REPORTS
OF
Certain Caſes,
ARISING
In the ſeverall Courts
OF
RECORD
at WESTMINSTER;

In the Raignes of Q. *Elizabeth*, K. *James*, and the late King CHARLES.

With the Reſolutions of the Judges of the ſaid Courts, upon Debate and ſolemn Arguments.

Collected by very good Hands, and lately Re-viewed, Examined, and Approved of by the late Learned Juſtice *GODBOLT*.

And now Publiſhed by W: HUGHES *of* GRAYS-INNE *Eſquire.*

With two TABLES, one of the *Caſes*, the other of the *Principall Matter* therein contain'd.

Quid juvat Humanos ſcire & cognoſcere Caſus,
Si fugienda facis, & facienda fugis.

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Mich.

Mich.17. Eliz. In the Kings Bench.

1.

THis Caſe was moved to the Court. If an Abby hath a Parſonage appropriate in *D.* which is diſcharged of payment of Tithes, and afterward the Abbot purchaſeth part of the lands in the ſame Town and Pariſh where the Parſonage is: That this land ſo purchaſed is diſcharged of Tithes in the hands of the Abbot; For the Tithes were ſuſpended, during the poſſeſſion of the Abbot, in his own hands. But after that, the Abby was ſurrendred into the hands of the King, Anno 30. *H.* 8. And afterwards the ſame poſſeſſions &c. were given to King *H.* 8. by the Statute of 31. *H.* 8. cap. 13. as they were in the hands of the Abbot. The queſtion was, Whether the Land ſo purchaſed by the Abbot before the ſurrender, were diſcharged of payment of Tithes by the Statute, or not. And the opinion of Mr. *Plowden* was, That they were not diſcharged of Tithes by the Statute: For that no lands are diſcharged by the Statute, but ſuch lands as were lawfully diſcharged in right, by compoſition, or other lawfull thing. And the lands in this caſe were not diſcharged in right, but ſuſpended during the poſſeſſion of the Abbot, in his own hands. And ſo hee ſaid it is, when the Land is purchaſed by one, and the Parſonage by another, the right of Tithes is revived, and the lands charged as before the purchaſe of the Abbot. And ſo, he ſaid, it had been adjudged.

Paſc. 17. Eliz. In the Common Pleas.

2.

A Man makes a Leaſe for Life, and afterwards makes a Leaſe unto another for Years, to begin after the death of Tenant for life; The Leſſee for yeers dieth inteſtate; The Ordinary commits Adminiſtration;

niſtration; The Adminiſtrators and the Tenant for life joyn in the purchaſe of the Fee-ſimple: Two queſtions were moved; The firſt was, Whether the Fee were executed in the Tenant for life for any part? 2. Whether the Term were gone in part, or in all? And the opinion of the Juſtices was, That the Fee was executed for a moitie. *Manwood.* If the Land be to one for life, the Remainder for yeers, the Remainder to the firſt Tenant for life in Fee, there the Fee is executed; ſo as if he loſe by default, he ſhall have a Writ of Right, and not *Quod ei deforceat*; for the term ſhall be no impediment that the Fee ſhall not be executed: As a man may make a leaſe to begin after his death, it is good, and the Leſſor hath Fee in poſſeſſion, and his wife ſhall be endowed after the Leaſe. And I conceive, in the principall caſe, That the term ſhall not be extinct; for that it is not a term, but *intereſſe termini*, which cannot be granted nor ſurrendred: *Mounſon.* If he had had the term in his own right, then by the purchaſe of the Fee, the Term ſhould be extinct. But here he hath it in the right of another as Adminiſtrator. *Dyer.* If an Executor hath a term, and purchaſeth the Fee, the term is determined: So, if a woman hath a term, and takes an husband who purchaſeth the Fee, the term is extinct. *Manwood.* The Law may be ſo in ſuch caſe, becauſe the Husband hath done an act which deſtroyes the term, viz. the purchaſe. But if the woman had entermarried with him in the Reverſion, there the term ſhould not be extinguiſhed; for the Husband hath not done any act to deſtroy the term; But the marriage is the act of Law. *Dyer.* That difference hath ſome colour. But I conceive, in the firſt caſe, That they are Tenants in common of the Fee. *Manwood.* The Caſe is a good point in law. But I conceive the opinion of *Manwood* was, That if a Leaſe for yeares were to begin after the death, ſurrender, forfeiture or determination of the firſt leaſe for yeares, that it ſhall not begin in that part, for then perhaps the term in that part ſhall be ended, before the other ſhould begin.

Paſc. 20 *Eliz. in the Common Pleas.*

3.

A Man ſeiſed of Copyhold land deſcendable to the youngeſt Son by Cuſtome; and of other Lands deſcendable to the eldeſt Son by the common Law; leaſeth both for yeers: The Leſſee covenanteth, That if the Leſſor, his wife and his heirs will have back the land, That then upon a yeers warning given by the Leſſor, his wife or his heirs, that the Leaſe ſhall be void. The Leſſor dieth; the Reverſi-

on

on of the cuſtomary Land deſcends to the younger ſon, and the other to the eldeſt, who granteth it to the younger ; and he gives a yeers warning according to the Covenant. *Fenner.* The intereſt of the term is not determined, becauſe a ſpeciall heir, as the youngeſt ſon is, is not comprehended under the word [Heir ;] but the heir at common Law, is the perſon who is to give the warning to avoid the eſtate by the meaning of the Covenant. But *Manwood* and *Mounſon*, Juſtices, were cleer of opinion, That the intereſt of the term for a moity is avoyded ; for the Condition, although it be an entire thing, by the Deſcent, which is the act of Law, is divided and apportioned; and the warning of any of them ſhall defeat the eſtate for a moity, becauſe to him the moity of the Condition doth belong : But for the other moity, he ſhall not take advantage by the warning, becauſe that the warning is by the words of the Condition appointed to be done by the Leſſor, his wife, or his heirs : And in that clauſe of the Deed the Aſſignee is not contained. And they agreed, That if a Feoffment of lands in Borough-Engliſh be made upon condition, That the heir at common Law ſhall take advantage of it. And *Manwood* ſaid, that hee would put another queſtion, Whether the younger ſon ſhould enter upon him or not? But all Actions in right of the Land, the younger ſon ſhould have ; as a Writ of Error to reverſe a Judgment, Attaint, and the like. *quod nota.*

Paſc. 22 *Eliz. in the Common Pleas.*

4

IT was holden by *Meade* and *Windham*, Juſtices of the Common Pleas, That a Parſonage may be a Mannor : As, if before the Statute of *Quia emptores terrarum*, the Parſon, with the Patron and Ordinary, grant parcel of the Glebe to divers perſons, to hold of the Parſon by divers Services, the ſame makes the Parſonage a Manor. Alſo they held, That a Rent-Charge by preſcription, might be parcel of a Manor, and ſhall paſſe without the words *cum pertinentiis*. As, if two Coparceners be of a Manor and other Lands, and they make partition, by which the eldeſt ſiſter hath the Manor, and the other hath the other Lands ; and ſhe who hath the Lands grants a Rent-charge to her ſiſter who hath the Manor, for equality of partition. *Anderſon* and *Fenner* Srjeants, were againſt it.

Hill. 23 *Eliz. In the Common Pleas.*

5.

THis Caſe was moved by Serjeant *Periam*; That if a Parſon hath Common appendant to his Parſonage, out of the lands of an Abby, and afterwards the Abbot hath the Parſonage appropriated to him and his Succeſſors: Whether the Common be extinct? *Dyer*, That it is: Becauſe he hath as high an eſtate in the Common as he hath in the Land. As in the caſe of 2 *H.* 4. 19. where it is holden, That if a Prior hath an Annuity out of a Parſonage, and afterwards purchaſeth the Advowſon, and then obtains an Appropriation thereof, that the Annuity is extinct. But *Windham* and *Meade* Juſtices, conceived, That the Abbot hath not as perdurable eſtate in the one as in the other; for the Parſonage may be diſappropriated, and then the Parſon ſhall have the Common again. As if a man hath a Seignorie in fee, and afterwards Lands deſcend to him on the part of the Mother; in that caſe the Seignory is not extinguiſhed, but ſuſpended: For if the Lord to whom the Land deſcends dies without iſſue, the Seignorie ſhall go to the heir on the part of the Father, and the Tenancy to the heir on the part of the Mother; And yet the Father had as high an eſtate in the Tenancy as in the Seignory. And in 21 *E.* 3. 2. Where an Aſſize of Nuſance was brought for ſtraightning of a way which the plaintif ought to have to his Mill: The defendant did alledg unity of poſſeſſion of the Land, and of the Mill in W. and demanded Judgment, if &c. The plaintif ſaid, that after that, W. had two daughters, and died ſeiſed; and the Mill was allotted to one of them in partition, and the Land to the other, and the way was reſerved to her who had the Mill: And the Aſſize was awarded. And ſo by the partition the way was revived, and appendant as it was before: and yet W. the Father had as high an eſtate in the Land, as he had in the Way.

Hill. 23 *Eliz. In the Common Pleas.*

6.

A Man makes a Feoffment in Fee of a Manor, to the uſe of himſelf and his Wife, and his heirs: In which Manor there are Underwoods uſually to be cut every one and twenty yeers; and afterward the Husband ſuffers the wood to grow five and twenty yeers, and afterwards hee dieth. The queſtion was, Whether the Wife, being

being Tenant for life, might cut that Underwood? And it was moved, What ſhall be ſaid ſeaſonable Underwood, that a Termor or Tenant for life might cut? *Dyer* Chief Juſtice, and all the other Juſtices held, That a Termor or Tenant for life, might cut all Underwood which had been uſually cut within twenty yeers. In 11. *H.* 6. 1. Iſſue was taken, If they were of the age of twenty yeers, or no. But in the Wood-Countries they may fell ſeaſonable wood which is called *Sylva cædua*, at ſix and twenty, eight and twenty, thirty years, by the cuſtome of the Country. And ſo the Uſage makes the Law in ſeverall Countries. And ſo it is holden in the books of 11. *H.* 6. and 4. *E.* 6. But they agreed, That the cutting of Oakes of the age of eight yeers, or ten years, is Waſte. But by *Meade* Juſtice, the cutting of Hornbeams, Haſels, Willows, or Sallows of the age of forty yeares, is no Waſte, becauſe at no time they will be Timber. Another queſtion which was moved was, That at the time of the Feoffment it was ſeaſonable Wood, and but of the growth of fourteen or fifteen yeers: If this ſuffering of the Husband of it to grow to 25 years, during the Coverture, ſhould bind the Wife, ſo as ſhe cannot cut the Woods. *Gaudy* Serjeant ſaid, That it ſhould not bind the Wife; For if a Warranty deſcend upon a Feme Covert, it ſhall not bind her. So if a man ſeized of Land in the Right of his Wife be diſſeiſed, and a Deſcent be caſt during the Coverture, it ſhall not bind the Wife, but that ſhe may enter after the death of the Husband: But by *Dyer* Chief Juſtice, and all the other Juſtices, This Permiſſion of the Husband ſhall bind the Wife, notwithſtanding the Coverture; for that the time is limited by the Law, which cannot be altered, if it be not the cuſtome of the Country. As in the caſe of 17. *E.* 3. Where a man makes a Leaſe for years, and grants that the Leſſee ſhall have as great commoditie of the Land as hee might have. Notwithſtanding theſe words, he cannot dig the land for a Mine of Cole or Stone; becauſe that the Law forbids him to dig the land. So in the principall Caſe, The Wife cannot fell the Wood, notwithſtanding that at the time of her eſtate ſhe might; and afterwards by the permiſſion of the Husband, during the coverture; the time is incurred, ſo as ſhe cannot fell it, becauſe the Law doth appoint a time, which if it be not felled before ſuch time, that it ſhall not be felled by a Termor, or a Tenant for life, but it ſhall be Waſte.

Hill. 23. *Eliz.* *In the Common Pleas.*

7.

A Man makes a Leaſe of a Garden, containing three Roodes of Land, and the Leſſee is ouſted, and he brings an *Ejectione firme*, and declares that he was ejected of three Roods of Land; *Rodes* Serjeant, moved, That by this Declaration it ſhall be intended, that he was ejected of the Garden, of which the Leaſe was made, and ſo the *Ejectione firme* would lie. And it was holden by the Lord Chief Juſtice *Dyer*, That a Garden is a thing which ought to be demanded by the ſame name in all *Precipes*; as the Regiſter and *Fitz.N.Brevium* is. And this Action is greater then an Action of Treſpaſſe, becauſe by Recovery in this Action, he ſhall be put into Poſſeſſion. But *Meade* and *Windham* Juſtices, contrary: And they agreed, that in all reall Actions, a Garden ſhall be demanded by the name *Gardinum*; otherwiſe not. But this Action of *Ejectione firme* is in the nature of Treſpaſſe; and it is in the Election of the Party to declare, as here he doth; or for to declare of the Ejectment of a Garden; for a Garden may be uſed at one time for a Garden; and at another time be ploughed and ſowed with Corn. But they conceived that the better order of pleading had been, if he had declared that he was ejected of a Garden containing three Roodes of Land, as in the Leaſe it is ſpecified.

Hill. 23 *Eliz.* *In the Common Pleas.*

8.

