the finding of the Jury was not ſo plain and certain that the Court could paſs Sentence of Death upon the Priſoners.

It had been inſiſted on, that although the Priſoners did not at firſt uſe Force, but gently ſtruck *Cox's* Hand, upon which he dropt the Gold, and ſo there was no putting him in Fear, yet what was found after ſeemed to find a Fact that had all the Eſſentials of that Offence, which the Law calls Robbery, which is a forcible or violent Taking of Goods from the Perſon of another, putting him in Fear. 3 *Inſt.* 68. *H. P. C.* 73. That taking Goods from his Preſence was always held to be a Taking from his Perſon, if by Force and putting him in Fear; and therefore if a Man have his Horſe or Coat by him, and a Thief by Force putting him in Fear, take it away, it is Robbery. *H. P. C.* 73. Or if he take Cattle by Force out of a Field, the Owner being preſent and put in Fear. *H. P. C.* 73.

Then laying the firſt Part (gently ſtruck his Hand) out of the Caſe, it was after found that the Money was lying on the Ground in his Preſence; and then the Priſoners ſwore if he touched it they would knock his Brains out, upon which being

being put in Fear he deſiſted, and they took it; that when they gently ſtruck the Money out of his Hand, he did not loſe the Property, but the Property continued in *Cox*, and the Money was his ſtill, though lying on the Ground; and then when the Priſoners by Threats which put him in Fear forced him to deſiſt from taking it up, and they immediately took it up, this is Taking from his Perſon, being a Taking of his Goods by Force in his Preſence and Putting him in Fear. And though it is not found that they took it in his Preſence, yet if it be all one continued Act, the Force, the Putting in Fear, and the Taking, it will be ſufficient; for the Caſes put *Stamf. P. C.* 27. *Crompt. Juſt.* 30. 3 *Inſt.* 69. If a Thief aſſault a true Man in the Highway to take his Purſe, and he in Flight to eſcape throw his Purſe into a Buſh, or his Hat fall off, and the Thief perceiving it, take up the Purſe or Hat, it is Robbery, were allowed to be good Law; becauſe as Lord *Coke* ſays, it was at the ſame Time; from whence it was inferred, that here it being found, that when *Cox* by Force and Terror deſiſted from taking up his Money, and the Priſoners then and there immediately took it up, that was ſufficient to denote the Time of Taking to be one and the ſame with that in which the Money was forced from him by thoſe Threats which made him deſiſt from taking it up.

But the Judges ſeemed unanimouſly to agree, that the Caſe was to be conſidered upon the ſpecial Verdict, and that was not to be made good by Intendment or Conſtruction. It was not denied, but that if a Thief ſet upon a Man to rob him, and he throw away his Money or his Goods (being near him and in his Preſence) and was forced away by Terror, and the Thief took them, it would be Robbery; and therefore here poſſibly it might have been well, if the Jury had found, that when *Cox* deſiſted, the Priſoners at the ſame Time, or without any intermediate Space of Time, or inſtantly took it up; but the Word *immediately* has great Latitude, and is not of any determinate Signification; it is in Dictionaries explained by *Cito, Celeriter*; in Writs returnable *immediatè* it has a larger Conſtruction, as ſoon as conveniently it can be done. In *Mawgridge*'s Caſe it is twice mentioned, but with Words added to aſcertain it, as *without Intermiſſion, in a little Space*

of Time, &c. In the Statute 27 *Eliz.* it is directed, that Notice be given as ſoon as conveniently may be; in the Pleadings that is uſually expreſſed by *immediatè*; ſo that *then and there immediately* doth not neceſſarily aſcertain the Time, but leaves it doubtful; beſides, it is proper to take Notice, that in this Verdict the Words *then and there immediately* are not coupled in the ſame Clauſe or Sentence with the Words preceding, but it is a diſtinct Clauſe, and a ſeparate Finding.

The Court of King's Bench (purſuant to this Opinion of the Majority of the Judges) held, that the Defendants ought to be diſcharged of this Indictment. Then a Queſtion ariſing, whether the Defendants ought to be diſcharged out of Cuſtody? It was held that they ſhould not, but that they ſhould be remanded; for though no Robbery is found by the Verdict, yet it appears they are guilty of Grand Larceny, for which no Judgment can be given upon this Indictment; for this differs from Burglary and other Caſes, where the Priſoner may be acquitted of the Burglary, and found guilty of the Felony; but here the Offence is laid to be a Robbery in taking *a perſonâ*; and that being the only Doubt of the Jury, the Court cannot give Judgment againſt them upon this Indictment, but muſt diſcharge them as to it, and remand them in order to be tried upon a new Indictment for the Grand Larceny.

Attorney General and *Perry. Intr. in Scacc. Paſch.* 7 *Geo.* 2. *Rot.* 29.

Caſe 211.

INformation by Attorney General for 623 *l.* 14 *s.* 3 *d.* ½ due to his Majeſty for ſo much Money received by the Defendant for his late Majeſty's Uſe, between *April* 1. 1725. and 1 *Sept.* following.

Money received for the Drawback of Goods and Merchandize, not fairly exported according to the Statute, liable to the King's Demand, tho' in the Hands of a third Perſon not *particeps criminis.*

The Defendant pleads, that he is not indebted for the ſaid Sum.

Upon a Trial by a Jury of *Middleſex*, they find ſpecially to the Effect following, *viz.* That on the 24th of *Sept.* 1724. the Defendant imported into the Port of *London* 28333 Pounds Weight of *Virginia* Tobacco, and paid Cuſtom for the ſame, *viz.* 88 *l.* 10 *s.* 9 *d.* ½ for the old Subſidy, and gave Security by Bond to pay 535 *l.* 3 *s.* 6 *d.* ½ for the additional Duties due to his late Majeſty on Importation of the ſaid Tobacco. That in *May* 1725. the Defendant ſold the ſaid Tobacco to *Richard Corbet* for Exportation to *Cadiz* in *Spain*, and ſhipped off the ſame in the Port of *London* in the Ship called the *Francis* and *Mary*, *Iſaac Cocart*, Maſter for *Cadiz*. That on the 14th of *July* 1725. *Richard Corbet* made Oath before the proper Officer, that he had the Direction of the ſaid Voyage, and that all the ſaid Tobacco ſo ſhipped was exported really and truly for Parts beyond the Seas, on Commiſſion, and that none of the ſaid Tobacco had been ſince landed, or was intended to be relanded in *Great Britain* or *Ireland*.

That *John Walkley* the Defendant's Servant made the uſual Oath, that the Duty of the ſaid Tobacco was paid or ſecured, and that the Defendant had ſold it for Exportation. That 5 *June* 1725. a Declaration of the Contents of the Loading of the ſaid Ship was made in theſe Words. *A Content in the* Francis *and* Mary, Iſaac Cocart, *for* Cadiz, 40 *Ton*, 5 *Men*, 4 *Guns*, 1, 38. Micha. Perry, *&c.* That the ſame Day *Iſaac Cochart* made Oath under the ſaid Content before the proper Officer, that the ſaid Content did contain a juſt and true Account of all the Goods, *&c.* on board his Ship for the preſent Voyage, and he would take no more Goods on board without firſt paying Cuſtom, and having a Warrant from the King's Officers; and if he ſhould take on board any Certificate Goods, or Goods that receive a Drawback, Bounty or *Præmium* on Exportation, he would not reland them, or ſuffer them to be unſhipped in order to be relanded, without Preſence of the King's Officers.

That the ſaid Tobacco being ſo put on board the Ship, and certified by the proper Officers of the Cuſtoms, two Debentures

bentures were made out; one for the Drawback of 88 *l.* 10 *s.* 9 *d.* ½; the other for the Drawback or Diſcharge of the 535 *l.* 3 *s.* 6 *d.* ½ ſecured by the Defendant, upon which the Defendant the 13th of *Auguſt* 1725, received back the 88 *l.* 10 *s.* 9 *d.* ½; and on the 17th of *Auguſt* 1725 had his Bond for the 535 *l.* 3 *s.* 6 *d.* ½ delivered up to him.

That this Tobacco after it was put on board was landed in *Ireland* 28 *July* 1725, but without the Defendant's Privity, nor had he the Property in it from the Time it was put on board, nor the Direction of the Voyage, but was ſold by Defendant for 1269 *l.* 11 *s.* 2 *d.* for Exportation to the ſaid *Richard Corbet*, whereof 645 *l.* 16 *s.* 10 *d.* ½ was paid in Money, and the Debentures were taken for the Remainder of the Price, and if by any Accident the Debentures became void, the ſaid *Richard Corbet* was to anſwer the Amount in Money to the Defendant.

That *Richard Corbet* hath been abſent five Years, but the King's Officers had no Notice of the Tobacco's being landed in *Ireland* till *June* 1733. *Et ſi ſupra totam, &c.*

It was argued by the Solicitor General, that the Money the Defendant received by the Debentures for the Drawback, was Money originally due to the King, and nothing had been done which ſhould deveſt the King's Right to it, and conſequently the Defendant receiving the King's Money muſt be indebted to him.

By the Statute 12 *Car.* 2. 4. and the Statute which gives the additional Duties, the Monies given are due to the King, and though by the Book of Rates a Drawback is allowed on Exportation, that muſt be a real Exportation, for by Statute 13 & 14 *Car.* 2. 11. *S.* 12. 3. if Goods ſhipp'd out by Certificate, be relanded, *&c.* no Allowance ſhall be demanded or made for thoſe Goods. And by Statute 4 & 5 *W.* & *M.* 15. *S.* 13. no Perſon ſhall be allowed to ſwear to a Debenture for any Duties to be drawn back upon Re-exportation, but he who is the true Exporter as being intereſted in the Propriety and Hazard of the Goods, or as being employed by

by Commiſſion, is concerned in the Direction of the Voyage, ſo as to be able to judge that the Goods are really *& bona fide* exported and not landed or intended to be relanded, *&c.* And the Debenture for the Duties on Tobacco by Stat. 7 *&* 8 *W.* 3. 10. *S.* 5. is to be in Parchment, and the Duty printed on it *in hæc verba*, and ſigned and ſworn by the Exporter. By Stat. 7 *Annæ*, 13. *S.* 16. reciting, That by Law every Perſon importing Tobacco or other Foreign Goods is intitled to a Drawback of the Duties paid or ſecured, *&c.* If Tobacco, *&c.* for which Drawback or Debenture for it is to be made, be relanded, Exporter forfeits double Value of Drawback, *&c.* By Stat. 6 *Geo.* 21. *S.* 49. if any Tobacco exported be landed in *Ireland*, the ſame and double the Drawback of it ſhall be forfeited, and every Debenture for the Drawback ſhall become void, as if the Tobacco were relanded in *Great Britain.*

Since therefore the Defendant received from the King's Officers the Sum of 88 *l.* 10 *s.* 9 *d.* ½ and his Bond for 535 *l.* 13 *s.* 6 *d.* ½ under Colour of two Debentures, which were in themſelves void by reaſon of the Landing the Tobacco in *Ireland*, before the Receipt of the Money (for the Verdict finds the Tobacco was landed in *Ireland* 28 *July* 1725. and the 88 *l.* 10 *s.* 9 *d.* ½ received back 13 *Auguſt*, and the Bond delivered up on the 17th of *Auguſt* following) this is Money received from the King's Officers without any proper Authority, and conſequently is Money received to the King's Uſe, and the Defendant is chargeable for it on that Account.

It was inſiſted on the other Side by Mr. *Strange*, and after argued by Mr. Attorney General for the Crown, and Mr. *Bootle* for the Defendant, in *Mich.* Term enſuing; and by Mr. *Bootle* it was alſo inſiſted, firſt, That this was a Caſe of great Hardſhip on the Defendant, who was an innocent Perſon, guilty of no Fraud; for the Jury find he had ſold his Goods for Exportation, and all was done the Law requires ſhould be done to ſecure againſt the Tobacco being relanded; they were entered with the Cuſtom-houſe Officers for *Cadiz* in *Spain*; they were ſhipped for *Cadiz*; the Declaration of the Contents of the Loading for *Cadiz*; *Corbet* made Oath he

had the Direction of the Voyage, that the Tobacco was really and *bonâ fide* exported for Parts beyond the Sea, and the Defendant's Servant made Oath they were ſold for Exportation; and the Jury expreſly find that the landing in *Ireland* was without the Defendant's Privity; and if after all this the Defendant ſhall be anſwerable for the Default of the Buyer, no Merchant can be ſafe.

That the Caſe was harder ſtill in the Information againſt the Defendant and others as Executors, for as *nullum tempus occurrit regi*, the Executor may be charged after all Aſſets diſpoſed, and yet the King ought to be preferred.

2. It was argued that the Exporter is the Perſon only liable, and *Corbet* was the Exporter. By Stat. 4 & 5 *W.* & *M.* 15. *S.* 13. it appears who is the Exporter, he that is intereſted in the Propriety and Hazard of the Goods, or he who being employed to act by Commiſſion is concerned in the Direction of the Voyage, and no other is to take the Oath which intitles to the Drawback; now the Jury finds *Corbet* had the Property of the Goods, and not the Defendant; that *Corbet* took the Oath, and as he only entitled himſelf to the Drawback he only is anſwerable for it. If the Goods be afterwards relanded, he forfeits the double Value. By Stat. 7 *Ann.* 13. *S.* 16. and by Stat. 6 *Geo.* 21. *S.* 49. But as the Defendant is found not to have the Property of the Goods, not to be concerned in the Voyage, and conſequently could not run any hazard in it, as he did not take the Oath, and was not intitled to the Drawback, he ought not to ſuffer by any Default of *Corbet* who was the Owner.

3. That the Defendant in this Caſe did not receive the Money to the Uſe of the King, but to the Uſe of *Corbet*, and as Servant or Agent to him; the Verdict finds it was received for the Satisfaction of *Corbet*'s Debt, and then it muſt be to his Uſe; ſuppoſe *Corbet* had received the Money himſelf, and paid it to the Defendant, and after relanded the Tobacco, ſhould the Defendant have been charged? Why then, when he takes the Debenture and receives it to pay himſelf? In the Caſe of *Tomkins* and *Barret*, *Salk.* 22, where three were bound

in a Bond upon an uſurious Contract, and one paid Part of the Money, and after the Obligee ſues another Obligor who pleads the Statute of Uſury, whereby the Plaintiff was barred and the Bond avoided, now the Obligor who had paid Part of the Money on this Bond brings *Aſſumpſit* for it as for Money received to his Uſe; but it was held by Chief Juſtice *Treby* that it did not lie. In the Caſe of *Cary* and *Webſter*, *Mich.* 8 *Geo.* *Cary Anno* 1720 paid 500*l.* to *Webſter* then a Clerk to the *South-Sea* Company, which was paid over to the Company in Reality, though omitted to be entered as paid; it was held by Chief Juſtice *Pratt* at *Niſi prius*, that the Money being received by the Defendant as Servant to the Company and paid over, the Company only was chargeable for the Receipt of the Money, and not the Defendant; but if he had not paid it over, then indeed the Plaintiff might have ſued him, or the Company, at his Election.

To which Mr. *Bootle* added, that all Actions of this Nature muſt ariſe *ex contractu* or *ex quaſi contractu*, and in both Caſes Privity was neceſſary; but here is no Privity between the King and Defendant, the Dealing was with *Corbet*, he was intitled to the Drawback and had the Debenture for it, and conſequently muſt be reſponſible for it to the King; the King cannot follow his Debtor to the ſecond or third Degree; as this would be inconvenient, ſuch Meaſures ſhould be taken as may avoid it, as may encourage Commerce, which will be impracticable if the Vendor ſhall be anſwerable for the Default of the Buyer.

Mr. Solicitor General in Reply, and Mr. Attorney General more largely in his Argument to Mr. *Bootle*, inſiſted, that they did not charge the Defendant in this Caſe with any Fraud in Relanding the Tobacco, or Obtaining the Debentures, or Repayment of the Money or Bond, ſince by this Information the Defendant is not charged for any Forfeiture, nor yet for any Fraud, or for any Duties due from him to the Crown, but merely for the King's Money by him received, in the ſame Manner as any other Perſon might be charged who ſhould receive the Money of the King or any Subject; and therefore he would admit, what had been ſo much in-

ſiſted on, that the Defendant was an innocent Perſon, that he was not the Exporter, that he received the Money towards the Satisfaction of his Debt from *Corbet*, and that it was an hard Caſe *Corbet* ſhould defeat the Debenture given him in Payment.

But it muſt be admitted, for it is expreſly found, that the Defendant received the Money from the Officers of the Crown, and that he received it by Colour of thoſe Debentures the 13 & 17 *Aug.* whereas the Tobacco, for the Drawback of which theſe Debentures were given, was landed in *Ireland* on the 28th Day of *July* before.

Now the Drawback to be allowed by the Book of Rates, which is confirmed by Statute 12 *Car.* 2. is upon Exportation, if exported by a foreign Merchant in twelve Months, by an home Merchant in eighteen Months; and by ſubſequent Acts the Time has been extended to three Years; ſo then if the Goods be not exported, no Drawback is to be paid; and if any Debenture be given for it, it is null and void. But this appears more expreſly by Statute 13 & 14 *Car.* 2. 11. *S.* 12. where it is ſaid, that if Goods ſhipped out on which the Drawback was allowable be relanded, no Allowance ſhall be demanded or made, ſurely the Debenture muſt be void, if nothing can be demanded or paid upon it. So by Statute 6 *Geo.* 21. *S.* 49. which more directly relates to the preſent Caſe, it is ſaid, if Tobacco to be exported be landed in *Ireland*, the Debenture for the Drawback ſhall be void.

It was ſaid by one of the Defendant's Counſel, that the Act did not make it abſolutely void, but ſaith, it ſhall become void as if relanded in *Great Britain*. But can it be imagined theſe Words import, it ſhall not be void, that the Penalty for landing in *Ireland* ſhould make the Debenture for the Drawback good, for ſo it muſt be if it is not become void? This would be a ſtrange Conſtruction, but ſurely no Words can more plainly denote, that the Debenture for the Drawback before was void, if the Goods ſhipped for Exportation were relanded in *Great Britain*, and ſo it ſhall be for the future, if they be landed in *Ireland*.

Now

Now this being the Caſe, that the Debenture was void by landing in *Ireland*, the Defendant could not be intitled to receive any Money upon it; and he that receives the Money of the Crown, without any Title to it, ought to pay it back again. Nothing can be a plainer and more evident Poſition than this, that if a Perſon demands Money from an Officer of the Crown, who pays it, upon Suppoſition it was due, but it after appears not to be due to him, it is Money received to the Uſe of the King, and ought to be reſtored.

And this is not a Demand the King makes by Virtue of any particular Prerogative peculiar to the Crown, but the Caſe would be the ſame in Regard to any common Perſon; ſo that this Information is not otherwiſe to be conſidered than as an Action on the Caſe by a Subject, who, in Caſe any one ſhall demand or receive Money from him without any Title or Authority for doing ſo, ſhall recover it back in ſuch an Action as Money received to his Uſe. The Caſe cited *Sal.* 22. may be good Law, (although it was only by a Judge at *Niſi prius*, where Matters may not be maturely conſidered) becauſe when a Perſon is Party to an uſurious Contract, and hath actually executed the Contract he made, it may not be reaſonable to allow him to unravel his own Act, after he hath freely carried it into a compleat Execution. But in the ſame Caſe it is agreed, that where a Man pays Money on a miſtaken Account, or under or by a mere Deceit, he may recover his Money back again. So a Caſe is there cited, that where one bound in a Policy of Aſſurance paid his Money, believing the Ship was loſt, when it was not, it was held, an *Aſſumpſit* lay to recover it back. The Caſe of *Jacob* and *Allen*, *Salk.* 27. is much ſtronger; there *H.* having Letters of Adminiſtration to one, who was ſuppoſed to die Inteſtate, makes a Letter of Attorney to the Defendant to get in Debts due to the Inteſtate, who collects ſeveral Sums, and pays them to the Adminiſtrator; after a Will was diſcovered, the Adminiſtration recalled, and an *Aſſumpſit* brought by the Executor againſt the Defendant for Monies received to his Uſe; and held the Action lay, for the Adminiſtration was void, and ſo the Defendant acted without Authority; and then there

was nothing to hinder the Raiſing an implied Contract, and the Charging the Defendant in an *Indebitatus aſſumpſit*; altho' it was urged, that the Money being received by a ſpecial Authority, and for a particular Purpoſe, and after paid over to the Adminiſtrator, the Action ought to have been brought againſt the Adminiſtrator, and not againſt the Defendant, who acted as his Servant, and had paid the Money to him; at leaſt a ſpecial Action on the Caſe ſhould have been brought, and not an *Indebitatus aſſumpſit*; and the Caſe *Carey* and *Webſter* is not like this, for there the Plaintiff paid his own Money to the Servant for his Maſter, and he paid it over accordingly.

But it is objected, the Drawback was paid to the Defendant as *Corbet*'s Agent, and for his Uſe.

But how could he receive that for the Uſe of *Corbet* which was the Price of his own Tobacco, and received for his own Uſe?

It is likewiſe ſaid, *Corbet* is liable to this Demand. It is true, he is liable for the Forfeiture for the double Value for the Fraud; but how is he liable for this Money he did not receive, which the Defendant received for himſelf, and not for him? Beſides, if *Corbet* were liable, may not a Perſon that hath two Remedies take either? Or if he hath Remedy againſt ſeveral, may he not come againſt which he pleaſes?

As for the Inconveniences alledged, though they are no greater than in the Caſe of any Subject, yet in Caſe the Law be againſt the Defendant, they may be Arguments for an Alteration to the Legiſlature, but this Court muſt determine according to what the Law now is.

After Mr. Attorney General had finiſhed his Reply, Mr. Alderman *Perry* the Defendant deſired he might ſpeak for himſelf, which was allowed; and he repreſented the Hardſhip of the Caſe againſt him, the Fairneſs of his Dealing, the Danger of his Ruin, if after ſo many Years Acquieſcence he ſhould be called to an Account for all Monies received by him and his Father on Debentures, in caſe it ſhould be diſ-

covered that theſe Debentures were void. But not deſiring any further Argument, but referring himſelf to the Judgment of the Court, the Court took Time to conſider the Matter till next Term.

And on full Conſideration of the Caſe, *Reynolds* Ch. Bar. *Carter* and *Forteſcue* Barons, againſt *Thomſon* Baron, were of Opinion, firſt, That the Debenture for the Drawback given by *Corbet* to the Defendant, by landing the Tobacco in *Ireland*, became void; for no Drawback ought to be made unleſs the Goods be exported; the Words of the Statute 13 & 14 *Car.* 2. 11. are expreſs, *No Allowance ſhall be made or demanded if the Goods be relanded*, &c. And ſo by Statute 6 *Geo.* 21. if landed in *Ireland* the Debenture for the Drawback ſhall be void.

2. That the Payment of the Money to the Defendant by the King's Officers upon this void Debenture renders the Defendant anſwerable to the King for the Money by him received; for whoever receives the King's Money, without Warrant or lawful Authority, is accountable to the King for it. This is expreſly reſolved by two Chief Juſtices and Chief Baron, 11 *Co.* 90. the Earl of *Devonſhire*'s Caſe, who was Maſter of the Ordnance, and by Privy Seal 2 *Jac.* reciting that Munition utterly decayed and unſerviceable had been claimed as Fees and Vails to the Maſter of the Ordinance, by Reaſon of his ſaid Office belonging; and giving him Authority to diſpoſe ſuch of them as were ſet down in a Book, &c. he had diſpoſed of ſeveral Pieces of Iron Ordinance, Shot and Munition in the ſaid Book ſet down; for thoſe Things being received and diſpoſed by him by Colour of a Privy Seal, which was void, becauſe founded on a falſe Suggeſtion, (for it ſuggeſts theſe were Fees or Vails claimed as belonging to the ſaid Office, which muſt mean lawfully claimed and lawfully belonging, which was not true, for this was a new Office erected 35 *H.* 8.) the Earl was accountable for them as much as if he had taken them without any Privy Seal. So in Sir *Walter Mildmay*'s Caſe, cited 11 *Co.* 91. and reported *Cro. Eliz.* 545. *Mo.* 475. who being Chancellor of the Exchequer received 140 *l.* a Year for thirty Years together, by Warrant

from

from the Lord Treaſurrer, as an Augmentation of his Fees, ſince the Court of Wards was annexed to the Exchequer, whereby his Labour was much increaſed; but becauſe ſuch Warrant was void, it was reſolved he ſhould anſwer for the Monies he had received.

And this is not from any peculiar Prerogative the Crown hath above a Subject, for the Caſe would be the ſame with Regard to a common Perſon; whenever a Man receives Money belonging to another without any Reaſon, Authority or Conſideration, an Action lies againſt the Receiver as for Money received to the other's Uſe; and this, as well where the Money is received through Miſtake under Colour, and upon an Apprehenſion, though a miſtaken Apprehenſion of having a good Authority to receive it, as where it is received by Impoſition, Fraud or Deceit in the Receiver (for there is always an Impoſition and Deceit upon him that pays, where it is paid) by Colour of a void Warrant or Authority, although the Receiver be innocent of it.

Caſes might be cited to warrant every Part of this Rule; but as the Defendant appears to be an innocent Perſon, wholly ignorant of the Fraud of *Corbet* in landing the Tobacco in *Ireland*, and one who thought he had a good Debenture, and was lawfully intitled to receive the Drawback; it is neceſſary to inſtance only Caſes where the Party receiving thought at the Time of his Receipt that he had a good Authority to do ſo, but after diſcovers he had not; as where a Man having a Grant of an Office or Conveyance of Lands, and thinking himſelf well intitled receives the Rents and Profits, it is well known that if it after appear the Grant or Title is not good, the Receiver is chargeable by the rightful Officer or Owner of the Land for ſo much Money received to his Uſe. 2 *Mod.* 260, 263. 2 *Jon.* 127. 2 *Lev.* 245. 3 *Lev.* 262.

The Caſes cited by Mr. Attorney General are ſtrong to the ſame Purpoſe. A Man inſuring the Ship, on Rumour that the Ship is loſt pays the Inſurance, it after appears the Ship is not loſt, the inſured ſhall pay back the Money. *Salk.*

22.

22. And *Jacob* and *Allen*, *Salk.* 27. 2 *Ann.* By *Trevor* Chief Juſtice, if Adminiſtrator authoriſes *A.* to collect Debts and Effects of his Inteſtate, which he receives and pays over, and then a Will is diſcovered, the rightful Executor may bring *Aſſumpſit* againſt *A.* for what he has received, as Money received to his Uſe: It was there inſiſted, that *A.* was only Agent for the Adminiſtrator, received the Money for his Uſe, and had paid it to him; yet held, that the Adminiſtration being void, the Adminiſtrator could give no Authority, and conſequently *A.* received without Authority, and then nothing hinders the Raiſing an implied Contract, and Charging the Defendant in an *Indebitatus aſſumpſit.*

So in the Caſe of *Martin* and *Sitwell*, 1 *Show.* 156. where *Barkedale* had made a Policy of Inſurance for 5 *l. Præmio* in the Plaintiff's Name, and paid the Money to the Defendant, and it after appeared the Defendant had no Goods on board, upon which *Martin* brought *Aſſumpſit* for the 5 *l. Præmio*; and it was inſiſted, this was Money received from *B.* and to his Uſe; but as *Martin* was Truſtee for *B.* the Payment by *B.* muſt be taken as Agent for him; whereby it is plain, that there is no Force in that Objection, that the Defendant acted as Agent for *Corbet*, and received the Drawback by his Authority, and for his Uſe.

But it is further objected, that *Corbet* being the Perſon who committed the Fraud, who was the Exporter, and intitled to the Drawback, the Crown ought to purſue their Remedy againſt him, and not againſt the Defendant, who was innocent, and took this Money only in his own Behalf, and for Satisfaction of a Debt owing to him from *Corbet.*

It is ſure, for any Penalty forfeited by the Landing in *Ireland*, *Corbet*, and not the Defendant, ought to be proſecuted; but when *Corbet* obtains a Debenture, which he himſelf makes void and ineffectual, and delivers this Debenture as Payment for the Tobacco he bought of the Defendant, what need is there to reſort farther than to him who had the Money from the Crown? *Haſſer* and *Wallis*, *H.* 6 *Ann. King's Bench*, *Salk.* 28. A Man marries a Woman ſeiſed of Lands, and takes the

Rents and Profits, but after it appears he had a former Wife then living; upon which ſhe brings *Aſſumpſit* againſt the Huſband for Money received to her Uſe; and though objected, that the Payment to him, who had no Authority to take the Rents, was abſolutely void, and ſo the Tenants might be ſued, for the Money ſtill lay in their Hands, and they might ſue *Wallis*; yet the Court held the Action was maintainable againſt *Wallis* who received the Rents, and Recovery againſt him would be a Diſcharge to the Tenants.

As to the Caſe of *Tomkins* and *Barnet*, *Salk.* 22. upon an uſurious Contract, the Caſe appears to be good Law; the ſame Caſe is *Skin.* 411. But there is a Miſtake in one of the Reports, for *Salk.* ſaith it was in the Common Pleas, and came to Trial before Chief Juſtice *Treby*; *Skinner*, That it was in the King's Bench, and came to Trial before Chief Juſtice *Holt*; unleſs it can be ſuppoſed, that the ſame Caſe, which in both Reports is ſaid to be *H.* 5 *W.* & *M.* ſhould after Nonſuit in one Court, be brought on to Trial in the other Court; for this is an Exception to the general Rule, that where a Man receives Money for an unlawful Purpoſe, or upon an illegal Contract, he who is Party to the unlawful Act ſhall not exempt himſelf, and defeat what himſelf hath done, by falling on his Accomplice, who is not more criminal than himſelf; as in the Caſe there put, if a Man gives Money to *A.* to bribe the Cuſtom-Officers, who pays it accordingly, he ſhall not afterwards charge *A.* for this Money as received to his Uſe.

So if a Man gives Bond upon an uſurious Contract, and pay Part of the Money, and after an Action is brought on the Bond, to which the Statute is pleaded, and the Bond thereby avoided, he who paid Part ſhall not maintain an Action againſt the Receiver, as for ſo much received to his Uſe, for he was Party to this uſurious Agreement; and though an Act of Parliament makes the Bond void, yet it is only to him who claims the Benefit of the Statute and pleads it; for if he plead *Non eſt factum*, or *Solvit ad diem*, the Plaintiff will recover; if then he pay the Money, he waives the Ad-

vantage of the Statute; and a Party equally faulty, who pays his Money purſuant to a faulty Agreement, ought not to have it back again; ſo that the Reaſons given by *Treby*, that the Plaintiff in ſuch Caſe is *particeps criminis, & volenti non fit injuria*, ſeem not altogether ſo improper.

The Objection made, that in this Caſe no Privity was between the King and Defendant, was likewiſe made in the Earl of *Devonſhire*'s Caſe, 11 *Co.* 90. and in Sir *Walter Mildmay*'s Caſe there cited; but it was there anſwered, that in the Caſe of the Crown the Law will raiſe and create a Privity ſo as to render him accountable who receives any of the King's Money.

And in Caſe the Defendant be chargeable, the Executors will be ſo likewiſe, they were reſolved ſo to be in both theſe Caſes.

All the Barons agreed that the Delivering up the Bond could not be conſidered as Money received to the King's Uſe; and therefore it was adjudged by the Court, that his Majeſty do recover againſt the ſaid *Micajah Perry* the Sum of 88 *l.* 10 *s.* 9 *d.* ½ being ſo much by him unjuſtly received in Money of the Officers of the Cuſtoms for the Duty inwards, called the Old Subſidy; but as the Reſidue of the ſaid 623 *l.* 14 *s.* 3 *d.* ½ in the ſaid Information mentioned, that the ſaid *Micajah Perry* do go without a Day as to ſuch Reſidue, ſaving his Majeſty's Right, if he ſhall think fit hereafter to proſecute him for it.

Caſe 212. *Bayley* and *Warburton and others.* In Scacc'.

Whether a Leaſe for Years by Tenant for Life, in Purſuance of a particular Power, ſhall be good againſt him who claims in Remainder.

EJectment on Demiſe of *John Crew*; on Not guilty at Aſſiſes at *Cheſter* 24 *Sept.* 5 *Geo.* 2. before Chief Juſtice of *Cheſter*, a ſpecial Verdict was found, that the Grandfather of the Leſſor being ſeiſed in Fee, on his Marriage with *Lucy*

Birom his ſecond Wife, by Leaſe and Releaſe 23d and 24th of *Feb.* 35 *Car.* 2. ſettled the Lands in Queſtion *inter al'* to the Uſe of himſelf for Life, then to *Lucy* his Wife for Life, then to the Iſſues of that Marriage; then to the Uſe of *Anne* the Wife of *John Offley*, who was his eldeſt Daughter by his former Wife, and the Heirs of her Body, and for want of ſuch Iſſue, to the Uſe of *Elizabeth* his youngeſt Daughter by his firſt Marriage, and her Heirs, with a Power to himſelf to make Leaſes.

Provided alſo that it may be lawful for the ſaid *Lucy*, during her Life, to demiſe the Premiſſes to any Perſon for ſuch Term, with and under ſuch Conditions, Rents and Reſervations, in ſuch Manner to all Intents as Tenants in Tail may do by Statute 32 *H.* 8. for the Term of one, two or three Lives, upon and under ſuch Reſervations and Rents, and in ſuch Manner as Tenant in Tail is enabled to do by that Statute.

That *John Crew* died leaving no Iſſue by *Lucy*, and no Children by former Wife but *Anne* the Wife of *Offley* and *Elizabeth*; upon which *Lucy* entered and was ſeiſed for Life; Remainder to *Anne Offley* in Tail who died 11 *May* 1711, (her Huſband being before Dead) leaving Iſſue *John Crew* the Leſſor of Plaintiff (whoſe Name was changed by Act of Parliament from *Offley* to *Crew*) her Son and Heir.

That *Lucy* married *Edward Turner*, and after his Death *William Frowd*, and that by Indenture 2 *June* 1713 the ſaid *William* and *Lucy* being of full Age demiſed the Premiſſes to *John Ryland*, one of the Defendants, in Conſideration of 26 *l.* and Surrender of former Leaſe from *Edward Turner* and *Lucy*, on which were two Lives ſubſiſting, To hold to *John Ryland* and his Heirs from the making hereof, during the Lives of his Sons *Richard* and *Iſaac*, and *Mary Norbury* Widow, yielding 1 *l.* 4 *s.* 8 *d.* yearly, during the Term, an Heriot, the beſt Good of every Perſon who (poſſeſſed by Force of Demiſe) dies ſeiſed, all ſuch Boons, Duties, Services, Averages and Cuſtoms as have antiently been paid, doing Suit twice

twice a Year on lawful Summons, with Clauſe of Re-entry for Non-payment.

That at the Time of this Demiſe the Premiſſes let were not in the Hand of any Farmer, and were before moſt commonly let for 21 Years; that the Rent was the uſual Rent, and the Demiſe was made with all the Requiſites neceſſary to be obſerved by Tenants in Tail in making Leaſes, and according to the Form of the Statute 32 *H.* 8.

That Leſſee entered, after which *Lucy* died *Feb.* 20. 1724, upon which the Leſſor entered as in Remainder, and made the Leaſe in Declaration 10 *May* 1726.

On this ſpecial Verdict the Queſtion was, Whether this Leaſe to the Defendant was good againſt the Leſſor of the Plaintiff, who claimed in Remainder? And it was inſiſted upon it was not; firſt, becauſe the Leaſe was made by *Lucy* and her Huſband, whereas the Power was given to her alone, and ſo the Power was ſuſpended by her Marriage. *Sed non allocatur*; for a Power given to a ſingle Woman, if ſhe marry, may be executed by her Huſband and her; Reſolved on a ſpecial Verdict between *Harris* and *Graham*, *Mich.* 11 *Car.* King's Bench, 1 *Rol. Ab.* 329. *pl.* 12. where a Man deviſed to his Wife for Life, and by his Codicil gave her Power to Leaſe for ſix Years, ſhe married, and her Huſband and ſhe made Leaſe for ſix Years; and held good. So it was reſolved 1 *Sid.* 101. in Chancery, by *Bridgman* and *Hale* and Lord Chancellor, between Duke of *Bucks* and Lord *Antrim* and his Wife, who executed ſuch Leaſe, the Power being to the Wife alone; the ſame Caſe ſeems indeed reported *Cha. Ca.* 18. and there it is ſaid, that *Bridgman* held the Execution by Huſband and Wife ill, where an Intereſt paſſed; otherwiſe, where it was a nude Power; but *Hale* thought it might be fit to be argued, and the Chancellor concurring with *Bridgman*, the Bill was diſmiſſed. This Caſe is cited 3 *Salk.* 276. but there and in *Chan. Ca.* 18. the Power given to the Wife to Leaſe is ſaid to be (being ſole) and ſo recited *Equi. Ca.*

2. That the Leaſe by *Lucy* and her Huſband ought to have been by Fine, ſhe being Covert. *Sed non allocatur*; for the Eſtate of the Leſſee is not derived from the Leſſor's but ariſes out of the Eſtate of the Feoffees or Releaſees named in the original Settlement, and therefore nothing more is requiſite to the raiſing an Eſtate to the Leſſee, but what is required by the Deed which creates the Power, which is only an Indenture ſigned by the Party making the Leaſe, and made in ſuch Manner as the Statute 32 *H.* 8. requires in Leaſes by Tenant in Tail; and therefore it is held, that in Leaſes for Life made by Virtue of a Power no Livery is needful, and it hath been doubted whether Livery would not hurt; but *Hale* held it did not prejudice. 1 *Vent.* 281. And in the Caſe of *Harris* and *Graham* as above, no Fine appears.

3. That this Leaſe will not continue in force againſt the Leſſor of the Plaintiff who claims by Virtute of Remainder, for the Leaſe is to be made under ſuch Conditions, Rents and Reſervations, and in ſuch Manner and Form to all Intents and Purpoſes, as Tenant in Tail may lawfully and is enabled to do by Statute 32 *H.* 8. but Leaſe by Tenant in Tail is not good againſt him in Reverſion or Remainder. *Co. Lit.* 44. *a. b.* 8 *Co.* 34. *Cro. Eliz.* 602. *Noy* 6.

And the Chief Baron doubted hereof; but it was argued, that if ſuch Conſtruction be made, this Power of Leaſing is wholly inſignificant, for *Lucy* had but an Eſtate for Life, and therefore every Leaſe beyond it muſt have Continuance againſt the Perſon in Remainder, and a Leaſe determinable on her own Life ſhe might have made without the Power; beſides I took Notice that the Reaſons why Leaſe by Tenant in Tail ſtood not good againſt him in Remainder were becauſe the Leaſe is derived from the Eſtate-Tail, and it appears not that the Statute meant to make it good againſt any but his Iſſue, for the Statute mentions not the Donors. *Dyer* 48. in the Margin. But the Leaſe here is derived out of the Fee-ſimple veſted in the Releaſees and their Heirs, by him that had the Fee, and had Power to model the Uſes of it as he pleaſed, and ſince the Statute 27 *H.* 8. 10. executes the

Poſſeſſion to the Uſe in the ſame Manner and Plight, as it is limited, whence ſuch Power of making Leaſes, *&c.* annexed to the Eſtates for Life becomes effectual, there is no Reaſon why ſuch Leaſe made by Virtue of ſuch a Power, ſhould not ſtand good againſt thoſe who claim in Remainder under the ſame Settlement, and conſequently ſubject to the Power; nor do the Reſtrictions (annex'd to the Power, which require it ſhould be made under ſuch Conditions, Rents, *&c.* and in ſuch Manner as Tenant in Tail is enabled to make) neceſſarily import that it ſhould be ſuch in Point of Duration, but only that it ſhould be attended with ſuch Circumſtances as that Act requires in the Execution of Leaſes by Tenant in Tail.

Caſe 213.

Fox and *Bardwell and others*; *Et econtra* *Bardwell and others* and *Fox*. In Scacc'.

Unity of Poſſeſſion of a Manor and Rectory will not exempt the Demeſne Lands from the Payment of Tithes when they come to be ſevered.

BILL in Exchequer by *Fox* as Vicar of *Lakenham* in the County of *Norfolk*, for the Tithe of Hay and all Vicarial Tithes ariſing on Lands in Defendant's Poſſeſſion from 10 *Oct.* 1727 for the Year following.

And the Caſe upon the Depoſitions appeared to be this: In the Time of *William* 2. the Cathedral Church of *Norwich* is ſuppoſed to be built, and the Biſhop's See removed from *Thetford* thither.

In the Time of *H.* 1. *Herbert* Biſhop of *Norwich*, grants to the Prior and Convent of *Norwich*, *Ferias quas Rex Williel-mus Fratribus donavit in hebdomadâ pentecoſtis, &c. Lakenham cum omnibus rebus quæ ad eandem pertinent villam præter ter-ram Osberti Archidiaconi Ameringhale, medietatem ſilvæ de Thorp, &c.* But this ſeems rather a Confirmation of the Grant of *H.* 1.

Anno 1121, *Everard* Biſhop of *Norwich* confirms to them, *omnia quæ Prædeceſſores mei dederunt, &c. ſimiliter quicquid Herbert de Roſs habuit in Lakenham, &c.*

Anno 1146. *William* Biſhop of *Norwich* confirms to them *omnia quæ Herbertus epiſcopus Norvicenſis, aut Everardus epiſcopus Norvicenſis donavit, & quicquid Herbert de Roſs habuit in Lakenham.*

Anno 1200. *John de Grey* Biſhop of *Norwich* grants to the Prior and Convent *de Norwich eccleſiam de Lakenham cum omnibus ad eandem pertinentibus, &c. adminiſtrari per capellanos ſuos, ſalvo nobis & ſucceſſoribus noſtris jure pontificali & parochiali.*

16 *Hen.* 3. *Anno* 1232. An *Inſpeximus* and Confirmation of the Grants of King *William* 2. and *Hen.* 1. wherein they grant *manerium de Lakenham, Ameringhale, medietatem Silvæ de Thorp, &c.*

Anno 1273. Confirmation by *Pope Gregory* to the Monks of *Norwich* of a Grant of the Church of *Lakenham*, and by the Valuation of Eccleſiaſtical Benefices, 20 *Ed.* 1. & 26 *Hen.* 8. it appears, that the Cure was ſerved by the Monks, who received an annual Penſion.

By Charter 30 *H.* 8. the King *Cœnobium de Priore & Conventu Eccleſiæ Cathedralis Sanctæ Trinitatis Norvici tranſpoſuit & mutavit in Decan' & Capitulum Eccleſiæ Cathedralis Sanctæ Trinitatis Norw'.*

And incorporates the Dean and Chapter, and grants them all the Poſſeſſions of the Priory. *Vide* 3 *Co.* 73.

The Dean and Chapter having by this Grant the Manor of *Lakenham*, and likewiſe the Church of *Lakenham*, as being Part of the Poſſeſſion of the Prior and Convent, by Leaſe 2 *Jan.* 33 *Hen.* 8. 1541. demiſed to *Robert Flint* the Scite of the Manor of *Lakenham*, and all the Lands belonging, except the Mills and Woods, for — Years, and covenanted, that the Leſſee ſhall have the Tithes of his Cattle going on the ſaid Demeſnes, and that the Dean and Chapter will diſcharge him of all Tenths, *&c.*

1 *Mar.* 1 *Ed.* 6. By Indenture the Dean and Chapter, in Conſideration that *Robert Flint* had been at great Charge in Building and Repairing the Houſes, demiſed to him *Lakenham* Woods; and it is declared, that whereas he held the Manor of *Lakenham*, (that is to ſay, the Scite of the Manor and Demeſne Lands by the Leaſe 33 *H.* 8.) which it is ſaid hath been always freed from the Payment of Tithes predial and perſonal in the Hands of the Farmers; the Meaning was, that he ſhould hold the ſaid Manor of *Lakenham* diſcharged of all Manner of ſuch Tithes; and by the ſame Indenture the Dean and Chapter demiſed to him the Tithes of Hay and Corn growing on the ſaid Demeſnes for 99 Years.

3 *June* 1 *Ed.* 6. the Dean and Chapter ſurrendered their Poſſeſſions to the King, who by Letters Patent 9 *Nov.* 1 *Ed.* 6. grants to the Dean and Chapter *Omnia illa maneria noſtra de Hindlenoſton, &c.* 20 *maneria in com' Norf', acetiam omnes illas rectorias & eccleſias noſtras de Hindlenoſton, &c. Lakenham, &c.* 25 *rectorias in com' Norf', &c. Acetiam advocationes, donationes, jura patronatus vicariarum prædictarum eccleſiarum & earum cujuſlibet, necnon omnia & ſingula maneria, meſſuagia, &c. reddit', &c. glebas, decimas, oblationes, obventiones, penſiones, portiones, advocationes, jura patronatus, proficua & hæreditamenta noſtra quæcunque in villis, &c. de Hindlenoſton, Newton, &c. Lakenham, &c. in com' Norf', &c. dictæ eccleſiæ cathedralis dudum ſpectant'.*

Except' tamen, & nobis, hæredibus & ſucceſſoribus noſtris reſervat' maner' de Hemilby ac rectoriâ & advocatione vicariæ de Wykelwood in com' Norf', necnon omnibus & ſingulis meſſuagiis, terris, &c. decimis, redditibus & hæreditamentis in Hemingsby, Lakenham, &c. aut alibi dict' maner' de Hemilby, Lakenham, &c. ac rector' de Hemilby ſeu eorum alicui quoquomodo ſpectant', ac Except' omnibus terris, &c. decimis jacentibus in Eaton, ac aſſignat' maner' de Lakenham extra dict' maner' de Eaton ac extra dict' maner' de Ameringhale ac modo in tenur' Roberti Flint.

By Patent 1 *July* 7 *Ed.* 6. the King grants to *Tho. Greſham*, Eſq; *manerium de Lakenham, ac tot' rector' & eccleſiam de Lakenham ac advocationem & jus patronatus vicariæ eccleſiæ ibi, &c.*

ac omnia & ſingula meſſuagia, grangias, &c. glebas, &c. ac decimas garbar', blador', granor' fœni & cannabi, ac al' decimas quaſcunque in Weſtacre, Lakenham, &c. dict' maner' & eccleſiæ ſeu eorum alicui ſpectant', &c.

It does not appear any Vicar was inſtituted till the Year 1610. but that ſince then *Smith* and others have been inſtituted Vicars, and Sir *Nevil Catlin*, his Father and Grandfather held *Lakenham* Farm as Aſſignees of the Leaſe made to —; that *Tuck*, *Wright*, *Ward*, *Armiger*, *Menſer*, were Tenants under the *Catlins* of the ſaid Farm; that the common Reputation has been, that the Vicars of *Lakenham* have been intitled to all the Tithes of *Lakenham*, except the Tithes of Corn.

That Tithes have been paid by the Owners and Occupiers of this Farm to the Vicars, or a Compoſition for them, which was uſually 8 *l.* a Year; that *Richard Catlin*, Father of Sir *Nevil*, paid ſo in lieu of vicarial Tithes to *Smith* the Vicar; that *Tuck*'s Father held the Farm ſeveral Years, and paid ſo; that *Wright* for many Years did the ſame; that *Ward* refuſed to pay, on which *Smith*'s Widow ſued him in the Exchequer, and had a Decree 9 *W.* 3. to pay Tithes in Kind, and being informed *Richard Catlin* had paid 40 *s.* quarterly, on Recommendation of the Court the Plaintiff accepted 8 *l.* a Year, and *Ward* paid it for Time paſt, and all Time after he held the ſaid Farm.

That *Wright*, *Richard Catlin* and his Father paid ſo; that *Tuck* and his Father paid ſo; that *Armiger* and *Menſer* paid ſo ſix or ſeven Years; that his Father at firſt paid but 5 or 6 *l.* a Year for two or three Years, but hearing 8 *l.* yearly had been paid, agreed to pay ſo, but paid only 5 *l.* a Year to *Harwood*, who was an eaſy Man; and Payments by *Tuck*, *Wright* and *Ward* were confirmed; Books of *Richard Catlin* contain Entries of his Payment *Anno* 1632 and 1635.

And two Decrees for Payment 9 *W.* 3. & *Trin.* 8 *Geo.* 1. were read, the laſt of which was againſt *Bardwell*, now Defendant, and *Ward* his Tenant, and *Reb. Ward* his Wife ſaith, her Husband paid 20 *l.* for the Tithes of the Year 1720.

and 22 *l.* for Tithes of the Year 1721. and by Report in the laſt Cauſe 15 *April* 1725. Defendant was reported indebted 20 *l.* for Tithes of the Year ——; and decreed to pay that Sum and Coſts.

On the Defendants Part they produced, beſide the Charters and Grants above, a Leaſe 14 *Oct.* 34 *H.* 8. from Dean and Chapter of *Norwich* to *Lawrence Stiſted* for fifty Years, of the Tithes of all Corn belonging to the Parſonage there, except the Tithes of Corn, Hay, Tack and Hemp belonging to the Manor of *Lakenham*, wherein is recited a Leaſe from the Prior and Convent of *Norwich* for twenty Years to *Ro. Pictoe*, dated 10 *Nov.* 27 *H.* 8.

This Leaſe to *Stiſted* was aſſigned to *Tho. Pictoe*, and on his Surrender by Indenture 12 *Apr.* 1 *Eliz.* the Dean and Chapter demiſed to *Pictoe* the Tithes of Corn in *Lakenham* belonging to the Parſonage there, except as before, for eighty Years from *Mich.* laſt.

On Surrender of this Leaſe by Indenture 20 *Dec.* 8 *Eliz.* the Dean and Chapter demiſed the ſame to *Edmund Dean*, who was Aſſignee of —— *Scrivens*, Aſſignee of *Tho. Pictoe*, for ſeventy-three Years.

By Indenture 14 *Feb.* 12 *Eliz.* the Dean and Chapter on Surrender of laſt Leaſe demiſed to *Lane* for ſeventy Years.

It appears *Lakenham* Farm is Part of the Demeſnes of the Manor of *Lakenham*, and conſiſts of thirty Acres in *Lakenham*, twenty-eight Acres in *Ameringhale*, the Town Cloſe which lies in *Eaton*, and the reſt lies in *St. Stephen*'s Pariſh; and it was proved by ten Witneſſes, and ſeveral Depoſitions in the former Cauſes, that *Lakenham* Farm was reputed Tithe-free, and never any Tithes in Kind great or ſmall paid for it; and *Wright* and *Ward* ſaid, what they paid was only a free Gift.

On this Caſe it was inſiſted for the Defendants, that *Lakenham* Farm was exempt from Payment of Tithes by Sta-

tute 31 *H.* 8. or ſecondly, by Grant 7 *Ed.* 6. or at leaſt the Plaintiff cannot be intitled to recover any Tithes as having no Vicarage indowed.

1. It was argued, that the Manor of *Lakenham*, and likewiſe the Rectory, having been granted to the Prior and Convent of *Norwich*, there was a Unity of Poſſeſſion, which was a Foundation for an Exemption by Statute 31 *H.* 8. but this was not ſo much inſiſted on; for although it was agreed, that where a perpetual Unity continued to the Time of Diſſolution, by Force of the Statute 31 *H.* 8. it was a good Ground for Exemption of thoſe Lands from Tithes in the Hands of the Patentees; yet here was no Proof that the Priory of *Norwich* was one of the greater Houſes that came to the Crown 31 *H.* 8. and it is evident they were in the Crown before, and conſequently by Surrender, or by Statute 27 *H.* 8. for by Letters Patent 2 *May* 30 *H.* 8. the King changes the Prior and Convent of *Norwich* into a Dean and Chapter, and tranſfers to the Dean and Chapter of *Norwich* all the Poſſeſſions of the Priory.

Now no Lands belonging to religious Houſes that were diſſolved by 27 *H.* 8. were exempt from Tithes; and Unity of Poſſeſſion was not in itſelf any Diſcharge for the Tithes, being collateral to the Land, as ſoon as the Unity ceaſed, the Right to Tithes revived accordingly. It appears, that the Dean and Chapter of *Norwich* having the Poſſeſſions of the Priory, immediately made Leaſes of the Tithes. By Indenture 2 *Jan.* 33 *H.* 8. they demiſed the Manor of *Lakenham* to *Flint*, who in Conſequence was bound to pay Tithes to the Rector the Leſſor, and 14 *Oct.* 34 *H.* 8. they demiſed all the Tithes of Corn belonging to the Rectory to *Law. Stiſted* for fifty Years, to commence after a prior Leaſe of them by the Prior and Convent 10 *Nov.* 27 *H.* 8. to *Rob. Pictoe* for twenty Years; ſo it is plain they did not then look on the Tithes to be extinct, or the Manor of *Lakenham* to be exempt from the Payment of them.

It is true, in the Leaſe to *Flint* the Dean and Chapter covenant he ſhould not pay Tithes for his Cattle agiſted on the Demeſnes

Demeſnes of the Manor, which Covenant ſhews that without it Tithes might have been demanded for the Agiſtment of his Cattle. In the Leaſe to him 1 *Mar.* 1 *Ed.* 6. it is declared indeed, that the Manor of *Lakenham* had been always freed from Tithes predial and perſonal in the Hands of the Farmers, and on that Account it was explained he ſhould not be charged for any ſuch Tithes, and the predial Tithes of the Demeſnes are demiſed to him for 99 Years.

But though this be inſiſted on as an Argument that the Demeſnes were always diſcharged of Tithes, yet if a Conſtruction be made according to the Import of the Words, it ſeems rather to infer the contrary: It is very likely the Prior and Convent, when they leaſed out any Part of their Lands, leaſed them free from the Payment of Tithes, in order to gain the higher Rent, and therefore in the Leaſe of the Manor of *Lakenham*, or any Part of the Demeſnes, they exempted them from paying any Predial or Perſonal Tithes; but this was an Exemption that was not inherent in the Lands, but was the Effect of their Covenant to excuſe them; when therefore the Covenant in the Leaſe 33 *H.* 8. excuſed only the Tithes of the Cattle agiſted on the Demeſnes of the Manor, that was not equivalent to what the former Tenants were excuſed from, and therefore in the Leaſe 1 *Ed.* 6. it was declared the Meaning was to excuſe him from all Predial and Perſonal Tithes, but not from all Tithes whatſoever; and therefore the Predial Tithes only were demiſed to *Flint* for 99 Years, but all mixt Tithes, with which the Vicar is uſually endowed, were ſtill payable by him; the Covenant to diſcharge all Tithes, was meant only to exempt from the Tenths payable by Statute 26 *H.* 8. and not to excuſe from any other Tithes.

2. But the Thing mainly inſiſted on is, that by Letters Patent 7 *Ed.* 6. the King grants to *Thomas Greſham* the Manor of *Lakenham*, *ac totam rectoriam & eccleſiam de Lakenham, ac advocationem & jus patronatus vicariæ eccleſiæ ibidem, ac omnia meſſuagia, &c. glebas, decimas in Weſtacre, Lakenham, &c. dict' maner', eccleſiis ſeu eorum alicui ſpectan', &c.*

4

Whence

Whence it is inferred that the Plaintiff, collated to the Vicarage by the Dean and Chapter, can have no Right to the Tithes, at leaſt not the Tithes ariſing from the Manor of *Lakenham.*

And although it was anſwered, that by the Letters Patent 1 *Ed.* 6. the King had granted the Rectory of *Lakenham* and Advowſon of the Vicarage to the Dean and Chapter, and conſequently the ſubſequent Grant to *Thomas Greſham* is void; yet it was urged that in that Grant there is an Exception of all Tithes in *Lakenham* to the Manor of *Lakenham* belonging; as therefore the Demeſnes of *Lakenham* have always been reputed exempt from Tithes, and it came to the Crown Tithe-free, and thoſe Tithes by this Charter are granted to *Thomas Greſham,* the Plaintiff cannot be intitled to them.

But it is evident by what is before ſaid, that the Manor of *Lakenham,* and other Poſſeſſions of the Prior and Convent of *Norwich,* came not to the Crown by the Statute 31 *H.* 8. but were in the Crown before, either by Surrender of the Prior and Convent, or by the Statute 27 *H.* 8. and conſequently did not come to the Crown Tithe-free; but in Reality, altho' the Manor of *Lakenham* and the Rectory of *Lakenham* had been long united, upon the Severance of them the Right of Tithes revived; when therefore King *Ed.* 6. in the firſt Year of his Reign granted to the Dean and Chapter of *Norwich* the Rectory of *Lakenham,* all Tithes in the Pariſh of *Lakenham* became due to the Dean and Chapter, as well thoſe ariſing out of the Demeſnes of the Manor as elſewhere, and the Exemption doth not extend to any Tithes, Parcel of that Rectory; but firſt, the King having granted ſeveral Manors, Rectories and all other Hereditaments in *Lakenham* or elſewhere in the County of *Norfolk,* which heretofore belonged to the Cathedral Church of *Norwich,* he excepts out of this Grant the Manor of *Lakenham*; but this amounted not to an Exception of the Rectory (if it had been appendant to the Manor, as it was not) becauſe the Rectory was expreſly granted away before: Then he excepts all

Tithes to the Manors of *Hemilby*, *Lakenham* and Rectory of *Hemilby*, *aut eorum alicui ſpectan'* ; but this doth not except the Tithes of the Demeſnes of *Lakenham*, which were not belonging to the Manor but to the Rectory of *Lakenham*, for the Tithes are Collateral to the Land ; beſides it does not import any Tithes belonging to the Manor, for it comes in with general Words *belonging to the Manor or Rectory of* Hemilby *or any of them*, ſo that it excepts not any Tithes belonging to the Manor, unleſs it otherwiſe appear there were any ſuch : The next Branch of the Exception indeed ſeems to import that there were Tithes belonging to the Manor, ſince it excepts all Tithes in *Eaton*, aſſigned to the Manor of *Lakenham* out of the Manor of *Eaton* and out of the Manor of *Ameringhale* now in the Tenure of *Robert Flint* ; and it ſeems probable there might be ſome Portion of Tithes granted before the Council of *Lateran* out of *Eaton* and *Ameringhale* and annexed to the Manor of *Lakenham*, becauſe in the Leaſe to *Stiſted* 34 *H.* 8. of the Tithe Corn belonging to the Parſonage of *Lakenham*, there is an Exception of the Tithe of Corn, Hay, Tack and Hemp belonging to the Manor of *Lakenham*, which were probably excepted out of *Stiſted*'s Leaſe, becauſe they were before demiſed to *Flint* ; and perhaps by the Leaſes of the Site of the Manor of *Lakenham* 33 *H.* 8. and 1 *Ed.* 6. and the Demeſne Lands, they might be thought to be comprehended in the general Words, but whether they were in the Tenure of *Flint* by thoſe Leaſes or any other, the Exception of the Tithes lying in *Eaton*, *& aſſignat' & appunctuat' Manerio de Lakenham extra Maner' de Eaton & Maner' de Ameringhale*, cannot except the Tithes ariſing out of the Demeſnes of *Lakenham*, and belonging to the Rectory of *Lakenham*.

And if thoſe Tithes be not excepted out of the Grant 1 *Ed.* 6. they cannot paſs to *Thomas Greſham* by the Grant 7 *Ed.* 6. they cannot Paſs as Part of the Rectory, being granted 1 *Ed.* 6. to the Dean and Chapter, could not paſs by the Grant 7 *Ed.* 6. for the King was deceived, and his Grant to *Thomas Greſham* as to the Rectory of *Lakenham* and the Advowſon of the Vicarage, and the Tithes belonging to the Church of *Lakenham*, is void ; it may poſſibly ſtand good as

to any Tithes in *Eaton*, or aſſigned out of the Manors of *Eaton* or *Ameringhale* to that of *Lakenham*.

I need not cite Caſes to ſhew that an Exception doth not extend to exclude out of a Grant what is expreſly granted. 2 *Rol.* 454. *S.* 8. A Man ſeiſed of the Manors of *C.* and *D.* of which *Blackacre* is Part of the Manor of *C.* but lies near *D.* and is enjoyed with and reputed Parcel of *D.* he grants the Manor of *D.* and all Lands reputed Parcel of it, except the Manor of *C.* *Blackacre* is not excepted, being expreſly granted as Parcel of the Manor of *D.* under the Words *all Lands reputed Parcel of that Manor.*

Suppoſe King *Ed.* 6. had granted to *Thomas Greſham* the Manor of *Lakenham*, the Rectory of *W.* and all Lands, Tithes, *&c.* to the ſaid Manor and Church or either of them belonging, and after had granted the Rectory of *Lakenham*, *cum omnibus juribus, membris & pertin' dict' eccleſiæ Cath' dudum ſpectan'* ; I apprehend the Tithes of Demeſnes of the Manor belonging to the Rectory would not have paſſed to *Greſham* ; it would be like the Caſe *Mo.* 426. where the Abbot of *Abingdon* ſeiſed of the Hundred of *H.* and the Leet belonging, and other Lands which came to the Crown on the Diſſolution, the King grants to one *Lions* Part of thoſe Lands, and all Leets *infra præmiſſa*, and after grants the Hundred of *H.* and Leet belonging, to Lord *Norris*; it was held the Leet paſſed by the laſt, not by the firſt Grant.

Thirdly, But in the laſt Place it is ſaid that here was never any Vicarage endowed, for the Cure was ſupplied by the Monks who had a Salary allowed them, and conſequently the Plaintiff cannot recover, for the Vicar cannot be intitled to Tithes unleſs endowed of them, and the Endowment muſt be proved by an Endowment produced, or elſe by Preſcription; but here is not any Endowment produced, and can be no Preſcription, becauſe it was ſhewn when there was none, for no Pretence of any Vicar, or Tithes paid to him till the Year 1610.

But

But it was anſwered, it may be difficult always to ſhew the exact Time when a Vicarage firſt commenced, or when it was firſt endowed.

By the Conſtitution of *Ottoboni* 21 *Apr.* 52 *H.* 3. *Univerſi Religioſi, qui Eccleſias in proprios uſus habent, ſi Vicarii non ſunt poſiti in eiſdem infra ſex menſium ſpatium, Vicarios Diœceſani præſentare non omittant, quibus ſufficienter pro facultate eccleſiarum aſſignent portionem, alioquin Diœceſani id facere ſtudeant.*

Therefore though the Church of *Lakenham* was appropriate before the Statutes 15 *R.* 2. and 4 *H.* 4. 12. which require that on Appropriations Care be taken there ſhould be a Vicarage endowed, or otherwiſe the Appropriation ſhall be void; and it was inſiſted that thoſe Statutes extend only to the Time future, and conſequently on this Appropriation there might be no Endowment of a Vicar; and it is moſt probable it was not, becauſe the Monks ſupplied the Cure till the Diſſolution, and had no Tithes, but an Annual Penſion; yet it appears by this Conſtitution the Religious were obliged to create a Vicar and endow him, otherwiſe the Biſhop was required to do ſo; and this Conſtruction extends to all precedent Appropriations, and therefore the Preſumption is, that there was a Vicar endowed purſuant to this Conſtruction.

How the Cure came after to be ſupplied by their own Monks does not appear; perhaps thoſe Monks might be preſented and inſtituted, though they are called *Capellani*; or perhaps the Pope might by Bull allow the Prior to appoint one of his Monks to officiate and ſerve the Cure, as in the Caſe of *Briton* and *Wade*, 2 *Cro.* 515.

The Prior of *Deintree* had the Advowſon of *Norton* appropriate, and the Vicarage was endowed with the Altarage and ſmall Tithes, and ſo continued till the Reign of *H.* 6. when on Petition of the Prior to the Pope, in regard the Priory was poor, the Pope granted *quod de cætero* the Prior ſhould conſtitute one of his Monks to officiate in the Cure,

and ſo it continued to the Diſſolution; but held this did not diſſolve the Vicarage.

It is true, this was an Endowment after the Statute 4 *H.* 4. but though this was a Reaſon given, that the Pope could not diſſolve a Vicarage after that Statute,

Yet it was alſo reſolved, that it could not be done by the Pope, though the Ordinary might do it.

It is ſure the Vicarage of *Lakenham* is mentioned in the Patents 1 *Ed.* 6. and 7 *Ed.* 6. ſo that the Church was looked upon to have a Vicarage then.

And though it does not appear how the Endowment originally was, it is ſure they were oftentimes uncertain and variable.

At firſt the Endowment might be ſmall, and after inlarged. *Seld. of Tithes* 3 *Vol.* 1262. ſaith, ſpeaking of the firſt Appropriations,

Nor was there any perpetual Certainty of the Profits of their Preſentee (that is the Perſon, the appropriate Perſon preſented to any Vicarage) till the Monks by Compoſition with the Ordinary, or by their own Ordinance, (which Preſcription after confirmed) appointed ſome yearly Salary in Tithes or Glebe, or Rent, for the perpetual Maintenance of the Cure; which Salaries became afterwards the Endowments of perpetual Vicarages.

Crimes & al' v. *Smith*, 12 *Co.* 4. in the Exchequer. The Caſe was, The Abbot of *Salby* held the Parſonage of *Lubbenham* in the County of *Leiceſter* as appropriate, which came to the Crown by Stat. 31 *Hen.* 8. who in the thirty-ſeventh Year of his Reign granted it in Fee-Farm, under which the Plaintiff claimed; the Defendant got a Preſentation from Queen *Elizabeth* to this Church, and inſiſted, that the Impropriation was made 22 *Ed.* 4. and no Endowment of a Vicarage, and conſequently the Appropriation void; and there

was no Inſtrument or direct Proof of any Endowment. But ſince, during the Appropriation ſuppoſed, there had been a Vicar inducted, as a Vicar rightfully endowed, it was reſolved by the Court, that the Vicarage, in Reſpect of its Continuance, was rightfully endowed.

And the Court ſaid, it would be dangerous to examine into the Original of Impropriations of Parſonages and Endowments of Vicarages.

In the preſent Caſe there is a Proof of Payment of vicarial Tithes to the Vicar for near 100 Years, while *Richard Catlin*, *Tuck*, *Wright*, *Ward*, *Armiger*, *Menſer*, held this Farm, and a conſtant Reputation, that all Tithes but of Corn belonged to the Plaintiff; and two Decrees of this Court in his Favour, which raiſes a ſtrong Preſumption for him.

It is poſſible the Endowment at firſt was but ſmall; that ſome Penſion was paid to the Incumbent; that when the Dean and Chapter had the Parſonage, they might vary or augment the Endowment of the Vicarage in *Flint*'s Leaſe 33 *H.* 8. the Demiſe of Predial and Perſonal Tithes only, looks like a Reſervation of the reſt for the Vicar; and the Preſcription, which is Evidence of an Endowment, need not to be ſuch as admits no Proof when it was not paid; for the Endowment may be within Time of Memory; but a Preſcription allowed by the Canon Law of ſixty Years or thereabouts, a Time ſufficient to induce a Belief that there was ſome Foundation for the Payment, though it does not appear exactly when ſuch Payment began.

