REPORTS
OF
CASES
Adjudged in the COURT of
EXCHEQUER,
In the Years 1655, 1656, 1657, 1658, 1659, and 1660.

And from thence continued to the 21st. Year of the Reign of his late MAJESTY
King Charles II.

The whole Taken and Collected by
Sir *THOMAS HARDRES* Kt.
Late of *Grays-Inn*, and Serjeant at Law to his said Majesty King *Charles* the Second.

LONDON,

Printed by the Assigns of *Rich.* and *Edw. Atkins* Esquires, For *Christopher Wilkinson* at the *Black-Boy* in *Fleet-Street*, *Samuel Heyrick* at *Grays-Inn* Gate in *Holborn*, and *Mary Tonson* at *Grays-Inn* Gate next *Grays-Inn* Lane, 1693.

THE PREFACE.

THE Reader *is here presented with a Collection of* REPORTS, *both in Law and Equity, taken by a Person whose Learning and Industry is very well known to most, if not all, the now Eminent Practisers of the* Law, *and in a Court, of which there are very few Reports Extant; nor must it be omitted in this Advertisement, that most of the Cases here Reported, were adjudged when that Extraordinary Person Sir* Mathew Hale *was Chief Baron of the Court of* Exchequer, *whose Arguments and Reasons the Author seems to have taken a particular Care to preserve for the Benefit of Posterity. What Approbation these Collections have received from Persons, who are best able in themselves, and most proper, by vertue of the Places they hold, to judge of their Worth, appears by the Authority preceding the Title Page.*

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DE

DE
Term. Sanctæ Trin.

Anno Domini 1655. In Scaccario.

John Ernly Esq; Plaintiff, *Henry* Lord *Falkland*, and *Jo. Doddington* Esq; Defendants.

IN an Action upon the Case upon a Promise the Plaintiff declared, That whereas upon the 17th day of February in the year 1653. there was a Communication betwæn the Plaintiff and the Defendants concerning an Horse-race to be run the usual four Mile Course at Burford in Oxfordshire; upon that Agrément it was concluded betwæn the Plaintiff and the Defendants to run it with a Bay Stone-horse against a Gray Stone-horse on Thursday five Wæks next after that day, and betwixt the hours of 2 and 4 in the afternoon. The one Rider to weigh 16 pound more than the other, who was to weigh 10 Stone; and he or they that loss, were to pay the other or others 200 l. when required. And whereas likewise the Defendants in consideration the Plaintiff promised to perform his part of the said Agrément, promised to perform their part thereof; and then alledges that although he performed his part of the said Agrément, and that the Race was run at the time, and that the Parties then weighed the weights agreed on, and that the Plaintiffs Horse won the Race, yet the Defendants refuse to pay the 200 l. and avers a particular request, and lays it to his damage of 300 l. Upon Non assumpsit pleaded, a Verdict passed for the Plaintiff and 200 l. damages given him. And it was now moved in Arrest of Judgment by Hardres for the Defendants. 1. Because the Promise, which is the ground of the Action, is not sufficiently averred, but laid only by way of Recital; viz. Whereas the Defendants promised, &c. which is not a direct (1)

positive Averment, as there ought to be, In 4 Rep. Sir Gilbert Gerrard's Case, it is resolved, that the word sciens is not a direct Averment upon which a Traverse or Issue may be taken: So in 5 Rep. Semain's Case, Præmissorum non ignarus is adjudged to be an insufficient Allegation of Notice, where Notice is necessary; and that it ought to be directly and certainly alledged, 7 H. 7. 2. In Trespass for cutting down and carrying away Trees, resolved that the words prætextu cujus is no certain and positive affirmation of Seisin to make good a Plea; and in 3 H. 7. 11. & 3 Ed. 4. 21. it is ruled that Declarations ought to be certain, because they contain the ground of the Plaintiff's Action. Mich. 43 & 44 Eliz. Garforth and Clerk's Case, in an Action upon the Case for words, the Plaintiff declares that slanderous words were spoken Quorum tenor sequitur in hæc verba; and this was adjudged to be nought after a Verdict, for want of a certain Allegation, though the words were actionable in themselves. Hill. 22 Car. B. R. Entr. Trin. 22 Car. Rot. 173. Waterhouse versus Powel, In an Action upon the Case the Plaintiff alledged that the Defendant inter alia made such a Promise; and this was ruled to be nought, though after Verdict, for want of certainty. So here the word Whereas Quod cum is not a direct and positive Affirmation, but an imperfect speech, and therefore ill. Mich. 24 Car. B. R. Dawson *versus* Parkly, Trespass of Battery and entry into Lands laid with a Quod cum adjudged to be nought; and there it was said to have been often adjudged so. There is a diversity betwixt Matters that are but Conveyances and Inducements to Actions, and Matters that are the very grounds and foundations of Actions. Inducements need not be so precisely alledged; and therefore to say quod cum sit indebitatus, &c. in an Action upon the Case, is well enough: So in 34 H. 6. 4. in Decies tantum the Record in the former Action needs not be recited at large, because it is but a conveyance to the Action: But in a Scire facias upon a Judgment the whole Record must be set forth, 19 H. 6. 49. acc. so here it is well in the Inducement but not in the Promise it self. Trin. 35 Eliz. B. C. Hughs *versus* Robotham in an Action upon the Case upon a Promise, the same difference was taken. See the Case now reported, Cr. Eliz. 302, 303.

2. Every Issue must contain a certain positive affirmative and negative: but in this Case there is no direct affirmative, being laid with a quod cum, and consequently this is a Jeofail not aided: For though an immaterial Issue be aided, as in an Action of Debt upon a Bill, Issue taken upon payment, as in 5 Rep. Nichols Case; yet an unformal Issue, in which there is not

not an affirmative and a negative, is not added; and so it has been often adjudged in the Common Pleas.

Another Exception he took was to the last averment, viz. That the Parties then weighed, and the word then he said must relate to the proximum antecedens which is certain, and not to an uncertain time; as in 28 H. 8. Dyer 14. b. Bowles Case, the word then related there to the Feast and not to the Parties death, tho the Parties death had been last mentioned. And if in this case it be taken to relate to the last certain time that has been mentioned before, then the performance does not appear to have been according to the agreement; for the time last mentioned is four of the Clock in the Afternoon, whereas they ought to weigh the Weights agreed upon at the time of Riding. Wherefore he prayed that Judgment might be arrested.

Atkins pro Quer'. As to the Objection concerning the Relation of the word then, He said it ought to be taken according to Common Exposition, and with respect to the Subject Matter, especially since here it is said that they weighed the Weights agreed upon: To the other Objection he said that the word whereas was certain enough, as the word licet in Det, Plow. Com. 121. Buckleys Case. And in Det it is the usual Form to begin with a quod cum: And so the Presidents are in this Court, which make a Law; V. Plow. Com. 128. New Book of Entr. fol. 2, 4, 12. and the Old Book of Entries.

At another day the Chief Baron gave his Opinion, that no Objection of weight had been made, but only that concerning the quod cum; But he conceiv'd the Promise certainly enough alledged, and said, it was as direct an affirmation as the word licet in the Case afore-mentioned: But that that sway'd with him, he said, was Presidents, of which there are two in the New Book of Entries, and seven in the Old, where a quod cum is used in the very Clause of the Promise. And Saunders in Buckleys Case, Plow. Com. agreed, if Presidents were so; and yet the words in a Formedon in descender ut Filio & hæredi are as material as the words here in question; wherefore Judgment was given pro Quer', Pasch. 39 Eliz. Matthews and Cranes Case upon a Writ of Error in the Exchequer-chamber was cited in Point.

Jones *versus* Williams.

IN Det for Rent upon a Lease for Years, the Plaintiff declares that J. S. upon the 20th of Nov. 13 Car. made a (2)

Lease to the Defendant for 99 years, if three lives should so long live, rendring Rent, and that afterwards the Lessor devised the Reversion to the Plaintiff, & postea scilicet, on the 6th day of Nov. anno 13 Car. dyed; and after a Verdict pro Quer', it was moved in Arrest of Judgment, that the Death of the Lessor was alledged to have happened before the Lease made.

Atkins pro Quer'. The scilicet being repugnant to what goes before is to be rejected as void; for what comes after, it is superfluous, and needed not to have been expressed at all; for the certain day of his death is not material. Vid. Hob. Rep. 79, 171, 213, 284. and Plow. Com. 171. accordant in the Case of Hill and Grange. This is like the Case of an Anglice, 10 Reports, Osburnes Case, which is but expository like this.

Shaftoe pro Defendente. The death of the Lessor here is material, for otherwise the Plaintiff has no cause of Action.

Williams pro Quer' cited three Judgments, in Ejectment, Trover and Covenant, where the scilicet was rejected, because contrary to what went before, and mentioned to be before the Lease made, and before the Trover and the Covenant. Et Adjornatur. Nota, This Case has often been adjudged in the Upper Bench in my time, in Ejectment, Faux Imprisonment, Trover & similibus.

The Attorny-General *versus* Straite.

(3) IN an Information in the Exchequer-chamber by English Bill for small Tythes appertaining to the Rectory of Southwycke in Dorsetshire; The Defendant in his Answer did not admit the Plaintiffs Title, but alledged an Extinguishment of the Tythes by unity of Possession. And the Plaintiff made no proof of the value of the Tythes, nor what Cattle had been depastured in the place, where, &c. And for that cause the Court upon hearing of the Cause, refused to direct a Tryal at Law, because no particular damnification appeared to them, whereon to ground a Decree for the Plaintiff, if the Verdict should pass for him; and thereupon the Bill was dismist.

Hardwycke *versus* Newre.

(4) THE Plaintiff exhibited his Bill as Parson of Haddam in Hartfordshire for predial and other Tythes, and upon

on proof of the quantity and values, had a Decree for the whole; and the Clerks said, That this was the constant practise where a Bill is exhibited for predial Tythes, and the single value only demanded.

Barnehurst *versus* Cabbot.

IN an Action upon the Case upon a Promise of the Defendants to pay to the Plaintiff a Det owing by a third Person, if he would forbear to sue that Person; the Plaintiff averred forbearance hitherto; and after a Verdict for the Plaintiff, Shastoe moved in Arrest of Judgment, because the Plaintiff had not alledged in particular how long he had forborn, that so it might appear to the Court, whether he had forborn a convenient time, or not; and cited Home and Gibbons Case, Pasch. 29 Eliz. B. C. consideration quod differret diem solutionis, adjudged to be naught. And Pasch. 36 Eliz. B. R. Rot. 88. Sackford *cont.* Phillips, where a Promise was laid as this is, and the like averment made, and held to be ill. And in Mich. 21 Jac. which Case began Hill. 18 Jac. Mips *versus* Sir Isack Sidley; In an Action upon such a Promise as this, the Plaintiff averred that he had forborn a twelve-month, and held good; and a diversity was there taken betwixt, where a certain time is alledged, and where not. (5)

Obj. Hob. Rep. 216. Bidwell and Cattons Case.

Resp. There an Action was actually commenced, which is not in our Case.

Mr. Thomas pro Quer'. He cited Hill. 42 Eliz. C.B. Smith and Campions Case. A promise and averment exactly the same with ours, and adjudged good; and two Judgments were cited, Pasch. 9 Jac. The Executors of Hangers Case; forbearance for a quarter, shall be understood a quarter of a year, according to common parlance. Vide Pasch. 37 Eliz. May and Alvarez, reported Cro. Eliz. 387. so here the Plaintiff has averred forbearance hitherto, which is certain enough by computation.

Chief Baron. It appears here upon Record how long time the Plaintiff forbore, and that is as well as if it had been particularly expressed:

Another Exception was taken because the Plaintiff alledged himself to be a Debtor to the Protector without more, and does not say of England, &c. sed non allocatur, &c. Et adjurnatur.

At another day the Chief Baron gave Judgment for the Plaintiff that the consideration was good; Banes Case, 9 Rep. and the averment sufficient; for that it appears upon Record how

how long the forbearance was; and therefore no particular averment necessary, Wymarkes Case, 5 Rep.

Webb *versus* Beale.

(6) IN Trespass for an Assault and Battery, and taking of the Plaintiffs Goods, the Defendant as to the Battery pleaded not guilty, and as to the taking of the Goods justified, for that the Protector and all his Predecessors, Kings and Queens of England, had time out of mind had a Court of Record in such a place, and that in that there was a Plaint entred against the Plaintiff, and that he was attached by his Goods, and because he did not appear and put in Bail that they were forfeited according to the Custom of the Court, to the Lord of the Court. The Plaintiff replyed, De injuria sua propria, &c. generally; to which the Defendant demurred.

Shaftoe pro Quer'. The Replication is good: I agree to what is resolved in Crogates Case, 8 Rep. that when a meer Matter of Record is pleaded, then such a Replication is not good; but here is not a meer Matter of Record, but what is mixt and interwoven with Matter of Fact. Besides, It appears throughout the Pleading that the Court here spoken of, is but a Court-Baron, which is not a Court of Record: He cited 22 Ed. 4. 33. b. Hob. Rep. 1 Edit. 344. Peter and Staffords Case, 34 H. 6. 49. Co. Mag. Charta.

Latch and Windham pro Def. This Exception is unexpected, being against Crogates Case, which was a Case solemnly settled upon consideration of all the Books, which seemed to vary: And the main reason of the Case is, because there ought not to be various and mixt Matters put in issue to a Jury, but some one certain and special Matter according to the Rule of Law there laid down. Wherefore because this Matter ought not to be drawn in question after Crogates Case, they prayed Judgment for the Plaintiff. Et Adjurnatur.

Crosses Case.

(7) EXceptions were taken to the Return of an Outlawry, upon a Writ directed to the Warden of the Cinque-ports, and Lands found in St. Peters, in Thanet, liable to the Outlawry. 1. Except. Because the Outlawry is recited to have issued at the Feast of the Conversion of St. Paul in 1653. without saying in what year of our Lord Christ; sed non allo-

catur;

catur; for 1653. must relate to the year of our Lord, and can have no other intendment. 2. St. Peters is not alledged to be in any County. 3. Lands are found in the particular Occupation of such and such, but the value of every particular parcel is not found, but by the lump, that in toto the Lands are of such a value, sed non allocatur. And for the second Exception it was prayed that it might be amended and made to agree with the Record in the Common Pleas before the Clerk of the Outlawries, this here being but a Transcript of that: And Pollard and Fitz. Williams Case was cited, where it appeared that but 11 were of the Jury, and after Plea and Issue, ruled and ordered to be amended, according to the Record of the Outlawry; and so it was ruled here. Quod nota.

Wales & Ux' *versus* Norton & Ux'.

IN an Action upon the Case for these words, spoken by the Defendants Wife, of the Wife of the Plaintiff, viz. She is a forsworn Whore, and a perjured Whore, and forswore herself at Watermans Hall concerning the Servant of J. S. Upon not guilty pleaded there was a Verdict for the Plaintiff, and Hardres moved in Arrest of Judgment, that the words as here laid are not actionable: He grounded what he said upon 4 Rep. 13. b. In Actions for words, the sense and meaning of the words is to be regarded, and the sense and meaning appears by the occasion of speaking them: sensus verborum è causa dicendi accipiendus est: and they are not favoured so as to be stretcht, 4 Rep. 18. b. He is a perjured old Knave, and that is to be proved by a Stake parting the Lands of H. M. and Mr. W. adjudged not actionable, because the latter words extenuate the former, and shew that the Party meant not judicial Perjury; but yet the words perjured old Knave of themselves are actionable, Mich. 9 Car. B. R. Redhead and Smith: Thou art a cheating and Conny-catching Thief, and didst cheat the Company of Watermen at Newcastle of twenty Nobles; adjudged not actionable, because the word Thief is qualified, and refers only to cheating and cozening, which is not Felony; and the main of the Charge is Cheating: so here the main Charge is Forswearing, which is not actionable; and the speaking of the words was occasioned by something that passed at Watermans Hall, where Perjury cannot be committed. (8)

But the Chief Baron said, That here were several and distinct Clauses, and the words perjured Whore are in a distinct Clause

Clause by themselves, without reference to, or dependance on the rest; and Judgment was given for the Plaintiff.

Wake *versus* Chapman & Ux'.

(9) AN Action upon the Case was brought for these words spoken of the Plaintiff by the Defendants Wife, viz Thou art a cheating Rogue and a Runnagate Rogue; and the Plaintiff laid that he was a Merchant of Cales, &c. Upon not guilty pleaded, the Plaintiff had a Verdict, and Hardres moved in Arrest of Judgment, that the words are not actionable, tho spoken of a Merchant, without a colloquium of his Trade: As to say of a Mayor that he has cozened all his Brethren, or of an Overseer that he has cozened the Poor of their Bread, or of a Lawyer that he has cozened all his Kindred, adjudged not actionable, 13 Car. B. R. Marches Rep. 135. So to say generally that a Man is a Cozener or a Cheater without a colloquium of his Trade or Profession, is not actionable 15 Car. B.R. Pasch. 7 Car. B.C. Alexton and Moor, Trin. 7 Car. B.R. Gees Case, And Judgment was hereupon arrested quousq; &c.

De

De Termino Sancti Michaelis Anno Domini 1655. In Scaccario.

Joan Crawley *versus* Henry Fenne *Esq*; In *Det.*

THE Plaintiff declares, That upon the 18th day of August, 1654. at London, in St. Mary le Bow, in the Ward of Cheap, the Defendant by his Writing Obligatory produced in Court, and bearing that date, did acknowledge himself to owe and be indebted unto the Plaintiff in the Sum of 50 l. to be paid to her or her Assigns at her day of Marriage, or on the 1st day of February, which should first happen; provided that the Plaintiff do make good, justifie and maintain the truth of the Declaration given to the Defendant, under her Hand and Seal, bearing even date with the said Writing Obligatory, and avers, That although she always hath been, and still is ready to make good, justifie and maintain the truth of the said Declaration, yet the Defendant hath, and still doth deny to pay the said Debt, to her Damage of 20 l. To this Declaration, after Oyer of the Writing Obligatory, the Defendant demurs. (1)

Object. The Declaration is vitious, because it does not express the Contents of the Declaration given under the Plaintiffs Hand and Seal, which ought to be set forth, as in case of an Obligation conditioned to perform Covenants in an Indenture, it must appear what the Covenants were.

Resp. 1. The averment in the Declaration, that she was always ready, &c. needed not to have been expressed at all: The Proviso in the Bill is a Condition subsequent and not precedent; it is not that which creates the Debt, the Debt arises by the Plaintiffs Marriage, or the coming of the 1st of February which is past; and being a subsequent Condition, it lies on the Defendants part to alledge a breach of it, for it is for his advantage, 7 Rep. 9. b. Ughtreds Case, Annuity granted for the Exercise of an Office; the Plaintiff in an Action to recover his Annuity, needeth not aver that he has exercised the Office; and the difference there taken, is betwixt a Condition precedent and subsequent, 5 H. 7. 1. Annuity granted till the Grantee be advanced to a Benefice; he needs not shew that he

is not advanced: He quoted 21 Ed. 4. 36. b. 9 H. 6. 15, 16. where a difference is taken betwixt where a Condition is for the advantage of the Obligee and of the Obligor; he for whose advantage it is, must plead it: here he said the Proviso was for the advantage of the Obligor, for it comes after the solvendum; and consequently the Plaintiff not obliged to set it forth.

Resp. 2. The Proviso here limits no certain time for the performance, and consequently the Plaintiff has time to perform it as long as she lives, unless hastned by request, 22 Ed. 4. 43. Annuity pro consilio impendendo; the Defendant must demand Councel, and be denied it, before the Annuity be forfeited; so here the Defendant ought to require the Plaintiff to make good her Declaration, 6 Rep. 31. in Bothies Case, where the Defendants presence is requisite, there the Plaintiff has time during Life, unless hastned by request; as in our Case. But if the Mony had been made payable to the Plaintiff when she should have proved, &c. then it would have been necessary for her to have set it forth; but here she needs not, for the Proviso comes after the solvendum; wherefore the Proviso here being a Condition subsequent, and the Party having time to perform it during her life, unless hastned by request, which she has not been; the averment in the Declaration is meerly Nugatory, and the General Demurrer ill; quære quid inde venit.

Henry Newman *Plaintiff*, *and* Elienor Phillips *Defendant*.

(2) IN Trespass and Ejectment for several Messuages; Not guilty was pleaded as to a third part, and for the two other thirds, the Case upon a Special Verdict was thus; viz. Cuthbert Beeston seized in Fee of the Messuage in question, called the Walnut-tree (inter alia) lying in Southwark, in the County of Surry, holden in Capite, devised two parts of the same to George Ward and his Heirs after the death of his Wife, to the intent and purpose, and upon condition that the Devisee, his Executors or Assigns, shall with the Rents and Profits of the Premises, after the death of his Wife, for ten years, pay several charitable Ases expressed in his Will, and died without Issue; the Wife enters, George Ward the Devisee hath Issue Cuthbert, and dies, his Son being within age; the Wife dies, and then by a Writ directed to the Escheator of Surry, (the Mayor of London for the time being, being Escheator

for in Southwark, by a Patent of 4 Edw. 4. and no other Escheator to meddle there) dated the 18th of Nov. Anno 45 of Eliz. the said Cuthbert Ward is found to be the Queens Ward, and during the time of this Wardship the said Condition is broken. Agnes Phillips Cozen and Heir of the Devisor enters, and dies without Heir, and so found by special Commission under the Great Seal dated the 2d of June, 18 Jac. directed to Ferrand and others; and after by another like Commission dated the 9th of January, 19 Jac. which was afterward quashed by Order of this Court. King James died seized, and the same descended to King Charles, who being seized the 5th of June, 2 Car. leased the same under the Great Seal to Arthur Y. for 41 years from Michaelmas before; the Lessee entred, and by mean Assignments the same comes to the Lessor of the Plaintiff, who entred, and was possessed till ejected by the Defendant.

Hardres pro Quer'. 1. I conceive this to be a good Condition, in point of creation, by virtue of the words, to the intent and purpose, and upon condition, &c. for eâ intentione, or ad effectum will amount to Conditions in a Will, tho not in a Grant, 10 Rep. Mary Portingtons Case, 42. a. and the Books there cited.

2. An Infant and his Estate may well be subject to a Condition, Vid. 8 Rep. Whittinghams Case, 44. b. There diversities are taken betwixt Conditions in Fait and Conditions in Law; betwixt Conditions at Common Law and Conditions by Statute Law; and Conditions at Common Law, which require skill and confidence, and which do not: Infants are bound by all Conditions, whether in Fait or in Law, that require confidence and skill; as when the Office of Parker or Steward descends to an Infant in Fee; and the reason of that comes up to our Case.

3. The Heir is comprehended within the word Assigns, with respect to the performance of Conditions and Covenants, Vid. Plow. Com. Chapman and Daltons Case, 288. and 5 Rep. 96 Goodales Case.

4. The question will be next whether or no the King be well entitled to the Wardship, by virtue of an Office found virtute brevis before the Escheator of the County, when the Mayor of the City of London, for the time being, is Escheator there by Patent? I conceive the Office to be void, and the King not entitled by it; and that the Escheator acted only colore, but not virtute Officii.

For else there would an uncertainty arise, which might endeigle the Court, as not knowing who to give credit to; for

if another Writ had issued to the Mayor of London, as there ought to have done, and upon that there had been found contrary to what has been found before the Escheator of the County; this contrariety would be mischievous; wherefore two separate and distinct Officers are not to be admitted within one and the same Precinct, to avoid contradiction and contrariety in the Execution, Cro. Car. 195. Office of Sheriff granted for Life, and afterwards granted to another, the second Grant is void, and there needs no Scire fac', 4 Rep. 46. In 11 Rep. in Auditor Curles Case, it is said the King cannot make two distinct Officers of one and the same Office; but two Persons may constitute one and the same Officer; for then one cannot act without the other, 6 H. 7. fol. If the King grant an Office to one, and afterwards grant the same Office to another, the second Grant is void for the reason above mentioned. So here, if there cannot be two Officers within the same place, at the same time, then the execution of the Writ in the Case at Bar by one, who is not an Officer there, was void, & coram non Judice. Vide 10 Rep. the Case of the Marshalsey. And if it be a void Office, then the King is not entitled by it; for a void Office, and no Office at all, are one and the same; as in 22 H. 6. 46. b. A void Award, and no Award, are all one; and an Obligation to perform an Award, cannot be forfeited by not performing a void Award. 5 H. 7. 28. b. Insufficient return of a Sheriff, and no return at all, are all one. 7 Ed. 4. 16. b. 11 H. 8. Keilw. 199. held there, That if an Escheator seize by vertue of an insufficient Office, he is a Trespasser and a Disseisor. 3 and 4 Eliz. Dyer 208. b. If in an Office found upon a diem clausit extremum, the certainty of the place, and the name of the County be not express, it is as no Office at all. 7 Ed. 4. 16. b. there it is held that if an Office taken before an Escheator finds a Feoffment to the use of the King, the King is not entitled thereby, because the Feoffment does not appear upon Record, without which the King cannot take.

Object. The Sheriff may execute a Writ within a Franchise, and the Execution shall be good, tho the Lord of the Franchise may have an Action against him for it.

Resp. The Cases are not alike, for the Court does not take notice of Franchises, and the Sheriff is the Officer to the Court, notwithstanding the Franchise; and the Lord of the Franchise, is but a subordinate Minister to the Sheriff; but one Escheator is in no such subordination to another Escheator; but they have severally the same Power within their Precincts.

There.

Therefore if there be no Office in the Case, then there is no Wardship; for before Office found there can be no Wardship; for till the Office found, the Freehold and Possession are ject upon the Heir; Vid. Plow. Com. 229. a. 230. a. Seignior Berkeleys Case.

5. Admit the King well entitled to the Wardship, yet the Estate is liable to the Condition, and the Entry good for the Breach thereof.

1. Because here the King claims under the Title of a Subject, and therefore shall be in no better condition than the Subject under whom he claims, upon this Head, Vid. 49 Ed. 3. 15. Isabel Goodcheaps Case, and 4 Rep. The Case of the Comminalty of Sadlers 55. b. where a diversity is taken betwixt the Kings having an original Estate upon condition, and a derivative one. If it be an original Estate, then the performance of the Condition must appear upon Record, else the King cannot enter; otherwise when the King claims under another.

2. The Kings Estate here is but a Chattel, viz. An Estate during the minority of the Ward; and Chattels may be divested out of the King, and vested in him without Office.

20 Ed. 4. 11. If the King be entitled to an Advowson in the Right of his Ward, he may present to the Church without Office. Vid. 6 and 7 Eliz. Dyer 236. a. It was found by Office, that a Morgagee of Lands held in Socage, died seized of them and of Lands held in Capite, his Heir within age; afterwards the Morgagor performed the Condition, and paid the Mony to the Executors of the Morgagee, and entred; And the question was, whether or no he should answer the Profits to the King till Livery sued or not? And adjudged that the Morgagor should receive the Profits presently, and should be put to his monstrance de droit, to get his Lands out of the Kings Hands. 3 and 4 Ph. and Mar. Dyer 138. b. The Dutchess of Suffolks Case; An Estate was given to the King eâ intentione that he should grant other Lands in lieu of it; the King granted other Lands in lieu of it to hold of him in Capite, who died, his Heir within Age, and in Ward; then an Entry was made for a supposed breach of the Condition, and the Entry is there admitted to be lawful if there were a Breach; but it was doubted whether these words amounted to a Condition. 22 Eliz. Dyer 367. a. The Morgagee of Lands held in Capite, and of other Lands, died, his Heir within Age; and the King seizes and dies, the Morgagor performs the Condition and enters, and held per opinionem Cur' Wardorum, that his Entry was lawful, which is a Case express in the Point.

Object.

Object. The King is not subject to the Condition, but is entitled to the Profits by reason of the Wardship, which is an ancient Flower of the Crown, nor has he notice.

Resp. As well as the King may be bound by an express Condition, when an Estate is conveyed to him upon Condition, as appears by the Case of the Wardens and Commonalty of Sadlers, Co. 4 Rep. So shall he be bound when he claims under a conditional Estate, as here; and as appears by Isabel Goodcheaps Case, 49 Ed. 3. afore-cited, & terra transit cum onere; and tho a distress or the like cannot be made upon Land in the Kings Possession, yet non sequitur, that therefore it cannot be clog'd with a Condition; and the Kings Title by Wardship comes under the Will, which creates the Condition; for if there had been no such Will, there would have been no such Wardship, so that the Title to enter for the Condition broken is paramount to the Title by Wardship; and that there may be an Entry upon the Kings Possession for a Condition broken, appears by the Cases cited already out of Dyer. And for what has been objected concerning Notice, there is no Person here to give notice, for the Devisor is dead, and his Heir is a Stranger to the Tenure and the Wardship and not concerned in it, nor mentioned in the Office whereby the King claims the Wardship.

3. Admit the Party not to be in possession against the King, yet none can take advantage of this but the King himself; and the King here has not taken advantage, for it is more for his advantage to be out of possession, because then he becomes entitled by Escheat; and the King shall be accounted in of his best Title. Vid. 14 Ed. 4. 5. b. 5 Ed. 4 4. a. If one Office find the Heir within age, and another find him to be of full age; that which makes best for the King shall be received.

6. It is made a question, whether or no the King be well entitled to this Escheat by virtue of this Office found before Commissioners? And I conceive that he is.

But I conceive the King well entitled to the possession, as this Case is, tho there had been no Office at all; viz. by the death of his Tenant without Heir; and in 4 Rep. 58. a. 9 H. 7. 2. Plow. Com. 229. b. Lord Berkeleys Case, There is a diversity taken betwixt, when there is a possessio plena, as when the Kings Tenant is disseised, and when the possessio is vacua. In the one Case an Office is necessary, but not in the other.

But admitting that an Office is necessary; yet I hold that there is in this Case sufficient matter of Record to entitle the

the King by this Commission, as well as if the Office had been found by Writ.

14 Ed. 4. 6. adjudged, That a Commission to others does as well entitle the King to an Escheat, as a Writ to the Escheator; and the reason there given is, because as the King is Superior to all Persons in Dignity and Honour, so he is Superior in Law by his Prerogative; and the Law admits of a favourable construction where-ever the King is concerned; nor is there any difference betwixt a general and a special Commission; nor is the King bound to pursue the Method prescribed for Subjects: And a diversity is there taken between the King and a Subject; for a Subject cannot take advantage of an Office, virtute Officii or Commissionis; but the King can by his Prerogative, wherewith agrees 11 H. 8. Keilw. 198. Besides the King is not held up to Forms, if there be sufficient matter in the Record to entitle him; and for that Vid. 5 Rep. 56. b. Knights Case, where a Lease was made by the Prior of St. John of Jerusalem, upon condition to pay 5 l. Rent quarterly; the Priory was dissolved, and the Possessions thereof given to the Crown: then by Office more Rent was found in arrear for one quarter than was due, yet held good, for the Condition was broken if any part of the Rent was in arrear. 12 and 13 Eliz. Dyer 296. b. If an Office do not find the Party Son or Child upon a settlement made by the Ancestor, this may be supplied by a Suggestion made by the Attorny-General, as a supplement to the Office. 1 Ed. 5. 6. b. A suggestion that Land is held of the King, and that the Wardship belongs to him, sufficient upon Information without Office. Vid. 7 Rep. 13. b. Sir Francis Englefields Case. If the King be entitled by Forfeiture to the benefit of a Condition, and give Authority to another by Letters Patents to perform it; this being certified into the Exchequer, is sufficient to entitle the King.

Here the King has a Title upon Record, and the possessio is vacua, or else the King himself is in Possession; and so the King sufficiently entitled to this Escheat, and therefore the Lessee of the Assignee of the Kings Patentee, has good cause of Action; but admitting that the Kings Patentee had no Title, yet his Possession is a good Title against the Defendant, for whom no Title at all is found: So upon the whole matter he prayed Judgment for the Plaintiff.

Afterwards in Easter Term, Anno 1656. Hide argued pro Defendente. 1. That the Office found by the Escheator of Surry was good, notwithstanding the negative words in the Mayor of Londons Patent. Vid. Dyer 135, 209. being in the same County. And the Statute of 23 H. 6. inflicts a penalty upon

upon Escheators, if they do not cause an Office to be found within a month after the Writ comes to their hand. Vid. 9 H. 20. 7 Ed. 4. 17. 4 Rep. 46. Holcrofts Case. 20 H. 7. 7. There is a diversity between general Authorities and particular Jurisdictions; nor is there any damage to the Party here, but only a breach of the Liberty. 2. Perkins makes a quære upon the Kings being subject to a Condition; but admitting that he is, yet notice must be given before there can be an Entry upon him. Dyer 138. Goldsboroughs Rep. 137. The Duke of Norfolks Case, Pasch. 7 Jac. Popham. Rep. 8 Rep. Fraunces Case. 3. The Heir cannot enter after Office found, and the King being in Possession. Dyer 139. 49 Ed. 3. 16. 2 Rep. 4 Rep. 4. A Title of Entry cannot Escheat, for where there is an Escheat, the Kings Tenant must die in his Homage, and so the Writ of Escheat runs; there must be a Tenure betwixt the King and him, which is not here. 7 H. 5. 8. 15 Ed. 4. 11. 7 H. 4. 47. Bro. Tit Entry Cong. 36. Obj. The Jury has found it. Resp. Matter of Law cannot be found by the Jury, so as to bind the Court. Plow. Com. 114. b. 231. b. 27 H. 8. 8. 5 Ed. 4. 7. So he concluded pro Defendente.

Vid. Cr. Jac. p. Where it is adjudged, That during the Kings Possession, the King being entitled to the Profits by a Title of Wardship, which is paramount; no breach of a Condition by the Tenant shall forfeit the Estate.

The Protector *against* Wyche.

(3) AN Information sets forth, That at Gravesend in the County of Kent, upon such a day, in such a Vessel, then and there riding, such a Person seized 206 l. 4 s. in Gold, from certain Persons unknown, then and there passing, or upon their passage in a certain Ship from Ratcliffe, in the County of Middlesex, to parts beyond the Seas. Wyche the Defendant came in and claimed Property, and pleaded that no Gold was found in any Vessel, by any passing, or upon their passage from Ratcliffe to parts beyond the Sea; and issue being joyned thereupon, a Ven' fac' was awarded from Ratcliffe, and a Verdict found for the Protector. Serjeant Maynard moved in Arrest of Judgment, That the Ven' is not well awarded, for that it ought to have come from Gravesend in Kent, where the Offence was laid to have been committed; for tho the Vessel is said in the Information to have come from Ratcliffe, that is not material, it is but a formal and no substantial part of the Information; nor is there any answer to it,

it, or Issue tendred upon it; and though Ratcliff had been materially named, yet since nothing is answered as to it, but only to what is laid at Gravesend, and Issue taken upon that, the Ven ought to have come from Gravesend and not from any other place. And admitting that the Venue ought to come from Ratcliff, yet it ought to come from Gravesend too, and the rather for that the Offence is laid there. And therefore here is a mistrial for want of a right Venue; and it is upon an Information, which is not aided by the Statutes of Jeoffails. 2. The Seizure here is mentioned to have been not by the Searcher, whom the Statute of 2 H. 4. c. 5. directs to seize, but by another person. And since that Statute fixes it upon a particular Officer, who is known and intrusted, no other person ought or has Authority to seize; and this appears likewise by the saving, which gives the Searcher power to allow the party his reasonable Expences, which no other has power to do. 3. The Issue is taken upon a disjunctive, passing or upon their passage, and therefore it is ill; for those words do not signifie one and the same thing; they are not Synonyma, for one signifies the present, and the other the future tense: One betokens a readiness to pass, the other actual passing; and concluded for the Defendant.

Finch for the Protector. 1. The Ven Fac is well awarded, because the Offence is a continued Offence and began at Ratcliff. 2. This Disjunctive signifies but one and the same thing in common intendment. And if it were otherwise, yet in some Cases a Disjunctive has been allowed in an Issue, Hob. Rep. Keble and Osbaston's Case, and 31 H. 8. Dyer 43. b. In an Information in the Exchequer for shipping Cloth without paying Custom for it: The Defendant traversed, that the Custom was not concealed or withdrawn modo & forma prout &c. and Issue was taken upon this, and it was admitted to be a good Issue. 3. Any person may seize as well as a Searcher, it being for the common Good and the King's Profit, else the King might very easily be deceived and defrauded; and the Verdict supplies the defect, if it be one. Et adjornatur.

At another day in the same Term Windham argued for the Defendant: 1. A Searcher ought to seize; but no other person can. It was a Crime at the Common Law to transport Coin, Vid. 3 Inst. 92, 93. but not to be in passage with it. So it was an Offence for any Man to go beyond Sea without Licence; and yet it was not lawful for any to stop them; and by the Statute of 18 Ed. 3. not printed, it was made Felony to transport Coin; but then came this Act of 2 H. 4. and confiscates it, if seized in the passage, and gives power to

the Searcher to seize and allow to the party his reasonable Expences, which is a judicial Power; and the Exercise of it is called by the Act The Award of the Searcher, Hob. Rep. 245. Py and Westons Case: In an Information a Moiety was demanded, when only a third part was due, and held to be naught. Object. The Statute is only in the Affirmative, that the Searcher may seize. Resp. It is a Trust and a Judicial Power given to the Searcher, which is not transferable: And the Statute is introductive of a New Law, Plo. Com. 113. a Diversity is taken when a Statute is introductive of a new Law, and when not: If it be introductive of a new Law, then no Man can act in that Affair, but according to what the Statute directs, and such an affirmative Statute implies a negative; otherwise if the Statute be but affirmative of, and additional to, what the Law was before: But this Statute here is introductive of a new Law, and therefore cannot be put in Execution but according to the true sense and meaning of the Act it self. 2. The second Point in the Case is, that here is a mistrial, and the Visne ill awarded: For the Offence is laid at Gravesend only; for it is said, that at Gravesend in a certain Vessel there the Party had seized this Gold to the use of the Protector, because the said Gold was then and there found in the possession of certain persons unknown, that were then and there in passing to go from Ratcliff out of England; and it does not appear that the Gold was ever at Ratcliff, but at Gravesend only; nor does the Defendants Plea draw the Visne elsewhere. For the Plea is, that the said Gold was not found in the Custody of any person in passing in any Ship or Vessel going out of England. And the Law is very precise and curious in awarding Venues to the proper and nearest place to where the Fact was committed, 6 Rep. Arundels Case. Nor is this Case aided by any Statute. And admit that the Venue ought not to come from Gravesend only, yet it ought to come at least from Gravesend and Ratcliff, since the Counties of Kent and Middlesex may well join, Vid. Hob. Rep. Cook and Clerks Case, 305, 306. concerning a way through three Mills, the Jury ought to come from all three, Vid. etiam 10 E. 4. 10.

Serjeant Maynard on the same side. The Searcher only ought to seize; for the Statute is in the affirmative, and introductive of a new Law, which makes it imply a negative. But an affirmative Statute that is in affirmance of the Common Law does not implie a negative.

Finch for the Informer. 1. Any person may seize, quia pro bono publico; and nothing here is given to the Informer.

2. If

2. If none can seize by Law but the Searcher, then it is implied here that the Seizure in this Case was by the Searcher; for it is said, that the Gold was seized, and you say that none can seize but a Searcher. 3. The Venue is well awarded, and the Issue well joined upon a Disjunctive, 24 Car. B. R. Jenny and Frevil's Case, Pay or cause to be paid, put in issue; held to be well enough. And in the Statute of 21 Jac. of Jeofails, Informations for transporting Gold are excepted. As to the Case concerning a Way, that has bẽn objected; the terminus a quo is traversable.

Atkins on the same side. 1. The words of the Statute of 2 H. 4. are not compulsory, that the Searcher must, but may seize. 2. The Forfeiture doth not rise upon the Seizure, but upon the Offence, which began at Ratcliff. And in Py's Case, Hob. (before cited) the Information was held good for the King, though not for the Informer. 3. The Venue is well awarded; for the Act is transient, as in case of an Escape, it is an Escape in any County whereever the party comes, 10 Ed. 4. 10. acc.

The Attorny General argued to the same purpose: Et adjornatur.

At another day the Barons all held that the Issue was well joyned, notwithstanding the disjunctive, because the parts of the disjunctive Proposition are Synonimous, Vid. 5 Rep. Dormer's Case. But they held the Visne to be misawarded, because all the Fact and Offence appeared to have been in Kent and not in Middlesex, and the Venue must come from the nearest place. Whereupon a new Venire was awarded to the Sheriff of Kent, returnable next Term in order to a Tryal at Bar. And a Tryal at Bar being had the next Term, there was a Verdict for the Defendant; and then a new Information was preferr'd in the Name of the Attorny General only for this Gold, and the Fact laid in Middlesex, and a new Tryal at Bar ordered in Easter Term next: At which time a Tryal being had, there was another Verdict for the Defendant. And it was moved in Arrest of Judgment; that the former Judgment was not well entred; for the Entry was thus, Quia videtur Curiæ hic quod prior Ven. facias erronice emanavit, ideo Venire de novo agard &c. which is amiss; for it ought to have been, Quod prior Veñ Fac̃ and the Pannel be quash'd.

Finch. The Judgment ought to be arrested; for else there will be a double Veñ Fac̃ upon the File simul & semel; which must not be; for Presidents he cited Rastal's and Cook's Entries. But otherwise it is, when a new Veñ Fac̃ is awarded to

supply a defect in a Verdict: For in that case there is no default in the Court. And therefore in that Case the Entry is not Quod Ven Fac & Pannellum cassentur, as is when the Ven Fac is insufficient; for that is the Act of the Court. And he cited 9 Jac. B. R. the Earl of Northumberland's Case in a Quo Warranto.

Serjeant Maynard contr. The manner of Entry in such Cases is the Office of the Clerks, and the Judgment of the Court is not requisite in such Cases; and Presidents vary: But it be amiss, it is but a mistake of the Clerk, which ought not in reason to avoid the Judgment of the Court.

At another day Turner argued for Wiche: The difference is when there is a Verdict given and when not; for if there be a Verdict given upon the Ven Fac and recorded, there needs in that Case no formal Judgment to quash the Ven Fac if it be ill: But when there is no Verdict, such a Judgment or Award of the Court is necessary; for else there would be a double Ven upon the Roll at one and the same time, upon which there might be two Tryals in one and the same Cause, which would be absurd: And with this difference the Presidents agree, Co. lib. Intrat. 253, 340. Rast. 210. & 8 Rep. Loveday's Case. Object. 9 Jac. Resp. There was no Verdict in that Case, and therefore it comes not up to our Case. Object. There is here a negative pregnant, viz. That the Gold was not found in the possession of any person going beyond Sea at Gravesend. Resp. The Traverse is in the same Terms that the Charge is. Object. Unless such a Judgment be entred, the Issues of the Jurors, who did not appear, will be lost. Resp. That cannot be after Verdict, as here.

Finch pro Quer. That an insufficient Ven Fac requires such a Judgment, viz. Quod breve & Pannelum cassentur, Vid. the New Book of Entries 253, 395. Rast. Book of Entries, 210, 2 3. New Book Entries, 476. 5 Rep. 41. and Keilw. 56. 6 Rep. Arundel's Case, such a Judgment given. Trin. 3 Jac. Sturges and Jerkin, in False Imprisonment, and Trin. 10 Jac. B. R. Mortimer's Case. Et adjornatur.

Rook's *Case*.

(4) There was an Information against Rook for importing twenty Pottacoes of Tobacco of foreign growth in a Vessel not belonging to any of the People of this Nation; but it is not said that the Goods imported belonged to them, as the Act runs, but concluded generally contra formam Statuti. And after a Verdict for the Informer, it was moved in Arrest

Arrest of Judgment that the most material part of the Act is omitted, viz. (to them belonging) for if the Goods imported do not belong to this People of the Nation, but to a Stranger, then they are not forfeited within that Clause of the late Act. And the words contra formam Statuti will not aid substantial defects, as this is. To which it was answered, that the words contra formam Statuti aided it; as in 14 Eliz. Dyer 312. In an Action upon the Statute for distraining averia carucæ contra formam Statuti; it was not averred that there was a sufficient distress besides, and yet the Declaration held good. So in 11 H. 4. 13. Upon a Ravishment of a Woman contra formam Statuti, without saying, She consented to the Ravisher, and yet adjudged good. Sed nota, These Cases do not come up to the Case in question; for in the former Case it must come on the other side, and in the second Case the Ravishment implies that she consented not; and therefore contra formam Statuti is sufficient in these Cases. But per Curiam contra formam Statuti will not aid the Information in this Case; it being the most material part of the Act, which creates the Offence, and therefore ought punctually to be pursued, and Judgment was arrested. But the Court would advise whether the Judgment should be that the party iret sine die, without the assent of the Attorny General.

Currier *contra* Cryer.

UPon an English Bill in the Exchequer Chamber the Case was, viz. An Abbot had a Mill within the Kings Mannor, at which Mill all the Inhabitants were bound by Custom to grind their Corn &c. The King granted the Mannor over; and the Mill came afterwards to the Crown by the dissolution of the Abby; and the King granted it inter alia in Fee-farm, and the Resiants and Inhabitants were decreed to grind there, as if it were a Prerogative Mill and appertaining to the King's Mannor, at which of common Right all the Tenants of the Mannor ought to grind their Corn, and by Custom all the Inhabitants. And this was decreed upon view of divers Presidents: but none of the Presidents were in point, to wit, of a Mill in gross, which never was appertaining to the King's Mannor, or originally in the King. (5)

The

The Protector *versus the Lord* Lumley.

(6) A Bill was exhibited against him by the Attorny General to discover his real and personal Estate, and what secret and fraudulent Gifts and Conveyances he had made; for that he was outlawed, whereby his Goods and the Profits of his Lands were forfeited. The Defendant demurred, quia nemo tenetur prodere seipsum, and to discover his Estate upon a Forfeiture. But the Court held that he ought to make answer to this Bill, because the Protector is entituled to his Estate by course of Law; and the Outlawry is in the nature of a Gift to the King, or a Judgment for him. And a common person may have a Bill of Discovery in the like Case, to enable him to take out Execution: and he was ruled to answer, quod nota.

Stanley *and* Pegg.

(7) IN an English Bill to have the use of Depositions taken in the Dutchy, at a Tryal at the Assizes, the Case was; viz. Two Commoners on the behalf of themselves and all others the Commoners within, &c. preferred a Bill in the Dutchy-Court against the Owner of the Land in which Common was claimed, to have their Common, which was decrée'd accordingly for all the Commoners. And now the Defendant having purchased Lands within the Common, and the now Plaintiff being then and yet a Commoner there, but not named a Plaintiff in the former Bill, prefers his Bill here (the Dutchy-Court being put down) against the Defendant Peg, to have the use of the Depositions taken in the former Cause. To which the Defendant demurred, because neither the Plaintiff nor Defendant here were Parties to the former Bill. And the Demurrer was allowed; because the Parties here were not actual Parties in that Suit, though the Suit there was for the same Cause upon which the Action at Law was brought, and of general concernment; and it seemed hard, considering that the Defendant here claimed under the Defendant there.

Morell

Morel *versus* Duglas.

AN English Bill was preferred to be relieved against a Judgment obtained at Law upon nihil dicit in Debt upon an Obligation; the Equity of the Bill being that the Mony was paid: To this Bill there was a Demurrer, upon the Statute of 4 H. 4. that after Judgment the Party shall be in rest and peace, unless Error or Attaint be brought. And the Court allowed the Demurrer. And Langham and Limbry's Case was cited in point; which was ruled in the House of Lords by the advice of all the Justices in the last long Parliament; the matter being 18000 l. damages given in an Action of Covenant, and Judgment thereupon. And the Case betwixt Throgmorton and Sir Moyle Finch, wherein it was adjudged that after Judgment for the Mortgagée in Ejectment a Court of Equity cannot relieve the Mortgagor; but he ought to have preferred his Bill before Judgment. And though the Preamble of the Act does not mention Courts of Equity, yet by Construction the Statute extends to them. (8)

The Attorny General *versus* Andrew.

SIR.... Harrison acknowledged two Judgments in Debt to one Andrew, upon Bond, and was bound to one Fielder in a Bond bearing date before the Judgments. Fielder assigns his Debt to the King, Andrew takes out Execution upon his Judgments, viz. two Elegits; by one he has the Moiety, and by the other the other Moiety of Sir.... Harrison's Lands extended; then Process issued out of the Exchequer for the Debt assigned to the King. And the question was, whether or no the King should be preferred in this Case? And then, whether any of the Lands are lyable to the King's Debt, for that Andrew hath taken all the Lands, whereas by his second Elegit he ought but to have taken a Moiety of a Moiety.? (9)

Shaftoe pro Quer, conceived that the King's Debt should have preferment. It is is to be observed that it was two years after the Judgments obtained, and one year after the Debt assigned before the Extent was. The Law favours the King in the Recovery of his Debts, and gives him Prerogatives in his Execution both with respect to the Goods, Lands and Body of his Debtor. 1. As to his Goods, Vid. 3 Rep. Sir William

Herberts

Herberts Case, Dyer 328. F.N.B. 28.b. Vid. l'Stat. de 25 E. 3. cap. 19. Hob. Rep. 115. 2. For his Lands, Vid. Co. Magn. Charta p. 206. F. N. B. 117. 5 Rep. Knights Case, 56. All a Mans Lands shall be seized upon an Obligation assigned to the King, though the Obligee himself could have but a Moiety. 3. For his Body, Vid. Dyer 197, 296. And for the Kings Prerogative as to his Debt, Vid. 45 E. 3. Decies tantum 12. 4 H. 7. 17. 33 H. 6. 27. 38 Ass. 20. The King ought to be preferred in this Case of ours, because upon the assignment of a Debt to the King, the Enquiry is, what Lands the Tenant had at the time of the Assignment? For from that time they become liable to the King, and it is found that Sir John Harrison had these Lands then. Pasch. 21 Jac. in Cur Wardof Sir Edw. Cooks Case, Sir Christopher Hatton had limited Uses to himself for life with divers Remainders over, with a power of Revocation; and then he was made Remembrancer of the first Fruits, and became endebted to the King, and died, his Heir within age; and then the Lands so setled were extended, and by Doderidg, Tanfield and Lee, held that they might well be extended; because the power of Revocation subjected the Lands to his Disposal. And Co. Jurisd. of Courts, 115. Body, Lands and Goods are lyable all at once for a Debt assiged to the King, though not to the Subject, to whom the Debt was originally owing. 2. The Priority of the Judgment is of no avail in the Case; upon this Rule of Law; viz. the King's and the Subjects Title concur, the King's Title shall be preferred, Vid. Dame Hales Case, Plowd. Com. 158. Baron and Feme are Jointenants for years, the Husband drowns himself and the Wife is in by Survivor; yet if this be afterwards found by Office, the King shall have the whole Term. And fol. 263. b. 321. Weston, If a Villain purchase, and the Lord seize, and afterwards the Villain be found to be an Ideot a nativitate, the King may enter notwithstanding the Seizure; for Laches of Entry shall not prejudice the King. Hill. 4 Ed. 6. Bendl. Rep. An Estate is given upon condition not to commit Treason, and afterwards the party commits Treason, the King's Title shall be preferred, and he shall have the Land. 44 E. 3. 3. cited in 10 Rep. 127. Clan's Case. If the King's Tenant pay his Rent to the King upon the day, the King's Successor shall have it paid over again. So if a Bishop collate the same day that he dies. 3. The Extent of the Suit of Andrew cannot prejudice the King, quia nullum tempus occurrit Regi, 50 Ass. 5. Plowd. Com. 261. If a Widow have a Lease for years by Survivorship, yet it shall be liable to the Debt owing to the King by her Husband, Plowd. Com. 559.

There

There can be no Tenant at sufferance of the King's Land, quia nullum tempus occurrit Regi, 37 H. 6. 27. Of Property in Market overt, Littl. Villenage, 178. If the King's Villein purchase and alien, yet the King may enter, 11 E. 31. 31 E. 3. Droit 13. The King's Prerogative in darrein presentment, and in droit d'advowson, and Co. Lit. 294. b. So when the King's Tenant holds over his Term he is an Intruder, Co. Coron. 188. Where this is said to be an ancient Prerogative. And 21 Jac. 2. said to be the first Act that limits the King as to time. But when the Kings Interest is temporary and not permanent, there he is limited to time, 7 Rep. 28. in Case of Lapse, Vid. Dyer 224. b. 3 Rep. 12. Com. 321. Cavendishes Case, 7 E. 4. 29. 11 H. 4. 26. Co. Lit. 183. If an Alien and a Subject purchase, after Office found the King shall have all. 4. There was a time in this Case, when if the King had seized, the Land would have been subject to his Debt; for there were two years betwixt the Judgment and the Extent; and Lacheſs shall not prejudice the King, 10 Rep. 111, 114. There the Lacheſs of an Officer in not seizing shall not prejudice the King, 3 E. 4. 25. Plowd. Com. 488. b. Hob. 347. The King's Tenant is disseized, and the Disseisor attainted; the Disseisee enters, the King shall have the Lands after Office found, which is stronger than our Case, Vid. Com. 482. b. 486. 3 E. 6. Dyer 67. b. Stringfellowes Case, There a Writ of Prerogative was allowed after an Extendi facias, and Goods thereupon seized into the King's Hands, 41 E. 3. Execution 38. As for the point upon the Statute of 33 H. 8. ca. 39 where it is Enacted, that the King shall be preferred, unless where there is a Judgment, &c. Vid. Dyer 56. That an affirmative Law does not take away the Prerogative at common Law, 11 Rep. 64. Dr. Fosters Case, Dyer 302. 135. Com. 130. Hill. 36. Eliz. B. R. Entr. Hill. 35 Eliz. Rot. 181. That a Lay Man, though no Doctor, may execute Ecclesiastical Jurisdiction deins 37 H. 8. Trin. 8 Car. Walker and Harris's Case, accord. in B. R. 2. That Clause of the Statute has not been observed in this Court, Trin. 4 Car. in Scaccario, Rot. 18. James Vanderbrooks Case, He and two others were Executors to one Corown, who was indebted to the King by Assignment, and they pleaded a Judgment against them, & riens præter, &c. and this held to be no Plea: And upon the Statute of Sewers a Certiorari allowed contrary to the express words of the Statute. 3d. Point. The second Extent was ill in part upon the Statute of Westm. 2. because the whole was taken instead of a Moiety. The Reason of that Law was, because it was not reasonable that one Creditor should go away with all, Co. Magn. Cart. 395.

and Execution 294. A moiety only is extendible. Obj. That is to be understood at one and the same time. Resp. That is a mistake. 10 Ed. 3. Execut. 137. Tr. 38. Eliz. C. B. Cogan and Hunt, A moiety only of a moiety is extendable upon the second Elegit; and in 9 Jac. B. C. Burnams Case, held, That but a moiety of the remaining moiety should be extended. 4th Point. It appears upon the Pleading, that Andrew's extent was two years after the Judgment, and then a Scire fac' ought to have issued; as 1 H. 5. 4. So upon the whole matter he prayed Judgment for the Plaintiff.

Afterwards in Easter Term 1656. Atkins argued pro Defendente. As to the Objection, that all these Lands are extended upon two Judgments, he said they were Judgments of the same Term, and therefore no priority betwixt them; and therefore 10 Ed. 2. Extent 137. comes not up to the Case in question: but I conceive that in this Case the Judgment shall be preferred before the Kings Title. I agree that where the Kings Title and that of a Common Person commence both together, the Kings Title shall be preferred, as in Dame Hales Case, Plow. Com. 260, 263. So if one Obligee be Outlawed the King shall have the whole, because each had power of the whole. Fitz. Herb. Execution 113. But if a Common Persons Title be prior to the Kings, its otherwise; as in 49 Ed. 3. 16. Devise 10. A Devise prevents an Escheat. Vide 4 Rep. 61. b. Plow. Com. 482. Dyer 224. Sir William Cavendishes Case, F. N. B. 45. G. 150. Q. of a Title of Dower. Et Execution 113. where Survivorship takes place. As for the Kings Prerogative in Suits for recovery of his Debts, that extends only to the Debtor himself, and not to a third Person. F. N. B. 28. Reg. 281. b. Inst. 131. b. Nor does a Protection lie after Suit commenced. Hill. 2 Car. Rot. 389. B. R. Busher and Murrey, in Scire fac. upon a Judgment, a Protection pleaded and disallowed, because cast after the Suit was pending. And Dyer 328. accord. and Plow. Com. 246. The Kings Prerogative does no wrong to the Subject: In our Case there was both Judgment and Execution before the Kings Title. One reason I take from the nature of a Judgment. 8 Rep. 171. and of the Assignment of a Debt by 33 H. 8. cap. 29. 4 Rep. Saddlers Case, A Judgment is higher than a Statute; and Westm. 2. concerning taking Lands in Execution, transfers that part of the Kings Prerogative to Subjects.

Object. It is inquirable quas terras habuit al temps, &c.

Resp. There are the same words in Execution upon a Statute-Merchant. Dyer 306. a. F. N. B. 267. d. so that signifies nothing. 2. A Judgment is a common Security, and ought there-

therefore to be favoured; but Judgments will become of small effect, if the Kings Debt shall leap over them. 2. The Debtors own Act ought not to prejudice the Creditor. Obj. But the course of the Court is so. Resp. If the course of the Court be contrary to an Act of Parliament, it ought not to prevail; and the affirmative words here imply a negative. 4 Inst. Court d'Exchequer, and Dyer 67. And the Cases that have been objected, are concerning Goods, not Lands; and Goods are not liable till Execution taken out. 4. There is no Prerogative but what is time out of mind, and part of the Common Law, which cannot be here; and no President is cited to the contrary where a Judgment shall be avoided; and prayed Judgment pro Defendente.

Afterwards in Trin. Term 1656. the Court gave Judgment.

Baron Parker pro Defendente. The King has many Prerogatives pro bono publico; but in the Case in question, the Statute of 33 H. 8. abridges the Prerogative, and controls the Common Law: Affirmative Statutes do not alter the Common Law, but negative Statutes do; and here is a negative implied. Vide Dyer, Stringfellows Case, 3 Eliz. Dyer in Lassels Case, The Kings Debt shall be preferred when it is in equal degree, otherwise not. As to the point of two moieties being extended upon two Judgments, he held that to be well. Pasch. 13 Jac. B. C. Rot. 121. Crooks Case adjudged.

Baron Nicholas, accord. Before the Statute of 33 H. 8. the King was not bound, but the Statute has made an alteration, though it sound in the affirmative, for it enacts a new thing, & ita quod makes a condition precedent, and a limitation. Vide Plow. Com. Townsends Case, and Stradling and Morgans Case, 3 Rep. Heydons Case, 10 Rep. Chancellor of Oxfords Case, how such Statutes are to be expounded, and the clause would else be idle. For the second point he held the Execution to be well, because the Judgments being of the same Term, were of equal date. Execut. 117. and if it were not good, yet that it was only voidable, 8 Rep. Drurys Case.

Chief Baron Steel accordant. The Subjects Title is prior to the Kings, and is executed. 9 Rep. 129. Quickes Case, The words of the Statute of 33 H. 8. are introductive. 7 Rep. Cecils Case, and Dyer, Strinfellows Case are unanswerable. For the second point he held the Extents well executed, because both Judgments were in the same Term, which is but one day in Law. Co. Mag. Chart. 55. There Mony payable at several days becomes several Debts.

And Judgment was given accordingly.

Armestrong *and* Spencer.

(10) IN an Information for transporting Hides into Scotland, upon not guilty pleaded, and a Verdict for the Plaintiff. Atkins moved in Arrest of Judgment, upon the Statute of Union, which provides, that all Goods shall have the same Priviledges, Freedoms and Immunities there as in England, any Law, Statute, &c. to the contrary notwithstanding, whereby he said the Act of 11 Eliz. cap. 9. was repealed, which prohibites the Transportation of Hides into Scotland; that the Statute of Union was a general Law, of which the Judges were bound to take notice, and that therefore the Court ought ex Officio to stay Judgment. Plow. Com. 66. b. Dyer 76, 119. as when it appears to the Court that the Plaintiff has no cause of Action.

Shaftoe pro Quer'. The Act of Union does not repeal that of 18 Eliz. cap. 9. The first Clause extends to the Customs and Excise only, and the second to Goods transported out of Scotland only, (sed nota, this is a mistake, vid. Stat.) Also general words in subsequent Statutes do repeal former Statutes, as in Trudgeons Case, 21 Eliz. cited in Co. Inst. Villenage; That the Statute of Premunire does not repeal the Statute de donis, &c. so as to subject Tenant in Tail to a Forfeiture: nor is the Court bound to take notice of all general Laws, but of such as are in the negative; as of the Law of an Appeal to be brought by a Woman, by which she is restrained from bringing an Appeal for the Death of any Person but of her Husband. Mag. Chart. Et per 8 Ed. 4. 17. A general Pardon must be pleaded, else the Party loseth his Defence; and the Statute of 21 Jac. of Limitations must be pleaded; and Vide Coles Case, Plow. Com. Besides, a Man may, if he will, renounce the benefit of a Law made for his advantage; as in the 10 Rep. Beaufages Case, upon the 23 of H. 6. cap. 10. A Sheriff may take one Surety if he will; and the Court here ought not to take notice of a Persons not being priviledged, Dyer 119.

But the Barons conceived that the Act of Union had repealed that of 18 Eliz. cap. 9. as to Scotland, and that it is a general Law, of which they were bound to take notice, as they are of all general Laws, except where there are Provisoes and Exceptions, which there are not here; and Judgment arrested quousq; &c.

De

De Termino Sancti Hillarii Anno Domini 1655. In Scaccario.

James Wainwright *Plaintiff, and* Griffith Griffith *Defendant.*

IN an Action of Debt against a Gaoler for 69 l. 14 s. 3 d. upon an Escape. The Plaintiff declares, that in Trin. Term. 1649. in this Court he recovered against Richard Midgly as well 58 l. 14 s. 3 d. Debt as 11 l. adjudged to him for Damages. Whereupon a Writ issued to the Sheriffs of London to take his Body, returnable Tres Mich. next following; and upon a non misit breve returned and Writs of the like nature continued until 15 Pasch. 1652. The said Sheriffs returned a non est inventus &c. Whereupon a Testatum issued at the Plaintiffs request 28 Maii 1652. directed to the Sheriff of Montgomery to take the Body of the said Midgly, and to have his Body before the Barons here three Weeks after the Holy Trinity next following, to satisfie the said debt and damages; which Writ was directed to Sir Edward Corbet Bacon then Sheriff of the said County; and by vertue thereof, and before the return of the same, the said Sheriff took the said Midgly in Execution, and had him in Execution and did then and there by vertue of the said Writ commit him to the Gaol of the said County of Montgomery at Welchpool in Execution as aforesaid, under the Custody of the Defendant then Keeper of that Gaol, there to remain &c. whereby the said Midgly was in the Defendant's Custody till the 20th of June, 1652. that he suffered him to go at large, the Plaintiff not being satisfied his said debt and damages; whereby an Action arises to demand the said Execution Mony against the Defendant, which he refuseth to satisfie and pay, to the Plaintiffs damage of 40 l. &c. (1)

Upon nil debet pleaded, and Issue thereupon, the Jury found a Special Verdict; whereby they found the Recovery and Writs of Execution prout, &c. and that the Sheriff of Montgomery by vertue of that Writ of Execution to him directed upon the 6th of June 1652. took and arrested the said Midgly,

and

and had him in Execution, and the same day at Lanvillings in the said County, committed him to the Defendants custody, then Keeper of the County-Gaol at Welch-pool. They find likewise, that it is usual for the Gaoler of the County to attend the Sheriff, and to take Prisoners into his Custody at other places than where the County-Gaol is kept; and that after the said Commitment at Lanvillings aforesaid, on the 20th of June aforesaid, the Defendant suffered him to escape here in London, in the Parish of St. Mary le Bow, the Plaintiff not being satisfied.

They find also that the said Midgeley was never in the Defendants Custody in the Gaol at Welch-pool, and so conclude, &c.

The Case.

A Sheriff takes a Man in Execution for Debt, and commits him to the Gaoler of the County, at another place than where the Gaol is kept, and the Gaoler suffers him to escape, the Prisoner never having been in his custody at the place where the Common Gaol is kept, and it being usual for Sheriffs to commit Prisoners over to the Gaoler at other places than where the Common Gaol is; The question was, whether an Action upon this Escape will lie against the Gaoler, or ought to have been brought against the Sheriff?

Hardres pro Quer'. I conceive an Action well lies against the Gaoler, or against the Sheriff, at the Plaintiffs Election. I agree, that at Common Law a Mans Body could not be taken in Execution upon a Recognizance or Judgment but only in special Cases; as in Trespass, &c. where a force and breach of the Peace is supposed. 2 Inst. 382. An Action of Debt does not lie against a Gaoler at Common Law, but only an Action upon the Case, which supposes a Tort and a Trespass; but where the Law makes the Body liable to be taken in Execution, there it is severe, and requires that the Prisoner be kept in salva & arcta custodia, at his peril that has him in custody; and therefore the Statute of 13 E. 1. de Mercatoribus provides, that if upon a Statute Merchant the Debt be not paid at the day limited, and the Party be committed to prison, and the Keeper of the Prison will not receive him, he shall be answerable for the Debt, if he be able, and if not, he that committed the Prisoner to his keeping shall answer for him. Vide etiam Stat. Westm. 2. cap. 11. By which Statutes it appears, that the Law makes this provision for the security of the Parties Debt in case of an Escape,

viz.

viz. That he who actually suffers the Escape shall be liable in the first place; and if he be not able to make good the loss, then his Superior shall be responsible; so that the Gaoler, who has the Prisoner in custody, is far from being excused, but is liable as well as his Superior; nay, and in the first place. The Reasons of the Law may be these. 1. It is more natural and consonant to reason, which is the foundation of all Laws, That he who actually offends should be punished, then that another should be punished for him, and he who is the Offender be quit against him to whom he has done the wrong. 13 H. 7. 1. If a Prisoner escape, and the Gaoler retake him, he shall be in Execution again, for he that offended shall not be excused. Vide etiam 3 Rep. Rigeways Case, F. N. B. 130. b. If a Man committed to prison by Auditors of an Account, make his Escape, the Gaoler shall make satisfaction to the Party, and shall have a special Action upon the Case against the Prisoner to answer for the Escape, and the Damages that the Gaoler has sustained thereby, which Case comes up close to ours, and to the reason that I have urged. 3 Rep. Boytons Case, there it is laid down as a Rule, That by the Law every Man is to bear his own burden. A second Reason may be this; viz. An Escape is a Tort, a Wrong, and in the nature of a Trespass, which whoever commits must answer it in his own Person, and not another for him. Vide 2 Inst. 382. 15 Eliz. Dyer 322. a. 41 Ass. 15. 10 Eliz. Dyer 271. by which Books it appears, that an Action upon an Escape lies not against an Executor or an Heir, because it is a personal Tort and Trespass, for which therefore the Party must answer himself. 44 Ed. 3. 20. If a Mans Servant take Toll where it is not due, he himself shall answer it, and not his Master, by the Common Law. 13 H. 7. 15. b. 28 H. 8. Dyer 29. a. If a Mans Servant set a Dog on to bite a Man, he himself shall answer it; so if my Servant put my Beasts into another Mans Ground. 12 H. 7. vide 20 H. 7. 13. b. 21 H. 7. 23. If a Master commands his Servant to distrain for Rent, and he abuse the Distress, the Servant shall answer for it; and the reason of all these Cases is, because the Party that committed the Tort, ought in reason to answer for it, and make it good. A third Reason may be this, viz. The Law looks chiefly upon him that has the actual possession and charge of a thing, as the Person responsible for its forth-coming, 1 Inst. If any Person of his own Head takes the Profits of an Infants Estate, without any legal Authority, the Infant may charge him as his Bailee; Long quinto, fol. 70. b. Debt lies against the Successor of a Provost of a College, who is in

in de facto, tho he be not a righful Provost. 17 Ed. 3. 27. b. Quare non admisit, which is an Action grounded upon a Tort, and refusal, lies against a Gardian of the Spiritualities de facto; So here, if a Man be in possession of a Gaol, the Law looks upon him as the Party, that is immediately liable as Gaoler. Fourthly. The Law takes notice of Common Gaolers, as Officers and Ministers of Justice; as appears 3 Rep. Boytons Case, and therefore Habeas Corpus s are frequently directed to them: and before the Statute of 14 Ed. 4. cap. 10. which annex't all Common Gaols to the Counties, they were Officers of themselves, and all Gaols belonged to the King, and not to the Sheriff; so that they are not meerly Servants, but Officers and Ministers that the Law takes notice of. Fifthly. My fifth Reason is grounded upon the general Rule of expounding Statutes made in such Cases; viz. Beneficially for the relief of the Parties grieved. Infancy and Coverture are greatly respected and favoured in the Law; and yet vide Whittinghams Case, 8 Rep. 44. a. That if an Infant Gaoler suffer an Escape, an Action lieth against him, and that a voluntary Escape is a forfeiture of his Office. Plow. Com. Plats Case, 35. b. Stat. 1 R. 2. cap. 12. Gives a Writ of Debt against the Gardian of the Fleet for suffering a Prisoner to go at large; and this Statute is by equity extended to all Sheriffs and Keepers of Gaols; and tho the Statute mention a Writ of Debt, yet a Bill of Debt is within the Statute. 2 Inst. 382. The Statute of Westm. 2. cap. 11. which mentions one Court only, is extended by equity to all other Courts. 9 H. 6. 19. 30 H. 6. 6. 33 H. 6. 1. There it is held, That if Rebels break the Prison, that does not excuse the Gaoler. 39 H. 36. 2. The Duke of Norfolks Case, 11 H. 4. 73. a. If a Man that is a Gaoler by Tort, and in possession of the Goal, suffer a Prisoner to escape, he shall answer for it. 2 Inst. 382. If such a Goaler suffer a voluntary Escape, he is within the Statute de frangentibus prisonam; à Fortiori in our Case, where there is a lawful Gaoler; so that the current of the Books and Authorities mention the Gaoler, as the Person against whom the Action is brought ever after. Vi. 14 Ed. 3. cap. 10. that annexes the Gaols to the Counties: See also F. N. B. 121. A. P. 130. b. 14 H. 7. 1. 34 Ed. 1. Debt 172. All which Books are, that an Action upon an Escape lies against a Gaoler. 10 and 11 Eliz. Dyer 278. b. The Duke of Norfolks Case, There Gawdy Deputy Marshal was charged in Debt for an Escape. 33 H. 6. 56. The Cryer of the Court sent to arrest a Man, who escaped; an Action lies against him. Mich. 37 and 38 Eliz. B.R. Bassets Case, Milton; In Debt upon an Escape, a diver-

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sity was taken betwixt a Bailiff of a Liberty, and a Sheriffs Bailiff; an Action lies against the first, but not against the second, because he is a meer itinerant Servant, and not fixt in any certain place.

Object. A Gaoler is not an Officer to the Court, but the Sheriff is; and in the Case of a Deputy Marshal, he is a Person admitted by the Court to execute the Office.

Resp. This is no reason why the Gaoler should be excused, who has committed the Fault, and he is an Officer sufficiently known, and to whom some Writs shall be directed.

Object. The Sheriff must answer for him, per 14 Ed. 3. cap. 10.

Resp. That is no reason why he should not answer for his own Fault, if he be able.

Object. A Gaoler is but a Servant to the Sheriff and an under Officer, and shall not be subject to Escapes any more than a Sheriffs Bailiff.

Resp. Tho he be a Servant to the Sheriff, yet he is an Officer known to the Court, and fixt in an Office certain, and he is not meerly itinerant as ordinary Bailiffs are; and he seems rather an Officer to the Court than a Deputy, for that a Hab. Corp. is directed to him.

2d. Point, Whether the Gaoler's receiving the Prisoner at another than at the Common Gaol, will alter the Case?

I conceive it will not, for it is not the Walls of the Prison, but the Prisoners being in custody, that makes the Prison; and that is where the Gaoler is, provided it be within the same County. The Gaol it self is not material, the inconvenience would otherwise be great, and a great latitude would be given to the Power of Gaolers, to keep Prisoners in custody or discharge them, which it is not fit such an Officer should have: For suppose that at a Sessions, or an Assize, a Prisoner be committed to the Gaoler, whose Prison (it may be) is at a great distance; if the Prisoner were not to be in his possession and custody till he were brought within the Walls of the Prison, then it would be in the Gaoler's power to suffer him to escape without punishment, which would be a most unreasonable thing, that he who is but an Officer, an Executioner of Justice, should have ligandi & solvendi potestatem. 3 Rep. 36. a. Butler and Bakers Cases, An Infant delivers a Deed to another to be delivered to the Party, as his Deed, It shall not now be in the Attornies power to deliver this Deed at the full age of the Infant, and not before, because he is but an Attorny, and it shall not be in his power to make the Deed bind or not bind the Infant at his Election; so here.

Also the form of Declarations upon Escapes shews, That not the Gaol, but the Prisoner's being in the Gaolers Custody makes the Prison; for the words are, That he suffered the Prisoner to go at large out of his custody, and not that he suffered him to go out of the Gaol. Vid. 2 Inst. 589. That if a Man be under a lawful Arrest, and break loose, he is within the Statute de frangent' Prisonam, tho he be not within the Walls of the Prison.

And pray'd Judgment pro Quer'.

It was afterwards argued in Easter Term by Vaughan pro Defendente, and in Trin. Term by Shaftoe pro Quer'.

Shaftoe. That Debt lies upon an Escape against a Gaoler. Obj. No such Action has been brought. Resp. Such Actions have been brought, tho but rarely, because for the most part they are poor and indigent Persons. Obj. He is but in the nature of a Deputy or Servant. Resp. This Action lies against a Deputy. 11 Ed. 2. Debt. 172. against the Keeper of a Gaol. Obj. Respondeat superior. Resp. When the Inferior is not responsible, Westm. 1. cap. 17, 19. Westm. 2. cap. 43. Dyer 238. Deputy Customer. Co. Mag. Charta 382. Bar 253. Ere directed to a Gaoler to have the Body of a Prisoner, &c. 8 Rep. Grisleys Case, A Habeas Corpus directed to him. Vid. 34 Ed. 1. Debt 162. 11 Ed. 2. Debt 172. 12 Ed. 3. Bar 253. 11 H. 4. 83. 30 H. 6. 6. Rast. Entr. 169. Debt, division Gaoler 2. 14 Ed. 4. 3. b. 14 H. 7. 1. 10 Ed. 4. 10. F. N. B. 121, 130. Co. Magna Charta 592. An Action for an Escape lies against a Prisoner at the Suit of the Gaoler. Obj. The Prisoner was not in the Common Gaol. Resp. That needs not. Co. Mags Cart. 589. 5 H. 4. 8.

Allen pro Defendente. Debt lies not against the Gaoler; there was no such Action at the Common Law, but an Action upon the Case, Dyer 275, 322. and no Statute gives it. Co. Mag. Cart. has it, That a Keeper of a Prison is not within the Statute of Westm. 2. cap. 11. The Statute of 1 R. 2. has not altered the Common Law in this Case, and it must be understood to extend to all others in equal degree, and not otherwise.

1. The Action lies against the Sheriff, and therefore not against the Gaoler. The Statute does not create a double Debt. 2. It is the Sheriffs Gaol, as appears by the Statutes; and the Gaoler is but his Servant. 3. The Sheriff may commit a Man elsewhere than at the Common Gaol. 4. There is no Process directed to a Gaoler, but a Habeas Corp. which may be directed to any Person whatsoever that has the Body; no Process of charge or discharge, there is no Record to charge him.

him. 5. The Prisoners are in the Eye of the Law in the custody of the Sheriff only. 3 Rep. Westbyes Case, If the Sheriff die, and an Escape happen, there is now no Person against whom to bring the Action, says the Book. 6. This is the first time of putting it in practice.

2. The Verdict has found, that he was not in his custody in the Common Gaol. Mich. 37 and 38 Eliz. Basset and Miltons Case. 5 Ed. 4. 1. This Action lies against the Bailiff of a Franchise, but not against a Sheriffs Bailiff. Bro. Esc. 40. And when the Prisoner is out of the Gaol, tho in the Gaolers custody, the Gaoler acts but as the Sheriffs Servant or Bailiff.

3. There is a material variance betwixt the Declaration and the Verdict; for the Declaration says it, That he was in the Common Gaol, and the Verdict has found quite contrary. When Actions for Escapes are said to lie against Gaolers, such absolute Gaolers are intended as Writs are directed to.

He pray'd Judgment pro Defendente.

Guilbert *versus* Eversly.

THE Plaintiff preferr'd an English Bill in the Exchequer-Chamber for Tithes of Herbage, as Vicar of Eling in Surry, against an Inn-keeper who depastured Travellers Horses, for which there was no customary payment, and the value of the Lands depastured were proved to be 30 l. per annum, and the Court was in doubt what Decree to make for a certain Rate to the Parson; it not being ascertain'd by Custom. And they conceived, that they ought to have regard to the value of the Land, which is proved to be 30 l. per annum, and so to allow him 2 s. in the pound; but they agreed clearly, that Tithes were payable for such Herbage eaten by the Mouths of Travellers Horses, as aforesaid; and so it was adjudged in Trin. 16 Jac. B. R. in a Prohibition, The Court denied to grant a Prohibition, the Libel being against an Inn-holder for Tithes of Herbage eaten by Travellers Horses. And in Mich. 7 Car. B. R. Face and Gauge, held that Tithes shall be paid for agistment of Cattle, by the Occupier of the Lands: But the Court said, they would award a Commission to enquire into the value of these Tithes, nisi partes concordarent en le mean temps, which they advised. (2)

John Harris *Executor of* William Harris *Plaintiff and* Richard Ferrand *Defendant.*

(3) THE Plaintiff declared, That whereas John Battisford, deceased, in his life-time, viz. On the 15th of May, in the 14th year of the Reign of King Charles the I. had and received to his use, of John Stretton of London, Scrivener, the Sum of 100 l. being the proper Monies of the Defendant. And whereas the said William Harris the same day and year, by his Writing Obligatory, became bound with the said William Battisford, as his Surety to the Defendant, in the Sum of 200 l. with Condition for the payment of 105 l. at a day then to come, and long since past: And whereas the Defendant on the 1st day of February, in the 3d year of King Charles the I. lent the said William Harris, in his life-time, the Sum of 500 l. and that at the same time there was a Colloquium between them concerning the payment of part of the said hundred pounds, and Interest, by the said Battisford, upon which Colloquium the Defendant on the said 1st day of February, in the said 3d year of King Charles the I. in consideration, that the said William Harris, at the instance and request of the Defendant, did give to one Robert Garty, to the Defendants use, one entire sufficient Conveyance or Security for the payment of the said 100 l. and 48 l. for Interests and Costs, as also of the said 500 l. in all amounting to 648 l. did assume upon himself, and promise to the said William Harris, that if any part of the said hundred pounds and Interest were before paid to the said John Stretton the Scrivener, by the said Battisford, or by any other by his appointment, that then he the said Defendant would pay so much Mony to the said William Harris, as of the said 100 l. and Interest was paid to the said Stretton by the said Battisford, or by any other by his appointment, when he should afterwards be thereunto required. Avers, That altho the said Battisford by the Hands of Humfrey How his Tenant, before the said 1st of February, in the 3d year of King Charles, to wit, Such a day in London did pay to the said Stretton 50 l. principal Mony, and 10 l. 5 s. Interest of the said 100 l. in all amounting to 60 l. 5 s. yet the Defendant did not pay the said 60 l. and 5 s. nor any part thereof to the said William Harris in his life-time, altho oftentimes requested, nor to the Plaintiff since the death of the said William, altho by the Plaintiff since his death, on the 22th of

Nov.

Nov. 7 Car. Regis at Milton aforesaid, thereunto requested, hath not allowed, paid nor otherwise contented, to his damage of 200 l. &c.

The Defendant protestando that he made no such promise, for Plea pleads the Statute of 21 Jac. of Limitation of Actions, and that the said William Harris in his life-time, viz. on the 8th day of Nov. in the 4th year of King Charles requested the payment of the said Mony of the Defendant, at which time the cause of Action did arise upon the said promise; and that neither the said William in his life-time, nor the Plaintiff since his death did commence any Action or Suit against the Defendant, upon the said promise, within six years after the cause of Action accrewed; & hoc parat' est, &c. and demands Judgment.

The Plaintiff replies, That his cause of Action first began on the 22th of Nov. 7 Car. upon which day, and not before the Plaintiff demanded the said 60 l. 5 s. of the Defendant, and that he began his Action within six years after, viz. The 1st of February, in the 12th year of King Charles, without that, that the said William in his life-time requested the Defendant to allow, and pay to the said William the said Monies paid to the said Stretton, by the said Battisford, as aforesaid, as the Defendant hath alledged, and that he is ready to, &c.

The Defendant rejoins, That the said William in his life-time did request him the Defendant to pay the said Monies paid to Stretton, as before he hath alledged; and of this he puts himself, &c.

The Jury find that the said William Harris did not require the Defendant to pay him the Monies paid by the said Battisford to the said Stretton, as the Plaintiff in his Replication hath alledged, and assess damages to 80 l. and costs 20 s. &c.

Howel pro Defendente, moved in arrest of Judgment, and took four Exceptions; 1. To the Declaration. 2. To the Issue. 3. To the Verdict. And 4. for default of Notice.

1. To the Declaration. Because the request mentioned to have been made by the Testator, is laid only by a sæpius requisitus; and when-ever a Request is requisit before an Action brought, being part of the promise, and as it were a Condition precedent, there it must be particularly alledged, and not by a sæpius requisitus. Vide 4 H. 8. 29. Hob. Rep. 274, 437. 1 Edit. where the Statute of Limitations was pleaded; so that for want of a sufficient Request laid, the Declaration is nought.

2. To the Issue. The Issue is taken upon the Traverse, which is, That the Testator did not request the Mony, &c. as the De-

Defendant hath alledged. 1. This is repugnant to the Declaration, where it is mentioned, that the Testator was sæpius requisitus, &c. and six years are not to be allowed after the Testators death, if the Testator himself made a request. 2. The Traverse is ill, because it comprehends the day upon which the Defendant alledgeth the Demand to have been made by the Testator; and the day is not material, and therefore ought not to have been made part of the Issue, as here it is; the Traverse ought to have been, absque hoc, that he made any request before or after within six years before the Action brought. Vide 7 Rep. Maunds Case, 21 Ed. 3. 42. vid. Bro. Traverse 69. 15 Ed.4.23. Bro. Traverse 165. 39 H.6. 45. 2 Ed. 4. 16. Bro. Pleadings 9. besides, the Issue is repugnant to the Declaration, as hath been said, and is therefore void.

The 3d. Exception was to the Verdict, which also is repugnant to the Declaration, Vid. 9 H. 6. 37. for the Declaration says the Defendant was sæpius requisitus by the Plaintiff, and the Verdict says, That he never was requested by him at all. Vid. 33 H. 6. 30, 31. In Error in Maintenance, a Verdict contrary to the Record of the Declaration, void; so if contrary to the Confession of the Party, 7 Ed. 4. 31. and Judgment must be given upon the whole Record, as in 8 Rep. Bonhams Case, and Turnors Case.

The 4th. Exception was for want of Notice. Notice ought to have been given to the Defendant of the Mony paid to Stretton, because he is a Stranger to the whole matter. Vid. Hob. Rep. 51, 68. and concluded pro Defendente.

Hardres pro Quer'. Four Exceptions have been taken in Arrest of Judgment by the Councel of the other side; but I conceive that none of them are sufficient to arrest it.

As for the first, which is to the Declaration, I agree to the Rule that has been laid down concerning when a special Request must be alledged, & licet sæpius requisitus is not sufficient; and I agree that in this Case there ought to be a special Request laid, and that licet sæpius requisitus is not sufficient, that being only the course and form of Pleading, and not traversable, Plow. Com. 128. b. in Buckleys Case. But now in our Case the Plaintiff does not insist, as the ground of his Action, upon any request made by the Testator, but upon the request made by himself, which is precisely alledged to have been made the 22th of Nov. 7 Car. 1. and that request is the ground of the Plaintiffs Action. The Testators requesting is put down only for form, and is no part of the ground of the Action; so that this Request made by the Plaintiff is enough for him, nor does any other cause of Action appear in the

the Case. And though the Declaration would be defective, if the Action were to be grounded upon a Request supposed to have been made by the Testator, yet it is full and particular as to the Request made by himself, and that's sufficient, which answers the Objection made on the other side. If a Man declare in an Action upon the Case upon a Promise to pay Costs of Suit, in which Case Notice is requisite, and having laid the Promise and what Costs were recovered, says that the Defendant præmissorum non ignarus (which is not a sufficient allegation) did not perform it, although the Defendant upon such a day had Notice, and lay it precisely, the Declaration is good by reason of the Notice being specially express in the following words, though the former words of themselves would not have bẽn sufficient. So here, though the licet sæpius requisitus be not sufficient, yet the special Request alledged afterwards is; and upon that this Action is grounded.

The second Exception was taken to the Issue. I agree the Cases cited to prove that when the day is made parcel of the Issue, and is not material, the Issue is naught; and that it is good cause of Demurrer; though this is not so clear by the ancient Books, Vid. 19 H.6.9. 21 H.6.39. But in this Case of ours, the Traverse does not comprehend the day: We say only that the Testator did not request the Mony, as the Defendant has alledged: In this Traverse there is not a word of the Day; but only 'tis said, as the Defendant has alledged, which goes only to the substantial, and not to the circumstantial part of the Plea, Vid. 19 H. 6. 7s 5 H. 5. 1. 39 E. 3. 1. It is a common Case, that if a Man in an Action of Trespass or an Action upon the Case upon a Promise, plead non culp. or non assumpsit modo & forma, that this does not comprehend or extend to the day alledged, and therefore the Trespass or the Promise may be found to have bẽn made at any other time; but it comprehends only the substantial part of the Plea, Vid. Lit. 482, 483. for the words modo & forma, that they are a Form of Pleading and not Words of Substance. And therefore in a Writ of casu consimili brought upon a supposed Alienation in Fee, if the Tenant plead ne aliena modo & forma, and an alienation for Life be found, it sufficeth; yet that is not modo & forma, Vid. Long. Quinto fol. 26. In Trespass sur 5 R. 2. Pasch. 1 Car. Ent. Hill. 21 Jac. Rot. 92. The Bishop of Norwich against Cornwallis. In Debt upon an Obligation bearing date 30 Novemb. 20 Jac. conditioned to perform an Award, the Defendant pleaded that the Bond was primo deliberat on the 28th of April 21 Jac. after which day there was no Award made. Absque hoc quod cognovit se teneri & firmi-

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ter obligari modo & forma prout &c. This was held naught because the words modo & forma went only to the date, which was no material or substantial thing; and the words modo & forma do not comprehend any circumstantial part.

And if the Law be so, then this Objection vanishes; for modo & forma and as the Defendant has alledged are all one, and therefore these words shall not extend to comprehend the day, but the request, which is the substance of the Plea: And as in those Cases of modo & forma the Jury may find the Request at another day; so in this Case, since the words as the Defendant has alledged refer to no more than modo & forma does, they do not comprehend the day neither; so that the Issue here is well taken and could not be bettered.

But admitting the day to be comprised, yet being after Verdict it is aided by the Statutes of Jeofails, as appears by these Cases, Vid. 5 Rep. Nichol's Case 43. Hob. Rep. Keble and Osbaston. Ibid. Napper *versus* Jasper and George. Ibid. Wood *contra* Buden. Pasch. 41 Eliz. C. B. Johnson *versus* Clerk. In Debt upon an Obligation the Defendant pleaded the Statute of Usury, and that the Plaintiff corrupte aggreeavit & recepit &c. and Issue was taken hereupon, and found for the Plaintiff, and aided, though the matter of the Issue were double, because there was an Issue, though more was in it than needed, and part of it took in an immaterial thing. Otherwise it is, when there is no Issue at all, there a Verdict does not mend the matter, Hob. Jennings *contra* Lee. In Battery the Defendant justified, the Plaintiff replied de injuria sua propria, without saying absque tali causa; this was found for the Plaintiff, but not aided, because no Issue at all, being taken upon two affirmatives, Hob. Tasker and Salter's Case in Trespass d' Ass. The Defendant justifies by reason of the Plaintiffs coming upon his ground: The Plaintiff replyed, that he was a Copyholder of the Mannor, and that the Lord had for himself and his Tenants of the Plaintiffs piece, a Way over the Defendant's piece, and Issue was taken thereupon, and found for the Plaintiff and not aided, because the Issue was impossible and so no Issue at all. But where the Issue is joined upon an affirmative and negative, though upon a thing that is not very material, yet it is aided after Verdict; and so in our Case, if the Day were comprised, yet there being a Verdict found for the Plaintiff, it is aided by the Statute of Jeoffails.

The Case in 7 Co. Maunds Case, the where day of the demand was traversed, does not come up to our Case; for there was a Demurrer, but we are here after Verdict.

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A second Objection taken to the Issue hath been that it is repugnant to the Declaration; for in the Declaration the Plaintiff alledges that the Mony was not paid, licet sæpius requisitus by the Testator; and in his replication the Plaintiff says that the Testator made no Request, which is a contradiction.

Resp. This is no contradiction at all; for the words licet sæpius requisitus are only words of form and meerly nugatory and surplusage; and are as if they had not been inserted; and then what is said contrary to an immaterial and insignificant part of the Count, will not amount to a contradiction, 10 Rep. Osborn's Case 130. In an Action upon the Case upon a Promise to deliver diversa bona, viz. unum fulchrum lecti, Anglice a Field-bedstead with a Testern and Curtains of Say, which is more than is in the Latin. Upon non assumpsit pleaded, and Issue found for the Plaintiff, and entire damages given; all was held good, because the rest was only nugatory and surplusage, and signifies nothing, and damages shall not be supposed to be given for what signifies nothing, 22 H. 6. 46. In Debt upon an Obligation to perform an Award, if the Award be naught, it is as much as no Award at all and needs not be performed, 10 Rep. Osburn's Case, 131. b. Plo. Com. 399. in the Earl of Leicester's Case. If a Custom be confirmed by Act of Parliament, which is void in Law, the Confirmation signifies nothing, because a void Custom and no Custom at all are both alike.

So here the Allegation of a matter in Pleading, which signifies nothing, and is inserted only as a form of Pleading, signifies nothing that the Court will take notice of; and then any thing alledged afterwards that's contrary to it, will not make a real contradiction, so as to vitiate the Pleading.

But admitting this to be a variance, yet not being material, it is aided after Verdict, Mich. 15 Car. in B. R. The Original was in Trespass of Assault and Battery; and counts that the Defendant struck the Plaintiffs horse, whereby the Plaintiff fell; and this was held good, and no material variance. This cannot be material, because licet sæpius requisitus is only matter of form.

The third Exception was to the Verdict for being contrary to what the Plaintiff has admitted in his Declaration; but this is answered already.

The fourth Exception is for want of Notice that the Mony was paid to Stretton. But Notice in this Case is not requisite; the Case as to that is but thus, viz. A Man pro-

miſes to pay back ſo much Mony as I. S. paid to I. D. and the Plaintiff avers ſo much Mony paid by I. S. to I. D. here needs no Notice. For it is a general Rule that when the Matter does not lie more properly in the Conuſance of one than of the other, no Notice is requiſite, 9 E. 4. Obligation conditioned to perform an Award, in Debt upon this Obligation Notice of the Award needs not be alledged, becauſe the Defendant may take notice of the Award as well as the Plaintiff, Mich. 22 Car. B. R. Collet *verſus* Bayfield. Upon a Treaty of Marriage, a Promiſe is made to the Father of the Daughter by the Father of the Son, to pay the Daughter 100 l. after the death of the Son, if ſhe ſurvive him; the Father of the Daughter dies, the Son dies, the Adminiſtratrix of the Daughter's Father brought an Action upon this Promiſe, and per Curiam Notice of the Death of the Son needs not be given to the Father of the Son, Page *verſus* Barnes, Paſch. 23 Car. B. R. Entr. Mich. 22 Car. R. 156. A Promiſe to pay ſo much Mony at the full age of an Infant; held that Notice of his attaining his full age needs not be given, becauſe it is as notorious to the one as the other: The like of the Marriage of I. S.

Trin. 23 Car. B. R. Bear *verſus* Choldwich, In Debt upon an Obligation to pay ſo much Mony upon the Return of ſuch a Ship from Sea, Notice of the Return needs not be given. But where a thing lies more properly in the Conuſance of the Plaintiff than of the Defendant, there Notice ſhall be given, as in the Caſes that have been cited by the adverſe party, viz. to give the Plaintiff ſo much for a Commodity as any other had before that time given him for the like; or to give ſo much for every Cloth the Plaintiff ſhould buy; or to pay the Plaintiff what damages he had ſuſtained by a Battery; or to pay the Plaintiffs Coſts of Suit. In theſe and many other like Caſes it has been adjudged, that Notice muſt be given; for theſe are ſuch things as lie moſt properly in Conuſance of the Plaintiff. But ſo it is not in the Caſe at Bar: For how ſhould he know how much a third perſon has paid to a Scrivener, better than the Defendant? Wherefore Notice here is not requiſite. And prayed Judgment pro Queſ.

Afterwards in Trin. Term this Caſe was argued again by Howel pro Defendente and by Hardres pro Queſ. But no new matter urged on either ſide. And the Court took it ill, that the ſame Council ſhould argue the ſame matter twice. Afterwards the ſame Trin. Term the Court delivered their Opinions, viz. That licet ſæpius requiſitus was no material part of the Declaration, and therefore no contradiction in the Replication

cation or Verdict. That the Words, as the Defendant has alledged, are but tantamount to modo & forma; that if the Day be part of the Issue, yet that an immaterial Issue is aided after Verdict, if it be good in form. That Notice needs not, because the matter does not rest in the Conusance of the Plaintiff more than of the Defendant. And Judgment was given pro Quer.

Jo. Hunter *the Elder and Younger Plaintiffs, and* William Bennison *Defendant.*

IN Debt upon an Obligation of 300 l. dated the 9th of May, 1653. The Plaintiff declared that the Defendant became bound to him, as aforesaid, the Condition of the Bond being, that if the Defendant and Thomas Bennison their Heirs, &c. do perform the Award, which William Kimp, William Leak, the said Tho. Bennison and Edward Wilson with the Ampirage of William West Esq; should make touching and concerning the Title of the Lands, Messuages, Barns and Tenements called Burrow's Close, Holt and Stubbins, with the Appurtenances, and to give the Title to whom it belongs, and of all other Suits and Differences depending betwixt the said parties, or either of them, so as the same be tendred or ready to be delivered in writing under their Hands and Seals to them or either of them at or before to morrow at 12 of the Clock of the Day, that then, &c. (4)

The Defendant pleaded nul award fait.

The Plaintiff replyed, that after the ensealing of the said Obligation and before the morrow after, viz. on the same 9th of May, 1653. the said Arbitrators and Ampire made an Award concerning the Premises, as followeth, viz.

That Hunter the Elder upon the 2d day of March then next following should pay to the said Defendant William Bennison 7 l. 10 s. for every Acre of the Lands aforesaid, the Barn included, to be measured by an able Measurer in the presence of the Arbitrators and Ampire, or some or two of them, after seven yards to the Poll, at the equal charge of both Parties, the said payment to be made in the Church-Porch of Gressingham in that County: Upon payment whereof the said William Bennison, his Heirs or Assigns should pass, convey or surrender to the said Tho. Hunter or his Heirs, or such as he should appoint, all the said Lands with warranty against him and his Heirs, and all claiming under him; or in de-

fault of such payment, the said Tho. Hunter and his Heirs should seal and deliver a release of all his claim to the said Lands and every part thereof, and a general Release for all Actions, Suits and Demands. And that all Suits and Controversies, and all Judgments, Executions and Condemnations had against any of the said Parties, their Children, Servants and Agents should cease and be no farther prosecuted. Then he lays for Breach,

That the said Award was tendered on the said 9th of May according to the Effect of the Condition, and avers an admeasurement made the said 2d day of March, 1653. and the Lands upon the same contained 12 acres according to 7 yards to the Poll, and that 80 l. was due to be paid, which the said Tho. Hunter the Elder tendred accordingly, which the Defendant refused, and that the said Tho. Hunter did request him to pass a Surrender to him and his Heirs, which he refused.

The Defendant demurrs and the Plaintiffs joyned in Demurrer.

Hardres argued pro Defendente, That there was good Cause of Demurrer.

1. Because the Submission is void.

2. Because the Award is void.

1. There is no Submission and then there can be no good Award. To make a good Award there are five things requisite, 4 Eliz. Dyer 216. b. 1. Matter of Controversie. 2. A Submission. 3. Parties to the Submission. 4. Arbitrators. And 5. Giving up the Award, Now here wants a Submission: For it appears by the Condition, that the Defendant and Tho. Bennison are to perform the award of four, whereof the said Thomas is one. So that Thommas Bennison is both a Party submitting and a Judge; he is one that must perform the award, and an Arbitrator too; which is void in Law. Now it is a principal Challenge, if an Arbitrator be one of the Jury, much less must the same person be both Arbitrator and Party.

2. The Condition is repugnant in it self, viz. That the Arbitrators together with such a person being Umpire should make an award; for it is a contradiction that both the Arbitrators and the Umpire too should make it: For an Umpire is a Judge by himself, and cannot be an Arbitrator.

3. The Award is void. 1. For that the matter submitted is Title to Lands in particular, and that they shall give the same to whom they appertained; so that the award is in the nature of a bargain and sale betwixt the Parties; the one being

being to pay so much Mony to the other for every acre of Land; but the Title is not determined to whom the Lands do appertain as it ought to be, and therefore its naught; for a matter submitted in particular is not determined; and wherever a thing in particular is submitted, it must be particularly determined one way or other.

8 Rep. 98. Baspoles Case, a Rule is there laid down, that where the Submission is of certain things in specie, with a Clause ita quod the award be made of the Premises, there those particular Cases must be determined, or else the award is void, Vid. 4 Eliz. Dyer 216.

2. The award is naught, because a matter not submitted is awarded; viz. that the Lands shall be measured by others in their presence, which is void in Law; for they cannot give their power to another.

19 E. 4. 1. If Arbitrators award that the Defendant shall secure the Payment of such a summ to the Plaintiff in such manner as they shall advise, this is naught, because after their award made they have no more to do.

3. The award is that the admeasurement shall be at the equal charge of both Parties; which is void, because not within the Submission.

Pasch. 23 Car. B. R. sup. Capel *versus* Alten, Debt upon an Obligation to perform an award; the award was that the Defendant should pay to the Plaintiff 7 l. and that the Plaintiff should pay for writing the award, and held to be void for that reason.

Trin. 1650. Entr. Hill. 1649. Rot. 673. B.S. Hale *contra* Massy. Debt upon an Obligation to perform an award; the award was that the Defendant should pay so much Mony to the Plaintiff, and that both Parties should pay the Expences due to the House, where the award was made; and the award was therefore held to be void. By the same reason here, where they have awarded that both Parties shall be at the Charge of the admeasurement.

4. The award is naught because it is not definitive, but conditional, viz. That the Plaintiff shall pay &c. or in default thereof, that the Plaintiff shall release, &c. all his Right. For an award is a judicial Act, and such Acts must be definitive and not conditional, Pasch. 13 Car. R. in Banc. Com. Loggins *contra* Blagrave. Debt upon an Obligation to perform an award; which was made, unless the party shewed cause to the contrary within 6 days, held to be no award.

5 Rep. Samon's Case 77. b. awarded that the Defendant should become bound in an Obligation to the Plaintiff without saying

in

in what sum, and the award was held void for the uncertainty: So here.

5. The award is void, because it concerns Strangers to the Submission. It is that all Controversies, Judgments and Condemnations against the Parties, their Children, Servants or Agents shall cease, Vid. Samon's Case afore cited. Trin. 5 Car. B. R. Humphry and Ladd. Arbitrament that the Father and Son should release all their Right, whereas the Son was no party to the Submission, held to be void.

And prayed Judgment, &c.

Jones *and* Clerk.

(5) UPon an Information for not garbling two and twenty Bags of Spice according to the Statute of 21 Jacob. whereby it became forfeited, &c. Not-guilty was pleaded, and a special Verdict found, viz. That the City of London made a Lease of the Office of Garbler to Hatton for 31 years, rendring 400 l. per annum, the Lease to be void for Non-payment, &c. and to be executed by him, his Deputies or Assigns; and that afterwards the Plaintiff obtained a latter Grant and Lease from the City for three years, the Rent of 400 l. not being paid, within which three years space these Spices were garbled; and they found the Statute of 21 Jac. that the Plaintiff was possessed of the said Office by vertue of the said Grant. And the question was whether of the two had better Title to the Office and Execution thereof upon these two Grants?

Atkins pro Quef. The Plaintiff is found to be in possession, and that is sufficient to maintain this Information; and Possession is supposed to continue, if it be not avoided, Plo.Com. 193. and precise Form is not required in special Verdicts, 4 Rep. Fulwood's Case, 9 Rep. the Countess of Shrewsbury's Case.

Object. Such an Office as this cannot be granted for years, as in 9 Rep. Sir Geo. Reynel's Case concerning the Office of the Marshalsea.

Resp. This Office does no way concern the Administration of Justice, and it may be executed by a Servant or Deputy. And admitting that it be void as a Grant, yet it is a good appointment of an Officer within the Statute of 21 Jac. Vid. 4 & 5 Ph. & Mar. Dyer 152. b. 153. And then Hatton's Lease is avoided by this second appointment, Adjornatur.

After-

Afterwards in Easter Term Gundry argued pro Defendente. That it was an Office of Trust, and not grantable over, Vid. the Preamble of the Statute of 21 Jac. Vid. 9 Rep. Sir Geo. Reynel's Case, and the Statute is that the Officer shall be appointed by the City, which cannot be, if the Office be grantable for years. Vide 10 Ed. 4. 1. The Office of Chamberlain of this Court; and it is a Place that requires continual attendance in the City. 2. This Grant cannot be taken as an Appointment. Obj. A Grant shall be taken most strongly against the Grantor. Resp. A Grant shall not be construed so as to work a wrong. If this be construed to amount to a Deputation, it will be a wrong to the City; and since the intention was to pass an Interest, it will not amount to an Authority; And if an Assignee commit a Forfeiture, the Grantor is not concerned; but if a Deputy commit a Forfeiture, this affects his Master. 3 Jac. Gibbs and Seales Case, B. R. A Lease was made of a Manor, except Waifs, Estrays and Perquisites of Court, &c. afterwards a Lease was made of all these, the Lessee of the Manor made Baily; and this was adjudged to be no Surrender, because a Baily has only an Authority, in which an Interest will not merge; so if a Lessee of a House afterwards accepts of a grant of the custody of the same House, this is no Surrender; wherefore there is here no Officer, and consequently no Forfeiture.

The same Term Shaftoe argued pro Quer.

1. This is an Office that may by Law be granted for years, because it is not an Office of Trust, or concerning the Administration of Justice; Vid. the Preamble of the Stat. of 21 Jac. 3 Inst. 264. but it consists chiefly in diligence.

Obj. 9 Rep. 39 H. 6. 34.

Resp. 9 Ed. 4. 40. is to the contrary. But 2dly. admitting it to be a void Lease, yet it is a good appointment of an Officer within the Statute of 21 Jac. and it was the intent of the Deed that Jones should have the Office. A Charter of Feoffment may amount to a Tenancy at Will, and a void Act may yet to some purposes have effect. 22 Ed. 4. 5. 27 H. 6. 3. If a Tenant at Will grant over his Estate, tho the Grant be void, yet it determines his Will. 34 Ass. 5. If a Disseisor enfeoff the Disseisee, tho the Feoffment be out of doors, for the Disseisee is remitted, yet a Rent-charge issuing out of the Land to the Disseisor, is thereby extinguished. But if an Act be made void by Act of Parliament, it shall avail to no intent or purpose at all, Co. Lit. 120. A simoniacal Presentation does not so much as amount to a Claim.

He

He cited a Case betwixt Love and Jones in this Court 1652. which he said was a Case in point.

Serjeant Evers pro Defendente. 1. The Lease is not good, because it is an Office of great trust. 9 Rep. 50. concerning the Clerk of the Market. But if it were granted for Life or at Will, the inconvenience would not be so great. 5 Ed. 4. 3. 11 Rep. Auditor Curles Case. 2. The City have by the Act of Parliament only power given them to appoint a Garbler, and therefore a Lease of the Office void; if they do more than the Act impowers them to do, its void. Obj. It is found that they have power to dispose. Resp. That finding it is contrary to an Act of Parliament, and therefore it is void. Vid. 9 Rep. The Countess of Shrewsburys Case. 3. It is not a good appointment, because the City intended to pass an Interest. Vide 6 Rep. Sir Moyle Finches Case. Co. Lit. 301, 302. A Conveyance shall not enure to a contrary end than it was designed for. Vide 10 Rep. 57. For the finding of the Jury. 4. The Verdict is, That the City having right to dispose, &c. but the Jury do not find that they have a Right, 1 Inst. 227. which ought to have been more certain. 5. They find that the Defendant had notice of the Grant made to the Plaintiff, but they do not say by whom it was given. Vide 8 Rep. Fraunces Case, and 3 Rep. Pennants Case, No Forfeiture without precise notice.

Windham pro Defendente. A Grant cannot amount to a Licence. 2 Rep. Buckleys Case. 11 Rep. 48. Obj. Hob. Rep. Collisons Case, A bad Will shall amount to an appointment, by 43 Eliz. Resp. That had the help of an Act of Parliament. But here it is found that the City has the disposing of the Office, and yet they are not Officers themselves, so that they cannot make an Assignment or a Deputation of what they have not; no Man can grant what he has not. And here the second Grant was made upon a supposition, that the first was void for non-payment of the Rent reserved, which cannot be, for no Rent can be reserved out of it, so that the second Grant is void. And all the Court took it, that the Verdict was good and certain enough, and that it should be taken by common intendment; and that the word having was a sufficient affirmation, as well as the word licet, Plow. Com. 120. And a disposing Power comprehends a Power to make a Lease; and this Office may be granted for years: Nor was this made a Question in 9 Rep. but the seizing without Office found: Nor is it an Office in which the Administration of Justice is concerned, but a Trust, which is demisable, as the Office

Office of Aulnage, Prisage, &c. nor is any attendance upon a Court requisite. And it appears by the Statute of 21 Jac. that it is assignable: and Baron Nicholas held that Sir George Reynold Case, Rep. 9. was not Law; for by the same reason that it could not be granted for years, it was not grantable in Fee, for there is the same inconvenience. Plow. Com. Nevils Case, 9 Rep. Countess of Salops Case. 9 Ed. 4 40. And if it be not a good Lease, yet it may be a good Appointment. Vide Dr. Floyds Case, Hob. Rep. And every Grant shall be taken most strongly against the Grantor; and ut res magis valeat; and 8 Rep. Foxleys Case, is no Law, as Baron Nicholas said it had been adjudged. 22 H. 6. A Grant by one Jointenant to the other shall amount to a Confirmation. And there is a diversity where an Office is granted to one only, and where it is granted to a Man and his Assigns, or with a Power to make a Deputy. Vide 11 Ed. 4. 1. 39 H. 6. 34. Plow. Com. Nevils Case. Lord Pembrooks Case cited in 2 Rep. Seignor Cromwels Case. 11 Rep. Lifords Case, And the Case of Aulnage is stronger, for that is an Office to which a Seal belongs, with which the Officer is entrusted. Vide 17 Ed. 4. cap. 5. Void Leases have been held good appointments within the Statute of Charitable Uses; and Judgment was given pro Quer'.

Sir Thomas Walsingham *envers Sir* Henry Baker *and the* Attorny General.

IN a Bill of Review to reverse a Decree made in the Exchequer-Chamber, the Case was thus, viz. Sir Francis Wyat being seized of the Mannor of East Peckham in Kent, in Tail, the Reversion being in the Crown, ex dono Regis; and also of the Mannor of Hunton in Kent, in Fee, conveys over the Mannor of Peckham to one Moulton in fee, and to secure his Title, conveyed to him also the Mannor of Hunton, who reconveyed it to Wyat, with a Proviso, That in case he should be disturbed in his enjoyment of Peckham, that then he might enter into the Mannor of Hunton. After this Sir Francis Wyat becomes attainted of High-Treason, and his Mannors and Lands thereby forfeited to the Crown; the King enters and seizes, and from him by mean Conveyances the Mannor of Hunton came to the Defendant since the Forfeiture; and the Mannor of East Peckham, with the Condition annexed, (6)

was conveyed to the Ancestors of the Plaintiff Walsingham, by the said Moulton before that Attainder; and it was much contested concerning the Plaintiffs Title to Hunton; and upon a Bill preferred by the Attorny General against the Plaintiff and Moulton, it was decreed, That the Defendant should be no farther sued or molested for the Mannor of Hunton, forasmuch as the King had covenanted to secure Bakers Title to it; and to this Bill the Defendant demurs. 1. Because Moulton is not made a Party, who is the principal Party concerned in the Interest, and is to have the benefit thereof. 2. Because the Plaintiff has only an equitable Interest, by force of the Condition, in the Mannor of Hunton. And upon the debating of this Demurrer, it seemed to the Court that the Plaintiff was a proper Party to the Bill without Moulton, because the Plaintiff is pars gravata, and one against whom the Decree was; and by this Bill the Plaintiff does not seek to recover any thing, but to be discharged only. Vid. 6 Rep. Ruddocks Case. And for the 2d. Obj. An equitable Interest is as available in a Court of Equity, as a legal Interest is at Common Law. Et Adjornatur.

Afterwards in Easter Term 1656. the Court held there was no cause of Demurrer, and it was over-ruled, and the Parties proceeded to the hearing of the Cause, and the Merits were ut supra, with this, That there was this farther Ground for the Decree, viz. That it appeared to the Court, that Baker and his Ancestors had been in possession 60 years, and that there were Fines and Non-claims after the Condition broken, and the Entry of Moulton, and therefore the Court decreed as aforesaid.

The Cause being opened and debated, the Plaintiffs Council urged, That there was no Fraud or Trust in the Case, but matter of Freehold and Inheritance, which is proper for a Tryal at Law, and not for a Court of Equity, without a Tryal at Law, especially in this Cause, wherein none of the Parties are entituled to the Priviledge of this Court, but only in respect of a Covenant with the King, to preserve the Kings Interest, who is a third Person; and there is no reason that a third Person should foreclose a Remedy at Law betwixt two others, when this Covenant does not at all concern one of them; and if there had been no such Covenant, it would not be denied but that the Decree ought to be reversed.

On the other side it was urged, That this was a Court for the Kings Revenue, as well as a Court of Equity; and that it may and often does determine matters in Fair, where the

the Court has a Jurisdiction without a Tryal at Law, where the Proofs are full, without doubt or difficulty, as a Custom for Multure, Tithes, and Parcel or not Parcel; and there are many Presidents in Court to this purpose: and they cited 11 Rep. Nappers Case 13. a. for two Presidents in a like Case, the one in Chancery, the other in this Court. And the Lord Huntingtons Case, Hob. Rep. They said there were but two Grounds to reverse Decrees, the one for Matter appearing in the Body of the Decree, the other for new Matter arising since; but for want of Proof no Decree can be reversed, for that is a thing that rests in scrinio Judicis, and does not appear in the Body of the Decree; and the Proofs after a Decree are no more to be questioned, than the Verdict of the Jury upon a Writ of Error; and they offered many Presidents to this purpose, which the Court ordered to be delivered to the Council of other side, to be viewed, Et adjornatur.

Afterwards in Trin. Term the Court delivered their Opinions. Baron Parker was for affirming the Decree, Baron Nicholas and the Chief Baron for the Reversal of it, and it was reverst accordingly.

Baron Nicholas, No Equity appears in the Body of the Decree, and therefore no Court of Equity can Decree it. The Earl of Worcesters Case, and Sir Moile Finchs Case, in Chancery, Mich. 41 and 42 Eliz. 4 Inst. 85. Nor is there here any Equity in the Bill.

Obj. It is a Court for the Revenue.

Resp. So is the Latin Court, but that Court will be to little purpose, if all things shall be determined on the English side. 2. No Matters of Freehold are determinable in Equity. 3. Matters proper for the determination of the Common Law, are not determinable in Equity. 4. This Decree is a breach of Magna Charta, which enacts that Tryals shall be per pares, & per legem terræ.

The Mischiefs that would ensue, if this course were allowed, are these. 1. Tryals by Jury would be ousted. 2. A Jury can have better cognizance of Matters of Fait, being de Vicineto than the Court, and may judge better of the credibility of the Witnesses, &c. and Writs of Error and Attaint would be put out of doors. 3. At Law if a Man be cast, he may have an Action of a higher nature, which he cannot have here, if he be once barred.