SErgeant *Fenner* moved this caſe. That Land is given to the Wife in tail for her Joynture, according to the Statute of 11. *H.*7. The Husband dieth, the Wife accepts a fine, *Sur conuſans de droit come ceo, &c.* of a Stranger: And by the ſame fine grants and renders the Land to him for an Hundred years; whether this acceptance of a Fine and Render by the Wife were a forfeiture of her eſtate, ſo as he in the Reverſion or Remainder might enter by the Statute. *Mead* and *Dyer* Juſtices; it is a forfeiture, and *Mead* reſembled it to the Caſe in 1 *H.*7.12. where it is holden, That if Tenant for life do accept of a Fine *Sur conuſans de droit come ceo, &c.* that it is a forfeiture, and the Leſſor may enter. But *Fenner* asked their opinions, what they thought of the principall caſe, But *hæſitaverunt*, becauſe they

they ſaid it was a dangerous caſe, and is done to defraud the Statute of 11. *H.*7.

Paſch. 23. *Eliz. in the Common Pleas.*

9.

A Man made a Feoffment in Fee to two, to the uſe of himſelf and his wife, for the term of their lives, without impeachment of waſte during the life of the Husband; the remainder after their deceaſe to the uſe of *I.* his ſon, for the term of his life. And further by the ſame Deed, *Vult & concedit*, that after their three lives, viz. of the Husband, Wife, and Son, that *I. S.* and *I. D.* two other Feoffees, ſhall be ſeized of the ſame Land, to them, and their heirs, to the uſe of the right Heirs of the body of the Son begotten. It was moved, That by this deed, the two later Feoffees ſhould be ſeized to the uſe of the right Heirs of the body of the Son begotten, after the death of the Husband, Wife, and the Son. But it was holden by all the Juſtices, That the ſecond Feoffees had not the Fee, becauſe by the firſt part of the Deed, the Fee-Simple was given to the firſt Feoffees; and one Fee-Simple cannot depend upon another Fee-Simple: Notwithſtanding, that after the determination of the former uſes for life, the Fee-Simple ſhould be veſted again in the Heires of the Feoffer; and that the words, That the ſecond Feoffees ſhould be ſeized, ſhould be void. But *Dyer* Chief Juſtice, and the other Juſtices, were againſt that, becauſe there wanted apt words to raiſe the later uſe: As if a man bargain, and ſell his Reverſion of Tenant for Life, by words of Bargain and Sale only, and the Deed is not Enrolled within the ſix months, but afterwards the Tenant for Life doth attorne, yet notwithſtanding that, the Reverſion ſhall not paſſe, becauſe [Bargain and Sell] are not apt words to make a Grant: And that Caſe was ſo adjudged in the Common Pleas as the Lord *Dyer* ſaid. So in the principall Caſe, and therefore the later Uſe was utterly void, and ſhall not be raiſed by intendment. But otherwiſe it had been, if it had been by deviſe.

Paſch. 23. *Eliz. in the Common Pleas.*

10.

IT was holden by all the Juſtices of the Common Pleas, That the Queen might be put out of her Poſſeſſion of an *Advowſon* by two Uſurpati-

Uſurpations; And ſhe ſhall be put to her Writ of Right of Advowſon, as a common perſon ſhall be, becauſe it is a tranſitory thing; and that the Grant of that Advowſon made by the Queen after the two Uſurpations, ſhould be void; and that was ſo adjudged upon a demurrer in the point. And ſo it is holden in 47 *E.*3.4.*b.*

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*Pſch.*23. *Eliz. in the Common Pleas.*

II.

AN Indenture of Covenant was made betwixt *I. S.* and *I. D.* in which *I. S.* did Covenant to Enfeoffe *I. D.* of his Manor of *D.* In conſideration of which, *I. D.* by the ſame Indenture, did Covenant with the ſaid *I. S.* to pay him 100 li. The Queſtion is, If *I. S.* will not make the Feoffment, whether *I. D.* be bound to pay the money? It was holden by the Lord *Dyer* Chief Juſtice, and Juſtice *Mead*, That he is not, becauſe the money is Covenanted to be paid Executory to have the Feoffment made; and therefore if he will not make the Feoffment, he ſhall not have the money. As if I Covenant with one, That I will marry his Daughter; and he Covenants with me, That for the ſame cauſe, he will make an Eſtate to me and his Daughter, and to the Heirs of our two bodies begotten, of his Manor of *D*; he ſhall not make it untill we are married. But if I Covenant with a man, That I will marry his Daughter; and he Covenants with me, To make an Eſtate to me and his Daughter; if I marry another woman, or if the Daughter marryeth another man, yet I ſhall have an Action of Covenant to compell him to make the Eſtate, becauſe in this later Caſe, the Covenant was made for another Cauſe. And this difference was ſo taken by the whole Court, 15 *H.*7.10. So if *A.* grant to *B.* all the ancient Pale, and for that, *B.* grants, That he will make a new Pale; it is holden in 15. E.4.4. by *Cateſby*, and affirmed by *Littleton*, That if *B.* cannot have the ancient Pale, that he ſhall be excuſed from making the new Pale. But if two things are given by two Perſons, one for the other, there if one of them detain the one, the other cannot detain the other, as is 9 E.4. 20. and 15 E.4.2. It is holden, That if one grant Tithes in Fee, by one Deed, and by the ſame Deed, for the ſame Grant, the Grantee grant to the ſame Perſon an Annuity of 20 li; That if the Grantor of the Tithes, enter into the Tithes, yet the Grantee cannot detaine the Annuity, becauſe the grant of the Tithes is executed in him, and he may have an Action for them, if the other enter upon them. But in the principall Caſe; The Covenant was but Executory for the other, and then if one be not performed, the other ſhall never be performed:

Windham

Windham and *Periam* Juſtices, conceived the contrary: and therefore the caſe was adjourned, and a demurrer in law upon it.

Paſch. 23 *Eliz. in the Common Pleas.*

12.

TEnant in taile, the Remainder in Fee; the Tenant in taile makes a Leaſe for life according to the Statute of 32 *H.* 8. and afterwards dieth without iſſue: and before any entrie, he in the remainder grants his Remainder by Fine: Whether the Conuſee of the Fine may enter upon the Tenant for life, and avoid his Leaſe, was the queſtion. *Fenner* Serjeant, Hee cannot: becauſe when a Free-hold is given by Livery, it cannot be defeated without Entrie, As, If a Parſon make a Leaſe for life, rendring rent, and dieth, and his ſucceſſor accept the rent, the leaſe is affirmed, as it is holden in 11. *E.* 3. and 18. *E.* 4. The Caſe was, That a man made a Leaſe for life, the remainder in Fee; Tenant for life granted over his eſtate: and then a *Formedon* was brought againſt the Grantee, and then the firſt Tenant for life died: And by all the Juſtices (except *Littleton*, and divers Serjeants) the Writ ſhall not abate, if he in the Remainder hath not entred. So in the principall caſe, When he had made a Leaſe for life, and afterwards died without iſſue, living the Tenant for life,; his eſtate is not defeated before entrie of him in the Remainder: And then, when before entrie, he in the Remainder grants his Remainder, the Grantee ſhall have it but as a Remainder; for ſo is his grant: and ſo the eſtate of Tenant for life which was but voidable, is made good: And ſo was it holden by *Windham* and *Periam*, Juſtices: but *Meade*, and *Dyer* Chief Juſtice did conceive, that by the death of Tenant in taile without iſſue, his Leaſe made to him for life, was void, and not voidable; becauſe by the death of Tenant in tail, his eſtate, out of which the eſtate of the Tenant for life was derived, is determined; and therefore the eſtate for life is determined alſo; *Et ceſſante cauſâ, ceſſat effectus.* And *Meade* compared it to the Caſe of 21. *H.* 7. 12. where it was holden, That if a man do make a Leaſe for life upon condition, that if he pay unto the Leſſee ten pounds at ſuch a day, that his eſtate ſhall ceaſe. Now by the performance of the Condition, the eſtate is determined without entrie.

Mich. 24. Eliz. In the Common Pleas.

13. Poles Caſe.

Thomas Pole one of the Clerks of the Chancery, married a woman who was Executrix to her Husband: and in an Action of Debt brought againſt them in the Common Pleas, the ſaid *Pole* brought a writ of Priviledg, to have removed the ſaid Action into the Chancery: And by all the Juſtices the Writ was diſallowed, and the defendants ruled to anſwer there, becauſe the Wife was joyned in the Action with the Husband; and ſhe could not have the priviledg, and therefore not the Husband. And ſo it is adjudged by the whole Court, 34. *H.* 6. 29. and 35. *H.* 6. 3. But ſee 27. *H.* 8. 20. where the caſe was, That a man brought an Action in the Common Pleas againſt Husband, and at the *pluries* returned, he and his Wife were arreſted into an inferiour Court *veniendo* to *Weſtminſter*; and becauſe the Husband hath priviledg, therefore his Wife ſhall be in the ſame condition. But *Dyer* ſaid, That the reaſon there was, becauſe the Wife came in aid of her Husband to follow his ſuit: And therefore it is not like the principall Caſe at the Bar.

Mich. 24. Eliz. in the Common Pleas.

14.

IN Debt upon a Bond of Forty pound, for the Payment of Twenty pound at a Day and Place certain: The Defendant pleaded, That he had paid the ſaid Twenty pound, according to the Condition, upon which they are at Iſſue; and at the *Niſi Prius*, the Defendant gave in Evidence, That he had paid the Money to the Plaintiff before the day, and that the Plaintiff had accepted of it; all which Matter the Jury found ſpecially, and referred the ſame to the Juſtices: And it was ſaid by the whole Court, That that payment before the day was a ſufficient Diſcharge of the Bond; but becauſe the Defendant had not pleaded the ſame Specially, but Generally, that he had paid the Money according to the Condition; the Opinion was, That they muſt find againſt the Defendant, for that the Speciall Matter would not prove the Iſſue: and the Lord *Dyer* Chief Juſtice ſaid, That the Plaintiffs Councel might have demurred upon the Evidence.

Mich. 24. *Eliz. in the Common Pleas.*

15

AN Action was brought upon the Statute of 1 & 2 *Phil. & Mar.* And the Statute is, That no Diſtreſſe ſhall be driven out of the Rape, Hundred, Wapentake or Laith, where ſuch diſtreſſe is, or ſhall be taken, except it be to the *Pound Overt* within the ſaid County, not exceeding three Miles diſtant from the place where the Diſtreſſe was taken; and the Plaintiff declared of a Diſtreſſe taken in a Hundred, in ſuch a County, and that he drove it ſix miles out of the County; and becauſe a Hundred may be in diverſe Counties, and the Statute is, That the driving ought not be more then 3 miles out of the Hundred; and that it might be that the driving was ſix miles from the place where the Diſtreſſe was taken in another County, and yet not three miles from the Hundred where the taking was, for that Cauſe it was not adjudged againſt the party; And that was after Verdict, in arreſt of Judgment.

Paſch. 24. *Eliz. in the Common Pleas.*

16.

A Feme ſole ſeized of a Manor to which there were Copyholds; One of the Copyholders did entermarry with the woman, and afterwards he and his wife did ſuffer a Recovery of the Manor, unto the uſe of themſelves for their lives, and afterwards to the uſe of the heires of the wife. The Queſtion was, Whether the Copyhold were extinct; And *Anderſon* the Chief Juſtice ſaid, That if a Copyholder will joyn with his Lord in a Feoffment of the Mannor, that thereby the Copyhold is extinct. The ſame Law is, if a Copyholder do accept a Leaſe for years of his Copyhold: which was agreed by the whole Court.

Paſc. 24. *Eliz. in the Common Pleas.*

17.

I. N. Doth Covenant with *I. S.* by Indenture, to pay him forty pounds yearly for one and twenty years, and afterwards *I. S.* doth releaſe to *I. N.* all Actions. The Quſtion was, Whether the whole Covenant were diſcharged: And it was holden by all the Juſtices, that only the Arrerages were diſcharged, becauſe the Covenant is executory,

yearly to be executed during the Term of one and twenty years, for he may have ſeveral Actions of Covenant for every time that it is behind; and if it be behind the ſecond year, he may have a new Action for that, and ſo of every year during the Term, ſeveral Actions: for nothing ſhall be diſcharged by the releaſe of all Actions, but that which was in Action, or a Dutie at the time of the releaſe made, As in 5. *E.* 44. and *L.* 5. *E.* 4. 41. In debt for Arrerages of an Annuity; the defendant pleaded a releaſe of all Actions, which bore date before any arrerages were behind; And the opinion of the Juſtices was there, That it was no Plea, and ſo it was adjudged; for it is not a thing in Action, nor a Duty, untill the day of paiment comes. And it is there holden by *Arden*, That if a man make a Leaſe for two years rendring Rent, and that the Tenant ſhall forfeit twenty ſhillings *nomine pœnæ*, for not paiment at the day, there a releaſe of all Actions perſonals made to the Tenant before the penalty be forfeited, is no Bar; for it is neither Duty, nor thing in Action before the failer of paiment. And in 42. *E.* 3. 33. A man did releaſe to his Tenant for term of life all his Right for the Term of the life of the ſame Tenant for life; And that he nor his heirs might any right demand, nor challenge, or claim for the life of the Tenant for life, in the ſaid Land; and afterwards he died, and the Tenant committed Waſte, and the heir brought an Action of Waſte, and the Tenant pleaded the ſame Releaſe, and it was holden no Plea, for nothing was extinct by the ſame Releaſe but that which was in Action at the time of the Releaſe made, and that the Waſte was not. *Rhodes* Serjant put a Caſe, which he vouched to be adjudged. 4. *Eliz.* which was, That if a man Covenant with *I. S.* that if he will marry his daughter, that then he will pay him twenty pounds; If a Releaſe were made by *I. S.* before the marriage, the ſame will not determine the twenty pounds if he marry her afterwards, becauſe it was not a Duty before the marriage: So in the principal Caſe, notwithſtanding that the Covenant was once broken for the non-paiment at the firſt day; yet becauſe a ſeveral Action of Covenant lieth for every day that it was arreare, the Releaſe ſhall extinguiſh but only that which was Arreare at the time of the Releaſe made: And ſo Note, That a Releaſe doth not diſcharge a Covenant which is not broken.