Beſides, there was on 6 *Nov.* 1735. to which the Debate of the Cauſe had been put over, further Evidence given of ſeveral Preſentations by the Dean and Chapter to the Vicarage, and the Vicars inſtituted thereon, ſome of which were ſaid to be in Purſuance of the Conſtitution of *Ottoboni*.

The firſt Inſtitution was 1312, which were followed by others 1327, 1359, 1361, 1375, 1386.

Anno 1569. there was a Sequeſtration granted of the Profits of the Vicarage by the Biſhop, in order to ſupply the Cure in the Vacancy, and *anno* 1610 there was a Preſentation again.

Beſides, there were produced Accounts of the Chamberlains or Treaſurers of the Priory in the Time of *R.* 2. and *H* 6. wherein he accounts for 5 *s. de terris pertinen' vicario de Lakenham*, 41 *l.* 4 *s.* ½ *de eccleſia de Lakenham*, 14 *l. de manerio cum decimis*, & 19 *R.* 2. *de manerio* 20 *l. de decimis* 4 *l.*

It was further proved, that the Reputation was, that the Vicar had Tithe-Hay as well as other vicarial Tithes, and that the Payment of the 8 *l.* yearly by *Catlin*, *Wright*, *&c.* was reckoned to be for the Tithe of Hay, Clover, Turnips, and all other ſmall Tithes, and that Tithe had been once paid in Kind to the Vicar.

It was further inſiſted, that the Vicarage or Rectory of *Lakenham* came not to the Crown either by the Statute 31 *H.* 8. or 27 *H.* 8. but the King 30 *H.* 8. tranſlated the Priory and Convent to a Dean and Chapter, and transferred the Poſſeſſions of the Priory to the Dean and Chapter; ſo that theſe Poſſeſſions not being ſurrendered to the Crown, nor veſted in the Crown by any Act of Parliament, there could not be any Exemption from Tithes; for Unity of Poſſeſſion cannot be an Exemption longer than the Unity continues, and it is only by Force of penning the Clauſe in Stat. 31 *H.* 8. that the Lands given to the Crown by that Statute are diſcharged, where there had been a perpetual Unity till the Diſſolution by that that Statute.

And the Court was of Opinion, that Unity of Poſſeſſion of the Manor and Rectory of *Lakenham* in the Hands of the Prior and Convent, and after of the Dean and Chapter of *Norwich* till 1 *Ed.* 6. did not exempt the Demeſnes of the Manor from Tithes when they came to be ſevered.

That

That by the Letters Patent 9 *Nov.* 1 *Ed.* 6. the Rectory was granted to the Dean and Chapter of *Norwich*, and conſequently the Grant of it by the Patent 7 *Ed.* 6. to *Thomas Greſham*, Eſq; was void; and although there was an Exception in the Grant 1 *Ed.* 6. of the Manor of *Lakenham*, Rectory of *Hemilby*, *&c.* and all Lands, Tithes, *&c.* to the ſaid Manors, Rectory, *aut eorum alicui quoquomodo ſpectan'*, that did not except any Tithes, Parcel of the Rectory of *Lakenham* which was before expreſly granted to the Dean and Chapter, much leſs the Tithes belonging to the Vicarage.

That the Reputation of Tithe Hay and all Vicarial Tithes belonging to the Vicar, and the Payment of them by the reſt of the Pariſh, and the Payment of the 8 *l.* yearly, or ſome other Sum, as a Compoſition for them by the Owners and Occupiers of *Lakenham* Farm above 100 Years, and the two former Decrees in Favour of the Vicar, was a ſufficient Evidence of ſome antient Endowment.

And the Court decreed the Defendant ſhould account with the Plaintiff for the Tithes demanded by the Bill, and that the Defendant's croſs Bill ſhould be diſmiſſed with Coſts, which upon an Appeal to the Houſe of Lords in *Mar.* 1735-6 was affirmed, with 200 *l.* Coſts.

DE
Termino Paſch.
9 Geo. 2. In C. B.

Roger Acherley ver. *Bowater Vernon.* Caſe 214.

IN Action of Debt for 5700 *l.* the Plaintiff declares, That whereas *Tho. Vernon*, Eſq; being ſeiſed in Fee, by Will 17 *June* 1711 deviſed to his Wife out of the Manor of *Shrawley*, and other Lands and Tenements in the County of *Worceſter*, an Annuity or Rent-Charge of 1000 *l.* a Year for her Life, clear of all Charges, except Parliamentary Taxes, in lieu of her Jointure.

The Non-Performance of a Condition, though ſubſequent, ſufficient to bar the Plaintiff's Title to whatever he claimed upon ſuch Condition.

And by the ſame Will deviſed to his Siſter *Eliz. Acherley* the Plaintiff's Wife 200 *l.* a Year out of Rents of his ſaid real Eſtate, to her own Hands for her ſeparate Uſe, excluſive of her preſent or any future Husband; and to be made up 400 *l.* a Year from his Wife's Deceaſe, during his Siſter's Life.

And after a Deviſe of other Eſtates to *William Vernon*, &c. he deviſed all the Reſidue of his real and perſonal Eſtate (his Debts, Legacies and Funeral Expences firſt paid) unto his Brother *Roger Acherly*, *Geo. Vernon*, *Geo. Wheeler*, *John Bearcroft* and *Richard Vernon*, their Heirs, Executors and Adminiſtrators, upon Truſt and Confidence, that after the Annuities and annual Rents before deviſed to his Wife and Siſter, &c. paid, the ſaid Truſtees ſhould inveſt the Reſidue of his perſonal Eſtate in the Purchaſe of Lands, &c. and ſhould ſtand

ſeiſed of all his real and perſonal Eſtate, during his Wife's Life, to the Uſes and Purpoſes in the ſaid Will; and after the Deceaſe of his Wife (in caſe he die without Iſſue then living) ſhould ſtand ſeiſed of all his Manors, Meſſuages, Lands, Tenements and Hereditaments, and Lands to be purchaſed with the Surplus of the perſonal Eſtate, and ſhould ſettle the ſame to the Uſe of *Bowater Vernon* for ninety-nine Years, if he ſo long live, with Remainders over, *&c.*

And directed, that his Truſtees during his Wife's Life ſhould pay the clear Surplus of the Profits of his real and perſonal Eſtate, after Payment of the ſaid Annuities, Debts, *&c.* to the ſaid *Bowater Vernon* for ſo long Time as he ſhould live, and after his Deceaſe, to his firſt and other Sons in Tail Male, *&c.*

And whereas by Codicil 2 *Feb.* 1720. *Thomas Vernon* the Teſtator having purchaſed other Lands, deviſed the ſame to his Truſtees and Executors, ſubject to the ſame Truſts or ſame Uſes to which he had deviſed the Bulk of his Eſtate, *&c.*

Then revoking that Part of the Will that appoints *Roger Acherley*, *George* and *Edward Vernon* three of his Truſtees, he deſires *Frances Keck* and *John Nichols* to be two of his Truſtees.

And whereas the Teſtator died 5 *Feb.* 1720. ſeiſed, *&c.* after whoſe Death *Roger Acherley* and *Elizabeth* his Wife were ſeiſed of the ſaid Rent deviſed to *Elizabeth* in Demeſne as of Freehold, in Right of the ſaid *Elizabeth*, by Virtue of the ſaid Deviſe. And *Bowater Vernon* entered into the ſaid Manor, *&c.* out of which, *&c.* and hath been ever ſince Tenant of the Demeſne thereof, and 1900 *l.* for nine Years and a Half, ended 5 *Feb.* 1731. in the Life of the ſaid *Elizabeth Acherley* and *Mary Vernon*, became due to the ſaid *Elizabeth* for the ſaid yearly Rent, and is yet unpaid.

And the ſaid *Elizabeth* died 3 *May* 1732. and *Mary Vernon* died 5 *July* 1733. whereby, and by Death of *Elizabeth*, and

by

by Force of Statute, Action accrues to the Plaintiff, her Husband, to demand the ſaid 1900 *l.* Part of the ſaid 5700 *l.*

In the ſecond Count Plaintiff declares, that whereas *Thomas Vernon* being ſeiſed in Fee of the Manor of *Shrawley*, *&c.* by Will 17 *Jan.* 1711 deviſed to *Elizabeth* Wife of Plaintiff 200 *l.* a Year to be iſſuing out of his Real Eſtate, *&c.* for Life, and died 5 *Feb.* 1720, after whoſe Death Plaintiff and Wife, in Right of Wife, were ſeiſed of the ſaid yearly Rent, and *Bowater Vernon* entered into the ſaid Manor, and hath ever ſince been Tenant of Demeſne, and 1900 *l.* for nine Years and a half's Rent ended 5 *Feb.* 1731, became due to the ſaid *Elizabeth* in her Life and Life of *Mary Vernon*, and then *Elizabeth* died 3 *May* 1732, whereby, by Force of Statute, Plaintiff became intitled to demand the ſaid 1900 *l.* other Part of the ſaid 5700 *l.*

Third Count to the ſame Effect, on Deviſe by Codicil 2 *Feb.* 1720; to which the Defendant pleads he owes nothing.

And on Trial at the Sittings 24 *Feb.* 8 *Geo.* 2. before Chief Juſtice *Eyre*, agreed to a Verdict for the Plaintiff on the firſt Count, and reſt for Defendant.

And the Plaintiff ſhall inſert into the Declaration the Condition in the Codicil deviſed to *Lætitia A.* and whatever in Will or Codicil Defendant thinks neceſſary, and if the Court be of Opinion for the Defendant the Plaintiff ſhall pay Coſts of a Nonſuit.

Serjeant *Skinner* for the Defendant.

The Caſe principally intended to be referred to the Conſideration of the Court is this:

Thomas Vernon deviſes 200 *l.* Rent-charge to his Siſter, Wife of the Plaintiff, for her Life for her ſeparate Uſe, to be iſſuing out of his Real Eſtate, and deviſes his Real Eſtate to Truſtees, on Truſt that the Rent-charge being firſt paid, after his Debts and Legacies ſatisfied, they ſhould ſtand ſeiſed, during

during his Wife's Life, to the Uſes of his Will, and to enable them to perform it; and directed them, during this Wife's Life, to pay the clear Surplus of the Profits, after the ſaid Annuities, Debts, Legacies. *&c.* deducted, to Defendant ſo long as he lives, then to his Sons, *&c.* and after Death of the Wife to ſtand ſeiſed, and ſettle the ſame on Defendant, *&c.* the Defendant enters on Death of the Teſtator, and hath ever ſince received the Profits as Tenant; the Plaintiff's Wife dies. Whether the Plaintiff can maintain Debt againſt the Defendant for the Arrears of this Rent-charge during the Coverture.

By Statute 32 *H.* 8. 37. If any in Right of his Wife hath an Eſtate for Life in any Rent, and the ſame be unpaid in the Wife's Life-Time, the Husband after her Death ſhall have Debt againſt the Tenant of the Demeſne that ought to have paid the ſame.

2dly, It was inſiſted, that by the Codicil it is ſaid, But my Will is, That what I have ſo given to my Siſter and Niece be accepted in Lieu of all, either might claim out of my Real and Perſonal Eſtate, and upon Condition that they releaſe all Right, *&c.* to my Executors and Truſtees of my Will.

This Clauſe makes the Releaſe a Condition precedent, and it is agreed by the Caſe,

That the Right is not releaſed.

That the Condition precedent muſt be ſhewn to be performed, or nothing Veſts, appears by the Caſes that are mentioned 1 *Rol. Abr.* 415. *S.* 11. *Pl. Com.* 30. 2 *Vern.* 340, 1 *Sand.* 215.

And this muſt be a Condition precedent as to the Legacy to the Niece; and ſhall the ſame Words make Condition precedent to the Niece and not to the Siſter?

Serjeant *Eyre, contra,* The Words of the Codicil muſt be taken diſtributively. 2 *Vern.* 478.

Whether a Condition be precedent or ſubſequent, muſt be collected from the Intent of the Teſtator, to be collected from the Words of the Will. *Win.* 114. *Cro. Eliz.* 219.

Now here the Deviſe of the Annuities precedes the Deviſe of the Real Eſtate.

But if the Will and Codicil be connected together, ſtill the Annuity to the Teſtator's Siſter is deviſed firſt on Condition; it is ſaid the Words make it a Condition precedent, as to Releaſe from the Niece; but I ſubmit it was ſubſequent to the Niece, for it is taken Notice of, that the Niece was under Age at this Time.

It is not to be underſtood he meant void Releaſes to be made, he knew his Siſter was married, and Niece under Age, and neither the Teſtator knew could then releaſe.

Beſides the Teſtator ſaith my Will is, *That the Annuity ſo given be accepted, &c.* then adds, *having thus provided for my Siſter and Niece, &c.* which ſhews he look'd on the Proviſion made at preſent before any Releaſe.

In Caſe it be a ſubſequent Releaſe, it is then become impoſſible by the Act of God, by Death of Wife during Coverture, and conſequently Non-performance cannot avoid the Annuity.

Serjeant *Skinner* in Reply, This muſt be a Condition precedent, as it is annex'd to an Annuity which is Executory, and conſequently muſt ceaſe if not releaſed.

Afterwards in *Trin.* 9 & 10 *Geo.* 2. it was argued by Serjeant *Chapple* for the Defendant, who inſiſted,

Firſt, That the Annuity was given by the Teſtator to his Siſter on a Condition precedent, which is not averred to be performed.

Secondly, If not, yet the Annuity ceaſed by Non-performance of the Condition.

As to the Firſt, It appears the 200 *l.* a Year was not given abſolutely, but upon a Condition, and if ſhe had no Eſtate in her, the Plaintiff, as her Huſband, cannot by Statute 32 *H.* 8. 37. maintain Action for the Arrears.

Now the Words require ſomething to be done previous, the Words are in the preſent Tenſe, be accepted on Condition ſhe do releaſe, not if ſhe ſhall accept or ſhall releaſe.

There is a Difference between a Deviſe of Land and of Annuity that is Executory. 7 *Co.* 10.

The Intention of the Teſtator muſt be the Rule to conſtrue the Words, and if the Teſtator had been asked when ſhe ſhould have the Annuity, he would have ſaid when ſhe releaſed her Right.

No Part of the Annuity can be paid till ſix Months end, for it is payable half-yearly. *Co. Lit.* 208. 2 *Co.* 79. Where a Condition concerns a Tranſitory Act, without limiting a Convenient Time, it muſt be done preſently, that is, in Convenient Time, conſidering the Nature of the Tranſaction.

Now, if ſhe takes the Annuity, and after refuſes to releaſe, ſhe hath the Annuity, though the Teſtator intended it in Lieu and Satisfaction of her Claim to the Eſtate.

Being a married Woman will not alter the Caſe, for if it don't veſt till the Act done, ſhe might have levied a Fine. 10 *Co. Ow.* 25. ſhews doing all ſhe could do, had been a good Performance; *Lat.* 20. if ſhe had levied a Fine, tho' the Huſband had diſſented, it might poſſibly have been good.

Marriage, Infancy, *&c.* no Excuſe. 1 *Rol. Abr.* 421. 1 *Vent.* 199. 1 *Rol.* 444, 426.

If ſhe had executed a Releaſe, it had ſhewn her Willingneſs to do all ſhe could, though not effectual. 1 *Saund.* 115.

Paſch. 1730. Bill in Chancery by Mrs. *Acherley* againſt Truſtees and Plaintiff for this very Annuity; Decreed, on executing a Fine the Arrears ſhould be paid to her.

In *Jan.* 1733. *Grangier*, as Adminiſtrator to his Wife, exhibited a Bill for the Arrears of this Annuity.

But 16 *May* 1734, by Maſter of the Rolls Bill diſmiſſed, becauſe not alledged they had releaſed.

Serjeant *Wright*, *contra*, What has been done in Chancery is no more than that Court would not preclude Remedy at Law, unleſs they would comply with what was reaſonably to be done on their Part.

But here is no Condition at all by the Will; then the Words in the Codicil are *What is ſo given be accepted*, &c. then ſuppoſes it was given.

Beſides the 200 *l.* was not to be in Lieu of her Right, but the 400 *l.* a Year, and then it was to be releaſed.

So the 1000 *l.* made up 6000 *l.* to the Niece, was not to be in Satisfaction of her Right, nor was ſhe bound to releaſe on Payment of 1000 *l.* till the 6000 *l.* paid.

Then the Releaſe could not be required till the whole Benefit of the Deviſe took Effect.

Objected, She ſhould have done what ſhe could.

Anſwered, What ſhe could not lawfully do ſhe was not bound to do.

But

But this muſt be a Condition ſubſequent; he deſigned his Siſter an immediate and preſent Maintenance prior to any Eſtate given to others.

Secondly, She was to releaſe to Truſtees, who had no Eſtate but what was ſubſequent to hers.

The Caſe 1 *Rol. Abr.* 415. 16. *S.* 12. the Condition was held ſubſequent, becauſe to be performed at a Day future.

So 3 *Lev.* 132.

Objected, Difference between Deviſe of Land and Annuity that is Executory. But no Difference but where the Condition is Executory.

Thirdly, If Condition be ſubſequent, it is become impoſſible by Act of God, the Siſter dying before the Wife.

In this Caſe I think the Deviſe of 200 *l.* a Year is not upon a Condition precedent, if it had ſtood upon the Words of the Will, it is evident it was intended to be given to her immediately upon his Death, for it was to be paid to her half-yearly during her Life, and excluſive of her preſent Huſband as well as any future Huſband, and when ſhe ſurvived his Wife it was to be 400 *l.* a Year.

Then he Deviſes his Eſtate at *Hertington* in *Lincolnſhire*, paying out of it 100 *l.* a Year to his Truſtees during his Wife's Life, the better to enable them to pay the ſaid Annuities.

Then he gives all the Reſt of his Real and Perſonal Eſtate, after Payment of his Debts, Legacies and Funeral Expences, to his Truſtees, *&c.* on Truſt to pay the Annuities before deviſed to his Wife and Siſter firſt, and after Payment of all Debts, *&c.* to lay out the Reſidue in a Purchaſe, *&c.* And that the Truſtees ſhould pay the ſaid clear Surplus after the ſaid Annuities, *&c.* to the Defendant *Bowater Vernon.*

So that upon the Will the Annuity to his Siſter undoubtedly veſted preſently, without any Condition precedent.

Then by his Codicil he firſt ratifies his Will, except in the Alterations after mentioned, and then makes his Niece's Legacy 6000 *l.* which before was but one; and then adds the Proviſo inſiſted on;

But my Will is, That what I have ſo given to my Siſter and Niece be by them accepted and taken in lieu of all they may claim out of my real and perſonal Eſtate, and on Condition they releaſe all ſuch Right to the Executors and Truſtees of his Will.

Now the Words of this Proviſo do import the Bequeſts to his Wife and Niece to be antecedent to what is required to be done by the Proviſo.

That which is required to be done is, that the Gifts be accepted in lieu of all they claim out of his real and perſonal Eſtate, and on Condition they releaſe ſuch Right to his Executors and Truſtees; it muſt be given before it can be accepted, and the Acceptance muſt precede the Releaſe.

So that in this Caſe the Releaſe cannot be prior to the Deviſees Acceptance of it in lieu of all other Intereſts they may claim out of the Eſtate.

Secondly, The Deviſe is by the Will, this Proviſo by Codicil annexed to the Will; ſo that the Proviſo did not intend to defeat the Will, but to add a Condition to the Deviſe thereby made; and therefore the Wording of the Codicil is, *What I have ſo given*; which imports, that the Legacies were already given to which this Condition is annexed.

It is objected indeed, that with reſpect to the Niece the Releaſe muſt be antecedent.

But I do not ſee any Neceſſity for ſuch Conſtruction, the Legacy of 1000 *l.* is made up 6000 *l.* by the Codicil; no

Doubt ſhe will accept the 6000 *l.* rather than the 1000 *l.* but then ſhe muſt releaſe all other Rights to the Eſtate; but ſuch Releaſe may be ſubſequent.

I ſee nothing in the Nature of the Thing, why this ſhould not be made after as well as before.

But the Legacy given to the Niece of 1000 *l.* by the Will is to be paid at the Age of eighteen, or Marriage, and this is confirmed by the Codicil, in caſe ſhe releaſe her Right to the Eſtate.

But ſhe could not releaſe till the Age of twenty-one, and conſequently her Legacy was payable before ſhe could releaſe.

The Condition therefore that ſhe ſhould releaſe muſt be ſubſequent to the Legacy deviſed.

And if it be ſubſequent as to the Niece, the ſame Words will not make a Condition precedent as to one, and ſubſequent as to the other.

Chief Juſtice *Reeve* thought it a Condition ſubſequent.

But the other Judges doubting, it was adjourned; and afterwards in *Eaſter* Term 12 *Geo.* 2. *Willes* Chief Juſtice and the whole Court inclined to think it a Condition precedent; but held, that ſuppoſing it to be a Condition ſubſequent, yet not being performed, the Plaintiff was not intitled to the Arrear of the Annuity; and therefore the Verdict was ſet aſide, and the Plaintiff to pay the Coſts of a Nonſuit.

Caſe 215. ## *Bluet, qui tam, &c.* ver. *Needs.* In C. B. Entered *Trin.* 7 & 8 *Geo.* 2.

Conviction of Perſon unqualified in 5 *l.* Penalty for every Hare, when held good.

BLUET Clerk, *qui tam pro pauperibus quam pro ſe ipſo*, exhibits his Bill 23 *Jan.* in *Hillary* Term laſt againſt the Defendant an Attorney of this Court, for 40 *l.* Debt, for that at *Holcomb Regis* in the County of *Devon*, 28 *Nov.* 1733.

the Defendant did uſe a Gun to kill and deſtroy the Game, whereas he was not qualified ſo to do by the Laws of the Realm; whereby an Action accrued to the Plaintiff to demand 5 *l.* Part of the ſaid 40 *l.*

Secondly, That 16 *Jan.* 1733. he did keep another Gun to kill and deſtroy the Game, not qualified, *&c.* for which Action accrued for other 5 *l.*

Thirdly, That the ſame Day he expoſed to Sale ſix Hares againſt the Form of the Statute, whereas he was not qualified in his own Right to kill Game; whereby Action accrued to demand 30 *l.* Reſidue of the 40 *l.*

Defendant pleads he owes nothing; and in Arreſt of Judgment moved,

Firſt, That the firſt Count is not good; ſince by Stat. 5 *Ann.* 14 *S.* 4. it is enacted, That if any Perſon, not qualified by the Laws of this Realm ſo to do, ſhall keep or uſe any Greyhounds, Setting Dogs, Hays, Lurchers, Tunnels, or any other Engine to kill and deſtroy the Game, and ſhall be convicted, *&c.* before a Juſtice of Peace, he ſhall forfeit 5 *l.*

But a Gun is not mentioned in this Act, and therefore when by Statute 8 *Geo.* 19. it is enacted, That Perſons liable to be proceeded againſt before a Juſtice of Peace for any pecuniary Penalty or Sum for any Offence againſt the Law for Preſervation of Game, may be proceeded againſt by Information before a Juſtice of Peace, or by Action of Debt, or in Caſe, *&c.* before the End of next Term after Offence, *&c.* But Debt lies not unleſs the Offence be within the Statute 5 *Annæ* 14.

Secondly, It is not ſufficient to ſay he was not qualified, without ſhewing he had not 100 *l.* a Year, nor other Eſtate which makes a Qualification.

The Queen ver. *George*, *Mod. Ca.* 40. in the Queen's Bench, 2 *Ann.* It was held, that Conviction on Statute 4 & 5 *W.* & *M.* 23.

M. 23. ſhewing that Defendant *exiſtens perſona diſſoluta, &c.* did hunt and kill ſo many Hares, *&c.* ought to be quaſhed, becauſe it did not ſhew he was not qualified.

Thirdly, The ſelling ſix Hares together is but one Offence; and by Statute 9 *Ann.* 25. which enacts, That if any Perſon whatſoever, not being qualified in his own Right to kill Game, ſhall ſell or expoſe to Sale any Hare, Pheaſant, *&c.* he ſhall forfeit for every Offence ſuch Penalty as on Higlars, *&c.* by Statute 5 *Ann.* 14. is inflicted, (*viz.*) the Sum of 5 *l.* which ought not to be underſtood 5 *l.* for every Hare, Pheaſant, *&c.* but for all ſold at once; but the Penalty on Higlars, *&c.* by 5 *Ann.* 14. is the Sum of 5 *l.* for every Hare, Pheaſant, *&c.*

As to the firſt Objection, a Gun is an Engine to deſtroy the Game.

So as to the ſecond Objection, we have exactly purſued the Words of the Act; and if the Defendant had been qualified, he muſt ſhew it. *Dy.* 312. *Carth.* 6, 124, 304.

As to the third Objection, that all is one Offence, the Statute 9 *Geo.* refers to the Statute 5 *Annæ*, which gives 5 *l.* for every Hare, *&c.*

And though it be objected now at laſt, that the Jury finds but 10 *l.* without ſhewing to which of the Offences it is to be applied; it is to be obſerved, that this is an Action of Debt for 40 *l.* and the ſeveral Offences after mentioned make up that Sum; and the Jury may find the Defendant owes but Part of the Debt.

And *per Cur'*, As to the firſt Objection, the Averment of his not being qualified is ſufficient, ſince the Words of the Act

Act are purſued; and the Defendant may come and ſhew his Qualification.

Indeed Convictions have been quaſhed for not ſetting forth what was his Want of Qualification; becauſe it muſt be made out before the Juſtice, that he had no ſuch Qualification as the Law requires; and therefore the Juſtice ought to return, that he had no Manner of Qualification, before he can convict the Defendant.

As to the ſecond, this is after Verdict; and it is Matter of Evidence, whether a Gun be an Engine to kill and deſtroy Game.

As to the third, the Statute 9 *Geo.* ſaith not he ſhall for every Offence pay 5 *l.* but ſhall forfeit the Penalty of the Statute 5 *Ann.* on Higlars, and which is 5 *l.* for every Hare, *&c.*

And being a Debt, the Jury may find Part of the Debt.

Judgment for the Plaintiff.

Philips ver. *Fowler.* In C. B.

Caſe 216.

IT was moved for a new Trial, becauſe the Jury being divided caſt Lots, which falling in Favour of the Plaintiff, Verdict was given for him.

Verdict ſet aſide where the Jury caſt Lots, how they ſhould give it.

If the Jury caſt Lots how they ſhall give their Verdict, and give it as the Lot determines, the Verdict ſhall be ſet aſide. Reſolved 2 *Lev.* 139.

After Motion in Arreſt of Judgment, on an Information in Nature of a *Quo Warranto*, for fiſhing in the River *Thames*, *The King* againſt *Ld. Fitzwalter*, (this was before *Hale* in the King's Bench) *Tr.* 27 *Car.* 2. Verdict ſet aſide for the ſame Cauſe. 2 *Lev.* 205. *Foſter* and *Hooden*, *M.* 29 *Car.* 2.

So in the Caſe of *Fry* and *Hordy*, 2 *Jon.* 83.

So where Jury conſented to join in Verdict if the Court approved of it, was ſet aſide. *Cro. Eliz.* 779.

In the Caſe of *Prior* and *Powers*, 3 *Keb.* 811. *Mich.* 16 *Car.* 2. it is ſaid a new Trial was denied for this Complaint, but it was becauſe the Matter appeared only by pumping the Juryman to ſwear againſt himſelf; and *Twiſden* ſaid it would be of ill Conſepuence; and that in Sir *Philip Acton*'s Caſe a new Trial had been granted for throwing Croſs or Pile.

Serjeant *Chapple*, *contra*, inſiſted, That it had been admitted by the Motion in Arreſt of Judgment, that the Verdict was good, and therefore Defendant cannot have Liberty after to move to ſet it aſide; in pleading, if the Defendant omit to plead in due Order, he loſes the Benefit of the former. *Co. Lit.* 303.

And a Man cannot plead to a *Scire facias* Matter which avoids or abates the Writ.

In the Caſe of *The King* againſt *Lord Fitzwalter*, though it is ſaid to be a Motion in Arreſt of Judgment, the Motion was only for a new *Venire*, *&c.* 1 *Keb.* 465, 535.

It is ſaid 2 *Salk.* 647. none ſhall move for a new Trial after Motion in Arreſt of Judgment.

Nor after Motion in Arreſt of Judgment he cannot move to ſet aſide a Writ of Inquiry.

After Writ of Error brought, you cannot move to ſet aſide the Judgment for Irregularity. *Salk.* 402.

Serjeant *Eyre* to the ſame Effect.

In Reply, Serjeant *Skinner*, *Hawkins* and *Wright* inſiſted, That this Motion is not to ſet aſide the Verdict for an Irregularity, or being againſt Evidence; but becauſe it is againſt Juſtice, againſt the Nature of a Trial by Jury, againſt *Magna Charta*, which ſaith Trials ſhall be *Per judicium parium ſuorum.*

It is admitted the Motion is not too late to puniſh the Jury; ſhall it then be too late to prevent the Ruin of the Defendant by this Verdict, for which they are puniſhed?

In Caſe Judgment had been entered on Diſcovery that it was illegally obtained, it has been vacated. 1 *Lev.* 95. *Mo.* 631. 2 *Rol. Abr.* 1 *And.* 232. Verdict held to be void, becauſe the Jury examined Witneſſes apart.

Chief Juſtice, it is generally true, that after Motion in Arreſt of Judgment, a Matter known to Party, ſhall not be inſiſted on to have a new Trial.

But no Inſtance where in a Caſe like this the Verdict was allowed, becauſe there had been a Motion before in Arreſt of Judgment; this therefore being a Verdict contrary to *Magna Charta*, to the Duty of a Jury, againſt Reaſon and Right, I think there ought to be a new Trial; the Caſe 2 *Lev.* 139. *The King* againſt *Lord Fitzwalter*, is a Reſolution expreſs in the Point.

Judge *Denton* and I were of the ſame Opinion; Judge *Forteſcue* doubted, he ſaid he could not take it to be as no Verdict ſince the *Poſtea* had returned it as ſuch, but he agreed it ought to be a void Verdict; and it was ſet aſide.

Caſtell

Caſe 217. ## *Caſtell Attorney* ver. *Bailey.* In C. B. *Intr. Paſch.* 8 *Geo.* 2.

Where a Verdict hath found Words ſpoken of the Plaintiff as Brother of the Defendant, it is ſufficient, tho' no Averment in the Declaration that he was his Brother.

ACTION for Words, for that the Defendant 1 *May* 1734 falſely and malicioufly ſpoke of the Plaintiff, *He* (meaning Plaintiff) *is perjured and forſworn, and I can prove it.*

Secondly, *My Brother* Caſtell (meaning Plaintiff) *is perjured and forſworn, and I will prove the ſame.*

Thirdly, *My Brother* John (meaning Plaintiff) *is perjured and forſworn, and I can prove it,* to the Damage of 5000 *l.*

Defendant pleads Not guilty; Verdict for the Plaintiff, and Damages given generally.

Serjeant *Chapple* moved in Arreſt of Judgment becauſe of intire Damages, and on 2d and 3d Counts the Action is not maintainable becauſe no Averment that Defendant was Brother to Plaintiff, and then no Evidence that thoſe Words were ſpoke of Plaintiff.

And it hath been laid down as a Rule, that where the Words ſpoken may be applicable to ſeveral, it is not ſufficient to ſay the Words were ſpoken of the Plaintiff; but there ought to be an expreſs Averment, that the Plaintiff hath the Title or Deſcription given him.

In the Caſe of *Delamore* 11 *Car.* King's Bench. 1 *Rol. Ab.* 84. *S.* 2. 774. 2 *Cro.* 442. Error was of a Judgment in the Court at *Bath,* wherein the Plaintiff declared, that in a Suit there between Defendant and *S.* the Plaintiff was Witneſs, and in Diſcourſe of ſuch Trial with the Wife of *S.* and the Oath the Plaintiff had taken, the Defendant ſaid of the Plaintiff, *Your Brother* Delamore (*Innuendo* the Plain-

tiff *exiſten' fratrem dict' uxor'*) *took a falſe Oath againſt me in the Hall, &c.*

After Verdict for Plaintiff, the Declaration was held not to be good, becauſe not averred the Plaintiff was Brother to the Wife of *S.* indeed the Report adds *quære rationem* —— for there was another Cauſe of the Judgment, becauſe no Averment that Iſſue was joined, but only, that at a Trial he was Witneſs, and ſwore, *&c.*

So *Mich.* 15 *Car.* in the King's Bench, *Johnſon* and *Dy*, 1 *Rol.* 84. *S.* 4. Plaintiff declares that the Defendant having Diſcourſe of the Plaintiff, ſaid of him to *John Johnſon*, Sen. *I will take my Oath that your Son ſtole my Hens*; Judgment was arreſted becauſe no Averment that the Plaintiff was his Son; but *Mar.* 62. takes Notice *Croke* was abſent. *Vide Pal.* 521. 2 *Cro.* 635.

So *H.* 1652. *Burrows* and *Uſher*, 1 *Rol.* 85. *S.* 9. Plaintiff declares that the Defendant having Diſcourſe of the Plaintiff, ſaid of Plaintiff, *Your Father* (Innuendo Plaintiff) *ſtruck and killed* Nich. Ruſſell.

But Judgment was arreſted after Verdict, becauſe not averred the Plaintiff was Father to him to whom the Words were ſpoken.

So likewiſe adjudged by three Judges, (*Gawdy, contra*) *Cro. El.* 416. by all the Juſtices, *Phelps* and *Lane*, *Cro. Car.* 92. So 1 *Brownl. Maſter Euſtine is a Rogue*, but there held well. 1 *Rol.* 84. *Cro. Car.* 177. *Shelman.* Court divided, *Cro. Car.* 420. 4 *Inſt.* 17, 18. Reſolved, that in Action of Slander two Things are requiſite, the Perſon muſt be aſcertained, and the Slander muſt appear from the Words themſelves, and cannot be ſupplied by an *Innuendo*. *Hob.* 267. *Innuendo* will not aſcertain the Perſon of Plaintiff. 1 *Rol. Abr.* 74. Words muſt be ſuch as By-ſtanders may underſtand them of the Plaintiff. So *Yel.* 51. *Mo.* 132. *Cro. Eliz.* 496. Words ſpoke in *Latin*, there muſt be an Averment the By-ſtanders underſtood the Language, ſo if ſpoken in *Welch*. The De-

nomination of Brother is very extenſive and uncertain; all Relations by Marriage, nay all in like Office or Employment, are often called Brothers.

But where the Words denote a Perſon preſent or a Perſon certain, there Declaration is ſufficient, if it alledge the Words ſpoken of the Plaintiff without other Averment.

As in the Caſe of *Woodroof* and *Vaughan*, *Cro. El.* 429. *I did not know that* Woodroof *was thy Brother, he hath forſworn himſelf, I will prove him perjured*; Declaration held good.

So *Nelſon* and *Smith*, *Mich.* 22 *Car.* in the King's Bench, Defendant having Diſcourſe of Plaintiff, ſaid of the Plaintiff, *Captain* Nelſon *is a Thief*, *&c.* good without Averment that the Plaintiff was a Captain, or known by that Name, for a Plurality of *Nelſons* ſhall not be intended.

Brown and *Lane*, 2 *Cro.* 443. *Thy Maſter* Brown *hath robbed me*; reſolved Declaration good, though no Converſation of Plaintiff, or Averment he was his Maſter, for it ſhall not be intended he had more than one Maſter. 1 *Rol. Abr.* 79. S. C.

Go tell thy Landlord he is a Thief, 2 *Rol.* 79. 2 *Cro.* 107. *Thy Brother*, meaning the Plaintiff, *is perjured*; held good without Averment. *Wiſeman* and *Wiſeman*. So *Ray.* 86.

Chief Juſtice: The Verdict hath found the Words ſpoken of the Plaintiff, otherwiſe the Plaintiff could not have had a Verdict; the Caſes 2 *Cro.* 443. *Brown* and *Lane*, and 2 *Cro.* 107. *Wiſeman* and *Wiſeman*, ſeem in Point.

If there had been no Allegation that the Words were ſpoken of the Plaintiff, the *Innuendo* would not help; Words are not ſo ſtrictly conſtrued as heretofore, and good Reaſon for it, ſince Diſcouragement of Actions for Slander will encourage Revenge in another Manner.

Libel is ſufficient, when alledged to be of and concerning the King and Government, the Miniſters, *&c.* the o-

ther is Matter of Evidence, whether the Words concerned them or not.

The other Judges concurred in the ſame Opinion; and Judgment was given for the Plaintiff.

Joſuah Hands verſus *Herbert James.* In C. B.

Caſe 218.

EJectment on the Demiſe of —— *Hutchinſon.* 1 *Oct.* 8 *Geo.* 2. at Trial at Sittings 17 *Feb.* 8 *Geo.* 2. before Chief Juſtice *Eyre*, the Plaintiff's Leſſor made Title to the Premiſſes as Heir at Law to *William Hutchinſon*; Defendant on Evidence ſhewed, that *William Hutchinſon* and *Hannah* his Wife were joint Purchaſers in Fee; *Hannah* ſurvived, and by Will 28 *April* 1719 deviſed to the Defendant; at the Execution of the Will, the Words ſubſcribed are *ſigned, ſealed, publiſhed and declared by Teſtatrix as her laſt Will and Teſtament, in Preſence of us*; and then three Witneſſes ſet their Names; but thoſe Witneſſes being all Dead, there was no Proof that the Witneſſes ſet their Names in Preſence of the Teſtatrix, but one Witneſs was an Attorney of good Character; and it was left to the Jury, who found Verdict for the Defendant.

Whether it ſhall be left to a Jury to determine whether the Witneſſes to a Will (being all dead) ſet their Names in the Preſence of the Teſtator, merely upon Circumſtances without any poſitive Proof.

But it was agreed by Conſent a Caſe ſhould be made and left to the Opinion of the Court, Whether this Matter ſhould have been left to the Jury to determine, Whether the Witneſſes ſet their Names in Preſence of the Teſtatrix?

Serjeant *Eyre* for the Plaintiff. This was a neceſſary Circumſtance by the Statute of Frauds to be proved; it is expreſly required, that the Witneſſes ſhould ſet their Names in the Preſence of the Teſtatrix.

And it appears by the Caſe, that it was not proved, for all the Witneſſes, that could have proved it if it was done, were Dead, and therefore it ought not to have been left to the Jury, who could no more tell it was, than that it was not ſo.

Ser-

Serjeant *Chapple contra:* The Query is not, whether the Witneſſes ſhould ſubſcribe in Preſence of the Deviſor, but whether the Evidence of this ſhould not be left to the Conſideration of the Jury? If the Jury cannot have expreſs Proof, they may determine on Circumſtances; as in Caſe of Livery on a Feoffment when it is not indorſed, or the Execution of a Deed that is inrolled but not proved, or a Deed proved by the Counterpart when the Original is loſt.

Per Cur'. This is a Matter fit to be left to the Jury, which is all that is referred to the Court. The Witneſſes by Statute of Frauds ought to ſet their Names as Witneſſes in Preſence of the Teſtatrix, but it is not required by the Statute that this ſhould be taken Notice of in the Subſcription to the Will; and whether inſerted or not, it muſt be proved; if inſerted, it does not conclude but it may be proved *contra*, and the Verdict may find *contra*; then if not concluſive when inſerted, the Omiſſion does not conclude it was not ſo, and therefore muſt be proved by the beſt Proof the Nature of the Thing will admit.

In Caſe the Witneſſes be dead, there cannot probably be any expreſs Proof, ſince at the Execution of Wills few are preſent but Deviſor and Witneſſes; then, as in other Caſes, the Proof muſt be circumſtantial, and here are Circumſtances.

1. Three Witneſſes have ſet their Names, and it muſt be intended they did it regularly.

2. One Witneſs was an Attorney of good Character, and may be preſumed to underſtand what ought to be done, rather than the contrary.

And there may be Circumſtances to induce a Jury to believe that the Witneſſes ſet their Hands in Preſence of the Teſtatrix rather than the contrary; and it being a Matter of Fact, was proper to be left to them; as, Whether Livery was given on a Feoffment, when no Livery is indorſed; Whether a Deed was executed, when only a Counterpart

was produced, *&c.* And the Court was of Opinion the Plaintiff ought to be nonſuited.

Newberry and his Wife ver. *Stradwick.* In C. B.

Caſe 219.

DEBT in this Court on Judgment in the King's Bench.

Sufficient to inſert in the Copy of the Iſſue, by way of Replication to a Plea of *Nul tal. record. Quod habetur tale recordum*, though not under Counſel's Hand.

Defendant pleads No ſuch Record.

Plaintiff replies, *Habetur tale record'*, and a Day given to bring it in.

Upon this the Defendant made up the Iſſue, and delivered a Copy of the Iſſue with the Replication, which was accepted by the Plaintiff, and paid for, and the Record not being brought in, the Defendant ſigned a *Non proſ.*

Now moved by Serjeant *Belfield*, that when no ſuch Record is pleaded, where the Record lies in the ſame Court, upon which it is prayed *quod per Cur' videat'*, *&c.* the Iſſue may be made and delivered, and it is well.

But when Record is in another Court, there ought to be a ſpecial Replication delivered, *quod habetur tale recordum*, under Counſel's Hand; and it is not ſufficient to inſert it in the Copy of the Iſſue delivered, for thereby the King will be defrauded of the Stamps.

And it was agreed, that there ought to be a Replication *Quod habetur tale recordum.*

But it was certified by the Prothonotaries, that of late it hath been held ſufficient to inſert ſuch Replication in the Copy of the Iſſue delivered, and that being on ſtamped Paper, it is the ſame Thing in reſpect to the Duty as if deli-

vered in a Paper by itſelf. And Prothonotary *Borrett* ſaid this had been ſeveral Times done and allowed.

And Prothonotary *Thompſon* ſaid, that the Plaintiff having accepted the Copy of the Iſſue, and paid for it, it was too late for him to complain of it; for if he had not acquieſced in it, though he could not refuſe to pay for the Copy of the Iſſue, yet he ſhould have ſtruck out that Part.

And Sir *George Cook* Prothonotary ſhewed a Cauſe, where after paying for the Iſſue, it was held too late to complain.

And the Court was of that Opinion.

Caſe 220.

Moxon ver. *Horſenail & al'.*

Whether Chambers in an Inn of Chancery are within the Words or Intent of 43 *Eliz.* ratable to the Poor.

TReſpaſs for entring his Chamber at *Bernard's Inn, London*, and taking his Chair Value 50 *s.*

On Not guilty, the Jury find a ſpecial Verdict to this Effect:

That the Pariſh of *St. Andrews Holborn* lies Part in *London* and Part in *Middleſex*; That Sir *Francis Child* Alderman of *London* 6 *May* 1732. appointed Overſeers for that Part within *London*, and two Juſtices of Peace nominated Overſeers for that Part in *Middleſex*, and the Churchwardens and Overſeers rated the Pariſh to the Poor, which was approved, *&c.* and thereby the Plaintiff was rated 1 *s.* That the Plaintiff inhabited a Chamber in *Bernard's Inn*, being an Attorney of the King's Bench, and a Member of that Society, and having that Chamber for the Exerciſe of his Profeſſion, and having no other Habitation; That *Bernard's Inn* lies in that Part of the Pariſh which is within *London*; that the Defendants by Virtue of a Warrant from Sir *Francis Child*, then Alderman, 11 *July* 1733. on Plaintiff's Refuſal to pay the Rate, diſtrained the ſaid Chair, being of 2 *s.* Value, as Overſeers of

the Poor; and after it was appraiſed, and ſold for 2 *s.* returned the 1 *s.* Overplus; that there are other Chambers in *Bernard's Inn*, the Occupiers of which were alſo rated; that *Bernard's Inn* is one of the Inns of Chancery uſed and inhabited by Students and Practiſers of the Law Time out of Mind, and dependant on *Grey's Inn*, as an Inn of Court for the Study and Practice of the Law. And if the Plaintiff on this Matter be a Perſon liable to be aſſeſſed to the ſaid Tax, they find for the Defendant, if not, for the Plaintiff.

Serjeant *Wright* for the Plaintiff argued, that he is not liable to be rated to the Poor for his Chamber in this Caſe; for if it be within the Statute 43 *El.* 2. it muſt be as an Inhabitant of the Pariſh, or as an Occupier of a Houſe within the Pariſh.

By that Statute, the Churchwardens and Overſeers may raiſe a Stock for the Relief or Imployment of the Poor by Taxation of every Inhabitant, Parſon, Vicar, others, *&c.* and of every Occupier of Lands, Houſes, *&c.* in the ſaid Pariſh, in ſuch competent Sum as they ſhall think fit.

The Word *Inhabitant* in its largeſt Senſe comprehends every Perſon that dwells in a Place; but that could not be the Meaning of the Word in this Act, for then all Women, Servants, Children, *&c.* in a Pariſh might be rated, which never was done.

But it may be taken in a more ſtrict Senſe; as where Stat. 22 *Hen.* 8. 5. for repairing Bridges, enables Juſtices of the Peace to tax every Inhabitant, Lord *Coke* ſaith, 2 *Inſt.* 703. the Act extends not to every Perſon that hath perſonal Reſidence, as Servants, *&c.* but to ſuch as are Houſholders; and this appears by the fourth Branch of the Statute, which gives Diſtreſs on every ſuch Inhabitant in his Lands, Goods, Chattels, *&c.*

And it has been always held, that by Stat. 43 *Eliz.* 2. the Inhabitant is ratable in reſpect of his Land or Ability; ſo it

was

was reſolved 5 *Co.* 67. *b.* and ſo by the Chief Juſtice *Eyre* in this Court, *Tr.* 5 *Geo.* 2. it was agreed. *Fitzgib.* 298.

But the Plaintiff is to be conſidered as a Gueſt occaſionally reſiding in his Chamber for the Study and Practice of the Law, as an Agent indeed for his Clients in ſeveral Parts of the Kingdom. And by the Order of all the Judges of *England*, *Mich.* 3 *Ann.* the Attornies are ordered to be admitted, and take Chambers in ſome Inn of Chancery, or in Lodgings near, *&c.* ſo that Lodgings and Chambers are looked upon as Places of the ſame Nature. A Perſon that comes to the Term may be a Lodger, *Latch* 127. and a Perſon at a Chamber in the *Temple* may take an Examination in relation to a Robbery as a Juſtice of Peace dwelling in or near the Hundred, which is in a diſtant County; which ſhews he was not looked on as an Inhabitant at his Chamber. *Cro. Car.* 212.

Secondly, The Plaintiff cannot be charged as the Occupier of an Houſe, for it is found there are many Chambers in the Houſe, and he hath but one. By the Caſe *Salk.* 532. it ſeems as if the Houſe ratable to the Poor ought to be one intire Houſe; though if ſeveral Houſes be joined into one, and ſeveral Families live in it, or if one Houſe be divided into two for ſeveral Families, they may be rated ſeverally; this is *Hoſpitium*, and *Domus & Hoſpitium* differ (*Hob.* 245.) A Man is not chargeable for a Standing in the Market. 2 *Rol. Abr.* 289. 2 *Rol.* 238. All Perſons in Colleges and Inns of Court may equally be charged.

Serjeant *Hawkins contra:* The Words of the Statute 43 *El.* 2. are expreſs, That a Rate ſhall be raiſed by Taxation of every Inhabitant; and there can be no Preſcription againſt an Act of Parliament, therefore there is no Force in the Argument, that Chambers have not heretofore been rated.

A Chamber is *Domus Manſionalis*, and Burglary may be committed by breaking and entering into it with Intent to commit a Felony. Reſolved *Cro. Car.* 474. *H. P. C.* 33.

It is objected, the Plaintiff is there as a Gueſt; but it is found he inhabits there, and hath no other Habitation; ſo that unleſs rated here he can be rated no where. It is Charity to the Poor, which by the Law of God and Man every one ought to pay.

And an Attorney hath no Privilege to be exempt, altho' he hath Privilege to excuſe him from an Office that interferes with his Attendance at *Weſtminſter*, as to be a Soldier. 1 *Vent.* 436. to be a Reeve, *&c. March* 30.

Although by *Magna Charta* it is enacted, that *Eccleſia ſit libera*, yet a Parſon, *&c.* is ſubject to all Charges by Act of Parliament, 2 *Lev.* 139. much more an Attorney; nor can any Order of Court exempt them.

In Reply it was admitted, an Attorney could not claim any Exemption in reſpect of his Profeſſion, *&c.* But the ſole Queſtion was, Whether Chambers in an Inn of Chancery are within the Words or Intent of Stat. 43 *Eliz.* 2. ratable to the Poors Rate? If they be ſo, no Preſcription, no Orders of Court can exempt them. But that they have been charged no Inſtance can be given; and it will be equally the Caſe of all Scholars, Fellows or Students in the Univerſity or Inns of Court.

Ideo adjornatur.

Noxon ver. *Lilly & al'.* In C. B.

Caſe 221.

TReſpaſs for taking his Goods.

A Proceſs to take the Body in the Cuſtom will

firſt Inſtance, if found, if not, to attach him by his Goods, is a void Proceſs, and not make it good.

The Defendants juſtify by Proceſs out of the Court of Record at *Worceſter*, and alledge, that a Plaint was levied by the Defendant againſt —— and that there is a Cuſtom, that on ſuch Plaint an Attachment ſhall iſſue to take the Defen-

dant, if found in the Juriſdiction; if not found, to attach him by his Goods to appear, *&c.* That on ſuch Plaint by the Defendant *Lilly* againſt the ſaid —— Attachment iſſued, directed to the other Defendants, to attach the Plaintiff by his Body or Goods, which Precept the Defendant *Lilly* delivered to the other Defendants, Serjeants at Mace who took the Goods in the Declaration.

Plaintiff demurs.

Serjeant *Chapple:* This Proceſs is not good, it is a Contradiction in itſelf, for it is to take the Body if found, if not found, to attach him by his Goods. When ſhall he do ſo, or when ſhall he be ſaid not to do ſo?

He hath till the Return of the Precept to take the Body, and before ought not to take the Goods. In caſe Act of Parliament direct levying Penalty by Diſtreſs and Sale, and if no Diſtreſs, he ſhall be committed, there muſt be a new Warrant for Commitment after it appears there is no Diſtreſs.

Secondly, The Proceſs iſſued purſues not what the Cuſtom alledges the Proceſs ought to be; for it is to attach the Defendant by his Body or Goods, *&c.* without ſaying if Defendant not found; ſo it leaves it to the Diſcretion of the Officer to take the Body or Goods at his Election.

Thirdly, The Taking ſo many Goods as in the Declaration, is extraordinary.

Serjeant *Hawkins*: In Caſe there be a Miſtake or Error in the Proceſs, that ſhall not prejudice the Parties to the Suit nor the Officer; and here, though the Proceſs is not by Grant but by Cuſtom,

Cur': No Difference between Proceſs by Grant and Cuſtom, for if the King grants the Privilege *tenere Placita*, legal and uſual Proceſs the Grantee may iſſue as incident, and Cuſtom ſuppoſes a Grant originally, but in both Caſes it muſt be a

Proceſs legal; none can juſtify the Reſtraint of another's Liberty or taking away his Property unleſs by the Law of the Land, that is he muſt have a lawful Authority and muſt duly purſue it.

Here the Proceſs is to take the Body of the Defendant in the firſt Inſtance, if he be found, *&c.* which is a void Proceſs, and Cuſtom will not make it good.

Brice ver. *Smith.* In C. B.

Caſe 222.

FOrmedon, Defendant pleads *Ne done pas*, on Trial Will was produced 28 *July* 1683, made by *Philip Brice*, Grandfather of the Demandant, whereby he deviſes the Premiſſes to his Son *Philip* (the Father of the Demandant) and his Heirs, on Condition that he pay 30 *l.* to his Brother *William*, *&c.* Then deviſes Copyhold Lands to his other Sons in like Manner; and in Caſe any of my Children die without Iſſue, then I give the Eſtate of him or them ſo dying, to the right Heirs of them or him ſo dying, for ever; no Subſcription was ſigned, ſealed and publiſhed, *&c.* but only the Names of Witneſſes ſubſcribed.

If an Eſtate be given to a Man and his Heirs, and if he die without Iſſue Remainder over, thoſe Words are explanatory of the Word *Heirs*, and make an Eſtate-Tail.

Verdict for the Plaintiff.

Serjeant *Wright* inſiſted, this is an Eſtate-Tail in his Son *Philip*.

2 *Cro.* 827. Deviſe to his eldeſt Son and his Heirs, on Condition, *&c.* and if he die without Heirs of his Body, then to his other Son and his Heirs; and held an Eſtate-Tail in the eldeſt Son.

So 2 *Cro.* 655. Deviſed to his Son and Heirs, and if he die without Iſſue, to his Daughter *Margaret*, *&c.*

So *Lutw.* 810, 813. 3 *Cro.* 525. *Mo.* 422. *Ray.* 425.

Ser-

Serjeant *Eyre, contra:* The firſt Queſtion left to the Court is, Whether there is ſufficient Proof of the Will?

But it was anſwered, This is a Fact left to the Jury.

2ly. This is an Eſtate in Fee, for Deviſe is to *Philip* and his Heirs expreſly, and no Limitation, if he die without Iſſue, to any other Perſons, as in the Caſes cited, but to the right Heirs of the Deviſee himſelf. 1 *Rol. Abr.* 536. *pl.* 7. Deviſe to three Daughters and Heirs, and if either die without Iſſue, then to *J. S.*; the three Daughters have Eſtate-Tail and not a Fee, for the Limitation of the Remainder over explains what Heir he means, which imports, if no Remainder over, the Eſtate would be a Fee.

2 *Lev.* 68, and 3 *Lev.* 115. *I give my Lands in* A. *to my Son* John, *in* B. *to my Son* Stephen, *in* C. *to my Son* Roger, *and if any live to full Age and have Iſſue, to them and their Heirs in like Manner; but if any die without Iſſue of his Body, Deviſes over.* By 2 *Inſt.* they have Fee, and ſo at laſt reſolved by the whole Court.

Chief Juſtice ſeemed of Opinion for Demandant, for the Words (*if he die without Iſſue*) are Explanatory of the Word (*Heirs*) in the firſt Part of the Will, and ſhews in the firſt Words the Teſtator meant to give to his Son *Philip* and his Heirs (that is ſuch Heirs as were the Iſſue of his Body) and after to his right Heirs generally.

If Lands be given by Deed to a Man and his Heirs, being underſtood to him and the Heirs of his Body, that makes an Eſtate-Tail.

But it was ſaid that the Tenant in this Caſe was a Purchaſer, and therefore a further Argument deſired, which was granted, and therefore adjourned.

And afterwards *Paſch.* 10 *Geo.* 2. Judgment was given for the Demandant by the whole Court.

Corniſh ver. *Trefey & al'.* In C. B. *Intr.* Caſe 223. *Hill. 9 Geo. 2. Rot.* 1886.

TReſpaſs againſt three Defendants, *William Trefey*, *Charles Lamb*, *Edward* otherwiſe *Edmund*.

Miſnomer improper for a Demurrer, but ought to be pleaded in Abatement.

The two firſt Defendants pleaded Not guilty, and the ſaid *Edward*, who was attached by the Name of *Edmund*, makes Defence and Demurs.

And by Serjeant *Belfield* it was argued, that a Man could not have two Chriſtian Names, and therefore Defendant ſued by the Name of *Edward* alias *Edmund*, could not be ſo ſued. 2 *Cro.* 558. *Lutw.* 294.

But it was anſwered by Serjeant *Wright*, and agreed by the Court, that this Matter is improper for a Demurrer, but the Defendant ſhould have pleaded it in Abatement, and then the Plaintiff might have replied, and the Plaintiff might have known againſt whom to have a new Action.

And in Pleas of Abatement, Defendant muſt always give the Plaintiff a better Writ; beſides the Court cannot judicially take Notice that the Defendant's Name is not as he is named in the Declaration.

As a Man may have ſeveral Names added together at his Baptiſm, as *Edward*, *Edmund*, *Edgar*, which all make but one Chriſtian Name; ſo it is not impoſſible but he might be Chriſtened *Edward* alias *Edmund*; and the Defendant admits himſelf to be the ſame Perſon, by ſaying *and the ſaid* Edward. *Lutw.* 10.

So Judgment for the Plaintiff.

Caſe 224. ***Scrape*** ver. ***Rhodes & al'.*** **In C. B.**

A Deviſe to *E. H.* and her Heirs, and if ſhe and *D. S.* die without Iſſue, he gives ſeveral Annuities charged upon the Premiſſes to chartiable Uſes; held that *E. H.* had an Eſtate in Fee.

EJectment on Demiſe of *J. Surby.* On Not guilty, Jury find,

That *Nathaniel Hudſon* was ſeiſed in Fee of a Moiety of 150 Meſſuages, and alſo of ſeven Meſſuages in or near *Saffron Hill* in St. *Andrews Holbourn*; and by Will 3 *Nov.* 1699 deviſed the ſeven Meſſuages to his Siſter *Elizabeth Hudſon* and the Heirs of her Body, and for want of ſuch Iſſue to *Dorſet Surby*, Son of his Siſter *Martha* and his Heirs and Aſſigns; and his Moiety, *&c.* of all Meſſuages, *&c.* he deviſed to his ſaid Siſter *Elizabeth* and her Heirs; and in Caſe his ſaid Siſter and *Dorſet Surby* both depart this Life, having no Iſſue of their or either of their Bodies, he gives ſeveral Legacies to Charitable Uſes payable for ever; Remainder to ſuch Uſes as his Siſter *Elizabeth* ſhall appoint, which Payments to Charitable Uſes he directed ſhould be paid after ſuch Deceaſe of *Elizabeth* and *Dorſet Surby* without Iſſue, by ſuch Perſons as ſhould enjoy the ſaid Moieties and Eſtates; and as to the other Moiety, he gave the ſame to his Siſter *Martha*'s Son *Dorſet, &c.*

By Leaſe and Releaſe 6 & 7 *Sept.* 1705, *Elizabeth* conveys the Premiſſes to her deviſed, to the Uſe of herſelf for Life; then as to one Moiety to *Sarah* for Life, then to Truſtees, *&c.* then to her firſt and other Sons in Tail, then to her Daughters, *&c.* then to ſuch Uſes as *Elizabeth* ſhall direct; as to the other Moiety, to the Uſe of the ſaid *Dorſet Surby* for Life, *&c.*

Elizabeth dies without Iſſue; *Sarah* dies leaving Iſſue *Anne* and *Elizabeth Bealings*; *Dorſet Surby* has Iſſue two Sons, *Hudſon* and *John Dorſet*, and *Hudſon* dies without Iſſue, *John* enters and makes the Demiſe to the Plaintiff.

Serjeant *Skinner:* The Caſe is ſhortly this: *Nath. Hudſon* ſeiſed in Fee, by Will deviſed to his Siſter *Elizabeth* in Fee the Moiety of 150 Meſſuages, and to *Dorſet Surby* ſeven other Meſſuages, on Failure of Iſſue of the Body of his Siſter *Elizabeth*; and in Caſe both the ſaid *Elizabeth* and *Dorſet Surby* depart this Life, leaving no Iſſue of their or either of their Bodies, then he deviſes out of his ſaid Moieties and Eſtates in *Saffron-Hill* and *Chick-lane* for the Maintenance of poor Children in *Chriſt's Hoſpital* 10 *l.* a Year for ever; and for Relief of the Poor in the Freedom of *London* in *St. Sepulchre's* Pariſh 10 *l.* a Year for ever; and 20 *l.* a Year to *Hannah Blake*, Daughter of his Kinſman *James Linwood* of *Colcheſter*; which three Sums he directed ſhould be paid yearly, after the Deceaſe of his Siſter *Elizabeth* and Kinſman *Dorſet Surby* without Iſſue, for ever, on the 5th of *November*, by ſuch Perſon as ſhall enjoy the ſaid Houſes, *&c.*

Elizabeth died without Iſſue 1709. *Dorſet Surby* ſurvives and enters, and dies, leaving *John Surby* the Leſſor of the Plaintiff, (his eldeſt Son *Hudſon Surby* dying without Iſſue in his Life-time) and two Daughters, *Sarah* and *Elizabeth*, of whom *Sarah* married *Richard Bealing*, by whom ſhe left Iſſue *Anne Elizabeth Bealing*, now living. The Queſtion is, whether the ſeven Meſſuages, and the Moiety of the other Meſſuages of the Teſtator, (which are the Premiſſes in the Declaration) belong to the Leſſor of the Plaintiff?

I apprehend it cannot be diſputed, as to the ſeven Meſſuages, but that an Eſtate-tail did veſt in *Elizabeth Hudſon*, with Remainder to *Dorſet Surby* in Fee; for the Deviſe of them is expreſly to *Elizabeth* and the Heirs of her Body, Remainder to *Dorſet Surby* and his Heirs; and the Leſſor is his Heir, ſo that as to them there can be no Queſtion.

As to the Moiety of the other Meſſuages deviſed to his Siſter *Elizabeth* and her Heirs, I beg Leave to inſiſt, that ſhe had only an Eſtate-Tail in them, and then her Conveyance by Leaſe and Releaſe 6 *&* 7 *Sept.* 1705. will be void; for the ſubſequent Words in the Will, *In caſe the ſaid* Elizabeth

and

and Dorſet Surby *both depart this Life, leaving no Iſſue of their Bodies, or either of their Bodies, then ſuch charitable Legacies ſhall be paid for ever,* ſhew the Teſtator's Intent, that *Elizabeth* ſhould have the Moiety of the Houſes deviſed only to her and the Heirs of her Body.

In *Clache*'s Caſe, *Dy.* 330. 1 *Rol. Abr.* 835. *L.* 35. it was held, That if a Man deviſes Land to *A.* his Daughter and her Heirs, and if ſhe die without Iſſue, it ſhall remain to *B.* and his Heirs, and if both die without Iſſue, then over to another; this is an Eſtate-Tail, though the Deviſe was to *A.* and her Heirs, which makes a Fee.

So if a Man deviſe to his Son *Richard* and his Heirs for ever, and if he die within Age of twenty-one, or without Iſſue, it ſhall be divided among his other Sons; it ſhall be an Eſtate-Tail. *Cro. Eliz.* 525. So *Webb* and *Herring*, 2 *Cro.* 416. and *King* and *Rumbal*, 448. *Nottingham* and *Jennings*, *Salk.* 233. So in the Caſe of *Craven* and *Sandford*, *H.* 1726. A Man deviſes to his two Daughters and their Heirs for ever, and if all my ſaid Children die without Iſſue, then he deviſes over to another; it was held an Eſtate-Tail.

On the other Side it was inſiſted for Defendant, that the Deviſe to *Eliz.* in this Caſe was to her and her Heirs, and no Deviſe of the Lands over on her dying without Iſſue, but only a Deviſe of three Legacies, which were to ſtand charged on the Eſtate in Caſe *Elizabeth* and *Dorſet Surby* both died leaving no Iſſue; a Contingency which hath not yet happened.

Afterwards *Paſch.* 10 *Geo.* 2. this Caſe was again argued by Mr. Serjeant *Chapple* for the Plaintiff, who urged, that *Elizabeth* had only an Eſtate-Tail in the Moiety of the Meſſuages no more than in the ſeven Meſſuages; and although the Moiety of that Moiety be only in Queſtion, yet to collect the Intent of the Will the whole Will muſt be conſidered.

Deviſe to one and his Heirs, and to another and his Heirs in other Part of the Will, they are Jointenants. So a De-

viſe to one and his Heirs, and after a Deviſe over on his dying without Iſſue, ſhews what Heirs were meant in the firſt Part of the Will; and ſo it ſhall be an Eſtate-Tail.

Now here the Deviſe of the ſeven Meſſuages is to *Elizabeth* and the Heirs of her Body, and then to *Dorſet* and his Heirs; and the Deviſe of the Moiety to *Elizabeth* and her Heirs gives but an Eſtate-Tail to both; for he after charges Legacies to charitable Uſes on both Eſtates, and they are given, if *Elizabeth* and *Dorſet* both die without Iſſue. That they are charged on both appears, becauſe they are to be paid by thoſe that enjoy the ſaid Houſes, Grounds, Moieties and Eſtates, which Words comprehend both the aforementioned Eſtates, as well the ſeven Meſſuages as the Moiety of the 150 Meſſuages.

Then he Deviſes the Remainder (that muſt mean the Remainder of both Eſtates) to ſuch Perſons as *Elizabeth* ſhall appoint; ſo that here is a Remainder limited to her in Fee; and thoſe Words muſt ſignify nothing if the former Deviſes did not make an Eſtate-Tail; and ſo are the Caſes, *Mo.* 127. *Ray.* 122. 2 *Jon.* 172. *Ow.* 29. 2 *Cro.* 416. 1 *Rol.* 836. *L.* 9 *Co.* 127.

Serjeant *Eyre contra:* The Charge of the Legacies can be only on the Moiety of the 150 Meſſuages, and then the principal Argument, why the laſt Words make an Eſtate-Tail, is taken away.

But it is plain the Deviſe of the ſeven Houſes is given to *Elizabeth* in Tail, Remainder to *Dorſet Surby* in Fee, and then this Charge of the charitable Uſes is only to take place in Caſe *Elizabeth* and *Dorſet* both die without Iſſue.

As to the Caſes cited, they ſeem applicable where Croſs Remainders are limited, but Croſs Remainders take no Place but where there is a Neceſſity for it.

And afterwards *Trin.* 11 *Geo.* 2. the Chief Juſtice delivered the Judgment of the whole Court for the Defendant.

For in the former Part of the Will he expreſly deviſes the ſeven Meſſuages on *Saffron Hill* to his Siſter *Elizabeth* and the Heirs of her Body, and after to *Dorſet Surby*, the Son of his Siſter *Mary*, and his Heirs; and preſently after the Teſtator deviſes the Moieties of other ſeventeen Meſſuages to his Siſter *Elizabeth* and her Heirs; whereby it plainly appears the Teſtator well underſtood the Difference of limiting an Eſtate in Tail or in Fee; and therefore he could never intend that *Elizabeth* ſhould have no other Eſtate in the Moieties of the ſeventeen Meſſuages that are deviſed to her and her Heirs, than ſhe had by the Deviſe of the ſeven Meſſuages given to her and the Heirs of her Body.

It is ſure, if a Man in the former Part of his Will gives Lands to another and his Heirs, and after by ſubſequent Clauſes ſhews, that if he did die without Iſſue, it ſhould go to another; and that is all that can be inferred from any of the Authorities cited in the Argument of this Caſe, which are all agreed, and need not now be repeated.