Obj. Matters of Freehold have been determined here.

Resp. That is against the Case of Sir Moyle Finches Case above cited, and many Bills have for that cause been dismist.

Obj. But there are Presidents.

Resp. None of the Presidents that have been produced, come up to this Case in Point; but that in Hill. 45 Eliz. which is a President without President; and if there be one or two more, that might countenance such a Decree as this, two or three Presidents ought not to prevail against the fundamental Rules of Law.

Chief Baron. He held that the Court had a Jurisdiction of the Cause; but conceived that the Decree was erroneous for matter apparent. 1. He said there was a Title paramount the King, by vertue of the first Condition, which avoids the King's Title, 4 Rep. Sadler's Case; and a Covenant subsequent cannot controll that in Law nor in Equity. The Reasons given in this Decree confound it: Decrees and Judgments are how shorter how better. 2. Here's a transmutation of Equity; there may be Equity for the King, but there's none for the Party; and the one shall not take advantage of the other's Equity: so that this Equity does not stand upon its right bottom. It is not rectum & Justitia, but obliquum. So the Decree was revers'd.

De

De Termino Paſchæ Anno Domini 1656. In Scaccario.

John Hayes *and others* Plaintiffs, *verſus* Edward Harding *and others* Defendants, *by* Engliſh Bill.

The Caſe.

THE King by Letters Patents bearing date the 22th of May, Anno Domini 1637. for preventing and reforming of Abuſes in the Trade of Soap-making, and the better Government of that Trade, did ordain there ſhould be in England and Wales, one Society or Body Corporate of Soap-makers, by the Name of Governors, Aſſiſtants and Commonalty of the Society of Soap-makers, to continue for ever, who had thereby power to elect Officers to ſearch for, and try all Materials, and Wares, and Weights and Meaſures, and to break, burn or deſtroy all found to be, or ſuſpected to be falſe or adulterate; and that none not Free of that Society, ſhould uſe that Trade without admittance into the Society, upon pain to forfeit all the Soap they ſhould make; and that all Perſons to be admitted into the ſaid Society, ſhould take an Oath for their good Demeanor and Obedience to the Ordinances thereof; and that all that had uſed that Trade for ſeven years, ſhould be admitted upon a reaſonable Fine; for which Charter of Incorparation they gave the King 43000 l. beſides 6 d. a Tun impoſt upon Soap; and divers Ordinances and By-Laws were made by the Corporation, and confirmed according to 19 H. 7. And amongſt the reſt, That any Perſon that had ſerved as Apprentice therein for ſeven years, might be admitted. The Plaintiffs were of the Corporation, but not the Defendants, nor had they been Apprentices for ſeven years, but uſed the ſame, tho brought up to other Trades; and for uſing thereof, their Goods and Veſſels were ſeized, &c. whereupon they brought their Actions at Law which were yet depending. (1)

Whether this were a good Charter of Incorporation, or a Monopoly, within the Statute of 21 Jac. cap. 3. was the Queſtion.

It

It is urged for the Defendants, That Soap-making is not a Trade within the Act of 5 Eliz. cap. 4. But I conceive that it is within that Statute, for it is an Act and Manual Occupation, and requires great skill and labour; and the 5th of Eliz. is a beneficial Law made pro bono publico, and therefore must have a liberal and favourable construction for the advancement of Knowledge and Experience in all Arts and Mysteries, and Manual Occupations, for without that the Common-wealth cannot be well served; and this Law has ever been expounded in a large and beneficial Sense. Pasch. 13 Car. in B. R. Appletoft *versus* Sturton, An Action of Debt was brought against a Tagger of Points, for using that Trade, not having served, &c. which is a Trade of low and mean Concernment, to which he pleaded the Custom of London, That a Man who had served an Apprenticeship to one Trade, might exercise any other; and the Custom found against him, and Judgment given against him accordingly in Mich. 14 Car.

Mich. 22 Car. Johnson *versus* Wilnerford. In an Information upon 5 Eliz. cap. 4. against a Draper in Norwich for using that Trade, not having been an Apprentice, &c. It was adjudged that he was within that Statute, within the word Mystery, which is a large and extensive word; but the Information was quasht, because it was not averred that he did not use the same Trade at the time when the Statute was made.

Pasch. 22 Car. Huttons Case, For exercising the Trade of hafting Knives in York, not having served as an Apprentice, &c. In an Information for 11 Months, one Month was found, but nothing said of the rest of the time; and the Court doubted what should be done in that Case, whether a new Tryal or a Repleader.

In our Case Soap-making is an Art, a Mystery, a Manual Occupation, and of so long continuance, that for ought appears to the contrary, it was in being when the Statute was made, and is as necessary a Trade as others that are named in the Act: and consequently a By-Law or Ordinance to restrain such as have not served as Apprentices, &c. from using it, is a good By-Law, and consonant to Law.

But admitting it not to be within the Statute, but that it is a new invented Manufacture; it is then to be considered when it was first invented. If at the time of the granting this Patent, then tho it had been granted to a single Person, it might have been good notwithstanding the Act of 21 Jac. cap. 3. of Monopolies, and would hold good for 14 years, if not contrary to Law, or prejudicial to the Common-wealth, or to the first Inventors.

But

But waiving all this, I conceive this Patent not to be within the said Act against Monopolies.

I know very well that common and vulgar Judgments run high against all such Patents, and condemn them before they understand them, as being contrary to the Liberty of the Subject, and the freedom of Trade; but they that consider them better, are not so hasty and rash in their Censures: For certainly upon a serious consideration all such Patents and By-Laws as tend most to the well regulating and ordering of Trades, and the better management of them, so that the benefit of them may be derived to the greater part of the People, though with a prejudice to some particular Persons, have always been allowed by the Law; but Patents which tend to the engrossing of Trade, Merchandize and Manufacture, tho of never so small value, into one or a few Hands only, have always been held unreasonable and unwarrantable; and therefore I agree to the Case in 11 Rep. of Monopolies, That a Grant of the sole making of playing Cards to one Man, was a void Grant, because injurious to the Publick, in regard such a Grantee might set what Prizes he would upon them: But our Case is quite another thing; for here is an Incorporation consisting of many Persons using this Trade, and there is liberty given to all others to be admitted, if they have served their Apprenticeships; and tho they have not, yet with the Corporations leave they may be admitted; and this difference is grounded upon many Authorities.

2 Ed. 3. 8. Jo. de Bretaignes Case, The King granted that all Ships that should come to such a Haven, should unlade at such a place only, for the better answering to the King's Duty of Custom. This was adjudged a good Patent, and yet the Merchant is under a strict injunction which may be prejudicial to him.

A Grant lately made to incorporate Coachmen, and that none should drive a Coach without Licence, held good.

Hill. 43 Eliz. in B. R. Tailor *versus* Brown, Entr. Hill. 41 El. Rot. 450. The King granted to the Corporation of Weavers in London, that none should intermeddle in their Trade, unless he were of their Fraternity; the Grant was held to be good, there being a Rent reserved upon it: But because the Plaintiff could not prove that the Defendant had intermedled; Judgment was given against the Plaintiff.

Mich. 43 and 44 Eliz. in B. R. Hawkeshead and Ward, The King granted to the City of London, That all Persons bringing into London salable Commodities, should pay so much for Toll; this was held to be a good Grant; and yet generally speaking, it may seem to be against the Liberty of the Subject.

22 H. 7. 89. Keilw. Rep. It appears there, that Pevensley in Sussex, part of the Dutchy of Lancaster, was made a Member of the Cinque-Ports by the Kings Letters Patents; and in the Cinque-Ports the Inhabitants have a Priviledge to be impleaded there, and not elsewhere.

The Law is the same with respect to By-Laws; such of them as serve for the good Government of a Society, are good in Law.

Mich. 6 Jac. Bonners Case, in B. R. There was a By-Law made in a Leet, that none should receive any to inhabit there, that was not born in the Leet, or had not inhabited there by the space of three years, unless he brought a Testimonial of his Good Behavior, and shewed it to the Constable, under a certain pain; this was held to be a good By-Law, and yet it is against the general liberty of the Subject, by which any Man may go and live where he please.

Mich. 21 Jac. B. R. Upon a return made by the City of London, of a Hab. Corp. for a Bricklayer, the Court held that By-Laws might well regulate and order Trades; as that one Baker should bake nothing but White-bread, and another nothing but Brown, &c. for this is no restraint properly, but an ordering of Trade; and of this a President was cited temp. H. 4. one Gascoynes Case.

Pasch. 4 Jac. in B. R. A By-Law that none in London should receive a Journy-man not Free of the City, held good; yet such By-Laws tend to abridge Trades, and the liberty of the Subject; but being for the better Government of Trade in general, they are allowable.

5 Rep. 63. The Chamberlain of Londons Case, A By-Law, that every Man shall bring his Cloath to such a place in London to be searched, and should pay 1 d. held good, because it tends to the prevention of Fraud and falsehood: so here the Grant being for the preventing of such Mischiefs, and for the well-ordering of the Trade, and having them expert in it, that exercise it, is a good Grant.

Obj. 11 Rep. The Case of the Tailors of Ipswich.

Resp. That Case does not come up to ours, for the restraint there was too general, and against the Statue of 5 Eliz. cap. 4. Wherefore he concluded that the Grant was good.

The Attorny General *versus* Shirt.

(2) THE Attorny General at the Relation of Sir William Waller preferred a Bill in the Exchequer-Chamber against Shirt for Prisage, Shirt having imported nine Tuns and a half

of

of Wine; in which Case it was urged, that the Duty ought to be paid as well as if there had been ten Tuns; for otherwise the King may easily be defrauded of his Duty, for Merchants will import but such quantities in every Vessel on purpose to defraud the King; so that it is fraud apparent. And upon Bill and Answer (the Defendant in his Answer denying the Fraud) without any proof, upon shewing of Presidents, sc. 11 Maii, 5 Car. Sir William Waller and others against Derricke, fol. 292. and Pasch. 6 Car. fol. 314. and Mich. 9 Jac. fol. 220. Sir Thomas Waller *versus* Poole, and 16 Jan. 13 Jac. Singleton and Gamon, and 28 Jun. 8 Car. Sir William Waller *contra* Atkins, In the Books of Decrees in this Court, (by which it appeared that the Court had declared such Importations apparent Fraud, without proof; and declared against them, and gave notice accordingly to all Merchants in all Ports of England) and also upon the view of an ancient Account in Mich. 16 Ed. 3. in this Court of Prisage taken upon the Importation of nine Tuns only in a Ship called the Trinity of London; the Court declared this to be Fraud apparent, and decreed Prisage to be paid; but if under nine Tuns be imported, no Prisage is due, as was agreed by the Court.

Hancocke *versus* Price.

IN Ejectment for 3000 Acres of Waste: Inter alia, after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that an Ejectment does not lie of Waste for the uncertainty what it means. (3)

Baldwin pro Quer'. There is a diversity betwixt a Precipe, in which the Demand must be certain, and an Ejectment, which lies de Pomario, de Cottagio, &c. of which a Precipe doth not lie, 10 Jac. Rethoricke and Chappels Case; so de portione Decimarum, Price and Wood, Hill. 5 Car. Rot. 181. in B. R. so of a Cole-mine, 5 Jac. B. Cumming and Kimming; so of a Boillary of Salt. Mich. 36 and 37 Eliz. and Palmer and Umphries Case, Ejectment de pecia terræ, Judgment in that Case was reversed in the Exchequer-Chamber; but if it had been de pecia terræ containing so many Acres, it had been well enough; so Ejectment of a Close of Land containing so many Acres good, 6 Jac.

Shaftoe on the same side. 1. The Law takes notice what Waste Ground is. Vide the Statute of Merton, cap. 4. which speaks de Vastis, Boscis & pasturis, Vide 2 Ed. 6. the Statute of Tithes, Ejectment lies de Cubiculo, Mich. 30 and 31 Eliz.

Brandons Case, And there Wray Chief Justice cited a Judgment in 29 Eliz. where Ejectione Firmæ was brought de quadam fabrica, and good; and in 21 Jac. de terra montana, good.

Finch pro Defendente. A convenient description and certainty is requisite; as de domo has been held ill for the uncertainty, 22 Jac. Banc. R. ent. Warren and Walker, de terra montana is naught; and for that cause upon a Writ of Error out of Ireland, a Judgment has been reversed, 18 Jac. in Banco Regis, Stafford and Mackdonnels Case, upon conference betwixt the Judges, Vide 16 Ed. 2. Warr. Chart. that Ejectment lies not de pastura: So here the word Waste is uncertain, and may comprehend Land of any quality, and the Sheriff will be at a loss what Land to deliver; and of that Opinion was the Court; and afterwards the Plaintiff released the Waste and Damages, and took Judgment of the residue.

Protector *versus* Cutterel.

(3) SIR John Lewis was outlawed at the Suit of Whitmore, the Outlawry was certified here; and upon an Inquisition a Lease was found of 60 years, if such a one should so long live. Cutterel hereupon appeared as Terre-tenant, and demurr'd to the Inquisition, and there was a Joinder in Demurrer.

Tucke pro Defendente. 1. Except. Because the Writ upon which the Inquisition was taken, recites the Outlawry to have been in 18 Car. and does not say of the Reign of the King.

2. Except. The Inquisition has found a Lease at the time of the Outlawry, but not at the time of the Inquisition, which ought to have been done, Vide 21 H. 7. 32. 7 H. 7. 3.

3. Except. The beginning and end of the Term are not found, which ought to be: An Inquisition ought to be as certain as an Indictment or Declaration, Vide 5 Rep. 120. b. 3 H. 7. 11, 12. Plow. Com. 202. Co. Inst. 303. As this Inquisition is found, the Party grieved can have no remedy, because here is no certainty that he can plead to, to avoid it. Vide 4 Rep. Palmers Case, the same Point.

4. Except. If such a one so long live, and the life of the Cestuy que vie is averr'd indeed, but no place, 6 Rep. 47. and 3 Ed. 4. 27.

Obj. There is here no Tenant before the Court, for Cutterel does not make himself a Title, Vide Stamf. Prerog. 63, 64, 65. 37 Ass. 10.

Resp.

Resp. If he were to plead, he ought to make himself a Title; but this Inquisition is such as he is not obliged to plead to, Vide 7 Ed. 4. 16, 17, 22.

But the Court was informed that the Defendant was dead, as in truth he was, and no more was done in it.

The Protector *against* Cory & al'.

SHalmer was Outlaw'd at the Suit of Jenkinson, and upon an Inquisition taken, the Jury found a Seisin in Fee of a Messuage, and of several pieces and parcels of Land in T. in the Occupation of such and such, and found the value: They found likewise a Seisin in Fee of two Marshes in T. called by particular Names, and their value, and in whose Occupation. Cory and others appeared as Ter-tenants, and demurred; Joinder in Demurrer. (5)

Hardres pro Defendentibus. The Inquisition is uncertain, because it is not found how much of these Pieces were arable, and how much pasture, which ought to have been found, that the Terre-tenants may know what in particular they are to have back out of the Kings Hands. 11 Rep. 55. Savils Case 11 Rep. 25. b. Harpurs Case, de decimis, ill. Detinue of a Box with Charters, ill without shewing their number and nature, because the thing it self is to be recovered; otherwise in Trespass, Hill. 2. Car. Ent. P. 2. Car. Rot. 361. Holmes *vers.* Wingreve, De Crofto terræ naught in Ejectment, otherwise in an Assize, because of the View. Tr. 23 Car. B. R. Brown and Webster. So Repl. pro cent. ovibus vervecibus & matricibus, without shewing how many there were of each, naught. Mich. 22 Car. B. R. Moor and Clipsams Case. And Justice Roll there cited a Case in 15 Car. in Ejectment for 40 Acres of Land, Meadow and Pasture held naught; so here in the Case at Bar. The Marshes are likewise uncertainly found; for the certainty of Acres is omitted: but the Court held the Inquisition well, and certain enough for the Marshes; and that an Inquisition might be avoided in part, and be good for the remnant, as here where several Values are found; otherwise if the value of the whole had been entirely found, and Judgment was given accordingly. The Court likewise held that here was a good Terre-tenant, tho it was only found that the Land was in his Occupation, and that they might join in Demurrer, tho their Occupations were several.

De Termino Sanctæ Trinitatis Anno Domini 1656. In Scaccario.

Swan *and his Wife against* Porter.

(1) THE Plaintiffs preferred a Bill against the Defendant partly in their own Right, and alledged themselves to be Debtors and Accountants, and partly as Administrators to the Wives Mother, but did not alledge to be a Debtor and Accountant. The Defendant pleaded Outlawry in the Baron in 23 Car.

Hardres pro Quer. The Outlawry so far forth as it concerns the Protector, is pardoned by the General Pardon. But, per Curiam, the Plaintiff ought to have replied, and have made himself capable to have the benefit of the Pardon, by shewing that he was not a person excepted.

But the Plea is ill, to alledge Outlawry in the Husband, when he and his Wife sue as Administrators, &c. To which the Court agreed, but said that the Mother of the Wife ought to have been alledged to be a Debtor and Accountant, else the Court has no Jurisdiction; and the reason is, because it is presumed that what is recovered must go in satisfaction of the Debt owing to the King, and must therefore be alledged.

William Preston *against* Thomas Mercer.

(2) IN Trespass, vi & armis, &c. the Plaintiff declares that the Defendant the 30th of Sept. 1653. and divers times since till the 3d of Nov. 1655. with force and arms, horse-dung, dirt and other filth so near the Walls of the Plaintiffs Dwelling-house in London in St. Butolphs Bishopsgate in the Ward of B. did put and lay, that the said Walls became rotten, wasted and broken. And also that the Defendant the 30th of Octob. 1653. and divers times after till the exhibiting of the Bill with force and arms, filth and stinking water, being in the yard of the Defendant's House, near adjoyning to the Plaintiffs

Plaintiffs said Messuage did make to run; which said Water did pierce the Walls of the said Dwelling-House of the Plaintiff; and sunk into the Plaintiffs Cellar and House of Office part of the said Plaintiffs house; to the Plaintiffs damage of 60 l. Upon Not-guilty pleaded, there was a Verdict for the Plaintiff, and 10 l. damages given.

Hardres moved for the Defendant in Arrest of Judgment. 1. Because the place of laying and putting the filth is omitted; nor is there any place alledged where the stinking Water was made to run; for it does not appear where the Defendant's Yard is. Now this stinking Water is the most material thing in the Case, and the cause of all the Plaintiffs damage; and therefore a place where &c. ought to have been alledged, as in 6 Rep. 47. Lieu del Assets, 4 Car. ..... *versus* Huggens. In Debt for Rent upon a Lease made in St. Mary le Bow London of an House, the place where the House stood was omitted; and for that cause Judgment was arrested after a Verdict for the Plaintiff, Vid. Hob. Rep. 113. a. 121. a. 1st Edit.

2. The Action here brought is an Action of Trespass vi & armis, whereas the Plaintiff ought to have brought an Action upon the Case; for Trespass lies not in this Case, because a Man cannot commit a Trespass in his own Ground vi & armis. If a Man break or pull down a Wall in his own ground whereby another Mans ground comes to be overflown, Action upon the Case lies and not an Action of Trespass, 7 R. 2. Act' sur le Case, 36. And Pasch. 12 Car. B. R. Entr. Hill. 11 Car. Rot. 427. Forber *versus* Hayes. Action sur le Case, quare aquæductum fregit, &c. lies well, unless it appear that it was broken in the Plaintiffs own Soyl, and then Trespass, &c. So here.

Atkins pro Quer. The Omission of the place is not material. It shall be taken to be in the same place that was before alledged, Hob. Rep. 208. 1st Edit. And if that shall not be presumed, yet the Venue coming from one of the places sufficeth, Hob. Rep. Gogle's Case, 189, 190. Where a Way was claimed by Prescription, the Venue came only from the place where the Tort was laid, though the way went through three several Townships. And for the Action, Trespass is proper in this Case, for here is a wrong done to the Plaintiff in rotting his Walls.

Hardres. The Case of a way that has been cited is against the Plaintiff, for there Issue was not taken upon the Prescription; if it had, the Court held that the Venue ought to have been awarded from all three places, for that all were material.

The

The Court seem'd to be of Opinion against the Plaintiff; but advised the Parties to agree it; and so it was referred to Arbitrement. But the Reference proving ineffectual; the Court gave Judgment at last pro Querente, after great wavering in Opinion and Arguings pro & con.

The Protector *against Sir* Thomas Ashfield.

(3) SIR Thomas Ashfield being sequestred for Recusancy, and two parts of his Lands in Buckinghamshire seized; In Easter-Term last he came in and pleaded that the Possession of the two parts ought to be no longer detained from him; for that he saith, that he is no Recusant, but is conformable to the Reformed Religion and Doctrin thereof professed in England according to the Laws in such Cases made and provided; and that he never refused to take the Oath of Abjuration specified in the Ordinance made the 19th day of Aug. 1643. and for proof of such his Conformity, that on the 22d day of Septemb. 1655. he took the said Oath according to the said Ordinance, as by Certificate and Oath appears; and that he hath frequented the publick Worship of God in the publick places thereof, and bæn present at the publick Ordinances of Prayers and Preaching there, as by Affidavit made appeareth. All which he is ready to averr, and thereupon prays to be discharged of the said Sequestration, and restored to his possession of the Premises.

Whereupon the Attorny General craved advice of the Court. And the doubt was, Whether or no Conformity by a Recusant Convict were now a discharge? For that the Statute of 1 Jac. c. 4. directs that such Conformity be registred and certified to the Bishop; and Bishops are now taken out of the way.

Hardres pro Ashfield. The Act gives two parts to the King till Conformity, by one clause; and by another clause this Conformity must appear by the Bishop's Certificate. But though Bishops and all Powers and Authorities committed to them, be taken away, whereby this clause concerning the Certificate is in a manner abrogated, yet the Recusant's power of Conforming is not taken away; and then it is now to be taken as if it had bæn enacted, that the party should forfeit two thirds till Conformity, and that no provision had bæn made how his Conformity should appear. In which Case Conformity must be tryed by the Common-Law, and not by Certificate: For whereever a Statute-Law gives or provides any thing, the Common-Law supplies all necessary Remedies and Requisites.

The

The Statute of 2 E. 6. of Tythes, gives treble damages, but does not mention how, nor in what Court they shall be recovered: In which Case the Law supplies it; viz. by Action at Common-Law and a Tryal by Jury, as appears Co. Magn. Chart. upon this Statute.

7 E. 6. Dyer 83. a. By the Statute of 32 H. 8. Tythes are made a Lay-Fee. Now by Exposition upon this Statute they shall be demanded, tryed and recovered as Lay-Fees. So here the Statute allows of a Conformity to be a discharge; but does not provide how this Conformity shall be proved. Why, the Common-Law shall supply that.

2. The Common-Law is the most ancient, general and fundamental Law of the Land. And the Priviledges of the Church derive themselves only from the Indulgence and Favour of Princes; and they had no foundation in the ancient Common-Law, ex. gra. Sanctuary, and some particular Tryals, that are left to them. And although the Priviledges of the Church are confirmed by divers Acts of Parliament, that hinders not but that there was an ancient Common-Law, in which they had no bottom.

9 H. 7. 2. Profession of Religion is triable by the Bishop's Certificate; yet if the time of a persons becoming profest come in question, that is to be tryed by the Common-Law.

45 E. 3. 18. 50 E. 3. 19. So general Bastardy or unques accouple en loyal matrimony is tryable by the Bishop's Certificate. But special Bastardy, as whether one was born or begotten before Espousals: Or whether a Woman be a Man's Wife or not: Or whether she were married to another before: These matters being specially alledged and put in Issue must be tryed per pais.

41 E. 3. 37. 11 H. 4. fo. If the Bastardy or Profession of a third person come in question, or of a person that's dead, it shall be tryed per pais.

By all which Instances it appears that the Law of Holy Church had bounds set to it; and that it took place only in a Case of a general Allegation of Bastardy, Profession, Loyalty de matrimony or divorce; and that only so long as the party was alive and a party to the Suit. And that in all other Cases the Common-Law retained its Jurisdiction; and more especially it ought in this Case so to do, where Holy-Church had no finger in the Pye, but by vertue of a Clause in an Act of Parliament, which is now repealed.

3. It is a natural and necessary implication in all Laws, which are nothing but refined Reason, that no Man ought to be punished more than his Offence deserves, but secundum quali-

qualitatem personæ & quantitatem delicti; and this is the voice of Magna Charta it self, cap. 14.

4 Rep. Copihold Cases, If a Lord impose a grievous Fine upon a Copy-hold Tenant upon his admittance, the Court shall judge upon a Tryal at Law, whether it be so or not: And so it has bẽn often held.

F. N. B. 75. a. If a Man be amerced for a Trespass or an Offence outragiously, a Writ de moderata misericordia lyeth, to the end that the reasonableness of it may come in question.

So here; the intent and meaning of the Law was to introduce Uniformity in Religion, and to punish such as offend in dissenting from the Religion Established, so long as they continue obstinate. And this appears by the Case of Heresie upon the Statute of 2 H. 4. c. 15. If a Heretick convicted would recant, he should be received, and not be punished; but if he relapsed, he was to be burnt without more ado. So that that Law conform'd it self to the Law of God, who wills not the death of a Sinner, but rather that he should repent and be saved. And therefore it would be contrary to Reason and the Law of God, not to receive an Offender upon his Repentance; or to deprive him of the benefit of his Repentance.

4. If there be no means for a Man to have the benefit of his Conformity, there will be a failer of Justice, which must not be presumed. Nullum iniquum in lege præsumendum est. In such Cases the Law will strain hard to come at Right.

6 Rep. 47. b. Dowdales Case, Debt against an Executor, who pleaded pleinment administer; the Jury may find Assets in Ireland, or in any part of the World, because otherwise there would be a failer of Justice.

15 E. 4. 14. 10 H. 6. 14. If it in Debt or Trespass a matter arising beyond Sea be in Issue, the Tryal shall be here, because else the matter in question would fail of a Tryal.

21 H. 7. 6. b. In Debt upon a Bond to perform the Covenants of a Lease, by which Oblations were demised. If the Defendant plead, that before the day of payment the Pope had resumed the Priviledge of Oblations, so that the Defendant could not enjoy the benefit of his Lease, he must alledge this in some place in England, to the end that it may be tryed; else there would be a failer of Right.

2 R. 3. 4. In Trespass for taking of Goods, the Defendant pleaded a Will by which he himself was constituted Executor, and so entituled himself to the Goods in question, which had bẽn the Testators. The Plaintiff said, that after the Will made, whereby the Defendant was appointed to be Executor, the Testator made another Will, wherein he appointed the Plaintiff to be

be his Executor. The Defendant pleaded that the Pope by his Bull had delegated such a one to examin this matter, who had by sentence adnulled the Will, by which the Plaintiff claimed. It was resolved, that because this matter was not tryable by the Certificate of any Bishop of England, to whom the Court might write, that therefore some matter must be put in Issue triable per Patriam, ne deficiat Justitia. As in Case of a Deprivation by the Court of Rome; or in case of a Quare Impedit against the Archbishop of Canterbury, if the ability of the person come in question; these shall be tryed per pais, and they shall not be tryed by any inferior Ordinary. So if a Profession in the Order of St. John of Jerusalem be alledged, because there is none to whom the Court can write for tryal of it, it shall be tryed per pais. And the reason of all these Cases is, lest there should be a failer of Justice. Though these things are in their own nature tryable by the Bishop's Certificate; yet where that cannot be had, they shall be tryed per pais. Now this is the Common-Law of the Land, and Magna Charta says, Nulli negabimus Justiciam.

Harwood *contra* Paty, Mich. 1649. in B. R. in Ejectione firm. Entr' Hill. 24 Car. Rot. 78. The question there was, whether or no the Tythes of a Parsonage were extendible by vertue of the Statute of Westm. 2. Because now adays there can be no Bishop's Certificate that the Defendant nullum habet laicum feodum. But it was adjudged, that they were extendible, because it was only the permission and indulgence of Princes to give such a Priviledge to the Clergy, because of the Bishops who had a superintendency over the Clergy; but that now Episcopacy being abolished, that Priviledge vanishes: And that Tythes for the future shall be subject to the Rules of the Common Law. And the Rule in Slades Case 4 Rep. is recurrendum ad extraordinarium, quando non valet ordinarium. And in consimili casu consimile debet esse remedium. And it was held there likewise that where a Bishoprick is taken away, that general Bastardy and unques accouple in loyal, matrimony &c. shall be tryed per pais, that there may be no failer of Justice. So, I say, in our Case; Conformity must now be tryed by our Law, because there is no Bishop to certifie it.

Atkins argued briefly on the same side; Sed non constat quid inde venit.

Morgan *against* Morgan.

(4) TRespass & Ejectment of Lands in Breknockshire: Not-guilty pleaded, and a Ven fac awarded out of Monmouthshire, being nearest to the place where the Lands lay. After Tryal and a Verdict for the Plaintiff, Griffith moved in Arrest of Judgment, that there was a mistryal in the Case; and that the Ven ought to have come out of Herefordshire.

1. The Issue ought to have been tryed in Herefordshire, being the next English County and not in Monmouthshire, upon the Statute of Rutland, 12 E. 1. For Authorities, Vid. Fitz. Jurisdict. 53 Ass. pl. 382. 14 E. 2. Bro. Judgment, 131. 19 H. 6. 12. 11 H. 4. 12. Bro. Cinque-Ports, 8. 24 E. 3. 42. 21 H. 7. 34. Plo. Com. 220. The Statute of 27 H. 8. does not alter the Law, which makes Monmouthshire, as it is commonly called, an English County; see the Preamble of the Statute. Nor does that Law make it indeed an English County, it remains a Welsh County still; only the Courts of Law in England have a Jurisdiction given them in Monmouthshire. And if it were expressly made an English County, yet an Issue arising in Wales could not be tryed there; the Conusance of Juries in Monmouthshire is not enlarged, Plowd. Com. 129, 130. 1 H. 6. 10.

Object. There are Presidents of such Tryals.

Resp. They passed sub silentio, and it was an Usurpation. For the Tryal ought to be in Herefordshire, as appears by the Books cited, unless it were by consent, Vid. 36 H. 6. 32. Nor is this Ven well awarded; it is awarded of the Neighbourhood next adjoyning to the place where &c. and not de corpore Comitatus, nor from any particular place in Monmouthshire, Vid. Plowd. Com. Stradling and Morgan's Case. Pasch. 7 Car. Risam and Goodman's Case, Rot. 25. 12. B. Com. Hob. Rep. 266. And prayed that Judgment might be arrested.

Jones pro Quer. Monmouthshire is an English-County by the words of the Statute. Nor is this a Privilledge, but a Burthen. Statutes made for the advancement and furtherance of Justice ought to have a large and beneficial Construction, Plo. Com. 59. ibid. 208. 3 H. 7. 4. As for the 2d Point, the awarding of the Ven is certain enough, Vid. Rast. Entries 267. Adjornatur.

Afterwards in Hill. Term. 1656. Powis argued pro Defendente and Jones pro Quer.

Powis.

Powis. The Ven is not awarded from any certain place, Plo. Com. 200. b. acc. 22 E. 4. 3. In Trespass de prox. hundredo. And there is a Mistryal, for that Monmouthshire is not an English County; He cited and relied on these Books, viz. 7 Rep. 21. b. Com. 129. the Stat. of Rutland. 6 H. 5. Jurisdict. 34. 13 E. 3. Jurisdict. 23. Ass. 382. 1 E. 3. 14. 19 H. 6. 12. 35 H. 6. 13. 30 H. 6. 6. b. 3 E. 3. 20. 6 H. 4. 9.

Jones pro Quer. Returns of Sheriffs are favourably expounded, 39 E. 3. Bro. Return, 56. 21 H. 7. 19. And the words of the Statute do make this an English County. The King has a Prerogative at Common-Law in Tryals of Issues; and an Act of Parliament does not put him in a worse Condition than he was before, unless he be named, 7 Rep. 14. 2 H. 7. 3. And the Statute adds more Land to Herefordshire, out of which Juries do frequently come. To this Powis answered, that by the express words of the Statute the Lands added to Herefordshire are made part of the County to all intents and purposes; which words are not made use of with respect to Monmouthshire.

In Trin. Term, 1657. Judgment was arrested.

Baron Nicholas and Parker held clearly that the Tryal in Monmouthshire was a Mistryal; for that Monmouthshire was but made an English County by the Statute of 27 H. 8. within time of memory, and Tryals in prox. Com' of Issues arising in Wales have been time out of mind and at the Common Law. So that a place newly made an English County cannot have such a Tryal, no more than in Plo. Com. Rice Thomas's Case, Liberties time out of mind shall extend to a place newly taken in. Accordingly Judgment was given for the Defendant; and this they said was the Opinion of all the Judges in Serjeants-Inn.

Vaughan *against* Mansel.

IN an English Bill for Multure due to the Plaintiffs Mill, by vertue of a Custom that all the Inhabitants in H. where the Plaintiffs Mill is, ought to grind all their Corn, Grain, Mault and Oatmeal to be used or spent, at the Plaintiffs Mill. After Answer and Depositions in the Cause, the question upon the hearing was, whether this was a good Custom or no? Because (as was objected) that (as the Custom was laid) no man could use, give or any way dispose of any Corn or Grain, but such as was ground at the Plaintiffs Mill; which seemed unreasonable. The Court ordered Presidents to be (5)

searched; and all the Presidents produced were of Decrees for Corn and Grain to be spent in their Houses.

Atkins. This is a good Custom, and warranted by Presidents and Authorities of Law, Vid. Co. Book of Entries 641. Such a Custom for all Corn spent in such an House, Rast. Entr̃ 591. All Corn growing on 100 acres of Land. And F. N. B. 122. Vid. etiam Harbin and Green's Case, Hob. Rep. A Custom to grind all Corn spent or sold, held to be unreasonable; but for all Corn spent, a good Custom.

Finch pro Defendente. The Custom here is an unreasonable Custom, and Presidents cannot alter the Law. But a Custom to grind all the Corn spent in such an House at I. S. his Mill, and not elsewhere, is a good Custom: For thereby it implied that he is not bound to grind all spent, which is unreasonable; for then he could not justifie the giving Poultry or Horses any Corn, but what must be ground. But the Custom, as here it is laid, is naught; for it obliges the persons to grind all their Corn spent; and this diversity was taken and judged in Alwood and Chalworth's Case in B.S. Mich. 1654. It was a Cause that came out of the Dutchy, and was decreed accordingly.

Chief Baron and Baron Parker. The words & non alibi are implied in such Customs, and signifie no more when expressed. And a multitude of Judicial Presidents in Court make a Law, as the Case of Concurrent Leases. And many Presidents would be reversed, if we should decree against this Custom. And such Customs must have a reasonable Intendment, viz. that all such Corn as is ground must be ground there.

Baron Nicholas contra. Because the Custom is against common Right, and shall not therefore be taken by Intendment. Et Adjornatur.

Afterwards in Mich. Term 1656. the Barons were divided in Opinion, and the Parties agreed upon an Issue to be tryed at Law.

The Protector *against* Holt.

(6) A Scire fac̃ issued out of this Court, reciting that William Lyme being bound in a Bond of 2000 l. to the late Keepers of the Liberties, &c. by inquisition the 28th of August 1655. it was found upon a Writ of Extent directed out of this Court to the Sheriffs of London, that the said Lyme was then possessed of certain Pearl and other Jewels to the value of 91 l. 18 s. 2 d. and that the same remained in the hands of Robert

Robert Holt, and were seized into the Protector's Hands; to shew cause why Execution should not be against him for the said Monies: Who thereupon appeared and pleaded, that before the time of the Inquisition, viz. the 1st of July 14 Car. Nicholas Carey was possessed of those Goods, and granted them over to him the same day and year for 44 l. 7 s. Without that that the said Lyme was possessed of the said Goods at the time of the said Inquisition. The Attorny General replied, that the said Nicholas Carey was not possessed at the time, &c. and Issue being thereupon taken, it was found for the Protector.

Hardres pro Defendente. Here is a Jeofail and not amendable, not being within the Statutes, because betwixt the Protector and the Party.

1. The Issue is taken upon a thing that is immaterial, viz. upon Cary's possession such a day, and the very day mentioned in and made part of the Issue, and therefore it is naught, Pasch. 1 Car. Entr. Hill. 2 Car. Rot. 425. Constable and Clobery's Case, in B. R. In Covenant, The Plaintiff had covenanted to go with his Ship with the first fair wind a Voyage to Cales; and the Defendants covenanted, if he should so do, to pay him at his return so much for freight. The Plaintiff alledged that he had been there and was returned, and the Defendants had not paid him: The Defendants pleaded a Plea and traversed absque hoc that the Plaintiff sailed with the first fair Wind. And the Court held this to be an ill Traverse; for the substance of the Covenant is to perform the Voyage, and the first fair Wind is no material part of it.

Pasch. 1 Car. B.R. Entr. Hill. 22 Jac. Rot. 92. The Bishop of Norwich against Cornwallis, In Debt upon an Obligation dat. 30 Novemb. 20 Jac. to stand to the award of, &c. The Defendant pleaded a Plea and traversed absque hoc quod cognovit se debere & firmiter obligari modo & forma &c. held to be an ill Traverse, because it took in the date of the Bond, which is not material.

So here the possession of Carey such a day before is not material, issuable or traversable; for if he were possessed at any time before, it sufficeth.

2. The setting forth of the possession of Cary and his Grant to the Defendant is but Conveyance and Inducement to the Defendant's Traverse, which is not issuable.

11 Rep. Priddle and Napper's Case 10.a. In Attachment sur Prohibition. The Plaintiff declared upon an Unity of Possession temps dont &c. before the dissolution, &c. of the Tythes and Lands out of which, &c. in such a Prior; ratione cujus the

Lands

Lands were discharged of Tythes tempore dissolutionis, &c. The Defendant pleaded a Title to the Rectory, without that that the said Prior held the said Lands discharged of Tythes at the time of the dissolution. Issue was taken hereupon, and held to be an ill Traverse. For that the Prescription of Unity ought to have been traversed; and not the Conclusion or ratione cujus, which is but matter of form.

Hill. 1 Car. B. R. In Debt against Executors, they pleaded a Judgment in Bar: The Plaintiff replyed that it was satisfied and kept on foot per fraudem & covinam. The Defendant traversed the Satisfaction. And adjudged ill, because it is only Inducement; and the Covin is the material thing.

Pasch. 24 Car. B. R. Allen *contra* Reeve, In Covenant for not repairing, &c. the Plaintiff shews for breach, that the House was burn'd down through the negligence of the Defendant, &c. and that he did not repair it. The Defendant traversed that it was not burn'd down prout, &c. and adjudged an ill Traverse, because the Defendant's not repairing is the substantial part, the other being but Inducement.

Mich. 22 Car. B. R. Lord Roberts *contra* Luxton, In Scire fac against an Executor upon a Devastavit returned; he pleaded that he had no Assets at the time of the issuing of the Scire fac absque hoc that he had wasted &c. And this was adjudged to be an ill Traverse; for his having wasted is but Inducement, and the substance is whether or no he had Assets at the time of the first Action brought.

So here the Possession and the Grant of Carey are only Inducement to the Traverse, and not issuable.

3. The Scire fac here is to compel the Defendant to answer for the value of the Goods that he has in his possession, whereas it ought to be to answer for the Goods themselves. For the Value is only to be recovered, when the Goods themselves cannot; and the Protector cannot be said to be out of possession.

But without considering these Objections the Court gave Judgment for the Protector.

De

De Termino Sancti Michaelis Anno Domini 1656. In Scaccario.

Samuel Reynolds *Plaintiff*, John Prosser *Defendant*. *In* Action sur le Case.

THE Plaintiff declares, That whereas John Lord Aburgauny, the 1st of April 1647. did by his Writing Obligatory become bound to one George Smithson in 800 l. with condition for the payment of 369 l. to the said George, on the 29th day of March next ensuing the date of the said Writing Obligatory: That the said 369 l. was not paid at the day. (1)

And whereas the said George in Easter Term 1652. in the Common Bench had obtained Judgment for 700 l. Debt upon the said Bond, and 6 l. Damages against the said Lord.

And whereas on the 24th day of May 1654. the said George had appointed the said Samuel to receive the Principal Mony, in the Condition of the said Bond mentioned, with the Interest thereof then unpaid, and in default of such payment to prosecute the said Lord, in the name of the said George, upon the said Judgment for the recovery thereof, to the proper use of the said Plaintiff.

And thereupon the said Plaintiff, the 7th day of June 1654. intended to sue forth Execution against the said Lord, in the name of the said George, of which intent the Plaintiff, the said 7th day of June gave notice to the Defendant.

Whereupon the Defendant afterwards the said 7th of June 1654. at London, in consideration that the said Plaintiff would forbear to prosecute the said Lord, in the name of the said George, upon the said Judgment until the end of Michaelmas Term then next ensuing, did assume upon himself, and faithfully promise that the Defendant at the end of the said Michaelmas Term would pay the Plaintiff so much of the Principal Mony, in the Condition of the said Bond mentioned, with so much Interest thereof as should be then remaining due and unpaid; and the Plaintiff in truth saith, that he giving credit to the said Promise, from thenceforth hitherto hath altogether forborne

to

to prosecute the said Lord upon the said Judgment; and that at the end of the said Michaelmas Term there was due upon the said Bond, for Principal and Interest, the Sum of 400 l. whereof the Plaintiff then and there gave notice to the Defendant.

Which the Defendant hath not paid, but refuseth so to do to the Plaintiffs Damage of 700 l.

Upon non Assumpsit a Verdict was found for the Plaintiff, and Damages given.

Hardres pro Defendente in Arrest of Judgment; the Consideration is laid to be, that in consideration that the Plaintiff would forbear to prosecute the Lord Alburgauny upon the said Judgment, in the name of the said George, by virtue of a Letter of Attorny to the Plaintiff, to receive to his own use from the said George, till the end of Michaelmas Term then next ensuing, the Defendant promised then to pay the Plaintiff all the Mony due for Principal and Interest upon the said Bond.

This is no good Consideration.

16 Eliz. Dyer 336. b. in Sir Francis Calthrops Case, A Consideration is called a cause or occasion meritorious, requiring a mutual Recompence in Deed or in Law; in all Contracts and Bargains there is quid pro quo.

11 Rep. Magd. Colledge Case, resolved, That the Statute of 18 Eliz. for confirmation of the Queens Grants made for Mony, or in discharge of a Debt or other Consideration, does not extend to a Grant made upon no Consideration, which is grounded upon the nature and definition of a Consideration.

Doct. and Stud. lib. 2. cap. 24. so far discusses the Point, as to hold that a Spiritual Consideration, or a Promise to build an Alms-house, or to do such an Act for the Honor of God, is not Obligatory, nor that an Action will lie for it; but the Ground there laid down is, That if he to whom the Promise is made have any Charge laid upon him, or any real Damage, or that the Party who makes the Promise has any benefit or profit, such a Promise doth bind in Law; but if neither of these happen, or the Party be in a worse Condition than before, it binds not.

10 Eliz. Dyer 272. A Master promiseth to two Men, that in consideration they had bailed his Servant out of Prison, he would save them harmless; this bound him not, because he had no benefit, nor they prejudice by his Promise; but if a Man promise to pay a Sum of Mony if J. S. will Marry his Daughter or Cosen, or because he has married her, the Person

son who makes the Promise here has a benefit, sc. the advancement of his Daughter, and the Consideration is a continuing one.

Now let us examine the present Case by this Rule. Where is the Cause or Consideration meritorious, which deserves such a Recompence? Or where is the benefit that the Promiser receives by it? Or where's the prejudice of him to whom the Promise is made? That the Promiser has no benefit is clear, for he is a Stranger to the Debt, and no way liable to the Judgment; so that the validity of the Consideration must consist in the prejudice that he sustains to whom the Promise is made, or else it is no where to be found: Now his prejudice can be pretended to be no other than he receives by forbearance to prosecute, &c.

Now the Plaintiffs promise of forbearance can be no good Consideration, unless it be prejudicial to one, or beneficial to the other. Mich. 6 Car. B.R. Morgans Case, A Lessee promised in Consideration the Lessor would forbear to distrain his Corn unshocked, he would pay his Rent that was due; adjudged to be no Consideration, because such Corn is not distrainable.

Trin. 2 Car. B. R. Goodwin *versus* Willoughby. A. promiseth to pay a Debt upon Account, and dies; his Wife promiseth in consideration of forbearance to pay the Mony, when she should have received such a Debt; this does not bind the Wife, unless she were Executrix or Administratrix, or chargeable with the Debt.

Hill. 1650. B. R. Lee *versus* Newcombe. In Error of a Judgment in an Inferior Court, the Defendant promised that if the Plaintiff would accept the Defendant for his pay-Master, for a Debt due to the Plaintiff by a Stranger, and would forbear the Defendant 6 months, that he would pay the Debt; adjudged to be no consideration, because the Plaintiff might sue the Stranger notwithstanding, and therefore is at no prejudice, which is a strong Case to our purpose.

Mich. 1651. B. sup. Hummers *versus* Hunton. Action sur le Case sur promise, the Defendants Son died endebted to the Plaintiff, and the Defendant being his Mother, but not Executor nor Administrator to him, nor having any effects of her Sons in her Hands, promised if the Plaintiff would forbear to sue for his Debt, that she would pay it. This was adjudged to be no consideration, because she was not liable to any Suit, so that the Plaintiff had no prejudice by such forbearance.

So that it appears clearly that where the Plaintiff is at no prejudice, nor the Defendant receives no benefit by forbearance; there forbearance is no consideration to ground an Action upon.

But now in our Case the Plaintiff has no real prejudice by such forbearance of Suit by himself, who has but a Letter of Attorny to prosecute in another Mans Name, and receive the Mony to his own use; for though he forbear to prosecute, yet the Party himself to whom the Debt is owing may prosecute in his own Name, and recover the Debt, and may permit and suffer the Plaintiff to have the benefit of it, according to the purport of his Letter of Attorny; so that neither the Defendant has any benefit by this forbearance, nor the Plaintiff a prejudice by his Cesser; and therefore here is no good consideration, no more than in the Case before cited betwixt Lee and Newcombe.

But if it had been in consideration that the Party himself, to whom the Debt was owing, would forbear Suit, such a Promise would have been good; but as it is, it is no more than if an Obligor should promise to pay the Debt due upon the Bond, if a Stranger would forbear to sue, for the Plaintiff here is in effect a Stranger.

Pasch. 1651. Pet *versus* Bridgewater, was our very Case. The Plaintiff there had a Letter of Attorny to receive a Debt to his own use, as here, and power to release and discharge it, which the Plaintiff here has not (for ought appears) and there the Defendant promised, that if he would forbear to prosecute the Suit, he would pay him the Debt; and it was moved in Arrest of Judgment there, as it is here, that there was no consideration, because what the Plaintiff does must be in another Mans Name, and the Debt remains due to another Person, who may sue and prosecute for it in his own Name, notwithstanding the Letter of Attorny. And the Chief Justice Roll said in that Case, That it appeared that the Plaintiff had power to discharge and release the Debt, which is for the Defendants advantage; and therefore he held it to be a good consideration, but said it would have been otherwise, if the Plaintiff had had no such Authority, which in our Case he has not, at least it does not appear that he has; so that this Case is a Case in point for the Defendant; wherefore he prayed for the Defendant, that the Judgment might be arrested.

Allen argued for the Plaintiff.

And afterwards the Court was of Opinion that the consideration was sufficient, and the Plaintiff had his Judgment.

The

The Attorny General *versus* Buckeridge, *in a* Demurrer *upon a Plea to an* Outlawry.

IN Hillary Term 1652. A Writ of Outlawry issued out of this Court directed to the Sheriff of Berks, as appears by the Margent, to enquire what Goods and Chattels, Lands and Tenements, Ambrose Southby and Thomas Wythens Gent. had on Munday next before the Feast of the Purification of the Blessed Virgin Mary, in the year of our Lord 1652. at which time they were Outlaw'd at the Suit of William Grove in Debt. Upon an Inquisition taken at Abingdon in that County, the 28th of March 1653. before the Sheriff, It was found that the said Wythens at the time of the said Outlawry and Inquisition was seized in Fee of a Messuage, with the Appurtenances in Grove, in the Parish of **** in that County, and of and in five Acres of arable Land, twenty Acres of Meadow, ten Acres of Pasture, and Common of Pasture for all Cattle thereunto belonging in Grove aforesaid, now or late in the tenure or occupation of Edward Dawson, of the clear yearly value of 30 l. &c. (2)

In Mich. Term 1654. Richard Buckeridge comes in as Terre-tenant of a Messuage, with the Appurtenances, and of a parcel of Ground called Bull-acre, and of a Close called But-Close, and of a Cottage or Tenement adjoining to the said But-Close, containing an Acre and a half parcel of the Premises.

And pleads, that before the said Outlawry, viz. in Hill. Term 1649. the said Wythens was summoned to answer unto the said Buckeridge in the Common Pleas at Westminster, in the County of Middlesex, in a Plea of Debt for 600 l. who declared for so much Mony borrowed, and thereupon the said Wythins appeared by Attorny, and suffered Judgment to go by non sum Informatus for 600 l. Debt, and 5 l. Damages.

That thereupon the 7th day of July, in the year of our Lord 1652. in the same Court of Common Pleas at Westminster, in the County of Middlesex, He made his Election, and prayed a Writ of Elegit to the Sheriff of the said County, which was granted returnable Tres Mich. following, at which time the Sheriff, namely Henry Herne Esq; then returned an Inquisition taken at Wanting in the said County, the 12th of October before, by which it was found that the said Wythens was seized, inter alia, of the Lands, &c. in Fee, of which the se-

veral Values were found, a moiety whereof he delivered to the Plaintiff in the Action, the now Defendant, of which the Lands pleaded to are parcel, by virtue whereof he entred, and was possessed, until the said Richard Dew Sheriff aforesaid, by colour, &c. and avers, That the Mesuage and Premises pleaded to, are parcel of the Lands and Premises in the said Inquisition, and the same that were delivered for the moiety as aforesaid; all which, &c. and prays the Lord Protectors Hands may be amoved, &c.

To this Plea the Attorny General demurred, and Buckeridge joined in Demurrer.

1. Except. Because the Party here has pleaded to a Mesuage and parcel of Ground called Bull-acre, and a Close called But-close, and to a Cottage or Tenement adjoining to But-close, containing an Acre and a half, parcel of the Premises, which is not certain enough, the quantity nor the quality of the Lands not being set forth.

Resp. There is certainty enough, by reason of the Names of the Grounds, &c. for greater certainty is not requisit, than to inform the Sheriff what Land in particular he is to put the Party into possession of, as having been unjustly taken from him; and the Names of the Grounds are a sufficient direction to him for that: If there be a convenient description and certainty, it is enough. Ejectione Firmæ de domo naught, for uncertainty what it signifies, and what it contains, 22 Jac. B. R. Int. Warren and Walker.

But Pasch. 1650. B. Sup. Fry *versus* Petchey, In Ejectione Firmæ de domo vocat. Holts, &c. adjudged good and certain enough.

Mich. 22 Car. B. R. Forcible Entry in uno clauso vocat. B. adjudged good in Butlers Case.

Pasch. 1656. Excheq. The Protector *versus* Sory and others, An Inquisition found a Seisin of two Marches vocat. &c. and held good upon a Demurrer; so here.

Obj. 11 Rep. Savils Case 55.

Resp. There is not such precise certainty required here; only it must constare Curiæ, that the Lands contained in the Plea, and in the Inquisition, are one and the same.

The Exception as to Cottagio sive Tenemento adjoining, &c. receives this answer. 1. It is alledged to be parcel of the Premises. And 2d. in Pasch. ..... B. R. ..... In Forcible Entry in Mesuagium sive Tenementum in the Occupation of such a one, adjudged good.

2. Except.

2. Except. The Defendant pleads, that he came into the Court of Common Pleas at Westminster, in the County of Middlesex, and made his Election, and prayed a Writ of Elegit to the Sheriff of the said County, which must be understood of the Sheriff of Middlesex, that being the proximum antecedens.

Resp. That Rule ad proximum antecedens fiat Relatio, has many Restrictions, and does not always hold; but Relation shall be had secundum subjectam materiam, and so as to avoid incongruity and absurdity.

28 H. 8. Dyer 14. b. Bolds Case, A Condition, that if such a one die before such a Feast without Issue of his Body (then living, &c.) these words do not relate to the Feast, but to the death of the Party.

4 H. 6 4. b. Debt against M. the Wife of T. G. of N. Judgment demanded of the Writ, because the Wife is not named of any place as she ought to be; for (of N.) relates (as was objected) to T. G. the Husband, but over-ruled.

18 Ed. 3. 29. Quare Impedit præsentare ad prebendariam de M. Majorem; this word Majorem does not relate to M. but to prebendariam.

11 H. 6. 53. b. In a Præcipe quod reddat, the Tenant pleaded the Warranty of R. Cosen to the Demandant, (sc.) Brother of M. Mother of J. Mother of the Demandant, cujus hæres he is; here the words (cujus hæres, &c.) do not relate ad proximum antecedens, quod nota per Curiam, but secundum subjectam materiam. Bro. pleadings 150.

8 Ass. 26. 7 Ed. 3. 275. In Mortdancester for 2 parts of 40 s. Rent; after Summons it was awarded quod prædict' reditum teneat, &c. this relates only to the Rent demanded.

6 H. 7. 7. In Cessavit, where the Tenure is by Homage, Fealty and Rent, & in faciend' servitia prædicta cessavit, this relates to the Rent only, ut evitetur absurdum.

Now consider our Case, The County of Berks is in the Margin, which is direction for all that ensues; and upon an Inquisition taken of Lands in this County, the Party comes in and pleads to part of the Lands so taken, and sets forth his Case, viz. That the outlawed Person was endebted to him, whereupon he had Judgment by non sum Informatus in the Com. B. at Westm. in Com. Middlesex, and chuses, and prays a Writ of Elegit to the Sheriff of the County aforesaid, at the return whereof Henry Herne Sheriff returns an Inquisition taken at Wanting aforesaid, in the County aforesaid, and delivers him a moiety, &c. to the value of 10 l. and avers the Land pleaded unto, to be parcel of his moiety; In this Case, putting all these things

things together, it cannot possibly be understood that Com. prædict. should relate to Middlesex, for there is no discourse nor occasion ministred of any thing done in Middlesex, but all the matter and the whole dispute arises concerning these Lands, and it cannot be presumed that the Sheriff of Middlesex should execute an Elegit of the Lands in Com. Berks.

Besides, the Plea is good to a common Intent, and sufficient enough.

3d. Obj. It does not appear by the Plea, but that the Defendant is satisfied his Debt by perception of Profits, and he does not aver that he is not satisfied, 31 Ass. 28. in point.

Resp. He cannot be satisfied by common Intendment, for the Lands extended upon the Elegit are but of 10 l. yearly value, and the Debt is 605 l. and he has but been two years in possession; and if there has hapned any satisfaction by casual Profits, which is not to be presumed, it must come on the other side. Till that appear what we have alledged is sufficient.

At another day, this same Term, the Matter of the 3d. Obj. was argued at the Bar by Hardres pro Defendente.

It appears upon Record, that the Extent upon the Elegit was the 12th of October 1652. for 605 l. Debt, and Costs of Suit, and that the Lands were extended but at the value of 10 l. per annum, and that they had been but two years in Extent at the time of the Plea pleaded, being Michaelmas Term 1654. so that it is not possible the Debt should be satisfied by the extended value.

There has been objected the Book of Assizes 31 pl. 28. and Bro. sur ceo, Pleadings 63. That such averment is necessary.

Resp. That Book does not warrant any such Rule; the Case is no more than thus, viz. In Assize the Tenant as to parcel pleaded a Recovery in a former Assize against the Plaintiff; and to the residue he pleaded an Extent upon an Elegit, for Damages recovered in the former Assize to 5 l. and that the Lands were delivered to him tanque, &c. and that the Mony was not yet satisfied; Judgment si Assize, &c. The Plaintiff replied, That the Lands extended were his, but the Damages for which they were extended, were recovered against another Person; this is the effect of the Book.

Which does not warrant that of necessity there must be such an Averment; nor is there any Rule laid down in the Book concerning the Matter: But Bro. in his Abridgment observes, that so it is pleaded in divers places in the Book of Assizes, and thence concludes that it must be pleaded in like manner, or that the Pleading is vicious, which is a meer non sequitur, that because it has been oftentimes pleaded, therefore it is of necessity to be pleaded.

Besides,

Besides, there is a mistake in saying that it has been generally pleaded; for in that very year, viz. 31 Ass. pl. 13. In an Assize for Rent, the Tenant pleaded, that before the Grant of the Rent there was an Elegit sued out upon a Judgment for 100 Marks, and the Lands extended quousque, and assigned to himself, and that the Demandants Father, &c. granted and confirmed to him for life; and the Plea was admitted to be a good Plea: But the question was, whether it was not double? sc. The Elegit and the Grant, before the grant of the Rent, for which the Assize was brought; so it is not always pleaded, as Brook says.

2. It was necessary, for any thing that appears to the contrary, to set it forth in 31 Ass. pl. 38. because the Debt was but 5 l. and it does not appear how long the Land had been extended, so that perhaps the time was passed, within which the Debt might have been run up, and then without doubt the Defendant ought to plead so, if he would hold over.

3. Admitting that it had been most usually pleaded, yet it does not follow, that de jure it must be so pleaded.

It is usually said in the Declaration, in an Action upon the Case, and Debt, licet sæpius requisitus; and yet in Plow. Com. Buckleys Case, it is said to be but a form of Pleading, and that if it be omitted, it does not vitiate the Declaration.

In Avowries it is usually said & hoc parat est varificare, and yet it is not necessary, 3 Mar. Bro. Averment 81.

So that the inserting of words into Forms of Pleadings, is not always an Argument that therefore they are necessary; and the Law is so that they cannot be omitted.

It has been farther objected, that it is in the nature of a Condition precedent, and therefore must be averr'd

Resp. That is a mistake; for the Commencement of the Estate does not depend upon the Debt being satisfied, but the Estate is to determine upon it: the Estate is created by Extent, and is not to expire till the Debt be satisfied, and therefore the continuance of it needs not be averred. As 7 Rep. Ughtreds Case, A Man is made Captain of a Fort for his life, and an annuity granted to him for the Exercise of the Office; In an Action for this Annuity, the Plaintiff needs not aver that he has exercised the Office, for the Annuity would determine upon his not executing it; and therefore that must come on the other side, being a Condition subsequent; and in all Cases of Condition subsequent, the Plaintiff declares generally without any Averment; and the breach of the Condition must be alledged by him that will take advantage of it; it is matter ex post facto; and every Man in pleading

ing must alledge that that makes for himself only, and is for his avail, and shall not be driven to alledge what makes against him; which is a strong Case to our purpose; for it does not make for the Defendant to alledge that the Mony is paid, no more than in the other Case that he had exercised the Office; the payment of the Debt is not for the advantage of the Extender, &c. but for the benefit of the other Party.

In 2 H. 7. 8. b. there is a notable Case to this purpose, The King granted a Patent directed to the Clark of the Hanaper to pay such a Sum of Mony to the Patentee, receiving an Acquittance for the same; the Patent was shewn to the Clark; and in an Action of Debt for non-payment, it was held and adjudged that the Plaintiff need not aver that he offered an Acquittance, but the other ought to have demanded it; and that it was sufficient for the Plaintiff to say that he shewed him his Patent, because it was for the Defendants advantage to alledge that he demanded an Acquittance, and the Plaintiff refused, &c.

So here it is for the advantage of the other side to alledge that the Mony was received and paid.

But it is observed that it is as necessary to make this Averment, as it is to aver the life of a Cesty que vie, &c.

Resp. The Cases are not alike, for there the Life is the limitation of the Estate, and not a collateral determination of it, as in our Case.

Now for Reasons and Authorities.

1. Such an Averment is not necessary, because as it hath been said, it is in the nature of a Condition subsequent, and a collateral determination of the Estate.

2. The Estate here is in the Eye of the Law a certain Estate. Vide Borastons Case, 3 Rep. 21. Lands let till an Infant of the age of 9 years comes to 21 years of age, is a certain Estate for 12 years; so here the Estate limited upon the Extent is by common Intendment for a certain time, i. e. till the Debt be raised out of the extended Value; as if the Debt were 100 l. and the Land extended at 20 l. per annum, it is an Estate for 5 years; and this appears 4 Rep. Fulwoods Case, 67. b. where it is adjudged upon consideration had of all the Books, that after the expiration of the years within which by computation the Mony might be raised according to the extended value upon the Elegit, the Party may enter; and the difference taken is betwixt an Elegit and a Statute-Merchant, for there he cannot enter, and the reason is, because the Extender is to have his Charges and Expences

pences over and above the Debt, which are not to be recovered upon the Elegit.

11 H. 6. 6. If a Tenant by Elegit bring an Assize, and hanging the Assize the years expire, the Assize shall abate.

19 Ed. 1. Exec. 146. If he be interrupted by War, he shall not hold over.

Whereby it appears, that in Judgment of Law he had a fixt Estate for a certain term of years.

3. Here we need not aver that the Debt is not satisfied, because it appears upon the Record not to be satisfied; for the Land has been under Extent but for two years before the Plea, &c. and it is valued but at 10 l. per annum, and the Debt is 605 l. so that it appears to be impossible that 605 l. should be raised out of 10 l. per annum in two years time; and it is a Rule in Law, Quod constat clare non debet verificari.

In 8 Ed. 3. 17. If in Trespass the Defendant plead a former Recovery for the same Trespass, he must aver that it was the same Trespass, and betwixt the same Persons, 33 H. 8. Bro. Averment 42. But if in that Case it appear upon Record that it is the same Trespass, and betwixt the same Parties by the word (prædict.) there needs no such Averment; so here.

4. In all Pleadings it is unformal and incongruous to aver a negative.

5. Things casual and accidental are not to be presumed, unless alledged.

6. An Extent is matter of Record, and therefore cannot be avoided but by matter of Record; and then it is not necessary to aver that it is not satisfied, because it must appear by Record to be satisfied.

4 Rep. Commonalty of Sadlers Case, If the King be entituled by double matter of Record, this shall not be avoided by Traverse or monstrans de Droit, but by double matter of Record.

1 H. 7. 14. b. Debt upon a single Bill, payment without an Acquittance under Seal is not a good Plea.

46 Ed. 3. 33. In Debt upon a Recognizance, Acquittance under Hand and Seal is not a good Plea in Bar, but the Party is put to his Audita Querela.

So here the Extent must be avoided by matter of Record, viz. either by effluxion of time, which must appear upon Record, or by surmise upon Record and Scire facias.

For Authorities.

15 H. 7. 1. 26 E. 3. 69. b. Annuity granted till the Grantee be promoted to a Benefice. In an Action for this Annuity the Grantee needs not aver that he is not promoted, but that must come on the other side, because it is for his advantage. So here.

22 E. 4. 43. Annuity pro consilio impendendo. In an Action the Plaintiff needs not aver that he gave Counsel.

15 H. 7. 15. a. seems to be a Case express in point, where this difference is taken, viz. when payment or satisfaction happens within the time limited by the Extent, there the party whose Lands are extended, must surmize it, and have a Scire fac to which the Extender may answer. But if Satisfaction be through effluxion of time, there needs no such Surmise.

And another difference there taken is that when the Extender cannot receive the Profits for all the time limited; then if he will hold over, he must surmise the special matter, as a Disturbance by the party, Surrender or some such matter, &c.

Vid. 4 Rep. 82. Sir Andrew Corbet's Case, 5 E. 3. 59. a. 17 E. 3. 43. b. 21 E. 3. 1. a. 39 E. 3. 30. 21 E. 3. 20. b. 15 E. 4. 5. b. 2 H. 4. 8. b. 12 H. 4. 6. b. 32 E. 3. Scire Fac 101. 19 E. 3. Sugg. 18. 2 E. 3. Scir Fac 109. 15 E. 3. p. 115.

Upon all which Books it appears, that if the party whose Lands are extended, will avoid the Extent, he must avoid it by surmise upon Record; and that the surmise of satisfaction must come on the other side, as more proper for him; and if so, it will necessarily follow that the Extender needs not alledg, that he is not satisfied. Nor shall he be here in a worse condition, because the Protector claims under the party, whose the Lands are. Whereupon he prayed Judgment pro Defendente.

And upon this Argument the Barons were of opinion that such averment is not necessary; because the payment of the Mony is not the creation, but the determination of the Estate, which in Judgment of Law is certain by the extended Value. Et casus fortuitus non est supponendus. And that this Case differs from that of a Lease for years, if such an one so long live; for the continuance of that life, is the very Essence of the Continuance of the Estate. Et adjornatur.

Afterwards in Hill. Term it was argued by Finch for the Protector.

He agreed to the Case 15 H. 7. 15. And that if the Plea had been pleaded in Bar to the Plaintiff, the Averment would not

not have bæn necessary: But the Case of Prerogative differs from that of a Subject, as in the Case of a Condition subsequent, 1 H. 7. 24. 38 H. 6. 34. Grant ad effectum, &c. is a Condition and must be pleaded, Hob. Rep. 142. Commendam granted upon a Condition subsequent; it must be pleaded, and mispleading vitiates it. 4 Car. Scac. Sir William Brooman's Case, Direct performance must be pleaded, 4 Car. B. R. Sir Tho. Mounson's Case, Condition must be averred. So here.

For Reasons. 1. All Pleas shall be taken most for the Protectors advantage.

2. The Execution of the Elegit is not well pleaded. The Writ of Elegit appears to have bæn taken out three years after Judgment given; and there is no Averment of Continuances; so that it did erronice emanare. And such an Execution shall not bind the Protector.

Hardres pro Buckeridg. It is now at last admitted to me by the other side, that, if this Plea were betwixt party and party, it would be a good Plea without the averment contended for; and that then it must come on the other side to alledge the Debt satisfied. But the Objection now made is, that this being in the Protector's Case, the Prerogative will make a difference: To which I give this Answer, viz. that I do not find in any Book of Law, that the King's Prerogative will enforce the Subject to alter the nature and manner of his Plea.

I agree the Protector may alter his own Count or Plea, or waive it and demur; so he may waive his Demurrer and plead. But if he will alter his Declaration, it must be in the same Term, and not in another Term if the party has pleaded to it; nor after Issue joyned, 13 E. 4. 8. 28 H. 6. 2. 5 Rep. 105. a. Baker's Case, 9 H. 4. 6. b. 3 E. 4. 26. a.

But to compel or enforce the Subject to alter the Nature and Form of his Pleading; such a Prerogative is not to be found.

Reasons. 1. This would be to alter the Law it self, which the King cannot do, though he has many Prerogatives allow'd him by Law.

Vid. Plowd. Com. 487. b. Hill. 2 Car. B. Com. In Quare Impedit. If the King by his Attorny enter a Non vult ulterius prosequi, the King cannot afterwards proceed in the same Suit, but he may begin anew; and this is by reason of the prejudice which otherwise might accrue to the Subject. The King *versus* Pickering.

Plo. Com. 246. b. The Lord Barkley's Case. The King's Prerogative is no warrant to him to wrong the Subject. And therefore, if before the Statute de donis conditionalibus an Estate had bæn given to the King and the Heirs of his Body, he could not alien it nisi post prolem suscitatum, no more than a common person, and upon this ground.

F. N. B. 7. a. 40 E. 3. 17. The King cannot alter the nature of his Writ.

2d Reason. The Protector here claims under a Subject, and therefore shall not be in a better condition than he under whom he claims; Except some particular Cases, in which the Quality of his person priviledges him, as in case of a demand of Rent.

If a Man that is endebted to the King lease his Lands, the King shall not distrain upon the possession of the Lessée, 22 E. 4. 10. b. 41 E. 3. 26. b.

In a Writ of Right he must alledge Seisin and lay the Esplees, and convey a discent as any other common person, 6 E. 3. f. 219. b.

3d Reason. If the Law were otherwise, it would introduce doubt and uncertainty, and the Subject would be at a loss for want of a certain Rule.

Object. But it has bæn objected, that this is in the nature of a Condition subsequent, whereof in the King's Case Performance must be alledged.

Resp. The Cases cited are not like to ours, nor stand upon the same Reason. I agrée the Case, that where the King erects a Court in a Manor to do Justice there, or gives Lands upon Condition to give them to a Nunnery to be erected, or to provide a Chaplein, as in the Cases that have bæn quoted; the Patentées must in Pleading aver the Performance of the Conditions, because they are the grounds and considerations of the Patents, which unless they appear to be performed, the Estate is gone.

Vid. Hob. Rep. Anne Needlers Case. A difference there taken betwixt the Consideration of a Patent being executed and executory. If executory, it must be averred to be performed; and thereby the Estate, that passed by the Patent, is supported. But here we are not in any such Case; but in a Case upon the Stat. of Westm. 2. that gives the Elegit, and subjects the Lands of the Debtor upon a reasonable Extent and value, to Execution till the Debt be satisfied; and as I said before, gives to the Plaintiff a certain Estate by computation of time. And it appears here upon Record, that that time is not yet expired, nor can be, whereas no such thing appears upon Record

cord in the Cases that have been objected; and the payment is collateral to the Estate, and must come in by surmise of the other Party, and that as well in the King's Case, as in the Case of a common person.

1 E. 5. 6. b. A surmise in Chancery by Information, that the Heir held by Knights Service, and was within age, held to be sufficient, and that without Office found, and that the party should answer to it,

3 Eliz. Dyer 197. b. Upon a forfeiture of Letters Patents a Scire Fac was issued to revoke them; and they were annulled upon it. And the reason there given is, because he that is in by matter of Record, must be displaced in like manner.

2d Object. It is likewise objected that here is no good Execution by Elegit; because the Elegit went out three years after the Judgment entred, and there are no Continuances, that appear at least; and so the Elegit erronice emanavit; and that of this the Court ought to take notice.

Resp. That is not material; for be the Execution right or wrong, yet it must stand till it be reversed by Error, and it can no otherwise be avoided.

8 Rep. 142. b. Dr. Drury's Case. If a Man that is in Execution upon an erroneous Judgment, escape, the Sheriff cannot take advantage of it; for till reversal it remains in force.

In Trin. Term, 1656. In this Court between the Attorny General and Andrew, it was adjudged per Curiam that an Elegit, which had issued two years after Judgment, was but erroneous, and could not be avoided by the Protector, who came to the Lands by a subsequent Extent. So here.

Whereupon he prayed Judgment for Buckeridge; and Judgment was given accordingly.

The Protector *vers* Geering.

Upon an Outlawry at the suit of Spencer, the question was, Whether or no one as Amicus Curiæ might appear and quash an Inquisition found upon the Outlawry, for matter insufficient apparent. (8)

Atkins. It may be so quash'd upon Motion without Plea or Demurrer. 1. It is for the honour of a Court of Justice to avoid Error in their Judgments, Dyer 201. Errors are like

Fe-

Felons and Traytors; any person may discover them, they do caput gerere lupinum, Vid. Hob. 5. Error, though by consent. He cited these Books, viz. 11 H. 4. 45. 8 Ed. 4. Judgment 50. 4 H. 6. Office de Court 2. 33 H. 6. Error. 56. 34 Ed. 3. Office de Court 25. 9 H. 6. 46. The Court ex Officio ought to examine and enquire into Errors, though not moved.

For Amicus Curiæ, he quoted these Authorities, viz. 4 H. 6. 16. Bro. Office de Court 6. 41 Ed. 4. 21. pl. 6. Bro. Error 49. 7 H. 4. 36. a. per Hull. Pleas Cor. 51. b. 3 Inst. 137. 9 Ed. 4. 9. Bro. Non-ability 30. 3 Inst. 29. 7 Ed. 4. 16. b. 5 Ed. 4. 7. There is a diversity betwixt matter apparent, and matter dehors; and there is a Case in point 7 Ed. 4. 22. b. per tot. Curiam.

1. Obj. There is a diversity where an Error is evident, gross and apparent, and where it is disputable.

Resp. There is no ground for this distinction; the word Evident is only to distinguish an Error apparent in the Record from matter dehors; for Judges are presumed to know all Errors, and the word Errors supposeth manifest Errors, 21 H. 6. 11. Judgment 16.

2. Obj. If these were allowed, all Records that entitle the King would be overthrown, and his Possession lost.

Resp. Plow. Com. 294. b. and 7 Ed. 4. 18. And if the Office be insufficient, there is no Estate vested. Hob. f. 38. 7 Ed. 4. 16. b. The Sheriff a Disseisor.

3. Obj. To whom shall the Mony be restored, because the Party concerned does not appear?

Resp. 7 Ed. 4. 22. There the Issues and Profits were restored to him that was ousted by the Office; the Books do not leave that arbitrary.

2. Reas. Barbarism will be introduced, if it be not admitted to inform the Court of such gross and apparent Errors in Offices.

Shaftoe argued to the contrary.

But afterwards the Barons, viz. Nicholas and Parker took it clearly upon the Book of 7 Ed. 4. That an Amicus Curiæ might shew cause to quash an Inquisition; and that Bennets Case which had been urged to the contrary, went off by agreement of the Parties.

Woolridge

Woolridge *and* Dovey.

IN Ejectione Firmæ, a special Verdict was found, upon which the question was, whether or no a Prescription for Common of Pasture for all Cattle and Swine in a Forest at all times of the year, were a good prescription, or not. (4)

Obj. It does not appear that it is a Forest, for it does appear to have been disafforested; and a few words in a special Verdict found afterwards, shall not by inference and construction make it a Forest again. And it must have been a Forest temps dont, &c. or the prescription cannot come here in question.

Baldwin argued pro Quer', That the prescription was naught, which was agreed to by the Court, and the Councel of the other side; and for not finding expressly that it was a Forest, Judgment was given pro Defendente.

Cook *versus the Earl of* Arundel *& alios.*

THE Case was upon English Bill, at the Suit of Cook, to make the Defendants Lands subject to the payment of a Fee-farm Rent, and to charge them with it; for that the Duke of Norfolk, who had in his hands both the Plaintiffs and Defendants Lands subject, inter alia, to the payment of this Rent, had granted the Plaintiffs Lands to one under whom the Plaintiff claimed, and covenanted that these Lands should be discharged of the Rent, upon which Covenant the Plaintiff now seeks relief, and would have it taken to be a real Covenant which should run with the Land, and charge the other Lands with the whole Rent: But the Court was clear of Opinion, that it was no more than an ordinary and a personal Covenant, which must charge the Heir only in respect of Assets, and not otherwise; and thereupon the Bill was dismist. (5)

James

James *versus* Blunck.

(6) AN English Bill was preferred to be relieved against the Defendant for Rent, the Defendant being Assignee of an Assignee of a Wine-Licence Lease, made by the Plaintiff, rendring 41 l. per annum. And it appeared that the Defendant was a purchaser of his Interest in the Lease for a valuable consideration, and had no notice of the Rent reserved upon the Original Lease; and therefore the Bill was dismist, because it is only a personal Contract, which does not run with the Licence; as in Case of a Lease of a Fair, rendring Rent, an Action of Debt does not lie against the Assignee; and æquitas sequitur Legem in this Case, especially where the Assignee is a Purchaser for a valuable consideration without notice of the Rent reserved.

De

De Termino Paschæ Anno Domini 1657. In Scaccario.

John Cother *Plaintiff*, Essex Merrick, &c. *Defendants*. In Ejectione Firmæ.

UPon a Special Verdict found the Case was this, viz. (1)
Robert Earl of Essex seized in Tail to him and the Heirs Males of the Body of his Grandfather of the Manor of Pembrooke, died seized; his Son entred and made a Lease by Deed for 21 years to Sir John Merrick, rendring Rent to the Lessor his Heirs and Assigns, and died, and after his death the Estate Tail descended upon one, who was not Heir at Law to the Lessor. And the question was, whether this were a good Lease within the Statute of 32 H. 8. to bind the Issue in Tail.

Edgar pro Quer. The Lease is not within the Statute. 1. It is not pursuant to the Reservation directed by the Statute, Vid. Statutum. The Reservation must be such as that the Rent may go to the Reversioner, Vid. 5 Rep. Lord Mountjoy's Case, 41 E.3. 17. 33 H.8. Bro. Joyntenants 62. At Common Law a copulative shall be taken for a disjunctive, ut res magis valeat, &c. But in positive Laws; such as Acts of Parliament, it is otherwise, Keilway 97. Dyer 45. 2 R. 3. 18. Statues must be pursued, 12 H. 7. 21. Keilw. 21 H. 7. 25. 7 H. 7. 4. 8 Rep. 48. 8 Rep. Pain's Case. 5 Rep. Elmer's Case, Dyer 246. Vid. Keilw. 8. 18 E. 4. 18. Reservation to the Lessor during the Term, Inst. 348. Reservations are taken strictly, because they derogate from the Grant aforegoing, 27 H. 8. 18. Dyer 115. comes up to our Case.

Object. Lit. 348. 3 Rep. 23. Rent reserved to the Lessor and his Heirs shall go to the Lord by Escheat, and 8 Rep. Whitlock's Case; the Reservation shall go according to the Proviso, &c.

Resp. Those Cases differ from ours; for there is a relation to a precedent Act, and the Case is at Common Law; but the words of the Statute require that the Reversioner shall have the same advantage that the Lessor himself, which is not here; for it is a collateral Heir to the Lessor, to whom

the Reversion is descended; the Statute extends to ordinary Entails, and not to such unusual ones as this, to a Man and the Heirs Males of the Body of his Grand-Father.

He cited 5 Ed. 3. 7. Special Essoin al auter jour. 12 Ed. 4. Bro. Parliament 79. 22 Ass. 45. Dyer 72, 236. 2 Rep. Wisemans Case, sur. 34 H. 8. cap. 20. of Recoveries.

Finch pro Defendente. It is a good Lease within 32 H. 8. The doubt is upon the Proviso, that the Rent shall go to such Persons and their Heirs as the Lands should have done, if no such Lease had been made, so that if the Reversioner be secure, it sufficeth. Mich. 8 Jac. B. R. Sir James Skidmores Case, per Fleming Chief Justice. Rent reserved to the Issue in Tail only, held to be a good Reservation, though the Lessor himself be omitted.

1. The Rent is incident to the Reversion, when generally reserved, and shall go to the Heir in Burrough English, and to the Heir on the part of the Mother. 7 H. 6. 4. 5 Ed. 2. Avowry 207. Pasch. 4 Jac. B. R. Hills Case, A Husband made a Lease of Lands that his Wife held in Frank-Bank, rendring Rent to him and his Heirs; the Rent shall go to the Wife who has the Reversion.

Another Reason he grounded upon the words of the Statute after the Proviso, which vide in Statuto.

Obj. 35 Eliz. Richmond and Butchers Case. Rent reserved to the Lessor and his Executors, during the Term, ceases by the death of the Lessor.

Resp. That Case was at Common Law, and there the Executors are named, which is particular; but here is the word Heirs, which is a general word.

Hill. 1 Car. B. R. Shury and Browns Case. Rent reserved to the Lessor and his Assigns during the Term, shall be paid during the Term, and shall go to the Heir, per touts les Justices. Whitlocks Case, 8 Rep. comes up to our Case. 10 Car. in Cur. Wardor. Cumberfords Case, A Tenant in Tail makes a Lease, rendring Rent to him and his Heirs, adjudged good; whereas the Power given him by the Statute, is only to reserve it to him to whom the Reversion belongs. 5 Rep. Mallories Case, in point. Dyer 115. Mich. 18 Eliz. B. R. Rosse and Hartwells Case. The same Point adjudged upon Evidence to a Jury, and compounded. A Lease for three lives, Rent reserved to the Tenant in Tail, his Heirs and Assigns, it shall go with the Reversion. Hill. 39 Eliz. Rot. 341. in Com. B. Reve and Cox, in Warburtons Rep. to the same effect.

In

In the same Term Powis argued pro Quer', the Case was; Tenant in Tail to him and his Heirs Males of his Body, had Issue two Sons, by two different Venters, and died, the eldest Son entred and made a Lease for 21 years, reserving Rent generally to Himself, his Heirs and Assigns, and died without Issue, having two Sisters, his Heirs at Law; whether by this Reservation the Rent belonged to the second Brother, to whom the Reservation descended, as Heir Male of the Body of the Father, was the question: He argued against it, and that this was a Reservation to the Heirs General, and so the Lease not a good Lease within the Statute. 1. He grounded himself upon the words of the Statute of 32 H. 8. vide Statutum. 2. He said a Reservation was to receive the same construction as if it were a Grant. 5 Rep. 112. Co. Inst. 47. Dyer 45. 21 H. 7. 25. b. Hill. 33 Eliz. in Communi Banco, Richmonds Case.

3. The Heir in Tail in this Case is neither Heir General nor Special to him that made the Lease; he is Heir Special to the Father, but not to his elder Brother, Vide F. N. B. 212. In Formedon. 11 H. 6. 13. 9 H. 6. 24.

Afterwards in Trinity Term it was argued by Windham pro Defendente, That the Rent, as here reserved, should go along with the Reversion; the word (Heirs) shall be expounded secundum subjectam materiam. Co. Lit. Rent reserved to a Mans Heirs, shall go to the Heirs on the part of the Mother, if the Lands descended from the Mothers side. 30 Ass. 47. Rent reserved payable at Lady-day and Michaelmas; The Law will transpose the words to preserve the Rent. Plow. Com. Hill. and Granges Case. And it is inforced by these words, during the Term; and if other construction were made, there would be a contradiction in the Reservation. He cited 5 Rep. Mallories Case 111. and Shury and Browns Case above mentioned.

A Reservation is clausula ancillaris, Hob. Stuckley and Butlers Case, and must not precede, but follow after. Vide Hob. in Clanrickrads Case of Covenants, Reservations, Warranties, and other concomitant Clauses. The word Heirs must be applied to the Condition of the Estates, as a Warranty must in that Case cited out of Hobart.

Shafto pro Quer'. The Statute that enables a Tenant in Tail to make such Leases, must be observed, or the Leases will be void. 3 Rep. Brownes Case. 10 Rep. 51. Pasch. 3. Eliz. in Banco Com. Baron and Feme seized to them and the Heirs of the Body of the Husband; the Husband made a Lease rendring Rent to the Heirs of the Body of the Husband; this was held to be no good Lease within the Statute: The words of Reservation mentioned in the Statute (quod vide) are very

particular, and direct to what Heirs the Reservation shall be made; and therefore, unless they be pursued the Lease is void. 5 Rep. Montjoys Case. Dyer 307.

Obj. The Rent must follow the Reversion. Pasch. 4 Jac. Co. Ent. 124, 125. Hills Case.

Resp. There it was found to be part of the Custom in Case of Frank-Bank, that the Wife should have the Rent, and that the Rent should go to her without any particular Reservation.

11 Ed. 3. Ass. 86. 10 Ed. 4. 18. 21 H. 7. 25. Perk. 697. Co. Lit. 47. 8 Rep. Whitlocks Case. Dyer 187.

2. Obj. The words (during the Term) are objected.

Resp. Those words do not enlarge the Reservation, nor are they more than the Law would imply without them, Expressio eorum quæ tacite insunt &c. 5 Rep. 6 Trin. 8 Car. B. R. Bland and Inmans Case. Cro. 1 Rep.

3. Obj. The word Heirs must be taken secundum subjectam materiam.

Resp. It cannot be taken so here; the Reservation is to Robert and his Heirs, and the Brother of the half Blood is not Heir to him general nor special, his Sisters only are his Heirs.

Afterwards in Easter Term 1659. the Barons delivered their Opinions seriatim, for the Defendants.

Baron Hill, The Rent shall go along with the Reversion, and the Lease is a good Lease. The Statute of 32 H. 8. is an enabling Law, and the Question here depends upon the Proviso, which says, That the Rent shall be reserved to the Lessor and his Heirs, or those to whom the Lands would go, if no such Lease had been made; and in the Exposition of Statutes, the the Judges must make such a Construction as to advance and not to frustrate the Intention of the Makers. Now their Intent was, that the Rent should go along with the Reversion, and the Lease be good, if by any reasonable Construction in Law it might be so; and so it may be here, for Rent does naturally follow the Reversion; and the second Brother is Heir to the Estate.

2. The words of the Reservation here are, during the Term; and the other Cases that have been cited where those words are found, have also restrictive words and special Reservations, Vide Dyer 45. Keilw. 88. 10 Ed. 4. 18. 21 H. 7. 21.

Obj. Richmond and Butchers Case.

Resp. The Heir could not have the Rent in that Case, because the Creation of it was but for Life of the Lessor.

Obj. Wootton and Edwins Case.

Resp.

Resp. There it was limited only to the Assignee; so is Cro. 1 Rep. 288. Inman and Blands Case, upon the same Reason. But here are no special words to restrain the general words of the Reservation; and the Law will marshal words, ut res magis valeat; and the Lease is derived out of the Inheritance, and the Rent reserved upon the Lease shall follow the Reversion, and the word Heirs shall be understood secundum subjectam materiam. Co. Lit. 372. 3 Rep. 84. Co. Lit. 12. Hob. Rep. 13. And in our Case the second Brother is Heir to the Entail and to the Reversion. That the Statute, which is an enabling Statute, ought to be expounded, ut res magis valeat. Vid. Plow. Com. The Case of Mines, and 46 b. 3 Rep. Borastons Case, Co. Lit. 183.

Obj. Hob. Rep. 130. Oats and Friths Case.

Resp. There the Reservation was special, here it is general.

Obj. There is here no privity betwixt the Reversioner and the Lessee to enable him to recover the Rent.

Resp. There is a privity, for he claims under the Lessor per formam doni. Also the Act of Parliament creates a privity, because it gives the Rent, to him, to whom the Reversion goes; and Sury and Browns Case, and Mallories Case, 5 Rep. confirmed this; nor does Whitlocks Case, 8 Rep. make against this, it gives only advice; but Austens Case, Dyer 115. seems to be a Case in Point, and so the Abridger observes by a Nota; and 1 Inst. 46. agrees.

So that I hold the Lease to be made pursuant to the direction of the Statute, and that it is a good Lease.

Baron Parker accordant. 1. It is the Office of a Judge to preserve, and not to destroy an Estate, if the Exposition be not contrary to the words; as appears in Altonwoods Case, 1 Rep. of a Grant. Bredons Case, ibid. of a Fine. Lit. in his Case of a Condition cy pres. 3 Rep. Linc' Colledge Case, A Lease made by a Bishop contrary to the 1st of Eliz. not void, but voidable, though the words are that it shall be void. And the intent of the Law-makers, which was to uphold Estates, is more to be regarded than bare words; as in 3 Rep. 34. Co. Lit. 236. 5. Rep. 15. Plow. Com. 76. Co. Mag. Chart. 84, 110. If the Reservation had been to the Heir of the Tenant in Tail only, it had been good, as was adjudged in Skidmores Case. So a Lease for 99 years, if three Lives so long live; and Rent reserved shall ensue the nature of the Land, and go accordingly. Whitlocks Case, 8 Rep. has no influence upon the Case in question; but Wyats Case, Dyer 115. is full in the Point. And there is a diversity where the Person

to

to whom the Rent is reserved is capable of it, and where not; where the Person is capable, the Rent shall go according to Reservation, as during the Term to the Lessor and his Assignes. Shury and Browns Case, and 5 Rep. Mallories Case, of Successors. But if the Person be not capable to take it, then it will be otherwise; as in Inman and Blands Case, cited Cro. 1 Rep. 288. and Richmond and Butchers Case.

Obj. Here is a Clause of Re-entry reserved for non-payment of the Rent to the Heirs of the Lessor, which shews the intent of the Parties to have been, that the Rent should go accordingly to the Heirs general.

Resp. No Implication shall prevail against express words; and that Clause is no part of the Reservation, and the Intention is as strong to the contrary; for the Heirs at Law may enter for a Condition broken, and yet another Person enjoy the Estate, upon and by vertue of their Entry; and concluded pro Defendente.

Baron Nicholas accordant for four Reasons. 1. Because the words during the Term, without more, would have been enough; as appears by the Books, 14 H. 6. 26. 10 Ed. 4. 14. 21 H. 7. 25. Dyer 45. Co. Lit. 47. 27 H. 8. 19. & utile ꝑ inutile non vitiatur.

Obj. But the words that follow, viz. to him and his Heirs, are restrictive of the words that go before,

Resp. When there are two Clauses in a Deed, of which the later is contradictory to the former, there the former shall stand; as in 2 Ed. 2. Feoffments & Faits, 24. 4 H. 6. 22. of a Gift in Frank-marriage, rendring Rent, the Reservation is void.

2. Resp. Subsequent words shall not confound those that went before, if by construction they may stand together; as in 5 Rep. 112. Mallories Case, the word Successors; and in Shury and Browns Case, the words Executors and Assigns.

2. Because the word Heirs here being a comprehensive word, shall be extended secundum subjectam materiam in all manner of Conveyances; as in a Grant, Grant to a Man and his Heirs, habendum to him and the Heirs of his Body makes an Estate Tail. 35 Ass. 14. 37 Ass. 15. 2 Rep. Baldwins Case; so in Covenant, vide Hob. 275. so in the Case of Rent. Co. Lit. 12. Avowry 207. 7 H. 6. 4. Hob. Rep. 34. Rent shall run according to the nature of the discent of the Land, to the Heir in Burough-English, to the Heirs in Gavel-kind, to the Heir on the part of the Mother, &c. so here.

Obj. The Lessor of the Plaintiff here is not heir to the Lessor.

Resp.

Resp. He is his Heir secundum formam doni, F. N. B. 112. And in Bland and Inmans Case, there was no Reversion, as there is here, descending upon the Heir in Tail: and here are all the general words that can be required during the Term, and to him and his Heirs; so that nothing can be more express.

3. A Reservation is clausula ancillaris, and waits upon the Reversion.

4. Because Acts of Parliament must be construed according to reason, ut res magis valeat, and according to the Parties intention.

Obj. If Rent had been reserved thus upon a Feoffment, it would have gone to the Heir at Common Law.

Resp. In that Case there would be no Reversion remaining in the Lessor, as there is here.

Obj. If the Reservation had been to his Heirs Males, it would have been ill.

Resp. In that Case it would have been restrictive, which now it is not.

Obj. Oats and Friths Case, Hob. Rep. 130.

Resp. Because there the Son had nothing in the Lands, and there wanted privity; but here it is otherwise; and concluded pro Defendente.

Chief Baron Widdrington accordant, upon four Considerations. 1. Where no Person in particular is named to receive and enjoy the Rent, there the Law determines who shall have it; as in 21 H. 7. 25. Dyer 45. 27 H. 8. 19. 5 Ed. 4. 4. and the Law says, That in such Case the Rent shall go to the Heir together with the Reversion; but when the Lessor particularizeth the Person, there the Law will not carry it farther; as in 20 Ed. 4. 18. Assize 86. 2 Ed. 4. 5. Cro. 1 Rep. 207. 14 H. 6. 26. for in that the agreement of the Parties prevents the Construction of Law.

2. Where the Reservation is special, and to improper Persons, there the Law follows the words, as in Richmond and Butchers Case, and 5 Rep. 97. Randals Case there cited.

3. Where the words are general, as here, during the Term, the Law will expound them accordingly, and according to Law, especially the words, his Heirs, going before, vi. Feoffments & Faits 21. 5 Rep. 19, 112. 27 H. 8. 19

4. When the Estate of the Lessor is a particular Estate, and the Reservation general, there the Law shall make such construction, as that the Rent shall go with the Reversion and Estate of the Land; as in Co. 1 Inst. 112. Avowry 207. 8 Rep. Syms Case: But if it be incident to a Person, it shall not go farther;

ther; as in Dyer 45. 7 Rep. 19. vide 10 Rep. 116, 117. 38 Ed. 3. 10. 45 Ed. 3. 32. and Dyer 115. by the Pleadings seems to be a Case in point, and concluded pro Defendente, and Judgment was given accordingly.

Jane Roberts *an Infant by* Hutchinson *her Guardian, against* John Roberts *her Father, and Sir* John Roberts *her Grand-father.*

(2) THE Plaintiff by her Guardian exhibited her Bill to stop John Roberts her Father, who was Tenant by the Curtesie of Lands, of which the Remainder in Tail was in herself, from committing Waste and felling down Timber, which Timber the Defendants had contracted for in the lifetime of the Plaintiffs Mother, who was Tenant in Tail of the Soil; and the Court held that in such a Case any Person might become Guardian to an Infant against her Father; and that Waste is by Law a forfeiture of the Fathers Guardianship, and that the Contract made nothing in the Case; whereupon the Injunction was continued to stay Waste.

Thomas Tooke *Plaintiff, against* Ralph Fitz-John, *Executor of* Robert Fitz-John *Defendant.*

(3) UPon English Bill the Case appeared to be thus, viz. The Testator made his Will, and made the Defendant his Executor, and afterwards declared his Will to be, That the Plaintiff should have a Bond, upon which he owed the Testator 100 l. and died; the Defendant proved the Will, but not this last part and Codicil; and to compel him to do it, the Plaintiff sued him before the Commissioners for Probate of Wills, &c. pending which Suit the Bond was put in Suit at Law, and to be relieved in the Premises, and to have the benefit of this Bequest, and to stay the Suit at Law, this Bill was preferred; And upon the Defendants Answer, and reading the Depositions, and hearing their Testimony, who proved the Testators having given the Plaintiff the Bond in question; it was held per Curiam, That no relief lay here for the Legacy, before the Codicil proved, and that this was no proper Court to prove it in, but that it appertained to the Ecclesiastical Jurisdicton, and that the Common Law has nothing

thing to do with it, but where that Court cannot determine it, which here they may; but when the Codicil is proved, and made part of the Will, then it will be proper to be relieved here against the Bond, by reason of the Legacy, and not before; but because the Matter was not yet determined before the Commissioners, the Court supported the Injunction till the hearing there; and Dame Swinnertons Case was cited in point in Chancery.

..... *versus* Chillender & al'.

Upon several Informations here against the Defendants, upon Goods seized that had been imported contrary to the Act of Navigation, and otherwise, and Property claimed by Chillender, Marshal and others; the Case was, whether the Court ought to grant Writs of Restitution to the Claimants upon giving security ex debito Justiciæ or not. (4)

Hardres pro quer'. I conceive not, but that all such Writs are ex gratia Curiæ, and to be granted at discretion.

I will first endeavour to answer the Objections and Arguments that have been made by Council a simili; and ad idem by Presidents, and ex reipsa, which being done, I will lay the Case open in an equal Ballance, and then offer some Reasons to the contrary.

The 1st. Object. a simili is the Case of Felons Goods seized; and the Statute of 1 R. 3. c. 3. which provides, that if a Man be arrested or imprisoned for Felony, no Officer shall seize his Goods before Conviction, according to the Law of the Land.

Resp. The Answer is clear, and so declared by the very Act it self, which is Lex terræ; and so Stamford pl. Cor. 193. b. tells us, that that Statute is but a Confirmation of the Common-Law, with which Bracton agrees, who is there cited, f. 52. That in such a Case a Writ lies to deliver the Goods upon security, and there is great reason for it, to wit, The Sustenance of Persons in Prison, who have no Estates of their own, but depend upon Labour, and live by that when they are out of Prison. But that Statute extends only when the Party is in Prison; for if he be at large, he is not within this Law, but the Officer may seize, and that by the Statute of 25 Ed. 3. c. 14. called the Statute de proditoribus, that upon the 2d Capias the Sheriff may seize, though there be no forfeiture till the Exigent; by which it appears that this is the settled Law of the Land, by which the Felon, in the first Case, is to have his Goods;

but in the Case at Bar there is no positive Law, Common or Statute, in the Case.

A second Objection has been made, That when Goods are seized after Outlawry, yet upon pleading and giving security, they shall be restored to the Party, though forfeited; and for the same reason it ought to be so in the Case in question.

Resp. It has always been practised so in the Case objected, nor was it ever denied; but in the Case in question restitution has been frequently denied; and many times there is good reason why it should be denied; and Presidents in one Case, unless they be ad idem, are no Guides in other Cases.

The 3d. Objection grounded upon Presidents and Usage ad idem, may receive a double Answer.

1. As for Usage and constant Practice, I agree that constant Usage, and the course of the Court, is the Law of the Court and of the Land. 2 Rep. 17. Lanes Case. But where the Usage and course of a Court is not constant and certain, there it is otherwise; for an Usage or Custom interrupted and discontinued not once or twice, but often, cannot be termed Usage or Custom; for it is of the Essence of an Usage or Custom to be semper; for as continuance makes it, so discontinuance destroys it.

28 H. 8. Dyer 30. Copy-holds must be always demised or demisable.

My 2d. Answer is, That Presidents without a Judicial Examination do not make a Law. 4 Rep. Slades Case 94. resolved, That Presidents not made upon a Judicial debate, but that pass as it were sub silentio, do not make a Law, & multitudo errantium non parit errori patrocinium, Vide etiam Mittons Case, 4 Rep. 32. b. 6 Rep. Sir John Molins Case, fol. 6. ibid. fol. 73. Sir Drue Drury's Case. 11 Rep. 75. Magdalen Colledge Case. By all which Cases it appears that Presidents not grounded upon Debates and judicial Determinations, are not of force enough to be Directions to a Court of Justice.

3. I answer, That in this Case there are Presidents pro and con in all times, and therefore no argument to be drawn from them.

Now to give an Answer to some Reasons of Law that have been offered to prove these Writs due ex debito Justiciæ.

Obj. 1. Any Man may seize, and any thing may be seized upon such a Suggestion and Information, which is a great inconvenience, that Mens Properties should be so invaded whilst it remains doubtful whether there be any forfeiture or not

not till Judgment, and the Owners have no remedy in the mean time.

Resp. This Objection may be answered by an Argument à pari, and thus retorted, viz. If any one may seize, then every Merchant may before any body else by intendment can know any thing of the Matter, set up an Informer, who may consent to, or not oppose the Writ of Delivery, and not prosecute afterwards; and no other Informer perhaps can, because not privy to the Evidence, by which means the Common-wealth may be defrauded; and there is as much reason that the Common-wealth, which by presumption will do no Injustice, should have the custody of the Goods, as a private Owner, when there is a dispute whether they be forfeited or not.

So that there being inconveniences on both sides, what Arguments can be drawn from thence to prove these Writs due ex debito Justiciæ? Which is as much as to say, that it is Injustice in the Court to deny them, though how to make it Injustice to deny them, where the Presidents are pro and con, and inconveniences equal on both sides, and no positive judicial President to direct the Court in what Cases to grant them, and in what not, I cannot comprehend.

For certainly what is demandable, ex debito Justiciæ, ought to be grounded upon some direct and positive Law, or upon some undeniable reason, such as that of Magna Charta, nullus liber homo, &c. or upon multitudes of judicial Determinations in all Ages.

Nor can these Writs be concluded to be ex debito Justiciæ, though there may have been one or two Judgments in point; for we see by daily experience that Courts may err in Judgments; else how comes it to pass that so many Judgments are afterwards drawn in question, and many Judgments given upon debate, contradicted and reversed?

I will cite only two Presidents, and those fresh in Memory.

The Attorny General *versus* Andrews, Trin. 1656. The question was, whether the King should be preferr'd before a Subject, who has a Judgment and execution for his Debt? And adjudged that he should not, if the Subject sued out Execution first, although a Judgment of this Court was cited to the contrary in point.

Mich. 1656. The Protector *versus* Geering. The question was whether one as Amicus Curiæ might quash an Inquisition; and adjudged clearly that he might, though a Judgment in this Court was cited to the contrary: by which Cases, and many others of the like nature, it appears that Judges are

not bound by the Judgments of their Predecessors; and it would be mischievous if it were otherwise; to wit, That one should be concluded by the Opinion of another in æquali gradu with himself: but when there are diversities of Opinions, and a Point settled upon solemn Debates, the Case may be different.

Now to conclude, since the Argument à simili cannot hold in these Cases to tye up the Hands of the Court, since Presidents are pro and con, since there are no judicial Determinations in the Case, in what Cases such Writs are to be granted, and in what not, since the inconveniences are equal on both sides; and since the Judgment given in 23 Car. rather makes against the right of demanding these Writs than for it, What is to be done in such a Case? Why, certainly the Court according to their discretion must be Ampire, the Judges being indifferent Arbitrators between the Common-wealth and the Subject; and being intrusted with the Declaratory Power of the Law secundum bonam & sanam discretionem. And to them I submit this Case, it being most fit for them to provide due remedy both for the Common-wealth and the Subject, so as neither may be defrauded or defeated of their just Rights.

Turner for the Informers.

It is a Contradiction, that the Goods should be forfeited, and yet the Protector recover only Damages. It will be a discouragement to Informers, if the Goods must ex debito Justiciæ be delivered to the Owner.

Shaftoe argued on the same side.

Serjeant Maynard contr'. These Writs cannot be grantable ex gratia or favore Curiæ, for the Court can do nothing out of Grace or Favour. Ex gratia Principis they may be grantable, but then the Court must have a Privy Seal. They are grantable ex debito Justiciæ, but in what Cases, rests in the legal Discretion of the Court; nor can there be any great inconvenience one way or other in the Goods remaining, or not, in the custody of the Seizor; for the Informer may prosecute faintly without delivery of the Goods as well as after delivery, especially if it be an Informer set up on purpose. And the Case of a Replevin of Goods taken by the Kings Officer may be disputable notwithstanding the Book of 3 H. 7. 1. And the Case of Felons Goods is stronger, and that is Common Law, and by the same reason this should be Common Law too; and so concluded for the Claimers.

Et Adjornatur. Nota, This Dispute lies in a narrow compass, and is a Dispute about words more than any thing else; for

for upon the matter both sides agree that they are not due ex debito Justiciæ in all Cases; so that it is at least in the discretion, though not in the Grace of the Court, in what Cases to grant them or deny them, which upon the matter is the matter in question, and yet agreed to on both sides.

Stavely *versus* Ullithorn.

IN an Action of the Case upon a feigned Action, upon a Bill in Equity, and an Order for a Tryal at Law, the question was, Whether such Lands were discharged of Tithes as having belonged to Fountain-Abbey in Yorkshire, which was of the Cistertian Order; and it was held, per Curiam, clearly that the Council of Lateran, which freed that Order from payment of Tithes, was a general Law received in England. And if these Lands were discharged of Tithes from the time of that Council, that no after Covenant or Contract made by the Abbot to pay Tithes, could dispense with this Privilege, or make them liable to Tithes; for once discharged by this Council, and always discharged; for this Council is as forcible as an Act of Parliament, which concludes all Parties; and the Court were also of Opinion, That if there were any such agreement for payment of Tithes before the Council, that yet this Councel, as a General Law, which includes all Mens consent, had dissolved it, and the Lands were discharged. (5)

The Attorny General *against Sir* Ralph Freeman, & alios.

UPon English Bill the Case was, a Man was outlawed, and afterwards made a Lease of his Lands, and afterwards these Lands amongst others were found by Inquisition, and this Lease was pleaded in Bar to bind the King, being before the Inquisition. And the Court held that a Lease or other Estate made by the Party after Outlawry, and before an Inquisition taken, will prevent the Kings Title, if it be made bona fide, and upon good consideration; but if it be in trust for the Party only, it will not be a Bar; but that no conveyance whatsoever made after the Inquisition, will take away or discharge the Kings Title. (6)

Sheffield

Sheffield *versus* Serjeant & al'.

(7) UPon a Bill in Equity to be relieved for customary Tithes, in London, the Case was, That the Plaintiffs Title was under a Sequestration by Parliament, and an Order thereupon by the Committee for plundered Ministers; and the question was, whether he was relievable according to the Decree confirmed by the 37 H. 8. concerning Tithes in London, by which the Mayor of London must be first addrest to: And the Decree mentions only the Parson, Vicar and Curate, and whether he that is in by Sequestration be within it, not being Parson de Jure, was the question; and it was urged by the Defendants Council, that he is relievable there, and therefore not here, because he comes in under the Parsons Title, and as his Lessee; the same Law is of an Impropriator, who is not within the words of the Decree; and that so it was lately ruled in Chancery, which the Court agreed to, but yet were divided in this Case; and it was afterwards by consent referred to compromise.

Anne Gibbons *Plaintiff*, Anne Prewd *Defendant*. *In* Action sur le Case.

(8) THE Plaintiff declared, That whereas it was upon the 18th of November 1652. mutually agreed betwixt them, that the Plaintiff should before Lady-day following, convey over all her Estate and Interest in the real Estate of William Prewd, deceased, to the Defendant and her Heirs, and that in consideration thereof, the Defendant should before that time pay the Plaintiff 25 l. and convey unto her and her Heirs so much of the said real Estate as should amount to 50 l. per annum, and enter into a Bond of 2000 l. the said Defendant afterwards the same day and year in consideration the Plaintiff did promise to the Defendant to perform her part of the said Agreement, did promise to the Plaintiff to perform her part of the same, and avers the real Estate to be worth 500 l. per annum. Upon Non Assumpsit, and Verdict for the Plaintiff; it was moved in Arrest of Judgment,

By Mr. Atkins, That as the Case is, the Plaintiff must perform her part of the Agreement first, otherwise the Defendant cannot convey to the Plaintiff 50 l. per annum out of the said Estate.

Answ.

Answ. The performance on the Defendants part is not sub modo, or conditional, but absolute and reciprocal by reason of the Agreement; for it is not in consideration that the Plaintiff should convey all her Estate, &c. but in consideration that the Plaintiff did agree to it; and the consideration upon which the Action is grounded, is a mutual Promise to perform the Agreement. 5 H. 7. 10. b. As if I covenant to marry a Mans Daughter, and he Covenants to give me a hundred pounds; so here the Agreement and Promise, which is reciprocal, and gives the Defendant a Remedy upon Breach made by the Plaintiff, is the consideration, and not the performance of any Act by the Plaintiff.

2. The Plaintiff has as long time by the Agreement to convey her Estate, as the Defendant has to convey part of the real Estate of William Prewde.

3. The Agreement and Promise made by the Defendant, is not to convey to the Plaintiff part of the Estate conveyed by the Plaintiff to the Defendant, but to convey part of the real Estate of William Prewde, which may be done though the Plaintiff does not convey any part of her Estate and Interest therein to the Defendant.

2d. Obj. was, That the Defendants part of the Agreement was promised to be performed in consideration of the Plaintiffs performing her part of the Agreement, which is not averr'd to be performed.

Answer. That is a mistake, for the Defendants Agreement does not depend upon the Plaintiffs performing of any Act, but is, that in consideration that the Plaintiff agreed to do such a thing, the Defendant agreed to do another thing, and the consideration is no other than the reciprocal Promise of one to the other, which is Executory, and upon which the Parties have mutual Remedies; and it is a general Rule, that when the Defendant has a remedy for the consideration of a Promise, that consideration needs not be averr'd to be performed, which is our Case; and afterwards Judgment was given pro Quer'.

Trin. 1655. *In this Court,* Ernely *versus Lord* Falkland *sur Promise.*

THE Plaintiff declared that it was agreed betwixt the Plaintiff and the Defendant, that their Horses should run a Race, and the Winner to have of the other 200 l. with some other particulars of the Agreement: And that whereas the Plaintiff had promised to perform on his part, the Defendant (9)

had

had promised to perform on his. After a Verdict for the Plaintiff, the consideration was admitted upon a motion in Arrest of Judgment, to be good, being grounded upon such a reciprocal Promise. But the only question was, whether it was certainly enough laid, or no: For the words were, Whereas the Plaintiff promised, &c. but that too was adjudged to be good and sufficiently certain, Vid. 48 E. 3. 3. Rasepoole's Case, & Mich. 24 Car. Reg. Bragg *versus* Nightingale, Entr' Trin. 24 Car. Reg. 601. & Brockesby's Case, Pasch. 1649. B. R. Entr' Mich. Car. Reg. 73.

Sir George Sands *versus Sir* John Thorowgood *and others, Trustees for the Maintenance of Ministers, In a* Bill of Review.

(10) THE Case was this: Sir John Thorowgood and the rest of the Trustees had a Decree in this Court against the Plaintiff for 400 l. odd mony, which was accordingly paid; and afterwards the Trustees were altered by an Ordinance of the Lord Protector, and five were put out and five new ones put in; after which the Plaintiff preferred his Bill of Review against those Trustees, that had the Decree against him, omitting the New Trustees. Whereupon the Defendants demurred, and shewed for Cause, that the Trust was transferred to others by Act of Law; and therefore they that have the present Interest and Estate ought to be made parties, and they that are displaced ought to be named; for there is no reason to charge them since they received nothing to their own use. But it was answered, that this is in the nature of a Writ of Error, 6 Rep. Ruddock's Case, which must be brought against the same persons that have recovered; and here the parties sue to be restored to what has been recovered from them, which they must be by the persons that recovered against them. And though the said Ordinance had altered the Trustees, yet the Rules and Methods of Proceedings were not altered by it.

The Court seemed to doubt upon the matter, but at last it was agreed that the new Trustees should be made parties sans prejudice, &c.

De

De Termino Sanctæ Trinitatis Anno Domini 1657. In Scaccario.

Information per Morby *versus* John Urlin *Esquire.*

UPON the Statute of 35 H. 8. cap. 17. for grubbing up Wood in Buckinghamshire contra formam Statuti; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment. (1)

1. That it is not mentioned in the Information, that the Wood was growing at the time of the Act made, for so the words of the Statute run, and so it ought to be set forth, as upon the 5th of Eliz. concerning Apprentices, which hath been often adjudged.

2. Because by the Statute of 21 Jac. 1. the Information ought to be brought and tried in the proper County.

Atkins pro Quer'. The Proviso in the Statute is general, and not tied up to Wood growing at the time of the Act, and contra formam Statuti supplies it, if the Law were so; as in Dyer 312.

And as to the 2d Objection grounded upon the Statute of 21 Jac. cap. 14. That is a mistake, for that Law takes place only in such Cases where Justices of Peace or of Assize have power by Law to hear and determine; but by this Act of Parliament, upon which the present Information is grounded, they have no power at all, for the Prosecution is tied up to Courts of Record; and thus that Law has always been construed; to which the Court agreed; but they conceived the 1st Exception fatal, and that it could not be supplied by the words contra formam Statuti; for they do but make the conclusion upon the Case before set forth, and are themselves no part of the Case, but disclose the result of the Premises, and will not of themselves make a Case without sufficient Premises, which ought to set forth the Law, as it is upon the Statute. Et Adjornatur. But afterwards Judgment was arrested upon the first Exception.

Edward Master *Esq*; *against Sir* Herbert Whitefield *and* Hockin.

(2) UPon English Bill in the Exchequer-Chamber, the Case was thus, viz. The Plaintiff had Judgment against the Defendant, Whitefield, for 500 l. in Mich. 1651. in the Upper-Bench; and afterwards in Trin. 1654. the other Defendant, Hockin, obtained a Judgment against the Defendant Whitefield for 1000 l. and outlawed him upon it in Mich. 1654. whereupon the 10th of Dec. 1654. the Manor of Burmarsh was extended of the value of 120 l. per annum, and seized into the Protectors Hands; and in January 1654. the moiety of it was extended by vertue of an Elegit upon the first Judgment; and the Defendant Hockin obtained a Lease of it out of the Exechequer, upon the Extent upon the Outlawry, quamdiu, &c. but levied only by levari the said 120 l. p ann. out of the moiety extended ut supra, and permitted the other Defendant and his Tenants to enjoy the residue of the Profits of the said Manor, to the value of 378 l. per annum; and the Defendant Hockin was decreed to account with the Plaintiff for all the Profits which he had or might have received, without any willful or negligent default of his. Quod nota, That the Lessee of an Estate upon an Outlawry shall be compelled to account for the Profits, which he might have received, with a Creditor of the Party outlawed, who has an Interest in the same Lands by Extent.

But afterwards in Easter Term 1658. the Court held that the Lessee could levy no more than the extended value, and could not enter and take all the Profits, for that the Protector had no Interest in the Lands extended, but only perception of Profits, vid. 21 H. 7. 7. a. accordant per Cur. but the Party may take out a melius inquirend. and have them extended at a greater value; and it was agreed, that the Plaintiff should take the Defendant Hockins place, and pay him 200 l. per annum, till Hockins Debt were satisfied, and the Outlawry to remain in force; and the Extent upon the Elegit, after the Extent upon the Outlawry was held void, quoad the Protector.

De

De Termino Sancti Michaelis Anno Domini 1657. In Scaccario.

Gardiner *and his Wife versus* Parker.