Paſch. 24. *Eliz. in the Common Pleas.*

18.

UPon a ſpecial Verdict in an Action of Debt; The Caſe was this: *I. S.* and *I. N.* did ſubmit themſelves to the Award, Order, Rule and Judgemant of *A.* and *B.* for all Matters, Quarrels and Debates, and the Bond was made to perform the Award, Order, Rule and Judge-

ment

ment made by them: And they Award, Order, Rule and Adjudge, That *I. S.* ſhall pay to *W. N.* who was a Stranger, twenty ſhillings. The firſt Queſtion was, Whether the Award were good: And it was holden by *Anderſon* Chief Juſtice, *Meade* and *Periam* Juſtices, That the Award was void, becauſe it was out of their Submiſſion, for they cannot Award a man to do a thing which doth not lye in his power, for in this Caſe *W. N.* to whom the money is to be paid, is a Stranger, and it is in his Election, if he will accept of the money or not. And ſo it is holden in 22. *H.* 6. 46. and 17. *E.* 4. 5. but *vid. cont.* 5. *H.* 7. 2. Then if the Award be void, The ſecond Queſtion was, If yet the Bond to performe it be good or not; And it was holden by the whole Court, that it was void alſo, againſt the Book of 22. *H.* 6. 46. becauſe that the Condition was to performe that which was againſt the Law (*Quære* that Caſe, for it ſeemes not to be Law at this day.) And it was then holden, That Awards concerning Acts to be performed by them which have not ſubmitted, are void: And in all Caſes where each of the parties which ſubmit have not ſome thing, the Award is void.

Paſch. 24. *Eliz. in the Kings Bench.*

19.

IN an Action upon the Caſe upon a Promiſe; The conſideration was, Where *I. S.* had granted a Term to *I. D.* That afterwards upon the requeſt of *I. S.* *I. D.* did make to *W.* an Eſtate for four years, upon which *W.* brought his Action: And after Verdict it was moved in ſtay of Judgement, that there was no good conſideration, and a difference taken, where the Promiſe was upon the Grant; and where afterwards: If it were before, then the Condition was good; but if it were afterwards, it was not good: And it was adjudged, That the Plaintiffe, *Nihil capiat per billam.*

Paſch. 24. *Eliz. in the Kings Bench.*

20.

AN Action upon the Caſe upon a Promiſe was: The Conſideration was, That in conſideration that the Plaintiffe *Daret diem ſolutionis*, the Defendant *Super ſe aſſumpſit*; and becauſe he doth not ſay *in facto*, that he had given day, It was adjudged that no ſufficient Conſideration was alledged: But if the Conſideration were *Quod cum indebitatus, &c.* the ſame had been a good Conſideration without any more; for that implies a Conſideration in it ſelf.

Paſc

Pasch. 24. Eliz. in the Kings Bench.

21.

IT was said by *Cooke*, That the Chancellor, or any Judge of any of the Courts of Record at *Westminster*, may bring a Record one to another without a Writ of *Certiorare*, because one Judge is sufficiently known one to the other, as 5. *H.*7.31. where a Certificate was by the Chancellor alone; and to this purpose is 11.*H.* 4. But that other Judges of base Courts cannot do, nor Justices of the Peace, as 3. *H.*6. where the certificate by Suitors was held void.

Pasch.25.Eliz. In the Common Pleas.

22. Skipwith's Case.

IT was found upon a speciall verdict in an Action of Trespass, that the place where, &c. was Copy-hold land: And that the Custome is, That *quælibet fœmina viro cooperta poterit* devise lands whereof she is seised in Fee, according to the custome of the Manor, to her Husband, and surrender it in the presence of the Reeve and six other persons. And that *I. S.* was seised of the land, where, &c. and had issue two Daughters, and died, and that they married husbands; and that one of them devised her part to her husband by Will in writing, in the presence of the Reeve and six other persons: and afterwards at another day shee surrendred to the Husband, and he was admitted; and she died, and her Husband continued the possession. And the Husband of the other Daughter brought an Action of Trespasse. *Rodes* Serjeant, The Custome is not good, neither for the Surrender, nor for the Will, for two causes: One, for the uncertainty of what estate shee might make a Devise, and because it is against reason, that the Wife should surrender to the Husband. Where the Custome shall not be good, if it be uncertain, he vouched 13. *E.* 3. *Fitz. Dum fuit infra ætatem.* 3. The Tenant saith, that the lands are in *Dorset*, where the Custome is, that an Enfant may make a Grant or Feoffment, when he can number twelve pence. And it was holden, that because it is uncertain when he can so do, the Custome is not good. 19. *E.* 2. in a Ravishment of Ward, the defendant pleaded, that the custome is, that when the Enfant can measure an ell of cloth, or tell twelve pence, as before, that he should be out of Ward: and it is holden no good custom for the cause aforesaid. 22. *H.* 6. 51. *a.* there a man prescribed, That

the

the Lord of *D.* had uſed to have Common for him and all his Tenants; And becauſe it is not ſhewed, what Lord; whether the Lord mediate or immediate, it is adjudged no good cuſtome. And as to the Surrender, it is againſt reaſon, that the Wife ſhould give to the Husband; for a Wife hath not any Will but the Will of her Husband: For if the Husband ſeiſed in the right of his Wife, make a Feoffment in Fee, and the Wife being upon the land, doth diſagree unto it, ſaying, that ſhee will never depart with it during her life; yet the Feoffment is good, and ſhall binde during the life of the Husband, as it is holden in 21. *E.* 3. And therefore it is holden in 3. *E.* 3. *Tit. Deviſe, Br.* 43. That a Feme covert cannot deviſe to her Husband; for that ſhould be the Act of the Husband to convey the land to himſelf. And in the old *Natura Brevium*, in the Additions of *Ex gravi querela*, it is holden ſo accordingly. And the Caſe in 29. *E.* 3. differs much from this Caſe: For there a woman ſeiſed of lands deviſable, took an Husband, and had iſſue; and deviſed the lands to the Husband for his life, and died, and a Writ of Waſte was brought againſt him as Tenant by the Courteſie; and it was holden that it did lie, and that he is not in by the Deviſe; for the reaſon there is, becauſe he was in before by the Courteſie: But as I conceive, that Caſe will diſprove the Surrender; for in as much as he had it in the Right of his wife, he could not take it in his own Right. Alſo he took another Exception in the principal Caſe, becauſe that the wife was not examined upon the Surrender; but none of the Juſtices ſpake to that Exception: but when the Record was viewed, it appeared, that it was ſo pleaded: Further, He ſaid, That the deviſe was void by the Statute of 34. *H.* 8. *Cap.* 5. where it is ſaid, It is enacted, That Wills and Teſtaments made of any Lands, Tenements, &c. by women Coverts, or &c. ſhall not be taken to be good, or effectual in Law. And he ſaid, That this Statute doth extend to cuſtomary Lands; And as to that all the Juſtices did agree, That it is not within the Statute. And as to the Statute of Limitations, *Anderſon* chief Juſtice ſaid, That if a Leaſe for years, which perhaps will not indure ſixty years, ſhall be taken ſtrong, this ſhall. *Anderſon* moved, That if the Lord Leaſe Copyhold land by Word, Whether the Leſſee might maintain an *Ejectione firme*: and he conceived not; for in an *Ejectione firme*, there ought to be a Right in Fact: And although it be by concluſion, it is not ſufficient, for that the Jury or Judge are not eſtopped or concluded: And he conceived, That if Tenant at Will make a Leaſe for years, that it is no good leaſe betwixt him and the Leſſor; but that he may well plead, that he had nothing in the land: *Meade* contrary; but they both agreed, That the Book of 14. *E.* 4. which ſaith, That if Tenant at Will make a leaſe for years, that he ſhall be a Diſſeiſor, is not Law. *Anderſon* ſaid, That the preſcription in the principal Caſe was not good, for it is *Quod qualibet fœmina viro cooperta poterit, &c.* and it

ought

ought to be, that feme Coverts *poſſunt*, and by the Cuſtome have uſed to deviſe to the husband, and therefore the preſcription is not good, that *Poteſt ponere retes* upon the land of another upon the Cuſtome of the Sea; for preſcription muſt be in a thing done: alſo by him the deviſe is not good according to the Cuſtome, for that is, that ſhe may deviſe and ſurrender; and that ought to be all at one time, and that in the preſence of the *Reeve* and ſix other perſons, as well as the Surrenderer; and the words of a Cuſtome ſhall be ſo far performed as they may be. *Meade* contrary: And that theſe Witneſſes ſhall be referred to the ſurrender onely, for a deviſe may be without Witneſſes. And he ſaid, that ſometimes the latter clauſe ſhall not refer to all the precedent matter, but unto the latter onely, as 7.*H.*7. is, Where a *Præcipe* was brought of lands in *A. B.* and *C. in Inſula de Ely*: the Clauſe (*in Inſula de Ely*) is referred onely to *C.* And it was ſaid, That if in the principal Caſe the Will were good, that then the husbands are Tenants in common; and then the Action of Treſpaſs is not maintainable.

Paſch. 25. Eliz. in the Common Pleas.

23.

THis Caſe was moved by Serjant *Gawdy*. *Thomas Heigham* had an hundred Acres of lands, called *Jacks*, uſually occupied with a houſe; and he leaſed the houſe and forty Acres, parcel of the ſaid hundred Acres, to *I. S.* for life, and reſerved the other to himſelf, and made his Will, by which he doth deviſe the houſe and all his lands, called *Jacks*, now in the occupation of *I. S.* to his wife for life; and that after her deceaſe, the remainder of that, and all his other lands pertaining to *Jacks*, to *R.* who was his ſecond ſon; Whether the wife ſhall have that of which her husband died ſeiſed for her life, or whether the eldeſt ſon ſhould have it, and what eſtate he ſhall have in it. *Meade*. The wife ſhall not have it; for, becauſe that he hath expreſſed his Will that the wife ſhall have part, it ſhall not be taken by implication, that ſhe ſhall have the whole or the other part, for then he would have deviſed the ſame to her; And therefore it hath been adjudged in this Court betwixt *Glover* and *Tracy*; That if Lands be deviſed to one and his heirs males; and if he die without heirs of his body, that then the land ſhall remain over, that he had no greater eſtate then to him and his ſpecial heirs, *viz.* heirs Males: and the reaſon was, becauſe the Will took effect by the firſt words. *Anderſon* Chief Juſtice; It was holden in the time of *Brown*, That if lands were deviſed to one after the death of his wife, that the wife ſhould have for life: but if a man ſeiſed

of

of two Acres, deviſeth one unto his wife, and that *I. S.* ſhall have the other after the death of the wife, ſhe takes nothing in that Acre for the Cauſe aforeſaid. For the ſecond matter, If the Reverſion ſhall paſs after the death of the wife to the ſecond ſon; we are to conſider what ſhall be ſaid land uſually occupied with the other, and that is the land leaſed with it. But this land is not now leaſed with it, and therefore it cannot paſs. *Windham.* The ſecond ſon ſhall have the Reverſion; for although it doth not paſs by theſe words, Uſualy Occupied, (as *Anderſon* held) yet becauſe the deviſe cannot take other effect, and it appeareth that his intent was to paſs the land, the yonger ſon ſhall have it. *Anderſon. Jacks* is the intire name of the houſe and lands; And that word when it hath reference unto an intire thing called *Jacks*, and is known by the name of *Jacks*, ſhall paſs to the ſecond ſon; for words are as we ſhall conſtrue them: And therefore, If a man hath land called *Mannor of Dale*, and he deviſeth his *Mannor of Dale* to one, the land ſhall paſs, although it be not a Mannor: And if I be known by the name of *Edward Williamſon*, where my name is *Edward Anderſon*, and lands are given unto me by the name of *Edward Williamſon*; the ſame is a good name of purchaſe. And the opinion of the Court was, that the Reverſion of the land ſhould paſs to the ſecond ſon.

Paſc. 25. Eliz. in the Common Pleas.

24. *The Lord* MOUNTJOY, *and the Earle of* HUNTINGTON'S *Caſe.*

NOte, by *Anderſon* Chief Juſtice, and *Periam* Juſtice. If a man ſeiſed of any entrie Franchiſes, as to have goods of Felons within ſuch a Hundred, or Mannor; or goods of Outlaws, Waifes, Straies, &c. which are caſuſal; Theſe are not Inheritances deviſeable by the Statute of 32. *H.* 8. for they are not of any yearly value, and peradventure no profit ſhall be to the Lord for three or four years, or perhaps for a longer time. And ſuch a thing which is deviſeable ought to be of annual value, as appeareth by the words of the Statute. And alſo they agreed, that the ſaid Franchiſes could not be divided; and therefore if they deſcend to two coparceners, no partition can be made of them. And the words of the Statute of 32. *H.* 8. are, That it ſhall be lawful, &c. to diviſe two parts, &c. and then a thing which cannot be divided, is not diviſeable. And they ſaid, That if a man had three Manors, and in each of the three ſuch Liberties, and every Manor is of equal value, that yet he cannot deviſe one Mannor and the Liberties which he hath to it, *Cauſâ quâ ſupra*: but by them an Advowſon is deviſeable, becauſe it may be of

annual value. But the Lord Chancellor, ſmiling, ſaid, That the Caſe of the three Manors may be doubted. And there alſo it was agreed by the ſaid two Juſtices, upon Conference had with the other Juſtices, That where the Lord *Mountjoy* by deed, Indented and Inrolled, did bargaine and ſell the Manor of *Camfora* to *Brown* in Fee; and in the Indenture this Clauſe is contained, Provided alwayes, And the ſaid *Brown* Covenants, and Grants to, and with the Lord *Mountjoy*, his Heirs and Aſſigns, that the Lord *Mountjoy* his Heirs and Aſſigns, may digg for Ore within the land in *Camford*, which was a great Waſte; and alſo to digg Turffe there to make Allome and Copereſs, without any contradiction of the ſaid *Brown*, his Heirs and Aſſigns. They agreed, That the Lord *Mountjoy* could not devide the ſaid Intereſt, *viz.* to grant to one to digg within a parcel of the ſaid Waſte. And they alſo agreed, That notwithſtanding that Grant, That *Brown*, his Heirs and Aſſigns, owners of the Soile, might digg there alſo, like to the Caſe of Common *Sans* number. The Caſe went further, That the Lord *Mountjoy* had deviſed this Intereſt to one *Laicott* for one and twenty years, and that *Laicott* aſſigned the ſame over to two other men: And whether this Aſſignment were good or not, was the Queſtion; foraſmuch that if the Aſſignement might be good to them, it might be to twenty; and that might be a ſurcharge to the Tenant of the ſoile. And as to that the Juſtices did agree, that the aſſignement was good; but that the two aſſignees could not work ſeverally, but together with one ſtock, or ſuch workmen as belonged to them both. And *Cook*, who reported the opinions of the Juſtices, was of Counſel with the Lord *Mountjoy*. And note, in that caſe it was ſaid, That Proviſo being coupled with other words of covenant and grant, doth not create a Condition; but ſhall be of the ſame nature as the other words with which it is coupled.