But here the ſubſequent Clauſe relied on, to prove this Eſtate-Tail in the Siſter *Elizabeth* in the Moieties of the ſeventeen Meſſuages, is this:

But in Caſe my Siſter Elizabeth *and my Nephew* Dorſet Surby *die, leaving no Iſſue of their or either of their Bodies*, he gives out of his Houſes and the ſaid Moieties three Annuities, payable by them that ſhould enjoy the Eſtate after the Deceaſe of his Siſter *Elizabeth* and *Dorſet Surby* without Iſſue.

So that he does not deviſe the Lands themſelves, but only yearly Sums of Money payable out of the Lands.

The Intention therefore ſeems to be, as far as can be collected out of ſuch obſcure Words, that his Siſter *Elizabeth*

ſhould have the Eſtate in Fee; but if ſhe left no Iſſue, and if his Nephew *Dorſet Surby* left no Iſſue, (who was Heir at Law to *Elizabeth*, if ſhe left no Iſſue) then the Eſtate ſhould ſtand charged with thoſe Annuities in the Hands of any collateral Heir.

Judgment for the Defendant.

Athelſtone ver. *Moone and Willis.* In C. B. Caſe 225.

ON Motion for an Attachment, for not performing an Award which had been made purſuant to a Rule of Court, it was objected by Mr. Serjeant *Eyre*, that the Award was void; for the Submiſſion is of all Matters between the Parties, (without ſaying between them or either of them) ſo as the Award be made of the Premiſſes by ſuch a Day. But the Award is, that the Defendant *Willis* ſhould pay a Sum of Money due by him to the Plaintiff; as therefore the Submiſſion muſt be underſtood of joint Demands which the Plaintiff had againſt the Defendants, this Award of a ſeveral Debt from one of them only is not within the Submiſſion.

A Submiſſion of all Matters in Difference, imports all Matters which either Party had jointly or ſeverally againſt each other.

But it was not allowed; For a Submiſſion of ſeveral Perſons of all Matters in Difference between them, imports a Submiſſion of all Matters that either had againſt the other jointly or ſeverally; and ſo it was held 1 *Rol.* 246. *pl.* 1. 8 *Co.* 98. *Baſpole*; and the Words *Ita quod, &c.* do not in this Caſe any wiſe reſtrain the Arbitrators.

King ver. *Harris.* In C. B. Caſe 226.

AN Attachment that iſſued for a Contempt was made returnable on *Wedneſday* next after ——

An Attachment returnable before the full Term, if after the Eſſoin-day, which is ſtrictly the firſt Day of the Term, held good.

And by Serj. *Chapple* it was moved to quaſh it; for altho' the Eſſoin-day was the Day before, the Term did not begin till the *Friday*, which being the Day of Appearance, the Proceſs

ceſs ought not to have been returnable before, and conſequently it is void, and ought to be ſet aſide as a Writ returnable at a Day out of Term.

Serjeant *Wright:* This is not returnable at a Day out of Term, for the Eſſoin-day is the firſt Day of Term.

And 1 *Bulſt.* 35. it was held, that a Judgment might be given on the Eſſoin-day, and that when given in full Term it relates to the Eſſoin-day; that a Judgment upon an Inſpection of an Infant made on the Eſſoin-day was good, for the Parties may appear on the Eſſoin-day, although the *Quarto die poſt* is the Day of Grace allowed them, before which no Default ſhall be recorded.

But if the Defendant do appear on the Eſſoin-day, his Appearance may be recorded, and he may then plead, and Judgment may be then given.

And Juſtice *Williams* ſaid, that here a Difference appeared between the *Teſte* and Return of Writs; for a Return may be on the Eſſoin-day, tho' a Writ ſhall not abate if returned on the *Quarto die poſt.*

And *Croke* ſaid, if a Man be bound to appear on the firſt Day of Term, he may appear on the Eſſoin-day.

So it was reſolved, That Judgment by Confeſſion, *H.* 22 *Jac.* relates to the Eſſoin, and ſo precedes a Recognizance acknowledged 22 *Jan.* the Day before full Term. *Cro. Car.* 102.

Caſe 227.

Craven ver. *Hanley.* In C. B.

Where the Treſpaſs is confeſſed by the Defendant in his Plea, the Plaintiff ſhall have Judgment, though a Verdict be found for the Defendant.

TReſpaſs for entring his Cloſe, and feeding his Hay with Defendant's Cattle.

The Defendant pleads, the Plaintiff was poſſeſſed of a Cloſe called *Little Holme* in the ſaid Village, and the Plaintiff

14 *Oct.* gave Licence to the Defendant to eat up the Fog off the Cloſe in the ſaid Village with his Cattle, at any Time between that Day and the 11 *Nov.* following; and that he put in the Cattle in the Declaration to feed the Fog in the ſaid Cloſe, and the Plaintiff having an Hay-Stack in the Cloſe, for want of fencing about the ſaid Hay-Stack his Cattle eat the ſaid Hay, *viz.* ſix Load of Hay, Part of the ſaid Hay-Stack, *abſque hoc*, That he was guilty at any other Time than between the ſaid 14 *Oct.* and 11 *Nov.* following.

Plaintiff replies of his own Wrong, *&c.*

And after Verdict for the Defendant, Serjeant *Eyre* moves, that the Plaintiff ought to have Judgment; that this Licence is no Juſtification of feeding the Plaintiff's Hay, and conſequently the Treſpaſs being confeſſed, Plaintiff ought to have Judgment.

Serjeant *Chapple* for the Defendant inſiſted, that this Iſſue being found for the Defendant, Judgment ought not to be for the Plaintiff.

It appears the Plaintiff put a Fence about his Hay-Cock, but it was inſufficient; though the Licence is to be taken ſtrictly, yet the Perſon licenſed is excuſable if his Cattle againſt his Will do eat the Graſs where Way, *&c.* is, to which Licence is given.

Plummer and *Webb*, *Popham* 151. *Noy* 98. *A.* licenſes *B.* to put a Stack of Hay on his Land, after *A.* leaſes his Land to *W.* whoſe Cattle eat the Hay; no Treſpaſs; cited 1 *Vent.* 44. and allowed, for *B.* ought to fence his Hay at his Peril. 1 *Jon.* 388.

Serjeant *Eyre contra:* The Treſpaſs being confeſſed, the Plaintiff ought to have Judgment, tho' the Verdict be found for the Defendant, if the Matter of the Plea do not excuſe the Defendant in eating the Hay with his Cattle.

Now where Licence is given, the Party can only do what he is licenſed to do. It is ſaid, the Cattle going in a Way to which he is intitled are excuſed in eating the Graſs, that is eating what cannot be helped; he muſt ſay *Raptim & Sparſim.*

In the Caſe of *Poph.* 151. the Hay belonged to him who had Licence to put his Hay on the Land, and then no Doubt he ought to take Care of it himſelf.

But here the Hay belongs to the Owner of the Land, and the Licence is to eat the Fog of his Ground, but not to eat out his Hay.

And after the Court was of that Opinion; for the Defendant ought to ſecure the Hay at his Peril, and he might juſtify the doing ſo, as it ſeems by the Caſes mentioned *Poph.* 151. *Noy* 98. which are cited 1 *Vent.* 44.

Judgment for the Plaintiff, who may afterwards have a Writ of Inquiry.

5

DE
Term. Sanct. Trin.
9 & 10 Geo. 2. In C. B.

Le Marque ver. *Newman.*

Caſe 228.

MOTION to ſet aſide Writ of Inquiry for want of proper Notice of executing it.

Notice of executing a Writ of Inquiry ought to aſcertain Time and Place where it is to be executed.

The Notice was given at the *Three Tuns* in *Brook-ſtreet* in *Middleſex*; and on Affidavit that there were three *Brook-ſtreets* in *Middleſex*; *Brook-ſtreet Stepney*, *Brook-ſtreet Hanover-ſquare*, and *Brook-ſtreet Holbourn*, and though an Affidavit was made on the other Side, that there was no *Three Tuns* in any of thoſe *Brook-ſtreets* beſides in *Brook-ſtreet Holbourn*, and that Writs of Inquiry were uſually executed there, yet the Writ of Inquiry and Execution on it was ſet aſide, for the Notice ought to aſcertain the Time and Place where the Writ of Inquiry is to be executed, ſo that the Party may know certainly when and where to reſort with his Witneſſes; and this ought to be done with ſo much Certainty, that the Defendant need not be put to the neceſſity of going over the County to inquire whither he is to reſort; and therefore Notice to execute it at the Sheriff's Office in *Northampton* hath been held ill; and ſo to execute it between ten o'Clock and two in the Afternoon; and the Writ of Inquiry was ſet aſide by the Opinion of all the Court.

Smith

Caſe 229. ***Smith*** ver. ***Richardſon.*** In C. B.

In an Action for Words, upon Not guilty pleaded, Whether the Defendant can be admitted to give Evidence of the Truth of the Words ſpoken, (when they import a Felony) in Mitigation of Damages.

ACTION upon Caſe for Slander, in ſaying *The Plaintiff is a Rogue and hath ſtolen my Beer.*

The Defendant at the Trial before Baron *Forteſcue* offered to give in Evidence, in Mitigation of Damages, that the Plaintiff was guilty of ſtealing his Beer.

But Counſel for the Plaintiff inſiſting he could not, as the Fact was Felony, ſince he had pleaded Not guilty, but he ought to have juſtified, and ſince he hath not juſtified, he ſhall not now charge the Defendant with Felony, though it be in Mitigation of Damages; and the Judge doubting of it, it was made a Caſe for the Opinion of the Court where the Action was brought.

Serjeant *Hawkins:* Any Thing that mitigates the Damages may in an Action of Caſe be given in Evidence where the Recovery is wholly in Damages.

That the Malice of ſpeaking may be excuſed is evident from many Caſes; Why not the Falſity of which he is accuſed in the Declaration, by ſhewing he ſpoke only what was true of the Plaintiff?

In 2 *Cro.* 91. a Man may ſhew in Evidence, that he ſpake the Words not maliciouſly, but mentioned in a Sermon only what he had read in the Book of Martyrs.

The Defendant acts in ſuch Caſe at his Peril, for if he attempt to prove the Plaintiff a Thief, and cannot do it, he aggravates the Damage by charging him falſly in Court with ſuch a Crime.

But if the Thing to be proved be a Bar of all the Damages, if pleaded, why may it not be proved in Mitigation?

Serjeant *Chapple contra:* 'T would be a great Hardſhip on the Plaintiff if the Defendant ſhould be at Liberty to charge him with a Felony at any Time in any Place, who hath no Opportunity to make his Defence againſt ſuch a Charge.

What was ſaid or done at the ſame Time may be given in Evidence, and was now allowed by the Judge, and it was here done.

The Caſes cited chiefly go where the Matter proved is in Bar of the Action, and defeats it.

Ordered to be ſpoken to again.

Gambier ver. *Larkin.* In C. B.

Caſe 230.

DEBT on Bond with a Condition to be a true Priſoner without making any Eſcape.

When the Defendant by his Rejoinder departs, it is good Cauſe of Demurrer.

The Defendant pleads *J. Larkin* did remain a true Priſoner without committing any Eſcape, *&c.* Plaintiff aſſigns Breach, that 13 *Jan. J. Larkin* made an Eſcape; Defendant rejoins, that *J. Larkin* went a little Way out of the Rules of the Priſon, but being ſent for back by the Plaintiff he immediately returned, with Conſent of the Plaintiff, was accepted as his Priſoner, and ſo continued ever ſince; to which it was Demurred.

Chief Juſtice *Reeve:* Here is a Breach aſſigned, to which Defendant rejoins, that *Larkin* did make an Eſcape, for he ſaith he went out of the Rules of the Priſon, which is an Eſcape, 3 *Co.* 44. and ſo by Stat. 8 & 9 *W.* 3. 27. and then he returned with Conſent of the Plaintiff; now this is a Departure; for if this would excuſe the Eſcape, it ſhould have been pleaded at firſt.

But this Plea in the Matter of it is no Excuſe.

It is not ſaid he was retaken on a freſh Purſuit, but he returned (being ſent for) without ſaying when, or after what Time, or any Thing in certain.

So Judgment for the Plaintiff.

Caſe 231.

Chambers ver. *Gambier.* In C. B.

In an Action for an Eſcape, Defendant pleads that Priſoner eſcaped and returned before the Action brought, without his Knowledge, and was in Execution for the Damages on the ſaid Judgment; and it was held well, it being tantamount to a Retaking on a freſh Purſuit.

DEBT for the Eſcape of one —— *Lampton.* Defendant pleads, That *Lampton*, without Knowledge of the Defendant the Warden of the *Fleet*, eſcaped, and before Action brought, without Knowledge of the Defendant returned, and was in Execution for the Damages on the ſaid Judgment; to which it was demurred.

Judgment for the Defendant, *Niſi, &c.* for this tantamounts to a Retaking on a freſh Purſuit; and the ſame Plea was held good *Hil.* 8 *Geo.* 2. *Grey* and *Gambier.*

Caſe 232.

Huxley ver. *Clendon.* In C. B.

Render of a Priſoner by his Bail, is not compleat till the Fees are paid.

MOTION by Serjeant *Chapple*, to vacate an Entry of a Surrender of a Perſon to Priſon by his Bail, made at Mr. Juſtice *Denton*'s Chambers and ſigned by him, on Affidavit, that *Clendon* and *Ambroſe*, who were his Bail, went to Judge *Denton*'s Chamber, and while the Render was making they talk'd about the Fees, and *Clendon* ſaid he knew the Fees as well as any one, but when the Book was ſigned *Clendon* went away, and the Gaoler ſaid he would take no Care of him. 2 *Keb.* 2. *Farreſly* 77.

Serjeant *Wright, contra:* The Bail is not to pay the Fees, and therefore the Bail not chargeable if not paid; here is

no Impoſition that appears upon the Court or Judge, and a Record was never vacated, but where the Court was impoſed on.

Per Cur'. The Query is, Whether here is not an Impoſition on the Court or the Judge, who acts in this Caſe in Aid of the Court where the Render ought properly to be made; if a Fee be due for the Render, the Render is not complete till paid, and the Judge who ſigns the Entry of *Comittit'* on the Bail-Piece doth it on Suppoſition that the Fees are paid, and if they be not, he is impoſed on, and the Act ought to be ſet aſide.

Ordered in the Abſence of Chief Juſtice *Reeve*, that the Judge's Name to the Render on the Bail-Piece be ſtruck out.

Howes ver. *Haſlewood.* In C. B.

Caſe 233.

DEclaration is laid in the City of *Norwich*, but *Norfolk* is in the Margin, and Writ of Inquiry executed there.

If Action be laid in one County and the *Venue* in another it is a *Jeofail*, and helped by the 4th and 5th of *Anne*.

Serjeant *Wright:* If Action be laid in one County, and the *Venue* be laid in another County, it is fatal, and not helped by any of the Statutes of *Jeofails*, and ſo are ſeveral Caſes adjudged. *Lutw.* 225. 7. *Rol.* 432. But afterwards *Hil.* 9 *Geo.* 2. It was held by the whole Court, that it was helped by Stat. 4 & 5 *Annæ* 16.

Richardſon ver. *Pattiſon.* In C. B.

Caſe 234.

IN Action *qui tam, &c.* on Stat. 9 *Anne*, for that the Defendant being a Cuſtom-houſe Officer did ſolicite *A.* and *B.* to vote at the Election of Members for the City of *Carliſle*, the ſaid *A.* and *B.* being Electors and having Right to vote at ſuch Election.

In an Action *qui tam* on Stat. 9 *Anne*, againſt a Cuſtom-houſe Officer, the Plaintiff hath a Right to inſpect Town-Books, and take Copies to be uſed at the Trial.

It

It was moved by Serjeants *Chapple* and *Wright*, that a Rule of this Court ſhould be made, that the Plaintiff may have Liberty to inſpect the Town-Books where the Freedoms of the ſaid *A.* and *B.* are inrolled, and take Copies of the ſame, to be uſed at the Trial of the Cauſe; and the Court made a Rule accordingly, Chief Juſtice *Reeve* abſent; although objected the Plaintiff is no Freeman, and ought not to be admitted to inſpect into the Books of the Corporation to make Evidence for his Action; nor is here any Affidavit, that the Right of Election was in the Freemen.

But it was anſwered, the Plaintiff hath a Right, by being Plaintiff in the Action, to ſee what relates to that Fact on which the Action is grounded.

Caſe 235.

Wayman ver. *Wayman.* In C. B.

Bail ſhall be given in an Action of Debt on a Judgment, notwithing a Writ of Error, if no Bail in the original Action, otherwiſe not.

SErjeant *Chapple* moved for Bail. The Caſe was, Judgment was given for the Plaintiff, who brings Debt on that Judgment; the Defendant brings Error on the original Judgment, and puts in Bail to the Writ of Error; and moved that no Bail being to the original Action, Bail might be to the Action of Debt on the Judgment. Mr. *Townſend* cited a Caſe where Chief Juſtice *Eyre* conſulted Judge *Tracy*.

Jackſon and *Duchot*, *Hil.* 13 *Geo.* If Bail be in the original Action in Caſe, and Debt be brought on the Judgment, no Bail ſhall be required; but if no Bail in the original Action, but a Writ of Error be brought upon it, and then Debt on the Judgment, Bail ſhall be given in the Action of Debt on the Judgment, notwithſtanding ſuch Writ of Error.

DE
Term. Sanct. Hill.
10 Geo. 2. In C. B.

Blacklock ver. *Mariner.*

Caſe 236.

TReſpaſs for Aſſault and Battery 1 *April*; Declaration charges another Battery 2 *April*, and a third Battery by the Defendant 3 *April*.

Where the Name of the Defendant is made uſe of in the Declaration by Miſtake, inſtead of the Plaintiff's, it ſhall be helped after a Verdict.

The firſt Count was for a Battery by the Defendant on *John Blacklock*; the ſecond and third Counts were for a Battery by the Defendant on the ſaid *Samuel*, which was the Name of the Defendant, inſtead of the Plaintiff, whoſe Name was *John*; and a Verdict being given for the Plaintiff, and intire Damages, Serjeant *Eyre* moved in Arreſt of Judgment, becauſe in this Caſe the Plaintiff recovers Damages for the Damages the Defendant received by the Battery on himſelf.

Serjeant *Chapple*: This is a mere Miſtake in the Clerk, and aided by the Statute 16 & 17 *Car.* 2. which helps all Miſtakes of the Chriſtian and Surname of the Parties who are once rightly named before in the ſame Record, and here *John Blacklock* is named right in the firſt Count, and then when the ſubſequent Counts ſay, that the ſaid Defendant did aſſault and beat the ſaid *Samuel Blacklock*, there being no ſuch Perſon named before, it appears evidently that it was a mere Miſtake; and may be compared to the Caſes, where the Plaintiff declares, that the Defendant being indebted to the Plaintiff, the ſaid Plaintiff did promiſe to pay to the Defendant or *vice verſa*,

verſa, which have been always helped after Verdict. 4 *Mod.* 162. Reſolved in the King's Bench between *Staveley* and *Palmer*, 13 *Will.* 3.

And of that Opinion was the Court, and Judgment given for the Plaintiff.

Caſe 237. ## *Elizabeth, Executrix of William Cartlitch,* ver. *Sir John Eyles.*

How far an Undertaking for a third Perſon ſhall bind.

Aſſumpſit, wherein the Plaintiff declares, that the Defendant 27 *Nov.* 1729. in Conſideration that the Teſtator at the Defendant's Requeſt would give Credit to *Thomas England* for any Quantity of Silver to work on as far as 300 or 400 *l.* Value, as the Occaſions of the ſaid *Thomas England* ſhould call for it, the ſaid Teſtator giving four or ſix Months Credit for Payment, promiſed Teſtator to be anſwerable to him for the Credit of the ſaid *Thomas England* as far as the ſaid 300 or 400 *l.*

And avers, that her Teſtator, relying on the ſaid Defendant's Undertaking, at divers Times between 27 *Nov.* 1729. and 18 *Jan.* 1733. gave Credit to *Thomas England* for Silver to work on as his Occaſions called for it, to the Value of 400 *l.* and gave Credit for Payment, ſometimes for four, ſometimes for ſix Months; and that on 18 *Jan.* 1733. there was due to the Teſtator for ſuch Silver 338 *l.* 3 *s.* 2 *d.* which *Thomas England* had not paid, and yet the Defendant refuſed to pay the ſame.

On *Non aſſumpſit*, and Iſſue joined, the Cauſe came to Trial before Mr. Juſtice *Denton*, and to prove the Promiſe in the Declaration, a Letter from Sir *John Eyles* was produced in theſe Words:

Mr. Tho. England, *who delivers you this, is a Silverſmith, whoſe Buſineſs is encreaſing beyond his Stock, and he has Occaſion for ſome Credit, being obliged ſometimes to work his Stock out before he can get his Money for the Plate he makes. I have a*

very good Opinion of his Honeſty, and would be anſwerable myſelf for his Credit as far as 300 or 400 l. *if it be conſiſtent with your Buſineſs to give him Credit for any Quantity of Silver to work upon to that Value, as his Occaſions call for it, (giving Credit for four or ſix Months Payment); if this Propoſition be at all agreeable, or can be made ſo, I ſhall be willing to talk further with you, who am,*

Sir,

Your Humble Servant,

Directed to Mr. *Cartlitch.*

John Eyles.

On this Letter *William Cartlitch* the Teſtator intruſted *Thomas England* from Time to Time with Quantities of Silver, amounting in the whole to 1379 *l.* for which he made *England* Debtor in his Book, and *England* always gave his Note for the Silver received, whereby he promiſed to pay for it, nor was any Time limited for Payment, nor did it appear that Sir *John Eyles* had Notice that *Cartlitch* truſted him at all, nor did he countermand *Cartlitch* from doing ſo.

Mr. Juſtice *Denton* gave Leave to move the Court upon this Letter for their Opinion, whether this Letter was ſufficient Evidence of the Promiſe in the Declaration attended with the above Circumſtances, which he ſaid was the whole of the Evidence given.

Upon this Evidence Chief Juſtice and I thought a new Trial might not be improper, ſince this Letter was indeed proper Evidence to be given to a Jury to induce a Belief, that Sir *John Eyles* had undertaken according to the Declaration; and if it had been proved, that upon this Letter Mr. *Cartlitch* had ſignified to Sir *John*, that he upon this Encouragement would truſt *England*, or that Sir *John* had any Knowledge he did intruſt him with Silver, and he did not controul his doing ſo, it might be ſufficient for the Jury to find for the Plaintiff.

But

But as the Letter only imported, that he had an Opinion of the Honeſty of *England*, and on that Account was inclined or diſpoſed to become anſwerable as far as 3 or 400 *l.* if conſiſtent with his Buſineſs to give ſuch Credit (for that is as much as the Words can reaſonably be ſtrained to, it not being ſaid, *I will be anſwerable*, but *I would or am inclined or minded to be ſo upon Terms*) and then going on to tell him, *that if the Propoſition was agreeable, or could be made ſo, he would talk farther with him*; it ſeems to be only a Propoſal or Communication, and not a compleat Agreement, but a proper Evidence, which with other Circumſtances concurring might be concluſive.

And therefore if the Defendant was privy to the Truſt given, and did not controul it, or was acquainted with the Letter's being delivered and accepted, it might be fit to charge the Defendant.

But it may be hard to charge him in caſe he had no Notice, which by the Judge's Report of the Caſe did not appear to have been given.

That *Cartlitch* truſted him upon Receipt of this Letter does not import any Notice to Sir *John Eyles*, for it appears not that he truſted him on Sir *John*'s Account, for the Credit in his Books was given to *England*, and he took Notes for the Money from him.

No Mention at all that it was done on the Defendant's Account, and it is uſual Evidence, when Credit is given on another's Account, to ſee how the Credit is entered in the Plaintiff's Books.

It is ſure *Aſſumpſit* lies not upon mere Communication, 1 *Rol. Abr.* 6. and this ſeems no more.

It refers to a future Treaty or Parlance, and if that had been ſo, the Defendant might have been vigilant how *Thomas England* went on in his Trade, might have put a ſtop to the

Credit given whenever he ſaw Cauſe, or might have taken Security from him, which, having no Notice of ſuch Truſt or Dealing, he could not do.

But Juſtice *Denton* and *Forteſcue* thought the Letter itſelf contained a full Promiſe from the Defendant to pay what the Teſtator credited him for not exceeding 3 or 400 *l.* that the Words (*would be*) were the ſame as *will be*, and the Concluſion of the Letter was rather artful than a Deſign of farther Treaty; and therefore a new Trial was denied.

Leaver ver. *Witcher.* In C. B.

Caſe 238.

Motion to plead double denied, after a Judgment that had been regugarly obtained was ſet aſide, on Payment of Coſts.

MOTION to ſet aſide a Judgment; which was granted on Payment of Coſts, although the Judgment was regular.

But then it was moved, that the Defendant might have Liberty to plead the General Iſſue, and likewiſe *Non aſſumpſit infra ſex annos.*

But it was denied; for when a Judgment is regular, and ſet aſide upon the Intreaty of the Defendant to let him in to try the Merits of the Cauſe, it ſhall be only allowed to plead the General Iſſue, and not the Statute of Limitations or other defenſive Plea, that goes not to the Merits of the Cauſe.

DE
Termino Paſch.
10 Geo. 2. In C. B.

Caſe 239.

Shelley ver. *Wright.*

The County being in the Margin will ſupply the Want of it in the Declaration.

DEBT on Bond for 400 *l.* wherein the Plaintiff declares, *Middleſex, to wit,* in the Margin; *George Wright* of *Weſtminſter,* Eſq; otherwiſe called *George Wright* of the Pariſh of St. *John the Evangeliſt, Weſtminſter,* in the County of *Middleſex,* was ſummoned to anſwer *Charles Shelley,* Eſq; in a Plea that he render him 400 *l.* *&c.*

Defendant after *Oyer* of the Bond and Condition (which was that the Defendant give a true State of all Fees, *&c.* received by him in the Office of the Plaintiff, as Auditor of the Alienation Office, and pay the Ballance, *&c.*) prays Judgment of the Writ, for that in the Writ and Declaration there wants the Addition of the County where the Defendant is converſant.

To which it was demurred; and it was agreed that it was not ſufficient within the Statute 1 *H.* 5. 5. to give the Addition in the *Alias dict'.* Reſolved *Cro. Eliz.* 198. *Mo.* 354. 2 *Lev.* 183.

Serjeant *Skinner* for the Plaintiff inſiſted, that the County in the Margin will ſupply the Want of it in the Declaration, and ſo it was held *Norris* and *Friend, Mich.* 4 *Geo.* 2. the Declaration was *Robertus Friend nuper de Weſtminſter in Comitatu tuo*; there was a Demurrer to the Plea in Abatement for

want of Addition, as here, becauſe *in Comitatu tuo* refers to nothing, being incertain ; but it was held that the County being in the Margin ſupplied the Omiſſion, and the Words *in Comitatu tuo* ſhall be rejected as inſenſible; and by the Courſe of Common Pleas the County in the Margin is Part of the Declaration, though it be not held ſo in the King's Bench; County in the Margin ſupplies Omiſſion in the Declaration. 2 *Cro.* 69, 613.

It is true in an Indictment the Omiſſion of the County is not helped by naming the County in the Margin.

And the Opinion of the Court was, That the Plea was ill, and a *Reſpond. Ouſter* awarded.

Skip ver. *Hook.* In C. B. *Intr. Hill.* 10 *Geo.* 2. *Rot.* 369.

Caſe 240.

A *Aſſumpſit* on Promiſſory Note by the Defendant to pay *William Welch* or Order 50 *l.* for Value Received; that *William Welch* indorſed it over to the Plaintiff, in Conſideration whereof the Defendant promiſed to pay to the Plaintiff, who, though often requeſted, refuſed, *&c.*

In an Action on a Promiſſory Note againſt Drawer, Plaintiff need not alledge Notice to the Defendant of the Indorſement.

Defendant demurs, and ſhews for Cauſe, that the Declaration did not alledge Notice to the Defendant of the Indorſment, and relied on Caſe 2 *Mod. Ca.* 43. *Lawrence* and *Jacob*, where, after Verdict and Judgment for the Plaintiff, the Judgment was reverſed in Error for that Cauſe. *Sed non allocatur*; for that Caſe is miſreported, for Juſtice *Forteſcue* produced the Paper-Book in that Caſe, and ſaid it was *Paſch.* 8 *Geo.* and that the Judgment was affirmed, and on the Authority of that Caſe, and on the Reaſon of the Thing; for the Defendant by his Demurrer admits that in Conſideration of the Premiſſes, (*viz.*) Defendant's making the indorſeable Note, and the Indorſing it to the Plaintiff, the Defendant aſſumed to pay the Money according to the Tenor of the Note.

Judgment was given for the Plaintiff by the whole Court.

Spinks

Caſe 241. ## *Spinks* ver. *Bird.* In C. B.

An Exigent is ſuperſeded by a Writ of Error.

JUdgment for the Plaintiff, a *Cap' ad Satis'* iſſues thereon againſt the Defendant, upon that *Ca' Sa'*, an *Exigent* was taken out, Teſted 7 *Feb.* then a Writ of Error was ſued by the Defendant, Teſted 5 *Feb.* and allowed 8 *Feb.*

Serjeant *Chapple* moved that the Plaintiff might proceed to outlaw the Defendant, notwithſtanding the Writ of Error; as if Debt be brought on a Judgment, and then a Writ of Error is ſued on the Judgment, the Court will permit the Plaintiff in that Action of Debt to proceed to Judgment, though they will ſtay Execution.

Serjeant *Parker*, *contra*: The Writ of Error is of itſelf a *Superſedeas*.

It is true it is no Contempt till Notice, but by taking out the Writ of Error the Court is ſtayed from Proceeding in the Execution. 2 *H.* 7. 12. 2 *Cro.* 342. *Godb.* 439. 1 *Vent.* 30. 1 *Mod.* 28. The Form of the Writ of *Superſedeas* in Error ſhews that an Exigent is ſuperſeded. *Raſt. Ent.* 309. *b. pl.* 10. *Off. Br.* 378. *Theſ. Br.* 293. *Cliff.* 693, 694.

And of that Opinion was the Court, for the Exigent is only to carry on the Execution.

Caſe 242. ## *Goodtitle* ver. *Bradburne & al'.* In C. B.

Whether a Husband ſeiſed jointly with his Wife, can without her make a good Tenant to the Precipe.

EJectment on Demiſe of *Iſaac Colman*; on the General Iſſue a ſpecial Verdict is found to this Effect:

Richard Lowth ſeiſed in Fee, conveys to *Robert Colman* and *Mary* his Wife, and to the Heirs of the Body of *Robert Colman* on the Body of *Mary* his Wife to be begotten, and for want of ſuch Iſſue, to the Heirs of the Survivor.

By Leaſe and Releaſe, *Robert Colman* without his Wife, conveys to *Edward Haberfield* and his Heirs, to make him Tenant to the Precipe, on which a Recovery was ſuffered, and was declared to the Uſe of *Robert Colman* and his Heirs; *Robert Colman* dies without Iſſue, his Wife ſurvives; *Iſaac Colman* his Son and Heir by a former Wife, after the Death of *Mary* his Wife, claims as Heir to *Robert Colman*, and brings his Ejectment againſt thoſe who claim as Heir to *Mary* the Wife, who was the Survivor.

Serjeant *Eyre* inſiſted, That this Recovery was good to veſt the Eſtate in the Huſband and his Heirs, and prevent the Taking of the Heir of the Survivor.

And this depends upon this Queſtion, Whether the Huſband alone could make a good Tenant to the Precipe.

It is plain, if the Huſband be ſeiſed in the Right of his Wife, he by Bargain and Sale may make a good Tenant to the Precipe. 1 *Rol. Abr.* 845. *S.* 4. 2 *Rol. Abr.* 394.

If the Huſband be Jointenant with his Wife and levy a Fine, that makes a good Tenant to the Precipe; ſo it was held in *Cupledyke*'s Caſe, 3 *Co.* 6. *Mo.* 210. 2 *Rol.* 395.

Serjeant *Belfield*, *contra*: I admit the Caſes which ſay a Man ſeiſed in Right of his Wife may make a Tenant to the Precipe; but here the Huſband is not ſeiſed in Right of his Wife, but both are equally ſeiſed, for they take by Entireties, therefore in ſuch Caſe the Huſband alone cannot make a Tenant to the Precipe.

And ſo it was reſolved in the Caſe of *Owen* and *Morgan*, 3 *Co.* 6. *Mo.* 210. And the Caſe is to the ſame Effect in the Reaſon of it. 1 *Sid.* 83. 3 *Lev.* 107, 108.

So it was reſolved *Salk.* 2 570 598. But it was adjourned. v Pigl 38

Caſe 243. ## *Steward of Bury* ver. *Rabutin Sheriff of Suffolk.* In C. B.

The Sheriff's Deputy to be entered on Record.

MOTION, that the Sheriff of *Suffolk* hath uſually appointed a Deputy at *Bury* in order to receive and return Writs, which the preſent Sheriff refuſes to do.

Rule was inlarged to ſhew Cauſe why he ſhould not make a Deputy in the Town, purſuant to a Rule of this Court, *Hil.* 14 & 15 *Car.* 2. *Hil.* 15 & 16 *Car.* 2. and *Trin.* 1 *Jac.* 2.

Enlarged to the firſt Day of next Term, *Trin.* 10 & 11 *Geo.* 2. The Rule diſcharged, there being no Cauſe in Court relating to this Matter, nor any Complaint by Suitor of the Court.

Ordered, That for the future the Sheriff's Deputy be entered on Record.

Caſe 244. ## *Harvey* ver. *Stokes.* In C. B.

The Miſtake of the Name of a third Perſon is not aided or amendable, though a Miſnomer of the Plaintiff or Defendant is.

DEBT on Replevin Bond; Defendant pleads that ſhe did proſecute the Replevin with Effect, and the Sheriff was not damnified; Plaintiff replies that the Plaint was removed by *Recordari* to the Common Pleas, where Judgment was given for *Thomas*, who was Plaintiff in the Suit, and a Return adjudged *prout per Record'*; and ſo the ſaid *Rebecca Stokes* did not proſecute with Effect; nevertheleſs the ſaid *Thomas* (who was Plaintiff in the Action) did not return the Cattle, and this he is ready to certify; to which the Defendant demurred, and the Plaintiff joined.

And for Cauſe of Demurrer the Defendant ſhewed the Plaintiff hath not verified his Replication.

This Caſe was argued ſeveral Times, and two Objections made.

Firſt, That that is ſhewn for Cauſe of Demurrer.

Secondly, That no Breach of Condition appears; for the Condition is to proſecute with Effect, and if adjudged there ſhould be a Return, that ſhe would make Return.

Now though it be ſhewn that *Rebecca* did not proſecute with Effect; it is not ſhewn that ſhe did not return the Cattle, but only that *Thomas*, who was the Plaintiff in the Suit, did not return the Cattle.

So there is no Breach at all of the Condition appearing.

And now Chief Juſtice *Willes* gave the Opinion of the Court for the Defendant, becauſe the Plaintiff had aſſigned no Breach, and the Miſtake of the Name of a third Perſon is not aided or amendable, though a Miſnomer of the Plaintiff or Defendant be ſo. *Bridg.* 100. 2 *Lev.* 117. But as to the Word *certify* inſtead of *verify*, the Court held it to be to the ſame Purpoſe, and well enough.

DE
Term. Sanct. Trin.
11 Geo. 2. In C. B.

Caſe 245.

Trevet ver. *Angus.*

In a Defeazance to a Bond, it is not neceſſary to recite the Bond.

DEBT on Bond 4 *June* 1727. for 80 *l.*

After Oyer of the Bond and Condition, which was to pay 40 *l.* and 20 *l.* on the 25th of *December* then next, Defendant pleads, that on 12 *Mar.* 1729. there being but 40 *l.* due on the ſaid Bond, the Plaintiff did covenant, that if the Defendant did pay 5 *s.* in the Pound on 25 *Dec.* next for every 20 *s.* due to the Plaintiff from the Defendant, and ſo at the ſame Rate for every greater or leſſer Sum than 20 *s.* on or before 25 *December* next, then the Plaintiff ſhould and would accept the ſame Compoſition of 5 *s.* for every 20 *s.* in full Diſcharge of all Sums of Money as then were or on the ſaid 25 *Dec.* ſhould be due from the Defendant to the Plaintiff, and that on Payment of the ſaid Sum of 5 *s.* in the Pound, or 5 *s.* for every 20 *s.* to the Plaintiff, according to the Intent of the ſaid Deed, then the ſaid Deed ſhould be a Releaſe to the Defendant, to be pleaded or given in Evidence.

That on 12 *Mar.* 1729. ſhe was not indebted more than 40 *l.* and then ſhe tendered 10 *l.* which was 5 *s.* in the Pound, which the Plaintiff refuſed to accept.

Plaintiff demurs, and ſhews for Cauſe, that the Defendant did not ſhew that ſhe was ſtill ready to pay.

Serjeant *Wright* for the Plaintiff inſiſted, that this was no Defeazance, but a Covenant; For,

Firſt, It has no Relation to the Money due upon the Bond; for although it ſaith by way of Recital, or Suppoſal rather, that Money was due from the Defendant to the Plaintiff, and the Defendant avers, that ſhe was indebted by Bond in 40 *l.* and Intereſt, and all but 40 *l.* was paid to 12 *Mar.* 1729. yet the Words of the Deed are, *That if the Defendant pay* 5 s. *in the Pound for every* 20 s. *due to the Plaintiff from the Defendant, and ſo at the ſame Rate for every greater or leſſer Sum than* 20 s. *on or before the* 25*th of* December, *the Plaintiff ſhould and would accept the ſame in Diſcharge of all Sums as then were or on the* 25*th of* December *ſhould be due from the Defendant to the Plaintiff.*

So that the Deed imports, 5 *s.* in the Pound ſhould be paid, not for the Sum in the Bond, but for whatever Sum of Money ſhould be due to the Plaintiff from the Defendant on the 25th of *December* next.

Secondly, It is to be a Releaſe on Payment of the Money; and though Tender and Refuſal may be equivalent to Payment, and he covenants to accept this Compoſition, his Non-acceptance is a Breach of his Covenant, but it becomes not a Releaſe till Payment.

Thirdly, She ſhould have pleaded it with an *Uncore priſt*; for although Tender of collateral Sum being made, if it be refuſed, it need not be pleaded with an *Uncore priſt*; yet when the Payment is to be of a leſſer Sum in lieu of a greater, it ought to be ſo pleaded.

But it was recommended to the Parties to agree this Matter, it being hard, when a Compoſition was agreed to by the Plaintiff, that he ſhould come upon the Defendant for the whole Debt.

And on the other Side it would be hard that the Plaintiff ſhould loſe the 5 *s.* in the Pound, which the Defendant tendered, though ſhe hath not brought the Money into Court, if this be neceſſary.

But the Plaintiff not complying to any End, now the laſt Day of *Trinity* Term, 21 *June* 1738. the Chief Juſtice delivered the Opinion of the whole Court for the Defendant; and gave the Reaſons in anſwer to the Objection made.

Firſt, This is a Defeazance to this Bond, and ſufficiently relates to it; for it is not neceſſary to recite the Bond, no more than where a Power of Revocation is inſerted in a Deed; a Revocation by a ſubſequent Deed is good, though it doth not recite or mention the Power, or in direct Words refer to it. 10 *Co.* 143, 144. *Scroop*'s Caſe.

They alſo held, that it was not neceſſary in this Caſe to plead with an *Uncore priſt*, or to bring the Money into Court. *Co. Lit.* 207. 9 *Co.* 79. *b.* *Cro. El.* 755. *Mo.* 36.

Caſe 246. *Matlem* ver. *Bingloe & ux' & al'.* In C. B. *Intr. Trin.* 11 *Geo. Rot.* 1275.

A Papiſt may deviſe his Eſtate to be ſold in order to pay Money he owes other Papiſts, notwithſtanding the Statute 11 & 12 *W.* 3.

EJectment on Demiſe of *John Marſh* and *John Amyas*, of a Meſſuage, Garden, Orchard, 100 Acres of Land, and 100 of Meadow, and 100 of Paſture, in *Woodriſing* in the County of *Norfolk*, made 10 *April* 10 *Geo.* for ſixteen Years.

At the Aſſizes at *Norwich* 26 *July* next, before Chief Juſtice *Raymond*, a ſpecial Verdict was found to this Effect:

John Bedell was ſeiſed in Fee of the Premiſſes in Queſtion 1 *Feb.* 1707. and was a Papiſt, and died ſo ſeiſed 28 *Feb.* 1707.

That *Geo. Bedell* his Brother and Heir was born 1 *Aug.* 1683. and was under the Age of eighteen Years at the Time of making the Act for the further preventing the Growth of Popery, and of the Age of twenty-four Years at the Time of his Brother's Death; on whoſe Death he entered into the Premiſſes as Heir to his Brother, but was a Papiſt, and continued ſo to his Death, and never took the Oaths, nor ſubſcribed the Declaration 30 *Car.* 2.

By Will 9 *Aug.* 1715. *Geo. Bedell* deviſes the Lands and Tenements in Queſtion to *John Marſh* and *John Amyas* and their Heirs, to the Uſe of them and their Heirs, on Truſt that they in the firſt place, by and out of the Rents and Profits, or by Mortgage or Sale, *&c.* raiſe Money ſufficient to pay all the Debts he ſhould owe at his Deceaſe to *John Marſh*, and all his other Debts and Legacies and Funeral Charges, and the Charges in executing the Truſts; then to pay 150*l.* a Year to his Siſter *Elizabeth*, Wife of *John Matlem*, for her Life; and 25*l.* a Year a-piece to his Siſters *Iſabella* and *Mary* for their Lives; and ſubject to theſe Truſts ſhall permit *Robert*, Son of *John Matlem*, to receive the Reſidue of the Profits of what remains unſold till the Age of twenty-one, and then ſhall convey to *Rob. Matlem* and his Heirs, and died 19 *Aug.* 1715.

That four Days before his Death *Elizabeth*, Wife of the Defendant *John Bingloe*, who was his Siſter and next of Kin, and a Proteſtant, entered and took Poſſeſſion; that after his Death *John Marſh* and *John Amyas* the Truſtees entered, and demiſed to the ſaid *Robert Matlem* the Plaintiff for ſixteen Years, whom *John Bingloe* and his Wife ouſted; and upon this Demiſe he brings his Ejectment.

The general Queſtion was, Whether *Geo. Bedell*, being under eighteen at making the Statute 11 & 12 *W.* 3. attaining afterwards his full Age, and not taking the Oaths or qualifying himſelf as that Statute requires, could make the Deviſe to theſe Truſtees who are Proteſtants, upon Truſt for

for Payment of Debts and Legacies, and after for *Robert Matlem* a Proteſtant.

And as to that Point it was argued by Serjeant *Wright* for the Plaintiff, that a Papiſt, notwithſtanding the Statute 11 & 12 *W.* 3. is enabled to diſpoſe his Eſtate by Will.

He hath the Freehold in him, he is ſeiſed, elſe he could not convey; and as he may convey by Deed, ſo he may likewiſe deviſe.

It is true, if he deviſe to a Papiſt, ſuch Deviſee is diſabled by that Statute to take, for the Deviſee muſt take by Purchaſe.

So if he deviſe to Proteſtants in Truſt for Papiſts, or to raiſe Money, or pay Legacies, ſuch Truſt or Legacy would be void; and that was the Caſe of *Roper* and *Ratcliff*.

And in *Eaſter* Term 13 *May* 11 *Geo.* Judgment was given for the Plaintiff by the whole Court.

And Chief Juſtice *Willes* gave the Reaſons of the Judgment, *viz.* That though *Geo. Bedell* was under eighteen at making the Statute 11 & 12 *W.* 3. yet after profeſſing himſelf a Papiſt, and not taking the Oaths, he is diſqualified as well as other Papiſts; yet the Diſability incurred by this Statute is very near the Words in Stat. 1 *Jac.* which do not prevent his having or being ſeiſed of the Eſtate, and conſequently he may diſpoſe of it; he may take any perſonal Legacy or Gift, ſo cannot be reſembled to a Monk, *&c.* He may bring Waſte, nay he may take a real Eſtate *ſub modo*, *&c.* he takes for the Benefit of his Proteſtant Heir till he conforms, and for the Benefit of himſelf when he conforms.

The Inheritance muſt be in ſome Body, it cannot be in the King, for it is given to another; it cannot be to the next of Kin, for he hath but the Rents and Profits; it cannot be in his Heir, for *Nemo eſt hæres viventis*; *Thornby* and *Fleetwood* on Stat. 1 *Jac. Hob.* 73. on Stat. 3 *Jac.* ſhew they were

ſeiſed who are Papiſts, notwithſtanding thoſe Statutes; and Clauſes which give Papiſts Debt and Waſte ſtrenthen this Conſtruction.

Beſides, it ſeems moſt agreeable to the Intent of the Legiſlators, which was to encourage the bringing Papiſts Eſtates into the Hands of Proteſtants, which is beſt done if they may deviſe or convey to them.

As to the Truſts upon which this Eſtate is deviſed, the Annuities and Legacies are all to Proteſtants, and the Remainder is to *Robert Matlem* a Proteſtant.

But it was objected, that if a Papiſt can deviſe his Eſtate to be ſold for Payment of Debts, he may run in Debt to Papiſts, and ſo ſell his Eſtate from his Proteſtant Kin.

But it is not found any Debt is due to a Papiſt, and it ſhall not be intended they are ſo; it will be Time enough to conſider this when it comes to be the Caſe.

But a Papiſt may ſell his Eſtate and give the Money to Papiſts; Why may he not deviſe it in order to pay what Money he owes them?

Judgment for the Plaintiff.

Matravas ver. *Adlam and Brown.* In C. B. Caſe 247.

SCIRE facias againſt the Defendants on Recognizance of Bail for *Aaron Laws*, wherein they are bound to *John Matravas* the younger in 92 *l.* on Condition, that if the ſaid *John Matravas* recover againſt the ſaid *Aaron Laws*, and he did not pay, *&c.* they ſhould render the Defendant, or pay Condemnation; then alledges, that although the ſaid *John Matravas* the younger, by the Name of *Matravers*, recovered Judgment *M.* 10 *Geo.* 2. againſt the ſaid *Aaron Laws* 80 *l.* and 15 *l.* 10 *s.* Coſts, and had not been paid, yet the Defendants had not rendered, *&c.* Defendants demur.

In a *Scire facias* on a Recognizance of Bail, Defendants demurred, becauſe it was not ſufficiently averred, that the Plaintiff was the ſame Perſon to whom they were bound; but held no Cauſe of Demurrer.

And Serjeant *Belfield* inſiſted, firſt, That the Bail was not liable, becauſe the Recognizance is to *John Matravers* the younger, and no Averment, that the Plaintiff in the Action, named *John Matravers* without Addition, is the ſame Perſon.

Secondly, If there was an Averment, it would not help, no more than if *Edward* ſigns Bond, and is ſued by the Name of *Edmund*, which is his true Name, to ſay *Edmund* by Name of *Edward*, *&c.* became bound, *&c.* *Cro. El.* 897. 2 *Cro.* 640. *Lut.* 894, 895.

Sed non allocatur; for here is ſufficient Averment, and it is not like the Caſes cited; therefore Judgment for the Plaintiff.

Caſe 248. ## *Moravia* ver. *Sloper & al'.* In C. B.

In juſtifying under the Proceſs of an Inferior Court, it is neceſſary to ſhew, that the Precept levied was within the Juriſdiction of the Court.

TReſpaſs for Aſſault, Battery and falſe Impriſonment.

Defendants as to all but Aſſault and Impriſoning, and Detaining in Priſon twenty-eight Days, Not guilty.

As to Aſſault, Impriſoning and Detaining in Priſon twenty-eight Days, Defendants plead, That the Borough of *Devizes* is an antient Borough, and 9 *May* 1735. at a Court held for the ſaid Borough within Juriſdiction of the Borough, before the Mayor, Recorder, and three Councillors of the Borough, by Virtue of Letters Patent of King *Cha.* 2. dated 5 *June* in the 15th Year of his Reign, *James Batten* levied a Plaint againſt the Plaintiff, of a Plea of Treſpaſs on the Caſe, to his Damage of 40 *l.* and prayed Proceſs; and thereupon at the ſame Court a Precept iſſued to the Bailiffs and Serjeants at Mace of the Court, commanding them to take the Plaintiff, and to have his Body before the Mayor, Recorder, and three Councillors, at a Court to be holden on *Friday* the 6th of *June* next, which Precept 9 *May* 1735. aforeſaid, was by

William Salmond, Attorney of the Plaintiff *James Batten* in the ſaid Suit, and at the Requeſt of *James Batten*, two Defendants, delivered to the Defendants *James Williams* and *James Parker*, then and till Return the Bailiffs and Serjeants at Mace, *&c.* who, requeſted by them and other Defendant *Robert Sloper*, arreſted the Plaintiff, and detained him the ſaid twenty-eight Days, till at the Court 6 *June* following, held before the Mayor and three Councillors by Virtue of the ſaid Letters Patent, they returned the Precept duly executed, which is the ſame Aſſault, *&c.*

To which Plea the Plaintiff demurs, and the Defendants join in Demurrer.

And for the Plaintiff it was inſiſted, that this Plea is ill.

For firſt, It doth not ſhew, that the Matter for which this Precept was levied was within the Juriſdiction of the Court; and although the Officer may be excuſed who is bound to obey the Precept, although the Matter be not alledged to be within the Juriſdiction, 1 *Lev.* 95. yet the Plaintiff in the Action, and *Sloper* who is a Stranger, ought to ſhew it. 2 *Mod.* 29, 129, 195. 3 *Lev.* 20, 242. 1 *Vent.* 369. 2 *Mod.* 192.

And if the Plea is ill as to one Defendant, it is ſo to all, if they join in Pleading; and ſo it was held between *Richard* and *Bowler*, 3 *W. & M.*

And by the Court the Plea is ill for that Cauſe, and was ſo determined in this Court *Tr.* 8 *Geo.* 2. and in the Caſe of *Gwyn* and *Pool*, 2 *Lut.* 1560. The Reaſons are,

Firſt, That the Paintiff might not know the Extent of Juriſdiction, but it is his Default to ſue where he knows not the Juriſdiction, when he may ſue in Courts above.

Secondly, Defendant may plead to the Juriſdiction of the Court, but that is not an adequate Remedy; and then this Plea is likewiſe ill, becauſe it does not appear the Court of

Devizes

Devizes had Juriſdiction in perſonal Actions. And this is bad even in Reſpect to the Officer, for it muſt have ſhewn the Juſtice of Peace had Authority in the Matter.

Thirdly, There was a *Capias*, although no Summons or Precept. 1 *Vent.* 220.

Judgment for the Plaintiff.

Caſe 249.

Reaſon ver. *Liſle.* In C. B.

In an Action of Debt upon the Statute 4 & 5 *Ann.* for keeping and uſing a Dog to kill the Game, it is neceſſary to ſhew what Sort of Dog it was.

DEBT on the Statute 4 & 5 *Ann.* 14. on five ſeveral Offences againſt that Statute.

1ſt and 2d, That the Defendant uſed an Engine called a Gun.

3d, That the Defendant kept and uſed a Dog to kill and deſtroy the Game, not being qualified by the Statutes of this Realm ſo to do.

4th, That the Defendant expoſed to Sale an Hare, not being intitled to the ſaid Hare under any Perſon qualified to kill Game.

5th, That the Defendant expoſed a Pheaſant to Sale, not being intitled under any Perſon qualified to kill Game.

After *Nil debet* pleaded, a Verdict was found for the Plaintiff and Damages.

And now the Defendant moved in Arreſt of Judgment, and took ſeveral Exceptions.

Firſt, That it does not appear on which Count the Damages are found.

Sed non allocatur; for it is frequent when ſeveral Counts are in a Declaration, that Damages are given more or leſs than the Sum in any one Court; yet held well.

Secondly, That the two firſt Counts are for keeping or uſing a Gun, whereas a Gun is not mentioned in the Statute. *Sed non allocatur*; for if he had been charged for uſing a Gun to deſtroy the Game contrary to the Form of the Statute, this after Verdict had been ſufficient; for the Statute ſaith, if any uſe Tunnels or any other Engine to deſtroy the Game; and after Verdict for the Plaintiff the Court muſt intend, that the Jury thought a Gun an Engine to deſtroy the Game; and ſo it was reſolved in this Court between *Blewit qui tam*, *&c.* ver. *Needs.* ante, 525

But here the Declaration ſaith the Defendant uſed a certain Engine called a Gun, which is not ſo ſtrong as the Caſe of *Blewit* and *Needs*.

Thirdly, The Plaintiff does not alledge, that the Defendant was not qualified by the Laws of this Realm, but that he was not qualified by the Statutes of this Realm, and a Perſon may be qualified by Law to *Hunt*, though not qualified by the Statute Law; which is in the Negative, that not having ſuch an Eſtate he ſhall not be qualified.

Sed non allocatur; for the Words may well import as much as being unqualified, or not qualified.

Fourthly, That in the third Count the Plaintiff declares, that the Defendant kept and uſed a Dog to kill the Game, without ſaying what ſort of a Dog; it might be a Maſtiff Dog, or Lap Dog, which might chance to kill Game; and the Statute 4 & 5 *Annæ*, 14. upon which this Action is founded, mentions only Greyhounds, Setting Dogs and Lurchers.

And therefore the Action for the Penalty given by this Statute ought to conform to it, and ſhall not be extended by Equity, being a Penal Law.

And though the Statute 22 & 23 *Car.* 2. *cap.* 25. mentions Dogs generally, and that be confirmed by this Statute, yet it doth not give the Penalty of 5 *l.* to every Thing forbidden by that Statute, wherein the Penalty is 20 *l.* only. And of this Opinion was the whole Court.

Fifthly, It was excepted, that the two laſt Counts alledge the Facts againſt the Form of the Statutes; whereas there is but one Statute againſt expoſing Hares, *&c.* to Sale.

But the Court took no regard to this Exception, for there are ſeveral Acts about Hares, *&c.* And the Statute 9 *Annæ* relates to this Matter. But for the fourth Exception the Judgment was arreſted.

Caſe 250. *Fawcet* ver. *Strickland & al'.* In C. B. *Intr. Paſch.* 10 *Geo.* 2. *Rot.* 383 *and* 384.

Right of Common of Paſture will not hinder the Lord's Improvement by Incloſure, leaving ſufficient Common for the Tenants of the Manor.

TRESPASS for Chaſing his Cattle.

Defendants plead that the Defendant *Strickland* is Lord of the Manor of *S.* in which are ſeveral large Waſtes; that he improved 700 Acres of one of theſe Waſtes called *Blew-Caſtle Common*, leaving ſufficient Common for the Tenants of the ſaid Manor; that the Plaintiff put his Cattle into the Part ſo incloſed, and ſo with a Dog chaſed them out, which is the ſame, *&c.*

Plaintiff replies, That he is Tenant of the Manor and hath Right of Common of Paſture for all Commonable Cattle Levant and Couchant on his Tenements there in the ſaid Waſte, and likewiſe the Plaintiff hath Common of Turbary in the ſaid Waſte, ſo that Incloſure is unlawful.

Defendants demur, and ſhew for Cauſe the Replication was Double, and doth not deny or confeſs that there was not ſufficient Common left.

As to the Cauſes ſhewn for Demurrer, they are of no Regard, for the Replication means not to inſiſt on double Matter, but the Mention of the Right to Common of Paſture is to introduce the Claim of Common of Turbary, which is inſiſted on as an Argument why ſuch Common of Paſture is not within the Statute of *Merton*.

So the whole Queſtion is, Whether a Man having Common of Paſture and Common of Turbary in the ſame Waſte, Whether the Lord cannot improve the Common by Virtue of the Statute of *Merton*?

It is ſure Common of Turbary or Piſchary is not within Statute. 2 *Inſt.* 87.

But here the Action is for chaſing Cattle put into the Waſte to uſe his Common of Paſture; then although the ſame Plaintiff has Common of Turbary, that will not hinder the Lord's Improvement, for they are diſtinct Rights. And *Hill.* 11 *Geo.* 2. Judgment was for the Defendants by the whole Court.

Pardo ver. *Fuller.* In C. B.

Caſe 251.

ACTION on a Promiſſory Note againſt the Indorſer. In an Action on a Promiſſory Note againſt the Indorſer, there ought to be Evidence of a Demand upon the Drawer, but that is a Fact to be left to the Jury.

At Trial before Chief Juſtice *Willes* at *Guild-Hall* it was doubted, whether the Plaintiff ought not to prove a Demand of the Drawer before the Action brought; the Matter on Proof was left to the Jury, whether a Demand was made, or not.

On

On Motion for a new Trial, Judge *Forteſcue* mentioned the Caſe of *Davies* and *Maſon*, 1 *Geo.* 2. in Common Pleas, wherein it was agreed by the Court, that there ought to be a Demand of the Drawer, for the Indorſer undertook conditionally only if the Drawer did not pay.

Indeed if a Note be forged, Chief Juſtice *Holt* held the Indorſer liable though no Demand.

And indeed no Demand can be, for when a Note is forged there is no Drawer.

So on a Note payable to a Man or Bearer, no Demand need be from him to whom it is made payable.

But a new Trial was denied, for the Evidence of the Demand was left to the Jury, who were the proper Judges of that Fact, and knew beſt the Courſe of Dealing.

Caſe 252.

Anonymus.

Viſcomiti Lond. præcipimus tibi inſtead of *Vicecomitibus Lond. præcipimus vobis*, held amendable after Verdict.

MOTION to amend the Declaration delivered and the Award of the Court thereon.

Lond. was in the Margin, the Fact was laid at *Tame* in the County of *Oxford*, but the Award of the *Venire* was to the Sheriffs, and went to the Sheriff of *Oxford*, and was tried by a Jury of the County of *Oxford*; and after Verdict it was inſiſted, this was a Miſtrial; for being laid in *London* (for *London* is in the Margin) and the Award of a *Venire* being to the Sheriffs, there being but one Sheriff unleſs in *London*, it muſt be intended to the Sheriffs of *London*, and then the Sheriff of *Oxford* had no Authority to return the Jury.

But by the Court, Award was amended, for by the Statute 8 *H.* 6. *cap.* 15. a Letter too little or too much is amendable, and an Award of the Court may be amended.

So *Viſcomiti Lond. Præcipimus tibi* inſtead of *Vicecomitibus Lond. Præcipimus vobis* was amended.

Green and Bridget his Wife, Relict of Thomas Dobſon, ver. *Roe*. In C. B.

Caſe 253.

In Dower, Plea of Leſſee for Years ought not to be received after Plea and Judgment for Demandant.

IN Dower, the Defendant pleaded that *Tho. Dobſon* was ſeiſed in Fee, and made Leaſe to *John Caudle*, but did not ſhew when ſeiſed in Fee, or that Term was aſſigned to him, ſo it might be after Coverture.

After Judgment for Demandant, *John Caudle*, claiming by Leaſe for Years from *Thomas Dobſon* Father of the Demandant, prayed to be received.

Inſiſted by Serjeant *Prime*, That Judgment for Seiſin ouſted the Leſſee, and he could not falſify the Judgment till aided by the Statute of *Glo.* 11. which extended only to Recovery by Default on Colluſion.

But this was helped generally by Stat. 21 *H.* 8. 15. *Vide Cro. El.* 565. *Noy* 64. 3 *Lev.* 168. *Winch* 80. 1 *Keb.* 678. *pl.* 7. *Lilly's Pract. Reg.* 669. Termor was received. 14 *Car. Salk.* 291.

The Writ of Seiſin requires Delivery of actual Poſſeſſion, ſo does Livery, and conſequently the Leſſee will be ouſted.

Serjeant *Draper contra*: Firſt, This is not a Caſe within Statute of *Glo.* 11. which extends only where Judgment is by Default, or on Render, or *Nient dedire*, 2 *Inſt.* 325. and not to feint Pleader.

Then the Statute 21 *H.* 8. 15. only enables the Termor to falſify, as Leſſee for Life might after Judgment, which ſhews it muſt be after Judgment; and Tenant for Life after Recovery may falſify by Entry, by Action, or by Writ of Diſceit. *F. N. B.*

Secondly, Stat. 21 *H.* 8. 15. enables to falſify only after Judgment; the Caſes *Cro. El. &c.* were on Judgments by Default, which was by Virtue of Stat. *Glo.* 11.

Thirdly, This is a Dilatory, 2 *Inſt.* 322. and therefore not to be received by Statute 4 & 5 *W.* 3. It is in Nature of Plea after *Darrein continuance*, and Party can have but one ſuch.

Fourthly, The Plea ought not to be received without Affidavit to verify it; for Tenant in Dower cannot counterplead, nor can he ſhew Leſſee paid. 2 *Rol. Ab.* 444. *S.* 6, 7.

The Court: No Receipt could be by Common Law; by Stat. *Glo.* Receipt of Leſſee is allowed only on Judgment by Default; but here was a Plea, and Judgment for Demandant, only ſtaid by the Court till this Matter was conſidered.

By Stat. 21 *H.* 8. 15. Remedy given is after Judgment, and Termor is enabled to falſify, as Leſſee could do ſo, which was not by Receipt, for he might falſify the Recovery.

But this is not properly a dilatory Plea; ſo the Leſſee was not admitted to be received.

Caſe 254. *Cockerel* ver. *Armſtrong & al'.* In C. B.

Where Intereſt is in Land, or claimed out of it, the Plaintiff cannot reply *De injuriâ ſuâ propriâ*, but ought to traverſe the Right.

TReſpaſs for taking and impounding a Gelding at *Scarborough.*

Defendants plead, that the Place where the Gelding was taken is called *Weatneſs*, containing 1000 Acres in *Scarborough*, of which the Bailiff and Burgeſſes of *Scarborough* were ſeiſed in Fee, and the Defendants as their Servants, and by their Command, took the Cattle Damage-feaſant.

To which the Plaintiff replies *De injuriâ ſuâ propriâ* generally.

To which Defendants demur, and ſhew for Cauſe, that the Plaintiff did not traverſe.

And Judgment was given for the Defendants.

Firſt, Becauſe ſeveral Things are put in Iſſue, which is a Reaſon in *Crogate*'s Caſe, 8 *Co.* 67. *a.*

Secondly, Becauſe where Intereſt is in Land, or claimed out of Land, the Plaintiff cannot reply *De injuriâ ſuâ propriâ.*

Sir Archibald Grant ver. *J. Gordon Ar.* In Scacc'. *Hil.* 8 *Geo.* 2. *Rot.* —

Caſe 255.

DEBT on a Bond dated 11 *Nov.* 1730. in the Penalty of 12000 *l.* Defendant after Oyer of the Bond and Condition, which was to pay 6963 *l.* 3 *s.* 3 *d.* on the 15th of *May* next, pleads, that before the making the ſaid Writing, *viz.* 11 *Nov.* 1730. *William Gordon*, Bart. was indebted to the Plaintiff in the Sum of 6963 *l.* 3 *s.* 3 *s.* and Sir *Archibald Grant* the Plaintiff was indebted to the ſaid Sir *William Gordon* (Co-obligor in the ſaid Bond with the Defendant, who was his Son) in the Sum of 500 *l.* received to his Uſe, and being ſo indebted *eodem die* it was corruptly agreed contrary to the Statute of Uſury, that the Plaintiff ſhould forbear and give Day of Payment for the ſaid 6963 *l.* 3 *s.* 3 *d.* till the 15th of *May* following 1731. and that for ſuch Forbearance the Plaintiff, without any Payment, Satisfaction or Account, ſhould have and retain to his own Uſe the ſaid 500 *l.* then due, and Sir *William* ſhould diſcharge him thereof; and for ſecuring Payment of the ſaid 6963 *l.* 3 *s.* 3 *d.* Sir *William* and the Defendant ſhould give the ſaid Bond; and that in Purſuance of ſuch corrupt Agreement the Plaintiff

Uſury, what ſhall be ſo.

tiff gave Day for Payment of the 6963 *l.* 3 *s.* 3 *d.* till the 15th of *May*, and Sir *William* and his Son the Defendant did execute the ſaid Bond, and Sir *William* diſcharged the 500 *l.* giving a Receipt acknowledging the Payment of it, and diſcharging him from it, which without any Payment, Satisfaction or Account, the Plaintiff ſtill retains to his own Uſe, which Sum of 500 *l.* exceeds the Rate of 5 *l. per Cent' per Ann.*

Plaintiff by his Replication traverſes the corrupt Agreement, and Iſſue is joined thereon; and at a Trial before Chief Baron *Reynolds* 27 *Jan.* 173- the Jury found ſpecially, that before the making of the ſaid Writing, *viz.* 11 *Nov.* 1730. Sir *William* was indebted to Plaintiff in 6963 *l.* 3 *s.* 3 *d.* and the Plaintiff to him in 500 *l.* for Money received to his Uſe; and being ſo indebted, it was agreed between Plaintiff and Sir *William*, that the Plaintiff ſhould give Day for Payment of the ſaid 6963 *l.* 3 *s.* 3 *d.* till 15 *May* next, and for forbearing the ſaid Sum for the Time, and till the Day laſt mentioned, the Plaintiff, without Payment, Satisfaction or Account, ſhould have and retain the ſaid 500 *l.* to his own Uſe, and Sir *William* ſhould diſcharge him from it; and that for ſecuring the ſaid 6963 *l.* 3 *s.* 3 *d.* Sir *William* and Defendant ſhould give Bond in Penalty of 12000 *l.* with Condition *ut ſupra*, and at the ſame Time Sir *William* ſhould aſſign to Plaintiff a Mortgage of Lands in *Kent*, and two *Scotch* Bonds, as a farther collateral Security for the ſame Sum; that in Performance of the ſaid Agreement Plaintiff gave ſuch Day of Payment, and retained to his own Uſe the ſaid 500 *l.* and without Payment, and the ſaid Sir *William* diſcharged him of it, and gave Receipt for it; and for ſecuring the 6963 *l.* 3 *s.* 3 *d.* Sir *William* and Defendant executed the Writing in the Declaration, and Sir *William* aſſigned the ſaid Mortgage and two *Scotch* Bonds as a farther collateral Security, and that the ſaid 500 *l.* is above the Rate of 5 *l. per Cent' per Ann'*; but whether on the ſaid Matter it was corruptly agreed *prout*, they reſerve to the Court, *&c.*

2

Upon

Upon this ſpecial Verdict, it was inſiſted this Verdict was for the Plaintiff. For,

Firſt, The Jury do not find the ſame Contract that was pleaded.

Secondly, The Contract as found is not uſurious.

As to the firſt Point, it was argued, that the Contract found is variant from the Contract pleaded, which ſaith, Plaintiff in Performance of his corrupt Agreement agreed to give the Bond on which the Action is brought; the Jury find, he agreed to give that and three other Securities, *viz.* an Aſſignment of a Mortgage and two *Scotch* Bonds. The Contract is intire, and the whole ought to have been ſhewn, that the Court may judge of it, and that a Recovery or Bar in this Action may be pleaded to another Action that may be brought on the Bonds aſſigned.