The Plaintiffs brought an Action upon the Case for words spoken by the Defendant of the Feme Plaintiff, viz. You are a Whore, and I can have a better Whore for a groat, and you get your Living by your Tail; adjudged actionable since the late Act. For that these words imply a continued course of Fornication and Adultery. So to say, Thou art a Whore and wert carted for a Whore: Or, Thou art a Whore and goest down into the Country to vent thy ware: Or, Thou art a Whore, and such a Man's Whore. Judgment, nisi causa, &c. (1)

De Termino Sancti Hillarii Anno Domini 1657. In Scaccario.

The Attorny General *versus* Alum.

(1) IN an Information at the Suit of the Attorny General, the Case was thus, viz. The Russia Company was incorporated by Letters Patents, 1 and 2 Phil. and Mar. and it was granted to them, That no Person not being of their Company should Trade thither without their leave, on the penalty of forfeiting Ship and Goods. Afterwards by Act of Parliament, 8 Eliz. these Letters Patents were confirmed; and it was farther enacted, That no Person, Subject or other, should Trade thither without leave of the Company; and the question was, Whether or no one that was Free of the Company, might Trade thither without leave of the Company.

Stephens pro Defendente, That he may; for it was not the intent of the Act to exclude them, but Strangers that were not of the Company; and the Act is an Act of Confirmation, rather than of Creation; Besides, 1. there is no inconvenience in such Persons trading; and the Act was made to redress an Inconvenience.

2. When a particular Benefit is intended, it does not extend to other Persons.

3. It would be a repugnancy to construe the Act so as to restrain Priviledges granted before the same Act, 8 Rep. 154.

A 4th Reason he grounded upon a Proviso in the Act relating to Hull; and cited 8 Rep. Doctor Bonhams Case. That the Priviledges granted to the College of Physitians extended to Graduates without nomination, &c.

Atkins, for the Attorny General. The Act 1st. alters the Name of the Corporation. 2. It alters the Penalty. 3. It makes an alteration in the Traders, viz. That none shall Trade thither, Subject or Denizen, without Licence, which extends

extends to particular Persons even of the Company, to restrain their Trading thither without Licence. The Intention of the Act was to regulate the Trade, and to appropriate it to the Regulation and Government of the Company.

And the Court inclined to be of this Opinion, for the great Inconvenience was the single and separate Trade of those of the Company, and not of Foreigners, who could not Trade without leave of the Company. And the Act is a meer Act of Creation, and to regulate those of the Company, who Trade separate, to the prejudice of the Joint Stock of the Company. And if it were an Act of Confirmation, it would be a void Act, because the Letters Patents themselves are void, being to appropriate a Trade, which the King cannot do by Law.

De

De Termino Paschæ Anno Domini, 1658. In Scaccario.

The Attorny-General *Plaintiff, against the Earl of* Westmerland *Defendant.*

In a *Plea* to a Charge and a *Demurrer to it.*

(1) THE Lord Brudnel was a Recusant Convict, and the Earl of Westmerland took a Lease of the King of two parts of his Estate in trust for the Recusant, and with a Non-obstante of the Act of Parliament in 3 Jac.

Stevens pro Quer. That the King cannot dispense with that Act. 1. Because the Act absolutely forbids it. If the Act had forbidden it sub modo, and under a penalty, it might have been otherwise, 1 Inst. 117. 3 Inst. 237. Dyer 303. 2 Rep. 3.

2. There is a difference betwixt an Act that barely creates an Offence, which was none before; and an Act that considers a thing as mischievous in its consequences. In the first Case the King may dispense; in the latter he cannot.

3. An Act made pro bono publico cannot be dispensed with: And this is an Act pro bono publico, viz. To prevent Recusants from maintaining and nourishing Enemies to the State, Hob. 214. 11 Rep. 88. 2 Rep. 3, 12. 3 Inst. 238. Bract. 132. 4 Rep. Bozoun's Case, Assize 443. 11 H. 7. 12.

4. When the Law disables the King to grant, there no Non-obstante can make such a Grant good, Hob. 75. 146. Dyer 211, 225.

5. Where the King endangers the breach of his Oath, there he cannot dispense with an Act of Parliament.

Object. The King can pardon Murder, which touches his Oath, Stamf. Pl. Cor. 101. 3 Inst. 236. 12 Rep. 18.

Resp. In Rickaby's Case in the Upper-Bench, 1653. It was resolved that the King could not pardon Murder by a Non-obstante.

But

But in the Case in question, because the Trust did not appear by any matter of Record, the Court would not take notice of it by any matter dehors. But the Court was of Opinion that the King could not dispence in this Case, because he was disabled by the Act to grant, &c.

Pawlet *vers* Freak.

UPon English Bill the Case was, that several Executors were made, and one proved the Will and the rest refused; and he that had proved the Will dyed, and another person took out Letters of Administration; and preferred his Bill in this Court. (2)

And the Court held clearly that by the proving of the Will by one, they are all Executors; and although he that proved the Will dye, yet no other person can administer during the lives of any of the rest. And it does not appear that they who refused, are dead. Whereupon the Bill was dismissed, Vid. 9 Rep. Hensloes Case, and 21 E. 4.

Jones *versus* Winckworth.

IN Trover and Conversion for Letters Patents of Wine-Licence. After a Verdict for the Plaintiff it was moved in Arrest of Judgment. (3)

1. That a Record cannot be converted; sed non allocatur: For the Word Letters Patents here signifies the Exemplification of them under the Broad-Seal, and so it is intended in common parlance.

2. Because the Date of the Letters Patents is not specified; sed non allocatur: because there is sufficient certainty without it; besides the Date is upon Record.

3. Because the Plaintiff does not alledge that he was possessed of them ut de bonis propriis: sed non allocatur after a Verdict: And the Declaration does mention that the Defendant knowing them to appertain to the Plaintiff converted them, which implies as much. And Judgment nisi, &c.

Young

Young *vers* Woollaston *and* Pennington *Vicounts de* Londres.

(4) IN Debt for 1000 l. by them levied in the year 1639. for the King, and assigned over to Young; after the darrein continuance Woolaston dyed, which the Plaintiff suggested upon the Roll, and prayed a distring' Jurator' against Pennington only, who at the day of the Nisi prius pleaded the death of Woolaston in Abatement; which Plea was received notwithstanding the surmise upon the Record; sed quære de eo, Vid. 4 H. 7. 7. The Plaintiff at the Nisi prius demurred to the Plea; and there was a Joinder in demurrer; and this was allowed by the Judge of Nisi prius; and so he said, it had bẽn used. And that a Demurrer to a Challenge might be determined there; but other Demurrers were to be adjourn'd.

The next Term it was argued by Serjeant Hardres pro Quer.

I will not insist upon the general Learning of Abatements of Writs; but will stick to that which is here in point, viz. Abatements by the death of Parties.

1. The Law regards and tenders the preservation rather than the destruction of a thing; the affirmance of Writs rather than their abatement. If in a Writ of Error two Originals are certified, the better of the two shall be taken, 5 Rep. 37. Bishop's Case. And so the constant practice is in the Court of Kings Bench, that if in a Writ of Error a Certiorari be awarded upon diminution alledged, and a Certificate be made in affirmance of the Judgment, the Plaintiff in the Writ of Error shall not have another to make it reversible in the point already certified; but in affirmance of the Judgment there may be another Certiorari, Avery and Kirton's Case, Mich. 1649. in B. R. Entr Mich. 23 Car. Rot. 239. Upon this ground in 11 Ass. 20. it is held that if by any matter a Writ may be made good, it shall not be abated; and therefore if two parts of a moiety of a Mill be demanded in a Writ of Mordancester, the Writ is good; and it shall be intended a third part of the Entirety, though not demanded according to the usual form. In 12 Ass. 28. Trespass quare fossatos suos fregerunt, which is improper and should have bẽn prostraverunt; yet the Writ was not abated for that: So here if by any reasonable construction or intendment the Writ may be made good, it shall not be abated.

The

The 2d Reason I go upon is, to avoid circuity of Action; for frustra fit per plura quod fieri potest per pauciora, 21 H. 7. 23, 24. John Pursoe's Case. If a Man make a Lease for years and covenant that the Lessee may cut down Trees; the Lessee may plead this in an Action of Waste, without being put to an Action of Covenant. So in Debt upon an Obligation the Defendant may plead that after the sealing of the Bond the Plaintiff granted to him that he should not be impleaded till such a time, and if he were that he might plead it in discharge; this is a good Plea in Bar.

So that it appears by these Cases that the Law will not work the dissolution of any thing, but in case of necessity; nor will countenance circuity of Actions, and perplexity of Suits, if it may be avoided.

3. To apply the reason of the Law to our Case of Abatement. The death of one Defendant will not abate a Writ, where there is no alteration made by his death, and where there are others left who are sufficient to support it. And therefore if a Writ of Mordancester be brought against two Joyntenants, and one of them die, the Writ abates only against him; because the whole Estate of the Land survives to the other; and there is no alteration made. But if the Defendants be Co-parceners, the Writ abates by the death of one, because there the Estate does not survive and there is an alteration of the Tenancy.

7 E. 3. 273. b. If a Quare Impedit be brought against an Husband and Wife, and the Wife dye and the Baron be Tenant by the Curtesie, the Writ does not abate. In like manner if it be brought against two others, and one dye, 9 H. 5. 6. So if the Patron dye, 11 H. 6. 30. b. 57. a. Because in these Cases there are sufficient persons left to support the Writ and the Action, 11 Ass. 15. 27 Ass. 45.

7 E. 3. 245. a. If in a Præcipe against two persons one Tenant make default, and the other take upon himself the entire Tenancy, and Issue be taken upon it, and afterwards he that made default dies, this does not abate the Writ, though the other Tenant has taken the entire Tenancy upon himself, because the Demandant has not admitted it, but taken Issue upon it.

And as the Law is so in real Actions, which are more precise, and must have proper Tenants; so it is the same in personal Actions, and upon the same reason.

47 E. 3. 7. a. In a Scire fac to recover damages in an Assize against two, whereof one dies; this does not abate the Writ against the other.

12 Rep. 2. 25 E. 3. 81. b. In Audita Querela against two, who have taken out Execution upon a Statute-Merchant, and afterwards released; the death of one of them does not abate the Writ.

Mich. 1 & 2 Eliz. Dyer 175. Replevin against two; after Conusance made as Bailiffs, one of the Defendants dyeth; this does not abate the Writ.

And the reason of all these Cases is because by the death of one of the Defendants there is no alteration made as to the Plaintiff, and he cannot purchase a better Writ.

There is a diversity betwixt a Writ that was not well purchased at first, and a Writ that is right originally, though by the death of a Defendant, or other accident, it may become faulty; as if an Action be brought against several persons, whereof one is not in rerum natura, the Writ shall abate against them all; but the Writ in our Case was right when it was taken out.

A second diversity there is betwixt the Act of God or of the Law, and the Act of the Party: For if the Plaintiff, pending the Suit, will release to one of the Defendants, it will abate the Writ against them all; otherwise, in case of death.

And after Issue joined death cannot properly be pleaded by one as a Party, but as Amicus Curiæ, 38 H. 6. 9. b. 18 E. 4. 2. b. 19. b. 14 H. 6. 9. a. So that it is in the Breast of the Court to make it abatable or not.

Obj. 13 E. 3. Bre 263. 31 E. 3. Bre 344. If an Account be brought against two, and one dye, it abates against all.

Answ. There the Writ charged them as Receivers and Bailiffs, which they could not be, when one of them was dead, so that the Writ was falsified; which is not in our Case; for the Action here is grounded upon the Return, which remains true as aforesaid.

Object. 50 E. 3. 7. 40 E. 3. 26. If an Action of Debt be brought against two, and one dyes, the Writ abates against both.

Answ. The Action there was grounded upon a joint contract, and therefore by the death of one the Surmise of the Writ was altered: For one being dead, the Surmise ought to be that two contracted and one dyed, and there the Parties made the Contract; but in our Case the Law raised it, & fortior est dispositio legis quam hominis. Also here in our Case the Surmise of the Writ remains true, and cannot be altered for the better against the survivor, nor said otherwise; and therefore not like the Cases objected.

For

For Authorities he cited 18 E. 4. 1. per Cur, 22 R. 2. Bre 888. If Conspiracy be brought against two Men, the death of one shall not abate the Writ, and yet a Writ of Conspiracy does not lie against one Man; and the acquittal of all but one, is a discharge of all, Stamf. Pl. Cor. 173. b. Which is far stronger than our Case is.

Mich. 40, 41 Eliz. B. R. Harris's Case: There it was held clearly by the Court, that if an Action of Debt were brought against two Sheriffs upon an Escape of one in Execution, that the death of one does not abate the Writ; which is in Effect the same Case with ours.

And he prayed Judgment for the Plaintiff.

Cough *and* Floyd.

AN English Bill was brought against an Executor at the Suit of a Creditor to discover Assets; and it was demurred to, because it was brought before any Suit commenced at Law; by which means the Defendant is liable to be doubly vext: For perhaps if he were sued at Law he would confess the Debt, or pay it, rather than stand out Suit. Quod nota. (5)

De Termino Sanctæ Trinitatis Anno Domini 1658. In Scaccario.

Alderman Langham *against* Baker *and twenty two others, Parishioners of St.* Hellens London.

(1) THE Plaintiff as Farmer of the Impropriate Rectory of the said Church, prefers his here Bill against the Defendants for not paying their Tithes, in London, according the Decree in 37 H. 8. To which the Defendants plead the said Decree, and that the Plaintiff has his remedy before the Mayor of London by the Act of Parliament, which settles the Decree; and demand Judgment whether or no this Court will take conusance of the Matter?

And it was held clearly that the Court has jurisdiction in this Cause; for that it appears by the very Decree it self, and the Act in 37 H. 8. and by Linwood de Decimis, That Tithes where payable in London before the said Act for Houses, but the Quota was doubtful, which is remedied by the said Act and Decree; and the Act has no negative words; it is not said before the Lord Mayor of London, and not elsewhere, Vide Scudamores Case, 5 Jac. cited Co. Mag. Chart. upon 2 Ed. 6. and Tithes were determinable here ab antiquo; as appears by 38 Ass. Selden de Decimis. 4 Ed. 4. and by Articul. Cleri cap. 4. In Case of the King and his Farmers; the Cause follows the Person and his Priviledge; and this Case is not to be resembled to Cases where Justices of the Peace are impowred by Act of Parliament; and for that cause Justices of Oyer and Terminer have nothing to do, nor Justices of Gaol-delivery; and so vice versa, 11 Rep. Doctor Fosters Case. For they have but a limited Jurisdiction. And the Kings Farmer has in respect of the Revenue the same personal Priviledge that the King has; and without question the King may sue here. And it was ruled that the Defendants respondeant ouster.

Baker

Baker *against* Lenthal, *Usher of the* Chancery.

THE Plaintiff preferred his Bill here to be relieved against a Bond put in Suit by the Defendant at Common Law, which in deed was in the Petty-bag by reason of his priviledge; to which the Defendant pleaded his priviledge as an Officer of the Court of Chancery; and the Court agreed, that when both Parties are priviledged Persons, his priviledge shall take place, who sues first in this Court; as in the Case Trin. 7 Jac. Gay *contra* Reynolds, in a Suit commenced in the Common Pleas by an Attorny of that Court against the Marshal of the Kings Bench; so here the Suit in Equity to be relieved against the Penalty of the Bond is first attached here; and it is not the same Suit with that at Common Law, but distinct from it: It was also said, that if both are priviledged Persons, and the attendance of the one is more requisite than of the other (as in this Case it is) the Plaintiff here being an Accountant in this Court, and upon his Account, as is alledged by the Bill (which cannot be done by Deputy, or by Attorny) that in such case his priviledge shall be allowed, who has most cause of priviledge. Et Adjornatur. (2)

At another day in the same Term the Plea was over-ruled, and an Injunction granted till Answer.

Chichly *against* ..... *and others Commoners within the Mannor of*, &c.

THE Plaintiff, as Lord of the Mannor, by English-Bill prayed a Decree against the Defendants, to have them concluded by a former Decree made in this Court concerning Improvement and Apportionment, by which Decree all the Tenants were bound upon the Answer of ten only; and the consent of the rest did not appear; and the Defendants in this Suit answered, that they and all those whose Estates they have in such Messuages, Lands and Tenements have time out of mind had Common of Pasture, Turbary, and liberty to dig Gravel in the said Common, &c. which the Plaintiff by Replication denied, and upon Examinations, and hearing the Cause, the Court was of Opinion that the former Decree, to which the Tenants were not Parties, does not conclude (3)

conclude them. And that it ought to be tried at Law whether they have such a Common as they claim to have, or not; and that the Common, as alledged in the Answer, is void in Law, because Common sans nomber cannot be appendant to any thing but Lands; and that it is called Common sans nomber, because it is only for Beasts levant and couchant; and it is incertain how many those are, there being more in some years than in other; but it is a Common certain in its nature; for id certum est quod certum reddi potest. And that they ought to go to Law to prove the prescription, that they have laid in their Answers, which seemed hard upon the Defendants, for want of Form in their Answer; especially since the Title to the Common is not the Scope of the Bill, but the Improvement, by which it is admitted that they have Right of Common.

Henry Olive *Plaintiff*, George Gwin *Defendant*.

(4) EJectment for Lands in Brecknock-shire, in Wales; upon not-guilty pleaded, and a Tryal there, the Defendants gave in Evidence a Recovery in a Writ of quod ei deforciat, which is their Writ of Right, at the Great Sessions there; and Issue being tendered thereupon, the Defendants produced an Exemplification of the Record, under the Seal of the Great Sessions, but not the Record it self; and the Plaintiff demurred to the Evidence; and the question now was, Whether the Exemplification maintained the Issue for the Defendants, or not?

Trever pro quer'. That it is no Evidence. He said that Lieger-Books, and such Paper Books cannot be exemplified, but when offered in Evidence, must be themselves produced: But yet that Exemplifications of Popes Bulls, under the Bishops Seal, had bẽn admitted in Evidence in Sir Tho. Reads Case, Hill. 22 Jac. B. R. But the Common Law took no notice of Exemplifications, till the Statutes of 3 and 4 Ed. 6. and 23 Eliz. cap. 3. which Statutes concern Letters Patents only, as was resolved in Pages Case, 5 Rep. and in 5 R. 2. Parl. Roll. num. 85. there is an Answer in Parliament, That the Law admits of no Exemplification of Process or Pleadings.

Obj. By the Act of 34 H. 8. concerning Wales, and the Government thereof, it is enacted, That Exemplifications of Records shall be allowed.

Resp.

Resp. There are but two Repertories of Records in Wales, the one in North-Wales, the other in South-Wales; and this Statute extends to the Welsh-Men only; as appears Plow. Com.

Obj. 27 Eliz. cap. 9.

Resp. That Act extends only to Fines and Common Recoveries. And the Court here cannot take notice of the Exemplification of a Record there, where the Jurisdiction is limitted; as appears Cro. Car. 34. upon a Record removed hither. And Hill. 7 Car. B. R. in Prices Case, the Judge cited Authority, That if the Record of a Judgment there were removed hither, an Action of Debt would not lie upon it; nor was any such Evidence ever offered since, 34 H. 8. And a Law disus'd is as it were become nul. Vide Littleton upon the Statute of Mert. concerning disparagement. Hob. Rep. 78. St. Johns Case. 6 Rep. Gateways Case, and 37 Ed. 3. Rot. Parl. num. 10. The Barons and Serjeants at Law were yearly to make enquiry what Laws were used, and what not: also the Exemplification is only of the Enrolment of the Record, and not of the Record it self. 2 and 3 Eliz. Dyer 187, 275. Bro. Record 49. Co. Inst. 225. and Dyer 369. Scire Fac' does not lie upon the Tenor of a Record. And by 15 Ass. 16. a Record in Wales cannot be vouched here; and in a Case tried at Lent Assizes 1656. such an Exemplification was not admitted for Evidence upon Issue of nul tiel Record in Ejectment, and so concluded pro quer'. But it was said on the other side, That here the Issue is not upon nul tiel Record, but the General Issue; and the Exemplification comes in upon Evidence only to the Jury, and may be sufficient ground for them to find for the Defendant. Et Adjornatur.

At another day Atkins argued p Defendente; He cited Newys and Scholastica's Case, Plow. Com. 411. where the Chirographe of a Fine was given in Evidence to the Jury, upon a General Issue in Assize, Dyer 239. b. The Jury find a private Act of Parliament, Dyer 167. Constat of a Patent. 5 Rep. Pages Case. Bro. monstrance de faits 68. The difference is betwixt a Plea of a Record, and Evidence upon a General Issue, in Whiteheads Case, temp. of Wilde Chief Baron. The Court held an Exemplification of a Recovery, under the Seal of the Mayor of Bristow, to be good Evidence to a Jury; and the Statute of 27 Eliz. seems direct in the point. Vid. 39 H.6. 4. Dyer 233. Bro. Records 65.

Upon a Debate in Michaelmas Term after, it was agreed that a sworn Copy of a Record in Wales, might be given in Evidence; but its said that an Exemplification could not, because

cause the Court here ought not to take notice of any such inferior Seal; but if it were exemplified under the Great Seal, then it would be Evidence and Proof, although the Record it self were lost; but whilst the Record it self is in being, no Exemplification under any other Seal shall be admitted. But it was said on the other side, that it was held by the Judges at Serjeants-Inn upon a Demurrer to evidence in Whiteheads Case, That an Exemplification under the Seal of the Mayor of Bristow, of a Recovery there, should be given in Evidence, though the Record it self could not be found. And so it was at the next Assizes; and per Cur. Trials in the next adjoining County to Wales are not by any Statute Law, but by Prescription; and they are tantamount to Trials within Wales, where it is admitted that such Evidence is good, being within the same Jurisdiction, & Adjornatur.

At another day Baldwin argued for the Plaintiff, That it is no Evidence, because the effect of the Record only is expressed, whereas the Record it self ought to be set forth in hæc verba, 3 H. 6. 4. Mich. 21. Car. B. R. Rot. 440. Wright and Sir Paul Pinder, in Evidence to a Jury, to prove a diem clausit extremum out of the Exchequer, the Record it self could not be found, but a Warrant for it, and an Entry of it in the Docket-Book was proved, and upon a Demurrer it was adjudged to be no Evidence, because a Record cannot be proved but by it self. Vide Rast. Entries 318. 1 and 2 Ph. and Mar. Rot. 13. B. R. John *versus* Langley, The recital of a Lease without shewing it, ruled to be no Evidence upon a Demurrer. Vide Bro. Records 74. N. B. 144. 28 Ass. 14. 9 H. 7. 9. Dyer 227. Plow. Com. 232. Dyer 236. No Exemplification is Evidence but in the same Court to prove a Record upon nul tiel Record pleaded, but it must be under the Great Seal. Vide Bro. Records 65. Co. 1 Inst. 128. 12 Ed. 4. 16. and the Statute of 27 Eliz. cap. 3. extends to Common Recoveries only. It must be given in Evidence by the late Act, in like manner as if it were to be pleaded, and that must be under the Great Seal; and so concluded pro Quer'.

Harris *versus* Colliton.

(5) THE Defendant had a Judgment at Law against the Plaintiff: After a Verdict for Rent of a House, and to be relieved against that Judgment, the Plaintiff preferred his Bill here, alledging that he could make no profit of the House demised, by reason that it was demolished in the late Wars;

to

to which Bill the Defendant demurred, and sets forth the Statute of 4 H. 4. That after a Judgment the Party shall not be impeached till it be reversed by Error or Attaint. And now Atkins argued for the Defendant, That the said Statute was not introductive of a new Law, but declarative of the Common Law; and that it extended to the Court of Chancery, by reason of the words devant le Roy mesme, as this Court likewise is, and so is called; and collateral Equity is within the Law, as was resolved in Mich. 39 and 40 Eliz. in Throgmorton and Sir Moyle Finches Case, Co. Jurisdiction of Courts: And in Doct. and Stud. 30. it is said, That that Statute is a reasonable and equitable Law, being made for repose and quiet; and in 22 Ed. 4. it is said, That after Judgment no Injunction lies out of a Court of Equity; and in 22 Car. in Langham and Case, In the House of Lords, in Parliament, it was resolved, That after a Judgment obtained at Law, no remedy lies in Equity; but the Court not being full it was adjourned.

Afterwards in Michaelmas Term Finch argued for the Defendant. 1. He considered how the Common Law stood before the Statute of 4 H. 4. He said there was an Equity, as appears by Doctor and Student, which was part of the Common Law, though regular Proceedings in Equity were not known till of late times. Vide Articul. sup. Chartas, cap. 5. Co. Mag. Chart. 551. There many Acts of Parliament are cited, that after a Judgment there was no remedy for the Defendant, but in Parliament, otherwise than by a Writ of Error, or a Writ of Attaint; and that the Common Law was thus, appears by the Statute of Gloc. cap. 4. and Westm. 2. cap. 4. Where after Judgment by default, though by Collusion, a Lessee for years, or a Feme-Covert, could not falsifie; and in 2 R. 3. 21. and in Bracton the Reason is given, viz. Because Parliaments were to sit once or twice a year to redress such Grievances. And it appears by 13 Ed. 3. prohibit. That after a Judgment obtained at Law, a Prohibition lay to the Court of Chancery.

Then he considered the Statute of 4 H. 4. 1st. in words, 2d. in meaning. The words both in the Preamble, and in the Body of the Act, are full, and import a positive restraint; they are, that the Party shall rest in peace; and a Fine is called finis, quia finem litibus imponit. Then for the meaning, He said by drawing the Matter in question over again in Equity, the Law is subverted, and the Judges will extend the words of an Act to Cases of equal Mischief, Vide 10 Rep. Bewfages Case, upon 23 H. 6.

Obj. The Statute extends only to a reversal, which cannot be by a Suit here.

Resp. The Fruit of the Judgment is lost by a Suit in Equity, and that is a Mischief equal to, and is in effect a Reversal of the Judgment; and such a collateral Act the Civilians call appellatio Curatoria; and it is said in the Reg. 62, 63, 64. to be in enervationem Judicii; and in 18 Ed. 3. Act de Parliament, num. 32. it is called so.

Obj. At Law one Action lies against another, and that does in effect take away the Effect of the former.

Resp. The Statute did not intend to alter what was Common Law before; but there was no relief in Equity before; and therefore the last words of the Act do not extend to it.

Obj. The constant Practice in Chancery is to the contrary.

Resp. There was no such Practice for 100 years after the Statute of 4 H. 4. was made, viz. in H. 7. time, and before in 3 H. 5. nu. 46. 15 H. 6. cap. 4. The Parties flew into Parliament for relief in an Assize after Judgment; and in 3 H. 6. Rot. Parl. num. 22. The Bishop of Ely having recovered 400 Acres of Land in Wisbich, the Parties betook themselves to the Parliament; so in 3 H. 5. num. 17. vide Co. 3 Inst. 123.

Obj. In 9 Ed. 4. an Injunction was granted after Judgment.

Resp. But in 22 Ed. 4. it was denied; and it does not appear in 9 Ed. 4. but that the Bill was exhibited before Judgment.

Obj. There are many Presidents for it.

Resp. Judicandum est legibus non exemplis. There are a thousand Presidents for a Capias upon a Recognizance in Chancery; but a thousand more cannot make it to be Law; and many pass sub silentio, or upon the sole Opinion of the Chancellor, who is willing to enlarge his own Jurisdiction.

Then he considered the Statute of 33 H. 8. and argued that that Statute did not enlarge the Statute of 4 H. 4. or let in any Authority, in Equity, after a Judgment at Law; He said there was no Book of Orders in the Exchequer before 1 Mar. An Audita querela is for Common Law Equity; but no remedy lies by an Audita querela upon Matter that might have been pleaded before Judgment, as the Matter contained in this Bill might.

Then he considered of some Authorities; and 1st. Those that made against him, 7 H. 7. 11. Tenant by Statute Merchant relieved in Equity upon the Statute of Gloc. cap. 4.

Resp.

Resp. That was upon a Recovery in a Court of Ancient demesne, which not being of Record, is not within the Statute of 4 H. 4.

Object. 9 E. 4. Relief in Equity after Judgment.

Resp. That is contrary to Law upon the Reason there given.

Object. Doct. & Stud. 31.

Resp. That makes for me rather than against me.

Object. 9 Rep. 99. Stamf. Prærog. 65. That the Chancellor has a double power, legal and equitable, ordinary and extraordinary.

Resp. That is no proper distinction to be urged in a Court of Law.

Object. Dyer 21, 22. Injunction there after a Judgment at Law.

Resp. That does not appear by the Book.

Object. In 12 Jac. the Judges were of opinion in Case of Præmunire, that the Chancery could relieve after Judgment.

Resp. Vid. 3 Inst.

The Authorities he cited for him, were 13 E. 3. Prohibiton 11. Crompton's Jurisdict. de Courts 57. Throgmorton and Sir Moyl Finch's Case, Mich. 39 & 40 Eliz. Co. Jurisdict. de Courts tit. Chancery; and there was the same ground of Equity that is pretended to be here, 3 Inst. 123. 4 Presidents there. The 20th Article against Cardinal Wolsey, Co. Mag. Chart. 551. Pasch. 13 Jac. in Hab. Corp. for Glanvil and Allen, 17 Car. Tomson and Hollingworth's Case in B. R. In Debt, where such a matter as the Equity of this Bill was pleaded and overruled, 23 Car. Lumbrey and Langham's Case in Parliament accord. and concluded for the Defendant.

Atkins for the Defendant cited Moorhead and Douglass's Case in this Court, 1655. Adjudged upon Argument in point.

Stevens pro Quer. He said the Court here does not intermeddle with the Judgment; that rests in peace; but with matter dehors; and that cannot be Law that excludes Equity. He argued that the Statute of Præmunire could not possibly extend to the Chancery; nor the Statute of 4 H. 4. for that the Jurisdiction of the Court of Chancery in Equity was not then in being, and therefore could not be restrained by that Law.

In answer to the Reasons alledged by the Lord Coke to the contrary, he said; 1. That nothing tryable at Law was touched here. 2. That the Parties are at peace as to Pleading, but not in Equity. 3. That no matter in or upon Record is in question, but matter dehors: And concluded pro Quer.

At another day it was argued by Shaftoe for the Defendant: He said, that at the Common Law a Prohibition would lie, 13 E. 3. Prohibition 11. He urged the Statute of 27 E. 3. of Præmunire, and that the words (in auter Court) extend to restrain the Court of Chancery. 1. Because all other ways of avoiding Judgments are by the Common Law, and therefore not entended to be precluded; as, by a Writ of Disceit for want of Summons, 35 H. 6. 44. By Audita Querela, which is an equitable Writ. By Certificate in Assise N. B. 183. By an Action of an higher nature, &c. Vid. Plowd. Com. 393. 18 E. 3. 15. Dyer 315. 2. The Parties will never be at peace, which the Common-Law aims at, and the words of the Statute plainly design, if Judgments at Law shall be questioned afterwards in Chancery, Vid. Co. Mag. Chart. 360. Doct. & Stud. 31. & Co. Lit. 168. Judicium pro veritate accipitur, Vid. 9 E. 4. 39. Attaint lies not at the Suit of an Infant upon the same Reason. His 3d Reason he grounded upon Magn. Chart. Nulli negabimus, nulli differemus Justitiam, &c. and referred to the Lord Cook's Commentary upon those words. 4. The Right betwixt the Parties is bound by the Judgment, Vid. 27 H. 8. 15. 37 H. 6. 14. That the Court of Chancery, with respect to Proceedings in Equity, is no Court of Record. 5. To question the matter in Equity is to draw it ad aliud examen; because Proceedings there are upon written Depositions and not viva voce according to the Course of Tryals at Common Law, Vid. Hob. Rep. Darcies Case, 324. and Manwaring's Case, 203. And by this means the Courts of Law would be made Handmaids to the Chancery.

Object. The Penalty of the Bond is recoverable at Law.

Resp. The Law allows of a Mischief rather than an Inconvenience; and the Recovery of the Penalty may be prevented by exhibiting a Bill before Judgment, Lit. p. 231. Doct. & Stud. 31.

Object. The words (in auter Court) in 27 E. 3. do not extend to the Chancery.

Resp. In the Statute of 16 R. 2. c. 6. they are so expounded, Vid. Parker in vita Stratford Archbishop of Canterbury, and by 5 E. 4. 6. they extend to Ecclesiastical Courts in England.

Object. 7 H. 7. 12. per Keble, that Releif lies in such Case.

Resp. That is but the single opinion of a Serjeant.

For Authorities he cited, 10 H. 6. 14. that the Custom of London does not extend to a Judgment. And 22 E. 4. 37. Doct. & Stud. cap. 18. Co. of Præmunire, 3 Inst. Norrice's Case, Dyer 201. That after Judgment upon inspection of an

Infant

Infant no farther Examination is allowed in Chancery, Dr. Smith's Case, Mich. 13 Jac. B. R. 11 Rep. Magdalen Coll. Case, Apsley's Case, Pasch. 13 Jac. & Glanvil's Case, Bulstrode 2 Rep. 302. Co. Jurisdict. de Courts, 83. Keilway 42. That the Chancery is but of late standing with respect to its extraordinary Jurisdiction, Hob. Rep. 203. Candish's Case, Dyer 20.

Montague pro Quer. The Statut of 27 E. 3. of Præmunire is not pleaded here, nor does it extend to the Chancery; the word alibi by 5 E. 4. 6. extends to the Court of Rome and Ecclesiastical Courts, not to the Chancery, which is a Limb of the Common Law; and the Chancery was well known at that time, Vid. Plo. Com. 321. and Co. Jurisdict. of Courts, tit. Exchequer. The words in peace relate only to the Courts in which the Judgments are given; and cannot be extended to Cases which the Common Law cannot examin; and Doct. & Stud. 31. does not prohibite the Examination of a matter in Equity. Nor can a Court of Equity annihilate or call in question a Judgment, but only mitigate the Rigor of it in some Cases, which answers 13 Ed. 3. Prohibition. 30 Ed. 3. 14.

Object. Co. Jurisdict. tit. Chancery.

Resp. The point there was whether the same matter could be examined over again, which had received a determination at Law; and that is not our Case.

Object. Co. tit. Præmunire; That the Chancery is within the Statute of 27 E. 3. of Præmunire.

Resp. The question is there upon the very same matter that had been tryed at Law, and Fraud and Surreptitiousness, which the Court that gave Judgment, could well enquire into and determin. And Langham's Case concerned excessive damages only; and the Defendant petitioned the Parliament which 4 H. 4. prohibites; and yet in that Cause there was a new Tryal by an Order in Chancery, Vid. 7 H. 7. 11. Dyer 201, 301. Et adjornatur.

The Attorny General *at the Relation of* Thomas Ceely *against* Geo. Bagg *and* John Marsham *Esq*;. *In an* Information.

THE Case was, That Sir James Bagg Father of the Defendant George, being an Accountant to the King as Receiver of his Customs in 2 Car. In 3 Car. Carew and Gregory by Deed of Bargain and Sale enrolled bargained (6)

and

and sold to the Defendant George and his Heirs, being then of the Age of nine years, the Mannor of Leigham for 1200 l. paid by Sir James Bagg, who afterwards received the Profits during his Life, and dyed in Aug. the 14th of King Charles, being endebted to the King in the sum of 22500 l. for the Customs by him received in 12 Car. After his death a Writ of Diem clausit extremum issued bearing date the last day of the preceding Trin. Term to enquire what Lands he had when he became indebted to the King; upon which it was found that he was then inter alia seized of this Mannor, and the Lands were seized into the King's Hands. Afterwards in Hill. Term 1649. the Defendant George Bag pleaded as Ter-tenant to the Extent, the said Conveyance in 3 Car. And the Attorny General upon consideration of the said Conveyance entred a Nolle ulterius prosequi; whereupon Judgment was given, that the Hands of the Keepers of the Liberties, &c. should be amoved.

Afterwards the Defendant George compounded for his Estate, being forfeited for Deliquency; and another person, who had paid the Composition Mony, had it mortgaged to him for his Security before the Information exhibited. And the Court was of opinion that this was Fraud apparent; and sufficient matter disclosed, to satisfie them, that this Mannor was the Estate of Sir Ja. Bagg, being purchased with his Mony, and the Profits received by him during his Life. And they would not try the fraud. They were also of opinion that the Extent was well executed, though the Writ bore Teste before Sir James's death; and it was a good Warrant to make enquiry after his death, under the Hands of the Treasurer and Chancellor of the Exchequer, and according to the common course of such Writs, which never bear Teste in the Vacation time, but from Term to Term. But they doubted whether this Judgment, as it is entred without a Salvo Jure should bind or no, the Amoveas manum being absolute: But they all held that the Statute of 4 H. 4. c. 23. does not extend to this Case of a Nolle prosequi. Et adjornatur.

Afterwards in Mich. Term the matter was argued, and the Question was whether or no after such Judgment as aforesaid, the Protector could bring in question again the validity of that Conveyance for Fraud.

Hardres. I conceive he cannot. 1. A Judgment being once given by a Court upon matter of Fact, the validity thereof can never be drawn in question again for the same matter upon farther Evidence afterwards appearing to contradict the same; for that were to bring in question the Credit and Duty

of

of the Court. And the Rule is de fide & Officio Judicis non recipitur quæstio. And the Result of all here is, that because Evidence and Matter now appears to the Court to clear the Fraud of the Conveyance, therefore that Judgment shall now be impeached. This, I say, is to tax the Court in point of their Trust and Duty, which ought not to be, and would be a means to make Suits perpetual, 1 & 2 Ph. & Mar. Dyer 114. Vaux's Case. An Assize was brought for the Office of a Philizer. Vaux being admitted a Philizer, was put out of his Office by the Court for absenting himself and letting his Office to farm, and the Defendant Keble was put in his place; yet no Record was made of Vaux's discharge, nor was he called to answer for himself. And in the Assize the Plaintiff would have had this matter enquired into; but it was not admitted: For the Court having determined the matter of Fact; this was rather a point of tryal than a Judgment, and shall not now be inquired into.

1 Mar. Dyer 89. b. Verney's Case. A Fine was levied by a Feme Covert, who dyed before Certificate and Engrossement, and the Fine afterwards certified and alledged for Error in fait, that the Woman dyed before the Teste of the Dedimus; whereas the Judge had certified the Concord taken after; and this was not admittrd to be questioned after the Certificate.

F. N. B. 21. It shall not be alledged against a Judgment, that the Verdict passed for the Plaintiff, and the Court entred it against him.

9 E. 4. 3. It shall not be alledged that the Court gave Judgment one way, and the Clerks entred it another way; for this is matter of Fact and against the Record.

If in Mayhem the Court upon Examination assess damages too high; or if in Dower they try by Proofs whether the Baron be dead or alive; or if upon inspecting an Infant they adjudge him to be of age; these matters shall never be brought in question again upon better Proofs; for this is in effect to attaint the Court, impeach their Credit, and make Suits perpetual.

Pasch. 1656. In the Exchequer-Chamber in Sir Thomas Walsingham's Case; In a Bill of Review it was held that there are but two grounds for reversing Decrees; the one for matter appearing in the body of the Decree, the other for new matter arising since the Decree; but not for Error in Judgment or want of proof, which comes up to our Case; that better proof or matter apparent, which appeared at the time of giving the Judgment, shall not bring a former Judgment in question; if it should, it would be a President of dangerous Consequence

quence to the quiet of Men's Inheritances. Matters de hors, as the Death of a Party, or the Judgment of the Coroners in an Outlawry, do not concern the Judgment of the Court it self, and they may therefore be drawn in question, but not a matter once questioned and adjudged, 2 R. 3. 20.

If upon an Information in this Court for Prisage it appear upon the Defendant's Plea that there was not a sufficient quantity of Wines, and Judgment is given accordingly upon the Attorney-General's Confession, this matter can never be drawn in question again upon an English Information upon Circumstances of Fraud; and it is the usual course in such Cases to prefer a Bill before Judgment to examin the Fraud, which shews that after Judgment there is no remedy: So here.

My 2d Reason is, because by the Judgment transit in rem judicatam, 6 Rep. 44. b. Higgen's Case. If a Man have Judgment upon a Bond, and dye, his Executors shall not commence a new Action upon the same Obligation; because transit in rem judicatam, which is a thing of a higher nature. And the reason there given is because else Actions and Judgments upon one and the same cause of Action would be infinite, to the perpetual Vexation and Charge of the Subject, which the Law avoids. Interest Reipublicæ ut sit finis litium.

16 H. 7. 56. 13 E. 3. Estopp. 180. 19 R. 2. Estopp. 281. If a Deed be enrolled, or Judgment given against the Defendant upon a Release pleaded, he shall never afterwards be admitted to say that it is not his Deed, or that it is a good Release; for this would be to impeach the point tryed: But in a collateral point he may, as to say that he had nothing in the Lands at the time of the Release.

3dly. The same Court cannot examin their own Errors in a subsequent Term, F. N. B. 21. because it would be inconvenient.

4thly. Because in this Case there is no salvo jure, the force of which is in this as in other Cases, viz. that the Commonwealth shall not be prejudiced, if it have a better Title. It is in the nature of a Protestation, which excludes a Conclusion, 2 E. 2. Voucher 108. If a Man enter into Warranty of Lands, this extends to a Rent issuing out of the Land; but if he enter into the Warranty saving his Rent, all's well.

The want of a Saving has always used to conclude the King, not so as to debar him of any other Title, but to conclude him in the Title tryed.

Object. The Protector at this rate will be in a worse Condition than a common person; for he cannot have a Writ of Error.

Resp.

Resp. No he is not; for a Writ of Error lies for the one as well as the other upon an erroneous Judgment; and this is common Experience; but in this Case there is no reason why he should be in a better condition, because it tends to the disquiet of the Subject.

For Authorities he cited Mich. 12 Jac. B.R. Baggs Case. Bulst. 2 Rep. 245. In a Quo Warranto upon the Claim of a Forrest by vertue of a Charter of King Henry II. and Judgment given upon the Attorny Generals confession of the Claim, and there held that the Attorny Generals Confession and Judgment upon it binds not the King as to matter of Law, but that as to matter of Fact it does, which is our very Case; for here the matter and circumstances of the Fact are the ground of the Judgment.

30 Car. Exchequer, Sir Edmond Bacons Case. In a Quo Warranto for certain Liberties claimed, Judgment was given upon a like Confession of the Attorny General, and the same distinction taken and agreed to.

So upon the whole Matter he concluded pro Defendentibus.

Shaftoe argued at the same time on the other side.

De Termino Sancti Michaelis Anno Domini 1658. In Scaccario.

(1) THIS Term John Dorrington Esq; had a Patent for the Office of first Remembrancer in this Court; but the Court told him, that not having Experience himself, he must find an able Deputy to execute it. And that the Grant of an Office to an unskilful person is void, as in Scrog's Case, Dyer 165. & 1st Inst. 3. And his Admission was respited for that cause for two days, but at last after the admonition he was admitted, the Court telling him they had many Presidents of denying Admission to such Officers for want of Skill.

Button *against* Honey.

(2) IN an English Bill for Vicaridge-Tythes in some Towns in Kent, the Plaintiff did not set forth in his Bill how they became due to him, whether by Prescription or Endowment, as he ought to have done, and Exception was taken to this at the hearing, after Answer and Depositions. And the Exception over-ruled, because the Defendant does by his Answer admit him to be Vicar, and that the Tythes in question are his due; but insists only upon Payment and Satisfaction, Quod nota; for it has been often ruled contrary, it being the ground and foundation of the Plaintiffs Title. But the Bill was afterwards dismist upon the Merits with 40 s. Costs.

Alderman Langham *against* *and others.*

(3) TO an English Bill for Tythes of certain Houses in London according to the Act of 37 H. 8. and to have a discovery of the Improvements of Rent; the Defendants in their Answers set forth a Customary Payment in lieu of all Tythes. And Exception was taken to their Answers, because they do not discover their Rents, but relye upon their Answer de modo decimandi. And the Court held that the Modus being alledged no otherwise than by way of Answer, they ought likewise to have set forth the particulars of their Rents, and answer to all the parts of the Bill; but if the Defendants had pleaded it,

it, they needed not have answered to any other matter, and so it was ruled, though objected, that if the Proofs were against them upon the Modus, they might then answer upon Interrogatories to the particulars.

Rich *against* Barker *and others.*

UPON an English Bill to have Contribution towards the Repairs of publick Bridges within the Manor of Sunning against the Freehold and Copyhold Tenants, and such as had part of the Demesnes of the Manor by the purchase from the Crown at several times. The Charge being upon the Plaintiff as Lord of the Manor ratione tenuræ; the Court held, that the ancient Freehold Tenants and Copyholders are not liable to contribute; for nothing is part of the Manor but Demesnes and Services, and not the Lands of the Tenants. And although the Copy-holders were enfranchised, yet they are not chargeable; for the Enfranchisement only alters the manner of their Tenure. They held likewise that all, who have any part of the Demesne Lands of the Manor by purchase, are liable. And that if cesty que trust of the Demesnes in Possession or Reversion be named, that it is sufficient in a Court of Equity, without making the Tenants of the Land or them in the Reversion Parties, Vid. F. N. Br. 325. de Exonerī pro rata portionum, ibid. 64. 152. (4)

Sir Rich. Minshal *and* Spicer.

UPON a Suggestion to have a Prohibition to the Court for Probate of Wills, &c. to stay the Probate of a Will of Lands and Goods, because the Testator was non compos. (5)

Atkins argued, that upon such a Suggestion as this, which goes to the whole Will a General Prohibition ought to go; so upon Suggestion of a Revocation or no such Will. Otherwise where the Sugestion is particular and concerns the Lands only. He cited 6 Rep. 23. the Marquis of Winchesters Case, Hob. 290. Serles and William's Case, Pasch. 10 Jac. B. R. Semain's Case, Cro. 2d Rep. Egerton's Case, Cro. 1st Rep. 94, 114, 115, 165, 391. Vid. Dyer 201. Et adjornatur.

At another day Stevens argued against the Prohibition as to the Goods. And the Court declared that unless the Plaintiff would go to Issue this Term compos or non-compos, they would not grant a Prohibition.

James Lewes *Esquire Plaintiff, versus* James Colinson *and* Mary *his Wife* Executrix *of* Thomas Dockwray, *Defendants.*

THE Plaintiff brings an Action of Covenant upon this Covenant in a Deed, viz. that it shall be lawful for the Plaintiff notwithstanding any Act or thing done or suffered by the said Henry Dockwray and Thomas Dockwray to the contrary, to enter and take possession of the Premisses, and take the Profits thereof during the time that the same should remain in the Possession of the said Henry Dockwray his Executors or Assigns by vertue of the said Statute and Extent, without any Let, Suit, Trouble, Disturbance or Demand of the said H. or Tho. Dockwray, or either of them, or either of their Executors, Administrators or Assigns; and upon non est factum pleaded there was a Verdict for the Plaintiff and 1700 l. damages.

Hardres for the Defendant moved in Arrest of Judgment, because the Breach is assigned in this, viz. that the Plaintiff cannot take possession of the Premises by reason of the Let, Hindrance, Trouble, Disturbance and Demand of the said H. and T. and of the Defendants after their Death, and it is not shewn how this Let, Hindrance, Trouble and Disturbance was. For a Declaration ought to contain such a certainty, to which a certain Answer may be given; and upon which a certain Issue may be joined and a certain Judgment given thereupon. Et oportet quod certa res deducatur in exitum; else the Defendants cannot provide for their defence.

5 Rep. 34. b. Playter's Case, That is the reason there given why an Action of Trespass for pisces is held to be naught, without shewing the Nature and Number of them; and that it is not aided after Verdict, but is matter of Substance. And it is there said by the Court, that it would be very inconvenient, if it were otherwise; for that unless a certain thing be put in Issue, wherewith the Jury be charged, they cannot afterwards be attainted, though they should give excessive Damages.

10 Rep. 77. a. The Case of the Marshalsea; And it is common in other Books, that if an Action upon the Case be brought upon an Indebitatus assumpsit, the Declaration is not good, unless it

it be shewn for what cause, as upon Account of Wares sold, &c. and yet the cause of the Debt there is not traversable, as the Breach of Covenant is in this Case of ours.

11 Rep. 55. a. Savils Case. Ejectione Firmæ de mesuagio & uno clauso vocat', &c. containing three Acres eidem spectant', &c. this was held ill after a Verdict, because the nature of the Acres not shewn, and yet there is more certainty than in this Case.

2 H. 4. In Waste, the Plaintiff must shew wherein the Waste was, Cro. 1 part, 151. Jemx's Case. In Debt against one as Heir, upon a Bond, the Plaintiff must shew coment Heir, or else it is naught, though after a Verdict.

Authorities in the Case are many and express; but first to answer some Objections.

1. Obj. A Demand is a Breach.

Resp. That is not the Case, the Breach is not assigned in that, and if it were, without question it would be insufficient as much as a refusal, in 8 Rep. Frances Case.

2. Obj. In Covenant there needs no particular breach be assigned, Cro. 1 Rep. 176. Symmes Case; and there is a difference betwixt an Action of Covenant, and Debt upon an Obligation to perform Covenants.

Resp. That Case makes for me; for there was a Covenant that the Defendant should permit the Plaintiff quietly to enjoy; and the breach is assigned in this, that the Defendant did not permit him quietly to enjoy, but had received all the Rents and Profits from the time of the Demise, to the bringing of the Action, so that there is a certain and particular breach alledged; to wit, That the Defendant took all the Profits; and the diversity betwixt an Action of Covenant and an Action of Debt, with respect to the assigning one or more breaches, is taken by the Councel, and the Law is so; and yet in that very Case, p. 299. Judgment was given upon a Demurrer pro Defendente.

For Authorities. 2 Rep. Mansels Case. In Debt upon a Bond conditioned for quiet enjoyment of Lands discharged of, &c. or otherwise to save harmless, &c. it is not sufficient for the Defendant to say that he has saved the Plaintiff harmless, without shewing how.

22 Ed. 4. 40. b. Is a notable Case to this purpose. 10 Ed. 3. 39. 10 Ass. 15. 8 Rep. 191. Frances Case. Pasch. 1649. B. R. Rot. 1284. Ingleby *versus* Steward. Hill. 12 Car. Brights Case. Mich. 23 Car. B. R. Amy *versus* Goldsmith. Hill. 22 Car. B. R. Fortescue *versus* Brograve. Cro. 1 Rep. 385. Palmes *versus* Knight. &c.

Allen

Allen pro Quer'. The breach is well assigned, and a disturbance appears upon the Record; and the manner of it to be with-holding the possession, which can be by none but the Defendants themselves or their Testators: He cited Smiths Case, 17 Ed. 4. 2. 1 Cro. Syms Case. Dyer 240, 255, 304. a. 306. b. 10 Rep. 59. a. Plow. Com. 84. a. 202. &c.

Hardres. Mr. Allen seems to admit, that if it shall not be intended by the Court that there is a sufficient Breach laid in the Declaration, that then it is naught: For this; It must be considered what the Covenant is, and how the Breach is laid: The Covenant is, That it shall and may be lawful for the said Sir James Lewis, his Executors and Assigns, notwithstanding any thing heretofore done by the said Thomas and Henry Dockway to the contrary, to take into their possession the extended Lands therein mentioned, and to hold and enjoy, and take the Profits thereof during all the time the same should remain in the possession of the said Henry Dockway, his Executors, Administrators or Assigns, by vertue or reason of the said Extent, without any let, suit, trouble, disturbance or demand of the said Henry or Thomas Dockway, their Executors, Administrators or Assigns, or of either of them; the breach is laid, That the Plaintiff could not take into his possession all the said Premises, and hold and enjoy and take the profits thereof during the said time, by reason of the let, trouble, disturbance and demand of the said Henry and Thomas, and of the Administrators of the said, &c. against the form of the said Indenture.

Obj. The Breach as it is laid is apparent, for the Plaintiff declares that he could not take into his possession, &c. which strongly implies, that the possession was with-held from him by them, which is a sufficient Breach.

Resp. That is not necessarily implied in these words, for the Breach is laid in one entire and continued Clause, and not by parcels, and so it must be taken altogether; and if by Intendment it may be taken one way or other, the strongest shall be taken against the Countor; and in truth, in this Case, as appears by Affidavit, the Plaintiff and they that claimed under him, enjoyed the Lands many years, and paid Rent for them: Now taking the Sentence altogether, it will appear incongruous to say that it shall be presumed here, that the possession was with-held, and to say that the possession was with-held by reason of a disturbance or demand, and that is not proper in Common Parlance; for none can be disturbed who is out of possession, nor can a Man be kept out of possession by a demand; so that the with-holding of the possession,

ession, as here laid, may or may not be: I admit that when a Declaration has such a sufficient certainty, that by necessary intendment it cannot be taken otherwise, it is well enough; as in 14 Eliz. Dyer 304. A Lease made by a Parson, virtute cujus he was possessed; the Life of the Parson needs not be averred; for it is necessarily implied; so 14 Eliz. Dyer 306. b. Trover and Conversion of a Hawk, and declares that he was possest of it, ut de bonis suis propriis; he needs not alledge that it was reclaimed, for that is necessarily implied in the words, that he was possest of it, ut de bonis suis propriis; so 10 Rep. in the Bishop of Sarums Case; In Avowry for Rent reserved upon a Bishops Lease, which was voidable, the Party does not aver that the Bishop was dead, and if not, the Lease held good during his Life; but because in the Declaration he was called nuper Episcopus, it was held good, causa qua supra.

But when the words of a Declaration may have two Intendments, they shall be taken most strongly against the Plaintiff, for they must shew fully and precisely wherein the Party is agrieved; and that they do not, when they stand indifferently whether the Defendant be a Tort-feasor or not; for since the Declaration is what the Defendant is compellable to answer to, and lays the Foundation of what the Court is to give their Judgment upon; it is but reason that it should be certain; 1. That the Defendant may know what to answer to, and the Court whereupon to adjudge; and therefore if there be two Intendments, of which one makes for the Plaintiff, and the other against him; that which makes against him shall be taken, and if the truth be of his side, it is his folly not to disclose it, vide Plow. Com. 202. Stradling and Morgans Case adjudged upon this ground. In Debt upon 7 Ed. 6. against a Receiver of the Kings Revenue. In Waste, If a Man declare that the Reversion was granted to him, and the Tenant attorned and had done Waste; it is not good, unless it appear that the Waste was done after Attornment.

3 Ed. 4. 21. In Debt against a Successor of a Prior for a Sallary; the Plaintiff declared that he was retained with the Defendants Predecessor as his Baily in Husbandry, and that his Services came to the use of the House, but did not alledge expressly that he was retained by the Predecessor, and it may be that he was retained by some other Person, who had no power to retain him; therefore the Count was held to be ill. Hill. 11 Car. R. in Error by the Lady Throgmorton against Rich. Windwood upon a Judgment given in an Action of Waste, the Plaintiff had declared upon a Bargain and Sale made

made to him of the Reversion, in 14 Jac. 1. and enrolled within six Months, and also upon a Fine levied to him within the six Months, and that he was seized by vertue of the Bargain and Sale; and Exception was taken because the Declaration does not expressly lay the Fine to have passed after the Enrolment; for if before, then the Plaintiff was in by the Fine; but says generally that the Enrolment was within six Months; and that within those six Months the Fine passed. And by all the Justices against Jones it was held Error; because Declarations must be certain in every point, and where they may be taken two ways, the strongest shall be taken against the Plaintiff, Hill. 13 Car. B. R. Marshal *versus* Hall in Error of a Judgment in C. B. in an Assumpsit.

In this Case it may be the possession was with-held from the Plaintiff by Dockwray, and it may be it was not; for it is not expressly alleged; and therefore it shall be taken most strongly against the Plaintiff, and the Declaration is not good.

Allen argued pro Querente; but what Judgment the Court gave non constat.

Hugh Audely *versus* .....

(6) A Bill in the Exchequer to be relieved against an Extent upon a Det in aid for 1500 l. penalty after the penalty satisfied by perception of Profits, but not according to the extended Value; but the Court would not relieve the Plaintiff without paying costs and damages over and besides the penalty; for it appeared there had been a default in the Plaintiff in not permitting the Defendant quietly to receive the Profits upon a former Extent; whereby the Defendant was put to great Charges at Law and in this Court. And the Court declared that the Plaintiff should either have all Law or all Equity; viz. that the Defendant should account only for the extended value according to Law, or else that he should have all his costs and damages besides the penalty; and so it was decreed.

The Protector *against* St. Johns.

(7) UPON an Outlawry and Plea and Replication and Demurrer to it, after Extent the Protector dyed, and the Court was of Opinion that all but the Outlawry and the Extent upon it was gone by the death of the Protector, as in 7 Rep. the Case of Discontinuance of Process, Vid. la. Et adjornatur.

De

De Termino Sancti Hillarii Anno Domini 1658. In Scaccario.

The Attorny General *Plaintiff*, Samuel Mico *Defendant.*

THE Defendant was charged by English Bill, for that he being a Merchant, in the year 1657. did conceal the Custom and Excise of 290 Casks of Currants imported at the Port of London, in a Ship called the Christopher of London; and for that he endeavoured to corrupt Nathaniel Hawes and John Oldenham, two of the Officers for the Customs and Excise, and promise them a Reward of 40 l. a piece for their Connivance therein, that thereby he might take away the said Goods without paying the due Custom and Excise for the same; and that he did accordingly pay to the said two Officers 40 l. a piece; therefore for relief and discovery of the Truth, was the Scope of the Bill; to which the Defendant demurred, for that the Bill and the Charge thereof concerns matter of Misdemeanor; for which, if guilty thereof, the Party may incur great Penalties and Forfeitures. (1)

Serjeant Archer pro Defendente. The Defendant is not compellable to answer to this Bill; for that it is against Law and Reason to oblige any Man to accuse himself; And it has been often resolved in this Court, that in a Suit for Tithes, unless the Plaintiff demand the single value only; the Defendant shall not be compelled to answer so as to discover the quantity and nature of Predial Tithes; and so it was adjudged in this Court, 1 Jac. in Fenner and Robinsons Case.

The Attorny General contra. This Court ought to preserve the Revenue from Frauds and Deceits; and without such a discovery as the Bill requires, it cannot be answered to the Government, nor the certainty of it known, as by Law it ought; and this is pro bono publico; the Customs and Excise have been given to defend and guard the Seas for the benefit of Merchants, and therefore ought more to be favoured than Matters of private Interest and Concern.

Atkins pro Quer'. This Bill is according to the common Course, and pursuant to Presidents in Court; and the rather ought the Defendant here to answer, because no Penalty or Forfeiture is demanded by the Bill; but a discovery and no more: It is usual to prefer a Bill against Merchants, to discover the quantity of Wines imported in such or such a Ship, because Prisage is an ancient Duty and Revenue of the Crown, Trin. 29 Eliz. Lib. decret. fol. 262. Atkinson *cont.* Hewit. A Bill was exhibited against Hewit, being a Searcher for taking Bribes, and Forswearing himself before a Baron, for which he was fined and punish't upon English Bill, Pasch. 44 El. Lib. decret. fol. 144. *versus* Fisher, one of the Auditors of this Court; there was a Bill exhibited against him for making a false particular, for which he was fined 2000 Marks, and ordered to go through Westminster-Hall with a Paper in his Hat, inscribed, for deceiving the Queen in making a false particular, Hill. 1 Car. There was an Information in this Court by English Bill against one Ambrose Dudley the Kings Woodward, for cutting down and wasting the Kings Wood; to which he put in his Answer, and was fined, Mich. 11 Car. There was such an Information as this of ours, against one Rooks an Officer; to which he answered, and was fined.

Stephens pro Quer'. He cited the Statute of 33 H. 8. cap. 39. which gives Power and Authority to this Court, to hear and determine such Offences as they conceive to be meet, Vide Statutum; and in 10 Car. in Blackford and Guyers Case, in this Court, Lib. decret. fol. 185. this very Point was over-ruled upon a Demurrer, and the Defendant put to answer.

Shaftoe pro Defendente. He cited a President in 11 Car. in one Huntleys Case, That in a Bill against one Ralph Bowes for importing Cards without Licence, the Defendant should not be forced to answer, because he might thereby be drawn within the Penalty of a Statute; and Co. Mag. Cart. fol. 657. upon the Statute of 2 Ed. 6. two Presidents are there cited, That before that Statute the Ecclesiastical Court could not compel a Man to set forth what Tithes were due from him; so a Man shall not be compelled there to own whether he has heard Mass or no, nor whether he has taken Usury or no, because these Offences are punishable by Statute-Law; and two Presidents are there cited to that effect: And by the Statute of 25 H. 8. cap. 14. it is declared to be contrary to Justice and Equity, that a Man should be convicted, or subjected to the loss of Lands, Goods or Life, unless upon due Accusation and Proofs by Witnesses, or upon Presentment, and the Parties own

own Confession, or by Process of Outlawry; Vide Hob. Rep. 84. Spendlow *cont.* Sir William Smith; and it is a common Rule in Chancery, That a Defendant shall not be compelled to discover who is Tenant to the Precipe, but only in Dower and Partition; and though the Party do not directly accuse himself, yet oblique he would be forced to do it, if he were put to answer, as in this Case.

Widdrington Chief Justice. It was usual in the Court of Wards, to compel a Discovery of a Tenure in Capite. Et Adjournatur.

Nota, In Mich. 7 Car. in Blackfords Case, it was ordered that the Defendant should answer to all Points wherein he was not charged with a Crime.

At another day, in the same Term, it was argued by Hardres pro Defendente. In the Argument of this Case (it being of great weight and consequence,) I shall insist 1st. upon Law. 2. Upon Reason. 3. Upon Authorities. 4. I shall give Answer to some Objections.

1. I conceive the Demurrer consistent with, and agreeable to all manner of Laws, viz. To the Law of God, the Law of Nature, and the Law of the Land.

1. For the Law of God. That not only allows, but rather commands every Man to preserve himself from hurt and damage; as appears by the Case of St. Paul mentioned in the Acts of the Apostles, who being accused by Tertullus the Orator for Sedition and other Crimes before the Governor; answered, I am not careful to answer thee about these things, i. e. I am not bound to answer thereunto. And when Pontius Pilate asked our Saviour some Questions, he answered nothing; whence it appears what the Law of God, and the God of Law allows of in such Cases of Crime.

2. For the Law of Nature. That is of the same stamp; hence the Rule, Nemo tenetur seipsum prodere, vel accusare; and upon that Rule it is, That if a Man will prefer a Bill to compel me to answer what Trespasses I have committed upon his Land, or what other Injury I have done him; I shall not be compelled to answer to such a Bill, as the Common Rule in all Courts is, because it is matter of Crime and Tort; for which I am finable and punishable in another Court, over and above what Damages the Party is to recover against me. Upon this ground, though the Parties own Confession of a Crime be the clearest Proof in the Law, yet if such Confession proceed from Dread, or be extorted by any Compulsion, it ought not to be received against him;

27 Ass. 40. A Woman was indicted for the stealing of Bread to the value of 2 s. who said that she had done it by the command of her Husband; and the Justices out of compassion to the Prisoner would not Record her Confession, but gave her leave to plead not-guilty, which she did, and was acquitted, 22 Ass. 71. If a Prisoner disclose any thing to the Court which makes him a Felon, yet the Court will not take advantage of it, but suffer him to plead not-guilty; and these Cases depend upon the former Rule, viz. That a Man is not obliged to condemn himself. Now if this be the Law and Voice of Nature, then is it superior to all positive Laws, and is called Lex Æterna, or the Moral Law, 7 Rep. 12. b. Calvins Case. It is the Law that was infused into the Heart of Man at his first Creation; and whatever Positive Laws are contrary to this Law of Nature and Reason, they are void in themselves, vide 8 Rep. 118. Doctor Bonhams Case.

3. For the Law of the Land. That is very full in the Point; and that appears by Magna Charta, cap. 14. nullus liber homo amercietur, nisi per legale Judicium proborum & legalium hominum; and in 8 Rep. in Grieslys Case, That Statute is expounded not to extend to Offences committed in Courts of Justice, or committed by Officers of Courts; for, that Fines for such Offences are affereable by the Judges, but that it extends to all other Amerciaments upon private Persons for Offences committed out of Court: The same Statute goes farther, and says that Great Men shall likewise be amerced per Pares suos; and in Co. Mag. Char. p. 29. it is said out of Bracton, Comites vero vel Barones non sunt amerciandi, nisi per Pares suos, Et hoc per Barones de Scaccario, vel coram ipso Rege; and in the Margent it is said, That of ancient Time the Barons of the Exchequer were Barons and Peers of the Realm. The 29 Chap. of Mag. Char. has a farther latitude to this purpose; for by that Statute, no Free-man shall be imprisoned, or disseised of his Free-hold, Liberties, or Free-Customs, or Outlawed, or Banish'd, or any way Destroyed; nor shall any Man be condemned or proceeded against, but by the lawful Judgment of his Peers, or by the Law of the Land, Co. Mag. Chart. p. 46. explains the word disseised thus; No Man shall be disseised, i. e. Lands, Tenements, Goods, Chattels, &c. shall not be seized, &c. nor shall any Man be disseised of his Lands and Tenements, or dispossessed of his Goods or Chattels contrary to Law, &c. The words per Legem Terræ signifie Common Law, Customary Law and Statute Law; and in pag. 47, 49. that those words are applicable to the word Outlawry. Now to apply this Law to our Case.

This

This Conclusion will naturally follow, that if neither Common Law, Customary Law nor Statute Law do compel the Defendant to answer in this Case, then he ought not to be enforced to it. Now the Common Law, as appears in Doct. and Stud. cap. 1. is what hath been used and accustomed time out of mind, and has passed for Law; and Magna Charta is said to have been made but in affirmance of the Common Law, which was in being long before that Statute was made; and therefore if the Defendant were by the Common Law obliged to answer, as in this Case; it must appear that the ancient and constant Practice has been so; but that does not appear; so that the Common Law does not warrant it.

Nor is it by Statute Law, for there is no such Statute.

Customary Law is twofold, Consuetudo Patriæ & Curiæ. Consuetudo Patriæ is what is used throughout a Country; as Gavel-kind and Borough-English, and therefore it is called Lex Patriæ. Consuetudo Curiæ is the Custom and Practice of a Court; and this must be supported by constant Use and Practice, and not by two or three Presidents: but where the Presidents are judicial, the Judges must have given Judgment accordingly by divers Successions of Ages; as appears 4 Rep. Rawlins Case 54. a. Commonalty of Sadlers Case 57. a. and Slades Case 94. a. Therefore if in this Case there has not been a Succession of Judicial Presidents for some Ages; then is there no such Law of this Court; and there has been no such Succession here, for there has really but one been found; ergo, since neither Common Law, nor Customary Law, nor Statute Law compels the Defendant in this Case to answer, he ought not to be compelled.

Besides, it appears Co. Mag. Chart. p. 50. That by vertue of these words per Legem Terræ, none ought to be drawn to answer to any Offence, but by Indictment or Presentment; then if this course of proceeding hath not a Foundation in Law, as it appears by these Rules and Statutes that it has not; then there is in this Cause good reason for a Demurrer.

As for the Star-Chamber, wherein Men were compell'd to answer to criminal matters without Indictment or Presentment; that Court was established by Act of Parliament, viz. 3 Hen. 7. and yet the Course that afterwards crept up there, to examin Men upon Interrogatories upon Oath, was afterwards the Bane of that Court, and has been adjudged illegal by the late Act of Parliament, that took away the Court and all other like Jurisdictions, 17 Car. 1. cap. 10. and that because they were contrary to Magna Charta. And yet in that very Court, if any appeared to be of dangerous Consequence to the Procedings at Common Law, and not cognisable in the

the Court of Star-Chamber, it would not be admitted in such Cases to interrogate Men upon their Oaths. And therefore in Sir Steven Proctor's Case *versus* Darnbrock and others, Hobart's Rep. 138. Upon a Bill there for divers, but especially for one horrible Ryot, because it appeared upon the hearing that one Wetheral, who had bẽn grievously hurt in the Ryot, died within three Months after; the Bill was dismiss'd upon advice with the Judges; because it exceeded the Capacity of the Court, and was of dangerous Consequence, though it were laid but a Ryot in the Bill. In the same Book, p. 195. Tufton and Nevil's Case, there was a Bill preferred in the Court of Star-Chamber for a Ryot, and it was laid by way of Inducement, that the Defendant had solicited the Plaintiffs Wife to Unchastity; as to that part the Defendant demurr'd, and ruled to be a good cause of Demurrer; though laid but by way of Inducement; and the reason there given, is because the Crime of Unchastity was naturally alieni fori, viz. for the Spiritual Court, whose Proceeding was not to be usurped upon nor prevented. The like reason holds in our Case; for the Offences and Crimes laid in the Bill do properly belong to the Common-Law, and are punishable by the Common Law by way of Information or Indictment; and therefore ought not to be questioned here; especially since they are laid directly and are the main scope of the Bill, and are not laid by way of Inducement, as in the other Case.

Now if neither Common-Law, Statute-Law, nor Custom (which ought to have the Requisites aforesaid) can be shewn; as no such hath yet been shewn, nor (I believe) can be; then there is no ground for this Bill, but being contrary to all these Laws, it must be naught.

The second Head that I insist upon is, Reason. 1. It is against the common practice of all Courts of Justice to enforce Men to answer in such Cases. For it cannot be shewn that there was ever a Bill exhibited against a Popish Recusant to compel him to answer, whether he were a Popish Recusant or not, whereby he would forfeit two parts of his Estate in Lands, and all his Goods: nor upon the late Ordinance of Parliament against Delinquents, was it conceived reasonable to compel a Man to answer, whether he were a Delinquent, or whether he had done any Act that would render him so; causa qua supra; although neither Popish Recusant nor Delinquents, are liable to any Judgment of Life or Member.

2. There is no President of any such Practice for 20 years and upwards last past; and disuser renders a thing absolute, vide Lit. upon the Statute of Merton, That an Action lies not against

against a Lord for disparagement of his Ward, because it had been disused; so here.

3. My third Reason is ab incongruo. It is a very incongruous way of proceeding; for by this means the ordinary way of proceeding by Information and Indictment would be interrupted; and the Rule is, Non est decurrendum ad extraordinarium, vbi valet ordinarium.

4. If this were allowed, what need would there be of Officers and Searchers to look after such things? The Laws which appoint such Officers, do implicitly acknowledge, that Men are not obliged to confess.

5. Because the matter charged throughout the Bill, is a direct Crime, viz. substracting Customs and Excise, and Bribery in order thereunto, which is of greater concernment then the substracting of Tithes, which yet it has been often overruled that a Man shall not answer to by Bill, when a penalty is required; but in this Case there is a penalty and a punishment besides in another Degree, and in another Court.

6. That that is contrary to a Maxim and Principle of Law, must not be admitted in a course of proceeding in Equity; and upon this Reason it is adjudged in Beverleys Case, 4 Rep. That because it is against a Rule of Law, that any Man should be admitted to stultifie himself; as to say, that he was non compos mentis; that therefore no Relief lay in Equity in such Case, because if that were admitted, a Principle and Foundation of the Common Law would be thereby subverted; so here. And for these Reasons I conceive there is here good cause of Demurrer.

My third Ground is Authorities, vide 1 and 2 Eliz. Dyer. 175. Scrogs *versus* Coleshil. Scrogs was put into an Exigencers place by the Chief Justice; and Coleshil had a Prior Grant of the same Office from the Queen temp. Vacationis of the Office of Chief Justice. A contest arising betwixt these two, the Queen directed a Commission to the Earl of Bedford and nine others to hear and determine the Interest and Title to the Office between the Parties; and if Scrogs should refuse to make answer, &c. then to commit him to Prison; Scrogs did refuse to answer before the Queens Commissioners; and being committed by them, pray'd his Habeas Corpus, and the Court granted it; and in 18 Eliz. Hindes Case. when one refused to answer to Interrogatories before Commissioners concerning Usury, Habeas Corpus granted per Cur'.

Vid. Regist. 366.] Where in a Writ of Prohibition it appears, that the Ecclesiastical Court cannot examine Men upon Oath against their Wills, only in two Cases, viz. Matrimonial,

nial and Testamentary; but not in any criminal Case, as Incontinency, Usury, Simony, &c. For, as the Civilian says, that was Inventio Diaboli ad destruendas miserorum animas ad infernum; and the Writ is express, that it is contra consuetudinem Regni Angliæ.

10 Eliz. Dyer, but not printed; there is a Case of one Leigh, an Attorny of the Court of Common Pleas, who was committed to prison, because he refused to answer before the Ecclesiastical Commissioners, whether he had been at Mass, or no? And a Habeas Corpus was granted; notwithstanding that by 1 Eliz. the Ecclesiastical Jurisdiction is saved.

Cromp. Jurisd. of Courts, p. 366. If any Man be compelled to answer upon Oath, where he is not bound by Law, it is an Oppression and punishable: but there is no Law for it in our Case, as has been said; Therefore, &c.

In 4 Jac. A Case upon the Oath ex Officio was referred in Parliament time to the two Chief Justices, Popham and Coke; and it was held by them, that no Ecclesiastical Person could be examined upon Oath for a Matter punishable at Common Law, as Usury, &c. for that if he were, his Answer would be Evidence against him.

The Statute of 2 H. 4. cap. 15. which impowred the Bishops to proceed according to the Canons of the Church, is repealed by 25 H. 8. cap. 14. by which Act it is declared not to be consonant to Justice or Equity, that any Man should be convicted, or incur any Loss in his Fame or Goods, but by Accusation and Witnesses, Presentment, Verdict, Confession or Outlawry; and it says moreover, that the most expert and diligent Man in the World cannot escape the incurring some Penalty and Danger; if he be liable to be examined upon such captious Interrogatories as may be administred to him; so here: Besides these Authorities, I have three Presidents in this Court.

1. Trin. 33 Eliz. in Scacc. Vavasor *versus* Radcliffe *& al'*. Upon a Bill for importing Cod and Ling by colour of a void Licence; the Defendant demurred, because it was an Offence against an Act of Parliament, and Penalties inflicted; and the Demurrer ruled good.

2. Pasch. 34 Eliz. Bowes *versus* Bore and Peacocke. Upon a Bill at the Suit of a Patentee for the sole Transportation of Cards, against the Defendants for transporting Cards without paying Custom; the Defendants demurred, and it was ruled good, because Forfeitures and Penalties were to be incurred thereby; for the recovery whereof there was remedy by

by Information; and therefore the Parties need not be sued in equity to compel them to condemn themselves.

3. Trin. 37 Eliz. The Attorny General *versus* Lewkner. An Information for exporting Wares and Merchandises, &c. And upon a Demurrer it was ruled, that the Demurrer was good, causa qua supra, &c.

In the 4th place I proposed to answer some Objections that have been made.

1. Obj. This Court ought to preserve the Revenues of the Crown, and to prevent Frauds and Deceits therein, which cannot be done effectually without enforcing a Discovery thereof.

Resp. The same Objection may be made in Case of any Offence whatsoever; for the punishment of Offences is pro bono publico, and before they are punished they must be detected; and the Revenue is concerned there too in point of Forfeitures; and yet Men are not put in such Cases to answer upon Oath to convict themselves. The difference is between Causes Criminal and Civil; If an Offender be once legally convicted of an Offence, whereby he ought to forfeit his Estate, then it is lawful and proper to prefer a Bill to discover what Estate in Lands and Goods he then had, as in Case of an Outlawry or Attainder, &c. for the effect of such a Bill is only to discover what is forfeited already, and not to discover a cause of Forfeiture, as in this Case.

Again. The Publick Revenues ought to be collected and secured according to Law, and not by any means or method contrary thereunto: The Prerogative of the Prince cannot, nor ought to prejudice the Subject.

2. Obj. It is common to prefer a Bill for Prisage of Wines.

Resp. Prisage is an Ancient Revenue of the Crown; Sir John Davis 8. b. 10. a. And may be claimed by Charter, as in London; or by Prescription, as by the Bishop of Durham, Vid. 6 Ed. 3. 189. b. & Quo Warranto 113. nor is there a Penalty in the Case; so that such a Bill is no more than a Bill to discover a Duty in which the Crown has an Inheritance.

3. Obj. It was usual to prefer Bills in the Court of Wards to discover Tenures in Capite, which was penal.

Resp. Those Tenures, and the Incidents thereunto, as mean Rates, &c. cannot properly be termed penal, for they were warranted by the ancient Common Law of the Realm; and were no other than Reservations betwixt Lords and Tenants upon the distribution of Lands, and the original Creation of Tenures; and yet even that course of Discovery was accounted a Grievance, and was one Cause amongst many, why those Tenures were put down.

4. Obj. The scope of this Bill is only to have a discovery, and not to inflict any punishment.

Resp. Though the Bill does not tend directly to inflict a punishment, yet it makes way to inflict one; and the Lord Coke Mag. Chart. p.48. observes, that all oblique Proceedings, contrary to Law, are a kind of destruction, and a breach of Magna Charta; and the Rule there is, Quando aliquid prohibetur, prohibetur omne id per quod devenitur ad illud; so that if this Bill be a means to render the Defendant liable to punishment elsewhere, it is all one as if he were liable to be punished here, and upon this very Prosecution; and the words (no ways destroyed) are very remarkable; for they extend to all means whatsoever tending to destruction.

5. Obj. The Statute of 33 H. 8. cap. 39. gives this Court a power to proceed in Matters concerning the Revenue, according to their discretion, and as they think fit.

Resp. But yet they must proceed secundum Legem Terræ, Vide 5 Rep. Rooks Case 100. a. and 1 Rep. 140. Kighleys Case; The Statute of 23 H. 8. cap. 5. gives power to Commissioners of Sewers to make Laws, Orders, &c. according to their Wisdoms and Discretion, which words are as large and ample as these in the Statute of 33 H. 8. cap. 39. and yet if they make any Orders contrary to Law, such Orders are void; so that in such general words as those, secundum Legem are always to be implied; and so they must in this Statute of 33 H.8. c.39.

6. Obj. There are divers Presidents in point.

Resp. There is but one that comes up to the Case at Bar; and that one we encounter with another directly contrary to it: and one single President, especially being thwarted with another point-blank contrary to it, will not make a Law; it is like an Estoppel against an Estoppel, which sets the Matter at large; and though we were not furnished with any contrary Authority, yet (as hath been said) there must be a constant usage in the Case to make a Law of the Court; and (as Littleton tells us upon the Statute of Merton) what has been disused becomes of no force; and this course has been disused for 20 years and more; for the President quoted is in 10 Car. 1. And if that President had been looked upon as legal, without question many other Bills of like nature would have been preferred betwixt that time and this: and I have heard that that very President was questioned in the late long Parliament.

2. Resp. As for some other Presidents that have been insisted on, they are Presidents of Bills against Ministers and Officers of the Court, who are excepted out of Magna Charta, c.14. as appears by Co. 8 Rep. Grieslys Case, and may be punished by the

the Court for any Enormities relating to their Offices, as the constant Practice is in all other Courts of Justice; so that those Presidents do not come up to our Case.

He concluded, and pray'd Judgment pro Defendente.

The Attorny General *versus* Richard Waring, *& al'.*

IN a Scire Facias upon a Recognizance to stand to and perform the Order of the Court; Judgment was given against the Defendant, upon which he brought a Writ of Error; and the question was, Whether a Writ of Error would lie or not, in regard there was neither Treasurer nor Chancellor? Vide the Statute of 31 Eliz. and there being many such Writs depending, whether they were Supersedeasses or not? (2)

Atkins pro Quer' in Brevi de Errore. The Writ lies, and is a Supersedeas, for there is no default in the Party, Vide 6 H. 7. 15. vide 1 Rep. Pelhams Case; and 31 Eliz. cap. 1. Mountague to the same purpose. Cro. 2 Rep. 341. That a Writ of Error lies in Parliament from the Court of Kings Bench; and is a Supersedeas; contrary to the Lord Cokes Opinion; and there is more reason for a Supersedeas in this Case than in that; for if a Writ of Error does not lie here, or that it be no Supersedeas, but Execution be suffered to be taken out, and the Mony levied and got into the Kings Coffers, there can be no restitution, as in Case of a Common Person. Et Adjournatur.

De Termino Paschæ Anno Domini, 1659.

In Scaccario.

Anne Hall *Widow Plaintiff, and Sir* Edward Deering *Baronet Defendant.*

The Case.

(1) JOHN Mills being seized in Fee of divers Lands and Tenements in Hoathfield in Kent 7 Apr. 1587. devised them to his Son George to have and to hold to him and his Heirs in Fee-simple for ever. And if it should happen the said George to die before he should come to the age of 21 years, and without Heirs of his Body lawfully begotten, that then the said Lands should wholly remain to his Son Samuel in like manner, prout, &c. and so to his other Children in like manner; and afterwards to Jo. T. and his Heirs, and after dyed. George the Son entred and married the Plaintiff; and by his Will dated the 20th of May, 1641. devised the said Premises to his three Daughters equally between them; and devised an Annuity of 5 l. per annum out of the same to his Wife, for her Life, and dyed; the Defendant's Father purchased two of the Daughters shares in the Premises, and never paid any part of the said Annuity.

The Question was, whether or no, as this Case is, the Devisor could charge the said Lands with the Annuity or not.

Hardres pro Quer. I conceive the Devisor had power to charge the Estate with this Annuity. The Question will be, what Estate George takes by his Fathers Will; viz. whether an Estate in Fee-simple or in Fee-tail: And I hold, that he hath a Fee-simple Estate. 1. Because the first words in the Will give him an absolute Fee-simple; and the subsequent words (And if, &c.) are not words of Limitation or Qualification, but of Collateral determination. And that they are so appears by this, viz. Because George's Estate is made determinable upon his dying within Age and without Issue, both

both must happen, or else his Estate continues. Also the Determination is limited to a certain time; and therefore is not a Limitation of the Estate. As if Lands were devised to a Man and his Heirs so long as such a Tree shall grow or such a House stand; the Devisee would have a Fee-simple, but qualified with a Collateral Determination, Vid. Plo. Com. Walsingham's Case. And this is not like to Sonday's Case 9 Rep. A Devise to one and his Heirs, and if he dye without Heirs of his Body, that then the Land shall remain to another; for there the subsequent words shew what Heirs were meant by the precéding words, as in Baldwin's Case 2 Rep. A Grant to one and his Heirs, Habendum to him and the Heirs of his Body; but here it is, If he dye within Age and without Issue, then, &c. so that the words (without Heirs of his Body) are not put in by way of Limitation of the Estate, but are joyned and coupled with other words, which are not words of Limitation, but of Determination. And admitting, as it really happened in this Case, that George should attain the age of 21 years, if yet his Estate should be held to determin by his dying without Issue, that would be directly contrary to the very words of the Devisor, and to his meaning and intention, which must be gathered from his words: The words are, that his Estate shall not determin unless he dye within Age and without Issue; & mala est expositio quæ corrumpit viscera textus. But the better Exposition is that which makes all the words stand and be consistent.

Object. 16 Eliz. Dyer 330. b. Clache's Case, There the Case was, that Lands were devised to one Daughter and to her Heirs; and if she happened to die within the age of sixteen years, living her Sister, then to her Sister and her Heirs; and if the second Daughter dyed without Issue, then to the third Daughter and to her Heirs; and if both the Daughters died without Issue, then to a Son and his Heirs; and if they all died without Issue, then to a Stranger in Fee. There it was held by Dyer, that none of the Daughters had any Estate-tail, but a Fee-simple Estate: Sed alii e contra.

Resp. That Case does not oppose what I argue for in this. For it is not there held that none of those Limitations made a Fee-simple Estate. But the opinion of Dyer, that none of the Limitations there made a Fee-simple, is opposed; for all the Limitations there are not alike; some of them having these words only to limit or determin them, viz. If she dye without Issue.

For

For Authorities. Mich. 2 Jac. Com. B. Emerson's Case. A Man devised Land to his four Sons in Fee, and if one of them dyed without Issue, that his part should survive. In that Case it was held, that if three of them dyed without Issue, the fourth had a Fee-simple, because the subsequent words were not added by way of Limitation, but of Determination.

2. 17 Jac. Pell and Brown's Case; Cro. 2d Rep. 590. A Man devised Lands to one of his Sons and his Heirs for ever, paying 20 l. and if he dyed without Issue, living the other, that then the Land should remain to that other Son. And it was held per Cur. that the first Son took a Fee-simple by the Will. But the great Question was, whether a Remainder could be limited upon it or not; because a Remainder in Fee cannot be limited upon a Fee. But it was held that the Remainder was good, because it did not depend upon a Limitation, but a Collateral determination of the Estate. For that the words, if he dye without Issue, were not absolute and indefinite, but tyed up to a Contingency, viz. living William.

3. Hill. 1650. Banc. R. Hanbury *versus* Cockman, upon a special Verdict. A Man devised to his Son and his Heirs certain Lands with a Proviso, that if he died before Marriage or before his age of 21 years without Issue, then the Lands should remain to his second Son in Fee: The eldest Son attained his age of 21 years, and then died without Issue. The Court adjudged in that Case upon the first Argument, that this was a contingent Remainder, and that it could not take effect, because the Contingency never happened, as it must do, before that Remainder could come in being. And there it was said, that when the words are clear and plain in themselves, the Court ought not to make a doubtful Construction upon them, and that all the Preliminaries must happen before the Remainder takes Effect. So in this Case of ours the Defendant George must dye within Age, and without Issue, before the Contingency can take effect; which it is impossible that he should do when he has attained his full age; and by consequence he had, when he came of age, an absolute Estate in Fee-simple; and his Devise of the Annuity good in Law. Vid. for farther Authorities, 2 & 3 Ph. & Mar. Dyer 124. & 18 & 19 Eliz. Dyer 354.

Afterwards in Mich. Term. eodem Anno, it was argued by Finch pro Defendente; his Argument was very short, and it does not appear what became of the Case, or that any Opinion was given by the Court in it.

Brumrigg

Brumrig *versus* Hanger *and his* Wife.

IN an Action upon the Case for words; the Plaintiff declared that the Husband was sued in the Sheriffs Court for 30 l. and the Plaintiff produced as a Witness against him, and that a Verdict passed against him, and that the Wife having a Colloquium concerning that Tryal, said of and to the Plaintiff the same day, Thou art a for-sworn rascally Fellow, and I will prove thou tookest a false Oath against my Husband and me this day. After a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the words were not actionable; 1. Because it doth not appear that it was in a Court of Record: and 2. Because the words have reference to a particular Suit, in which the Wife was not a Party. (2)

Atkins pro Quer'. It needs not appear that the Court was a Court of Record; if the Oath was taken in a Judicial Proceeding, the Action is maintainable, Hob. Rep. 283. Adams *versus* Fleming, Thou wert forsworn in the Councel of the Marches, which is not a Court of Record; to the same purpose vide Cro. 2 Rep. 204. Case, and 562. Johnsons Case. Cro. 2 Rep. 158. Harris and Dixons Case. Cro. 1 Rep. 337. Sir Richard Strouds Case. 2. It appears here to have been a Court of Record, because the Suit was for 30 l. and the Sheriffs Court in London is really a Court of Record, and is so called, Co. Jurisdiction of Courts 247. And a Writ of Error lies upon a Judgment obtained there, N. B. 23. a. Reg. 129. Hob. Rep. 70. Lambe and Wisemans Case. Et Adjornatur.

In Hillary Term after it was alledged that the Defendants Husband was dead puis le darreine continuance, so that the Suit ought to abate.

Atkins pro Quer'. This Suit is like an Action of Trespass, which is joint and several, and does not abate by the death of one Defendant; and like to a Replevin, (vide 2 Eliz. Dyer 187.) which does not abate by the death of one of the Bailies. In Cro. 1 Rep. there is a doubt made whether an Action of Trespass shall abate by the death of the Husband; but in 2 Cro. it is adjudged that it does not abate; and here the Husband is named only for conformity; for the words were spoken by the Wife only, 18 Ed. 4. 1. In Conspiracy the death of one does not abate the Writ; and that the words were actionable he argued as before. Et Adjornatur.

The

The Court doubted upon the matter of Abatement; but it was afterwards held per Cur. that the words were actionable with such an Inducement, and that the Suit is not abated by the Husbands death; the Wife being the only Tort-feasor, otherwise if the Wife had died, as in Cowleys Cases, Hob. Rep. and Judgment was given accordingly.

Turner *versus* Gallillee.

(3) IN an Action upon the Case after Issue joined, and notice given by the Defendant of Trial by Proviso; the Plaintiff comes into Court in Person the day before the Trial, and enters upon the Roll a Nolle prosequi; and now the Defendant prays his Costs.

Hardres pro Quer'. Costs are not assessable in this Case by any Law or Statute, which I conceive upon these grounds.

1. By the Common Law the Defendant could not have Costs; and this is clear by our Books; and it appears by the Preambles of the Statutes of 23 H. 8. c. 15. 8 Eliz. c. 28. and 4 Jac. cap. 3.

2. The Plaintiff is not by the Common Law entituled to Costs in all Cases, but only when he recovers Damages according to the Statute of 6 Ed. 1. cap. 1. vide 10 Rep. 116. a. Pilfords Case.

3. Where a Statute gives Damages by creation; there the Plaintiff shall recover no costs; the reason is, Because Damages being given out of course, and where the Common Law does not give them, and the Statute being therefore introductive of a new Law, the Plaintiff shall recover what the Statute appoints him to recover, and no more, Vid. 27 H. 6. 10. 2 H. 4. 17. 9 H. 6. 66. Upon this reason it is said in those Books, that Costs are not due in Qu. imp. Waste, Decies tantum, because Damages in those Cases are given by Statutes, where they were not recoverable before; upon the same reason the Plaintiff has no Costs in case of a Forcible Entry, 9 Ed. 4. 5. So where a penalty is given, as for ingrossing, Vid. 4 Mar. Bro. Costs 31. So upon 2 Ed. 6. for Tithes, no Costs to be recovered upon the same reason.

4. Where a Statute is new, and introductive of a new Law, no Costs or Damages are to be recovered, but in Cases limited by the Statute, though in equal mischief, 7 Ed. 4. 14. The Statute of Rich. 2. which gives Damages in Chancery against the Plaintiff, where the Bill is found not to contain matter

matter of Truth, does not extend to a Demurrer, per Cur. Vide Cro. 1 Rep. 532. James and Tintneys Case. Intrat. Trin. 11 Car. B. R. Rot. 7153. in Case of an Avowry for a penalty imposed by custom for the Breach of a By-Law, Vid. Cro. 1 Rep. 542. Daly and Bellamies Case, adjudged that the Defendant in an Attaint shall recover those Costs only which he had in the former Suit; and yet there is the same mischief that is in other Cases; but it is not within the Statute of 4 Jac. because it is not an original Suit, but an Action that has dependance upon the former Suit. In Hill. 2 Car. B. Com. in Mildmays Case, adjudged that the Demurrer is not within that Law, because not within the Letter; and it is there doubted (though now resolved) whether or no a special Verdict be within it or not? By all which Cases it appears that a Statute introductive of a new Law, though made for ease and quiet, and to avoid vexation, yet must be taken strictly.

5. Then if a Nolle prosequi be another thing, and different from a Non-suit, it will follow that this Case of ours is not within the Statute, and that a Nolle prosequi and a Non-suit are distinct things, as appears clearly by 8 Rep. 59 and 62. in Beechers Case, That a Retraxit and a Nolle prosequi are both one, and are a Release and Bar to the Action, and are entred both alike; but a Non-suit has another manner of entry, and is no bar; and therefore it was reasonable to give Costs in case of a Non-suit, to avoid vexation by commencing the same Action over and over again; but where the Plaintiff is barred and cannot begin again, the reason does not hold, for there the Party cannot be doubly vexed, as he may notwithstanding a Non-suit, so that the Cases differ extreamly, and there is no President of Costs in such case, in Com. Ban. or in the Exchequer.

He cited likewise Hill. 15 Car. B. R. Cro. 1 Rep. Earl of Oxford *versus* Waterhouse. North *contra* Wingate, Mich. 15 Car. B. R. Cro. 1 Rep. Peacocks Case, Hill. 1 Car. B. R. Cro. 1 Rep. Arkey and Heard. Mich. 7 Car. Cro. 1 Rep. In Salter and Skeltons Case, Hill. 16 Jac. resolved that the Defendant in Replevin shall not have Costs, if he claim Property, because out of the Statute of 21 H. 8. and Skipward and Mackworths Case. Hill. 2 Jac. Entr. Mich. 44 and 45 Eliz. Rot. 32. B. R. accord. In 8 H. 6. 8. A diversity is there taken betwixt the Plaintiffs coming in Person, and saying that he will not sue ouster, that is said to be a Retraxit and a Release; and betwixt his saying that he will not appear, which is but a Non-suit, 2 Ed. 4. 43. b. per touts les Justices, if a Plaintiff come in

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and say that he will not sue ouster, it is a Retraxit, and when he will not appear, it is a Non-suit.

But how this Matter was ruled does not appear.

Sir John Thorowgood *and other Trustees for Ministers Maintenance, Plaintiffs, and Sir* Henry Herbert *Defendant.*

(4) IN a feigned Action upon the Case by Order of the Court of Exchequer-Chamber, the Issue was whether or no the Defendant had a good Lease in being, of the Rectory of Cherry in Montgomeryshire; and a special Verdict being found upon a Tryal at Bar in the Court of Exchequer, the Case in effect appeared to be thus, viz. That Doctor Manwaring was by Judgment of the House of Peers in Parliament, 30 Car. upon an Impeachment sent up against him by the House of Commons, disabled to hold any Spiritual Promotion; and after that Parliament was determined, the King by his Patent under the Broad Seal pardoned him all Treasons, Felonies, Disabilities, &c. but without any recital in the Pardon of that Judgment against him in Parliament; and afterwards he was made Bishop of St. Asaph in Wales, by Congè d'Eslire; and this Rectory being then in Lease to the Defendant for years, another concurrent Lease was made of it to one Owen in 11 Car. and confirmed by the Dean and Chapter; after which in 16 Car. the said Doctor Manwaring made another concurrent Lease to the Defendant of the Tithes of this Rectory, rendring the ancient Rent, which later Lease was not confirmed; and the Bishops Estates being taken away by Act in 1646. and vested in Trustees, they the Trustees accepted of the Rent reserved upon this last Lease made to the Defendant; and two Points were made in the Case. 1. Whether or no this disability of Doctor Manwarning were pardonable by the King, or not? And 2. Whether this last concurrent Lease were void, or not?

Trevor argued pro Quer'. 1. That this disability is not pardonable by the King. For the effect of a Pardon, vide Bracton 133. that the King is the Fountain of Grace, and can pardon Offences, and that no other can, must be admitted; and so is said, 1 E. 2. Claus.Rot.Membr.9. Bract. lib.2. sect. 107. 9 Ed. 4. 2. Stamf. Pl. Coron. 100. b. though this Power has been abridged by Acts of Parliament, 4 Ed. 2. c. 13. 2 Ed. 3. c. 3. and 14 Ed. 3. c. 14. which mentions a Non-obstante, vid. etiam Co. Inst. 3 part, 236. Plow. Com. 502. And why this Pardon

Pardon did not purge Doctor Manwarings disability he alledged these Reasons.

1. Because the Judgment given against him by the House of Peers is not recited in it; nor is there any non-obstante in the Case; and that the Offence ought to be recited in the Pardon, vide 13 R. 2. cap. 1. 9 Ed. 4. c. 28. 6 Rep. the Case of Burglary. and the general words in the Pardon of all Disabilities are not sufficient, because too general, and cannot be extended to disabilities inflicted by a Judgment in Parliament, unless it be named, vide Co. Mag. Chart. 478. & 2 Rep. Archbishop of Canterbury's Case.

2. Because the King is not a Party to the Judgment; and a Pardon is no more than the Kings Release, Vide Co. Mag. Chart. & Placita Parliamentaria, num. 42. and 4 H. 4. num. 79. Many Peers of the Realm judged in Parliament without the Kings assent; so in 19 Jac. Floyd was sentenced for speaking scandalous words of the Palsgrave; and whereas he had been sentenced by the House of Commons, the Lords would not allow of that, but made the Sentence their own: and in 1 H. 4. num. 9, 10. divers Lords were degraded by the House of Peers, saving to the King Power to pardon them, which shews, that without such saving he could not have done it; And in 51 Ed. 3. num. 7. 28, 32, 33, 34. there are many Impeachments before the Lords for deceits in the Revenue; and in 50 Ed. 3. num. 128. and 51 Ed. 3. num. 75. the Commons prayd that the Lord Latimer might be restored; and thereupon 50 Ed. 3. Rot. Pat. num. 21. He was restored by the King; and in 28 Hen. 6. Rot. Parl. num. 20. The Duke of Suffolks Case, who was impeach't by the Commons, and had Judgment to be banished; and it is there declared that the King had nothing to do with that Judgment.

3. All Judgments given by the Lords are to be executed by Order from the House only, Vide Trin. 6 Rich. 2. B. R. Rot. 23. and 51 Ed. 3. Rot. Pat. num. 23. The King pardoned a Sentence, and Judgment given by the Lords; but in 1 R. 2. Rot. Parl. num. 41. Alice de Pierce was impeached and sentenced in Parliament for having procured that Pardon, and was banish't the Realm: and of those that were adjudged in 19 Car. viz. The Lord Keeper and Lord Treasurer, &c. none were pardoned afterward, Vid. Vet. M. Chart. imprinted 1529. Pars 2. fol. 55. and Pinsents Abridgment of the Statutes temp. H. 7. Hugh de Spencer Father and Son were sentenced by the Peers in Parliament, without the Kings Assent; and after their Sentence was reversed; then the King in Trin. 15 Ed. 2. B. R. Rot. 33.

wrote to the Chief Justice and others, commanding them to cancel that Judgment, and in Mich. 15 E. 2. B. R. Rot. 40. The King granted him Restitution of all his Goods, and in Trin. 18 E. 2. B. R. Rot. 42. The said Hugh the Son was pardoned for all Offences committed by him since his Banishment; but no Pardon of any thing that had relation to the Judgment; and in 15 E. 2. Fitz-Herb. Petition 2. it appears that a Judgment of Repeal being repealed, the first Judgment becomes of force again; and in 1 Ric. 2. Rot. Parl. num. 54. this Judgment given by the Lords is recited throughout, Vid. 2 H. 4. c. 22. French Impression, Rot. 97.

For the 2d Point. The third Lease is meerly void, and cannot be extinguished or merged in the first Lease for years, for years cannot drown in years. Nor is it good by the enabling Act of 32 H. 8. cap. 28. without confirmation, but is utterly void, Vid. 3 Rep. Lincoln College Case. And if it were only voidable, the Trustees here are not concluded by their acceptance, because they do not claim under the Bishop, but Paramount as Founders. Besides, Rent cannot be reserved out of Tythes no more than out of a Fair, 8 Rep. Jewels Case, and prayed Judgment pro Quer.

Finch pro Defendente. 1. There is no legal Disability in the Case; for Dr. Manwaring was a Commoner and consequently not liable to be sentenced by the Peers, Vid. Magn. Chart. Nec super eum ibimus &c. nisi per legale Judicium Parium suorum. 2. The Lords give Sentence in their Judicial Capacity; and where the Law does not inflict a Disability, they cannot do it. 3. The King can well pardon it, Hob. Rep. Commendam's Case, the King is entrusted with the distribution of Mercy. I argue 1st à majore, the King can pardon Treason, Vid. 1 H. 7. 26. 3 Inst. 7. Segrave's Case, 11 R. 2. cap. 13. Hill. 16 Car. Morgan's Case of Murder, which by special words the King can pardon, but not otherwise, as in Rickabies Case. 2dly, Ab absurdo, the Absurdity that so many Acts of Parliament will be avoided. 3dly, A simili, Fitz. Herb. Coron. 154. & 281. Hob. Rep. 82. The Pardon discharges the Reatus, 1 Cro. 55, 56. Sir John Bennet's Case, Sir John Mompesson's Case accord. upon a Pardon of a Disability by Act of Parliament. 4. A Lease made by a Bishop de facto is a good Lease, Vid. 9 E. 4. Bagot's Assize, 1 E. 4. cap. 1. 11 H. 7. c. 1. Dyer 313. 2 Mar. Bro. Leases, 68. And the Lease, if not good in Law, is but voidable; which the Trustees by their acceptance of the Rent have made good. Whereas it has been objected that the Judgment is not recited, that is

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a mistake; for it is recited particularly, and all Disabilities thereby incurred are discharged. Nor is this to be taken for a Lease of Tythes only, for a Lease of the Rectory is found. He concluded and prayed Judgment pro Quer.

Afterwards in Mich. Term 12 Car. 2. the Question concerning the King's Power of Pardoning the Disability was dropt (for now the King was Restored) And the only Question that now stuck was, whether a Concurrent Lease made by a Bishop without Confirmation be void or only voidable; and consequently, whether it be made good by acceptance or not.

Sir Heneage Finch now Sollicitor General, argued that it was only voidable; the Statutes of 32 H. 8. and of 1 El. (he said) were made for the benefit of the Successors only. And Leases not warranted by those Laws, are at Common Law, which in such case makes them voidable only, and not void, and Cro. 1. Rep. 95. is accord.

Stevens e contra, That the Lease is void, and cited 3 Rep. 60. Hunt and Singleton's Case there cited, and Cro. 2 Rep. 173. And this being a feigned Action upon the Case directed by the Court to try whether there be a good Lease in being, the Jury upon Non-assumpsit pleaded find the special matter and conclude if there be a good Lease, then &c. which special Conclusion ought to be rejected, because it is the thing referred by the Court to be tryed.

Hale Chief Baron. If Issue had been taken upon the special matter, it would have been as you say. But here the Issue is upon Non Assumpsit; so that the special matter, which induceth the Issue, is now but collateral. For here two things offer themselves in Issue, viz. the special matter and the general Issue; so that taking Issue upon one excludes the other.

Et adjornatur.

Thomas

Thomas Young *Gent. Plaintiff, and* Isaac Pennington *Esq; Defendant.*

(5) IN an Action of Debt for 1000 l. the Case was thus, viz. William Wall was bound to the King for 1000 l. the King assigned it to the Plaintiff by Letters Patents shewn in Court; and granted him power thereby to sue for it in the King's Name, rendring to the King at the Receipt of his Exchequer the 8th part of what should be by him received, levied, compounded for or recovered. And moreover the King charged all Sheriffs and other Officers into whose hands soever it should come, upon the view of the said Letters Patents, or of the Enrolment thereof to make payment of the same, &c. Afterwards this Sum of 1000 l. was recovered by Judgment of the Court at the Plaintiffs Prosecution; and upon an Inquisition and Extent to the Sheriffs of London, the Sum of 1000 l. was levied by the Defendant and Sir John Woolaston deceased, then Sheriffs, and Return thereof made accordingly into this Court. And the Defendant having notice of the Letters Patents, refused to pay it to the Plaintiff; for which cause he brought his Action, and the Defendant pleaded to the Letters Patents, Nul tiel record; and the Plaintiff demurred.

Hardres pro Quer. The Plea of Nul tiel Record is an ill Plea in this Case, 6 Rep. 15. b. in Eden's Case, and in 16 H. 7. 11. b. A diversity is taken betwixt the Great Seals and other Seals of Courts, for they are but Transcripts of Records, whereas the Great Seal is the Record it self, Vid. 4 Rep. Hind's Case, accord. But a Matter consistent with the Record may be pleaded, as non concessit per Litteras Patentes, Plo. Com. 232. Seignior Berkly's Case, & 12 H. 7. 12. accord. And the reason given is, because Records cannot be tryed but by themselves, if a day be given to bring them in as in other Cases.

Object. Perchance the Patent that was shewn the Defendant had not a Seal to it.

Resp. That cannot now be alledged, because it is not the same Term in which it was shewn in Court, Vid. 5 Rep. Wymark's Case, 74. b. and it is said here profert hic in Curiam. But the Defendants time to have questioned the validity of the Patent was at first, it cannot be drawn in question now.

Allen

Allen & Stevens pro Defendente. Admitting the Plea to be naught, yet the Plaintiff ought not to demur to it. But the Court ought to have bein moved in it, and upon view of the Letters Patents to have determined the matter. And by the Demurrer he has confessed the Plea. But to that the Court answered that a Demurrer was no Confession of any thing not sufficiently pleaded. They urged farther that it was a good Plea, because there might perhaps be a Vacat entred, Vid. 5 H. 7. 24. Dyer 176, 177. Keilw. 96.

But at another day Allen took three Exceptions to the Declaration. 1. That an Action of Debt does not lie for the Plaintiff in the Case, because there was no Debt due to him, but the Mony was to be brought into Court. 2. If the Plaintiff could have an Action of Debt, yet he must not sue for the whole 1000 l. because an 8th part of it is due to the King. 3. Because it is not averred that the Patent or the Inrolment of it was shewn to the Sheriff, as the Patent directs. And it is not sufficient to say, that he had Notice of it; for that is not traversable as it is here pleaded, being laid too generally; and because it is not expressed by whom he had Notice, so that a certain Issue might be taken upon it.

Et adjornatur.

De

De Termino Sanctæ Trinitatis Anno Domini 1659.

This Term Baron *Parker* sate alone in the Court

Randolph *versus* Randolph.

(1) AN English Bill being preferred to have an Account; the Defendant pleaded a Plea, and did not averre it in the Conclusion; and for that cause it was over-ruled.

Doble *and* Potman.

(2) UPon a Cross Bill against a Parson to discover what sort of Tithes in particular he claims to be due to him; for that the Parson in his Bill one while demanded one manner of Tithing, and another while another; the Court held that in such a cross Bill the Plaintiffs need not entitle themselves to the Jurisdiction of the Court, because the cross Bill is grounded upon another Bill here in Court; as if a Man be sued here in the Office of Pleas, he may have an English Bill to be relieved against the Plaintiff without setting forth Matter of Jurisdiction.

De

De Termino Sancti Michaelis Anno Domini 1659. In Scaccario.

Harris *versus* Philips *and* Biggs.

AN Action upon the Case was brought against the Defendants being Sheriffs of London for an Escape upon mean Process; and after Issue joyned and a Tryal by Nisi Prius, and before the day in Bank Bigs died. And Suggestion was now made by Affidavit of his death, and admitted by the Court to prevent Error in Law, without entring the Suggestion upon the Roll, because no Roll is made of the Cause till after the Term, and then it would be too late. And it was moved that the Suit ought to abate; and they resembled this Case to an Action of Debt, Account or an Action upon the Case against two upon a joynt Contract, or against Executors, where one dies, the Action falls. Nor is this (as was urged) like to Trespass, which is joint and several; for this Action is joint, and must of necessity be brought against both. But it was answered, that an Escape is in the nature of a Trespass and a Tort; and is committed by both and each of them, that though they are reputed one Officer, yet they are two distinct persons; and this Case is not like a Contract, which is entire and cannot be severed in Judgment; but it is like to a Trespass or Ejectment brought against Baron and Feme, which are but one person in Law; and yet if the Baron dies, the Suit shall proceed against the Wife. So in Replevin against two Bayliffs for taking a Distress; and in Conspiracy against two, if one dye the Action does not abate; and yet the Action lies not against one singly. The Books cited were 5 E. 4. 6. 18 E. 4. 1. Dyer 175. 2 H. 6. 13. Co. Inst. 285. Cro. 2 Rep. 19, 356. Et adjornatur. (1)

Morby *versus* Urlin.

IN an Information upon the Statute of 35 H. 8. c. 17. for not leaving Standils in Wood. After Judgment given against the Defendant, the Plaintiff dyed, and his Administrator surmised it upon the Roll and prayed his Moiety, and had it; and so it was said is the Course in C. B. (2)

De Termino Sancti Hillarii Anno Domini 1659. In Scaccario.

There were then these Barons in Court, viz.

Wild *Chief Baron.*

Thorpe *and* Parker } *Barons.*

Churchman *versus* Tunstal.

(1) IN the Exchequer Chamber upon English Bill the Case was thus, viz. The Plaintiff was a Fermor of a Common Ferry at Branford in Middlesex, at a Fee-farm Rent; the Ferry had been a Common Ferry time out of mind; and he laid in his Bill that no other Person ought to erect any other Ferry to the prejudice of his; and the Defendant being a Waterman, who had Lands on both sides the River of Thames about three quarters of a Mile distant from the Plaintiffs Ferry, did usually in his Boat Ferry over Passengers, Horses, &c. which was prejudicial to the Plaintiffs Common Ferry; wherefore the Plaintiff seeks here to suppress the Defendants Ferry, and that the Defendant may be enjoined by Decree of this Court to use the Plaintiffs Ferry: and the Plaintiffs Council insisted that it was usual and frequent in such Cases to suppress by Decree such Nusances in the Kings Case, and that of his Fermors; as in Case of a Mill erected to the hindrance of the Kings Mill; and the like in Case of a Fair or Market, although in those Cases a special Action upon the Case, or a Quo Warranto lies well enough: and in Trin. 21 Jac. lib. decret. fol. 346. Inter Attorny General and Webster, it was decreed, that a Beam set up to weigh Lead near to the Kings Beam within his Manor, to the Nusance of the Kings Beam, should be cut down; and Mich. 29 and 30 Eliz. in this Court there was a Case betwixt Sir John Cuts, and the Mayor and Burgesses of Thacksted in Essex, concerning a Fair, which was cited in this Case.

Against

Against a Common Ferryman an Action upon the Case lies, if he refuse to carry Passengers, &c. or if he exact excessive Prizes; and he is endictable if he do not keep his Ferry in good repair, &c. but a private Ferry-man is not.

Again, A Ferry is a Franchise, and a Flower of the Crown, which a private Man cannot set up without Licence: and the Case in 22 H. 6. 14. per Paston and Newton is express in Point, vide 11 H. 6. 23.

The Council of the other side urged, That these Common Ferries were in the nature of Monopolies and Restraints upon Trade; that a Common Stream is like a Common High-way, which is free to all; for which reason Toll-thorough cannot be claimed by Prescription, 22 Ass. 58. That the restraint which the Plaintiff would lay upon others is uncertain, and without limits of distance; for by the same reason that the Defendant may not use a Ferry three quarters of a Mile from the Plaintiffs Ferry; by the same, he may not use one, two, three, or ten or twenty Miles off: Nor is this Case like to that of a Mill; for that a Quo Warranto lies not here. That this Prescription is in the negative, and not proved as it ought to be; and they cited these Cases, viz. 11 H. 4. 47. 13 H. 4. 14. 8 Ed. 3. 304. 8 Rep. 125, 127. Cro. 1 Rep. 132.

And the Court was of this Opinion, because it came too near a Monopoly, and restrained Trade, and because no President was shewn in Point. The Case of a Beam (that had been urged) was of a Beam in the Kings own Manor; and they dismist the Bill, but without costs.

Sed quære de eo, for contrary to the Book of 22 H. 6. and to Presidents in like cases in this Court, which is the proper Court for the Revenue, and ought to prevent Damage and Prejudice that may arise to it.

Ford *versus* Bradsham *in* B. R.

IN a Writ of Error to reverse a Fine levied at the Grand Sessions in Wales, after divers Certioraries awarded upon Diminution alledged, and two years expired. (2)

Griffith pro Defendente, now moved for a Scire Fac. against the Ter-Tenants upon the Books of 4 H. 7. 10. 7 H. 7. 5. 38 Ass. 17. 41 Ass. 15. F. N. B. Bro. Sc. Fac. Dyer 320, 321. and 9 H. 6. 47. To which it was answered, that a Scire Fac. ought not to be awarded in this Case after so great delay; nor is it of necessity to be granted, but is in the discretion of the Court, and it lies as well after as before Judgment in the

Writ of Error; and of this Opinion was the Chief Justice Newdigate, and cited 8 H. 6. and 43 Ed. 3. in point; and that in Dyer no Scire Fac. was awarded. Quod Nota says the Book. But Hill Justice said, that it ought to have issued before; as in 21 Ed. 4. and 21 H. 7. In Error to reverse an Outlawry, a Scire Fac. to the Lords mediate and immediate; and Nicholas Justice doubted. Et Adjornatur.

Barringtons *Case*.

(3) ONE Barrington being sued in the Kings Bench, pleaded his Priviledge as one of the Auditors of the Exchequer, and alledged in his Plea that Omnes, &c. omitting & quilibet ought not to be sued elsewhere, than in the Court of Exhequer. And Crompton and Levingstons Case was cited as a case in point in the Court in 1655. where the Defendant insisted upon his Priviledge in Chancery as a Clerk there; and was over-ruled, because though Omnes could not be sued elsewhere, yet aliquis might: Besides, he does not here aver his Plea, as he ought to have done, because it is issuable, whether or no he be the same Person who is Auditor there; and to this Opinion the Court seemed to incline; but the Plaintiffs Council said that the Presidents in the Exchequer were without any such Averment: And they made a difference betwixt the Officers or Clerks of Courts, who are upon Record there, and their Servants who are not. Et Adjornatur.