Paſch. 25. Eliz. In the Common Pleas.

25. WEBBE and POTTER's Caſe.

In an *Ejectione firme* the Caſe was this:

John Harris gave Land in Frankmarriage to one *White*: And the words of the Deed were, *Dedi & conceſſi* I. W. *in liberum maritagium* Joannæ *filiæ ſuæ*, *Habendum eidem* J. W. *& hæredibus ſuis in perpetuum*, *tenendum de Capitalibus Dominis feodi*, *&c.* with warranty to the Huſband and his heirs. *Periam* Juſtice, although the uſuall words of gift in Frankmarriage are not obſerved; yet the Frankmarriage ſhall not be deſtroyed (for the uſuall words are, *In liberum maritagium cum* Joanna *filia mea*; in the ablative caſe): And it was holden by all the Juſtices,

ſtices, that notwithſtanding that, the Frankmarriage was good. Alſo a gift in Frankmarriage after the eſpouſals, is good, as it was holden by all the Juſtices. And ſee *Fitz. Tit. Taile* 4. *E.* 3. and 2. *H.* 3. *Dower* 199. And he ſaid, That a gift in Frankmarriage before the Stat. of *Donis*, &c. was a Feeſimple, but now it is but a ſpecial tail: and if it ſhould not be in law a gift in Frankmarriage, then the Husband and Wife have an eſtate but for their lives; for they cannot have an eſtate taile, for that there are not words of limitation of ſuch eſtate in the gift. And hee cited 4. *E.* 3. and 45. *E.* 3. 20. to prove his opinion: and hee much relyed upon the intent of the Donor, which ought to be obſerved in conſtruction of ſuch Gifts according to the Statute. And becauſe the *Habendum* is repugnant to the premiſſes, and would deſtroy the Frankmarriage, it is void, and the premiſſes ſhall ſtand good: and to prove that, he cited 9 *E.* 3. 13 *E.* 1. 32. *E.* 1. *Tit. Taile*, 25. 3. *H.* 4. by *Hill.* And he took this difference; Where a Remainder is limited upon a Gift in Frankmarriage to a ſtranger, and where it is limited to one of the Donees; for in the firſt caſe, the Remainder is good for the benefit of the ſtranger; but in the ſecond caſe it is void. And he ſaid, that if a Rent be reſerved upon ſuch a Gift, that it ſhould be void during the four degrees, but afterwards the Reſervation ſhould be good. And if the Donor grant the Reverſion over, and the Donee in Frankmarriage attourn, now he ſhall pay rent to the Grantee; for by *Littleton*, he hath loſt the Priviledg of Frankmarriage, viz. the Aquitall; and no privitie is betwixt the Grantee and the Donees. 10. *Aſſ.* 26. & 4. *H.* 6. That it is not any taile, if it be not Frankmarriage. *Windham* Juſtice: Although it be no eſtate in Frankmarriage, yet is it an eſtate taile: and he cited 8. *E.* 3. although there want the word *Heirs.* Alſo if a man give lands to another *& ſemini ſuo*, it is good; 45. *E.* 3. *Statham, taile.* If it be not Frankmarriage, yet it is a good eſtate in taile. 19. *Aſſ.* Land was given to Husband and Wife in Frankmarriage, *infra annos nubiles*, and afterwards they are divorced; the Wife hath an eſtate in taile. *Meade* Juſtice did agree with *Windham*, and ſaid, That although there be not any Tenure, nor any Aquitall, yet it may be a good Frankmarriage; as if a Rent, Common, or Reverſion be given in Frankmarriage, it is good; and yet there is not any Tenure nor aquitall. *Dyer* Chief Juſtice conceived, That it is not Frankmarriage; becauſe that the uſuall words in ſuch Gifts are not obſerved: for he ſaid, that the gift ought to be *in liberum Maritagium*, and not *Joannæ filiæ ſuæ*; for that is not the uſuall form of the words: And he ſaid, That if the word [*Liberum*] be omitted, that it is not Frankmarriage; for that he ſaid, is as it were a Maxime: and therefore the uſuall words ought to be obſerved. And by the ſame reaſon ſuch a Gift cannot be with a man, but ought to be with a woman: alſo ſuch a Gift ought to be with one of the blood of the

Donor, who by poſſibilitie might be his Heir. Alſo there ought to be a Tenure betwixt the Donor and Donee, and alſo an Aquitall. And if theſe grounds and ceremonies be not obſerved, it is not Frankmarriage. Alſo if it once take effect as a Frankmarriage, and afterwards the Donor granteth the Reverſion over, or if the Reverſion doth deſcend to the Donees, yet it ſhall not be utterly deſtroyed, but ſhall remaine as an eſtate taile, and not as an eſtate for life; becauſe it once took effect in the Donees and their iſſues as a Frankmarriage, 31. *E.* 1. *taile* 116. If a man give lands in Frankmarriage, the remainder to the Donees and the heirs of their bodies; yet it is a good Frankmarriage. And if a man give Lands in Frankmarriage, the Remainder to another in taile, it ſhall not deſtroy the Frankmarriage, becauſe that the Donor hath the Reverſion in Fee in himſelf, and the Donees ſhall hold of him, and not of him in the Remainder in taile; but if the Remainder had been limited to another in Fee ſimple, then it had been otherwiſe. Alſo if the Donor grant the Services of the Donees in Frankmarriage, reſerving the Reverſion to himſelf, it is no good Grant, although that the Donees attourne; for that the Services are incident to the Reverſion: but if he grant the Reverſion, then they do paſſe. And he concluded, That the Husband had the whole, and that the Wife had nothing: for ſhe was no purchaſer of the premiſſes, becauſe that the Gift did not take effect as a gift in Frankmariage: And he ſaid, that he doth not conſtrue it ſo by the intent of the Gift; for here is an expreſſe limitation of the Fee to the Husband and his heirs, which ſhall not be contradicted by any intendment; for an Intendment ought to give way to an expreſſe Limitation, as a conſideration implyed ought to give place to a conſideration expreſſed. And afterwards this yeer it was adjudged, that it was not a Frankmarriage, nor a Gift in taile, but that it was a Fee ſimple. And the Juſtices ſaid, that although the old books are, That where it takes not effect as a Frankmarriage, that yet it ſhall take effect as an eſtate taile, thoſe Books are againſt Law. But they agreed, That where once the Gift doth take effect as a Frankmarriage, that by matter *ex poſt facto*, it might be turned to an eſtate in taile

Paſch. 26 Eliz. In the Common Pleas.

26.

Eade and *Windham* (the other Juſtices being abſent) were of opinion, That a Copyholder in Fee, who by the Cuſtome might ſurrender in Fee, might make a ſurrender in taile, without any ſpeciall cuſtome ſo to doe: and he who may preſcribe to make a Feoffment

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in Fee, might make a Leaſe for life, and it ſhould be good, *quia omne majus continet in ſe minus.*

Paſch. 26 *Eliz. In Communi Banco.*

27

IN a Writ of Dower, the Defendant made her demand *de tertia parte liberæ faldæ* : and Serjeant *Gaudy* moved if it were good, without ſetting in certain for what cattell : And it was held not good ; for if it be not of a certain number, ſhe ſhall not be thereof endowed, no more then of a Common uncertain. And if ſhe do demand Common which is certain, yet ſhe ſhall not be endowed, if ſhe do not ſhew the certaintie of it. *Windham* ſaid, That if the Common be uncertain, that the woman ſhall be allowed for it : But *Meade* ſaid, He doth not know how the allowance ſhall be made.

Paſch. 25 *Eliz. In the Exchequer Chamber.*

28

IT was holden in the Exchequer Chamber, before the Treaſurer and the Barons, in the caſe of one *Pelham*, That whereas the Queen had granted to him by Letters Patents, That he ſhould not be Bailiff, Conſtable, nor other Officer or Miniſter, *licet eligatur* : That if the Queen make him Sheriff of a County, that he ſhall not be diſcharged by that Patent, for that ſuch Offices do not extend to Royal Offices : as a grant of Amerciaments ſhall not extend to Amerciaments Royal. And alſo the making of a Sheriff is not by election, but onely by denomination of the Queen. So that if he have not theſe words beſides (*licet eligatur per Nos*) he ſhall be Sheriff. And that they ſaid was alſo the opinion of *Bromley* Lord Chancellour.

Mich. 26 *Eliz. In the King's Bench.*

29

IT was holden by the Court, That if a man binde himſelf to perform the laſt Will of *I. S.* and he is made Executor, that hee is bounden to pay Legacies without any demands. *Vide* 11. *E.* 4. 10. *a.* 14. *E.* 4. 4. *a.* 20. *E.* 4. 28. Yet it was ſaid, That *Paſch.* 25. *Eliz.* they put a difference

ference, where a man is bound to perform the laſt Will, and when to perform the Legacies; for in the later caſe the Law is *ut ſuprà.*

Hill. 26 Eliz. In the Common Pleas.

30.

IF I be bound, that my Leſſee ſhall take, reap, and carry his Corn peaceably without interruption: and afterward in Harveſt, when he is reaping, I come upon the land, and ſay to him, that he ſhall not reap any corn there; but otherwiſe I do not diſturb him: The opinion of all the Juſtices was, that for theſe words ſpoken by me upon the Land, that I have forfeited my Bond. And yet it was urged by Serjeant *Puckering*, That I was bound to ſuffer him to do three things, *ſcil.* to take, to reap, and to carry, and all theſe things he hath done. See the Caſe 47. *E.* 3. 22. where the ſaying to a Tenant by one Coparcener, that he ought not to pay any thing to the other, was a Diſſeiſin.

Paſch. 26. Eliz. in the Common Pleas.

31

A Man was bound in a Recognizance for his good behaviour: and it was ſhewed, that he was arreſted for ſuſpicion of Felony by a Conſtable, and that he eſcaped from him; to which he pleaded, Not guilty: Exception was taken, becauſe it was not ſhewed that a Felony was committed, which might cauſe ſuſpicion, for that is traverſable: and *per Curiam* it need not; for although no ſuch felony was committed, and although the arreſt were tortious, yet the Recognizor had forfeited his Recognizance, by making an eſcape, which is a Misbehaviour.

Paſch. 26 Eliz. In the Common Pleas.

32 Bushey's Caſe.

PAul *Buſhey* Vicar of *Pancras* leaſed his Vicarage to Doctor *Clark*, the Glebe land, and the Church, and all things to the ſame belonging (Excepting the houſing) reſerving twenty pound rent yeerly, at *Lammas*, and *Sancti Petri advincula*, by equall portions: and if the

Rent

Rent be behinde by the ſpace of a month, that then it ſhould be lawfull for the Vicar to diſtrein: And the Leſſee was bound to peform all Covenants, Articles and Agreements contained or recited within the ſame Indenture. And for rent not paid the 29 of *Auguſt* 25. *Eliz.* the Vicar brought Debt upon the Bond: To which the Defendant pleaded, That the Rent was not demanded the 29 day of *Auguſt*: upon which they were at iſſue: and the Jury being ready at the Bar, *Walmeſley* ſaid, That the Enqueſt ought not to be taken for three cauſes: Firſt, He hath made a leaſe of the Vicarage except the houſing, and the Plaintiff hath alledged the demand to be generall *ſuper terras glebales*, and hath not ſhewed where. To that the Juſtices ſaid, It had been better to have ſaid, At ſuch a gate, or hedg, or high-way; but notwithſtanding they did not allow of that Exception; for if it were not well demanded, it ought to be ſhewed of the other ſide. The ſecond exception was, becauſe the Enqueſt were all *de Vicineto de Pancras*, and it might be that ſome of the Lands appertaining to the Vicarage did extend to *Iſlington*: but that Exception was diſallowed alſo. The third Exception was, becauſe that the *Venire facias* did not well recite the Iſſue, for the exception of the houſing was left out: and *per Curiam*, it is not needfull that all be recited: But if another iſſue then that upon which they were at iſſue had been recited, it had not been good. And afterwards the Enqueſt was taken, and found for the Plaintiff. But nothing was ſpoken, whether there needed any demand in ſuch caſe, or not.

Paſch. 26 Eliz. In the Common Pleas.