If Plaintiff declares in Debt on Contract for Sale of a Horſe for 40 *s.* and Jury find Contract was for Sale of two Horſes for 40 *s.* it is a different Contract. 2 *Rol. Abr.* 702. So in Debt for 20 *l.* if Jury find Debt for 40 *l.* or two Marks. 2 *Rol. Abr.* 703. In *Aſſumpſit* for two Things, if Jury find the Undertaking was only to do one of them. 2 *Rol.* 707. So if uſurious Contract is pleaded with one, and Jury find it made with two; to which it was anſwered, *Modo & forma* goes to the Subſtance of the Plea only. *Co. Lit.* 281. 2 *Rol. Ab.* 705. *pl.* 38, 61.

As to the ſecond Point, it was inſiſted the Contract found is not uſurious; for firſt, it is not found for what Time the Forbearance was, but only till the 15th of *May*; and tho' the Agreement is made 11th of *November*, yet the Money being due before, it might be from a diſtant Time before the Time alledged; being after a Verdict does not aſcertain any Thing.

If Agreement appears not to the Court uſurious, the Court will not conſtrue it ſuch. 2 *Cro.* 507.

If by Miſtake agreed to be paid the Day after, it ſhall not be void. 2 *Cro.* 677. *Cro. Car.* 501. 1 *Sid.* 285. *Vide* 3 *Mod.* 35.

It is but diſcharging a Debt, which is a Choſe in Action, and might never be paid; and the Statute ſaith, reſerving or taking above 5 *l. per Cent*'; here is no Loan, and there is a Difference between *intereſſe lucri*, and *intereſſe damni.* Vide *Lut.* 271. *Comb.* 133. 1 *Sid.* 421. And afterwards in *Trinity* Term 1738. *Reynolds* Chief Baron, *Carter* and *Forteſcue* Barons, *contra Thomſon* Baron, gave Judgment for the Plaintiff.

5

DE

DE
Term. Sanct. Mich.
11 Geo. 2.

7th July 1738, *Ante hunc Terminum recepi Literas Patent' Domini Regis geren' dat' eodem die conſtituent' me fore Capital' Baron' Scaccarii ſui.*

Speed, and Sarah his Wife Adminiſtratrix of Anderſon her former Husband, verſus *Martin.* In Scacc'.

Caſe 256.

BILL to have a Note of 30 *l.* given by *Anderſon* to the Defendant delivered up, and an Injunction to ſtop the Defendant's Proceeding at Law and in the Spiritual Court.

Anſwer falſified by one Witneſs ſent to a Trial.

The Caſe was this:

Anderſon the Inteſtate borrowed of the Defendant at ſeveral Times 70 *l.* for which he gave a Note for 40 *l.* dated in *May* 1732, and a Note for 30 *l.* dated in *May* 1735; on the 23d of *July* 1735 an Account was ſettled, and 20 *l.* having been before paid and indorſed on the 30 *l.* Note, the Plaintiff inſiſts that *Anderſon* then paid more 55 *l.* in full of Principal and Intereſt on both Notes, and the 40 *l.* Note was delivered up, and the Defendant not having the 30 *l.* Note then with him, he promiſed to deliver it as ſoon as found, and gave a Receipt for 55 *l.* in full of both Notes and all Demands. But *Anderſon* dying the 20th of *July* following, the

the Defendant puts the 30 *l.* Note in Suit, and then ſtopping that Suit proceeds in Spiritual Court to obtain Adminiſtration as principal Creditor.

By his Anſwer the Defendant ſwears that on 23d *July* he received only 44 *l.* in Satisfaction of the 40 *l.* Note and Intereſt, which was delivered up, and proved by one Witneſs that *Anderſon* ſaid a few Days before his Death, that 11 *l.* or 12 *l.* was ſtill due to him; on which it was inſiſted for the Defendant, that the Plaintiff's Bill ought to be diſmiſt, ſince the Defendant had denied the Equity of the Bill, and the Plaintiff had not proved the Payment of 55 *l.* ſave by one Witneſs, his Servant, who ſwore that he ſaw the 55 *l.* paid, and the Receipt produced was read over to him, and he ſet his Mark to it. And one Witneſs is not ſufficient to found a Decree againſt the Defendant's Oath.

It was inſiſted for the Plaintiff, that the Bill was proper ſince the Defendant was vexatious, having begun a Suit on which the Matter might be tried, and then ſuing in the Eccleſiaſtical Court; and Bills for Peace were uſual, and to have Bonds or Notes delivered up that were ſatisfied; and here beſides the one Witneſs that is poſitive, there is the Defendant's Receipt under his Hand, which he denies only as he remembers and believes; and as to *Anderſon*'s declaring 11 or 12 *l.* due, we can prove his Declaration to the Contrary.

Per Cur'. *Anderſon*'s declaring he owed nothing is no Evidence, for he cannot take Advantage of his own Declaration, and one Declaration he did owe Money, is of more avail then twenty Declarations to the contrary; that the Bill was not improper, ſince the Defendant would not proceed in the Action wherein the Fact might be tried, but affected to get the Adminiſtration to himſelf; Let therefore the Bill be retained; but in Caſe the Defendant is willing to try whether the 10 *l.* is due, or not, he ſhall have Liberty to do it, ſince there is but one Witneſs in Effect againſt his Oath; he is poſitive that he paid but 44 *l.* the Witneſs is as poſitive that he paid 55 *l.* let that be tried before the End of next Term, and the Bill retained till that Time, and in the mean Time an Injunc-

tion to ſtop the Proceedings at Law and in the Eccleſiaſtical Court.

Vide 2 *Vern.* 283, 554, *Chriſt's College in Cambridge* verſus *Widdrington*; on hearing 25 *Feb.* 1692 before *Rawlinſon* and *Hutchins*, Lords Commiſſioners, the Cauſe was referred to an Account, and as to one Article of the Account there was but one Witneſs againſt the Defendant's Oath. *Et per Cur'*: It was not ſufficient Evidence to decree againſt the Defendant. And the Plaintiff having had the Benefit of a Diſcovery on the Defendant's Oath, we will not ſend it to be tried at Law where one Witneſs is ſufficient, though inſiſted by Defendant's Counſel that it might be tried at Law.

Note; This was only in reſpect to one Article on the Account before the Maſter; and the Plaintiff had before the Benefit of the Decree, an Account and Diſcovery from the Plaintiff.

Harriſon ver. *Ridley & al'*. In Scacc'.

Caſe 257.

4 *Nov.* 1738.

BILL of Revivor by Plaintiff, Aſſignee of the Clerk of the Peace, to whom the Effects of one *Bowman*, diſcharged as an Inſolvent Debtor by Virtue of the Statute of 2 *Geo.* 2. 22. were aſſigned and transferred for the Benefit of his Creditors; *Bowman* had exhibited his Bill in this Court to be relieved againſt Securities entered into by him to the Defendants; and the Defendants having anſwered *Bowman*, who was a Priſoner, was diſcharged by Virtue of the Statute for relieving Inſolvent Debtors, and all his Effects, purſuant to the Direction of the Act of Parliament, transferred to the Clerk of the Peace for the County of *Middleſex*, who made an Aſſignment of them to the Plaintiff, who thereupon brought a Bill of Revivor to revive the Proceedings in the original Suit brought by *Bowman*; and the Defendants, as to ſo much of the ſaid Bill as deſired to revive theſe Proceedings, demurred; and it was inſiſted for the Defendant that the Plaintiff could not revive, there being no Privity between *Bowman* and him, and it was the conſtant Courſe that the Aſ-

Bill of Revivor lies not by Aſſignee of the Clerk of the Peace.

ſignee or Deviſee could not revive, but muſt proceed by original Bill, which was indeed in Nature of a Bill of Revivor. It is plain he could not do ſo, unleſs he could do it by Virtue of the Statute; but the Statute *S.* 8. veſted the Property of *Bowman*'s Effects as fully as in Aſſignees of a Commiſſion of Bankrupts. But Aſſignees of a Commiſſion of Bankrupts could not bring a Bill of Revivor, but muſt ſue by an original Bill, which was daily Experience. And of that Opinion was the Court, and the Demurrer allowed.

It was likewiſe objected againſt the Bill of Revivor, becauſe ſuch Bill can only revive the former Proceeding; but here was new Matter of Fact, which required new Anſwer and Examination, and therefore improper to have it inſerted in a Bill of Revivor. But as to this the Court gave no Opinion; and poſſibly if the Plaintiff is proper to have a Bill of Revivor, it will be neceſſary he ſhould inſert ſo much new Matter as is needful to ſhew how he comes intitled to revive.

Caſe 258. ## *Joſeph Milles* verſus *Mat. Davies, Evan Watts and Selby Price,* alias *Rees.* In Scacc'.

Sheriff may juſtify by Grant of a Replevin, without ſhewing the Property of the Goods to be in the Plaintiff.

TReſpaſs for taking two Bullocks, *&c.* of the Plaintiff. The Defendant, as to all but the Taking the ſaid Bullocks, pleads Not guilty; and as to the Taking them he juſtifies, for that before the Taking, the other Defendant *Evan Watts* came before him, then Sheriff *Com' Radnor,* and made his Complaint againſt the Plaintiff in a Plea of taking and unjuſtly detaining the Cattle, and found Pledges to proſecute the ſaid Plaint, and to return the Cattle, if a Return ſhould be adjudged, and prayed a Warrant to replevy the ſame; whereupon he made his Precept to the other Defendant *S. P.* his ſpecial Bailiff, to replevy the ſame; and the Plaintiff ſhould appear at next County-Court to anſwer the ſaid *Evan Watts* in the ſaid Plea; which Precept, before the Return and before the Taking, he delivered to the ſaid *S. Price,* who by Virtue of it, at the Time and Place in the Declaration, took

the Cattle, and the Plaintiff not claiming Property, delivered them to the Defendant, and ſummoned the Plaintiff to appear at the next County-Court, to anſwer *Watts* in the ſaid Plea, for taking and diſtraining his Cattle, and then returned his Precept executed as aforeſaid, he being Sheriff at Taking and Return of Precept, which is the ſame Taking, *&c.*

The Defendant *Evan Watts* pleads Not guilty generally.

Defendant *Selby Price*, as to all but Taking, pleads Not guilty, and as to that juſtifies by Virtue of the Precept *ſupra.*

The Plaintiff demurs to both Pleas, and ſhews for Cauſe, That the Defendants do not alledge that the Cattle were the proper Cattle of the ſaid *Evan Watts*, or that he claimed Property or Title to them, or that they were in his Poſſeſſion, or ſhewn by him to the Sheriff or Bailiff, or were diſtrained by the Plaintiff out of his Poſſeſſion.

Secondly, That the Plea doth not mention what Pledges by Name were found.

Thirdly, That it is not alledged Plaintiff had Notice of the Plaint or Replevin.

Fourthly, That the Plea amounts to the General Iſſue.

The Defendants join in Demurrer.

As to the firſt Cauſe of Demurrer, the Defendants who juſtify are Officers, who cannot know in whom the Property of the Cattle is. By Stat. *Marl.* 52 *Hen.* 3. 21. *Si averia capiant' vicecomes poſt querimoniam ſibi fact' deliberare poſſet*; and therefore it is agreed, that it becomes the Sheriff's Duty upon ſuch Complaint by Parol, or by Precept to his Bailiff, to replevy them. *Per Litt.* 9 *Ed.* 4. 48. *b.* *F. N. B.* 69. *E.* 2. *Inſt.* 139. And ſuch Precept may be given before any County-Court. *Co. Lit.* 145. *b.* It is true, ſuch Plaint ought after to be entered; but who is to enter it? He that makes the Complaint, not the Sheriff; if then the Plaintiff does not enter

enter it, ſhall his Neglect ſubject the Plaintiff to an Action? The Sheriff might lawfully make ſuch Precept before the Plaint entered; ſuppoſe he does ſo, and the Party, from whom the Cattle are taken, before the next County-Court brings his Action, ſhall he be liable to it for doing what he lawfully might and ought to do?

In Caſe the Perſon from whom the Cattle are taken hath Property, the Law gives him a proper Remedy; if he claim Property before the Sheriff, he muſt return it, and on ſuch Return a Writ *De proprietate probandâ* iſſues; and if found for the Claimant the Sheriff can proceed no further. *Co. Litt.* 145. *Dyer* 173. But if the Plaintiff had Property, and omitted to claim it before the Sheriff, he might plead Property in himſelf or in an Eſtranger, either in Abatement or in Bar. 2 *H.* 6. 14. 9 *H.* 6. 39. *b.* 39 *H.* 6. 35. *a. R. Cro. El.* 475. *Salk.* 5, 94. and many other Books.

Now here the Plea expreſly ſaith, that the Plaintiff claimed no Property before the Sheriff, and that he was ſummoned to anſwer the other Defendant *Evan Watts* in a Plea of taking and detaining his Cattle, whereby although he did not make his Claim before the Sheriff, he might have appeared and inſiſted on it by Plea.

As to what is ſaid, that the Sheriff doth not ſhew by his Plea, that the Defendant *Evan Watts* was poſſeſſed of the Cattle, or had diſtrained them; the Sheriff had no Authority, and conſequently no Cauſe to inquire into the Defendant's Right or Title to the Cattle; if the Plaintiff had claimed Property, he could not have determined it without a Writ of *Proprietate probandâ*, and upon ſuch Writ, if it had appeared the ſaid *Watts* had no Property, though he had Poſſeſſion, he could not have replevied the Cattle.

As to the ſecond Cauſe of Demurrer, that the Plea doth not alledge what Pledges are found, and who by Name. It is true, in Replevin by Writ the Sheriff muſt take Pledges, and thoſe Pledges are liable; for if a Return be adjudged, and the Cattle not returned, a *Scire facias* lies againſt the Pledges;

and if the Sheriff returns *Nichil*, a Writ ſhall be ſued againſt him to anſwer the Value of the Cattle. 2 *Inſt.* 340. *Co. Lit.* 145. And therefore if the Sheriff doth not take Pledges in Replevin by Writ, it is Error. Reſolved *Cro. Car.* 594. And an Action on the Caſe lies againſt him for his Default. Reſolved *Cro. Car.* 446. And therefore in ſuch Caſe there might be Reaſon the Sheriff ſhould ſhew what Pledges he hath taken. But in a Replevin by Plaint the Sheriff is not bound to take Pledges. Reſolved *Cro. Car.* 594. And therefore his Omiſſion to take them is not Error. Reſolved *Jon.* 439. Yet if the Sheriff doth take Pledges, a *Scire facias* lies againſt them, if the Cattle be not returned. Reſolved 3 *Mod.* 57. Reſolved in *C. B. H.* 3 *Geo. inter Mulſo* and *Sheers.* But whether the Sheriff was obliged to take Pledges or not, what need hath the Defendant to ſet forth the Names of the Pledges in his Plea? for the Defendant only juſtifies the Taking of the Cattle, which the Plaintiff claims to be his, becauſe he was Sheriff of the County of *Radnor*, and as ſuch was bound to give Replevins *ſuper querimon' ſibi fact'*, and he did ſo accordingly; and being required by Stat. *W.* 2. to take Pledges on granting ſuch Replevin to make Return as well as to proſecute, he ſaith he did ſo, whereby the Plaintiff was ſecure of having his Cattle again if a Return ſhould be adjudged; but who thoſe Pledges were is not at preſent material, ſince here appears as yet no Cauſe why a *Scire facias* ſhould be awarded againſt them.

As to the third Cauſe of Demurrer, it is expreſly ſaid by the Plea, that the Precept required the Officer to ſummon the Plaintiff to appear and anſwer the other Defendant *Evan Watts* at the next County-Court in a Plea of taking and detaining his Cattle, and that *Selby Price* the Officer ſummoned him accordingly; What other Notice ſhould the Sheriff give of ſuch Plaint or Replevin?

As to the fourth Cauſe of Demurrer, that the Plea amounts to the General Iſſue, it does not appear but that the Plaintiff may have the Property of the Cattle for which this Action is now brought. It is admitted, that the Plaintiff had the Poſſeſſion of them, and that upon the Defen-

dant *Davis* his Command they were taken out of his Poſſeſſion by the other Defendant *Price*, and conſequently if they had pleaded Not guilty, the Plaintiff muſt recover; for it had been ſufficient for him to prove that the Plaintiff had the Cattle in his Poſſeſſion, and the Defendant took them, unleſs the Defendants could ſhow ſome Matter to juſtify or excuſe the Taking; but ſuch Juſtification or Excuſe muſt be pleaded, and could not be given in Evidence upon Not guilty.

In the Caſe of *Holler* and *Buſh*, *Paſch.* 9 *W.* 3. in *B. R. Salk.* 394. Treſpaſs for a Horſe, the Defendant pleaded that the Biſhop of *Sarum* had Right to grant Replevins in ſuch a Manor; that the Horſe was *A.*'s and the Plaintiff impounded him, and the Defendant took him by Virtue of a Replevin; it was held very rightly, the Plea amounted to the General Iſſue, for the Plea admits no Property or Poſſeſſion in the Plaintiff, and conſequently he had no Colour of Action, for by the Plaintiff's Taking and Impounding the Horſe, the Horſe was not in his Poſſeſſion, but in the Cuſtody of the Law, and conſequently no Juſtification needful.

If ſaid the Plea admits the Property in the Plaintiff, and then the Cattle could not be taken from him by a Replevin without ſhewing ſome Cauſe for it, 'tis tantamount, as to ſay, the Sheriff ought not to grant a Replevin, unleſs the Party praying it hath juſt Ground of Action. But what Authority to examine into or determine that Point? If the Party who hath the Cattle claims Property, the Sheriff cannot determine it without a Writ *de proprietate probandâ*; and then if the Property be found for the Party claiming it, it is but an Inqueſt of Office, and the Party who made the Plaint may after ſue a Writ of Replevin, to which Property may be again pleaded. 7 *H.* 4. 46. *a.* *Co. Lit.* 145. *b.*

And this appears, *Minos* and *Soleby*, *Trin.* 23 *Car.* 2. in *C. B.* 2 *Mod.* 242. Trover for taking his Sheep; the Jury found *A.* agreed to depaſture his Sheep with *B.* for ſometime, and then if *B.* would give ſuch a Price he ſhould have them before the Time; *A.* ſells them to the Plaintiff, *B.* afterwards ſells them to *C.* who brought a Replevin for them, and the

Defendant, his Servant, in Aſſiſtance of the Sheriff's Officer, drove them to his Maſter's Ground, and though the Plaintiff demanded them, refuſed to deliver them. And though the Court held the Property was in the Plaintiff, yet gave Judgment for the Defendant, for he entered in Execution of the legal Proceſs, which is a Juſtification to him as well as the Officers.

Theſe Things occurred on reading the Paper-Book, but it was again argued by Serjeant *Draper* for the Plaintiff, and Mr. *Bootle* for the Defendant.

Serjeant *Draper* inſiſted, that the Plea was ill, for it ought to have ſhewn that *Watts* who ſued the Replevin had Property in the Goods replevied; for although the Defendant *Davis* be an Officer, he ought to ſhew he had Authority to take the Goods, and that his Authority was duly executed; now his Authority is by Stat. *Marlb.* which requires *ſi averia alicujus capiant' & injuſte detineantur vicecomes redeliberare poſſet*; ſo there muſt be a Perſon whoſe Cattle are taken, there muſt be an unlawful Taking, otherwiſe the Sheriff hath no Authority. *Watts* appears not to have any Right to the Cattle, or that he ſo much as claimed the Property of them; the Plea ſhould ſay they were *Averia ſua*; ſo it was in *Hallet* and *Birt*'s Caſe, *Carth.* 380. 5 *Mod.* 248, 252. though the Court indeed gave no Judgment as to that Point. So *Reg.* 81. Therefore in Treſpaſs, a Replevin pending for the ſame Treſpaſs is a good Plea. *Bro. Treſp.* 48, 251, 252, 271.

Secondly, The Party ought to ſhew the Cattle to the Sheriff, till when he is not bound to replevy them; for it is a good Return *Quod nullus venit ex parte quer' ad monſtrand' averia.* *Dal.* 277. *Kelw.* 119. *b.* So the Sheriff ſhould not return till the *Pluries*, till then he is excuſed, on the *Pluries* he may return the Claim of Property, till ſuch Return the Writ *de proprietate probandâ* lies not, for it recites the *Pluries.* *Reg.* 83. *a.* 85. *b.* and ſuch Writ muſt be brought by the Plaintiff in the Suit, for it cannot be by a Stranger. *Co. Lit.* 195. *b.* 2 *Rol. Abr.* 481. 14 *H.* 4. 25.

If

If the Sheriff be ſhewn a Stranger's Goods, and takes them, Treſpaſs lies againſt him. 2 *Rol.* 552. 5. *b.* And otherwiſe a Stranger could not have Remedy, though all his Goods are taken away; and it would be the moſt miſchievous Thing poſſible, for the Sheriff might ſtrip a Man's Houſe, and he would have no Remedy; he cannot have *proprietate probandâ*, becauſe a Stranger, nor does it lie on Replevin by Plaint. *Fitz. Proprietate probandâ.* 4 *Dal.* 436. *Reg.* 83. *Th. Br.* 170.

Thirdly, The Defendant ought to have ſhewn when the County Court was held; for otherwiſe how could the Plaintiff, againſt whom the Plaint was ſued, know when or where to appear?

In inferiour Courts it is not enough to ſay, that the Party is adjourned to the next Court, unleſs it be likewiſe ſhewn at what Time and before whom ſuch Court is to be held.

In Anſwer to which it was argued, that it lay not in the Knowledge of the Sheriff in whom the Right of the Cattle replevied was; and if he ſhould ſay that the Property of the Goods did belong to *Evan Watts*, it would make the Plea amount to the General Iſſue, as was held in the Caſe of *Dale* and *Philipſon*, 2 *Lutw.* 1372.

Upon which the Court inclined to think the Plea was good notwithſtanding the Objections inſiſted on; but as many Caſes had been cited by the Counſel, Time was taken to conſider them to a further Day in the ſame Term, when I delivered the Judgment of the Court for the Defendants.

DE
Term. Sanct. Hill.
11 Geo. 2.

Roe ver. *Sir John More, Bart.* In the Exchequer-Chamber. Caſe 259. 28 *January.*

ERROR of Judgment in *B. R.* in an *Aſſumpſit* for 40 *l.* for the Occupation of an Houſe, and for Lodgings and Neceſſaries found by the Plaintiff for the Defendant and his Servants. On *Non aſſumpſit* pleaded, the Jury found for the Plaintiff, and gave 8 *l.* Damages; and Judgment was given for the Plaintiff.

Error in Fact not aſſignable in the Exchequer-Chamber.

On 11 *Feb.* 11 *Geo.* 2. which was in *Hil.* Term following, the Plaintiff in Error comes in proper Perſon before the Juſtices of *C. B.* and Barons of Exchequer, and aſſigns for Error, That it appears by the Record, that in *Eaſter* Term 10 *Geo.* 2. he defended and pleaded to Iſſue in *B. R.* by *Richard Ednel* his Attorney, whereas he was then an Infant under the Age of twenty-one Years.

Defendant in Error pleads *In nullo eſt Erratum*, and prays that the Judgment be affirmed.

In this Caſe it was agreed, that it was Error for an Infant to appear by Attorney, for he ought to appear by Guardian. But the Queſtion in this Caſe was, whether this being an Error in Fact was aſſignable for Error in the Exchequer-Chamber, which ſat only by Virtue of the Statute 27 *Eliz.* 8.

And it was inſiſted by Mr. *Robinſon* that it was; and ſo it was reſolved *Cro. El.* 731. and ſo again 2 *Cro.* 5. where all the Juſtices and Barons agreed, (except *Anderſon* Ch. J.) that it might be aſſigned; and the Defendant pleading that he was at full Age, a *Niſi prius* was awarded under the Exchequer-Seal, and Chief Juſtice refuſing to ſeal it, on which Iſſue the Jury found for the Plaintiff in Error, upon which the Judgment was reverſed. It is true, when the Record was remanded, it was moved in *B. R.* that they had proceeded in the Exchequer-Chamber without Warrant of the Statute to try Error *in fait*, for the Statute impowers them only to try Errors in the Record; and of that Opinion were all the Juſtices. But it is ſtrange the Juſtices of *B. R.* whoſe Judgment was reverſed, ſhould determine againſt the Juriſdiction of the Court that reverſed it. Theſe Caſes were *M.* 41 & 42 *El.* the firſt was *Price*'s Caſe, wherein the Death of the Party before Judgment was aſſigned; the other was, that of *Rowe* and *Lord*, wherein the Error aſſigned was, that the Plaintiff being an Infant ſued by Attorney, when he ought to have ſued by Guardian or *Prochein Amy*, (which at that Time was Error, though it be ſince helped by the Statute 21 *Jac.* 13. after Verdict.)

But afterwards the ſame Error was aſſigned, that one of the Defendants appeared by Attorney being under Age, upon a Writ of Error in the Exchequer-Chamber of a Judgment in *B. R.* and the Judgment was reverſed. 2 *Cro.* 303. *King* ver. *Merborough* and *Crakes.*

So in Error of a Judgment in *B. R.* in Ejectment, it was aſſigned for Error, that the Leſſor was ſeiſed in Right of his Wife, who died before Judgment; although the Death of one, who was no Party to the Suit, was held no Error, yet it was agreed in the Exchequer-Chamber, that Judgment might be reverſed for Matters of Fact, as the Death of the Party, or the like, where the Writ was abſolutely abated. *Hob.* 5. *Wilkes* and *Jordon*, *P.* 9 *Jac.*

So in the Caſe *Cro. Car.* 413. 1 *Jon.* 410. where the Death of two of the Defendants before Verdict was aſſigned for Error; it was moved, that this might be examined in *B. R.* but the Court held it could not after Judgment entered. Then it was conſidered, whether Error in Deed was aſſignable in the Exchequer-Chamber; becauſe, as *Berkley* ſaid, the Statute gave Power only to examine Matters in Law. But *Bramſton* Ch. J. *Jones* and *Crook*, held it was well aſſignable. And in the Report Notice is taken, that it was aſſigned in the Caſe of *Row* and *Long*, 2 *Cro.* 5. and tried by *Niſi prius*; and the like was *H.* 16 *Jac. Rot.* 75. and the like *M.* 10 *Car. Smith* and *Merchant.*

Serjeant *Draper contra* inſiſted, That by the Statute 27 *Eliz.* the Preamble recites, Foraſmuch as erroneous Judgments given in *B. R.* are only to be reformed by the High Court of Parliament, which Court is not ſo often holden as in antient Times, neither in Reſpect of the greater Affairs ſuch erroneous Judgments can be well conſidered of and determined during the Time of Parliament; whereby Subjects are greatly delayed of Juſtice; therefore Authority is given to the Judges of the Common Pleas and Barons of the Exchequer, to examine, and affirm or reverſe the Judgments of the King's Bench in the Caſes there enumerated; ſo that it is plain the Statute intended to give a Writ of Error before the Juſtices and Barons only in Caſes where a Writ of Error lay before in Parliament, and to prevent Delay where the Parliament were not frequently held. As therefore the Parliament never examined into Errors in Fact, nor had any Method to try them, (for it was never known that the Parliament ever iſſued Proceſs for the Trial of any Matter of Fact) but only for Errors appearing upon the Record; ſo this Statute gave the Juſtices and Barons Authority only to examine and reform Errors in and upon the Record; nor was there any Occaſion for it; for Errors in Fact were before remediable, and ſtill are by Writ of Error *Quod coram vobis reſidet.* So that it ſeems an Encroachment upon the Juriſdiction of the Court of *B. R.* for the Exchequer-Chamber to examine and try Matters of Fact, which is expreſly provided againſt by the Statute, and by

by the Exception in the Writ of Error, (other than ſuch as are concerning the Juriſdiction of the Court of King's Bench.)

It is true, that this Matter was not ſo fully conſidered at firſt, and therefore there was Variety of Opinions among the Judges about it; and in *Price*'s Caſe, *Cro. El.* 731. it was held Error in Fact might be aſſigned, and tried; but yet they held they could not bail, or do any Thing but examine the Errors, which muſt be the Errors in the Record before them.

So in the Caſe 2 *Cro.* 5. though the Juſtices and Barons held ſuch Error aſſignable, and triable by them, yet *Anderſon* Chief Juſtice was of a different Opinion, and ſo ſtrongly ſo, that he would not ſuffer the Seal in his Cuſtody to be made uſe of to ſeal the Writ of *Niſi prius*. And therefore it is no Wonder all the Juſtices of *B. R.* declared againſt it, and refuſed to grant Reſtitution to the Defendant, againſt whom there was an Execution; which could only be on this Foundation, that the Exchequer-Chamber had no Juriſdiction in the Caſe, and then the Proceeding before them was null and void, as being in this Reſpect *Coram non judice*.

The Caſe *Hob.* 5. was only a bare Admiſſion of the Court, no judicial Determination, for the Judgment was not reverſed; ſo in the Caſe in *Cro. Car.* 513. for it came before the Court of *B. R.* only upon a Motion to amend the Record, by varying the Entry of the Death of two of the Defendants after the laſt Continuance, and making it to be before the Verdict; altho' it was confeſſed by the other Party to be as the Entry was; but the Court held ſuch Amendment could not be made after Judgment entered.

Then it was ſtarted, how it could be helped? For as *Berckly* ſaid, it could not be aſſigned for Error in the Exchequer-Chamber; the other Juſtices indeed on a ſudden thought it might; but then when it came to be conſidered how it could be tried, they all doubted, and the Matter was adjourned; and what became of it afterwards appears not.

2

But

But in the Caſe of *Hopkins and Prior* ver. *Wriggleſworth*, 2 *Lev.* 38. 1 *Vent.* 207. where in Error in Exchequer-Chamber of Judgment in *B. R.* in Treſpaſs, Death of one of the Defendants before Judgment was aſſigned for Error, and *In nullo eſt Erratum* pleaded, which is a Confeſſion of the Fact, yet the Judgment was affirmed, for the Exchequer-Chamber hath nothing to do with Errors in Fact, which *B. R.* might have examined before the Statute, and therefore the Statute extends to no Caſes but ſuch wherein there was no Remedy before but in Parliament.

So it was ſaid in the Caſe of *Ipſly* and *Tack*, that Error in Fact cannot be aſſigned in the Exchequer-Chamber. 2 *Mod.* 194. That Matter of Form cannot be aſſigned, appears 1 *Sid.* 253.

The Cauſe being adjourned till the next Term, *Hill.* 1738, all the Juſtices and Barons agreed that Error in Fact could not be aſſigned, nor was it examinable in the Exchequer-Chamber, that *In nullo eſt Erratum* was in the Nature of a Demurrer to it, and that Judgment ought to be affirmed; upon which it was moved that the Plaintiff in Error might diſcontinue his Writ upon Payment of Coſts, which was granted *niſi cauſa*, and afterwards made abſolute; but afterwards in *Eaſt.* Term 1739, upon Affidavit that the Coſts were taxed, and had been demanded, and that the Plaintiff in Error refuſed to pay them, Rule for diſcontinuing the Writ of Error was diſcharged; the Cauſe was again put into the Paper, and the Judgment affirmed.

Sir George Wynn ver. *Biſhop of Bangor.* In Scacc'. Caſe 260.

IN an Ejectment on the Demiſe of Sir *George Wynn*, for a Piece of Land in which a Lead Mine was diſcovered, after a Verdict for the Plaintiff it was moved for a new Trial on ſeveral Affidavits, ſhewing,

Where a new Trial ſhall be granted for a Misbehaviour in one of the Jury.

Firſt, That upon the View granted in this Cauſe, *George Wynn*, who was one of the Showers for the Plaintiff, gave Evidence to ſuch of the Jurors as were upon the View, by arguing againſt the Likelihood that the Places ſhewn on the Part of the Defendant as the Limits of their Land ſhould be the Boundaries, becauſe the Names they bore might be given for ſuch and ſuch particular Reaſons.

Secondly, That one of the Jurors declared at the View, that by what they had ſeen (before the Shower for the Defendant had ſhown) they ſhould ſoon determine the Diſpute.

And after, the Day before the Trial, he ſaid, Sir *Geo. Wynn* was a Neighbour, and Right or Wrong he would give it for him; and for theſe Reaſons the Court granted a new Trial, although Baron *Parker* ſeemed to think that the Words being known before the Trial, and for them a Challenge might have been taken againſt the Perſons being on the Jury, that ſuch Challenge being omitted, it was not proper to alledge the Matter as a Cauſe for a new Trial, and the Caſe of *Tependen* and *Shaw* was cited for that Purpoſe.

But the Chief Baron ſaid he was Counſel in that Cauſe, which related to a Fiſhery at *Milton*, claimed by the Lady *Catherine Herbert*, who was Grandaughter to the Duke of *Leeds*, and after a Verdict for the Lady at the Aſſizes at *Maidſtone* it was moved for a new Trial, becauſe the Duke had ſent Letters to ſeveral of the Jurors returned upon the Panel, deſiring them to appear at the Aſſizes; but a new Trial was denied, becauſe the Letter did not hint any Thing more than a Deſire they ſhould be there, altho' the Chief Juſtice *Holt* expreſt a Diſlike to ſuch Letters, which from a Peer of ſuch Eminence, might be thought to have ſome Influence on the Cauſe, tho' nothing was ſaid about it.

Hodgſon ver. *Atkinſon.* In Scacc'.

Caſe 261.

Cuſtom or Preſcriptions only triable at Common Law.

PRohibition was moved for to the Conſiſtory Court of the Biſhop of *Cheſter*, for that a Libel was there exhibited, ſuggeſting that by Cuſtom and conſtant Uſage the Pariſhioners who had Lands in the Chapelry of the Chapel of *Preſton Patrick* in the Dioceſe of *Cheſter*, or the major Part of them, uſed to chooſe or nominate a Curate to officiate in that Chapelry, and to pay him out of their Lands a Salary or Penſion for ſo doing.

That *Atkinſon* was duly Elected by the major Part of the Pariſhioners to be Curate there, and had entered a *Caveat* in the uſual Form againſt any other's being admitted Curate; that notwithſtanding ſuch *Caveat*, the Biſhop granted a Licence to *Hodgſon* to officiate as Curate there, although it did not appear that he was in Holy Orders, and upon a Suggeſtion that they proceeded to examine this Cuſtom, although Cuſtoms and Preſcriptions were triable only at Common Law, a Rule was made for a Prohibition, *niſi*, *&c.* And now upon ſhewing Cauſe it was inſiſted, that this Libel was not intended to examine or controvert the Cuſtom but only to examine the Validity of the Licence to *Hodgſon*, pending a *Caveat*, and when he was not in Holy Orders, of which they have the proper Juriſdiction; which was admitted, and ſo a Prohibition only *quoad* the Trial of the Cuſtom.

Croft ver. *Powel & al'.* In Scacc'.

Caſe 262.

Mortgagee with Power to ſell, ſells with Notice of Mortgage without Mortgagor, his Eſtate redeemable.

BILL to redeem a Mortgage made by *Rouſe* to *Baldwin*, and by him aſſigned to *Gabriel Powel*, Father of *John Powel* the Defendant; and upon the opening the Bill and Anſwer and reading the Depoſitions, the Caſe appeared to be this; *Robert Rouſe* ſeiſed in Fee of Lands *in Com' Brecon* by Leaſe and Releaſe 16 and 17 *January* 1703 conveyed them to *John Baldwin* and his Heirs, and by a Defeazance bearing Date with the Releaſe and executed at the ſame Time,

it

it was agreed that if *Rouſe* ſhould repay 1000 *l.* borrowed of *Baldwin*, and likewiſe two other Debts borrowed of other Perſons, and which *Baldwin* took upon him to pay off, amounting together to 2200 *l.* within the Space of one Year from the Date of the Indenture, then *Baldwin* ſhould reconvey to him; but if he failed to pay that Money within the Year, then *Baldwin* ſhould mortgage or abſolutely ſell the ſame Lands, free from Redemption, and out of the Money raiſed by ſuch Mortgage or Sale pay the ſaid 2200 *l.* and Intereſt, and be accountable for the Overplus to *Ro. Rouſe* and his Heirs.

That after the ſaid *John Rouſe* borrowed ſeveral other Sums of Money, ſome of which were paid off by *Baldwin*, who took ſeveral Aſſignments of their Securities in Truſt for himſelf; and in particular in the Year 1710. he confeſſed a Judgment for the Sum of 578 *l.* for ſecuring a Bond-Debt of that Penalty, to *John Ridhouſe*, to whom Sir *John Morgan* is Adminiſtrator with the Will annexed, being his Grandſon, and in 1712. made a Mortgage to the Plaintiff for ſecuring 695 *l.* which Mortgage was made by Leaſe and Releaſe, dated 19 & 20 *Apr.* 1709. but, upon a Trial at Law for that Purpoſe, were found not to be executed till 5 *July* 1712.

By Articles of Agreement *inter John Baldwin* of the firſt Part, *Richard Knight* of the ſecond, and *Gabriel Powel* of the third Part, dated —— the ſaid *John Baldwin* agrees for 4300 *l.* to convey this Eſtate to *Gab. Powel* and his Heirs, and to warrant the ſame to him and his Heirs, except as therein after excepted, and covenants he had full Power to convey, except as is excepted, and in ſuch Exception the ſaid Defeazance is mentioned.

And afterwards by Indenture of Leaſe and Releaſe, dated 25 & 26 *Mar.* 1716. *J. Baldwin* conveys to *Gab. Powell* and his Heirs, to the Uſe of him and his Heirs, and in ſuch Conveyance the ſaid Defeazance is mentioned and excepted; and *Baldwin* therein covenants, that the Sum of 4400 *l.* was then due to him upon the ſaid Mortgage; and by *Henry Williams* his Depoſition it appears, that at the Grand Seſſions at *Brecon* in *Wales*, *Anno* 8 *Ann.* a Fine

was levied of the ſame Lands and Tenements by *Ro. Rouſe* and *Suſan* his Wife, to *John Baldwin* and his Heirs, but the Deed leading the Uſes of ſuch Fine does not appear; and that *R. Rouſe* was privy and conſenting to the ſaid Agreement made by the Articles aforeſaid *inter John Baldwin* of the firſt, *Richard Knight* of the ſecond, and *Gab. Powel* of the third Part, and that *Baldwin* being in Poſſeſſion preſented to a Benefice belonging to that Eſtate when it became vacant.

That in 1719. *Gab. Powel* exhibited a Bill in this Court againſt *Rouſe* and his Wife, and their Daughter *Ja. Baldwin*, and other Incumbrances, praying to be quieted in the Poſſeſſion of the ſaid Eſtate; or if the Court ſhould decree his Eſtate to be redeemable, that *Rouſe*, *&c.* might redeem by a ſhort Day, or otherwiſe might be foreclоſed.

Upon this *Rouſe* exhibits a Croſs Bill, praying to redeem; and *Gab. Powel* by Anſwer to ſuch Croſs Bill inſiſts, that *Rouſe* having conveyed to *John Baldwin* and his Heirs *ut ſupra*, by Leaſe and Releaſe 1708. and having borrowed more Monies, and neglected to pay Intereſt to *Baldwin* and others for two Years, and the annual Profits not anſwering the Intereſt by 40 *l. per annum*, in order to bar the Wife's Dower, without which he could not be able to meet Purchaſers, a Fine *Sur conuſance de droit* was levied at the Great Seſſions in *Wales* 10 *Ann.* upon which *Baldwin* took upon himſelf to be abſolute Owner, and treated with ſeveral for the abſolute Sale of the Premiſſes.

That after ſix Years Poſſeſſion the Defendant *Gab. Powel* treated with *Baldwin* for the abſolute Purchaſe in *Aug.* 1716. and agreed with him to purchaſe the Eſtate for 4300 *l.* and entered into the Articles *ſupra*, and took an Aſſignment of a Mortgage to *Knight*, and paid him 2200 *l.* and paid *Baldwin* 350 *l.* and agreed to pay him 1750 *l.* more; that while the Agreement was writing he was ſhewn the Defeaſance, and *Baldwin* deſired it might be taken Notice of in the Articles; which was done, on his aſſuring 4400 *l.* was then due to him upon the ſaid Eſtate.

That in *Mar.* 1716. *Baldwin* conveyed to him and his Heirs, by which he thought to have had an abſolute Eſtate; but *Baldwin* acting under the Power in the Defeaſance, inſiſted to have it mentioned, and it was ſo; and he fearing he might be accountable to *Rouſe* for the Overplus above what was due to *Baldwin*, made him covenant that 4400 *l.* was then due to him; that nine Months after *Cotten* asked if he had paid all the Money, and he confeſſed he had 1300 *l.* ſtill in his Hand, which *Cotten* adviſed him to keep, and not to pay, but by Direction of a Court of Equity, ſince *Rouſe* had made over the Overplus for the Benefit of his Wife and Children, and ſhowed him a Deed *Nov.* 1709. to that Effect; that on the ſaid Bill he offered to pay the 1300 *l.* he had ſtill in his Hand, and ſubmitted the Plaintiff in the Croſs Bill or *Baldwin* ſhould redeem.

On this Caſe it was inſiſted, that *Powel* had an abſolute Eſtate not redeemable; for the Eſtate conveyed to *Baldwin* was an abſolute Eſtate; and though there was a Defeaſance executed at the ſame Time, yet that made the Eſtate defeaſable only in Caſe the 2821 *l.* was paid within a Twelvemonth, if not, he was inveſted with a Power to ſell abſolutely, free from all Equity of Redemption; that then it became a Truſt in him to ſell; and in Caſe an Eſtate be conveyed to Truſtees to ſell, or deviſed to them to ſell, for Payment of Debts and Legacies, the Vendee by Virtue of ſuch Sale hath an abſolute Eſtate, free from all Charges or Power of Redemption.

Perhaps *Rouſe* might have redeemed *Baldwin* even after the Year, but when he had given him a Power and Authority to ſell, in caſe the Money was not paid within the Year, he then became a Truſtee for that Purpoſe, and his Vendee will by his Sale, in Purſuance of his Power and Truſt, have an abſolute irredeemable Eſtate. It may be reſembled to the Caſe of *Bonham* and *Newcomb*, 2 *Vent.* —— where a Man conveyed an Eſtate to another and his Heirs, under a Condition, that if the Vendor paid him 1000 *l.* at any Time during his Life, he ſhould ſuffer a Recovery; but in Caſe of Failure of Payment, the Vendee ſhould hold abſolutely to him

and his Heirs, and his Heirs ſhould not redeem. Upon a Bill preferred by the Heir to redeem after the Death of the Vendor, it was held the Eſtate was not redeemable; and this Decree was afterwards affirmed in Parliament.

Secondly, This Caſe is the ſtronger, becauſe *Baldwin* continued ſix Years in Poſſeſſion as abſolute Owner before he ſold to *Gab. Powel*, and during that Time he preſented to a vacant Benefice, which if he had been only Mortgagee, he ought not to have preſented to it, becauſe it belongs to the Mortgagor to preſent; then *Rouſe* and his Wife paſſed a Fine to him, which paſſed their Right in it to him, and made him an abſolute Eſtate; And how can he after be able to redeem againſt his own Fine? Beſides, his Conſent was given to the Conveyance to *Powel*.

Thirdly, Here have paſſed twenty Years and more ſince the firſt Mortgage made to *Baldwin*, and it is not uſual to admit a Redemption after a quiet Poſſeſſion for twenty Years together.

And although it be objected, that *Gab. Powel* had Notice of the Defeaſance, and it was excepted in the Conveyance and Articles, that was but a prudent Caution, as was likewiſe the Covenant, that 4400 *l.* was due to *Baldwin* at the Time of that Conveyance, ſince *Baldwin* might poſſibly be accountable for the Overplus, if he had ſold for more than what was due to him.

But it was anſwered, and reſolved by the Court, that the Eſtate was redeemable; for the Eſtate conveyed to *John Baldwin* and his Heirs being defeaſanced by a Deed of the ſame Date, was in its Nature a Mortgage to him; and therefore though the Money was not paid within the Year, yet the Mortgagor might ſtill redeem, upon Payment of Principal and Intereſt, at any Time while the Eſtate continued in the Hands of *Baldwin*.

Then though *Baldwin* had a Power, for Non-payment of the Money within the Year, to mortgage or ſell in order to raiſe

raiſe the Money lent, and to be accountable for the Overplus, it is not now to be conſidered what he might have done, but what he has done. And it is manifeſt, that it was not *Baldwin*'s Intention to give *Gab. Powel* an abſolute and indefeaſable Eſtate, for it is not conveyed to him abſolutely and free from the Equity of Redemption; but while the Articles of Agreement were writing, *Baldwin* ſhows to *Powel* the Defeaſance, and inſiſts to have it mentioned in the Articles; and when the Conveyance was executed in Purſuance of theſe Articles, the Covenant for Enjoyment, and for his having Power to convey, is with Exception, as therein mentioned, that is, ſubject to the Defeaſance.

And although *Powel* ſays in his Anſwer, that he treated for the abſolute Purchaſe, yet it is evident, that when *Baldwin* inſiſted to have the Defeaſance inſerted, he has it ſo, and inſiſted to have a Covenant from *Baldwin*, that 4400 *l.* was due to him, fearing, as he ſaith, that he ſhould be accountable for the Overplus to *Rouſe*.

So that this is a very different Caſe from a Truſtee, who is authoriſed by Will, *&c.* to ſell for Payment of Debts and Legacies; there is no Original Mortgage, but the Truſt is directly to ſell, and there is no Body to redeem, for as the Truſt was to ſell abſolutely, the Purchaſer cannot be ſubject to Redemption, and the Heir is at no Prejudice, if the Purchaſe Money be more than will ſatisfy the Debts and Legacies, he will in Equity be intitled to the Overplus.

Nor can it well be conceived, if *Powel* had expected an abſolute Eſtate free from Redemption by *Rouſe*, he would not have inſiſted that *Rouſe* ſhould have joined in the Conveyance; beſides he was ſo conſcious of having a redeemable Eſtate, that in 1719 he prefers a Bill againſt *Rouſe* and his Wife and their Daughter, the now Plaintiff (who is Heir at Law to *Robert Rouſe*) *Baldwin* and Truſtees, for Incumbrances aſſigned, in Order, it is ſaid, to be quieted in his Poſſeſſion; but he likewiſe prays that if the Court ſhould think his Eſtate redeemable, *Rouſe* may be decreed to redeem by a ſhort Day or be foreclоſed, and likewiſe confeſſes he kept 1300 *l.* of the

Purchaſe Money in his Hands to ſecure againſt any Demands from *Rouſe.*

So that this has no Reſemblance to the Caſe of *Bonham* and *Newcomb*, 2 *Vent.*— which is likewiſe reported 1 *Vern.* — *Ch. Ca.* — *Eq. Abr.* — for there was no Mortgage originally, but a Conveyance was made to one who married his Niece, on Condition that he paid him during his Life 1000 *l.* he ſhould reconvey, and his Heir ſhould not redeem; which plainly ſhews his Intention was to prefer his Niece in Marriage with 1000 *l.* or that Eſtate at his own Choice, but the Feoffee could not compel him to pay the 1000 *l.* in caſe he deſired the Money, and all Mortgages being only a Pledge for Security of the Money lent, muſt be mutual in the Remedy; as the Mortgagor has Power to redeem, the Mortgagee has Power to inſiſt on Payment or a Foreclоſure, but the Huſband could not inſiſt on Payment of the 1000 *l.* or a Foreclоſure if it was not paid; and upon this Foundation it was decreed againſt the Heir; for Lord *Nottingham* conſidering it as a Mortgage decreed a Redemption notwithſtanding the Covenant the Heir ſhould not redeem.

It is a known Rule, that if a Truſtee conveys, though upon valuable Conſideration, to one who has Notice of the Truſt, he is liable in Equity to the Performance of the Truſt. If then *Baldwin* on Nonpayment within a Year ſtood a Truſtee, as is inſiſted, for *Rouſe*, his Vendees coming in with Notice of that Truſt will ſtand in the Place of *Baldwin* himſelf, who is acknowledged to be redeemable.

As to *Baldwin*'s being in Poſſeſſion as Owner, and preſenting to a Benefice, that will not ſtrengthen the Caſe, for *Baldwin* had the legal Eſtate, and conſequently had a Right to preſent at Law; but ſince a Preſentation is gratuitous, and the Mortgagee cannot account for any Benefit from it, a Court of Equity will compel the Mortgagee to preſent the Nominee of the Mortgagor, and although by the Depoſition of Mr. *Williams* it appears that Mr. *Baldwin* preſented, it does not appear but he might preſent at the Nomination of *Rouſe.*

And the Fine between *Rouſe* and his Wife and *Baldwin* doth not vary the Caſe, it doth not appear what Uſes that Fine was declared to; and if no Declaration of Uſes, it reſults to the Uſe of thoſe who had the Eſtate before; it is true if a Tenant in Tail makes a Leaſe not warranted by the Statute, and after levies a Fine, it corroborates the Eſtate of the Leſſee; that is, it gives him ſuch Eſtate as the Leſſor might have made to him by Fine, but it does not vary the Nature of the Leaſe, which continues ſubject to the ſame Reſervations, Proviſoes, Conditions and Covenants as before.

And if the Fine be levied before any Intereſt veſted in the Leſſee, as where the Leaſe is to commence *in futuro*, and the Fine is levied before it commences, it does not operate in Confirmation of it.

So here the Fine to *Baldwin* may operate to ſtrengthen his Eſtate, and free it from the Dower of the Wife, which could not be barred but by Fine; but it confirms it *in ſtatu quo*, it confirms it as a Mortgage, and does not diſcharge it from the Equity of Redemption to which it was before liable; for then every Fine by a Mortgagor, after a Mortgage made, would render the Mortgage irredeemable.

As to the Length of Time, it is of little Weight in this Caſe, for although Lord *Nottingham* did look upon the Statute of Limitation as a proper Rule to determine the Time of Redemption; yet that has in many Caſes been varied from, and no certain Rule in Point of Time has been fixed upon.

But here the Conveyance to *Powel* was in 1716. and he preferred a Bill in 1719. for a Foreclоſure; and this Bill by the Plaintiff for a Redemption was exhibited 1729. ſo that the Time of twenty Years limited for Entry before an Ejectment was not elapſed before the Bill for Redemption againſt *Powel* was exhibited.

It was therefore decreed, that the Deputy ſhould take an Account of what was due to *Powel* for Principal and Intereſt, and an Account of the Rents and Profits received ſince the Conveyance to *Powel*, and that the Adminiſtrators of *Baldwin* ſhould account for what Rents and Profits were received by *Baldwin*, and ſhould take an Account of the Intereſt due for the Monies advanced by him until he was paid off by *Powel*; and that Coſts ſhould be reſerved until the Account taken; that upon Payment by *Croft* of what ſhould appear due to *Powel*, he ſhould be permitted to redeem, or otherwiſe his Bill ſhould be diſmiſſed.

And upon hearing the Cauſe that ſtood next *inter* Sir *John Morgan* ver. *Powel & al'*, wherein Sir *John Morgan* as Heir and Adminiſtrator with the Will annexed to *J. Ridhouſe* his Grandfather, to whom *Rob. Rouſe* had confeſſed Judgment in *M.* Term 1710. in the Sum of 1200*l.* being the Penalty of a Bond given by *Rouſe* to him for ſecuring 695*l.* which Judgment was prior to the Mortgage to *Croft*, which by the Verdict was found not to be executed till the 5th of *July* 1712. though dated in *April* 1709. it was by Conſent of all Parties concerned for *Croft* and *Powel* decreed, that an Account ſhould be taken of what was due on that Judgment, as well as of what was due to *Powel*; that Sir *J. Morgan*, on Payment of what ſhall appear due to *Powel*, ſhould be permitted to redeem him, or if he refuſed, his Bill ſhould ſtand diſmiſſed; and that in caſe Sir *J. Morgan* ſhould redeem *Powel*, *Croft* on Payment of what ſhould be due to Sir *J. Morgan* ſhould be permitted to redeem both; that Parties ſhould be examined on Interrogatories, and the Deputy armed with Power to ſend for Perſons, Papers, Records, and to iſſue Commiſſion to examine Witneſſes, *&c.*

Osbal-

Caſe 263. ***Osbaldiſton*** ver. ***And. Croſs, Harry Croſs, Will. Kroger and Richard Chancy.*** In Scacc'.

Court refuſed to order an Account in Equity for an Attorney's Bill tax'd by Prothonotary of *C. B.*

BILL ſuggeſting, that the Plaintiff being an Attorney of *C. B.* and having a Tenant or Servant in a publick Houſe, agreed with Defendants *A.* and *H. Croſs*, Brewers, to lay his Beer and Ale to the ſaid Houſe, which he would pay for; that the Defendants brought in a Bill for 314 *l.* 15 *s.* that Plaintiff brought in a Bill for Buſineſs done for Defendants ſometimes as Partners, ſometimes on their ſeveral Accounts, amounting to 324 *l.* 15 *s.* 1 *d.* that this Bill was taxed by Prothonotary at 102 *l.* 17 *s.* that Defendants had on Trial a Verdict for 210 *l.* 18 *s.* this 102 *l.* 17 *s.* being pleaded by way of Set off, and an Allowance made of it by the Jury. But it was inſiſted by the Plaintiff, that the Prothonotary in his Taxation deducted 41 *l.* 15 *s.* out of the Plaintiff's Bill as received by Plaintiff, which had been otherwiſe diſcounted; and the Taxation being upon a Plea put in to an Action brought in by the Defendants as Partners, the Prothonotary had diſallowed all Sums diſburſed by the Plaintiff for any of the Defendants on their ſeveral Accounts; and ſo prayed that the Defendants might come to a fair Account with the Plaintiff for the Monies due to him.

The Defendants did not plead, but inſiſted by way of Anſwer in Bar to the Account prayed.

And the Plaintiff being ready to read his Proofs, the Defendants Counſel objected, that admitting the Suggeſtions of the Bill proved, the Plaintiff's Bill ought to be diſmiſſed, as having no Foundation for Relief in a Court of Equity; for if the Defendants ſhould be decreed to account here, it would tend to over-hale that Taxation of his Bill which had already been taken and ſettled in a proper Court; and in Caſe the Prothonotary did not make all juſt Allowances, upon Application to the Court of *C. B.* the Judges

would have referred it back to be reconſidered; and in Caſe this Method ſhould prevail, which is without Example, every cunning and litigious Attorney would prefer a Bill in Equity whenever his whole Bill was not allowed, in order to have it re-examined, and the Account taken in a Court not ſo proper for it. And though it is ſaid, that the Bill, with Reſpect to the Buſineſs done for the Defendants in their ſeparate Capacities, was rejected by the Prothonotary, as not within the Rule of Reference; yet that is a Matter determinable at Law, and no Impediment to the Plaintiff's Iſſue at Law, as ſuggeſted; and by the ſame Reaſon every Attorney may avoid ſuing for his Fees, and bring a Bill againſt the Defendant for an Account in another Court where his Bill cannot be taxed. And though it be ſaid, 41 *l.* 17 *s.* 1 *d.* was charged as received by the Plaintiff, which was diſcounted otherwiſe, that might have been a Ground for a Re-examination, if the Court of *C. B.* had been applied to; or if any Perſon had received that Sum without Conſideration, it is Money received to the Plaintiff's Uſe; but after he inſiſted on this before the Prothonotary, and acquieſced in his Taxation, and had the Benefit of it upon the Trial, it is too late to inſiſt on in this Matter; and although this might have been pleaded, yet it may be inſiſted on by the Defendants Anſwer. And of that Opinion was the Court, and the Bill was diſmiſſed.

Hungate ver. *Fothergil, Adminiſtrator of Eliz. Beſt.* In Scacc'. Caſe 264.

BILL to have Conveyance of an Eſtate diſcharged of 6 *l.* *per Annum* granted out of it to *El. Beſt* for her Life, on Payment of what was arrear at her Death. It was referred to the Deputy to take an Account of what was due, who reported 44 *l.* 16 *s.* 1 *d.* due; but Exception was taken to the Report, becauſe no Deduction was made for what was due for Board of *Eliz. Beſt*, which ought to have been allowed out of the Arrears, ſince her Board muſt amount to that Sum or more. But ſince no Agreement appeared that the Board ſhould be ſet againſt the Annuity, the Court thought

Board not deducted out of Money due unleſs agreed.

the Deputy had done right, for *Non conſtat* but ſhe might pay for her Board (and the Deputy ſaid ſhe did); and therefore the Exception was diſallowed, and on Payment of 44 *l.* 16 *s.* 1 *d.* the Defendant ſhould convey; but on the Failure of Payment in ſix Months his Bill ſhould be diſmiſſed with Coſts.

Caſe 265. ## *Biſhop* ver. *Burton & al'.* In Scacc'.

Will not read on Proof of Witneſs's Hand, unleſs there be poſitive Proof that he is dead.

BILL for Account of perſonal Eſtate, and if that not ſufficient, of real Eſtate deviſed by *Marriot Pett* to *William Jeſſup* and *William Finch*, for a Term of 500 Years, for Payment of his Debts, and ſets forth, that *Marriot Pett* by Will 16 *Oct.* 1706. deviſed *ut ſupra*, on Truſt for Payment of Debts, and after to raiſe 206 *l.* a-piece to his Daughters *Elizabeth* and *Jane*, and died 1722. That the Executors refuſing, his Son *William Pett* took Adminiſtration with the Will annexed; that the Defendants *Burton* and *Bance* entered on theſe Houſes by Virtue of an Outlawry againſt *William Pett* the Son, which was now avoided by his Death, and Judgment for an *Amoveas manum*, and therefore prayed an Account of Profits from *William Pett* generally, from *Burton* and *Bance* ſince Recall of Outlawry. But when Plaintiff was put to prove the Will, the Proof was of the Hands of *Marriot Pett* the Deviſor, and of *Gilbert Innis* and *James Sawhill*, two of the ſubſcribing Witneſſes, who were proved to be dead; and as to *J. Barrington* the third ſubſcribing Witneſs, the Witneſs depoſed, that he was credibly informed in the Country where he lived, and believes it to be true, that he died two Years before, and believes his Name ſubſcribed was his proper Hand-writing. But the Court was of Opinion, that was not ſufficient Proof to have the Will read in Evidence.

4

DE
Term. Sanct. Hill.
12 Geo. 2.

Anonymus.

Caſe 266.

Court may order Feme Covert who is an Infant, being Heir or Truſtee, to levy a Fine.

PETITION in Chancery was exhibited againſt an Infant, the Heir of a Mortgagee in Fee, upon the Statute 7 *Annæ* 19. which (reciting that many Inconveniencies ariſing by Reaſon Perſons under Age of 21 Years having Eſtates in Truſt or by Way of Mortgage cannot convey any ſure Eſtate in ſuch Lands and Tenements) enacts, That Perſons under Age, by direction of Courts of Chancery or Exchequer, on Petition of the *Ceſtui que Truſt* or Mortgagor, ſhall convey and aſſure ſuch Lands in ſuch Manner as the Court ſhall direct; and ſuch Conveyance or Aſſurance ſhall be as good and effectual to all Intents as if ſuch Infant was of full Age; and ſuch Infants ſhall and may be compelled to make ſuch Conveyances and Aſſurances in like Manner as Truſtees or Mortgagees of full Age are compellable to convey or aſſign their Truſt or Eſtate.

The Heir, againſt whom the Petition was, was a Feme Covert, and it was doubted by the Maſter of the Rolls, whether ſhe could be compelled to levy a Fine, becauſe ſuch Fine muſt enure to a double Intent, firſt, to aſſure or convey the Eſtate as ſhe was an Infant, and then to bar her as ſhe was a Feme Covert; upon which Application was made to the Lord Chancellor, who propoſed the Matter to my Conſideration, as it might be a Caſe that might come before the Court of Exchequer.

And

And I thought the Court might order an Infant that was a Feme Covert to levy a Fine, for the Act is General; firſt, That all Perſons under Age ſhall convey and aſſure, ſo that it ſeems to be the Intent of the Act, that every Infant, which comprehends all without Exception, whether Covert, or not; and a Feme Covert cannot aſſure otherwiſe than by a Fine; and the Statute directs that ſuch Infants ſhall convey and aſſure, and the Inconvenience before the Statute is recited to be, that before an Infant could not make a ſure Eſtate, ſo that whatever Act is neceſſary for any Infant to do in order to make a ſure Eſtate, or aſſure to the Party the Lands, *&c.* the Infant is compellable to make, for he is to convey or aſſure in ſuch Manner as the Court ſhall direct, and ſuch Conveyance ſhall be good and effectual to all Intents in ſuch Manner as if the Party was of full Age. It ſeems to be left therefore to the Diſcretion of the Court what Conveyance is proper; and whatever it would be needful for a Perſon of full Age to do to make a ſure Eſtate, the Court may direct an Infant to execute; and conſequently ſince a Feme Covert of full Age could not aſſure but by Fine, the Court may direct an Infant to convey in the ſame Manner; it is true that in many Caſes a Deed ſhall not enure to a double Intent, but that is when one Intent was ſingly in View; for if one and the ſame Act muſt in the Nature of the Thing have a double Operation or Effect, the Law will allow it to enure to a double Intent; as if a Diſſeiſor grant to the Diſſeiſee for Life or in Tail, who aſſigns it over to another, ſuch Aſſignment enures as a Truſt and Confirmation too. *Co. Lit.* 302. *a.*

Caſe 267. *The King* ver. *Rich. Manning.* In Scacc'.

In ſmuggling Goods all preſent and aiding are Principals and equally liable to the whole Penalty.

INformation by Attorney General againſt Defendant, for that Merchants unknown having Imported 100 Weight of Tea, Value 50 *l.* and landed them in the Port of *London*, the Duties not paid or ſecured, the ſaid Tea came to the Hands and Poſſeſſion of Defendant, knowing the Duties not to be paid or ſecured; whereby he forfeited 150 *l.* the treble Value.

The Defendant pleads *Non devenerunt*; and on Trial before Chief Baron *Reynolds* a ſpecial Verdict was found, That the 100 Weight of Tea was imported and landed, the Duties not paid; that *Thomas Quoif* and the Defendant, who knew the Duties were not paid or ſecured, bought the Tea for 20 *l.* on their joint Account of one *Samuel Gibron* of *Aſhburnham* in *Suſſex* privately, but only a third of the Money was paid by the Defendant; that they after carried it to *Cudham* in *Kent*, and there divided it into twelve Parcels, and brought it on Horſes in Sacks to a Place near *London*, and thence carried it into *London* by Night under their Coats to an Inn in *Whitechapel*, where, by the Defendant's direction, it was put under a Bed, on which Defendant laid himſelf down whilſt *Thomas Quoif* went out to ſee for a Purchaſer, to whom they ſold it for 24 *l.* and the Defendant had 8 *l.* the third Part of that Price, for his Proportion of the Tea.

That the Value of the Tea was 24 *l.* the treble Value 72 *l.* and whether the whole 100 *l.* of Tea came to the Defendant's Poſſeſſion they ſubmit to the Judgment of the Court; and if the Court be of Opinion the 100 Weight of Tea did come to the Poſſeſſion of the Defendant, they find ſo; but if the Court think only a third Part of it came to his Hands, they find a third only came to his Poſſeſſion. *Per Stat.* 8 *Annæ*, 7. 17. If any Goods whatſoever liable to the Payment of Duties ſhall be unſhip'd with Intent to be laid on Land, (the Cuſtoms and other Duties not being firſt paid or ſecured) or if any prohibited Goods ſhall be imported, not only the Goods ſhall be forfeit, but alſo the Perſons aſſiſting or otherwiſe concerned in the unſhipping thereof, or to whoſe Hands the ſame ſhall knowingly come after the unſhipping, ſhall forfeit treble the Value thereof.

And it was inſiſted by Mr. *Strange* Solicitor General, that the treble Value of the whole 100 Weight of Tea was forfeit; for Defendant and *Quoif* having bought the Tea on their joint Account, the Defendant had the Poſſeſſion of the Whole, and Partners in a Wrong are anſwerable for the Whole; and cited a Caſe *Mich.* 1721, *Doe* ver. *Butlar*, on a *Devenerunt*, where it was ſaid, That the Defendant having carri-

ed away for his Share but four Anchors of the 320 Gallons of Brandy and 200 Gallons of Wine charged in the Information, ought to be charged with no more than what he carried away; but by *Montague* Chief Baron, as the Defendant was preſent when the whole Quantity came on Shore, he was liable for all, it not being material what he carried off himſelf; and a Verdict was for the King for the Whole.

So *Michaelmas* 1726. *Attorney General* verſus *Ambr. Burgeſs*, on a *Devenerunt* for 3000 *lb.* of Tea and 200 *lb.* of Coffee, it appeared Defendant had ſeveral Partners in the Goods, and all did not come to Defendant's own Hands; but *Pengelly* Chief Baron, As there appeared no Diſtribution to be made between the Partners, and they having a joint Property, the Poſſeſſion of the Perſons to whoſe Hands the Goods came was the Poſſeſſion of the Defendant; and when ſeveral Perſons are concerned in a Fact of this Nature, though they are not all together when the Fact is committed, every one may be proſecuted for the Penalty ſeparately; that the receiving the Goods by the Defendant's Agents after the Landing, was ſufficient to charge the Defendant, and as all the Partners acted their Parts, they were Agents for one another, and all chargeable; that where ſeveral were concerned in taking Goods, Trover lay againſt any one; and the King had a Verdict for the whole Quantity.

So in the Caſes, *Attorney General* verſus *John Palmer*, *Paſch.* 1727.

Attorney General verſus *Edward Carbeld*, *Hil.* 1732.

Attorney General verſus *Sweeting*, *Paſch.* 1727.

The Court took Time to conſider thoſe Caſes, and after ſome Days Conſideration, I was of Opinion for the King, but not meerly becauſe the Goods were bought on their joint Account, for though Jointenants *ſont ſeiſie per my et per tout*, yet to divers Purpoſes each hath but a Right to a Moiety, as to infeoff, give or demiſe, to forfeit or loſe by Default. *Co. Lit.* 168. *a.* If two purchaſe, and one is a Villain, the

Lord

Lord can enter but into a Moiety, or if one be an Alien, the King, on Office found, ſhall have but a Moiety.