Philips *versus* Biggs.

(4) IN an English Bill against the Defendant as Executress of her Husband, to have contribution; the Case was, That the Plaintiff in this cause, and the Testator were Sheriffs of Middlesex, and that there had been a Recovery against them for an Escape in the Testators Life-time, and 500 l. Damages recovered, which the Plaintiff in this cause had paid and satisfied, to which the Defendant ought to contribute, as the Bill suggests.

The Court doubted hereof, the case being primæ impressionis, and resembled it to the case of two joint Obligors; but what became of it non constat.

Twisleton

Twisleton *versus* Dame Mary Thelwel *Executress of her Husband deceased.*

AN English Bill was preferred to be relieved against a Bond entred into by the Plaintiff to the Defendants Testator, upon an agreement of the Testators to save the Plaintiff harmless against others; the Court decreed for the Plaintiff, and 140 l. Costs were taxed; the Defendant moved to have the Costs discharged, because an Executor is not liable to pay Costs. (5)

Atkins. An Executor being Defendant pays Costs at Law in all Cases, when the Judgment is against him, though but de bonis Testatoris; for then the Costs are de bonis Testatoris si, &c. & si non, &c. tunc de bonis propriis; he cited Co. 2 Inst. 286, 289. Upon the Statute of Gloc. Plow. Com. 183. 31 H.6.13. Bro Executors 164. Entr. 328. Et Adjornatur.

But it was afterwards ordered that the Executor here being a Defendant should not pay Costs, because it is without President; and that it was no reason to give Costs in Equity, because the Law allows Costs; for that an Executor cannot plead the Recovery at Law in excuse of Assets.

Walker *contra* Norton *& al'.*

UPon English Bill the Court held, That if two answer jointly and severally, if one of them answer first for himself, and the other say that he has perused all that the former has answered, and for himself answers, that he believes it to be true, supposing this other Defendant not to be charged with any thing of his knowledge, that such a Relative Answer is sufficient in a joint and several Answer, but not where the Defendants Answer severally, each apart. (6)

De

De Termino Sanctæ Trinitatis Anno 12 Car. II. Regis. In Scaccario.

The Barons were

Sir *Orlando Bridgman* Chief Baron.

Sir *Edward Atkins* and *Christopher Turner* Esq; } Barons.

Rochel *and his Wife versus* Stedle *and his Wife.*

(1) IN Assault and Battery for beating the Husband and Wife; upon Not-guilty pleaded they were found guilty of beating the Wife only, and nothing was found concerning the Battery of the Baron. And it was now moved in Arrest of Judgment, that Baron and Feme could not joyn in an Action for beating the Baron.

Stevens pro Quer. This is no Cause to arrest Judgment, for no Damages are given for the Battery of the Baron; nor is any thing said to it, which makes it a Discontinuance, and that is aided by the Statute of Jeoffails; and it is like the Case in 9 E. 4. 51. where Damages are given severally, it should be good for that part, in which they may joyn. And Cro. 2 Rep. 655. & 11 Rep. 45. b. accord. in Detinue de Chartres brought by the Husband, where part of the Charters belonged to the Wife. So in 22 Eliz. Dyer 370. Clifton's Case in Eject. Custod. terræ & hæredis, the Plaintiff released the Damages, and had Judgment for the Land.

Atkins pro Defendente; and cited Hob. Rep. 184. Revel and Gray's Case, and Dyer 305. b. Curia advisare vult.

Bridgman Chief Baron admitted, that if Non culp. had been found as to the Husband, it had been well; but here is a non liquet as to him; and he cited Poley's Case in Osborn's Case, 10 Rep. 130. b. and took a Diversity betwixt their being Plaintiffs and Defendants. For if there be a mistake as to one of the Defendants, it may be well; as in an Action upon the Case

Case (cited by Mr. Stevens) brought against Baron and Feme for Words spoken by them both; and the Baron be found Non culp. and the Feme guilty, there it is good. Another diversity he took betwixt a Declaration being ill for abundance and for defect; if for abundance, it may be made good by a Verdict; otherwise, if through defect.

Atkins Baron inclined to the same Opinion, and cited Drury's Case, Mich. 5 Jac. in Brownl. Rep. 209. Et adjornatur.

But afterwards it was held to be a void Verdict, because only part of the Issue is found, as 1st Inst. 227. and there is no Discontinuance, for the whole was continued: And by the Chief Baron, Venire facias de Novo must be awarded.

The Dean *and* Chapter *of* Chichester's Case.

There was a Charge in the Great Pipe upon the Dean and Chapter of Chichester for a Fee-Farm Rent of 35 l. 6 s. and 8 d. To which the Lady Howel pleaded as Terre-Tenant that Queen Eliz. in the 7th year of her Reign granted the Colledge of Bosham, and two other Mannors to this Dean and Chapter and their Successors, rendring that Rent. And that afterwards in 14 Car. Regis, the King, reciting that Grant, and mentioning it to be a doubt, whether the Grant made by the Queen, of the said Colledge, were good or not, grants and confirms the same to the Dean and Chapter and their Successors, rendring the like Rent; and granted moreover that the Grantees should not be charged with a double Rent; and pleaded this latter Grant as a Confirmation only, and demanded Judgment if the Premises should be charged with a double Rent; and prayed to be discharged of this additional Rent, to which the Attorny General demurred. (2)

And it seemed to the Court that the Plea was not good. 1. Because here is no double Rent in the Case issuing out of one and the same thing. For the first Rent was charged upon two Mannors, as well as upon the Colledge. 2. Because it does not appear by the Plea that any Rent has been paid; by which means the Grantees may come to be discharged of paying any Rent. And with which of the two Rents they ought to be charged and with which not; and whether any Rent at all has been paid or no, does not appear by the Plea. Et adjornatur.

Atkins pro Defendente. The second Patent works as a Confirmation, and the Rent reserved thereby is void, Litt. 538, 539.

539. Plo. Com. 397. 9 H. 6. 9. 9 Rep. 142. And the Law is the same in the King's Case, 10 H. 7. 23.

Object. The Defendant ought to have pleaded, Rex non concessit.

Resp. That needs not, for it appears sufficiently to be a Patent of Confirmation only, and so the Law intends it, 9 H. 6. 22. 19 H. 6. 44. 9 H. 7. 2. Plo. Com. 331. And the Court seemed to be clearly of this Opinion. But because there is no Plea of discharge as to the first Rent, it was held to be ill, and the Defendant had leave given to mend the Conclusion of her Plea.

Griffith *versus* Manser *and* Vaughan.

(3) TWO Joyntenants of the Office of Fines for Original Writs in two Counties in Wales committed the Custody of the Seal of the Office, and the Collection of the profits thereof to a third person. Both the Joyntenants commence a Suit in Equity against the said third person to have an account of the Profits; one of the Plaintiffs releaseth all Actions and Accounts to the Defendant; whereupon the other Joyntenant exhibits this Bill against his Companion and the Defendant in the former Suit, surmising in his Bill that the said Release was obtained by Combination, and for a valuable Consideration in Mony paid, &c. To which Bill the Defendant, who was not Jointenant, pleads the same Release. And per Curiam it was held to be a good Plea, although the Bill seeks relief against it. For there does not appear any particular Fraud or Combination in obtaining it; and a general Allegation of Combination is not sufficient; for there may be a lawful Combination, and the Defendant is not obliged to answer but to unlawful Combination. Also here the Release is good in Law, and no default in him that obtained it for his own advantage. Besides it appears to have been obtained upon a valuable consideration; so that Equity ought not to set it aside; and if the Plaintiff has any Remedy in this Case, it must be against his Copartner and not against him to whom the Release was made.

Earl

Earl of Devonshire *Plaintiff, versus* Gibbons *and others Defendants.*

THE Case upon English Bill was thus, viz. Articles of Agreement were made betwixt the King and Sir Cornelius Vermuyden and others, for the draining of Hatfield level lying in Lincolnshire, Yorkshire & alibi; by which Agreement the King was to have one part of the Lands to be drained, the Drainers another part, and the Tenants and Commoners a third part; and that the Drainers in consideration of their being allowed their third part should make Enclosures and maintain them in all times to come. Afterwards the Plaintiff, who was no party to the Articles, was assest by the Commissioners of Sewers for Lands that he had in Yorkshire, towards the Maintenance of a certain Sewer; against which he seeks Relief, and to have all those who have Lands chargeable towards the maintaining of it, contribute. Upon the hearing it was objected that the Plaintiff was not party nor privy to the Articles, nor claimed under any that were. But it was answered, that he had good cause of Suit for all that, and to crave Relief by the Equity of the Statute of 23 H. 8. of Sewers, and according to the proportion there mentioned; because he is aggrieved by this Assessment through their not repairing the Banks, who are obliged to repair them by these Articles. And whatever the Commissioners of Sewers may do, this Court may; that is, the Court may lay the Charge upon them, who have bound themselves by Articles, and relieve all such as are endamaged by this Drain and Assessment; and a Case in Chancery was cited betwixt the Earl of Derby and Wainwright; the Earl was decreed to admit Copy-holders at a Fine certain, which he refused to do; and thereupon Copy-holders were relieved, who were no parties to the Decree. And the Court seemed to be of this Opinion (though at the first Baron Atkins hesitated) because in effect the Articles were made for the Relief of all that were to receive any damage by the draining. And being made pro bono publico, all persons are parties. As if one Man should take upon him to repair a common Causey, which the Country ought to repair, by this means he makes himself liable to the whole County if he do it not. And a Man may by Matter ex post facto be entituled to Relief, who had no cause at first; as a Feoffee of Lands may have an Audita Querela though he comes to the Possession (4)

session of the Lands, after the Charge. Sed adjornatur. Et quære de eo, for it is a new Case in Equity. And afterwards it was decreed accordingly.

Wall *and his Wife Executress of* Young, *versus* Pennington, *and the Heirs and Executors of Sir* John Woolaston.

(5) THE Case was thus, viz. in 15 Car. nuper Regis 1000 l Debt due to the King was levied by the Sheriffs of London, and remained in their hands, and upon process against them they pleaded the general Act of Pardon, made in the year 1651. by which Act this Debt was not pardoned, and which Act is now no longer in force; but the Attorny General, that then was, confessed this Plea, and a Judgment and a Quietus est was obtained upon it; and yet new Process was issued against them now, because the Confession of the Attorny General is not binding to the King in matter of Law, though it be in matter of Fact; for which was cited Sir Edmund Bacon's Case 3 Car. in the Exchequer, and 12 Jac. Brig's Case, and a President was shewn in 3 Car. where a Rent discharged by such Confession, was put in Charge again, in Sir Edmund Sawyer's Office one of the Auditors.

..... *versus Sir* John Fortescue *and others.*

(6) THE Defendants Commissioners for examining Witnesses met at the time and place appointed; but refused to join and act in Execution of the Commission; and upon Affidavit made of this, the Court ordered that the Defendant should name other Commissioners. And it was pray'd that the Plaintiff might nominate other Commissioners too, because one of his Commissioners was not there; so that it seemed to have been a practice. And the Court doubted whether an Attachment lay against the Defendants Commissioners or not. Et adjornatur.

Charles

Charles Fleetwood *Plaintiff*, George Pool *Esq*; *and others*, *Defendants*.

THE Case upon English Bill was thus; viz. The King had a Decree in the Dutchy Court against divers Commoners in Darbyshire to enclose certain Lands within the County Palatine of Lancashire; and the Plaintiff by his Bill here makes Title to the King's part by Letters Patents under the Great Seal. And after Answer, Replication and Depositions in the Cause, Exception was taken upon the hearing, that the Plaintiff had not made a good Title to himself, to the King's part, being Dutchy Lands, for that he had no Grant of them under the Dutchy-Seal, Vid. Plo. Com. 218. the Dutchy of Lancaster's Case. But because the Dutchy-Seal was produced at the hearing of the Cause, though omitted in the Bill, the Court held it to be well enough. Quod nota, and Quære, whether the Plaintiff shall be admitted to supply by Evidence a Title that by his own shewing in his Bill is defective. It was likewise held by the Court, that although the Dutchy-Court be in being, yet the Suit is well begun here, for that whatever belongs to the Jurisdiction of the Dutchy may well be determined here. Whereupon it was decreed for the Plaintiff. (7)

De Termino Sancti Michaelis Anno 12 Car. II. Regis. In Scaccario.

Judges in the *Kings Bench.*

Sir *Robert Foster* Knight, Chief Justice,
Sir *Thomas Mallet*, } Knights.
Sir *Thomas Twisden*, }

Judges in the Court of *Common Pleas.*

Sir *Orlando Bridgeman* Kt, Chief Justice.
Sir *Robert Hide*, } Knights.
Sir *Thomas Tirrel*, }
Brown.

In the *Exchequer.*

Sir *Mathew Hale* Knight, Chief Justice.
Sir *Edward Atkins*, } Knights.
Sir *Christopher Turner*, }

Hacket *and* Bedel *contra* Wakefield.

(1) UPON a Bill in Equity to be relieved upon a Security, for a valuable consideration, for 60 l. per annum for Lives; the Case was thus, viz. The Plaintiff was a Purchaser for a valuable consideration, as aforesaid, and the Defendant afterwards took the Lands so charged in Mortgage, and being informed that the Plaintiff was before him in time, he took assignments of three Recognizances prior to the Plaintiffs Title, two of which were for Mony, and the third for Counter-security, upon which he extended all the Lands charged; and now the Plaintiff seeks by his Bill a discovery of the nature of these dormant Incumbrances, and for what cause contracted, and what was actually received and paid upon them, or by perception of Profits since the Extent; to which the Defendant

fendant pleaded his Mortgage, and subsequent to that his purchase of the other Incumbrances to corroborate his Security, and that therefore he ought not to make any discovery; but the Court over-ruled his Plea, and ordered him to answer, and that the Matter of his Plea should be saved to him at the hearing; and the Court conceived that the Defendant ought to answer, because the Plaintiff has a prior Security, though both were purchasers.

But Baron Turner said, That if the prior Incumbrance that was taken in, had been a Fee-simple upon a forfeited Mortgage, that then the second Mortgagee or Purchasor should not have a discovery, because then the whole Estate was absolutely in the first, and consequently the second could have no interest in it; but here the first Incumbrances were only Charges upon the Land, the Cognisees having no interest in it.

The Defendants Councel produced two Orders of Chancery, whereby they alledged that that Court had ruled it otherwise in the point in question.

But the Court ordered ut supra notwithstanding.

Danvers *contra* Wellington.

IN Ejectione Firmæ pro uno Mesuagio sive Burgagio in Hay infra muros; it was moved in Arrest of Judgment after Verdict for the incertainty of the Declaration; but the Court held it to be good, and that an Ejectment lies well de Burgagio; and that Mesuagium and Burgagium signifie the same thing in a Borough. (2)

Phillips *contra* Kettle.

IN Debt upon the Statute of 2 Ed. 6. for Tithes; The Plaintiff declares that he was Rector of St. Martins All-Saints, and that by reason thereof he ought to have the Tithes of 100 Acres of Land in the said Parish of St. Martins All-Saints, and the Tithes of 80 Acres of Lands in the Parish of St. Martins Genavesee, without shewing how he became entitled to the Tithes of Lands out of his Parish; and this was held by the Court to be well enough after a Verdict; besides that, a general Allegation without shewing a Title is well enough in this Action. Another Exception was taken, because it was not alledged that the Defendant was subditus Domini Regis, as the Statute requires; sed non allocatur, for that it (3)

is

is alledged that he is occupator terræ, which implies that he is subditus, vide Cro. 2 Rep. Kippax Case, which seems to the contrary in this Point.

Sir Simon Fanshaw *versus* . . .

(4) IN a Bill of Review the main question was, whether a Copyhold Estate devised to be sold by Executors to pay Debts, and sold accordingly, be Assets at Law and in Equity, or at Law only; for if they be Assets at Law only, then a Decree, which makes them Assets in Equity without a Trial at Law, is erroneous; and upon this the Cause was adjourned; but it was held that no matter of Fact in the Cause could come in question; for that would be to unravel all sorts of Decrees.

Afterwards in the same Term the Decree was held to be good, and that it could not be reversed, because it cannot now appear whether upon the proof it appeared to be matter of Law or Equity; and after a Decree it shall be intended that the Court adjudged upon the whole proof according to the purport thereof.

Wilson *versus* Redman *& al'.*

(5) UPon a Bill in Equity, the question was, whether certain Lands were discharged of Tithes, as having been part of the Possessions of an Abbey of the Cistercian Order; and the Court held, that a Tenant for life or years is not within the Statute, but that a Tenant in Tail, who has an Estate of Inheritance is discharged quamdiu propriis manibus, &c.

Richard Green *versus* Thomas Robinson *and* Thomas Wood.

(6) UPon a Bll in Equity, the Case was; A Mannor was held of the King in Fee-farm, in which Mannor there was a Custom, That all the Tenants and Resiants within the Mannor should grind all their multure of Corn and Grain baked and brewed in their Houses at the Lords Mill, and not elsewhere; and that the Defendants had erected another Mill out of the said Mannor, near to the said Mill, by reason whereof

whereof many of the Tenants and Resiants of the said Mannor ground their Corn and Grain at the new erected Mill out of the Mannor, to the prejudice of the Lords Mill; and to have this Mill out of the Mannor demolished, was the drift of the Bill.

And the Court said, that it was lawful for any Tenant to set up a Mill upon his own Ground out of the Mannor, but not within the Mannor: but if the Owner or Tenant of such a Mill, out of the Mannor, cause or perswade any of the Tenants or Resiants within the Mannor to grind there, or fetch any Grist out of the Mannor to his own Mill, that in that Case he may be prohibited by a Decree of this Court; but that they could not decree any Mill to be destroyed, unless erected within the Kings Mannor, to the prejudice of the Kings Mill; whereupon the Bill was ordered to be dismist, unless Presidents were shewn the next Term: but then no Presidents being shewn, the Bill was ordered to be dismist, but without prejudice to the Right of the Lord of the Mannor.

De

De Term. Sancti Hillarii Ann. 12 & 13 Car. II. Regis. In Scaccario.

Sir William Hix *against the* Attorny General *and* *Sir* William Cooper.

(1) UPON English Bill the Case was, That Sir William Hix put 100 l. out at Interest to the Defendant, and took Bond in the Name of one Toomes, who afterwards became a Felo de se; and now the Plaintiff was relieved against the King upon this trust in Equity, upon the Statute of 33 H. 8. c. 39. Sed quære whether that Statute extends to any Equity against the King otherwise than in case of Pleas by way of discharge. But it was likewise decreed in this Cause that the Plaintiff should be saved harmless from all others.

Hammond's *Case*.

(2) HAmmond was outlawed at the Suit of another person, and Lands in his Possession were extended; a third person that claimed a Title to those Lands, brought an Action of Trespass and Ejectment for them; and pleaded to the Inquisition, and an Injunction was prayed for the King to stay Proceedings at Law, and it was denied, because although a person outlawed cannot after Extent prevent or avoid the King's Title by any Alienation, as appears 11 H. 7. yet the Outlawry gives no such Priviledge to the Possession of a Disseisor, but that the Disseisie may enter and bring his Ejectment; for by the Outlawry the King has a Title only to the Profits and no Interest in the Land. But it was ordered that the Plea to the Inquisition should be tryed first, and that the Ejectment should be brought in this Court, because the King's Revenue was concerned.

White

White *and* Snoak *and his Wife Plaintiffs, against* Potter *Defendant.*

UPON English Bill the Case appeared to be that there was a Custom within a Mannor held of the King in Fee-Farm; that all the Copy-hold Tenants of the said Mannor should grind all their Corn and Grain bak'd and brew'd within their ancient Copy-hold Messuages at a Copy-hold Mill within the Mannor, and not else where, of which Copy-hold Mill the Plaintiff Snoak in the Right of his Wife was Tenant for Life, and the Plaintiff White had purchased the Freehold and Inheritance: And another person had erected another Mill within the said Mannor, at which divers of the Copy-hold Tenants ground their Corn. (3)

And it was held by the Court that the purchase of the Freehold and Inheritance of the Copy-hold Mill had not destroyed the Copyhold during the Life for which it was held; and that the Reversioner of the Free-hold of the Copy-hold is subject to the King's Fee-Farm Rent, but not the Copy-hold during the Wifes Life. And that therefore the Copyholder for Life should have no benefit as Fee-farmer.

But Tr. 11 Car. Rot. 41. in this Court, Sir John Trevor *contra* Powel. It was held by the Court that a Covenant on the King's part is equivalent to a Fee-Farm to entitle the Patentee to the Privilege of this Court.

And Mich. 3 Car. in this Court Seintley *contra* Bendel, held by the Court that a new erected House is within the Custom, and that none may grind elsewhere, but in Case of Excessive Toll, or that the Gist cannot be ground in convenient time.

And it was also held in this Case, that to compel all the Tenants within the Kings's Mannor to grind at the King's Mill, is a personal Prerogative of the Kings, which no other Lord can have without Tenure, Custom or Prescription. But it will extend to a Fee-Farmer, because it is for the King's advantage. And that the Custom in this Case does not go to the Estate, but to the Thing it self, and runs along with the Mill, into whose hands soever it comes. And that the Suit here must be as Debtor and Accountant only, because the Copy-hold for Life is not liable to the Fee-farm. And if two joyn, as they do here, where one of them is, and the other is not lyable to the Fee-farm, that is irregular, unless that other be a priviledged person. It was decreed against Potter, who had erected

the new Mill, that he should not withdraw or take away any Gist from the other Mill; but his Mill was not decreed to be demolished; for that can be done in the Kings own Case only, or in the Case of his Patentee.

Norrice's *Case*.

(4) AN Action of Covenant was brought upon these words, viz. I oblige my self to pay so much Mony at such a day, and so much at another day. And per Curiam, clearly an Action of Covenant lies, especially if both days are not passed. But the Chief Baron doubted how the Law would have bẽn, if the Words were teneri & firmiter obligari; for that those Words sound in Debt and not in Covenant.

Another Exception was taken, because the Plaintiff mentions in his Declaration one Richard Norrice, and afterwards naming again the same Name does not say, prædict. Yet, the Court held it good for all that; and the Chief Baron said that it had been often so adjudged, and that it shall be intended to be the same person. But it would have altered the Case, if it had bẽn quidam Richardus Norrice.

And per Cur. the Words quod teneat Conventionem and de Conventione fracta are all one.

De

De Termino Paſchæ Anno 13 Car. II. Regis. In Scaccario.

Anderſon *Plaintiff*, Arundel *Defendant*.

IN Ejectione Firmæ after not-guilty pleaded, and in another Term, the Defendant pray'd in aid of the Kings Leſſees for 99 years of his Dutchy-Lands in truſt for the Queen, as part of her Jointure, and as Baily to them; and it was denied by the Court: and the Chief Baron held, that in perſonal Actions aid does not lie of a common Perſon till after Iſſue joined upon the right of the Matter, but not upon the general Iſſue, becauſe it does not appear to the Court whether the Right will come in queſtion or no; and if it does not, there is no cauſe of aid; nor can aid be prayd in another Term after Imparlance, becauſe there it is ad reſpondendum, and after ſuch an Imparlance taken no aid lies: but in real Actions aid prayer of a common Perſon lies before Iſſue joined, becauſe there the Title of him in Reverſion or Remainder appears by the Plea, for without ſhewing it he cannot draw his Plea: but for the Kings immediate Tenant, or for his mediate Tenant that joins with his immediate Tenant, aid lies in a perſonal Action as well before as after Iſſue joined; but not for the Kings mediate Tenant that does not join with his immediate Tenant; and it is a good Counter-plea to an Aid-prier, to ſay that he claims under the ſame Title, and in affirmance of it: ſo a Writ of Rege inconſulto does not lie, but when it appears clearly to the Court, that the Parties Title is in diſaffirmance of the Kings, vide 2 R. 3. 11. 3 H. 6. &c. (1)

Sir John Langham *Baronet*, *versus Sir* Edward Lawrence *& al'*.

(2) THE Plaintiff preferred a Bill as Farmer of the impropriate Rectory of St. Hellens, London, against the Defendants Parishioners there, to have the use of the Leger-Books in their Custody, which concern himself and the Parish, at a Trial to be had at Law concerning divers payments pretended by the Parishioners to be payable to them in lieu of their Tithes. and directed by this Court to be tryed at Law upon a former Bill exhibited by the Plaintiff against the Parishioners; and the Defendants demurred to the Bill, because it was only to provide himself of supplemental Proof after the hearing of the Cause; and because it appears of the Plaintiffs own shewing that the Books belong to them as well as to himself: but per totam Curiam the Demurrer was over-ruled, because it was not to have supplemental Proof in the same Cause, in the same way of proceeding, but collateral to it, to wit, upon a Trial at Law, where the former Proofs are only Evidence, and may be credited or not; and other, and contrary Evidence may be given to induce the Jury to give their Verdict one way or other: and it is like the Case of Deeds or Records discovered afterwards, which may clear the matter in question, and are fit to be used, and do not impugn or contradict in point of Testimony or Oath, any thing that has been proved before, which is the reason why subsequent Proofs are not admitted: besides, these are common Evidences which appertain to the Plaintiff as well as to the Defendants; and they are like to Court-Rolls, which belong both to Lord and Tenants, and Copy-holders; and therefore they may have a Bill one against another to have the use of them, as well as against Strangers.

Doctor Thomas Parker *Plaintiff*, *versus* John Seabrook *& al' Defendants*.

(3) THE Plaintiff as Arch-deacon of London exhibited his Bill against the Defendants as Parsons and Vicars in London, for certain Sums of Mony due for their Proxies by Prescription; and for which there is now no remedy by the Ecclesiastical

stical Law; to which the Defendants demurred, alledging the thing in demand to be meerly of Ecclesiastical Cognizance, and determinable in the Spiritual Court, & non alibi; and if the Title by Prescription alters the Case, then the Plaintiff ought to have his remedy at Law, and not in Equity; but of this the Court doubted. Et Adjornatur. Vide Sir John Davies Rep. The Case of Proxies.

And the Chief Baron quoted out of Linwood lib. 3. decret. de procurationibus, that there are three sorts of Proxies. 1. Ratione Visitationis. 2. Ratione consuetudinis. 3. Ratione Pacti. And said that Proxies of the second and third sort were recoverable at Law; but because in the Case in question the matter was doubtful; the Defendants were ordered to answer, and that this matter should be saved to them at the hearing, vide the Statute of 34 H. 8. concerning the saving of Proxies, and that they shall be recoverable as formerly.

John Stafford *Esq*; *Plaintiff*, *the Earl of* Anglesey *Defendant*.

UPon English Bill the Case appeared to be, That the Ancestors of the Plaintiff had had a yearly Rent of 10 Marks issuing out of the Mannor of Newport-Pannel in the County of Bucks, and payable to them and their Heirs; and this Mannor afterwards coming to the Crown, upon a Petition exhibited before King Henry VIII. in his Court of Augmentations, it was decreed by the Court upon advice had with the Justices of the Court of Common Pleas, that the said Rent should be paid by the King, his Heirs and Successors, by the Hands of his Baily of the said Mannor, to the General Receiver of the County; and now the Mannor being granted out of the Crown to the Defendants Father in Fee, with a Covenant to make an allowance to the Patentee for that Rent, or to the like effect; Relief was prayed by the Plaintiff against the Patentee, and granted per Curiam, without making the Attorny General a Party, because this Covenant does not go in derogation or disaffirmance of this Rent, but in allowance and affirmance of it; otherwise if there had been such a Covenant, and the Title to the thing litigious. (4)

Princes

Princes *Case.*

(5) PRince was committed by the Lord Mayor of London, Sir Richard Brown Baronet, for that contemptuously and unseasonably he served him with a Process of Subpœna out of this Court, when he was executing his Office as a Magistrate, and examining Offences of High-Treason, in derogation of Magistracy, and in disturbance of the due execution of Justice, till such time as he should find Sureties for his Good Behaviour; and this Return being ordered to be filed, it was moved that he might be set at liberty, because there did not appear (as was alledged) any good cause of commitment. And per Hales Chief Baron, He cannot be remanded, because it does not appear by the Return that the Lord Mayor was then a Justice of the Peace, so that he had power to commit him for such a Cause; but because the Process was unduly served upon such a Person, at such a time, the Court would not discharge him; but there was no exception taken to the Lord Mayors committing a Person for an Affront done to himself.

Edward Cage *Plaintiff*, William Warner *and* John Lucy *Defendants.*

(6) THE Bill charged, that the Plaintiff in the Month of May 1658. became Incumbent of the Church of Bearested in Kent, and that the Defendants in June 1658 and 1659. by colour of an Order of Sequestration made by the Committee in the County of Southampton, as they pretended, had seized divers Tithes of divers Parishioners within the Plaintiffs Parish, due to the Plaintiff; and to discover the particulars of the Tithes so taken, and their Values, and to have them paid to the Plaintiff was the Scope of the Bill; to which the Defendant demurr'd, because it is a matter determinable at Law, and a criminal Matter; but the Court put the Defendants to their answer, because it is matter of discovery; as in the Case where a Man by colour of a Title enters into a House or Lands, and possesses himself of the Goods and Profits; it may be impossible for the Plaintiff to discover the particulars without such a Bill: nor is it a charge by way of Trespass, but under colour of Title: so where a Will is proved,

proved, and Administration to another revoked, such a Bill is necessary, and usual for the Goods, and yet there was in strictness of Law a Trespass; so here.

Spark *versus* Stafford.

UPon a Prohibition prayed to the Court of Admiralty, the Case was, That the Defendant being Master of a Ship, of which the Plaintiff was Owner, the Ship was taken by Pyrats upon the Sea; and to redeem himself and his Ship, he contracted with the Pyrat to pay him 50 l. and pawned his Person for it: The Pyrat carried him to the Isle of Scilly, and there he paid it with Mony borrowed, and gave Bond for the Mony; and at his return after the redemption of both his Ship and himself, he sued in the Admiralty for the 50 l. and had a Sentence for it; and the Prohibition was denied, because the original Cause arose upon the Sea, and whatever followed was but accessory, and consequential; and therefore well determinable in the Court of Admiralty. (7)

Garrard *versus* Askwith, Wood *& al'.*

IN a Bill in Equity, the Case was, That one who was named Defendant, but was not served, was mentioned in the Decretal Order, and in another Order afterwards for Costs, and accordingly Costs were taxed him as a Defenddant; and he releast to the Plaintiff, and now upon a motion for an Attachment for non-payment of Costs, he produced, and proved this Release: And per Curiam this Release does not bar the Defendants of their Costs, because the Person who released was never served, nor had appeared: but they directed the mistake in the Orders to be amended, and then to proceed for the Costs; for the Court conceived that there was not any Cause at present for an Attachment, by reason that the naming of him as a Defendant, was done by the other Defendants in the entring of their Orders. (8)

Holbeech

Holbeech *versus* Whadcocke.

(9) IN a Suit by English Bill for the Tithes of the Herbage of barren Cattle, and others; the Chief Baron said, That Tithes for barren Cattel were due de communi Jure according to the value of the Land after the rate of 2 s. per pound, for that they cannot be otherwise valued or accounted for, because the Profits of the Lands for which they are paid, are perceived by the Mouths of Beasts; but by Custom or Prescription such Tithes may be paid in other manner; as by the Acre, and for all manner of Cattle, barren, and for the Plough, and the Pale; but of common Right Tithes are not due for Cattle bred for the Plough and the Pale, to be used in the same Parish; but if they belong to another Parish Tithes are due for them; and of that Opinion was the whole Court; and when Tithes are payable by Custom, they shall be paid though the Lands are not rented or lay fresh.

Pory *versus* Wright & *al'*

(10) UPon a Bill in Equity for Tithes of Pasture-Ground parcel of the Possessions of the Abbey of Fountain, being of the Cistertian Order; it was held per Curiam that Tithes for the agistment of Cattle are payable by the Owner of the Cattle; for the Cattle take the Profits and Herbage of the Soyl; so in the Case of Commoners: and it cannot be said that the Profits are taken by the Owner of the Soyl, or that the Ground is in propriis manibus. The Chief Baron said the Owner of the Soyl might pay them, but clearly the Agistor is compellable to pay them.

The Mayor *and* Burgesses *of* Scarborough *versus* Skelton.

(11) A Bill in Equity was preferred for demolishing of a Mill near to a Mannor of the Kings, which was granted to the Plaintiffs in Fee-farm; and in which the Farmors have Mills, which are prejudiced by this Mill being so near to them; and the Court conceived a doubt, whether any Mill not within the Kings Mannor might be demolished, where there is no Tenure

nor

nor Custom whereby the Inhabitants are obliged to grind at the Kings Mill. And a day was given to search Presidents in it. Vide Green and Robinsons Case, lately in this Court; in which Case this was made a question, and upon search made, no President produced to warrant it.

Roe *versus* Roe.

IN an Information at the Suit of Cross, tam quam for selling and importing to be sold Foreign Woollen, contra formam Statuti, and Issue thereupon; it was said by the Court, that it is not material upon the Trial, whether there be such a Statute or no, or whether the Forfeiture, or any part of it be given to the Informer or not; for that is matter of Law, and not matter of Fact, and may properly be alledged in Arrest of Judgment; for the substance of the Issue and matter of Fact to be tried by the Jury is, whether such Cloath was imported to be sold; and if there be no Law to prohibit it, or if there be, and that Law gives the Informer no part of the Forfeiture; this is matter of Law, which the Court is to determine, such Statute, if any be, being a general Law, otherwise if it were a particular Law. (12)

And afterwards Judgment was given for the King only, because no Act of Parliament gives the Informer a share.

The Attorny General *versus* Turner.

IN a Scire Facias upon an Inquisition, and Extent to have Execution for a Debt due by him to Sir George Binion, who was endebted to the King as his Receiver in the Sum of 1500 l. being a Debt in aid; to which the Defendant appeared, and pleaded the Act of General Pardon, which pardons all Sums of Mony, &c. which the King could pardon, with an Exception of Bonds, &c. entred into, to the King, since the 25th of March 1640. by any Receiver, &c. To which Plea the Attorny General demurred. (13)

Mr. Mountague pro Rege. 1. This Debt is not pardoned, because it is a Duty that the King cannot pardon, being the Parties Interest; as Attachment of Goods before Forfeiture. 2. Because the Act of General Pardon did not intend to discharge it; and Acts of Parliament ought to be expounded agreeably to the intent of the Law-makers, Vide Plow. Com. Easton and Studs Case, 455. Co. Inst. 368. upon 11 H. 7. 12. 3. Because upon such Acts of General Pardon made in the

Reigns of Queen Elizabeth, King James, &c. which are as full as this, no such Objection ever was made, that Debts in aid were pardoned, Vide Lanes Rep. 117. Chamberlains Case, A Pardon of all Debts does not extend to Debts due to a Person Outlawed. 4. By an equitable construction, the Exception in the Act will extend to this Debt, Vide Co. 1 Inst. 24. Dyer 201.

Obj. Exceptions are to be taken strictly.

Resp. So must penal Laws be taken strictly, and yet they are construed equitably, Plow. Com. 176. 41 Eliz. B. R. Mattocks Case upon the Statute of 40 Eliz. of Pardon.

Powis pro Defendente. 1. General Acts of Pardon are always liberally construed, Kelw. 198. Dyer 249. 2 R. 3. 4. Otherwise it is of particular Pardons, Stamf. Pl. Cor. 102. Co. Lit. 39. 2. Because such a Debt in aid is after Inquisition and Seizure become a Debt due to the King, and the Party cannot release it; as a Debt upon Outlawry, 3 Jac. Cro. 2 Rep. 82. And the Suit for it may be in the Kings Name, or in the Name of his Grantee; and there is a diversity betwixt a Forfeiture and a Debt assigned in the Kings Case, 21 H. 7. 7. for in the first Case the Interest is vested in the King of personal Goods before Inquisition; but in the second Case not till after Extent and Inquisition.

Obj. It is not a Debt due to the King, but to the Party.

Resp. It does not appear but that it is for a Debt really due to the King. 3. It is within the words of the Act, whereby all Sums are pardoned, which can be pardoned by the King; and it is not within the Exception, because there is no Bond in the Case entred into by the Receiver to the King, but it is a Debt due to the Receiver.

Obj. 1 Rep. 22. Resp. That Case goes upon the special penning of the Act; and 5 Rep. 49. b. Wyrrals Case is a stronger Case than ours, upon the General Act of Pardon in 39 Eliz. in the Case of the Pardon of a Debt forfeited to the King by Utlawry.

Obj. It has not been known heretofore.

Resp. There never was such an Act of Pardon heretofore.

Obj. The Act must be construed according to Equity.

Resp. But it must be taken most beneficially for the Subject against the King.

Obj. It is within the Exception.

Resp. It is not within the words of the Exception, and why should it be said to be withing the meaning? And concluded pro Defendente.

Chief

Chief Baron. By the Seizure and Inquisition the property of the Debt is altered, and it is now become a Debt due to the King, which the Party cannot discharge. And although the Party may pay his own Debt to the King, and so divest the Debt in aid out of the King; yet till that be done, it is a Duty to the King; and no such thing appears to have been done; and the words of the Act are full to discharge it; and the Scire Facias is to have Execution for the King, which presupposeth that it is yet due and payable to the King, and so pardoned; nor does it come within the Proviso or Exception, because it is not a Bond, &c. entred into to the King by the Receiver, but comes to the King by means of the Receiver; and the Act must be expounded liberally for the Subject. Et Adjornatur.

But afterward the Lord Chief Baron advised the Attorny General to waive his Demurrer, as he might do, and plead the special Matter, that it was only to enable the Party the better to recover his Debt, and the Kings Prerogative made use of for that purpose only; and so the whole matter would come in debate.

Accordingly the Demurrer was waived, and the Attorny General replied, That Sir George Binion being the Kings Receiver by Patent, took Security for this Debt in the Kings Name, for the use and benefit of him the said Sir George, and pleaded the Exception mentioned; to which the Defendant rejoined, and pleaded payment of the said Debt; to which Rejoinder the Attorny General demurred for want of alledging at what place the said Debt had been paid to the late Protector Oliver Cromwell; And now two Exceptions were taken to the Replication. 1. Because the Patent is not mentioned to be hic in Cur. prolat. 2. Because no place is shewn where this Bond was taken for Sir George Binions use; sed non allocatur, per Cur. because the Patent belongs to the Patentee, and not to the King; and it is but conveyance to the matter pleaded, and introductive of it; and that the alledging the place is not requisite, because the Bond is admitted by the Plea of the Pardon; and where a matter is not issuable, the place is not necessary to be shewn; for the laying of a place is only in order to have a Venue, Vid. Cro. 2 Rep. 482. And Judgment was given pro Rege, nisi causa, &c.

Randal *versus* Head & *al'*.

(14) IN a Bill for Tithes of Conies per Custom (inter alia) to pay the 10th Cony, or the value of it. The Defendants by their answer deny the Custom, but do not discover how many Conies they killed, or the value of them, as the Bill requires; to which Exception being taken, the Court held that a discovery needed not, where there is a full Answer given to the thing in demand; and that till that be tryed the Defendants are not obliged to discover; otherwise any Plaintiff might upon a feigned Suggestion compel a Defendant to discover what Writings he has, or what Goods or other Things whatsoever, upon pretence that he is Jointenant with him; and so what he has gained by his Trade, which would be strangely inconvenient; but where there is no such great inconvenience, as upon a Bill against an Executor to discover Assets upon a Bond or Debt, there he must answer, though he deny the Debt, because it concerns the Act of another Person, and Assets are presumed; nor is there any inconvenience in the Case: but in all such Cases the Court thought it fit that the Defendant, if such matter were found against him, should be examined upon Interrogatories to discover his Knowledge, and so it was ordered, and an Issue directed to try the Custom: also the demand of Tithes of Conies being against Common Right, the Court conceived the Case for that reason to be the stronger for the Defendant.

Wilkins *versus* Shalcroft.

(15) UPon a Bill in Equity as Debtor and Accountant against a Person who has the priviledge of the University of Oxford; the Defendant pleaded his priviledge, and a Copy of their Charter of Exemption was shewn, which exempts them from the Justices of one Bench, and of the other, and from other Justices, but not a word of the Exchequer; wherefore the Court was of Opinion that the Defendant ought to answer over, nisi, &c. and that it sufficed for the Plaintiff to call himself Debtor and Accountant without more.

Afterwards in Michaelmas Term the Lord Chief Baron delivered the Opinion of the Court, that the Defendant ought not to be allowed the priviledge of the University; he said Sir Richard Moor, one of the Masters of Chancery, was sued here by

by Bill as Debtor and Accountant, and was not allowed his priviledge; he cited likewise the Earl of Darbys Case against a Register in Chancery; in which Case the Register was denied the priviledge of his Court; and that the general priviledge of a Person, as a Member of the University, or a Clark in Chancery, does not toll the particular Priviledge of this Court: Also that an Accountant has a more particular Interest in his Priviledge than a Debtor, although his Debt may be taken in Execution for the King, and the King may have Execution upon a Judgment obtained at the Suit of his Debtor, because by 1 R. 3. c. 13. an Accountant is not suable elsewhere; and here the priviledge of Exemption granted to the University has not these words, licet tangat nos, vid. Cro. 1 Rep. 73. wherefore the Defendants priviledge was disallowed.

PRocess of the Pipe issued against Sir Christopher Pack, Floydby, Booth, Avery and Bateman, upon a charge upon them of 22000 l. upon which the Case appeared to be, that three of them had their Quietus by the Judgment of the Court, upon their account for this very Mony in the time of the late Protector; and afterwards in the time of the Government that ensued, it was ordered by an Ordinance of Parliament, that notwithstanding this Quietus, a Charge should be made of it in the Pipe, and Process issued upon it: And by the late Act of General Pardon it is enacted, That all Judgments and Quietus's since the year 1648. should stand good notwithstanding the late Times. And now the question was, whether this Quietus were a good discharge; and the doubt was, because now upon the matter this Quietus and the Judgment thereupon was repealed by the said Ordinance of Parliament; so that the Act of Pardon cannot operate upon it; but because the Parties surmised to the Court, that they had other matters in discharge of themselves, besides the Act of General Pardon, to wit, discharges for this very Mony, they were admitted to plead that matter too, though it were double, by consent of the Attorny General. (16)

Wilson

VVilson *versus* Reedman, Burton & *al'*.

(17) UPon a Bill in Equity for Tithes, and a Tryal at Law directed to try whether or no the Lands, of which Tithes were demanded, had belonged to any Order of Religion that claimed to be discharged of Tithes quamdiu in propriis manibus, &c. It was held clearly by the Court, That if at the time of the Dissolution such Lands were in Lease, or an Estate for Life or in Tail were out upon them, yet the Reversioner should have the benefit of the Discharge after the determination of those Estates; for that the Discharge was not interrupted, but suspended only during the time that they were in the Hands of particular Tenants, Vide Dyer 277. b. accord. But if an Escheat had happened, it was doubted then whether they should have bœn discharged, having bœn parted withal by a Feoffment made before the Statute of quia emptores terrarum, by an Abbey to hold of them by certain Services; otherwise it is in Case of a discharge by Unity, for that must be perpetual, and continue so at the time of the Dissolution, vide 11 Rep. Harpurs Case, and 2 Rep. the Archbishop of Canterburys Case.

Driver *versus* Man.

(18) UPon a Bill in Equity for Tithes of Corn and Grain, and a Demurrer to it, because the single value was not barely demanded; but it was a Bill of Discovery only to enable the Plaintiff to recover the treble value; sed non allocatur; for that Tithes were suable for in this Court before the Statute; Quod nota, & quære, because it is contrary to the common Practice and Usage to have such a Bill, without alledging that the Plaintiff is contented to receive the single value only.

The Attorny General *versus* Jones.

(19) UPon a Bill in Equity for Cordage, which belonged to the King, and was seised for his Use, to discover the truth and value of it; the Defendant in his Answer made Title to it, as his own, and now prayed a Writ of Delivery

very upon giving security; and it was granted him as well as upon an Information of Seizure; and though the King claim the property in it as his own Goods, and not as Goods forfeited to him; for the Party has no other remedy; nor does any Record appear whereby the King is entitled; otherwise if there were such a Record, as an Inquisition or other Record.

Vandebergh *versus* Blake.

UPon a Special Verdict depending in an Action upon the Case before the Act of General Pardon, and continued upon Curia advisare vult huc usque; the Defendant now would have pleaded by way of Suggestion the said General Pardon, not having had a day to plead it mean betwixt the Special Verdict and the Judgment; but he was not allowed by the Court, because Continuances are made and entred after Special Verdicts, and days thereupon given to the Parties ad audiendum Judicium; but it is otherwise in Case of a General Verdict, for there the day of Nisi prius, and the day in Bank is all one, and because this Plea was tendred after the first Continuance, it was not allowed. (20)

VVilford *versus* Greaves.

IT was found by Inquisition upon an Outlawry, that the Party outlawed was seized in Fee de sex clausis prati & pasturæ; and it was now moved that this Inquisition was void for uncertainty. (21)

Chief Baron. An Inquisition found de uno Mesuagio sive Tenemento has been held good, because it is not an Office of entituling, but of Instruction or Information, which does not require such precise certainty as an Office of entituling does; so in an Inquisition upon an Extent upon a Statute or Judgment, or in Dower, such certainties suffice; else all such Inquisitions were liable to be quash't, which would annul all such Proceedings, which would be mischievous; and such Inquisitions have not used to be quash't for want of such precise certainty.

Chillenden

Chillendens *Case*.

(22) CHillenden being committed by this Court for non-performance of a Decree, by which he was decreed to pay 32 l. 15 s. to a new Corporation made by the Protector for the propagation of the Gospel in New England, which Corporation had power to make Collections for it; and having collected such Sums of Mony now in the custody of such Persons, they now come here by Habeas Corpus, and prayed to be discharged, because the Corporation is dissolved, and they know not to whom to pay the Mony; and because by the General Act of Pardon all Contempts, &c. are pardoned: But the Court held, that this Collection being for a publick Use, the Mony belonged to the King; and that the King is now entituled to it, as well as to the Mony collected for the buying of Impropriations, as was lately adjudged; and they doubted whether a Person committed for not obeying a Decree were pardoned; for the commitment of the Party is the Execution of the Decree; and there is no other way of executing it. Et adjornatur.

De

De Termino Sanctæ Trinitatis Anno 13 Car. II. Regis. In Scaccario.

Bishop *against* Warner *and others.*

THE Commissioners of Excise fined the Plaintiff being a Brewer according to the New Act in 20 l. for not paying the Duty of Excise; and upon a Return made that he had no Goods, whereof a Distress could be taken, they imprisoned him; whereupon he brought an Action of False-Imprisonment in the Court of King's Bench; and the Defendants prayed that the Action might be laid here, because the Cause concerns the King's Revenue. Sed non allocatur per Curiam, because this Fine does not immediately concern the Revenue of Excise, but is a Penalty imposed for an Offence committed in it; and it belongs no more to this Court than other like Cases arising upon Fines and Imprisonments; otherwise, if it had immediately concerned the King's Revenue. (1)

Sir Ralph Banks *against Sir* Thomas Bennet *& al'*

UPon an Ejectment brought in the Court of Common-Pleas by the Defendant here, the Plaintiff moved that the Action might be laid here, because his Title was under an Extent out of this Court, for Debts in Aid. To which it was answered that all those Debts were pardoned by the Act of General Pardon, and so the Extents at an end; and that the Leases of those Lands under the Seal of the Exchequer rending Rent were determined also; being only quamdiu in manibus nostris. Yet the Court ordered the Parties to prosecute their Suit here, because this could not appear but upon Examination of the whole matter. (2)

John Vanderbergh *and* James Vanderbergh *by their Guardian Plaintiffs, and* George Blake *Defendant.*

(3) IN an Action upon the Case the Plaintiff declared that they being Merchants Denizens, were upon the 28th day of July, Anno Dom. 1656. possessed of a Pack of Linnen-Cloth containing 1692 Ells, of the value of 550 l. and imported by them by way of Merchandize, for which Custom was paid as for the Goods of Denizens; that the Defendant knowing this and intending unjustly to deceive the Plaintiffs and cause them to lose their Goods, the same day for his private gain and avail, unduly without any good cause seized the said Goods to the use of the Protector, as Goods of Merchants Aliens imported hither, and entred at the Custom-House as Goods of Denizens, although the Defendant knew and had Notice that the said Goods were the Plaintiffs Goods and by them imported by way of Merchandize. And moreover that to make the Plaintiffs lose the said Goods by colour of Justice, and without any probable cause, but falsly and malitiously and on purpose to cause the Plaintiffs to lose them, upon the 23d of October, 1656, The Defendant came into this Court, & tam pro Domino Protectore quam pro seipso gave the Court to understand, that he seized the said Goods, because that betwixt the 1st day of November then last past and the time of the Seisure they were the Goods of Merchants unknown, and were customed as Denizens Goods, whereas they were the Goods of Aliens; whereby the Protector lost his Custom; whereupon the Defendant for the Protector pray'd the Advice of the Court and that the Goods might be forfeited to the Protector. And that these Procedings were without any notice thereof had by the Plaintiffs; and that afterward on the 31st day of October aforesaid these Goods were condemned as forfeited by Judgment of the Court here. Whereas the Defendant had notice that the said Goods belonged to the Plaintiffs, and that they were Denizens, and that the said Goods were duly customed; whereby the Plaintiffs lost their said Goods, ad damnum 1000 l.

Upon Not-Guilty pleaded a Special Verdict was found, and all the matter aforesaid found, saving that the Jury found the Inquisition upon the Seizure in hæc verba, which the Defendant had exhibited on behalf of the Protector only, and that the Defendant falsly and maliciously had exhibited it.

Stevens

Stevens pro Quer. I conceive it to be clear that an Action lies for this false and malitious Prosecution. So it was held in Skipton and Pewtings Case in this Court lately, upon the Act of Navigation: So is Hob. Rep. Waterer and Freeman's Case, upon a second Execution by Fieri facias after the Execution of the first, and the Goods delivered to the Plaintiff upon it.

2. The Variance betwixt the Information, as set forth in the Declaration and found in the Special Verdict, does not alter the Case; for since there is sufficient matter found to maintain the Action, the finding of other immaterial things will not vitiate it; as if an Action of the Case be brought for calling the Plaintiff Thief, and if it be found that he called him strong Thief; the Verdict maintains the Action, and so in other Cases.

Object. The Action is grounded upon the Record.

Resp. That I deny, for it is not alledged as Matter of Record, but as Matter of Fact, and the Allegation is immaterial; and concluded pro Querente.

Hale Chief Baron. It deserves consideration whether an Action lies at all, as this Case is, or not: For here the Goods are condemned as forfeited by Judgment of the Court; and the party might have prevented that by coming in before Judgment upon Proclamation and claiming Property; and if such an Action should be allowed, the Judgment would be blowed off by a side-wind: and so in other Actions; as if a Man be convicted of Perjury, an Action upon the Case lies not, though the Prosecution were malitious. It has been a great doubt in this Court whether an Action of Trover lies after such a Condemnation, and adjudged at last that it does not. But if a particular person had come in, and claimed property, and lost them, yet the true Proprietor might have an Action of Trover, because he was no party to the former Suit; but here upon a Condemnation after Proclamation, it is otherwise. True it is, that such an Action would lie if upon a Commission of Bankrupts a Man should be found a Bankrupt without cause; So if Process of a Court be unduly served. For these are but Preparatories in the Course of the Suit; but after the Suit has had its effect, it would be hard, if such an Action should be admitted.

And for the Variance betwixt the Declaration and the Information, there is no question, but that although there were a mistake in the Matter of Fact, and sufficient Matter be found besides, that this does not vitiate the Declaration; but in Matter of Record it is otherwise; and therefore if the Action

here had been grounded upon the Seizure only, all had been well; but it is grounded upon the Information, which is Matter of Record, as well as upon the Seizure, and hereupon the doubt arises. An Information tam quam, and an Information pro Protectore only, vary. If the Number or Nature of the Justices were mistaken, it would have been a material variance, for it would not be the same Record. And here is no averment or allegation by way reference to the Record; but it is in the intituling part of the Declaration; and Damages given upon the whole Matter.

Turner Baron. If Judgment be given against a Plaintiff upon the forgery of a Bond in Issue, he cannot have such an Action; but here is no Judgment given against any person.

Chief Baron. An Action does not lie against a Man that sues for Tythes that are not payable. Here are Mischiefs on both sides, and the Case is of great concernment. Et adjornatur.

Afterwards Hardres argued pro Defendente. The first question is whether an Action lies at all, or no. The Point is; an Information is prosecuted here upon a Seizure of Goods, as uncustomed, and after Proclamation here made the Goods are condemn'd, according to the course of the Court, whereby the Goods are forfeited; and then the party brings an Action against the Informer for falsly and malitiously seizing and exhibiting this Information; and I conceive the Action lieth not. It is a Rule in Law, to which all the Books agree, that an Action upon the Case or an Action of Conspiracy lies for a false and malitious Prosecution, upon which the Plaintiff is acquitted or Ignoramus found; and the reason is because now it appears there was no cause for it: The Party that was molested being now by Judgment of the Court or other due Procedings of Law acquitted or discharged; and therefore the Law allows him Recompence for such unjust Vexation, to prevent such undue Practices and Procedings. Herewithal the Books agree, 9 Rep. 55. les Poulter's Case, N. B. 114. 43 E. 3. 20. a. 27 E. 3. 80. N. B. 98, 116. But unless it were falsly and malitiously, Conspiracy lies not, 35 H. 8. 14. 27 Ass. 12. Stamf. Pl. Cor. 173. But if a Man be prosecuted with all possible Violence, and with apparent Malice expressed in Words or otherwise, yet if the Prosecution were for a just cause, and the Party be condemned, such Action lies not, for the Law takes no Notice of Malice, where the Cause of the Prosecution is not false; as appears by the Books cited; and it is like the Case in 13 H. 8. 16. Where an Officer by vertue of some legal Process arrests me, or a Stranger in Case of fire pull down my House, no Action lies, because it is damnum absque injuria.

ria. Now it appears in this case that upon a due course of Proceeding Judgment has been given for the Forfeiture of these Goods; so that the exhibiting the Information cannot now be said to have been done falsly and malitiously, because the Judgment of the Court has passed upon it against the Plaintiff, and all Judgments of Courts are presumed to be just, and given upon good grounds. And though Malice and an Invention to cause the Plaintiff to lose his Goods are alledged, yet if there be no Falsehood in the Case the Action lies not; for these are but Accidents and Ingredients and Accessory; they are not the ground and foundation of the Suit; But the Injustice and Falshood is a thing to be considered, which cannot be objected after Judgment, for these Reasons.

1. If this were admitted, it would open a way to avoid and defeat the fruit of all Judgments by a collateral way; for all that has been recovered by the Judgment might be recovered again in damages, if such Proceeding be allowed, 1 & 2 Ph. & Mar. Dyer 14. Vaux's Case. He having an Office of one of the Philizers, was put out of it by the Court for absence and farming it, and Keble put in his room; and no Record made of Vaux's discharge; nor was he called to answer for himself. And in an Assize he would have had this Matter examined over again; but it was not admitted, because it would draw in question the Proceeding of the Court. 3 Eliz. Dyer 201. The like in case of a Judgment given upon Inspection of an Infant. If a Man be convicted for Forgery of a Deed, he cannot have an Action of Trover for the Deed so long as his Conviction is in force.

2. If this Action were allowed, it would discourage and overthrow all Proceedings of this nature; because after Judgment given for the Informer, he would not be sure that he was in peace, but would be liable to be disquieted by another Action for malitious Prosecution; and this would be a mean to prevent, if not to subvert all Justice, which the Law protects and advances; especially in these Cases, where the Informers get nothing to themselves. If a Man be endicted and acquitted, no Action lies against the Enditors, because they are returned by due Process of Law, to make enquiry for the service of the King and the Common-wealth; and such Actions would have a tendency to the smothering of great Offences, N. B. 115. 22 Ass. 77. 27 Ass. 2. After a Conviction by a Petty Jury, an Action will lie against no person; because it would beget infinite Vexation, and be an occasion of much Perjury; and of smothering Offences; and persons would be deterred from serving the King, 27 Ass. 12. Co. 12 Rep. 23.

Cam.

Cam. Stell. Pasch. 5 Jac. It lies not in case of Treason, because every Man is under a particular Obligation to discover that; and they would be discouraged to make discoveries if they were liable to Actions; and therefore for causing one to be endicted of Treason an Action lies not, though the Party be acquitted, Lovet and Faulkner's Case, Bulstr. 2 Rep. 270.

All these Cases that have or can be cited, come under these considerations, viz. either the Party was acquitted; or the Matter coram non Judice; or the Proceedings and Judgment of the Law not controlled, but affirmed, as in the Case of a second Execution; or in a Case of Matters of Fact, which are untrue, as in Case of a Suit against his own Release, and so found. But it does not appear by any Case that I have met with, that a Plaintiff shall be admitted to sue for a false and malitious Prosecution contrary to a Judgment or Matter of Record, which affirms it to be true; which is our Case.

3dly, There is no President shewn of any such Action.

The 2d Part of the Case is this, viz. The Plaintiff declares that the Defendant tam pro Domino Protectore quam pro seipso preferred this Information; and the Jury have found that the Defendant exhibited it pro Protectore only. Whether this Variance be such as that it shall not be said to be the same Information. And I conceive it cannot be intended to be the same, for these Reasons.

1. Every Man is presumed to know his own Case best. If a Man be bound to two, and one of them only sue; or if three Men are bound, and the Action brought against two only, in both Cases the Action is naught, unless it appear to the Court that the other person is dead; 28 H. 6. 3. 36 H. 6. 16. 6 E. 4. 5.

In Maters of Record if there be any Variance the Law is yet more scrupulous. Judgment in a Quare Impedit for Sir George Sherley Baronet, and in a Writ of Error he is called Knight and Baronet; and held that the Record is not hereby removed, Sherly *versus* Underhil, Hob. 468. If a Judgment were given before nine persons, and the Writ of Error mention it to have been given before eight, it is not good, nor is the Record removed by it, Cro. 2 Rep. 254. So if a Writ of Error suppose the Judgment to have been given coram Thesaurario & Baronibus, and it was given coram Baronibus only, it is naught, and does not remove the Record, 28 H. 6. 11. b. 12. a. In Error of a Pleint supposed to be against two, which in truth was against three, of whom two were found guilty and the other acquitted; per Curiam the Record is not here-

by

by removed by reason of this Variance, and the Party was put to purchase another Writ of Error, Kedgewin *versus* Worgan, B. R. Pasch. 23 Car. Rot. 242 adjudged, P. 1649. A Writ of Error directed Majori Recordatori & Aldermannis de placit. coram iis; and in the Return the Recorder was omitted, this was held to be an ill Certificate, Tomkins *versus* Jordan, Pasch. 24 Car. B. R. By these Cases it appears plainly that in case of a Record the Certificate and Return must agree with the Writ, or else that it is naught. Now here is a greater Variance than in the Cases cited; for there the Variance is only in the Numbers, Additions, &c. of the Persons; but here the Variance is in the entituling part of the Suit, which is the Information: For an Information tam quam and an Information pro Rege only, can never be intended to be the same Information, no more than in the Cases alledged the Record mentioned in the Writ and that in the Certificate or Return can be intended the same.

2. Upon such an Issue as this, all the material parts of the Declaration ought to be found, or it is against the Plaintiff. If Issue be taken upon a Prescription for Common for Beasts levant and couchant upon a Messuage, and so many Acres of Land, so many of Meadow and so many of Pasture; and the Jury find fewer of some and more of others, this is such a Variance as amounts to a Failer of the Issue, Michel *contra* Mortimer, Hob. Rep. 209. Issue taken whether W. S. Knight granted; and found that W. S. Esquire granted; this is against the Pleader, Dyer 299. b. 300. Earl of Pembr. *versus* Bostock, Cro. Car. 171. Issue taken upon the Extent of a Statute, whether all the Lands were Fee-simple or not, and some were found to be entailed; this was against the Pleader, Sir John Ashburnham *contra* St. John, Cro. Car. Here the ground and most material part of the Declaration is the Seizure and the Information; as to which the Variance is as great as the difference is betwixt an Information tam quam and an Information for the King only.

3. Informations tam quam and pro Rege only, differ materially; for after an Information tam quam commenced the King cannot pardon nor release it; nor can the Attorny General enter a Nolle prosequi to stave off the Prosecution of the Informe[illegible], because in such Cases he has gained an Interest, which the King cannot deprive him of, 1 H. 7. 3. 37 H 6. 4. 2 R. 3. 12. 5 E. 4. 3.

4. The Informations mentioned in the Record of this Case shall not be presumed to be the same, because it is not found that they are the same; and there may be some other Information

mation, besides this found by the Jury, which agrees with the Declaration, for ought appears to the Court to the contrary.

In Error of a Judgment, in Debt or Ejectment, if upon alledging diminution, an Original be certified which varies in Term, County or Name, it shall not be intended to be the Original in that Action, unless it be expresly certified to be so; but it shall be presumed that there is some other Original to warrant those Proceedings, Cro. 1 Rep. 272, 281. 2 Cro. 185, 479, 654, 674. Nor shall these Informations be presumed to be the same.

Obj. The mistake is only by way of recital, and not of substance.

Resp. It is not so, but is as express averment as any other part of the Declaration.

Obj. There is sufficient matter found besides, and then variance hurts not.

Resp. The Action here is grounded on a false and malitious Seizure and Information, so that all is material; and not like to the Case of an Action for Words, where part of the words are actionable, and part not; or where sufficient words are found to maintain the Action, and more than is laid, or more than needed: but it is not so here, one part being matter of Fact, and the other matter of Record, and the Action grounded upon both.

Obj. Another Information was pleaded, depending in the C. B. 28 Apr. which ought to have been the 29th of Apr. This Variance did not vitiate the Plea, Hob. 292. Parrys Case.

Resp. True, because it was of the same Term, which is but one day in the Eye of the Law.

Obj. The Plaintiff in this Action had no notice of the Suit, nor was Party to it.

Resp. The Seizure and Proclamation was sufficient notice; and the Seizer could not make him a Party, because he could not know who he was.

Afterwards in Hill. Term 14 and 15 Car. II. Judgment was given for the Defendants, quod Querentes nihil capiant per Billam.

Turner *versus Sir* George Binion.

(4) IN a Bill to discover upon what consideration a Bond was given, that had been assigned to the King as a Debt in Aid; the Court held that a Man was not bound to discover the

the consideration of a Bond, which implies in it self a consideration; and so Baron Atkins said it had been ruled in Chancery.

The Attorny General *versus* .....

IN a Bill to discover what Goods he had imported contrary to the new Act of Navigation, for which he ought to pay double Custom, as for the Goods of Aliens, which he had not paid; it was likewise alledged that the Attorny General would not prosecute for the Forfeiture, but for the Duty only: To this Bill there was a Demurrer, because a Penalty ensued thereupon, the Goods being forfeited by the Act of Tunnage and Poundage; and the Attorny General, when he has had a discovery, may relinquish this Bill, and begin de novo for the Penalty, and is not bound by the Allegation of the Bill; to which was answered, That the Attorny General waiving the Forfeiture, might sue for the Duty by a Bill of Discovery, as well as in Case, when the Plaintiff in a Bill for Tithes demands no more than the single value: and that after the Attorny General had informed upon a penal Law, no other could. And the Court enclined to this Opinion; sed Adjornatur. Vid. Micoes Case supra, Termino Hill. Anno Dom. 1658. (5)

The Attorny General *versus Sir* Edward Barkham.

IN a Bill of Reviver, upon a Bill of Reviver, there was a Demurrer to it, and the question was, whether it would lie or not? And 7 Rep. Kennes Case, and Robinsons Case, Cro. 2 Rep. 186. being cited in point that it lies not, and divers Presidents being cited out of Chancery that it does lie; the Court in regard of the difficulty and consequence of the Case, adjorn'd it till Presidents were searched; but the Chief Baron seemed to be clearly of Opinion, that it lies, and that it is not like a Bill of Review, or an Action per Journeys Accounts. (6)

Afterwards in Michaelmas Term the Court agreed that it well lies, upon reading two Presidents in point in the Court of Chancery, especially in Case of Death; as here two several Defendants dyed one after another: but if one be named Defendant in the Original Bill, who is yet alive, he ought not to be named in the Bill of Reviver, because the Suit never abated quoad him; but if he named in the Bill of Reviver

 only.

only, there he may be named in every Bill of Reviver afterward, because he was not named a Defendant in the Original Bill; sed Adjornatur; and afterwards in Hill. Term 13 & 14 Car. 2. a Plea was put in, That before the first Information exhibited, the Lands were granted over in Fee, and the Grantee not made a Party to the Information; and of this the Court doubted; Et Adjornatur.

Sir VVilliam VValler *and his Wife versus* Farmor.

(7) IN an English Bill for Tithes, a modus decimandi was in Issue, and a Tryal awarded by the Court ad informandam conscientiam in the County of Oxford; and after a Verdict against the Plaintiff, and against the Directions of the Court to the Jury, as appears by Affidavit, it was now moved to have a Trial at Bar, because the Plaintiff was a Councellor at Law; sed non allocatur, because here the Matter of the Issue is local, and not transitory; then a Trial was prayed to be awarded in an adjoining County, by reason of the great power and influence that the Defendant had in Oxfordshire; and upon this the Matter was adjorn'd; but afterwards a new Trial was granted in Oxfordshire, and another Verdict against the Plaintiff upon that Trial too.

De

De Termino Sancti Michaelis Anno 13 Car. II. Regis. In Scaccario.

Thomas Lewes *Esq*; *versus* Roberts.

ACtion upon the Case for these words, viz. You and your Crew brought the late King to death; the words were spoken at an Election of Knights of the Shire to serve in Parliament. After a Verdict found for the Plaintiff, and 200 l. Damages, it was now moved for the Defendant in Arrest of Judgment, that the words are not Actionable; for that they ought to be taken in mitiori sensu, and they may be understood, that he attended the King to his Death: but per Curiam the words sound in Scandal; and in common Acceptation and Construction they amount to this, That the Plaintiff put the King to death, or had a hand in his death. (1)

Breamer *versus* Thornton & *alios*.

IN a Bill for Tithes for the year 1660. The Defendants by their Answer set forth an Agreement made ten years ago between the Plaintiff and the Defendants, and other the Parishioners of the said Parish, to take 2 s. 6 d. in the pound for every pound Rent of Land, within the Parish, as long as they should live together, and he continue Parson, and that they had constantly paid it accordingly, and that by the said Agreement the payment was to be made upon the 1st day of May, and the 1st day of November yearly; and it appeared that the Plaintiff had not given notice that he retracted the said Agreement, or dissented from it, after the 1st day of May 1660. And per Curiam this agreement will not bind the Parson, being by parol, but it will excuse the Parishioners of the Penalties and Damages given by the Statute of 2 Ed. 6. and from Costs till notice given of his dissent from the agreement; and that notice given after payment becomes due, is too late; and that it is too late if given after the Lands are manured and sowed, because perhaps if notice had been given before, (2)

he would not have been at so great charge upon them, or not have sown them at all; and the Court desired the Parties to agree. Et Adjornatur.

Savory *against the* Attorny General.

(3) UPon English Bill the Point was this, viz. The Plaintiff being an Accountant, and pardoned by the General Act of Pardon, had within the time limitted by the Act, and before notice of the Act accounted for 700 l. and given Bond to pay it; against which Bond he now prayed relief, because his Account was pardoned by the Act of Indemnity: but the Court doubted of that, because though the Account be pardoned, yet the Bond is not, if it had been given before the Act took place, by an express Proviso in the Act: Besides, this Bond changes the matter of Account into another nature, and amounts to payment; in which Case there would have been no restitution: and no Man shall be intended to be ignorant of the Act; and it shall be retted his own folly to give Bond for a Debt that was destroyed. Sed adjornatur.

Afterwards the Plaintiff obtained a Warrant from the King, under the Privy Signet, for a Decree by Confession; but the Court would not allow of it, unless it were under the Privy Seal, &c.

Gwilliams *& al' versus* Rowel *& al'*.

(4) UPon a Bill in Equity the Case was, That the Father of the Defendant, Rowel, gave instructions for his Will to be put into Writing in his Life-time, that his Messuages and Lands should be sold by one How and another for payment of his Debts and Legacies, and made other Persons Executors, and died, without making any other publication of his Will: One of the Trustees for the Sale of his Houses and Lands died; and now the Survivor and the Heir were compelled to sell, because the Lands were tied with a Trust, which will survive in Equity, vide Dyer 371. to this purpose vide Co. Inst. 112. b. 113. a.

Meriel

Meriel *versus* VVymondsold & *al'*.

UPon a Bill in Equity the Case was thus, viz. The Plaintiff had agreed with two of the Defendants to pave their Streets in Putney; and they on the behalf of the Parish agreed to pay him for them, which Agreement was put into Writing, and remains in the Hands of the Defendant Wymonsold. The Work was done according to the Agreement, and it came to 360 l. and for satisfaction the Plaintiff preferred his Bill against them, with whom he had agreed, and against others of the Parish, who had agreed with the Undertakers for the Parish to pay their shares: And per Curiam the Plaintiff must have relief against the Undertakers, especially in this Case, because the written Agreement, which is his Evidence, is in the Hands of one of the Defendants; and the Undertakers must take their remedy against the rest of the Parish. (5)

Thomas Vere *Deputy Aulnager and Collector of the Subsidy of Aulnage by Information* tam quam, *&c. Plaintiff*, John Sampson, Thomas Foster *and* James ····· *Defendants.*

THE Information sets forth, that the Informer between the 1st day of October last past, and the time of exhibiting the Information at the Parish of St. Michael Bassishaw, in the Ward of Bassishaw, London, did seize, as forfeited, a Cloath called a double Bays, and one Cloath called a single Bays, as Goods of Persons unknown, because the said Goods being made and wrought to sell and utter, were put to sale before the Mark of the Maker, and the Seal of Lead were put thereto, in which the true and just length thereof is to be contained, to be found by the Buyer by due probation, and before they were sealed by the Aulnager of the County where they were made, and the Seal of the Collector of the Subsidy, contrary to the form of the Statute; whereupon the Plaintiff desires the advice of the Court, and that they may remain forfeited, and one half thereof be to himself. (6)

Sampson claims property of one single Bays, and demurs. Foster of a double Bays, and demurs. The third Defendant

of a single Bay, and demurs likewise. The Plaintiff joins in all.

Hardres pro Querente. The Point of this Case is the great ventilated Question concerning the Duty of Aulnage, payable to the King, for the new Draperies; and it is of great concern and consequence; the Property of the Subject being on one side, and the Revenue of the Crown on the other.

Six things are to be considered in this Case. 1. How the Law stands upon the express words, and penning of several Statute Laws concerning this matter. 2. What construction ought to be made by the Rules of Law, without offering any violence or injury to the Words, upon these several Statute Laws. 3. For what reasons new Draperies made from time to time since the enacting of these Laws, shall be drawn within the compass of them. 4. How other Laws of the like nature have been expounded. 5. What Objections may be made, and Answers given in the Case. And 6. What Presidents and Authorities there are in the Case.

For better order and method sake, I will begin with a short recital of such Statutes as conduce to the Case in question; and passing the Statutes of 2 Ed. 3. cap. 14. which directs the Assize of Cloaths; and the 25 Ed. 3. cap. 1. which are of no force; I will begin with 27 Ed. 3. cap. 4. which was the first that gave any Duty of Aulnage, or Aulnagers Fees; and because former Laws were grievous in respect of Forfeitures, for the releasing of those Forfeitures in ease of the People, and for a convenient Recompence to be made to the King for the same, that Law was made upon the Peoples offer to give the King a Recompence; whereupon the King reciting the Complaint made to him, and the Peoples offer of a Recompence, and the release of the said Forfeitures accruing to him for the defectiveness of Cloaths not of Assize, enacts, That the King and the Aulnager shall have certain Fees there ascertained for every whole and half Cloath; which Law was made and grounded upon a mutual Recompence betwixt King and People. After this Statute many Laws were made for the better regulation and execution of the Office of Aulnager, without any dispute of the Duty; as 11 H. 4. cap. 6. 4 Ed. 4. cap. 1. 8 Ed. 4. cap. 1. 1 R. 3. cap. 8. all which make nothing in the Case in question: But in process of time when new Inventions sprang up of making other sorts of Cloth, this introduced divers other Laws for the Aulnagers direction, without giving any new Fee to the King or the Aulnager; but proportioning this original Fee, which was a Standard for all others; and therefore by an express Law made anno 17 R. 2.

cap.

cap. 2. Power is given to put to sale all Kerseys (then newly invented) and all other Cloaths of any length or breadth, paying the Subsidy and Aulnage after the rate aforesaid, which is an express, full and clear Law for the Duty to be paid for all manner of Cloaths, without exception or restraint. The 11th of H. 6. cap. 9. was made to explain the word (Cloth) in the Statutes of 7 H. 4. cap. 10. and 11 H. 4. cap. 6. and enacts, That they shall not extend to Streights made, or to be made; but it goes farther, having special regard to the Duty, without impeachment of any the Kings Officers, or of the Duty of Aulnage, Customs or other Dues, 1 H. 4. cap. 14. 9 H. 4. cap. 2. by a particular Law then made Kersies, Kendal-Cloth, Coventry-Freeze and Cogware are exempted from all manner of Subsidies for three years, except Aulnage, by which it is plain, that without such an Exception they would have been liable; and there is no Law, but that of 27 Ed. 3. cap. 4. which gives any certain Duty to the King, except for Kersies; and therefore that Law is to be looked as the Rule and Square for all. The 8th of Eliz. cap. 2. reciting, that divers Lancashire-Cottons, Freezes and Rugs had been sold without the Aulnagers Seal set to them, in deceit of the Aulnager of his accustomable Fee; and therefore enacts, that none shall be sold before the Aulnagers Seal be set to them: By which Law the Parliament admits, that the Duty of Aulnage is due for new Draperies, without any particular Laws being made concerning them.

So that upon perusal of all these Laws, it appears that the Duty of Aulnage was always admitted, and never disputed according to the proportion of 27 Ed. 3. cap. 4. and 17 R. 2. cap. 2. so that in truth the proper question now to be made, is, What proportion such new Draperies ought to bear, rather than whether they shall pay at all or no? But the question concerning the proportion is not now in dispute, nor do the Defendants raise any question concerning it.

The second Consideration is, admitting there may be some doubt concerning the Duty being due or not, whether it be not within the meaning, though not within the words of the Law? For the clearing of which, I shall take for a Ground what is laid down in 3 Rep. Heydons Case, That it is the Office of an Expositor, to suppress subtil Inventions, and Evasions pro bono privato, and to add force and life to the Remedy provided according to the true Intention of the Lawmakers. Upon this ground it is there resolved, That Copyhold Estates are within 31 H. 8. Of Dissolution of, &c. against doubling of Estates, one upon another, before the dissolution, because there is the same mischief in them, that there is in

other

other Lands, 2 and 5 Eliz. Dyer 219. upon the Statute of 32 H. 8. cap. 33. which enacts, that Disseisins with force shall not toll Entries; that it extends to disseisins without force, 11 Rep. 736. Magdelen Colledge Case upon the 13 Eliz. c. 10. to prevent Leases made for more than 21 years or three lives; whereas 18 Eliz. cap. 2. confirms all Leases made to the Queen, though for a longer time; yet if a Lease were made to the Queen colourably, and to make her a Conduit Pipe only to transfer the Interest to another; such Lease is not confirmed, for it is a subtile Invention to creep out of the Law: so here the subtile Invention of an Artist must not be permitted to elude the Law.

Plow. Com. 82. There it is said by Saunders Justice, That though a Statute give a penalty, (which is stronger than this Case, for here is but a Recompence given,) yet things that are not within the words shall be taken within the Equity; for that the words are but the Image of the Law; the Life and Soul whereof rests in the Minds of the Expositors.

Plow. Com. 205. b. Stradling and Morgans Case, The Intention of the Makers of the Law, is the sure Rule of interpreting a Law, which the Judges must collect sometimes from the occasion and necessity of enacting it; sometimes from the words themselves, and sometimes from Foreign Circumstances; and the Intention of the Law-makers must be taken according to what is consonant to reason and discretion.

Plow. Com. 248. Lord Berkleys Case, What is taken to be within the Intention of an Act, though not comprehended within the precise words of it, is equivalent to what is within the express words, and as strong.

Plow. Com. 363. a. Stowel and Zouches Case, Every Law consists of two parts, the words and the sense: These two make up the Law; and it is the Office of an Expositor to put such a sense upon the Letter as is consonant to Equity and right Reason.

Plow. Com. 465. a. Eiston and Studs Case, It is not the words, but the sense that makes the Law; the Letter is but the Body, the Sense is the Soul and Life of it; the Word is but the Shell, the Sense is the Kernel.

Ibid. fol. 466. b. 467. a. That Equity must of necessity take place in exposition of all Laws; and Equity makes no difference betwixt penal Laws and others; and that the best way to expound a Law, is to consider what answer in all probability the Law-makers would have given to such or such a question proposed to them: and without question in this Case of ours their answer

answer would have been, that a proportionable Duty of Aulnage should be paid for such new Draperies, with respect to the kind and quality of them.

3dly. The third thing to be considered is, For what reason such new Draperies ought to pay such a Duty?

The first Reason is drawn from the Ground and Reason of making these Laws, which (as appears by Co. Mag. Chart. p. 606.) was by reason of a Record there cited out of 24 Ed. 3. Excheq. Rot. 13. That a great part of the Wooll of the Nation was converted into Cloth, and Custom being due for Wooll of common Right, and it being an Inheritance in the Crown, and not due by Grant or Benevolence, as appears by 1 Eliz. Dyer 165. Sir John Davies Rep. 8. b. 31 H. 8. Dyer 43. 1 Mar. Dyer 92. and 9 H. 6. 12. for that reason the King departing with his own proper Right and Inheritance, which by that means was diminished, the Law gave him a perdurable Duty in lieu of it; which reason holds here in proportion for the expence of Wooll in such new Draperies; and the reason is the same in all Exchanges and Warranties for a Recovery in proportion, and of the Writ of Contribution betwixt Jointenants, F. N. B. 163. & per Bracton lib. 1. cap. 4. Æquitas est rerum convenientia, quæ paribus in causis paria Jura desiderat. And the Law of Equality and Proportion, is the most equal and just Law, and most consonant to Reason.

The second Reason is grounded upon the words of the Statute of 27 Ed. 3. cap. 4. especially upon the Statute of 17 R. 2. cap. 2. by the first of these a Release as it were is given by the King, upon condition to have in lieu such a Duty upon the Consumption of Wooll in Manufacture; in which the quality of the then present Manufacture was not considerable; but the expence of Wooll which occasioned it: and the words of 17 R. 2. are express for all Cloaths in proportion.

The first Law of 27 Ed. 3. and the reason of it is supported by another like Case; as that of 10 Ed. 4. Taltarums Case of Common Recoveries, notwithstanding the Statute de donis conditionalibus, by reason of the reciprocal Benefit by recompence in value.

44 Ed. 3. 2. Octavian Lumbards Case, If a Tenant in Tail grant a Rent-Charge in consideration of a Release, which corroborates his Title; this Rent shall bind the Issue in Tail; so a Warrant with Assets binds an Estate Tail: and by the same reason here, where there is not only a recompence in value, but a direct positive Law for all Cloaths in proportion; this Duty must be paid for these new Draperies.

3dly. There being here the same Loss to the King, and the same Charge and Duty to the Officer, the same Duty must be paid, 14 Ed. 3. Bar 277. 17 H. 4. 14. b. If a Man repair a Bridge or a Causeway, he may by Law require a reasonable satisfaction for passing there.

5 Rep. The Chamberlain of Londons Case. A Peny was demanded for every Cloth that came to be sold at Black-well-Hall for the view and search of it there; this was held a good demand by the Common Law, because it tended to prevent Frauds and Falsities, and the Subject had a benefit by it; and so he has here by the Duty of Aulnage.

8 Rep. 124. b. The City of Londons Case. A reason is there given for the encrease of the Penalty given in Edward the Fourths Time, to 5 l. viz. because the value of Mony was fallen, and therefore the Penalty was advanced in proportion, and that was said to be pro bono publico; so here; this is pro bono publico, and pro Rege, and therefore such an Exposition ought to be made as may be for the advance of the Duty.

The 4th Consideration shall be how other like Laws have been expounded, without offering violence to them.

1. The words of some Statutes have been enlarged by construction; as 4 Rep. Vernons Case, the Statute of 27 H. 8. of Jointures, which abridges the Common Law has always been construed to extend to other Cases than those express'd in the Letter of the Act: so 5 H. 5. 6. 12 H. 4. 2. and Lit. Sect. 30. the Statute de donis extends to other Estates Tail than are mentioned in the Law it self, N. B. 60. n. The Statute of Gloc. concerning Waste, extends to a Tenant for half a year.

2. Statutes that mention one thing only to be reformed, yet have been extended to other things in owel mischief.

Plow. Com. 10. a. Fogassa's Case, and 82. Partridges Case. The Statute of Westm. 3. cap. 2. de quia emptores terrarum, which enacts, that upon Alienation made by the Tenant of part of the Tenancy, he shall hold pro particula illa secundum quantitatem terræ, has been construed of the quality and value, and not of the quantity; the value and not the extent of the Ground being the meaning and intent of the Law, which comes up to our Case, Doct. and Stud. 99. Plow. Com. 53. b. by the Statute of 4 H 7. cap. 17. The Heir of Cesty que Use by Knights Service shall be in Ward, no Will being by him declared; yet if a Will be declared by him, whereby he makes a Devise in Tail, this is adjudged to be within the Equity of the Law, which was made to prevent and suppress Devises made to defraud Lords of their Wardships; and the same reason

reason is here to prevent new Inventions in deceit of the King.

3. By the Rules of expounding Laws afore-mentioned, a later Law has been held to be within the Equity of a precedent one, 21 Ed. 3. 21. b. Plow. Com. 127. a. Buckleys Case. The Statute of Act Burnel made in the 13th Year of Edw. I. That in Case of an Extent upon a Statute-Merchant, if the Extenders value the Goods too high, they shall take them themselves at the price, and satisfie the Creditors, is taken to be within the Equity of the Statute de Mercatoribus made 11 E. 1. though there are no such words in the Statute, but the reason is the same.

The Statute of 12 H. 7. cap. 19. Stamf. Prerog. Regis 96. The Statute of 4 H. 7. cap. 17. which gives the Wardship of Lands in Use, is expounded by the Statute de Prerog. Regis, which gives the King the Wardship by priority, where there is a Tenure of himself and a Subject.

Upon the same reason Draperies newly invented shall be taken within the Equity of other and former Draperies for the Kings advantage.

4. Things constituted de novo, have often been construed to be within the meaning of former Laws.

12 Eliz. Dyer 288. b. The Bishop of Durhams Case, If a Man have Forfeitures for Treason within such a Precinct, and a new Treason be made by Act of Parliament, he shall have the Forfeitures for that new Treason.

12 H. 7. 19. and Bro. Parliament 40. A Note is made upon it, That if a thing be made Felony by Statute, the King shall have annum, diem & vastum, without any words in the Act to give it him; but by his Prerogative, just as he has in Cases of Felony at the Common Law.

Plow. Com. 467. By 4 Ed. 3. Trespass is given to an Executor de bonis asportatis in vita Testatoris; this Law extends to an Administrator, constituted by the Statute of 31 Ed. 3. and not before.

Upon the same ground of Reason the King in this Case ought have his Duty of Aulnage.

5. Expositions of Laws have been so made, as to meet with all such Inventions as have been set on foot to defraud the King of his Duty.

Pasch. 1656. in Scaccar. The Attorny General *versus* Skirt. Upon an Information for Prisage, it was there held by the Court, That to import 9 Tuns only is Fraud apparent; and that the Law would extend to lesser quantities, if Fraud were discovered; and that the King should have his Duty of Prisage,

though there were but 9 Tuns. Here the King will else lose his Duty by these new Draperies, which are invented from day to day; for if Wooll were not so wrought and vended, there would be more old Draperies wrought off; of which no doubt is to be made.

Now if care ought to be taken to prevent subtile Evasions and Inventions; and if Laws ought to be so expounded, as to advance the remedy and suppress the Mischief, according to the Rules before cited, then without question these new Draperies ought to pay a proportionable Duty of Aulnage, with old Draperies.

The 5th Consideration shall be to answer such Objections as have been made against this Doctrin.

1. Obj. The Statute of 27 Ed. 3. extends only to Broad Cloth and half Cloaths, and forbids the taking of the Duty for lesser Draperies.

Resp. That Statute limits the Fees of the Aulnager to Broad Cloaths, &c. but not the Duty payable to the King, because in other Draperies the Aulnager was at no trouble, nor took any pains, and therefore was to have no Fee. But 2dly, The Cloaths mentioned in the Statute, were the only Cloaths in use when the Statute was made; and that's the reason why they are particularly mentioned; but that does not exclude other Cases.

Obj. This is a new Tax, and cannot be assessed but by Act of Parliament.

Resp. I agree it to be a new Tax; but the question is, Whether our Case be not within the meaning and provision of the Act of Parliament?

3. Obj. The Act of 27 Ed. 3. has a retrospect to 2 Ed. 3. c. 14. and to 25 Ed. 3. cap. 1. where the length and breadth of Cloaths are set forth; and therefore shall not extend to any others.

Resp. That is a mistake; for liberty is given to make Cloaths of any length and breadth paying the King his Duty; but Fees to the Aulnager are prescribed in some particular Cases only, which is a full answer to this Objection. Besides the occasion of this Law was the great consumption of Wooll, by converting it into Draperies; for which Wooll-Custom was paid in case of Transportation, Vide Co. Mag. Chart. 606. & Jur. de Courts 29, 30.

4. Obj. 50 Ed. 3. cap. 8. The Aulnagers Duty not payable for Frize, and other Draperies there mentioned, because not of the length and breadth, &c.

Resp.

Resp. That Law extends only to Irish Mares, which were not within the meaning of 27 Ed. 3. that Law being made only in respect of the Loss the King sustained by working English Wooll, as aforesaid.

5. Obj. The 27 Ed. 3. cap. 4. is a penal Law, and not to be strecht by Equity.

Resp. All Laws must receive an equitable Construction, whether for or against the Offender; it cannot be accounted a Law that does not admit of Construction; and Plow. Com. 468. is express to this Point.

6. Obj. The Case of 2 Jac. cited by all the Judges, Co. Mag. Chart. 62. & Jur. de Courts 31. does not extend to Norwich Stuffs by the express Opinion there.

Resp. That is true, if it be understood of the Aulnagers Fee, for viewing and measuring them; but it is not true with respect to the Kings Duty, as appears by the Case it self in Hen. 4. there cited, because being most of them made and tack'd up in Plights, it would be a great loss to have them undone to be measured, &c. but this does not hinder the Kings Duty being due for them, which is not rated upon the view, and by the measure, but by the weight; and so it was also in 4 Jac. for these very Stuffs.

The 6th Consideration shall be upon divers Judgments, Authorities, Opinions and Presidents in point, which are of three kinds; 1. Acts of Parliament. 2. Opinions and Resolutions of Judges. 3. Judicial Presidents.

1. For Acts of Parliament, vide 27 Ed. 3. cap. 4. 17 R. 2. cap. 2. which is a general Law for all Cloaths, 11 H. 6. cap. 9. 1 H. 4. cap. 19. 9 H. 4. cap. 2. 8 Eliz. cap. 2. all which, especially 17 R. 2. cap. 2. seem full in point, viz. That the Duty of Aulnage shall be paid to the King for all Cloaths in proportion.

2. For the Resolutions and Opinions of Judges; the Authority has been cited, which passed upon great deliberation, and consideration had of all the Statutes; and they were of Opinion, That for all new Draperies made of Wooll only, Aulnage was due; 24 June 1605. at Serjeants Inn, Anno 2 Jac. Regis cited Co. Jurisdiction of Courts, and Magna Charta 606. and in 4 Jac. the like was held in the Case of Norwich Stuffs.

3. For Judicial Proceedings, he cited Hill. 4 Jac. in Scac. a Decree for the Duke of Lenox *versus* Peckner. Trin. 6 Car. Regis, the like Decree betwixt the Dutchess of Lenox and Dawson. Mich. 32 and 33 Eliz. in Scac. Rot. 321. accord. Mich. 39 Eliz.

39 Eliz. Scac. lib. decret. 262. Hall *versus* Greathead *& al'*, the matter settled again with new Rates, to be paid for new Stuffs, per Barones.

So that in all times since the making of 17 R. 2. a Subsidy has always been held to be due to the King for new Draperies; and for these Reasons and upon these Authorities, he prayed Judgment pro Querente.

Mr. Stevens argued the same day for the Defendants.

Hale Chief Baron. Certainly a Custom was due to the King at Common Law for Wooll, Wooll-fells and Leather long before the giving of half a Mark by the Statute of Edw. 1. and that appears by the Red-Book in the Exchequer, but not according to the proportion settled by that Statute; but some Custom was due and paid: Also without all dispute there was an Assise of Cloth and Draperies before the Statute of 2 Ed. 3. to wit, at Northampton in the time of King Rich. I. who made an Ordinance for the Assise of Cloaths; as appears by Roger Hoveden: and see the Statutes of 4 and 7 Jac. 5. and 6 Ed. 6. and 2 and 3 Ph. and Mar. concerning the better ordering of Cloaths, and paying the Aulnage in proportion. Et adjornatur.

In Hill. Term, Annis 13 and 14 Car. 2. The Case was argued by Strode pro Defendente, and by Sir Heneage Finch pro Querente.

In Trinity Term, Anno 14 Car. 2. The Court delivered their Opinions, all agreeing pro Querente; viz. Baron Turner, Baron Atkins and Hale Chief Baron.

Hale Chief Baron. There are two sorts of Draperies, one sort of Strait weaving, and the other of Frost weaving, as Kersies, &c. Cloaths were made here before the time of King Edw. I. as in the Reigns Rich. I. Hen. II. Hen. III. &c. as appears by divers Grants made to Guilds and Fraternities before that time, and by Reservations of Fee-farm Rents; but the Trade was not great till King Edw. I's time. There was likewise a Subsidy of Aulnage due before the time of King Edw. III. though not the same Subsidy; as appears by 52 H. 3. Statute de Scaccario, but it was reduced to a more certain Rate; but there was then no Custom payable for them, but in Case of Exportation only. There was Aulnage before the Statute of 27 Ed. 3. as appears 13 Ed. 3. membr. 2. there was then a Measurer of Cloaths. Now for the present question, Whether the Subsidy of Aulnage be due for Bays, though the Statute of 27 Ed. 3. extend not to them, but to particular Cloaths there mentioned; it will be hard to bring them within that Law, because they differ in weight, length and breadth; yet there is a concurrent Law made in 17 R. 2. which makes the quantity a necessary ingredient

dient to the Subsidy; for 17 R. 2. proportions the Subsidy given by 27 Ed. 3. which settles the Duty only; and therefore I ground my Opinion for the Duty upon 17 R. 2. the words of which Statute are, paying the Duty according to the Rate, which words bring the Statute of 27 Ed. 3. to that of 17 R. 2. and upon both these Statutes taken together, the Duty arises, and the Penalty for non-payment of it.

Obj. 17 R. 2. mentions not Bays, but Cloaths and Kersies.

Resp. The generality of the words, Cloaths, as well Kersies as other, comprise all; and there cannot be more significant and comprehensive words to include all manner of Cloaths; and by the Demurrer they are confessed to be Cloaths, as they are laid in the Information.

A second Reason I take from several other Acts of Parliament, which explains 17 R. 2. as 1 H. 4. cap. 19. 9 H. 4. nu. 3. 4. which give a relaxation of this Subsidy for a certain time only; and only for some particular Cloaths there mentioned.

Obj. 11 H. 6.

Resp. That Act only enacts, that Straits shall not be accounted Cloaths within the Statute of H. 4. but they are notwithstanding that within 17 R. 2. and so in effect the Statute it self says, and refers to 17 R. 2. and by the Statute of 4 Ed. 4. cap. 1. and 4 Ed. 6. cap. compared with 7 Ed. 4. cap. 5. it appears that the Subsidy of Aulnage is due for Straits; so is 1 R. 3. cap. 8. 8 Eliz. 12.

Obj. The Statute of 6 Ed. 6. begat that of 8 Eliz.

Resp. Those Laws do not create the Duty, but refer for that to the 17 R. 2. And by the last Clause in 4 Jac. the Duty is saved.

My third Reason is grounded upon the Judgment given in 1 Jac.

Obj. By that Judgment Norwich Worsteds were not to pay the Subsidy.

Resp. It is true, they do not come within the General Conusance of Cloath granted by Patent, 3 Ed. 3. and therefore repealed in the Parliament of 5 Ed. 3. Rot. 13. and 22 Ed. 3. nu. ult. and by 11 H. 4. nu. 39. the Government of Worsteds is committed to those Norwich for four years only; and afterwards the time was enlarged by 7 H. 4. cap. 1. and 4. which appoint Wardens: and it is true, there has been no Decree that the Subsidy should be paid for them; but this is not now the question.

My fourth Reason is grounded upon Judicial Presidents, in such Cases, in the Reigns of Queen Eliz. King James and King Charles I.

Obj.

Obj. There is no certain proportion limitted for such Draperies.

Resp. The proportion ought to be according to the weight of Broad-Cloth, for it cannot be otherwise; and by the Statute of 4 Jac. cap. 2. the weight of Broad-Cloth appears to be 64 l. and to contain 24 yards; vide etiam the Statute of 4 Ed. 4. for the weight; so he concluded pro Quer. and Judgment was given accordingly; but the Forfeiture was remitted, paying the Duty, by consent of the Parties.

Allison *and* Sharpley, *& alii contra* Dickenson *& alios.*

(7) UPon a Bill in Equity, the Case appeared to be, That Sir Edward Wittington died possessed of a Personal Estate in both Provinces of York and Canterbury; and his Will was proved in the Prerogative Court of Canterbury; and upon a Suit there for a Legacy, there was an Appeal after Sentence; and afterwards Administration was granted of his Goods within the Province of York, from which there was an Appeal; and pending these Appeals, a Bill is preferred here to discover the Personal Estate of the Intestate, and an Agreement to have Administration; to which the Defendants pleaded the Administration granted of the Goods within the Province of York, and concluded generally whether they ought to make answer to any matters contained in the Bill in any other manner.

And per Curiam clearly, where there are Bona notabilia in several Provinces, there must be several Administrations; so is 33 H. 6. and Administration granted in one Province, is void as to Goods in another, because there are distinct Supreme Jurisdictions; and they held the Plea good as to those Goods; and that the Appeals, if brought within fifteen days, suspend the former Sentences; and they were clearly of Opinion, that the Conclusion extended to make it a Plea to the whole Bill, though the Matter of the Plea was special; and therefore, that as to what was not contained in the Plea, the Defendants ought to answer; and so it was awarded.

Dry

Dry *contra* Wills & *alios*.

TRover and Conversion for divers Goods of the Plaintiff; upon Issue joined in 1658. the Jury gave a Special Verdict after the Act of General Pardon; and found, that the Defendant by Warrant from a Justice of Peace, upon a Decree for Tithes, by virtue of an Ordinance made in the late Times, (but the Ordinance was not found) took the Goods mentioned in the Declaration; and they found the Act of General Pardon: And it was now moved on behalf of the Plaintiff, that the Ordinance not being found, no notice could be taken of it; and then the Act of General Pardon makes nothing in the Case, because a Justice of Peace, qua Justice, has no Power or Authority, nor colour or pretence of any Power or Authority in such Cases; and that the Jury having found that Goods mentioned in the Declaration were taken, it shall be intended of the Plaintiffs Goods, in a Special Verdict; to which the Court seemed to agree. And per Hale Chief Baron, if the Ordinance had been found, yet this Case would not have come within the Act of General Pardon, without special pleading, for the Act was made after Issue joined; and it extends only to Actions brought since the Act in case of pleading the General Issue, and giving the Act in Evidence. (8)

Pitcher *versus Jones*.

IN an Information for importing 32 Bags of Spices, &c. being of the Growth of Asia, Africa or America, from Holland beyond the Seas, not being the place where such Goods were first, or most usually shipped for Transportation, contra formam Statuti, (being the Act of Navigation) The Defendant pleaded, that he did not import them contra formam Statuti; whereupon Issue was joined and found for the Plaintiff. And it was now moved in Arrest of Judgment, that it was not alledged, that these Commodities were not of the Growth of Holland; to which it was answered, That that is supplied by the Verdict, for if they were, the Verdict ought not to have been for the Plaintiff; and the Information alledging, that they were of the Growth of Asia, Africa or America, and imported from Holland, implies that Holland is not within any of those Parts; especially, it being laid contra formam Statuti, (9)

and Johnsons Case, Cro. 2 Rep. 609. Cholmleys Case, 1 Cro. 464. were cited to that purpose. Et Adjornatur.

But afterwards the Court held it to be a good Exception, and Judgment was arrested upon it.

Sir William Waller *versus* Topham, Stevens, Wilkinson *& al'*.

(9) IN an English Bill for Prisage of Wines, the Case was; The Defendant, Topham, in several Vessels laden at the same time at Amsterdam, imported into the same Port here, viz. That of Hull 10 Tuns and more of Sack and Rhenish Wines; and the question was, whether Prisage should be paid for them, as Wines imported in parcels to defraud the King of his Duty? And two Presidents were cited, Mich. 9 Jac. lib. decret. 220. Sir Thomas Waller *versus* Hill; and Pasch. 5 Car. lib. decret. 292. Waller *versus* Derricke, *& al'*, wherein several Ships of the burden of 30 or 28 Tuns, only 9 Tuns and 3 Hogsheads were imported in each Vessel, and not the quantity of 10 Tuns; and this was held by the Court to be fraud, and that Prisage should be paid for them: but in those Cases the Parties submitted to the Court; and it was also proved that they had often offended in the like kind; but here the Parties never had offended formerly. Also a Proviso in the Statute of 22 H. 8. made for Southampton to exempt them from Prisage, except where 10 Tuns were imported in several Vessels, Vide Hill. 8 Car. lib. decret. 425. Waller and Atkins, being another President to the same purpose; and the Chief Baron conceived that prima facie this should be presumed to be fraud, being imported from the same place, to the same place, and at the same time in several Vessels, and consigned to the same Merchant, and belonging to the same Owner, unless there be some proof to the contrary, to disprove these Presumptions; as that one Vessel was not sufficient to import all, or was almost laden before, or the like; Et adjornatur. But afterwards the Court held it to be fraud upon the said Circumstances.

The

The Kings Attorny General, *and the* Queen Dowager, *and her Trustees for her Joynture*, Plaintiffs, *against* Tarrington *and* Rainesborough *& al'*, Defendants.

UPon a Bill in Equity the Case was, That the King had granted to the Queen for her Jointure, inter alia, the Office of the Custody of Higham Ferrers Park, with all Messuages, Edifices, Lodgings, Buildings, &c. thereunto belonging; and the Herbage and Pawnage of the Park, saving the Soyl, and sufficient Feed for the Deer there, to have and to hold for her Life. The Queen granted the Premises to Sir P. M. for a certain term of years yet to come and unexpired; and the Lessee covenanted to repair all the Buildings, Bridges, &c. from time to time, and so to leave all in good repair at the end of the Term; under which Lessee the Defendants claimed, and during the time of the late Wars, they purchased the Reversion in Fee, and destroyed the Deer, and cut down the Wood and plowed up the Ground, and converted it into arable Land; and the Plaintiffs claim the Office as forfeited, and pray relief for breach of Covenant, and destroying the Fences, &c. and the Court held, that the forfeiture of the Office, if any were committed, was pardoned by the Act of Oblivion; and that the King and Queen Dowager could not join, because their Interests were several; the one in respect of the Office, Herbage and Pawnage, and the other in respect of the Soyl and Inheritance; and if there were a Forfeiture, the Interest of the Queen would be destroyed, and then one Plaintiff would be to be relieved against another, which cannot be. They held also that the breach of Covenant committed before the 24th of June 1660. was pardoned in like manner: but it being a continuing Covenant, recompence ought to be made for what happens since; and the Decree for that must be, not to give Damages, but to perform in specie. And afterwards upon mediation of the Court, the Parties submitted to Mr. Attorny General to end all differences. (10)

Dionysius Andrews *versus* .....

IN an Action upon the Case for undermining the Plaintiffs House, whereby a great part of it fell in and spoiled many of his Goods; Upon not-guilty pleaded, there was a Verdict for the Plaintiff, and Damages given. But the Plaintiff not (11)

being content with the Damages, would not enter up his Judgment upon the Verdict, but brought another Action: And now the Defendant moved that he might have liberty to enter up Judgment upon the Verdict for his own avail, to the end he might plead it to a new Action, and the Court gave leave accordingly.

Burton *and* Hicket.

(12) UPon an Information for transporting Calves-skins, the Case was, By the late Act liberty was given to transport them with reference to the Book of Rates, which gives so much a Dozen Custom, with an Exception of Calves-skins of above 4 l. weight. And in the Book of Rates, at the end, there is another Clause, whereby for all other things imported and exported, for which no certain Rate is limited, Custom shall be paid according to the proportion of the Rates there set down. And now the question arises, whether Calves-skins which weigh more than 4 l. may be transported, paying Custom according to the proportion of the Book of Entries? And the Court held not, because excepted by particular Name in the Book of Rates. And it was not the Intention of the Act to extend this last Clause to things excepted, as these are, but to things not excepted; for the transportation of them was prohibited, till of late leave was given by this Act; and the Act did not intend to suffer Calves-skins of above 4 l. weight to be transported: but if there were any of that size in a dozen of Skins under that size, that would be no obstruction to the Transportation of such Dozen as the Court conceived, though they delivered no positive Opinion as to that point; but because the Parties agreed, the Informer had all that weigh'd above 4 l. and the Defendants all that weigh'd under, delivered to them severally.

De

De Termino Sancti Hillarii Annis 13 & 14 Car. II. Regis. In Scaccario.

Greenway *versus* Horneblow.

AN Action upon the Case was brought against an Executor, upon a Promise made by the Testator to pay 20 l. at his death; and the Plaintiff not having averred that it was not paid in the Testators life-time, that was now moved in Arrest of Judgment, after Verdict; but the Court held it to be well enough, because the Mony was not payable in the Testators life-time; as if Mony be payable at Michaelmas, the Plaintiff needs not aver that it was not paid before; but it is sufficient to assign the Breach as the Contract directs: And the Chief Baron said, it had been adjudged, That if two Persons be to pay Mony, and one of them die, in an Action brought against the Survivor, 'tis sufficient to allledge that the Survivor has not paid it, and that it is aided after Verdict; and that after Verdict it shall not be presumed that the other had paid it; and Judgment was given pro Querente, nisi, &c. (1)

Vincent de La barre *Plaintiff*, Cadwallader Jones *Defendant*.

ACtion upon the Case, wherein the Plaintiff declares, that the late King, having a good Opinion of him, did by his several Letters Patents, under his Great Seal, make him Collector of his Customs and Subsidies of Wooll, &c. in Sandwich, and all Ports and Creeks thereunto belonging, and also Keeper of his Cockets there during pleasure, with all Fees and Perquisites thereunto belonging, wherein the Plaintiff behaved himself honestly and faithfully. That the Defendant malitiously envying his good Condition, and fraudulently intending to deprive him of his good Name, and to cause the said late King to repeal his said Patents, of his Malice forethought, (2)

thought, and without any just cause, upon the 17th day of June 1643. at St. Clements in the County of Middlesex, falsly and malitiously did suggest to the said late King, and cause the said Suggestions to be inserted into other Letters Patents of the said late King, that the Plaintiff did not only extort and take from the Merchants divers Sums of Mony contrary to his Allegiance, and the said late Kings Proclamation; but did also lay out not only those, but divers other Monies of his own to the maintenance of the then present Rebellion; whereas the Plaintiff did not so; by means of which false and malitious Prosecution, the Defendant procured a Patent of Revocation from the said late King, dated the 19th of January 1643. reciting those Suggestions, and discharging the Plaintiff of his said Offices; and that the said late King afterwards by his Letters Patents dated the 14th of Febr. 19 Car. Regis did grant the said Office to the Defendant for his life.

That afterwards 31 of May 1660. the now King returning to his Government, the Plaintiff and Defendant contended about their Interests in the said Offices; and the Plaintiff petitioned the now King to revoke the Letters Patents made to the Defendant, and to grant the said Offices to him de novo; upon which it was referred to the Commissioners of the Treasury, and by them to the Attorny General to certifie whether the said Revocation were legal, and the Letters Patents granted to the Defendant good in Law; whereupon the Plaintiff and Defendant attended the Attorny General, to shew him the said Letters Patents; upon the shewing whereof, one John De la Bar the 4th of August, Anno 12 Regis nunc, at St. Clements aforesaid, did affirm the Suggestions in the said Letters Patents of Revocation then shewed by the Defendant to be false and untrue; to which the Defendant then and there falsly and malitiously answered, and affirmed that they were true; by reason whereof the Plaintiff is hurt in his good Name, and Trade of Merchandise, to his damage of 10000 l.

To the first part, concerning the inserting those false Suggestions into the said Letters Patents; the Defendant pleads the Statute of Limitations, and Issue is taken thereupon.

To the later part he pleads not guilty, which is found for the Plaintiff, and damages given him 500 l.

After which it was moved in Arrest of Judgment; and that Exceptions principally insisted on.

First, That it is not said and averred to be in auditu complurimorum, &c.

2. That the Answer made to John de la Bar was in point of Evidence and Defence.

3. That

3. That it is not averred, that upon the 4th of August when the words were spoken, the Suggestions were read and repeated, whereby the By-standers might apprehend what they were.

Hardres pro Quer'.

As for the 1st Exception, the omission of in auditu complurimorum is added after Verdict; and so it has been adjudged in Smart and Easedales Case, Cro. 3 Rep. 199. and in Heel and Taylors Case, in Mich. 43 and 44 Eliz. in Communi Banco.

As for the second there is a mistake in it; for the answer to John de la Bar was not any way relating to the matter referred; for nothing was referred but this Question, whether the Letters Patents of Revocation were good or not, and whether the Defendant had a legal Grant? which no way concerns the Suggestions upon which the Action is grounded; for be the Suggestions true or false, the said Revocation and the Grant to the Defendant may be good; the validity whereof was the only thing that was referred to the Attorny General; and not the truth or falshood of the Suggestions: So that the affirming that the Suggestions, which in themselves are scandalous, were true, cannot be said to have been by way of Evidence or Justification, being wholly collateral to the matter then in question, Vide Brook and Mountagues Case, Cro. 2 Rep. 90. and Eyres *contra* Sedgewicke, Cro. 2 Rep. 601. Co. 12 Rep. 128.

To the 3d Exception he said, that this Case differed extreamly from the Case in 4 Co. Buckly and Woods Case; for there it does not appear that any thing was spoken but between the Parties themselves; but here the Discourse is with Stangers. And it will be strongly presumed that the Stranger in this Case knew what the Suggestions were, or else he could not have affirmed that they were false; for it shall not be presumed that a Man will affirm a thing to be true or false, which he knows nothing of; and so strong an Intendment will supply a defect in the Declaration.

Somersall *contra* Barnaby, Cro. 2 Rep. 287. In an Action upon the Case to save the Plaintiff harmless, and deliver Lead, it was not said to whom it was to be delivered, but intended to the Plaintiff: so if an Assumpsit be laid, and it is not expressed to whom the Promise was, it shall be intended to have been made to the Plaintiff, Arundel *versus* Gardner; Assumpsit to do a thing upon request, and a request is laid, but it is not said by whom; it shall be intended to have been by the Defendant, Cro. 2 Rep. 652. wherewith agrees, 9 H. 6. Dyer 15. 2 Ed. 4. 20. 3 Ed. 4. 11. 4 Ed. 4. 2. Bradley and Todders Case, Cro 2 Rep

228. A promise to pay 100 l. upon Marriage; the Plaintiff avers the Marriage; and a request of the 100 l. but says not that the Defendant had notice given him of the Marriage; yet this was help't by Intendment, that when after the Marriage he requested payment of the Mony, notice was given of the Marriage, Vide Cro. 2 Rep. Berrisford and Woodroffs Case, and the Earl of Northumberland *versus* Byrt, 2 Cro. 163, 164. In this Case the intendment that John de la Bar knew what the Suggestions were; and consequently for the Defendant to answer and say they were true, is scandalous and actionable: and prayed Judgment pro Quer'.

Judgment was given pro Quer. by the Opinions of the Chief Baron and Baron Turner, against Baron Atkins; but upon a Writ of Error brought in the Exchequer Chamber it was reversed.

Not. per Cur. It is the constant Practice of the Exchequer, That if Fines, Amerciaments, and the Issues of Jurors are once totted, the Party becomes thereby a Debtor to the Sheriff, and the Sheriff to the King; and he must answer for them though he cannot levy them of the Party.

..... *Plaintiff and* Collingwood *Defendant.*

(3) IN the Exchequer Chamber before all the Judges of England, the Case was this; viz. An Antenatus in Scotland, being an Alien, had Issue four Sons, the two elder were Aliens, and the two younger naturalized: One of the younger Sons purchased Lands, and died without Issue; the eldest Brother having Issue born within the Realm; and the question was, who should be his Heir? whether the younger Brother, or the Issue of the elder Brother; and by the Opinions of most of the Judges and Barons, the younger Brother ought to inherit, and not the Issue of the elder.

De

De Termino Paschæ Anno 14 Car. II. Regis. In Scaccario.

John Eccles *Plaintiff and* Richard Calverly *Defendant.*

IN Ejectione Firmæ upon a Special Verdict the Case was, A Man seized in Fee-simple of a Farm and Lands thereunto belonging, called Vines and Lushers Farm, situate, lying and being in F. and E. H. suffers a Common Recovery of the whole, and declares the Uses of all that Farm, and the Lands thereunto belonging, called Vines and Lushers Farm lying in F. to the use of Himself and his Wife for life, for the Jointure of the Wife; whereas part of the Farm containing 21 Acres, lay in E. H. And whether those 21 Acres pass by the Recovery or not, was the sole question. (1)

Sir Robert Atkins, That they do not pass, because the last words which compleat and ascertain the Sense, are restrictive; as in 4 Rep. 50. Andrew Ognels Case. A Rent-charge is granted out of a Farm in the occupation of B. part of which Farm was in the occupation of another Person; no other part of the Farm is charged, but what was in the occupation of B. Hob. 171. Stukely and Butlers Case, accordant, where a difference is made betwe'n Manerium & totum Manerium, Vide Hob. 276. Clanrickards Case, and Dyer 361. So if the Manor of Dale be granted, nothing passeth but what lieth in D. though part of the Manor lie in S. 7 Ed. 4. 14. Long Quinto Ed. 4. 103. 9 Ed. 4. 6. And in Case of a Will, Dyer 261. b. A Man having Lands in a Ville, and in two Hamlets in the same Ville, devises all his Lands in the Ville, and in one of the Hamlets; per Cur. nothing in the other Hamlet passeth. And here the word those Lands, &c. restrain the Sentence, as in 2 Rep. 33. Doddingtons Case, the Pronoun illa; and in 10 Rep. Arthur Legats Case, the words quæ quidem, &c. and concluded pro Quer. Et adjornatur.

The King *versus* Francis Williamson *Esquire.*

(2) IN Scire Fac. upon a Debt due upon a simple Contract for Ale and Beer, amounting to 27 l. which was seized in aid of one Read a Receivor of the King; Proceedings were stayed upon a motion, because amongst the Rules of the Court, made in 15 Car. 1. one was, That no Debt upon Contract should be seized in aid, nisi for the Kings Farmor, or by special Order of Court, Vide 4 Rep. 94. Slades Case, That such Debts were seizable before.

In Trin. 14 Car. 2. it was moved again, and the Inquisition ordered to be quashed.

De

De Term. Trinitatis Anno 14 Car. II. Regis. In Scaccario.

The Attorny General *versus* Thomas Sparrow, Samuel Blackwell *and* Humfrey Blake.