33

IF a man be preſented unto a Benefice, which is not above the value of ſix pound *per annum*, and afterwards he is preſented unto another of twenty pounds; and afterwards is deprived for cauſe of Plurality: The Ordinary muſt give notice to the Patron; for that is at the common Law: and untill Deprivation it is no Ceſſion.

Trinity 26 Elizab. In the Common Pleas.

34 THROGMORTON and TERRINGHAM's Caſe.

IN a Replevin, the Defendant did avow the taking of the cattell, by reaſon that one *A.* held of him an Acre of land in the place where, &c.

&c. by fealty, and ſixteen ſhillings rent, the rent payable at two Feaſts of the year, &c. And the Plaintiffe ſaid, that he held the ſame acre, and two others of the Avowant by fealty, and ſixteen ſhillings payable at one day, *abſq; hoc* that he held the ſaid acre by the ſervices payable at two dayes, &c. *Snagg.* The tenure cannot be traverſed: and 21 *E.* 4 the laſt caſe is the ſame caſe; where the Avowry is made for 12 pence at four days; and the Plaintiff ſaid, that he held by twelve pence payable at one day, without that that he held by the Services payable at four dayes. And there it is holden, that the ſame cannot be an Encroachment, becauſe they agree in the Services. *Walmeſley,* He ſhall have the traverſe for the miſchief which otherwiſe would follow: for if he ſhould traverſe the ſeiſin, thereby he ſhould confeſſe the Tenure. *Periam conceſſit*, and ſaid, That the difference which is commonly taken in our Books, is, That where they agree in the Tenure, there the Seiſin is traverſable; but where they do not agree in the Tenure, there the Tenure is traverſable. So is 26. *H.* 8. 6. 7. *E.* 4. 27. 12. *E.* 4. 7. 20. *E.* 4. 16. And he conceived here, that the payment at two dayes doth alter the tenure; ſo as now it is another tenure then before. Alſo he ſaid, That if Wh. acre and Bl. acre be adjoyning, and are holden the one of *I. S.* and the other of *I. D.* and *I. S.* diſtrein and avow for both acres, that he may well traverſe the tenure. *Meade* 8. *H.* 7. 5. *a.* It is ſaid by *Brian*, That if avowry be made for a tenure of two acres by twenty ſhillings, and the Plaintiffe ſaith, that he holdeth theſe two and two other acres by twelve ſhillings, without that, that he holdeth the two acres by twenty ſhillings: that that is good, for that he cannot do otherwiſe. And it is no reaſon, that for a falſe avowry, the Plaintiffe ſhould be at a miſchief. But the Book is not ruled, for *Keble* is contrary. *Vide Librum.*

Trinit. 26 Eliz. in the Kings Bench.

35 Savell and Cordell's Caſe.

Henry Savell Leſſee for years of the Manor of M. grants the ſame Manor, *Habendum* for ſo many years, which ſhould be to come after his death, to *Cordell* Maſter of the Rolls, if *Dorothy* his Wife ſo long ſhould live: And afterward *Henry Savell*, and he in the Reverſion levied a Fine. The Caſe went by many Conveyances further. But two points were here moved: 1. If it were a good Grant for ſo many yeers, &c. *Shuttleworth* argued that it was. But *Cooke* contrary. And *Cooke* ſaid to that which hath been ſaid, That Leaſes which have uncertain beginning, may be by act of matter *ex poſt facto*, made certain, and ſo good

good. As a leaſe for ſo many years as *I. S.* ſhall name; if he name, it is a certain leaſe: but if the Leſſor die before *I. S.* name, and after hee name, all is void, as it is in the Commentaries put by *Weſton*, and granted by *Dyer*, 273. And the reaſon is, that it behoves that the intereſt paſſe out of the Leſſor during his life, and the Deed ought to have its perfection in the life of the Leſſor. But in our caſe here, the Leſſor or Grantor is dead before the certaintie of the beginning is known, and before any perfection of intereſt out of him: and therefore the reaſon in the common caſe, 40 *Aſſ.* and 16. *E.* 3. that there behoveth to be Attornment in the life of the Leſſor, proves our caſe: for the reaſon of that is, that it behoveth that ſome intereſt paſſe out of the Leſſor or Grantor during his life; and that perfection of his Grant be in his life, or elſe the Grant is void. *Vide* 31. *E.* 3. *alb.* 20. and 33. *E.* 3. *Confirmation* 22. If the Chapter confirm the Grant of the Biſhop after his death, it is void; for it ought to have perfection in the life of the Biſhop, otherwiſe it is void. And upon that reaſon is the caſe put by *Popham*, *Com.* 520. *b.* That where a man grants all his term which ſhall be to come after his death; that it is a void Grant, becauſe no intereſt paſſeth during the life of the Grantor. And to this purpoſe is 7. *E.* 6. *Br. Leaſes.* 66. *Temps. H.* 8. 339. If a man will take by Livery within the view, it behoves the Feoffee to enter during the life of the Feoffor: and yet that is a more ſtrong caſe; for by the Livery, being a ceremony of the Law, it is preſumed that the land paſſed; and yet there ought to be an entry to fortifie the Grant, otherwiſe it is void. The ſecond point was, If by the Fine levyed, the poſſibilitie aſwell as the right of poſſeſſion of the term did paſſe: And I conceive, that it doth; therefore we ſee in many caſes, a man may grant by his Deed a poſſibility to come. As 19. *H.* 7. 1. where a man ſeiſed in the right of his Wife, made a Feoffment in fee, and after they had iſſue, and the Wife died; that he ſhould not be Tenant by the Courteſie, and yet the Wife was remitted: but by his own Grant he had granted from him the poſſibility he might have had to be Tenant by the courteſie. And here, If *Cordell* had entered, and made a Feoffment in fee, or levied a Fine, the poſſibility which he had to have the term, had been cleerly gone. 39. *H.* 6. 43. If I diſſeiſe my Father, and make a Feoffment in fee, and afterwards my Father dieth; although that a new Right deſcends unto me, yet I ſhall be barred of this poſſibilitie which I had at the time of the Grant: But otherwiſe it had been, if this diſcontinuance or grant had been defeated by entry or otherwiſe, in my life, by my Father or any other; in that caſe I may ſhew the ſpeciall matter, as 15. *E.* 4. 5. is, and ſo avoid my own Deed. And 44. *E.* 3. 4. is, That tenant for years and he in the Reverſion diſclaim, and it is holden a good Diſclaimer; which proves, that a poſſibility may alſo paſs by Diſclaimer. And 21. *E.* 3. and 35. *H.* 6. is, That if he who hath cauſe to have a Writ of Error, if

he enter into the Land, and make a Feoffment, the Writ of Error is gon for ever; ſo by theſe Caſes it is proved, and appeareth, That a Poſſibility may paſſe by grant: And ſo in the Principall Caſe, the Poſſibility to have the terme, is by this Fine granted; and the Grant is a good Grant, And it was adjourned.

Paſch. 26. Eliz. in the Kings Bench.

36. LUDDINGTON and AMNER's Caſe.

Intratur Mich. 25. Eliz. Rott. 495.

IN a Writ of Error, the Caſe was this; *Perepoynt* poſſeſſed of a Leaſe for 99 years, deviſed the ſame unto his Wife for Life; and that after her Deceaſe, that it ſhould go to his Children unpreferred; the Wife took Sir *Thomas Fulſter* to her Husband, and the Leaſe was put in Execution by *Fiery facias* for the Debt of Sir *Thomas Fulſter*, and afterwards Sir *Thomas* died, and the Wife died: The Adminiſtrators of Sir *Thomas Fulſter* did reverſe the Judgement, upon which the Leaſe was taken in Execution: And afterwards *A.* the Daughter of *Perepoynt* entred, ſuppoſing her ſelfe to be the only Daughter of *Perepoynt* alive, unpreferred by her Father in his life time. And the Pleading was, That the Wife of *Perepoynt* was his Executrix, and that ſhe entred into the Leaſe after the death of *Perepoynt*, *Virtute legationis & donationis prædict. Cook.* There is a difference in our Books, That the Deviſe of the Occupation of a Term, may be with the Remainder over, but not a Deviſe of the Term with the Remainder over. And the Deviſee of the Occupation of a Term hath one ſpeciall Property, and the Remainder another Property: As if a Leaſe be extended upon a Statute, the Conuſee during the Extent hath one Property, and he who is to have it afterwards, another Property, and the reaſon of the difference is apparent, when the Occupation is deviſed, and when the terme is deviſed; for in the firſt Caſe, he puts but only a confidence in the Deviſee, as it appears in *Welkdens* Caſe. But in the other Caſe all the Property goes, and there is no confidence repoſed in the Deviſee. And there is a Caſe in the very Point, with which I was of Councell, and was decreed in the Court of Chancery; it was one *Edolf's* Caſe; Where the Deviſe was of a terme, the Remainder to another, and he made the Deviſee his Executor, and he entred *Virtute donationis*, as in this Caſe; and it was decreed, That the Executor might alien the Terme, and that the Remainder could not be good: And to this purpoſe, *Vid.* 33. *H.* 8. 2 *E.* 6. 37 *H.* 6. 30. But if there might be a Remainder, yet *Incertæ Perſonæ nulla donatio*, for if all the Children be preferred

preferred, then the Remainder is void; and then the Property of the Leaſe is in the Wife; and ſhe might preferre her at any time during her life, and the generall property cannot be in another, but in the Executor, for the Legatee cannot enter, although that 27 *H.*6. ſeemeth to be contrary. And if the whole Property be in the Wife, her Husband might alien it, and therefore it may be extended for his Debt, as 7 *H.*6.1. is. But it may bee objected, That the Caſes before put, are of a deviſe of a Term, and this is of a Leaſe. That makes no difference, for in *Wroteſley's* Caſe, Leaſe there is ſaid to contain, not only a terme, but alſo the years to come in the terme. Then the Queſtion is, If by the ſale of the Sheriff upon the *Fieri facias*, if the term be ſo gone, that the Wife ſhall not have it by the Reverſall of the Judgment by Error? for the Judgement is, that the Party ſhall be reſtored to all that which he hath loſt: It is very cleer that it ſhall never return, for if it ſhould be ſo, then no ſale made by the Sheriffe might be good, unleſſe the Judgement be without Error, which would be a very great damage to the Common Wealth. And alſo by reaſon, and by the Judgment in the Writ of Error it ſhould not be ſo reſtored, for the Judgment is, That he ſhall be reſtored to all that which he hath loſt, *ratione judicii*; and here the Defendant hath not loſt any thing by force of the Judgment, but by force of the Execution: For the Judgment was to have Execution of 200 li. and of the 200 li. he ſhall be reſtored again, and not of the Leaſe: And therefore in 7. *H.* 7. If a Manor be recovered, and the Villains of the Manor purchaſe Lands, and afterwards the Judgment is reverſed by Error, the Recoveror ſhall have the Perquiſite, and the other ſhall not be reſtored to it: And 7. *H.* 7. A Statute was delivered in Owell maine, and a recovery was by the Conuſee upon Garniſhment of the Conuſor, and the Conuſee had Execution; and afterwards the Judgement is reverſed by Error; yet the Conuſor ſhall not be reſtored to the Land taken in Execution, but only the Statute ſhall be redelivered back where it was before: And in this Caſe if the party ſhould be reſtored to the term, it ſhould be great inconvenience. Alſo if I give one an Authority upon Condition, and the Party doth execute the Authority, and after the Condition is broken, the Act is lawfull by him who had Authority upon Condition. And ſo was the Lord of *Arundels* Caſe, where the Feoffee upon Condition of a Manor, granted Coppies; it was holden, That the Grants made by him were good, notwithſtanding the Condition was afterwards broken. And in 13 *E.*3. *Barr* 253. That a Recovery was Erroneous, and the Party being in Execution, the Gaoler ſuffered him to eſcape, and after the Recovery was reverſed for Error, yet the Action lay againſt the Gaoler. Alſo by him, the Jury have given an imperfect Verdict, ſo as we cannot tell whether the Party were preferred or not, for the Will was (unpreferred generally) and the Jury find that ſhe, viz. *A.* the daughter, was not

preferred by her father in his life time, ſo as the Preferment by the taile is limited generally; ſo as if any other prefer her, ſhe ſhall not have the Remainder. And the Jury have found, that ſhe was not preferred by one certain, *viz.* by her Father; nor in a certain time, in his life time; which is as much as to ſay, That ſhe was preferred by the Uncle, Aunt or Mother; and if it were ſo, then the Remainder is not good to her. Alſo they find no preferment in the life of the father, and it may be that the Father hath given her preferment by Will, and that was no preferment in his life, but is conſummate only by his death; and ſo ſhe might be preferred by him by Implication, by his Will. So as upon the whole Matter, I conceive, That the Judgement ought to be reverſed. Note, that this Caſe was afterwards adjudged at *Hertford* Terme; and the Judgement was, That the Iſſue of the Wife had Judgement for her Terme; and that the Judgement upon which the Execution was, was Erroneous, and reverſed by the Writ of Error; and that the opinion of the Juſtices was, That the Term was not to be reſtored, but ſo much for which it was ſold upon the Execution. And the Daughter of *Perepoynt* brought an Action for it, and had Judgement.

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27 *Eliz. in the Common Pleas.*

37.