If one Jointenant be indebted to the King, but a Moiety ſhall be extended; and if he die before any Extent, no Extent ſhall be made on the Land in the Hands of the Survivor. *Co. Lit.* 185. *a.*

If *A. B.* and *C.* are Partners, and Judgment and Execution is ſued againſt *A.* only his Share of the Goods can be ſold; it is true the Sheriff may ſeiſe the Whole, becauſe the Share of each being undivided cannot be known; and if he ſeiſe more than a third Part he can only ſell a third of what is ſeiſed, for *B.* and *C.* have equal Intereſt with *A.* in the Goods ſeiſed; but the Sheriff can only ſell the Part of him againſt whom the Judgment and Execution was ſued. So it was Reſolved by *Holt* and the Court, *Heydon* and *Heydon*, *Mich.* 5 *W.* & *M.* *Salk.* 392. So it was held *Show.* 774. *per Holt*, and no Judge denied it, and *Pollexfen*'s Opinion accords. And in that Caſe *Backhurſt* and *Clinkerd*, *Show.* 174. when a *Scire Facias* iſſued againſt *B.* after the Seiſure of all the Partnerſhip Goods upon the Judgment and Execution againſt *A.* and the Sheriff returned *Nulla bona*, it was held a falſe Return; for *B.* had a Share of the Goods, and the Poſſeſſion continued in him, notwithſtanding the Seiſure upon the Execution againſt *A.*

But for the more explicit Declarations of the Grounds of my Opinion, I do agree, Firſt, That where ſeveral Perſons are engaged in a tortious Act, all preſent and aiding and aſſiſting in it are equally culpable, and liable to anſwer for the Whole of the Miſchief done, and that where they are Parties in the Act, though not perhaps preſent at that particular Branch of it for which he is charged. It is ſo in the Caſe of Robbery, Burglary or other Felony; and therefore if *A.* and *B.* engage in a Robbery or Burglary, and *A.* ſtands to watch while *B.* breaks open and robs the Houſe, or while *B.* purſues and robs a Perſon out of his Sight, and if *B.* kills the Man *A.* is guilty of the Murder; ſo it is if ſeveral come to do a Treſpaſs, to make an Affray, rob a Park, plunder

plunder a Ship, or run prohibited or uncuſtomed Goods, all engaged in the Fact are chargeable with the whole Doings and all the Conſequences of it, if Murder be committed by any of the Company, though the reſt were in other Rooms, in other Parts of the Park, or know not what Goods were taken or carried off by others, they are equally guilty; for in the Eye of the Law they were all preſent aiding and aſſiſting; and therefore if the Defendant had been found guilty of aiding or aſſiſting, or otherwiſe concerned in the unſhipping the Tea, I ſhould make no Queſtion but he would have been liable to the Penalty of the treble Value for what he or any others at that Time carried off, for they were all aiding, aſſiſting and concurring in the ſame tortious Act.

And this is what was determined in the Caſes cited; in the Caſe of *Doe* and *Butlar*, the Ch. Bar. *Mountague* ſaith, the Defendant was preſent when the whole came on Shore, therefore not material what he carried off.

So was the Determination by Ch. Bar. *Pengelly*, *Attorney General* and *Burgeſs*; All the Partners acted their Parts, and were Agents one for another, and all chargeable. It is ſaid indeed before, the Partners having a joint Property, the Poſſion of the Perſons to whoſe Hands the Goods came was the Poſſeſſion of the Defendant; but this cannot be meant of a joint Property by Purchaſe, but where ſeveral Perſons are Parties in the Tort; in running the Goods into other Hands, the Poſſeſſion of thoſe to whoſe Hands the Goods came is the Poſſeſſion of the Defendant, who was Party in the running them, though he was not the particular Perſon who brought the Goods to the Hand in which they were found; for ſo it is, added he, where ſeveral Perſons were concerned in a Fact of this Nature, though not all together when the Fact is committed, yet every one may be proſecuted for the Penalty ſeparately; this, or ſimilar to this, muſt be the Caſe to make all the Expreſſions pertinent and conſiſtent, if we have a full and right Account of them.

So in the Caſe *Attorney General* ver. *Palmer*, which was on a *Devenerunt* for 1000 *lb.* of Coffee. It was objected, that

the Defendant being hired with others for carrying the Goods in the Information, he was chargeable for no more than the two Bags that he carried.

But it was anſwered by Ch. Bar. *Pengelly* very rightly, that the Defendant was a Perſon to whoſe Hands the Goods came within the Nature of the Statute; for as all the Perſons went together with one Intent, the Crown might charge whom they would. All Agents are to be charged, otherwiſe the Act was not made full enough for the Benefit of the Crown; and it appeared the Defendant had the whole Charge of the Goods for ſome Part of the Time. A private Perſon may bring an Action againſt any one, where ſeveral are concerned in taking his Goods from him. He remembered an Action againſt two for ſtranding a Ship, when 200 were concerned, and a Verdict againſt them, and they paid the Money.

So in the Caſe *Attorney General* ver. *Edward Carbold*, on a *Devenerunt*, for 6000 *lb.* of Tea, which it was proved the Defendant and others brought from the Sea-ſide at ſeveral Times. It was objected, The Defendant could not be charged with more than the three Horſe-loads he carried, ſince the Defendant had not the Command of the Reſt, nor was their Maſter.

But it was anſwered, Where ſeveral are concerned in a joint Deſign, they are all anſwerable, as in Caſes of Coſts and Wrongs. In Treſpaſs, if ſeveral take away Goods, all are anſwerable for the whole. In this Caſe they were all jointly concerned in the ſame Thing, and every one anſwerable for the whole; cited the laſt Caſe, *Attorney General* and *Palmer*, that the ſeveral Proſecutions there could be but one Recovery by the King; for if Satisfaction was recovered from one for the whole, the others were diſcharged; if ſeveral bound in a Bond, all may be ſued, but there can be but one Satisfaction.

Per Ch. Bar. *Reynolds*, Where ſeveral are jointly concerned, it is a joint Undertaking, they are all liable for the whole,

though the Crown can have but one Satisfaction. And the King had a Verdict for the whole.

And a Case was cited, *P.* 1727. *inter Attorney General* and *Sweeting*, on a *Devenerunt* for 1800 *lb.* of Tea, 100 *lb.* of Cocoa, 150 *lb.* of Coffee.

Obj. The Defendant was not chargeable within the Words of the Statute; for he kept a Publick House, and was not responsible for the Goods brought there by the Guests; the Goods belonged to another, and the Defendant could not know but by Hearsay that the Goods were run. But Ch. Bar. *Pengelly* was of Opinion, that since the Act made, not only the Importer, but those to whose Hands the Goods came after, liable to Prosecution, the Crown might charge all to whose Hands the Goods came after Importation; for the first might not be found, and if other Persons could not be prosecuted, the Act would be evaded; and where a Person delivers run Goods over to another, both are equally guilty.

And afterwards, *viz. Feb.* 1738. *Hil.* 12 *Geo.* 2. the Court gave their Opinion. And it was agreed, first, That in all Cases of Tort, all Persons present, aiding and assisting are equally liable for the whole Mischief done; and one shall not excuse himself by saying he did but little Part of the Trespass; for in Trespass there are no Accessaries, but all aiding and assisting in it are liable.

So that in pulling down a House, plundering a Ship, running Goods, which are illicit and tortious Acts, all are responsible for the whole Damage done. And this is what was determined by Ch. Bar. *Montague*, *Doe* ver. *Butland*, the Defendant being present, and helping to bring the whole on Shore, was responsible for the whole, and it is not material what he himself carried.

So by Ch. Bar. *Pengelly* in Cases *Attorney General* ver. *Burgess*, and *Attorney General* and *Calver*, That where several Persons are concerned in a joint Fact of this Nature, though not

all together when the Fact is done, every one may be profecuted for the Penalty ſeparately.

So Ch. Bar. *Reynolds* determined *Attorney General* and *Corbold*, where ſeveral are jointly concerned, and it is a joint Undertaking, they are all liable for the whole.

Secondly, It is agreed, that where Run Goods come to the Hands of any Perſon knowingly, by this Statute 1 *Ann.* ſuch Perſon is made liable to the ſame Penalty of the treble Value, although he is but in Nature of an Acceſſary in receiving the Goods, as well as the Principal, who was aſſiſting in the running and unſhipping the Goods. But there is this Difference between them; he who was preſent a helping the Goods on Shore is Party in the illicit Act itſelf, and therefore is chargeable with the whole; but he who receives any Part of the Goods after they are put on Shore is not Party to the original Act, but is only culpable for what he receives, and conſequently can forfeit only the treble Value of the Goods that came to his Hands.

And I believe no Body would think it ſo conſonant to Juſtice, that the Receiver of a Pound of Tea or Coffee, that had not paid Duties, ſhould pay the treble Value of 1000 *lb.* that was run at the ſame Time, which he knew nothing of. Our Law is very cautious in extending Puniſhment beyond its due Proportion; and therefore in Treſpaſs, Mayhem, *Præmunire*, *&c.* there are no Acceſſaries, for Acceſſaries before by Counſel or Command are in the ſame Degree as Principals; but the Acceſſary after, by receiving the Offender, cannot by Law be under any Penalty, unleſs the Statutes which induce the Penalty expreſly extend to Receivers and Comforters, as ſome do. *Hale's Hiſt. P. C.* 613.

Thirdly, It is agreed, That if a Perſon be hired to carry Goods which have not paid Duties, knowing the Duties unpaid, he is a Perſon to whoſe Hands the Goods knowingly came, and conſequently liable to the Penalty of the treble Value, otherwiſe the Act might be eaſily eluded.

But

But there is a Difference where a Perſon is hired to help the Goods on Shore, who being preſent, and aiding and aſſiſting in the unſhipping of the Goods, is Party in the Wrong, and liable as every principal Actor to anſwer the whole Damage. And that was the Caſe of *Attorney General* and *Palmer*, wherein it was ſaid, that all the Perſons hired went together with one Intent to carry off the Goods. If Perſons are hired to pull down a Houſe, they are all Treſpaſſers. But if a Porter be hired to carry a Parcel of Tea after the Importion, which he knows was run, he is a Perſon to whoſe Hands that Parcel came within the Intent of the Act, and will be liable to the treble Value of that Parcel; but I believe no Body will ſay he is anſwerable for the treble Value of the whole Cargo.

Fourthly, So likewiſe if a Keeper of a Publick Houſe receives the whole Parcel, which any of his Gueſts, whom he knows to be a Smugler, brings to him, and takes it into his Poſſeſſion and conceals it for him, he is a Perſon to whoſe Hands thoſe Goods came, and will be chargeable with the Penalty of the treble Value of what he ſo concealed, but not of the Goods carried by other Perſons to other Places. So was the Caſe of *Attorney General* and *Sweeting*, and many ſubſequent Determinations.

Fifthly, So likewiſe if a Perſon buy any Quantity of Goods which he knows were run, and the Cuſtoms not paid, he will be chargeable with the treble Value of the Goods ſo bought, for he is a Perſon to whoſe Hands the Goods came; for though it was under the Pretence of a Contract, yet ſince he knew the Cuſtoms unpaid, it was an illicit Contract, and he becomes *Particeps Criminis* by receiving thoſe Goods; and the Contract or Purchaſe will no more exempt him than if he had bought Goods of a Pirate or Felon, which alters not the Property of them.

Per Stat. 8 *Geo.* 18. *S.* 10. Foraſmuch as Perſons uſing clandeſtine Trade, are greatly encouraged by many for private Lucre, who buy and receive Goods clandeſtinely imported; If any

ſhall receive or buy any Goods clandeſtinely run or imported before condemned, knowing the ſame ſo to be clandeſtinely run or imported, forfeits 20 *l.* on Conviction before a Juſtice of Peace.

But ſuppoſe two Perſons join Stock together, and buy Goods on their joint Account, and one is conuſant that the Goods are run, and the other is not, (which was the preſent Caſe, for it cannot be intended that *Quoif* knew the Goods were uncuſtomed, unleſs it had been ſo found, for *fraus non eſt præſumenda*), I am clearly of Opinion that the Defendant is liable to the treble Value, though *Quoif* is not; but then the Queſtion will be for what Quantity he is liable; and I am of Opinion that if they had divided the Goods after their Purchaſe, that the Defendant could be liable only to the treble Value of his Share, and no more, for no more came to his Hand or Poſſeſſion; for though Jointenants are ſeiſed or poſſeſſed *per my & per tout*, that is, they are ſo far poſſeſſed of the Whole that none can ſay, till Partition made, that this or that Part is not in his Poſſeſſion, yet they in Right and Reality are poſſeſſed of no more than their proper Share or Purparty.

As therefore they give or diſpoſe of no more, ſo neither can they forfeit any more. *Co. Lit.* 186. *a.*

If a Villain and Freeman purchaſe, the Lord is intitled to what his Villain is poſſeſſed of, yet he can enter into a Moiety only.

So if an Alien and natural-born Subject purchaſe, though the Heir is intitled to all the Alien was ſeiſed or poſſeſſed of, yet the Heir, on Office found, can have but a Moiety. The treble Value of what comes to the Defendant's Hands is the Meaſure of his Penalty, but that muſt be meant of what really and truly comes into his Poſſeſſion, and not what Notionally and Virtually only can be ſaid to be in his Poſſeſſion.

If Partners be of Goods, and Execution be ſued by *Fieri facias* againſt one for his ſeparate Debt, the Sheriff may ſeiſe the Whole in order to inventory and appraiſe them, and to have a true Account of the Value; but he can ſell but the Share of him againſt whom the *Fieri facias* was ſued, for the *Fieri facias* warrants him to levy *de bonis & catallis* of the one, and all may in ſome Senſe be ſaid to be his Goods, becauſe he hath a joint Intereſt in all, yet ſince he hath a Right and Poſſeſſion of a Moiety only, the Sheriff can diſpoſe no more. *Heyden* and *Heyden*, *Salk.* 392.

And notwithſtanding ſuch Seiſure of the Whole, the other Partner continues in Poſſeſſion of his Share or Moiety; and therefore where *A. B.* and *C.* were Partners, and upon a *Fieri facias* againſt *A.* the Sheriff had ſeiſed the Whole, and a *Fieri facias* came againſt *B.* and the Sheriff returned *Nulla bona*, it was reſolved Action on the Caſe lay againſt him for the falſe Return, for *B.* was ſtill in Poſſeſſion of his third Part of the Goods. *Bachurſt* and *Clinkerd*, *Show.* 174.

However, as this ſpecial Verdict is found, I think the whole 100 Weight of Tea came to the Defendant's Poſſeſſion, for it is ſaid, that he took Care of the Whole, that by his Direction it was put under the Bed, and he lay down on the Bed; ſo that apparently he had at one Time the whole under his Cuſtody and Care, and uſed Endeavours to conceal it, knowing the Whole to be uncuſtomed Goods. What more does an Inn-keeper or Alehouſe-keeper, do who takes the Goods of a Smugler to lay up and conceal? So it was determined in the Caſe of *The Attorney General* and *Sweeting*, 1727, and many Times ſince.

A Jointenant may make his Companion his Bailiff, and maintain Account againſt him as ſuch. *Co. Lit.* 186. *a.* Here *Thomas Quoif* intruſts the Defendant with the Goods to conceal and ſecure them; ſuppoſe he had imbeziled them, would he not have been chargeable by his Companion for them? and if ſo, he muſt have Poſſeſſion of them.

It is not neceſſary that he to whoſe Hands Goods came ſhould have the abſolute Poſſeſſion in them. If a Man delivers Money to a Servant to carry, and he is rob'd of it, the Servant may maintain an Action againſt the Hundred, and that he was poſſeſſed *ut de bonis ſuis propriis.* So it was reſolved 4 *Mod.* 404. *Combs* ver. *Hund.* of *Bradly*, and yet the Poſſeſſion is not deveſted out of the Maſter, for he may bring an Action if he pleaſe.

And Judgment was given by the whole Court, that the Defendant ſhould be charged with the treble Value of the whole 100 Weight of Tea, which amounted to 72 *l.*

Philip Earl of Cheſterfield ver. *Charles Duke of Bolton.* In Scacc'. Caſe 268.

COvenant, wherein Plaintiff declares, That by Indenture 21 *July* 1713, between *Anne Vaughan*, ſole Daughter and Heir of *John* late Earl of *Carbery*, of the firſt Part, *Scroop* Earl of *Bridgwater*, *Cho.* Earl of *Sunderland*, *Edward William Pawlett*, and the Plaintiff, then named *Philip Dormer Stanhope*, of the Second, Sir *Thomas Stepney*, Sir *Edward Manſell*, Sir *Nicholas Williams* and *Griffith Rice* of the Third, the Defendant then Marquis of *Wincheſter*, of the Fourth, and *Richard* and *John Vaughan* of the fifth Part, Reciting, that the late Earl of *Carbery* deviſed his Eſtate *in Com' Carmarthen* for 100 Years to *Richard* and *John Vaughan*, on Truſt to raiſe 150 *l. per Annum*, for Maintenance of his two Siſters Lady *Frances* and Lady *Altham* for their Lives, Reverſion to his Daughter and her Heirs; and that in Conſideration of a Marriage between her and the Defendant ſhe conveyed to the ſaid Earls of *Bridgwater*, *Sunderland*, Lord *William Pawlett* and Plaintiff and their Heirs, all the Capital Meſſuages called *Golden Grove*, the Demeſne Lands, Park, Warren, *&c.* to the Uſe of the Defendant and the ſaid Lady *Anne Vaughan* his Intended Wife, after the Marriage, for their Lives and the Life of the Survivor, without Impeachment of Waſte, except ſuch Waſte

Covenant to repair binds tho' Houſe burnt.

Waſte after reſtrain'd; then to Truſtees, to preſerve Contingent Eſtates; then to firſt and other Sons of Defendant on Body of ſaid Lady *Anne* in Tail Male; then to Daughters of ſaid Marriage; then to ſuch Uſes as Lady *Anne* by Deed or Will ſhould appoint, and for want of appointment, to her and her Heirs; the Defendant covenants with the ſaid Earls of *Bridgwater*, *Sunderland*, Lord *William Pawlett* and Plaintiff, That at all Times during his Life, the Defendant ſhould and would ſufficiently repair and keep in good and ſufficient Reparation the ſaid Capital Meſſuage called *Golden Grove*, and ſo leave the ſame at the Time of his Deceaſe; he being allowed to cut ſufficient Timber for repairing the ſame. And the Plaintiff aſſigns the Breach, that after the ſaid Marriage, *viz.* 1 *May* 1730, and from thence continually hitherto, the ſaid Capital Meſſuage called *Golden Grove*, and all the Buildings thereof, have been in Decay and wanted good and ſufficient Reparation, and great Part thereof fallen down; and although the Defendant during all the ſaid Time was allowed to cut down ſufficient Timber for repairing the ſame, yet he hath not repaired the ſame or any Part, or kept it in good and ſufficient Repair.

The Defendant by Leave of Court pleads double; firſt, That he hath repaired and kept in good and ſufficient Repair the ſaid Capital Meſſuage according to the Form and Effect of the ſaid Covenant; and thereon Iſſue is joined.

Secondly, That before the ſaid 1 *May* Three fourth Parts of the ſaid Capital Meſſuage was burnt down, and that he repaired and kept it in ſufficient Repair until it was ſo burnt down; and that he hath ſufficiently repaired and kept in Repair the Reſidue of the ſaid Meſſuage that was not burnt down; upon which the Plaintiff demurs.

And it was inſiſted by Mr. *Taylor* Counſel of the Defendant, that by this Accident the Defendant was excuſed from the Repair of the Houſe; for, as in Waſte the Defendant is excuſed by inevitable Accidents, there is the ſame Reaſon

he ſhould be excuſed in Covenant. If a Man covenants to deliver a Horſe, if the Horſe die before the Time, he is excuſed. *Pal.* 559. And wherever a Thing cannot be delivered in the ſame Plight, he will be excuſed. 1 *Co.* 98. *Shelly*'s Caſe.

Secondly, And this is the more reaſonable ſince the Statute 6 *Annæ*, 31. 56. by which it is provided, That no Action ſhall be brought or proſecuted againſt any Perſon in whoſe Houſe any Fire ſhall begin, or any Recompence made by ſuch Perſon, for any Damage ſuffered or occaſioned thereby; in which Statute the Words are general, and muſt extend to all Perſons; and it provides, That the Perſon whoſe Houſe is accidentally burnt ſhall not make Recompence for any Damage ſuffered or occaſioned thereby; and this is the Defendant's Caſe, for the Plea ſaith, That the Houſe mentioned in the Declaration was burnt by Accident without any Default of the Defendant.

Thirdly, The Plaintiff hath not intitled himſelf to this Action of Covenant, for the Covenant is, That the Defendant ſhall repair, being allowed to cut ſufficient Timber for repairing the ſame; ſo that the Allowance of ſufficient Timber is a Condition precedent, which ought to appear to have been complied with before the Defendant can be charged with the Repair.

It is true the Declaration avers, that the Defendant was allowed to cut ſufficient Timber, but does not ſay there was any Timber to cut; and the Plaintiff ought to ſhew every Thing requiſite to be done on the Plaintiff's Part, previous to his Action; and if there was no Timber the Defendant could not, nor was he bound to repair; and conſequently the Plaintiff ſhould have ſaid that there was ſufficient Timber which the Defendant was allowed to cut down.

Fourthly, The Declaration doth not ſhew that the Plaintiff, who is the Covenantee, had any Intereſt in the Land, and conſequently that he is prejudiced by the Houſe being burnt; the Houſe belongs to the Defendant himſelf during his Life, and it doth not appear he hath any Son, or if he hath, he

only could be damnified; Why then ſhould the Plaintiff recover any Damages in this Caſe?

On the other Side it was inſiſted, That in this Caſe the Defendant hath expreſly covenanted to keep the Houſe in good and ſufficient Repair, and therefore is obliged to do what he has undertaken to do; he might have excepted Fire, as is frequently done; And what Reaſon can there be for ſuch Exception, if the Party was not otherwiſe bound to make good any Damage that might happen by Fire?

This therefore is not like the Caſe of Waſte, where inevitable Accidents excuſe, but even in Waſte, the Defendant muſt repair in convenient Time; and if blown down by Tempeſt, conſumed by Lightning or deſtroyed by Enemies, the Tenant may take the Materials that remain, to repair; much more where the Covenant is expreſs to keep in Repair.

So is *Dy.* 33. *a.* Where a Leaſe was made of a Meadow, in which the Leſſee covenanted to ſuſtain and repair the Banks, ſo that the Meadow ſhould not be ſurrounded, under the Penalty of 10 *l.* but by a ſudden and outragious Flood, occaſioned by overturning the Wears in *Devon*, the Land was drowned and the Banks demoliſhed. By *Fitzherbert* and *Shelly*, the Leſſee is excuſed from the Penalty; as where an Houſe is burnt by Thunder, or blown down by the Wind, becauſe it is the Act of God, which cannot be reſiſted; but yet he is bound to do it up and repair it in convenient Time by Reaſon of his Covenant.

So it is ſaid *Stile* 48. the Leſſee is not chargeable for Waſte where an Enemy invades, unleſs he be bound by a particular Covenant to keep the Land let, without Waſte.

Al. 27. *Paradice* ver. *Jane*, in Debt for Rent, the Defendant pleads Expulſion by Prince *Rupert* with an Army; reſolved no Plea; for when a Man by his own Contract creates a Duty or Charge on himſelf, he is bound to make it good if he may, though an Accident by inevitable Neceſſity happen, becauſe he might have provided againſt it by

his Contract. Therefore if Leſſee covenant to repair an Houſe, though burnt by Lightning or thrown down by Enemies, he ought to repair it.

So *Pool* ver. *Archer*, 2 *Show.* 401. Covenant to repair, and the Houſe fell down; Leſſee pleads Entry by Leſſor the next Day after the Houſe was burnt down, ſo that he could not repair; and Judgment for the Plaintiff.

So in the Caſe *Sti.* 162. *Comton* and *Allin.* So 2 *Leo.* 189. In 2 *Sand.* 420. *Walton* and *Waterhouſe.*

In all theſe Caſes it is determined, that the Leſſee is bound to repair, though the Houſe covenanted to be repaired is conſumed by Fire.

This Caſe was again argued by Mr. *Clark* for the Plaintiff, and by Mr. *Starky* for the Defendant.

And it was inſiſted for the Defendant, firſt, That the Action was not maintainable againſt the Defendant in this Caſe, becauſe it does not appear that the Houſe called *Grove Place*, was by Settlement limited to the Defendant in Poſſeſſion, for there is a Term of an hundred Years limited to *John* and *Richard Vaughan*, on Truſt to raiſe 150 *l. per Ann.* for his Siſters; and another Term of — Years limited to Truſtees for the ſeparate Maintenance of the Ducheſs after her Marriage; and *Grove Place* might be included in one of theſe Terms; and if ſo, it could never be the Intent he ſhould repair it till he came into the Poſſeſſion of the Eſtate. *Sed non allocatur*; for if this would excuſe the Defendant, it was incumbent on him to ſhew that it was compriſed in one of theſe Terms, for it ſhall not be intended; but in Caſe it was ſo, when the Defendant has expreſly covenanted to keep *Grove Place* in Repair, he will be obliged to do it, although it had been ſettled as Part of the ſeparate Maintenance of his Wife. A Man may oblige himſelf by Covenant to repair an Houſe in the Poſſeſſion of another.

Secondly,

Secondly, The Covenant is, he ſhall keep in Repair, not that he ſhall rebuild, and therefore it could not be the Intent of the Parties to bind the Defendant beyond the common and ordinary Repair, and not to make a new Houſe, if by Accident, without the Defendant's Default, it ſhould be burnt or demoliſhed. *Sed non allocatur*; for when the Defendant covenants he will repair, and keep in good and ſufficient Reparation without any Exception, this imports that he ſhould in all Events repair it; and in Caſe it be burnt or fall down, he muſt rebuild it, otherwiſe he doth not keep it in good and ſufficient Reparation; and this is warranted by the Caſes cited, which ſhew the Covenantor muſt rebuild if Neceſſity require, as where the Houſe is burnt by Fire, *&c.*

Thirdly, The Eſtate limited to the Defendant is without Impeachment of Waſte, and conſequently the Covenant to Repair is contradictory and inconſiſtent with it. *Sed non allocatur*; for the Eſtate is not abſolutely without Impeachment of Waſte, but it is with an Exception, except as herein after reſtrained and it is after reſtrained from cutting Trees in Walks or ;ornamental, and therefore the Covenant to repair is not inconſiſtent with the Eſtate given him; nor does it follow, that if a Perſon has an Eſtate without Impeachment of Waſte, that he may not oblige himſelf by Covenant to keep up an Houſe upon it in Repair.

Fourthly, It is not ſhewn that there was ſufficient Timber allowed to the Defendant to put the Houſe in Repair; the Covenant is, That the Defendant ſhall repair and keep in good and ſufficient Repair, he being allowed to cut ſufficient Timber for repairing the ſame, that was not in the Walks or ornamental to the ſaid Meſſuage; now this being in the Nature of a Condition precedent, it ought to be expreſly averred that this was done, before the Defendant can be charged with any Breach of Covenant for not Repairing.

It is indeed ſaid, although the Defendant was allowed to cut ſufficient Timber for Repairing, that was not in any Walks or otherwiſe ornamental, but that is not full enough;

for firſt, the Word (*although*) is no proper or formal Averment. Secondly, It is not ſhewn there was any Timber growing but what was in the Walks or ornamental; and it ſhould have been expreſly alledged there was Timber ſufficient beſides what grew in the Walks or was ornamental to the Houſe; it is not enough to ſay he was allowed to cut Timber, if there was none to cut down. *Yel.* 49. It was not ſufficient to alledge the Defendant found good Security, unleſs ſhewn who was the Security he gave. Thirdly, It is not ſaid, who it was allowed him to cut down the Timber, and ſo altogether uncertain; this is traverſable, and what Iſſue can be joined on this Averment?

Sed non allocatur; for it was anſwered and reſolved by the Court, that *licet* has been always held a proper Word for an Averment. *Pl. Com.*

And as to the other Part of the Objection, it is enough to make the Averment in the Words of the Covenant; and in Caſe there was not Timber ſufficient, the Defendant might ſhew it; and as that was a Matter for his Benefit, it was incumbent on him to ſhew it, and it ſhall not be preſumed, and it muſt be intended he was allowed to take it by all who could give that Allowance. Judgment upon this Plea for the Plaintiff.

Wallis ver. *Pain and Underhill.*

Caſe 269.

Tithe for Clover Seed due to Vicar.

BILL was exhibited in the Exchequer by the Plaintiff, who was Tenant or Farmer under the Impropriator of the great Tithes in the Pariſh of *Prittlewell* in the County of *Eſſex*, and inſiſted the Defendant ſowed a Field with Clover which was cut for Hay; he let the Aftermath grow for Seed which was cut and thraſhed for Seed, of which the Plaintiff ought to have the Tithe as a great Tithe. The Defendant *Pain* inſiſted, that he was Farmer of a Farm called *Milton-Hall*, and that there was a *Modus* to pay 2 *d.* an Acre and 10 Buſhels of Wheat to the Vicar in lieu of all ſmall Tithes; that he had paid to the Plaintiff for the Tithe Hay of his

Clover, and that the Aftermath of Clover ſtood for Seed and was thraſhed for Seed, which was a ſmall Tithe and payable to the Vicar; and Mr. *Underhill* the Vicar inſiſted upon the Tithe of Clover Seed as a Vicarial or ſmall Tithe.

And by the Depoſition of ſeveral Witneſſes it appeared, that the Difference between Clover cut for Hay and that cut for Seed was conſiderable, and when made into Hay it was cut while the Graſs was green and fit for Cattle to eat; that when cut for Seed it ſtood till the Stalk was ſear and good for nothing, but was thrown out for Stover or Fodder, and the Seed was the only Thing of Value or regarded; and that the Tithe of Clover Seed had been always paid to the Vicar in that Pariſh, and look'd upon as ſmall Tithe; that the Impropriator had never received it but once about five Years ago, when the Plaintiff took it from a Woman in the Pariſh; but for 20 or 30 Years the Defendant had received it as ſmall Tithes, and 50 Years ago it had been paid to or for the Vicar; indeed the Vicar Mr. *Underhill* for great Part of the Time he has been Vicar, held the great Tithes likewiſe.

It was argued by Mr. *Banbury* and Mr. *Bootle*, that Clover Seed is in the Nature of it great Tithe, and due to the Plaintiff; for as Tithe Hay is due to him, the Seed of that Hay muſt of Conſequence belong to him too; that where the Parſon is intitled to Tithe Hay, he will be intitled to the Hay made of Clover, as well as of other Graſs; and if to the Hay, likewiſe to the Seed.

It was agreed that they conld not find that any Caſe had been in Court, wherein it was determined that Clover Seed was great Tithe, or that it did belong to thoſe who had the Tithe of Hay; but two Caſes were mentioned, one from Ch. Ba. *Dod*'s Notes, and it was the Caſe of *Stanford* and *Hughes* as cited in the Caſe of *Pocock* and *Cole*, *Hill.* 1694, in theſe Words, *Arable Land pays Tithes to the Impropriator in Kind, Sainfoin was ſown upon the Land and ſtood to Seed, and the Profit was in the Seed, and not in the Stalk; there was a Cuſtom of* 2 d. per *Acre for Hay, payable to the Vicar*; and it was reſolved, That notwithſtanding the Stalk and Seed was in the Nature

of Corn, yet it ſhould be look'd upon as Graſs and payable accordingly.

The other Caſe was from Mr. *Brown*'s Notes in theſe Words, *It was decreed that the Aftermath of Clover Graſs is Titheable, unleſs a* Modus *can be proved,* 3 *Jac.* 2. *Brook* and *Hall.* And *Hall* and *Babb was cited, Trin.* 1683.

In this Caſe the Lord Chief Baron cited the Caſe of *Pomfret*, Parſon of *Luton* in *Bedfordſhire*, that the Tithe of *Sainfoin* ſhould be paid as Graſs, and not as Grain, though there was Proof of thraſhing it and feeding Hogs with it, and making Bread with it, and the Vicar then had it.

This Caſe of *Pomfret* ver. *Laundy and Waite*, is found *Trin.* 32 *Car.* 2. *f.* 227. wherein *Laundy* inſiſted that *Sainfoin* thraſhed was looked upon as Grain, and ſown and often thraſhed as Grain, and that the Tithe belonged to the Impropriator, and not the Vicar. As to this Defendant, the Caſe was to be farther heard at the ſetting down of Cauſes that Term, when the Court would further conſider whether he ſhould pay Tithe of *Sainfoin* to the Impropriator or the Vicar, but no ſuch Decree can be found; and as to the other Defendant *Waite* the Queſtion was determined on Stat. 31 *H.* 8.

Now by theſe Caſes it appears, that it was thought reaſonable the Stalk and Seed ſhould go together, and conſequently when the Impropriator is intitled to the Stalk, as he is when made into Hay, he ought likewiſe to have the Seed.

And it would be very inconvenient if it was otherwiſe, for the Owner might ſhift his Tithe to the Parſon or Vicar as he pleaſed; for when it was firſt cut, it is fit to be made into Hay, the Tithe whereof will belong to the Parſon; but if he let it ſtand to dry, that the Seed may be ripened and fit to thraſh, then the Tithe will belong to the Vicar; and when ſhall it be ſaid to be dry enough for the Vicar? When it is firſt cut, the Tithe ought to be ſet out, and the Parſon will have it; but after a while the Vicar will claim it, altho' it was before veſted in the Parſon.

On

On the other Side it was inſiſted by Mr. *Floyer*, Mr. *Wilbraham* and Mr. *Starkie*, That Clover Seed is in its Nature ſmall Tithe, at leaſt it is a Vicarial Tithe due to the Vicar in the preſent Caſe; that there is not one Caſe in Point againſt it, and Tithe of no Seed was ever look'd on as a great Tithe: It is ſaid that the Stalk and Seed ſhall go together, but it is frequent that the Seed or Fruit of Trees goes to the Vicar, when the Tree goes to the Parſon; Wood is always reckoned a great Tithe, and goes to the Rector, unleſs the Vicar be ſpecially endowed with it; but Acorns as well as the Fruits of all other Trees were always held as ſmall Tithes.

But if the Matter were doubtful, in this Caſe it appears it has always been paid to the Vicar for thirty, forty or fifty Years, ſo that there is no Pretence in this Caſe to ſay it does not belong to the Vicar.

But it was a new Caſe, and the Court took Time for to conſider of it. And

Afterwards in the ſame Term, I delivered their Opinion as follows, *viz.*

As this was a Matter that might be conſiderable in its Conſequences in Relation to the Quiet of poor Vicars, I conſidered two Points.

Firſt, Whether Clover Seed was in its Nature a ſmall Tithe, ſo that it would belong to the Vicar who was endowed *de Minutis Decimis.*

Secondly, Whether if that was in any reſpect doubtful, it would not belong to the Vicar under the Circumſtances of the preſent Caſe.

And I was of Opinion that Clover Seed was in its Nature a ſmall Tithe. By the Conſtitution of *Robert Winchelſea*, Archbiſhop of *Canterbury*, an uniform Payment of Tithes

was eſtabliſhed in the Province of *Canterbury*. *Volumus quod decimæ de frugib.* (*non deduct' expen'*) *integre & ſine Diminutione ſolvantur, & de fructibus arborum, de ſeminibus omnibus, de herbis hortor', niſi parochiani fecerint redemption' pro talibus decimis* ; where a manifeſt Diſtinction is made between Tithes *de frugibus* and Tithes *de fructibus, ſeminibus & herbis hortor'*. And *Lind.* ſaith *f.* 188. *Decimis*, that Tithes *de frugibus* ſtrictly taken mean ſuch only *quæ ſolent ligari*, but in a larger Senſe they comprehend not only Tithes *de frumentis & leguminibus, verum etiam de vino, ſilvis cæduis, cretæ fodinis & lapicidinis*, that is, all ſuch as commonly are reputed great Tithes.

But ſpeaking of Tithes *de ſeminibus omnibus*, he ſaith *f.* 192. *de decimis*, that they comprehend all Seeds, *ſive in campis, ſive in hortis, utpote lini, milia, canabi, grana porrorum, ceparum, hyſſopi, cauliæ, petrocilini, rapi, lactucæ & aliar' herbarum.*

And upon the Words making Redemption *pro talibus decimis* he ſaith, Tithes *de fructibus, ſeminib' & herbis quæ revera decimas int' minutas computantur* ; *ſunt enim decimæ minutæ quæ proveniunt de milio, menthâ, anetho, & ſimilibus* ; and he takes Notice that *Hortienſis* ſays *quod in Angliâ conſiſtunt minutæ decimæ in lanâ, lino, lacte, caſeis & agnis, in partu animalium, pullis, ovis, & decimis hortor'* ; *decimæ etiam mellis & ceræ numerantur inter minutas.*

So that by Common Law, as long as the Diſtinction has been made between great and ſmall Tithes, which is as long as Appropriations to Religious Houſes who uſually engroſſed the Great, but left the ſmall Tithes to the Curate, all Seeds have been reckoned as ſmall Tithes.

The Common Law ſeems to follow the Canon Law in this Point, 2 *Inſt.* 649. *Coke* ſpeaking of Tithes ſaith, *quædam ſunt majores, frument', zizania, fœnum, & quædam minores ſive minutæ, quæ proveniunt ex menthâ, anetho, olerib', & ſimilibus.*

And all the Reſolutions, relating to Tithes which proceed from Things newly introduced into *England*, have held them

to be ſmall Tithes; it was ſo reſolved *Paſch.* 38 *Eliz. Baddingfield* and *Frank*, *Cro. Eliz.* 467. *Mo.* 909. 1 *Rol. Abr.* 310, 335. *Owen* 74.

And in Caſe the Vicar ſues the Impropriator for the Tithes of Saffron in the Eccleſiaſtical Court, no Prohibition ſhall go. 2 *Rol. Abr.* 310.

So if the Field was formerly ſown with Corn, and after be ſown with Saffron, the Tithes ſhall be paid to the Vicar; for *per Popham*, the Tithe of Saffron Heads are ſmall Tithes; and though the Tithes of the Field have been paid to the Parſon, yet when converted to another Uſe whereof no Graſs Tithes come, the Vicar ſhall have the Tithes. *Ow.* 74.

So Sir *Richard Uvedale* ver. *Tindal*, *Hut.* 77. *Cro. Car.* 28. the Queſtion was on a ſpecial Verdict, if Woad was ſmall Tithes or great; and it was unanimouſly agreed that Woad was ſmall Tithes; for if no Circumſtances be to difference the Caſe, Hemp, Line, Saffron, Hops, Tobacco, and all ſuch new Things ſhall be *Minutæ decimæ.*

So 1 *Sid.* 447. where Prohibition was prayed to a Suit by a Vicar for Tithe of Woad, ſuggeſting it to be a great Tithe, the Court doubted becauſe it is reckoned, as the Book ſays, *inter minutas decimas*, as Hops, *&c.*

So 1 *Sid.* 443. on Motion for a Prohibition to a Suit for Tithe of Hops, it was ſaid Hops, Woad, and ſuch ſmall Things of new Invention, are *minutæ decimæ.*

So *Pal.* 219. *Ward* and *Britton*, the Queſtion was whether Lamb was ſmall or great Tithe; *Bridgman* Ch. J. ſaid *minutæ decimæ* comprehend only Tithe of Gardens, Hemp, Hops, Saffron, *&c.*

So 1 *Vent.* 61. it is ſaid Hops are of the Nature of ſmall Tithes.

So Flax was ſmall Tithes, reſolved *per* three Juſtices, *Wharton* and *Liſle*, 3 *Lev.* 365. 4 *Mod.* 184. *Carth.* 263. *Skin.* 341, 356. So it was held in *Noah Webb*'s Caſe, 14 *Car.* 1 *Rol.* 643. S. 3.

It is true ſome Opinions have been, that ſmall Tithes muſt be eſtimated not from the Nature of the Thing titheable, but from the Quantity of the Tithe, and therefore it was ſaid in *Uvedale* and *Tindal*'s Caſe, if all the Profits of a Pariſh conſiſt in ſuch Things, Hemp, Hops, Wool, Lambs, *&c.* may be great Tithes. So in *Cod. Ju. Eccl.* 691. it is ſaid Hops in Gardens are ſmall, in Fields great Tithes; and in the Caſe of *Wharton* and *Liſle*, *Holt* Ch. J. at firſt ſeemed of Opinion that Tithes muſt take the Denomination of ſmall or great, from the Quantity of the Crop growing, but the three other Juſtices held ſtrongly that Tithes were great or ſmall from the Nature of the Things which yielded the Tithes; and *Holt* yielded to it ſo far, that he abſented himſelf when Judgment was given; which he would ſcarce have done, if he had been fix'd in the contrary Opinion.

And this ſeems the better Opinion, for it gives Foundation for continual Debate, what ſhall be a Quantity too large for ſmall Tithes; if it be ſaid what grows in a Garden, ſome Gardens are not half an Acre, others two or three Acres; Gardens are enlarged now a Days to 50 or 100 Acres.

Perhaps that may be a proper Diſtinction as to Peaſe, Beans or other Pulſe, becauſe they had exiſtence in former Times, and Appropriations were made *de Bladis & Leguminibus* to Religious Houſes; but as to Things newly introduced into *England*, there is but little Reaſon that the Patentees, who claim only what came to the Crown upon the Diſſolutions of Monaſteries, ſhould have Tithe of thoſe Things which were never appropriated, and to which the Religious Houſes diſſolved never had Title.

As to Clover Seed there does not appear any expreſs Determination in this Court; that it is in its own Nature a ſmall Tithe; it is a Seed, and all Seeds are mentioned as

ſmall

ſmall Tithe, and no Inſtance appears that ever any Seed was held to be a great Tithe; it is a Seed newly introduced, and therefore there is Reaſon to look upon it to be of the Nature of thoſe Things of a new Invention, which by the Caſes cited have always been held as minute Tithes.

It is true that Clover Graſs made into Hay is of the Nature of all other Graſs made into Hay, and conſequently muſt belong to the Parſon, or other Perſon who is intitled to Tithe Hay; but it does not follow, when it ſtands for Seed, and is not made into Hay, that the Seed may not be ſmall Tithes. Wood is a great Tithe, but Acorns, Maſt, *&c.* are ſmall Tithes, 10 *Co.* — Rape Seed, Caraway Seed, Turnip Seed, Muſtard Seed are ſmall Tithes; but if the Herb be growing with other Graſs and made into Hay, it would be great Tithe; Vetches are great Tithe if mowed or cut when Ripe, but if cut Green for Cattle they are ſmall Tithes.

So Apples and other Fruits are confeſſedly ſmall Tithes, but the Wood of Apple Trees and other Fruit Trees, if cut in a Year when no Tithe paid of the Fruit, is as other Wood for Firing, great Tithe; but in the Year when Tithe is paid of the Fruit, if then fell'd no Tithe ſhall be paid of the Wood, the Fruit being look'd on as the Principal.

And this may anſwer an Objection, that it would be in the Power of the Occupier to make it great or ſmall Tithe, and ſo favour the Parſon or Vicar as he pleaſed, by cutting it for Hay or letting it ſtand for Seed; it may as well be ſaid a Man may fell his Apple Trees the Year he tithed the Fruit or after, to prejudice or favour the Parſon.

The Caſes mentioned from Mr. *Dod*'s and Mr. *Brown*'s Notes are imperfect Hints of thoſe Caſes; I obtained a Note of them from Ch. Ba. *Ward*'s Notes, which are thus:

Paſch. 1680. *Woodford* and *Standfaſt*, Queſtion was, Whether Clover ſhould pay Tithe as Hay, and ſhould be within a *Modus* of 2 *d. per* Acre for all Meadow and mowing

Ground when the Clover ſtands for Seed, and a great Quantity is produced.

Note; The Court was divided; *Montague* Ch. Baron and *Atkins*, that it ſhould be accounted Hay; *Raymond* before his Removal and *Gregory* to the contrary, and after *Weſton* inclined it was not within the Cuſtom; but the Plaintiff the Day after the Term prayed to diſmiſs his Bill without Coſts or Prejudice; which was admitted.

Pomfret and *Launder Wait & al'*, 8 *July* 1680, Tithes of Clover Graſs thraſhed and made into Horſe Bread, and Hogs fed with the Seed, yet adjudged to be Hay, and titheable to the Vicar who was endowed with Hay, and not to the Impropriator, as a new and different Tithe from Hay.

In theſe Caſes it appears the Diſpute was between the Impropriator and the Vicar who was endowed with Tithe of Hay, for the Seed of *Sainfoin* or Clover, (for in that the Reports differ) the Impropriator inſiſted it was of the Nature of Corn or Grain, and conſequently belonged to him.

In the firſt Caſe the Court was divided; in the Second, inclined, that the Seed belonged to the Vicar; ſo that as far as the Authority of theſe Caſes goes, the Tithe of the Seed was decreed to the Vicar; it is true the Vicar was endowed of the Tithe of Hay, and the Expreſſion of ſome of the Judges was, That the Seed ſhould go with the Stalk and ſhould be look'd upon as Hay or Graſs; but ſuch Expreſſions might well be uſed in Favour of the Vicar, who was intitled to Tithe Hay, in Oppoſition to the Impropriator's Claim, who would have it taken to be of the Nature of Corn, becauſe Horſe Bread was made of it, and Hogs fed with it. And therefore it would be too rigid a Conſtruction of thoſe Expreſſions to ſay they imported, That the Seed ſhould in all Caſes be reputed of the Nature of Graſs or Hay, ſince they are apparently different; altho' in theſe particular Inſtances where the Vicar had Tithe Hay, they may be reſembled to it, ſince one as well as the other belonged to him. The whole Authority of theſe Caſes reſults to this; that *Sain-*

foin or Clover Seed is not of the Nature of Corn or Grain; in which the Court being divided in the firſt Caſe, the Plaintiff finding the Inclination of the Court, deſired to diſmiſs his Bill without Coſts; which was admitted. In the ſecond Caſe it appears not what Determination was finally made, nor does it appear what became of it in the Entry of the Deputy Remembrancer; whether it was properly great or ſmall Tithes was not at all under the Conſideration of the Court; and by the Caſes before cited it ſeems moſt reaſonable to account it of the Nature of ſmall Tithe.

But in the preſent Caſe it ſeems moſt evident it ſhould be ſo taken, ſince by the Depoſitions in the Cauſe it appears, that for 40 or 50 Years in this Pariſh the Vicars have received the Tithe of this Seed; and although the Impropriator hath frequently hired the Vicarial Tithes, yet it was rarely, if ever, taken by him when he did not hold both.

And all the Barons agreed in Opinion, that the Plaintiff's Bill ſhould be diſmiſt with Coſts.

Baron *Parker* ſeemed to doubt of the firſt Point, becauſe of the Expreſſion in the Caſes cited, that the Seed and Stalk ſhould go together.

DE

Termino Paſch.

12 Geo. 2.

The Aldermen and Burgeſſes of Bury St. Edmund and Lawrence Wright, Plaintiffs, ver. *Lewis Evans Defendant.* In Scacc'. Caſe 270.

BILL for ſmall Tithes was brought by the Plaintiffs ſetting forth, That King *James* the firſt was ſeiſed in Fee of the Rectories and Vicarages Impropriate of the Pariſhes of St. *Mary* and St. *James* in *St. Edmund's Bury* in the County of *Suffolk*, and of all Tithes great and ſmall belonging to the ſaid Rectories and Vicarages, formerly Part of the Poſſeſſions of the Monaſtery of *Bury St. Edmund in Com' Suffolk.*

Preſcription *in non decimando* againſt a Lay Impropriator held not good.

That being ſo ſeiſed, by Letters Patent dated 1 *July* 6 *Jac.* the King granted to the Aldermen and Burgeſſes of *Bury St. Edmund*, and their Succeſſors, (*inter al'*) *Decimas tritici, garbar', lanæ, vitulor', &c. & omnes & omnimodas decimas dict' monaſterio ſpectan' tam majores quam minores.*

And afterwards by Letters Patent dated 17 *Sept.* 12 *Jac.* the King granted to the ſaid Aldermen and Burgeſſes, and their Heirs and Succeſſors, (*inter al'*) the Rectories of St. *Mary* and St. *James*, and the Vicarages of the ſame Churches, the Advowſons, Rights of Patronage, *&c. Ac omnes & omnimod'*

mod' decimas tam majores quam minores, prædial', mixtas & minutas, to the ſaid Churches, *&c. dicto monaſterio ſpectan'.*

That by Indenture 2 *April* 1724. the Aldermen and Burgeſſes of *Bury* made a Leaſe to the other Plaintiff *Wright* of all their Tithes of Corn and Grain, ariſing within the ſaid Town of *Bury* in the ſaid Pariſhes of St. *Mary* and St. *James*, for the Term of eleven Years.

And afterwards, taking Notice that by the ſaid Leaſe the Tithes of Corn and Grain only were demiſed, and the ſmall Tithes in the ſaid Pariſhes by Miſtake were omitted; altho' they were intended to have been leaſed, and the Plaintiff *Wright* the Leſſee ought in Conſcience to enjoy them; it was by an Order of Council, entered in the Council-Books of the Corporation, agreed, that a Bill ſhould be exhibited in the Name of the Corporation or *Wright*, or both, for the Recovery of the ſaid ſmall Tithes due from the Defendant and others for Lands by them held in the ſaid Pariſhes, and on ſuch Recovery, Satisfaction ſhould be made for the ſame to the Plaintiff *Wright*; that the Defendant *Lewis Evans*, from the Year 1724. to the Year 1734. held ſeveral Lands within the ſaid Pariſhes in the Town of *Bury*, particularly 184 Acres Part of a Farm called *Eldo* Farm, or the Old Farm, which Farm for the greateſt Part lay in the Pariſh of *Ruffham*, and only 184 Acres Part of it lay in the Pariſh of St. *Mary*, which Farm was Parcel of the Poſſeſſions belonging to the Monaſtery of *Bury St. Edmund* in the County of *Suffolk*; that the Defendant *Evans* likewiſe held in the ſaid Pariſh of St. *Mary* during the ſaid Years ſeveral Lands called *Wood Went*, containing about ninety-four Acres, and other Lands containing about thirty-ſix Acres, and other Lands about nine Acres, on which were ariſing yearly great Quantities of Corn, Hay, Clover Seed, Turnips, and other ſmall Tithes; whereby the ſaid Aldermen and Burgeſſes, or the ſaid *Wright*, became intitled to demand the ſaid Tithes; and pray, that the Defendant may ſhew Cauſe why the Defendant ſhould not make Satisfaction for the ſame to the ſaid *Wright*; the ſaid Aldermen and Burgeſſes conſenting he ſhould receive the

ſame; and that the Plaintiffs may have ſuch Relief in the Premiſſes as the Nature of their Caſe in Equity and good Conſcience doth require.

To this Bill the Defendant anſwers, and admits, that he hath held the ſeveral Lands in the Bill during the Time charged, particularly the ſaid 184 Acres, Parcel of *Eldo Farm*, or *Old Farm*, which was Part of the Poſſeſſions belonging to the Monaſtery of *Bury St. Edmund*, and the Lands called *Woad Went*, and the ſaid thirty-ſix Acres and nine Acres in the Pariſh of *St. Mary*, and believes the ſeveral Kinds of Tithes and Quantities mentioned in the Bill might be ariſing in the ſaid ſeveral Years, but inſiſts, that he hath paid and ſatisfied to the Plaintiff *Wright* for all the Tithes of Corn and Grain growing in the ſaid Years; but that no ſmall Tithes were ever paid or demanded for the ſaid Lands; and doth inſiſt, that, as no ſmall Tithes, or any Satisfaction or Compoſition for the ſame, were ever paid by or demanded from the Defendant, or any Perſons under whom he claims, in reſpect of the ſaid Lands, or from any other Owners or Occupiers of Lands in the ſaid Town of *Bury*, after ſuch Length of Time and ſo long Enjoyment of Lands freed and diſcharged from ſmall Tithes, a legal Diſcharge is to be preſumed; and it muſt be neceſſarily intended the ſmall Tithes by due Courſe of Law were aliened or releaſed to the Owners of the ſaid Lands by the Perſons intitled to the Inheritance of the ſaid ſmall Tithes, though the Conveyance or Releaſe, or other legal Diſcharge be loſt or deſtroyed, eſpecially ſince the ſmall Tithes in the ſaid Pariſh of St. *Mary* are of equal Value with the great Tithes ariſing there.

This Cauſe coming on to be heard on *Thurſday* 17 *May* 1739, the Plaintiffs produced the ſaid Letters Patent 6 & 12 *Jac.* the Leaſe and Order of Council, and by Depoſitions of *Charles Woodward* and *Francis Wright* (all which were read) proved that 40 or 50 Years ſince they held Lands for many Years in *Bury*, or collected the Tithes there, and ſmall Tithes were paid by ſeveral Perſons in the ſaid Pariſh of St. *Mary* and St. *James*; and they had heard their Fathers (who held Land 40 Years there before their having Lands there) and

one *Richard Copſy* deceaſed, declare ſmall Tithes in the ſaid Pariſh ought to be paid or compounded for.

On the Part of the Defendant it was proved by Depoſition of ſeveral Witneſſes, that 48 or 50 Years before they gathered Corn in the ſaid Pariſh, and never knew any ſmall Tithes paid or demanded.

On this Caſe it was firſt inſiſted by Mr. *Bootle* and Mr. *Starkey* of Counſel with Defendant, that the Bill was not proper which demands Satisfaction for ſmall Tithes to the Plaintiff *Wright* who had no Leaſe of, or Title to them. *Sed non allocatur*; for the Plaintiffs ſhew the Title of the Corporation to great and ſmall Tithes, the Leaſe of the great Tithes to the Plaintiff *Wright*, and their Intention he ſhould have the ſmall Tithes; and then conclude, that the Corporation, or he, are intitled to ſuch ſmall Tithes; and then pray that the Defendant may ſhew Cauſe why he ſhould not make Satisfaction to him for the ſmall Tithes ariſing on his Lands, the Corporation conſenting he ſhould have them; and they pray general Relief as the Nature of the Caſe requires, ſo that the Court may conſiſtently with the Prayer of the Bill direct the Defendant to account to the Plaintiff *Wright* for his great Tithes not ſatisfied, and to account to the Corporation for the ſmall Tithes which are not comprehended in their Leaſe to him, and to which therefore the Corporation continues intitled, notwithſtanding it is prayed that the Defendant ſhould ſhew Cauſe why he ſhould not make Satisfaction for them to *Wright*, they conſenting he ſhould have that Satisfaction.

Then it was inſiſted by the Counſel for the Defendant, that ſince there was no Proof of any ſmall Tithes being ever paid by the Defendant, (although it was proved by *Richard Micklefield* that 2 *s.* had been demanded *per* Acre for the ſmall Tithes of the Lands he held, Part of *Eldo* or *Old Farm*, and he offered 18 *d. per* Acre, but afterwards he refuſed to pay it); and that it was proved by ſeveral Witneſſes they never knew ſmall Tithes paid for, and that the ſmall Tithes

were more in Value than the great Tithes in that Pariſh; It was inſiſted,

That in the Caſe of a Lay Impropriator, the Defendant might ſay in Bar of the Demand of Tithes, that no Tithes had ever been paid or demanded for theſe Lands.

It is true in the Caſe of a Rector or Spiritual Perſon, no one can preſcribe againſt him in a *Non decimando*; but otherwiſe it is in the Caſe of a Lay Impropriator.

And the Reaſon given in the Biſhop of *Wincheſter*'s Caſe, 2 *Co.* 44. (that if ſuch a Preſcription ſhould hold in the Caſe of a Spiritual Perſon, a Jury of Lay Gentlemen would not be equal in the Trial of ſuch Preſcription) fails in the Caſe of Lay Impropriators.

And although there was no expreſs Determination in the Point by this Court, yet many Judges were of that Opinion; in the Caſe of *Benſon* and *Olive* in this Court, where the Bill was by a Lay Impropriator, the Chief Baron and another Baron were of that Opinion; indeed when it was ſpoken to in 1727 and 1730, the Court was divided in Opinion, and ſo no Decree was made.

In the Caſe of *Meadly* and *Tomlins*, *Paſch.* 7 *W.* 3. the Bill was by a Leſſee of the Dean and Canons of *Windſor*, and in the Caſe of *Talbot* ver. *Samon*, *Harding & al'* 1736, the Plaintiff was a Leſſee of the Biſhop of *Litchfield* and *Coventry*, the Court determined not the Matter by allowing the Preſcription alledged, becauſe they were in effect Eccleſiaſtical Perſons, being Leſſees for Years to ſuch as were Spiritual Perſons.

And in this Caſe, though there was Proof of Payment of ſmall Tithes by the Inhabitants of St. *Mary*'s, yet none were paid by Defendant; one Witneſs indeed ſaid he promiſed to pay for the Tithes of Clover Seed, but he might apprehend that to be great Tithe before the Determination of the Court in the Caſe of *Wallis* and *Pain*; and though he once offered

offered to pay 18 *d.* in the Pound when 2 *s.* was inſiſted on, upon better Thought afterwards he refuſed to pay it.

And the Court being earneſtly deſired to conſider the Caſe, and it being a Matter which might frequently come before the Court, they took Time to think of it till next Term; and in *Trinity* Term the Ch. Baron delivered the Opinion of the Court to the Effect following.

The Matter for the Determination of the Court may be conſidered under two Heads;

Firſt, Whether a Layman can preſcribe in a *Non decimando* againſt a Lay Impropriator.

Secondly, Whether the Defendant hath made out a Caſe which may intitle him to the Benefit of ſuch a Preſcription.

And in both theſe Points the Opinion of the Court was for the Plaintiff.

As to the firſt Queſtion, they think there is no Foundation for ſuch a Diſtinction, that the Defendant may preſcribe againſt a Lay Impropriator any more than againſt an Eccleſiaſtical Perſon; which it is admitted he cannot. For,

Firſt, No ſuch Diſtinction appears in any Law Book whatſoever; the Rule is laid down generally, that a Layman cannot preſcribe in a *Non decimando*, but in *Modo decimando* he may; this is ſaid by *Choke* ſo long ago as 8 *Edw.* 4. 14. this is expreſly reſolved in the Biſhop of *Wincheſter*'s Caſe, 2 *Co.* 44. 1 *Rol. Abr.* 653.

The ſame is agreed in ſeveral other Caſes, *Wright* ver. *Gerrard*, *Hob.* 306. *Mo.* 425. 2 *Keb.* 28, 60.

And in *Slade* and *Drake*, *Hob.* 297. it is largely deſcanted upon, and agreed by Lord Ch. J. *Hobart* to be a ſettled Principle of Law.

So *Seld. de Decimis, ch.* 13. *f.* 2. 3 *Vol. f.* 1279. who was not thought averſe to the Privileges of Laymen in the Enjoyment of Tithes, after an Account given of the Infeodations of Tithes to Laymen, which by the Laws of *France* and *Spain* were ſtill allowed, concludes that Infeodations were in *England* as in other States, but of later Times none are allowable, derived from other Original than the Statute of Diſſolutions; that Diſcharge by Preſcription of paying no Tithes, or any Thing in lieu of them, by the later Canon Law, ſince the Parochial Right eſtabliſhed, is allowed only to Spiritual Perſons, but to no Layman, the Laity being uncapable of Tithes by Pernancy, as alſo of Diſcharge by bare Preſcription, ſaving in Caſes within the Statute 31 *H.* 8.

And the Reaſon given in the Books why a Layman cannot preſcribe in a *Non decimando*, is, becauſe a Layman, ſince the Parochial Right eſtabliſhed, is incapable of Tithes in Pernancy; ſo ſaith Lord *Coke*, 2 *Co.* 44. as well as Mr. *Selden ſupra*; and conſequently, as he cannot take a Grant of Tithes to himſelf unleſs upon a Conſideration paid for them, as upon a real Compoſition by Parſon, Patron and Ordinary, or by a *Modus* given in Lieu and Satisfaction; ſo he cannot be diſcharged from the Payment of them; for a real Compoſition ſhall not be intended unleſs it be ſhewn.

It has indeed been objected, that there is no Foundation for a Layman to be excluded from the Benefit of ſuch a Preſcription, ſince there is no Incapacity in him to take ſuch a Grant; and therefore it is hard that Time, which eſtabliſhes a Right in other Caſes, ſhould weaken his Right in reſpect to his Diſcharge from the Payment of Tithes, and conſequently he ſhall have no Advantage from a real Compoſition, unleſs he can produce it, which yet in Length of Time, may as well as other Grants be loſt; and yet in other Caſes where there has been an immemorial Uſage to pay or to be exempt, ſome Grant ſhall be preſumed originally made, to warrant it.

But this will not appear altogether ſo hard, if it be conſidered, that when the Parochial Right became eſtabliſhed, and

Tithes were the fix'd and ſettled Revenue of Spiritual Perſons only, a Grant of them to any other Perſon was void, unleſs made upon a valuable Conſideration, ſo that there was *quid pro quo*; as was the Caſe of a real Compoſition or *Modus decimandi*; it was void not from any Incapacity in the Grantee to take, but from the Impropriety of the Thing granted, which being appropriated to Spiritual Perſons as their proper and peculiar Maintenance, could not be given to a Layman; that this was ſo, appears by an Epiſtle of Pope *Innocent* the Third, in the Body of the Canon Law, *lib.* 3. *tit.* 30. *ca.* 29. *de Dec.* where it is ſaid, *Perceptio decimarum ad Eccleſias Parochiales de jure communi pertinet*; and *Lind.* ſpeaking of Portions of Tithes which a Parſon might preſcribe to have in the Pariſh of another, ſaith *portiones potuerunt pervenisse ad locum Religioſum de conceſſione laici, &c. de decimis vel proventibus quos laicus talis habuit ab Eccleſiâ aliâ in feudum ab antiquo hoc verum eſt, ſi tales portiones decimarum eis donatæ fuerunt ante concilium Lateran' celebrat' Anno* 1130, *Temp. Alex.* 3 *Nam ante illud concilium potuerunt laici decimas in feudum retinere, non tamen poſt tempus dicti concilii.*

And the Canon of that Council runs, *Prohibemus ne laici decimas cum animarum periculo detinentes in alios laicos poſſint transferre, ſiquis vero receperit & eccleſiæ non reddiderit, Chriſtianâ ſepulturâ privetur.* Cod. 691.

Hence it is manifeſt, that it was not thought a Layman was incapacited to be the Pernor of Tithes, from any Incapacity in his Perſon, but from the Nature of the Thing granted; which being eſteemed in thoſe Days as the peculiar Revenue of the Church, and Laymen being under ſo ſevere Penalties prohibited to hold them, it is no Wonder the Common Law, which in many Inſtances admitted the Authority of the Canon Law in thoſe Times, ſhould hold the Pernancy of them by a Layman as unlawful.

But ſince a Layman may claim an Exemption from Payment of Tithes by real Compoſition as well as by a *Modus*, why ſhould not he preſcribe to the Exemption as well in one Caſe as the other? There is a plain Difference; for when

he preſcribes *in Modo decimandi*, the Compenſation to the Parſon manifeſtly appears in the Preſcription, and if no Advantage to the Parſon appears, the *Modus* is not good; but if a Man ſhould be allowed to preſcribe in a *Non decimando* without ſhewing any Conſideration at all, it would be liable to great Abuſe; and it is not ſo great an Hardſhip for a Temporal Perſon to keep the Inſtrument of his real Compoſition, when he knows it neceſſary he ſhould do ſo, as it would be miſchievous to the Clergy, if that was not requiſite; for a Compoſition by a Parſon and a Succeſſor for ſome Years, might ſoon give Pretence to ſet up a preſcriptive Right.

Secondly, Another Reaſon, why a Layman ſhould not preſcribe againſt a Lay Impropriator, any more than againſt an Eccleſiaſtical Perſon, is, becauſe a Lay Impropriator muſt claim under a Spiritual or Eccleſiaſtical Perſon; for every Patentee of the Crown, who can lay Claim to Tithes, muſt claim it by Virtue of the Statute 31 *H.* 8. 13. or other Statute for the Diſſolution of Religious Houſes.

The Statute 31 *H.* 8. is the firſt Act of Parliament that enacted the King and all Perſons who ſhould have any Manors, Lands, *&c.* belonging to the Religious Houſes, thereby diſſolved, ſhould hold and enjoy the ſame freed and diſcharged from the Payment of Tithes in as full and ample Manner, as the Abbots, *&c.* had the ſame at the Time of the Diſſolution.

Now it is well known, that none of theſe Religious Perſons could be exempted from the Payment of Tithes but by his Order, the Pope's Bull, Compoſition real, Preſcription or Unity of Poſſeſſion; and every Patentee of the Crown, that is, every Lay Impropriator, muſt alledge a Title to the Tithes he demands, by Grant from the Crown of ſome Rectory, Vicarage or other Tithes, which were Part of the Poſſeſſions of ſome Religious Houſes which came to the Crown by that or other Statutes; and therefore, as Lord *Hobart* ſays in *Slade* and *Drake*'s Caſe *f.* 296. a Temporal Perſon ſucceeding a Spiritual Perſon in Diſcharge, (and it is the ſame in the Perception of Tithes) it is to be reckoned in a Spiritual Perſon, and

not

not in a Temporal; and conſequently a Man, who could not preſcribe againſt an Eccleſiaſtical Perſon, cannot any more preſcribe againſt the Patentee who derives his Title from and under him, and is in the Nature of his Repreſentative.

As to Authorities in the Caſe, it is agreed there has not been any Determination againſt the Plaintiffs; the Caſe of *Benſon* and *Oliver* was rather in Favour of the Plaintiff; for tho' the Court was divided upon the Circumſtances of that Caſe about making a Decree, or leaving him to Law, the Plaintiff brought his Action on the Statute 2 & 3 *Ed.* 6. 13. which was tried before the Chief Juſtice *Raymond*, and recovered; and the other two Caſes mentioned, *Meadly* and *Tomlins*, *Paſch.* 7 *W.* 3. and *Talbot* and *Salmon* 1736, ſeem Authorities for the Plaintiff, for there the Leſſee of the Dean and Canons of *Windſor*, and Leſſee of the Biſhop of *Coventry* and *Litchfield* (though Laymen) had Decrees for their Tithes, altho' a conſtant Nonpayment was inſiſted on; and what Difference can there be in the Reaſon of the Thing between a Lay Leſſee and a Lay Impropriator, if the Preſcription is allowable only, becauſe he is a Layman, and not an Eccleſiaſtical Perſon?

There are two Caſes, of which my Brother *Parker* hath given himſelf the Trouble to get Copies, they may be fit to be conſidered on this Queſtion.

The firſt is the Caſe of *Medly* and *Talmy*, *Paſch.* 7 *W.* 3. wherein the Plaintiff, as Leſſee of the Rectory of *Leominſter in Com' Suſſex*, exhibited his Bill againſt the Defendant for Tithes of Corn and Grain growing on his Lands in the ſaid Pariſh, and ſuggeſting, the Defendant pretending his Lands were exempted from the Payment of Tithes, refuſed to diſcover how they were ſo diſcharged. The Defendant by Anſwer inſiſts, That his Father in the Year 1652 purchaſed the Lands in Defendant's Occupation of one *William Cooper* of *Maidſtone* in *Kent*, which in the Purchaſe Deeds were mentioned to be free from the Payment of Tithes, and conveyed as ſuch, but the antient Deeds are loſt or miſlaid, ſo that he cannot ſet forth by what Ways or Means they are exempt.