IN Scire Facias against the Defendants (who were Commissioners for Prise-goods and Treasurers, the Accounts whereof are excepted out of the Act of General Pardon, and all such Sums and Goods vested in the King by a late Act) grounded upon an Inquisition, whereby the Defendants were found indebted to the King in the Sum of 10000 l. all Mony for Prise-goods, and to shew cause why the King should not have Execution for this Debt; the Defendants appeared and demurred. (1)

Sawyer pro Defendentibus. Scire Fac. ad satisfac. as this is, does not lie before the Debt be determined upon Record, for it is a Judicial Writ, Vide 27 H. 8. 7. but here before the Account be stated, it is uncertain what the Debt is, by reason of the Allowances that are to be made to the Parties: The Case of Sir William Herbert 3 Rep. is to be understood upon an Account stated and perfected, Vide l'Stat. de 52 H. 3. cap. 27. and 8 Eliz. Dyer 224. which was in case of a refusal to come to an Account; but Process ad computandum issued. First, It was adjudged here last Term in Leman and Blackwells Case, That Process of the Pipe does not lie against an Accountant, which Process is not so strong as this. 2. The auditing and stating of Accounts is a Judicial Act, which must be done by the Barons, by the Statute of 51 H. 3. de Scaccario, and not by Inquisition. 3. It would be very mischievous if this course were allowed; for then upon two Nichils returned, Body, Lands and Goods might be taken in Execution, when perhaps there is nothing at all due, and

the Party would be put to his relief in Equity, which is a long and chargeable way.

Hale Chief Baron. Distringas ad computandum is the usual Process; and the new Act, which vests these Debts in the King, does not alter the nature of them, so as to make that a Debt certain, which in its own nature is uncertain: But conceiving some doubt in the Case upon the Inquisition which was taken before the Act, whereby the Debt was vested in the Crown, though the Scire Facias issued not till afterwards, and upon the Act it self, he advised the Parties to go to an Account voluntarily according to common Form, which they consented to, &c.

The Attorny General *versus* Pickering.

(2) EJectione Firmæ for Lands in Sussex, being tried at the Bar, the Defendant challenged the Polls for default of Hundredors, but did not shew it for Cause till the Pannel was perused; and the Plaintiffs Councel alledged, That this cause of Challenge ought to have been shewn upon taking the Challenge to every of the Polls, and not afterwards. And it was said that this Challenge lies not against the King; sed non allocatur; for it is a Challenge at Common Law, Keilway 102. a. and the Jury thereupon discharged.

Hale Chief Baron. It is against the common course to take a Challenge for want of Hundredors, when the Tryal is at the Bar, upon a Jury returned at the denomination of an Officer of the Court, where there are but twenty four left by the Parties themselves. And he said there were two sorts of Challenges for default of Hundreds, the one, to the Array, where the Sheriff returned none of the Hundred; the other, to the Polls, where none of the Hundred appear. But if this Challenge be taken to the Polls, it must be taken presently, and the special cause assign'd, viz. want of Free hold there; and a Venire Facias de novo shall not issue, because there is no misdemeanour in the Jury, nor any insufficient Verdict given by them, which if it were, would discharge the first Jury. And so there shall not be two Venire Facias's in one and the same Cause, which the Law does not allow of, but a Tales only: Sed Cur. advisare vult, because

because if a Tales only were granted, the Array might be challenged, which would be the same Mischief as before: Et Adjornatur. Et quære de Tales, forasmuch as all the Jurors were challenged by the Polls.

The Attorny General *versus* Colvile.

IN Scire Facias the Case was, That Sir George Binion being the Kings Receiver, and the Defendant endebted to him by Obligation in 600 l. Sir George assigned this Debt to the King for security of his own Debt; and the question was, Whether or no this were pardoned by the Act of Oblivion? And the Court held, That if were it assigned to the King only to secure it the better to the Receiver himself, as it may be by the course of this Court, then it is not pardoned: But otherwise, if it had been assigned in satisfaction for a Debt owing by the Receiver to the King. And the Case is stronger than that of a Debt in Aid; for there the King takes it to that intent, to satisfie his own Debt; but here this Debt is assigned to the King for the particular benefit of the Receiver himself, and is so pleaded, which upon a Demurrer must be admitted to be true. Another day was given, but Judgment entred pro Rege. (3)

The Attorny General *versus Sir* Blewit Stonehouse *an Infant by his* Guardian.

IN Scire Facias upon a Debt of 200 l. due to the King by his Farmer, to whom another Person was endebted by Recognizance in Chancery in 600 l. and this Debt of 600 l. seized in aid, and the Rectory of cum pertinentiis seized by extent at the value of 90 l. per annum. The Defendant as Terre-Tenant only, without making any Title, pleads matter in Equity upon the Statute of 33 H. 8. and that the Sum of 706 l. 17 s. 8 d. had been levied upon this Extent, which was more than would satisfie the Debt of 200 l. due to the King, with Costs and Damages; to which Plea there was a Demurrer; and the (4)

the cause of Demurrer was, because the Defendant recites the seizure to have been per quandam Inquisitionem, which is uncertain; sed non allocatur, because it is only by way of recital of the Inquisition, which was before set forth in the Scire Facias by the words per quandam Inquisitionem, and no other shall be presumed to be in the Case.

Et per Hale Chief Baron. The Terre-Tenant, though he do not make a Title, yet may plead by way of exoneration and discharge of the Land, that the Kings Debt is satisfied; so may any Occupant; so may a Disseisor: but he questioned whether this Plea were well applyed, for it ought to have been pleaded in discharge of the Debt of 600 l. for the whole is to be levied, though it be more than will satisfie the Kings Debt, for it is an entire thing, and cannot be apportioned; otherwise if several Debts had been seized in aid, and one or two of them would have discharged all that were due to the King; and Baron Turner said it had been so held by Chief Baron Walker in this Court, 1 and 2 Car. 1. because the King cannot be Tenant in Common with a common Person of a personal Thing. But it was said to be the common Practice of the Court to have an amoveas manum, when the Kings Debt was levied; and here it appears that the Debt of 600 l. is levied, and more, and the Court said, that no Costs or Damages ought to be allowed in this Case, for the 600 l. is not due upon a Statute, but upon a Recognizance in Chancery. Et Adjornatur.

Dean *and* Chapter *of* Norwich *Plaintiffs, versus* Dr. John Collins *Defendant.*

(4) UPON a Bill in Equity for a Pension of 53 s. and 4 d. issuing yearly out of the Vicarage of St. Stevens in Norwich, of which the Plaintiffs are Patrons, and the Defendant confirmed therein by the Act of Ministers, though there was no Vicarage-house, nor Glebe, nor Tithes, nor other Profits, but only Easter-Offerings, Burials and Christnings, yet per Curiam the Vicar is liable, though he have only casual Profits; and that a Pension by prescription, as this is, may be sued for here, as well as in the Spiritual-

Spiritual-Court, or at the Common Law by a Writ of Annuity.

Charles Hamond *qui sequitur tam*, &c. *quam Plaintiff versus* William Taylor *Defendant.*

IN Debt upon the Statute of 5 and 6 Edw. 6. cap. 14. concerning Ingrossers, &c. for engrossing two thousand Quarters of Oats; after nil debet pleaded, it appeared in Evidence upon a Trial, that they were Forein Oats, and exempted by the 13 Eliz. cap. 23. as Forein Victuals; quod Cur. accord. and also that the Defendant was a licenced Badger, and by that too, exempted from the Penalty of the Statute. And it was held by Hale Chief Baron, That any thing in the same Statute, upon which the Suit is commenced, may be given in Evidence, but if it be in another Statute, it must be pleaded: but that since the Statute of 21 Jac. 1. upon the General Issue any thing may be given in Evidence, and excuse of the Party, and thereupon the Plaintiff was nonsuited. (6)

The Attorny General *Plaintiff versus Sir* Francis Hungate *Defendant.*

IN an Information in the Exchequer-Chamber for the Barony or Manor of Sherborn in the County of York; one Point was this, viz. King Henry VIII. granted the said Manor, with the Appurtenances, and these words follow, quæ omnia are of such a yearly value as is expressed in such a particular, with a Non-obstante of any mis-recital of the true value, or that they were of greater value; and indeed the value was not truly expressed in the particular. (7)

Yet per Hale Chief Baron, the Grant is good; he said the reason why a mistake in the Consideration, or in the

the Kings Title, or the non-recital of an Estate or Lease in being, shall vitiate the Kings Patent, is because by his Prerogative he ought to be truly informed of the truth of his Case; but it is otherwise in case of a Common Person, whose Grant is to be taken most strongly against himself; and that here the Non obstante aids those defects; and it is the proper Office of a Non obstante so to do; as appears 4 Rep. Bozouns Case. And without doubt if there had been such a Non obstante in the Patent, in Arthur Legats Case, after the Clause quæ quidem omnia sunt concelata Non obstante that they are not concealed, all would have passed that was comprised in the Patent; to which all the Court agreed.

De

Mich. 14 *Car.* II. Regis, in Scaccario.

Sir William Waller Plaintiff, *versus* Giles Travers Defendant.

The Plaintiff, as Farmer of the Prizage and Butlerage of Wines within the Kingdom of England, hath exhibited his Information in this Court against the Defendant; for that the Defendant, being a Merchant, did in the Month of February, in the Year of our Lord One thousand Six hundred Fifty nine, Import an Hundred Butts of Spanish Wine into Bristol, and other Out-Ports, of which Prizage, viz. Two Tuns was demanded and not paid. (1) Prizage of Wines.

The Defendant pleads, That at the time of the Importation of the said Wines in the Information mentioned, and long before, he was and still is a Citizen of London; and that by a Charter Granted to the said City of London, in the First year of the Reign of King Edward the First, no Prizage is to be taken of the Wines of the Citizens of London against their Wills, but that thereof they are by the said Charter for ever quit: The Words of the Charter being these; viz. Et quod de Vinis ipsorum Civium nulla prisa fiat per aliquem Ministrum nostrum vel hæredum nostrorum seu alterius, contrà eorum voluntatem; viz. de uno Dolio ante malum, & alio dolio retro malum, nec aliquo alio modo, sed inde perpetuò sint quieti.

Upon which words this Question arose, viz. Whether Prizage should be paid for Citizens Wines out of the City?

Hardres for the Defendant: First, This Charter of King Edward the First, upon which this Privilege is grounded, was Granted for the Advancement and Encouragement of Trade and Merchandize, which are (as it were) the Blood which gives nourishment to the Body Politick of this Kingdom; and therefore it ought to receive a favourable and benign Construction, for the better support and maintenance of Trade and Commerce, the advancement whereof is of great consideration in the Eye of the Law. Insomuch that 2 Hen. 5. 5. A Bond taken to debar a Man from following his Trade, is void in Law. And upon this ground it was, that a Charter granted by King Edward the Third, Anno Regni Tertio, To Almains and other Foreign Merchants, that they might safely and securely come into England with their Merchandizes, and should be free

from Pontage, Murage, and other like Tolls throughout the Kingdom, has been held to be a good Grant: Although the Grantees were no Corporation capable regularly of such a Priviledge; and although such words do not by a general Intendment of Law make them a Corporation: As a Grant Probis hominibus de Islington, without reserving a Rent, does not make them a Corporation. Vide Dyer 1 Mariæ, fol. 100. a. 7 Ed. 4. 14. Yet in regard that the said Grant was made for the Encouragement of Merchants, and the Advancement of Trade, it has been expounded Secundum Legem Mercatoriam; which is Jus Gentium, and not according to the usual and common course of expounding Charters by the Rules of the Common Law. Vide Co. Magn. Chart. & 4 Inst.

And in Co. 11. Rep. 69, 70. Magdalen Colledge Case, it is Adjudged, that the King is within the Statute of 13 Eliz. whereby Colledges, Deans and Chapters, Hospitals, Parsons, Vicars, &c. are prohibited to make any Leases, Gifts, Grants, &c. to any person or persons, Bodies Politick or Corporate, other than for One and twenty Years, or three Lives; the reason of which Resolution is express'd to be, because Laws made for the advancement of Religion and Learning, and the relief of the Poor, ought to have an ample Construction, and shall be extended as far as the words will reach: And the King being included within the Generality of the words, shall not be exempted by Construction; because Summa ratio est, quæ pro Religione facit. But now, by Merchandize and Trade Religion is maintained, Literature advanced, and the Poor cherish'd; all which would suffer a visible decay, if Trade were obstructed: Especially in this Kingdom, which being an Island, is in a great measure maintain'd, and the Crown it self supported by Trade, as one of its main Pillars. And therefore I conceive that a Charter granted as in Our case, for the Advancement of Trade, ought to have a liberal and beneficial Exposition in order thereunto.

13 *Eliz.* cap. 10.

In the Ninth year of King James the First, in Com. Banc. it was held in one Hanger's Case, by the Opinions of four Justices and three Barons against three other Justices, That the Wines of Hanger a Citizen of London, which arrived in the Port of London in two Ships, but whereof the Bulks were not broke in his life time; and in two other Ships, which did not arrive till after his death should be discharged of Prizage. And yet at the time when the Prizage became due, Hanger was no Citizen, but a dead Corps; and consequently according to the Letter of the Charter, and by common Intendment thereupon, those Wines ought to have paid the Duty; for that in truth they were the Goods of his Executors in point of Property and Interest.

Pasch. 9. *Jac.* 1. Rot. 163.

And

And if in that case a sort of strained Construction was made to extend and enlarge the Exemption, beyond the Literal sense of the Words; I hope that in this case a plain, natural and genuine Exposition at least, shall be admitted to exempt a Citizen, being re & nomine such, from the Prizage of these Wines.

My second Reason is taken from the Circumstances of the Persons, to whom this Grant was made. It was made to the City of London, the Metropolitan City, the Heart and Epitome of the whole Kingdom, the King's Chamber, the Merchants whereof fill his Coffers by their Customs, and supply the Subjects with Necessaries, and increase the Honour of the Nation by their Commerce and Traffick abroad, and strengthen it by their Shipping at home: And therefore great reason there is, that the several Charters granted in favour of the City, and whereby Immunities are granted to them, should receive a large and benign Construction.

Upon this ground it is that so many, so large and ample Grants have been from time to time made to the City, by the several Kings of England successively: And it is upon the same Reason, as appears by Co.8 Rep. The Case of the City of London, that many Customs against common Right, and the Rule of the Common Law, and which alter the Course of Justice, are allowable there, though no where else: As for Example, A Custom to Arrest a man for Debt before it become due: A Custom for a Beadle to search a man's House for Suspicious persons, and to arrest and imprison them: A Custom whereby an Executor may pay a Debt upon a simple Contract before a Debt due upon Bond; and others of like nature: Which cannot be said to receive their Validity from Acts of Parliament; for since they would be void in themselves, if pretended to in other places, a General Confirmation by Act of Parliament, of the Customs of the City, would not make them good there. But the great respect which the Law has to the City of London, for the Causes aforesaid, is the reason why such Customs and Priviledges are allow'd to obtain in, and have been granted to the said City, as no other City within the Kingdom does, or by Law can enjoy without a special Act of Parliament. Upon the same Reason it is, that by the Statute of Magna Charta, the Liberties of the City of London are saved by Name, though no other Town or City in particular be named, Magn.Chart.cap.9. viz. by reason of its Eminency, and of the great regard that London is of before other places, as being the support of the Trade of the Nation, and the great Mart and Staple of all Commodities.

My third Reason is; Because if the Discharge granted by this Charter did not extend to Citizens Wines imported elsewhere than at London, it would be a means to lessen the Trade of the City, which is the support of the Citizens. For the City of London being as it were the Magazine of all Foreign Trade, cannot be supported and maintained in its Grandeur by importing Goods into the Thames only; but the Citizens of London import into all parts of the Kingdom, to supply all places with their Merchandize: And if they do not enjoy this Exemption elsewhere, as well as in their own Port, it would tend to the lessening of their Trade, and thwart the design of Granting them this Priviledge. For the Wealth of the City arises by the freedom of Trade, and Encouragement given to the Citizens by their Liberties and Franchises, and by a fair and candid Interpretation and Construction of them.

My fourth Reason is; Because this Grant enures by way of Discharge and Exemption from a Burthen, to which the Citizens had before been liable: And such Grants have always been Expounded more beneficially than others, upon this ground, that Favores ampliandi sunt. And upon this Ground the case is put 19 Hen. 6. 62. The Rector of Edington's Case. And 38 Hen. 6. 10, b. per Danvers, If the King grant to a Parson, that he and his Successors shall be quit of the payment of Tenths, when granted by Parliament; this is a good Grant, being by way of Discharge. But if the King should make a Grant of Tenths to be granted to him by Parliament, the Grant would be void, 22 Ed. 4. Grants 29. The same appears by Charters of Pardon, which are always expounded extensively for the party. So General Pardons by Act of Parliament; as the Stat. of 43 Eliz. cap. 19. Of Pardon, cited 6 Rep. in Edward Phitton's Case: The Act Excepts the Process of Cap' Utlagat' ad satisfaciendum, till such time as the party Outlawed make satisfaction; yet it is held and adjudged, that if he die before satisfaction made, his Executors may make satisfaction, and shall thereupon be admitted to the benefit of the Pardon. So Co. 7 Rep. 18, b. Sir Tho. Cecil's Case, It is held upon the Statute of 33 Hen. 8. cap. 39. for alledging, pleading, and declaring Matter in Law, Reason or good Conscience in discharge of the King's Debt, that the said Statute does not extend to the Cases only that are expressly there provided for, but to all other Cases by Construction. Wherefore since Acts and Charters of Grace and Bounty have always received an Extensive Interpretation, at least so far forth as the words will bear, I hope that in this case the Charter, upon which the Question arises, being a Charter of Grace, will receive a like interpretation

tation for the honour of the King and benefit of the Subject.

My fifth Reason is grounded upon this Rule, which holds in all Cases of Grants from the Crown; viz. That the King's Grants shall be construed largely and liberally with respect to all such things as are in particular granted by Name, though not with respect to all such things as may seem to be comprized within General words. Co. 1 Rep. Altonwood's Case; If the King grant Bona & Catalla felonum, Obligations and things in Action will pass; As Walter Chief Baron said in Clayton's Case, 4 Car. 1. in Scaccar. Upon the Stat. of 21 Jac. 1. Of Pardon, that it had been Adjudged in Mich. 39 & 40 Eliz. in B. R. Inter Essington & Barker, Pasch. 12 Car. B.C. in an Action upon the Stat. de 2 Ed. 6. for payment of Tithes, it was held clearly, that if the King make a Grant of Tithes, All sorts of Tithes pass thereby: But the Doubt in that case was occasioned by a Videlicet in the Grant, viz. of such and such things; and the Question was, Whether Tithes of other things, that were not named, would pass; but if the Videlicet had been out of the Case, there would have been no scruple, but that all sorts of Tithes had passed. So if the King Grants Conusance of Pleas in Debt, the Grant extends to Debts upon Record, as well as to other Debts: Long's Case, Hill. 22 Car. 1. B.R. 11 Hen. 6. 50. Grant of Goods forfeited pro feloniâ vel alio delicto, per quod forisfacere potest catalla, extends to Outlawry in Debt or Trespass. Hob. p. 302, 303. Holland vers. Shelly: Grant of the goods of Outlaws extends to all manner of Outlawries. So in this Case, the Citizens shall have all favour of being discharged of Prizage, which they may have without offering Violence and Injury to the Words of the Charter: But for the Citizens of London, to be discharged of Prizage for Wines imported elsewhere than at London, is as much within the Letter of their Charter, as to be discharged thereof for Wines imported into the Port of London.

My sixth Reason is, That the place of Importation is not limited by the Charter, nor, as I conceive, ought it to be limited and restrained by Construction: Ubi Charta non distinguit, nec nos distinguere debemus. And it is a general Rule, that Clausula Generalis generaliter est Interpretanda. And another Maxim we have, that Propositio indefinita æquipollet Universali. 2 R. 3. 4. 21 Ed. 4. 44. If the King Grants to an Abbot, that he shall be discharged of the payment of Tenths granted per totum Clerum Angliæ, these General words shall discharge such an Abbot from the payment of Tenths granted by the Clergy of the Province of Canterbury, though not granted by the

the Totus Clerus Angliæ; and though the Abbot himself be one of the Grantors: Because such Grants of Exemption and Priviledge have always had a large and beneficial Construction.

It has been strongly objected by the other side, that in this very Charter, the Clauses that go before and follow after this Clause of Discharge of Prizage, and which concern the Citizens being exempted from Purveyances, &c. have these words in them; viz. tam extra quam infra Civitatem: Which words being not inserted into this Clause concerning Prizage, they infer the Intention of the Grant to have been, That they should be discharged of Prizage only for Wines imported infra, and not extrà Civitatem.

To this I Answer, First, That many Clauses are inserted into Patents, rather for explanation than to enlarge the Grant; and sometimes Clauses that are not at all necessary: And the like we see in Acts of Parliament. vid. 1st Rep. 24. b. Porter's Case, and in 4 Co. fo. 72. b. Burrough's Case; if the King make a Lease rendering Rent at the Receit of the Exchequer, or into the Hands of his Baliff; these words are redundant, and the Law would imply them, though they were not express: And therefore if the King should Grant the Reversion of such a Lease over, the Grantée must demand the Rent upon the Land.

Secondly, The Clause in this Charter that concerns discharge of Prizage, imports a Grant of a quite other thing, and of a different nature, and that has no dependance upon the Clauses precedent or subsequent: But is a Clause that stands by it self, and is not affected by any Words, that may be inserted into any of them. And this may appear by the Case afore-cited, of Holland and Shelley, Hob. 302, 303. Where the King Grants the Goods, quorumcunque Utlagatorum & Utlagand. But the Clause preceding mentions, omnia & omnimoda bona & catalla quorumcunque felonum, and the Clause subsequent is, omnium & singulorum pro feloniâ in Exigend' qualitercunque posit' & ponend. And the Question was, Whether the Goods and Chattels of a Person Outlaw'd for Debt or Trespass passed by this Grant? And it was resolved, that they did, though that Clause of quorumcunque Utlagator' & Utlagand' was placed betwixt two Clauses, which concerned Felons: And the Reason given is, because the middle Clause of Outlawry stands perfect of it self, and without dependance upon the other, though it be amongst them: And by the same Reason, this Clause concerning Prizage, ought not to lose any thing of it's force and effect, by its being placed as it is; Which I conceive to be a full answer to that Objection.

By

My Seventh Reason is this; viz. because the Priviledge is annext to the Goods, and not to the Person: As on the other side has been agréed, and is evident by Hanger's Case afore-cited: And consequently wherever the Goods of a Citizen are imported, there the Exemption takes place: And this appears by the Wording of the Grant: It is not said that every Citizen shall be discharged, &c. but de Vinis Civium nulla prisa fiat, &c. so that the force and strength of the Clause rests upon the Word Vinis, and the Word Citizen is but the Genitive Case to it, and a Word that appropriates the Wines to the Persons, whose Wines were intended to be so exempted. As in the Case, 10 Hen. 7. 8. a. If a Man Grant Custodiam prati & arborum vento prostratarum, there if the Grantée take any Windfals, he shall account for them: But if the Words had run thus, viz. Custodiam prati & arbores vento prostratas, he should not have accounted for them. For in the first Case, the effect of the Grant, as to the Trees, depends upon the first Word Custodiam; but in the other Case, the Word Arbores, being put in the Accusative Case, makes it a separate and distinct Grant. So in our Case, the effectual Word, which governs the Period, and with which the Priviledge runs, is the Word Wines: And therefore, where the Wines described in the Grant are found, viz. the Wines of Citizens, there the Exemption takes place, be it where it will.

Eighthly, The place where Prizage shall become due, is but Circumstantial and Accidental, and therefore shall follow and attend the substance; as in the Case 9 Hen. 6. Where a Man Grants Common ubicunque averia sua ierint; there the Grantée may put in his Beasts, when and where he will; because the Grant of Common is the Substance, and the Time and Place is not. So here the Exemption from the duty of Prisage is the Substance, and the Place but Circumstantial and Accidental.

But it has been objected, that this Priviledge has never been enjoyed, but in the Port of London, and that therefore the Charter ought to be so construed, as not to extend to other Ports.

I Answer, First, That indeed Custom and Usage, will in some cases extend an Ancient Grant, beyond what the Words in themselves would otherwise import; as in the Case afore-mentioned, of the Forest of Savernacle; in which Case, the Grant was extended by the better Opinion, to carry Tithes not comprized in the Videlicet. And so in the 9 Rep. in the Case of the Abbot of Strata Mercella.

But

But Non user, will never destroy the validity of a Grant of things, which do not lye in Forfeiture for Non-user, which is our Case.

Secondly, I say, if other Citizens, or the Defendant himself, has at any time or times waived this Priviledge, that ought not to turn to their or his prejudice, whenever they or he shall think fit to claim it. For if any Man have a legal Discharge of Toll, Pontage, Murage, &c. and shall notwithstanding submit to pay those Duties, he may for all that insist upon his Priviledge, when ever he pleases.

Thirdly, Perhaps some Persons [illegible] be chose rather to pay a small sum, than to contend the matter; but that is no argument, that therefore when greater sums are demanded, they ought then to submit in like manner.

But besides all this, We have it in proof, as far as a Negative is capable of being proved, that Prizage has not been paid for Citizens Goods, though Imported elsewhere, than at the Port of London.

The adverse Party rely most upon the Case of the Cinque-Ports, who have the like Priviledge for their Goods, notwithstanding which (say they) it was adjudged in Trinity Term, 7 Jac. 1. in Scaccario, That that Priviledge did not extend beyond the Cinque-Ports, but was Circumscribed within their own Limits.

To which I Answer, First, That if their Priviledge be Circumscribed within their own Limits, viz those of their own Ports, yet they have a larger boundary than the Citizens of London, whom the Plaintiffs Council would restrain as to this Priviledge, to Wines Imported into the Port of London only, where their Bulks are for the most part broken up: And therefore the Inhabitants of the Cinque-Ports, have the more Reason to be Satisfied.

But Secondly, That Priviledge of the Cinque-Ports, stands wholly upon another Foundation, than this of the City of London: For the Priviledges of the Cinque-Ports were first Granted to them, as appears by their Ancient Charters, which I have seen, by reason of their personal attendance to oppose Foreign Invasions, and in consideration of the Charge that they were at therein, and the Hazard, that they were to run thereby. And to encourage them to be the more diligent in attending upon this Service, were their Priviledges Granted to them: And that is the Reason, why their Priviledges do not extend beyond the Limits of the Cinque-Ports, from which they ought not to recede. But the Priviledges and Immunities Granted to the City of London, are upon another Ground,

Ground, viz. because it is the Metropolitam City, Cor Regni & Camera Regis, the Life, source and fountain of all Merchandise and Trade, which furnisheth and supplieth the whole Kingdom with Commodities: And therefore their Priviledges with respect to Trade, ought in Reason to be as extensive as their Trade it self. Which Reason does not hold in that Case, of the Cinque Ports: And therefore the Argument drawn from them, is not conclusive.

I shall conclude with the Statute of 1 Hen. 8. cap. 5. Whereby it is Enacted, That no Citizen of London, or other the Kings Subjects, Inhabiting in any other place Exempt from Prizage, shall custome any other Mens Goods in their own Names in any place, upon Pain of Forfeiting double the value of the Prizage: Whereby it appears to have bèen the Judgment of that Parliament, that the City of London had such a Priviledge, as I contend for. I hope the Court will be of the same Opinion, and give Judgment for the Defendant.

N. B. these words (*in any place*) are not in the Statute.

A few days after, the Barons delivered their Opinions, seriatim.

Baron Turner, Judgment ought to be given for the Plaintiff, for I take it that the Citizens of London, are not discharged of Prizage in the Out-Ports: General words in the King's Patents, shall not always be Generally expounded, but do admit of many Restrictions, Qualifications and Exceptions; and so do the Grants of Subjects in some Cases: As, if a man Grant to another omnes Arbores suas, Fruit-Trees do not pass thereby. Secondly, If the words of this Grant should be extended to All Ports, it would be a great prejudice to other Merchants. Thirdly, Prizage was an ancient Inheritance in the Crown, and therefore, shall not pass from the King without express words. Fourthly, Because the Clauses in the Patent, which are both precedent and subsequent to the Clause in question, and which contain Grants of Exemption to the Citizens of London in other matters, have these express words, viz. tam extrà quàm infrà civitatem prædictam. And Fifthly, The Case of the Cinque-Ports, which has bèen cited and insisted on by the Plaintiffs Council, appears to me to be a Case in point. Wherefore, &c.

Baron Atkyns, Argued for the Plaintiff too; First, Because nothing that is matter of Prerogative, can pass from the King, without express and determinate words. Hob. 243. in Stanhope's Case against the Bishop of Lincoln, Williams and Adamson. Secondly, By comparing the wording of this Clause, with the wording of the Clauses before and after, it appears not to have bèen the King's Intention, that it should pass per totam Angli-

am. Thirdly, To put such a construction, would tend both to the King's dishonour, and to his loss: To his dishonour, by Reason, that so great a number of his other Subjects would receive a prejudice thereby. And to his loss, in respect of his own Revenue, which would be diminished. Fourthly, Because such Patents have been used to be construed strictly, as appears by Sacheverill's Case. And he that enjoys this Priviledge must be Civis & liber homo, free of the City, and an Inhabitant within the City, and a Pater familias too: If he want any of those qualifications, he is not intituled to this Priviledge; as was resolved in Hanger's Case, Moor, Case 1120. So that this Grant has been expounded strictly. vid. 8 Rep. Jehu Webb's Case, upon Grants of the like nature. vid. Sir John Davy's Reports 7.8, &c. le Case de Customs payable pur Merchandises.

Hale Chief Baron Argued on the same side. First, He said this Priviledge ought not to be extended to the Out-Ports, because in the King's Grants, Indefinite words do not import an absolute Universality, as appears by a Case cited in Sir John Davy's Reports, p. 17. a. viz. The King had Granted to a Venetian Merchant, that he should be quit, de omnibus Custumis, subsidiis & Impositionibus, & omnibus aliis denariorum summis debitis & solubilibus pro quibuscunque Merchandizis, importand', &c. and that he should be as Free as the Citizens of London. By colour of which Charter, he claimed to be free of Prizage, because by a Special Charter, the Citizens of London were discharged thereof. And yet it was adjudged, that this Grant did not discharge him of Prizage, because Prizage is not specially express in the Grant. Vid. etiam 2 R. 3. 4. And in our Case, the Grant may well be satisfied, without such a General Exposition, as this. Secondly, He argued from the nature of the thing Granted, which was an Inheritance in the King, and an antient Revenue of the Crown: And there is a great diversity betwixt Grants made by the King of things which were not vested in himself before, but are as it were created by the Grants made thereof, as Exemption from Toll; and Grants of things, which precedent to the Grants, were actually parcel of the Kings Revenue: In which last Case, special words are required; as appears by the Case in Sir John Davy now cited. And it appears by the Red-book in the Exchequer, that Grants of Exemption from Prizage, made to the Merchants of Aquitain, and of other forein places, run in these words, per totum Regnum; and therefore we may reasonably conclude, that this Patent, would have been conceived in the same words, if the Kings intention had been such.

Thirdly,

Thirdly, He argued from the nature of the place, to which this Grant was made; viz. the City of London, which has a Port of its own of a large extent, and therefore there is no necessity of construing the Patent, so as to discharge them elsewhere. If such a Grant were made to the Town of Salisbury, where there is no Port, it were reasonable to allow the discharge to run per totam Angliam, because the Grant could not admit of any other Construction. Fourthly, He considered the manner of the Grant it self; In a Grant made to them by King Hen. 3. Prizage is excepted, but in 1 of Edw. 3. it is remitted to them. And here First, the consideration of the Patent is Local, pro meliorátione Civium. Secondly, The Clauses before and after have Special words, tam extrà quàm infrà Civitatem. And for Authorities, it has been Adjudged in the Case of the Cinque-Ports, upon a like Grant with this before us, that they shall not be discharged out of the Ports. But if a Ship bound for the Port of London, should by stress of Weather, or otherwise be forced into any other Port, in such a case as that, the Citizens are to enjoy their Priviledge, as well as if the Ship had arrived in the Port of London: And so it was held 25 Edw. 3.

And accordingly it was Decreed for the Plaintiff the same Term.

Richard Proctor Esq; *versus* Francis Philips Esq;

IN an Action upon the Case, for disturbing the Plaintiff, to take the Fees and other Profits of one of the Judges Places in the Sheriffs Court in Guild-Hall, London (the Action being laid in London) After Not guilty pleaded by the Defendant, and Issue thereupon, The Plaintiff surmised to the Court, That the Place was granted to him according to the Usage of the City by the Mayor and Aldermen, by which Title he was in: And that the Mayor, Aldermen and Commonalty of the City in Common Council Assembled, pretend a Title to the placing of Judges there: So that it is like to come in question betwixt these distinct parties of the Corporation, whether has the better Right to place Judges: And hereupon he pray'd a Ven. fac' to a forein County, all the Commonalty of the City of London being concerned in the success of the Trial. (2)

But per Hale Chief Baron & totam Curiam, the Surmise is not sufficient to award a Venire facias to a forein County. First, Because it does not appear that the Title will come in

question upon this Issue: For the Defendant may perhaps insist upon some other Title, or that he has not taken the Profits. And in all the Cases that have been cited, as in Hob. Rep. 85. Day and Savage's Case; and in Smith and Hancocke's Case in B.R. and in the Case of one Bowbridge, it appear'd by the Issue that all the County was concern'd; otherwise no forein Venue ought to be awarded. And in the Case between Day and Savage the Question was, whether the Issue should be tried by Certificate, or by a Jury; and not whether a Ven. fac' should issue into a forein County. And in the Case of Smith and Hancocke, the Defendant in Trespass Justified by virtue of the Custom of the City of London; so that the Cities being concerned in the Cause appeared by the Issue, and not by Surmise. Secondly, It does not appear by this Surmise that there is not a sufficient number of Freeholders in the City to try this Issue, who are not Free of the City, nor within the distress of the City, which ought to appear, for else there shall not go a Venire into a forein County. And in the case in Dyer 279. b. concerning the Custom of the City of York, that Wares forein bought and foreign sold within the Liberties of the City should be forfeited and seisible by the Mayor, Viscounts and Citizens, the Venire facias was awarded to the Sheriff of Yorkshire, upon a Suggestion, that there was not a sufficient number of Freeholders within the City, not free of the City, to try the Issue; as appears by Bendloe's Rep. Case 39. Thirdly, It is not here surmised that the Title will come in question, but that it may come in question; which is but a May be. Fourthly, As it appears by the Suggestion, the Contest is betwixt the Corporation of the City it self; and the Question is, Whether the Mayor and Aldermen, or the Mayor, Aldermen and Commonalty, Assembled in Common Council, have the Right to place Judges there: So that the Custom of the City does not come directly in question betwixt them and a Stranger, but amongst themselves. Fifthly, If this Suggestion were admitted to be good, yet in case the other side should deny the fact of it to be true, how should it be tried? To whom should a Venue be awarded to try it? In all cases of forein Venires, they are awarded either by Admittance or Consent of the Parties, or upon a Nient dedire, or a Demurrer overruled; as appears Pl. Com. 79 b. and Dyer 300, 367. So that upon the whole matter they agreed, that the Suggestion would not aid the Plaintiff. But the Court gave him leave to amend his Suggestion, in regard the Defendant had neither pleaded nor demurred to it.

Hobart

Hobart *versus* Barrow.

A Prohibition was moved for to the Delegates, upon a Surmise that the Will in question concerned Lands: (3)
Upon which the case appeared to be thus; Viz. There was a Will proved in Common Form, and afterwards the Plaintiff suggesting that the Testator had made another Will, and a Contest arising upon it, the Second Will was sentenced to be his Will. From which Sentence there was an Appeal to the Delegates: And a Prohibition was now prayed to them Causa qua supra; viz. because the Testator had disposed of Lands by his Will; which is a good ground for a Prohibition primâ facie 6 Rep. Mountague's Case, Brett & Netter's Case, Cro. Car. p. & Dennie's Case, ib. p. which was in case of an Appeal, as our case is.

Hale Chief Baron. The course was at first to grant a Prohibition upon all such Suggestions, and if upon the Trial it appeared that nothing was disposed of in the Will, but Land, then the Prohibition was perpetual: But if there were a personal Estate, and an Executor in the case, then a Consultation was awarded quoad, &c. Afterwards upon suggestion that the Will concern'd Lands and Goods, a Prohibition was used to be granted only quoad the Land. But of Later time, upon a Suggestion that the Will dispos'd of Lands, if the personal Estate were concerned likewise, they have used to deny a Prohibition, because the party is at no prejudice by it with respect to the Land; the Probate in the Spiritual Court being no Evidence against him at Law for the Land. And the Executor would be at a prejudice, if a Prohibition should issue; because then the Executor would be hindred from proving the Will, before which he cannot sue for a Debt due to the Testator, which may be a means to diminish the Estate: Sed Adjornatur.

Being moved on another Day in the same Term, many Precedents were cited for the Granting of Prohibitions quoad the Land. But per Hale Chief Baron; There ought not to be a Prohibition upon this Suggestion: Because in this Cause the Suit before the Delegates is only to put the party into a condition of doing the same thing, which the Plaintiff himself has done already, viz. to prove his Will: And it is grounded upon an Act done by the Plaintiff himself; and if it were not prosecuted, the Defendant would have no means of proving his Will, being ty'd up with a Prohibition; which is unreasonable. But because the Plaintiff had brought his Action here to try his Title to the Land, and the Validity of the Defendant's Will,

and

and offered to proceed in it with effect, the Court ordered a Prohibition, quoad the Land, unless the parties would consent to be concluded by the Probate. And the like was done in another case in this Court, betwixt Minshaw and Spicer.

Samuel Friend *versus* John Drury & al' in Ejectment.

(4) IN an Ejectment of Lands in Sutton-Marsh in Lincolnshire, upon a Title controverted betwixt the Lord Dacres and the Duke of Richmond. It was held by Hale Chief Baron & tot' Curiam, That if a Letter of Attorney be made to enter into all or any part of Lands in the name of the whole, and to make Livery, that the Attorney may enter into any part, though in the possession of several Tenants, and make Livery severally of the several Tenements apart, that he enters to the possession of.

Gill *versus* the Attorney General & al'.

(5) UPon a Bill in Equity the case was, that divers Commissioners of Excise in the Late times for Yorkshire, were bound each for himself, with Sureties to perform for his part all the Articles and Rules of Excise, and to make true payment of all Mony that should be received by himself, or by any other person or persons for him, and by his means, consent or procurement. And it was held in this case, by Hale Chief Baron, that by this Security each Commissioner was bound for himself only, and that they were not bound one for another: But if the words had been (as some of the Bonds did run) that he should answer for all Monies received by himself, or by any other person by his means or assent, that by these words Each would have been bound for the Receits of the other Joynt-Commissioners. But it was held clearly, that if there are Joynt Accountants, Each is liable for the whole; to wit, in the King's Case, though not received by himself; though the Law be otherwise in case of Common Persons: As in case of Joynt Executors, none is chargeable for more than comes to his hands severally. But yet in that case, if by Agreement amongst themselves, one be to receive and intermeddle with such a part of the Estate, and another with such a part, Each of them will be chargeable for the Whole: Because the Receits of Each are pursuant to the Agreement made betwixt both.

. . . *versus*

. . . *versus* Browne & al'.

IN Ejectment for an Estate of the Lord Cobham's in Kent, it was held upon Evidence per Curiam, by Advice of all the other Judges, whom one of the Barons was sent to consult, (quod nota) that if one Witness be Examined for the Defendant, de bene esse, to preserve his Testimony, upon a Bill preferred, and before Answer, and upon an Order of Court for his Examination, made upon hearing of Councel on both sides; and if after Answer the Witness dye before he be Examined again, the Answer coming in on the Eight and twentieth of November, and the Witness's Death happening on the Eighteenth of December following, and he being sick all the mean time, so that he could not go to be Examined; that notwithstanding all this, the Examination of such a Witness should not be read in Evidence, because it was taken before Issue joyned in the Cause, and he might have been Examined after: And the Defendants did not appear to be in contempt. (6)

Compost *versus* . . .

IN an Action of Debt upon the Statute of 2 Ed. 6. for Tithes of Eltham Park in Kent, the General Issue was pleaded; and upon a trial at Bar, it was held upon Evidence by Hale Chief Baron, and the Whole Court, that the King is not by virtue of his Prerogative discharged of Tithes for the Ancient Demesnes of the Crown; but that he is capable of a Discharge de non Decimando by Prescription (because he is Persona mixta) as well as a Bishop. Vide 2 Rep. l'Evesque de Winchester's Case: But if the King alien any of the Lands that he is so discharged of Tithes for, his Patentée shall pay Tithes, and not only so, but the Prescription is destroyed for ever, though the same Lands should afterwards come into the King's hands again, by Escheat or otherwise. (7)

Sir

Sir George Carterett *versus* Sir John Massam.

(8) TO a Bill in Equity preferred by Sir George Carterett, as Debtor to the King and Treasurer of the Navy, the Defendant Sir John Massam pleaded his Priviledge, as one of the Six Clerks in Chancery, under the great Seal. Upon which Case it was held by Hale, Chief Baron, and the whole Court, that a General Priviledge as Debtor, will not hold against a Special Priviledge in another Court, but against a General Priviledge it will. But a Priviledge as Accountant, will hold against a Special Priviledge in another Court, as Officer of the Court or otherwise, though it be not alledged, that such Accountant is entred upon his Account; because that is intended, if the contrary be not shewn. And every Accountant may be Attacht by the Court to make his Account. And in this Case, they held that the Plaintiff being Treasurer to the Navy, was eo ipso an Accountant. But the Plea was overruled specially in this Case, because it appeared by the Bill, that Lands seised into the Kings Hands upon an Extent, were Assigned to the Plaintiff, upon condition that the Assignment should be void, upon the payment of a certain sum of Mony, by the King at a day then past; so that the King had an equitable interest in the Estate.

Moor *versus* Pudsey.

(9) IN Trespass quare clausum fregit, the Defendant Pleads, that Sir Charles Smith was seized in Fee of the Land, &c. and that it was Extended upon an Outlawry, and he the Defendant, by the Sheriffs command entred upon a Levari facias, &c. and so justifies. The Plaintiff in his Replication, protesting that Sir Charles was not seized, says, that the Master and Fellows of Kings Colledge in Cambridge were seized in Fee, and that before the Outlawry and the Inquisition thereupon, they demised to the Plaintiff, Absque hoc, that the Close in which, &c. was contained in the Inquisition. And issue being taken thereupon and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Traverse was naught, and that the seizin in Fee, and not the being comprized in the Inquisition, ought to have been Traversed. But per Curiam, the Travers is well taken, for

for any part, of what the Defendant makes his Title is Traversable: As if in Trespass the Defendant alledge a Seizin in Fee in J. S. and a demise to himself, the Plaintiff may Travers either the Seizin in Fee, or the Demise, at his Election; so here. Besides in this Case, the seizin in Fee is not material, because the Defendant justifies by command from the Sheriff, who had Authority by vertue of the Extent, and Levari fac. though Sir Charles were never seized. Et Judic. intrat. pro Quer.

Ayleway *versus* Markam, the General Searcher.

(10) IN Action upon the Case by Bill against the Defendant as Searcher, for the profits of the Office, Judgment being ready to be entred up for the Plaintiff, for want of a Plea; it seemed to Hale Chief Baron and to the whole Court, that a Suit by Bill does not lie but against those Officers, who are obliged to a Personal attendance in Court, and not against others, such as Searchers, Collectors, Sheriffs, or others, unless they be actually upon their Accounts; for the mischief would else be great, if Searchers and others, whose presence is necessary else where, upon their several Charges and Duties, should be sued here by Bill, and compelled to Answer, without being Summoned, or have Judgment against them by Default: But because the Clerks said, there were many Presidents for it in Court, the Barons appointed a day to be attended with Presidents, and Judgment stayed in the mean time.

Manly & Al' *versus* Lovell.

(11) THe Plaintiffs bring an Action of Trover and Conversion as Executors, against the Defendant for an Obligation; and declare that it was lost in the Testators time, but lay the Conversion since his Death. Two of the Plaintiffs were sever'd and Non Prof. entred as to them; to the third, the Defendant Pleaded non Culp. and found against him, and 500 l. damages given. And now moved in Arrest of Judgment, upon this Severance: And held by Hale Chief Baron, and the whole Court, that Summons and Severance lies not in this Case; because the Conversion, which is the most material part of the Declaration, was in the Executors own time. So that upon the matter, the Action is grounded on their own Possession; as Trespass of their

own Possession: In which Case, Summons and Severance does not lie. And consequently the Nonsuit of one, is the Nonsuit of all: And all the proceedings after are to no purpose. Per Hale Chief Baron, there are two sorts of Severances; One, when a Plaintiff will not appear, there he shall be Summoned and Severed: The other, when all appear, but some one or more will not Prosecute, there he or they shall be Severed by Order of Court. And Judgment in this cause was Arrested.

Sir John Hedworth an Infant, by Sir John Jackson his Guardian Plaintiff, *versus* Josias Primate Defendant.

(2) Upon English Bill the Case was thus; viz. a Man acknowledged a Statute of 1500 l. for the payment of 800 l. with Interest, at the rate of 8 l. per Cent. which being forfeited, and Lands extended upon it, at a certain annual value, The Conusor afterwards, for a good and valuable Consideration, settles the same Lands in Tail: And then borrows more Mony of the same Conusée, and Articles are drawn betwixt them, whereby it is agréed, that this Statute and Extent, shall stand for a security, for the Mony borrowed. Then the Conusor dies, and the Right of Entail descends upon the Plaintiff, and the principal Mony of 800 l. with Interest is satisfied by perception of profits or otherwise: It was held by Chief Baron Hale & totam Curiam, that the Plaintiff could have no relief against the Penalty of this Statute: for both the Statute, and the Settlment in Tail, were for valuable Considerations, and the Mony borrowed afterwards raises an Equity for the Conusee, and the Heir has an Equity, by reason of the Entail: Yet because the Conusée has both Law and Equity of his side, and the Plaintiff has only Equity, till the Penalty of the Statute be satisfied; therefore the Plaintiff shall not be relieved, till the Penalty be levied according to the extended value, or by casual profits, such as Mines, felling of Trées, &c. And by Hale Chief Baron, since the new Act, which reduceth Interest to 6 per Cent. more shall not be allowed upon any Contract, though made before the Statute, by reason of the words of the Statute, which are, That no Person or Persons, &c. shall from and after the 29th of September 1660, upon any Contract, take, &c. above 6 l. per Cent. Whereas the Statute of 21 Jac. 1. cap. 17. runs in these words; viz. upon any Contract to be made after the said four and twentieth day of June, &c. which many do not take notice of; but those words were left out of the New Act on purpose

12 Car. 2. cap. 13.

purpose to leave it in General, to my certain knowledge. But further, the Chief Baron and the whole Court held, that the Defendant here should not be relieved in Equity, for any Mony Lent since the Settlement upon the Credit of his former Security, for then no Purchaser could be safe; and so it was held, Trin. 18. Car. 2. in this Court Inter Poole & Dudley.

Anonymus.

IN an Action of Debt upon a Bond with a Penalty, Conditioned for performance of certain Covenants, Articles and Agreements contained in an Indenture of Lease for a year: The Defendant Pleaded performance of Covenants: The Plaintiff replied, that the Defendant did not pay the Rent, reserved upon the Lease at such a day according to the Form, and Effect of the Condition of the Obligation. The Defendant Rejoyns, and alledges an Entry by the Plaintiff, into the Land Leased before the Rent, and that he kept the Possession till the Rent day was past. Upon which, Issue being taken it was found for the Plaintiff. And now the Defendant moved in Arrest of Judgment, upon a fault in the Replication; viz. That the Plaintiff says, the Defendant paid not his Rent according to the form, &c. of the Condition of the Obligation, whereas there is no mention of any payment of Rent in the Condition of the Bond, but in the Lease only. Sed non allocatur; because the Defendant by his Rejoynder has confess'd, that such a Rent was Arrear, and has waived taking Issue upon it, and taken Issue upon another matter: And therefore this shall be well enough after a Verdict. And per Hale Chief Baron, it is all one in substance, to Plead as the Plaintiff has done, and to have pleaded secundum formam & effectum Indenturæ; for the Condition of the Bond Comprehends all that is Comprized in the Lease. But tho' it might have been made a question upon a Demurrer, there can be no doubt of it after a Verdict. (13)

Anonymus.

(14) IN an Action upon the Case, upon a Promise to redeliver some Rings to the Plaintiff, in as good plight as they were delivered to him, or else to pay him 18 l. in Mony: The Plaintiff averred, that the Defendant had not redelivered to him the Rings, but omitted to say, nor paid him the 18 l. in Mony: And this was held to be naught, though after a Verdict, upon Not-guilty found for the Plaintiff. Because it may well be that the 18 l. was paid, and then the Plaintiff had no cause of Action.

Hill. 14 & 15 *Car.* II. Regis.

Hill *versus* Worseley & Rogison.

(1) UPon a Bill in Equity the Case was, that the Defendant Worseley had Mortgaged Lands to the other Defendant, and then Articled with the Plaintiff, to sell him the same Land free of all Incumbrances, for Two Hundred and Fifty Pounds: Of which Fifty Pounds were actually paid to the Defendant Worseley. Afterward Worseley released to Rogison the condition and power of Redemption, and pending the same Bill, releas'd to the said Rogison, the Mortgagee, all his Right in and to the Lands: But no Mony, or other valuable consideration appeared to have bæn paid, or given for either of these Releases. And the Court held, that neither of these Releases, ought to obstruct the Conveyance to the Plaintiff by Worseley; because they were given without any valuable consideration, and one of them, pending this Suit; and that both the Releases ought to be set aside as to the Plaintiff. But they doubted, whether upon this Bill, the Defendant Rogison could be compelled to convey his Estate to the Plaintiff upon the payment, of what was due upon the Mortgage with Interest; because the Bill prays only a Discovery against Rogison, and that Worseley should make the Assurance, and to be relieved in the premisses; and no conveyance from Rogison is required.

Ano-

Anonymus.

THe Award of the Venire upon the Roll was 17 Aprilis: And the Ven' bore Teste the 18th of April; and yet it was amended after Verdict: Because the Award upon the Roll is the Warrant, and it is is but the Default of the Clerk. And it is all one as if the Ven' fac' had born Teste before the Award upon the Roll, or upon the Lord's Day. (2)

Bell *versus* Chaplain.

IN an Action upon the Case upon a Promise, the case was thus; The Plaintiff had delivered another man's Goods to the Defendant: And the Defendant thereupon promised in consideration of a Sum of Mony given him by the Plaintiff, to deliver them to the Owner, and did not deliver them. In this case the Deliverer, or the Owner, may have an Action against him; but they cannot Joyn where the Consideration is not Joynt: As when in Consideration of Ten Shillings given by two men, a Man assumes to do something to or for them severally, or to or for a Stranger. But if the Consideration be several; as for Example, in Consideration of Ten shillings paid by one, and Ten Shillings by another; there they must sever in the Action. And if a third person be to have the benefit of the Promise, as in the case of Father and Son, where a Promise is made to the Father for the benefit of the Son, there they cannot Joyn; but either of them may bring the Action. But in that case the Declaration must be upon a Promise made to the Father, though the Son bring the Action. So if in Consideration of Five Shillings given to the Defendant, he promise to pay so much to one, and so much to another; he to whom the Promise is made may bring the Action, and the breach of Promise and the Consideration given is a sufficient Damage to him. (3)

Per Curiam.

Stone *versus* Ludlowe & al'.

IN a Bill for Tithes due to the Complainant, as Vicar and Incumbent of in Essex, the Complainant did not shew how he was Entitled to them, viz. by Prescription, Endowment, or otherwise. And the Court held it to be good notwith- (4)

withstanding, as well as in an Action at Law for Tithes upon the Statute of 2 Ed. 6. the Plaintiff is not obliged to set forth his Title. Quod nota; for it is against many Presidents in this Court, which I have known of Demurrers for that cause, held to be good.

Page's Case.

(5) IN a Bill for Tithes, the Defendant by his Answer set forth, That the Lands whereof Tithes were demanded, were parcel of the Priory of and that the Lands belonging to that Priory were discharged by Order, without saying more. And this was held sufficient: Quod nota; because of the Uncertainty.

Pasch. 15 *Car.* II. Regis.

Anthony Mildmay's Case.

(1) Summons of the Pipe. SUmmons of the Pipe issued against him to levy Five hundred Pounds upon a Super set upon him by one Jones, Treasurer of certain Sums of Mony in the late Times. And a Supersedeas was now moved for, because this being an Execution against Body and Goods, the party cannot else be received to plead in discharge of it. And per Hale Chief Baron, Summons of the Pipe ought not to issue but for a Debt upon Record, or a Debt stated and determined, and not for Mony due upon matter in Pais, as this Case is. Wherefore if a Collector in Chief charge his Under-Collector upon account, or an Under-Collector charge any particular person within his Precinct; or if any Accountant charge another together with himself, for Timber or other goods of the King's sold to him and not paid for, Summons of the Pipe shall not issue in these cases, but a Scire facias, or a Distringas ad Computandum, to which the party may plead: For that these Debts are not Debts upon Record; but arise upon the Accountant's Charge only: And so here. Wherefore in this Case, the Summons of the Pipe was Superseded; and a Scire facias ad Computandum awarded.

Thur-

Thurbane & al'.

COmmission of Rebellion issued against one Thurbane of Gowtherst in Kent, and one Green appear'd before the Commissioners and affirmed himself to be the person, whereupon they apprehended him by virtue of their Commission; but he made resistance, and snatch'd the Commission from them and tore it in pieces. Upon Affidavit made of this matter, an Attachment was prayed against Green. Hale Chief Baron; If a wrong Man be taken, though he affirm himself to be the person against whom the Commission is awarded, yet the Commissioners having no Warrant to take him by their Commission, his affirming himself to be the person will not excuse them in false Imprisonment; as has been held upon the Executing of a Capias. But an Attachment was granted, Nisi, &c upon this Affidavit. (2) Commission de Rebellion.

Francis Knight *versus* Garnons Dauler.

IN Ejectione firmæ, for the Rectory of Burghfield in the County of Berks: Upon a demise for years made by Dr. Griffith, and a Tryal at Bar, the Case upon Evidence appeared to be; That the Earl of being a Popish Recusant Convict had presented the Lessor; who thereupon was instituted and inducted into the said Rectory: But the Record of the Conviction was burnt, as was supposed, amongst other Records of the same nature in the Inner Temple: Wherefore the Defendant offered to prove it by other Evidence, as by the Estreat thereof into the Exchequer, and made accordingly by Authority of this Court from time to time, as also by Inquisition found and returned here of Recusants Lands. And it was held by Hale Chief Baron, and the Whole Court, That in such a case as this a Record may be proved by Evidence, because the Conviction here is not the direct Matter in Issue, but is only inducement to it; as if an Appropriation were in issue, the King's Licence, if it could not be found upon Record, might be proved in Evidence without shewing a Record of it, although it be the Foundation of the Appropriation. So in Sir Paul Pinder's Case, In an Action of Trover and Conversion for Goods, the Proof depended upon a Fieri facias & Venditioni exponas; and yet in that case, because the Fieri facias could not be found upon Record (3) Record proved in Evidence.

cord, it was admitted to be proved in Evidence: So in this Case. But then the Proof must be strong and cogent, slight and ordinary Evidence will not serve the turn. Accordingly in this case the Conviction was admitted to be proved in Evidence. But because by the Estreat of this Conviction into the Exchequer, it appeared to have been at the same Assizes, at which the party was presented as a Recusant, which neither the Statute of 23 nor 29 Eliz. does allow of: for a Proclamation is directed to be made at the same Assizes or Gaol delivery, in which the Indictment shall be taken (if the same be taken at any Assize or Gaol-delivery) by which it shall be commanded, that the Body of such Offender shall be rendred to the Sheriff of the same County, before the next Assizes, &c. Upon this it was held, that the Conviction was not sufficiently proved, and the Jury found for the Plaintiff, &c.

The Attorney General *versus* Hutchinson & Pococke.

(4) Act de Indemnity.

IN a Scire facias against them, for Two thousand two hundred seventy and two pounds due upon Account, to which they pleaded the Act of Indempnity, and the Attorney General by Replication pleaded the Act of Vesting made 13 Car. 2. cap. 3. and the Defendants demurr'd to it: The Case upon the Demurrer appear'd to be, That these Defendanrs were authorized to have a care of sick and maimed Soldiers, and their Wives and Children: And that by order of the Committee for the Revenue, in the Late times, they were impowered to receive divers Sums of Mony of other Collectors and Receivers in those times for that purpose; and that accordingly they, and others by their Order, received divers great Sums, for which the Defendants were now found in arrear by certain Commissioners of Enquiry. And it was held by Hale Chief Baron: 1. That none of these Sums are excepted out of the Act of General Pardon, because they are not in the hands of any Receiver, Treasurer, Farmer, or Collector, which are the persons excepted; (Vid. L'Act de Obliv' 12 Car. 2. cap. 11. Paragraph 10, 11.) but these were Moneys received of them by Order; and so neither within the Words, nor the Intention of the Exception. 2. But yet he questioned whether these Sums were pardoned or no, because given to Charitable Uses, and so not within the Intent of the Act. But Thirdly, he held clearly, that the Misrecital of the Entituling of the Act of Vesting did not vitiate the Replication, because it is not Matter of substance. Et Adjornatur.

Cotton

Cotton *versus* Wiseman in B.R.

IN Ejectione firmæ for Lands in Kent, a Question arose upon a Special Verdict, viz. Whether or no by the Statute of 31 Hen. 8. cap. 3. and a Private Act made 2 & 3 Ed. 6. (whereby amongst other things the Lands in question were disgavell'd, To all intents, constructions and purposes whatsoever, and that they should descend as Lands at Common Law, any Custom, &c. notwithstanding:) Gavelkind Lands, by those Acts made descendible according to the course of the Common Law, lose any other Qualities or Customs appertaining to Gavelkind Lands? And Resolv'd per Cur', that they do not: For it was not the design of either of those two Acts to divest those Lands of any of their former Priviledges; not expressly altered by the Letter of those Laws. For else instead of a benefit, which the Acts intended them, the Owners of Gavelkind Lands would suffer a great Prejudice by the loss of their former Priviledges; as in case of forfeiture for Felony, and the like, &c.

(5) Gavelkind. Vide est Case Reported at large in *Syderfin*, p. 77, & 135, 136, &c.

Thomas Morrice *versus* William Antrobus.

ACtion upon the Case. A Trial at Law was directed out of the Exchequer-Chamber, Whether or no a Lease made by the Petty Canons of S. Pauls for One and twenty years, were a good Lease in Law, yea, or no? And the Case upon Trial appear'd to be, That upon the 14th of Octob. Anno 13 Car. 2. they made a Lease for One and twenty Years of the Rectory of S. Gregory's, near to S. Paul's, to the Plaintiff and his Wife, rendring Forty pounds a Year; and the Plaintiff covenanted to pay over and above a couple of Capons yearly, or Six shillings and Eight pence in Mony: And it appeared upon Evidence, that in a former Lease made divers years ago, there had only been Five and twenty pounds Rent reserved; that in another Lease there had bẽn Thirty seven pounds reserved; and in another, Eight and thirty pounds per Annum; but that in the last Lease of all, precedent to this now in question, Forty pounds per Annum had bẽn reserved, and a couple of Capons; and that the Exceptions out of the other Leases were more large, than out of the Lease now in being. And held by Hale Chief Baron, That the Statute of 32 H. 8. cap. 28. is a Pat-

(6) Lease per les Petty Canons de S. *Pauls*.

tern for the Expounding of that of 13 Eliz. cap. 10. But that the Accustomed Rent mentioned in the Statute ought to be understood of the Rent reserved upon the last Lease, and not upon the first: For that Rent having been alter'd since, cannot be called the Accustomed Rent. And that if a Corporation Aggregate makes a Lease not warranted by the 13 of Eliz. that such Lease is void against themselves, as has often been Adjudged: But if a Sole Corporation make such a Lease, it shall bind him, though it shall be void against his Successor. He held likewise, that the Variances betwixt the former Leases and this in being, both with respect to the Exceptions of Tithes, and other things there excepted, which are not excepted here, and in the Reservation it self, are material, and sufficient to make void the Lease: For in the former Lease before this, the Capons were reserved, and so part of the Rent: Here the Lessee only Covenants to pay them, which Covenant of his will not bind his Wife, if she survive him; and therefore his Covenant will not amount to a Reservation. Otherwise, if both had Covenanted; or if the Lease had been made to the Husband alone with such a Covenant. And it was agreed in this case, that a Lease for 21 Years, made of Tithes, is a good Lease within the Statute; but not a Lease for three Lives; because Debt lies not for the Rent. And the Parties, by the Courts Advice, referred themselves to the Attorney General, who was of Councel for the Defendants.

DE

De Termino Sanctæ Trinitatis, Anno 15 *Car.* II. Regis.

In Scaccario.

Richard Proctor Esq; *versus* Francis Phillips Esq;

IN an Action of Trover and Conversion for Mony in the County of Essex, after Not guilty pleaded, and a Trial at Bar appointed, the Recorder of London now moved that the Cause might be tried in London; because it concerned the Office of a Judge's Place in the Sheriff's Court in London: And that by their Charter confirm'd by Act of Parliament, Matters that concern the City, or any Office there, ought to be tried there and not elsewhere. And he produced a Writ out of the Chancery, under the Broad Seal, for Allowing the Liberties of the City; and insisted, That it appeared by Affidavits made is this Cause for changing the Venue, that the Matter in question arose within the City, and concern'd it: And pray'd the Cause might be tried in London. Sed nod allocatur per Curiam; First, Because it does not appear to the Court upon Record, that the cause of Action arose within the City. And Affidavits in the Cause are not sufficient; they being only Collateral and Interlocutory Matters of Record in the proceedings, and out of the pleadings. Secondly, Because this Prayer comes too late, being after Issue joyned: And after a Plea, or a Special Imparlance, the plea of Ancient Demesne, or the like, comes too late. Thirdly, If it were allow'd, the party would be without remedy, it being after Issue joyn'd, because the Action is laid in another County; and so the Plaintiff should be enforced to suffer a Nonsuit, or have a Nil Capias per Billam entred against him. Fourthly, Because it appears by the same Affidavits, that the City it self is concern'd; and it is against Reason, that they should try their own Cause: Nor is such a Priviledge granted to them by their Charter. And so it was Ruled and Adjudged in Smith and Hancock's Case in B.R. in an Action of Trover and Conversion, brought for Goods seized by the Officers of the City, as forfeited to the City by the Custom there; viz. That that Cause should not be tried by Certificate (1)

by the Mouth of the Recorder; but upon a surmise of Special Matter, it was tried by a Jury of the County of Surry. Et Adjornatur.

It was moved at another day by Serjeant Keeling, to have the Supersedeas allowed, and the Cause tried in the City, although Conusance of Pleas could not be demanded after Issue: He cited the Register of Writs, fo.180. where a Supersedeas issued to have an Issue tried at the Bar, which was awarded to be tried by Nisi prius; and Regist.91, to the same purpose. To which the Court answered, That the Writ in this Cause came too late, and that it was not possible, after Issue joyned, and a Venire facias awarded to try it in Essex, for the Issue to be tried in London. And although, as appears by the Regist. fol. 4. a Supersedeas lies for the trial of Lands held in Capite in such or such a Court; yet after Issue joyned such a Supersedeas lies not, but has been refused, as appears by 6 Ed.3. fol.15. So in case of Priviledge, it is too late after Plea to claim it, Dyer 33, 34. Although in the 1st Part of King H.6. it was controverted; and in Crew and Done's Case in B.R. in Trover and Conversion for Corn, laid in Middlesex, whereas in truth the cause of Action arose in Cheshire, there were Special pleadings to draw the Cause down and make it triable in Cheshire; to which there was a Demurrer. But the Court did nothing in it.

At last, upon the Serjeant's Prayer the Writ was entred upon Record de bene esse; but no stop put to the Trial.

Henry Twisse, Clerk, Plaintiff; and *Brazen-Nose Colledge* in *Oxford*, Blount, Archer and Carpenter, Defendants.

(2) IN a Bill at the Suit of the Vicar of Gillingham in Kent, for Tithes of the Manor of Uxbury, and other Lands belonging to the Rectory Impropriate of Gillingham aforesaid; the Tithes demanded being for Eight years last past, and ending in the Year of our Lord One thousand six hundred sixty and one. The Case upon Hearing appear'd to be, that for divers years before the Bill Exhibited in the Times of many Vicars, the said Tithes had been Enjoyed by the said Vicars of Gillingham aforesaid: But an Endowment was produced, bearing Date the Seventh of March, in the Year One thousand three hundred sixty two, mentioned to have been made by Islipp, then Archbishop of Canterbury, and preserv'd in the Archbishop's Register; by which it did not appear that the Vicar was Endowed with any Tithes

Tithes of Corn or Grain: Nor in the said Instrument of Endowment, was liberty reserved to the Archbishop, as is usual in such Cases, to Augment or Diminish, &c. and it was thereupon insisted, that the Vicar ought not to have those Tithes. But the Court held, that where a Vicar has used time out of mind, or for a long time, to take Tithes or other profits, he shall not be concluded, by their not being express't in the Endowment of the Vicarage: And that it has been often so held and ruled. And it shall be presumed by Reason of a long Possession of such Tithes, &c. that the Vicarage has at some time or other been Augmented therewith. And the not reserving such a power to the Archbishop is not material; for an Augmentation may have been notwithstanding, with the Assent of, or upon Citing all parties, but not without Notice or Citation; as it may be, when such a Power as aforesaid, is reserved to the Archbishop.

Dashfield *versus* Curnocke.

(3) IN an English Bill for Tithes of a Park due to the Plaintiff, as Vicar of Barkly in Glocestershire, for Ten years last past: The Case upon hearing appeared to be, that one Dr. Chetwin was Vicar there, and one Nicholas Paul his Curate, and that after the Death of Dr. Chetwin, who died about Ten years ago, the said Paul held in as Vicar, and officiated as such till August, Anno Domini 1661. and that for refusing to Subscribe according to the New Act, and to conform to the Discipline of the Church of England, he was removed, and the Plaintiff presented to the Vicarage. And the Court held clearly that the Plaintiff was entituled to all the Vicarage-Tithes, that became due since the Death of Dr. Chetwin, during the Vacation, for that Paul was not Confirmed in the Vicarage by the Act for Confirming Ministers; because he was not Incumbent by any of the ways or means mentioned in that Act, (vid. the Act Parag. 1.) as he ought to be, if he would entitle himself to the benefit of the said Act. But because it was hard upon the Tenant to pay so much at once, though he had paid no Tithes in the mean time, viz. for Ten years last past, before the Bill Exhibited: And also because the now Plaintiff is removed from the said Vicarage, having accepted of another Benefice, and was Vicar there but a Twelvemonth; For these Causes, though the Tithes in question were worth 10 l. a year, Communibus annis, yet through the mediation of the Court, the Plaintiff accepted

12 Car. 2. cap. 17.

accepted of 65 l. in Satisfaction for the whole, Costs of Suit included, and the Mony to be paid the next Term: And so it was decreed, &c.

Anonymus.

(4) IN Termino Paschæ in May a Distringas Issued against the Jurors returnable Tres Trin. nisi prius venerit Matheus Hale Mil. Capital' Baro, &c. on such a day, ejusdem mensis Junii, whereas no Month of June was mentioned before: After Verdict, this was moved in Arrest of Judgment, as a Discontinuance; And it was held by the Chief Baron and the whole Court, that the word Ejusdem shall be void, and the word Junii shall stand and be intended June next ensuing, as a Covenant to pay Mony at Michaelmass, shall be intended Michaelmass next.

Wheeler *versus* Toulson.

(5) EJectione firmæ for so many Acres of Meadow, and so many Acres of Pasture; upon Not Guilty Pleaded, the Jury find a Demise de Herbagio & Pannagio of so many Acres. And the Question was, whether this Evidence did or did not maintain the Issue for the Plaintiff? It was moved that it did, because an Ejectment lies de Herbagio. v. Reg. 227. And that this Evidence is for the Plaintiff, Cro. Eliz. 676. Spark's Case was Cited; viz. that an Ejectione firmæ was but in the nature of a Trespass, and Cr. Car. 362. so if a Lease be found made by a Guardian or a Copy-holder, such a Lease will maintain the Declaration, though their Leases and Grants are void against the Lord and the Infant. But the Court inclined against the Plaintiff. First, Because by the same Reason, that an Ejectment lies upon a Lease of Herbage, by the same Reason the Plaintiff ought to Declare accordingly: As in the Case of 27 Hen. 8. where Pasture is granted for Ten Oxen, the Precipe must run accordingly, And so here. 2 Herbage does not include all the Profit of the Soyl, but only part of it. As Co. 1. Instit. fol. 4. b. Et Adjurnatur.

Workman

Workman *versus* Chappel.

IN an Action upon the Case, upon several Promises for Curing the Plaintiff of a Sore, and applying several Medicines to him, and for the Medicines themselves. The Defendant pleaded, that he had paid to the Plaintiff Threescore pounds for the Medicines, and the Application of them; whereupon Issue was taken, and a Verdict for the Plaintiff: And the Court was now moved for a Repleader, because the Cure is not answered to, and the Plaintiff has Declared upon that, as well as upon the Price and Application of the Medicines; And per Curiam, there ought to be a Repleader in this Case: For the Plea here is to the whole, and is naught. And this Case differs from the Case of a Discontinuance cited Co. 11. Rep. in Heydon's Case; for the Plea there was pleaded but to part, and a Discontinuance is aided by the Statute after Verdict. Et issint le diversity. (6) 32 Hen. 8. cap. 31.

Watt's Case.

IN an Information of Forgery for Publishing a forged Deed, pretended to have been the Act and Deed of one Coke, knowing it to be Forged: Upon Not-Guilty pleaded, it appeared to the Jury upon Evidence, that the said Deed imported a Revocation of the Will, and of a Codicil annex't to the Will of the said Coke, to the prejudice of the Executors and sundry Legatees named in the Will. And it was held per Curiam, upon Conference with the Judges of the King's Bench, whom one of the Barons was sent to advise with. First; That a Trustee, who has convey'd over his Estate in Trust, or has assented thereunto, cannot be a Witness for the King in this Case: Nor can a Legatee, or any other Person that is a loser by the Deed, or may receive any advantage by the Verdict's being found for the King. And for this Dutton and Colt's Case was cited, being a Case in Point, in B. R. And it is the same in case of Perjury, he that is injured by the Perjury, shall not be received as a Witness; because if the Verdict pass for the King, he will consequentially reap an advantage by it. But in case of an Indictment for Battery, he that was beaten may be a Witness, because he can reap no benefit by the Verdict in (7)

in another Suit: And the Cause is of small moment. But in case of Forgery, Perjury or Usury, (as appears Co. 1. Inst. fol. 9. b.) the party grieved may have an advantage by the Verdict, and therefore shall not be received as a Witness; & ifsint le diversity. It was likewise held, that if Witnesses are Examined de benè esse before answer, upon a Contempt, such Depositions cannot be made use of in any other Court, but the Court only where they were taken. The Reason seems to be, because there was no Issue joyned, so as there could be a legal Examination; and they were only taken to be Read in the Court, in which they were taken, upon a Contempt to that Particular Court.

De Termino Sancti Michaelis, Anno 15 *Car.* II. Regis.

In Scaccario.

Wilson of the Middle Temple, *versus*, &c.

(1) IN Debt upon the Statute of 32 H. 8. cap. for the Arrearages of an Annuity, Devised to the Plaintiff's Wife for Life, who was Dead before the Action brought, against the Administrator of the Terre-Tenant and Occupier of the Land, out of which, &c. The Defendant pleaded Nill Detinet, upon which the Plaintiff Demurred. And the question was upon the Demurrer, whether this were a good Plea or not in this Action? Because the Action is grounded upon a Will in Writing, which (as was urged) is equivalent to a Deed; and to a Deed it were not a good Plea: As in Case of Debt upon a Bond, or otherwise upon Specialty. But where an Action of Debt is grounded upon matter in pais only, as upon Prescription, or upon a Deed, that is not requisite to maintain the Action, as for Rent, reserved upon a Lease by Deed, there it is a good Plea: And the Books go upon this difference; vid. 19 Hen. 8. 9. 22 Ed. 4. 51. 5 H. 7. 23. 9 Ed. 4. 53. 10 H. 7. 24. 21 H. 7. 14. But per Hale Chief Baron; the Cases are not alike: For a Will is not a Deed, though it be as effectual to pass a thing, as a Deed is. Yet it is not a Deed in it's own nature; because there needs no

no sealing nor delivery to a Will; which is essential to a Deed. And therefore Nil detinet is a good Plea to an Action of Debt grounded upon a Will, as well as to an Action of Debt upon a Tally: And the Action here is not so much grounded upon the Will it self, as upon a Statute Law, which enables men to dispose of their Lands, and of Rents out of Lands by their Wills. In an Action of Debt upon a Grant of a Rent Nil detinet is a good Plea, because the Plaintiff has other remedy to Levy it; viz. by Distress; but it is not a good Plea, to an Action grounded upon a Grant of a bare Annuity, because the Grantée in such a case has no remedy by Distress: And therefore in that case, the Defendant must avoid it by matter of as high a nature, as by acquittance under Seal or the like. But because it appeared to the Court, that the Action was brought in Middlesex: And that the Houses, out of which this Annuity was devised, lay in London, which made the Action Local, by reason of the pernancy of the profits, the whole Court enclined against the Plaintiff. Et Adjurnatur.

Richard Henchman Clerk Plaintiff, *versus* William Ayer and three others Defendants.

Upon a Bill in Equity to be relieved, and to recover the payment of One hundred pounds a year, agrèed to be paid to the Plaintiff by a Vestry Order, made by the Defendants and others the Parishioners of S. Buttolphs Bishopsgate, for a yearly Lecture in the Parish; because it appeared to the Court, that all the parties to the Order were not made Defendants, and that these Persons who were made Defendants, had paid their proportions of the Salary: The Court were of Opinion, that the Plaintiff could not have a Decrée in the Cause: But advised the Defendants to propound at their next Vestry, the payment of the Arreares, which the Court, conceived to be justly due, and which it was a Disreputation to the Parish to refuse the payment of. (2)

Mrs. Ashe's Case.

(3) SHe had obtained of the King a Privy Seal, whereby was Granted to her the Forfeiture of certain Recognisances, for appearing at the Sessions, amounting in the whole to 800 l. And it was now made a question, whether the Court might compound these Forfeitures by vertue of their Privy Seal, which was granted before the Privy Seal and Grant to Mrs. Ashe? And it was doubted, whether this latter Privy Seal did not take away and revoke the Power given to the Court in this Particular: But it was held clearly per Curiam, that the Court might upon good matter in equity discharge these Debts, by vertue of the Stat. of 33 Hen. 8. cap. 39. And the Case in question seemed a hard Case to the Court, because the party himself was in Cause, why there was no Appearance, by Beating the Parties so hainously, the very day before they ought to have appeared, that they were disabled thereby to appear.

The Atturny General *versus* Ralph Tooke.

(4) TO an Information for Arrears of Excise, due for certain Barrels of Soap: The Defendant pleaded, that by a late Act for Vesting the Arrears thereof in the King, it is provided that no Person shall be questioned or molested for any of the Duties therein or thereby Vested in his Majesty, unless he shall be Sued or Prosecuted with effect before the 25th day of Dec. which should be Anno Dom. 1662. And that he was not questioned or molested for the same, before that time. To which Plea the Attorny General demurr'd. And now one cause of Demurrer was shewn to be this; viz. because the Act of Parliament was pleaded, and it is not averr'd, prout patet per Recordum: So that no Issue can be taken upon it. But to this it was answered by the Court, that such Averment needs not in this case, because the Act is a General Law, for it concerns the King, and the Court is bound ex officio to take notice of it, though it were not pleaded, so that no Issue can or ought to be taken upon it; for if there be no such Act, the pleading of it is to no purpose, and the Court must of their own Knowledge adjudge it to be no Plea. The Second Cause of

Stat. Anno. 13. Car. 2. cap. 12.

of Demurrer was, because as Mr. Attorny General said, these Arrears of Excise were vested in the King, by an Exception out of the Act of Oblivion; for they are not in that Exception limited to any other: And all Publick Duties do of course appertain to the King, where no other Person is appointed to take and receive them. And that the Act of Vesting does not fetch them out of the Crown, or give the King a new Title to them, but was intended to Vest in the King such Arrears only, as were excepted by the General Act of Pardon, and were then in the Hands of Trustees or other Persons, according to the late pretended Acts of Excise: But the Arrears in the Case in question, are none of those Arrears. To which it was Answered by Hale Chief Baron, that though these Arrears would have been Vested in the King, though the said Act of Vesting never had been made, yet because the said Act was made for this purpose only, and for no other, the said Arrears shall now be looked upon as Vested in the King, by vertue of the said Act only, and no otherwise; for else the Act would be to no purpose, but be Frivolous and Impertinent: Which was not the intent of them that made it. And therefore, unless the directions of the Act be pursued, the King loseth his remedy; And there may be a difference betwixt a General Act of Vesting, and such a Particular Act as this; for perchance such a Case as this, might happen not to be within a General Act; but then there are matters besides sufficient to make the Act effectual: But here the Act concerns the duty of Excise only, nor is there any thing else in the Purview. And therefore, those Arrears must be governed by the Act. But yet because it was a matter of great Importance, and many Securities and Suits depended upon it; Adjurnatur.

V. 12 Car. 2. cap. 11. Par. 10.

Blake *versus* John and James Vander Bergh.

(5) IN an Information for not paying Custom for some Linnen Cloath, the Case was thus; viz. The Defendants were Born within the Realm, their Father being an Alien, but their Mother Born here: And the Question was, Whether the Defendants being so Born as aforesaid, should pay Aliens Custom, or not? Because the Attorny General said, that directions were lately given in Scaccario, that the Issue of Aliens for the first Generation, being Merchants, should pay Aliens Duties. But here the Defendants Mother was Eng-

lish. And the Court gave Liberty to find this Specially. But the Plaintiff would not insist upon it, because some part of the Goods were clearly forfeited for not paying any Custom at all, or making offer to pay it, save only by a Post-Entry after Seisure, and a Month lacking three days after the first Entry of the quantity and parcels at the Custom-house. And a Verdict passed for the Plaintiff, for that part only.

Igleton *versus* Wakeman.

(6) EJectione firmæ. Upon a Special Verdict, the Case was thus; viz. the Declaration was of several Messuages, in the several Parishes of S. Michael, S James, S. Peter and S. Paul, and that part of the Premisses ly in the Parish of S. Peter and S. Paul: But that there is no Parish called the Parish of S. Peter, nor none called the Parish of S. Paul: And it was held clearly per Curiam, that the Copulative (Et) should be referr'd to that which is real and has an Existence, ut res magis valeat: Not to make S. Peter's one Parish, and S. Paul's another; but to make them both one Parish. And the words several Parishes, is supplied by the other Parishes afore-mentioned; so that if there be any such Parish in being, as that of S. Peter and S. Paul, the Copulative shall refer to that. As in 6 Ed. 3. Precipe of Ten Acres in A. B. and C. there the Lands must lie in every one of the Mills: But if the Precipe were de Manerio & de decem Acris in A. B. and C; there it would be well enough, though the Manor lay elsewhere, provided the Ten Acres lay within the Mills named: For then the last words are satisfied by the Ten Acres. And Judic. nisi, &c. given accordingly.

Berke

Berke *versus* Harris and Al'.

There was an English Bill in the Exchequer against Harris, to shew by what Title he held such a Meadow, which (as was alledged) appertained to the office of Keeper of Glocester-Castle, granted to the Plaintiff for Life; and against the other Defendants, as Brewers of the City of Glocester, every one of which, as the Bill suggested, was by Custome obliged to pay such an Annual Sum to the said Officer. To which Bill the Defendants Demurred: Because the Bill is concerning things of several distinct Natures, and is brought against several Persons, which will occasion several Answers and Examinations, and if they were suffered to be put all into one Bill, each party would be obliged to take Copies of what no way concerned his own Cause; whereby the charge would be encreased to no purpose. And of that Opinion was the whole Court. As if a Parson should prefer a Bill against several Persons; viz. against some for Tithes, and against others for Glebe, this is naught. But for Tithes only, it is well against several Parishioners; because they are of the same nature. So in case a Lord of a Mannor would prefer one Bill against divers Tenants, for several distinct Matters and Causes; as, Common, Wast, several Piscary, &c. this were naught, though the Ground and Foundation of the Suit; viz. the Mannor, be an entire thing. So here, &c. (7)

DE

De Termino Sancti Hillarii, Anno 15 & 16 *Car.* II. Regis.

In Scaccario.

James Stevens, Plantiff, *versus* Francis Duckworth, Defendant.

(1) Vide Stat. 12 *Car.* 2. c. 25. & 7 Ed. 6. c. 5

IN an Information Tam quam, for selling Wines by Retail in York, without a License, whereby the Defendant forfeited Five pounds a day, the Information being for Ninety days, Four hundred and fifty pounds were demanded: Upon Not-Guilty pleaded, and a Special Verdict found, the Question was, Whether or no he that has a License to keep a Tavern in York, according to the Statute of 7 Ed. 6. cap. 5. may by virtue of such License sell Wines by Retail, to be spent in his own House? Which Question depends upon the wording of that Statute: For it was agreed, that the Exception in the *Act* of 12 Car. 2. cap. 25. extends to save such Licenses within Corporations, as were made pursuant to the said Act of 7 Ed. 6. c. 5. Vid. le Stat. de Ed. 6. & perlege.

Sir Edward Turner for the Plaintiff. This Information is grounded upon a malum Prohibitum: And the Question ariseth upon two Acts of Parliament; viz. that of 7 Ed. 6. cap. 5. and that of 12 Car. 2. cap. 25. And I conceive that Judgment ought to be given against the Defendant: First, Because Licenses to sell Wines are now become part of the Revenue of the Crown, and therefore those Acts ought, in favour of the King, to receive a liberal Construction. Secondly, Because it is expressly Enacted, That no person or persons whatsoever, &c. shall sell or utter by Retail, &c. any kind of Wine or Wines, to be drunk or spent within his or their Mansion-house or Houses, or other place in his or their tenure or occupation, &c. by any colour, craft, or mean whatsoever. And where the words of an Act of Parliament are positive and express, no Interpretation ought to be admitted. Thirdly, To construe a License to keep a Tavern, to be a License to sell Wines by Retail, to be spent in the person's House, that has such a License, is against the intention and design of the Acts, which was to prevent mens disor-

☞ Vid. 7 Ed. 6. c. 5. Paragr. 4. & 12 *Car.* 3. c. 25. Paragr. 1.

disordering themselves by excessive and unreasonable Drinking.

Object. The Preamble of the Statute of 7 Ed 6. c. 5. mentions the Inconveniencies, evil Rule and common Resort of mis-ruled persons, used and frequented in many Taverns of late, newly set up, in very great number, in Back-Lanes, Corners, and Suspicious places, &c. and therefore the Acts are to be construed so as to prevent only those Inconveniences: which will be sufficiently avoided, though it be allow'd that every man, who has lawful License to keep a Tavern, be eo ipso at liberty to sell Wines by Retail, to be spent in his own House. Resp. The Preamble is but a Key to open the meaning and sense of the Law, but is no Enacting part of it.

Obj. The Usage since the making of the Act hath been so, that a person's being licenced to keep a Tavern, enables him to sell Wines in his House by Retail. Resp. Usage contrary to an Act of Parliament does not take away the force and effect of the Law. Besides, the contrary has been practised; vid. 3 Eliz. Dy. where the Queen granted such Licenses, and not the Persons authorized by the Act.

The Patent granted to the Lord Goring, temp. Car. 1. allows this difference betwixt keeping a Tavern, and selling Wines by Retail, to be spent in the Tavern-keepers House; though that was held to be a void Patent, because it was General, (vide 7 Rep. fol. 37.) to dispense with all people: But a Particular Dispensation would have been held good. Also, it was lately held in the Star-Chamber, unlawful to dress Meat in a Tavern without Licence; and so he concluded pro Quer.

Hardres for the Defendant. My first Reason I take from the Preamble of the Act, which shews the Intention of the Law-makers, and gives an Account of the Mischiefs that were before, which appear to have been occasioned by Unruly persons frequenting Taverns in By-Corners; so that Drinking in Taverns was not the Mischief, but the Multitude of Taverns, and their situation in By-Corners: This the Makers of the Law would have answered, was their design, if they had been asked the question. But its Objected, That an Enacting Clause in the Statute is express in the point, and from express words Non est recedendum. I answer; There are Three things to be considered in an Act of Parliament: 1. The Words; 2. The Sense of the Words; 3. The scope and meaning of them taken all together. As where there are several Clauses in a Deed, the Meaning shall be gathered from them all put together; so as one may not confound nor contradict another. Now according to this ground, the sense and meaning of this Clause in the Act of

7 Ed. 6.

7 Ed. 6. which is so much urged, will be thus, viz. That no person, not having a License according to the Act, shall sell any Wines by Retail; nor any that has a License shall sell Wines by Retail, but only in his Mansion-house, and not elsewhere. And such an Exposition is frequent upon other Statutes; as Magn. Chart. cap. 7, & 12. and Co. upon those Statutes, 2 Inst. 17, 18, 24, 25. Secondly, The Reason of a Law, and the Design of the Law-makers, must be judged of by what has been the constant practice ever since: For, Usus optimus Magister & Interpres. Upon this ground the word Lands, in the Statute of Ed. 1. de Mercatoribus, extends to all Hereditaments. So the word Feoffment in the Stat. of Marlebr. cap. 6. extends to all Conveyances, Co. Mag. Chart. p. 110. So Co. 4 Rep. Slade's Case, 94. Use, Custom and Presidents rule all proceedings in Courts. 2 Rep. fo. 17. Lane's Case, the word Commisimus extends to a Lease. So here; it having been the Constant practice since the making of the Statute, to sell Wine in Taverns by Retail, to be spent there, that sufficiently demonstrates how this Law is to be Interpreted. Thirdly, If the Law be expounded otherwise, the Exposition will be absurd and incongruous: That he who keeps a Tavern should not utter his Wine to be spent in his House, is against the nature of the thing it self. And to what great purpose would it be to provide that Taverns shall be kept in open places, if the Vintners must not be permitted to sell their Wines to be spent in their own Houses, but that all must be sent out of Doors. Vide Stat. Mert. cap. 7. & Co. ad loc. Vid. etiam 21 Hen. 8. 5. & 26 Hen. 8. 2. Fourthly, I argue from a Non-user; viz. because no Information or Popular Action has ever yet been brought for this pretended Offence; and though Non-user does not abrogate a Law, yet it much enfeebles the strength of it; vide Mag. Chart. cap. 3. & Co. ad loc. And Stat. Mert. cap. 7. Lit. Sect. 108. & Co. 1st Inst. 81. where it is said, That Non-user of a thing is a great presumption, that the Law will not bear it, and may expound and declare the meaning of a Law. So here, Since none that have had Licenses to keep Taverns, have ever been punished for selling Wines by Retail in their Houses, it is a good Argument to prove, that the Makers of this Law did not intend they should be punished: And so he prayed Judgment for the Defendant.

Mr. Thurland for the Plaintiff. The best way of Expounding an Act is, by taking all the Clauses together. The Preamble does not limit and bound an Enacting Clause; but only shews some Causes why the Act was made, as in this case it does no more. And I conceive the Defendant is guilty of a breach of this

this Law; First, The words of the Second Clause are an Universal Negative, with restringent words, Not in any Place or House, &c. and contrary to such full and positive Words no Exposition ought to take place. Obj. One part of an Act ought not to destroy the other, if they may be made consistent. Resp. The first Clause is only, to License men to sell Wines; the second Clause restrains them from selling any in their own Houses. Obj. Taverns are not named in the Second Clause. Resp. The Reason is, because Selling Wine is prohibited, and so Taverns are prohibited in effect: Taverns and Wine sellers are Convertible; and the words of the License are only, to sell Wines by Retail. And where the Words of an Act are doubtful, such an Exposition ought to be made of them, as will best obviate and redress the Mischief. Vide Co. Lit. 188. Now one Mischief here is, Drinking in Taverns, of which Notice is taken in the Statute of 28 Edw. of the View of Frank-pledge. And such Licenses are not favoured in Law, Vide Dyer 270, a. Obj. The Practice has been contrary. Resp. This were a proper Objection, if the Law were in the Affirmative; but this Statute runs in the Negative, Vid. 1 Inst. 115. a. As to what has been argued concerning Presidents, they are for us: Vide Dyer 270, a. And 19 & 25 Eliz. Sir Walter Rawleigh's Case, where Licenses have been granted by the King to that effect, viz. to sell Wines in their Houses. Likewise the Statute of 12 Car. 2. is for advancement of the King's Revenue, and ought therefore to have a large and beneficial Construction for the King's Profit. And the Proviso therein does not reach our Case; for it provides only, That Cities and Towns Corporate may use and enjoy such Liberties and Privileges, as heretofore they have Lawfully used and enjoyed. Vide 9 Rep. the Case of the Abbot of Strata Mercella. Ibidem Quicke's Case, amongst the Cases of the Court of Wards. So he concluded, and prayed Judgment pro Quer. 12 Car. 2. cap. 25. Par. 8.

Ellis Argued for the Defendant. He insisted, That the Second Enacting Clause was put in favour of Vintners, and that the meaning of it was no more than this; viz. That no others, but only such as were in the former Clause allowed to be Licensed, should sell Wines by Retail. He cited Pl. Com. 17. 464, & 469. 1 Instit. 365. It is Enacted, 1 Car. 1. cap. 4. That Keepers of Taverns shall be taken to be within the Statutes made 1 & 4 Jacob. 1. against Tipling in Ale-houses: Which would have been to no purpose, if they had taken the Law to be against Keepers of Taverns selling any Wine at all, to be spent in their own Houses. And if the Law were, as it is urged for the Plaintiff, then no Traveller upon the Road could

drink a Glass of Wine in his Inn, if the Inn be a Tavern, but must send for it out of his Inn, which is unreasonable.

Afterwards in Easter Term, 16 Car. 2. the Judges delivered their Opinions seriatim.

Baron Rainsford Argued pro Quer'. He said Three things were to be considered in the Exposition of a Statute; First, What the Common Law was before the making of the Statute. 2. What the Mischief was, which the Law-makers would redress: And, Thirdly, What Remedy the Law had provided for that End. Now in this case, First, It was lawful before the making of this Law, for any Man to sell Wine where he pleased himself. Secondly, For the Mischiefs, see the Preamble of the Statute. Thirdly, For the Remedy provided by the Law, see the Purview; which consists of two Clauses concerning Uttering of Wines; First, The first Clause carries a Restraint upon Persons that have no Licenses. The Second Restrains them that have Licenses: See the Second Clause, That no person or persons whatsoever, shall sell or utter by Retail any kind of Wine or Wines, to be drunk or spent in his or their Mansion-house or Houses, or other place in his or their Tenure or Occupation, &c. And as in 5 Co. Edriche's Case, one Clause in an Act of Parliament, must not abrogate or controll another. And in this Case, the Second Clause restrains the selling or spending of Wines by Retail in any Taverns for these two Reasons; First, The First Clause was made against such as should Sell without Licenses; so that the Second Clause needed not with respect to them, but was added for them that should have Licenses, to direct how they should sell their Wines, viz. Not in their Mansion-houses, nor, &c. Secondly, If the Act were construed otherwise, this Inconvenience would follow, viz. That one and the same person would be subjected to two Penalties for one and the same Offence, by the same Act of Parliament; that is, to the 5 l. by virtue of the First Clause, and to the 10 l. by the Second Clause; which it cannot reasonably be supposed that the Parliament ever intended. 'Tis true, in Dr. Foster's Case, 11 Rep. we meet with such a thing, but the several Penalties there are inflicted by several Acts, not by one and the same Act of Parliament. It has been Objected, That the Statute of 1 Car. 1. cap. 4. concerning Tipling, extends to Taverns. Resp. That Clause well may be supposed to have been inserted in that Act, by reason that Licenses were frequently granted by the King, to Vintners to sell Wine in their Houses. Obj. For Taverners not to be permitted to sell Wine in their Houses, is against the Intent of the Law, and of the

the License it self. Resp. To abridge the Power that one had before, is usual, and may be done by the Common Law; as if a man makes a Feoffment in Fee, provided that the Feoffee shall not alien to such a one; much more by Act of Parliament. Obj. No man has been brought into question upon this account; and the Practice has been so, that Vintners have without controll sold Wine by Retail, to be spent in their Houses. Resp. This does not appear Judicially to the Court. And there has been much alteration in the practice since 7 Ed.6. nor does Usage destroy the Effect of a Law, though it be against it, Co. Lit.81. Et multitudo errantium non patrocinatur errori. And now Licenses to sell Wine are become part of the Revenue of the Crown; and therefore Constructions upon Acts of Parliament must be favourable with respect to them, 4 Ed.4.3,12. Plow.Com.10,11.

Baron Turner pro Quer'. He Argued much upon the same grounds. He was of Opinion, That Vintners, as well as other Retailers, were within the Second enacting Clause; and that there was no material difference betwixt them: But that they were Synonymous in the intendment of Law. And here the Clause is Negative, which enforceth a more violent Construction. Vide 11 Rep. Magdalen Coll. Case, he gave the same Answer that Rainesford had done, to the Objection grounded upon the Stat. of 1 Car.1.c.4. And to the Objection concerning the Inconvenience that Travellers would be at, he answered, That the Innkeepers might prevent that Inconvenience, by taking Licenses to vend Wine in their Houses; and concluded, that Judgment ought to be given for the Defendant.

Baron Atkyns pro Defendente, for these Reasons: First, Because the Intent of the Act appears to be, That a Man having a License pursuant to the Act to keep a Tavern, may by virtue of that License sell Wines to be spent in his House. Now the Intent of an Act must be gathered from all the words of the Act put together. Of this Act there are Four Parts to be considered: First, The Title of the Act. 2. The Preamble. 3. The Purview. 4. The Proviso. The Title and Preamble of the Act, are the Introductory part thereof, and a Key to the Law. See the three Purviews of the Statute. Secondly, Before this Act was made, the Law did not look upon it as a Mischief to sell Wine, to be spent in a Tavern; and therefore we have the less reason to believe, that the Makers of this Act designed any Remedy whereby to prevent that. And yet there were eleven or twelve Acts of Parliament made before concerning selling of Wines, prices of Wine, Impositions

upon Wines, and Forestallers of them: But no Remedy was ever provided to restrain Taverners from selling Wines in their Houses; nor was that looked on in the Eye of the Law as a Mischief. Thirdly, No Information, or Popular Action, has ever been brought for this Offence against the Law, with which the Defendant is now charged; though it has been frequently committed every day, and would in all likelyhood, at one time or other, have been prosecuted, if the Law had been taken so. Obj. Against express Negative words no Interpretation must be admitted. Resp. First, There are in this Act of Parliament many Membra incidentia; which must all be so Expounded, as to be consistent with one another. Secondly, General Clauses in the Purview of an Act, may restrain General Clauses in the Preamble; but not special and particular words and Clauses, as there are here; vide Hob. 182. Burton & Morrice's Case. Co. Magn. Chart. 28. Again, This Second Clause is a distinct Act by it self, and extends only to Private Houses, for which no Provision was made before; vide Plow. Com. 263. And it is a constant Rule, That upon all Acts of Parliament there must be such a Construction made, as that one Clause may not destroy and frustrate another. Fourthly, Because the Statute of 7 Ed. 6. is taken away by 1 Jac. 1. cap. 25. with respect to Private Houses. Fifthly, Acts which restrain the Common Law, must be Construed strictly. 2 Inst. 465. 18 Ed. 4. 16. Obj. But the King's Proffit is concerned in the case. Resp. We are bound to adjudge according to the Reason of the Law, and not for the King's Proffit; as Starkey said, 21 Ed. 4 45. and so he concluded for the Defendant.

Hale Chief Baron pro Defendente. We are to consider in this Case, First, That by the Common Law any man might keep a Tavern, and sell Wines there without controll; but ill Orders kept in such places were punishable at Common Law, as Nusances: And that Tavern-keepers used to Retail Wines, to be spent in their own Houses before 7 Ed. 6. appears by the Statute of 18 Ed. 2. de visu Franci Plegii: Art. 28. Of such as continually haunt Taverns, and no Man knoweth whereon they do live; and by 51 Hen. 3. de Pistoribus; and by 4 Ed. 3. cap. 12. 5 Ed. 2. cap. 1. 24 Hen. 8. cap. 6. by which Statutes Prices of Wines, and Disorders in Taverns are limited and corrected. The Second thing to be considered, is what Alteration the Statute of 7 Ed. 6. has made herein. Now this Act, First, limits the Prices of Wines. Secondly, Restrains Persons from selling Wines: And, Thirdly, It restrains the Number of Vintners, and the Liberty which they had before. And this we may divide into these Parts: First, Who they are that are allowed to

keep

keep a Tavern out of a Corporation. Secondly, Who are allowed so to do within a Corporation; and the Penalties upon others not allowed by the Act. Thirdly, The Restraint within Market Towns, which is double, according as they are Corporate or not Corporate. Fourthly, How they shall be Licensed. Fifthly, What Numbers shall be Licensed. For these things Vide the Statute at large. Now the Clause upon which the Question here ariseth, has a Saving annexed to it, and the Statute of 12 Car.2.cap.25. hath Two Savings; See them in the Statute. So that Two Points arise hereupon: First, Whether or no, before the Statute of 12 Car. 2. selling of Wine in a man's own House might be licensed; and how? Secondly, Whether or no there be here such a License, as the Law required? 'Tis observable in the first place, that every Taverner might lawfully Retail Wines; but that every Retailer of Wines might not keep a Tavern. Secondly, That every Tavern is a House, but not vice versâ. A Taverner may lawfully Retail Wines to be spent in his House by the Statute of 7 Ed. 6. for these Reasons: First, The Preamble, which introduceth the sense and meaning of the Statute, expresseth the Mischief that was before, and which was intended to be Redressed; and the Case in question is not within the Mischief. Secondly, The Clause which creates a Question in this case, is to be understood of Retailing Wines in Private Houses, which are not Taverns. Thirdly, The Reason of Carter's Case, cited 8 Rep. in Denham's Case, extends to our Case; to wit, that a General Clause shall not be stretch'd to particulars mentioned before. Fourthly, The word House in the Statute, is to understood of Private Houses; and to such only does the Act of 1 Jac.1.cap.25. extend. He that has a License to keep a Tavern, has liberty to Retail Wines to be spent in his Tavern: And the words, Colour, Craft, Engin, or other Means, are to be taken in malam partem, and must not be applyed to them that have Licenses according to the Act. Object. This Second Clause extends to all persons whatsoever, or else a man shall be liable to a double penalty for one and the same Offence. Resp. Rather we ought to infer, that General words may be restrained by Particular words going before: Vide 8 Rep. Dr. Bonham's Case, in like case of a Penalty. And the true meaning of the Act was, that no person should sell Wines out of a Market Town, under the penalty of Ten Pounds; nor within a Market-Town, under the penalty of Five Pounds; nor in a Private House, under the penalty of Ten Pounds, whether within or without a Market-Town. And a Man may Retail Wines without keeping a Tavern; but not è contra. The Second Question,

which

which is the more difficult of the two, is, whether or no the License in this Case of ours, be a sufficient License to exempt the Defendant from the penalty of the Law? For the License is only to Retail Wines, and not to keep a Tavern: which must be kept in a certain place. And I am apt to think that this License, being only to Retail, is not sufficient; but this I will consider further of, because it has not yet been spoke to.

And upon this last point Judgment was Arrested, quousque, &c.

The Court directed to have it argued, whether or no upon the Special Verdict a Sufficient License were found to keep a Tavern; for if there be not, then the Defendant is within the second Clause of the Act of 7 Ed. 6. being only a Retailer of Wines, and so not qualified to utter Wines to be spent within his House.

Serjant Maynard pro quer'. But he mistook the Point, and Argued that a Taverner could not sell Wines to be spent in his House; and that a Taverner and a Retailer were one and the same. But because the Court had already delivered their Opinion, and directed one single Point to be Argued, which he had not prepared himself to Argue, he desisted.

Hardres pro Defendente. I conceive that upon the Special Verdict taken all together, there appears sufficent matter to enable the Defendant to keep a Tavern. First, The Jury find expressly that the Defendant was appointed by the Mayor, Almen and Comminalty of York, by Writing to keep a Tavern within the said City, and that the Defendant's Tavern was one of the 8 Taverns, appointed and Authorized by the Stat. of 7 Ed. 6. to be kept within the City of York, and to sell Wines by Retail there, from the day of the date of the said Writing for a Year: Which Writing they find in hæc verba, Know all Men, &c. by which Writing the Defendant has License given him to Retail Wines, but not in express words to keep a Tavern. They find moreover, that by the Colour of this Writing, the Defendant (who had no other License) sold Wines to be drunk in his House. So that upon the whole matter, the Jury find that the Defendant was Licensed to keep a Tavern, and kept a Tavern accordingly; which being matter of Fact only, the Jury are Judges of it.

Secondly, I take it for a ground, that if a Jury find some General matter directly and positively, and afterward find some Special matter, the Court in such a case, ought so to apply the Special matter, as to make it consistent with the General matter, if it may be. v. 6 Rept. Dowdale's Case.

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So in the 9 Rept. in the Earl of Shrewsbury's Case, fol. 51. b. In an Action upon the Case for holding a Court, and taking the profitts of it, the Defendant pleaded Not-Guilty: The Jury found that from such a day the Defendant held the Court, usque impetrationem brevis, & semper abinde recepit proficua, &c. and the Court held that this last abinde shall be understood, to reach only to the Purchase of the Writ; because else it would make void the Verdict, if it took in all the time, to the time of the Verdict And consequently, Dammages given for all that time. So here this form of the License, may include a power to the Defendant to keep a Tavern, because every Taverner is a Retailer of Wines, tho' every Retailer of Wines, is not a Taverner: And the Jury have found, that the Defendant was hereby Licensed to keep a Tavern. And if the License be so Understood, all the parts of the Verdict will stand together. But true it is, that if the Special part of a Verdict contradict the General part, then the Special part only shall stand, v. 20. Eliz. Dyer, 361. in Debt against Executors, the Issue was upon Assetts enter maines; and the Jury found a Special Verdict, scil. that the Testator made a Lease for years of a House, and certain Implements therein, rendring Rent to him, his Heirs and Assigns, and that the Executor had received the Rent ever since the Testators Death, & issint Assettes. Yet the Court Over-ruled the Conclusion of Assets, because by the Special finding no Assets appeared.

Thirdly, I conceive the Words of this License will amount to enable the Defendant to keep a Tavern. First, Because in the License that is found, the Defendant is called a Vintner: And therefore it is to be presumed, That the Licensers intended to give him leave to follow his Trade. Secondly, It appears by the Verdict, that by vertue of the License he kept a Tavern, and that his was one of the eight Taverns in York: And therefore it is to be presumed, that the Licence was granted on purpose to enable him so to do, as in 5 Hen. 7. 1. a License to Enter and Occupy amounts to a Lease, and ought to be pleaded so. Thirdly, A License ought to be taken most strongly against him that Grants it, and for his Advantage, to whom it is Granted. As in 13 Hen. 7. 13. A Warrant for a Buck in a Park, impowers the Servant of him that is to have the Buck, to go into the Park for him, and to Assist the Park-Keeper in killing him, and to bring him away. So 13 Hen. 7. 13. in the Dutchess of Suffolk's Case: A License given to me to take Wood, and carry it with a Cart over another Man's Ground, extends to my Servants; because it

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is matter of profit. Otherwise, if it were matter of Pleasure only, as to walk in my Garden. And in this Case, the best intendment for the Defendant is, that he be hereby enabled to keep a Tavern; for the License can be of no better use to him.

Objection, The Statute mentions two sorts of sellers of Wine, viz. Retailers and Taverners: And Licenses to keep a Tavern, have usually the word Tavern in them. Resp. Yet Taverners are the chief Retailers: And therefore the Word Retail shall have such a construction, as will carry the most effectual and beneficial sense: And though Licenses to Taverners have those words usually, yet they are not of necessity, but are forma loquendi only. And so he concluded pro Defendente.

But per Hale Chief Baron, & totam Curiam, there is not a sufficient License found here to keep a Tavern. First, Tavern-keeping and Retailing of Wines, are things of a different nature from one another. Secondly, They have distinct Appellations given them in the Statute, and distinct penalties are inflicted. Thirdly, If Taverners and Retailers of Wine were all one, the design of the Act would be disappointed, by reason of their number, and the places in which they Live: For Retailers are not restrained to any certain place or numbers, as Tavern-keepers are. Fourthly, Because the Custom has always been, that when a man had a License to keep a Tavern, the word Tavern was expressed in the License. And although the Defendant be stiled a Vintner, that is in a second License, not in the first, upon which the Verdict is given for 5 l. penalty: And though it be found that he kept one of the 8 Taverns, yet no License is found enabling him so to do.

So upon this point, viz. for want of a sufficient License in this behalf, Judgment was given against the Defendant.

Papilion

Papilion *versus* Sir John Harrison & al'.

IN an Action upon the Case, against the Farmers of the Customs, for taking more for Custom than they ought, the question was singly this; viz. By the Book of Rates, annexed to the Act of Tunnage and Poundage five pounds per Cent. are allowed to the Merchants out of the subsidy of Poundage, and 10 l. more for ready Money: And whereas twelve pence in the pound is due and payable to the King for Poundage, six pence in the pound more is given by another Act, and called the Additional Duty: And whether or no five pounds per Cent. should be allowed out of this Additional Duty or not, was the Question? (2)

Sir Robert Atkyns argued pro Quer'. First, from the Title of the Book of Rates, which mentions the benefit of Merchants, &c. Secondly, from the Generality of the Clause, whereby the five pounds are allowed, viz. of all Subsidies: And the Additional Duty is part of the Subsidy. Thirdly, This Additional Duty is of the same kind and nature, to all intents and purposes with the original Subsidy of twelve pence in the pound. And the same Book allows it for Wines, and yet there is an Additional Duty upon them, and called so.

Stevens pro Defendente. This Additional Duty is distinct from the Subsidy, because otherwise denominated; and a special allowance being made to the Merchants out of the Subsidy, that cuts off all other allowances, unless they were directed by special words; as where in Case of leakage 12 l. per Cent. is allowed, that cuts off all other Allowances: And so he thought the Act in this Case ought to be interpreted.

Hale Chief Baron. If the Subsidy of twelve pence in the pound and the Additional Dury of six pence, had been both of them in one and the same Act of Parliament, there had then been no doubt in the Case, but that the Allowance of 5 l. per Cent. should have been made out of both. And as it is, it is upon the matter but one Entire Subsidy of 1 Shilling and six pence in the pound: sed Adjurnatur.

In Trinity Term after the Judges delivered their Opinions seriatim. Baron Rainesford was of Opinion, that 5 l. ought not to be allow'd out of the Additional Duty, but only out of the twelve pence in the pound: He said, First, This Additional Duty was given in lieu of the Excise, out of which no such allowance was made. Secondly, That in the Statute of

Tunnage and Poundage fol. 4. the Subsidy is described, and it's description does not agree with the Additional Duty. Thirdly, The Books of Rates makes a distinction betwixt these two Duties; as appears by the second Rule and twelfth Rule, by the different names given them, and different times appointed for payment. Fourthly, Because the 10 l. per Cent. allowed for present payment, is an allowance which depends upon the Merchant's Election; and that shews it to be different from the Subsidy of twelve pence, &c. Object. The Seventeenth Rule is General; viz. Out of all Subsidies. Resp. But this Duty of six pence per pound is not the Subsidy, nor any part of it; and it has Allowance peculiar to it self. Object. The Title of the Rules mentions the benefit of Merchants. Resp. The Preamble of the Act mentions Tunnage and Poundage, to be given to the King for the defence of the Sea, which is Universally for the good of all Trade. Object. But Strangers have this allowance made them. Resp. Because they pay more than Englishmen. Object. This allowance has been made by the Commissioners of the Customs. Resp. Neither the King nor the Farmers are concluded by their allowing it, if it were not due.

Baron Turner, Baron Atkyns and Hale Chief Baron argued all pro Quer', that 5 l. per Cent. ought to be allowed out of the Additional Duty, as well as out of the twelve pence per pound. First, It appears in divers places of the Book of Rates, that six pence in the pound, is look't upon as part of the Subsidy of Poundage; and then 5 l. being by the Seventeenth Rule, to be allowed out of all Subsidies, must be allowed out of that. Secondly, It is in reality a Subsidy of Poundage, because paid by the pound. Thirdly, The Book of Rates is incorporated into the Act of Parliament, and is part of it; so that whatever is there, is to be taken as if compriz'd in the body of the Act it self. It's Objected, that this Duty comes in lieu of the Excise Resp. That does not appear to us: But if it be so, it's now converted into a Duty of another Nature. Obj. Other Allowances are directed to be made out of this Duty; viz. 10 l. per Cent. Resp. That Allowance is only for Interest, in respect of present payment. Obj. It's called by another name. Resp. The word Additional shews it to be a Subsidy, and of the same nature with the twelve pence in the pound. In the Act of Tunnage and Poundage, Paragr. 13. the sum of 3 l. and 4 l. a Tun Additional Duty is given and so called. Object. By the second Rule a moity of the twelve pence in the pound, is to be allowed in case the same Merchandizes be exported again, and the Whole Additional Duty. Resp. That is only in

in one particular Case, which does not alter the Nature of the Duty. And Judgment was given pro Quer', nisi, &c.

Veale *versus* Priour.

IN an Action upon the Case, for disturbing the Plaintiff in exercising the Office of the Registership of Policies of Assurance in London, and taking the Profits thereof: Upon a Special Verdict found, the Question was, whether or no, that were an Office Grantable for years or no? (3)

Mountague pro quer'. Three things are here to be considered. First, Whether this be a good Office or not. Secondly, Whether or no it be an Office of Trust. And Thirdly, Whether it may be Granted for years or not? For the first, he held it to be a good Office: That in many Cases the King might create an Office de novo, by the Words Constituimus, Erigimus; but this Office seemed by the Statute of 43 Eliz. cap. 12. to be an Office by Prescription. Yet if it were but an Office in Reputation; and mentioned as an Office in Patents and Grants, that were sufficient, without words of Creation, Erigimus & Constituimus, &c. Vide 12 Edw. 4. 79. in case of a Grant of the Office of Brocage. Also in this case, the Grant of an Office, and the Appointing of an Officer is good without Constituimus, Erigimus, &c. because it was an Employment in being before: As in case of a Warenner or Parker. Vide 21 Ed. 4. 79. Also if an Officer be constituted by Grant, it is sufficient, although there be no Office erected by express words, as appears 9 Ed. 4. 11. b. If the King Grant to a Man the Office of House-keeper, with a Fee for exercising it, it's a good Grant though there were no such Office before; Dyer 200. b. And that an Office de novo may be Erected without the Words Erigimus, Constituimus, &c. appears by Cremor and Burnet's Case, Mich. 1651. B.R. Enter, H. and Field and Boothby's Case, in 1658 B.R. Enter Pasch. 1657. Rot. 474. Grant of the Office of House-keeper, good by the word Concessimus. Object. Here's no fee Granted. Resp. It's Granted that the Fee shall be ascertained by the Mayor of London. Besides, a Fee is not of necessity, Vide Moor p. 808, 809. the Bishop of Salisbury's Case; where it is held, that the Constitution of a New Office and Officer is good in Law though no Fee, neither Annual nor Casual were annexed to it at first. For the Second Point; he held it to be an Office of Trust. Those are Offices of Trust, which concern the Common-Weal, the King's Revenues, the Administration of Justice,

and the Subjects in General. Now this Office concerns First, the King's Revenues with respect to the Customs, as appears by the Preamble of the Act of 43 Eliz. c. 12. Secondly, It concerns the Subjects interest and benefit; viz. All Merchants. And therefore he held, as to the third Point, that it was not Grantable for years, no more than the Office of Marshal of the King's Bench, Vide 9 Rep. Sir George Reynel's Case, & les reasons la done. Cr. 1. Rep. 584. Bro. Office, 45. So he concluded for the Plaintiff.