ONE had certain Minerall Lands Leaſed to him for years, with liberty to dig, and make his Profit of the Mine. The Leſſee afterwards digged for Mine, and ſold the Gravell which came of it: And by the Opinion of the whole Court, This ſale was no Waſte, for no Sale is Waſte, if the firſt act be not Waſte: As the Sale of Trees by Tenant for Life or Years is not waſte, if the Cutting and Felling down of them was not Waſte before, for the Vendition is but a ſecondary Act, and but ſubſequent to the Act precedent; which Act, if it were lawfull, the Sale alſo is lawfull, for the Sale alone is not waſte. But they ſaid, That if the Leſſee fell or cut Timber Trees, and ſell them, it is waſte, *Non quia vendebat, ſed quia ſcindebat*; For if he ſuffer them to be upon the ground, without doing any thing with them; yet it is waſte; but he may uſe them for the Reparation of his houſe, and then it is no waſte: And yet when he fels them with an intent for Reparations, and afterwards ſells them, it is waſte, *Non propter Venditionem* only, but for the felling; for by this Act done, it is plaine from the beginning to be unlawfull, for the Sale is only a Declaration of his ill intent, and a means that his meaning was, by felling of the trees, to benefit himſelf by the hurt and injury of another. But in the Principall Caſe, becauſe

cauſe he ought to digge the Land, and that was lawfull for him to do, the Act ſubſequent cannot be unlawfull: And ſo it was adjudged.

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27. *Eliz. in the Common Pleas.*

38. MACROWE'S Caſe.

Macrowe brought Debt upon a Bond which was endorced upon Condition to pay a leſſe ſum: The Defendant pleaded the Statute of 13. *Eliz.* That all Covenants, Contracts and Bonds, made for the enjoying of Leaſes made of Spirituall Livings, by Parſons, &c. were void; And averred, that that Bond was made for enjoying of ſuch a Leaſe: But becauſe the Condition expreſſed of the Bond, was for payment of monie, The Juſtices held it cleer for Law, That the Bond was good, and out of the Statute: And ſo it was adjudged.

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27. *Eliz. in the Common Pleas*

39. KITTLEY'S Caſe.

AN Action of Debt was brought againſt *Euſtace Kittley*, and *Charls Kittley*, Executors of the Will of *Francis Kittley*: The Defendants pleaded, That they had fully Adminiſtred; and upon a ſpeciall Verdict the Caſe was this, *Francis Kittley* made the Defendants his Executors, who being within age, Adminiſtration was committed unto another untill they came of full age; and after they were of full age, the Jury found, That in the hands of the Adminiſtrator *Fuerunt bona & debita Teſtatoris*, to the value of 4000. li. To which Adminiſtrator the Defendants Executors did releaſe at their full age all Demands; the which Releaſe, whether it were Aſſets in the hands of the Executors or not, the Jurours prayed the Opinion of the Court. *Puckering* the Queens Sergeant; It is not Aſſets, for a Releaſe of a thing which is not Aſſets in the hand of an Executor cannot be ſaid Aſſets, and things in Action before they come in Poſſeſſion, cannot be ſaid Aſſets: But a Gift of Goods in Poſſeſſion is Aſſets, and a *Devaſtavit* of the Goods of the dead. Alſo there is a difference betwixt a certain thing releaſed and a thing uncertain; of a certain it is Aſſets, for by ſuch means he hath given ſuch a thing which is Aſſets; but contrary, of an uncertain. And this Difference is proved by 13. *E.* 3. *Execut.* 91. where it is holden,

pen, That if Executors releaſe to the Debtor, he ſhall account for ſuch Sum before the Ordinary; by *Parne*. But *Trew*, He ſhall not account: But the whole Court was againſt *Puckering*. And firſt *Anderſon*, It is a cleer Caſe, That this Releaſe is Aſſets, for he hath thereby given away that which might have been Aſſets: And the Law doth intend, That when he releaſes, that he hath Recompence and Satisfaction from the Party to whom the releaſe is made: And he denyed the Difference of certain and uncertain, put by *Puckering*; and be it in Account or Treſpaſſe, a Releaſe is Aſſets. And it is not requiſite that every Aſſets be a thing in Poſſeſſion, or in the hands of the Teſtator; for a thing may be Aſſets, which never was in the Teſtators hands, if thoſe things come in Lieu of the thing which was in the hands of the Teſtator, as Money for Land or other Goods ſold: Or if they came by reaſon of another thing which was in the hands of the Teſtator, as increaſe of Goods by the Executors in their hands, by Merchandizing with the Goods of the Teſtator, or Goods purchaſed by the Villain of the Teſtator after his death, ſhall be Aſſets. So money received by the Executor of the Bailiffe of the Teſtator after his death, ſhall be ſaid Aſſets. *Windham* Juſtice, So it is, if the Teſtator have Sheep, Swine, or Cowes, and dieth, and they have young Lambs, Pigs, or Calves, they are Aſſets for the reaſon aforeſaid: And he agreed, that the Releaſe is Aſſets; and he ſaid, It had been ſo here adjudged, and he denyed alſo the difference taken by *Puckering*. *Periam* agreed with the reſt in all, and alſo denyed the difference: And by him, Things in Action or Poſſeſſion certain or uncertain, if they be releaſed, they are Aſſets: And he ſaid, That the uncertainty muſt be ſuch, that the ſame cannot be proved to the Court, or unto a Jury; that the thing releaſed might not by Poſſibility have been Aſſets. For if Treſpaſſe be done to the Teſtator by taking his goods and he dieth, and the Executors releaſe all Actions, the ſame is Aſſets, becauſe it might be proved to the Jury, That had they not releaſed, but had brought their Action of Treſpaſſe, *De bonis aſportatis in vita teſtatoris, &c.* that they might have recovered Damages, which would have ſatisfied the Debts or Legaces of the Teſtator, and therefore it ſhall be Aſſets: And yet the thing recovered was not in the Teſtator, or a thing in Poſſeſſion, or certain in the hands of the Executors; with whom *Rodes* agreed. And *Periam* conceived, That ſuch Adminiſtrators made *Durante minori ætate* of the Executor, could not by our Law, neither Sue nor be Sued; For, as he conceived, the Infant was the Executor, and an Infant Executor may either Sue or be Sued, and may releaſe if there be a ſufficient Conſideration given him: and therefore Adminiſtration for ſuch defect is but idle: Wherefore, he ſaid, That if an Infant doth releaſe where he hath no cauſe, nor good conſideration, he ſhall be anſwerable of his own goods, when he cometh of full age, for the waſting of the

the eſtate; and ſuch Releaſe ſhall be Aſſets: And it was holden, That a Releaſe before probate of the Will, is good: and it is Aſſets alſo. And the ſame Term Judgment was given, that the Releaſe of the Enfant Executor was Aſſets.

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27. *Eliz. In the Common Pleas.*

40. SYDENHAM *and* WORLINGTON'S Caſe.

Sydenham brought an Action upon the Caſe upon an *Aſſumpſit* againſt *Worlington* for 30 li, and alledged for Conſideration, that he, at the requeſt of the Defendant, was Surety and Bail for *J. S.* who was arreſted into the Kings Bench upon an Action of 30 li, and that afterwards, for the default of *J. S.* he was conſtrained to pay the ſaid 30 pounds. After which, the Defendant meeting with the Plaintiff, promiſed him for the ſame conſideration, that he would repay that 30 pound: upon which promiſe and conſideration, the Plaintiff brought this Action. *Walmeſley.* This Conſideration will not maintain this Action, becauſe the conſideration and the promiſe did not concur and go together; for the conſideration was long before executed, ſo as now it cannot be intended that the promiſe was for the ſame conſideration. As if one give to me an Horſe, and a month after I promiſe him for the ſaid Horſe ten pounds; for that he ſhall neither have Debt nor Aſſumpſit, for it is neither a Contract nor a ſufficient Conſideration, becauſe it is executed. *Anderſon.* The Action will not lie, for it is but *nudum pactum*, becauſe the ſuppoſed contract was determined, and not in *eſſe* at the time of the promiſe. But he ſaid it was otherwiſe upon a conſideration of Marriage, for that is alwayes a preſent conſideration, and alwayes a conſideration, becauſe the party is alwayes married. *Windham* to the ſame intent; and compared it to the Caſe of 5. *H.* 7. If one ſell an horſe to another, and after at another day will warrant him to be good and ſound of limb and member, it is void warranty; for it ought to have been at the ſame time that the horſe was ſold. *Periam* Juſtice contrary: for he ſaid, This caſe is not like to any of the caſes which have been put; becauſe there is a great difference betwixt Contracts and this Action; For in Contracts, the conſideration, and promiſe, and ſale ought to concur, becauſe a Contract is derived of *con & trahere*, which is a drawing together: ſo as in Contracts every thing requiſite ought to concur; as the conſideration of the one ſide, and the promiſe or ſale of the other ſide. But to maintain an Aſſumpſit, it is not requiſite, for it is ſufficient if there be any moving cauſe or conſideration precedent, for which cauſe or conſideration the promiſe

miſe was made; and that is the common practice at this day: For in Aſſumpſit, the Declaration is, That the Defendant, for and in conſideration of ten pounds to him paid (*poſtea, ſilicet,*) a day or two after, *ſuper ſe aſſumpſit, &c.* and that is good; and yet there the conſideration is executed. And he ſaid, that *Hunt* and *Baker's* caſe (which ſee 10. *Eliz. Dyer* 272.) would prove it. The caſe was this: The Apprentice of *Hunt* was arreſted when *Hunt* was in the Country; and *Baker* one of *Hunts* neighbours, to keep the Apprentice out of the Counter, became his Baile, and paid the debt. Afterwards *Hunt* returning out of the Country, thanked *Baker* for his neighbourly part, and promiſed him to repay him the ſaid ſumm: Upon which *Baker* brought an Action upon the Caſe upon the promiſe: And it was adjudged that the Action would not lie; not becauſe the conſideration was precedent to the promiſe, but becauſe it was executed and determined long before. But there the Juſtices held, That if *Hunt* had requeſted *Baker* to have been ſurety, or to pay the debt, and upon that requeſt *Baker* paid the debt, and afterwards *Hunt* promiſeth for that conſideration, the ſame is good; for the conſideration precedes, and was at the inſtance and requeſt of the Defendant. So here, *Sydenham* became bail at the requeſt of the Defendant, and therefore it is reaſon, that if he be at loſſe by his requeſt, that he ought to ſatitfie him. And he conceived the Law to be cleer, that it was a good conſideration, and that the requeſt is a great help in the Caſe. *Rodes* Juſtice agreed with *Periam*, for the ſame reaſons, and denyed the Caſe put by *Anderſon*. And he ſaid, That if one ſerve me for a year, and hath nothing for his ſervice, and afterwards, at the end of the year, I promiſe him ten pounds for his good and faithfull ſervice ended; he may maintain an Aſſumpſit, for it is a good conſideration: But if the ſervant hath wages given him, and the Maſter, *ex abundantia*, as he ſaid, promiſeth him ten pounds after his ſervice ended, the ſame promiſe ſhall not maintain an Aſſumpſit; for there is not any new cauſe or conſideration preceding the Aſſumpſit. And *Periam* agreed to that difference, and it was not denyed by the other Juſtices: but they ſaid that the principall Caſe was a good caſe to be adviſed upon; and at length, after good advice and deliberation had of the cauſe, they gave Judgment for the Plaintiff, that the Action would lie. And note, That they very much relyed upon *Hunt* and *Bakers* Caſe before cited. See *Hunt* and *Baker's* Caſe in 10. *Eliz. Dyer* 272.

Paſc. 27. Eliz. in the Common Pleas.

41 CARTER and CROST's Caſe.

CArter brought an Action of Detinue of a chaine againſt *Croſts*, and declared, That *Thomas Carter* his brother, was thereof poſſeſſed, and died Inteſtate; for which cauſe the Biſhop of *Cork* granted him Letters of Adminiſtration; and that the Chain came to the Defendants hands by Trover, &c. And declared alſo, That he was as Adminiſtrator thereof, poſſeſſed in *London*: To which the Defendant *Croſts* pleaded the Generall Iſſue; and the Jury gave a ſpeciall Verdict, and found that the Adminiſtration was committed to *Carter* in *London* by the Biſhop of *Cork* in *Ireland* here, and did not find that *Carter* was poſſeſſed of the chain in *London*. And upon this ſpecial Verdict, firſt it was moved, That the Biſhop of *Cork* in *Ireland*, being in *England*, might commit adminiſtration of things in *Ireland*; And it was held cleerly by the Court, That he might of things within his Dioceſſe in *Ireland*, becauſe it is an Authority, Power, or Matter that followes his Perſon; and whereſoever his Perſon is, there is his Authority: As the Biſhop of *London* may commit Adminiſtration, being at *York*; but it ought to be alwaies of things within his Dioceſſe; and therefore they held, That the Declaration was good in that point, That the Biſhop of *Cork* did commit Adminiſtration in *London*, although there be no ſuch Biſhop of *England*. The ſecond point was, If an Aminiſtrator made by a Biſhop of *Ireland*, might bring an Action here as Adminiſtrator; and it was holden, That he could not, becauſe of the Letters of the Adminiſtration granted in *Ireland*, there could be no triall here in *England*; although that *Rodes* Juſtice ſaid, That Acts done in Spirituall Courts in Forrain places, as at *Rome*, or elſewhere, the Law ſaith, That a Jury may take notice of them; becauſe ſuch Courts, and the Spirituall Courts here, make but one Court; and he proved it by the Caſe of the *Miſcreancy* in 5. *R.* 2. *Tryall* 54. where a *Quare Impedit* was brought by the King againſt the Clerk of a Church, within the Biſhopprick of *Durham*, and counted that the Biſhop who is dead, preſented his Clerk, and that the Clerk died, and the Chapter collated a Cardinall, who for Miſcreancy and Schiſme, was deprived, the Temporalties being in the Kings hands. *Burgh*, He hath counted of an Avoidance for Miſcreancy at the Court of *Rome*, which thing is not tryable here. *Belknap* Chief Juſtice, I ſay for certain, That this Court ſhall have Conuſans of the Plea, and that I will prove by Reaſon; for all Spirituall Courts are but one Court; and if a man in the Arches, be deprived for a Crime, and appeal to *Rome*, and is alſo there deprived, that Depriva-