The Cauſe coming to be heard before Ch. Baron *Ward* and J. *Litt. Powis* then Baron, on reading the Purchaſe Deed 1652, and great Debate, the Court thought not fit to decree for the Plaintiff without a Trial, and propoſed an Action ſhould be brought on Statute 2 *Ed.* 6. which the Plaintiff declining, the Bill was diſmiſt by Conſent without Coſts.

It is probable the Defendant had a legal Exemption, which the Plaintiff was conſcious of, but thought to take Advantage of the Loſs of the Defendant's Deeds, whereby he was diſabled to make it out; but the Court not favouring his Deſign, choſe to diſmiſs his Bill without Coſts.

The ſecond Caſe Brother *Parker* hath copied out, was *The Mayor, Aldermen and Burgeſſes of Warwick* againſt *Lucas*, *Trin.* 9 *Anne*, and heard 5 *July* 1710. The Plaintiffs ſued as Impropriators of the Rectory of St. *Mary* in *Warwick* for the Tithes of two Cloſes called the *Upper Fryers*; the Defendant admitted the Plaintiffs intitled to all Rectorial Tithes in the Pariſh except thoſe two Cloſes, which he inſiſts were the Site of the Manſion-Houſe of the late diſſolved Friers Preachers in the Town of *Warwick*, which came to the Crown by the Diſſolution of the ſaid Houſe, and were freed from the Payment of Tithes by Virtue of ſome Preſcription, Bull, Order or other lawful Means, and had ever ſince been held free from Payment of Tithes to the Rector or Vicar; and that the Monaſtry being a Spiritual Corporation were capable of being diſcharged by Preſcription. And upon Debate the Bill was diſmiſt by the Court with the Plaintiffs Conſent, with moderate Coſts.

In theſe two Caſes it does not indeed appear directly, whether the Defendants could make out a legal Diſcharge or not; it was probable they could, and the Plaintiffs thought it ſo probable that they cared not to try that Point, but conſented the Bills ſhould be diſmiſſed; but they are far from ſhewing the Opinion of the Court, that a bare Preſcription could be ſet up againſt a Lay Impropriator any more than an Eccleſiaſtical Perſon; for if ſo, the Bills ought to have been diſmiſt with Coſts without more ado. But as where an

Eccleſiaſtical Perſon ſues, if the Defendant has a probable Ground of Diſcharge, it is not proper to decree againſt it, without putting it in a Way of Examination, which the Court ſeemed willing to do in theſe Caſes; but the reſpective Plaintiffs doubtful of the Iſſue, choſe rather the Bills ſhould be diſmiſt.

But for the clearer Illuſtration of this Point, it may not be improper to conſider in what Caſes a Defendant may be diſcharged by Preſcription, and in what not.

Where any Man occupies Lands which came to the Crown by the Diſſolution of Religious Houſes by Virtue of the Statute 31 *H.* 8. 13. or Statute 32 *H.* 8. 24. it is manifeſt he may inſiſt on a Diſcharge by Preſcription; for ſince the Religious Houſes diſſolved by thoſe Statutes (being Eccleſiaſtical Bodies) were capable of a Diſcharge by Bull, Order or Preſcription, the Patentees of any Part of the Poſſeſſions belonging to any of thoſe Houſes, are enabled by a ſpecial Clauſe in the Acts to enjoy the ſame acquitted and diſcharged of the Payment of Tithes, in as full and ample Manner as the Eccleſiaſtical Perſons enjoyed them at the Time of ſuch Diſſolution, *&c.*

And by the Statute 2 *Ed.* 6. 13. no Perſon ſhall be compelled to pay Tithes for any Lands, *&c.* which by the Laws and Statutes of the Realm, or by any Privilege or Preſcription are not chargeable with the Payment of them.

Secondly, A Spiritual Perſon, or the King who is *Perſona Sacra*, being capable of Tithes in Pernancy, is capable of Preſcribing to be diſcharged of the Payment of Tithes.

That a Spiritual or Eccleſiaſtical Perſon may ſo preſcribe is Reſolved in Biſhop of *Wincheſter*'s Caſe, 2 *Co.* 44. *Cro. El.* 511. So it is in *Richard* Biſhop of *Lincoln*'s Caſe, *Cro. Eliz.* 216. 1 *Rol.* 264. *Mo.* 435, 618. *Yelv.* 2. *Cro. Eliz.* 785. *Jon.* 368.

That the King may likewiſe preſcribe in a *Non decimando* appears 22 *Aſſ.* 25. 10 *H.* 7. 18. *Mo.* 483. *Sti.* 137. *Jon.* 387. *Het.* 60. and in many other Books.

But I know not that it has been allowed in any other Caſes.

It was inſiſted on in the Caſe of *Sidowne* and *Holmes*, *Cro. Car.* 422. *Jon.* 368. 1 *Rol. Ab.* 654.

Plaintiff in Prohibition ſurmiſed that the Prior of *Briſtol* was ſeiſed in Fee of Lands in his Poſſeſſion, and he and his Predeceſſors Time out of Mind, till the Diſſolution of the Priory by Statute 27 *H.* 8. held them diſcharged of the Payment of Tithes, and by Patent the Lands came to *Edward Battel*, and to the Plaintiff as his Leſſee; and it was inſiſted, that the Prior being capable of Tithes and of being diſcharged by Preſcription, the Plaintiff ought to have the Benefit of the Diſcharge; but by three Judges it was reſolved, That the Prior being capable of a Diſcharge by Privilege as well as by Grant or Compoſition, it ſhall not be intended to be a Diſcharge by Compoſition, but rather by Privilege, which was the general Courſe of Exemption, which Privilege was gone by the Diſſolution, and conſequently the Plaintiff ought to pay Tithes; and a Conſultation was awarded.

And *Rolls* ſaid it had been ſo reſolved 7 *Car.* in the Exchequer, and in another Caſe 11 *Car.* by the ſame three Judges.

The like Reſolution was in the Caſe of *Wright* ver. *Gerard*, *Hob.* 306. *Jon.* 2. where the Plaintiff inſiſted upon a Diſcharge by Unity of Poſſeſſion of a Farm called *Downhall* and of the Rectory Impropriate of the ſame Pariſh, both which came to the Crown by Statute 27 *H.* 8. and the Plaintiff claimed the Farm, as the Impropriator did the Rectory, by Grant from the Crown; but a Conſultation was granted.

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The like Reſolution was in the Caſe of *Bowles* and *Atkins*, 1 *Lev.* 185. 1 *Sid.* 320. 2 *Keb.* 28, 60, 472. where Debt was brought on the Statute 2 *Ed.* 6. 13. againſt the Leſſee of *All-Souls* College, who inſiſted, that the Prior of *Abingdon* and his Predeceſſors held the Lands Time of out of Mind, or diſcharged of Tithes till their Alienation to the College of *All-Souls*; but it was unanimouſly agreed by the whole Court, that the College being a Temporal Corporation could not preſcribe in a *Non decimando*. And it was ſaid in that Caſe, that this Point had been reſolved in the Caſe of *Sidown* and *Holmes* held for good Law in all the Courts of *Weſtminſter*.

Theſe are ſo many Determinations in the Matter in Queſtion, and much ſtronger than the preſent Caſe; and it appears, that no Difference was made between a Lay Impropriator and a Spiritual Perſon; for the Ground and Reaſon why ſuch Preſcription is not good, is not in Reſpect of the Perſon againſt whom the Preſcription is alledged, but in Reſpect of the Perſon preſcribing; becauſe a Layman is not capable ſo to preſcribe, though an Eccleſiaſtical Perſon may.

And this is confirmed by all thoſe Caſes where a *Modus* is inſiſted on for the Diſcharge of the Tithe of Hay, Corn, *&c.* becauſe it is ſpent for the Fodder of their Cattle, the Maintenance of their Family, *&c.* which was always diſallowed, becauſe it amounts to a Preſcription in a *Non decimando*. *Mo.* 683. And ſuch *Modus* was diſallowed for the ſame Reaſon, as well where Sir *H. Waller* a Lay Impropriator libelled for the Tithes, as where the Parſon of the Pariſh ſued for them; and after Argument at Bar a Conſultation was granted, becauſe none can preſcribe in a *Non decimando*. 2 *Cro.* 47. And many Caſes might be cited to the ſame Purpoſe.

So where the King preſcribes to be diſcharged of the Payment of Tithes (as he may) his Patentee being a Lay Perſon cannot do ſo; as was reſolved 11 *Car.* where in a Prohibition the Plaintiff declared, that King *Ed.* 6. was ſeiſed in Fee of the Foreſt of *Savanach in Com' Wilts*, and twenty Acres of

Wood, Parcel of the ſame Foreſt, and held the ſame Time out of Mind diſcharged of the Payment of Tithes, and granted them to the Duke of *Somerſet*, and by meſne Conveyances the twenty Acres of Wood came to the Plaintiff, whom the Defendant ſued for Tithes. The Defendant pleaded, the twenty Acres were not Parcel of the Foreſt, and by Verdict found they were. But it was reſolved, the Alienee of the King could not have Advantage of this Preſcription in a *Non decimando*; for a real Compoſition or other Conſideration for ſuch Diſcharge ſhall not be intended, without ſhewing it ſpecially, and then the Grantee of the Crown cannot be diſcharged. 1 *Rol. Ab.* 655. *Jon.* 387. *Stile* 137. And in Caſe the Grantee of the King cannot preſcribe in a *Non decimando*, although he claims under the Crown, which was exempt by Preſcription from the Payment of Tithes, it may be juſtly inferred, that he cannot do ſo in any other Caſe; and that the Law will not allow any Perſon to preſcribe in that Manner, unleſs it be a Perſon Eccleſiaſtical or Sacred, as the King is, who was enabled to hold Tithes in Pernancy, or unleſs he be within the Exemption created by the Statute 31 *H.* 8. or 32 *H.* 8.

By the Words of the Anſwer it looks as if ſome Streſs was laid upon the Pariſh being exempt in this Caſe; for the Anſwer ſays, that no ſmall Tithes, or any Satisfaction or Compoſition for the ſame, were ever paid by or demanded from the Defendant, or any under whom he claims, or from any other Owners or Occupiers of Lands within the Town of *Bury St. Edmund*; but the Counſel for the Defendant did not inſiſt upon this, nor indeed could they with any Colour do ſo; for beſides, that it appears by the Depoſitions in the Cauſe, that ſmall Tithes had been paid by ſeveral Inhabitants there, it was reſolved in the Caſe of *Hicks* and *Woodſon*, T. 6 *W. & M.* 4 *Mod.* 336. *Carth.* 392. *Salk.* 655. *Skin.* 560. that a Cuſtom to be exempt from the Payment of Tithes could not be alledged in an Hundred, much leſs in a Pariſh; but it muſt be in a County or *in Pais*, ſuch as the Wild of *Kent*; and there only for Things not due of common Right, as for Wood, *&c.* And therefore Cuſtom alledged in the Hundred of *Huntſpil* to be free from Tithes for the Agiſtment of

Barren Cattle, was after a Verdict for the Plaintiff, which found the Cuſtom, held to be a void Cuſtom, and a Conſultation was awarded, which was a farther Authority in Confirmation of the general Maxim of Law, that a Layman cannot preſcribe in a *Non decimando.*

Thirdly, Another Reaſon may be given for the diſallowing the Defence ſet up for the Defendant in the preſent Caſe, in that the Defendant does not alledge any particular Ground of Diſcharge, but only ſaith, That no ſmall Tithes were ever paid or demanded for his Lands; and therefore after ſuch Length of Time, and ſo long Enjoyment of Lands free from Payment of Tithes, a legal Diſcharge muſt be preſumed, and it muſt neceſſarily be intended the ſmall Tithes were aliened or releaſed to the Owners of the Land by the Perſons intitled to the Inheritance, tho' the Conveyance or Releaſe or other legal Diſcharge be loſt or deſtroyed.

I agree, that in Courts of Equity the ſame Formality is not required as in Pleadings at Law, but the Subſtance of the Matter alledged for the Exemption of the Defendant ought to be ſhewn with ſo much Certainty at leaſt, as the Court may ſee what is inſiſted on, and direct the ſame to be tried or examined. In Caſe a Preſcription is relied upon, the Defendant ought to alledge the Preſcrption in ſuch a Manner as that it may be tried. In this Caſe the Defendant does not ſo much as ſay, he is excuſed by Preſcription, he ſays indeed no ſmall Tithes were ever paid or demanded, which may be Evidence of a Preſcription; but in all Caſes where a Preſcriptive Right is inſiſted on, that is the Matter which muſt be tried; and can the Court direct a Trial of what is not alledged, or where that only is alledged, that may be ſome Proof of it, or whence it may be inferred? Much leſs, whether any legal Diſcharge generally, or whether any Conveyance, Releaſe or other legal Diſcharge; an Iſſue muſt be upon a ſingle Point, not a Matter complicated, confuſed or multifarious. *Co. Lit.* 303.

In the Caſe of *Priddle* and *Napper*, 11 *Co.* 9. where the Defendant in Prohibition traverſed the Preſcription alledged,

inſtead of the Unity of Poſſeſſion, which was the Ground (if any) the Plaintiff had to excuſe himſelf from the Payment of Tithes, it was held to be ill; for he ought to have traverſed the Unity, *ratione*, *&c.* as he was diſcharged, and conſequently his Plea was inſufficient.

In *Slade* and *Dick*'s Caſe, *Hob.* 294. it is ſaid, That the Diſcharge of Tithes being againſt Common Right, he muſt plead it with its Ground and Reaſon ſpecially; it is true a Spiritual Perſon being capable of a Diſcharge by Preſcription, might alledge the Preſcription generally, without aſſigning any Reaſon for ſuch Diſcharge; but here is no Preſcription directly inſiſted on, which could be ſent to a Trial.

Many Caſes might be cited to ſhew the Impropriety of ſuch Pleadings, but it is leſs needful, ſince the Matter, if it had been more properly inſiſted on, had been inſufficient.

The ſecond Queſtion, Whether by any Thing elſe appearing in the Caſe, the Defendant may excuſe himſelf from the Payment of Tithes; for it was urged, that there being an Unity of Poſſeſſion in the Abbot who had the Rectory and *Eldo Farm* in Fee, and conſequently the Defendant ought not to be charged for the ſmall Tithes of 184 Acres, Part of that Farm; but how does this Unity of Poſſeſſion appear? All the Proof offered for it, is, that the Plaintiff makes Title to the Rectory and Vicarage of St. *Mary*, and of all Tithes Predial, Mixt and Minute, *Monaſterio de Bury St. Edmund nuper ſpectan'*; that by a Roll out of the Augmentation Office, it is ſaid that 4 *Nov.* 31 *H.* 8. the Abbot and Convent of *Bury* ſurrendered to the King the Monaſtery and Church of *Bury*, and all Manors, Meſſuages, Lands, Tithes, Rectories, Vicarages, *&c.* belonging to the ſaid Monaſtery. That 10 *July* 37 *H.* 8. the Duke of *Norfolk* accounted to the Crown for the Manor of *Old Haw*, *Hoe* and *Ruſtham*, Part of the Poſſeſſions of the Monaſtery of *Bury St. Edmund*, reſigned to the King, and by him granted to the Duke of *Norfolk*, and valued at 21 *l.* 17 *s.* 4 *d. per Ann.*

Now

Now it does not appear that *Eldo Farm* was Part of the Manor of *Old Haw*, nor is it ſo much as averred by the Anſwer; there is nothing to induce a Probability of it, but an Imagination that *Eldo* may be a Corruption of *Old Haw*, which is a Thing meerly imaginary and deſtitute of all Proof; but admitting it really was, not only that ought to have been expreſly alledged in the Anſwer, but it ought likewiſe to have been ſhewn that the Abbot and Convent had been ſeiſed of the Rectory and Lands *ſimul & ſemel* Time out of Mind, and continued ſo ſeiſed till the Time of the Diſſolution; for according to *Priddle* and *Napper*'s Caſe, 11 *Co.* 14. *b.* every Unity that amounts to a Diſcharge from the Payment of Tithes, by Virtue of the Statute 31 *H.* 8. ought to have four Qualities. It ought to be rightful, and not commence by Wrong. 2. It ought to be equal, that is, the Abbot and Convent ought to be ſeiſed of the Rectory and Land both in Fee. 3. It ought to be perpetual, having Continuance Time out of Mind. 4. It ought to be conſtantly free from Payment; for if the Tenants for Years or Will under the Abbot and Convent ever uſed to pay Tithes, the Unity will not avail.

And Lord *Hobart* adds a fifth Quality; it muſt have conſtant Continuance in the ſame Body, elſe it is of no Force. *Wright* and *Gerrard*, *Hob.* 310, 311.

And the ſame Qualifications have been agreed and confirmed by many ſubſequent Reſolutions and Authorities.

Now if the Defendant had by his Anſwer inſiſted, that there had been ſuch an Unity of Poſſeſſion in the Abbot and Convent of the Rectory or Vicarage of St. *Mary* and of *Eldo Farm*, the Plaintiff might have been able to prove that *Eldo* and *Old Haw* were not the ſame Eſtate; that *Eldo Farm* was never in the Abbey and Convent; nor does the Defendant inſiſt or make out, that he derives his Title to that Farm under the Duke of *Norfolk*; that the Rectory was appropriate within Time of Memory; that the Leſſees paid Tithes, or that the Eſtate was in Leaſe at the Time of the

Diſſolution; in which Caſes theſe Lands would not be diſcharged by the Statute. Vide *Cro. Eliz.* 584. *Mo.* 528. 2 *Bul.* 65, 66. *Jon.* 412. And for theſe Reaſons the Court decreed the Defendant to account for the ſeveral Matters prayed by the Bill.

Jones & Ux' verſus *Meredith & al'.* In Scacc'. Caſe 271.

IN —— Term —— *Geo.* 2. Complainants exhibited their Bill, ſetting forth that *Giles Meredith* died ſeiſed of certain Lands above 100 *l. per Ann. in Com' Monmouth,* leaving Iſſue only one Son *Giles Meredith,* and three Daughters, *Catherine, Cicely,* and *Mary* ſince married to *William Watkins,* who are the Defendants; and the Plaintiff having married *Mary* the only Siſter, and who on Failure of Iſſue of the ſaid *Giles Meredith* the Father, is his Heir at Law; that *Giles* the Son entered and died ſeiſed *Oct.* 1736; that his Siſters *Catherine, Cicely* and *Mary* were educated in the Popiſh Religion, whereby the Plaintiff *Mary,* their Aunt, being the next Proteſtant Kin, is intitled to enjoy the Rents and Profits of the Eſtate by Virtue of the Statute, until the Defendants take the Oaths and conform. Proteſtant Kin, when aided in a Court of Equity.

That the Plaintiffs hereon brought an Ejectment in *C. B.* in *Hill.* Term laſt; but *Roberts* another Defendant cauſed himſelf to be added a Defendant in the ſaid Eſtate, and inſiſted on a Mortgage of the ſaid Eſtate, made to him by the other Defendants for a Term of Years for Security of 400 *l.*

Therefore the Bill prays a Diſcovery whether *Giles Meredith,* the Father and Son, did not die ſeiſed, and when; that *Roberts* may diſcover whether *Catherine, Cicely* and *Mary* were not educated in the Popiſh Religion, and now profeſs it; and whether not of the Age of 18 Years and ſix Months at the Death of *Giles* the Son, or of what Age; and whether they have not refuſed or declined the ſaid Oaths, and are thereby

incapacitated to hold the ſaid Eſtate; whether Plaintiff *Mary* is not next Proteſtant Kin, and what Incumbrance he has; and that Plaintiffs may redeem, *&c.* But at the Beginning of the Prayer it aſks, that all the Confederates may anſwer the Premiſſes (which comprehends all repeated in the Praying paſt) as fully as if repeated and interrogated.

Catherine and *Cicely* the two unmarried Defendants, as to ſuch Part of the Bill as prays to be let into the Poſſeſſion of two Thirds of the Eſtate, or that Plaintiffs may redeem, or ſeek other Relief, demur. As to ſuch Part as prays theſe Defendants ſhould diſcover whether the ſaid Defendants were educated in the Popiſh Religion, or now profeſs the ſame, or at Death of *Giles Meredith* the Son, were 18 Years of Age and ſix Months, or of what Age, or whether they have refuſed or declined the Oaths in Statute 11 & 12 *W.* 3. and thereby incurred the Incapacities of that Act, and whether Plaintiff *Mary* is not their next of Kin, they plead the Statute 11 & 12 *W.* 3. and as to the reſt of the Bill they anſwer.

The Defendants *Watkins* and his Wife put in the like Demurrer and Plea.

It was inſiſted on by Mr. *Wilbraham* and Mr. *Murrey* for the Defendants, that the Demurrer and Pleas of all the Defendants were good, and ought to be allowed.

Firſt, As to the Demurrer by *Catherine* and *Cicely Meridith*, the unmarried Siſters of *Giles Meredith* the Son, it was urged, that this was a Caſe wherein Equity would not interpoſe; that by the Statute 11 & 12 *W.* 3, 4. in Caſe a Perſon educated in the Popiſh Religion do not take the Oaths and ſubſcribe the Declaration mentioned in the Act, he is diſabled to inherit or take any Lands; and the next Proteſtant of Kin may hold and enjoy them, without Account for the Profits, till he does take the Oaths and ſubſcribe ſuch Declaration; ſo that a ſevere Penalty is put upon the Party, the Forfeiture of all his Lands; and it is not uſual for a Court of Equity to aid a Penal Law, or in-

force it, or carry it further than the Law will carry it; if the Plaintiffs have Right to the Land, they may recover it at Law, but if they have no Title at Law, this Court will not give them one; it is more properly the Buſineſs of a Court of Equity to relieve againſt a Penalty than to aſſiſt the Recovery of it.

Secondly, The Bill prays that the Plaintiffs may redeem the Mortgage, but they are not intitled to Redemption; none can redeem but the Mortgagor himſelf, his Heir or Aſſignee, or ſome Incumbrancer that has a Lien upon the Eſtate. A Man makes a Bond to *B.* for Money lent, and dies, and his Heir aſſigns the Equity of Redemption, *B.* cannot redeem till he has obtained Judgment upon the Bond againſt the Heir. *Eq. Abr.* 315.

Thirdly, None can redeem but he that has a Right to the Eſtate in the Land; but the Plaintiff has not the Eſtate in the Land, that ſtill remains in the Defendants; all that the Plaintiff can pretend to, is a Perception of the Profits during the Incapacity, which is a meer Chattel Intereſt, which gives no Right to the Land itſelf; and indeed the Defendants have the Right of Redemption in them. In the Caſe of *Lomaz* and *Bird*, 1 *Vern.* 182. where the Heir general of the Mortgagor preferred a Bill to redeem, the Defendant in his Anſwer ſet forth a Deed of Intail, whereby the Eſtate was intailed to another; the Plaintiff offered to redeem at his Peril, but the Court would not permit it, unleſs he ſhould ſhew the Intail was dock'd.

Fourthly, It would introduce great Inconveniencies if the Plaintiff ſhould be allowed to redeem, for the Eſtate would become irredeemable; for the Plaintiff ſtanding in the Place of the Mortgagor, if he be capable to redeem, and having the Mortgage aſſigned to him, the ſame Perſon would be both Mortgagor and Mortgagee, and he could not redeem himſelf.

Beſides, the Proteſtant Kin would be anſwerable for Waſte, but as Mortgagee he could not be ſued for Waſte; and who ſhall pay the Intereſt? Shall the Plaintiffs have the Rents and Profits, and let the Intereſt run in Arrear?

As

As to the Plea it was inſiſted, that the Defendants were not obliged to diſcover what might ſubject them to a Penalty; for when a Bill prays a Diſcovery of what might be dangerous to the Party diſcovering, he may take either Method, to demur or to plead to that Part of the Bill; in this Caſe the Defendants have pleaded the Statute 11 & 12 *W.* 3. 4. to ſhew nothing is denied to be anſwered by the Defendants, but what would endanger their incurring the Penalties inflicted by that Act.

In Caſe a Bill be for Diſcovery, if Defendant has ſet forth his great Tithes purſuant to the Statute 2 & 3 *Ed.* 6. 13. which ſubjects him to the Forfeiture of the treble Value, in Caſe he hath not done ſo, the Defendant is not obliged to anſwer, unleſs the Plaintiff waives the Penalty, and agrees to accept the ſingle Value only. *Hard.* 137, 138.

And there in the Caſe of *The Attorney General* ver. *Mico*, where a Bill was to diſcover whether the Defendant did not conceal the Cuſtoms and Exciſe upon 260 Casks of Currans imported, and had endeavoured to corrupt the Cuſtom-Houſe Officers by promiſing 40 *l.* Reward to conceal it, on Demurrer by the Defendant the Court inclined to think he ſhould not be compelled to make a Diſcovery, unleſs the Attorney General waived the Proceeding for all Forfeitures. *Hard.* 201.

On a Bill to diſcover what Waſte he had done, Demurrer to it was allowed. 11 *Car. Attorney General* ver. *Vincent.*

So on Bill to diſcover Marriage, where a Deviſe was to the Defendant *durante viduitate*, which by her Marriage would be loſt, the Defendant demurred, and the Demurrer was allowed. *Monins* and *Monins*, 2 *Cha. R.* 68.

In many Caſes, Acts of Parliament have by particular Clauſes provided, That the Defendants might be put to make Diſcovery of Matters in which they are concerned, upon their Oaths, which ſeems to admit they would not other-

ways be liable to make ſuch Diſcovery; for if they had, there had been no need of ſuch Proviſion; as by Statute 12 *Anne* 14. §. 5. it is enacted, that on a *Quare Impedit* brought by the Univerſity for Benefice of any Popiſh Recuſant, the Court may examine Patron or Clerk conteſting the Right of Preſentment in open Court, or by Commiſſion or Affidavit, in Order to diſcover any ſecret Truſt, Fraud or Practice relating to ſuch Preſentation.

So by Stat. 1 *Geo.* 55. §. 1. which obliges Papiſts to regiſter their Eſtates, it is enacted, That Perſons ſuing for Penalty may by Bill in Chancery demand a Diſcovery, to which no Plea or Demurrer ſhall be allowed.

And *Trin.* 1637 at Sittings in Chancery after Term, *Int. Smith* and *Read*, it was determined by Lord *Hardwick* Chancellor, That the Defendant was not obliged to diſcover by Anſwer, whether he be a Papiſt, or not; in that Caſe, on Marriage of Mrs. *Pain* with Mr. *Smith*, a Settlement was made to the Uſe of Husband and Wife for their Lives, and after to the firſt and other Sons of that Marriage in Tail; Remainder to Mrs. *Pain* in Fee, who deviſed it to the Defendant; and the Bill was to diſcover if the Deviſor was not a Papiſt, in which Caſe the Deviſe would be void; and on Plea to this Bill, Lord Chancellor held, that Defendant was not obliged to anſwer; which is an Authority in Point; for that was rather ſtronger, it being inſiſted the Defendant was not required to anſwer with reſpect to himſelf, but only in reſpect to the Perſon under whom he claimed; but it was inſiſted it was a Penal Law, and the Anſwer would ſubject the Party to the Penalty.

As to the Caſe, with reſpect to *Jones* againſt *Watkins* and his Wife, there is more Ground for the Allowance of the Demurrer as well as the Plea, the Plea ſtands upon the ſame Foot with the former; but as to the Demurrer, beſides what was alledged for the Support of the former Demurrer, it was inſiſted, that here was no Colour for the Bill againſt *Watkins* and his Wife, ſince here was no Title made for the Plaintiff to demand the Poſſeſſion, or the Rents and Profits of that Share

or Property of this Eſtate that belonged to the Wife of *William Watkins*, who is not alledged to be educated in, or to profeſs the Popiſh Religion, and conſequently muſt be intended to be a Proteſtant.

And if the ſaid *William Watkins* be a Proteſtant, then the Queſtion will be, Whether if a Papiſt ſeiſed of an Eſtate in Fee of Lands and Tenements marry a Proteſtant, the next of Kin to the Wife can take the Poſſeſſion of the Eſtate out of the Hands of the Proteſtant Husband; for by the Statute 11 & 12 *W.* 3. the Papiſt is diſabled in reſpect of himſelf only; but when a Papiſt marries, the Husband becomes ſeiſed in Right of his Wife, and conſequently the Eſtate is veſted wholly in him, and he has done nothing to forfeit it; beſides, the Husband may be ſaid to be next of Kin to his Wife, there is an Alliance and Affinity betwixt them; and the next of Kin, within the Meaning of this Law, is not the next of Blood or the next in Courſe of Deſcent, and therefore the Father may take before the Uncle, and the Brother of the half Blood before the Siſter of the whole. *Co. Lit.*

Beſides, the Intention of the Act to prevent the Growth of Popery, is as well anſwered by the Papiſt marrying a Proteſtant, as by ſelling the Eſtate to a Proteſtant, for ſuch Marriage may be a Means of bringing over the Family to the Proteſtant Religion.

In Anſwer, it was urged by Mr. *Bunbury* and Mr. *Bootle*, that if the Demurrer in this Caſe was allowed, the Act of Parliament would be eluded, for every Papiſt would mortgage his Eſtate, and the Proteſtant Kin would be defeated without Remedy.

The Demurrer is to the whole Relief prayed, and ſurely the next of Kin may redeem; he is a Kind of Purchaſer under the Act, and ſtands in the Place of the Heir; and tho' it is ſaid to be a Penal Law, yet the Bill is not to obtain a Penalty, but to be relieved againſt a Fraud in ſetting up this Mortgage. *Mod. Ca. in Law and Equity* 146. *Winter* and

Birmingham, Bill by next Proteſtant Kin to account for the Rents and Profits was allowed.

As to the Plea, that is ill; for the Bill does not pray they ſhould diſcover, and whether Papiſts or not, but that the other Defendant *Roberts* ſhould do ſo; beſides it goes to the Diſcovery which ſurely they may be ask'd.

As to the Demurrer by *Watkins* and his Wife, her Diſability is not removed by her Marriage, nor is the Husband ſole ſeiſed; the Pleading is, the Husband and Wife are ſeiſed in Right of the Wife; beſides the Demurrer confeſſes all alledged by the Bill, and goes to the whole Relief, which is not proper to be determined on a Demurrer.

This Matter ariſing upon a new Law, the Court took Time to conſider it, and in *Mich.* Term, *Sat.* —*Nov.* now Baron *Thompſon* being dead, the other three Barons agreed in Opinion, That the Demurrer by the Defendant *Meredith* ought to be over-ruled; and at the Deſire of the others, I delivered the Opinion of the Court to this Effect.

That the Demurrer is bad, as to ſuch Part of the Bill as ſeeks to be let into Poſſeſſion of two Thirds of the Eſtate in the Bill, to be permitted to have and enjoy, and be quieted in the Poſſeſſion thereof by the Injunction of the Court, or ſeeks to redeem the Mortgage mentioned, or any other Relief. Now it is plain, and agreed by the Counſel for Defendants, that the Demurrer being intire, if it be faulty in any Part, it ought to be over-ruled.

It is ſo at Law; if the Defendant demur to the whole Declaration, or the Plaintiff to an Avowry in Replication for Rent, of which Part appears not yet due, the Plaintiff or Avowant ſhall have Judgment to recover for ſuch Part as is well demanded, or appears to be due. 1 *Sand.* 286. Reſolved 2 *Sand.* 379, 380.

It is the ſame in Equity, and the Reaſon is obvious; for the Demurrer is a Stop to the Plaintiff's Demand of every Thing

Thing to which it extends; but it would be unreaſonable to refuſe the Aid he is in Conſcience intitled to, becauſe he asks ſomething more.

Perhaps it is improper for the Plaintiff to pray the Court ſhould let him into the Poſſeſſion of the Eſtate, for that he muſt recover at Law; but there are other Things wherein the Plaintiffs may be proper to ask the Aſſiſtance of the Court. The Bill ſuggeſts that the Plaintiffs have brought an Ejectment; but the Defendants, by making a Mortgage to *Roberts* and making him a Defendant, render it impoſſible for them to recover at Law; and pray it may be ſet aſide, or if made *bonâ fide*, that on Payment of what is due they may be admitted to redeem.

In reſpect to which the Court may probably give Relief, but the Demurrer is againſt all Relief.

But it is objected, that in Caſe the Plaintiffs as the next Proteſtant Kin may have the Rents and Profits by Virtue of the Statute 11 & 12 *W.* 3. yet they have only the bare Perception of the Profits, and no Eſtate in them, for the legal Eſtate remains in the Popiſh Heir, who may ſell, deviſe or tranſmit it to his Poſterity, and conſequently the Proteſtant Kin can have no Title to redeem.

It is true, the Words of the Statute being, That every ſuch Perſon educated in the Popiſh Religion or profeſſing it, ſhall in reſpect of himſelf only, and not in reſpect of his Heirs or Poſterity be diſabled to take, *&c.* the Seiſin of the Eſtate has been conſtrued to remain ſtill in him; for otherwiſe it would be difficult to ſay how his Heir could have the Eſtate conſiſtently with the known Rules of Law. So it was held in *Tredway*'s Caſe *Hob.* 73. *Ley* 59. upon the Statute 1 *Jac.* 1. which is penned in the ſame Manner; and therefore Papiſt Tenant in Tail may make a Tenant to the Præcipe, and ſuffer a common Recovery; as was reſolved, *Thornby* and *Fleetwood*, 12 *Anne*, and in Lord *Derwentwater*'s Caſe 6 *Geo.* 1. So he may deviſe the Eſtate to a Proteſtant. Reſolved in

C. B. P. 1738. *Mallom* and *Bringloe*; *Marribod* and *Dorrell*, *H.* 8 *Geo.* 2. in *B. R.*

But yet the next Proteſtant Kin after Entry has an Eſtate and Intereſt, which enables him not only to receive the Rents and Profits, but likewiſe to leaſe the Lands during his Title, otherwiſe he could not maintain an Ejectment; and if he has ſuch an Intereſt that he may leaſe, ſurely he may likewiſe redeem a former Mortgage, as well as Leſſee for Years may do ſo. A Copyholder is not ſeiſed of the Eſtate, the Seiſin of the Freehold remains in the Lord of the Manor; yet as a Copyholder may make a Leaſe whereon an Ejectment is maintainable, 4 *Co.* 26. ſo he may redeem a Mortgage made of the Copyhold Eſtate.

Tenant by Statute-Staple, Statute-Merchant or *Elegit*, has but a Chattel Intereſt *quouſque debit' levat' fuerit*, yet daily Experience ſhews he is admitted to redeem.

It is ſaid indeed, a Proteſtant Kin is a mere Pernor of the Profits, and therefore cannot redeem; but why? No Authority is cited for it. In *Chudleigh*'s Caſe, 1 *Co.* 123. it is ſaid, that a Pernor of the Profits is in Nature of a *Ceſtui que Uſe* at Common Law; but none I believe will deny, but that *Ceſtui que Uſe* might exhibit a Bill in Equity to have the Truſt executed, and to redeem a Mortgage made by the Truſtees with his Aſſent. *Bro. Conſcience.*

It was urged further, that none can redeem but he who is Heir, Aſſignee or Incumbrancer; and this is the general Deſcription of thoſe who are intitled to an Equity of Redemption.

But it is ſure, there is no Neceſſity a Man ſhould come in for a valuable Conſideration in order to intitle him to Redemption; for a Perſon who claims by a voluntary Settlement may redeem. *Eq. Abr.* 315. And ſo it was reſolved *Ca. Ch.* 59.

If a Man make a voluntary Conveyance, and after mortgage, though ſuch Mortgagee may avoid the Conveyance as fraudulent to him, yet it ſuffices to paſs the Equity of Redemption.

Indeed generally, he that redeems muſt be the Mortgagor, or Somebody that claims under him; but it is not requiſite he claim by expreſs Aſſignment from him. Tenant in Dower or by the Curteſy may redeem, whoſe Eſtate is created by the Law; and he, who has an Eſtate or Intereſt given by Act of Parliament, has as much Reaſon to have this Benefit as he that comes in by the Act of the Party. Every one is Party to an Act of Parliament; and there ſeems to be no Reaſon why the Perſon intitled by Virtue of an Act of Parliament, ſhould not have equal Advantage in a Court of Equity with the Aſſignee of the Party. The Aſſignee of Commiſſioners of Bankrupts may redeem as well as the Bankrupt himſelf. *Dub. Ca. Ch.* 71. *Adm.* 3 *Vern.*

The only Ground for Redemption ſeems to be, the having an Intereſt in or Lien upon the Land: He that has ſuch Intereſt or Lien may redeem, he that has none cannot.

And therefore if a Man makes a Bond, wherein he binds himſelf and his Heirs, and after mortgages his Land, the Obligee by Judgment cannot redeem. But if he obtain Judgment againſt the Heir of the Obligor, although the Heir had before aſſigned his Equity of Redemption, the Obligee, who gains thereby a Lien upon the Eſtate of the Obligor againſt his Conſent, (for *judicium redditur in invitum*, and) ſolely by the Operation and Act of Law, is intitled to redeem. *Bateman* and *Bateman*, *Eq. Abr.* 315.

Nay, if he gains but an equitable Lien upon the Land, it is ſufficient; and therefore if a Man article on his Marriage to make a Marriage Settlement, and after mortgage his Eſtate to one who had no Notice of the Articles, the Wife ſhall

redeem; for the Articles for a Purchaſe are conſidered in Equity as a Purchaſe. 2 *Vent.* 343.

So if a Man agrees at his Marriage to leave his Wife worth 1000 *l.* and it being left to the Parſon of the Pariſh to draw the Agreement, who takes a Bond for the Payment of the Money, and then the Obligor dies, leaving his Eſtate Freehold and Copyhold in Mortgage; the Wife, having an Equity upon the Land by Virtue of the Agreement on Marriage, was allowed to redeem. *Acton* and *Pierce*, 2 *Vern.* 480.

But againſt the Plaintiffs having the Liberty of Redemption it was further argued, that a Court of Equity ought not to aid or aſſiſt the Execution of a penal Law; and it is certain, that it is not in the Power of a Court of Equity to extend a penal Law beyond what the Law itſelf imports, or the Courts of Law will extend it; nor is it proper for a Court for to aſſiſt the Recovery of a Penalty or Forfeiture, when he may proceed at Law to recover it; therefore there is no Reaſon to apprehend, that the Court will in this Caſe put the Plaintiffs into Poſſeſſion, if the Law will not do it, or give them any Advantage beyond what the Law intended them. But if the Defendants by Contrivance ſet up a Mortgage, which renders their Proceeding at Law impracticable, it may be fit for a Court of Equity ſo far to interpoſe, as to prevent the unfair Meaſures which are deſigned to elude the Benefit of the Law.

If a Leſſee commit Waſte, the Court will not oblige him to diſcover the Wrong he has done, which may ſubject him to a Penalty, or conſtrue that to be Waſte which the Law will not call ſo; but will ſtay his going on in the Deſtruction he is making, till it be ſeen whether he has any Right to do ſo or not. It is ſaid *Eq. Abr.* 131. 2 *Vol.* 590. that if a Truſtee, by Fraud and Combination with *Ceſtui que Truſt*, endeavour to evade a penal Law, under Pretence that Equity ſhould not aſſiſt a Penalty or Forfeiture, Chancery will aid, and not ſuffer its own Maxims to be made uſe of to elude a beneficial Law.

It was ſaid, that if the Mortgage was without any real Conſideration, it would be a Truſt for the Papiſt, and conſequently void at Law; but I doubt that is not ſo; for by what has been ſaid it appears, that a Papiſt has ſuch an Eſtate in him that he may alien and demiſe, and conſequently the Eſtate granted to *Roberts* would paſs an Intereſt to him, though made without a valuable Conſideration, which would be a Title prior to the Demiſe by the Leſſor of the Plaintiff in Ejectment.

As to the Inconveniences that may enſue from the Plaintiffs being allowed to redeem, I ſee no greater than what may be ſuppoſed in a Redemption by a Dowreſs, or other Perſon who has but a particular Eſtate or Intereſt. It may be ſaid, he is Mortgagor and Mortgagee, if he take the Aſſignment of the Mortgage to himſelf; and as for his being diſpuniſhable for Waſte, he is liable to anſwer treble Damages for any voluntary Waſte, in an Action of Debt.

In ſhort the Plaintiffs may have many Occaſions for the Aid of a Court of Equity; and therefore ſince the Demurrer is general to all Relief, ſince ſuch a Practice of ſetting up a Mortgage to prevent the Proteſtant Kin from recovering, if he can have no Relief, would intirely defeat the Deſign of the Act, we are of Opinion the Demurrer ought to be overruled.

As to the Plea, we all agree that it ought to be allowed; for the Diſcovery, to which this Plea is pleaded, tends directly to make the Defendants accuſe themſelves of thoſe Offences which might ſubject them to the Penalties and Incapacities of the Act. It is the excellent Temper of the *Engliſh* Law, that Nobody is compelled to accuſe himſelf; *Nemo tenetur ſeipſum accuſare.*

This has been determined not only in Courts of Law and Equity, but in Parliament.

It is true, that by a Conſtitution of Cardinal *Otho*, the Pope's Legate 21 *H.* 3. it was ordered, *Quod juramentʼ calumniæ in cauſis eccleſiaſtʼ & civilibʼ de veritate dicendâ in ſpiritualibʼ, quo veritas facilius aperiatur, præſtari debet de cætero in Regno Anglʼ Conſʼ in contrarium non obſtante.* But this was allowed only in Cauſes matrimonial and teſtamentary. 2 *Inſt.* 657. And by Statute 13 *Car.* 2. 12. No Eccleſiaſtical Judge can tender Oath whereby any Perſon may be charged to accuſe himſelf, or ſubject himſelf to Cenſure or Puniſhment, *&c.*

But the Caſe of *Read* and *Smith* is a direct Determination in Point; or this is rather a ſtronger Caſe, where the Defendants are ask'd as to their own Education in the Popiſh Religion; there they were interrogated only as to the Perſon under whom the Defendants claimed.

What was ſaid, that *Roberts* is ask'd whether they were not brought up in the Popiſh Religion, is a mere Evaſion; for though *Roberts* the other Defendant is ask'd theſe Queſtions, yet all the Defendants are charged with being ſo educated, and all are deſired to anſwer the Matter as fully as if the ſame were particularly repeated and interrogated.

It was ſaid the Defendants might be ask'd what Age they were of; but the Charge is, that they were of the Age of 18 Years and ſix Months, whereby they were incapacitated to hold the Eſtate; ſo that the Inquiry about their Age, is only with Deſign to ſubject them to that Incapacity; and the Plea is worded with like Caution.

As to the Demurrer and Plea of *Watkins* and his Wife, the ſame ſtand upon ſomewhat a different Foot; it is not charged by the Bill, that *Watkins* the Husband was a Papiſt, and conſequently it muſt be intended, that he is a Proteſtant; for every one muſt be preſumed to be of the eſtabliſhed Religion till the contrary appears; then the Queſtion will be, Whether, if a Papiſt marry an Husband who is a Proteſtant, the next of Kin, that is a Proteſtant, to her before her Marriage

ſhall take the Rents and Profits of her Eſtate from the Husband during Coverture?

The Statute ſaith, That the Perſon educated in the Popiſh Religion ſhall be diſabled to take and hold any Lands, *&c.* but the Husband is not ſo educated, and conſequently not diſabled to take and hold them, as by Law he is intitled to do.

It was rightly obſerved, that the Pleading is, That the Husband and Wife are ſeiſed in Right of the Wife; whence it was inferred, that both being ſeiſed, the Proteſtant Kin will be intitled to have and enjoy the Lands the Wife is ſtill ſeiſed of after her Marriage.

But that Inference is not to be drawn from the Form of Pleading; for it is true, that the Wife has a joint Seiſin with the Husband of the Freehold and Inheritance, which the Husband therefore cannot diſpoſe of without her; but the Husband alone has the Title to the Rents and Profits, and may diſpoſe of the Poſſeſſion during the Coverture without the Wife. A Writ of Entry *ſur Diſſeiſin* was brought againſt Husband and Wife, who pleaded *Non-tenure*; the Demandant replied, that *A.* was ſeiſed till diſſeiſed by Husband and Wife, who made a Feoffment to Perſons unknown, but the Husband and Wife continued to receive the Profits; but the Replication was diſallowed, for the Pernancy of the Profits being but a Chattel could be only in the Husband. *Bro. Profits* 15.

If a Feme leaſes *dum ſola* and marries, and the Leſſee pays his Rent to the Wife, though no Notice of Marriage alledged, the Payment is ill; and the Husband had Judgment in Debt for the Rent. *Pal.* 210. *Tracy* and *Dutton.*

So the Husband may ſue alone for Rent, for not repairing, *&c.* or other Profits or Benefits to the Eſtate of the Wife; and though he may, he need not join his Wife. *Cro. Car.* 438.

Now here the Pernors of the Profits demand the Rents and Profits from the Husband who is legal Pernor of them, and the Deſign of the Act ſeems as well anſwered by the Husband's taking them as any other.

But the Court need not give any poſitive Opinion on this Point, becauſe the Demurrer being general as to all Relief, and it being poſſible the Court may find it needful to give ſome ſort of Relief with reſpect to theſe Defendants alſo; and therefore the Court thinks fit that this Demurrer as well as the other by *Meredith* be over-ruled; but the Plea ought to be allowed.

Mackenzie verſus *Marquis of Powis.* In Scacc'. Caſe 272.

A Decree was made againſt Marquis of *Powis* for Payment of a large Sum of Money, and he being ſerved with a Copy of the Decree, and not paying, an Attachment went; and it was now moved to diſcharge the Attachment as irregular; becauſe no Letter miſſive was ſent before or with the Decree that was ſerved; for the Defendant being a Peer of the Realm, a Letter is ſent to him ſigned by two Barons, inſtead of a *Subpœna*, and ſo it ought to have been now inſtead of the *Subpœna* which is ſerved upon him, together with the Copy of the Decree.

Decree ſerved on Peer needs no Letter miſſive.

This was referred to the Deputy Remembrancer to report how the Practice was; who reported that it was not uſual to ſend ſuch Letter before or with the Order of Court or Service of the Decree; whereupon the Motion was not allowed.

And there ſeems no Reaſon for what was inſiſted on; it is well known that the *Subpœna* was introduced *Temp. R.* 2. when *J. Waltham* Biſhop of *Sarum* was Chancellor of *England. Seld.* When the Practice was introduced of ſending a Letter

Letter to a Peer inſtead of ſuch a *Subpœna*, *non conſtat*. Mr. *Selden* ſays, 6 *Vol.* 1543, That it was the Courſe in the Star-Chamber of Chancery to pray ſuch Letter in a Bill againſt a Peer; poſſibly that Practice being begun in the Star-Chamber on the Erection of that Court towards the End of *H.* 8th's Reign might be afterwards followed in Courts of Equity. No Mention of any Proceſs but a *Subpœna* is made in the Year Books or *Doctor and Student*, but in *Weſt Symb.* §. 21. it is taken Notice of as the Courſe in Chancery, 36 *El.*

This may be a proper Complement before the Party is in Court, but when he has appeared and anſwered, and a Decree is againſt him, it ſeems more proper to demand Obedience to it by Proceſs of the Crown, than by Letter from the Barons; by the Order 35 the Direction is general, that the Defendant ſhall be ſerved with a Copy of the Decree in Perſon, and a *Subpœna* ſhall be annex'd to it, and ſerved at the ſame Time. In Chancery the *Subpœna* is inſerted in the Writ itſelf which contains and recites the Decree, and no ſuch Letter is ſent; but if the Defendant diſobeys, an Attachment and Injunction ſhall go. 2 *Vern.* 91. 2.

What Uſe can there be of ſuch a Letter? Is it to notify the Decree to him that he is no Stranger to? For he is ſuppoſed preſent in Court by the *Subpœna ad audiend' Judicium*, and a more full Notice of it is given by the Copy of it ſerved.

DE

Term. Sanct. Mich.

13 Geo. 2.

Scot qui tam and Bray ver. *Schawrtz & al'.* In Scacc'. *Mich.* 11 *Geo.* 2.

Caſe 273.

Navigation by Mariners of *Ruſſia* good, tho' not Natives.

INformation was exhibited in the Exchequer by *Scot qui tam, &c.* ſetting forth, That he had ſeiſed the Ship called the *Conſtant* in the Port of *London*, with its Tackle, Goods, *&c.* as forfeited to the Uſe of his Majeſty and himſelf, being imported from Foreign Parts, when the Ship, in which imported, was not belonging to the People of *Great Britain* as the true Owners, and whereof the Maſter and three Fourths of the Mariners are *Engliſh*; nor of the Built of the Country of which the Goods were the Growth, Product or Manufacture, or of the Port where ſuch Goods only can or are moſt uſually firſt ſhipped for Tranſportation, and whoſe Maſter and three Fourths of the Mariners at leaſt were of that Country or Place; whereby the Ship and Goods were forfeited.

Upon which a Writ of Appraiſement went out, and 22 *Oct.* 1737 was returned.

On this Seiſure *Adam Hen. Schawrtz*, *Sam. Felman* and *Tho. Zuckerbecker*, Merchants of *Riga*, entered their Claim; and after *Oyer* of the Information pleaded, that the Ship and Goods were not imported contrary to the Form of the Statute.

This Iſſue came on to be tried 29 *Nov.* 1738, and the Jury found a ſpecial Verdict.

That *Scot* who ſues *qui tam, &c.* was Surveyor of the Act of Navigation, and ſeiſed this Ship and Goods 19 *Aug.* 1737 as not navigated according to the Act.

That the ſaid Ship ſet Sail from *Riga* in *Ruſſia* for the Port of *London*, with the Goods in the Information, which were the Product of that Country; that the Ship was *Ruſſia* built; that *Harry Hagſon* was Maſter, who was born out of the Dominions of the Empreſs of *Ruſſia*, but *Anno* 1733 was admitted a Burgher of *Riga*, and has ever ſince continued ſo, and has been reſident there when not engaged in Foreign Voyages, and traded from thence nine Years before the Seiſure. That there were only 11 Mariners on Board, of whom four were born in *Ruſſia*; that *Morgan* a fifth was born in *Ireland*, and there bound Apprentice to the Maſter, and as ſuch went with him to *Riga*, and three or four Years before the Seiſure ſerved on Board the ſaid Ship, and ſailed therein from *Riga* in the preſent and former Voyages; that the other ſix Mariners were born out of the Dominions of *Ruſſia*, but *Stephen Hanſon*, one of them, had reſided at *Riga* eight Years next before the Seiſure, *Hans Yaſpar* five Years, *Reign Steingrave* four Years, and *Derrick Andrews* the Cook ſeven Years, and theſe four during thoſe Years had ſailed from *Riga* in that and other Veſſels; that *Riga* is a Port where the Goods ſeiſed can only be, or moſt uſually are, firſt ſhip'd for Tranſportation.

And if on the whole Matter found, the Court think the Importation of the Goods in the Ship being ſo navigated be legal, they find for the Claimants; *Et ſi non, &c. contra.*

Upon this ſpecial Verdict Mr. Solicitor General inſiſted, that the Ship and Goods were forfeited by the Statute 12 *Car.* 2. 18. intitled, An Act for the Encouraging and Increaſing of Shipping and Navigation.

This Act was meant for the Encouragement of the *Engliſh* Shipping and Navigation, for that is intended in the Title, as appears by the Preamble, which ſays, For the Encouragement of the Navigation of this Nation; and the Principal Means to encourage it was by prohibiting the Importation or Exportation of any Goods into or out of his Majeſty's Dominions, but in Ships which are of the Built or belong to his Dominions, and whereof the Maſter and three Fourths of the Mariners at leaſt are *Engliſh*.

The only Clauſe in this Act the Claimants can ſhelter themſelves by, is Sect. 8. which ſaith, that no Goods of the Growth, Production or Manufacture of *Muſcovy*, or of any Countries, *&c.* to the Great Duke or Emperor of *Muſcovy* or *Ruſſia* belonging; as alſo that no Maſts, Timber, Boards, no foreign Salt, Pitch, Tar, Roſin, Hemp, Flax, Raiſins, Figs, Prunes, Olive, Oils, no Corn, Grain, Sugar, Pot-Aſhes, Wines, Vinegar, or Spirits called *Aquavitæ* or Brandy, ſhall be imported into *England*, *&c.* in Ships but ſuch as belong to the People thereof, and whereof the Maſter and three Fourths of the Mariners at leaſt are *Engliſh*; and that no Currans or other Commodities of the Growth, Production or Manufacture of any of the Countries, *&c.* to the *Ottoman* or *Turkiſh* Empire belonging, ſhall be imported in any Ship but which is of *Engliſh* Built and Navigation as aforeſaid, and in no other, except only ſuch Foreign Ships as are of the Built of that Country or Place of which the ſaid Goods are the Growth, Product or Manufacture, or of ſuch Port where the ſaid Goods can only be, or moſt uſually are, firſt ſhipp'd for Tranſportation, and whereof the Maſter and three Fourths of the Mariners at leaſt are of the ſaid Country or Place.

We do not inſiſt but that the Ship is *Ruſſia* built, that the Goods are the Growth of that Country; but what we rely on is, that the Ship was not Manned as the Act requires; and this depends on two Queſtions.

Firſt, Whether the Exception at the End of the Clauſe extends to the whole Clauſe, or only to the latter Branch; for if

if it extends not to the Whole, then it is plain that the Ship was not Manned as the Clauſe requires, for it is requiſite that the Ship, though *Ruſſia* built, ſhould be Mann'd with a Maſter and three Fourths of the Mariners *Engliſh*, which it is Evident this was not.

Secondly, Admitting the Exception extends to the Whole, the next Queſtion will be, whether by what is found there appears, that the Maſter and three Fourths of the Mariners are of that Country.

Firſt, Mr. Solicitor General urged (and in the next Term Mr. *Hollings*, who then argued more largely) that the Exception related only to the laſt Branch of this Section, which contains two diſtinct Clauſes; the firſt relates to Goods from *Muſcovy*; the ſecond to thoſe from the *Turkiſh* Dominions; the firſt allowed to be imported in the Ships of the Country whence the Goods were brought, whereof the Maſter and three Fourths of the Mariners are *Engliſh*, the other are allowed only to be imported when the Ship as well as the Maſter and three Fourths of the Mariners are *Engliſh*, except when both are of the Country whence the Goods come.

Secondly, The firſt Clauſe allows Goods from *Muſcovy* in Ships of *Ruſſia*, and only requires the Maſter and Mariners to be *Engliſh*; the next Clauſe requires the Ship as well as Maſter and Mariners to be *Engliſh*; it is moſt natural therefore that the Exception which ſpeaks of both ſhould relate to the ſame Clauſe that mentions both; there was no Occaſion to ſay with reſpect to Goods from *Ruſſia*, except the Ship be of that Country, for that was before provided for.

Thirdly, If ſuch Conſtruction ſhould be made, the *Ruſſia* People would have larger Privilege than the *Engliſh* themſelves; for they might import Goods in Ships Manned either with their own or *Engliſh* Mariners; but the *Engliſh* can import only in Ships whereof the Maſter and three Fourths of the Mariners are *Engliſh*.

But ſuppoſing the Exception extends to both Parts of this Section, yet what is found by this Verdict ſhews the Ship *Conſtant* was not Manned according to the Intent of the Act of Navigation; for it is found that the Maſter and ſeven of the eleven Mariners were born out of the Dominions of the Empreſs of *Ruſſia*; for what can be meant by *them of that Country* but thoſe that are born there?

The Words are ſet in Oppoſition to the Word *Engliſh*, for the Importation of Goods was prohibited but in Ships *Engliſh*, whereof the Maſter and three Fourths of the Mariners are *Engliſh*, except it be in Ships of the Built of that Country of which the Goods are the Growth, Product or Manufacture, whereof the Maſter and three Fourths of the Mariners are of that Country or Place; now the Word *Engliſh* muſt be meant of the Natives of *England*, or at leaſt ſuch as are naturalized, none elſe can be called *Engliſhmen*. A Denizen indeed is a *Engliſhman*, *a parte poſt*; but all others are Aliens, and if an Alien continues in *England* at all Times after his Birth, he does not thereby become a Denizen. 1 *Rol. Ab.* 195. All not born under the King's Allegiance, naturalized or made Denizen are Aliens, and therefore cannot come under the Deſcription of *Engliſhmen*. I delivered the Opinion of the Court, and ſaid, that upon this Information it may be fit to conſider the Drift and Deſign of the Act of Navigation, which was intended, as Mr. Solicitor General obſerved, to encourage and increaſe the Shipping and Navigation of the *Engliſh* Nation.

The Means propoſed as effectual for this End, was, That the Importation of all Goods from any of his Majeſty's Dominions in *Aſia*, *Africa* or *America* into *England*, *Ireland*, *Wales* or *Berwick*, and the Exportation from any of thoſe Places into any of his Dominions in *Aſia*, *Africa* or *America*, ſhould be in Ships of the Built of and belonging to ſome of thoſe Dominions, whereby the Maſter and three Fourths of the Mariners at leaſt were *Engliſh*. §. 1.

And ſo likewiſe the Carriage or Removal of them from one Port or Creek in *England*, *Ireland*, *Wales*, *Guernſey*, *Jerſey* or *Berwick*, to another. §. 6.

2. That no Goods whatſoever ſhould be imported into theſe Places of the King's Dominions in *Europe*, from *Aſia*, *Africa* or *America*, (tho' not under the King's Dominions) but in ſuch Veſſels and ſo man'd. §. 3.

Thirdly, That no Goods ſhould be imported in ſuch Veſſels ſo manned, unleſs ſhip'd from the Place of which the Goods were the Growth, Production or Manufacture, or in the Port where they only can be or moſt uſually are ſhip'd for Tranſportation. §. 4.

By theſe Methods all Foreigners were excluded not only from the Import or Export of any Goods of the Growth or Manufacture of *Aſia*, *Africa* or *America*, into or out of *England* or *Ireland* or the adjacent Iſles, and from carrying them from one Port to another in theſe Kingdoms or Iſles, but were likewiſe reſtrained from bringing them into any *European* Country for the Uſe of the *Engliſh*, ſince the *Engliſh* could not fetch them thence; which muſt neceſſarily contribute greatly to the Increaſe of the *Engliſh* Shipping and Seamen.

But as it was the Policy of the Legiſlators to prohibit the Importation of all Goods from *Aſia*, *Africa* and *America*, (for ſo in Effect it is) unleſs brought in Veſſels of the King's Dominions, whereof the Maſter and three Fourths of the Mariners are *Engliſh*; was it their Intention to prohibit all *European* Goods likewiſe, unleſs ſo imported? No ſurely, that could not be convenient; and therefore a Medium is found out for *European* Commodities; none ſhall be imported from the Dominions of the Emperor of *Muſcovy* or *Ruſſia*, no Maſts, Timber, Boards, Salt, Pitch, Tar, Roſin, Hemp, Flax or Pot-Aſhes, which are great Part of the Traffick from *Denmark*, *Sweden* the *Baltick* and *Northern* Seas; no Raiſins, Figs, Prunes, Oil, Olives, Corn, Grain, Sugar, Wines, Vinegar and Spirits, which comprehend the chief

Trade in the *Levant* and other Countries of *Europe*, ſhall be imported, unleſs in Ships belonging to the People of that Country whence the Goods are brought, and of which the Maſter and three Fourths of the Mariners are *Engliſh*; no Currans or other Goods from the *Turkiſh* Dominions ſhall be imported, unleſs in Ships *Engliſh* built, navigated as aforeſaid.

But ſuppoſe they will not ſend theſe Goods in ſuch Manner, ſhall they not be imported? Yes, they may, in Ships of the Built of that Country whence the Goods are, in which the Maſter and three Fourths of the Mariners are of that Country or Place, but then they ſhall pay Aliens Duties. §. 8, 9.

This ſeems the plain Intention of the Law, to encourage the Importers of theſe Goods to make Uſe of *Engliſh* Shipping and Seamen; but in Caſe they have Ships and Men of their own Country, the Importation is not prohibited, but they may uſe them paying Aliens Duties.

So Ling, Stockfiſh, Pilchards, or other dried or ſalted Fiſh, not caught in *Engliſh* Veſſels, Codfiſh, Herring, Oil and Blubber from Fiſh, Whalefins and Whalebones cured, ſaved or dried not by the People of *England*, may be imported, paying double Aliens Duties.

Now to bring what has been mentioned to the Information.

Two Things have been inſiſted on to ſupport it.

Firſt, That the Exception in the End of the eighth Section doth not extend to the Goods of that Country.

Secondly, Admitting it ſhould, yet nothing is found by this ſpecial Verdict, that ſhews the Maſter and three Fourths of the Mariners are of that Country or Place whence the Goods are brought, as the Act requires.

As to the firſt, it muſt be admitted, that if the Exception Sect. 8. does not extend to the Whole, but is to be confined to the latter Part of that Clauſe, the Navigation is not legal; for

for though the Ship *Conſtant* be *Ruſſia* built, and laden with Goods of the Growth or Manufacture of *Ruſſia*, yet it appears the Maſter and three Fourths of the Mariners are not *Engliſh*.

But on Conſideration of what has been urged, which is as much I think as could be urged on that Point, I think the Exception extends to the whole Section.

It is a general Rule in Conſtruction, that where Reſtrictive Words are found at the End of the laſt Sentence, which are properly applicable to the ſeveral Sentences preceding, they ſhall extend to the Whole. 1 *Sand.* 60. *Gainsford* and *Griffith*.

Now this 8th Section contains the Proviſion the Legiſlature thought fit to make in Relation to the Importation of *European* Goods. It might be eaſily foreſeen, that if we reſtrained the Import or Export of Goods, unleſs in our own Ships and with our own Seamen, other States might do the like, and that in its Conſequence would amount to a Prohibition of all ſuch Goods; which would prove inconvenient; therefore they allowed the Importation, but upon theſe Terms, that the Goods from Chriſtian Countries might be imported in their own Ships, having the Maſter and three Fourths of the Mariners *Engliſh*; thoſe from *Turkey* by our *Engliſh* Ships and Mariners. It was not likely the *Muſſelmen* who have an Hatred to the Chriſtian Name, ſhould like their Ships ſhould be manned by Chriſtians; nor was it ſafe or honourable in reſpect of ourſelves or our Religion, to permit our Men to man their Veſſels; and therefore it was proper to prohibit the Importation from thence but in *Engliſh* Veſſels as well as with *Engliſh* Mariners.

But it was probable, that the Chriſtian as well as the Mahometan Countries might be unwilling to ſuffer ſuch Importation to us, unleſs made with their own Men as well as their own Veſſels; and therefore the Exception was added, that it might be done by all ſuch Foreign Ships as are of the Built of that Country or Place of which the Goods are the Growth, Production or Manufacture, or where firſt ſhip'd

for Tranſportation, and whereof the Maſter and three Fourths of the Mariners are of the ſaid Country or Place.

The Exception is indefinite, *ſuch Foreign Ships*, which has the Force of an Univerſal, and muſt relate to Ships from Chriſtian as well as Infidel Countries, and was equally neceſſary for them, unleſs it can be ſuppoſed the Legiſlature meant to favour the *Turkiſh* more than the other States of *Europe*.

It was ſaid indeed, there was no need to repeat the Words *Ships or Veſſels* in this exceptive Part of the Clauſe, and therefore ſince *Turkiſh* Goods were not to be imported but in *Engliſh* Ships and with *Engliſh* Mariners, by the latter Branch of the Section, the Exception which ſpeaks both of Ships and Mariners, ought to be confined to the latter Branch.

But this does not follow; it is true the other States of *Europe* are allowed before to import in their own Ships with an *Engliſh* Maſter and Mariners; the *Turkiſh* not, unleſs the Ships too be *Engliſh*; the Exception therefore muſt neceſſarily mention Ships as well as Mariners of the Country whence the Goods came; and though it was needleſs with reſpect to other *European* States, yet it could not be avoided if the ſame Liberty was intended for both *Turkiſh* and Chriſtian Countries, unleſs there had been a larger Tautology by repeating twice the ſame Exception, once without the Words *Ships and Veſſels*, and afterwards with them.

But it was inſiſted, That by this Conſtruction the Importers of Goods from *Muſcovy* would have more Privilege than the *Engliſh* themſelves; for theſe could import only in *Engliſh* Veſſels and *Engliſh* Seamen, whereas they could uſe either ſuch, or Veſſels of the Country whence the Goods come; this indeed is ſpecious, but if you conſider the Drift and Deſign of the Law, which was the Increaſe of *Engliſh* Seamen, and it is a ſure Means to augment the Numbers and Skill of our Mariners to have them man Foreign as well as their own Country Veſſels, in caſe Care be taken to call them home when our own Occaſions require them.

But this Conſtruction is made very plain by the next Section, §. 9. where the Goods of *Muſcovy* and all mentioned in the Sect. 8. as well as the *Turkiſh* Commodities imported in other than ſuch Shipping, and ſo navigated as aforeſaid, are declared to be Aliens Goods, and liable to the ſame Cuſtoms and Duties.

Secondly, The next Queſtion then will be, Whether by what is found it appears this Ship in the Information was man'd as the Act of Navigation requires.

And this depends upon the Meaning of theſe Words, *whereof the Maſter and three Fourths of the Mariners are of the ſaid Country or Place.*

What is meant by the Words, *Whereof the Maſter and three Fourths of the Mariners are Engliſh*, ſeems to be explained by the Act itſelf; in §. 2. it is ſaid, *No Alien born, unleſs naturalized or made Denizen, ſhall uſe the Trade or Employment of a Merchant or Factor in any Part of his Majeſty's Dominions in* Aſia, Africa *or* America.

So in Sect. 6. it is ſaid, No Perſons ſhall load on any Bottom, *&c.* of which any Stranger or Strangers born (unleſs ſuch as be Denizens or naturalized) are Owners, Part-Owners or Maſter, any Goods to carry from one Port to another; which imports, that none can be look'd upon as *Engliſh* but ſuch as are Natives, naturalized or Denizens.

And it is certain, that by the Laws of *England* all others are eſteemed Aliens, and are not intitled to all the ſame Privileges and Advantages that other *Engliſhmen* have.

And though an Alien continuing in *England* ſhall not become ſo much as Denizen, tho' the Continuance be ever ſo long, as was held in the Caſe cited 1 *Rol. Abr.* 195. whence it was inferred that the Words (*thoſe of other Countries*) being ſet in Oppoſition as it were to (*Engliſh*) ought to

be Natives of that Country, or at leaſt what is tantamount; yet it does not appear that any Antitheſis, or direct Oppoſition was deſigned by the Expreſſions uſed in the Act; our Laws in relation to Aliens were perhaps, as Mr. *Spellman* thinks, originally a Branch of the Feudal Law, where none could hold Lands without being obliged to ſwear Fealty to his Lord; which a Foreigner under the Allegiance of another Prince could not be ſuppoſed able to perform.