Symson pro Defendente. He argued, that it was an Office Grantable for years. First, The Right of Granting and Erecting New Offices is Vested in the King, as the Head and Fountain of Justice: What Grants are void in such Cases, Vide Nat. Br. 222. 13 Hen. 4. 14. Dyer 51. and for the Nature of an Office of Trust, Vide Co. Lit. fol. 3. b. But Sir George Reynel's Case. 9 Rep. is Objected. Resp. There is a Condition in Law annexed to Offices, by which they become forfeitable through Misuser, Abuser and Non-user: From which an Answer may be given, to all that is urged from Sir George Reynel's Case, 9th Rep. Vide Pl. Com. 380. that where there is trust and confidence reposed in an Officer, such Officer cannot make a Deputy, unless he be impowred by express words so to do. 9 Rep. the Earl of Shrewsbury's Case, and the Lady Russel's Case. A Deputy may be made, where an Office is disposed of to a Person, that is uncapable to manage it in person. Vide Pl. Com. 381. that a Woman may be endow'd of an Office. But the true and ancient diversity, is betwixt Officers Judicial and Ministerial. Cro. 1 Rep. 276, 556. Object. if this Office be allowed to be Grantable for years, then it may be forfeited for Outlawry. Resp. That will not follow: For the nature of the thing may exempt it. Vide Dyer, 2. Pl. Com. 380. An Annuity pro Consilio impendendo not forfeitable. In the 9 Rep. in Sir George Reynel's Case, the Custom of the Court was urged, which is not in our Case. And the consequence of not allowing this Office to be Grantable for Years, will be considerable. In 6 Car. 1. the Office of Printing was Granted to Barker and Bill for Years: And it was held to be a good Grant by Justice Jones and Doderidge, upon a reference to them from the Council-Table. And the same Objections were made there that are here. And one Reason given by them was, because it was but an Imployment. And no more is ours. So the Office of Post-Master was Granted to the Lord Stanhope for Years, and held to be good. Wherefore, he prayed Judgment pro Defendente.

Hale

Hale Chief Baron. The Office of Garbler has been held not Grantable for years, but that such a Grant amounts to an Appointment; as was held in the Case betwixt the City of London and Hatton. Employments of Private Concern, as that of a House-keeper, are grantable for years; otherwise of Offices that are of a publick and general Concern. Adjornatur.

Afterwards in Hillary Term 16 & 17 Car. 2. Regis, the Barons delivered their Opinions.

Baron Rainesford pro Defendente. First, I will consider how the Law would have been in this case, before the making of the Statute of 43 Eliz. cap. 12. concerning Policies of Assurances. Secondly, How the case stands upon the Statute: And, Thirdly, How the Law is since the Statute in this case.

First, He said, the Patent under which the Plaintiff claims this Office, would before the Statute have been a Monopoly, and void, nor could it have bound or charged the Subject, Vid. Co pla. Cor. 187. 11 Hen. 4. 86. b. 13 Hen. 4. 14, b. Before the Statute a man had no Benefit by Entring his Policy, nor is any Fee allowed by the Plaintiff's Patent, nor is it found that the Major of London has setled any according to the Statute: So that the taking of a Fee is but an Usurpation. And therefore the Plaintiff having no right to take it himself, cannot have an Action against another for taking it. Besides, the Grant of the Office by the word Commisimus is void, because there was no such Office before; as in the Case of Brocage, 22 Ed. 4. 79. Mo. Rep. 880. there ought to have been the words Erigimus, & Constituimus. Also, if the King had Granted it with a Fee, it would have been void, because the King cannot charge the Subject. And it is not found, that any Fees have been appointed according to the Statute. Vide Co. 11 Rep. 89. & 9 Rep.

Secondly, This Office by the Statute is only an Office for Registring Polices of Assurance, and does not extend to the Making of them. And Fees void by Law are not made good by the Statute, which gives only Power to the Mayor and others, to settle Fees, and that does not appear to have been done: I take the Plaintiff's Grant to be so far good, as to Enable him to Register, but not to take a Fee for it. Object. If it be void as to one, it is void as to both. Vide 11 Rep. Auditor Curle's Case. Resp. That was a Judicial Office, which ours is not: And a Grant may be good for an Office, though not for Fees. As a Grant of the Letter Office with a Fee, has been held void as to the Fee only, and with respect to a Subject, but good against the King. As a fraudulent Conveyance

veyance may be good against one man, and void as to another. And if no Fee be due, then No Action lies for the Plaintiff here: Vide 8 Rep. Jehu Webbe's Case; because the Office is a Charge without Profit. Et per 30 Ass. pl. 4. there is a diversity between an Ancient and a New Office.

Thirdly, The Plaintiff here has no certain Fee for Executing the Office, and therefore can have no Action: For the Fees ought to appear what they are, that so the Court may judge whether they be reasonable or not, 11 Hen. 4. 86, b. 30 Ass. 4. Nor does it appear what Fees others have received before: Vide Mo. Rep. 474. Heddy & Welhouse's Case. that the Fee must be reasonable: And that the Court may adjudge whether it be or no; Vide the Bishop of Chester's Case, cited 10 Rep. in the Bishop of Salisbury's Case: As in case of Fines for a Copyhold, where they are uncertain, else the Subject may be oppressed.

Fourthly, The Grant of this Office for years is a good Grant, for it is New Office: Ancient Offices must be granted no otherwise than they have acustomably been granted: Grants of New Offices are not restrained by Usage. Object. 9th Rep. Sir George Reynel's Case, 1 Cro. 587. Resp. This Case differs from that; First, That was an Ancient Office, ours is not. Secondly, It was an Office belonging to a Court in Westminster-Hall; so is not ours. Thirdly, The Officer there was to be admitted by the Court; not so here. Fourthly, Diligence and great care is requisite to the management of that Office; this Office requires very little. Fifthly, That is an Office that requires skill, so does not this. Sixthly, The Reasons that are given in that case, why that Office could not by Law be granted for years, do not reach this case. Vide 5 Ed. 4. 3.

There are many Presidents of Offices granted for years: First, Offices in which the safety of the Realm is concernd; as the Office of Havener; i.e. Warden of a Haven or Port, by R. Hen. 6. The Office of Gun-Founder, 1 Car. 1. the Office of Making Gunpowder, by the Now King. Secondly, Offices that concern the trade of the Realm, 1 H. 7. Exchange of Mony, 18 H. 8. of Gager. 17 R. 2. of Aulnager. 4 Hen. 4. c. 24. and the Letter-Office temp. Car. 1. 3. Offices that concern Administration of Justice, as that of Coroner and Sheriff, till the 14 Ed. 3. c. 7. of Surveyor of the Green-war, and of the 6 d. Writs in Chancery, and Subpena's in C. B. and B. R. of Controller of Sealing Writs, of making out Process in C. B. and in 9 Rep. 47. Of the Stewardship of a Court. And if the Grant of this Office for years should be adjudged void, it would go near to shake all these Grants.

Baron

Baron Turner argued for the Defendant: He cited Hob. Rep. 153. that a Ministerial Office may well be granted for years, and 11 Rep. Auditor Curle's Case; and denyed that the Reason of Sir George Reynel's Case 9 Rep. could be applied to this. But whereas it had been Objected that the Plaintiff did not set forth a Title to the Office, he said that in an Assize that would have been necessary, but not in an Action upon the Case. Vide 35 Hen. 6. 7. Avowry 43. 34 Hen. 6. 43. Cro. 3 Rep. 500. 338. It had likewise been Objected, that the Plaintiff did not alledge how he was disturbed, as he ought per 8 Rep. France's Case. Resp. It is found that he kept in the House, and that is a sufficient disturbance. But he concluded pro Def. upon the validity of the Grant for years.

Baron Atkyns pro Defendente. He argued much as Baron Rainesford had done, and insisted upon the multitude of Offices granted for years; and quoted Slade's Case, 4 Rep. that Presidents make a Law, &c.

Hale Chief Baron. The Question here ariseth upon a former Grant for years made to him, under whom the Defendant claims, and a latter Grant made for life to the Plaintiff of the Office of Registring Polices of Assurances; and I think Judgment ought to be given for the Defendant. I hold the Office in question to be a good Office, and that the Plaintiff's Declaration is a good Declaration; but the Defendant has produced a better title, for it is ancienter and therefore better, though his Grant be but for years. There is no Office of making Polices, for neither the Common Law, nor the Statute, warrants the erecting any such Office. Nor is this an Office by Prescription. Nor was it well created by Patent in the 17th year of Queen Eliz. (for then was the first Grant;) but the Validity of it depends upon the Accession of the Statute of 43 Eliz. The Patent is void for making Polices: Nor has it any Validity, but what it derives from 43 Eliz.; and that Statute mentions only Entring of them, and as to that particular gives Validity to the Letters Patents of 17 Eliz. And there is no Imposition here upon the Subject; and the Grant is good, because the Office is not limited to another person, but is incident to the Commission granted by the King before the Statute, and the Statute takes notice of the Grant. Vide the Statute. Object. There is no Office at all in the case, because no Fee limited. Resp. Though there be no certain Fee, yet the party must have what he reasonably deserves, as every one must, that does any thing for another at his Request. Now the Policies must be entred by the Statute of 43 Eliz.

and

and the Law will allow a reasonable matter for Entring them: And Usage since the Statute hath now settled it, if not as a Fée, yet as a competent recompence for his labour; as Labourers Rates, though certain, yet are not Fees, but Quantum meruits: And there may be an Office without a Fée, if the Officer have any other Equivalent profit, Mo. Rep. 808. Here is a settled Employment, which the party undertakes for a profit, and for which profit he may have a Quantum meruit: And if it be not in strictness of Law an Office, yet it is a Profitable Labour and Employment, and so is valuable. And tho' a man have an Office without a Fée, as the Office of a Baily or Steward, though the Grantor may turn out such an Officer, yet a Stranger cannot: Nor can the Grantor turn him out, if there are Casual profits incident thereunto; and if a Fée belongs to it, though he turns him out, he must pay him his Fée, 31 Hen. 8. Dr. Grants.

The Plaintiff here has made a title good enough in his Declaration. First, Here is no Monopoly; for the Office is erected by 43 Eliz. and though the Grant be void in part, that will not vitiate the whole; as in the Case of the Letter-Office afore-cited, and in Sir Daniel Norton's Case, Hob. Rep. 12, 13. in case of Covenants betwixt a Sheriff and his Under-Sheriff. This Office being an Office by the Statute of 43 Eliz. a Grant of it by the word Concessimus is sufficient. And as to that I take these Distinctions; viz. First, If an Office be relative to some other thing, there the word Concessimus is enough; as the Office of Parker, Keeper of an House, &c. those Offices have a relation to the Park, the House, &c. which are things in Being, and the Offices virtually contained in them; as Cremer and Burnett's Case in B.R. Vid. Style's Rep. But the Law is otherwise in case of a New Office, conversant about a thing that had no Existence before; as 21 Ed. 4. 78. 9 Ed. 4. 17. for in such case the word Constituimus is requisite. Object. This is not the Grant of the Office, but of the Officer. Resp. Regularly Grants of this nature are Grants of the Office; but if, it appear sufficiently, as here it does, what the Employment is the Grant will hold. But if his Employment do not appear, the Grant is void, 8 Jac. 1. Bull and Cæsar's Case.

Thirdly, The Plaintiff had done enough in laying a Disturbance in the Defendant, though he made himself no title; and as to this the Difference is betwixt a Pernor of a Rent or other Profit, and the Terre-Tenant himself; the Right Owner needs not alledge a title against the former; but against the latter he must, if it be in a Real Action, vid. 9 Ed. 4. 11. for he does not claim the Rent, but disputes the payment of it. But in

in a Personal Action, as our case is, the Law is the same in both cases. Cro. 2 Rep. Dent's Case.

Fourthly, Here the Title appears upon the whole Matter to be for the Defendant, because his Grant is prior to the other; and it is good, though it be but for years: First, Because where a Greater Estate may be granted, there regularly a Lesser Estate may, unless there be some special Reason to the contrary: And if this Office may be granted for life, in tail or in fee, it may be granted for years: And it is not universally true, that Offices cannot be Granted for years, for some can and are so granted. Secondly, This is not an Ancient Office, but one Erected de Novo. Thirdly, It is not of the Nature of this Office to be granted one way or other; as in 18 Ed. 4. concerning the Clerk of the Crown. And Custom makes a Law in such cases, vid. 9 Ed. 4. 11. Judicial Offices are not grantable in Reversion; but Ministerial Offices are; and by Usage and Custom a Judicial Office may be granted in Reversion. And Custom will make void a Grant, 9 Rep. Sir George Reynel's Case. The like of the Office of Prothonotary, Clerk of the Pipe, Remembrancer, and Chamberlain of the Exchequer. But where Usage has not prevail'd, there it is otherwise; as in case of an Aulnager, Customer, Controller, Sheriff, Coroner: Vide 33 Hen. 6. cap. 8. And there is nothing here in the nature of the thing it self, to disable this Grant. For there is no Trust in the case; all that the Officer has to do, is to write after a Copy; as the making of Subpœna's, and Sealing them is granted for years, and held good. And the Officer here has liberty to make a Deputy, so that no Inconvenience can arise: And this Excuses any Disability that may be in his person; as a Register's Office granted to an Infant in Reversion was held good for that reason; Young's Case, 3 Cro. And if it were otherwise, it would be dangerous to many Grants: And before the Case of Sir George Reynel, 9 Rep. the Law was taken otherwise, as in 30 Eliz. So he concluded pro Defendente, and Judgment was given accordingly.

Holton *versus* Raworth.

IN an Information upon Seizure of Canary-Wines, for not paying Custom, Not Guilty was pleaded, and upon the Trial a Special Verdict was found; viz. That Eight and Fifty Ton of Canary-Wines were laden on Board at the Canaries, and there was so great a Leakage in the Voyage, that when they arrived here at London, there was no more Wine than the quantity of Two and Fifty Ton. And the sole Question was, Whether or no twelve pounds per Cent. which the Act allows for Leakage, shall be allowed for these 52 Ton; the Act directing 12 l. per Cent. to be allowed upon due Entry made.

Stevens Argued for the Plaintiff, That it ought not to be allowed: Vide the Book of Rates, Rule 8. First, The Duty of Tonnage is due upon the Importation, and the Allowance for Leakage is to be made then and not afterwards: Vide the Tenth Clause in the Book of Rates. Secondly, There was no Allowance for Leakage till the Long Parliament, I mean no allowance by Act of Parliament, but such Allowances as were made by Particular Order of King and Council; as appears in the Reign of Queen Elizabeth, King James, and King Charles the First. In the 8th year of King James, the King appointed a certain Allowance to be made, wherewith the Merchants were not satisfied. Whereupon in 10 Jacobi the Rate of 12 l. per Cent. was setled by Patent to be allowed upon due Entries made: And afterwards, as I said, it was setled by Act of Parliament. But it was never meant, that it should be in the power of the Merchants, after their Wines are come into Port, to fill up the Vessels, and yet to be allowed 12 l. per Cent. for Leakage: For then it were not properly Leakage, but Wine spilt at Sea in the coming.

Object. The Entry is a due Entry, if the true Content be Entred.

Resp. I deny that, with respect to Leakage: For if the Merchants must be allowed for it, then must the due Entry be of more than perhaps is really come into Port: As in this Case, If due Entry had been made, there ought Eight and Fifty Ton to have been Entred; viz. the quantity that was Laden aboard. Unless a Vessel were so run out, that there were but ten or eleven Ton left within; and then such Vessel need not be Entred; but else it must: And the Entry must be of

of the Contents of the number of Vessels that were shipp'd, and in no other manner: See the Book of Rates. After the Vessels are fill'd up, there cannot be properly said to be any Leakage; and the Act must be Expounded secundum subjectam Materiam. And this Act must be Expounded beneficially for advancing the King's Revenue. Now 45 Shillings is given to the King for every Ton, and 12 l. per Cent. allowed out of the whole for Leakage; which must be understood of the Number of Tons that are when the Ships arrive, Leakage not reckon'd: There must be no consideration of that in the 45 Shillings, because it is allowed for in the 12 l. per Cent. He concluded for the Plaintiff.

Lechmere for the Defendant. First, The Duty is to be paid upon Unlading: See Waller and Hanger's Case, 9 Jac. concerning Prizage, which though a Duty payable to the Crown by the Common Law, there was yet a Doubt, whether it could at all rest till the Unlading? But the Duty in our Case is not a Duty at Common Law. And in Swinnerton's Case, the King granted for years the Customs of such a Port; a Vessel came into Port, and before Unlading the Grantees term Expired, and another Grant took place, and the Question was, whether of the two should have the Custom of that Ship's Cargo? That Case was ended by Compromise; but the better Opinion was, that no Duty became due till Unlading.

Secondly, The Law favours Merchants, for the Encouragement of Trade, and there is no reason why they should pay Customs for nothing, which here the Merchant would do, if he were compell'd to pay for six Ton more than is arrived, or for six Ton spilt at Sea: See the Book, fo. 10. concerning Piracy and Loss at Sea; yet is that but a Declaration of the Common Law. Vide Dyer 43. 1 H. 8. cap. 14. & Pl. Com. Fogassa's Case; lost by Tempest; and the Case of 31 Ed. 3. of Goods, that perish after they are come into Harbour, that no Custom shall be paid for them.

Thirdly, 'Tis a hard case, if a true Entry of all that is in the Ship, shall not be accounted a due Entry: But that Entry must be made of all that was shipp'd, though it be gone before the Vessel arrives; in which case it would be a false Entry to Enter it. So that according to this, a true Entry shall not be a due Entry; but a false Entry shall. Nor is it material what the Number or Contents of the Vessels are; nor whether a Ton of Wine be in one or two Vessels: Custom is paid by the Ton, and that is reckon'd by the Quantum, with-

out respect to the Vessels. So he concluded for the Defendant.

Hale Chief Baron. Custom is due for Goods Imported, when the Ship begins to break Bulk. And the 12 l. per Cent. allowed for Leakage, is in lieu of Five pounds per Cent. allowed upon other Commodities: And there is the more allowed upon Liquors, because they are subject to more Loss at Sea by Importation, than dry Goods are. But I take it, that Leakage is allowed in respect of the hazard the Wines run of being lessened in quantity by Running at Sea; and therefore that the Original Contents of the Vessels, when they were put on Board, and full, is to be regarded. Adjornatur.

Afterwards in Michaelmas Term, the Barons delivered their Opinions.

Baron Rainesford pro Quer'. He argued, That Leakage is not allowable for these 52 Tons fill'd up. First, Leakage becomes due by Consent and mutual Compact of King and Subject, as appears by 8 & 10 Jac. which has been cited, before which time no Leakage was allowed. And by this Contract it was to be allowed upon due Entry made; which is not here. And this Case may be compared to the 32 Hen. 8. of Wills; where the King has a third part by agreement, as it were, for the loss of his Wardship. But cessante causâ cessat effectus: As if an Annuity be granted pro Consilio impendendo, or to repair a Park. If the Grantee refuse to give Advice, or the Park be destroyed, the Annuity ceases, 9 Ed. 4. 19. 5 Ed. 4. 5. 41 Ed. 3. 6. 21 Ed. 3. 7. And if it were allowed, the King would lose his Customs of six Ton, which will be 22 per Cent. Loss to him.

Object. 'Twill be hard upon the Merchant to pay for 58 Ton; the allowance of 12 l. per Cent. will not be proportionable to his Loss.

Resp. It is all that the Act allows, and it ought to content him. And though it be not a sufficient recompence for Spanish Wines, it is a very large recompence for French Wines: So that taking one with another, the Recompence is valuable for both. Besides the Merchant is not to pay the Duty till Landing, by the 1st and 10th Rule; and in case of Corrupt Wines, or Exportation, he pays no Subsidy, which are great Benefits allowed him. Obj. The 8th Rule. Resp. The Duty of Custom arises and becomes due upon Importation, but is not payable till Landing: So that the filling up the Leaky Vessels after the Importation, makes this an undue Entry; and the Merchant thereby loseth the allowance for Leakage, which would else be made him.

Baron

Baron Turner accordant. Without due Entry no allowance to be made for Leakage by the Act. There are here three things considerable; First, Whether the Entry be to be made according to the Number and Continent of the Vessels, or according to the Quantity of the Wines contained in them? And I hold, that the Entry ought to be according to the Content and Number of the Vessels, and not according to the Quantity of the Wines contained therein: For that is the surest way for the King to be answered his Duty, the certainty of which cannot else be so well known. Secondly, Whether the Entry ought to be of what is Imported, or of what is Landed? I take it, that the Entry must be of the Wines imported: For the Duty becomes due by the Importation before Landing; though it shall not be paid, in case after Importation, and before Landing, the Ship miscarry through some accident or other, by the Hand of God. Thirdly, I think the Entry here is an undue Entry, because there are not so many Vessels Entred as are Imported, and that therefore no Leakage is to be allowed.

Baron Atkyns accordant. Custom is paid to the King for his Protecting Merchants in their Trade by Sea, Dyer 43. And it becomes due by Importation, and before Landing, insomuch that a Pardon after Importation, and before Landing, will not discharge the Duty; and so is Hanger's Case, 9 Jac. in case of Prizage. This allowance of Leakage is grounded upon a Contract and Agreement betwixt the King and the Merchants, which ought to bind them; and it is only to be allowed when a due Entry is made, which is not here. So he concluded pro Rege.

Hale Chief Baron to the same purpose. First, I will consider of some Exceptions to the Information: First, That there is no Latin word in the Information for the Species of the Wine; it is only said Quinquaginta quinque pipas Vini, Anglicè Canary Wine, without saying Hispanicè. Yet I hold it to be well enough, for that is only a specification of the Wine, and the General being expressed in Latin is sufficient; as in 24 Car. B.R. Ro. 431. the word Ferrum, Anglicè Iron-Bars: So the word Stannum, Anglicè Pewter-Dishes, or Platters, is sufficient without more: And yet there are Latin words by which these things might be express'd. A second Exception is this; viz. it does not appear that the Wine forfeited was seized. For Two and fifty Tuns were Entred, and Custom paid for them and yet Six of them seized for Non-payment of Custom. Resp. All the Custom is not paid, because Leakage is demanded to be allowed, which must not be here allowed; and then the case is no more than this, viz. There is Custom due for an

an Hundred Pipes of Wines, and there is only so much paid, as Ninety Pipes come to; in that case some of the Hundred Pipes may without question be seized for this Forfeiture.

Now for the matter in Law, there are three things here to be enquired into. First, At what time Custom becoms due. Secondly, According to what Proportion it must be paid. Thirdly, In what Case Leakage is to be allowed? For the first: Custom is not due till Landing. For goods may be imported by stress of Weather, or for want of Water or Victuals, and not by way of Merchandize; and if they are not imported as Merchandize, no Custom is due; but if imported as Merchandize, the Act of Tunnage and Poundage seems to make them lyable to the Duty upon the Importation: But this is corrected by other Acts, and by the Rules in the Book of Rates added to the Act: And by the Common Law, Customs are not due upon the Importation unless some Act by way of Merchandize be done, as breaking Bulk, selling part, &c. And this appears by the Acts of 28 Ed. 3. c. 13. & 20 R. 2. cap. 4. And here though the Act of Tunnage and Poundage makes it due upon the Importation, yet the first Rule in the Book of Rates corrects it, and makes it due upon the Landing only, and not fore more than is brought ashore: With which Swinnerton's Case agrees, that has been cited. And this is different from that of Prizage: Which becomes due upon breaking of Bulk, as appears in Hanger's Case. And the Reason is, because the Acts of 28 Ed. 3. cap. 13. & 20 R. 2. cap. 4. do not extend to Prizage, but to Customs only: So that Prizage remains as it was at Common Law, before the Acts made. A Second thing is be considered, is, whether the Duty be to be paid according to the Content of the Vessel, or according to the quantity of Wine that is really contained in the Vessel? Now if a Hogshead of Wine were imported in a Pipe, Custom should be paid but for a Hogshead; for else it would be very unreasonable. Vide 27 Ed. 3. cap. 5. and this may well enough be made to appear, either by the King's Gager, or by the Merchant's Information at his Peril. And concerning these matters between the King, the Merchant and the Buyer, see the Acts of 27 Ed. 3. c. 8. 18 Hen. 6. c. 17. 1 R. 3. cap. 13. And there is no penalty imposed for not filling the Cask, but for false measure there is; and therefore I take it, that the Duty is to be paid according to the true estimate of the quantity, and by no other Rule.

Thirdly,

Thirdly, The third Consideration in the Case is, that of Leakage; which we must consider three ways. First, Before Landing. Secondly, After Landing. And Thirdly, Both before and after, with respect to the Loss, that is sustained by it. Upon what Consideration there was an Allowance made for it, whether in respect of the Loss sustained, or of the Custom paid, or upon what other account, it was dubious, as also in what proportion it should be allowed, till 8 & 10 Jacob. 1. which settles it by Order of Court at 12 l. per Cent. upon due Entry made. And that was as it were the Medium agreed upon, between the King and the Merchants; Till the 17 Car. 1. till which time Allowance was made accordingly: And there had been two different Entries made, as there were in this Case; viz. one by the Master, and the other by the Merchant, the Merchants Entry would have been Conclusive for the allowance for Leakage. But now the word Leaking is got into an Act of Parliament, and is an Allowance made to the Merchant upon a due Entry, made by him according to his Contract: And otherwise it is not to be allowed; nor ought it here to be allowed, because the Entry here is not according to the Original Contract, to which the Act, which now allows it, has respect, as to the original cause of it: And as has been said, Cessante causâ cessat effectus. And this I take to be the sole Ground and Reason, why that Allowance is not to be made here; viz. because the Merchant has not in this Case made an Entry, according to the nature of his Contract. Object. Since the Act of Parliament has taken place, no notice ought now to be taken of that Contract. Resp. But yet the Reason of this Allowance may be enquired into; And that was the due Entry of all Wines Imported. Object. It was allowed for the Encouragement of Merchants. Resp. But with a Retrospect to the Contract, and in consideration of that. Object. If the Allowance be not here made, the Merchant's Loss will not be recompenced. Resp. It was not allowed in respect of the Loss only: But also in respect of the Customs paid upon the Importation, and of over paying the Customs when the Casks were not full. And if the Merchant will fill up his Casks and so decrease the Customs, as he may, if he please, then Leakage ceaseth. And though so much run out, that he would not be recompenced for his Loss in this case, if he paid Custom for Fifty eight Ton, yet he would be recompenced according to Contract. And if the recompence be short as to one sort of Wines, it is full and over as to another, viz. for all French Wines. So that Consideratis Considerandis,

siderandis, the Merchant receives a Satisfaction: He may fill up his Casks after importation; but then he waives his allowance for the Leakage: And shall pay the duty only for so many Tons full measure. So he concluded for the King, and Judgment was given accordingly.

De Termino Pasch. Anno 16 Car. II. In Scaccario.

King contr' Sir Edward Lake.

(1) IN a Prohibition upon an Excommunication, for not answering upon Oath to Articles exhibited against him, and for not taking the Oath of a Church-Warden, to present upon all the Articles contained in a Book thereunto annexed, amongst which there were some that would oblige him to accuse himself: It was held per Curiam, That a Refusal to give a Copy of the Libel is a good Cause of Prohibition: Or where a Libel is too General, as for certain Offences. Vide F. N. B. and Collins and Hunt's Case, Cro. first Rept. And that such Recognisances and Oaths as may be taken and Administred there, are only in causis Matrimonialibus & Testamentariis: But that the Citation needs not contain the Cause of Action, tho' the Libel must. And that since the late Stat. of 13 Car. 2. no man ought to have an Oath administred to him to present or accuse himself, or to be Sworn to a Book, that contains such matter inter alia. And if a Man be Excommunicated for not Answering to Articles, that he ought not to be put to Answer to, that it is a good Cause of Prohibition. And if he be not Absolved upon request, without being obliged to take an Oath de parendo Mandatis Ecclesiæ, an Attachment lies: for that such Oath ought not to be tendred, but where the Cause, upon which the party is Excommunicated, is proper for the Spiritual Court. And that no Man at this day ought to be Sworn upon Articles exhibited against himself. And that Church-Wardens ought to be sworn to do what appertains to their Office; and no more. And if the Ecclesiastical Court proceed against them for matter not within their Jurisdiction, that an Action upon the Case

Case lies. And that upon a Contempt to the Citation remedy lies in the Spiritual Court; and the like for Contumelious Words, if spoken in Court, but not if the Words were spoken elsewhere.

Clapham *versus* Sir John Lenthall.

(2)

IN Debt upon an Escape after Execution, the Defendant appeared & defendit vim & injuriam quando, &c. And Imparled Specially, saving to himself all Advantages and Exceptions, quoad Billam prædictam. And whether or no after such an Imparlance, he must be allowed his Priviledge, as Marshal of the King's Bench, was now the question.

In this Case it was held per Curiam, that there are three sorts of Priviledge in this Court; First, As Debtor. Secondly, As Accountant. And Thirdly, As Officer. Against the first of these any Man that has a Special Priviledge in another Court, as an Officer of the Court, or as an Atturny, shall have his Priviledge: Because the Priviledge of a Man as Debtor, is but a General Priviledge. But if an Accountant begin his Suit here, no Priviledge elsewhere shall be allowed; because an Accountant has a Special Priviledge, by Reason of his Attendance here to pass his Account: And the King has a particular concern in his Attendance. The same holds in case of an Officer of the Court: If he Commence a Suit here, no Priviledge in another Court shall prevail against him: Because his Attendance here is requisite, and his Priviledge here is Attach't first, by his Commencing his Suit: And herewith all the Presidents agree. Vide 9 Ed. 4. 53. per Cur'. But if an Accountant has finish't his Account, and reduced it to a certainty, so that it is become a Debt; he shall then have no other Priviledge, than a General Debtor has. So a Servant to a Minister or Officer of Court, has no Priviledge against a Priviledged Person elsewhere. The Court held likewise, that after such Defence as aforesaid, Priviledge may be allowed: For it is not a full Defence, nor does he go about to ouste the Court of Jurisdiction; but only claims his Priviledge. Likewise after a Special Imparlance Salvis Omnibus Advantagiis & Exceptionibus, a Man shall have his Priviledge. But if the Imparlance be Special, quoad Billam, Breve seu Narrationem, there it shall not be extended further; and after such an Imparlance Priviledge is not allowable: As appears 7 Hen. 6. 39. 22 Hen. 6. 7. 9 Edw. 4. 53. And when day is given before the

Count, it is called dies datus: When after, it is called an Imparlance. But upon the Defendant's prayer it was Adjourned.

Sir John Trever *versus* Roberts.

(3) IN an Action upon the Case, upon a Promise to pay such a sum of Mony, in consideration that the Plaintiff had Licensed and permitted the Defendant to Enjoy such Lands; After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the License and Permission here amount to a Demise; and therefore an Action of Debt ought to have bèen brought, and not an Action upon the Case: As 5 Hen. 7. 1. Cro. 2. Rep. 668. Cro. 3 Rep. 561, 786, 2. because the Plaintiff has not set forth his Title to the Land.

Hale Chief Baron: This License and Permission does amount to a Lease, upon which an Action upon the Case does not lye without Express Promise; but upon an Express Promise to pay Rent, an Action upon the Case will well lye: And so it hath bèen adjudged. For it may be the Promise was the ground of the Lease and Reservation. And here we are after a Verdict, which has found the Promise. So that we are to presume, there was an express Promise to pay so much Mony, in consideration that the Plaintiff would permit him to Enjoy the Land. Sed Adjurnatur.

The Attorny General, *versus* Richard Waring.

(4) IN a Scire facias, upon a Judgment upon a Recognisance at the Kings Suit, the Case was thus; viz. One Underwood was Endebted to one Parker, the King's Receiver in 1 Car. 1. And for Security, the said Parker took an Obligation of Six hundred pounds in the King's name, (the Debt being Three hundred pounds) Condition'd to pay 300 l. with Interests to Parker. Afterwards the Mony not being paid, Underwood's Lands and Goods were extended: And Lands were found to the value of Six pound per Annum for Life, and Goods to the value of Two hundred ninety three pounds fifteen shillings and six pence: Which were return'd in a Schedule. And afterwards by Order of Court, upon Security given to abide the Order of the Court, concerning these Goods they were to be restored to Underwood: Afterwards Underwood, and the now Defen-

Defendant Waring and one Jermy, became joyntly and severally bound in a Recognisance of Six hundred pounds to the late King Charles the First, Conditioned to abide the Order of the Court, as aforesaid. And some time after, the Order not being performed, this Recognisance was put in Suit in the time of the Late Civil Wars, and at last Judgment was obtained upon it; and a Writ of Error brought, which determined by Non-suit after the Act of Oblivion: And then the Act was pleaded to a Scire facias upon the Judgment; in which are Excepted, First, All Recognisances, Obligations and other Securities given or entred into, since the five and twentieth of March, One thousand six hundred and forty, by any Receiver, Reve, Bayliff, Collector or Publick Accountant in the Court of the Publick Exchequer, and their Sureties and their Accounts respectively. Secondly, There are Excepted in another Clause, any Bonds taken in his late Majesty's name, before the month of May, One thousand six hundred forty and two, for securing the proper Debt of any Servant, or Receiver of the Revenue of his said late Majesty, that hath not been paid to, or by order of the same lawful or pretended Authority. And upon a Demurrer these three Questions arose; First, Whether or no this Recognisance, were an Obligation within the intent of the second Exception? Secondly, Whether the Defendant here has time to plead? Thirdly, Whether he may plead it by Attorny, as he does here?

Hardres pro Defendente. First, Ex vi termini, there is a great difference betwixt an Obligation and a Recognisance: One has the partie's seal set to it, the other has not: And to the one Non est factum is a good Plea, but not to the other. Secondly, The words of this Act, being an Act of Grace, must be taken Extensively and most Beneficially for the Subject: And so the Act it self directs. And consequently, Exceptions out of the Act must be taken strictly, because they restrain the favour of the Law. Hill. 11. Car. 1. Bell's Case in B. R. Cro. 1. Rep. 324. the Act of General Pardon in 21 Jac. 1. Excepts All Offences in taking away, Imbezeling, or purloyning any the King's Majestie's Goods, Mony, Chattels, &c. And yet it was adjudged that the Felony in purloyning them, was not Excepted. Thirdly, The different ways of penning these two Exceptions shew as much; for in the former Recognisances are named, but not in the latter: Which shews that the makers of the Law designed to except them in one Clause and not in the other. Vide Cro. 1 Rep. 258. Priest's Case. Fourthly, Here the Recognisance was not entred into to secure a Debt owing to the Receiver, but to perform the Order of the Court, and to answer

the value of the Goods Restored, that had been extended upon a former Obligation, given to the King for the Debt of his Receiver, as aforesaid. So that this Recognizance is Collateral to the original Debt. And shall not be taken to be a Security for the Receiver's Debt, within the meaning of this Exception, which must be taken strictly. As in Drywood's Case, 5 Rept. 48. b. in the General pardon of 39 Eliz. the Exception of all Suits depending to be prosecuted, does not extend to a Bill in the Star Chamber, where the Plaintiff Dies: Though the Attorny General may Prosecute after the Plaintiff's Death; because the Intention of the Exception was, to be Prosecuted by the Party himself. Fifthly, Here the Recognisance is converted into a Judgment, which being of a higher nature, the Recognisance is now drown'd; 6 Rep. Dowdale's Case. Here the Original Obligation given to the King by Parker remains in force, notwithstanding that there has been Execution sued out upon it; for that there was but part of the Debt levyed: So that take the Exception never so strict, yet that will be within the benefit of it. In the 8 Rept. 138. b. Sir Francis Barrington's Case: An Exception of Wood for his Use and Occupation, does not extend to Wood Cut down and Sold by him; but to Wood Cut down for Repairs, Firing, &c. And in 7 Rep. 18. b. Cecill's Case. Remedy given by 33 Hen. 8. cap. 39. in Debts due to the King upon Obligation, does not extend to an Obligation for performance of Covenants. So here, there being a new Debt created to the King, by Judgment upon this Recognisance, the Recognisance is not within the Exception.

As to the Second Point; I conceive the Plea comes time enough. First, Because it is an Equitable Plea, upon the Statute of 33 Hen. 8. cap. 39. And this Court is a Court for the Revenue, and a Court of Equity as well as of Law. Vide 6 Co. Sir Edward Phitton's Case, where an Executor may come in and have the Benefit of a Pardon without process.

Secondly, Because no Audita Querela lies against the King, and therefore the party has time after Judgment given against him, to plead; as has been adjudged in 11 Hen. 7. 10. 8 Hen. 8. Keilw. 187. 34 Hen. 6. 15. 35 Hen. 6. 1.

Thirdly, The Defendant may plead by Attorney, because here is a Suit by Scire facias; as in 35 Hen. 6. 1. And prayed Judgment for the Defendant.

Stephens pro Quer'. First, An Obligation and a Recognizance are all one in substance: For a Recognizance binds the party, as well as an Obligation; and it was not the Intention of

of the Act to bar Just Debts due to Subjects, as appears by the Exceptions.

Secondly, The Defendant has no Day to plead, for it is after Judgment, and a Writ of Error and Nonsuit thereupon; and the Act of Pardon came out before the Error was determined.

Thirdly, He cannot plead by Attorney, for the Defendant's Warrant of Attorney determines by the Judgment; but the Plaintiff's does not till Execution, 35 Hen.6. 1. And pray'd Judgment for the Plaintiff.

Afterwards in Trinity Term it was argued again by Sir Robert Atkyns for the Defendant; and by Mr.Mountague, the Queens Attorney for the Plaintiff.

Sir Robert Atkyns. The Recognizance in this case is not an Obligation within the Exception, Vid.Co.Lit.172. that Obligation is a word in its own nature of a large extent; but it is commonly taken in the Common Law, for a Bond containing a penalty, with Condition for payment of Mony; that is, the strict Legal sense of it, viz. to be bound by a Writing sealed and delivered for the payment of any thing, Corn, Mony, or other things, Dyer 24, 25. And that is the Common and Vulgar acceptation of the word also; and so it must here be understood. But a Recognizance is acknowledged in Court, and the party's Seal is not affix'd to it; as it is to a Recognizance in the nature of a Statute Staple. He cited Cro. 1 Rep. 444. Co. 3 Inst. 169. Mag. Chart. 678. that it is the Seal of the Party that makes the Obligation.

Secondly, In the first Exception Recognizances are mentioned, and therefore shall not be taken to be within the second, because not express'd. And Security taken in the King's Name, is not usually taken by Recognizance; and therefore shall not be intended to be within the Exception, which must be construed beneficially for the Subject, as the Act it self must.

Thirdly, If Recognizances were within the Exception, yet they would not extend to the Recognizance in question, because it was not taken for the Security of a proper Debt; but is taken Collaterally: And the Obligation given to the King before is within the Exception, and therefore the Recognizance is not.

To the Second Point; The Plea here comes time enough, because the party has no other remedy, 11 Hen.7.20. 34 Hen. 6.

Object.

Object. But he ought to plead in Proper person.

Resp. He needs not; and the Case cited is of a Capias pro fine, where the party can appear no otherwise; and concluded pro Defendente.

Mr. Mountague pro Quer'. First, A Recognizance is an Obligation, though it be not a Deed: For it has words Obligatory, and that makes it properly an Obligation. And so it is called, An Obligation Recorded; Mr. Dalton 116. Dyer 21. a. the word Recepisse is a word Obligatory; so the word Debere, Ibidem; Vide Yelverton's Rep. Dobson & Key's Case, 4 Rep. 65. Cro. 1 Rep. 494. And as a Fine is reputed a Feoffment upon Record, so a Recognizance is no more than an Obligation recorded.

Secondly, It is within the Exception, because it ariseth out of the former Security, and is grounded upon it; and where the Principal is Excepted, all Incidents and Consequences are Excepted likewise: Vide 5 Rep. 47. and Littleton's Case there. Vide 6 Rep. Phitton's Case, & Co. 12 Rep. Ford's Case.

Thirdly, For the Third Point, he held that he ought to have been in person, and cited 35 Hen. 6. 1. Pardon 1.

Afterwards the Court delivered their Opinions for the Plaintiff. Though an Obligation be not a Recognizance in pleading, yet it may well be so within the meaning of an Act of Parliament. And in Sir Robert Tracy's Case, a Promise to become bound in a Thousand Pounds, may be perform'd by acknowledging a Recognizance, or a Statute; and here is the same Reason. And Debt in Aid is within this Exception; and so is a Debt Assigned, as has lately been Adjudged in Turner's Case, which are more strong Cases than ours: For they are not Debts owing to the King immediately; and here the Recognizance is grafted upon, and takes its rise from the former Obligation, which is within the Letter of the Exception: And this resembles in some sort a Nomine pœnæ, annex'd to a Rent; which shall go the Heir, as the Rent does. And the End and Design of this Recognizance is to secure the Debt owing to the King's Receiver. And the words of the Exception are not for paying, but for securing the proper Debt of any Servant or Receiver, &c. Though per Hale Chief Baron, if the words had been for paying, the Law would have been the same. And this Recognizance was acknowledged, to secure a Debt owing to the Receiver, and comes in lieu of it. But for the Second Point, If this were a good plea, it comes

comes in well enough without any Continuance, which serves to no other purpose, but to shew that the Judgment remains in force unreversed: Vide the Statute of 5 E. 2. c. 9. And he is regular enough in pleading it by Attorney. A Warrant of Attorney for the Defendant determines by Judgment; but a Warrant of Attorney for the Plaintiff determines not till Execution sued, or a year after the Judgment, because then the Plaintiff is put to his Scire facias: But here it is in the nature of an Original Suit, and he is (as it were) a Plaintiff, as appears by the Form of Pleading, in which he complains that he Unjustly vex'd: And Judgment was given pro Rege, nisi, &c.

De Termino Sancti Michaelis, Anno 16 *Car.* II. Regis.

In Scaccario.

The Attorney General and Hogskins, *versus* Doctor Guerdon.

Upon a Bill in Equity at the Relation of the said Hogskins, the case was this; viz. The Defendant Guerdon was made Master of the Mint in the time of the Keepers of the Liberties of England; and Hogskins was an Officer there. And there were Articles Invented betwixt the said Keepers and the Defendant concerning the Mint; by which the Defendant was obliged to pay the Under-Officers there, and was to have allowed him for his own Salary, Four Hundred pounds a year, and other Covenants there were on both sides: And Wages being due to Hogskins as an Officer, the King was restored, and all publick Debts, Duties, and Securities, due and given before, were thereby vested in him. Then comes the Act of Oblivion and discharges all Debts, Duties, Suits and Demands, which the King can pardon; except those Excepted in the Act. To a Bill preferr'd against Guerdon in this case for Wages due to Hogskins, the Defendant Demurr'd: And the Court conceiving (1)

ceiving a Doubt of the Matter, saved the benefit of it to the Defendant at the Hearing of the Cause. And the Cause coming to be heard, it was urged for the Plaintiff, that these Covenants are not pardoned, because the King has them only in Trust, and for the benefit of other persons: And it was not the Intent of the Act, that the King should pardon or discharge any thing, but what he might lawfully pardon; for id possumus, quod jure possumus. As if before the Act of Pardon the King had granted over an Obligation, or other Security, or Issues forfeited, the Grantee would not have lost the benefit of the Grant by the Pardon, for they could not lawfully be discharged by the King, being granted out of him. So here.

Secondly, These Covenants are Excepted by the Exception which saves the Accounts of Persons who have received any of the Rents and Revenues of any Lands or Hereditaments, of or belonging to, &c. The Profit of the Mint is an Hereditament, being an Ancient Revenue of the Crown. It is also Excepted by the words Recognizances, Bonds, and other Securities given or entred into by any Receiver, Reeve, Bayliff, Collector, or other Accountant in the Court of Publick Exchequer, &c. As the Defendant now is by virtue of the Patent for his Office, Granted to him by the Keepers of the Liberties, as aforesaid.

Paragr. 10.

Paragr. 21.

To which the Defendant's Councel answered: First, That these Covenants were pardoned, because they are now in the Eye of the Law made with the King, and it is in his power to discharge them; and tho' he has them only in trust, and for the benefit of others, yet that is not saved by the Act. Secondly, The Covenants are not saved by either of the Exceptions that have been urged; because the first Exception extends only to Ordinary Accountants, for the Revenues of his Lands and Tenements, &c. not to those that receive any part of his Revenues, not being appointed so to do, as Officer or Receiver. Nor does the other Exception affect this Case, for it is to be understood of such Accountants as are so upon Record, and so chargeable, and must have their Discharges here. But the Defendant is not such an Accountant; for by his Patent he is made accountable only before a Particular person, to be assign'd to him, from whom he is to have his Discharge, and not in the Exchequer; as the Exception is to be intended. And this seem'd to be the Opinion of the Court; but the Barons wish'd the parties to agree amongst themselves. And the Cause was Adjourned.

At

At another Day in the same Term the Court delivered their Opinions, That the Bill ought to be dismiss'd: And two Points were made in the Case: First, Whether or no there be proper Plaintiffs before the Court, and such as are entituled to be relieved? And they held in the Negative; because here the Covenants being vested in the King as a Publick Trustee, no remedy lies against him, as there does upon an Original Covenant by the King, upon the behalf, and for the use and benefit of another person. And because the Remedy here is not Reciprocal, there is no reason why the King should be relieved: But upon an Original Covenant by the King, there Relief lies upon and against all that claim under him; because it was Originally in the King by his own Contract; and so it was held in Sir John Baker's Case, 8 Car. 1. in this Court. But in this Case there was no Contract made with or by the King. And therefore the King not being chargeable himself, ought not to charge another.

The Second Point was, Whether or no this was within the Act of Oblivion? and they held it was within the Benefit of the Act. For admitting that it were an Original Trust in the King, yet he may release or pardon this Debt or Covenant, because the Interest in Law is in him; and the words of the Pardon are large and comprehensive, and will reach all Debts owing to the King, though in Trust, if not excepted. And so it must be in all General Pardons; and here it is stronger against the party, because himself is a party to it. Nor is it within any of the Exceptions. It is not within the Exception, whereby Detaining, Imbezelling, &c. any the Goods, Mony, Chattels, &c. of the late King, Queen, or Prince, &c. are Excepted. For that Clause extends only to such Goods as they were actually possess'd of and appertain'd to them, and not to such as they might for the future come to be entitled to. And all Accountants, generally speaking, are not Excepted; for then the Exception would be so large and comprehensive, that but very little would be pardoned. For every taking and receiving of any part of the Revenue or Goods, &c. of the King, makes a man accountable to him: But such Accountants were not universally intended to be Excepted. Secondly, It is not within the Exception of Accountants for the Profit of Lands, Tenements, or Hereditaments. For this Account is not of the Revenue of any Hereditament, but of the profit or product of the Office or Trade of the Mint. Which though it may be styled an Hereditament in the Crown, yet cannot reasonably be supposed to be included within this Exception. Thirdly, It is not within the Exception of Bonds or Securities, Paragr. 16.

given by any Receiver or other Accountant in the Exchequer, though the Defendant in this Cause gave Security; because the matter here does not lye properly in Account, but in Covenant, and so collateral to the Contract. And the Accounts meant in this Exception, are such as are ordinary and common, and well known in the Court, &c. and not such as arise by other means, as this does. And the Defendant cannot be charged or discharged by the Court; but by the direction of his Patent must be accountable to Particular persons, who have power to give him a Discharge; and therefore this Case is not within that Exception. And concluded pro Defendente.

The Attorney General, *versus* Holt and Others.

(2) IN a Scire facias against them upon a Recognizance, as Sureties to the Commissioners and Fermors of Excise, for the Arrears of Excise before the Act of Oblivion: Which pardoned all these Recognizances, but which were afterwards revived by another Act, whereby Farmers and all their Sureties were made liable to the Duty of Excise. It was Objected, That a Farmer is not chargeable with the Duty that was Farmed to him, but with the Rent only; and therefore is not within the Act. But tota Curia è contra, for they are express'd by Name. But the Commissioners and Sub-Commissioners are not comprehended, because they are not named: But their Sureties and themselves are liable for the Duty it self, and are Excepted out of the Act of Indemnity, although their Sureties are pardoned.

Seymor and his Wife, *versus* Northwortly.

(3) IN a Special Action upon the Case, directed upon a Hearing in the Exchequer-Chamber, the Issue was, Whether a Will of Lands made by Sir Henry Killigrew, deceased, were Revoked, or not? And the Jury found the Matter specially; viz. they found that he made a later Will in writing; but they say, That they do not find that he devised any Lands thereby. And whether or no this later Will thus found, shall amount to be a Revocation of the former Will, was the sole Question?

Sir

Sir Robert Atkyns pro Querente; that it is a Revocation. Object. A Revocation must be expounded according to the Subject Matter. If a later Will cannot consist with a Will formerly made, it will be a Revocation of it; but otherwise not.

Resp. The finding of the Jury, That they do not find that any Lands were devised by the later Will, is a void Finding; for it is Negative, and therefore superfluous. Vide 1st Rep. Porter's Case, of a Clause in the Statute of 5 Ed. 6. of Offices. And that the making of a later Will is ipso facto a Revocation of the former, is without dispute; Vide Perk. 42. Plo. Com. 541. 4 Rep. Forse & Hemblinge's Case. Now the Court shall presume, that Lands were devised by this later Will, because it was in Writing; and then if it be not a Revocation of the former, it will be void, as being to no purpose, nor of any Effect; and if it be not a Revocation of the former Will, then it is not a Will, but a Codicil: And no man can be said to leave behind him two Wills. But one Will, and one or more Codicils is proper; because a Codicil does not take away all the Effect of the Will. But here the Jury find expressly, that he made a subsequent Will; and consequently the former was Revok'd, Vide 4 Rep. 61. And it ought the rather to be held a Revocation in this case, because else the Heir at Law will be disinherited, whom the Law has always a favourable regard to: And a Revocation of a Will may be by word of Mouth, 2 Cro. 49, 115. 1 Cro. 51. 3 Cro. 781. But here it is in Writing, which is a stronger Case. So he concluded pro Quer'.

Mr. Finch Solicitor General pro Defendente. The Jury have found, that they do not find that any Lands were Devised by the later Will, and therefore being Matter of Fact, it shall not be presumed by the Court: Hob. Rep. is a more forcible Case than ours; for there a Fine was found, but no Proclamations, and per Cur. it shall not be intended that there were any; but it shall be taken as a Fine at Common Law only, which makes a Discontinuance, but not as a Fine upon the Statute, which is a Bar, &c. And if in that case the Jury had found, that they did not find that there were any Proclamations, this would have made the Verdict never a whit the worse; for it would but have been a fuller explanation of their Mind; and so it is here. And it is without question, nor a Point to be argued; but that a later Will is no Revocation of a former Will, unless it be contrary to it, and inconsistent with it & de eadem re. And if to the making of a good Will the

Testator must have Animum Testandi, then to make a good Revocation of a Will, there must be Animus revocandi; And the word Testamentum is not a vocabulum artis, to make it inconsistent with the former, because it is a Will: For there is no doubt, but that a man may have divers Wills, of Goods and of Lands; by which he may dispose of one part to one, and of another part to another: For these are of several things, and the one will not in such case be a Revocation of the other, Vide 1 Cro. 293. And the Civilians, who are very nice in Wills, yet do not hold a later Will to be a Revocation of a former, if they may stand together, Vide Swinburne; & vide 1 Cro. 24, & 49. a Case to the same purpose with this; and concluded pro Defendente.

In Easter Term, 17 Car. 2. the Court delivered their Opinions in this Case, viz. That they were not satisfied the second Will did Revoke the former, because it is not found that any Lands were Devised by this second Will; so that it may be, or it may not be consistent with the former; and where the Matter stands indifferentèr, the Court will not suppose a Revocation of a former Will solemnly made. But Hale Chief Baron held, That a second Substantive independent Will, though it do not by express words import a Revocation of a former Will, nor passes any Land, will yet amount in Construction of Law to a Revocation: But here it being in Doubt whether this were so or not, he held there was not sufficient Matter found for the Court to construe it to be a Revocation: For it may be, for ought appears to the contrary, that the second Will in this case was a confirmation of the former.

William Howard Esquire, *versus* Sir John Lenthall Marshal *de B. R.*

(4.) The Case was this, viz. Several Hab. Corp. issued out of this Court, with several Pains, amounting in the whole to 900 l. to have here the Body of one Morgan Baronet, Kirke and Mole; but no Return was made of them: And thereupon Sir William Howard obtain'd a Privy Seal of the King for these Pains, by the name of all Fines, Amerciaments, and Sums, for not having the Bodies of the said *Morgan Baronet*, *Kirke* and *Mole*, in this Court, and Process here issued to bring them in; and now upon Examining the Matter, and hearing of both Sides, it appears that the said Sir John Lenthall could not have their

their Bodies here, because the Writs came to him tardè, viz. but only the Night before, so that he had not time to prepare Returns of them, and that there was no Collusion in the case betwixt him and the Prisoners, nor that he had any promise, agreement, or other Security from any of them, to save them harmless, for not returning the Writs, and having their Bodies here. And per Cur. this is not like a Fine or loss of Issues, or any Mulct set by Order or Judgment of Court; but is only a Pain inserted into the Writ, which is Conditional. And therefore process of Extent shall not issue thereon, but a Scire facias only, to which the party may plead: As upon a Recognizance for the good Behaviour; and these Pains do not pass by the words Fines and Amerciaments; and it is in the power of the Court to mitigate them; and they are like the Pains inserted into Subpœna's and Injunctions, which are not levyable, but in terrorem only. But whereas Morgan was styled Baronet in the Writ of Habeas Corpus, and in the Privy Seal, Miles only, the Court gave no heed to that Variance.

The Attorny General *versus* Resby & *Al.* Sureties for the Duty of Excise, and the Performance of Covenants, &c.

TO a Scire facias against them they pleaded the Act of Oblivion, 12 Car. cap. 11. and the Attorny General Replied, to make them liable by vertue of the New Act of 13 Car. 2. cap. 13. and assigned a Breach, to which the Defendants Demurred. And held per Curiam, that a Breach was not requisite to be alledged, because admitted by the Defendants Plea of the Act of General Pardon: By which the Plaintiff was prevented to alledge a Breach. As in Yelverton 78. Where the Condition of a Bond is to perform Covenants in a Lease, and to pay Rent; if in an Action of Debt upon this Bond, the Defendant pleads performance of all the Covenants, and an Eviction of the Lands Leased by a Title prior to the Lease before the Rent became due; here the Plaintiff needs not reply and say, that the Rent was in Arrear such a day, because that is implied and admitted by the Defendant's Plea; so here. And this is not like to the Case of Debt upon a Bond to perform an Award, where the Defendant Pleads nullum fecerunt Arbitrium, and the Plaintiff in his Replication sets forth an Award; for there he must alledge a Breach, because it is not admitted by the Defendant's Plea. (5)

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It was then Objected, that by the Stat. of Mag. Cart. cap. 8. The Sureties are not Lyable, if the Principal be responsible, and that it does not appear here but that the Principals are. To which it was answered and resolved by the Court, that the said Act does not extend, nor was ever taken to extend to Sureties in a Bond or Recognisance, if they may be so called, being bound themselves equally with the Principal; as Sureties to perform Covenants and Agréements are in like manner: But to Pledges and Manucaptors only, who by express words are not responsible unless their Principals become insolvent, and so are conditional Debtors only: And so the Act has always béen construed, and the words themselves imply as much. And upon this point Judgment was given against them, nisi, &c.

Rogers *versus* Hawkesworth and Norwood, Executors of, &c.

(6) IN a Bill in Equity to have a Bond delivered up, being Discharg in the Testator's Life time; the Case was, that the Obligée being Sequestred, the Committée of Sequestrations compell'd the Obligor to pay the Principal Mony being 20 l. to them, except 30 Shillings which was suspended for the use of the State, and upon this they discharged the Obligor against the Obligée. And the Court held clearly that the Debt due upon this Obligation, was pardoned by the Act of Oblivion: But that there should be no Costs in the Case, for that this Bill was in the nature of a Plea at Common-Law, and by way of Exoneration and Discharge, and therefore the Defendants here shall pay no Costs, no more than if they had béen Plaintiffs at Law, and had béen Barr'd or Non-suited.

Dawson *versus* Fowle.

(7) IN a Prohibition to the Arches, where there was a Libel grounded upon an Election of Church-Wardens in S. Michael's Parish in Crooked Lane, Contrary to Custom, by a Select Vestry, chosen by the Bishop of London, and without the Parishoners. Doctor Walker Argued for the Defendant, that it was a void Custom, for this Election is according to the Ecclesiastical Law received here before the Canons in 1603. and is according to Common Right: And therefore no ground for a

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Prohibition; as appears by Baily and Boothby's Case, Hob. Rept. 69. in case of a Seat in the Body of the Church, which it belongs of Common Right to the Bishop to appoint. And as it belongs to the Common-Law to enquire by Jury, so it does to the Ecclesiastical Law to enquire by Church-Wardens, and therefore it is reasonable, that the Election of them should be according to the Ecclesiastical Law, since it is that Law that makes use of them in their proceedings. And if it be otherwise, there will be an end of all Visitations; for the end of Visitations, is only to enquire by Church-Wardens: And if the Custom here insisted on be against Law, there is as good cause to stay the Prohibition, as there would be to grant a Consultation, 5 Rep. Jeffries Case. And there ought to be some Prejudice or Advantage in particular disclosed in this Case, for else the pretended usage contrary to common right, will not obtain the Authority of a legal Custom. And there is no President to the contrary.

Hale Chief Baron. There are at least thirty Presidents to the contrary. And for Reasons, First, Church-Wardens are lay Incorporations: And to many purposes they are Temporal Ministers and Officers; as appears by many Acts of Parliament, 43 Eliz. concerning the Poor, and maimed Soldiers, &c. Secondly, The claim here is by Custom, which is Determinable at Common-Law only: So in case of the Election of a Parish Clerke by Custom. Of Common Right, every Parish ought to chuse their own Church-Wardens: But because the manner of Election varies and is uncertain, a Custom may be alledged: And issue may be taken whether a special and select Vestry, or the whole Parish ought to chuse their Church-Wardens; and that would be a proper issue. Et Adjornatur quousque, and proceedings in the Arches to stay in the mean time.

Stillingham *versus* Scott.

IN a Prohibition to the Arches upon a Libel for Defamatory Words, exhibited against the Plaintiff, who was of London Diocess, and not within any of the thirteen Parishes, which are exempt from the Jurisdiction of the Bishop of London, and subject to the Archbishop of Canterbury as Ordinary: The Prohibition being grounded upon the Stat. of 23 Hen. 8. cap. 9. against suing Men out of their Diocess. Dr. Walker pro Defendente. The Suit is well commenced there, nor is it contrary to the meaning and intention of the Act, which (8)

which was made to prevent Men's being cited into Foreign Dioceses, and so put to more charge than they would otherwise be: But here the Court is held within the Precinct, though not within the Jurisdiction of the Diocess of London; And therefore the Party is at no prejudice: For he may resort at the same Charge, Ease and Expence to either Court. Also by vertue of the Act of 23 Hen. 8. where the Bishop of the Diocess gives leave, a person may be cited elsewhere: And the Bishop of London by a frequent and constant usage, has given a General License in this Case: And so it was held in Hill. Term. 9 Jacob. 1. B.R. in Gobbett's Case. Object. Porter and Rochester's Case, was adjudged to the contrary. Resp. The Reason given there is contrary to Law. Mr. Manby pro Quer. He only insisted upon some President's, which he cited. As James's Case, and Porter and Rochester's Case, &c.

Hale Chief Baron. The Prerogative Court is not restrained. For it is excepted out of the Act of Parliament: But the Court of Arches is not excepted. And Dr. James's Case is express in the point: Hob. 17. And if the Suit be well begun there, yet it cannot be pleaded here before the Prohibition granted, but afterwards; as in Latch, 180. Et Adjornatur, and proceedings in the Spiritual Court to stay in the mean time.

Grant *versus* Hedding and Ball.

(9) IN a Bill in Equity for the Tithes of a Nursery sold; upon hearing of the Cause, divers Doubts and Questions were made; As,

First, Whether Tithes should be paid, if they yielded no other fruit?

Secondly, Whether Tithes should be paid for those Trees, that yield Fruit, which pay Tithes?

Thirdly, If some yield Fruit and others not, whether or no those that yield Fruit, priviledge and exempt the other that yield none, when they are all sold together?

Fourthly, Whether Tithes shall be paid for them, when they are sold and transplanted within the same Parish?

Fifthly, Whether the Vendor or the Vendée shall pay the Tithes?

In this Case were cited, 1 Cro. 2 Cro. Co. Magn. Carta and Dr. and Stud.

And the Court was of Opinion, that if the Owner sells them and pulls them up himself, he shall pay the Tithes; but

but if he sell them particularly to another, the Vendee shall pay the Tithes. As in case of Tithes of Corn; if Corn be sold standing, the Vendee shall pay the Tithes: But if he sell it after Severance, the Vendor must. Et Adjurnatur.

But afterwards Tithes were decreed in all such Cases.

Sir William Ingolsby Baronet, Plaintiff, and Robert Wivell and John Ullethorn, Defendants.

IN Trover and Conversion for a Lamb and a Sheaf of Wheat, upon Not-guilty pleaded a Special Verdict, was found to this effect; viz. That the Abby of Fountain had been time out of mind of the Order of Cesteaux, which Order was exempted for payment of Tithes for their Lands, quas propriis manibus excolerent. That before the Councel of Lateran, this Abby was seized of the Territory and Grange of Hemmingford within the Prebend of Scodeley, and the Parish of Rippon: That betwixt the years 1216 & 1261, there was a Composition betwéen the Abbot and Convent, and the Prebend of the said Prebendary under their Common Seals, That the Abbot and Convent should for ever be free from the payment of any Tithes of their Lands which they till'd at their own charge in Hemingford and belonging to their Grange of Galgach, within the Territory of Winkesley Anno Dom. 1216. And that they should pay Tithes for all other Lands, there and elsewhere, out of the said Grange of Hemmingford, and that the said Abbot and Convent should pay Annually to the said Prebend and his Successors the sum of five Marks, by equal Portions, the one moity to be paid at Easter, and the other moity at Michaelmass: They further find, that upon the 12th of November, Anno Dom. 1359. there was another Composition made betwixt them under the Seal of the Convent and the Prebend, reciting the former Composition (but they do not find that it was confirm'd by the Patron and Ordinary) and by this latter Composition, the Prebend and his Successors for all time to come were to have their election yearly, either to receive Tithes in kind of Corn and Grain arising within the places aforesaid, as well of Lands in the hands of the Abbot and Convent, as in the hands and manurance of their Tenants, or else to receive five Marks to be paid by the said Abbot and Convent in lieu thereof, so as such election were notified to the Abbot, or to any of the Monks resident within five Miles of the Abby, or to the Porter of the Abby, upon or before the feast of St. Tho- (10)

mas the Martyr, in the presence of a Proctor or of two good Men; and for those years in which the Prebend should chuse to receive Tithes, the five Marks should not be paid, & contrà. And that when no election was made, the Prebend and his Successors should be contented with the said five Marks, saving the Right of the Tithes of Lamb and Wool, which was to be paid as formerly: Then they find that the Possessions of the Abby came to the Crown by 31 Hen. 8. and that at the time of the Trover, &c. the Defendants were Proprietors of the Lands in Hemmingford, and that the Plaintiff was seized in fée of the Prebend, and that a Lamb and Sheaf were then Renovant upon the Lands, and whether or no Tithes in kind should be for these Lands, was the Question.

Sir Francis Goodrick pro Quer. First, He considered that this last Composition was good, though not confirmed, because it was for the Melioration of the Church, and gave them a benefit, which they had not by the first. And the Rule is, that a Parson, Prebend or other sole Ecclesiastical Corporation, potest meliorare, sed non pejorare Conditionem & statum Ecclesiæ. Vid. Bro. Corporat, 68. 2 Instit. 343. 2 Cro. 252. And if a Confirmation in this Case were requisite and necessary, it shall be intended that there was one. Ex diuturnitate temporis omnia præsumuntur solemniter esse acta.

Secondly, He considered, whether this Priviledge to be discharg'd of Tithes, be such a personal Priviledge, as that it cannot be released? And he conceived it might be released and waived; for that Quilibet potest renunciare juri pro se introducto. 2 Inst. 252. Dyer 249. Dr. Goodman's Case. Also here the Corporation being extinct, the Priviledge is gone, and the Tithes are revived, as Bro. Corp. 78. Goldf. Rep. 4. Hob. 40, 42, 44. Andrew and Coopers Case, 3 Cro. 675. 2 Inst. 491. 2 Leon. 71. But the King's Farmer shall enjoy the Priviledge, because it does not consist with the King's Dignity to Occupy Lands himself: Vid. Popham's Rep. 158.

Object. The Bishop of Winchester's Case, 2 Rep. and Englefield's Case, 7 Rep. concerning personal Priviledges not transferrable.

Resp. An Appropriation cannot be granted over, and yet it may be disappropriated by a Presentation; 2 Ed. 3. 8. N. B. 35. Hub. Rep. 152. 3 Cro. 176. and so he concluded for the Plaintiff.

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Pro Defendente. First, The first Composition here is well rooted and settled, and is in the nature of an Exchange, as appears 2 Rep. 45. 2 Inst. 490. Hob. Rep. 42. Secondly, It seems not to be destroy'd by the second. For the second is, only by way of Collateral Agreement and sounds in Covenant: There are no words in it of Grant or Release. And it cannot here be deemed an Elegible Inheritance, because it does not pass from both parties. And by a Release of five Marks, the whole would be discharged; so that it is not reciprocal, 44 Ed. 3. 5. Also the Corporation being dissolv'd, the second Composition falls of it self. And it shall not be presumed, that this Composition was confirmed, unless it be shewn, because the former, which is more ancient, was confirmed. So he concluded for the Defendant.

Hale Chief Baron. By the first Composition the Abbot only is discharged, quamdiù propriis manibus, &c. but by the latter the Abbot and his Tenants are discharged of Tithes of Corn and Hay only; so that there is a great difference betwixt these two Compositions. But he conceived, First, That the first Composition was good, although the Abbot were discharged by his order, quamdiù, &c. Secondly, That the Abbot may well renounce the benefit of his Priviledge. Thirdly, That there may well be a Relinquishment of the former Composition, and that it may be released or discharged. But the doubt in this case is, whether or no the second Composition be good in Law without a Confirmation, and an Annual Election, according to the Composition, and who must make this Election, and how, now that the Prebend is dissolved, and by whom, and to whom the notice must be given. There was one Southwell's Case, in 44 Eliz. Where an Abbot had had certain quantity of Wood, to be taken yearly in such a Wood, or else a certain sum of Mony yearly at his Election: And it was held in that Case, that the Election was transferred to the King, by the Statute of Dissolution of Monasteries: And that it should go along with the Land to the King's Patentee. But here this Prebend came to the King by the Stat. of 1 Ed. 6. of Chantries, &c. and whether the Election in this case remains or not, may be a Question.

Afterwards in Trin. Term Anno 17 Car. 2. It was argued again by Serjeant Hardres, for the Plaintiff.

First, There has been a Question stirred, but not much insisted on by the Defendant, viz. Whether or no this Priviledge of the Abby, to be free from payment of Tithes, may be waived or not? I shall not dwell upon that, for I take it to be very clear, that it may be waived. First, Because it was but a particular Indulgence granted to the Order of Cistertians, and for their benefit and advantage, and therefore it may be waived by them, in like manner, as an Exemption from serving upon Juries, &c. may be waived at one time, and resum'd at another; as is very usual and frequent.

Secondly, It is a Rule in Law, that whatever is created may by some means or other be dissolved and extinguished, tho' some things cannot be granted over: As in Lampett's Case, 10 Rep. a possibility of a Term, though not grantable over, yet may be released to the Tenant in Possession, Hob. Rep. 307. an Appropriation, though not grantable over, yet may become disappropriate by a Presentment. N.B. 35. 8 Hen. 7. 12. 21 Ed. 4. 58. b. A Corody incertain in an Abby, though not grantable over by the Founder, yet may be released and extinguished by him. So here.

But the second and more difficult Point is this; viz. Whether this second Composition be good or no, because not Confirmed by the Patron and Ordinary. And I conceive that it is good notwithstanding, as our case is, and that for these Reasons.

First, The second Composition is wholly for the benefit of the Prebend and his Successors, and is an enlargment of the former, because by this second Composition he has an Election, to take either his five Marks or his Tithes in kind, whether he will; whereas by the first Composition, he is tied up to his five Marks: And in such cases, Successors are bound though without coonfirmation, 44 Ed. 3. 21, 22. in Octavian Lumbard's Case, Tenant in Tail charged the Land with a Rent charge, for a release of the right of a Stranger; and held that this shall bind the Issue in Tail notwithstanding the Stat. of Westm. 2. 48 Ed. 3. 11. b. the like of a Recovery in Value by the Tenant in Tail; because the Issue is at no loss by it. Perk. 17. Tenant in Tail may determin his Election, as to so many Acres or a Rent Charge, and the Issue shall be bound by it. So here: No loss, but a profit accrues to the succeeding Prebend; and it is a Rule in Law, Co. Lit. 102. b. 341. a. Mag. Cart. 3. a. that a Parson without his Patron and Ordinary may meliorare statum Ecclesiæ suæ. And so in our Case.

Secondly,

Secondly, The second Composition was made only for a further Explanation of the former, and by way of Superoneration, and is a surcharge upon the Abbot and his Successors, without any Diminution to the Prebend. And in that case a confirmation is not requisite. If there be Composition confirm'd betwixt a Parson and his Parishioner, by which the Parishioner is to pay 5 l. in lieu of his Tithes for ten years; and afterwards another Composition is made, whereby the Parishioner agrées to pay 6 l. for those ten years; this second is good without a Confirmation, because it is an Enlargement of the former, and more for the Parson's advantage than it was.

Thirdly, The same may be proved by the Parallel, betwixt a Parson of a Church and an Infant: For our Authorities resemble them two to one another. As appears Co. Lit. 341.a. Mag. Cart. 3. a. Ecclesia infra ætatem existit & fungitur vice minoris. Now Co. Lit. 337. minor statum suum meliorare potest, non deteriorare. And therefore if an Infant submit to an Award, which is made for his advantage, he shall be bound by it, 13 Hen. 4. 12. 10 Hen. 6. 10. so if an Infant makes Partition or Assigns Dower, if it be equal and just, he shall be bound and concluded by it: The like of a Parson.

A Third thing is this; viz. admitting that the second Composition is good, Whether or no it be now possible to be performed, because no Election can now be made in form as directed by the Composition: Because now the Abby is dissolv'd, and the Corporation extinguisht, and the Prebend also with all it's Possessions is given to the Crown, the one by 31 Hen. 8. the other by 1 of Ed. 6. And yet I conceive all this is no hindrance, but that Tithes in kind may be recovered.

First, As for the Dissolution of the Abby and extinguishment of the Corporation, that will create no impediment, because it comes by the Act of the Corporation it self; to wit, by their Surrender: For the Act of 31 H. 8. vests nothing in the King, but what the Abbies themselves surrendred since 27 Hen. 8. as appears by the Statute; and it is a Rule in Law, that Res inter alios acta alteri nocere non debet, sed prodesse potest. If a Lessée for years charge his Estate with a Rent, and then surrender; yet the Charge continues as long as the term would have lasted, if it had bæn suffered to run out in time. 5 Hen. 5. 10.

Secondly, As for the Accession of the Prebend to the Crown by the Statute of primo Ed. 6. It is there Enacted, that all Tithes and Hereditaments appertaing to any Hospital given to the King, shall be in him in as ample manner as in the Hospital,

Hospital, and as if they had been particularly named: And it is also Enacted, That the King shall enjoy all Profits, Commodities, &c. appertaining to any Hospital by any Assurance, Composition, or otherwise. So that all is preserved for, and reserved to the King, that did appertain to any Hospital. And Unity of Possession in the King of the Abby and the Prebend, breaks no squares; for Tithes, and a Composition for Tithes, are Collateral to the Land, and revive by Severance, as appears in 11th Rep. Harpur's Case.

And where there can be no Election, there the party that is to have the benefit of it, shall have and enjoy the thing for which the Recompence is given, without any Election. Southwell and Ward's Case, Mich. 33 & 34 Eliz. Ro. 229. per Popham, Fenner and Clinch in Manuscript, and printed in Popham's Rep. 91. & Adjudge 36 & 37 Eliz.

Object. The Prior of St. Faith's, 13 Ed. 4. made a Grant of 200 Faggots or Focals to the Hospital of St. Giles's in Norwich, or of Twenty shillings in lieu of them, at the Election of the Hospital, with a Clause of Distress, reasonable Notice of the Election being given; and the Hospital Covenants, to give Notice in the Church belonging to the Hospital. Afterwards the Hospital comes to the Crown per 1 Ed. 6. who grants over the Hospital, with the said Rent, and the Grantee distrains for the Focals: And it was there adjudged, First, That the Focals pass by the Grant of the Hospital, and the Rent of Twenty shillings, though the Focals are not expressed in the Grant. Secondly, That there needs no Election, because the thing granted was the Focals, and the Twenty shillings are but by way of Recompence for it, and as an allowance and satisfaction for the same. And a difference was taken where the Election was precedent, and where subsequent to the Grant. If a man grants to another a Robe, or Twenty shillings, there the Election is precedent to the interest of the Grantee, here it is not so; Vide 2d Rep. Sir Rowland Heyward's Case. Now this Case of the Prior of St. Faith's resembles our Case in all respects: For here is a Composition for Tithes in kind, or else for five Marks in lieu; and the Hospital there came to the King by 1 Ed. 6. as ours does here, and yet the Election remained.

But in our Case there is a Clause, That when there is no Election made, the Prebend shall content himself with the five Marks. But to that I answer, That this Clause must have a reasonable Construction and Intendment; viz. That as long as there may be an Election made by any reasonable way or means, so long there shall be an Election, or else only Five Marks due. But here there can be no Election made at all,

all, according to the Composition, by reason that the Abby is Dissolved, and that by their own Act; and it is a Rule in Law, That Impotentia excusat legem; and Lex non cogit ad impossibilia, 42 Ed. 3. 5. If a man Covenant to leave Lands in as good plight as he found them, and Trees are blown down by Tempest, he is excused, 5 Rep. 20. Sir Anthony Maine's Case. A Lessor Covenants to make a new Lease to the Lessee upon surrender of the former; if afterwards he grant the Reversion to another for term of years, the Covenant is broken, though no Surrender be made, for that he has disabled himself to take a Surrender: So in this Case, It being vain and impossible to make an Election through the Abbot's own Default, the Prebend, &c. shall have the same advantage that he would have had, without making an Election.

Thirdly, If an Election be necessary, the Plaintiff has made his Election, for he has preferr'd his Bill for Tithes, and brought the Cause to Hearing; which is the same thing as if he had declar'd at Law; and that does amount to an Election, as when a man brings a Writ of Annuity, and counts upon it, 5 Hen. 7. 33. F.N.B. 152. Or the bringing of a Writ of Dower, and counting upon it, 12 Ed. 2. Dower 158. And the bringing of an Assise amounts to a Continual Claim, 9 Ed. 2. Age 141. So I conclude, that the Second Composition is a good Composition, that it remains in force, for the benefit of the Prebend, and all claiming under him; and that no Election is requisite, quia vana & inutilis; and that if an Election must be made, the Plaintiff here has made his Election, and pray'd Judgment pro Quer'.

Afterwards the Court delivered their Opinions, That the second Composition did not affect the Successors of the Prebend, and therefore that the Abbot was not bound by it. The Reason seems to be, because by the first Composition the Prebend and his Successors were bound only quamdiù propriis manibus, &c. and by the second Composition the five Marks go in recompence of all, whether in propriis manibus, or in the hands of the Tenants. But to this it may be answered, That it is still at the Successor's Election to take the five Marks, or Tithes in kind, and therefore that he is at no Prejudice.

The Court likewise held; That the power of Election is gone, because it cannot now be made according to the Composition; and that therefore the first Composition should stand, quo ad terras in propriis manibus; and for the others, that Tithes in kind may be taken, as before: For that the Election is destroy'd. And Judgment was given pro Defendente.

King

King *versus* Dr. Lake.

(11) IN a Prohibition, to stay an Excommunication for not paying of Proxies and Procurations; the Ground of the Prohibition was, because by the Statute of 34 Hen. 8. cap. 19. All such Archbishops, Bishops, Arch Deacons, &c. as have Right or Title to claim any Pensions, Portions, Corodies, Indemnities, Synodals or Proxies against any persons to whom the King had or should grant the Lands, Tenements, &c. charged therewith, with a Clause of Discharge, &c. should sue for their remedy and recovery thereof in the Court of Augmentations, now annex'd to the Court of Exchequer, and not elsewhere: And the Lands in this Case were granted by Patent discharged, &c. sed non allocatur per Curiam, because the Act extends only where particular Estates are granted over, as appears by the words of the Act, Any Sale Gift, Grant, or Lease for term of life, or lives, or years; and not where the Fee is granted, as was in this Case.

The Bishop of Ely, *versus* the Colledge of *Clare-Hall* in *Cambridge*.

(12) UPon a Bill in Equity, for an Annual Pension of Two pounds and Ten shillings, issuing out of an Hospital granted to the Defendants, and now for divers years in arrear, it was held per Curiam, that all Pensions reserved by the King, or granted to him out of Lands, are in the Nature of Rents, and triable here, and liable to be extinguished by Unity of possession: But that such as are reserved to the King, or vested in him by the Act of 26 Hen. 8. cap. 3. are of another nature, and collateral to the Land, and not lost by Unity, no more than Proxies. Vide Sir John Davie's Case of Proxies.

DE

De Termino Hillarii, Anno 16 & 17 *Car.* II. Regis.

In Banco Regis.

UPon an Information for a Riot against Thomas Godfry and John Percival Esquires, and Walter Wilsford Gent. for a Riot committed upon one Barker, Esquire, in the City of Canterbury: Not Guilty being pleaded, and four and twenty Jurors returned upon a Ven. fac. to the Sheriffs of the City, which is a County by it self, a Distringas was awarded, upon which a Special Return was made to this Effect; viz. (1)

Richard Ginder Gent. Sheriff of the City of Canterbury Returns, That King James by his Letters Patents, bearing Date at the 8th Day of September, Anno Regni sexto, de Gratiâ suâ speciali, ac ex certâ scientiâ & mero motu suis, Granted for himself, his Heirs and Successors, to the then Mayor and Comminalty of the said City, that the said City should be a free City, and that the Mayor and Comminalty of the said City, and the Citizens thereof, and their Successors, should be a Corporation in re, nomine & facto, by the Name of the Mayor and Comminalty of the City of Canterbury, and that by the same Name they should have a perpetual Succession; and further granted to the said Mayor and Comminalty of the said City, and their Successors, That they nor any of them should not be constrained nor compelled to appear before the said King, his Heirs or Successors, or before any the Justices of the said King, his Heirs or Successors, out of the said City, the Liberties or Precincts thereof, in any Jury, Assize, Recognition, or other Inquisition whatsoever, for or in answer of any Felony, Murder, Offence, or Criminal Cause whatsoever (High Treason only Excepted) falling, arising or happening, or which might thereafter fall, arise or happen within the said City, the Precincts, or Liberties thereof; but that they, and every of them, should be thereof acquitted and discharged for ever, as by the said Patent it plainly doth appear: And he farther Returned, That after the receipt of the said Writ of Distringas, he received another of the King's Writs to him directed, the tenor whereof ensues

in hæc verba; and so returns the second Writ verbatim: Which Writ recited, that amongst other Liberties granted to the said City by the said King James, he had Granted to them, That they should not be compell'd, ut suprà, and did therefore command the said Sheriff, to permit the said City quantum in se, to enjoy those Liberties, and to allow them to them according to their Charter, without molestation or trouble, Teste meipso apud Westmonasterium 19 die Januarii, Anno 16 Car. II. And he farther Returned, that all the Jurors named in the Distringas at the time of the issuing the Writ, and at the time that the Venire facias bears Date, were, and yet are Citizens and Freemen of the said City, per quod & virtute of the said Writ of Allowance, he had desisted from distraining the said Jurors, or any of them, to appear before the King at the day and place appointed by the said Writ of Distringas, and had not returned any Issues upon them, according to the purport of the said Writ of Allowance to him directed: Which Return being Filed, Day was given to the Sheriff to maintain it, the Court being very angry with him for it.

Thomas Hardres, Recorder of the City of Canterbury, for the Sheriff.

I conceive there is no doubt but this Franchise and Flower of the Crown may by Law be granted out of it, as well as greater things are, as to be Exempt from all Juries, and that Breve Domini Regis shall not currere, which takes away all Superiority of Westminster-Hall, as within the Cinque Ports and County Palatines, of which cases the Books are plentiful, and so they are in our very case, as appears by 18 Hen. 8. 5. 42 Ass. 5. 19 H. 6. 52. 35 H. 6. 42. 39 Ed. 3. 15, &c.

But the Questions and Doubts here, I conceive to be two: First, Whether the Exemption here returned will extend and hold place in casu Regis, where the King is the sole and immediate party? Secondly, Whether the Sheriff comes in time enough to make such a Return? And I hold the Affirmative in both.

First, The words of Exemption by the Charter are sufficient to extend to the Case in question; for the words are, Prout, &c. Vide the Words suprà in the Return. Which extend to our Case for these Reasons: First, I argue from the Occasion of making this Patent. By the Charter granted to the City 26 Hen. 6. and confirmed 1 Ed. 4. the Citizens are Exempted from going out of the City before any Justices of Assize, Justices of the Peace, Oyer and Terminer, or other Justices or Commissioners, Sheriffs, Escheators, Coroners,

or

or other Justices or Ministers. In 4 Jacobi Regis, the validity of this Exemption came in debate, upon an Indictment for a Murder committed in the City by one Robert Lade, who remov'd it and himself hither to be tryed, and upon Motion it was refer'd to the then Attorney General Hobart, to view the Charter, and certifie the Court, whether or no the Exemption extended to the Case then before them; who certified that it did not, whereupon the said Lade was tryed here and acquitted; because the Grant of 26 Hen. 6. did not extend to the Court of B. R. as appears by 8 Hen. 6. 21. Conusance granted in all Suits Coram aliquibus Justiciariis does not extend to this Court, which is Coram Rege, as appears in 21 Ed. 3. 54. b. 11 Rep. 84. Dr. Foster's Case. And for the same Reason, Negative words in an Act of Parliament do not bind this Court. And for this cause two years after, for the enlarging of their Exemption in that behalf, this Charter was purchased and drawn by the same Attorney General: And the Citizens have ever since bien quiet till now; so that the Patent having bien made upon this very occasion, ought in reason to be allowed in this case.

Secondly, If the Charter shall not be so Expounded, it will serve for little or nothing. For the Clause of Exemption extends to Criminal Causes only, and with an Exception of High-Treason. And therefore this case is not like those cases that are put of General words; which will not extend where the King is party without a special Clause, Licet tangat nos. As appears by 42 Ass. 5. 8 Hen. 6. 21. 41 Ed. 3. Exempt. 4. 25 Hen. 6. Exempt. 5. Because in those cases the words have a sufficient Latitude, though restrain'd to causes betwixt party and party. So a General Exemption from all Juries, Assizes, Recognition, &c. do not extend to a Writ of Right, in which four Knights Elect, and make the Return in the nature of Judges, and not the Sheriff: Nor to an Attaint, as in 34 Hen. 6. 25. & Marlebr. cap. 14. because there are extraordinary Juries in those. But where an Exemption is granted in case of an Attaint, there it lies, though after the Jury be impanelled, 35 Hen. 6. 42. But here the words are such as were intended to extend to this Court, and to such Causes only as the King is a party in, and therefore ought to receive such a Construction as will make them valid.

Thirdly, Although the words, Licet tangat nos, are not in the Charter, yet there are words equivalent, and which are tant amount, and that's enough. As in 8 Hen. 6. 19. In Trespass against the Vice-Chancellor of Oxford, he demanded Conusance of Pleas, by virtue of a Charter granted to the University of

Oxford, by King Richard the Second, whereby was Granted, That the Vice-Chancellor and his Successors should have Conusance of all Pleas moved in Curiâ Regis, wherein one of the parties was a Clerk residing in the University, to be held before him or his Commissary; and it is there held, that those words amount to as much as if it had been expressed, Licet ipse fuerit pars: And there, fol. 20. b. Babington said, that all Liberties and Franchises were Originally in the Crown, and derived from it: And if the King grant a Flower of the Crown, such a Grant is stricti Juris. From that case I argue to the case in question à fortiori; for in our case there are words which include the King himself: For in all Criminal Causes He is the most proper party, especially in Indictments and Informations, where he is the sole party; and therefore this Exemption shall Extend, as aforesaid.

Fourthly, Here is an Exception of High-Treason, and the Rule is, that Exceptio firmat regulam in non Exceptis; as in 14 Hen. 8. 2. a Grant of Bois Except Apple-Trees, passeth all other Fruit-Trees, although they would not have passed but for that Exception. So here, the Exception of Treason makes the Grant stronger against the King in all other cases.

Fifthly, It is a Rule in Law, That the King's Grants in all cases, where the King is not deceiv'd, shall be expounded pro Honore Regis; and so as to make them most effectual, 9 Ed. 4. 1, 2. A Grant of such an Exemption by a King, who is an Usurper, shall bind. So in 21 Ed. 4. 55, 56. such a Grant as this of ours to Citizens, shall extend to every one of them individually, tho' not granted to them by their Name of Incorporation. So 19 Hen. 6. 52. upon the Statute of 9 Ed. 3. c. 4. that a Release made within a County Palatine, of Right to Lands lying out of the County Palatine, shall be tryed out of the County Palatine, does not extend by Equity to an Obligation sealed within a County Palatine, for the payment of Mony elsewhere; because the Statute being made in restraint of the King's Grant, shall be stricti Juris. So here, it is more Honourable for the King to have this Exemption extend to the case in question, and have its full scope and effect; and the rather, because it does not tend to excuse, or any ways give any advantage to Malefactors, who may as well be tryed by Commission, or Nisi prius, within the City.

For the Second Point, I conceive that the City is, in time, to have the benefit of this Exemption allow'd them in this case.

First,

First, They could not come sooner; for it does not appear by the Venire facias, whether the Tryal was to be by Nisi prius or not; for that appears by the Distringas, and not till then: And therefore the proper time to make return of the Exemption is upon the Distringas. And here the Exemption is not from All Juries, but from All Juries out of the City, so that this case is not like a General Exemption. And it is said expressly by Brown 2 Clerk in 19 Hen. 6. 52. b. that in such case the Sheriff of London, will not return any Issues against the Jurors till the Distringas with a Nisi prius, which is as much as to say, that there is no need of claiming the Exemption before. And as it would be too soon, and before the Cause were ripe, to claim it sooner, so after the parties have appeared, it would be too late, as appears 18 Hen. 8. 5. b. Where if one appears and pleads his Exemption, it is naught till all have appear'd: For if it should be denied that he is a Citizen, it must be Tried immediately. Upon a second Distringas one appeared and pleaded such an Exemption in Attaint, and a Quære made of it. But in 34 Hen. 6. 25. 35 Hen. 6. 42. it is admitted to be good. In 22 Ed. 3. 20. in Debt against an Alien, he pray'd upon the Distringas Medietat. Linguæ according to a Charter, and it was allowed him after the Venire facias returned. And 22 Ed. 3. 14. after the Priviledge allowed, the party is not admitted to say, that he was not an Alien. But in case of an Alien, a Tryal per medietatem Linguæ, must be prayed upon the Venire facias, or not at all, as appears 21 Eliz. Dyer 357. Stamf. Pl. Cor. 159. And it differs from the Case of 22 Ed. 3. aforecited; because there it appear'd upon the Record that he was an Alien, and not so in the other Case against a Man that is an Alien, but not called so.

Secondly, This Exemption comes well before the Court upon the Sheriff's return, to save himself. For if after a Writ of Allowance served upon him, and the Charter shewn him, he should not return the Exemption, an Action upon the Case would lie against him, at the Suit of any person, who being distrained to appear upon a Jury, had right to be Exempted by the Charter: And the diversity taken in all our Books is; that upon the shewing of a Charter to the Sheriff without a Writ of Allowance, the Sheriff is not obliged to take notice of it; but upon a Writ of Allowance he is bound to take notice of it, upon the penalty of being lyable to an Action, as appears Co. Mag. Cart. 130. upon the Stat. of Marleb. cap. 14. as the Lord Coke observes.

So

So that upon the whole matter I conceive, that the Citizens have a good Exemption, and that it could not have been claimed before, and that it comes properly before the Court upon the return of the Sheriff, and that if the Sheriff had not return'd it, he would have been lyable to an Action: And therefore he prayed that the Return might be accepted, and the Priviledge allowed.

And the Reason that was given why all Citizens were returned, was this; because an Officer of the Court chose them, the Sheriff shewing him the Free-holders Book by Order of Court.

Term. Pasch. 31 Eliz. B. R. One in Ancient Demesne having such a Priviledge, yet being returned upon a Jury, pray'd at the Bar to have his Priviledge allowed: But the Court denied it, and Windham said, that he might take his remedy against the Sheriff. And per Nelson Clerk, if Issues were returned upon him, he might have the benefit of the Charter, by producing it in the Exchequer, upon the Estreat of the Issues.

Afterwards in Easter Term Anno 17 Car. 2. the Court held that this Priviledge did not come properly before them, upon the Sheriff Return; but that the Jurors, being Freemen, ought to demand it severally upon their appearance upon the Distringas. And the Sheriff was fined 100 l. and afterwards a Jury was returned and appeared without claiming their Priviledge, and Tryed the Cause this Term, and found for the King, and the Fine set upon the Sheriff was Discharged.

But this seemed to me to be a hard Case: That the Court should be of Opinion, that the Sheriff might not return the Priviledge: And yet that if he did not make such a Return, he might be liable to an Action of the Case, as has been said, and was not denied by the Court. Ideo stude benè de hoc & de Lege indè.

De

De Termino Pasch Anno, 17 *Car.* II. Regis. In Scaccario.

Whitehill *versus* the Atturny General, Ash & *Alios.*

UPon an English Bill, to be relieved against the Forfeiture of a Recognisance, for not appearing at the Gaol-delivery of New-gate, the Forfeiture having been granted over by Privy Seal, and the Barons here having Compounded for it after the Privy Seal granted, and the Grantee prosecuting upon the Recognisance, notwithstanding it was doubted, whether the Forfeiture of such a Recognisance be within the Statute of 33 Hen.8. cap.39. for relief in equity against the King: And whether this Composition made by the Barons, by vertue of their Privy Seal, be a good Composition, being made after the Privy Seal granted to Ash,&c. But because the Privy Seal granted to Ash,&c. mistrecited the date of the Sessions, at which the Recognisance was taken, nihil indè factum fuit: But the Bill was dismiss, and the Composition made by the Court confirmed. (1)

Morgan Jenkins Plaintiff, and Dame Margaret Kemishe Widow Defendant, in *Ejectione firmæ.*

UPon a Tryal at Bar a Special Verdict was found, by which the Case appeared to be this, viz. Sir Nicholas Kemish, the Father settled Lands upon himself for Life, the remainder to his Son Charles in Tail, and the Heirs Males of his Body, and afterwards upon the Marriage of his Son, in consideration of Two thousand and five hundred pounds Portion paid, the Father and the Son Levy a Fine and suffer a Recovery, to the Use of the Father for Life, the remainder to the Son and his Wife for their two Lives, and to the Heirs Males of the Body of the Son, upon the Body of his Wife to be Begotten, the remainder to the Heirs Males of the Body of the Son, with remainders over: And a power was reserved to the Father by any Writing, in the presence of two or more (2)

Wit-

Witnesses, to charge the Lands with Two thousand pounds. And afterwards, in Consideration of Two thousand pounds paid to the Father by David Jenkins Esquire, now Judge Jenkins in Wales, the Father and Son Mortgaged part of the Lands to David Jenkins in Fee, with this Condition, that upon the payment of Two thousand pounds ten years after, and of One hundred and threescore pounds yearly, in the mean time by the Father, his Heirs, Executors or Administrators, the Father, &c. might Re-enter, &c. the Father dies, the Son's Wife dies without Issue, the Son Marries again with the Defendant, and has Issue a Son and dies, the ten years expire, David Jenkins dies, the lessor of the Plaintiff being his Heir enters, and makes a Lease prout, &c.

Upon this Case two Points were raised. First, Whether the power here reserved be well Executed by making this Mortgage? Secondly, Admiting the power not well executed, yet whether or no this Conveyance being made by the Father and Son, for a valuable Consideration shall not stand good against the Estate Tail limited to the Heirs Males General of the Son, which was voluntary; by vertue of the Statute of 27 Eliz?

Levins pro quer. First, The Power here is well Executed, though there be no Recital of it in the Deeds of Mortgage, Vid. 6 Rep. Sir Edward Clere's Case; and though the Mortgage be by Lease and Release, for the power is by any Writing, Vid. 11 Hen. 4. 31. And though it was Executed only as to part of the Lands, the words of the Reservation being of All and Singular the Lands, &c. for such a power may be Executed, part at one time and part at another. And I conceive the power here to be well Executed for these Reasons; First, Because this Mortgage may properly be called a Charge upon the Lands, the word Charge being a General word, and extending as well to an Estate of, and in Land it self, as to an Estate charged upon the Land, Hob. Rep. 15. Warranty is said to be a Charge: And 50 Ass. 5. Lands being seized upon an Extent, is termed a Charge, Vid. Hob. Rep. 45. & 2 Co. Rep. Julius Winnington's Case: Dower and a Statute are Charges upon Land, and in Goldsborough's Rep. 95, 96. a Mortgage is said to be a Charge, and in 1 Inst. 205. Secondly, It is within the intent of the power, that Interest should be paid for the Two thousand pounds, because Mony cannot be borrow'd without paying Interest for it; and the 160 l. per annum, is no more than Interest for 2000 l. at the rate of 8 l. per Cent. And admitting that it were naught as to the Interest, yet it is well for the securing of the principal sum of Two thousand pounds. For if a Power be Executed more amply than according to the Reservation,

vation, yet the Execution is good for so much as is within the power, and void only for the rest: Vid. Cro. 3 Rep. 451, 462. If an Executor Assent to a Legacy upon Condition, the Condition only is void. If an Heir Assign Dower upon Condition, the Condition only is void.

To the Second Point he argued, admitting the Conveyance not to be warranted by the power reserved, that yet it was good by the Stat. of 27 Eliz. the Father and Son joyning in it, against the Heirs General of the Son: For that Estate, if not Fraudulent, is at least Voluntary, for neither the Marriage nor the Portion does affect that Estate; the Wife being dead without Issue Male, and the Son here in this Case, being a Son by the second Venter. And if it be not within the words, yet it is not within the intent of the Act. Vid. Dyer 294, 295. & 6 Eliz. Dyer, Churton's Case.

Stevens pro Defendente. The power here is not well Executed. There is a diversity between a power created by the Party, and a power given by the Law: If created by the Party, it must be strictly pursued, Vid. 5 Rep. Mountjoy's Case, 8 Rep. Whitlock' Case.

Object. But the word Charge extends to a Mortgage. Resp. In a Deed of Covenant it may, where the words must be expounded beneficially for the Person, to whom the Covenant is made, but not in case of a Reservation of a power: And here the intent of the Parties appears plainly, to have been against any such Conveyance; for by this means all the subsequent Estates would be divested, which was not the intent of the power, nor could they be Revested again after the Forfeiture.

Secondly, The Estate limited to the Heirs General of the Son is not Fraudulent, so as to be void against the Mortgagee. It is said in Twyne's Case, 3 Rep. that the Stat. of 13 Eliz. was made in Affirmance of the Common Law, but not the Stat. of 27 Eliz. and no Fraud is here found, nor shall it therefore be intended or presumed; as appears 10 Rep. in the Chancellor of Oxford's Case. This Estate is not within the words of 27 Eliz. Vid. the Statute. Nor is it within the Intent: Although the Statute has a liberal construction, with respect both to Persons and Estates; and has been construed to extend to one Person and not to another, and to one Estate and not to another. Valans and Winkfield's Case, B.R. and Sir Rich. Lydal's Case, 6 Jac. and Sir John Jacob's being Bromwel and Player's Case, in B. R. where a Conveyance was adjudged good as to one Person, and void as to another, and good against one Estate, and void against another: yet all powers of Revoca-

tion are not within this Law; as a power of Revocation with a limitation or condition precedent: And yet the words of the Statute are general. So a power to make Leases for one and twenty years, though a Feoffment be made afterwards for a valuable Consideration, yet Leases made by vertue of that power, are not within the Statute; for it is a qualified power. And so he concluded pro Defendente.

Hale Chief Baron. The Party to whom this Power was reserved, might have charged this sum of Two thousands pounds upon the Land, in other manner than he has done here: As if he had granted an Estate in the Land, till the sum of Two thousand pounds had been raised out of the profits of it; it had been a good charge, 27 Hen. 8. and Thomas and Kemishe's Case, in B.R. and it had been a good Execution of his Power. But so large an Estate as is here granted, seems not pursuant thereunto, for by this means all the subsequent Estates will be destroyed, which was not the intent of the Parties: And this Conveyance would break through and dislodge them all, which is unreasonable, the Mortgageor being but a Tenant for Life; for the Estate must arise out of his power only, though the Son joyns: For the Son has but an Estate Tail, which will not bear such an Estate as is here conveyed. Besides it does not appear to have been the intention of the Parties, that the sum of 2000 l. should be raised with Ten years Interest: For by the same Reason, 10000 l. might be raised by giving a longer time, for the payment of the Principal: And the intent here does not appear to have been for the raising any more than 2000 l. And it is to be considered, whether or no this Conveyance be good or not for the 2000 l. though void for the Interest. For a power is an entire thing. If a man has a power to make Leases for twenty one years, and he makes a Lease for Twenty two years, it is not good for Twenty one years It is also hard to presume Fraud in this Case, and there is none found. And the consideration of Marriage, and of the Marriage Portion, will run to all the Estates raised by the Settlement, although the Marriage is not concerned in them, so as to make them good against Purchasors and to avoid a voluntary Conveyance. But perhaps there may be good cause for relief in equity for the 2000 l. though the power was not strictly pursued. Et Adjornatur.

Thomas

Thomas Joyce, and Anderson *versus* Richhard Haines.

IN Debt upon an Obligation to perform an Award, betwixt them and the Defendants Wife or any of them, of all Matters and Controversies, so that the Award be made under the Hands and Seals of the Arbitrators, ready to be delivered to the Parties: The Defendant pleaded nul Award fait: The Plaintiffs reply, and set forth an Award, but do not Averr that it was paratum deliberari partibus. And by the Award the Defendant was to pay 16l. to the Plaintiffs in recompence and satisfaction of the Costs and Charges of such a Prosecution; and that the Plaintiffs should release to the Defendant all Demands, to the time of the Submission, and that the Defendant should release to them all Demands to the time of the Award. And it was held per Curiam, that although that part of the Award, whereby the Defendant was awarded to release all Demands to the time of the making of the Award, were void in Law, because it overreaches the Submission, yet because there were other matters awarded on both sides, which were good, the Award was sufficient: but because there wanted the Averment of parat' deliberari, &c. Adjornatur. But they held that the Award was good, though nothing at all were awarded concerning the Defendant's Wife, because the words of the Submission were betwéen them, or any of them, Vid. 8 Rep. Baspool's Case, and 10 Rep. Osburne's Case. (3)

Afterwards the Court held that the Plaintiffs néeded not to Averr parat' deliberari, &c. for that the Averment was supplied by the Publication of the Award, Cro. 541. but they doubted whether the Award were good on the Plaintiffs part, who were only awarded to release: And whether the awarding 16l. to be paid in recompence, &c. as alledged, is sufficient to make the Award Reciprocal, because it is applyed to one particular only.

Focus *versus* Salisbury.

(4) IN an Ejectione firmæ for Lands in Wales, the Case upon a Special Verdict, was, that a man seized in fee of Lands, for the continuance of them in his name and for the maintenance of his Brother, makes a Lease for 500 years in trust, that himself should receive the profits during his Life: And that afterwards his Brother should enjoy them, with some other trusts: And afterwards being in possession according to the trust, he covenanted with other persons, not with the lessees, to stand seiz'd of the said Lands, upon the same consideration as was mentioned in the Lease, to the use of himself for Life, with remainders over according to the trusts, and further that the said Lease and all Estates, made or to be made by himself should be and enure to the same uses, and Levies a Fine, and five years passed, the lessor being in Possession according to the Trust, and enjoying the profits during his Life; afterwards the Lessor dies, and one of the Lessees enters into part of the Lands in one County, which was not comprised in the Fine, enclaiming all the Lands in the other County.

Lechmere pro Quer. The First Question is, Whether or no this Lease for 500 years be barred by the Fine and five years Non-claim? In Saffin's Case, 5 Rep. a diversity is taken betwixt a Lease that commences immediately in point of time, though the Lessee do not enter, and a Lease that is to commence in futuro. In the first Case a Fine and Non claim is a Bar, but not in the second, Vid. 2 Cro. 60. accordant. A second diversity is betwixt, where an Interest is turned to a Right, and where not. 9 Rep. 105 Podger's Case. If a Lessee for years assign his Estate in trust and afterwards purchase the Inheritance, and Levy a Fine, this Fine after five years Non-claim will be a Bar; otherwise if
had Levied it. 10 Jac. in Curiâ Wardorum Hodges Case, Vid. 1 Hen. 7. 12, 22. upon the same Reason. Vid. Pl. Com. 351, 352. And by Co. 1. Rep. 112. a Feoffment or a Fine extinguishes a power of Revocation. And 1 Cro. 110. is in point.

Object. The Conusor here is but a Tenant at Will, and a Fine Levied by him cannot Bar; as in 3 Rep. Fermor's Case. Resp. 1. It does not appear in this case, that there is any such privity betwixt him and the Lessee. Secondly, The Estate at Will is here determined by the Fine. Vid. Baugh and Blundell's

dell's Case, 9 Car.1. Vide 27 Hen. 6.3. Et vide 3 Rep. 91. upon 4 Hen.7. concerning the force and effect of a Fine.

A Second Question in the case is, Whether the Claim here be well made, or no? I conceive it is not well made; for it is made after the Death of the Lessor, and in another County, and in Lands not comprized in the Fine. Vide Co.Lit.255. that the five years begin the day of the Fine levied; Vide Littleton 423. & fol.98. Co.Lit.252. 9 Hen.7.25. Claim in one County, not good for Lands in another County; and is but an Entry by Construction of Law, and must be taken strictly, Vide Dyer 337.b.

Williams pro Def. A Fine with five years Non-claim, is not a bar, unless the Interest to be barr'd were turn'd to a Right before, which is not done in our case: For the Fine it self here is but levied in affirmance of the former Estate of the Lessée; and so the Intention of the parties appears to have been by the Deed of Covenant, Vide Plo.Com. 373. 2 Inst. 517. & 2 Cro.2. And here the Lessor is in possession upon a Privity, which protects the Interest of the Lessée, and the Fine here does not work a Tort: And the Intention of the Lessor was, to affirm this Lease by the Fine; so that the Fine is so far from working a Tort, that it confirms and fortifies the Lease, Mo.Rep.220,298. Else the Lessor would be made a Tort-fesor against his Will, which the Law will not suffer, Vide Baugh & Blundel's Case, Cr.Car.9 Car. Nor will the Court presume or intend a Tort, if it may be taken otherwise; as in 3 Rep. Fermor's Case, 1 Cro.484. & 1 Cro. 304. If a Mortgagor levy a Fine, and five years pass, this does not bar the Mortgagee, he being out of possession, Noy's Rep.23.

Object. 1 Cro. 110. I Answer, The Circumstances of that case do not appear; nor is what is urged pertinent to the Principal case there; and it is but an Opinion obiter.

Hale Chief Baron. If a Claim were requisite in this case, there is no colour whereby to make this Claim good. But nothing here has been done, whereby the Estate of the Lessée was displaced: The Lessor continued in possession by the Lessee's leave and permission, as must be presumed; and so is a Tenant at Will, as Littleton says. Secondly, The Fine here does not displace the Estate; as if Lessee for years be, the Remainder over for life, and the Lessée for years levy a Fine, and five years pass; the Lessor is not barred by any Non-claim, because the Fine operates nothing, and Partes ad finem nihil habuerunt may be pleaded to it: Otherwise it is where a

Tenant

Tenant for life levies a Fine, for he has a Freehold, and his Fine displaces the Remainders, and therefore an Entry is requisite within five years after the death of the Tenant for life. And therefore when a Lessee for years, or at Will, is to levy a Fine, it is usual for the Lessee to make a Feoffment first, to displace the other Estates. But here the Lease for years is antecedent to the Estate of the Lessor, who levies the Fine, and he has a Freehold expectant upon the Lease, and not precedent to it. If there be Tenant for life, Remainder for years, Remainder in Fee to the Remainder-man for years; and the Remainder-man for years levies a Fine, the Estate for life will not be barr'd by this Fine, as hath been adjudged: But it was held in the same case, That a Lease for years in possession would have been barred, quod non credo. And the reason of Blundell's Case holds here, that a man shall not be disseised against his Will. And a Fine with five years Non-claim must bar an Estate precedent to the Fine, not subsequent to it. And there is here a Privity betwixt the Lessor and the Lessee, and therefore the Fine shall not bar; as in case of a Mortgage, where the Mortgagor continuing in possession levies a Fine. And in the Dutchess of Richmond's Case in C. B. this very Case was adjudged in terminis for two Reasons; First, By reason of the privity betwixt the persons: Secondly, Because the Lessor was in the nature of a Tenant at Will, and there was a Mutual confidence betwixt the parties. If he be Tenant for life, the Remainder for life, the Remainder for life, the Remainder in Fee to the first Tenant for life in Remainder, who levies a Fine; this is adjudged to be a Forfeiture, but that it operates no displacing; Gallant's Case. And although in this case the Lessor be estopp'd, yet that's nothing to the Lessee. There was one Heale's Case to this effect, viz. A. convey'd Lands to B. in Fee, with a Covenant to make further assurance: Afterwards B. leases to A. for forty years, and then A. makes further assurance upon Request; this bars and conveys the Lease for years, unless there were some precedent agreement to the contrary: But if there had been any such precedent agreement, then they held that it would have operated only in Confirmation and Corroboration of the Lease, and would not have destroyed it. Et Adjornatur.

The

The Attorney General, *versus* Poultney & al'.

UPon a Bill in Equity it appear'd, that Sir George Benion being the King's Receiver, had assign'd a Debt to the King; and upon the Plea to the Bill this Question arose, viz. Whether or no a Debt due to a Debtor of the Assignor might be seized, to satisfie the King's Debt? And Auditor Povey's Case, Co. Jurisdict. of Courts, p. 115. was cited, that it could not in case of a Det in Aid; no more can it here, because great Inconvenience would ensue upon such Seizures; viz. That a Debt in the third, fourth, or fifth degree would be seized, and so in infinitum: And great prejudice would accrue to the Subject hereby, for whereas before only a Moiety of his Lands were liable upon a Judgment, now all would be seized. And whereas Executors are not liable to Debts upon simple Contracts, here they would be liable, and that though they had discharged themselves of their Assets in the payment of other Debts; which would be very mischievous. But against this was cited Lane's Rep. 112. And the Rules of Court, Hill. 15 Car. 1. were read, for the preventing of Inconveniences in such cases for the future. (5)

Hale Chief Baron. Such Assignments are usually and properly made for the benefit of the King's Debtor, and we take notice of them as such; and for this purpose we have a Privy Seal, which was not anciently Granted, but for the benefit of the King himself only. And, as hath been urged, the Inconveniences would be very great, if upon such Assignments such Seizures might be made. Et Adjornatur.

Afterwards in the same Term, upon hearing the Directions under the Privy Seal, directed to the Court in 12 Jacobi, which prohibit such Seizures, Process was stay'd.

And afterwards in Easter Term, Anno decimo nono Car. 2. it was moved again: And the Orders made Hill. 15 Car. 1. Lib Decret. 340. were considered. And it was urged, that the Assignment in this case was in November 15 Car. 1. and so before the Rules in Hill. 15 Car. 1. and that those Rules were made for the future only, and consequently did not extend to the Case in question: And that in the time of Car. 1. before those Rules were made, it was usual (as appears by many Presidents) for Lands and Goods of a Debtor to the King's Debtor, to be seized and extended in case of such an Assignment.

ment. And to Auditor Povey's Case it was answered, That that Case was in 13 Jac. Regis, which was after the Privy Seal, made and directed to the Court in 12 Jac. for the preventing of such Mischiefs. Which Privy Seal determined with the King's Death; and there were no Orders or Rules given out afterwards till Hill. 15 Car. 1. and therefore the usual course that had obtained before 12 Jac. was put in Ure in King Charles his time, till the Rules of Hill. 15 Car. 1. And that usual course was, as aforesaid.

Hale Chief Baron. Those Rules had no further intent, than to provide for the satisfying of the King's own Debts, and not for the satisfying of Debts owing to the King's Debtor or Accountant, which would be extreamly inconvenient: For at that rate, if a man were indebted to the King in One hundred pounds, and another person indebted to the King's Debtor in a Thousand pounds, and a third person indebted to him in Ten thousand pounds: These several Debtors should have the benefit of the King's Prerogative, against the Lands and Goods for the recovering of their several Debts. There would be no Inconvenience if the King's own Debt were so levied, though in the Tenth degree; for then the King's Prerogative would be exerted for the satisfying of his own Debt only; and there is no question, but the King's own Debt may be so levied. But to make the King's Prerogative instrumental, and become a stale to satisfie other men's Debts, would be unreasonable, inconvenient and mischievous to the Subject; and so it is declared by the Privy Seal, made in 12 Jac. But all the Court agreed, that in this case, Pemberton, Debtor to the Lord St. John, Debtor to the Assigner Sir George Benion, should be liable:

First, Because the Assignment was before the Rules made in 15 Car. 1. and according to former Presidents in Court.

Secondly, Because the case here being of a Debt assign'd, the Lord St. John is but the first Debtor, and Pemberton the second; and so not within the Rules.

Thirdly, It appears by the third and fourth Rules, that the third Debtor is within the Rules, but no Debtor in a more remote Degree: And therefore the Plea was overrul'd.

Duncombe

Duncombe *versus* Hide.

IN a Bill at the Suit of a Copyholder against his Lord, to be admitted, where the Question arose, Whether Fine certain, or incertain, the Defendant was in contempt, for not answering, and was prosecuted to a Serjeant at Arms; and the Case was, that the Subpœna upon which the Contempt was founded, was left with the Defendant's Servant, who gave the Defendant no Notice of it. And the Court held, that though that were sufficient to discharge the Defendant of the Contempt, yet he should pay the Plaintiff his Costs: For otherwise a Plaintiff might be put to Charge, without any default in him. For primâ facie, the service of the Subpœna was a good Service, and ground for the Plaintiff to go on with process of Contempt: And therefore he shall have his Costs. (6)

The Attorney-General *versus* Sir George Sands.

UPon a Bill to discover the profits of a Real Estate forfeited by the Defendant's Son for murthering his Brother, and received by the Defendant; it was said by Council, and not denied by the Court, that a Lease for years in Trust for the Son was forfeited for Felony, Vide Co. 12 Rep. 1st Case, though an Inheritance be not forfeitable, as the Book says. But whether an Inheritance, as here, in Trust be forfeitable or no, was doubted, and the Court said nothing to it. Nota, the Lands were held of the King. (7)

Burwell and Salter *versus* Corrant, Executor of Lane.

UPon a Bill in Equity the Court held clearly, That if Land were devised to be sold by Executors for payment of the Testator's Debts, the Money received by such Sale should be Assets in the Executor's hands, if an Action of Debt were brought against them. And the Plaintiffs would have been dismiss'd, if all the Land had been sold; but because that did not appear, the Bill was retain'd. And afterward by agreement the parties went to Law upon the Defendant's confessing that he had received 2800 l. for Land sold. (8)

Lionel Copley's Case.

(9) Lionel Copley Esq; prayed a Prohibition to the Archdeacon's Court at Doncaster in Yorkshire, upon an Excommunication against him for not receiving the Sacrament in his own Parish-Church, grounded upon a Presentment made by the Churchwardens in 1664. The ground of his Prayer was because he had alledged and shewn to the Official a Certificate, that he had taken it in another place; and the Court held, that the Ecclesiastical Court had conusance of the Cause, and had good cause to proceed upon the Presentment primâ facie, because the party had not received the Communion there, viz. in his own Parish-Church; and that it lies on his part to prove, that he received it elsewhere. And if he did really receive it elsewhere, it is a good plea for him in the Ecclesiastical Court; upon the refusal of which plea a Prohibition lies, but not else. And because it did not appear to the Court, that Mr. Copley had pleaded it in the Spiritual Court, nor was there any Affidavit made of it; for that Reason the Court denyed to grant a Prohibition at that time, but would advise.