vation is triable in the Kings Court, in the Arches. And if a man be adhering unto the Kings enemies in *France*, his Lands are forfeitable, and his adherence ſhall be tryed where his Land is, as oftentimes it hath been for adherence to the Kings enemies in *Scotland*: And ſo (by my faith) if one be Miſcreant, his Land is forfeitable, and the Lord thereof ſhall have the Eſcheat, and that is good reaſon. For if a man who is out of the Faith of the King, ſhall forfeit his Land for the ſame; *à fortiori*, he who is out of the faith of God; and that he ſwore to be Law, Whereupon *Burgh* ſaid, *Reſpondes ouſter*: And ſo ſaith *Fitzherbert*, *Tryal* 54. by that Plea and Judgement, Miſcreancy and Deprivation at *Rome* ſhall bee tryed here: And there the *Venire facias* was awarded to the Sheriffe where the Church was, and not to the Biſhop of *Durham*; and ſo the Miſcreancy and Deprivation ſhall bee tryed where the Church is. The third Point was, Whether an Adminiſtrator might count of his own Poſſeſſion, although he was never poſſeſſed: and the whole Court were of Opinion that he might, if the Inteſtate at the time of his death was poſſeſſed; The Adminiſtrator may declare of Goods taken out of his owne Poſſeſſion, although he was never poſſeſſed; for of tranſitory things, the Law caſts upon him a ſufficient poſſeſſion to maintain an Action Poſſeſſory, as the Lord before ſeiſin may have a Raviſhment of Ward, &c. But otherwiſe it is, if one take the Goods of the Inteſtate out of his Poſſeſſion before he dieth, for then but only a bare right comes to the Adminiſtrator. And that is to bee meant when the Goods are taken *Tranſgreſſivè*, and not *Deſtrictivè*. The fourth Point was, Whether the Jury might find matter done out of the Realme; and if that ſhould abate the Writ or not. And they held alſo cleerly, That upon a generall Iſſue, the Jury may find a Forrain matter, as a thing done out of the Realme; but it ſhall not abate the Writ, if it be not matter of ſubſtance, and pleaded before: But here the finding of the Letters of Adminiſtration, is more then they had in Iſſue; and alſo is but matter of Evidence; for the ſubſtance in this Caſe was the Poſſeſſion, and not the Adminiſtration, for he might have an Action of his Poſſeſſion without ſhewing the Letters of Adminiſtration: And afterwards Judgement was given for *Carter* the Plaintiffe.

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Mich. 27. Eliz. In the Kings Bench.

42. FUTTER *and* BOOROMES Caſe.

THE Caſe was, that the Queen by her Letters Patents *anno* 12. of Reign, *ex certa ſcientia & mero motu, &c.* did grant to *B. totam illam portionem decimarum & Garbarum in L. in Com. Norf. unà cum omnibus aliis decimis ſuis cujuſcunque generis & ſpeciei fuerint in L. nuper in poſſeſſione* Johannis Corbet, or his Aſſigns, *nuper Abath. de Wenly, pertinent. &c.* And *in facto* the Parſonage of *L.* was parcell of the Abby of *Wenly*, and out thereof was a portion appertaining to another Church; And this Rectorie came unto the Queen by the Statute of diſſolution of *Abbyes*: The queſtion was, whether the Rectorie do paſs by the Grant, *totam illam portionem*: there being alſo words in the Patent, *viz. Non obſtante* any *miſnoſmer*, miſrecital, or other ſuch things which are recited in the Statute for confirmation of Patents. *Hamon*: the Grant is good; for this word (portion) ſhall not be ſaid a thing ſevered from the Church and Rectorie; And all the Tythes are parcel of the Rectorie: for as 44. *E.* 3. 5. is, before the Councel of *Lateran*, a man might give his Tythes to what Church he pleaſed; And when any thing is given to the Church, it is a portion belonging to the Church; as the Glebe is, which is but a clod of Earth, which is parcel of the Rectorie and a portion of it. And a caſe in this Court in the time of this Queen, was argued, and there in a Rectorie there were many Prieſts, and each of them knew his portion, ſo as they were called portionary Prieſts, which was in reſpect they had each of them intereſt in the Church, and not becauſe their portions were ſevered each from the other. And 22. *E.* 4. 24. by *Pigot* it is ſaid, If a Parſon hath any Tythes in another Pariſh, as appertaining to his Church, it is called a portion, ſo as portion is not meant that which is ſevered by it ſelf as in groſs; But by portion is meant all the Tythes appertaining to the Rectorie, or the Rectorie it ſelf. For as 22. *Aſſ.* 9. is, If the King have Tythes of thoſe Lands which lie out of any Pariſh, if he grant *totam portionem decimarum, &c.* I conceive, that the Tythes ſhall paſs thereby: And yet it is a thing ſevered from other Tythes; but it doth contain all the qualitie of Tythes in that place. And alſo if the King grant his Rectorie of *D.* to *J. S.* ſaving to him the Tythes, and afterwards grants *totam portionem Decimarum, &c.* I conceive cleerly (under correction) that the Tythes ſhall paſs. And in the principal caſe, If the Tythes ſhall not paſs by this word (portion;) yet the *Non obſtante* in the Letters Patents *de male nominando, &c.* ſhall make it to be a good grant, and that ſo the Tythes ſhall paſs thereby. We are alſo to conſider, if by any words

ſubſequent in the Patent, the grant be not good. *viz.* by theſe words, *cum omnibus aliis Decimis &c. in tenura & occupatione* Johannis Corbet &c. Whereas in truth *John Corbet* was never Occupier of them: And as to that, I conceive, That the words before, *cum omnibus, &c.* paſſe the Tithes; And that the words after, ſhall not abridge or controle the largeneſs of the precedent words; and to that purpoſe is the Caſe 39. *E.* 3. 9. of the Grant of the King to the Earle of *Saliſbury*, &c. In the end of which Grant were theſe words, *Quas nuper conceſſimus patri, &c.* although that the thing granted, was never granted to the Father; yet the Grant was good, and not reſtreined by thoſe words coming after. 2. *E.* 4. A Releaſe was pleaded of a right which the party had in Lands of the part of his Father, &c. there, although he had the Land from the part of his Mother, yet the Releaſe was good. In the Caſe of the Biſhop of *Bath* and *Wells*, which was lately argued in the Exchequer Chamber; There it was agreed, That if the King grant a Faire in ſuch a place, or elſewhere in the County of Somerſet; if he miſtake the County, in putting one County for another, yet the Grant is good, and all that coming after the *alibi* ſhall be void. He further argued, That all the matter appearing by ſpeciall Verdict, is not well found; for the Jury find, That no Tithes were in the Occupation of *John Corbet* at the time of the Grant; and no mention is in it, that they were not in his Occupation nor in the Occupation of his Aſſignes; for they might be in the Occupation of his Aſſigns, although that they were not in his own Occupation: For in a Verdict, if it ſtrongly imply any thing not expreſſed (as in the Caſe of *Trivilian*: where the Jury found a deviſe of Land, without ſaying, That the Land was holden in Socage) it is a good finding of the Jury; for no deviſe could be, if it were not of Land holden in Socage, and therefore that tenure is implyed. Contrary, When a man is to plead a Deviſe; but where the Verdict doth not ſtrongly imply a thing, it ſhall not be good; as in *Scolaſticas* Caſe, *Plo. Com.* 411. Exception was taken that the Jury did not find, That the Deviſor had not any Heir Male alive *præter* the ſaid *John* and *Frances*; for if he had, the wife of the Plaintiffe had no cauſe of Action. And it was there holden by *Harper*, That it was not a good Verdict for the incertainty; ſo in our Caſe. *Cook* contrary: 1. The Grant is not good, and the Rectory is no part of it; nor can they paſſe by the word [Portion.] 1. By the Etimology of the word; for Portion is a thing in groſſe by it ſelfe, and cannot paſſe by that thing which is intended *Nomen Collectivum*, as a Rectory is. So of a Manor; if a man grant *totam illam portionem Manerii*, hee being ſeiſed of a Manor, nothing paſſeth; for *portio* is no more then *partio*, as the Latiniſts ſay; and then if a man grant all that part of his Manor, or part of his Tithes in *D.* and he be ſeiſed of the whole Manor of *D.* or of the Rectory of *D.* nothing paſſeth. Alſo the words after expound the Queens mind, for the words precedent are coupled

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with a *(Cum)* after, *ſcil. Cum omnibus aliis*, &c. So as the firſt part ſhews the grant of Tithes, and the later part ſhews what Tithes; viz. thoſe which were in the Occupation of *John Corbet*. ſo as but part is granted: and in the Kings Grant, a part ſhall not be taken for the whole; and ſo in no caſe, if not by the Figure Synecdoche, which cannot be in caſes of Grants at the common Law. Alſo the words are, *totam illam portionem*, &c. and not *totam meam portionem*, &c. and the word [*illa*] or [*that*,] ought to have a word [*What*;] which is a word ſhewing in whoſe poſſeſſion the portion was. Alſo the Kings Letters Patents ought for the moſt part be taken according to the meaning of the King; for the caſe was in the Exchequer: That where the King granted all his Tenements in *D.* that nothing paſſed by that Grant, but the Houſes. Otherwiſe it is in the caſe of a common perſon. So 22. *Aſſ.* where the King grants goods of Felons *quorumcunq; damnatorum*, it ſhall not extend to Treaſon, nor to murder of the Kings Meſſenger. So 8. *H.* 4. 2. If the Grant be of all the goods of thoſe who *pro aliqua tranſgreſſione ſive delicto, &c. forisfacere deberent*; it ſhall not extend to thoſe who are *felo de ſe*. Alſo the *Non obſtante* doth not help the matter; For I take this difference, When nothing paſſeth by the words precedent, *Ex vi termini*, there nothing is helped by the *Non obſtante*: But if any thing paſſe by the precedent words, *Ex vi termini*, there a *Non obſtante* may make the thing good, which otherwiſe ſhould be void: As if the King grant to *J. S.* the Manor of *D. Non obſtante* that he is ſeiſed for the term of life thereof; it is a void Grant: But if the Grant were of the Manor of *D.* notwithſtanding that *I. S.* hath it for life, here the *Non obſtante* makes the Grant good; which otherwiſe ſhould be the ignorance of the King to make a Grant of that of which he is excluded by the *Non obſtante*; becauſe thereby he takes knowledg of the particular eſtate, and ſo he is not deceived. As to the matter moved againſt the Verdict, I conceive, that it makes againſt the other ſide; for it was on his part to prove the Occupation: and if there be no Occupation at the time of the Leaſe, the Grant is void: and he was to prove it, being in the affirmative. And then, *in re dubia majus inficiatio quàm affirmatio intelligenda*: and [a May be] may be intended in every caſe. And if ſuch conſtruction ſhould be in ſpeciall Verdicts, I dare affirm, that by ſuch [May bees] all ſpeciall Verdicts ſhall be quaſhed: But the Law is, to give a favourable conſtruction of them, according to the meaning of the Jurours. *Snagg* contrary: and by him theſe words, [*cum omnibus aliis, &c.*] are void in the Kings caſe: and vouched the caſe of 29. *E.* 3. 9. before vouched; Where the King had granted to the Earl of Salisbury the cuſtody of the Lands of the Prior of *Mountague*, being ſeiſed into the Kings hands as a Prior Alien: and afterwards the Earl died, his Heir within age, whereby the ſaid Lands, and others, and Advowſons, came to the Kings hand by

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reaſon of minority; and afterwards the King granted to the Son all the Lands and Advowſons which were *Patris ſui, ac omnes terras, ac omnes advocationes* of the ſaid Prior, which the King had before given to the father of the ſaid ſon. And it was there holden, That although that the Advowſons paſſed not to the Father, yet by that grant they did paſſe; and that theſe woads [which he granted to his father] were meerly void. *Clenche* Juſtice. Nothing paſſeth by this word [Portion] for it is a thing in groſs, and a thing in groſs cannot contain another thing, and a word which ſignifies a thing in groſſe cannot paſſe another thing: As if a man grant all his Services in *D.* it is to be intended Services in groſſe; and if he have not any Services, but thoſe which are parcell of a Manor, nothing ſhall paſſe by thoſe words. But I conceive, That thoſe Tithes which are parcell of the Rectory ſhall paſſe by theſe words, *Cum aliis, &c.* For although that the words are, in the tenure of *John Corbet*, yet if they were not in his tenure, the *Non obſtante* will help it; for it is, *Non obſtante* any miſnaming of the Tenants, or of the quantity or quality of the Tithes; ſo as theſe words imply as much as if the Grant had been in the tenure of *John Corbet*, or of any other in *L.* or elſewhere. *Gaudy* Juſtice, If the words *Totam illam portionem* were left out of the Book, the other words, *Cum omnibus aliis*, ſhall paſſe nothing; and thoſe words *Totam illam portionem*, are as nothing to paſſe a thing not in groſſe; and by conſequence nothing ſhall paſſe by the other words: And afterwards Judgement was given, That nothing paſſed by the Letters Patents.