In the Caſe of *Collingwood* and *Pace*, 1 *Vent.* 17. *Holt* Ch. Juſtice ſays, the Law is the Meaſure of the Diſability of Aliens, and the only Rule to determine how far it extends; ſo that we cannot reaſonably argue from the Authorities in our Law concerning Aliens, as to Ability of Perſons in other Countries, and what ſhall denominate them to be Perſons of that Country or not.

The Methods of Denization and Naturalization uſed with us are not known in other Countries. Ch. Juſt. *Holt* quotes *Terrien*, to ſhew that they in *France* naturalize according to the Laws of *Normandy*. 1 *Vent.* 419. But that is in a different Manner from us, where it can be done only by Parliament.

Domat. Vol. 2. *Suppl. to the Civil Law, l.* 1. *tit.* 2. *ſ.* 2. *art.* 9. it is ſaid, that if Foreigners deſire to fix their Habitation in *France*, and enjoy the Rights and Liberties peculiar to the Subjects thereof, the Favour is granted by Letters of Naturalization obtained from the King, which are called ſo, becauſe thoſe who obtain them are reputed by the Effect of the ſaid Letters to be as natural-born Subjects of *France*.

But on the Trial of this Information, it was proved by a Witneſs, who ſeemed acquainted with the Dominions of *Muſcovy*, that no ſuch Thing as Naturalization was known or practiſed there.

The beſt Method we can take to find out whom the Legiſlators intended ſhould man foreign Ships that imported Goods

Goods hither, may be to reſort to the Act itſelf, and ſee what can be collected from thence.

Now the §. 8. which ſpeaks of the Importation of Goods from *Muſcovy*, and other *European* Countries, ſays, they muſt be in Ships that truly and *bonâ fide* belong to the People thereof; and by the Concluſion it ſays, the Maſter and three Fourths of the Mariners muſt be of that Country, that is, they muſt be People of that Country.

Who ſhall be ſaid People of that Country the Act does not directly determine, but ſeems to uſe the Words in as large a Senſe as if it had ſaid the Inhabitants of that Country, without any preciſe Deſignation of Natives or not.

So Sect. 4. that ſpeaks of Ling, Pilchards and other dried and ſalted Fiſh, uſually fiſhed for and caught by the People of *England*, *Ireland* and *Wales*, muſt denote the Inhabitants of thoſe Kingdoms generally, whether Natives or not.

So when it ſays, Codfiſh, Herrings, Oil and Blubber made of Fiſh, when imported into *England*, *Ireland* and *Wales*, not being caught by Veſſels belonging thereunto, and the Fiſh cured, ſaved and dried or made by the People thereof, ſhall pay double Aliens Cuſtoms, it muſt mean the Inhabitants thereof generally, for it cannot be ſuppoſed the Legiſlature meant that if the Fiſh were cured and dried by Inhabitants not Natives, or the Oil or Blubber made by ſuch, the Importer ſhould be excuſed by the double Duties.

So where Sect. 16. ſpeaks, that the Act ſhall not extend to Fiſh caught, ſaved and cured by the People of *Scotland*, imported from *Scotland* in *Scotch* Veſſels, the Maſter and three Fourths of the Mariners being his Majeſty's Subjects; muſt it be inquired whether the Fiſh were caught by Natives of *Scotland*, before it be known whether the Ship and Goods were forfeited or not?

The Intent and Deſign of the Act therefore ſeems to be, that no Foreign Ships ſhould import any of the Goods

ſpecified in this Section, if they ſent for Mariners from any foreign Kingdom or State to mann them; but they might be allowed to import them if the Maſter or three Fourths of the Mariners were *Engliſh*, or thoſe who dwelt in their own Country.

It does not indeed preciſely fix and determine who ſhall be ſaid the People of a Country, but gives it a larger Extent and Signification than what is meant by the Natives of a Country, but the preciſe Notation of it is left to the general Import and common Underſtanding of the Word.

Now by the Civil Law, which is uſed in moſt Parts of *Chriſtendom*, and may not improperly be conſidered on this Occaſion, it is ſaid, *Juſt. Inſt. lib.* 1. *tit.* 2. *Appellatione populi univerſi cives ſignificantur*; the Word *Civis*, taken in the ſtricteſt Senſe, extends only to him that is intitled to the Privileges of the City of which he is a Member. And in that Senſe there is a Diſtinction between a Citizen, and an Inhabitant within the ſame City, for every Inhabitant there is not a Citizen; *Cives quidem origo, manumiſſio, adjectio, vel adoptio, incolas vero domicilium facit*, ſaith *Ead. l.* 10. *tit.* 39. *l.* 7. So *Dig. l.* 9. *tit. De verbor' ſignificatione*, 239. *Incola loci eſt, qui in aliquâ regione domicilium ſuum conſtituit.*

It is fit therefore to conſider how the Matter ſtands as to the Maſter and Mariners in the Ship mentioned in the Information.

Firſt as to *Harry Hagſon* the Maſter (for if he be not qualified the Navigation is illegal) it is found as to him, that he in 1733. became a Burgher of *Riga*, and has ever ſince continued ſo; that for nine Years he has been reſident there, unleſs when he went in foreign Voyages.

Now I am of Opinion, that he is ſufficiently qualified to man the Ship.

It is true, he is found to be born out of the Empreſs of *Ruſſia*'s Dominions, but he has been reſident there nine Years, and in 1733. was made a Burgher of *Riga*.

Now if his Birth under the Dominion of *Ruſſia* be not neceſſary, there can ſcarce any Thing be thought more cogent to denominate a Man of that Country, for being a Burgher there he muſt of Courſe take Oath of Allegiance to the Empreſs, as it appeared on the Trial he had done, although the Evidence of it was not admitted to be read, it being only a Certificate of it without proper Atteſtation.

He muſt therefore be a Subject of the Empreſs, which is all contended for on the laſt Argument as needful to denominate him of that Country.

By the Statute — *H.* 8. — a Perſon ſworn to a foreign Prince is looked upon as a Stranger to his native Country, and ſhall pay Aliens Duties.

The greater Difficulty will be in regard to four other of the Mariners, one of whom is ſaid to have reſided at *Riga* eight Years, another ſeven, another ſix, another only four Years before the Seiſure, and during theſe Years to have ſailed from *Riga* in this and other Voyages.

Now I am of Opinion theſe are Men of that Country within the Intent of the Act of Navigation. Firſt, Becauſe the Act ſeems to intend by People of a Country any that are ſettled and fixed Inhabitants there; and when it mentions Mariners of the ſaid Country or Place, it ſtill ſpeaks more looſely and generally, and conſequently a Reſidence of four, ſix or eight Years may well ſatisfy that Expreſſion.

Secondly, This ſeems to anſwer the Deſign of the Act, which was not to create Difficulties in other Countries to find Mariners among themſelves, as to prevent their ſupply-

ing themſelves with any Mariners from other States but *Engliſh.*

Thirdly, Becauſe by the Civil Law ſuch a Reſidence gives the Country a Right to their Service, *Qui originem ab urbe Româ habent, ſi alio loco Domicilium conſtituerunt, munera ejus ſuſtinere debent.* Dig. l. 50. tit. 4. lex 3.

So Cod. l. 10. tit. 39. l. 5, 6. *Si in Patriâ uxoris tuæ vel quâlibet aliâ Domicilium defixiſti, incolatûs jure ultro te ejuſdem Civitatis Muneribus obligâſti, Privilegio ſpeciali non intervenient', tamen originis ratione ac Domicilii voluntate ad munera Civilia quemq; vocari certiſſimum eſt.*

Fourthly, The ſpecial Verdict does not find theſe Perſons had ever any Reſidence or Habitation (ſince they were grown up) in any Place out of the Dominions of *Ruſſia*; it is found indeed they were born out of the Dominions of *Ruſſia*, but that they dwelt or reſided any where elſe ſo long as they have done in *Ruſſia*, does not appear, and what does not appear is not to be intended.

It is found that they made ſeveral Voyages from *Ruſſia*, but it does not appear that they ever made any Voyage from any other Country whatſoever; ſo that they may be properly ſaid to be Mariners of *Ruſſia*, but there is no Foundation to ſay they were ever Mariners of any other Country or Place.

And it is not inconſiderable (which was an Obſervation of Baron *Wright*'s) that the Act of Navigation requires only, that foreign Veſſels be man'd by a Maſter and three Fourths of the Mariners which are of the ſame Country; it does not ſay by Mariners born in that Country or brought up there, but Mariners of that Country, which is a Denomination they muſt acquire long after their Birth, for they could not be born Mariners, and if they are of that Country while they are Mariners, and never were Mariners of any other Country, it ſeems fully to ſatisfy the Words and Intent of the Act.

It

It is an uſual Diſtinction in moſt Countries and States to diſtinguiſh between the Inhabitants of the Land and Strangers; in *Greece* they diſtinguiſh between their πολιται, μετοικοι, & ξενοι, their Citizens, their Sojourners, (as the Archbiſhop *Potter* calls them, *Arch. Græca, cap.* 9.) and Strangers; the μετοικοι were born in ſome foreign Country, and came to ſettle in *Greece*, and were liable to pay Tribute and perform ſome Duties, but not capable to bear Office or intermeddle with Affairs of Government.

So the Civil Law diſtinguiſhed between *Originarii* and *Incolæ*, and thoſe who have not a fix'd Abode, but were Strangers there, *Cum neq; originales neq; incolas vos eſſe memoratis ob ſolam Domus vel Poſſeſſionis cauſam, publici juris Auctoritas vos muneribus obligari non ſinit.* Cod. 10. tit. 39. l. 4.

So in our Law the like Diſtinction is made between ſettled Inhabitants of any Pariſh and Places and thoſe that are not ſo. 2 *Inſt.* 702.

But it was inſiſted, that they ought to be Subjects at leaſt to the Empreſs of *Ruſſia*; how does it appear they were not ſo? It is not found they were not, or that they were Subjects to any other Prince; upon the Trial it appeared they were *Swedes* by Birth, but whether born in that Part of *Sweden* which came under the Dominion of the *Czar* or elſewhere, is not found; if conquered by the late *Czar*, they are ſince become his Subjects. *Gro. de jure B. & P.*

But if the Laws of *Ruſſia* are not contrary in this reſpect to ours, by their being Reſident there they owe a local Allegiance. *Hob. Courteen*'s Caſe *per Hob.* in an Information againſt *Dutchmen* for tranſporting Money, it was ſaid, that they were Subjects, owed Allegiance to the King; if they committed High Treaſon, the Indictment muſt ſay *Cont' Domin' ſuum*, tho' not *Naturalem Domin' & contra debit' ligeantiæ.* So 7 *Co. Calvin*'s Caſe; and this was agreed, and that in all Indictments for High Treaſon the Omiſſion of *cont'*

3 *Ligean-*

Ligeantiæ ſuæ debit' was Error, which was after affirmed in the Houſe of Lords. *King and Queen* verſus *Tucker*, 4 *Mod.* 163. *Ca. Parl.*

But it was urged, that by this Conſtruction the Act might be eluded; Foreigners might ſtay a Day or two, and then man their Veſſels; for if Reſidence for two or three Years will ſuffice, why not for two or three Weeks or two or three Days; where will you ſtop?

But there is no Conſequence of this can be drawn from what is ſaid, for if that was ſpecially found, it might alter the Caſe; that would be an Artifice or Fraud to evade the Act; but nothing of this Nature is found, which in a Penal Act muſt be, or it cannot be intended.

By the Civil Law a bare Habitation does not make any to have *jus incolatûs*, it muſt be where a Man *Domicilium conſtituit, ubi larem ſummamq; rerum habet, unde ſi diſcedit peregrinari incipit, & cum redit peregrinari deſinit*; and ſuch not liable to Charges or Offices *ut incolas ad Munera ſubeunda vel honores capeſſandos non aſtringuntur.* Cod. l. 10. tit. 39.

By the Common Law, Habitation for a Year and a Day was requiſite to make a Perſon ſettled there; but upon the Whole it would be almoſt impracticable and make Commerce very hazardous if every Merchant was to ſearch out the Nativity of every Mariner he employed, and in Caſe of Miſtake or Miſinformation was to forfeit his Ship and Cargo. And as no ſuch Conſtruction appears hitherto to have been made of this Act ſince the paſſing of it, the Court gave Judgment for the Defendant.

Caſe 274. ## *The Governors, Bailiffs and Commonalty of the Company of the Conſervators of the Level of the Fens* verſus *Thomas Hare.* In Scacc'.

Bill for Diſcovery of Matters proper at Law not proper for Relief in Equity.

BILL for an Injunction to ſtay Proceedings on an Ejectment for Lands in *Norfolk*, brought on the Demiſe of Sir *Thomas Hare*, after Verdict for the Plaintiff.

And it appeared by the Bill and Anſwer, that *Anno Dom.* 1665, the Adventurers of the Fenns *in Com' Norfolk* made two great Drains in the *Level* called one whereof was called the 20 Foot Drain; and after in the ſame Year they were incorporated by the Name *ſup.*

That by Articles of Agreement made 12 *April* 1680 *int.* Sir *Thomas Hare*, Father of the now Defendant, and *George Daſhwood*, Eſq; on his Marriage with *Elizabeth*, Daughter of the ſaid *George Daſhwood*, in Conſideration of 12000 *l.* to be paid for clearing the Debts of Sir *Thomas* on his Manors and Eſtate in *Stowbardolph* and *Wimbotſham in Com' Norfolk*, which Sir *Thomas* covenants to employ accordingly, and to ſettle the ſaid Manors and Eſtate for a Jointure and Proviſion for her, and in Lieu of Dower, to the Uſe of him and the ſaid *Elizabeth* during their Lives, ſubject to a Condition as to *Stowbardolph*, that if Sir *Thomas* ſhould die leaving his Wife and an Heir Male or Males of their Bodies then living, ſhe ſhould have his Eſtate in *Suffolk* and *Eſſex* for her Life, inſtead of the Manor of *Stowbardolph* and Eſtate there, and in Bar of her Dower; and on conveying the Eſtates, *George Daſhwood* covenants ſhe ſhould ſurrender and releaſe her Intereſt in *Stowbardolph* to and for the Uſe of ſuch Male or Males ſo living; but if Sir *Thomas* died leaving no Iſſue Male, *Elizabeth* ſhould enjoy the Eſtate in *Stowbardolph* and *Wimbotſham* for her Jointure, notwithſtanding the ſaid Proviſo; and the Eſtates in *Suffolk* and *Eſſex* ſhould be ſold for Daughters Portions, if any; and Sir *Thomas* covenants, that from Marriage, till Manors,

3 &c.

&c. in *Stowbardolph* and *Wimbotſham* ſhould be ſettled by Law according to Intent of Articles, he would ſtand ſeiſed of Eſtate in *Suffolk* and *Eſſex* to the Uſe of *Elizabeth* for Life.

That by Indentures of Leaſe and Releaſe 6 *&* 7 *Oct.* 1682. in Conſideration of the ſaid Marriage had, 13000 *l.* Portion (1000 *l.* more being paid purſuant to the Articles on Birth of firſt Child) and for ſettling the Lands after mentioned for Jointure of *Elizabeth*, and for Uſes after expreſſed, and in Purſuance and for full Performance of the Articles before Marriage, the ſaid Sir *Thomas Hare* conveys the ſaid Manors of *Stowbardolph* and *Wimbotſham*, and ſeveral other Manors *in Com' Norfolk* to *George Daſhwood* and —— *Brady* and their Heirs, to the Uſe (as to Manors of *Stowbardolph* and *Wimbotſham*) of himſelf for Life, and then of *Ralph* his eldeſt Son and the Heirs Males of his Body, then to the Uſe of ſecond, third and all other Sons of that Marriage in Tail Male; then to the right Heirs of Sir *Thomas*.

And as to the other Lands *in Com' Norfolk*, to the Uſe of Sir *Thomas* for Life, then to *Elizabeth* for Life for Jointure, then to Sir *Thomas* and Heirs.

By Indenture of Leaſe and Releaſe 21 and 22 *July* 1686, Sir *Thomas* conveys 339 Acres Fen-Land, Parcel of ſaid Manor of *Stowbardolph* to *Chr. Crutford* and *John Millbourne* in Fee, in Truſt for the Level.

By Indenture 22 *July* 1686, reciting Agreement to ſell 339 Acres for the Benefit of the Level, paying 537 *l.* 10 *s.* and that ſuch Conveyance was made, but it appearing doubtful whether Sir *Thomas Hare* had at preſent any Power to make ſuch Conveyance, Sir *Thomas Hare* agreed to give Security for a good Aſſurance of the 339 Acres within 13 Years, from all claiming in Remainder, *&c.* and thereby demiſes an Eſtate of 40 *l. per Ann.* to them for 99 Years, on Condition to be void on making ſuch Aſſurance.

That

That Sir *Thomas Hare* died —— leaving Iſſue *Ralph* and *Thomas*; that *Ralph* died without Iſſue, whereby the Eſtate deſcended to Sir *Thomas* the Leſſor of the Plaintiff.

On this Caſe it was inſiſted for the Plaintiff in Equity, that at the Trial the Settlement was produced, but not the Articles; but it being therein mentioned, that the Settlement was in Purſuance of Articles, the Plaintiff had a Verdict; but the Articles being ſince diſcovered by the Anſwer of Sir *Thomas Hare*, it appears that the Settlement was made ſubſequent to the Marriage, and quite variant from the Articles, and conſequently will not avail againſt a Purchaſer for a good and valuable Conſideration, as the Conſervators of the Fens appear to be, but ſuch a voluntary Settlement is fraudulent; and altho' they could not take Advantage of it at the Trial, not having the Articles to produce; yet now they (being produced) are proper in a Court of Equity to take Advantage of it, and the Court ought not to permit the Plaintiff at Law to proceed upon this Verdict, which now appears to have been gained contrary to Conſcience.

That the Articles only took Care to ſecure a Jointure for the Wife for her Life; and although the Settlement ſhould be good with reſpect to her Jointure, yet in Caſe any Remainders be limited voluntarily after Eſtates on good and valuable Conſideration preceding, ſuch Limitation of Remainders without Conſideration will be void in regard to a Purchaſer, by Force of the Statute 27 *Eliz.* — although the preceding Eſtates ſtand good againſt him; and ſo it was Reſolved 2 *Lev.* 147. *Lane* 22. 1 *Vern.* 285-6.

That it is not material, that the Purchaſers had Notice of this Settlement in 1682, for where a voluntary Settlement becomes void by Force of the Statute 27 *Eliz.* it will be ſo, notwithſtanding the Purchaſer had Notice of ſuch Settlement; and ſo it was held 5 *Co.* 60. *Vide* 2 *Lev.* 105.

This Caſe having been ſpoken to at large, the Court took Time to conſider of it till next Term, and had Copies of

the Articles and Settlement laid before them for their Conſideration in the mean Time; and this Court in *Hillary* Term decreed, that the Plaintiff's Bill ſhould be diſmiſt without Coſts.

The Reaſons why the Court diſmiſt the Bill were, that the Bill was only for Diſcovery, and an Injunction to ſtay the Proceedings at Law.

That the Plaintiff had a Diſcovery of the Articles made before the Marriage of Sir *Thomas Hare*, whereby they had in Reality the Fruit of their Suit; that the Bill made not out any Caſe to intitle them for Relief; what was prayed in relation to an Injunction was general to ſtay all the Defendant's Proceedings at Law; it cannot be deſired the Court ſhould grant a perpetual Injunction to ſtay for ever all the Defendant's Proceedings at Law for the future, where the Matter was properly triable at Law.

Rudge and James Hopkins, Plaintiffs, ver. *Robert Chapman, Clerk, Robert, Biſhop of Peterborough, John Hopkins, Chriſtopher Hopkins and* 33 *Inhabitants de Braybrook in Com' Northampton.* Caſe 275.

A Bill was exhibited by Plaintiff, ſetting forth that the Plaintiff *Rudge* and *John Hopkins* deceaſed, were ſeiſed in Fee of certain Lands, lately purchaſed by them in the ſaid County, without any Benefit of Survivorſhip; that they were ſued by the Defendant as Rector of the Pariſh of *Braybrook* for the Tithes of the ſaid purchaſed Lands; who by Anſwer inſiſted, that *Robert Chapman*, the Plaintiff in that Cauſe, held and enjoyed a Parcel of Meadow Land, called *The Dale*, in Lieu of all Tithe Hay ariſing upon the ſaid purchaſed Lands.

Bill to eſtabliſh *Modus*, when proper.

That after Iſſue, and Examination of Witneſſes, the Cauſe was brought to Hearing 4 *Nov.* 1731, and on Hearing, the Plaintiff's Bill was diſmiſt with Coſts.

That *John Hopkins* by Will 10 *Novem.* 1729 deviſed his Moiety of the purchaſed Premiſſes to the Plaintiffs *J. Rudge James Hopkins* and Sir *Richard Hopkins* and their Heirs, upon certain Truſts therein mentioned; that the Plaintiff *John Rudge* refuſing to act, by Decree in Chancery releaſed to the other Truſtees, and Sir *Richard Hopkins* is ſince dead; whereby the Plaintiff *James Hopkins* is become the only ſurviving Truſtee of the Will of *John Hopkins.*

So the Bill prays that this *Modus* may be eſtabliſhed by the Decree of the Court.

It was not proper to pray ſuch Decree, becauſe the Plaintiffs have not made proper Parties; firſt, The *Modus* alledged is, that the Rector enjoyed all the Meadow called *Dale*, in Lieu of all the Tithe Hay ariſing in that Pariſh, and all the Land-Owners of that Pariſh are not made Parties. *Sed non allocatur*; for *Hawkins* and the 33 other Defendants are named to be the Land-Owners of that Pariſh, and altho' it is not ſaid they were all the Land-Owners, *non conſtat* there are any others, and if there ſhould be, they cannot be bound by the Decree, and it ſhall not be intended, unleſs it had appeared.

Secondly, It was ſaid that *Rudge* is intitled to an undivided Moiety of the purchaſed Lands, and the other Plaintiff is only the ſurviving Truſtee of the other Moiety, but upon what Truſts does not appear, and the *Ceſtui que Truſt* is not before the Court.

To which it was anſwered, the Plaintiff is Truſtee for Perſons not *in eſſe*, and it was declared in the Houſe of Lords by Lord *Hardwick*, that Perſons not *in eſſe* might be bound by a Decree; that it had been ſettled lately in Chancery upon Mr. *Hopkin*'s Will, that till the *Ceſtui que Truſt* appointed by the Will ſhould be *in eſſe*, the Eſtate deſcended to the

Heir at Law, who was made a Defendant and did not oppoſe the Decree; and being Defendant, though no Decree can be for him, yet it would be miſchievous if any refuſing to be Plaintiff, ſhould hinder him that hath a joint Intereſt with him from ſuing for his Right; and it was therefore always thought ſufficient to name him a Defendant, as he was in this Caſe; but of this the Court took Time to conſider.

It is to be obſerved, that the Plaintiff comes for a Favour, not for the Recovery of a Right; if the Plaintiff ſhould ſue for Tithes in Specie again, the Plaintiff might bar his Demand by the ſame Means as before, as it is unlikely the Defendant ſhould again attempt an unſucceſsful Suit.

Bills of Peace are proper in Equity, but it is where the Right has been ſettled at Law by a Trial, and appears to be on a good Foundation.

Secondly, It does not appear by the Bill what Intereſt the Parſon hath in the Meadows of *Dale*, whether he and his Succeſſors were to enjoy it.

Thirdly, That the Plaintiff is intitled to a Moiety only of the Eſtate claimed to be exempt.

Theeds-

Caſe 276. *Theodoſia Skirme Widow, Executrix of Thomas Skirme her Husband, who was Executor of William Wogan, ſo he was Executor of Dame Mary Wogan the Widow and Adminiſtratrix of Sir William Wogan, and alſo Executrix of Viſcounteſs Purbeck her Mother, Plaintiff,* againſt *Eſſex Marychurch Meyrick, Eſq; Son and Heir of John Meyrick, Frances Meyrick, Gent. John Simmons, John Wogan and John Langhorne, ſurviving Executor of Anne, Widow and Executrix of John Langhorne who ſurvived Francis Morgan, the Truſtees in the Settlement.* 2 *April* 1710. In Scacc'.

A Perſon deemed a Truſtee, if he takes an Inheritance after Notice of Articles to ſettle the Eſtate.

Statute of Limitation when pleadable to a Truſt.

PLaintiff by his Bill ſuggeſts, that *Griffith Lewis* and *Sarah* his Daughter, having mortgaged Lands *in Com' Carmarthen* to Sir *William Wogan*, after the Deceaſe of *Griffith* and Sir *William Wogan*, *John Thomas* and the ſaid *Sarah* his Wife, Daughter and Heir of *Griffith Lewis*, by Indenture 26 *Jan.* 1709, and by Fine, in Conſideration of 1769 *l.* 5 *s.* due on the ſaid Mortgage, conveyed the ſaid Lands, being 80 *l. per Ann.* to Dame *Mary Wogan*, Widow and Adminiſtratrix of Sir *William Wogan*, and her Heirs.

Bill was filed *Mich.* 1735.

That by Indenture 2 *April* 1710 Dame *Mary Wogan* reciting, Sir *William Wogan* intended by Will to direct his Perſonal Eſtate to be laid out in Lands, to be ſettled on his Nephew *William Wogan*, and after on *Lewis Wogan*, to continue it in his Name, but died before Will made, whereby a Moiety of the ſaid Perſonal Eſtate belonged to Dame *Mary Wogan*

his Widow and Adminiſtratrix, the other Moiety to his Nephew *W. Wogan* and *J. Simmons*; and that ſhe was diſirous all Parts of the ſaid perſonal Eſtate belonging to her and the Nephew *W. Wogan* ſhould be ſettled according to the Intent of Sir *W. Wogan*, and that ſhe was Executrix of Lady *Elizabeth* Viſcounteſs *Purbeck* her Mother, and reſiduary Legatee; and that *L. Wogan* had agreed to find her Houſe, Diet, *&c.* ſuitable to her Quality, Fire, Coach, two Maids, two Servants to attend her on Hoſeback during her Life; out of her Regard to the Memory of Sir *W. Wogan*, and to perform his Intent to the ſaid *Lewis Wogan*, and that he may not be wholly deprived of the Benefit of the perſonal Eſtate accruing to her, and judging it not reaſonable or juſt *W. Wogan* ſhould have the Benefit of it, in regard he neglects to ſettle his Share of it purſuant to ſuch Intent, and being minded to ſettle all the perſonal Eſtate of Lady Viſcounteſs *Purbeck* to the Uſe of the perſonal Eſtate of Sir *W. Wogan*, by *J. Langhorne* and *James Wogan*, in Behalf of *L. Wogan*, and that *L. Wogan* has agreed to allow her Diet, *&c.* as aforeſaid, grants and aſſigns to *J. Langhorne* and *James Wogan* all her Moiety of all the Chattels real and perſonal of Sir *W. Wogan* and Lady Viſcounteſs *Purbeck*; To hold to them, their Executors, Adminiſtrators and Aſſigns, in Truſt for paying the Debts of Sir *W. Wogan*, and out of his and Lady *Purbeck*'s perſonal Eſtate to pay 300 *l.* to Lady *M. Wogan* for ſatisfying her Debts and Lady Viſcounteſs *Purbeck*'s, and then Debts of *Lewis Wogan*; and the Reſidue to lay out in a Purchaſe of Lands, to be ſettled to the Uſe of *Lewis Wogan* for Life, with Power of Waſte; then to *W. Wogan* his eldeſt Son in Tail Male, then to *J. Wogan* his ſecond Son in Tail Male, then to the Uſe of every other Son of *Lewis Wogan*, then to the Uſe of him and his Heirs.

Dame *M. Wogan* covenants ſhe hath not done nor will do any Act, whereby the perſonal Eſtate of Sir *W. Wogan* or Lady Viſcounteſs *Purbeck* may be leſſened, *&c.* or not quietly enjoyed by *J. L.* and *J. Wogan*; ſhe covenants to make further Aſſurance of all the Moiety of Sir *W. Wogan*'s perſonal Eſtate, and of the ſaid *Elizabeth* Viſcounteſs *Purbeck*; *Lewis Wogan* covenants to indemnify her from Charges of all Suits

about the ſaid perſonal Eſtates, and to provide her Meat, *&c.* Coach, and two Servants to attend her, and two Maids, and Diet, *&c.* for them during her Life.

And if *W. Wogan* ſettle his Share of Sir *W. Wogan*'s real and perſonal Eſtate to the ſame Uſes Sir *W. Wogan* intended by his Will, the Eſtate to be purchaſed by *J. L.* and *Jam. W.* ſhall be ſettled to the ſame Uſes.

That *Lewis Wogan* maintained Dame *M. Wogan* till his Death 26 *Nov.* 1714.

And *J. Meyrick* and *Fran. Meyrick* were her Counſel and Solicitor in preparing the ſaid Deed 2 *Apr.* 1710. by Virtue whereof *Lewis Wogan* became intitled to and enjoyed the Lands purchaſed by Dame *M. Wogan* during his Life.

That *L. Wogan*, Truſtee in the Settlement 2 *Apr.* 1710. died in the Life-time of *L. Wogan*, and *J. Langhorne* the other Truſtee died and made *Anne* his Wife Executrix, who made *J. Meyrick* the Defendant, *J. Langhorne* and *W. Bowen*, Executors.

That *Lewis Wogan* left Iſſue *W. Wogan* and *J. Wogan*, both Infants, after whoſe Death *J. Meyrick* and *Fran. Meyrick*, or one of them, entered on Behalf of *W. Wogan*, the eldeſt Son of *Lewis Wogan* then an Infant, into the Lands ſo purchaſed by Dame *M. Wogan* 1709. with perſonal Eſtate of Sir *W. Wogan*, and ought to account for the ſame to his Repreſentatives till his Death, which happened 20 *Mar.* 1728.

That Dame *M. Wogan* as Adminiſtratrix of Sir *W. Wogan* was poſſeſſed of a Leaſe of the Tithes of *Llangadock*, granted by the Biſhop of *St. Davids*, 100 *l. per ann.* into which *J. Meyrick* or *F. Meyrick* entered, and received the Profits for *W. Wogan* the Infant, *F. Meyrick* acting as Agent for *Anne Langhorne* and her Executors.

That Dame *M. Wogan* having an Annuity or Rent-charge granted her for her Life by Sir *W. Wogan* of 200 *l. per ann.* out of Lands in *Pembrook*, *Carm'* and *Cardigan*, confeſſed

Judgment to *J. Meyrick*, *M.* 4 *Geo.* in the Court of Exchequer for 578 *l.* on Pretence of Monies due to him for two Years Board, which he agreed to accept out of the Arrears of the ſaid Annuity, which he received from *Mich.* 1714. till her Death 26 *Nov.* 1724.

That Dame *M. Wogan* made the ſaid *W. Wogan* her Executor and reſiduary Legatee, who by Will deviſed all his real Eſtate to *J. Wogan* and his Heirs, and made *Tho. Skirme* Huſband of the Plaintiff his Executor and reſiduary Legatee, who 1731. made the Plaintiff his Executrix and reſiduary Legatee.

That *F. Meyrick* never accounted for Intereſt by him received from Mr. *Harley* for 1100 *l.* due to Sir *W. Wogan* on Mortgage, *viz.* 55 *l.* 20 *July* 1716. 50 *l.* on the 7th of *March* 1717. 50 *l.* on 29 *July* 1718. 120 *l.* on 21 *Dec.* 1718. That *J. Meyrick* died 1731. having made Defendant *Eſſex M. Meyrick* Executor, and ſubjected his real Eſtate for the Payment of his Debts.

Wherefore the Plaintiff demands, firſt, That the Defendant *Eſſex M. Meyrick* and *F. Meyrick* account with her for the Profits of the Eſtate *in Com' Carm'* from the Death of *Lewis Wogan* to the Death of *W. Wogan* his Son.

Secondly, That *F. Meyrick* account for Tithes of *Langadock* by him received during that Time.

Thirdly, That he would account for Intereſt of 1100 *l.* by him received of *Edward Harley*, Eſq;

Fourthly, That Defendant ſet forth what was due to *J. Meyrick* to whom Judgment was given from Dame *M. W.* and whether he be not ſatisfied the ſame out of the Arrears of her Annuity of 200 *l.* by him received, or other Eſtate, and if any Thing remain due on it; that *J. Wogan*'s Tenement called *Sander*'s Tenement, deviſed to him by *W. Wogan*, may go toward Satisfaction.

That

That *J. Simmons* Deviſee of *W. Wogan*, the Nephew of Sir *W. W.* to whom the Land out of which the 200 *l. per ann.* iſſues was given, may account for the Arrears of the ſaid Annuity.

Defendant *Eſſex M. Meyrick* by Anſwer admits that Dame *M. Wogan* by Indenture 20 & 21 *June* 1715. conveyed the Lands *in Com' Carmarthen* to *J.* and *Fra. Meyrick* and their Heirs for 50 *l.* and out of Kindneſs to them, and that they had from that Time received the Profits.

That Dame *M. Wogan* dwelt at *J. Meyrick*'s Houſe two Years and a Half, and after 5 *Aug.* 1717. went to dwell at *Haverford Weſt*, and being indebted for her Board there in 257 *l.* 10 *s.* and to *Fra. M.* 32 *l.* on 9 *Oct.* 1717. executed a Warrant of Attorney to confeſs Judgment in the Exchequer for ſecuring that Money, *viz.* 289 *l.* which is ſtill due, and the Judgment was entered up.

And the Defendant *F. M.* admits the Mortgage from *G. L.* and his Daughter was made for 1200 *l.* the Money of Sir *W. Wogan*, to *W. Wogan* Eſq; and —— *Welly* as his Truſtees, and on her purchaſing the Inheritance ſhe inſiſted on 100 *l.* more than what was due for Principal and Intereſt on Mortgage; that *J. Meyrick* and he were privy to her Purchaſe, and to the Deed 2 *April* 1710. but took not her Purchaſe to be included in the Deed.

Fra. M. alſo admits, that by Authority from Dame *M. W.* he received ſeveral Parts of the perſonal Eſtate of Sir *W. W.* and Lady *Purbeck*, but 21 *Dec.* 1717. ſtated Accounts with her, when due to him on the Ballance 207 *l.* 3 *s.* 5 *d.* in which Account the Rents of the Tithes of *Langadock* were included, and that 282 *l.* 1 *s.* 10 *d.* being due to him from *J. Simmons* the other Nephew of Sir *W. Wogan*, which he might receive out of the Share of the perſonal Eſtate of Sir *W. Wogan*, payable to him by Dame *M. W.* ſhe agreed the Defendant ſhould receive both Sums out of what he

ſhould after receive out of ſuch perſonal Eſtate, and the Rents of the ſaid Tithes, for which he ſubmits to account.

That by Deed 9 *Oct.* 1717. (ſame Day with Warrant of Attorney to confeſs Judgment) reciting the Indenture 4 *July* 1716. whereby Dame *M. Wogan* had given *J. Meyrick* 1000 *l.* to be received out of the Arrears of her Annuity, and agreed to pay him 100 *l. per ann.* for her Board, and had given all Monies due to her from any Perſon, except a Debt from *Tho. Cornwallis*, ratified the ſaid Gifts, and releaſed the future Payments of 100 *l. per Ann.* and ſhe covenanted to pay the 284 *l.* for which Warrant of Attorney was given out of the ſaid Arrears.

On hearing this Cauſe it was firſt objected, that here was Want of Parties, becauſe the Mortgage made by *John Thomas* and *Sarah* his Wife was to *W. Wogan* and —*Welly* for a Term, and no Declaration of Truſt appearing for Sir *W. Wogan*, they ought to have been Parties.

Sed non allocatur; for the Account demanded by the Plaintiff againſt the Defendants, is of the Rents and Profits of the Eſtate of Sir *W. Wogan*, and of this mortgaged Land as Part of Sir *William*'s perſonal Eſtate; and the Defendants admit, that the Money put out on this Mortgage was Part of Sir *W. Wogan*'s Money, and the Names of *W. Wogan* and *Willy* were uſed as Truſtees for him; but inſiſted, that Dame *M. Wogan* purchaſed the Inheritance of this Eſtate, and conveyed it to them in 1715, whereas the Plaintiff inſiſts ſhe had before agreed to convey it to *Thomas Lewis*, whoſe Repreſentative ſhe is; ſo the whole Queſtion between the Parties is, Whether this Eſtate *in Com' Carmarthen* belongs to thoſe who claim under the Deed 1710, or the Parties to whom conveyed in 1715? And whatever is determined in this Queſtion, cannot affect *W. Wogan* or *Willy*, for they will not be bound by the Decree; and if not Truſtees for Sir *W. Wogan* cannot be affected by it; for it is a known Rule, that none can be bound by the Decree but ſuch as are Parties or Privies to the Suit.

And it would be hard to diſmiſs the Plaintiff for want of Parties, where the Defendants admit the Plaintiff proper to make the Demand againſt them, in Caſe the Ground on which the Demand is founded be true, and none can be prejudiced, who are not Parties, by the Decree of the Court upon that Point.

Afterwards, at the Sittings after *Hil.* Term, the Cauſe came on to be heard upon the Merits.

And the firſt Part of the Plaintiff's Demand was, an Account of the Profits of the Eſtate *in Com' Carmarthen*, from the Death of *Lewis Wogan*, which was 26 *Nov.* 1714, to the Death of *W. Wogan* his Son 20 *Mar.* 1728; for the Plaintiff being Repreſentative of *W. Wogan*, on whom the perſonal Eſtate of Sir *W. Wogan* was agreed to be ſettled after his Father's Deceaſe by the Indenture 2 *April* 1710, was intitled to this Eſtate, which was a Mortgage to *W. Wogan*, though conveyed to Dame *M. Wogan* in 1729, and by her conveyed to *James* and *Francis Meyrick*, and their Heirs, by Indenture 20 and 21 *June* 1715; for *Meyrick* having Notice of this Settlement 2 *April* 1710, took the Profits ſubject to the Truſts of that Deed, and conſequently his Executors *Eſſex M. Meyrick* and *F. Meyrick* ought to account for the Profits by him received in the Life of *W. Wogan*.

Now it appears, that by the Deed 2 *April* 1710, Dame *M. Wogan* admits by the Recital, that Sir *W. Wogan* deſigned all his perſonal Eſtate ſhould be laid out in Land to be ſettled in his Name; that ſhe in reſpect to his Memory importuned his Nephew *W. Wogan*, that all the Parts of the ſaid Sir *William*'s perſonal Eſtate belonging to her and him might be ſo diſpoſed, but he refuſes; that ſhe was minded to ſettle all the Eſtate of Lady Viſcounteſs *Purbeck* and her Moiety of Sir *W. Wogan*'s perſonal Eſtate; and therefore of Intent to ſettle ſuch Part of the perſonal Eſtate as belongs to her, ſhe aſſigns all her Moiety of the Judgment, Mortgages, *&c.* and all and ſingular other real and perſonal Eſtate of Sir *W. Wogan* and Lady *Purbeck*'s perſonal Eſtate, up-

on the Truſts therein mentioned, and covenants ſhe had not done, nor would do any Act by Means whereof the perſonal Eſtate of Sir *W. Wogan* and Lady *Purbeck* are or ſhall be leſſened, impaired, *&c.* or defeated.

It is evident by theſe Words, the Whole perſonal Eſtate of the ſaid Sir *William Wogan* was agreed to be ſettled upon the Truſts of this Deed; and it is plain upon the Proofs in the Cauſe, that *Lewis Wogan* took the Profits of this Eſtate *in Com' Carmathen* while he lived; that the Inheritance was conveyed to Lady *Wogan* on the Conſideration of what was due on the Mortgage for a Term of Years to *William Wogan* and *Welly*, Truſtees for Sir *William Wogan*, and conſequently was Part of his perſonal Eſtate; and tho' 100 *l.* is ſaid to be inſiſted on, yet nothing more appears to be paid for the Purchaſe of ſuch Inheritance; that *John* and *Frances Meyrick* were privy to, and Preparers of the Deed 2 *April* 1710.

So that there can no Doubt be, but that on Bill by *Lewis Wogan*, or his Son *William Wogan*, againſt *John* and *Francis Meyrick*, (admitting this Deed 2 *April* 1710 was made on good and valuable Conſideration) a Court of Equity would have decreed this Eſtate to have been conveyed to the Truſtees upon the Truſts of that Deed.

It was inſiſted, that *Lewis Wogan* is to be conſidered as a Purchaſer; for the Deed by *Lewis Wogan* 2 *April* 1710 was out of reſpect to the Memory, and to fulfil the Deſign of Sir *William Wogan*, who had an Intention by Will to order his Perſonal Eſtate to be laid out in Lands, for Benefit of *William Wogan* his Nephew, and of *Lewis Wogan* and their Male Iſſues, and to continue it in his Name;

And in Conſideration of Covenant by *Lewis Wogan*, that he, his Heirs, Executors and Adminiſtrators, would provide Diet in his Houſe in *Wiſton* for Lady *Wogan*, during her Life, ſuitable to her Quality, and two Maid Servants and two Men Servants, with Coach and Horſes to attend her.

Now

Now, altho' a Court of Equity does not uſually decree the Execution of a Covenant or Agreement made without any Conſideration; yet a ſlender Conſideration may ſuffice to carry the Agreement into Execution; as if made for Proviſion for younger Children, for Affection to his Nephew, and in order to make Reconciliation between him and his Father. *Eq. Abr.* 16.

Here the Conſideration of the Agreement by Dame *Mary Wogan*, is to accompliſh what her Husband intended to do by his Will, but was prevented by Death, and the Covenant of *Lewis Wogan* to provide for her during her Life; which are undoubtedly ſufficient Conſiderations to enforce the Execution of the Agreement 2 *April* 1710.

However it may well be doubted whether Lady *Wogan* underſtood ſhe was to give up the Inheritance that had been conveyed to her of the Lands *in Com' Carmarthen*, for the Deed 2 *April* 1710 recites, that Sir *William Wogan* died poſſeſſed of a conſiderable Perſonal Eſtate, conſiſting in Leaſes, Mortgages, Judgments, Statutes, Bonds, *&c.* that ſhe was minded to ſettle all her Moiety, Part of the ſaid Perſonal Eſtate, then aſſigns all her Moiety of the ſaid Mortgages, Judgments, Statutes, Bonds, Chattels real and perſonal of the ſaid Sir *William Wogan*, *&c.*

Now altho' the Generality of the Words, with the Covenant ſhe had done no Act to leſſen Sir *William Wogan*'s perſonal Eſtate, are ſufficient in Equity to oblige the Transferring the Lands *in Com' Carmarthen*, for the Benefit of Creditors and Purchaſers of Sir *William*'s perſonal Eſtate for valuable Conſideration, notwithſtanding her having the Inheritance of that Eſtate conveyed to her; yet having the Inheritance, ſhe might poſſibly be unknowing that continued ſtill a Mortgage; it had, it is ſure, been fairer to have been more explicit in this Matter; it is ſure Lady *Wogan* was a Woman very eaſily impoſed on; and it does not appear *Lewis Wogan* was leſs eager to make Advantages of her Weakneſs than *Meyrick*; for firſt, the Aſſignment was of this perſonal

ſonal Eſtate immediately for the Benefit of *Lewis Wogan*, which was not agreeable to the Deſign of Sir *W. Wogan*, as recited in this Deed, which was firſt to ſettle it on *W. Wogan* his Nephew and his Iſſues, but he is omitted, and the Deed directs the perſonal Eſtate firſt for the Benefit of *Lewis Wogan*; the Pretence for this is, that *W. Wogan* refuſed to ſettle his Share of the perſonal Eſtate to the ſame Uſes. But if it was Sir *W. Wogan*'s Intent to ſettle the whole firſt on his Nephew, it was departing from that Intent, to ſettle her Part different from thoſe Uſes he meant his Eſtate ſhould go in.

Secondly, The Conſideration of this Deed on the Part of *Lewis Wogan* was to maintain the Lady during her Life, in the Manner mentioned in the Articles. But it appears he took no Care for that Maintenance being ſecured to her, ſo that after his Deceaſe ſhe dwelt with *Meyrick* two Years and a Half; ſo that although *Meyrick* was perhaps more impoſing, *Lewis Wogan* was not ſo free from all Impoſition as was fit he ſhould have been.

But in this Caſe it is to be conſidered, whether the Plaintiff is not barred by the Statute of Limitations, for *Lewis Wogan* died 1714. and *W. Wogan* his Son was then about the Age of fourteen or fifteen, and he died 20 *Mar.* 1728. ſo that he died above ſix Years after his full Age; for he muſt be of Age in 1720. and the Bill was not filed till *M.* 1735. ſo that if it ſhould be allowed, that the Statute of Limitation does not extend to a Truſt, and *Meyrick* having Notice of the Articles 1710. was a Truſtee for *W. Wogan* the Infant, as being a Truſtee by his Enjoyment of this Eſtate *in Com' Carmarthen*, that was purchaſed by, and conſequently Part of the perſonal Eſtate of Sir *W. Wogan*, which by theſe Articles *W. Wogan* ought to enjoy; yet by his Death that Truſt was intirely determined, and conſequently ſix Years have elapſed ſince the laſt Period of that Time for which the preſent Plaintiff demands an Account.

Although the Statute of Limitation does not extend to a Truſt, *Eq. Abr.* 303. and admitting *Meyrick* is a Truſtee, and

that the Statute runs not upon him after the full Age of *W. Wogan*, while the Truſt was continuing, which may be look'd upon in Nature of an Account current, and if a Man receive the Profits of an Infant's Eſtate, and continues ſo to do ſeveral Years after his full Age, he ſhall be accountable for what he receives after as well as during his Infancy. *Eq. Abr.* 7.

Yet when the Truſt is wholly determined, the Statute muſt then run upon the Plaintiff's Demand, or where will it ſtop? if the Suit may be brought after ſix, it may be after 26 Years.

The Statute 21 *Jac.* 16. ſaith, all Actions of Account and on the Caſe (other than ſuch Accounts as concern the Trade of Merchandiſe between Merchant and Merchant, their Factor or Servant) ſhall be brought in ſix Years, *&c.* yet if there be an Account ſtated between Merchants, the Statute extends to it, as was reſolved 2 *Sand.* 127. *Webber* and *Tivel*, 1 *Lev.* 287. and the Reaſon given by *Jones* who argued for the Plaintiff, is, that the Statute intended to except only Accounts current and continuing between Merchants, but when the Account is ſettled and aſcertained it becomes as a fix'd Debt.

So 1 *Lev.* 298. 1 *Mod.* 70. where the like Plea was to an *Aſſumpſit* on an Account between Merchants, the Plaintiff diſcontinued; and ſo it was reſolved *Chively* and *Bond*, 4 *Mod.* 105, and ſo agreed 2 *Mod.* 311.

And the Statute of Limitations is as well a Bar in Equity as at Law, Sir *George Sands* ver. *Blodwell*, *Jon.* 401. Bill in Chancery for an Account between Merchants was brought againſt an Executor, and the Statute of Limitations pleaded; and it was referred to three Judges, *Jones*, *Crook* and ——— for their Opinion; indeed there the Account was not finiſhed, for *Freeman*, one Merchant, owned 1200 *l.* due, and the other inſiſted on more, and the Account not being ſettled or ended, the Judges thought the Account not barred by the Statute, but no Doubt was but that the Statute would have

been a Bar in Equity as well as at Law, if the Account had been determined.

Sherman and *Withers*, *Mich.* 21 *Car.* 2. 152. A Bill was by an Inland Merchant againſt the Defendant his Factor, for an Account of 14 Years ſtanding, who pleaded the Statute, which was allowed; for the Lord Keeper was of Opinion the Exception in the Statute extended not to this Caſe, but only to Merchants trading beyond Sea.

So if one receives the Profits of an Infant's Eſtate, and ſix Years paſs after his full Age, a Bill in Chancery to account ſhall be barred by the Statute of Limitations as much as an Action at Common Law; for this Receipt of the Profits of an Infant's Eſtate is not ſuch a Truſt as being a Creature of a Court of Equity the Statute is no Bar to; and ſince he might have had his Action of Account at Common Law, there was no Neceſſity to come into Equity. *Trin.* 1719, *Locky* and *Locky*, *Eq. Abr.* 304. *Pr. Cha.* 518.

But a Difference was ſuggeſted, where a Matter is of that Nature that a Remedy lies at Law as well as in Equity; there if the Party purſues his Remedy in Equity, he ſhall be barred by Statute of Limitations as well as if ſued at Law; but otherwiſe it is, where the Party has no Remedy but in a Court of Equity.

However it is to be conſidered, that though the Statute 21 *Jac.* 16. does not mention Suits in Equity, yet they are conſtrued to be in it; *per* Lord Chancellor *Macclesfield*, *Mich.* 1721, Statute of Limitations ſpeaks nothing of Bills in Equity, yet theſe are conſtrued to be within it.

In that Caſe the Statute was pleaded to a Bill of Revivor after Decree to account, and Lord *Macclesfield* ſays, if the Suit had been on Bill and Anſwer, it could not have been doubted but the Plea had been good, for it was within all the Miſchiefs deſigned to be prevented by the Statute, when Vouchers loſt and Witneſſes dead.

But

But, being after a Decree to account, which is in Nature of a Judgment, he doubted, and ordered it to be ſpoke to again; after Defendant died, a Bill of Revivor againſt Heir, the ſame Plea, *per King* Chancellor Plea diſallowed, for Bill of Revivor is in Nature of *Scire facias* on Judgment.

Statute of Limitations after 20 Years Poſſeſſion by Mortgagee, Bar to Bill to redeem.

Vide Caſe *Sherman* and *Withers*, *ſupra*, *Mich.* 21 *Car.* 2. Statute pleaded to Bill by Inland Merchant againſt his Factor for Account of 14 Years ſtanding, allowed.

Caſe 277. ## *Howarth Cook and John Cook* verſus *Sarah Cook, Widow, Hannah and Sarah her Daughters, Infants.* In Scacc'.

Whether a Defendant after a Decree againſt him ſhall, before Execution ſued, by Alienation prevent the Plaintiff from taking his Lands upon the Sequeſtration.

ON a Bill for a perſonal Duty, a Decree was againſt *Sarah Cook* the Mother, who ſtood out in Contempt, but before Sequeſtration againſt her, ſhe being Tenant for Life, Remainder to —— by Feoffment, dated 28 *Septemb.* 1735, infeoffed Truſtees in Conſideration of 5 *s.* and in Conſideration of 400 *l.* Part of a conſiderable Sum recited to be due to her Daughters; and thereby conveyed her Eſtate for Life to the ſaid Truſtees, in Truſt for her Daughters and their Heirs.

Afterwards Sequeſtration was taken out againſt the Mother, and thereon this Eſtate was ſeiſed by the Sequeſtrators; but on Application to the Court, by Order 29 *Jan.* 1736, it was referred to the Deputy to examine into the Conveyance, and ſee what Intereſt the Defendants had in the Eſtate; who reported, that *Price* and his Wife (for he had married *Hannah* the eldeſt Daughter) and *Sarah Cook* the other Daughter, had not made out any ſufficient Title, whereby to impeach or affect the Plaintiffs Seiſure of the ſaid Eſtate by Virtue of the Sequeſtration iſſued in this Cauſe.

To this Report the Plaintiff took Exception in Writing (as of late directed) firſt, That before the Decree, the Eſtate was ſettled for the Jointure of the Mother for her Life; that the Feoffment was made before the Sequeſtration iſſued, and made *bonâ fide* for a valuable Conſideration.

It was inſiſted by Mr. *Wilbraham*, that the Decree does not bind the Land, nor is any Lien upon it, but only binds the Perſon of the Defendant.

It muſt be agreed, that a Decree in a Court of Equity being no Court of Record, does not in Point of Law bind the Land, but the Perſon only.

So it is ſaid *per* Maſter of the Rolls, *Bligh & al'* verſus *Earl of Darnly*, *Trin.* 1731, 2 *W.* (619), the Defendant's Father contracted before a Maſter for the Purchaſe of a third Part of *Cobham-Hall* in *Kent*; and it was inſiſted by Attorney General, that the Debt by this Contract being due by a Decree, it was in Nature of a Judgment, and would bind the real Aſſets in the Hand of the Heir.

But Maſter of the Rolls ſaid, that the Purchaſe of Land decreed to be ſold, creates no Debt by Decree, it is only payable by Order of Court; but when it is ſaid Debt by Decree is equal to a Judgment, and to be paid next to a Judgment, this is intended out of the perſonal Eſtate; for a Decree for a Debt does not bind the real Eſtate, acting only *in perſonam* not *in Rem*, and the Remedy to affect Land is only by Sequeſtration for a Contempt, and a Decree for a Debt never affects the Land in the Hands of the Heir.

And this was ſaid long ago by *Knightly*, 27 *H.* 8. 15. cited 1 *Rol. Abr.* 373. and it was agreed 1 *Rol. Rep.* 36. But the Queſtion in this Caſe is, Whether the Defendant, after a Decree againſt him, ſhall by Alienation before Execution ſued prevent the Plaintiff from taking theſe Lands upon the Sequeſtration?

It is agreed he cannot do ſo, if the Alienation be voluntary without Conſideration; and ſo it was held, where after a Decree to an Account of a perſonal Eſtate, and on Exception to the Maſter's Report it was deferr'd, and in the mean Time the Defendant, on Treaty of a Marriage for his Son, but before it was concluded, conveyed his Eſtate to his Son to enable him to make a Jointure, and to pay his Debts 1700 *l.* but with Power of Revocation, if his Son died without Iſſue. *Hil.* 32 *&* 33 *Car.* 2. *Cha. Ca.* 43. *Golſton* and *Gardiner.*

So in the Caſe of *Squib* and *Snelling*, 2 *Ch. Ca.* 48. it is ſaid, a Purchaſer from *J. S.* who had a Decree againſt him in Chancery for Land, ſhall be bound by the Decree, tho' he had never Notice of it, tho' the Decree binds the Perſon, and not the Land.

So where a Decree was made by Commiſſioners of Charitable Uſes, and Exceptions to it in Chancery, where the Decree was after confirmed; but Defendant in mean Time had conveyed his Land to raiſe Portions for Children, but with Power of Revocation, the Land ſhall be ſequeſtred for Money decreed. *Paſch.* 34 *Car.* 2. *Harding* and *Edge.*

So where Defendant being decreed to pay a Sum of Money, or deliver up Poſſeſſion of a Houſe and Land in *Edmonton*, made an Aſſignment of the Houſe and Land to a real Creditor on Bond, for Satisfaction of his Debt, of his own free Will, without Privity of the Creditor, after the Time ſet for paying the Money or delivering Poſſeſſion, the Court decreed the Poſſeſſion of the Houſe and Land without regard to the Conveyance. *Self* and *Maddox*, *Ver.* 459. *Goldſton* and *Gardiner*, *ſupra*, was cited and allowed.

So where a Decree was, Deviſee ſhould enjoy againſt the Heir, *A.* purchaſes in a Mortgage, then purchaſes the Equity of Redemption of the Heir, having Notice of the Will, tho' ſaid to be deſtroyed, he ſhall be bound by the Decree. 1690. *Finch* and *Howcham*, 2 *Ver.* 217.

DE
Termino Paſch.
13 Geo. 2.

Owens verſus *Sarah Smith Executrix of* Caſe 278.
Thomas Smith. In Scacc'.

BILL for Diſcovery of Aſſets, and it was ſuggeſted, that the Plaintiff had applied to one *Matthews* to be his Attorney in an Action of Aſſault and Battery by Plaintiff againſt *Thomas Smith*, and upon a Treaty of Accommodation between them, it was agreed, that the Plaintiff ſhould pay *Smith* 50 *s.* toward the Expences, and *Smith* ſhould pay the Attorney's Bill, who delivers a Bill of 10 *l.* 10 *s.* 2 *d.* but *Smith* dies before Payment to him of 50 *s.* or Payment by him of the Charges.

Where Demand is below the Dignity of the Court, the Bill ſhall be diſmiſt without entering into the Merits.

The Defendant admits Aſſets, and that ſhe found ſuch a Bill among her Husband's Papers, but look'd on it as an unreaſonable Bill.

The Plaintiff brings on the Cauſe to a Hearing, not content with the Diſcovery; and it was inſiſted by Mr. *Wilbraham* for the Plaintiff, that where the Bill was for a Diſcovery, the Plaintiff might have Relief for a Debt or Demand certain, or which might be made certain; that in this Caſe the Attorney's Bill, though not tax'd, might be aſcertained by the Officer of this Court who frequently tax'd Bills for proceeding at Law as well as in Equity.

It was admitted, that if a Bill in Equity was neceſſary for a Diſcovery, the Plaintiff might have a Decree for the Demand in Caſe it was certain, and admitted to be due, which was to avoid a Multiplicity of Suits.

But here the Plaintiff had a plain Remedy at Law, and the Demand was not aſcertained nor admitted, for though a Bill was delivered, that does not prove ſo much to be due, and the Anſwer ſaith it is unreaſonable; and altho' Matters of Law and Equity are contained in a Bill, the Whole may be referred to an Officer of the Court, yet that is not ſo proper where the Whole is a Tranſaction at Law.

And here the Plaintiff's Demand is but 10 *l.* 10 *s.* 2 *d.* which is a Cauſe beneath the Dignity of the Court; ſo the Bill was diſmiſt.

Caſe 279. *Hutchins* verſus *Fitzwater Foy and Joſias Gover.* In Scacc.

Where an Intereſt is actually veſted in any one, it will go to their Executors, otherwiſe not.

BILL for a Legacy of 50 *l.* charged on an Eſtate deviſed in Remainder to the Defendant *Foy* and his Heirs, to be paid to *Margaret*, Wife of *Gover*, who took Adminiſtration to his Wife, and in Satisfaction of Money he owed the Plaintiff, aſſigned it to him.

And the Caſe was, That a Man ſeiſed of Lands in Fee, by Will dated 3 *July* 1732, deviſes all his real and perſonal Eſtate to *Thomas Beal* for Life, and after to his Children, and for want of ſuch Iſſue, to his Siſter *Martha* for Life, and after her Deceaſe, to *John Beal* for Life, and then to his Children, and for want of ſuch Iſſue, Part of his real Eſtate called *Monks* to *W.* and his Heirs; the other Part called *Marſh*, to the Defendant *Fitzwater Foy* and his Heirs, paying out of it, when it falls, 500 *l. viz.* 100 *l.* to *S. D.* 150 *l.* to *W.* and *O.* 100 *l.* to *N.* and 50 *l.* a-piece to *Elizabeth*, *Mary* and *Margaret*, the three Daughters of his Siſter.

The Teſtator died 1732, *John Beal* died without Iſſue, and his Siſter *Martha* died in his Life-Time, *Margaret*, one of the three Daughters, married the Defendant *Joſias Gover*, and died in *December* 1734; *Thomas Beal* died without Iſſue 1736, whereby the Defendant *Foy* came to the Poſſeſſion of the Eſtate deviſed to him and his Heirs, and *Gover* having Adminiſtration to his Wife, aſſigned to the Plaintiff the 50 *l.* payable to the Wife.

It was inſiſted by Mr. *Bootle* and Mr. *Gundry*, that *Margaret* died before the Remainder fell into Poſſeſſion, and that the Legacy or Payment to her was lapſed, for it was to be paid out of the Profits when it fell, and conſequently could not veſt in her till then.

That the antecedent Eſtates to *Thomas* and *J. Beal* and their Iſſues might have laſted many hundred Years, and therefore it was uncertain, and a Contingency whether it ever would happen.

Secondly, That here was no Deviſe of any Money to *Margaret*, but only a Condition annexed to the Eſtate of the Defendant, *paying* in a Will making a Condition, for Breach of which the Heir might enter, but a Stranger cannot take Advantage of it. *Co. Lit.* 203.

Thirdly, That here the Charge does not begin till the Eſtate falls in Poſſeſſion, and then *Margaret* being dead could take nothing, the Time is not annexed to the Payment but to the Deviſe, for nothing was deviſed before.

Fourthly, The Deviſe is too remote, after a Dying without Iſſue, which may never happen.

The Caſe of *Carter* and *Bletſo*, 2 *Vern.* 617. may be compared to this; *Mat. Bletſo* deviſed all his Meſſuages, *&c.* to his eldeſt Son and his Heirs, but it is my Will my Son ſhall pay out of the ſaid Lands 600 *l*; to my Daughter *Mary*, 200 *l.* at her Age of 21; to my Son *J.* 200 *l.* at 21;

to Son *Mat.* 200 *l.* at his Age of 21. and 4 *l. per Ann.* for Maintenance till 21, and the Portions paid.

Mary married, and died before 21, her Husband took Adminiſtration; but *per Cur'*, there is no veſting Clauſe in the Will, the Direction that his Son pay *Mary* at the Age of 21, veſts nothing till ſhe attain her Age of 21; and ſhe dying before, it never ariſes.

So in the Caſe of *Venn* and *Clark*, in Chancery 24 *July* 1739, upon the Will of Lady *Mary Green*, dated 11 *Dec.* 1729, whereby ſhe deviſed the Sum of 2000 *l. inter al'* out of her real and perſonal Eſtate unto *Thomas Lewis*, on Truſt to put out to Intereſt, till *Mary Lewis*, Grandchild of her Siſter *Beecher*, attain the Age of 18, or marry, and when ſhe attains that Age, or marries, to pay it her.

She died before her Age of 18 or Marriage; and the Court held ſhe was not intitled to this Legacy, but diſmiſt the Bill brought by her Adminiſtrator for that Purpoſe without Coſts.

So in the Caſe of *Prouſe* and *Abington*, in Chancery 26 *April* 1728, *Thomas Compton* by Will 13 *Auguſt* 1718, deviſed Part of his real Eſtate to Truſtees and their Heirs, on Truſt to pay the Sum of 500 *l.* unto his Godſon *Thomas Prouſe*, to be paid to him at his Age of 21 Years, or Marriage; he died under Age and unmarried; and it was held the Money ſhould not be raiſed, but ſink for the Benefit of the Heir.

In the Caſe of *Hall* and *Terry*, heard by Lord *Hardwick* 8 *Nov.* 1738.

Nicholas Terry deviſed Lands to *Stephen Terry* and his Heirs, ſo as he, his Heirs or Aſſigns do in 12 Months after the Eſtate ſhall come unto him (which was on his Wife's Deceaſe) pay unto his Grandchild after named *Elizabeth Oades*, the Sum of 250 *l.* The Teſtator died in —— 1714, *Elizabeth* died within 12 Months after the Wife; and it was held by the Court, that nothing became due to the Executor, for

there was nothing deviſed till the 12 Months expired, for the Deviſe and Time of Payment commenced together, and the Will could not have a double Effect to give and veſt an Intereſt, and then give Direction as to the Payment.

But on the other Side it was anſwered, and reſolved by the Court, that in this Caſe the Plaintiff was well intitled to the Legacy of 50 *l.* aſſigned to him by the Husband and Adminiſtrators of *Margaret.*

It is indeed now a ſettled Rule in Courts of Equity, that where a Deviſe or Settlement of Lands is made by Will or Deed, charged with Portions for younger Children, payable at Age or Marriage, the Portion ſhall ſink in the Eſtate for the Benefit of the Heir or Deviſee, in Caſe the Child die before the Portion becomes payable; it was ſo held *Pawlet* and *Pawlet*, affirmed in the Houſe of Lords. 1 *Ver.* 204, 321. 2 *Ver.* 366. *Eq. Abr.* 267.

There was formerly a Difference taken and inſiſted on, between Lands deviſed and Lands ſettled by Deed; but it is now clearly ſettled the Caſe is the ſame in both, for the Reaſon is the ſame; for in both Caſes it appears, that it was the Intention of him that made the Will or Settlement, that Monies appointed to be raiſed, ſhould be a Proviſion for the ſettling theſe Children in the World, but if they died before there was Occaſion for ſuch Proviſion, there is no need to raiſe the Portions.

Caſes to this Effect are numerous, *Smith* and *Smith*, 2 *Ver.* 92, 416, 396. So in the Caſe *Bruen* and *Bruen*, 2 *Ver.* 439. *Pre. Cha.* 195. *Tournay* and *Tournay*, *Pre. Cha.* 290. *Warr* and *Warr*, *Hil.* 1702. *Freeman* and *Freeman*, *Mich.* 1727. *Eq. Abr.* 267, 268. *Norfolk* and *Gifford*, 2 *Ver.* 282.

The Caſes cited by Mr. *Gundry* went on the ſame Foundation, *Carter* and *Bletſo*, 2 *Ver.* 617. the Deviſe was to his eldeſt Son, and wills he ſhould pay 200 *l.* to his Daughter *Mary* at 21, or Marriage, which was plainly intended as

a Proviſion for her at full Age or Marriage, and therefore if ſhe died before, there was no Occaſion for it.

What was ſaid by the Court, that there was a veſting Clauſe, was a Reaſon *ex abundanti*, for properly ſpeaking, the Portion is not intended to veſt in the Intent of the Teſtator till it becomes payable.

The Caſes *Venn* and *Clerk*, *Price* and *Abington*, went on the ſame Reaſon.

The Caſe of *Hall* and *Perry* ſeems to be parallel to that of *Bruen* and *Bruen*, 2 *Ver.* 439. where the Father having by Marriage Settlement created a Term to raiſe 3000 *l.* for his Daughters Portions, having but one Daughter, deviſes his Lands to Truſtees, on Truſt to make good his Wife's Portion, and raiſe the 3000 *l.* in 12 Months after Death of him and his Wife; the Daughter dies within the Year, as appears, *Eq. Abr.* 267. (though not taken Notice of by Mr. *Vernon*) and ſo the Portion was not raiſed. So in the Caſe of *Hall* and *Terry*, the Grandaughter dying before the Year, the Time appointed for raiſing it, it was not payable.

But even in Wills or Settlements, if the Money deviſed or directed to be raiſed be actually veſted, and the Intereſt fix'd in the Party, it is to be raiſed though the Party die before the Time limited for the Payment.

Therefore Mr. *Bootle* made the right Diſtinction, whether this 50 *l.* to *Margaret* was charged or veſted in her, or not? For if it be a preſent Charge by the Will, and the Intereſt veſted in her, it muſt belong to her Adminiſtrator, and conſequently to the Plaintiff in Equity.

Earl of Rivers and *Earl of Darby*, 2 *Ver.* 72. 2 *Vent.* — Land was limited to *A.* for Life, then to his Wife for Life; Remainder to his firſt and other Sons in Tail Male; Remainder to Truſtees in Fee; provided if no Iſſue Male, to raiſe out of Profits 10000 *l.* for his Daughter, who by Will at 17

diſpoſes it to her Mother. Decreed to Deviſee, becauſe it was an Intereſt veſted in the Daughter, though ſhe died under Age.