Afterwards in Trinity Term He suggested, that he had alledged in the Spiritual Court, that he took the Sacrament elsewhere, and that the Court had refused to admit of the Allegation; and thereupon he now pray'd a Prohibition. But the Attorney and Solicitor General moved, that no Prohibition ought to go out in this case, because the matter is purely Spiritual and of Ecclesiastical Cognizance; and no Temporal Matter arises in the Cause. And if the Spiritual Court does not do Justice in it, an Appeal lies. They alledged farther, That if the Original Cause be of Spiritual Cognizance, and some incident dependent Matter arise, as a Lease or Livery of Seisin, which in their own nature are of Temporal Cognizance, and such Matter be pleaded there and refused; yet a Prohibition ought not be granted; and for that they quoted 12 Co. Rep. Robert's Case: And that in no case whatsoever a Prohibition shall be granted for any Temporal Matter arising in a Cause, before Refusal, where the Original Cause belongs to their Jurisdiction, but only in the case of a Modus. Vide 8 Ed. 4. and 2 Rep. the Bishop of Winchester's Case; and the reason of that is, because the Court Christian does not allow of any Modus; and because the Modus it self, if there be any, may and ought to be sued for there.

Hale

Hale Chief Baron: He denied the ground that they went upon, and said, That if the Law were so, then if a Suit were well commenced there, the Temporal Courts could not determine any Matter arising in it, which is not true; and said, That their Refusal of a Plea that contained Matter of Temporal Cognizance, had always been admitted to be a good Suggestion for a Prohibition. But the difficulty here was (he said) that all the Matter both of the Plea and the Libel, was Spiritual and of Ecclesiastical Cognizance; and that that Court had a Jurisdiction therein appeared by the Rubrick, confirmed by Act of Parliament, whereby it is appointed, that three times in a year, of which Easter to be one, All persons shall receive the Communion. And hereupon Adjornatur.

And afterwards, being moved again, the Court denied to grant a Prohibition, because the Cause was purely Spiritual, and they proper Judges of the Certificate, and if they refused the Plea, an Appeal would lie; but no Prohibition. Moreover they said, that the Allegation in the Certificate, that he had received the Communion alibi, was not sufficient, because by the Rubrick he ought to receive it three times a year, and so the effect of the Libel not answered.

Anonymus.

In Trespass Quare clausum fregit, the Defendant justified, because he said he had a right of fishing there by Prescription: But does not set forth what kind of Fishery he claimed, viz. whether Liberam, Separalem, or Communiam piscationis, nor whether he has it as appertaining to a Mannor, Messuage, &c. or not; but makes it a mere personal thing. And for that cause the Plea was held naught per Cur'. Vide 7 Hen. 7. 4 Ed. 4. 33. Dyer & Yelverton Rep. 7 Jac. where a difference is taken betwixt an Easment or Liberty only, and an Interest. An Easment, as a Way, &c. may be claimed, without saying to what it appertains; but a Common, which is an Interest, cannot; so here, &c. (10)

Austin *versus* Hilliers & Al'.

(11) IN Trespass for an Assault, Battery and Mayhem, Not guilty was pleaded, and the Jury gave the Plaintiff but Ten Shillings damages: But the Court, upon view of the Mayhem, seeing that his Leg had been broke, and upon Affidavit of what Charges the Plaintiff had been at to the Chyrurgeon, Encreased the Damages to 20l. Nisi causa, &c. And now cause was shewn to the contrary, viz. because it does not appear by the Declaration in what part of his body the Plaintiff was maim'd; as in 1 & 2 Ph. & Mar. Dyer 105. And a like Case was cited in B. R. 1652. But on the contrary side Latche's Rep. 225. Cooper's Case was cited to have been Adjudged, that the Plaintiff in his Declaration needs say no more, than that he was maim'd, without alledging in what part of his Body in particular.

Hale Chief Baron: If the Plaintiff alledgeth that he was maim'd, that is ground enough to increase the Damages, without alledging in what part of his Body; but if the Declaration does not expressly alledge a Mayhem, there we cannot increase them. And upon this Diversity former cases have been Adjudged. But upon the bringing of 20l. into Court a Day was given to the next Term, to shew cause why Execution should be awarded.

And afterwards in Trin. Term 17 Car. 2. it was moved again, and held per Hale Chief Baron, & tot' Curiam, That Damages may be increased, where the word Mayhemavit is in the Count, but that the usual and better way is to express the manner of the Mayhem. They held likewise, that in an Action of Battery the Court might increase the Damages upon their View, if the manner of the Battery were alledged in the Count; and Judgment was given pro Quer.

De

De Termino *Sanctæ* Trinitatis, Anno 17 *Car.* II. Regis.

In *Scaccario.*

NOta, that in the Court of Common-Pleas in the Earl of Chesterfield's Case. Upon a Special Verdict in Ejectione firmæ; it was adjudged per totam Curiam, upon advice with the other Judges and Barons, that if the King make a gift in Tail, saving the Reversion to himself: And afterwards give leave to the Tenant in Tail to suffer a common Recovery, and to that intent passes the Reversion out of himself, and lodges it in others, to have it Reconvey'd to him again afterwards, which is done accordingly, that afterwards the Tenant in Tail or his Issue, may bar this Reversion by a common Recovery: And that this is not within the Statute of 34 Hen. 8. which restrains, &c. because the Reversion was once severed from the Crown and the Privity of Estate gone, and the Statute is to be intended to restrain, where the Reversion continues in the same plight, that it was in at the first, without any Alteration. (1)

Nota, that Wagstaff and others of a Jury at the last Sessions held for the Gaol-delivery of Newgate, were fined 100 Marks a piece by Keeling Lord Chief Justice of the Court of King's Bench; because though Evidence was given before them that many persons above the number of five, had been Assembled in such a place as Conventiclers, and had Bibles with them, and were suspitious persons and Sectaries, yet the Jury would not find them guilty of keeping a Conventicle, upon the late Act of 16 Car. 2. because there was no full Evidence, that they were assembled to Exercise any Religious Worship, as the Act runs. And the Jury were committed till they paid their Fines. And now the Court of Exchequer was moved on their behalf, to remove by Certiorari, the Record of their Fines and their Estreats: To which the Attorny General said, that that concerned the King only, and therefore they were to be removed at the Suit and desire of the King only, and not else; and he seemed very angry that such motion was made. (2)

To

To which Hale Chief Baron said, that they might be removed at the Suit of any person aggrieved, because there was no other course, for him to be relieved and discharged of the Fine.

The Attorny General said, he might have his Writ of Error. But Hale Chief Baron doubted of that, and said he had not known any such practice.

And then Serjeant Wild Recorder of London said, that those Fines belonged to the City by their Charter, so that this Court had nothing to do with them. Hale Chief Baron, Notwithstanding all that they must first be Estreated hither. Et adjurnatur.

Afterwards by direction of the Court, Presidents were searched and inspected; but at last, upon Conference with all the Judges a Certiorari was denied. And afterwards they appeared in the King's Bench, upon a Habeas Corpus: But were not Bailed, till they had paid their Fines, Vid. Kelway. and Yelv. p. 23. Wharton's Case.

Edwards *versus* Slater.

(3) IN Ejectione firmæ, upon a Special Verdict the Case was thus, viz. A man settled Lands by Fine, to the use of himself for Life, with a clause in the Deed of Uses to this effect; that if he should make a Joynture to his Wife, and make a Lease for 31 years, to commence after his Death, for the raising of 3000 l. for his Daughters Portions, that then the Conusées should stand seized to those Uses: And limited divers remainders over in Tail, the Reversion in Fée to himself. Afterwards he made a Joynture pursuant to this Power, and then he bargained and sold the Lands to other persons in Fée by Deed enroll'd, in trust to raise Portions, &c. the Bargainées afterward reconvey'd the Lands to him in Fée by Feoffment: Then he made a Lease for 31 years, to begin after his Death, for the raising of 3000 l. for the Portions of two of his Daughters only, and he and his Wife after that Levyed a Fine sur Conusance de droit, &c. and afterwards he died. A person by the direction of the Lessée for 31 years entred, and whether his Entry were Lawful or not, was the Question.

Mr. Trevor pro quer' made several Points in the Case. First, He urged that by the bargain and sale, the Tenant for Life had departed with all his Estate, so that afterwards he had no such Power, as to make a Lease for 31 years. And upon this head he considered quid operatur by a bargain and

and sale, as well before as after the Statute of 27 Hen. 8. of uses? Before the Statute a Fee-simple would have passed without the word Heirs, and all the Estate that the Bargainor had, as appears, 27 Hen. 8. 5. Dyer 225. And since the Statute, nothing is left in the Tenant for Life, as appears 10 Rep. in Seymors's Case. So if Tenant in Tail Bargain and Sell totum statum suum; vid. Hob. 136. Dymock's Case, 7 Jac. Smith's Case, 2 Bulstr. 163. 3 Cro. 896. 1 Cro. 157. And the powers in this Case arise and pass out of the Interest and Estate of the Tenant for Life. Secondly, By the Reconveyance to the Tenant for Life in Fee, he is now in of a new and other Estate, and consequently his power lost and gone, Vid. 9 Hen. 7. 1. the Case of a Tenant by the Courtesie, who had made a Feoffment in Fee upon Condition, and entred for the Condition broken: He was held not to be in after his Reentry, in privity of his former Estate of Tenant by the Curtesie, Vid. 1 Rep. 174. Digge's Case, and 5 Hen. 7. 11. 11 H. 4. 2. Co. Lit. Homage Ancestrel. Co. Lit. 252. that privity of Estate is destroyed by a Feoffment. Thirdly, He insisted that the powers here were repugnant, unreasonable, inconsistent and contrary to Law, viz. that the Tenant for Life should have both these powers, to make a Joynture, and a Lease for 31 years, to commence after his Death; that the first of these destroied the latter, both the Joynture and the Lease being to commence in interest at one and the same time: As if a Lease for years be made, and afterwards another Lease be made to begin at the same time, if the second Lease be without Deed, it is void; and if it be by Deed, it is good only for the surplusage of time, if there be any, unless the Reversion pass by Attornment; as appears 3 Cro. 160. 4 Jac. Starkey and Dryops Case, Plow Com. 432. 6 Rep. Fitz. Williams Case. Likewise the power here is not pursued, if it were Originally good; for the Lease here made is only for the raising of Portions for some of his Daughters, and not for all: And the power was executed before, by making a Conveyance to other persons for the raising of Portions, viz. by the bargain and sale. And although a power be not duly Executed, yet if a man has ventred on such or such a Course and Method of Executing it, and have missed, he shall not afterwards execute it de novo. As if an Office or Inquisition be taken before Commissioners, and they have not followed their Commission, they shall not take upon them to find anew, Vid. 14 Edw. 4. 2. 32 Hen. 6. 10. 1 Rep. Digge's Case. An Use once revoked cannot be revoked again, though the words are totiès quoties. So of a Recovery in value,

14 Ed.

14 Ed. 4. 2. Recovery in value 32. Besides, this is an Hypothetical power, it begins with an If, which is not direct and positive: And may be wholly defeated and destroyed, by the destruction of the Estate to which it was annexed, as in the Case of Accruers 8th Report, Lord Straffords Case, and Plo. Com. 481, 489. which if once they be disturbed and displaced, will never revive again. Fourthly, Here the last Fine has barred the Lease by Non-claim: For the first Conusees have not made an Entry to preserve it, but, as the Jury has found, another person has entred by their direction, which does not amount to a Command. And a claim to avoid a Fine must be precise and certain, Vid. Lit. Title Continual Claim, 3 Cro. 31 Bract. lib. 5. fol. 436. Flet. 444. vid More's Rep. 450. concerning the manner of making claim to avoid a Fine, and that it must be certain and precise, Vid. 3 Cro 577. Leon. 2 Rep. 221. Fitz-hugh's Case, 9 Rep. Margaret Podgers Case, and so he concluded pro Quer'.

Serjeant Newdigate pro Defendent. Here is a good power, both to make a Lease and to make a Joynture, and the one does not destroy the other: They both arise out of the Primitive Estate, and not out of the Estate of the Tenant for life. But is a power Collateral to his Estate, and therefore is not destroyed by a conveyance made by him; as was adjudged in Phitton's Case, that a Lease and Release destroyed not such a power, and especially where the Tenant for Life passes away only such an Estate as he may lawfully pass, and by a bargain and sale no more passes from him, than he may lawfully convey; nor does such a conveyance make any displacing of Estates.

Object. It is unreasonable to have an Estate charged with two such powers. Resp. Cujus est dare ejus est disponere. And they may well stand together, and depend one upon the other; and perchance the Joynture may determin in the Life of the Tenant for Life, or within a short time after his decease, and then the Lease will be good for the residue of the Term, Vid. 2 Cro. 348. And in Berry and Riche's Case in the Common-Pleas it was lately ajudged, that if a man has a power to make a Lease for years, where there is another Lease in being, there if he makes a Lease to commence in præsenti, the power is well executed, and the second Lease shall continue as long as it may, taking effect in possession, after the determination of the first Lease. Vid. More's Rep. 618. And a direction to enter is here sufficient; for quod quis facit per alium facit per se. And a Command precedent, or an Assent subsequent in such Case is sufficient: As in 9th Rept. Podger's Case,

Lit. 416.

Lit 416. Co. Lit. 282. Dyer, 331. And in a Special Verdict at least such finding shall be good, Vid. 4 Rep. 62. Fulwoods Case, and 9 Rep. Count of Shrewsbury Case, and pray'd Judgment pro Defendente.

Hale Chief Baron. Here have been many material Questions stirred on the Plaintiffs behalf. First, Whether these powers are well raised? And it should seem that they are; because the Estates to be limited by them, shall take effect according to their precedency; and there may very well be a residue of the term for years, left unexpired after the determination of the Joynture; which sufficeth. Secondly, Whether or no the power be well Executed, as to the Lease for 31 years? And the power seems to be well Executed by the second conveyance, tho' not by the first, viz. by the bargain and sale, because it was neither made for a Joynture, nor was it a bargain and sale for 31 years; but passed away all his Estate and his Reversion in Fée; and so was not pursuant to his power, and therefore the power not well Executed by that conveyance. Thirdly, Whether here be a good claim made to avoid the Fine? But there needs no claim in the case; because this Lease is only a future Interest, and therefore not touched by the Fine. Vid. 5th Report, Saffyn's Case; and if it were requisite, an Entry by his direction, that ought to enter, which is found here, suffices in a Special Verdict. Fourthly, Whether this bargain and sale have destroyed the power. Fifthly, Whether it be destroyed by the Reconveyance? As to these two Points, it will be hard to say, that the Reconveyance has destroyed it, because it is not the Act of the party that had the power. And it is hard to say, that the bargain and sale has done it: Because the power is Collateral, and the Estate to be limited does not arise out of the Tenancy for life, but out of the first Estate. It would be much clearer and a stronger case, if the Tenant for life had a power generally to make a Lease for years, to say that the Lease should arise out of his Estate, than this of ours is, in which the Lease for years is not to commence, till after the Death of the Tenant for life; and therefore cannot be incident to his Estate. And in Noy's Reports, it is held that a Covenant to stand seized in Fée, does not destroy such a power: Though that may be questionable, because the whole Estate is there disturbed; whereas the bargain and sale here displaces nothing. And if the Bargainor had a power of Revocation, he might well execute it after the executing this Conveyance. But he said, he would not deliver any Opinion in the Case. Et Adjurnatur.

Afterwards in Easter-term, Anno 19 Car. 2. the Court delivered their Opinions seriatim.

Baron Rainesford pro Defendente. The sole Question here is, whether this Lease for 31 years be well made or not? The Joynture is out of doors, for that is barr'd by the Fine, and the Collateral Warranty, in the Fine does not bar the Issue in Tail, because he is under Age. So that the question is single, and concerns the Lease for years only; viz. whether the power to make a Lease for 31 years, to commence after the Death of the Tenant for life, be well executed or not? And here are two things to be considered. First, The bargain and sale, and the consequences thereof. Secondly, The Reconveyance by Feoffment, and the consequences of that. As for the bargain and sale, that does not displace any remainders limited to other persons. So that notwithstanding it, the power remains, and nothing is passed away by it, but what the Tenant for life might lawfully pass. Secondly, The Reconveyance by Feoffment that in deed divests all the remainders and makes the Feoffee to be in of a new Estate, 1 Rep. Chudleigh's Case, 10 Rep. Seymor's Case. And it may be doubted, whether or no the power be not thereby suspended, till the Estates be recontinued by an Entry? But I hold it is not: First, It is Collateral to the Estate of the Tenant for life, not being to commence till after his Estate be determined: And therefore it cannot be destroyed by a Feoffment, Vid. Albany's Case, 1 Rep. and Digge's Case, ibidem. And it is the same case then as where the power is in a Stranger; Vid. 8 Rep. Whitlock's Case. And the Estate here is Revested by a Reentry. And if a Tenant for life assigns over, that does not obstruct his power of making a Lease, to commence after his Death: For a Collateral power remains notwithstanding the Estates be disturbed; as in 15 Hen. 7. 11. 1 Rep. Albany's Case, and Digge's Case, Co. Lit. 170. A power given to Executors or to Feoffees to sell, remains after the Estate is disturbed. Secondly, The Estate here is recontinued by the Entry of the Tenant in Tail, after the Death of Tenant for life, which is found here by the Verdict. Vid. 1 Rep. Chudleigh's Case. Objection, The power cannot be said to be Collateral with respect to the Remainder in Fee, which was in the Tenant for life, and passed by the bargain and sale. Resp. There is a diversity betwixt a Condition and a Power. A Condition cannot be apportioned, but a Power may, for one is not favoured in Law as the other is: Vid. Co. Litt. 215. 237. Hob. 312. And as long as the Estates tail remain, the power shall be deemed Collateral, but not after they are determined. In this case they continue as yet. And concluded pro Defendente.

Baron

Baron Turner pro Querente. There are two questions in this Case. First. Whether this power be well created? And I hold it is. Secondly, Whether it be well Executed? And I hold it is not, because it is destroyed by the bargain and sale; nor is it Collateral; if it were, it would not be destroyed, according to Albany's Case, and Digges Case, 1 Rep. But here it savors of the Land. If a Feoffor had reserved such a power originally, it would not have bæn held to be Collateral: And though the Land do not pass from him that has such a power, yet if such person have an Estate in the Land, the power is not Collateral, Co. Lit. Cond. last leaf. And it might be mischievous, if the power were held to be Collateral; for then if the Tenant for life should grant a Rent charge, and afterwards make a Lease, &c. he would avoid his own Act. But because it savors of the Land, it is gone by the bargain and sale, and passes together with the Land, and amounts to a Confirmation by reason of the Estate in fée Expectant. As in 15 Jac. 2 Cro. Dutton and Ingram's Case: If Tenant in Tail, remainder to him in Fée, grant a Rent in Fée, the Rent continues after the Expiration of the Estate Tail, and the Grant works by way of Confirmation, by reason of the Remainder in Fée; and the Grant purports an Estate in Fée, tho' it be not really such; so here. And concluded pro Querente.

Hale Chief Baron pro Defendente. The Fine and Non-claim do not bar this future Interest, not being here displaced and turned to a Right. And the powers of making a Joynture and a Lease, as aforesaid, are consistent: For during the Continuance of the Joynture, the Lease shall not take effect in point of Interest, but shall go on in time, and the residue of the term that remains unexpired, after the Death of the Joyntress shall take effect in interest: And no more. The only question then is, Whether or no the power to make a Lease for one and thirty years be destroyed? First, Powers to raise Estates are either simply Collateral (as where a party that has such power has not, nor ever had any Estate in the Land: As where such power is reserved to a Stranger, and there it cannot be destroyed by such Stranger, because it is no more than a bare nomination) or not simply Collateral: And these latter are of two sorts. First, Appendant and annexed to the Estate; Secondly, In gross. A power of the first sort is, where Tenant for life has a power to make Leases for one and twenty years or three lives: Such a power is not simply Collateral. For if such a Tenant charge the Land with a Rent, and then execute his power, the charge shall not be defeated whilst he lives, Latche's Rep.

So if he had before Covenanted to stand seized to the use of another; because the power in that case is annexed to the Estate. But where the power does not fall within the Estate, as here the Tenant for life has a power to make an Estate, which is not to begin till after his own Estate determined, such power is not appendant or annexed to the Land, but is a power in gross; Because the Estate for life has no concern in it. And yet such a power may by apt words be destroyed by Release, or by a Fine or Feoffment, which carry away, and include all things relating to the Land: But an Assignment of totum statum suum, or other Alteration of the Estate for life, does not affect such a power; because it is a power in gross.

Now we are to consider, whether, as this case is, the power be destroyed? Two things have been urged, to prove the power gone and destroyed. First, The bargain and sale. Secondly, The Feoffment and Reconveyance to the Tenant for life.

In the first of these Objections there are two things. First, The Tenant for life has passed away his Estate for life. Secondly, He has passed away his Reversion in fee, by bargain and sale. Resp. To the first Objection, the bargain and sale does not touch the Remainders in Tail; but the Estate for life, and the Remainder in fee only. And the power here is not annexed to the Land, but is a power in gross. If the Tenant for life in this case, had a power of Revocation and should make a Lease, that would not destroy his power, because no is Estate displaced by it. And in Hughe's Rep. in 27, 28. Eliz. Cas. 40. a bargain and sale does not pass away, nor affect a Contingent use in the Bargainor: But a Feoffment or a Fine, would transfer it. And for Answer to the Second Objection, grounded upon the Remainder in fee being conveyed, I hold that if the Remainder in fee should come in being, the Bargainee would not hold the Land charged with this Lease, because the Interest of the Remainder in fee would support it, and it is a power annexed to that Estate, but till then it is a Collateral power, and in gross quoad the Remainders in Tail, which are precedent to it. But that is not our case; for the Question here is not, how the Law would have been in case the Remainder in fee had been the only Estate in being.

Objection, If the Fee-simple be discharged, then the mean Estates are so too: As in case of a Seignory or Condition, if the Fee be discharged, the mean Estates are so too. Resp. A Power is Apportionable, but a Seignory or a Condition is not. As a Warranty, tho' it be destroyed as to the Fee-simple, yet it continues annex't to the mean Estates. This was Alderman

Garraway's

Garraway's Case; A Lease for an hundred years being made, the Reversion was granted for life, and the Lessee granted his Estate to him in the Reversion in Fee; and it was held, that the Lease for years was not destroyed by meeting with the Fee, because by possibility the Lease for life might out-last the Term. So here there is a possibility that the Reversion in Fee may come in possession; and yet the Power is not destroy'd by it. So if a Grantee in Fee of a Rent purchase a Remainder in Fee of the Land depending upon an Estate tail, the Rent is not hereby extinct; because there is but a Possibility of the Remainder in Fee coming ever into possession. Vide Noys Rep. Bramall and Cook's Case, Pasch. 39 Eliz. No more in this case shall the Possibility of the Remainder in Fee coming into possession, destroy the Power.

A Second Question is, Whether the Feoffment has destroy'd it, or no? And I hold not; because it never was in the Feoffor, nor reserved to him. But there is no Feoffment here found, but only a Conveyance from the Bargainee to the Tenant for life, with these words, viz. Grant, Bargain, Sell, Release, Enfeoff and Confirm. But admitting the Power not destroyed, causa qua suprà; yet here is a forfeiture of the Estate for life, and a Displacing of all the Remainders.

Object. The Power then is suspended.

Resp. No; because here William had a Right to make such a Lease, which is sufficent to support the Power. As if Tenant for life, Remainder to the right Heirs of J. S. be disseised, the Right remaining in the Tenant for life is sufficient to support the Contingent Remainder: And by the Entry of Tenant for life, it is reduced together with the Estate. So here, If the Tenant for life had been disseised, and then had made such a Lease, and had entred, this would have reduced the Right to an Actual Estate. And here it is found, that the Tenant in tail Entred, which reduceth all the Estates and Interests, and by consequence the Lease for 31 years: And concluded pro Defendente.

Joy

Joy *versus* Kent.

(4) DEbt upon an Obligation, Conditioned to pay so much Mony if such a Ship return'd within six Months from Ostend in Flanders to London, which was more by the 3d part than the Legal Interest of the Mony; and if she do not Return, then the Obligation to be void. The Defendant pleaded, that there was a Corrupt Agreement betwixt himself and the Plaintiff, and that at the time of the making the Obligation, it was agréed betwixt them, that he should have no more for Interest than the Law permits, in case the Ship should ever return; and avers, that the Obligation was entred into by Covin, to evade the Statute of Usury, and the Penalty thereof: Upon this Averment the Plaintiff took Issue, and the Defendant demurr'd. And the cause of Demurrer was, because the Plaintiff had not traversed the most material part of the Defendant's Plea; viz. the Corrupt Agreement: And that the Averment was but the result of that, and the Construction of the Law upon it. And that such Plea is good, though a Matter and Agreement be averr'd, which is beside the Obligation and Condition thereof, and which destroys it; Vide Cro. 2 Rep. 253. 5 Co. Rep. 69. Burton's Case.

Hale Chief Baron: Clearly this Bond is not within the Statute: For this is the common way of Insurance, and if this were void by the Statute of Usury, Trade would be destroyed. And it is not like to the case, where the Condition of a Bond is to give so much Mony, if such or such a person be then alive; for there is a Certainty of that at the time. But it is Uncertain and a Casualty whether such a Ship shall ever return or not. But he agréed, that the Averment was well taken, because it discloses the manner of the Agreement: And although the Corrupt Agreement might have well been traversed; yet the Averment is traversable too, and the Demurrer to the Replication naught: And afterward the Demurrer was waiv'd by Consent, and Issue taken upon the Averment.

Barring-

Barrington *versus* the Attorny General, Knight and Pincheon.

UPon English Bill the case was, that Thomas Pride, Attainted of Treason for the Death of King Charles the First, by the late Act of 12 Car. 2. by his Will in writing, made before April 1659, had Devised certain Lands to be sold for the payment of his Debts, and made his Wife and his Son Executors, and that they should see his Will performed in every particular; and died. His Executors convey'd the Lands in question over to King and Pincheon, in trust, for the payment of the Testator's Debts: And whether or no these Lands should be liable in the Trustees hands to the payment of his Debts, or should be forfeited by the said Act of Attainder, was the Question. (5)

And it was said by Hale Chief Baron, that if there had been an Interest devised to the Executors, it would have prevented the Lands from Escheating; as 49 Ed. 3. Isabel Goodcheapes Case. And it has been held, That if a man devise that his Lands shall be sold by his Executors, for payment of his Debts, that that will give the Executors an Interest, as well as if he had devised his Lands to his Executors to be sold. Otherwise where he devises in General, that his Lands shall be sold without saying by whom, though in that case the Executors must sell, 15 Hen. 7. But here the question ariseth upon the Saving in the Act of Parliament, which saves all Estates, Trusts and Interests, bonâ fide, made before April, 1659. Excepting for Wife and Children. And here is but an Authority Devised, and that Authority is to the Wife and Child, who are within the words of the Exception. But yet it would be hard to make such an Exposition, as that an Estate setled upon a Wife or Child in Trust for others, and not to their own Use, should be Excepted; or that such an Authority as this, if there be no more, being given by Will for the payment of Debts, should be out of the Saving. But it was Ordered to have a Case made of it, for the Court to Advise upon.

And afterwards the Court held, that the Lands might well be sold, and that they are within the Proviso of the said Act of Attainder, whether it be a Power, or an Interest that passeth by the Will; and that the payment of Debts is a good Consideration; and that if one of them refused, the other might sell by the Statute of 21 Hen. 8. and though but a Power was devised, and

and the Lands vested in the King by Attainder; yet may they be divested again, as in case of an Escheat, in 49 Ed. 3. Isabel Goodcheap's Case. And the Exception in the Proviso, concerning the Wife and Children, holds only where an Estate is made to them, which is not here; and to their own proper use, which is not here neither. And Judgment was given accordingly.

Anonymus.

(6) IN an Action Tam quam in this Court upon the Statute of Usury, for taking more than 6 l. per Cent. contra form' Stat', there was a Verdict for the Plaintiff. And it was now moved in Arrest of Judgment, that it lies not in this Court for Usury committed in London; though it would lie upon the Statute of 21 Jacobi. And in truth, the Interest taken here was more than 10 l. per Cent. for there are Four Statutes against Usury, one in King Henry the Eight's time, a second in Queen Elizabeth's, a third in King James his Reign, and the last in King Charles the Second's; and the Usury in this case exceeds what any of the Statutes allow. And since the Conclusion is General, contra formam Statuti, it shall be intended contrary to the form of that Statute, which allows the largest Interest, viz. 10 l. per Cent', or at least 8 l. per Cent. and it shall not be intended of the last Statute, which allows but 6 l. per Cent And then by the Statute of 21 Jac. cap. 4. there shall be no Suit upon a Penal Statute, but as that Act directs, which does not extend to the Court of Exchequer, unless the Offence were committed in Middlesex. Also Usury is an Offence at the Common Law.

Hale Chief Baron: Jewish Usury was prohibited at Common Law, being 40 l. per Cent. and more; but no other. And here the Suit being for taking more Interest than 6 l. per Cent. shall be intended to be grounded upon that Statute that forbids the taking more than 6 l. and by that Law the Suit is given in no Court in particular, and therefore may well be prosecuted here: Though if a particular Court had been named, as in 21 Jacobi, it would have been otherwise. And we will not presume that a Suit is out of our Jurisdiction, if we may safely and fairly intend that it is within it. And if the Law were held otherwise, many such Suits in Com. B. would be avoided, and it would be of dangerous consequence: And such Usury is now so common, that all means that may be, must be made use of to prevent it. But the Court took time to consider of it.

The

The King *versus* Margery Barnard.

IN a Scire facias the Case was thus; viz. One Gaseley was in the Year 1659, Attainted of Murther and Executed; and it was afterwards found by Inquisition, that the said Gaseley had lent 30 l. to the Defendant, and that the Defendant was indebted to the said Gaseley for it. Whereupon a Scire facias was issued against the Defendant, who pleaded, that she was not indebted to the said Gaseley modo & formâ prout: And this Issue being tryed before Hale Chief Baron in Middlesex, he held clearly, that the Act of 12 Car. 2. of General Pardon could not be given in Evidence upon this Issue, but that it ought to have been pleaded; for that this is not a General Issue within the Intent of the Act. And he held, that if it had been pleaded, it would have been a good Bar: For the Act excepts only the Offence, and not the Forfeiture; which is pardoned. And that Act, as it self directs, ought to be Expounded most beneficially for the Offender. (7)

Doctor Blackmore's Case.

HE pray'd a Prohibition, for that he was presented in the Archdeacon's Court of Canterbury, and there prosecuted for not coming to Church at Biddendon in the County of Kent, whereas he dwelt and was Inhabitant in Sussex, out of the Diocess; and yet was cited to appear there, contrary to the Statute of 23 H.8. (8)

In opposition to which the Acts and Procedings in the Court Christian were produced and shewn, which express him to have been cited within the Diocess, and that he was resident there at the time of the Offence committed.

And hereupon the Court declared, that if a Man be cited within the Diocess, though he be not an Inhabitant there, but only comes there to Trade, or otherwise, that this is not within the Statute of 23 H.8. And that if it were otherwise, there might be Offences committed against the Ecclesiastical Law, which would not be punished at all. For men would offend in one County, and then remove into another, and so escape with impunity. But because it was alledged, that he was really cited out of the Diocess, and that it would be made appear to the Court. Adjornatur.

The Attorney General *versus* Fox, Baynard, & al'.

(9) UPon an Outlawry after Judgment in Debt against Thomas Brocas Esq; at the Suit of Angelo Stoner and his Wife; an Extent being taken out thereupon, it was found by Inquisition upon the first of October, in the Year of our Lord One thousand Six hundred Fifty and four, that the said Brocas was seised for life of divers Lands in Southampton; which were seised into the King's hands, and leased out under the Exchequer Seal to the said Stoner: Whereupon the Defendants as Terre-Tenants pleaded, that before this Inquisition and Seizure, the said Brocas by a Fine sur concessit, Granted these Lands to one Abdy for Five hundred years, if he should so long live: And that Abdy died, and that after the Inquisition taken, his Executors demised them to the Defendants for Four hundred and Sixty years. To which the Attorney General Demurred, because the latter Lease appears to have been made since the Inquisition and Seizure into the King's hands, during which time no Estate could be granted of the Lands seized: Nor any Action of Trespass brought by a Stranger that had Right; Plowd. Com. 545, b. 19 Ed. 4. 2 Stamf. Prerog. 56, b.

To which was answered by the Court, that any one that has an Estate or a Right, may grant the same over, if his Title be precedent to the Outlawry: But true it is, that the Person Outlawed cannot by his own Act defeat the King's Interest; but a Stranger, that has Right, may; for else it would be very mischievous.

Nota hoc; because it is contrary to the Course of the Court of Exchequer, as I have been informed.

The

The Countess Dowager of Pembroke *versus* the Earl of Burlington.

UPon a Demurrer to an English Bill, it was held by Hale Chief Baron, that Return of Writs may be claimed by Prescription, as appertaining to a Mannor: And so it appears in Quo Warranto 2. in 42 Eliz. Where the Law is admitted to be so; though the Prescription there was not well laid to Entitle the party to it. But more especially may it be claimed, as appertaining to an Honour; as was held in 19 Jac. in Howard's Case; in the Case of the Honour of Clun. For Honours have more large Incidents, than Mannors have. He held further, that against a Pernor the Plaintiff needed not shew how he claim'd that Priviledge. But in a Quo Warranto, where the Defendant must make a Title, he ought to shew it. Vide 9 Rep. The Case of the Abbot of Strata Marcella 29. And the Court rul'd the Case accordingly. (10)

For some following Terms the Author was Absent, propter ægritudinem.

De Termino S. Trinitatis, Anno 18 *Car.* II. Regis.

In Scaccario.

The Attorney General *versus* Beston.

(1) IN a Scire facias upon a Recognizance for Rent and Farm of the Excise, as Farmer thereof; he pleaded the Act of General Pardon 12 Car. 2. which excepts the Rent, but not the Security: And by an Explanatory Act made Anno 15 Car. 2. the Securities of their Sureties were made liable, but nothing is said of the Farmers own Securities. But the Court held that à fortiori the Farmer's own Securities should be liable, because the Explanatory Act mentions the Securities of the Sureties only: And it is strongly implied by omitting them out of the latter Act, that the Parliament had no Doubt upon them, but that they were Excepted out of the Act of Oblivion. Besides, the Securities of Farmers and their Sureties are but the same Securities in Law, for all are Principals with respect to the King. And since the Sureties are bound, à fortiori, the Principals shall. And Judgment was given accordingly.

Dennis *versus* Loving.

(2) IN Ejectione firmæ for a Messuage in Westminster in Middlesex: Upon a Special Verdict the Case was thus; viz. The Office of one of the Tellers in the Exchequer was granted in Reversion by the late King Charles to one Squibb, Habendum to him and his Assigns during his life, and with a Proviso that the Grantee should not intermeddle in the said Office, before he had given Security with Sureties to the Lord Treasurer. The Grantee before admittance or security given, Granted the Office over in Reversion to another; then the Office becomes void, and the King grants it to the Defendant, who entred into the House belonging to it, and the Assignee entred upon him and assign'd to the Plaintiff.

Serjeant

Serjeant Glynn pro Quer. Made these Points in this case; First, Whether this Office be Assignable? Secondly, Whether if it can be Assigned, yet an Assignment be good, that is made by a person, who has not bæn admitted? Thirdly, Whether this Assignment be a Forfeiture of the Office within the Proviso? Fourthly, If so, whether a Scire facias or finding an Office be requisite to enable the King, to take advantage of the Forfeiture. Fifthly, Whether the Special Verdict, supply the want of an Office or Scire facias.

First, The Office is Assignable, by reason of the word Assigns in the Patent. But else it would not have bæn Assignable, being an Office of Trust, which concerns the King in his Revenue: Some Offices are in their nature Assignable, without the word Assigns, and some not. As a Parkership is an Office Assignable in its nature, being an Office of Profit: Others are not, viz. Offices of publick Trust, as this here is. vide 5 Ed. 4. 3. 19 Hen. 6. 34. 11 Ed. 4. 1, 2. 10 Ed. 4. 14. so Offices granted to men, their Heirs and Assigns are Assignable: As 9 Rep. 97. b. admitted in case of a Shrivalty. And there is no inconvenience in such case; for if assigned to an unfit person, the Court can refuse to admit him. vide Dyer 150. 11 Ed. 4. 2.

Object. It cannot be assigned in this case, because then the intention of the Patent will be frustrated; which is, that Sureties shall be given before any exercise of the Office.

Resp. the Assignée may and must perform that, vide Lit. 97. and 5 Rep. Goodale's Case.

Secondly, The Assignment is good before Admission; for Admission relates to the Exercise of the Office only, and not to the Interest in it; and the Interest passeth by the Grant: Otherwise it is in Cases, where the Admission gives the very Interest it self. As in case of the Prothonotaries, or of a Copy-hold, 39 Hen. 6. 34. 9 Ed. 4. 4, 5.

Thirdly, There is no Forfeiture in this case, for there is no exercise of the Office before Admission: And the entry into the House is not an entermedling in the Office: For that is no Execution of, or Entry upon the Office, but upon a thing that is appendant to the Office, Vid. Pl. Com. 178. b. 169. 4 Rep. 33. 3 Cro. 18. Conditions that divest Estates are taken strictly,

Fourthly, Admitting there were a Forfeiture, yet a Scire facias, or finding an Office is requisite, Vid. 9 Rep. 95. 96. Pl. Com. 489. 2 Rep. 53. 4 Rep. 4. the Sadlers Case.

Fifthly,

Fifthly, The Verdict cannot supply this defect, because, First, Neither the King nor the Patentee are parties to it. Secondly, A Verdict against a Tenant for life, is no Evidence against him in the Reversion. Thirdly, If the Law be so; the party grieved is without remedy, which he may have if an Office were found; for that is Traversable.

Object. N. B. 38. 16 Hen. 7. 11. If a Title appear for the King, upon a Record betwixt other parties, he shall have the benefit of it.

Resp. That is alway quoad the party to the Record; for it is an Estoppel to him, as Hob. Rep. 127. And concluded pro Querente.

Sir Heneage Finch Sollicitor General pro Defendente. There are 2 principal Points in the case. First, Whether this Office were Assignable, if there had bèen no such Proviso. Secondly, Whether the Proviso alter the case?

The first Question, has four things in it to be considered. First, Whether the Office would have bèen Assignable, without the word Assigns in the Patent? Secondly, Whether the Habendum to his Assigns, had made it Assignable? Thirdly, Whether an Assignment be good before Admission? Fourthly, Whether the Assignee ought to be admitted?

The second Question, has four things likewise to be considered. First, Whether the Proviso be an implied or an express Condition? Secondly, Whether the Assignee be bound by it? Thirdly, The consequence of that: And Fourthly, What exposition is to be made upon the Patent taken altogether?

First, The Office is not Assignable without the word Assigns, because it is an Office of a great and a publick trust, Dyer 30. Secondly, The Habendum does not alter the case, it being in the King's Case; for it would be inconvenient, that the King should have an Officer in such a place, put upon him against his will, 11 Ed. 4. 1. 21 Ed. 4. 84. and Habendum to the Grantée and his Assigns, is no other than if it had bèen to him and his Heirs, which would have bèen Void, 21 Ed. 4. 84. per Bryan. Hill. 1652. B. R. in Hatton's Case, the Office of a Garbler granted with power to make a Deputy, does not extend to an Assignée, because an Office of Trust. There is no president of an Assignment of such an Office. Nor was there any such word as Assigns in the Patents of them, till the time of R. Car. 1. Thirdly, The Assignment before admittance is Void: For where an Office requires skill, admittance is necessary; for else there can be no examination of the Officer's abilities, vide 5 Ed. 4. and if it were otherwise, the Assignée might have a good Title, though the Assignor had none himself, Vide Hob. 148.

Hob. 148. Fourthly, The Stat. de Scaccario requires admittance (see the words of it) before Entry into the House.

For the second Question. First, A Proviso is modus donationis, and more than the Law implies. Vide 7 Ed. 6. c. 1. and the Proviso here varies from the Statute in three respects. First, The sufficiency of the Sureties is tryable by the Patent, by the Lord Treasurer: There by the Court. Secondly, Two Sureties are all the Act requires: Here are more. Thirdly, The Treasurer is to determin what sum the Officer and his Sureties are to become bound in; By the Stat. the Court is to determin it. Fourthly, The Assignee is not in this case bound by the Condition. First, The Proviso shall be taken strictly in the King's Case; and an Assignée is not named: Dyer 65, and Moor's Rep. Pl. 4. Anderson's Rep. 124. Latch 16. Dyer 66. Secondly, The Assignée cannot perform it. Vide 7 Ed. 6. c. 1. Condition de Recognisance. And the Stat. de Scaccario extends only to Officers. Also he is not lyable in such manner as the King requires by it. Third Consideration is the consequence of this, which is very prejudicial to the King; and therefore the Court will not permit it. Vide Hob. Rep. 335. Vide 5 Rep. Knight's Case, 7 Rep. Englefield's Case, Yel. 207. 1 Hen. 7. 24. 35 Hen. 6. 34. and 4 Car. Sir William Brockman's Case, in Scaccario.

For the fourth Consideration; the Proviso must be so expounded as to be a qualification of the Grant, and the power of Assigning to take place, after Security given and not before. And Hob. Rep. 170. is not Law, as appears Co. 4. Rep. Dumport's Case, and Mich. 1655. B. R. Fox's Case, such a Proviso was adjudged to be good, against that Authority in Hob. and this Office is not in its own nature Assignable: Otherwise, if it were such. And concluded pro Defendente.

Afterwards in Easter Term 19 Car. 2. The Defendant procured a Writ de Rege Inconsulto, directed to this Court to surcease proceeding, after the case had been debated on both sides, and that the Court were ready to deliver their Judgments; which Writ was grounded upon an Inquisition, and a seisure of the Office into the King's hands for a forfeiture, and a Plea to the Inquisition, and a Judgment thereupon in Chancery for the King: Which Inquisition was taken after the Special Verdict, and the Arguments in the case; and the Court allowed of the Writ de bene esse, and gave a day to shew cause, &c.

The

The Writ contained and set forth the Patent of the 29 of Jan. 14 Car. By which Patent, the Office of one of the four Tellers in the Exchequer, was granted to Arthur Squib Junior, in Reversion, Habendum to him and his Assigns for his life, to be exercised by him or his Deputy with all profits, Fees and regards thereunto belonging; with a Proviso not to exercise the said Office, till he should have given sufficient Security, with Sureties by Recognisance or Obligation, such as the Treasurer or Chancellor of the Exchequer should think fit for making his Accounts; That on the 28 of May 1658. Arthur Squib Senior, one of the Tellers died, and that thereupon Arthur Squib Junior claimed the said Office, and the profits thereunto belonging. That on the 14 of Sept. 15 Car. 2. An Office was found before Sir Anthony Jackson and others Commissioners upon Oath, that the said Arthur Junior had not exercised the said Office, nor taken the Oaths of Supremacy and Allegiance, and that yet he had taken Fees belonging to the Office, amounting to 113 l. without taking the Oath for due Execution of the Office. That the 17 of April 16 Car. 2. Edward Squib came and pleaded to this Inquisition, as Assignee of the said Arthur Squib Junior, that on the 21 of Feb. 1653, the said Arthur Junior, had assigned over to him the said Office, with the profits thereunto belonging, and that Arthur Squib Junior is yet alive. That upon this Plea Judgment was given in the Court of Chancery, that the said Office was forfeited, and that it should be seized into the King hands: And that the King is informed, that there is an Ejectment depending in this Court betwixt the said parties, ut suprà, for a House belonging to the said Office, upon the demise of the said Edward Squib; and thereupon required the Court not to proceed in the cause, Rege Inconsulto.

And the Question was, whether this Writ should be allowed, or not; and whether the Court might proceed, this Writ notwithstanding?

Hardres for the Plaintiff in the Action, conceived the Writ ought not to be allowed.

First, This Writ is in the nature of an Aid-prayer. 9 Rep. 17. a. Ann Bedingfield's Case. And it is there called a Circumspectè agatis. Now it is a constant rule in our Books, that there shall be no Aid-prayer of the King where the King can receive no prejudice nor mischief; and therefore it is adjudged, 4 Hen. 7. 1. that if the King commits the custody of a Gard, and the Committee be impleaded, that he shall not have Aid of the King: Because the King loses nothing: Though Livery be to be sued out of the King's Hands. Otherwise, where a Rent is reserved to the King. 9 Hen. 6, 20. 61.

and

and so are all the Books, that Aid of the King shall not be, but where the King is in danger of receiving a loss, &c. or where the King's Tenant has a Warranty. 35 Hen. 6. 56. 43 Ed. 3. 3. 48 Ed. 3. 18. 49 Ed. 3. 6. 24 Ed. 3. 6. 37 Hen. 6. 28. 2 Hen. 7. 11. 21 Ed. 3. 19. 11 Hen. 4. 86. In an Attachment for a Contempt, against the Mayor and Sheriffs of London, for that the King had granted to the Plaintiff, the Office of Measuring certain Cloaths in London, taking for the same as much as such a one took, during the Plaintiffs life; the Defendants pleaded, that they held the City of the King in Fee-farm, and that by this Grant the Fee-farm would be impaired, and prayed Aid of the King: And it was denied, because the King is at no loss; and if Aid were granted, the King might endanger the loss of his Reversion in the said Office.

Object. 2 Hen. 7. 7. b. 11. b. In Croft's Case; In an Assize brought for the Office of Keeper of Woodstock-Park, upon a Grant made by King Ed. 4. The Defendant made a Title to it, by Virtue of a Grant made by King Hen. 7. and prayed Aid and had it, though it was objected, that both parties claimed by Vertue of the King's Grant; and so the King at no prejudice.

Resp. It appears by the Book in that case, that the King was bound by Warranty to make recompence; and that was the cause why Aid was allowed; but there is no such thing in our case. And upon the same reason in 9 Rep. 16. b. Ann Bedingfield's Case, this very Writ of Rege Inconsulto, was disallowed in a Writ of Dower, brought against an Heir after his full Age, who had been in Ward to the King. Nor is the King here at any prejudice, both the claims of both Parties affirm the King's Title; nor can the King himself take the profits of such an Office, but only has it in him to Grant. As in 6 Hen. 7. but if the King had a Title to the thing it self, it were otherwise.

Secondly, The Writ in this case comes too late after a Special Verdict, and the matter fully and oftentimes discuss't in Court, and the Court fully informed of all the matter already: So that if the Writ should be alleowd in this case, there would be a manifest delay, contrary to the Statute of Magna Carta, nulli negabimus, nulli differemus Justiciam, &c. the case in Dyer, 100. b. Colepeper versus . . . . . does not come up to this; for there it was pendente placito indiscusso; but here the matter has been discuss't, a Special Verdict found and the matter debated upon solemn Argument: Nor does there appear to the Court any new matter in the Writ; no more than what has been disclosed in the proceedings before them. And

in 9 Rep. in Ann Bedingfield's Case; the Writ of Rege Inconsulto was brought before Plea pleaded.

Thirdly, The Court here is as fully informed by the matter before them as by the Writ, of the King's Title; so that the King needs be no more consulted: And the party is at a prejudice by this delay; for if the Plaintiff or Defendant dye, or the term expire, there is an end of the Matter.

Fourthly, If the Court proceed when they ought to surcease, it is Error, and a Writ of Error lies upon it: So that the King is at no prejudice.

Upon these Grounds and Reasons I prayed, that the Court would disallow the Writ, and proceed to Judgment without putting the Parties to more Charge.

Mr. Stevens, Mr. Attorny and Mr. Sollicitor General, spake to it on the other side.

In Trin. Term. 19 Car. 2. Sir Robert Atkyns Argued pro Quer. Admitting that the Writ would lie at any time before Judgment, and that it will lie in Ejectment: As Moor's Rep. Brownlows Case, and the Cases there cited, are: And that it is not against Magna Carta; Nulli differemus, &c. because it is a Writ at Common Law. vide 1 Cro. 490. N. B. 153. Yet he said, the Writ consisted of two Parts. First, A Certificate of the King's Title. Secondly, Mandatory: Which is as it were a Conclusion drawn from the Premisses, and must not go beyond them: for the Title being certified, the Court is to Judge upon that and upon nothing else; as in 9 Rep. Ann Bedingfield's Case, and it does not appear to the Court, that the King is concerned in this Suit. There are three Records in this case; First, The Suit here by Ejectment. Secondly, The Inquisition. Thirdly, The Writ. As for the Inquisition, that is void, because Seventeen Commissioners were appointed, and the Inquisition taken but by five of them: Pl. Com. 390. 393, 396; the case there was stronger than ours, and yet all was void: And if the Inquisition be void, all that depends upon it, is so too, as the Plea, the Judgment, &c. quia debile fundamentum fallit opus: And Authorities must be strictly pursued; Co. Lit. 181. b. Dyer, 93. b. 375. b. 247. Also the Judgment upon the Inquisition does not conclude Dennys, who is no party to it, though he claim under one that is party to it; for he has no remedy by Writ for Error or otherwise. Hob. Rep. 70, 193. 8 Hen. 4. 14. Also this Judgment upon the Inquisition is contrary to the Act of General Pardon, which pardons this Forfeiture, and is therefore void; likewise the Plaintiff had commenced his Suit before the Inquisition, vide 22 Ass. 5. Br. Aid de Roy. 72. Nor is the King concerned, but the

the Defendant only, by reason of this Patent; and both parties claim under the King. So that in that respect the King is equally concerned for both. Vide 4 Inst. 118. And the Plaintiff here is a Debtor to the King; so that upon that account the King is more concerned on his behalf. Vide 11 Hen. 4. 86. 15 Hen. 7. 16. Nor is there any such Title here as the Writ recites; for the Writ recites a Lease for 4 years, whereas the Lease was for 7 years, as appears by the Record; and so concluded pro Quer.

Winnington pro Defendente. He agreed, that if the Writ had set forth no Title, it would have been within Magna Charta. c. 29. which was made against General Writs of Prerogative; wherewith agrees 2 Ed. 3. c. 8. But a Writ that discloses a Special Tile is against no Law, as this Writ does; it is an Aid pryer & aliquid amplius. 21 Ed. 3. 44. N. B. 153. But because his Argument only aimed at the answering of some Objections, that had been made before, I will not relate it. And especially because it was said by the Lord Chief Baron Hales, and agreed to by the Court, that this Writ could not be allowed, because it was grounded upon a void Inquisition; And upon a Suit of which there is no Record here; the Lease upon Record here being a Lease for 7 years, and the Record recited being of a Suit upon a Lease for 4 years: So that this Writ cannot be maintained.

Whereupon another Writ, in which these faults were amended, was sent, and allowed. And he said that this Writ is only in Lieu of an Aid prayer; and because it is a delay to the party, he ought to be heard before it issue out of Chancery. But he conceived, that though the King be equally concerned; both parties claiming under him, that yet that is no cause to stay the Writ; as in 2 Hen. 7. because it is for the King's benefit, to have his Grants served as soon as may be; for then the King may pleasure another; and he said, that the General pardon makes nothing in the case, for it is not pleaded nor comes into the case. And upon the new Writ, the matter was Adjourned.

De Termino Sancti Hill. Anno 18 & 19 *Car.* II. Regis.

In Scaccario.

The Duke of York & Al' Contr. Sir John Marsham Baronet & al'.

(1) Upon a Bill in Equity, the case appeared to be thus; viz. Isaack Pennington, who was Attainted of High Treason by the Act of 12 Car. 2. amongst other persons, for the Murther of King Charles the first, was at the time of his Attainder seized inter alia, of a Messuage and 41 Acres of Land in in Norfolk, being Copyhold, in fee, according to the Custom of the Mannor of Winfarthing in the said County; of which Mannor the Defendant was Lord, at the time of the Attainder. And whether these Copyhold Lands were Forfeited by the Act of Attainder, or not, was the Question.

In this Act there are three Clauses to be considered; First, The Clause that gives the Forfeiture to the King of all Mannors, Messuages, Lands, Tenements, Rents, Reversions, Remainders, Possessions, Rights, Conditions, Interests, Offices, Fees, Annuities and all other Hereditaments, which the person Attainted had the five and twentieth day of March, 1646. or at any time since. And that they shall be in the Actual possession of the King, without Office or Inquisition.

The Second is a Proviso added in favour of Purchasers; which provides, that no Grant or Conveyance, Grants or Surrenders by Copy, &c. (not being the King's, Queen's, Bishops or pretended Delinquents Lands) had or made before the 29 day of Semptember 1659, by any the persons Attainted, (other than to their Wives, Children, Heir or Heirs,) for Mony bona fide paid or lent, &c. shall be Impeached, Defeated, made void or Frustrated, but the same shall be enjoyed by the Purchasors, Grantees, &c. as if this Act had not been made.

The Third Clause is a saving; which saves to all Corporations and other persons, all such Right and Title, and Interest in Law and Equity, which they or any of them had or ought to have of, in, to or out of the Premisses, (not in trust for the Offenders, nor derived by, from or under the Offenders, since the 25th of

25th of *March* 1646) and that in every such case the entries of all such persons are saved, notwithstanding the possession of the King or his Patentee.

In this Case there are Three things considerable.

1. Whether or no, by the General words in the first Clause Copyhold Lands are forfeited to the King?

Secondly, Whether the Proviso adds any strength or force to those General words?

Thirdly, How the Saving shall operate?

And I conceive that these General Words of all Lands, Tenements and Hereditaments, do not forfeit Copyhold Lands to the King, and that the Proviso does not enlarge them.

As for the General words of All Lands, Tenements, and Hereditaments, they do not comprize Copyhold Estates; by an express Judgment given in Co. 3 Rep. Heydon's Case: Where it is laid down for a Rule, That General Words in an Act of Parliament, do not extend to Copyholds Lands, where the Tenure, Service, Interest in the Land, or other thing in prejudice of the Lord, or of the Custom of the Mannor is thereby altered: And Cro. Car. pag. 42. Rowden versus Malster, the same Observation is made by Three Judges; and upon that reason it is there Resolved, That Copyholds are not within the Statute de Donis Conditionalibus; because then the Donee would hold of the Donor, and so the Tenure be altered, and the Lord prejudiced in the Wardship of the Lands, and change of Tenants would not so often happen; and upon the same Reason it is Resolved, that Westm. 2. cap. 20. of Elegit: 27 Hen. 8. cap. 10. of Uses: 31 Hen. 8. & 32 Hen. 8. of Partition to be made by a Writ de Partitione faciendâ: 32 Hen. 8. cap. 28. of Leases for 21 years, &c. by Tenant in tail, &c. and 32 Hen. 8. cap. of Entry for Conditions enfreint by Grantees of Reversions, do not extend to Copyhold Estates, which are stronger Cases than this of ours; for there the prejudice to the Lord is but temporary; here it is for ever. Upon the same Reason it has been adjudged in Mich. 30 Eliz. in Sulyard and Everard's Case, that the King cannot seize two parts of the Copyhold Lands of a Recusant convict; though the King has but a Title in that case to the Pernancy of the Profits during the Recusancy: And it was there agreed by the Court, that Copyholds would not have been comprized within the Statutes of Bankrupts without Special Words.

Mich.

Mich. 33 & 34 Eliz. in B.C. held by Anderson and Walmsley, that if a Baron be attainted of Treason, the Feme does not by the Stat. of 5 Ed. 6. forfeit her Dower of Copyhold Lands, of which she is dowable.

And Co. 4 Rep. 126. in Beverley's Case adjudged, that the King shall not have the Custody of the Copyhold Lands of an Ideot for the Reason aforesaid; though the Stat. de Prærogativa Regis give him the Custody of all the Lands and Tenements of the Ideot; and though the words are, that the King shall have the Custody of the Lands, of whomsoever they are holden.

And because there is the same Reason in our Case, the Law ought to be the same. For if the Lands should come to the King's hands by this Attainder, the Copyhold Estate would be destroyed, and the Lord be prejudiced in his Tenure, Fines, and Services for ever.

But on the other hand, where no such prejudice accrues to the Lord, but where he is in the same condition as before, there such general words in an Act of Parliament will extend to Copyholds; as the Stat. of Merton cap. 1. Westm. 2. cap. 3. 32 Hen. 8. cap. 9. & 28. as appears Co. 4 Rep. 26, 30. Cro. Car. before cited, pag. 42. and 9 Rep. Mary Prodgers Case 105. upon the Stat. of 4 Hen. 7. of Fines.

So that all the Cases cited on the other side, may be answered upon this distinction, viz. where a Prejudice may accrue to the Lord, and where not.

The Second thing to be considered, is, Whether the Proviso in the Act of Attainder, brings Copyhold Lands not excepted within the Body of the Act? And I conceive it does not for these Reasons:

First, Because the words Grants and Surrenders, &c. may have another Intendment; as in case of Grants made by Copy of Court-Roll by Lords Attainted, after the Forfeiture committed, or upon Escheats to them: For all such passing of Copyhold Estates by Surrender, &c. are but so may Grants made by the Lord, and are so pleaded; as appears Co. 4 Rep. Copy hold Cases, &c. This is enough to satisfie those words; and besides, the Proviso was added in favour of Purchasors.

Secondly, Words are oftentimes inserted into a Proviso, though not comprized in the Body of the Act, and rather to satisfie Lay-men and some Members of Parliament not learned in the Law, than for any necessity there is of them; as appears by many Cases. Co. 1 Rep. Porter's Case; so the 5 Ed. c. 16. concerning Offices: The Body of the Act extends only to Offices, in which the administration of Justice is concerned

concerned; and yet there comes an Exception of the Office of Parkership.

In 18 & 19 Eliz. Dyer 354. it is there held, That whereas the Statute of Wills made 32 Hen. 8. has a Proviso for Feme-Coverts and Infants, that those words are idle and superfluous; because the Body of the Act, by the words All persons, doth not extend to include persons that by Law are disabled.

So here the words Grants and Surrenders by Copy of Court-Roll, were put and crowded into the Proviso, rather to satisfie some persons that were Purchasers, than out of necessity.

Thirdly, If the words of the Proviso, which was made for the benefit of the Subject, should be admitted to be an Explanation of the Body of the Act; then would the Saving be invalidated, whereby the Rights of all Persons are saved, which they had or ought to have in, to or out of the Premisses. This Saving cannot be maintain'd, if the Lord must lose his Seigniory, and his Right to Fines and Admittances.

Fourthly, The Act did not aim at the loss of any, but of the Offender himself; else it would have punished the Nocent with the Innocent, and that in as high a degree. For the benefit that Lords of Mannors have by the Copyhold Estates held of them, by reason of Fines, Forfeitures, and other Perquisites, is tantamount to the Interest that the Copyholder himself has in the Tenancy, or in a manner as good and beneficial; and for that reason by doubtful, general and ambiguous words, Copyholds shall not be taken to be within the Act. Upon these Reasons and Authorities I pray'd Judgment pro Defendente.

Sir Edward Thurland argued pro Querente; but I did not take his Argument.

Chief Baron: If this Estate be forfeited, the Copyhold will be destroyed, and it will pass by Letters Patents, and not by Surrender; and it would be a hard Construction to expound an Act of Parliament, so as to destroy the Interest of an Innocent person.

Crispe and Pratt's Case, Cro. Car. Anno 15. has been objected; viz. that Copyhold Lands are within the Statutes of 1 Jac. & 21 Jac. concerning Bankrupts, by reason of the words, Lands, Tenements and Hereditaments, and may be sold.

Answ. Those words do not make the Reason; but the Reason is, because Copyhold Estates are expressly mentioned in the Statute of 13 Eliz. concerning Bankrupts; and therefore the Acts of King James being but subsequent and additional Acts, and by way of Explanation, Confirmation, and Approbation

bation of that Act of Eliz. and being beneficial Laws, for that Reason Copyholds have been held within the later Laws, because they were expressly named in the former; but if Copyholds had not been named in the Statute of 13 Eliz. the general words above-mentioned would not have brought them within the Statutes of King James.

Answ. 2. The Lord in that case is at no prejudice; for the Assignee of the Commissioners is to be admitted and to pay the Lord his Fine; which cannot be done here in the King's case; so that Case comes not up to ours.

Object. Who shall have the Copyhold then? For the Lord is not mentioned in the Statute to have it, but the King; and by what means shall any other come by it, and how?

Answ. The Lord shall have it as an Escheat, pro defectu Hæredis; the person Attainted being dead, and his Blood corrupted by the Attainder, as in case of Felony or Treason at Common Law; the Lord shall have the Land in possession in lieu of his Fines and Services, and all other benefits and advantages of his Seignory.

There was a Case betwixt King and Holland, which came into the Court of King's-Bench out of Chancery 23 Jun. 16 Car. Regis: The Case was, Holland had purchased a Copyhold in Fée in trust for an Alien; and upon Office found the King seised, to have Profits answered to him: And per Cur' it was not seisible, nor was the Trust forfeited to the King; and an Amoveas manum was granted Trin. 23 Car. in B. R. And the Reasons were,

First, Because then the Lord would be at a prejudice in losing his Services and Fines.

Secondly, A Prejudice may arise to a Stranger hereby, who may claim a Title to this Copyhold; and if it were not in the King's hands, might sue for it in the Lord's Court; but the King cannot be sued there. Vide 4 Rep. 30. 14 Hen. 4.

Thirdly, De minimis non curat lex. And it does not consist with the Honour of the King to become a Copyholder.

Fourthly, The Custom of the Mannor, and the Tenancy at Will, are the foundations of a Copyhold Estate; and the King cannot be Tenant to any, much less Tenant at Will: For if this Estate should come to him, he comes in by Inquisition.

Object. By this means the King will be in a worse condition, than a Subject.

Resp. In

Resp. In cases that touch his Regality, and concern him in point of Honour, the matter is not great if he abate of his Profit to save his Dignity, and prevent what might be a disparagement to him. This does not put him into a worse condition than a Subject, though it may seem so to do; but it is more for his Honour. And for this cause the King shall not be received in a Real Action to defend his Right, as a Common person shall; because the King cannot be a Tenant, 25 Ed. 3. 47.

After the Death of the Tenant, his Blood being corrupted by the Attainder, there is no great doubt, but that pro defectu Hæredis, the Land shall escheat to the Lord. But if the person attainted were alive, some question might be made, who should enjoy the Profits during his life?

The King against the Inhabitants of *Rodley* in *Gloucestershire*.

Upon a Bill in Equity, concerning Common claimed by the Inhabitants in the Forest of Sherwood, in certain Lands there lately enclosed by the King and his Patentees; it being a Common by Prescription, and the Lands of the Inhabitants there being now Disafforested; whether this Common be destroyed by the Deafforestation upon the Statutes of Charta de Foresta, Ordinatio Forestæ, & 34 Ed. 1. was the Question. (2)

And by the Opinion of Baron Raynesford and Turner, the Common is gone by the express words of the Statute of Ordinat' Forestæ, and of 34 Ed. 1. And in an Iter, 8 Ed. 3. a Judgment was cited in point in a like case, in this very Forest of a Common by Prescription. But the Chief Baron doubted upon these Grounds; viz. he said there were three manner of Forests: First, Ancient Forests de temps dont, &c. before Charta de Foresta, called Charta Parva, with respect to Magna Charta, which passed in the same year. Secondly, There are New Forests made in the Reigns of King Henry the Second, Richard the First, King John, &c. A third sort of Forests are such as were partly ancient and partly new: In regard the ancient Bounds of the Forests were enlarged, and Grounds taken in to the Forest that had not anciently belonged to it. And that is the Reason of the Saving in 9 Hen. 3. in Charta de Foresta; saving all Commons accustomed, though the Lands of the Owners were Disafforested by the Act; because

they had been Afforested in the Reign of King Hen. 2. or King John, &c. to the prejudice of the Owners of the Land, who had Common there; and were not Rightfully within the Forest, and therefore it was but reason that upon the Deafforestation of those Lands, the Owners should enjoy their Customs; and this is the true ground of that Saving in the Act. But afterwards in 12 Hen. 3. and 10 Ed. 1. there were other Perambulations; whereby many Forests were enlarged, to the prejudice of the Subject: And thereupon afterwards, in 28 Ed. 1. there was another Perambulation made, by which the King conceived himself much prejudiced in abridging the Bounds of the Forest, and exempting Lands out of the Forest, which in truth were part of it. Upon these Grievances on both sides, both to the King and Subject, occasioned by these Perambulations made after 9 Hen. 3. the King and his Subjects concerned therein, came to an accord and agreement; and thereupon Ann. 33 & 34 Ed. 1. Ordinatio Forestæ was made; whereby it is declared by assent of both parties, that the Deafforestations made upon those Perambulations (be they right or wrong) should be quite discharged of the Forest: But then the Owners of the Ground were not to have Common there. But such who were content to continue their Lands within the Forest, were to have Common, as they had used formerly to have it.

And this is the true state of the Case upon these Statutes. Which being admitted, it may be possible that the Defendants here ought to have Common, notwithstanding this Deafforestation of their Lands. For if their Lands were not duly and of right afforested, and that they had Common by Prescription in the Forest; it was not the intent of the Ordinatio Forestæ to toll such a Common. But if they were well afforested at first, and afterwards disafforested unduly by some Perambulation, then the Common is lost, if the Owner will have the Land remain Disafforested: And this is the true Meaning, and Interpretation, and Intent of this Act of Ordinatio Forestæ; and this being Matter of Fact, and it not appearing of what nature these Lands are that are now Disafforested, nor whether there be a Common by Prescription in the case; this Cause is not yet ripe for a Decree, which must be made one way or other, as the Matter of Fact shall guide us. And this is the first ground of my Doubt.

Secondly,

Secondly, This Act of Ordinatio Forestæ makes but a temporary suspension of the Common Law, viz. so long as the Owners of the Lands would be out of the Forest, & non ultrà: So that there cannot be in such a case an Absolute Decree, or a perpetual Injunction.

My Third Reason is, because now by the Statute of 17 Car. 1. 16. the Lands cannot be afforested again; and therefore it would be hard to take away Common, where it is due of right.

For these Reasons he would not deliver any positive Opinion in the case, which he said was a Case of great importance, and deserved another kind of Argument than upon an ordinary Demurrer in Law: Which yet the Court never refuseth to hear upon the least difficulty (though the consequence be many times of small concernment,) that this Cause deserved more consideration, than to be determined by a sudden Opinion upon the Hearing. But because the Chancellor of the Exchequer, and the other Barons were against him, the Decree passed pro Rege.

De Termino Paschæ, Anno 19 *Car.* II. Regis.

In Scaccario.

The Attorney General *versus* Sir Henry Palmer, Baronet.

(1) AN Information was exhibited in the Exchequer against the Defendant as Heir and Terre-tenant of the Lands of Sir Roger Palmer, late Knight of the Bath and Cofferer of the Houshold to the late King Charles the First, for 63139 l. 18 s. 9 d. ob. received by him as Cofferer, from the 1st of October 1641, to the 2d of October 1642; and to have a discovery, &c. To which the Defendant pleaded the Act of General Pardon, made An. 12 Car. 2. and that the said Sum is not therein excepted. To which the Attorney General replied, and set forth the Exception of all Issues, Fines, Amercements, Rents, and other publick Duties, levied, received and collected by any Sheriff, Undersheriff, Bayliff, Minister, or other Officer, to or for the Use of the late King, &c. and not accounted for and discharged; and that 44853 l. 1 s. 2 d. ob. part of the said Sum is unaccounted for by the said Sir Roger Palmer, and by him received as Cofferer aforesaid, in pursuance of two Acts made in quinto Eliz and primo Jac. concerning payment to be made, and to be apply'd for the payment of the Expences of the Houshold to the yearly value of 50000 l. and that Assignments should be made by the Lord Treasurer for that purpose: And sets forth also, the Exception of all Offences in detaining, imbezelling, or purloyning any Goods, Moneys, Chattels, or Jewels of the late King, Queen or Prince, other than Stores for Shipping, and other than such Goods and Chattels, as have been sold or disposed to any Creditors of His Majesty, and avers those Moneys so received were the Moneys of the late King, and not paid or laid out for his use, and so excepted.

The Question was, Whether the Many so received by the Cofferer were excepted, or not, by any Clause in the Act. And I conceived it was not excepted, and therefore discharged by the Act of Pardon; for these Reasons:

First,

First, The Act of Oblivion is an Act of General and free Pardon and Indemnity, and is to be taken according as the words are, and as the Act expresseth it self, but beneficially for the advantage and benefit of all subjects in General, and all Exceptions out of it are to be taken strictly. Hill. 11. Car. 1. Bell's Case, Cro. Car. 324. there was an exception out of an Act of General Pardon of the taking and imbezilling of the Kings goods, yet the Felony in imbezilling them was not excepted. Cro. Car. Priest's Case 258. there was an exception out of a General Pardon of Quare Impedit where there was no Incumbent; this did not extend where there was an Incumbent de facto by a Plurality, tho' the Statute of Pluralities makes the first Benefice ipso facto void in that case.

Pasch. 15 Car. 2. In this Court in a Scire facias versus Hutchinson and Pococke for 2272l. by them received in the late times of War, of others than Collectors and Treasurers for sick and maimed Soldiers: The Court in that case held this sum not excepted by the General exception of monies received by Treasurers, Collectors, &c, in the late times of War, &c. because it was mony received of them, and not by them; and therefore it was not within the Intention of the Act. So I say here, the sums received by the Cofferer at second hand of other Receivers and Collectors by Assignment, are not within the Intention or meaning of any exception in this Act.

Secondly, It is not within the scope of any exception of Accountants: For those exceptions aim at two sorts of Accountants. First, Treasurers, Receivers and Collectors of things in time of War before the 30 of January 1642, which does not concern our case. Secondly, To Accountants, as ordinary Ministers of Justice, and ordinary Receivers in pais. And it begins with Sheriffs, Undersheriffs, Bayliffs, Ministers or other Officers, which cannot reasonably be supposed to extend to such Superior Officers or Accountants. If they had been intended to have been excepted, without doubt they would have been excepted by express words.

Besides, these Accountants become so by receipts by Assignment of the Lord Treasurer for a provision for the King's Household, and it shall not be presumed that such receipts, disbursed and employed for the maintaining the King's own Houshold, and which must consequently follow the King himself, should be excepted; but such receipts only as do not follow the King.

Thirdly,

Thirdly, This Account is not within the exception of the words Ministers or other Officers, for this Officer, being Cofferer of the Houshold, is in a superior degree of Officers, and so their Accounts are distinguish'd in this Court, from those of Sheriffs and other Officers. So that superior Officers shall not be comprehended within any General words, after inferior Officers expressed by name; because it shall be intended, that if they had been designed to have been included, they would have been named at first. Vide 2 Rep. 46. b. the Archbishop of Canterburies Case, 22 Ass. 49. The King Grants bona felonum & qualitercunque damnatorum, this does not extend to High-Treason, because Felony is named at first. 11 Hen. 6. 54. b. The Statute of 8 Hen. 6. limits the process upon Inditements before Justices of the Peace, or other Commissioners in case of Outlawry: These last words do not extend to the Justices of the Court of King's Bench, which are superior.

Fourthly, The Cofferer shall not be taken to be within the General scope, or intention of any exception in the Act, because the whole drift of the Act, is for the benefit of the Subject; and like Acts have always been expounded accordingly.

7 Rep. 18. b. Cecill's Case, Remedy is given by 33 Hen. 8. c. 39. to recover debts due to the King upon Obligation, this does not extend to Obligations for performance of Covenants. Scaccario Mich. 16. Car. 2. Attorny General and Holt. The new Act of 13 Car. which gives remedy against the Farmers of Excise and their Sureties, upon their Recognisances, does not extend to Commissioners, because they are not named.

Afterwards in Trin. 21 Car. 2. the Court delivered their Opinions, that this Account was pardoned, and did not come within any exceptions of the Act: Not within the first exception; for that is intended only of such Goods and Mony, as was once actually in the King's possession and keeping, and wrongfully taken from him, as was done in the late Wars; and not of Goods or Mony belonging to the King, which were in the Hands of any other person: For if such an exposition were made, it would open a gap to let out all things that are pardoned by the Act, with relation to Goods and Mony. For in a large sense mony in the hands of the 1st, 2d, 3d, 4th, 5th, or 20th Receiver, which appertains to the King, may be said to be the King's Mony. Nor is it within the other Exception, for the Cofferer is a person of higher Rank, than any that are there named; and a superior shall not be included, where an inferior is first named; as appears 2 Rep. in the Archbishop of Canterburies Case, and so the Plea allowed per Curiam.

Thomas

Thomas *versus* Waters.

IN an Information upon the Statute of 12 Car. 2. for selling Wines without a License: Upon Not-guilty pleaded, a Special Verdict was found; viz. the Jury found the Statute of 7 Ed. 6. c. and that by Letters Patents bearing date 12 Octob. Ann. 17. of Queen Eliz. The Queen reciting that the Liberties and Franchises of the City, were prejudiced by the said Statute of Ed. 6. and had not been well understood, Granted to the Mayor and Comminalty of the said City of London, That every Free-man, and Widow of a Free-man, and her Husband should have liberty, notwithstanding the said Statute of 7 Ed. 6. to sell Wines in their Houses, or elsewhere (2)

The Jury found moreover, that the City of London was an ancient City, before the 12 of Octob. 19 Eliz. and that the Defendant was a Citizen, and had served an Apprenticeship to a Vintner in London, before the Information brought: And that he kept a Tavern in London, and had sold 8 Pints of Sack there, without a License according to 12 Car. 2.

Ellis pro Quer. made two Questions. First, Whether these Letters Patents are good, and a sufficient dispensation to the Citizens of London, and their Successors in perpetuity?

Secondly, Whether the Statute of 12 Car. 2. does not take it away, or whether it be saved to them by the Proviso in that Statute?

For the First, The Letters Patents are not good, nor is such a Dispensation legal: It is granted to the whole body of the City, and extends to dispense with all Acts of Parliament, made and to be made, and it Grants the Citizens liberty to sell Wines in what places they list, and to set up Taverns. And admitting that such a Grant were good and valid in Law, notwithstanding any penal Act of Parliament to the Contrary, yet can it not bind a Succeeding King: For the Original of these Dispensations with Acts of Parliament, he referred to Sir John Davie's Reports, and the Abuses there mentioned.

His First Reason, why the said Dispensation is now of no force, was because it was a mere License, and an Authority, it vested no Interest, and consequently died with the King. By the same Reason, 8 Rep. 82. Commissions died with the King. 1 Rep. 3. 4. Protection pro Rege & Successoribus suis, naught. Latch's Rep. 58. If the King's Grant passeth an Interest, the Successors are bound thereby, otherwise not. 1 Mar. Dyer 92. Dav. Rep. 90. A Grant to a Merchant

Merchant Alien to pay English Customs, shall bind the Successor, if named, because the Customs are an Inheritance in the Crown. So 36 Hen. 6. 48. Dyer 52. a Grant for the King and his Successors to the King's Tenant, that the Heir of the Grantee shall not be in Ward, is binding to the Successor, because the Seignory is an Interest in the King. A License to Alien must be executed, in the life of the King that Grants it.

Object. But a License to Alien in Mortmain may be executed after his Death, F. N. Br. 223. Pl. Com. 457.

Resp. 1 Inst. 99. 457. Because no Non-obstante is requisite, and it is an Interest in the King, but the mesne Lords are not bound thereby; with which agrees 43 Ass. 19. But where a bare Authority passeth and no more, it is otherwise. As in the case of a Commission of Sewers, and therefore it is enacted by Parliament, that those Commissions shall continue for ten years; viz. by 23 H. 8. in Latch, Thoresby's Case, 2 Car. 1. 70, 71. The death of the King dissolves the Parliament.

His Second Reason was taken from the Nature of these Letters Patents, viz. from their Largness and Extent: Being Universal and perpetual, and enabling them to set up as many Taverns as they pleased, and to sell Wines where they would, and at what prices they would. That such General Dispensations were void in Law, he quoted 11 Rep. the Case of Monopolies. And 7 Rep. 36. 37. the Case of Penal Laws.

Thirdly, He urged that the Grant not stinting them to any number of Taverns might give occasion of Excess and disorder; And Supernumerary Taverns, he said, were Nusances in Law, which could not be dispensed with. Vide 11 Hen. 7. 12. So the excess of Building in and near the City of London, has been punished in the Star-Chamber as a Nusance, notwithstanding the King's License.

Fourthly, This Grant is primæ Impressionis, and therefore void, as appears by the cases just now cited out of the 11 and 7 Rep.

Object. 2 of Hen. 7. 6. Sheriffs may be made for life notwithstanding the Statute of 23 Hen. 6. c. 10. and some other Statutes, which do expressly forbid it.

Resp. That case is a case of a Dispensation granted to one Man in particular; the Dispensation in our case is granted to a Multitude. Resp. 2. The King has an Inheritance in the Office, and therefore the Grant issues out of the King's Interest: and therefore tho' restrained by an Act of Parliament, yet by a Non-obstante may be restored to it's primitive quality: Which is not here. Resp. 3. Such things as are inseparably annex't to

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the Crown may be dispensed with, notwithstanding any Act of Parliament prohibiting such Dispensations: Vide 12 Rep. 18. But in other things which are common to the King with his Subjects, the King may be restrained: As by the Statute of 13 Eliz. concerning Leases; Vide Co. Rep. Magdalen Colledge Case. So in the case of Simony, No Non-obstante can make a Simoniacus capable of the living, that he was once presented to by Simony: Vide 1 Inst. 120. Upon the Statute of 2 Ed. 6. of Officers, In our case the King had no Inheritance, and therefore such a Dispensation as this, is void.

Fifthly, The King cannot transfer his power of dispensing to the City, because it is inseparably annex'd to the Crown. 20 Hen. 7. 8. 7 Rep. 25. Grant to make Denisens before Forfeiture, or a Grant to dispense with Penal Laws, void. And this is such a Grant; for every Freeman is to be licensed by the City, and the Widow of a Freeman is to enjoy the Priviledge. And they may admit whom they will to be Free.

Object. It is a great Trust committed to the City, which is an ancient and a famous Corporation.

Resp. But is communicable by them to as many as they please.

Object. It is but an Authority and a Priviledge, which is a Flower of the Crown.

Resp. The case in 7 Rep. 35. is a stronger case than ours, and yet there the Grant was adjudged void.

For the Second Point, he held that the Act of 12 Car. 2. had taken away this Priviledge, and repealed the Act of 7 Ed. 6. and that the Priviledge was not saved by the Proviso, in the Act of 12 Car. 2. and that the Non obstante in the Patent could not have any influence upon a subsequent Law. Dyer 52.

First Reason. Because the Grant here is not to the Master, &c. of the Company of Vintners, if it were, the Act had excepted it, but to the City of London, and there is no Grant to the Vintners.

Second Reason. Usage mentioned in the Proviso, is to be understood of lawful Usage; and is so expressed; viz. As heretofore they have lawfully used and enjoyed.

Object. Then the mentioning of the Master Wardens, Freemen and Commonalty of the Vintners of London, in the Proviso, will be void; and insignificant.

Resp. The saving must of necessity be void as to them, if there were no Grant made to them: As in Pl. Com. 507. Dyer 150.

Third Reason. No Privilege was intended to be saved by this Act, but such as may be raised and created by a Common and Usual Non-obstante; the Proviso must not be presumed to Extend to any other. A Non-obstante to the Statute of 7 Ed. 6. may be supposed to be saved by the Proviso in 12 Car. 2. But the Non-obstante in our case, is in opposition to a future Law. Besides, a Non-obstante does not make void a Law; but dispenseth with a Law pro hic & nunc. But if this Non-obstante be allowed, it will be perpetual. Wherefore he held it void; and not saved by the Proviso, and concluded pro Querente.

Sir Robert Atkyns pro Defendente. He made two Points; First, Concerning the Prerogative of Despensations. Secondly, Concerning the Nature of this Dispensation in particular.

For the First he said, the Original and the Necessity of Dispensations, is the fundamental Law of the Land. For all Men and Acts of Parliament are fallible: And therefore it is necessary, that a power of dispensing with them upon occasion, should be lodged in the King. All Emergencies cannot be foreseen, and therefore our Law in Justice and prudence gives this power to the King. And if it were not so, great mischiefs might accrue to the People: New Laws are for the most part only Probationers, and in intervals of Parliaments, great prejudice may arise by them; and therefore it is but just that the King, who is the Fountain of Justice and Mercy, should have a power to dispence in such cases, for the avoiding mischief and danger to the Realm. Vide Sir Francis Bacon's Advancement of Learning; and Dr. and Stud. 85. And God himself indulged Dispensations to the Jews, with the positive Laws of Moses, as when he gave them leave to rob the Egyptians, and in case of Marrying out of their Tribes: And therefore, the Power of Dispensing is justly termed, the highest Prerogative in the King. Vide 3 Inst. 23. Hob. Rep. 146. 155. 7 Rep. 35. Nor were Dispensations introduced here by the Pope, but the Dispencing Power appertains to the King by the Common-Law, in cases of necessity. Vide 2 Hen. 7. 6. and 8 Eliz. c. 6. of Cloath and 21 Jac. of Monopolies, countenances this Licensing of Taverns. And the Act of Parliament does not limit the King in point of time: And by the same Reason that he has it for life, by the same he may have it as well in perpetuity. Vide 1 Cro. 347. 2 Cro. 566. Also the number of 40 Taverns, is too small for so great a City, and a City which has so vastly encreased since the 7 of King Ed. 6. and consequently there is the more reason for the Patent in question. Vide Dr. and Stud. 127.

Secondly,

Secondly, Authorities granted for life of the Grantees, and in perpetuity have been held good. For life of the parties; Vide 2 Hen. 7. 6. of Sheriffs for life; and for two lives, Vide Trin. 15 Jac. 1. Bridgman's Rep. 113. upon the Stat. of 7 Ed. 6. concerning Wines, and no exception taken to it. Vide Dyer 270. where no time was limited, how long the License was to continue; and therefore, that case does not conclude to ours. And in Dyer 92. there wanted the word Successors. Vide 2 Rich. 3. 11. a like case of a Grant to the City and their Successors by King Ed. 3. An Exchequer-Chamber case. And in Trin. 2 Jac. 1. in an Information against & alios in B. R. upon the 7 of Ed. 6. the very Point now in question was overruled, upon a Demurrer against the Informer, and upon this Patent.

Object. This is no more than a License.

Resp. It is more than a License. It is a Liberty to sell Wines, which any man might have done before the 7 of Ed. 6. without restraint, as any Man may exercise a lawful Trade: And the Statute, which restrained that liberty, is now let loose by the Patent in this case.

Object. It is an unreasonable Grant, and is therefore Repealed by 12 Car. 2. and is not saved by the Proviso.

Resp. The advantage of the Patent does not accrue to all the Citizens in General: But only to those that are bred up to the Trade.

Object. Cases of Commissions and Protections have been objected.

Resp. Those things are temporary in their own Nature; and are bare Authorities.

Object. The multitude of Taverns, which this License gives way to, is a Common Nusance; and Common Nusances cannot be dispensed with.

Resp. If any such mischief happen, it may be remedied by Enditement. But it is not certain that any such effect will ensue. And the end and design of this Dispensation is to remove a mischief, that was occasioned by the Stat. of 7 Ed. 6. and not to create a Nusance, which by possibility may happen through an abuse of the Liberties hereby granted.

Object. By this Patent the King's Prerogative is transferred to others, which the Law does not allow of.

Resp. No power is hereby transferred; there is but a liberty granted to the City of Exercising a Trade, as they might have done before the Stat. of 7 Ed. 6. And before that Statute they might have made Men Free, as well as they can now.

Second Point is upon the Statute of 12 Car. 2. Now it has bœn resolved in this Court, in Stephens and Duckworth's Case, that the Proviso is effectual to this purpose.

Object. The Grantees here are not mentioned in the Proviso.

Resp. The Proviso does not go by way of Granting an Interest; but sounds in favour of such as have Advantage, by any former Grant. Nor does it refer to the Grant it self, but to Usage. And no Citizens used this Privilege, but the Company of Vintners only. And this Proviso goes in restraint of the Act, which Act Repealed 7 of Ed.6. without the Proviso. And no Clause must be idle in an Act of Parliament, if it may be made good by any reasonable Construction.

Object. The Patent is primæ Impressionis.

Resp. That is not so. Nothing is new, but the calling of it in question. And concluded pro Defendente.

Afterwards in Trin. Term, 19 Car. 2. the case was argued by Sir Edward Turner pro Quer. and by Mr. Mountague pro Defendente.

Sir Edward Turner:

First, These Letters Patents to the City are void. The Non-obstante is a Relaxation of, and a Dispensation with the Law; and that Artifice began at Rome, as appears 12 Hen. 8.6. and in Sir John Davie's Rep. 69, 71. nor was ever favour'd in our Law.

Secondly, This Non-obstante is contrary to those Rules of our Law that are laid down in 7 Rep. 36. 2 Ric.3. 12. and the Case of Sheriffs 2 Hen. 7. 6. does not prove our Case: For that was but a temporary Dispensation, pro hic & nunc, and the King alone was concerned there: But this Non-Obstante is prejudicial to the Subject, as well as to the King, by reason of the large extent of it. Vide 2 Hen. 7. 6. 28 Hen.8. cap.13. Hob. Rep. 46.

Thirdly, Where a Dispensation proceeds from an Essential Prerogative of the Crown, there it is good. Vide 7 Rep. Calvin's Case, 13 Ric. 2. c. 1. 16 R. 2. c. 6. in case of Murther, and the Case of 2 H.7.6. because Justice and Mercy are the proper Attributes of the King. Vide 8 R. 2. c. 13 H. 4. c. 2. Hob. Rep. 146.

Fourthly, But there are also many cases in which the King cannot Dispence: As, First, Where a thing is malum in se, and not malum prohibitum only. Vide Sir John Davie's Rep. 75. 1 Hen.7.3. 11 Hen. 7. 12. 11 Rep. 87. Secondly, Where the Subject is likewise concerned; Vide 2 Ric. 3. 12. 37 Hen. 6. 5.

7 Rep.

7 Rep. 18. 7 Rep. 18. Hob. Rep. 214. Thirdly, Where the King's Grant is contrary to the Common Law, there a Non obstante does not avail; Vide 4 Rep. 35. Dav. Rep. 25. Co. Lit. 120. de Simony, & Plowd. Com. 502. Fourthly, Where the Publick Government of the Nation is concerned; as 2 Hen. 4. c. 14. of the Jurisdiction of the Admiralty, 4 Instit. 135. Fifthly, This Power is not transferrable over, as is done here; 1. In respect of the thing it self: For the Statute of 23 Hen. 8. c. and of 7 Ed. 6. (as appears by the Preambles) were made to suppress Vice, which is for the benefit of all the Subjects; and by the latitude of this Dispensation it would be in the power of the City to continue the Mischief that was before. And although the King may dispence in perpetuity, where he has an Inheritance; yet where he has only a Power and Authority, as here, it is otherwise: Vide Dyer 52. b. 108. Plow. Com. 457. Latch. 170, 171. Thuresby's Case. 2. In respect of the Universality of the Grantees; Vide Hob. Rep. 230. For any man may be made Free of the City for 10 l.

Second Point. If the Patent were good originally, yet it is now void by the Act of 12 Car. 2. cap. 25. whereby the Power of granting Wine-Licenses is placed in others. It is a Negative Law and concerns the King's Revenue; and must therefore be expounded beneficially for the King.

Object. This Priviledge is preserv'd by the Saving in the Act.

Resp. The Saving extends only to the Corporation of Vintners; but the Grant here is to the City; and the Saving extends only to such Priviledges, as they had lawfully used; but this Priviledge was not lawfully used by them, because their Patent for it, was a void Grant.

Object. The Statutes of Mortmain are objected, with which the King may dispence, so as to erect a New Corporation, and give them power to purchase Lands, notwithstanding those Statutes.

Resp. The King is there concern'd in point of Interest, and that of Inheritance, which is not here.

Object. Presidents have been urged in 2 Jac. in B.R.

Resp. There were no such Cases: But in C. B. rot. 283. there is a Case, wherein Judgment was given, as is urged, but it was upon a Demurrer without Argument; and concluded pro Quer'.

Mr. Mour-

Mr. Mountague pro Defendente:

First, Non-obstantes and Dispensations are a Right inherent in the King, 3 Inst. 233. Nor can this be compared to the Cases of Licenses, Authorities, Commissions, Protections, &c. granted by the King: For they are derivative Powers, and may be Executed by others, and dye with the King; and regard his Natural Capacity. But a Dispensation is a Flower of the Politick Capacity, which never dies; and therefore no more does a Dispensation, if granted for life, till the Death of the Grantée; Vide Hob. Rep. 155, 183. 7 Rep. 36. Nor does the Grant here operate by way of Transferring any thing to the City; but by way of Dispensation; and though it is not Transferrable, yet it is Dispensable: Vide 11 Hen. 7. 12. Sir John Dav. Rep. 75. Stamf. 101. 11 Rep. 86. 12 Rep. 18, 19. Dyer 270. And in B. C. 1650. it was held, that such a Dispensation as this doth not determine with the life of the King. And the Reasons for its Continuance may be these; viz. the first may be taken from the Rule laid down in 7 Rep. 36. Vide likewise 11 Rep. 88. More's Rep. 714. 2 Rich. 3. 12. 1 Hen. 7. 3. So for Time; Vide 1 Hen. 4. cap. 6. 2 Hen. 7. c. 6. & 18 Hen. 6. c. 16. where a Grant to a Man and his Heirs, with a Non obstante of the Omission of the value, is good in perpetuity. So a Non-obstante of the Statute of Mortmain, granted to a Corporation, extends in perpetuity; Vide 4 Ass. Dyer 269. Plow. Com. 457. And in this case of Mortmain the King has no Title before Forfeiture, but a possibility only; Vide Mo. 353. & 3 Cro. 512, 513. But I agrée, where the Publick is interested, a Dispensation is void; as 11 Hen. 7. 12. but that is not here. And here is no Transferring in the case, but a Relaxation; and the thing here dispensed with, is not malum in se, but is the liberty of the Subject, which he enjoy'd before the Seventh of Edward the Sixth.

Secondly, This Dispensation is saved by the Proviso in 12 Car. 2.

First, We are in Effect within the Words of the Proviso: As the Proviso is worded, it is all one in substance, as if we were within the very letter of it: And they that are by name in the Proviso have enjoy'd the Privilledge, ever since the 19th of Eliz. Whether such Enjoyment has been lawful or not, depends upon the first Point.

Secondly, We are at least within the meaning and intent of the Proviso. The Proviso prevents any prejudice that may accrue by the Act to Corporations, and refers to Usage. And the Answer given to the case in primo Jacobi 1. comes not up to our case; for the Plea there was grounded upon a Grant made

made to the City in 9 Eliz. which was but durante beneplacito. So that a New Grant in primo Jacobi was necessary to supply that defect. But our Case depends upon a Patent in 19 Eliz. which came not in question there. So he concluded pro Defendente.

The Attorny General *versus* Meller.

Upon a Plea to an Inquisition upon an Extent, for a Debt assigned by Sir George Binion, the Defendant did not plead as Terre-tenant: But pleaded that long time before, &c. a Stranger was seised in Fée of the Lands seised, and by Lease and Release convey'd to another in Fée, que Estate the Defendant had, and traversed the King's Title. To which Plea the Attorney General demurred. (3)

Stephens, pro Rege. The Tenant ought to set forth all his Title, because it is traversable, and the King may traverse what part of it he pleaseth: And therefore Que Estate is not a good Plea against the King; Vide 7 Ed.4.26. 18 Ed. 4. 3. Dyer 238.

Wilmott, pro Defendente: The Mesne Estates and Conveyances are not traversable, and therefore they need not be set forth; Vide 18 Ed.4. 10. 30 Hen. 6. 7. And a Prior Title is traversable only where it is specially alledged. And a Que Estate is allow'd for the avoiding of Prolixity and Ill-pleading. Besides, the mean Conveyances may be lost, and then it will be unreasonable to oblige a Man to set them forth. And the King is at no Inconvenience hereby; because his Title is traversed, and so an Issue tendred; and 3 Hen. 7. 2, 3. and Crompton's Jurisdiction of Courts 198. are in point.

Hale Chief Baron: We must not be so strict here in the case of a Debt Assign'd to the King, as if it were in case of a Debt originally due to the King; because the King's Prerogative is here made subservient to the Interest of a Subject. Neither, if the King himself were here a Party originally, ought we to be so strict in this case, as in case of an Information of Intrusion; where the King makes a Title to himself expressly, which he does not here; his only Title here being, that such an one was seised, and became indebted to the King's Debtor: And therefore in this case a Que Estate may well be pleaded against the King, with a Traverse of the King's Title found by the Inquisition: Especially when the Defendant has shewn, that such an one was seised in Fée, and conveyed by Lease and Release, &c.

whose

whose Estate the Defendant hath; which gives the King opportunity sufficient to take Issue, or tender an Issue, or to Traverse the Defendant's Title, or the Que Estate, which is traversable: And therefore here's no Mischief or Inconvenience to the King, as there would be to the Party, if he were obliged to set forth all mean Conveyances, which perchance it is impossible for him to do; for they may be lost, or detain'd from him by others. And perhaps some, under whom he claims, were seised by Disseisin; which it is no good policy to disclose in pleading: But if any were seised by Usurpation, it might be safer; for to an Usurpation some Legal and Judicial Acts concur. But in case of an Intrusion, I agree the Law to be otherwise; and so is Dyer 238. to be understood. And though the Defendant does not here plead as Terre-Tenant; yet it appears by the Pleading that he is Terre-Tenant: For he pleads Que Estate il ad; which he could not have, if he were not in possession. Et Adjornatur.

Afterwards in Trinity Term 19 Car.2. it was Argued again by Mountague, pro Querente.

The Defendant ought to shew how he came by his Estate:

First, Because he is here in the nature of a Plaintiff. And this Diversity is observable in the Books, viz. that if a Plaintiff makes a Title to himself, he must shew how he comes by it, and not Entitle himself by a Que Estate. So in an Avowry, the Avowant must set forth his Title: But the Defendant in a Common person's case may well claim by a Que Estate. And so are Co.Lit.121. 7 Ed.4.26. 2 Cro.673. 9 Rep.Baten's Case, in case of a Nusance, where the possession is the substance. 2 Hen. 6. 10. 29 Ass. 19. 9 Ed. 4. 21 Hen. 7. 9. Dyer 171, 172.

Object. 2 Hen.4.13.

Resp. Bro. Que Estate, 6.

Object. 3 Hen.7.2.3.

Resp. Stamford's Prerog.63. contrà: Besides, there is no such thing as a Que Estate in 3 Hen.7.

Secondly, Admitting that the Defendant in this Case is properly a Defendant, and not to be looked upon but as such; yet we are in the King's Case: And therefore he ought to set forth how he came by his Estate; because the King may traverse any part of his Title; Vide 7 Ed. 4. 26. and concluded pro Quer.

Hale

Hale Chief Baron: Suppose Meller has an Estate by Disseisin, you would not have him set that forth in his Title; so that you see it may be inconvenient to oblige him to disclose his mean Conveyances, and tell ye how he came by the Estate. And the Case in Dyer 238. is in case of a Lease for years; which cannot be gain'd, but by Assignment or Conveyance: But a Fee Simple (which is our case) may be gain'd otherwise. Et Adjornatur.

The Case was Argued again in Michaelmas Term, Anno 19 Car. 2. And upon the Pleadings was thus; viz.

Lincoln, 8 Jul. 15 Car. 2. Scire fac. issued; setting forth, that Sir George Benion, the King's Receiver, was indebted to him in divers Sums by reason of his Office.

That Roger Fulwood and R. Lougher, Esquires, 23 May Anno 14 Car. 1. were joyntly and severally bound to the said Sir Geo. by Bond in 400 l. to be paid at a day since past; which was assign'd over to the said King, 12th of October 14 Car. 1. for and towards the satisfaction of that Debt.

That the Obligors dying, a Scire facias issued against their Executors, Administrators, Heirs and Terre-tenants at the time of the Assignment: And the Sheriff Returned, That he had warned John Meller, Tenant of a Messuage and Forty seven acres of Pasture in Silby; and Leonard Donington, Tenant of another Messuage and Twenty acres of Land, and Twenty six acres of Meadow and Pasture, with the Appurtenances, in Silby prædict'; and Thomas Gannock, Tenant of Forty acres of Land, Sixty acres of Meadow, and Twenty acres of Ingeland, cum pertinent' in *Silby* prædict': Which said Premisses the said Lougher was seised of in Fee at the time of the said Assignment; and because the Premisses were not seised into the King's hands, the Sheriff was commanded to do so by this Writ; and to enquire of, and to return the particular values thereof.

Whereupon the Sheriff did return the Values, and seised the Lands into the King's hands.

Hereupon Henry Meller comes in and pleads, that he was hereby aggrieved, and that the Premisses were parcel of the Manor of Silby; whereof Edward Kirton Esq; was seised in Fee; and being so seised by his Indenture, bearing date the 17th day of May, 20 Jacob. demised to Sir John Isham, John Blincoe, and Robert Tanfield, Esquires, for a Thousand years, by virtue whereof they Entred and were possessed.

That afterwards the said Kirton, by Indenture of Bargain and Sale, dated the 17th of Dec. 22 Jacob. Enrolled in Chancery within six Months, &c. did in Consideration of 2400 l. bargain and sell to John Lougher, and the said R. Lougher and their Heirs, the said Manor with the Appurtenances; by virtue whereof, and of the Statute of Uses, they were seised accordingly.

That the 1st of June 14 Car. 1. the said John Lougher died, and R. Lougher him survived.

That the 19th of June, 14 Car. 1. before the said Assignment by the said Sir Geo. Benion, the said R. Lougher, and Mary the Administratrix of the said John Lougher, by their Indenture did Release and confirm to the said Sir John Isham, Blincoe and Tanfield, their Heirs, Executors and Administrators, all their Estate, Right, Title, Interest, Claim and Demand, of and in the said Manor; by virtue whereof they were seised in Fée accordingly.

That afterward the 17th of Febr. 23 Car. 1. the said Blincoe and Tanfield died, and Sir John Isham survived; and that afterward the said Sir John died, and the Premisses descended upon Sir Justinian Isham, as Son and Heir, who entred and was seised; whose Estate in the Premisses the said Henry Meller hath, and traverseth the Seisin of the said R. Lougher at the time of the said Assignment, or at any time after.

To which Plea the Attorney General demurr'd, and the said Meller joyn'd in Demurrer.

The Question was, Whether or no the Conveyance of the Title of the said Henry Meller, by a Que Estate in Pleading, be good against the King in this Case. And upon the whole Matter the Case is no more than thus; viz. A man pleads, that such a one being indebted to the King's Receiver, (who assigns the said Debt to the King) and being seised of Lands in Fée, did before the Assignment of the said Debt to the King, convey his Estate over to another in Fée, who died, and the Land descended to his Heir, whose Estate the Defendant hath.

And it was argued by the Attorney General, that the Plea was not good, for these following Reasons:

First, If it were allow'd, it would tend to the diminution of the King's just Prerogative, with respect to his Revenue, which this Court ought to support and preserve.

Secondly,

Secondly, If this be admitted, it will be mischievous and inconvenient to the King; but the contrary will not be so to the Subject.

Thirdly, It is beyond all Presidents of Pleading in like cases.

Fourthly, As this case is, it is against Authorities in our Law.

For the first Ground and Reason: It is the King's undoubted Prerogative,

First, That he may traverse the Title made for the party, or maintain his own Title at his Election; 3 Hen.7.3. 13 Ed.4. 8. 7 Ed.6.Br. Traverse 369.

Secondly, He may waive his Plea or Issue in another Term; the like of his Demurrer, and may joyn Issue, as appears in 28 Hen.6.2. 11 Hen.4.8,36,37,38. Long Quinto 118. 5 Rep.105. Baker's Case. But after an Issue found he cannot waive it, 9 Hen.4.6. no more can an Informer, 34 Hen.8. Brook Prerog. 116.

Thirdly, The King may traverse any part of the Title set up against him by the party, and is not ty'd up as a Subject is.

These being the King's Prerogatives, if the party may make a Title against him by a Que Estate; the King's Prerogative of traversing any part of the Defendant's Title, will be of little or no advantage to him. For then no Subject would set forth more of his Title than he needs must, nor more than he would be obliged to do, if another Subject were party: And this forsooth! to avoid prolixity and nicety in pleading, which would reduce all Pleading to this size; viz. That such a one was seised in Fee, and enfeoffed such a one, whose Estate, &c. Or that such a one was seised in Fee, and died seised, and the Land descended to such a one, whose Estate, &c. Which is sufficient in case of a Subject, 7 Ed.4.26.b. And by such a concise way of pleading against the King, he will have no benefit of his Prerogative; nor will be in any better condition than a Subject, who must traverse the Feoffment or the Que Estate; for there will be nothing else for the King to traverse. And so the King will lose the advantage of that part of his Prerogative, to traverse what part of the Defendant's Title he pleases; which in many cases will redound to the diminution of the Revenue. And certainly, the Law hath given the King this Prerogative to better purpose than so; viz. that when a Title is set up against him, it should be more full, more certain and direct, than in the case of a Subject; as appears by other Cases, 8 Ed. 3.20. The Abbot of Peterborough's Case: Where in a

Replevin against him for Sheep taken, the Abbot Avows as Lord of such a Hundred, and says, That within the said Hundred he has a Franchise to have Felons Goods; and says, that he seized the Goods in question as the Goods of one Robert de Porter, who had stolen them and was fled; and so justifies: And this was held to be good, without shewing how or by what means he came to have such a Franchise. But if he had claim'd such a Franchise in a Quo Warranto, he ought to have shewn Coment, and to have convey'd a Title to himself. And so was done in a Quo Warranto, upon a claim of Conusance of Pleas, of Issues and Fines, &c. 2 Ed. 3. 29. Roger de Mortimer's Case, Tr. 40 Eliz. Ameredith's Case, cited 9 Rep. 29. in the case of the Abbot of Strata Mercella: Although the Grants were ancient, and that there had been many mean Conveyances; yet the Defendant was obliged to convey a particular Title to himself, and not by a Que Estate, as here; which, if it be here allowed, will come into fashion, to avoid prolixity in Pleading.

So in an Information of Intrusion, though the King be in possession. And yet in a Quo Warranto the King shews no Title for himself. And in an Information of Intrusion no Land, no possession is to be recovered: The Judgment being only quod Defendens Committatur.

Secondly, I said, that such Pleading would be mischievous, and inconvenient to the King; but the Subject would be at no prejudice, by being obliged to convey to himself a Title in particular; and that therefore, this President ought not to be allowed.

It will be mischievous and inconvenient to the King, because by this mean the Kings hands may be amoved, tho' no clear Title appears for the party, and though perhaps he has really none at all. And it has always been the care of this Court, to preserve and protect the King's Revenues, from all such as have not an undoubted Title to them.

But it will be no mischief to the Subject, to oblige him to set forth his Title in particular; for every Man is presumed in Law to be Conusant of his own Title, and to be able to set it forth. For the Evidences of his Estate and Title belong to himself; and therefore it is most consonant to Reason, that he should be compell'd to set it forth, and to draw down particularly the whole Title to himself. Upon this ground it is, that in our Books, viz. 20 Hen. 7. it is held that the King may be entitled sufficiently by Office upon an Outlawry to an Estate Tail, without shewing the Commencement of the Estate Tail; which yet a Subject must do, if he will Entitle himself to an Estate Tail:

Tail: Because it is his own Estate, and he comes in privity of it, and the Deeds and Evidences that concern it, belong to him.

Object. It may be mischievous to the Subject in many cases, as when some of his Evidences are lost, or detained from him, or mislaid: And perhaps he claims under a disseizin, which it is not policy for him to acknowledge.

Resp. The like may be objected in all other cases, as in a Quo Warranto, Information of Intrusion, &c. And this Argument holds not there. No more ought it to prevail here; where the King is seized by a good Title, and comes lawfully to the possession, and the interest of the Revenue is concerned; which is for the publick good.

Object. But it is the Subject's benefit, that is here promoted, though showded under the King's Prerogative.

Resp. This is not to be presumed; because such Assignments of Debts to the King, if colourably made, are naught by the Statute of 21 Jac. And de non Apparentibus & non existentibus eadem est ratio.

Thirdly, It is beyond all Presidents of Pleading; nor (as I am informed) can any one President of this Nature, be found upon search: And it will be of dangerous consequence to the King in Point of his Revenue, to introduce such a new sort of pleading; which has not been known before. And the Argument holds; if there be no President of it, then it is not allowable, if it be such a case as may frequently happen. And if it were allowable, there would certainly be Presidents found upon search: It is clear in our Books, that as Presidents make a Law in a Court, so want of Presidents (where (as in this case) there is frequent occasion of them administred) is an Argument of a thing's not being allowable.

2 Rep. 17. a. Lane's Case. It is there held, that a Demise for years under the Exchequer-seal, by the word Commisimus is a good Lease, by reason of the multitude of Presidents. So contrà in Lit. Sect. 107. 108. Upon the Statute of Merton, c. 6. that if a Lord Marry his Gard to his disparagement, si parentes conquerantur, he shall lose his Wardship: It is there said, that no Action lies upon this Law, because it was never seen nor heard, that any such Action had ever been brought: And if any Action would have lain in that case, it would some time or other have been put in ure. So I say here; if this were good pleading, there would be Presidents of it in Court.

Object.

Object. 3 Hen. 7. 2 Where a que Estate is admitted in such a case as this.

Resp. Nothing less, for a que Estate cannot be there intended. The case was in the Exchequer chamber before all the Judges; and it was this, viz. It was found by Office, that the Lord Greystock was seized in Fée and held of the King and died seized, with other circumstances usual in such cases. Hereupon comes another person and says, that the Dean of York brought a Writ of Right against the said Tenant of the King, and recovered against him and entred diù ante inquisitionem prædictam, and made a Gift in Tail to D. by vertue whereof he was seized, absque hoc that the King's Tenant died seized.

Now out of this case to deduce a que Estate, is without ground and contrary to Law. First, Without ground, for there is not the least mention or intimation of a que Estate in the case. Secondly, It is contrary to Law, to make such a construction upon the case, for it is clear in our Books, that a que Estate cannot be pleaded of an Estate Tail, (as the case there is) nor of any other particular Estate, without shewing coment. And this appears in 42 Ass. 28. 7 Ed. 6. Br. que Estate, 31. So that that case cannot be made a President for outs; and therefore for want of a President, I conceive the pleading ought not to be admitted.

Fourthly, Because as this case is, it is contrary to Authorities in Law.

It is clear in our Books, that a Plaintiff cannot make a Title by a que Estate, as a Tenant may, or one that comes in the nature of Tenant, as a Priee in Aid, a Vouchee, a Plaintiff in Replevin after Avowry, whereby he becomes a Defendant; as appears by 2 Hen. 6. 10. 3 Hen. 6. 11, 28. 22 Hen. 6. 13, 50. 9 Ed. 4. 3. 21 Hen. 7. 10. 29 Ass. 19. 18 Ed. 4. 29. 30 Hen. 6. 7. Now here, as it appears by the Record, John Meller and two other persons are returned Terre-tenants, and this Scire-facias is only to enquire of the value of the Land, and to seize it into the King's hand. And therefore Henry Meller, who pleads this Plea, and does not so much as name himself Tenant, cannot be Tenant, or presumed so to be against this Record; against which no averment can be taken: And therefore, if it were in the case of a Common Person, if he were not Tenant, or did not appear by the Record to be so, he could not plead a que Estate, as appears by the Books afore cited. And here he is but as a person, that comes to shew his Right and Interest as Amicus Curiæ; and if so, it behoves him to shew it precisely and certainly, which he has not done here. And upon these Reasons and

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Authorities, I conceive the Plea to be naught, and the Demurrer good, and pray Judgment for the King.

Lechemere pro Defendente. The question is upon the que Estate. Which I conceive Meller may well plead; for First, It is no material part of the Plea: But Entitles him only to contest his Right with the King. 7 Ed. 4. 26. b. Secondly, The demand here is not of the Land it self, but only to charge it with a Debt. Vide 2 Hen. 4. 13. Mich. 36. Eliz. Rot. 203 Exch. Treasurer's Remembrance upon an Alienation without License. Co.Ent.640. Dyer 238. In Account. Otherwise, incase of an Information of Intrusion. Sir James Stonehouse's Case. In case of a Pardon or Discharge, a Title needs not be shewn: But if the Title be concern'd, and the Land it self in demand, there a que Estate is not sufficient. A Third Reason I offer is because it is not Traversable. 7 Ed. 4. 26 Dyer 238.

Hale Chief Baron. A que Estate may be pleaded of any Estate of Freehold, with an Averment of the life of him, whose Estate, &c. and so the Books are to be understood; but not of a Lease for years, because such an Estate cannot be gained but by lawful means. But a que Estate cannot be pleaded of Franchises, because they are things that lye in Grant: But otherwise, if they are appurtenant to a Manor: And so is Crompton's Jur' of Courts to be understood. And the Land is not here in demand any more, than in case of an Alienation without License. For there the King may seize, till the Fine be paid; and he can do no more here, than seize till the Debt be paid. Also a que Estate may be pleaded by a Plaintiff, who is a Stranger to the Estate: As when a Lessor brings an Action of Debt, against a third or fourth Assignée of Lessée for years, for Rent Arrere; he may declare upon the Lease made to the first Tenant, que Estate the Defendant hath; because he cannot know how the Defendant comes to the Estate, nor by what Conveyances: Not being privy to them. Et Adjornatur.

Afterwards in Hill. Term Annis 19. and 20 Car. 2. The case was argued by the Barons. And per Curiam, the Plea of a que Estate is here good in casu Regis, for these Reasons.

First, Because the King's Title is bound by Special Matter before alledged; viz. by the Lease and Release.

Secondly, Because the que Estate is but Conveyance to the Freehold, and he that has a Freehold may plead it, tho' he came to it by Disseizin: 7 Ed. 6. 26 Dyer 238. Bro. Que Estate 63.

Thirdly,

Thirdly, Because the Plea here sounds in Discharge of his Lands, and is not for the recovering of any. And Courtneis Case in Co. Entr. 667. agrees herewith.

Fourthly, The King might Travers it. 9 Hen. 7. 14. 19 Hen. 6. 56.

Fifthly, The Debt here is but a Debt due to the King by Assignment, which is not of such consideration in the Eye of the Law, as a Debt Originally due to the King. Vide Co. Jurisd. of Courts 115.

Object. The pleading here is unusual, he does not plead himself Terre-tenant, but he is only found so by others.

Resp. So it was in Courtney's Case, and he is admitted so to be; and the same is held for Law in Co. Jurisdict of Courts 198. and Judgment was given accordingly.

Friend *versus* the Duke of Richmond.

(3) IN Ejectione firmæ upon a Special Verdict the question was, whether or no a Judgment in an Information of Intrusion pro Rege binds a Stranger, so that he cannot Enter?

Object. In Rymer and Bond's Case, in the case of a House, called the Wallnut-tree in Newington in Surrey, lately Adjudged in this Court, it was held that he could not Enter.

Resp. They were not Strangers there, but parties to the Information.

Hale Chief Baron. If the King be in possession by Title, he cannot be put out. But Judgment in an Information of Intrusion pro Rege, is only quod committantur & capiantur pro fine: And thereupon goes an Injunction for the possession: But there is no Judgment quod recuperet seisinam, nor does an Habere facias possessionem issue in such case. And it would be hard to bind persons in possession, who have a Title and were not parties to the Information; for by that mean any man might be stripp't of a lawful possession. And in this case the Fee-simple is granted out of the King; as appears by the Verdict. Vide 4 Rep. the Case of the Comminalty of Sadlers: Full in the Point. Et Adjurnatur.

Afterwards in Trin. Term 19 Car. 2. Mr. Stevens argued pro Quer. An Information of Intrusion, is but in the nature of Trespass. And no Judgment quod recuperet seisinam is given in it. And the mischief would be great, if such Judgment were conclusive to Strangers: At that rate no man would be safe, tho' he had never so much right, and were in possession.

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And it will be hard to put such to their Petition of Right, in which there is great delay, by reason of the Writs of Search. And tho' a Man has bæn in Possession 20 years, so that no man can enter upon him; yet by this mean he may be turned out of his Possession: And concluded pro Quer.

North pro Defendente. First, It is consonant to natural reason, that when a person comes in by Title, as for Example, The Wife of a Disseffor, there should be no entry upon such person; for that they come in by Act of Law, and so are Priviledged. A fortiori in case of the Kings Prerogative for there the Law presumes a Title, especially where the King claims Jure Coronæ: Otherwise, where the King claims by Purchase, or is seized by Tort: For there he is not Priviledged. Vide 4 Rep. the case of the Comminalty of Sadlers; and Stamford's Prerogative, Title, Petition: And it is otherwise likewise, when the Subjects Title is found by the same Office, which Entitles the King. For there an Amoveas manum lies; and an Entry upon the King's Patentee: But no such thing appears in our case.

A Second Consideration may be taken from the nature of a Judgment in Intrusion: Which is as strong for the King, as a Judgment in a Real Action. For the Information shews a Title for the King, and the Judgment in it is, that the Lands be seized into the King's Hands; and other Real Action the King can have none, because he cannot be Disseized. And therefore it would be hard upon the King, if having no other mean to recover, he should not have the same benefit of his Judgment, as a Subject would have of his in a Real Action. Vide the Judgment in an Information of Intrusion.

Three things are Objected.

First, This Judgment ought not to bind a Stranger.

Secondly, The Tenant of the Freehold is not made party to the Information.

Thirdly, This Tenant of the Freehold was in possession, at the time of the preferring the Information, and is found to have bæn so.

To the First I answer, that there is a diversity betwixt the King and a Common Person: for a man cannot falsifie a Recovery at the suit of the King, tho' had by consent. Stamf. Prer. 74.

To the Second, An Information is not like an Assize, which must be brought against the Terre-tenant: It sufficeth, if the Information be brought against the pernor of the profits, be he Tenant or no: Because no possession can be gained from the King, as from a Common person.

To the Third, An Actual possession is not found, and it may well be understood of a possession in Law, and shall be so presumed here for the King. Vide 14 Ed. 4. 2. and concluded pro Defendente.

Hale Chief Baron. It cannot be maintained, that such a Judgment shall bind a Stranger, for then would this become a trap to catch any Man's possession by lawful Title: And it would be of very ill consequence, especially considering that in this case, others are found to be in possession. And they that take the profits shall not be presumed to be Servants, and if they shall be so presumed, yet themselves only, and such as claim under them shall be bound by the Judgment. And though the Judgment in Intrusion includes an Amoveas manum, yet it extends only to such, as may lawfully be amoved. And if the Sheriff do otherwise, he is a Disseizor; as if in a Judgment against A, in a Real Action, he should oust B, who neither claims under A, nor is Tenant to the Action. And the King cannot gain any thing by wrong; so that he cannot be a Disseizor, but they that enter. And the Judgment in Intrusion, is not in the nature of a Seizin or Possession, but only quod pars committatur & capiatur pro fine. And upon that an Injunction issues for the possession against the party himself, and all claiming under him. And tho' a Petition of Right lies against the King in this case, yet when the King has granted the Land over, an Entry may be made upon his Patentée. Vide 11 Ed. 4. 7 Ed. 4. Nor does an Information of Intrusion suppose the King out of possession, for that would be contrary to the purport of the Writ, which supposeth that the party intruded upon the King's possession.

Reliqui Barones accord.

Et Judgment pro Quer. nisi causa, &c.

De

De Termino Sanctæ Trinitatis Anno 19 *Car.* II. Regis.

In Scaccario.

Edwards *versus* Owen.

IN Debt upon an Obligation made by a Woman during her Widowhood, conditioned That if the said Obligor from time to time, and at all times should upon request, do such Act and Acts for the conveying and Assuring such Messuages and Lands in such manner, and for such Estates at the charges of the Obligee, that then, &c. The Obligee tendered an Assurance, which was not according to the Condition of the Obligation, but differed in the limitation of the Estate; whereupon the Obligor refused to execute it: And afterwards Married, And the sole Question was, whether or no the Marriage were a Breach of the Condition? . . . . . pro Quer. The Marriage is a Breach: For the Woman has thereby disabled herself to make Conveyances, when requested, for by the Marriage, she can now make no conveyance, &c. but by Fine; whereas perchance the Obligée would be contented with a Feoffment, or with a Lease and Release: And so he will now be put to more charge; likewise, the Husband is now by the Marriage entitled to be Tenant by the Curtesie: So that she is now disabled, to convey the Lands in the plight they were in before the Marriage. And Conditions in such cases, must be performed Circumstantially; especially where the defalt is in the party himself; so where an Obligor takes Wife. Vide Littleton, sect. 357. Vide etiam 10 Hen. 7. 9. 19 Br. Condition, 127. 5 Rep. Sir Anthony Maine's Case. (1)

Lechmere pro Defendente. The Marriage is no Breach, for the Woman may after Marriage make such a Conveyance, as shall satisfie the intent of the Condition: And the Husband does not gain a Title by the Intermarriage, as a Wife does. He has no Estate before issue; and so this case differs from that of Dower. The Marriage gives him only a possibility of having an Estate for his life; which possibility the Law does not regard: As if there be two Joyntenants upon such a Condition, and one of them takes Wife, this is no Breach; and yet by possibility she may be Endowed, viz. if the other Joynte-

nant die during the Coverture betwixt her Husband and her. Likewise it does not appear in this case, that the Woman was seized of any such Estate, as that her Husband could be Entitled to be Tenant by the Curtesy.

The Court advised the Defendant to make a good Conveyance, that being the intent of the parties. And here the Obligée is prejudiced by the Marriage, and put to greater charge for the Conveyance.

Thomas *versus* Boys.

(2) IN an Information for selling Wines without License contr' to 12 Car. 2. The same matter came in question, that had lately been debated in Stevens and Duckworth's case in this Court: In which there were two Barons against two: Whether a man that has a License to keep a Tavern, according to the Statute of 7 Ed. 6. in a Corporation, as in this case, in Kingston super Hull, may sell Wines to be spent in his own House.

Sawyer argued pro Quer. And Lister pro Defendente; but because it was to the same purpose as the former Arguments were; and because nihil dictum quod non dictum priùs, I did not take their Arguments. And the Court appointed a day to deliver their Opinions.

Norfolk's Case.

(3) IN Debt upon an Obligation, Conditioned to appear before the House of Commons. The case was; They had voted one Wogan Guilty of High-Treason, and the Plaintiff being a Serjeant at Arms attending upon the House, was Ordered to take the said Wogan into Custody; who being taken into Custody by vertue of that Warrant, the Defendant entred into this Bond to the Plaintiff, conditioned for the said Wogan's appearance, who did not appear. And hereupon Debt being brought, the chief question upon a Demurrer was, whether this were a void Bond or no.

And per Curiam, it is void by the Common Law, for it was entred into for ease and favour of the Prisoner: And it is no more than a Bond to a Sheriff, to answer for an Escape. And here Wogan was taken into Custody for Treason, for which he could

could not be Bailed: Otherwise, if it were for an Offence bailable. But the Court agreed, that the Plaintiff was not an Officer within the Statute of 23 Hen. 6. cap. 10. so that the said Statute did not make void this Bond. But then it was urged, that the Condition which recites the Bond to have been entred into for Appearance only, is an Estoppel to the parties to say, that it was given for any other cause. To which the Court said, that here was no Estoppel; for an Estoppel in such cases, is always when the Bond is a good Bond; then indeed the Recital is an Estoppel: But when the Bond is void, the Estoppel is void too, and does not bind the parties: As if in a Case upon the Statute of 23 Hen. 6. cap. 10. or the Statute of Usury, the Condition of the Bond should recite some Matter that makes the Bond good; yet if in truth the Contract were Usurious, or the Condition not within the Statute of 23 Hen. 6. c. 10. and that be pleaded, it will avoid the Bond and the Estoppel too. So here likewise, the Plaintiff by his Demurrer has admitted the Matter of Fact, which the Defendant alledgeth in his Plea; to wit, that it was for Treason. And Judgment was given accordingly, Nisi causa, &c.

Pawlett *versus* the Attorney General.

IN a Bill to redeem a Mortgage, the Case appear'd to be thus; viz. the Plaintiff had mortgaged Lands in Fée to one Ludlow for security of 3000 l. with Interest, and bound himself in a Statute and Recognizance to perform the Covenants of the Mortgage, and to pay the Mony with Interest at a certain day. The day past, the Mony unpaid. The Mortgagee by his Will devised all his Goods, Chattels, Debts, and personal Estate, his Debts and Legacies being paid, to his Executor, and dies: Edmund Ludlow, Son and Heir of the Mortgagée is attainted of High Treason by the New Act of 12 Car. 2. The King seizes; and the Executor extends the Plaintiff's Lands upon the Recognizance, who thereupon Exhibits his Bill against the King and the Executor, and in it suggests, that he could not pay the Mony at the day at the place appointed, viz. in the Strand in Middlesex, by reason of the Plague; and that afterwards the Mortgagée accepted the Interest, and waived the Forfeiture: And the Question now upon a Demurrer to the Bill was, whether or no the Plaintiff could have any Remedy against the King, to have a Redemption? And it (4)

was

was said for the King, that he could not. But that he must prefer his Petition of Grace and Favour. For a Mortgage is in the nature of a Trust betwixt the Mortgageor and Mortgagée; and no more than the King can be seized to an Use, or in trust for another, so as to have remedy against the King for it; Dyer 8. 7 Ed. 4. 27. no more is there any remedy against him to redéem a mortgaged Estate. Also the King cannot be compell'd to Execute any Conveyances; and although the ordinary process of the Court may be stay'd in case of a Chattel, as when a Trustée for years is Outlaw'd, for the benefit of the Cestuy que Trust; yet it is otherwise in case of a Fée and Fréehold, as here. For though the Cestuy que Use of a term for years may forfeit it for Felony; yet a Cestuy que Trust in Fée cannot. And all the New Acts of Treason have especial Provisoes for this purpose, to be relieved against the King; which shews, that they thought the parties not safe without them.

On the other side, it was said by those who were of Counsel for the Plaintiff and Executor, That Natural Equity, such as in this case, was Natural Justice; and that an Act of Parliament, that should take it away, would be void in it self; as is said in Doctor & Stud. And no more than the King can deny Justice in his own case, no more can he deny Common Equity; and Common Equity is as due to the Subject against the King, as Justice is. There is more than a Trust in this case; the party here has an Interest sub modo, viz. to have a Redemption. Nor do the mortgaged Lands here come to the Crown Jure Prærogativæ, but by Escheat, as he is Lord Paramount, and the Lands held of him. And as well as a Bill to redeem a Mortgage lies against a Lord by Escheat, so well does it lye against the King. A Lord that has Land by Escheat, has it not méerly in the Post. And as a Bill to redéem lies against the Conisée of a Statute, who extends for a Debt due from the Mortgagée, or against a Tenant in Dower; so does it lye against a Lord by Escheat, and by 3 Ed. 3. If there be the King, Lord, Mesne and Tenant, and the Tenant be attainted of Treason; although the Mesnalty be Extinct, yet if there be a Rent by Surplusage, that remains, and shall be paid to the Mesne, and he shall have remedy for it here by the course of the Exchequer. And it would fall out to be very inconvenient, if it were otherwise; if the coming of Lands into the King's hands should discharge the equity of Redemption, where there is no wilful default in the party; but it is the Act of God only, as in this case, and the cases of Cestuy que Trust for years above-cited.

Hale

Hale Chief Baron: This is a case of great concern, and deserves great consideration. It was made a Question in this present Parliament in the House of Lords, in the Earl of Cleveland's Case; First, Whether or no there be a right of Redemption in this case against the King? And, Secondly, if there be, what Remedy must be taken? And I answered, as I take the Law to be, that in Natural Justice Redemption of a Mortgage lies against the King. But to the other Question I made no answer; because I took it to be a Point of great importance. But I am of Opinion, that the King cannot be compell'd to reconvey; but that an Amoveas manum only lies in such case. And this is all that can be done, if a Trustee forfeit the Estate. And it is to be considered here, whether or no there be a right of Redemption against the Lord by Escheat (for so the King is in here, and not by his Prerogative) and how the Course of Chancery is in case of the Redemption of Mortgages, who shall redeem, and against whom. I agrée the case of a Statute Merchant; for he comes in meerly by the party, viz. by the Act of the party, and the Remedy that the Law gives thereupon; and it is worth enquiring how the Presidents are, where a Trustée for years is Outlaw'd, and the Lands seized, what remedy the Cestuy que Trust has there? But admitting that case, yet it may be otherwise in case of a Fée simple; as Cestuy que Trust for years may forfeit his Interest for Felony; but Cestuy que Trust in Fée cannot; and I agrée the case in 3 Ed. 3. And I conceive, that a Mortgage is not meerly a Trust; but a Title in Equity. And the Matter of Redemption, it seems, is not the main business in the case; for Mr. Attorney General offers to give way to a Redemption, upon payment of the Mony: But the Point is, who shall have the Mony, whether the Executor and Devisee, or the King? for both contend for it.

And the Chief Baron further said; If the Condition of a Mortgage be to Reenter upon payment of the Mony to the Executors, or Administrators, there without doubt the Heir should not have the Mony after forfeiture; because the Mortgagee look'd upon it only as a Chattel; though if the word Heirs were inserted into the Condition, it would be more a Question. But he said, he took the Law to be the same in both cases. Yet he delivered no Opinion in the Principal case; but ordered a Case to be made of it. And the Cause was Adjourned.

Afterwards

Afterwards in Hillary Term, in Annis 19 & 20 Car. 2. it was argued again by Counsel on both sides; and much to the same effect as before. And the King's Counsel insisted, that a Mortgagor was not relievable against the King in equity:

First, Because the King is not liable to a Trust; and a Mortgage forfeited is of the same nature.

Secondly, Because by the Escheat the ancient Right and Tenure is destroy'd, and the King is in Jure Coronæ.

Thirdly, Estates in Dower, Frank-bank, Tenancies by the Courtesie, and of Disseisors, are not liable to Trusts, because they are in the Post; otherwise of Occupancies.

Fourthly, The Chancery has no Jurisdiction over the King's Conscience, but over the Consciences of Subjects only: For that it is a Power delegated by the King to the Chancellor, to exercise the King's Equitable Authority betwixt Subject and Subject. Nor is it within the Statute of 33 Hen. 8. cap. 39. for Equity against the King in the Exchequer. And they cited Dyer 8. 283. Lane's Rep. 54. Yelv. 115. Lane's Rep. Bowle's Case.

But the Plaintiff's Counsel urged, that Relief lay:

First, Although it did not lye, yet it is reasonable the Attorney General should answer; and the Matter in Law be respited till the Hearing of the Cause upon the Proofs; as is usually done in cases of Demurrers, for Difficulty of the Matter.

Secondly, An Equity of Redemption is now of so great esteem in the Law, that it is assignable and devisable; and an Occupant, a Tenant in Frank-Bank, &c. as was held in Draper's Case, shall be liable to it.

Thirdly, Many persons are liable in Equity notwithstanding the Forfeitures of Mortgages, who are not liable to Trusts: As when a Corporation makes a Lease, reserving Rent, with a Clause of Reentry; and the Lease comes to be forfeited through Casualty or Mischance, as in 39 Eliz. Throgmorton and Finche's Case. Nor is the loss of the Seignory any Objection here: For as in case of a Lord, Mesne and Tenant, If the Seignior purchase the Tenancy, the Mesnalty is Extinct, but the Mesne shall have the Rent by surplusage. So it is in the King's Case, 6 Rep. Sir John Molin's Case. And the Mesnalty shall be revived by the King's Granting over; and they cited the Books of 8 Ed. 3. 4, 5. 3 Ed. 4. 25. Litt. 339, 340. Dyer 360.

Hale

Hale Chief Baron: There is a Diversity betwixt a Trust and a power of Redemption; for a Trust is created by the Contract of the party, and he may direct it as he pleaseth; and he may provide for the Execution of it, and therefore one that comes in in the Post shall not be liable to it without express mention made by the party; and the Rules for Executing a Trust have often varied, and therefore they only are bound by it, who come in in Privity of Estate. A Tenant in Dower is bound by it, because she is in in the Per, but not a Tenant by the Courtesie, who is in the Post. So all who come in in Privity of Estate, or with Notice, or without a Consideration. But a Power of Redemption is an equitable Right inherent in the Land, and binds all persons in the Post, or otherwise. Because it is an Ancient Right, which the party is Entitled to in Equity. And although by the Escheat the Tenure is extinguish'd, that will be nothing to the purpose, because the party may be recompenc'd for that by the Court, by a Decrée for Rent, or part of the Land it self, or some other satisfaction. And it is of such consideration in the Eye of the Law, that the Law takes notice of it, and makes it assignable and devisable.

But the most considerable things in the Case are:

First, That the King is in actual Possession, and cannot be removed in equity by an Amoveas manum, as he may at Law.

Secondly, Whether there will not be a diversity betwixt the Estate of a Ward and an Escheat: For in Cases of Wardships, the Court of Wards had Jurisdiction by the 33th of Hen. 8. but in this case here is an actual Inheritance in the King.

Thirdly, The Statute of 33 Hen. 8. c. 39. is to be considered, which gives Relief in equity against the King. And I conceive clearly, that in this case the Executor would be relieved against the Heir for the Mony; because in common estimation it is but a personal Estate.

But Baron Atkyns was strongly of Opinion, that the party ought in this case to be relieved against the King, because the King is the Fountain and Head of Justice and Equity; and it shall not be presumed, that he will be defective in either. And it would derogate from the King's Honour to imagin, that what is Equity against a Common person, should not be Equity against him.

King *versus* Sir Edward Lake.

(5) IN an Action upon the Case, for Printing and Publishing a false and malicious Libel against the Plaintiff, containing amongst other things, these Words and Matters in an Answer to a Petition preferr'd by the Plaintiff to the House of Commons, against the Defendant: [The Prosecutor is Mr. *King*, whose Violence both formerly and lately is very Notorious, to say nothing before His Majesty's happy Restauration, of which much might be said too horrid to be related, which this Respondent passeth by, in regard of the Act of Oblivion, though the Three years therein mentioned, are long since Elapsed: And also said in the Consistory-Court in *Lincolnshire* with a loud Voice, in the presence of many People, That he would *strike at the Root*; whereas this Respondent conceives (always referring himself to the Judgment of this Honourable House) that there is no Root under God of Ecclesiastical Government, but the *King* himself: (And in the *Margin*, with an *Asterism* there are these Words, *Saltem quoad potestatem coercivam*;) and that the Plaintiff's Petition is stuff'd with illegal Assertions, Ineptitudes, Imperfections, clogg'd with gross Ignorances, Absurdities and Solœcisms.) By reason of which Words and Libel, he is damnified in his good Name and Credit, and Profession of a Barrister at Law, 5000 l. Upon Not Guilty pleaded, a Special Verdict was found, and Damages given to 150 l. Which Special Verdict finds those Words in the Margent, omitted in the Declaration; and this Clause also, Always referring himself to the Judgment of this Honourable House.

Sir Robert Atkyns pro Quer' cited Yelv. Rep. p. 152. & Hob. Rep. 180.

Stephens pro Defend. insisted, that the Words, as recited, were too general to ground an Action upon.

Hale Chief Baron: There is no material Variance betwixt the Declaration and the Special Verdict; and although such General words spoken once, without Writing or Publishing them, would not be actionable; yet here they being writ and publish'd, which contains more Malice, than if they had but been once spoken, they are actionable. And the Court being all of that Opinion, Judgment was given pro Quer', nisi causa, &c.

Anonymus.

Anonymus.

AT a Court-Leet held pro Rege within his Honour of Grafton, one was fined 20 l. according to a By-Law, for the payment of 5 l. a Month by every one within the Leet, that should receive or place an Inmate within any House there, without giving Security to the Overseers of the Parish, to discharge the Parish; and this Fine was Estreated hither, and Process issued to levy it. (6)

Hale Chief Baron: This is a good By-Law, and frequent in Leets; but it is hard to Estreat the Fine hither, without taking the usual Remedy for it by Distress; and to extend the party's Lands upon it, when perhaps he may have something to plead to it; as, that he is not within the Leet, or that he received no Inmate: But the Officers of the Court said, It was usual to Estreat such Fines into the Exchequer, when they belonged to the King: Otherwise, when they belong to Subjects. And thereupon the party was put to plead.

De Termino Sancti Hillarii, Annis 19 & 20 *Car.* II. Regis.

In Scaccario.

Rushworth & al', *contra* Countess de Pembroke & Currier.

(1) THe Case was thus; viz. Currier preferr'd a Bill in the Exchequer-Chamber, against the Plaintiffs and others, Tenants of a Manno of the Countess of Pembrokes, for Suit to his Mill, which he claimed by Prescription; many Witnesses were Examined on both sides: And now upon this Bill preferr'd against the Countess and Currier, a Trial at Law being directed to try the Title, the Countess would make use at the Trial betwixt Currier and her self, of the former Depositions taken, ut suprà; and that being deny'd her, she now appeal'd to the Court for Directions in the Matter, and pray'd a New Trial. The Court was of Opinion, That the former Depositions ought not to be made use of at the Trial, because the Countess was not a party to that Suit; and as they could not be read against her, no more could they be read for her: And because she was not bound by them, not having been a party to the Suit; nor was she in a Capacity of Examining any Witness in it, or preferring Interrogatories in it; for that Reason also she could not make use of the Depositions of any that had been a Witness in it. And it is not like to the Case of an Ejectment, brought by a Reversioner, or Debt upon the Statute of Ed.6. brought by a Proprietor of Tithes, after a Verdict at Law for the Lessee or the present Proprietor: For true it is, that such a Reversioner of Lands or Tithes shall have advantage of the Verdict, and give it in Evidence; but the Reasons are, because they cannot be immediate parties to the Action or Suit; for that must be prosecuted by the Lessee or present Tenant: And likewise because they may give any thing in Evidence to the Jury, as well as the Plaintiff himself: And Kindred or Affinity to the Reversioner, is a good cause of Challenge; but it is otherwise in case of Depositions. For there only parties to the Suit can Examine or Interrogate. Likewise the

the Reversioner or the Seignoresse might have been made a party to the Original suit in Equity, tho' not at Law. And it was ruled accordingly, that the Depositions should not be made use of.

Justice *versus* Henry Brown Administrator of his Wife, who was Executress of her former Husband Jenoways.

Upon a Suggestion for a Prohibition to the Admiralty, the (2)
the case appeared to be thus; viz. the said Justice and others had three parts of a Ship, lying in the Thames at Ratcliff in the County of Middlesex; and the said Jenoways had the fourth part. The owners of the three parts were for having the Ship go a Voyage; but Jenoways would not agree to it. Hereupon the Owners of the three parts Petitioned the Judge of the Admiralty, against the Owner of the fourth part, to compel his Assent: But the Judge would not compel him. But the Court of Admiralty by way of Stipulation, took a Recognisance of 200 l. penalty to the use of Jenoways, that the Ship should return from the intended Voyage within Eighteen Months, or else that the Owners of the three parts, should pay the Owner of the fourth part, the value of his fourth part. Hereupon the Ship goes to Sea, on the account of the Owners of the three parts, and never returns. Jenoways dies and makes his Wife Executress; she takes Husband and dies Intestate; the Husband takes Administration of his Wives Estate, and sues Justice upon the Recognisance in the Admiralty, and has sentence against him there: Whereupon he prays a Prohibition. First, Because the Court of Admiralty has no power to make such a Stipulation, whereby to bind the Interest of another party against his Will. Secondly, Because the Suit upon the Recognisance is not determinable in the Admiralty, for that it was taken infra Corpus Comitatus, and for that the Ship was there too at the time of the Stipulation and Recognisance taken. Thirdly, Because at the time of taking this Recognisance, there was no Libel nor Suit depending in that Court. Fourthly, Because the Plaintiff here can have no Title as Administrator to his Wife, but must Sue as Administrator, de bonis non of Jenoways. Fifthly, Because the Security being Joynt, one only is prosecuted upon it.

Doctor

Doctor Walker moved against the Prohibition, and grounded himself upon the great mischief and inconvenience that would ensue, if it should be in the power of one man of many to hinder Trade and Navigation. By that mean all Navigation might be destroyed, which would tend to the Destruction of the Common-wealth. And for the Advancement of that the Court of Admiralty has used time out of mind, without interruption, to make such Stipulations upon a Petition in Vacation time, which is in the nature of a Suit in such cases. And for the other Objections, he said, they were so many mistakes in the Suggestion.

The Chief Baron said, that the Objection drawn from Inconvenience and Antiquity, was of no great Force; for the same Objection might be made in case of Charter-parties, and Contracts made upon Lands for Freight and Voyages; and yet the Court of Admiralty, has nothing to do in those cases. By the Statute of 15 Rich. 2. nothing transacted upon Land or infrà Corpus Com. is to be tried in the Admiralty; and usage before or after, will not take away the Force and Effect of an Act of Parliament. And here the Ship being infrà Corpus Comitatûs, the Admiralty has nothing to do with it, nor any part of it, no more than in other cases arising ashore. Besides, this Recognisance seems to be void: For it is not in the nature of Bail, to compel a person to appear to an Action, and stare Judicio, but by way of Stipulation and contract between the parties, nor is it an Incident to, or dependant upon any Suit there: For if so, perhaps it might be good, if it were usually taken: And suppose in this case, that he who has but a fourth part, would set fire to the Ship; there would be no remedy in the Admiralty. Neither is there any remedy there, if he will not consent, so long as the Ship is infra Corpus Comitatûs; but if it were super altum mare, the case would be different. And the usage of the Court of Admiralty, in such cases is nothing to the purpose. For it is very well known, that the Ordinary has used time out of mind to cause an Administrator to make Distribution: And Presidents have been cited for it, from the time of King Kanute, and so downwards: And yet the Court of King's Bench Grants Prohibitions, and denies a Consultation, because by the Statute of Ed. 3. it is within the conusance of the Common Law, so here. Besides, if there be but Probabilis causa for a Prohibition, it must not be denied ex debito Justiciæ; for if it be granted where it ought not, the adverse party has remedy by Consultation, or other means to relieve himself against it: But if it be denied, where it is grantable, the party is without remedy. But because

because this was a case of great consequence, and no President was shewn of any Prohibition granted in such case, time was given to the first Saturday in Easter-Term, to advise upon the matter; and in the mean time all proceedings in the Admiralty were to stay by consent.

Sir John Williams *versus* Lister & Alios.

Upon a Prohibition the case was thus; viz. the Plaintiff brought Trespass here by Quo minus against the Defendants for digging in his Soil and Close in St. Johns, in the Isle of Thanet in the County of Kent; to which Not-guilty was pleaded. And then the Defendants preferred their Bill in the Chancery of Dover within the Cinque Ports, suggesting that there is and had been temps dont, &c. in St. John's a Pier called Margaret-Pier, and that the Pier-wardens had used time out of mind to dig there for Gravel, Sand, &c. for repairing the Pier, and for the safety and preservation of Ships and Shipping; and that by several Orders and Decrees of the Lords Wardens of the Cinque-Ports, it had been so ordered and put in Execution: And to have the benefit of that Custom, and of those Orders and Decrees, and to stop further proceedings at Law, was the scope of the Bill. To which the Now Plaintiff answered, denying that he knew any thing of such Custom or of such Orders. And upon hearing of the Cause in that Court of Chancery, upon Proofs the Plaintiff Sir John Williams, was decreed not to proceed in his cause here; and to pay 13 l. costs to the Defendants; upon which he prayed a Prohibition.

And per Curiam a Prohibition lies: For it is not in the power of any inferior Court to stay proceedings in a cause, that is first Attacht there: And a Quo minus lies in the Cinque-ports, as well as within a County-Palatine, or in Wales: And rather in the Cinque-ports than in a County-Palatine; because a County-Palatine has Jura Regalia within it self. And it is usual to Grant Prohibitions into County-Palatines. And so it was done last Term, to the County-Palatine of Lancaster, upon a suit commenced here by Quo minus: And afterwards, a Bill preferred there to stay it. And so it would be if a suit were commenced in the Admiralty there against Law, a Prohibition would lie: And the King's Debtor has the same Priviledge that the King has, to sue for his Debt where he will. It would else be very inconvenient, if a private juris-

diction

diction might do what they would, and there would be no remedy elsewhere. And Yelv. Rep. Crispe and Verall's Case was cited, which was in case of an Appeal of death, the party being slain within the Cinque-Ports; and yet the Appeal brought in B. R. the party being in Custod. Marischal. and a Debtor here has the same Priviledge.

The Defendants perceiving the Opinion of the Court, offered to surcease further proceedings in the Chancery of the Cinque-Ports; and to go to Tryal upon the Custom in this Action, having liberty to alter their Plea, and to plead the Custom; and so it was ordered.

Nota, per Hale Chief Baron, and the whole Court, upon a Habeas Corpus to remove a Prisoner in the Admiralty; tho' the Habeas Corpus be returnable the next Term, the Sheriff or Gaoler must not in the mean time suffer him to go at large; and if he does, he is liable to an Escape: For the Writ impowers the Gaoler only to bring him directly to the Court; and if he gives him any liberty in the mean time, it is at his Peril.

(5) Memorandum, That this Term Sir Allen Bradrif Controller of the Pipe, being present in Court, surrendered his Office to the Chancellour of the Exchequer, then also present in Court; who at the same time gave it to John Brewster, present in Court likewise, who thereupon was Sworn and admitted. And Nota, that all this was done without writing, only that an Entry was made of it in Court, according to a President Temp. Reg. Eliz. which was read in Court. It was one Fortescue's Case.

The

The Attorny General *versus* Horsham.

IN an Information and a Bill in the Exchequer, for Prisage of Wines, It was declared by the Chief Baron and the whole Court, to be the usual Custom of the Court in Equity, to cause single Prisage to be paid for Nine Tun and a half, and double Prisage for Nineteen Tun: But that stricti juris no Prisage was to be paid, but for Ten Tun; and yet that Nine Tun and a half, hath been construed to be fraud apparent; and that the reason why more was not imported in one Ship, was to defraud the King of his Prisage. But if only Nine Tun be imported, Prisage has very rarely been allowed, without apparent evidence and proof of a fraud. But where less than Nine Tun is imported, Prisage is never paid. And as it is an equitable construction against the letter of the Law, that Nine Tun and an half should pay Prisage; so by Equity, if Ten Tun be laden in a Ship, and it comes to pass by reason of Leakage, that but Nine Tunn are really imported, there no Prisage is to be paid, for here is Equity against Equity; which must take place as well against the King, as for him. (6)

De Termino *Sanctæ* Trinitatis Anno 20 *Car.* II. Regis.

In *Scaccario.*

Thomas Papillon *versus* VVilliam Buckner, John Boucher *& al'* Defendants.

(1) IN Trover and Conversion for goods, the Question upon a Special Verdict was; Whether or no after that the Commissioners of Excise in London, had adjudged Brandies Imported to be Strong-Waters perfectly made, and to pay as such, according to the Act of 12 Car. 2. c. 23. for Excise, the Validity of that Judgment might afterwards be drawn in Question in this Court, in this Action; which Question depended upon some Clauses of the Acts of 12 Car. 2. c. 23. and 15 Car. 2. c. 17. See and read the Acts themselves.

Lechmere pro Quer. that it might; for if such Commissioners, who have but a limited Jurisdiction, go beyond it, what they do is Coram non Judice, as 10 Rep. the case of the Marshalsea: And then Trespass or Trover lies against any that Act under them. Vide Dr. Bonham's Case, 8 Rep. and such power and Authority is Traversable. And 5 Rep. Rookes Case; If an Officer of the Commissioners of Sewers, when they exceed their Authority, or Act contrary thereunto, distrains for an Amercement layed by them, a Replevin lies well. Vide Cro. Jac. 336. Hersely's Case; So if Commissioners of Bankrupts declare a man a Bankrupt, who is not so, both an Action of Trespass lies for taking his goods and an Action upon the case for Slander: And so it was adjudged in B. R. in Norbery's Case of Gray's Inn. And there is great reason for this, because else great oppression might be used, and the party left without remedy by Error or Attaint. Vide Rolls Rep. 5.

Stevens pro Defendente, He made two Points. First, Whether the Officers are Guilty upon this Verdict, for Executing the Judgment of the Commissioners, if these Liquors are Strong-Waters? And Secondly, Whether they be Guilty, admitting them not to be Strong-Waters?

He

He conceived that if an Unjust-seizure were made, yet if afterward an Information were preferr'd for the same goods, and they condemned upon it, this would excuse the Seizure, tho' by a Verdict afterwards it should be found, that the goods were not well Seized. But if a Seizure be made for a just cause, and there be no due proceedings thereupon according to Law, an Action upon the case lies: Now here whether the proceedings are just, and such as may be maintained, the question depends upon the said Acts, and some Clauses therein: The Act of 12 Car. 2. imposes no certain Forfeiture in such case, but provides for the payment of the Duty before Landing. But about Brewers and Retailers, many Penalties are inflicted, And then there is a Clause that such Forfeitures and Offences, made and committed within the immediate limits of the Chief Office in London, shall be heard, adjudged and determined by the Chief Commissioners and Governors of Excise, appointed by his Majesty or the major part of them, or by the Commissioners for Appeals, and Regulating of this Duty, or the major part of them, in case of Appeal, and not otherwise: And all such other Forfeitures and Offences, made and committed within all or any other the Counties, Cities Towns or places within this Kingdom or Dominions thereof, shall be heard and determined by any two or more of the Justices of the Peace, residing near to the place where, &c. And in case of neglect or refusal of them, by the Sub-Commissioners, &c. And the Statute of 15 Car. 2. c. 11. inflicts a Penalty upon the Importer or Proprieter for Forein Liquors Imported and not duly Entred, to be recovered by Seizure, Suit or Information: And there is another Clause, that all Fines, Penalties and Forfeitures, for which no remedy is ordained for recovery thereof by this Act, shall be recovered by Action of Debt, Bill, Plaint or Information, in any Court of Record within such County, City or Corporation, where such Offence shall be committed, or by such other ways and means as by the said former Act is directed and appointed. Now in this case there is no particular course or remedy provided by the 15 Car. 2. c. 11. And therefore the remedy is before the Commissioners by Vertue of 12 Car. 2.

12 Car. 2. c. 23 Par. 31.

15 Car. 2. c. 11. Par. 16. 17.

Par. 25.

Object. Upon a Seizure the particular remedy is here in this Court; which is a Market overt in such cases; and Proclamation is made, that all persons may have notice.

Resp. The proceedings here are not upon the Seizure, but against the Person and the thing it self; and the Seizure is only in the nature of a Summons, to cause the party to appear, and if the Plaintiff were informed against in the King's Bench, it would be no prejudice to him, without a Summons to cause him to appear.

Object. It is hard that the party should be bound as to his property, without a Tryal by Jury.

Resp. It is by Act of Parliament, which has appointed how the Penalties shall be determined; which ought to be pursued. And it will otherwise be very inconvenient, if the King must stay for his Revenue, till a Tryal at Law be over: And therefore such a Summary way was provided for; because the other would be a great Charge and Detriment to the King, and a vexation to his People. And the Act of 12 Car. 2. has made provision against undue Judgments given by the Commissioners, and given an Appeal.

To the Second Point, Admitting these Liquors not to be Strong-Waters, yet (he said) the Officer was dispunishable. He agreed that where a particular Jurisdiction exceeds it's Bounds, all is void, and the Officer liable to an Action of Trespass. But where the matter is within their Jurisdiction, which is our case, there the Officer is not liable; for it is only an Error in the Judge, either in matter of Law or Fact: And concluded pro Defendente.

Afterwards in Mich. Term. 20 Car. 2. it was argued by my self and Sir Robert Atkyns: And Judgment was given pro Quer. because the Trover and Conversion found in the Special Verdict, was before the Information, and Judgment given by the Commissioners of Excise.

Terry *versus* Huntington & Al'.

(2) IN an Action of Trover and Conversion for goods, levyed by Warrant of the Commissioners of Excise, the question was, if they adjudge Low Wines to be Strong Wines perfectly made, upon the Statute of 12 Car. 2. c. 23. whether it may be drawn in question again by an Action in this Court, so as to make the Officer chargeable; which in effect was the same point with the case immediately foregoing.

Ayloff pro Quer. He argued much to the same purpose, that the Council for the Plaintiff had argued in the former case: That they had but a limited Jurisdiction; which if they exceeded, their Acts were void; and their other Officers lyable. And he cited the case of Callicoe, which the Farmers of the Customs had adjudged to be Linnen, and yet the contrary had been ajudged here. And two Courts may have Jurisdiction in a cause diverso respectu: If Right of Tithes come in question, the Spiritual Court had a Jurisdiction; if a Discharge of

of Tithes, the Common Law has; Vide Mo. Rep. 42. Cardinal Pool's Case, & vide Cro. Car. 395. the case of a Justice of Peace; where an Officer was held liable to an Action for taking a Distress pursuant to his Warrant, in case of a Cess rated upon one that was not liable; Vide Dyer 135.

But the main Doubt here is, because the Statute gives an Appeal; whence they would infer, that the party has no other Remedy. To which I answer, That the words [and not otherwise] relate only to the proximum antecedens; and the meaning of them is, that the Commissioners of Appeal shall proceed only in cases of Appeal, and not originally. And tho' the Act be restrictive with respect to the Commissioners and Justices of Peace, who have a stinted Authority; yet it was not the Intention of the Makers of the Act, to exclude the Jurisdiction of the Common Law. And the Act of 12 Car. 2. cap. 24. which gives the Hereditary Excise, concerns other matters, that are not determinable before the Commissioners of Excise; as Purveyance, &c. Vide Cro. Eliz. 38 Eliz. Placito, 7 Dyer 236. And the Act gives leave to plead the General Issue; which implies, that the Matter is examinable elsewhere.

Winnington pro Defendente: The Officers in this case are excus'd, because the Liquor is an Excisable Liquor: Otherwise, if the Liquor were not Excisable.

First, An Action lies not against the Commissioners; because they are Judges, and by consequence not against their Officers neither. For the Power of the Commissioners, vide the words of the Act of 12 Car. 2. cap. 23. The Proceedings here are according to the Act by Information, and Judgment has pass'd upon the Information after Witnesses examined, which is in the nature of a Trial. And, if being mistaken in Judgment, shall be held a sufficient ground of Action, it will be hard upon the Judges in Westminster-Hall, and elsewhere.

Secondly, I agree an Action may lie, if they have no Jurisdiction of the Cause; but if they have a Jurisdiction, it lies not: 10 Rep. 86, 87. And though here they have erred in Matter of Fact; yet being made Judges of that by the Statute, no Action lies against them; Vide Co. 12 Rep. 23, 24. Conspiracy lies not against a Juror for Matter of Fact; and many good Cases are there put; no more does an Action lye here. And this Case differs from all that have been cited of Sewers, Bankrupts, &c. For here a Judicatory is erected, and an Appeal given from it; which is not in those other Cases.

Object.

Object. If they be not Strong-Waters, they are not within their Jurisdiction, and then they are Trespassors.

Resp. If that appear to them upon the Information or Record before them, I agree they are Trespassors; but otherwise, I deny it. For the Commissioners can know what they are no otherwise; and their Judgment is equivalent to a Verdict, and therefore it would be unreasonable to punish their Officers; Vide Nudigate's Case, cited in Co. 12 Rep. 23. Nor is it found here, that they did this falsly or corruptly; and if the Masters are not guilty, no more are their Servants. And he concluded pro Defendente.

Hale Chief Baron: The Proceeding here is Civilitèr, not Criminalitèr, as in the Case cited out of 12 Co. But the case of a Justice of Peace seems to come full up to ours; for the Justice had a Jurisdiction, but he kept not within it. And suppose the Commissioners should adjudge Small-Beer or Water, to be Strong-Beer, it would be mischievous if the Subject in such a case should have no Action upon a Distress taken for a Forfeiture. And where the Jurisdiction it self is stinted and Examinable, there their Acts are so too; and their Judgment is no Estoppel, if the Matter be not within their Jurisdiction, which is a particular and circumscribed one. Et Adjornatur.

Afterwards in Hillary Term, 20 & 21 Car. 2. the Barons delivered their Opinions seriatim.

Baron Rainesford pro Quer': But yet he held, that the Defendants might well enough have Justified by virtue of an Authority from the Commissioners of Excise, who are Judges of the Fact; and that their Authority is not traversable by the Plaintiff; Vide 8 Rep. 121. Fitzh. Barr 271. And that the Plaintiff here must have taken his Remedy by Appeal, and no otherwise; as appears 8 Rep. Dr. Bonham's Case. But the Case of Bankrupts is different, for there no Writ of Error or Appeal is given by the Statute. And upon the 18th of Eliz. an Order for Maintaining a Bastard-Child is not traversable, because the party may have his Appeal. But if the Commissioners exceed their Authority, and that appear to the Court, then their Proceedings are Coram non Judice, and an Action of Trespass lies; Vide Rol. 869. 22 Ed. 4. 32. But if that does not appear, it will be otherwise. And in our Case it appears by the Special Verdict, that the Commissioners have exceeded their Authority, in adjudging Low-Wines to be Strong-Waters perfectly made, which are of another Species. And certainly, if the Commissioners would adjudge Rose-water to be Strong-Waters,

Waters, they would exceed the Power given them by their Commission; and then both themselves and their Officers, who should levy any thing by virtue thereof, would be Trespassers; Vide 10 Rep. the Case of the Marshalsea. And the Reason is, because when they exceed their authority, they cease to be Commissioners, and act as Private persons; Vide Cro.Car. 355. and Rol. 560. 5 Rep. 100. Rook's Case. And tho' the Plaintiff could not Traverse, yet the Jury would not be estopp'd, 2 Rep. Goddard's Case, 3 Rep. 52. Plow.Com. 514. 1 Hen. 4. and the Special Matter may be found, as in Cro.Car. 110. So he concluded pro Quer.

Baron Turner pro Quer': He argued much to the same purpose; insisted upon the Commissioners having a Limited Jurisdiction, and no Jurisdiction at all in case of Low Wines.

Hale Chief Baron, pro Quer': The Excise is setled by 12 Car. 2. By which Act a Special Court of Judicature is appointed, for the more speedy recovery of the Duty only; but not to leave all parties concern'd to the arbitrary Power of the Commissioners, and to deliver all up to their Will and Pleasure. And the Conusance belongs to them only in the first place; but secondarily to the Common Law: The Commissioners must enquire into the truth of the Matter, but can stay no Proceedings: Nor do the Proceedings before the Commissioners priviledge any persons from being subject to Actions; but the end and design of them is only to prevent more tedious Proceedings. And if they exceed their own Jurisdiction, that does not take away from the Jurisdiction of this Court. And though the Act gives a Recovery before the Commissioners; yet does it not subject all parties to their Power solely. And,

First, The Matter here is not within their Jurisdiction, which is a stinted, limited Jurisdiction; and that implies a Negative, viz. that they shall not proceed at all in other cases. But if they should commit a Mistake in a thing that were within their power, that would not be Examinable here. And it is to be considered, that Special Jurisdictions may be circumscribed; 1. With respect to Place; as a Leet or a Corporation: 2. With respect to Persons; as in 10 Rep. the Case of the Marshalshea: 3. With respect to the Subject Matter of their Jurisdiction; and here the Statute limits their Jurisdiction in all these Three respects: And therefore if they give Judgment in a Cause arising in another place, or betwixt Private persons, or in other matters, all is void, and Coram non Judice; as if they should adjudge Rose-water to be Strong-water. And here Low-Wines are Waters of the first Extraction.

Secondly,

Secondly, These Acts must not be extended further than they ought: For by that means the King might come to lose all his Duty upon Importation of such Liquors. And this would be in effect, to make a New Act of Parliament.

Thirdly, If such Commissioners exceed their Authority, what they do is Coram non Judice; and then, as appears 10 Rep. there Officers are not privileged.

Fourthly, Though the Information before them supposes the matter to be within their Power and Jurisdiction; yet the party is not thereby concluded, but that he may aver the contrary; as in the case of a Presentment in a Court Leet, if the Fact arose out of the Jurisdiction of the Leet, or was a private Nusance, or a Matter in difference betwixt Private persons; as in 10 Rep. the Case of the Marshalsea. So where a Parish-Tax is laid on a place, that is not within the Parish; Vide 5 Rep. St. John's Case, of a Hand-Gun, if it be not within the Statute of 33 Hen. 8. the party is not excused in Trespass, by a Warrant from a Justice of Peace.

And the Chief Baron held, against the Opinion of Baron Rainesford, that it would have bæn against the Defendants, though they had pleaded Specially: But otherwise in the case of a Brewer or Retailer, who are expresly comprizd in the Act; as if they should adjudge Small Beer to be Strong, for they have a Jurisdiction there, and an Appeal lies from their Sentence. But where they have no Power over the thing, as here they have not, the case is altered; and concluded pro Quer and Judgment was given accordingly.

De

De Termino Sancti Michaelis Anno 20 *Car.* II. Regis.

In Scaccario.

IN an Action for 100 l. upon a Bill of Exchange accepted, the Plaintiff declared, that by the Custom of England, if a Merchant send a Bill of Exchange to another Merchant to pay Mony to another person, and the Bill be accepted, that he who accepts the Bill, does thereby become chargeable with the Sum therein contain'd; and that a certain Merchant drew a Bill of Exchange upon the Defendant, payable to the Plaintiff, which Bill the Defendant accepted; per quod actio accrevit. And upon Nil debet pleaded, a Verdict passed for the Plaintiff; and now it was moved in Arrest of Judgment by Offley, (1)

1. That the Declaration is naught.
2. That an Action of Debt lies not.

For the First, He said, the Declaration was naught, because the Plaintiff declar'd, that per Consuetudinem Angliæ, &c. which he said was naught, because the Custom of England is the Law of England, and what the Judges are bound to take notice of; and that therefore the Consuetudo Angliæ ought to have been omitted, and that it would have been naught upon a General Demurrer, 34 Hen. 8. Bro. Custom 54. and 2 Hen. 4. the Case of Negligent keeping Fire, Cro. Eliz. 6. Yelv. Rep.

Secondly, An Action of Debt lies not in this case, because there is no Privity betwixt the Plaintiff and Defendant; nor any Contract in Deed, or in Law; and where these fail, Debt lieth not, Vide 19 Hen. 6. Dyer 21. Rol. 1 Part 594. Where Goods are delivered to another at the request of a third person, Debt lies not upon a Promise to pay for them, nor an Indebitatus Assumpsit: Otherwise when Mony is received to another man's use; as when a Sheriff levies Mony upon an Execution, tho' he make no Return of it, Debt lies against him; because he levied and received it to the Plaintiff's Use: And the Law creates a Contract there, but not in our Case.

Stevens pro Quer': As to the first Exception, it was been made a Doubt formerly; but is now setled, to be good; Vide Hob. Rep. & 8 Rep. Caly's Case. And for the Second, it is a Rule in Law, that where the Common Law, or any Particular Custom creates a Duty, Debt lies for it; as in case of a Taylor, who by the Common-Law may have an Action of Debt, or a Quantum meruit for making up a Suit of Cloaths. So in case of a Particular Custom, as in 11 Hen. 6. 24. a Custom of a Manor to collect Rents, and receive Twenty shillings for the same, Debt lies for it; yet there is no Privity of Contract. So he pray'd Judgment pro Quer.

Chief Baron: This is a Case of Weight and Concern for the future, and deserves Consideration. Declarations upon Bills of Exchange have often varied: Sometimes Declarations have been upon a Custom amongst Merchants only, without laying an express Promise: Afterwards they came to declare upon an Assumpsit. And after all, if an Action of Debt will lye, it will be a short Cut, and pare off a long Recital. For if Debt lies, a man may Declare upon a Bill of Exchange accepted in Debt, or in an Indebitatus Assumpsit, for so much Mony. But for the Plaintiff's inserting the Custom of the Realm into his Declaration here, I hold that to be meer superfluity and redundancy, which does not vitiate the Declaration. And without doubt, if the Common Law, or the Custom of a Place create a Duty, Debt lies for it without more ado; as in the case of a Toll due by Custom; 20 Hen. 7. 1. and so in cases of a certain Sum due by Custom for Pound-breach to the Lord of a Manor, or to a Gaoler for Barr Fees, Vide 21 Hen. 7. But the great Question here is, whether or no a Debt or Duty be hereby raised: For if it be no more than a Collateral Engagement, Order or Promise, Debt lies not; as in the case that has been cited, of Goods delivered by A to B, at the request of C, which C promiseth to pay for, if the other does not; for in that case a Debt or Duty does not arise betwixt A and C, but a Collateral Obligation only. In our Case the Acceptance of the Bill amounts clearly to a Promise, to pay the Mony; but it may be a question, whether it amounts to a Debt or not? For if so, then it is assignable to the King, or by Commissioners of Bankrupts. And it were worth while to enquire, what the course has been amongst Merchants; or to direct an Issue for tryal of the Custom amongst Merchants in this case. For although we must take notice in General of the Law of Merchants; yet all their Customs we cannot know but by Information. And although the Verdict here finds it in effect, and so might seem to inform us; yet it does not appear that

that the Custom was in Issue: So that we can have no certain Information of the Custom by this Verdict. Et Adjornatur.

Presidents were ordered to be search'd; and afterwards in Hillary Term, 20 Car. 2. it was moved again, and Presidents shewn, that by the Opinion of Chief Justice Debt lay not; and all the Clerks in Guild-Hall certified, that they had no President in London of Debt in such case.

Afterwards in Hillary Term, 20 & 21 Car. 2. the Court declared their Opinions, that an Action of Debt would not lye upon a Bill of Exchange accepted, against the Accepter: But that a Special Action upon the Case must be brought against him. For that the acceptance does not create a Duty, no more than a Promise made by a Stranger, to pay, &c. if the Creditor will forbear his Debt. And he that drew the Bill continues Debtor, notwithstanding the acceptance; which makes the Accepter liable to pay it. And this course of accepting Bills being a general Custom amongst all Traders both within and without the Realm, and having every where that effect, as to make the Accepter subject to pay the Contents, the Court must take notice of that Custom; but the Custom does not extend so far as to Create a Debt; only makes the Accepter Onerabilis to pay the Mony. Though Custom may give an Action of Debt, as in 20 Hen. 7. 1. of Toll; and so in case of a Fine for a Copyhold.

Wherefore, and because no President could be produced, that an Action of Debt had been brought upon an Accepted Bill of Exchange, Judgment was arrested.

Witheren *versus* Robinson.

IN an Information upon the Act of Navigation, the Question was, Whether or no Malaga-Wines, of the growth of Spain in Europe, being Imported not in English Shipping, nor in Vessels whereof two Thirds of the Mariners were English, are forfeitable by the said Act, or not? (2)

Atkyns pro Defendente argued, That these Wines were not within the Act; for that (he said) the Act extended only to Asia, Africa, and America, as appears by the Clauses thereof; and though the fourth Clause be General, yet does it not comprehend our Case; for it is relative to the Clauses going before. And as to the Objection grounded upon the Act for Customs,

which extends to these Wines; there Europe is named, which it is not in this Act, being here designedly omitted. Besides, this Fourth Clause seems relative to Holland only, and to have been inserted for no other purpose.

Chief Baron: The subsequent Clauses may perhaps include Europe in some particular cases, but not in the case now before us; and English-built Shipping is not mentioned afterwards.

Et Adjornatur.

The Attorny General *versus* Sir George Sands.

(3) UPon an Information Exhibited here, and Proceedings upon it, a Case was made and stated, which was to this effect; viz.

Sir Ralph Freeman purchased Land for the term of 99 years, in his own Name; and afterwards purchased the Inheritance of the same Lands in Trust: And then by his Will disposed of these Lands, to the Sons of Sir George Sands, his Grand-Children born, or which should be born in his life-time, and directed Conveyances to be made accordingly by his Trustees, and died. At that time Sir George Sands had two Sons, Freeman and George; and Freeman died, and after the death of Sir Ralph, Sir George had another Son Freeman, who kill'd his Brother George; for which he was attainted and executed, and no Conveyances were made by the Trustees, pursuant to Sir Ralph Freeman's Will: And the Questions hereupon were two;

First, Whether, as this case is, the term for years was forfeited?

Secondly, Whether or no the Inheritance in Trust were forfeited?

Mr. Winnington pro Querente: A Trust is defined in 1 Rep. 121. to be an Interest annex'd in Privity to an Estate in Lands; and the Common Law takes notice of it, Lit. Sect. 464. Cestuy que Trust shall be impanell'd on a Jury, Vide Co. Lit. 272. b. 5 Ed. 4. 7. There shall be a Possessio fratris of a Trust, and it was transferrable before 27 Hen. 8. and the second Feoffee should be seiz'd to the former use, Vide 3 Rep. 2, 3. it will pass by Grant. And there is a Diversity betwixt a Privity in Estate, and a Personal Privity; the latter will not go to the King, but the former will: For authority, Vide Co. 12 Rep. 1, 2. a Case cited Collaterally; which is contrary to Cro. Jac. 512, 514. where it is held, that a Trust of a Term is forfeitable, but not a Trust of

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an Inheritance, Anders. 1 p. 294. An use not forfeited for Felony, unless it be of a Chattel. The Term in this case of ours is forfeited; for this is not a Term that attends the Inheritance; but it is a substantive Estate of it self, not attending upon or ancillary to the Inheritance; for they are severally directed by the party, and Sir Ralph had the Term a long time before he purchased the Inheritance. Vide 1 Ed. 4. 6. 5 Rep. 56.

Ellis pro Defendente. First, The Trust of an Inheritance is not forfeited by Felony: First, Because to a forfeiture for Felony and to an Escheat a Tenure is requisite. Vide 2 Inst. 21. and for that reason a Fair or a Market are not forfeited; and a Trust is not held of any; but the Lands in Trust. Secondly, If the Law were otherwise, there would be a double forfeiture of the same thing; viz. by the Trustee, and by the Cestuy que Trust, which is unreasonable, and cannot be. Vide 14 Hen. 8. 8. Thirdly, Cestuy que Trust has neither jus ad rem, nor in re, but remedy in equity only, 11 Hen. 4. 5. 5 Ed. 4. 7. 3 Rep. 2. 3. which does not extend to a Paroll Trust of Lands, Tenements and Hereditaments. Vid Bulst. 2. part 830. 21 Car. B. R. the King versus Holland; a Trust for an Alien in Fée not forfeited to the King, 2 Cro. 513. nor for Felony; but it is grantable over by Common use in Equity.

Second Point, If a Trust of a Term attend the Inheritance, then it is of the same nature with the Inheritance; but if it do not attend the Inheritance, but be a substantive Estate of self, it is not forfeited: Because it belongs not then to the Felon, nor was ever in him, but it goes to the Administrator of the Termor, which the Defendant in this case is; and the Felon had no Interest in this Term by the Devise, because he was not then Born. And concluded pro Defendente.

Hale Chief Baron. The sole Question is here, whether the Lease attend the Inheritance in such manner, as that the Inheritance cannot be forfeited without it; for if it do not so attend it, then does it not appertain to the Felon, but to the Administrator of him that was Slain, or to the Trustée in possession; and then this Point as to the Term will be out of doors. But if it do attend the Inheritance, the Question will be, to what purpose it does attend it: For to some purpose it does not, as to prevent Dower, or to Stave off a Debt, for such a Term shall be Assets, if it attend an Inheritance in Fée-simple; but not if it attend an Estate Tail; which is not subject to the payment of Debts in equity.

After-

Afterwards in Hill. Term 20 Car. 2. Regis, Serjeant Maynard argued pro Quer. that both the Inheritance and the Lease were forfeited.

There are two Reasons, why Estates are forfeited for Felony; one for Example, the other for the encrease of the King's Revenue, in order to the Publique safety. And I conceive that although the Lease do not wait upon the Inheritance, yet it is forfeited in this case, because the Defendant Sir George Sands, who hath the Lease as Administrator, has it distinct from the Inheritance, that was conveyed to him before, and the Lease being in him in auter droit, it does not drown in the Inheritance; for if it did, it would not be Assets, but might work a Devastavit, which the Law will not work by any Operation; for it will not work a wrong; so that the Term is not extinguish't. And it is agreed on both sides, that both the Lease and the Inheritance were in the Defendant in Trust for his Son George.

Then Secondly, by George his Death they are in the Defendant in Trust for his Son Freeman the Felon; and notwithstanding the meeting of these two Trusts, of a Term and of the Inheritance, the one does not drown the other.

Then Thirdly, a Lease for years in Trust is forfeitable for Felony, for the King's Interest, and by his Prerogative; and so it was held Pasch. 7. Jacob. in Sir Walter Raleigh's Case in Scacc. that a Trust of a Term is forfeited, and so it was Ruled Trin. 11 Jac. in Abington's Case: But the case of an Inheritance in Trust is not resolved. And in 2 Car. 512. it is held that a Term in Trust is forfeited, but not a Fee in Trust. Hill. 3 Car. 1. Scacc. Babington's Case; held that if the King's Receiver Purchase a Lease in Trust, it is lyable to the King's Debts, though it were afterwards alienated. And in Pasch. 12 Car. C.B. in Sir Anthony Anger's Case, it is held, that a Lease for years of an Advowson in Trust, is forfeited by the Outlawry of Cestuy que Trust; but it is held there likewise, that the King cannot have a Qu. Imp. or an Ejectment, but a Subpœna only.

And great regard ought to be had to the King's Revenues in this case, because of the consequence of it: And a Trust does not hinder a man from granting over the Term; as is seen in dayly practice. If one Obligée commit Felony, the whole Obligation is forfeited. And it was resolved in Hill. 30 Eliz. B. R. that matter of Account is forfeitable to the King by Outlawry, tho' not transferrable by Grant, as a Trust of a Term is.

And

And if it be so, that the Trust of a Term is forfeitable, then the Question will arise betwixt the Felon and the King, whether of the two shall be preferred: And it is clear, that the Felon cannot have a Trust against the King, and the Trustée can have no colour to withold it from both the Felon and the King, and the King may Pardon and restore it to the Felon, by which means the Trustée would lose the benefit of it. And certainly in all reason, the King ought to be preferred before the Felon; for otherwise, the Punishment of Felony and the Interest of the King's Revenue would be both avoided.

Also a Trust is a Right in Conscience to take the profits, and ensues the nature of the Land; for by the 5 Ed. 4. there shall be a possessio fratris of an Use. And by Co. Lit. Cestuy que use may take a Release as Tenant at Will; and Trusts are look't upon by Acts of Parliament as Lands; Vide the Statute of Mortmain, Frauds, &c. Nay, they were look't upon as créeping up to the destruction of the Common Law, and therefore the Statutes of Bankrupts, enable the Commissioners to dispose of them. And although a Trust in Fée be not forfeited to the King, by way of Escheat, as is held 2 Cro. 513. the reason of that is because the King has a Tenant in by Title; and if it were otherwise in that case, the Lord would be prejudiced; but there can be in this case no prejudice to any third person, for the Lands here are held of the King: In 31 Ed. 1. Rot. 30. in Scacc. in the Treasurer's Remembrance; if a Baron purchase Lands in Fée Joyntly with his Feme, yet they shall be lyable to the King's Debt, after the Husband's Death, if his Wife Survive him. And it was held in 22 Jac. in Cur' Wardor' that a Power of Revocation in the party is subject to the King's Debt. And since we are here in a Court of Conscience, it is not conscionable for Sir George Sands to kéep it to himself; and less conscionable for him to withold the Fée-simple from the King. And no Assent of the Administrator to hold the Term in Trust for the Felon, will debar the King of it; because it is Assets to Debts. Vide 40 Ass. 35. that the Assent of an Executor is not necessary, in case of a Legacy given to the King. And concluded pro Quer.

Sir Robert Atkyns argued pro Defendente, that neither the Trust of the Inheritance nor of the Lease was forfeited.

First, A Trust is altogether the same that an Use was before 27 Hen. 8. and they have the same Parents, Fraud and Fear; and the same Nurse, a Court of Conscience. By Statute Law an Use, Trust or Confidence, are all one and the same thing. What an Use is, Vide Pl. Com. 352. and 1 Rep. in Chudley's Case; and they are collateral to the Land: A Cesty

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que Trust has neither Jus ad rem nor in re. Now for the first Point, a Trust in Fee-simple is not forfeited, for these Reasons; First, It is not an Interest at Common Law; and therefore not forfeitable. And it was one of the chief causes, why Uses were Invented; viz. to prevent forfeitures, as appears in Hob. Rep. Seignior Sheffield's Case. And in this respect, they do not differ from Common or Rent; which are not forfeitable: And 1 Rep. Chudleigh's Case, they are neither Chattells nor Inheritances, but Amphibious sorts of things, and of an Unnatural Generation; and the Common Law has no regard to them. Vid. Dr. and Stud. 98 Lane's Rep. 104. Perk. 69, 89. No Dower, nor Tenancy by the Curtesie of an Use. An Action of Trespass lies against a Cestuy que Use; Pl. Com. 3. Dyer 340. 12 Rep. 2. not forfeitable for Treason. Bulst. 2. part. 337. Nor do Acts of Parliament take notice of them, so as to Countenance them, but to suppress them 1 Inst. 71. and to support the Rules of Law; Dyer 10. Pl. Com. 58. Dyer 134,163. they are barred by Fines, run along with the Land, and there shall be Possessio fratris of them. 1 Rep. 136. b. They were not at the Common Law, but were lately found out, Vide Hobart's Rep. 338.

First Objection, Uses are Countenanced by the Law; for Lit. Cestuy que use shall be impannelled on a Jury.

Resp. The reason of that depends upon the Statute of 2 Hen. 5. c. 3. A Trust does not lie in Tenure, and therefore is not forfeitable. 3 Inst. 21. 25 Ed. 3. of Treasons does not extend to Uses. 3 Inst. 19. And it would be unreasonable to subject the same Lands to double forfeitures; viz. by the Owner of the Land and by the Cestuy que Trust. Vide Lane's Rep. 42.

Besides, a man's Interest in an Use, is in the Nature of a right of Action, which is not transferrable: 10 Rep. 48. 52. 3 Rep. 2, 3. No remedy for it but in Equity; and if the case in 10 Rep. had not been settled, it would be hard to maintain it for Law; and so it has been held by good Opinions. And the Lord by Escheat, is to hold the Lands discharged of the Trust, and by the same reason shall not have the forfeiture of it. Vide Mo. Rep. 196. Princip. Pasch. 8 Jac. For Authorities, Vide 3 Rep. 2, 3. 2 Cro. 512, 513. 5 Ed. 4. 7 Bro. Feoffment all Uses. A Feoffee shall hold Lands discharged of them; and the Lord of a Villein was not to have them till 19 Hen. 8. c. 15. 1 Inst. 19. 33 Hen. 8. and other Acts, which give the forfeiture of Uses in particular cases, shew that they were not forfeitable before.

Second

Second Point, The Trust of a Term which waits upon the Inheritance, is not forfeitable neither, and this Point has two parts: First, Whether the Trust of a Term waiting, can be forfeited. Secondly, Whether this Term here do so wait, as not to be forfeited but to stick to and follow the Inheritance? In this case, the Term for years was Originally taken in Alderman Freeman's Name, and the Inheritance afterwards purchased in the Defendant's Name. And then both are given by Will to the Defendant's Sons: Whereby George the Son had the possession of the Term by the Devise, and the Inheritance waits upon it. And the Devise here is only a Declaration, that the Devisees should have the Lands by Conveyance from the Trustees, and not before; so that before such Conveyance, they have but as it were a Right of Action, and but an Equitable Right, and it is not properly a Trust of a Term but a Declaration, to whom the Conveyance shall be made: And therefore, the Estate continues in the Offender, and it is not for a Court of Equity to dislodge it, and make it wait upon the Inheritance, altho' the Devisor might intend it. For that is but a puisne practice, and it tends to the subversion of the Rules of Law, to turn a term for years into an Inheritance, tho' neither an Estate in Dower, nor a Tenancy by the curtesie can be had out of it. And such settlements of Terms, have always been Discountenanced by the Judges; 1 Cro. 230. Mo. Rep. 810. 10 Rep. 52. and 15 Jac. 1. Exchequer Chamber, held that Lampet's Case deserved to be qustioned, if it were not settled.

Second Point, A Trust for years is not forfeited; First, Because the Cestuy que Trust had no legal Interest. Secondly, He had no legal remedy to gain possession. Thirdly, The Lord by Escheat would hold the Lands discharged of it, and therefore in this case, the Trustee for years shall have the advantage of it. And 2 Cro. 512. does not warrant the contrary, in case of a forfeiture for Felony; for there was not in that case any Lease from the King, but a personal contract, which is not devisable, as the Interest of the Term was here. And the Lord Cook in his 3 Rep. takes a difference betwixt Choses in Action or personal, and Frauds apparent; where there is a fraud apparent, their will be a Forfeiture; but there is none in this case: There was no Fraud in the Creation of this Lease; the intention of separating it was, to be a security to the Inheritance. And Armstrong's Case there cited, is not like to this case; for in the case of a Bond, the party has a legal Interest to Forfeit; and Fraud intended upon the Statute of 3 Hen. 7. c. 4. is the ground of the Forfeiture of the Lease.

But no such Fraud appears here. Vid. Lane's Rep. 104. 42. Mich. 7. Jac. Lib. Decretor' in Scaccario 146. and Sir Walt. Raleigh's Case, there Fraud was the reason and ground of the Judgment. If a Lease be Assigned in Trust, and then the Inheritance be purchased, and the Purchaser be Attainted of Treason, the King shall hold the Estate discharged of the Lease, because here is Fraud and Covin. And in Chudleigh's Case, 1 Rep. A Trust in Fee-simple is to many purposes Regarded as a Chattel; so that this being here the Trust but of a Chattel, will not enforce the Forfeiture. Vide Dyer 143. And if the Lease in our case wait upon the Inheritance, then it is for the Defendant; and it will wait upon him as well as upon the Offender, if he have the Inheritance. And Judgments in Equity ought not to contradict the Rules of Law, or delight to make Forfeitures. Lane's Rep. 54. a Trust of a Term, which a Husband has in right of his Wife is not Forfeited for the Felony of the Husband; which does not contradict Abington's Case, for there was a fraud, and so there was in Chirton's Case, Dyer, and so he concluded pro Defendente.

Hale Chief Baron, There is no question concerning the Forfeiture of the Fee-simple in Trust; for that must arise by Escheat, and there can be no Escheat but pro defectu Tenentis. But here is a Tenant in esse: If the offence committed had been Treason, then there might have been a Question, whether the Inheritance in this case should be Forfeited, in regard the Rent and Tenure have a continuance. But whether Sir George Sands shall hold the Land discharged of the Lease, or that the King shall have the Term is the sole doubt. The King does not gain an Interest in a Trust by Forfeiture, as he does in Debt; for there the Interest of the Bond passes to the King, and Process lies to recover it in the King's own name. And it is questionable, whether the King can have this in point of Prerogative in case of Felony, tho' perhaps more might be said if the Offence had been Treason. It is the Intention of the Party, that Creates and Governs Uses and Trusts: And therefore a Lease shall be deemed to attend the Inheritance, if it appears that the parties intended that it should do so; as here it does. And then it is no more than a shadow, an accessory to it; for otherwise, it would not be attendant of it. And then it cannot in this case go to the Felon; but to the Administrator of George the Son. And here they are consolidated by the Intention of the Will, which directs that the Trustees shall make Conveyances accordingly; nor is it kept on Foot, but only to avoid mesne incumbrances, which might affect

affect the Inheritance. And this appears to have been the Intention of the parties, when the fee was purchased; and therefore the Lease ought to go with the fee. And in the cases of Leases for years in Trust, that have been Forfeited, Fraud was the ground of it in the cases that have been cited. Et Adjurnatur.

Afterwards in Easter Term Anno 21 Car. 2. The Barons delivered their Opinions.

Baron Turner pro Defendente, That here is no Forfeiture, neither of the Inheritance, nor of the Term. That the Inheritance in Trust was not Forfeited, he quoted Co. 3. Rep. the Marquess of Winchester's Case, Co. 12. Rep. 1, 2. 5 Ed. 4. 7. Cro. Jac. 513. and the Statute of 33 Hen. 8. c. 20. concerning Forfeitures for Treason admits it.

Secondly, That the Lease was not Forfeited, he argued from it's being attendant upon the Inheritance, and quoted, Co. Plea. Cor. 19.

Hale Chief Baron. There are two main Points in the case. First, Whether the Inheritance be Forfeited? Secondly, Whether the Term for years be? And I hold that neither is Forfeited.

First, The Trust of the Inheritance is not Forfeitable in this case, because if it were, the King must be in by Escheat; which cannot be but for want of a Tenant; and here the Feoffees are Tenants. And at this day a Trust in Fee, or in Tail is not Forfeited at Common Law; but by the Statutes of 26 Hen. 8. c. 10. and 33 Hen. 8. c. 20. for Treason, as appears by the words of the Acts. And herewith agrees Co. 3 Rep. the Marquess of Winchester's Case.

Secondly, I hold that such a Trust in an Alien is Forfeitable. and will belong to the King; as it was held in Tr. 23. Car. in Holland's Case, and the reason is because an Alien has no capacity to Purchase, for the benefit of any other, but of the King. And it would otherwise be inconvenient, that Aliens should receive the profits of Lands to their own use; and the mischief would be the same, as if Aliens purchased the Lands themselves; but in that case the King is entituled to the profits only, the Land it self is not Forfeited to him.

Thirdly, I agree that in case of the King's Debtor, Lands in Trust for him in Fee-simple are lyable to the King's Debt by the Common Law, per Cursum Scaccarii, which makes the Law in such cases; and this appears by Presidents Temp. Hen. 6. and before 4 Hen. 7. a Trust or Use was lyable to a Statute; and that is the reason of Chirton's Case, in 50 Ass. And it was held in Sir Ed. Cook's Case, in Cur.

Wardor' that if the King's Debtor have a power of Revocation, that makes them lyable to the King's Debt: And that was the reason of Babington's Case, in Cur. Wardor' in 30 Car. and of Hoad's Case, in Pasch. 4 Jac. where Lands in Trust for a Recusant were subjected to the Debt of 20 l. per mensem; so in 41 Eliz. Babington's Case, a Trust lyable to a Debt imprest, because Cestuy que Trust has a profit by it, but that is a Special case, and grounded upon a Special Course in the Exchequer. But the Forfeiture of an Inheritance for Felony depends upon another reason, viz. upon the want of a Tenant, which does not hold in this case: And in the Statute of Hen. 8. of Uses this reason of Law appears. as also in the Statute of 17 Hen. 7. of a Purchase by a Villain in Trust, because the Lord has a Tenant to answer him his Services.

Object. If this Trust be not Forfeited to the King, who shall have it?

Resp. The Feoffee Sir George Sands shall now hold the Lands discharged of it, as in case of the Grantee of a Rent in Fee-simple, who dies without Heirs, the Tenant of the Land shall hold it discharged of the Rent, because there is no other that has any Title to it; and so he concluded that Point.

The Second matter is, whether the term for years be here Forfeited? And I deny that it is. There is a diversity betwixt a Term Assigned and a Term originally created: If a Term be Assigned in Trust with Fraud, it is Forfeited by the Outlawry of Cestuy que Trust, because it is only a Chattel and so esteemed; wherewith agrees Cro. Jac. 513. and Babington's Case before cited; and Sir Walt. Raleigh's Case; and such a Trust shall go with the Inheritance and is governed by it, as Mo. Rep. Lord Molineux's Case; where it was held that it should go to the Heirs of a Man's Body; and so in some cases, a Term for years shall go along with an Inheritance As if a Feme Covert has a Trust for years, her Husband cannot dispose of it, as he may of a Term not in Trust. Vide Co. Lit. Chap. Remitter. And in many cases Trusts are ruled by other Rules of Equity than Lands are, as in case of a Trust in Fee, a Court of Equity does not make it Assets to an Heir, as it does a Trust for years in the Hands of an Executor; so that the course of Equity governs them. A Trust for years cannot be limitted in Tail with remainders over, no more than a Term for years can. A Trust of a Term that follows the Inheritance may be resembled to a Box of Charters, which shall go to the Heir with the Land, that they concern' 4 H. 7. 10. but if the Owner Grant them

them over, then they shall go to the Executors of the Grantee; for by the Grant they become severed from the Inheritance, and become Chattels in gross, 8 Ed. 4. 3. So here, if the Lease had been assign'd over and severed, it would have been forfeited; but so long as it is attendant upon the Fee, it is not forfeitable. Nor was there any Conveyance or Appointment in this case to make it a Lease in gross. And therefore it cannot be forfeited for these Reasons.

First, Because the Estate in Law of the term was not in the person Attainted, but in the Lessee; and if it were liable to be forfeited, it must be forfeited as being a Chattel in him; for if not a Chattel in him, it is not forfeitable by him. And this term could not by any means come to the person attainted, for he was not the person for whom it was designed, but to his Brother George, and then it must go as a Chattel to his Executor or Administrator, who is Sir George the Defendant. And if it were not a Chattel in George, it cannot be so in Freeman, but must attend upon the Inheritance: So quâcunque viâ datâ, the term here is not forfeited.

Secondly, My 2d Reason is grounded upon the Intention of the Director and Devisor, that it should attend the Inheritance and be convey'd over accordingly, that it might not be kept asunder. And the Devisor directed, that both Estates should be convey'd over to Freeman and George Sands, deceased: But George had a power to dispose thereof, which he has not done. But if it had been limited to the first, second and third Sons of George in tail, then George would not have had a power to dispose of it, because then it would have depended upon the Freehold. But as this case was, George might by his act have disposed thereof as Heir, the Lease being an attendant upon the Inheritance, but it would not be forfeited, Causa qua supra.

Thirdly, The Person attainted is not the first Person to whom it was limited; but he came to it as Heir, and by consequence takes it as part of the Inheritance, and he has no other Interest in it; As when a Mortgage for years is assign'd over in Trust to attend upon the Inheritance, purchased by the Mortgagee. And if it were otherwise, many Inconveniences would ensue in cases of Marriage-Settlements, and other Settlements of Estates, in which it is the common course to preserve such a term, and not to let it drown in the Inheritance. For if the term were but forfeited in such a case, it would frustrate the whole design of the Settlement. Sir Walter Rawleigh's Case in the Exchequer was to this effect; viz. Queen Elizabeth purchased a Lease for years, and gave it to Sir Walter Rawleigh,

Rawleigh, and afterwards she purchased the Fee, and intended to give it to Sir Walter likewise; who to prevent a Merger, assign'd over the term to his Son, then a Child of six years of age: Afterwards the Queen convey'd the Fee to Sir Walter, who setled it upon his Son; but the Conveyance was void in Law. Afterwards, in primo Jac. Sir Walter was attainted of Treason, and then granted over all his Goods and Chattels in Trust for himself; and then made a Lease of his Lands for 99 Years, if he should so long live, in Trust for himself. And it was adjudged, that the Lease suprà was forfeited, though assign'd to his Son, because there was Fraud apparent, and himself took the Profits and had surrendred and taken a new Lease of the Bishop of whom it was held; and that the King's Inheritance was discharged of it, or at least that it should be attendant on the Inheritance that was forfeited. So he concluded pro Defendente; and Judgment was afterwards given, quod Defendens eat inde sine die.

Aprice *versus* Hayes.

(4) IN Ejectione firmæ upon a Special Verdict the case was this, viz. A Prior and Convent in primo H. 8. made a Lease of Lands for three Lives to A, and afterwards made another Lease of the same Lands to B for Fifty years; and afterwards made another concurrent Lease for Sixty years to a Third person. Afterwards these Lands came to the hands of King Henry the Eighth, by the Dissolution of Monasteries, and from him by descent to Queen Elizabeth; who in June, Anno Regni sui septimo, reciting the good Service performed by one Jones in France, who was slain there, in Consideration of Eighty Pounds paid, and for the maintaining of his Wife and Children, and reciting the said Lease for three Lives, and that two of them were expired, Granted the said Lands to the Wife of Jones for Sixty one years, after the Expiration of the said Lease for three Lives, or whensoever the said Lands should come by any means into the King's hands. And the sole Question was, When the Lease made to the Wife of Jones was to commence; viz. from the Death of the last Cestuy que vie, or after the Expiration of the Leases for 50 and 61 years? And whether or no the party has an Election, to have it commence at the Expiration of the Lease for lives, or those for years?

Moun-

Mountague pro Quer': The Lease to Jones's Wife commenceth from the Expiration of the Leases for 50 and 61 years: For so the Queen intended; and the Grantée would else have no benefit by it, which the Queen designed she should have: And here was a Consideration of Mony paid, which else will return to no account. And it is for the Queens Honour to have her Patent so construed. And if the Law will not make that Construction, yet the Grantée, or her Assignée (who is the party here concerned) shall have their Election, to have the Lease commence after the Leases for years are determined, ut res magis valeat; for that the Words here are in the Disjunctive, which always sound in favour of the person that is to take by them: Vide 6 Co. the Bishop of Bathe's Case, & 8 Co. the Earl of Rutland's Case, Trin. 1653. B. R. Stevens and Capel's Case, Dyer 312. & 6 Car. Keble & Hall's Case, B. R. and that such Election shall go to the Assignee; Vide Mo.Rep.85. 10 Rep.Clun's Case; and so he concluded pro Quer.

Afterwards in Hillary Term, 20 & 21 Car. 2. Winnington argued pro Defendente:

First, He said, the Queen was deceived in her Grant, and therefore the Patent void; because she did not recite all the Leases that were in being. But to this it was said and held per Curiam, That no Leases in being need to be recited, but only those that are upon Record; and not Leases made by Subjects, which by Intendment cannot be known nor discovered by the party. But Winnington urged, that the King's Grant should be void, when the King was deceived, and where his Grant operated contrary to his Intention; 5 Rep. 93, 94. Yelv.47. 1 Rep.44,45. Anderf. 1 Part 93. 8 Rep.55.

Secondly, He conceived, that the Lease to Jones his Wife commenced after the Death of the last Cestuy que vie; Vide Plo. Com. Stapleton's Case, 6 Rep. 36. Dyer 312. Stevens and Hall's Case Hill. 1653. And that the Lessée should not have an Election against the King; because here the King took notice of the Estate for three Lives only, and mentions no other. And therefore the King's Intention shall be taken to have been, that the Lease should commence then; and the Statute of 18 Eliz. of Confirmation does not make this Lease good; and concluded pro Defend.

Stroud pro Quer': The Interest granted to Jones his Wife shall commence when the Lands were to come into the Queens hands, and not before, for these following Reasons:

First,

First, In regard of the Consideration; which was the Service performed by Jones in his life-time, and the Maintenance of his Wife and Children; for if the other Exposition were admitted, it would not be effectual for the benefit of the Grantee.

Secondly, In regard of the Profit which the Queen had by Granting it, which was 80 l. which is a valuable Consideration, and for which there ought to be a Recompence; but there will be no Recompence in this case for it, if the Lease begin at any other time, than at the End of former Leases for years.

Thirdly, The Intention of the Queen and of the Party was so; and the Queens Charity implies as much, who designed to confer a Boon upon the Patentee.

Fourthly, The Rent was reserved so, as to become due after the Death of the last Cestuy que vie.

Fifthly, The King's Grants shall be construed beneficially for the Subject, so far forth as such Construction is consonant to the Rules of Law.

Sixthly, The King's Intent appears to be so, and the words [which shall first happen] shall be understood to make an Estate good, and not to destroy an Estate; Bro. Patents 93. & in 1 Rep. 45. former Leases need not be recited. And if words may be taken in two different senses, that sense shall be taken, which makes the Grant good, 21 Ed. 4. 44.

Object. The Estate for three Lives is only taken notice of.

Resp. It is not formally recited, but is only mention'd in a Clause where it is said Quæ omnia are to come into the Queens hands, Post, &c.

Object. It shall be intended to commence after the Death of the last Cestuy que vie, for the benefit of the Children.

Resp. For that Reason it shall be intended to commence after the Leases for years are ended; because that is more beneficial for them: And he concluded pro Defendente.

Hale Chief Baron: There is no question but the last Lease is good in its Creation, and it may take effect in Reversion, or by surrender of the other Leases; and if it had been for One hundred years, it would have been good for so many of them as remained unexpired at the determination of the other Leases: But when it shall commence, depends upon the Exposition of the Letters Patents: If it be intended to be a Lease in Reversion, all is well. But if the King intended to grant a Lease in possession, then the Grant is void, though there be a Rent

Rent reserved: For the Rent would not be payable till the Lease took effect in Interest. And if all the Leases had been recited, the Lessee might have had an Election; because then the King had taken notice of the Estates in being; but here they are not recited: But the Patent refers only to the Estate for three Lives; and the determination of that Estate by Surrender, Forfeiture, or alio modo. Et Adjornatur.

Pugh *versus* Owen.

(5) An Action upon the Case was brought for slanderous Words spoken of a Justice of Peace to his Servant; viz. Your Master's Witnesses (in such a Cause) were perjured; and your Master is the maintainer and upholder of them. After a Verdict for the Plaintiff, it was mov'd in arrest of Judgment, that the Words were not actionable. And of that Opinion were Baron Rainsford and Turner; because the Words did not relate to his Office of Justice, but were spoken as of a private Person: Not like to the case in 4 Rep. 16. And it was not said, that he upheld their Perjury, but only countenanced their Persons.

Hale Chief Baron, contr. For these Words, if true, are a Scandal to his Office; and upholding here, can have no other meaning than abetting them in their Perjury. But Judgment was arrested.

The Attorney General *versus* The Corporation of *Droitwich.*

(6) Upon Process against the Corporation for a Fee-farm Rent, the case was this: The Corporation of Droitwich, being an ancient Corporation before the Reign of King Henry the Second, 89 l. in Black-Rent was reserved; and now 100 l. Sterling Mony in specie was demanded.

Hale Chief Baron: Anciently in the time of King Henry the Second, and before and afterwards, till the Reign of King Edward the Third, all Fee-farm Rents were reserved in Black-Rent; i.e. in Silver-Bullion, unstampt, but refin'd and melted down; and there was a Special Officer appointed to view and weigh it: But afterwards in King Edward the Third's time, that Coynage was in use, which requir'd an allay,

5 l. per Cent. was allowed to the King by the Subject, in lieu of Fine Silver: So that he that was to have paid 100 l. in Black-Mony, was then obliged to pay 105 l. in Sterling. And this was setled by Act of Parliament, as an impartial Composition betwixt the King and People, in the Reign of King Ed. 3. Et Adjornatur.

(7) Between Savile and the Queen-Mother: In a Bill in Equity, the Court held upon the Statute of 33 Hen. 8. that any Matter in Law, as well as Equity, might be alledged as well as pleaded by the Subject, in his Discharge and Exoneration. And that it had been often allow'd by the Court; and upon that ground a Demurrer to this Bill was over-ruled.

Inter Berkeley & Morrice.

(8) Upon a Prohibition prayed to the Admiralty, the Case appeared to be this; viz. Morrice was Captain of a Private Man of War, in which Berkeley had an Interest; and Morrice took a Merchant-Ship beyond the Line, laden with divers Merchandizes. Berkeley sued Morrice in the Court of Admiralty to have an Account: Morrice pleaded there the Statute of 21 Jac. 1. of Limitations, the Cause of Action being of more than Seven years standing before the Suit commenced, as appeared by the Libel. And now Morrice suggested, that the Court of Admiralty would not receive that Plea, and therefore pray'd a Prohibition. And the Court held, that the Plea ought to have been received, for that the said Statute was pleadable there; and if it were not received, that the rejecting it was a good cause to have a Prohibition; as likewise if they receive it, and do not give Sentence thereupon, as the Common Law requires. But a Prohibition lies not before Refusal; because the Original Matter is examinable there. The Counsel on the other side urged, That the Reason why the Suit was so long delay'd, was, because of Morrice his absence beyond Sea: To which the Court reply'd, That the absence of the Defendant was not material; for the Act provides for the absence of the Plaintiff only. Et Adjornatur.

Inter

Inter Brookes and the Earl of Rivers.

A Prohibition was pray'd to Chester, to stay a Suit there depending by English Bill, in which the Earl of Rivers was Plaintiff against Brookes Defendant, concerning the Title to some Salt-Pits: The ground upon which the Prohibition was pray'd, was, because the Earl of Derby, who was Chamberlain of Chester, and Judge there, had an Interest in the Salt-Pits: And the Court held, That where a Judge has an Interest, neither he nor his Deputy can Determine a Cause, or Sit in Court; and if he does, a Prohibion lies. But because it did not appear upon Examination, that the Chamberlain had an Interest, therefore a Prohibition was not granted in this Cause: Tho' it appear'd that the Earl of Rivers had married the Earl of Derby's Sister; for Favour shall not be presumed in a Judge: Vide Co. 12 Rep. 114. The Earl of Derby's Case accordant, upon a Suit in Chester, in which the said Earl was concerned. (9)

Browne *versus* Sir Edward Lake.

Browne pray'd a Prohibition to the Ecclesiastical Court of Lincoln; because he was Prosecuted there ex officio upon Articles exhibited against him, for not coming to Church, and for sitting Irreverently there when he did come, and because they taxed Costs against him. And the Court doubted, whether Costs ought to have been taxed in this Cause, because it is not a Cause betwixt party and party; but promoted ex officio Judicis, and per instantiam Curiæ, though a person be assign'd by the Court to prosecute it. And afterwards, by the mediation of the Court, the Costs were mitigated; and the party submitted to pay them, and to conform to the Laws of the Church. (10)

De Termino Paſchæ, Anno 21 *Car.* II. Regis.

In Scaccario.

(1) NOta, by the Chief Baron; that if a Super be ſet upon one of the King's Collectors concerning his Collection, whereby he becomes a Debtor to the King, that yet Proceſs of the Pipe by Scire facias and Extent thereupon, ſhall not iſſue againſt him, as in caſe of Debt, but only a Proceſs ad computandum. And becauſe Proceſs of the Pipe had iſſued in this caſe, it was diſcharged ex motione of Mr. Sawyer.

The Attorney General *verſus* the Town of *Farnham* in *Surrey*.

(2) IN a Quo Warranto againſt them, for uſing a Fair and Market, and taking Toll, &c. It was ſaid by Hale Chief Baron, that a Corporation by Preſcription may be known by two different Names; as of Burgenſes, and of Ballivi & Burgenſes. But if the Name of Ballivi & Burgenſes be a Name which they have received within time of Memory; they cannot then preſcribe by it, but by their ancient Name, till ſuch a time, and then, &c. as in Dyer. And afterwards Iſſue being taken, whether they had Toll by Preſcription or no; and it being found for the Defendant, it was moved in arreſt of Judgment, that there had been a Diſcontinuance, becauſe there was no Iſſue joyned as to the other Liberties that were claimed: And this Action is not aided by the Statute of Jeofails; quod fuit conceſſum.

But the Chief Baron ſaid, they came too ſoon to urge that; becauſe Judgment was not yet given. And before Judgment there is no Diſcontinuance in the King's caſe. For the Attorney General may yet proceed by the King's Prerogative, to take Iſſues upon the reſt, or may enter a Nolle proſequi. And if he will not proceed, the Court may make a Rule upon him ad replicandum. And ſo there may be a Special Entry made of it. Wherefore non allocatur.

Friend

Friend *versus* the Duke of Richmond.

(3) Error was brought of a Judgment in Ejectione firmæ, and in the record a Space was left to insert the Costs, which had not yet been tared, and it was now prayed that it might be amended: But because it appeared upon Examination, that the Record was not yet certified, the Plaintiff was at liberty to get Costs Tared, and so fill up the space and make the Record perfect.

And per Hale Chief Baron, If such an imperfect Record had been certified, yet it might be amended by Rule of Court here; and then if it be removed by Error, the Court there must amend it. For it is the constant practise, that if a Record be removed into the King's Bench, out of the Court of Common Pleas by Writ of Error, and afterwards amended by Rule of Court in the Common-Pleas, the Court of King's Bench must amend it accordingly; but without such Rule, they must not amend it; so if a Record removed hither be mistaken, it is amendable by the Record in the Common-Pleas, brought into this Court by an Officer out of the Common-Pleas: Because these things are in affirmance of the first Judgment, and are therefore favoured in Law.

Castle *versus* Lichfield.

(4) IN an Action upon the Case, brought here and laid in London, upon an Indebitatus assumpsit for Mony for Tobacco. The University of Oxford demaunded Conusance of the cause, by reason of a Charter granted to them by 14 Hen. 8. and confirmed in the 13 of Eliz. By Act of Parliament, whereby is given to them, Conusance of all Suits arising any where against any Scholar, Servant or Minister of the University, depending before the Justices of the King's Bench, Common-Pleas and others there mentioned, and before any other Judge, tho' the matter concern the King; but the Court of Exchequer, is not mentioned in that clause: But in the clause whereby are granted to them all Fines, imposed upon any of them in any Court, there the Court of Exchequer is named; and the question was, whether Conusans should be allowed by this Court in this Action, by Quo minùs per debitorem Domini Regis?

Crooke

Crook pro Quer. Conusance lies not here. First, Because the Plaintiff is a Priviledged person here; and it is prejudicial to the King, that it should be allowed; for the King may have the benefit of what is recovered here by his Debtor, which advantage he would lose if this demand of Conusance be allowed; and it appears 2 Co. Inst. 114. & Rolls 489. that where two Priviledges Concurr, the first that Attaches shall prevail. Secondly, The Action is laid in London, and is a transitory Action; and being laid there, it shall not be altered by a demand of Conusance; no more than in the case of a County Palatine, when an Action transitory is laid elsewhere; as it was resolved, 10 Car. 1. vide 3 Hen. 6. 30. Thirdly. It does not appear, that the Conusance in question extends to this Court, for this Court is not named. Vide 8 Hen. 6. 18. And the words or other Court will not include it, after the naming of other inferious Courts: As in 2 Rep. Archbishop of Canterbury's Case: Upon the same reason it has been resolved, that a Bishop is not within the Act of 13 Eliz. of Leases made by Spiritual men. And for Authorities, he cited a case in 14 Car. 2. between Shalcrost and Wilkins: In which he said it had been adjudged so in this Court.

Holloway pro Defendente cited 9 Hen. 6. 27. and said the words aliis Justiciariis quibuscunque, did comprehend the Barons of the Exchequer. And by the same reason that Conusance should be ousted here, by the same reason all other Officers of others Courts, if sued here, should be ousted likewise of their Priviledges, Cujus contrarium est verum, as appears by dayly practice. Also by the words here licet tangat nos the King has dispensed with his Prerogative.

Object. 8 Hen. 6. 31. b.

Resp. The words here are vel alibi infrà Regnum Angliæ emergentibus.

Object. Wilkins Case.

Resp. That case went upon a particular reason; there was a Copartnership in the case. And it was declared that the University should not be prejudiced thereby. The Demand there failed by the Lacheſs of the Defendant, who did not follow it. It has been allowed in Chancery, which Court is not named in the Charter. And in 21 Eliz. In Poole's Case, upon an Information here for making Cards it was allowed, and the Defendant not compelled to Plead.

Holt

Holt pro Defendente. First, A Quo minùs is not a Writ or Bill of Priviledge, nor is it so called; as when Priviledged persons Sue in the Courts where they are Priviledged. Vide Dyer 28. 3 Leon. 223. But if the Plaintiff were an Accountant and entred upon his Account, that would alter the case, because his attendance would then be requisite, de die in diem. But a Quo minus is now but a common Action here. It appears by 38 Ass. Pl. 20. that a Quo minus did not lye unless a Debt were confess'd to the King, and then the King's Debtor had a Quo minus for the King's benefit. So it appears by 27 Hen. 6. 6. that a man in Custodiâ Marischalli had the Priviledge of the Court of King's Bench, if he were sued alibi, and might have a Supersedeas, which he cannot have now, because it is now common practise, and tho' Custod. Marischal'. is but fictitious, and not real. Vide 6 Hen. 7. 9. Conusance allowed. Nor is there any prejudice to the King, for he may have Execution elsewhere: As appears, 2 Inst. 115. And here the King has granted over the Conusance, whereby he has deprived himself of any benefit thereby. Vide 21 Ed. 3. 33. 22 Ass. 83. Bro. Conusance 25. And the words here licet tangat nos are a bar to the King: As in Moor's Rep. 126. Reg. 187. And the King's Interest being here named expressly, the Patent ought to be held as strong against him, as the Law would be for him, if he had not been named.

Chief Baron. There are three questions in this case. First, Whether the Grant extends to this Court, or not? Secondly, Whether it extend to this Action? And Thirdly, Whether the Conusance ought to be allowed here, the Action being laid in London? As for the Case of Wilkins, that has been cited, that is no President; for it was declared, that the Conusance there was not allowed, both because of the Laches of the Defendant, and upon a particular reason of Copartnership. Three sorts of Persons are Priviledged in this Court, Debtors, Officers and Accountants entred upon their Accounts. The two latter shall have their Priviledge, if they be sued elsewhere, but not the first: His Priviledge will not prevent Conusance, if the Grant extend to this Court. For a Debtor has Priviledge only for the King's benefit, which is now disused. But Conusance is not to be allowed in any case, if it appear that by allowing it there would be a failer of Justice: As when they cannot try the cause, because it is local. But if this do not appear at first, the cause shall be adjorn'd thither, and upon any Erroneous or Irregular Procedings a Resummons lieth. Et Adjornatur.

Afterwards

Afterwards in the same Term, It was argued by Mr. Sawyer pro Quer. and by Mr. Mountague pro Defendente.

Sawyer, Conusance ought not to be allowed in this cause. First, Because it appears by the Demand, that Conusance is granted to the Chancellor or his Comissary or Deputy; but the Demand here is made by the Deputy and Bayliff of the Vice-Chancellour; and so by the Deputy of a Deputy, contrary to the Grant made to the University. Secondly, The Defendant is not alledged to have been a Priviledged person, when the cause of Action accrued, but only when the Action was commenced: And perchance he was not Priviledged when the cause of Action accrued; and if so, he ought not to have it allowed. Thirdly, The Grant extends not to this Court, because not named, but only to the Courts of King's Bench, Common Pleas and other inferior Courts. Fourthly, It is not consistent with the Dignity of this Court, to be included in the words and other Courts, &c. after the naming of several inferior Courts. Fifthly, If they have Conusance of the cause, yet they cannot determin this cause, because it is laid in London: And they cannot try by Jury a cause laid there, because it is out of their Jurisdiction; and an inferior Court must upon Conusance allowed, proceed upon the same Plea and Declaration, as appears Co. Lit. 182. 4 Inst. 113. and they cannot compel the Plaintiff to declare anew.

Mountague. It is Objected, That Conusance shall not be allowed in this Court.

Resp. The case in the 2 Rep. Archbishops of Canterbury's Case, is to be intended where no Superiors are named before the General words, but Inferiors only: But without doubt, if there had been any Superiors named, the Words and all other Ecclesiastical persons, would have comprehended all. See in Co. Mag. Chart. 23. Where it is said, that Communia placita non sequantur Curiam nostram, extends to the Court of Exchequer.

Another Object. Was been made because the Action lies in London.

Resp. This does not hinder the Conusance, for the Court has Jurisdiction in all Cases, that concern Scholars or Officers; and the cause here is not to be removed, or adjourned thither to be tried there, but ought to be dismiss't here, that they may begin again there; and so are the Presidents. And the clause in their Charter is, that they may proceed as they please per Testes, according to the common or Civil Law, so that the laying of the Venue in London, does not hinder their proceedings there, because the Plaintiff must begin de novo.

It

It has been Objected, that the Vice-Chancellor is but a Deputy; and therefore cannot make a Deputy to Demand Conusance.

Resp. This is not material, for a Bayliff may properly Demand it.

A fourth Object. has been made, because the Defendant does not appear to have been a Priviledged person, at the time that the Action accrued.

Resp. He shall be intended to have been so, if the contrary appear not; and the Presidents are with us as to that.

Hale Chief Baron. It seems clearly to me that the Demand here is good, and that the University ought to have the Conusance allowed: First, Because the Patent is General. that they shall have Conusance of all Causes ubicunque, &c. in Anglia, and power to proceed as they will, according to the Common or Civil Law. But such a Patent would be void at Common-Law: Because not limited to a certain place, and because it impowers them to proceed according to the Civil-Law: But this Patent is confirmed by Act of Parliament, 13 Eliz. and that as fully, as if it had been transcribed into the Act verbatim.

Here are three things considerable. First, Whether or no the Suit here by Quo minus, be a hindrance to the Priviledge of the University? And I hold it is not, for the Priviledge of a Debtor only Entitles himself to the Court, but is no bar to any other Priviledge.

Secondly, Whether the Grant extend to this Court or not?

Resp. It does most clearly, because the Grant begins with Superior Courts, as King's Bench, Common-Pleas, and then descends to other Inferior Courts, &c. these words are sufficient to comprehend this Court, which is not Superior to the King's Bench or Common-Pleas. And by the Cases cited in 21 and 24 Eliz. it appears that this Grant extends to Causes depending in the Chancery and Exchequer, Ergo', &c.

Thirdly, Whether or no if the Plaintiff be dismist here, there will be a failer of Justice?

Resp. There will not, there was in 37 Eliz. a case betwixt Spelling and Jeffard: Where the Town of Maidstone demanded Conusance, and it was held that the laying of the Action in London did not ousse the Conusance; because the Suit here was to stay and be dismist, and the Plaintiff to proceed there ab Origine de novo.

For the better apprehension of this, it is to be known that there are three sorts of Conusance of Pleas. First, There is Tenere placita, which does not oust any other Court of Jurisdiction; but creates a concurrent Jurisdiction. The Second, is cognitio placitorum; as when a Plea is commenced here of

 which

which the Conusance belongs to another Court. Thirdly, There is a Conusance of Pleas with an Exclusive Jurisdiction, as in this case, that no other Court shall hold Plea, &c. and this is a Supersedeas to any other Court. The first is a Concurrent Jurisdiction; the Second is to be taken advantage of by Plea, and after Tryal the Cause to be Remanded: The Third is Exclusive of all others, and is a Supersedeas to them, Vide 20 Jac. B.R. in Halsley's Case, and 1 Car. B.R. where it is held, that the laying of the Action in another place is not material, because they must begin de novo.

Nor is the Objection material, that the Vice-Chancellor, and not the Chancellor demands Conusance, for the Court here is to supersede upon notice of the Patent. He concluded for the University, that the Conusance ought to be allowed. Baron Turner Accordingly; and Conusance was allowed accordingly.

Day *versus* Arundel.

(5) Upon an English Bill, to discover what Estate the Defendant claims in such Lands, and whether they be in Mortgage, and that there be a power of Redemption: The Defendant pleaded, that he was an absolute Purchaser of them for a valuable consideration, and that some years after a Fine was levied to him of them, and that he had no notice of the Plaintiffs Title: And the Court held this to be a good Plea, without shewing at what time, or for what consideration in particular; and the Chief Baron said, that so it had been ruled in Sherley and Fagg's Case lately in Chancery.

Goddin *versus* Wainwright.

(6) A Prohibiton was pray'd to the Spiritual Court, to stay proceedings upon a Libel grounded upon a Custom, that the Constable of the Town, should Collect the Rates assessed for Repairs of the Church, which the Constable refused to do: The reason offered for a Prohibition was, because it was not Tryable there whether the party were Constable or not, and duly elected or not? But the Court denied to Grant a Prohibition, because this matter is pleadable there; and a Prohibition lies not, unless upon Tryal of it there, their Law and proceedings cross the Common-Law; and in that case a Prohibition lies only till Tryal here, and after that a Consultation shall be granted. As when a Release is pleaded there; this is no cause for a Prohibition, unless they proceed in the tryal of it, contrary to the course of the Common Law.

DE

De Termino Sanctæ Trinitatis, Anno 21 *Car.* II. Regis.

In Scaccario.

Martin *versus* Verdew.

UPon an Information tam quam, grounded on the Act of Navigation, for importing Goods in a Foreign Ship, contrary to that Act; the Question was, Whether or no, if a Foreign Ship, Naturalized by the New Act, being a Prize taken in the late War with Holland, be afterwards sold to a Foreigner, who sells her again to an English-man? Whether or no now the Oath must be taken again according to the New Act? And adjudged, that it needs not, because the Ship was once lawfully Naturalized. (1)

Sir Nicholas Wolstan *versus* Aston.

UPon a Plea to a Bill in Equity, the case appeared to be thus; viz. A man upon marriage Covenanted to pay his Wife 1000 l. within two years after his death, and for performance thereof entred into a Statute; but before this Covenant and Statute he had mortgaged part of his Land for 500 l. for certain years: Afterwards he devised these Lands to his Wife, and her Heirs, if the 1000 l. were not paid to her according to the Marriage-Covenant, she paying off the said 500 l. He died, and made his Wife Executrix, to whose hands Assets came; the 1000 l. was not paid to the Wife, she paid off the 500 l. and had the mortgaged Lands assigned to her; She then Convey'd over the mortgaged Land in Fee by Fine, and died; and now the Question was, Whether or no the Heir of the Covenantor could redeem, paying the 1000 l. and the 500 l. with Interest upon discount of Profits? (2)

The Chief Baron was of Opinion, that the Devise to the Feme was absolute, if the 1000 l. were not paid, which deprives the Heir of the Covenantor of any Right of Redemption: But if that were otherwise, yet he thought the Fine with Proclamations, according to the Statute of 4 Hen. 7. would bar an Equitable power of Redemption, as well as a Right of Action. So a Fine and Non-claim will bar a Trust, if levied by a Stranger, and not by the Trustee himself; for then the Trust will go along with the Land: But a Fine levied by a Mortgagee will not bar an Equity of Redemption; and so it has been often Adjudged. He said also, that it had been often Adjudged, That if an Executor had Assets, he is compellable to redeem Mortgages for the benefit of the Heir: So if an Heir be charged in Debt, where the Executor has Assets, the Heir may compel the Executor in Equity to pay the Debt; but a Creditor may Sue either of them, and shall have the benefit of his Security. Et Adjornatur.

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An Abbot has a *Mill* within the King's Mannor, which comes to the Crown by the dissolution of Monasteries; and the Inhabitants had been bound by Custom to grind their Corn there, &c. p.21

A Mannor was held of the King in Fee-farm, in which there was a Custom, that the Tenants, &c. should grind their Corn, &c. at the Lord's Mill. The Defendants erected a Mill out of the Mannor, near to the said Mill: And to have this Mill out of the Mannor demolished, was the drift of the Bill; but it was dismist, p.174,175

Vide p.184,185.

Vide several Resolutions concerning the King's Mills, p.177

Monopoly.

King *Charles* the First by Letters Patents, bearing Date the 22 of *May* 1673, Ordain'd, there should be in *England* and *Wales* one Society or Body Corporate of Soap-Makers, &c. and that none, not free of that Society, should use that Trade, on pain to forfeit all the Soap they should make. Whether this were a good Charter, or a Monopoly, within

within the Statute of 21 *Jac. cap.* 3.? p.53,54,&c.

Vide p.353,&c.

N

Non-obstante.

THe Lord *Brudnel* was a Recusant-Convict. The Earl of *Westmerland* took a Lease of the King, of 2 parts of his Estate in Trust for the Recusant, with a *Non-obstante* of the Stat. of *Jac.* Whether or no the King could dispense with that Law? p.110

King *Hen.* 8. granted a Mannor, with the Appurtenances; *quæ omnia* are of such a yearly value as is expressed in such a particular, with a *Non-obstante* of any Misrecital of the true value; and indeed the Value was not truly expressed in the Particular: The Grant is good, p.231

Letters Patents granted by Queen *Elizabeth*, to the Citizens of *London*, That Free-men and Free-mens Widows and their Husbands, may sell Wine in their Houses, notwithstanding the Statute of *Edw.*6. Whether this Dispensation be good or not? and whether not taken away by 12 *Car.* 2.? p. 443, &c.

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The Statute of 4 *H.*4. *cap.* 23. does not extend to the Case of a *Nolle prosequi*, p.126

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Nusance.

To a Ferry, p.162,163

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A Serjeant at Arms, by virtue of an Order of the House of Commons, takes a Person into Custody, whom they had Voted guilty of High Treason; and lets him go again upon another person's entring into Bond for his Appearance. Whether such Bond be good, or void in Law? p.464,465

Office.

By Writ directed to the Escheator of *Surry*, *C. W.* is found to be the Queen's Ward, by reason of a House descended to him in *Southwark*, which was held *in Capite*; whereas the Mayor of *London* for the time being, is Escheator in *Southwark*, by Patent. Whether this be a good Office to Entitle the King? p.10,11,12,&c.

Offices and Officers.

The City of *London* made a Lease of the Office of Garbler to *Hatton* for 31 years, rendring 300 *l. per Annum*, the Lease to be void for Non-payment, and to be executed by him, his Deputies or Assigns. The Rent not being paid, the City makes a Grant of the same Office to another for 3 years. The Question is, Whether of these two have the better Title to the Office, and Execution thereof, upon these two Grants; and whether this Office be grantable for years? And if not, whether the

the Lease for 3 years be not a good Appointment within the Statute of 21 *Jac.* tho' it may be void, as a Grant? p. 46, 47, &c.

The Grant of an Office to an Unskilful person, is void, p. 130

Whether the Office of the Registership of Policies of Assurance, be an Office grantable for years, or not? p. 351, 352, &c.

Whether the Office of one of the Tellers in the *Exchequer*, can be assigned? Whether an Assignment made by one who is not Admitted, be good? The Office being granted for Life, with a *Proviso*, that the Grantee shall not intermeddle therein, before he has given Security with Sureties before the Lord Treasurer; the Grantee, before admittance or Security given, assigns it over; Whether this Assignment be a Forfeiture of the Office, within the *Proviso*? If it be, whether a *Scire facias*, or finding an Office be requisite, to enable the King to take advantage of the Forfeiture? Whether a Special Verdict do not supply the want of an Office, p. 424, 425, 426, &c.

The Office of Controller of the Pipe Surrendred in Court and another admitted, without Writing, only an Entry made of it in Court, p. 476

Outlawry.

Exceptions to the return of an Outlawry. 1. Because the Out lawry is recited, to have issued at the Feast of the Conversion of S. *Paul*, 1653. without saying in what year of our Lord Christ 2. Because the Vill in which the Land lay, is not found to be in any County. 3. Because the value of every particular parcel of Land is not found; but by the Lump, p. 6, 7

Execeptions to an Inquisition upon an Outlawry. 1. Because the Writ, upon which the Inquisition was taken, Recites the Outlawry to have been 18 *Car.* and does not say of the Reign of the King. 2. A Lease is found at the time of the Outlawry, but not at the time of the Inquisition. 3. The beginning and end of the Term are not found. 4. The Lease was for 60 years, if such a one so long live; and the Life of the *Cestuy que vie* is averred; but no place, p. 58, 59

In an Inquisition upon an Outlawry, the Jury find a Seizin in Fee of a Messuage, and of several pieces and parcels of Land in *T.* in the Occupation of such and such, and found the value: They find likewise a Seizin in Fee of 2 Marshes in *T.* by particular Names, and their values and in whose Occupation. *Cory* and others appear'd, as *Terre-Tenants* and Demurred. The Inquisition held to be certain enough as to the Marshes, and that an Inquision may be good in part, and void for the remnant, as where several values are found, and that here was a good *Terre-Tenant*, tho' the Land was only found to be in his Occupation, and that they might joyn in Demurrer, tho' their Occupations where several, p. 59

A Plea to an Inquision taken upon an Outlawry; to which the Attorny General Demurred, divers Execeptions debated, p. 75, 76, 77

A Lease or other Estate made by a person Outlawed, after Outlawry and before Inquisition taken, will prevent the King's Title, if it be made *bone fide*

and upon good consideration, p.101

A Lessee of an Estate upon an Outlawry shall be compelled to account for the Profits, which he might have received, with a Creditor of the person Outlawed, who has an interest in the same Lands by Extent, p.106

Such a Lessee can Levy no more than the extended value *ibid.*

It was found by Inquisition upon an Outlawry, that the party Outlawed was seized in Fee *de sex clausis prati & pasturæ.* p. 191

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FOR Cases arising upon the Act of General Pardon made 12 *Car.* 2. and what things are Pardoned thereby, and what not, *V.* p. 185, 186, *&c.* 189, 191, 192, 204, 217, 219, 229, 324, 335, 366, 367, *&c.* 371, 372, *&c.* 374, 378, 421, 424, 440, 441, *&c.*

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A Pension by Prescription may be recovered at Law, or in the *Spiritual Court*, p.230

All Pensions reserved to the King, or granted to him out of Lands, are in the nature of Rents, and Tryable here, and lyable to be extinguished by unity of Possession; but such as are reserved to the King, or vested in him by the Act of 26 *H.* 8. *cap.* 3. are Collateral to the Land, and not lost by Unity, p.388

Plea.

De Injuria sua propriâ, p. 6

Pleading.

Vide p. 9, 10.

A Contradiction to the Declaration in a part not material, does not vitiate a Replication or Verdict, p. 42, 43

A Breach of Covenant is assigned in this; *viz.* that the Plaintiff could not take Possession of the Premisses, by reason of the Lett, Hindrance, Trouble, Disturbance and Demand of, &c. and it is not shewn how this Lett Hindrance, Trouble and Disturbance was, p.132, &c.

An Annuity is devised by Will to a *Feme Covert* for Life; who dies: The Husband brings an Action of Debt upon the Stat. of 32 *H.* 8. for the Arrearages against the Administrator of the *Terre-Tenant.* To which the Defendant pleaded *nil detinet.* Whether that be a good Plea or not, p. 332, 333

A Declaration was of several Messuages, in the several Parishes of S. *Mich.* S. *James*, St. *Peter* and S. *Paul*, part of the Premisses lay in the Parish of S. *Peter* and S. *Paul*; but there is no Parish called the Parish of S. *Peter*, nor called the Parish of S. *Paul.* Yet *per Cur'* the Copulative

tive (*Et*) shall be referr'd to that which is real: *Ut res magis valeat*; not to make S. *Peter*'s one Parish, and S. *Paul's* another; but to make them both one Parish, p. 336

To a *Scire Facias*, the Defendant pleads the Act of Oblivion, the Attorny General replied to make them lyable by vertue of the New Act of 13 *Car.* 2. *c.* 13. and assigned a Breach; but *per Cur'* that needs not, because a Breach is admitted by pleading the Pardon, p. 377

In Transf. quare clausum fregit, the Defendant justified, because he said he had a Right of Fishing there by Prescription, but does not say what kind of Fishery he claimed; and for that cause the Plea was held naught, p. 407

In Debt upon a Bond the Defendant pleads, that there was a corrupt agreement, &c. and Avers, that the Bond was entred into by Covin, to evade the Statute of Usury; and *per Cur'* the Averment is Traversable, p. 418

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Sir . . . . *H.* acknowledged 2 Judgments in Debt to one *Andr.* upon Bond, and was Bound to one *Fielder* in a Bond bearing Date before the Judgments. *Fielder* Assigns his Debt to the King. *Andrew* takes out Execution upon his Judgments. Whether or no, shall the King be preferr'd in this Case, p. 23, 24, 25, *&c.*

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A Merchant, in several Vessels laden at the same time at *Amsterdam*, Imported into the same Port here 10 Tons and more of Sack and Rhenish Wines: Whether Prisage be due or not, as for Wines imported in parcels, to defraud the King of his Duty? p.218

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It is the usual Custom of the Court in Equity, to cause single Prisage to be paid for nine Ton and an half, and double Prisage for 19 Ton, p.477

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A Prohibition upon an Excommunication, for not answering upon Oath to Articles exhibited against him, and for not taking the Oath of a Churchwarden, &c. p.364

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A Power reſerved upon a Settlement, to make a Leaſe for 31 years, to commence after the Death of the party: Whether this Power be deſtroy'd by his making a Bargain and Sale in Fee-ſimple in Truſt to perſons, who after convey'd to him by Feoffment? p. 410, 411, 412, &c.

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Que Eſtate.

IN a Plea to an Inquiſition upon an Extent, for a Debt aſſigned by Sir *Geo. D.* the Defendant did not plead as Terre-Tenant; but pleaded, that long before, &c. a Stranger was ſeized in Fee of the Lands ſeized, and by Leaſe and Releaſe convey'd to another in Fee, *Que Eſtate* the Defendant had, and traverſed the King's Title: To which the Attorny General demurr'd, p. 451, 552, &c.

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A. is named a Defendant in a Bill in Equity, but not served; and is afterward mentioned in the Decretal Order, and in another Order afterwards for Costs: And Costs being taxed him as a Defendant, he Released to the Plaintiff, p.183

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Sureties.

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Where a Vicar hath used time out of mind, or a long time, to take Tithes or other Profits, he shall not be concluded by their not being express'd in the Endowment of the Vicarage, p. 328, 329
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AN Information sets forth, that at *Gravesend* in the County of *Kent*, upon such a day, and in such a Vessel then and there Riding, such a person seized 206 *l.* and 4 s. in Gold, from certain persons unknown, then and there passing or upon their passage, in a certain Ship from *Ratcliff* in the County of *Middlesex*, to parts beyond the Seas. Upon Issue joyned between the Protector and him that claimed property, that no such Gold was found, a *Venire Facias* was awarded from *Ratcliff*, and held to be misawarded, p. 16,17,18
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FINIS.