So where Land was deviſed to *A.* for Life, Remainder to *B.* in Fee, he paying 400 *l.* whereof 200 *l.* to be at Diſpoſal of Wife by Will as ſhe ſhould think fit; this being an abſolute Diſpoſition to the Wife, though ſhe made no Will, ſhould go to her Adminiſtrator. 2 *Vern.* 181. *Robinſon* and *Duſgale.*

But this is a ſtronger Caſe, for here the Defendant takes the Remainder charged with theſe Payments; the ſame Will that veſts the Remainder in him, veſts it ſubject to this Charge, and if he takes, he muſt take it *cum onere.*

It is objected, the Charge does not commence till the Remainder comes in Poſſeſſion, for the Payment is to be out of the Rents. It is true, the Money cannot be demanded till the Defendant can pay it out of the Profits; but it is a preſent Eſtate in *Foy*, and conſequently a preſent Intereſt in *Margaret*, though *Solvend' in futuro.* It cannot be doubted but *Foy* might by Will deviſe his Remainder, but by Statute of Wills no Deviſe can be made but by a Perſon having the Eſtate; and if he had deviſed it, it would have been ſubject to this Charge.

So *Margaret* in her Life might have releaſed this Intereſt, but none can releaſe what he has no preſent Right to. He may releaſe an Intereſt, though it be future or merely poſſible, but cannot releaſe where he has no preſent Right or Intereſt.

And the Court was of Opinion *Foy* was compellable in Equity to pay this 50 *l.* to the Plaintiff; and I delivered the Opinion of the Court to the Effect following:

If a Man by Settlement charges his Lands with the Payment of Portions of Daughters or younger Children, to be

paid at the Age of twenty-one or Marriage, and the Daughters or Child die before the Time limited for Payment, the Portion ſhall not go to the Adminiſtrator of the Daughter, but ſink in the Inheritance for the Benefit of the Heir. *Pawlett* and *Pawlett*, affirmed in the Houſe of Lords. 2 *Vent.* 366. 1 *Vern.* 204, 324.

And there is no Difference between Lands deviſed for Payment of Portions, and where by Settlement. 2 *Vern.* 92. *Smith* and *Smith*, 2 *Vern.* 416.

Another Difference ſettled in Equity is between a Legacy, or Sum of Money veſted before the Death of the Legatee, and where it is not veſted; if the Legatory dies before the Legacy veſted, it ſhall not go to the Executor or Adminiſtrator; but if it be veſted before his Death it ſhall.

And this not only in pecuniary Legacies, as where 100*l.* is given to an Infant at this Age of twenty-one, and where given to be paid at the Age of twenty-one; in the firſt Caſe, if he die before that Age, it ſhall go to the Adminiſtrator, in the other not. *Dav.* 59. *Vide* in Margin. Reſolved 2 *Vent.* 342, 366. *Ch. Rep.* 112. 2 *Vern.* 195.

And if deviſed to be paid with Intereſt, that imports it ſhould veſt preſently. *Skin.* 147. 2 *Vern.* 137, 508, 673.

And it is the ſame where Money is directed to be paid out of Land, as in the Caſe of *Earl of Derby* and *Earl Rivers*, 2 *Vern.* 72. cited by Mr. *Ord.* By a Marriage Settlement Lands are limited to Husband for Life, to Wife for Life, then to firſt and other Sons, *&c.* provided if no Iſſue Male, and one or more Daughters, Truſtees ſhall ſtand ſeiſed to the Intent the Daughter receive out of the Profits 10000*l.* and 100*l.* for Maintenance, without limiting Time of Payment; the Daughter at ſeventeen diſpoſes of it by Will; and held it was a veſted Intereſt in the Daughter, and well diſpoſed. *Trin.* 1688.

But 2 *Vern. Bruen* and *Bruen*, by Marriage Settlement a Term is created to raiſe 3000 *l.* for Daughters Portions twelve Months after the Death of Husband and Wife; the Daughter dies at the Age of five Years, the Portion ſhall not be raiſed; for the Reaſon given in *Vern.* is, that being to be raiſed out of Land, ſhe could not have Occaſion for it; but the better Reaſon is, that ſhe dying within twelve Months, the Time wherein it was to be raiſed, it was not veſted. *Paſch.* 1702. *Eq. Abr.* 367.

The Diſtinction therefore was well taken, whether the 50*l.* was veſted, or not veſted in *Margaret.*

And we think it was veſted;

For firſt, The Remainder veſted immediately by Death of the Teſtator; for *Foy* might ſell or deviſe it, and conſequently the 500 *l.* is veſted in thoſe to whom it was payable; for if he had ſold it, it muſt be ſubject to the Charge laid upon it by the Teſtator.

Secondly, The Eſtate and the Charge upon it paſs together, and the Deviſee muſt take it *cum onere*; for as it was the Teſtator's Intent *Foy* ſhould have the Eſtate, it was as much his Intent he ſhould pay the Money out of it when he had it.

It was ſaid to be a Condition, (*paying* making a Condition in the Will) but that ſtrongly ſhews the Teſtator's Intent was, that *Foy* ſhould not have it unleſs he paid that Money.

The Caſes cited fall under Diſtinctions before mentioned.

The Caſe of *Carter* and *Bletſo*, 2 *Vern.* 617. was, A Deviſe to his Son and his Heirs, but his Will was, his Son ſhould pay 200 *l.* to his Daughter at her Age of twenty-one; ſhe died before, and conſequently not payable, by both

Rules

Rules laid down; it was not given till twenty-one, and Portion payable out of Land ſhall not be raiſed, if the Party to whom payable die before the Time limited for the Payment of it.

In the Caſe of *Van* and *Clark*, the Deviſe was to Truſtees to put out at Intereſt till the Grandaughter of her Siſter attained the Age of eighteen, or married, and then to pay it to her; ſo that nothing could veſt in the Grandaughter till that Contingency happened, and ſhe dying before, the Portion could not poſſibly veſt.

In the Caſe of *Prouſe* and *Addiſon* likewiſe the Truſt was to pay at the Age of twenty-one, or Marriage, and conſequently the Legatee dying before that Age, or Marriage, the Truſtees were not required to pay the Money.

The Caſe of *Hall* and *Terry* went upon the ſame Reaſon; the Truſtees were not required to pay till twelve Months after the Eſtate came to them, which was after the Mother's Death, and conſequently the Legatee dying before, the Truſtees could not pay; and the Expreſſion, that the Deviſe and Time of Payment commenced together, imports that the Deviſe had no Effect, and could not veſt an Intereſt till the Time of Payment came upon which the Truſtee was to pay.

There was a Caſe of the like Nature *inter Gordon* and *Raines*, 5 *Geo.* 2. *Rep. of Chan. Ca.* 41. where a Term of Years was veſted in Truſtees, on Truſt that if no Son of the Marriage, and there be one or more Daughters, who ſhall attain the Age of ſixteen, the Truſtees, after the Death of *H. Raines* and his Wife, ſhall raiſe 6000*l.* to be paid at the Age of ſixteen, in caſe *H. Raines* and his Wife be then dead; there was a Daughter who lived to the Age of twenty-two, but died in the Life of her Father and Mother *H. Raines* and his Wife. It was held by Lord Chancellor *King*, aſſiſted by Lord *Raymond* and *Jekyl*, that the Husband and Adminiſtrator of this Daughter was not intitled to the 6000*l.*

which was not payable but upon a Contingency which never happened; for all the Caſes, when the Portion or Money to be paid were looked upon to be veſted, are where the Money was not payable upon a Contingency, or the Contingency had happened.

But in the preſent Caſe, neither the Remainder was limited upon a Contingency, nor the Legacy of 50 *l.* payable to *Margaret* upon any Contingency, but the Remainder veſted immediately upon the Death of the Teſtator, and conſequently the 50 *l.* payable out of the Profits of that Eſtate as ſoon as it came in Poſſeſſion.

Brotherow, Widow of J. Brotherow, verſus *Hood.* In Scacc'. Caſe 280.

BILL for a Legacy of 60 *l.* deviſed to her by Will of *Joſ. Mills* 1715. when ſhe ſhould attain the Age of twenty-one; ſhe attained that Age 14 *Feb.* 1734. but before had married one *Brotherow*, who was dead, and the Bill was againſt the Defendant as Executor of the Teſtator, who denied Aſſets. But it was objected, the Executor or Adminiſtrator of the Husband ought to have been a Party, for the Right veſted in the Husband, who might releaſe it.

Husband dying before Legacy was payable to his Wife, it is in the Nature of a *Choſe in Action*, which will ſurvive to the Wife.

Sed non allocatur; for the Husband dying before the Legacy was payable, it was in the Nature of a *Choſe in Action*, which would ſurvive to the Wife; and although the Husband might poſſibly have releaſed it, yet that ſhall not be preſumed; and if it had been ſo, the Defendant, to whom the Releaſe muſt be given, might make it appear.

Caſe 281. *Henry Harvy and Catherine ux', Daughter of Sir Thomas Aſton, and Anne Clifton, Widow, another Daughter,* verſus *Dame Catherine his Relict, and Sir Thomas Aſton his Son and Heir, Henry Wright and Andrew Kenrick.* In Canc'.

A Condition precedent, *viz.* (Marriage with Conſent of Mother or others) annexed to a Portion or Legacy, not to be diſpenſed with in a Court of Equity, though in the Caſe of Daughters Fortunes.

ON an Appeal from a Decree of his Honour the Maſter of the Rolls, the Caſe was this:

Sir *Thomas Aſton* having Iſſue a Son and three Daughters, by Leaſe and Releaſe 27 & 28 *May* 1712. Sir *Thomas Aſton* makes a voluntary Settlement to the Uſe of himſelf for Life, then as to Part to his Wife for Life, then to his Son for Life, and after to his firſt and other Sons in Tail Male; then to the Uſe of Sir *Robert Burdet* and Serjeant *Cheſhyre* for 1000 Years; which Term is afterwards made to commence immediately on the Deceaſe of Sir *Thomas Aſton*, and was, *inter al'*,

On Truſt, that if Sir *Thomas* ſhould have one or more Sons living at his Death, and alſo more than one Daughter then living, or born after, or married in his Life with his Conſent, the Truſtees ſhould raiſe for Portion of every ſuch Daughter 2000 *l.* and ſhould pay to her ſuch Sum at the Time of her Marriage with ſuch Conſent as aforeſaid, *i. e.* with Conſent of her Mother, if living and not remarried; if dead, or married to a ſecond Husband, with Conſent of the Truſtees Sir *Robert Burdet* and Serjeant *Cheſhire*, or the Survivor of them, his Executors, Adminiſtrators or Aſſigns;

And alſo on Truſt to raiſe for the Maintenance of ſuch Daughters yearly the Sum of 50 *l.* till their Age of eighteen,

and after 70 *l. per annum* till their Marriage with ſuch Conſent during the Life of the Mother, but if ſhe died or married again, 100 *l. per annum* till their Marriage or Death.

Provided, that if the ſaid Portions and Maintenances ſhould be raiſed or ſecured by thoſe in Remainder, or if there ſhould be no Daughters or younger Sons, or if all the Daughters die before Marriage, and the younger Sons before Age of twenty-four, and the Expences of Truſtees be ſatisfied, the Term ſhould ceaſe.

By Will 26 *Feb.* 1722. Sir *Thomas Aſton* taking Notice of the ſaid Term and Truſts, and the Purchaſe of other Lands, deviſes thoſe Eſtates to the Defendant *H. Wright* and *Andrew Kenrick* for 500 Years, on Truſt by Mortgage or Sale to raiſe the Sums of 3100 *l.* and 1000 *l.* (Monies he had applied out of his perſonal Eſtate towards ſuch Purchaſe) and pay them to his Executors, which ſhould be accounted as Part of his perſonal Eſtate; then wills, that out of the Monies to be raiſed by ſuch Mortgage, and out of the Monies due to him on Mortgages, Bonds, Notes or other Securities, or in Hands of Goldſmiths, Bailiffs, Agents, or due for Rent, there ſhould be paid to each of his Daughters unmarried and unprovided for at his Deceaſe, 2000 *l.* as an Augmentation of their Fortunes provided for them by the ſaid Indentures, to be paid at ſuch Times, and ſubject to ſuch Conditions, Proviſoes, Limitations and Agreements, as their original Portions are in the ſaid Indenture made ſubject and liable to.

By Codicil he directs the Term of 1000 Years limited to Sir *Ro. B.* and Serjeant *Cheſhire*, to commence immediately on his own Deceaſe, and adds other Eſtates to the ſaid Term for the better Raiſing his Daughters Portions, as therein appointed to be raiſed and paid; and limits his Eſtate in *Cheſhire* to Serjeant *Cheſhire*, till his Sons attained the Age of 25 Years, on Truſt to raiſe Proviſions for his Sons, and to apply the Reſidue of the Profits towards Raiſing his Daughters Portions by the ſaid Indenture, as they are by the ſaid Indenture appointed to be raiſed and paid.

16 *Jan.*

16 *Jan.* 1724 Sir *Thomas A.* died leaving a Son and three Daughters; *Paſch.* 1725 the Daughters exhibit a Bill, praying the Will might be proved, the Truſts executed, and Directions for Execution of Truſt.

6 *Dec.* 1725 Maſter of the Rolls decreed that the Settlement, Will and Codicil were duly proved; that the Truſts ought to be performed; that the Truſtees ſhould raiſe the Maintenance, and when Portions became due ſhould apply for further Directions.

Plaintiff married *Catherine*, and *Clifton* married *Anne*, now his Widow, both without Mother's Conſent, and in *Trin.* 1734 exhibit Bill of Revivor for Payment of the Portions, which by Order 7 *Nov.* 1734 ſtood revived.

And Dame *Catherine A.* in her Anſwer to it inſiſts, that Mr. *Harvey* and his Wife were acquainted before Marriage with the Terms on which the Proviſion for Daughters was made, and that if they married without Conſent they could not have his Wife's Portion.

That the Marriage was againſt her Conſent, and ſhe refuſed Conſent, becauſe *Harvey* had no Eſtate real or perſonal, to make a ſuitable Settlement for Wife or Children, nor was any propoſed, ſo that ſhe could not in Juſtice or Conſcience conſent.

5 *Nov.* 1736 it was decreed, that the Plaintiffs were intitled to their original Portions as well as to the additional Portions given by the Will, and Intereſt for the ſame from the Time of their Marriage.

On this Caſe, the Portions provided by the Settlement and by the Will have properly been conſidered diſtinctly, and I ſhall likewiſe conſider them diſtinctly.

Firſt Queſtion is, Whether, when a Father by a voluntary Settlement of his real Eſtate veſts a Term of Years in Tru-

ſtees, on Truſt to raiſe 2000 *l.* apiece for his Daughters Portions, to be paid at the Time of their Marriage with their Mother's Conſent, and a yearly Maintenance till Marriage with ſuch Conſent, it is proper for a Court of Equity to compel the Truſtees to pay ſuch Portion on the Daughter's Marriage, though her Marriage was without the Conſent required?

Secondly, Whether, if the Portion by the Settlement ought not to be paid, there will not be a Difference in reſpect to the Augmentation of the Portion given by the Will?

In the Conſideration of theſe Queſtions it may not be amiſs to lay out of the Caſe what ſeems uncontroverted on all Sides.

And firſt, That if a Portion be given on Conſideration that the Daughter ſhould never marry, I think ſuch a Condition ſhould be rejected as repugnant to the original Inſtitution of the Creation of Mankind; in the Caſe of *Fry* and *Porter*, Ch. Baron *Hale* takes Notice that the Condition did not reſtrain Marriage, though it required Conſent.

Secondly, If a pecuniary Legacy be given on Conſideration that the Legatee ſhall not marry without Conſent, and no Deviſe over; the Condition would be held ineffectual in this Court.

So it was held in the Caſe of Sir *H. Bellaſis* ver. Sir *W. Ermine*, 1 *Cha. Ca.* 22.

So *Flemyne* and *Waldgrave*, 1 *Cha. Ca.* 58.

So in the Caſe of *Jerveis* and *Duke*, 1 *Ver.* 19.

So *Garret* and *Pretty*, 2 *Ver.* 293. and in many other Caſes; ſo that it ſeems a Point eſtabliſhed in this Court.

And the true Reaſon of thoſe Caſes ſeems to be what is intimated by Ch. Baron *Hale* in the Caſe of *Fry* and *Porter*,

1 *Mod.* 308. to keep an Uniformity between this Court and the Eccleſiaſtical Court; for ſince pecuniary Legacies may be ſued for in the Eccleſiaſtical Court where ſuch Condition would be held void, it would be ſtrange the Legatee ſuing in the Eccleſiaſtical Court ſhould recover his Legacy, but ſuing here ſhould be bar'd.

And it is probable the like Determination might be made in this Court, to keep up an Uniformity in its own Decrees, if a Legacy ſhould be given out of Land in the ſame Manner, tho' the Eccleſiaſtical Court could have no Cognizance in that Caſe, but it might appear incongruous the ſame Words ſhould have a different Conſtruction in reſpect to a Legacy out of Lands, from what they would have in Caſe of a Money Legacy, when there is no eſſential Difference in the Equity or Reaſon of the Thing.

But on the Contrary it is as fully eſtabliſhed in this Court, that where a pecuniary Legacy is given to a ſingle Woman, on Condition that ſhe do not marry without Conſent, and if ſhe do ſo, that then the Money ſhall go to another Perſon, if ſhe marry without Conſent required, ſhe ſhall loſe her Legacy.

This Difference was agreed in the Caſe of Sir *H. Bellaſſis* and Sir *W. Ermine.*

In the Caſe of *Wiſeman* and *Forſter*, 2 *Cha. Rep.* 23.

In the Caſe of *Sutton* and *Jewks*, 2 *Cha. Rep.* 95. *Jerveis* and *Duke*, 1 *Ver.* 19.

In the Caſe of *Strutton* and *Grimes*, 2 *Vern.* and many other Caſes, which it is needleſs to enumerate, ſince it is agreed, and no Caſe to the contrary.

But the Eccleſiaſtical Court makes no Difference where there is a Deviſe over, and where not; yet Courts of Equity have always made a Difference; which ſhews, that where the Intent of the Party is clear and expreſs, that the

Legatee ſhall not have the Legacy unleſs ſhe marry with Conſent, the Court of Equity hath not followed the Rule of the Eccleſiaſtical Court.

And as this Court allows the Condition of not marrying without Conſent, where the Intention of the Donor or Deviſor is apparent it ſhould be complied with, by deviſing it over if it was not; ſo it is more ſtrongly allowed where the Settlement is of Lands on ſuch Condition; as appears by the Caſe of *Fry* and *Porter*.

And much more ſo where ſuch Condition is made a Condition precedent; as was determined in the Caſe of *Bertie* and *Lord Falkland*.

Theſe Things being premiſed, and I think agreed on all Hands, I ſhall conſider how far the preſent Caſe agrees or diſagrees with the Rules and Grounds upon which the Determinations in the Points mentioned have been made.

Now in the preſent Caſe it ſeems plain, that the Marriage with Conſent is made a Condition precedent to the Payment of the Portions provided by Sir *Thomas A.* for his Daughters by the Settlement 1712, for the 2000 *l.* is to be paid to each Daughter at the Time of Marriage with ſuch Conſent as aforeſaid, ſo that ſuch Marriage muſt neceſſarily precede the Payment of the Money.

It is admitted by the Counſel for Plaintiffs, that the Marriage muſt precede, and that is the principal Thing regarded, and the Conſent is only a Circumſtance that may well be diſpenſed with.

But upon Conſideration of the whole Settlement, it ſeems Evident to me, that the Marriage with Conſent, was the principal Thing in View of Sir *Thomas A.* for it is repeated in every Branch of the Truſt, if there was no Son, and two Daughters, the Portion of youngeſt was to be paid on Marriage with Conſent; ſo if more than two Daughters; ſo if Sons and two or more Daughters; ſo that the Conſent required

was

was as much deſigned by Sir *Thomas A.* as their Marriage, to intitle the Daughters to their Portions.

It is a known Rule, where a Condition precedent copulative precedes an Eſtate or Truſt, the Whole muſt be performed before the Eſtate or Truſt can ariſe; the Caſe of Sir *Cæſar Wood* alias *Creamer* ver. *Duke of Southampton*, *Ca. P.* 83. is an Authority expreſs in this Point; Sir *H. Wood*, on Marriage of his Daughter with the Duke, made a Settlement on Truſt to raiſe Maintenance for his Daughter till Marriage or Age of 17; and if his Daughter after her Age of 16 ſhould marry and have Iſſue Male by the Duke, then for Settlement on the Iſſue Male, and for a better Proviſion for the Duke and his Wife, on Truſt for the Duke and his Wife for their Lives, and after to their firſt and other Sons in Tail Male. She married before the Age of 16, and after that Age died without Iſſue; the Queſtion was, Whether the Duke ſhould not have the Eſtate for his Life? And at firſt decreed for him, but that Decree was reverſed in the Houſe of Lords; for it was ſaid the Words were plain and certain, that there muſt not only be a Marriage, but Iſſue Male; and when a Condition copulative, conſiſting of ſeveral Branches, is made precedent to any Uſe or Truſt, the intire Condition muſt be performed, elſe the Uſe or Truſt can never ariſe, or take Place; and it would be Violence to break the Condition into two Parts, which is but one according to the plain and natural Senſe of it.

The ſame Determination was made afterwards in this Court *inter* Sir *Cæſar Wood* and *W. Webb*, *Pa. Ca.* 87. and affirmed in the Houſe of Lords.

So that, according to the plain Rules of Conſtruction, the Marriage with Conſent, which is one intire Condition, muſt be complied with in the Whole, before the Portion of the Daughter can be payable, if the Intent of Sir *Thomas A.* can take place.

This is ſtill more evident, if poſſible, in that Sir *Thomas A.* hath directed Maintenance for his Daughters till ſuch Marriage

with Conſent; now it could never be Sir *Thomas A.*'s Meaning, that the Maintenance ſhould continue after the Portions paid; but if the Portions be payable on Marriage, though without Conſent, and the Maintenance be paid till Marriage with Conſent, they muſt have the Maintenance and Intereſt of Portion at the ſame Time; this plainly ſhews Sir *Thomas* intended the Portions ſhould not be paid till the Maintenance ceaſed, that is, till Marriage with Conſent required.

It was obſerved very truly, that in the Proviſo that determines the Truſt, the Words were *If no Daughter, or all die before Marriage, &c.* the Term ſhould ceaſe; but that muſt be intended of ſuch Marriage as before mentioned, the Marriage with Conſent of Mother or Truſtees.

It was likewiſe obſerved, that the Truſt is, if Sir *Thomas* ſhould have two Daughters living at his Death, or who ſhould marry in his Life-Time with his Conſent, the Truſtees ſhould raiſe 2000 *l.* for the Portion of every ſuch Daughter; whence it was inferred, that if the Portions were to be paid only on Marriage with Conſent of Mother or Truſtees, ſuch Daughter as married in Sir *Thomas A.*'s Life with his Conſent, could have no Portion; but I ſee no Ground for ſuch Inference, for ſince 2000 *l.* was to be raiſed for the Portion of every ſuch Daughter who was living at his Death, or married in his Life with his Conſent, and conſequently the Time of Payment on Marriage with Conſent of Mother and Truſtees, muſt extend only to ſuch Daughter as married not with Father's Conſent in his Life.

I am therefore of Opinion, that Marriage with Conſent of Mother or Truſtees, is a Condition precedent, that muſt be performed before the Daughter can be perfectly intitled to the 2000 *l.* to be raiſed by the Truſt of this Settlement;

And that it was the plain and manifeſt Intention of Sir *Thomas A.* that his Daughters ſhould not have the Portions, to be raiſed by this Truſt, paid at their Marriage, unleſs they married with ſuch Conſent as he preſcribes to them.

But the principal Objection is, that if the Intention of Sir *Thomas A.* was ſuch, yet that Intention is not agreeable to the Rules of this Court; for by the Civil Law a Condition not to marry without Conſent of others, is unlawful and void, and that Rule of the Civil Law is adopted into the Determinations of this Court in like Caſes; and the Civil Law makes no Diſtinction between Conditions precedent and ſubſequent, but looks on both as equally unlawful.

The Knowledge of the Civil Law is in many reſpects uſeful, but in Regard to the Determinations of this or other Courts in *Weſtminſter-hall*, *Seldon* ſeems to make a proper Obſervation, *Diſſert. ad Flet. l.* 3. § 5. who after Notice taken of the Prevalency of the Civil Law in this Realm in ſeveral Periods of Time, concludes that it is manifeſt ſome ſort of Uſe of it prevailed in Deciſions that were to be determined by the Law of *England*; not that any thought the Realm ſubject to the Imperial Law, or that the Common Law could receive any Change from it, for all taught the Common Law was to be followed, where it varied from it, or was repugnant to it; but if no expreſs Rule of the Common Law in the Caſe, the Rule of the Civil Law was followed; or if both Laws agreed, the Matter was in ſome Meaſure confirmed or explained by the Words in the Civil Law.

It is plain from what has been before obſerved, in Regard to Condition of not marrying without Conſent, when annex'd to Legacy pecuniary without any Deviſe over, the Rule of the Civil Law is followed; if there be a Deviſe over, the Rule of the Civil Law is rejected.

The preſent Caſe being different from both theſe Extreams, in order to diſcern how far the Reaſon of the Civil Law is applicable to it, it may be proper to conſider ſhortly the Ground upon which this Rule in the Civil Law was founded.

Now as by Statute of Wills 32 *H.* 5. a Man was allowed to deviſe his Lands, ſo as he left a third Part of his Lands held by Knight-Service to deſcend to his Heir;

So by *Lex Faſcidia Legare, jus eſto dum non minus quam quartam partem eo teſtamento hæredes capiant.* Dig. l. 35. tit. 2.

And if leſs was left, it was to be made up a fourth Part, — *tit.* 18. Hence it was ſaid he could deviſe only *uſq; ad quadrantem*, for as he that had the whole Inheritance, was called *hæres, ex aſſe*, as that was divided into 12 Parts, the Legataries could have but nine Parts, and the other three remained to the Heir; and if the Heir was totally diſinherited without juſt Cauſe, the Will was ſet aſide, as *Teſtament' inofficioſum.* Juſt. l. 2. tit. 13.

This fourth Part of the Heir was called *Legitima Portio.*

This *Legitima Portio* being payable on Marriage, when they went into another Family, was endeavoured to be avoided two Ways.

Firſt, By giving it on Condition they ſhould not marry.

Secondly, By preventing their Marriage.

Both were endeavoured to be remedied by the *Lex Julia*, which provided, as Dr. *Strahan* rightly obſerved, *Qui Cælibatûs aut viduitatis Conditionem hæredi Legatariove injunxerit, hæres Legatariuſve eâ conditione liberi ſunto, neq; minus delatam hæreditatem legitimam hâc lege conſequantur.* Goth' de fonte Juris Civilis.

Againſt the Hindrance of the Child's Marriage, it was provided, *Qui liberos, quos in poteſtate habent, injurie prohibuerint ducere Uxores aut nubere*, and by a ſubſequent Law, *qui dotem dare non volunt, per proconſules, præſideſq; provinciarum cogentur*

tur in matrimonio collocato & dotare. Dig. l. 23. tit. 2. lex 19.

The Branch of the *Lex Julia*, which made void Conditions prohibitary of Marriage annexed to a Legacy, mentions only ſuch as prohibited Marriage totally, and extended to Prohibitions to Widows as well as Maidens; but in reſpect to Widows it was ſoon after diſpenſed with; and therefore if a Man gave a Legacy to his Wife on Condition, if ſhe married, it ſhould go to another, *Non dubium eſt quin, ſi nupſerit, cogenda eſt reſtitutio*, ſaith *Gains*. Dig. l. 32. tit. 3. l. 14.

And though ſuch a Condition is mentioned as void, *Si mulieri legatur*. Dig. l. 35. tit. 1. l. 22.

Yet *Gothofred* in his Notes in the Margin asks *quid ſi uxori?* Anſwer, *ſi nupſerit, cogenda eſt*;

And ſaith the Law was abrogated in reſpect of Legacies to a Wife, *Nov.* 22. *ca.* 44. for ſhe muſt chuſe to forbear Marriage, if ſhe would have the Legacy, or to loſe the Legacy, if ſhe would marry.

So *Orph. Leg.* 3 *pt. c.* 17. *ſ.* 9. ſaith, ſuch Condition annexed to a Legacy given to a Virgin is void; but the Civil or rather Canon Law, allows it in a Legacy to a Widow, eſpecially if given by the Husband to his Wife, or Son to his Mother.

Another Evaſion of this Law, was by annexing a Condition not wholly prohibiting Marriage, but requiring to marry *ad arbitrium* or with Conſent of another, whoſe Conſent he knew would not be given.

But this being a mere Evaſion, was look'd upon as equally unlawful, *Reſcindi debet, quod fraudendæ legis gratiâ adſcriptum eſt.* Dig. l. 35. tit. 1. l. 64.

But this was void only *ubi fraus legi facta eſt.* And therefore a Condition not to marry a particular Perſon was

lawful; *ſi legat' ſit, ſi neq; Titio, neq; Seio, neq; Mavio nupſerit, ſi plures deniq; perſonæ comprehenſæ fuerint, ſi cuilibet eor' nupſerit, amitteret legat'*, for total Reſtraint appears not, ſince ſhe may marry any other. *Dig. l.* 35. *tit.* 1. *l.* 63, 64.

So if Condition be not to marry a Merchant Widow, any in *York, &c. Swinb.* 4 *part*, 272, 3.

But ſuppoſe a Legacy be given upon a precedent Fact, that may or may not be done, or to be paid at ſuch a Time as may not come; if the Fact required be not performed, or the Time required never come, by the Civil Law the Legacy is loſt, and can never veſt.

Dig. l. 36. *tit.* 2. *l.* 21, 22. If a Legacy be given *cum pubes erit, cum in familiam nupſerit, cum magiſtratum inierit, &c. niſi tempus conditiove obtigit, neq; res pertinere, neq; dies legati cedere poteſt.*

So *Ulpian* ſaith, *D. l.* 35. *tit.* 1. *l.* 41. *Legata ſub Cond' relicta non ſtatim, ſed cum conditio extiterit, deberi incipiant, ideoq; interim delegari non potuerunt.*

And although where the Condition is certain, if the Legatee die, though the Condition be after performed, when performed the Heir ſhall have it; yet when a Legacy is given upon a Time or Fact precedent, which may never happen, if the Legatary die before, it ſhall veſt in the Heirs.

So *Orph. Leg. pt.* 3. *c.* 17. *ſ.* 11. If Legacy be given at Marriage, or 21, till Time come, or Marriage, Legacy ſhall not veſt.

A Difference is there made, and by *Swinb.* and followed by many Caſes in Law and Equity, *Dig.* 596. *in margine. 2 Vent.* 342. *2 Ver.* 137, 508, 673. where the Time is annexed to the Legacy, and where to the Performance of the Thing given, as at 21, or to be paid at 21.

But in the Caſe of *Yates* and *Fettiplace*, 2 *Vern.* 417. Legacy to be paid at 21, or at 21, *per* Lord Keeper is all one, who ſaid Caſes cited by *Swinb.* and *Godb.* do not warrant the Difference.

But be that as it will, it is plain that by Civil Law a Legacy given on a precedent Contingency is not payable till the Contingency happen.

Hence it appears, that what is ſaid, that the Civil Law makes no Diſtinction between a Condition precedent and ſubſequent, muſt be taken with Allowance.

The Ground of ſaying ſo ſeems to me to be this: All Conditions impoſſible, *legibus interdicta* or *probroſa*, by the Civil Law, are void, and the Legacy is abſolute and without Condition, and conſequently it is not material whether it be precedent or ſubſequent, ſince it is null and void. And it would be ſtrange, when the Law makes a Condition void, and ſaith the Legatory ſhall be diſcharged from the Condition generally, to ſay it ſhall be ſo only where the Condition is ſubſequent, not where it is precedent.

Beſides, every Condition by the Civil Law ſuſpends the Legacy, ſo that tho' it be ſubſequent, it is not as Gifts at Common Law, actually due to the Party, but as was ſaid before *cum Conditio extiterit deberi incipiant, & interim delegari non poſſunt.*

So that the Meaning is, a Condition ſubſequent by the Civil Law is of the Nature of a Condition precedent at Common Law; the Intereſt does not veſt actually, though virtually it does, till the Performance of the Condition, or in negative Conditions till Caution or Security is given for the Performance. *Swinb.* 4 *pt. ſ.* 9.

But I do not obſerve, that in the Caſe cited by the Learned Civilians, where the Legacy is given on a precedent Fact to be performed, that may be performed, or not, that

the Civil Law allows the Legacy to take Effect till the Fact done; and in the Inſtances before given the Civil Law ſaith, the Legacy till Performance ſhall not have Effect.

But it hath been inſiſted, that in many Caſes the Court hath looked upon theſe Conditions as void, and rejected them, and that in Inſtances as ſtrong as the preſent Caſe.

That this Court hath decreed the Legacy where ſuch Condition was ſubſequent, and no Deviſe over, was before obſerved; and that it hath as conſtantly refuſed to decree it, where there was a Deviſe over, is as evident.

The Caſe *Mo.* 857. *Greſly* and *Luther*, was inſiſted on for that Purpoſe; *Aſſumpſit* on Promiſe made by Defendant, in Conſideration the Plaintiff, who was the Mother, would give her Conſent and Furtherance to her Daughter's Marriage with him. *Winch* held it no good Conſideration, becauſe he ſaid, in *Pigot*'s Caſe, it was determined, that a Perſon, to whom a Legacy was given on Condition ſhe married with Conſent of Mother, had Sentence for her Legacy, though pleaded in Bar ſhe did not marry with Conſent of Mother.

This *Pigot*'s Caſe is plainly a Sentence in the Eccleſiaſtical Court, where ſuch Condition is always diſallowed; but in the principal Caſe, the Conſideration was held good by the three other Judges; for Nature, they ſaid, had given Parents the Power of diſpoſing their Children, and in Nature the Children are bound to obey them, as appears by the Report of the ſame Caſe. *Hob.* 10. 1 *Rol. Abr.* S. 9. 1 *Brown.* 18.

But three Caſes have principally been relied on, determined in this Court, as parallel to this.

Firſt, The Caſe of *Fleming* and *Waldgrave*, *Cha. Ca.* 58. which was a Leaſe for Years to Sir *Edward Waldgrave* and Lady, on Truſt to raiſe 900 *l.* for a Feme Sole, in Caſe ſhe did not marry contrary to good Liking of Sir *Edward* and Lady; if ſhe did, then to go to ſuch Perſons as Sir *Edward* and

and Lady, or Survivor ſhould nominate, and for want of Nomination, to Sir *Ed.* and Lady, or Survivor of them; ſhe marries without their Conſent, they die without any Nomination. Bill was preferred by *Sandall*, who had a general Deed of Gift from Lady *W.* who ſurvived, of all her Goods and Chattels, againſt *F. Copledite*, who had Adminiſtration to the Feme and Lady *W.* to have the Benefit of this Leaſe; which was decreed for *Copledite.*

The Caſe is obſcurely reported, but here was no Nomination, for the Gift of all her Goods and Chattels could not amount to make *Sandall* Nominee of this 900*l.*

Here appears no Diſlike of Marriage; for though no Conſent, it does not appear they diſliked it, and the making no Nomination is an Argument they did not, and ſo the Condition not broken; and this might be the Reaſon the Book ſaith, it was not in the Power of the Truſtees to diſpoſe of the Leaſe otherwiſe; though the Book gives no Reaſon for ſuch ſaying; but in the Caſe of *Creagh* and *Wilſon*, 2 *Vern.* 573. it is ſaid, there may be a Difference between marrying without Conſent, and marrying againſt Conſent, according to the Caſe of *Fleming* and *Waldgrave.*

Secondly, The Caſe of *Needham* and *Sir H. Vernon*, reſolved *temp.* Lord *Nottingham*, 62.

The Caſe as reported is, That the Daughter of Lord *Kelmurrey* and the Son of Lord *K.* prefer a Bill to have the Benefit of a Settlement made by Lord *K.* and his Son, whereby Truſtees were to raiſe 1500 apiece for Portions of two Daughters, the Plaintiffs and the Siſters, payable at the Marriage with Conſent of Truſtees or major Part of them, and Maintenance in mean Time; and if Truſtees had raiſed the Portions before they married, they were to improve them to the beſt Advantage, that they might receive the Increaſe for Maintenance till Marriage; and if they married without Conſent, the Portion of her ſo marrying ſhould remain over to another; the Truſtees received the Rents ever ſince the Death of Lord *K.* had raiſed the Portions; and the Plaintiffs being in Years, and intending not to marry, would

lay out their Portions in Purchaſe of Annuities for their larger Maintenance.

Queſtion was, Whether Plaintiffs ought to have Portions at their own Diſpoſal, before they married with Conſent?

And it being admitted, if either died before Marriage, her Portion ſhould go to her Executor or Adminiſtrator, and they offering Security to indemnify Truſtees from Claim by Defendants, who were Infants, Children of *Charles* Lord *K.* to whom Portion after Marriage without Conſent was limited by the Settlement; the Court decreed it on giving ſuch Security.

It is evident this Decree was not conformable to the uſual Courſe of Proceedings in Equity; if one may gueſs upon ſo ſhort and obſcure a Report of the Caſe, it ſeems to be a Decree by Conſent.

The Brother *Robert*, who probably was the eldeſt Son of Lord *K.* and Party to the Settlement and to the Bill, and to whom the Benefit of the Portions, if not paid, would reſult, conſents his two Siſters ſhould have their Portions to lay out in the Purchaſe of Annuities, for their better Support, and ſo admits they would go to the Executor or Adminiſtrator if they died unmarried; or perhaps it might be apprehended by the Parties, that a Sum of Money given to a Daughter to be paid at Marriage, like a Sum demiſed to an Infant to be paid at his Age of 21 Years, was an Intereſt veſted that would go to the Executor or Adminiſtrator, though the Deviſee died before the Time of Payment, and upon ſuch Admiſſion, the Portions were decreed.

But there was ſtill a Difficulty for the Defendants to whom the Money was limited over, in caſe the Daughters married without Conſent of Truſtees; but the Plaintiffs being in Years, and declaring they intended never to marry, and being leſs likely to do ſo, when their Fortunes were turned to Annuities, and offering any Security to indemnify Truſtees againſt the Infants Claim, on ſuch Security which Truſtees

were willing to accept, the Court decreed the Portions to them.

However it is manifeſt, that this Queſtion, Whether the Condition annexed to the Payment of the Portions, that the Daughter; ſhould not marry without Conſent of Truſtees, is good, or not, was not the Thing under the Conſideration of Court; for they decreed the Portions though the Daughters never married; whereas it is agreed on all Sides in the preſent Caſe, that Marriage is neceſſary before the Portions are payable, whether the Mother's Conſent is neceſſary, or not.

But it is moſt evident the Court look'd upon the Condition as good, or there had been no need of Security to indemnify the Truſtees. (What need of ſuch Security, if the Condition was void?)

If it be thought that it may be inferred from this Caſe, that the Portions were an Intereſt veſted in the Daughters, though they died before the Time of Payment; it is to be conſidered, this was only the Admiſſion of the Parties, no Determination of the Court in that Matter.

But I apprehend it is now a ſettled Point in Courts of Equity, that if Lands be ſettled, or a Term of Years created, on Truſt to raiſe Portions for Daughters, to be paid at Age of 21, or Marriage, and the Daughter dies before the Time of Payment, the Portion ſhall not go to the Executor or Adminiſtrator of the Daughter, but ſink in the Eſtate for the Benefit of the Heir.

So it was held *Pawlet* and *Pawlet*, affirmed in the Houſe of Lords, 1 *Ver.* 204, 321. 2 *Ver.* 397.

So *Yates* and *Fettiplace*, 2 *Ver.* 417. *Pre. Cha.* 140.

So *Bruen* and *Bruen*, 2 *Ver.* 439. *Pre. Cha.* 195.

So *Tourney* and *Tourney*, *Pre. Cha.* 290. though the Portion was to be paid within a Year after the Father's Death, with Intereſt from his Death, if the Child died within the Year.

Thirdly, The Caſe *Semphill & Ux'* ver. *Baily & Ux'*, *Pre. Cha.* 562.

Gaskil had three Daughters, *Sarah*, *Elizabeth* and *Rebecca*; the Plaintiff propoſed to marry *Sarah* the Eldeſt; *Gaskil* declared if ſhe married him, he would not give her a Groat, on which the Match broke off; after by Will deviſed his real and perſonal Eſtate to his Executors, to raiſe 35 *l. per Ann.* for Daughter's Maintenance, and if ſhe married with Conſent of Executors, 1000 *l.* in Part of her Portion; then ſettles real Eſtate to her Uſe for Life, and then to firſt and other Sons in Tail; 1000 *l.* to ſecond, and 1000 *l.* to third; ſhe after married the Plaintiff without Conſent of Executors. Decreed the 1000 *l. per* Lord *Lechmere* and Ch. J. *King* in Dutchy, (*Dormer cont'.*)

Firſt, This is a pecuniary Legacy, and no Deviſe over, for the real Eſtate is after deviſed.

Secondly, It was to be paid at Age of 21, or Marriage, which ſeems to ſuperſede what was before mentioned, for the Words are poſitive it ſhould then be paid, but no Negative Words it ſhould not, if ſuch Marriage was without Executors Conſent.

Thirdly, What the Court principally relied on, was, That the Expreſſion of Marriage with Conſent of Executors, was previous, yet it was but a looſe inconſiderate way of expreſſing himſelf; Words that are conſtrued to be a Condition, muſt be ſuch as plainly ſhew it was the Intent of the Teſtator the Eſtate or Gift ſhould be conditional; what the Teſtator meant is difficult to ſay; it is ſuppoſed he meant ſhe ſhould not marry the Plaintiff, but he does not ſay ſo; if he meant ſhe ſhould never marry without Executors Conſent, he

he would not have given it at Age of 21, yet the Words are general, not confined to Marriage without Conſent under Age.

Since then it is apparent, that the Money to be raiſed is not payable till their Marriage with Mother's Conſent, which is a Condition precedent to the Payment; ſince even by the Civil Law, if Money be given to be paid at a Time or upon an Act previous to the Payment, nothing becomes due or can be demanded, till the Time incurred or the Act performed; ſince no Caſe appears where ever a Court of Equity decreed Truſtees to pay Portions out of Lands given on a Condition precedent, that the Party ſhould firſt marry with Conſent of Mother; the Matter muſt be conſidered as *res integra*; and upon the beſt Conſideration of it I have been able to make, I am of Opinion that Sir *Thomas A.*'s Daughters are not intitled to their Portions by this Settlement, unleſs on their Marriage with their Mother's Conſent.

And the Reaſons on which I ground my Opinion are;

Firſt, That it is the Right and Liberty of the Subject, who makes a voluntary Diſpoſition of his own Property, to diſpoſe of it in what Manner and upon what Terms and Conditions he pleaſes; this I believe will be univerſally allowed.

Secondly, That it is a fix'd and ſettled Maxim of Law, that if an Eſtate in Land, or Intereſt out of Land, is limited to commence upon a Condition precedent, nothing can veſt or take Effect till the Condition performed.

And this is ſo ſtrong and ſo ſettled a Point, that it holds altho' the previous Act was at firſt impoſſible, or after becomes impoſſible by the Act of God or other Accident, the Eſtate can never veſt. This is *Co. Lit.* 206, 219. and is a Rule ſo well known, that I need not cite Caſes to prove it.

And this being a fix'd Maxim of the Common Law, *Æquitas ſequitur Legem*; it is true in Courts of Equity it has prevailed, and it is reaſonable, that where a Compenſation can be made, Equity will relieve; for ſince it is the clear Intent of the Party, the Eſtate ſhould go to him; ſo when it was limited in Caſe he performed ſuch Condition, if the Performance be prevented by the Act of God, or other Accident, it is highly equitable, if an adequate Recompence can be made to him for whoſe Benefit the Condition was deſigned, that Relief ſhould be given, whereby the whole Intent of the Party may take Effect.

This Relief was heretofore given only on Breach of Conditions ſubſequent, the Court being cautious of extending it to Conditions precedent.

But the Reaſon being in both Caſes the ſame, the Court hath of late Years given Relief in caſe of Conditions precedent as well as ſubſequent.

But where the Matter lies not in Compenſation, as in Conditions not to marry without Conſent, Relief hath never been given, that I have underſtood.

This was in the Caſe of *Bertie & Ux'* ver. *Lord Falkland*, 2 *Ver.* 333. 3 *Ch. Ca.* 189. *Salk.* 231. ſolemnly ſettled on great Deliberation by Lord *Sommers*, Chancellor, aſſiſted by Ch. J. *Holt* and *Treby*, all Perſons of great Eminence and Ability.

Mr. *Cary* by Will 1685 deviſed to Truſtees, on Truſt for Mrs. *Willoughby* his Heir at Law for her Life; and if ſhe married Lord *Guildford* in three Years after his Death, then to her firſt and other Sons of that Marriage in Tail Male; if ſhe did not marry, then to Lord *Falkland* and his Heirs.

Treaty of Marriage was on Foot, ſome Backwardneſs ſeemed on Lord *Guildford*'s Side, ſo three Years elapſed, and no

Marriage ; and after married Mr. *Bertie,* but could not be relieved.

And it was ſaid in that Caſe, that it would not be eaſy to find a Precedent of Relief in a Court of Equity, in caſe of a Condition precedent.

So in the Caſe of *Creagh & Ux'* ver. *Wilſon,* 2 *Ver.* 572. *Eq. Abr.* 111.

A Man deviſed 200 *l.* to his Grandaughter if ſhe continued with his Executor till 21 ; but if taken away by her Father (who was a Papiſt) before that Age, or if ſhe married without Conſent of Executor, then but 10.

On Viſit to her Father with Executor's Conſent, he married her to a Papiſt. Decreed *per* Lord *King* ſhe ſhould have but 10 *l.* for he look'd upon this as a Condition precedent, and Decree of Maſter of the Rolls *cont'* reverſed.

But it was objected, that in the Caſe of *Bertie* and *Lord Falkland,* there was a Deviſe over ; but there does not appear any ſuch in *Creagh* and *Wilſon.*

But what is the Effect of a Deviſe or Limitation over ?

Where a Condition is annexed, not to marry without Conſent, it is a more full and plain Indication of the Teſtator's Intention that Condition ſhould be complied with, if it be limited over, in caſe the Conſent be not, than if no ſuch Limitation over ; becauſe as it is ſaid, there is as full Evidence that the Teſtator intended Lord *Falkland* ſhould have the Eſtate, if Mrs. *W.* did not marry Lord *Guildford,* as there was that her Iſſue ſhould have, if ſhe did marry him. Now if the Words of the Settlement ſhew as plainly that Sir *Thomas A.* meant his Daughters ſhould not have the 2000 *l.* apiece to be raiſed by the Settlement, where is the Difference if the Money had been given away to another ?

In the Caſe of *Fry* and *Porter*, 1 *Mod.* 308. Ch. Baron *Hale* ſaith, it is urged there ſhould be no Relief, becauſe there is a Limitation over; but that I ſhall not go upon, there have been many Reliefs in ſuch Caſes, but I think none in this; both Parties are in equal Degree to Deviſor; it is a voluntary Settlement, ſince Intent is as expreſs that the Perſon to whom limited ſhould have it, if Condition not performed, as the firſt ſhould, if it be; I think Conſtruction ſhould be made to comply with the Intention of the Party.

Now in the preſent Caſe the Settlement expreſly provides, That if any Daughter die before ſhe marry with ſuch Conſent as aforeſaid, the Sum intended for her Portion ſhall ceaſe, and the Eſtate be exonerated therefrom; or if raiſed, ſhall be paid to ſuch Perſon to whom the Remainder or Reverſion ſhall belong.

This ſeems to me equally ſtrong as if he had ſaid, it ſhall be paid to *J. S.* eſpecially if it be conſidered, that the Money doth not yet belong to the Daughter; where a Legacy is given to another, defeazable upon Marriage without Conſent, there it may be proper to take the Money from her to whom it was firſt given, and veſt it in another, in order to ſhew the fix'd and determinate Purpoſe of the Teſtator; for if it be not limited over, the Mention of Marriage with Conſent of Truſtees, Executors, or any other, looks rather like Advice, Recommendation or Requeſt to do ſo, than any Reſolution that ſhe ſhould loſe her Legacy if ſhe did not; but where it is upon a Condition precedent, the Intereſt is not veſted, and conſequently cannot be taken from any in whom it never attached, and transferred to another; for as the Rule of the Civil Law expreſſes it, *Cum conditio extiterit, tunc deberi incipiunt, & interim delegari non poſſunt.* Therefore in ſuch Caſes it ſeems more proper to ſay, the Portion ſhall not be raiſed, or ceaſe, which was indeed Sir *Thomas A.*'s Intention, and not to give it from his Heir to another; this is what a Court of Equity would direct in like Caſe, as appears by Lord *Pawlet*'s and the other Caſes mentioned, and argues Sir *Thomas A.* meant the ſame Thing; and therefore

fore the Rule, *expreſſio eor' quæ tacite inſunt, nihil operatur*, I think not applicable to the preſent Caſe.

A third Reaſon, which influences me to this Opinion, is, that it is moſt agreeable to the Rules of Equity, to direct the Execution of the Truſt according to the Intent of him who placed the Truſt in him; it is ſaid a Truſt is conſtrued favourably; and it is true, it is conſtrued with as much Advantage as may be to make good and anſwer the Intent and Deſign of the Party; but it is conſtrued ſtrictly with regard to the Execution of the Truſt; and therefore it would be a ſtrange Thing, when the Truſt directs the Truſtees to pay the Money at the Time of the Daughter's Marriage with her Mother's Conſent, that the Court ſhould direct them to pay the Money before that Time.

Nothing could juſtify a Court of Conſcience to decree Truſtees to act ſo contrary to the expreſs Words and Deſign of him that intruſted them, unleſs it were that the Condition of marrying with Conſent of Mother or Truſtees, is, as it has been ſuggeſted, an unſufferable Reſtraint on young Women, which encourages a vicious Courſe of Life, is a wanton Exerciſe of Power in a Parent, to ſubject his Children to the Arbitrary Controul of others in their Marriage, not only of their Mother, but of Eſtrangers, Executors, Adminiſtrators and Aſſigns.

In caſe the Condition was chargeable with ſuch pernicious Conſequences, I ſhould think it deſirable the Legiſlature ſhould ſuppreſs it.

Fourthly, But it is an Argument of no ſmall Weight in my Opinion, that the Reſtraint in the preſent Caſe, is not only Lawful, but Prudent and Reaſonable, and no Conſequence more likely to enſue from it, than the Hindrance of an inconſiderate or imprudent Marriage.

By the *Roman* Law, the Marriage was null, if made without the Father's Conſent, *nuptiæ conſiſtere non poſſunt,*

niſi conſentiunt omnes in quorum poteſtate ſunt. Dig. l. 23. tit. 2. l. 2.

Hence *Grotius* obſerves ſome went ſo far as to think the Father's Conſent neceſſary by the Law of Nature, to the Validity of the Marriage, *Parentum conſenſum ad validitatem conjugii quaſi naturaliter quidam requirunt*; but that is going too far.

But *Grotius* agrees the proper Rule, *filiorum officio conveniens eſſe, ut parentum conſenſum impetrant, plene concedimus niſi manifeſte iniqua ſit parentum voluntas.* Gro. de jure B. & P. l. 2. ca. 5. ſ. 10.

So *Puff'*: *Officium pietatis & reverentiæ requirit, ut & conſilium parentum adhibeant liberi, nec ipſor' voluntati reluctentur.* L. 6. ca. 2. ſ. — p. 635.

By the Cuſtom of *London*, a Daughter loſes her Orphanage Share of her Father's perſonal Eſtate, if ſhe marries without his Conſent, unleſs he be reconciled to it before his Death. Reſolved *Foden* and *Howlet*, 1 *Ver.*

And it is the conſtant Declaration of Judges of the Law, and in Courts of Equity, that Marriage with the Parents Conſent, is a Piece of Obedience Children owe by Nature to their Parents.

Nor is this Obſequiouſneſs leſs due to the Mother than the Father, though the Authority and Power of the Father is greater.

By the Civil Law the Father might devolve the Care of his Daughter's Marriage to the Mother, *ſi in arbitrio matris pater eſſe voluerit, cui nuptum communis filia collocaretur.* Dig. l. 32. tit. 2. ſ. 62.

And thoſe who argue againſt the Nullity of the Marriage by the Law of Nature, if made without the Father's Conſent, inſiſt that the Mother's Conſent ſhould be equally ne-

ceſſary with the Father's; for in Nature they ſay, *Omnibus ex æquo parentibus idem honos habeatur.* Dig. l. 32. tit. 2. not. ad ſ. 35.

It was on this argued, that the Promiſe to the Mother for her Conſent, and Furtherance of the Daughter's Marriage, was held a good Conſideration in the Caſe. *Mo.* 857. *Greſly* and *Luther.*

And if the Father may require his Wife's Care in the Marriage of his Daughter, why not a Friend's, as here, if his Wife died, or ſhould marry again, whereby ſhe might be leſs fit for ſuch a Truſt?

Why may not a Man confide, that his Friend would take Care to make no Executor or Aſſignee but ſuch he could rely on, in caſe his next of Kin (who would be his Adminiſtrator) was not ſo proper for the Truſt?

And as to the Suppoſition, That ſuch a Truſtee may act out of Intereſt, or for By-ends, and ſo refuſe Conſent without any Ground, ſuch Proceeding would ſurely be a Breach of Truſt, which I doubt not but this Court may find Means to remedy, as well as in Caſe of other Breaches of Truſt.

But the Condition in this Caſe is the more reaſonable, ſince here is a competent Maintenance provided by this Settlement for the Daughter till their Marriage with ſuch Conſent as required; ſo that they are not left deſtitute of Subſiſtence, although the 2000 *l.* deſigned in lieu of that Marriage, ſhould not be received by them, they have 70 *l. per annum,* and after the Death or ſecond Marriage of their Mother, 100 *l. per annum* till married with Conſent, which is equivalent to the Intereſt of that Portion; which ſeems deſigned rather as an Augmentation of their Fortunes, to encourage them not to marry without the Mother's Conſent.

So that what is required, that they ſhould marry with Mother's Conſent, is not only a lawful, but what ſeems to me a prudent and reaſonable Reſtraint; and conſequently I

am of Opinion the Daughters are not intitled to the 2000*l.* to be raiſed by this Settlement until the Time of their Marriage with ſuch Conſent.

The Schoolmen diſtinguiſh between the Pain of Senſe, and the Pain of Loſs; but the *Pœna damni* is but improperly called a Penalty, and yet that is all the Penalty in the preſent Caſe.

I proceed to conſider the additional Portions given by the Will, and muſt admit ſome Difference between them and thoſe by the Settlement; for the Portions by the Will are to be raiſed out of a perſonal Eſtate, and not as thoſe by the Settlement out of Land; for though a Term of 500 Years is veſted in Mr. *White* and *Kenrick* the Defendants, to raiſe the Sum of 3100*l.* and 1000*l.* by Sale or Mortgage of the Lands included in that Term, yet that was intended to replace thoſe Sums, which had been drawn out of the perſonal Eſtate, toward the Purchaſe of thoſe Lands, and when raiſed were to be paid to his Executors, and be accounted as Part of his perſonal Eſtate; and then the Will directs, That out of the Money ſo to be paid by the Truſtees to his Executors, and out of all the other Monies, Bonds, Bills, Notes, *&c.* there ſhould be paid to ſuch of his Daughters unmarried, and unprovided for at his Deceaſe, 2000*l.* as an Augmentation of their Fortunes provided for them by the ſaid Indenture of Leaſe and Releaſe, which are taken Notice of and recited in the Will;

To be paid at ſuch Times, and ſubject to ſuch Conditions, Proviſoes, Limitations and Agreements, as their original Portions are by the ſaid Indenture ſubject and liable.

Now the Words of the Will muſt import, that this additional 2000 a-piece by the Will muſt be paid as and in like Manner with the 2000*l.* a-piece by the Settlement; and then it is as if he had ſaid, *I give an Augmentation of* 2000*l. to each of my Daughters, when ſhe marries with her Mother's Conſent.*

Or it muſt import, That Sir *Tho. A.* meant to give 2000 *l.* a-piece to his Daughters abſolutely and unconditionally, and then the ſubſequent Words (*to be paid at ſuch Times as the original Portions*) are a Deſignation only of the Time of Payment.

But this laſt Conſtruction cannot be put upon the Will without great Violence to the Words. For firſt, Theſe Words (*to be paid at ſuch Times, ſubject to ſuch Conditions, Limitations and Agreements as the original Portions are liable to*) muſt be rejected as uſeleſs and inſignificant.

*S*econdly, The 2000 *l.* by the Will is meant as an Augmentation of the Portions by the Settlement, and therefore could not be intended to be paid but when the original Portions were ſo, which the Will deſigned to augment.

Thirdly, Here is no expreſs Deviſe or Bequeſt of 2000 *l.* to each Daughter, and then a Time limited for the Payment, as in thoſe Caſes which have been conſtrued to give a preſent Intereſt to the Legatee, though *Solvend' in futuro*; as where 100 *l.* is given to a Child to be paid at full Age, or with Intereſt at his full Age. *Dy.* 59. in Margine. *God. Orph. Leg. c.* 17. *ſ.* 11. 2 *Vent.* 342. 2 *Ver.* 137, 508, 673.

I ſay, admitting the Diſtinction holds in perſonal Legacies, where the Deviſe is to *J. S.* at his full Age, or to be paid at Age, yet in theſe Caſes there is a Deviſe, or Diſpoſition of the Legacy.

But in this Will (as if it was intended to avoid ſuch Conſtruction) there is no Gift or Deviſe of 2000 *l.* to his Daughters in expreſs Terms; but a Direction, that out of his Mortgages, Bonds, Money, *&c.* there ſhould be paid to his Daughters 2000 *l.* at the Time the original Portions are payable, which though it may be as effectual in Point of Operation or Benefit, yet it is different in the Manner of Expreſſion, and is not a direct Gift to the Legatee, which is relied on in

theſe Caſes, as a Reaſon to conſtrue it a preſent Intereſt in the Legatee.

Fourthly, It is provided by the Will, that if the Daughter died before her original Portion becomes payable, the Money ſhall not be paid to her Executor or Adminiſtrator.

But ſuppoſe the Will can admit this Conſtruction, what will be the Conſequence? Will a Court of Equity direct the Payment of the Portion preſently, when the Will directs the Payment at the Time their original Portions become payable, that is, at the Time of the Marriage with the Mother's Conſent?

So that even upon this Conſtruction I do not ſee how the Plaintiff can at preſent be intitled to theſe Portions.

But taking the Will to import, that the Augmentation of the Portions deſigned by the Will ſhall become due to the Daughters, when they marry with the Mother's Conſent, the only Queſtion that will remain is this:

Whether when a Man deviſes 2000 *l.* out of his perſonal Eſtate to his Daughter upon a Condition precedent, that is, upon her Marriage with the Mother's Conſent, it be proper for a Court of Equity to decree the Payment of ſuch Portion on her Marriage without ſuch Conſent?

What one might in Compaſſion wiſh or deſire is not to have Place in a Court of Juſtice; which is not to make Men's Wills, but to compel the Performance of them, according to the true Intent and Meaning of the Teſtator, as far as it can be collected from his Words, and as far as is conſiſtent with the Rules of Law and Conſcience.

Now that it was Sir *Tho. A.*'s real Intention, that his Daughters ſhould have only the Maintenance of 70 *l.* or 100 *l. per annum*, unleſs they married with the Mother's Conſent, and that the 2000 *l.* by the Settlement and 2000 *l.* by the Will ſhould not be paid them, unleſs they did ſo,

ſeems to me evident upon what I have already obſerved; and when by his Codicil he adds all other his Eſtate ſubject to his Wife's Jointure (except his *Cheſhire* Eſtate) to the Term of 1900 Years, veſted in Serjeant *Cheſhire* for the better raiſing his Daughters Portions; by Indenture 1712 he is ſo cautious, that the ſame are therein and thereby appointed to be raiſed and paid; which ſhews it was his fix'd and permament Intention.

And though in the Truſt of the *Cheſhire* Eſtate limited to Serjeant *Cheſhire*, till his Sons are of 25 Years, to raiſe Maintenance for his Sons till that Age, he directs the Reſidue of the Profits to be applied towards Payment of the ſaid Portions for his Daughters, which is a new Truſt; I ſee not how it can be thence inferred, that the Portions ſhould be paid otherwiſe than before directed.

This being Sir *Thomas A.*'s ſettled Intention, why ſhould it not prevail?

The Condition from what I have ſaid appears to me to be lawful.

A Condition precedent to any other perſonal Legacy, muſt be performed before any Intereſt or Title to the Legatee can accrue.

By the Civil Law (as was before ſaid) a Legacy given *cum pubeſcerit, cum in familiam nupſerit, &c. niſi tempus conditiove obtigit, neq; res pertinet neq; dies legati cedere poteſt.* Dig. l. 36. tit. 2. l. 21, 22.

Is there any Inſtance in the Common Law, any Inſtance in this Court to the contrary?

I have not heard any; the only Caſe that hath the Semblance of a Condition precedent, is that of *Semphill & Ux'* ver. *Bailey, Pre. Ch.* 562.

But the two Judges who decreed that Caſe, look'd upon it as a looſe inconſiderate way of ſpeaking, it appeared not he meant it to ſtand as a Condition precedent to his Daughter *Sarah*'s Portion of 1000 *l.* which he meant ſhe ſhould have at her Age of 21, or Marriage, without ſaying ſuch Marriage ſhould be with Conſent; and to another Daughter, the Words were thrown in between the 1000 *l.* given her in Money, and what was ſettled on her in Land.

In the Caſe of *Creagh* and *Wilſon*, which was a perſonal Legacy given on a Condition precedent which was not performed, and therefore not obtained in this Court. 2 *Ver.* 572.

In the Caſe of Limitation over, it is admitted, that a perſonal Legacy given on a Condition not to marry without Conſent, ſhould be loſt if the Condition be broken.

In this Caſe the Reſidue of his perſonal Eſtate, not by him before given and bequeathed, is expreſly given to his Wife, which is equivalent to a Limitation over, if that were neceſſary, where the Condition is precedent and never performed.

In the Caſe of *Creagh* and *Wilſon*, there was no Limitation over.

In the Caſe of *Aſton* and *Aſton*, 2 *Ver.* 452. (which ſeems to be in this very Family) the Limitation over was only to make good the Portions of his other Daughters, if any Deficiency, or otherwiſe of his Sons; and that being a Condition ſubſequent, and thought ſomewhat an hard Caſe, might make Sir *Thomas A.* ſo careful in the preſent, to give his Daughters their Portions upon the like Condition, but to require it ſhould be precedent to the Payment of them.

Fifthly, The only Reaſon why Courts of Equity have come in to allow Legacies given on Condition to be void, if the Legatees marry without Conſent, ſeems to be to keep up a Conformity between the Determinations of this and the Eccleſiaſtical Courts, where ſuch a Legacy would not be defeated

feated though the Condition ſubſequent ſhould be broken, and the Legatee marry without Conſent.

But ſuppoſe the Queſtion in this Caſe was in the Eccleſiaſtical Courts; a pecuniary Legacy is given to be paid to a Daughter when ſhe marries with her Mother's Conſent, will the Eccleſiaſtical Court decree it before ſuch Marriage?

The Difference *Swinb.* 4 *pt. f.* 17. *f.* 308. takes, is where a Legacy is given at a certain Time, and where to be paid at a Time uncertain; for ſo he ſays it is lawful for the Teſtator to do; in the firſt Caſe he ſaith, the Legatee, or if he die, his Executor may demand, and recover the Legacy after the Time is paſt, unleſs the Meaning of the Teſtator be contrary, or it be a perſonal Service that cannot be tranſmitted; but if the Legacy be given after an uncertain Time, the Legatee dying in the mean Time, his Executor or Adminiſtrator cannot demand it, but is utterly excluded; As if a Man gives 100 *l.* when his Daughter ſhall be married, if he die before Marriage of the Teſtator's Daughter, the Lagacy is utterly extinguiſhed; ſo if 100 *l.* given when his Son ſhall die, though it be certain he will die, yet if Legatee die before his Son's Death, the Legacy is extinguiſhed as if it had been conditional. And the principal Cauſe why a Legacy given after another's Death is reputed to be conditional, he ſaith, is becauſe it is not only uncertain when he will die, but whether he will die before the Legatary, and conſequently the Intention of the Teſtator ſeems to be, that the Legacy ſhould not be tranſmiſſible.

And he ſaith it is not material, whether the Uncertainty be joined to the Subſtance of the Bequeſt, or to the Execution of it, for in both Caſes the Legacy is reputed conditional; as if I give *A.* 100 *l.* when my Daughter ſhall marry, or to be paid when my Daughter marries, for if *A.* die before her Marriage, in either Caſe the Executor cannot demand it.

This is agreeable to what Lord *King* ſaith, *Yates* and *Fettiplace*, 2 *Vern.* 417.

The Intent of the Teſtator is the predominant Rule to be obſerved. *Swinb.* 314.

In all Sorts of Legacies, two Effects of Right of Legatee are neceſſary to be conſidered.

Firſt, That which makes him Maſter of the Thing, whether he may demand it, or not, as yet.

Secondly, That which puts him in a Condition to demand it: Of the firſt it is ſaid, the Time is come when the Legacy veſts and becomes due; of the ſecond, the Time is come when he may demand it.

If Legacy is pure without Terms, it is due and may be demanded at Death of Teſtator; if Term preſcribed, it is due at Death of Teſtator, and may be demanded when the Day or Term of Payment comes; if Condition added, both Effects take Place when Condition is performed. *Dom. l.* 4. *tit.* 2. *ſ.* 9. *H.* 7. *f.* 180. 74.

If the Right is veſted, he tranſmits it; if Time not come when Legacy was due, he does not tranſmit it. *Dom. ib.* 8. 10.

Legacies left to an uncertain Time are conditional. *Ibid.* Term of an uncertain Day implies a Condition.

The Lords Chief Juſtices Sir *William Lee* and Sir *John Willes*, who aſſiſted the Lord Chancellor *Hardwicke* upon this Appeal, being of the ſame Opinion, his Lordſhip was pleaſed to concur; and thereupon the Decree of his Honour the Maſter of the Rolls was reverſed.

A TABLE OF The Principal Matters.

F I N I S.