Hill. 28 *Eliz. in the Kings Bench.*

43. Cropp's Caſe.

Cropp made a Leaſe for years, reſerving rent at *Mich.* upon Condition, That if the rent be behind at *Mich.* and a Month after, that he might enter. The Leſſee after *Mich.* and before the Month ended, ſent his ſervant to the houſe of *Cropp*, to pay the money to *Cropp*; the ſervant coming to *Cropps* houſe; found him not, for he was not at the Houſe; the Servant delivered the Rent to one *Margery Briggs*, who was his Daughter in Law, to deliver the ſame to *Cropp* the Leſſor. And the ſame *Margery* at one or two dayes before the payment of the ſaid Rent, had received the Rent in the like manner, and had paid it to *Cropp*, and he had accepted of it: But now he refuſed to receive it of her, but at the laſt day of the Month he went to the Land, and there demanded the Rent, and becauſe it was not paid, he entred. *Laiton* argued for the Leſſor. That his entry was lawfull,

for

for, he ſaid, That the Tender made by *Margery Briggs* to the Leſſor was not ſufficient: 1. Becauſe the Servant of the Leſſee had Authority to deliver it to the Leſſor; therefore when he delivers it to another, he hath not purſued his Authority. 19. *H.* 8. & 27. *H.* 8. Letter of Atturney made to diverſe to give livery of Seiſin. If one make Livery alone, it is void; 34. *H.* 6. If a *Capias* be to many Coroners, and one execute it, it is void; 18. *E.* 4. If one hath a Letter of Atturney to make Livery, he cannot transfer this Authority to another to make Livery for him. Alſo, if in this Caſe a Stranger had tendered the Rent, the Leſſor was not bound to receive it; as upon a Mortgage, if a Stranger tender the Money, the Mortgagee is not bound to accept of it. 21. *E.* 4. In caſe of Corporall Service, as Homage or Fealty, the demand is to be made of the perſon; but of Rent, the demand is to be made upon the Land, becauſe the Land is the Debtor. *Clenche* Juſtice conceived, That if the Leſſee himſelfe had delivered the Rent to *Margery Briggs*, that it had been good, but it is a doubt if good, made by the ſervant, for he could not transfer his Authority to another. *Wray* Chief Juſtice, If it were upon a Bond, the Obligee was not bound to accept of it before the day; ſo if it were payable at *Mich.* only, there the Leſſor is not bound to accept of it before the day: but in as much as 'tis after the day, the Month is a Liberty and Benefit for the Leſſee; and it was due at *Mich.* therefore I conceive, That being tendred to him within any part of the Month, that he is bound to accept of it. And as to that, That his ſervant cannot transfer his Authority over, and therefore *Margery Briggs* is but a ſtranger in that act: that is not ſo, for now ſhe is a ſervant in that, to the Leſſor himſelf; and therefore there is privity enough: alſo ſhe hath received the Rent for him before. What then, ſaid *Laiton*? We can prove a ſpeciall commandment for the time before that ſhe received it. At another day the Caſe was moved again, and it was ruled againſt *Cropp* the Leſſor, becauſe the rent was due at *Mich.* and the month after was given becauſe of the penalty of Re-entry; and the Tender and Refuſall after the Rent was due, and within the month, ſaves the penalty; and alſo Lawes ought to be expounded *Secundùm equum & bonum*, and good conſcience; and the Leſſor was at no prejudice, if he had accepted of it, when his Daughter in Law tendred it unto him; and therefore it was conceived, That he had an intent to defraud the Leſſee of his Leaſe; and the Law doth not favour Frauds; and therefore it was adjudged againſt *Cropp* the Leſſor.

Hill.

Hill. 28 Eliz. In the King's Bench.

44 PRIDEAUX's Caſe.

IN this Caſe it was moved, Where a man marrieth a woman who is an Adminiſtratrix, ſo as the Suit is to be in both their names, Whether they ſhall be named in the Writ Adminiſtrators or not? *Wray* Chief Juſtice, They ſhall be; for by the Entermarriage, the Husband hath Authority to entermeddle with the Goods, as well as the Wife; but in the Declaration, all the ſpeciall matter ought to be ſet forth; and ſo ſome ſaid is the Book of Entries, That both of them ſhall be named Adminiſtrators.

Hill. 28. Eliz. in the King's Bench.

45.

AN Action upon the Caſe was brought for theſe words, viz. Thou art a Cozener and a Bankrupt, and haſt an Occupation to deceive men by; the words were ſpoken of a Gentleman, who had One hundred Pound land *per annum* to live upon; and therefore although he uſed to buy and ſell Iron, yet becauſe he was not a Merchant, nor did not live by his Trade, the better Opinion of the Court was, That the words were not actionable, and ſo adjudged.

Hill. 28. Eliz. in the King's Bench.

46 HARWOOD and HIGHAM's Caſe.

ONE had Houſes and Lands which had been in the tenures of thoſe which had the Houſes: and he deviſed his Houſes with the Appurtenances; and it was holden, and ſo adjudged by the whole Court, That the Lands did paſſe by the words, [With the Appurtenances:] For it was in a Will, in which the intent of the Deviſor ſhall be obſerved.

Trinit. 28. Eliz. Rot. 1130. in the Common Pleas.

47 The QUEEN and SAVACRE's Case.

IN a *Quare Impedit* by the Queen against *Savacre* Clerk, the Case was this; The Queen presented to a Parsonage which was void, by the taking of another Benefice by the said *Savacre*; and the said *Savacre* for to enable him to have two Benefices, pleaded, That he was the Chaplain of Sir *James a Crosts*, Controller of the Queens House, who, by the Statute of 21. *H.* 8. *cap.* 13. might have two Chaplains, and might qualifie them to take two Benefices; to which it was replied, That the said Sir *James a Croft* had two other Chaplains, which are qualified to have two Benefices, and have also two Benefices by reason of that qualification, and also are alive; so as he is a third Chaplain, who could not be qualified by that Statute. To which it was answered; That one of those two Chaplains is removed and discharged by the said Sir *James a Croft* to be his Domesticall Chaplain: *scil. Capellanum familiarem*, as it was pleaded, and so he hath now but two Chaplains, of which the Defendant was one; upon which there was demurrer joyned. Three Points were in the Case: 1. If the qualification, *Sub sigillo*, be sufficient within the Statute, without the Signature or name of Sir *James a Croft*. 2. When two Chaplains are qualified, and one is removed out of service, if he might qualifie another by the Statute, the party being alive who was qualified. 3. Whether he remain his Chaplain, notwithstanding such removall during his life. Upon which Points, after perusall of the Statute, it was agreed by the whole Court, That the Queen ought to have Judgement, and so they gave Judgement presently: And the reasons of their Judgement were, for the first Point, Because that the Defendant *Savacre* was not qualified, *Sub Signo & Sigillo prædict. Jacobi a Croft*, but only *Sub Sigillo*; and the words of the Statute are, viz. Under the Sign and Seal of the King or other their Lord or Master, &c. Which words, Or other their Lord or Master, shall be referred to Sign and Seal, which is limited to the King. And as to the second Point, they held the Law to be cleer, That after that he hath retained as many as by the Law he may retaine, and they are *sub Signo* and *Sigillo* testified to bee his Chaplains, and by reason thereof have qualification to have two Benefices, and have two Benefices by vertue thereof, although that afterwards they are removed for displeasure or otherwise out of service; yet during their lives, their Master cannot take other Chaplains, which may by this Statute be qualified; for so every Baron might have infinite of Chaplains which might be qualified, which was not the meaning of

the Statute; and of that opinion is the Lord *Dyer* in his Reports. And as to the third Point, they held, That although he were removed from the Domeſtreall Service of the Family, yet hee did remaine Chaplain at large; and ſo a Chaplain within the Statute: And further, the Opinion of the Court was in this Caſe, That if the party qualified do die, the Queen, or other Maſter mentioned in the Statute, might qualifie another againe: *Quod nota.* The Caſe was entred *Paſch. 28. Eliz. Rot. 1130. Scot.*

Mich. 28, 29. Eliz. in the King's Bench.

48.

ONE made a Deed in this forme, *Noverinit, &c.* that I have demiſed and to Farme letten all my Lands in *D.* to *I. S.* and his Wife, and to the Heirs of their two Bodies for thirteen years. And it was moved, That it was an Eſtate in taile, and 5. *E.* 3. and 4. *H.* 4. were vouched. But *Clenche* Juſtice (who was only preſent in Court) was of Opinion, That it is but a Leaſe for years, although it was put that Livery was made *ſecundùm formam chartæ*: and he ſaid, That if one make a Leaſe for forty years to another, and his Heirs, and makes Livery, that it is but a Leaſe for years; and he ſaid, It is no Livery, but rather a giving of Poſſeſſion. But he would have it moved again when the other Juſtices came.

Mich. 28, 29. Eliz. in the King's Bench.

49

AN Action upon the Caſe was brought againſt an Inn-keeper upon the Cuſtome of *England*, for the ſafe keeping of the things and Goods of their Gueſts; and he brought his Action in another County then where the Inn was; and it was ſaid by *Clench* Juſtice, That if it be an Action upon the Caſe, upon a Contract, or for words, and the like tranſitory things, that it may be brought in any County; but in this Caſe he ſaid, It ought to be brought where the Inn is.

Mich. 28, 29. *Eliz. in the King's Bench.*

50.

ONE charged two men as Receivers; The Queſtion was, Whether one of them might plead, *Ne unque ſon* Receiver; and it was moved, That he could not, but ought to ſay, *Ne unque ſon* Receiver, *abſq; hoc*, that he and his Companion were Receivers. *Clench* and *Suit* Juſtices held, That it was well without Traverſe, and *Vide* 10. *E.* 4. 8. Where an Account was brought againſt one, ſuppoſing the receipt of Two hundred Marks by the hands of *I. P.* and *R. C.* The Defendant (as to One hundred Marks) pleaded, That he received it by the hands of *I. P. tantùm*, without that, that he received it by the hands of *I. P.* and *R. C.* And as to the other One hundred Marks, he received them from the hands of *R. C.* only, without that that he received by *I. P.* and *R. C.* And there it was doubted, Whether it be good or not. But in the end of the Caſe, by *Fitz. Accompt.* 14. If an Account be brought againſt two, and one ſaith, He was ſole his Receiver, and hath accounted before ſuch an Auditor, if the Plaintiffe anſwer unto his Bar, he ſhall abate his Writ, becauſe the Receipt is ſuppoſed to be a joint Receipt: And it is not like unto a *Præcipe quod reddat* againſt two.

Mich. 28,29. *Eliz. in the King's Bench.*

51.

AN Action upon the Caſe was brought againſt one, for that he ſaid to another, I will give thee Ten Pound to kill ſuch a one; and the Queſtion was, Whether the Action would lie. It was ſaid, by Sir *Thomas Cockaine*, that ſuch a Lady had given poyſon to ſuch a one to kill her Child within her; that the words were not Actionable. Alſo one ſaid, That another had put Gun-Powder in the Window of a houſe, to fire ſuch a houſe, and the houſe was not fired; adjudged that the words were not Actionable. The Caſe was betwixt *Ramſey* of *Buckinghamſhire* and another, who ſaid, That he lay in wait to have killed him; it was found for the Plaintiffe, and he had Forty Pound Damages given him. But of the Principall Caſe the Court would adviſe.

Mich. 28, 29. Eliz. in the Kings Bench.

52

IT was holden by the Court, That the *Habeas corpus* ſhall be alwayes directed to him who hath the cuſtody of the Body: Therefore whereas in the caſe of one *Wickham*, it was directed to the Maior, Bailiffs, and Burgeſſes, Exception was taken unto it, becauſe the pleas were holden before the Maior, Bailiff and Steward: but the Exception was diſſallowed: But otherwiſe it is in a Writ of Error; for that ſhall be directed to thoſe before whom the Judgment was given. In *London* the *Habeas corpus* ſhall be directed *Majori & Vicecomit. London*, becauſe they have the cuſtodie, and not to the whole Corporation: But I conceive, that the courſe is, that the Writ is directed *Majori, Aldermannis, & Vicecomitibus, &c.*

Mich. 28 & 29 Eliz. In the Common Pleas.

53 MARSH and PALFORD's Caſe.

Owen moved this Caſe, That one had an upper chamber in Fee, and another had the neather or lower part of the ſame houſe in Fee; and he who had the upper chamber pulled it down, and he which had the lower room, would not ſuffer him to build it up again. But the opinion of the Juſtices was, that he might build it up again, if he did it within convenient time. And there it was ſaid, that it had been a Queſtion, Whether a man might have a Free-hold in an upper chamber?

Mich. 28, 29. Eliz. in the Kings Bench.

54.

A Queſtion was moved to the Court, Whether Tithe ſhould be paid of Heath, Turf, and Broom? And the opinion of *Suit* Juſtice was, That if they have paid tithe Wool, Milk, Calves, &c. for their cattell which have gone upon the Land, that they ſhould not pay tithe of them. But ſome doubted of it, and conceived, That they ought to ſay, that they have uſed to pay thoſe Tithes for all other Tithes; otherwiſe they ſhould pay tithe for Heath, Turf, Broom, &c.

Mich.

Mich. 28,29 *Eliz. in the Kings Bench.*

55.

TWo Parſons were of two ſeverall Pariſhes, and the one claimed certain Tithes within the Pariſh of the other, and ſaid, That he and all his Predeceſſors, Parſons of ſuch a Church, *ſcil.* of *D.* had uſed to have the Tithes of ſuch Lands within the Pariſh of *S.* and that was pleaded in the Spiritual Court: and the Court was moved for to grant a Prohibition: And *Suit* and *Clenche* Juſtices, He ſhall have a Prohibition, for he claims onely a portion of Tithes, and that by preſcription, and not meerly as Parſon, or by reaſon of the Parſonage, but by a collaterall cauſe, viz. by Preſcription, which is a Temporall cauſe and thing. And it is not materiall, whether it be betwixt two Parſons. *Vide* 20. *H* 6.17. *Br. Juriſdiction* 80. and 11. *H.* 4. and 35. *H.* 6.39. *Br. Juriſdiction* 3. Where in Treſpaſſe for taking of Tithes, the Defendant claimed them as Parſon, and within his Pariſh: and the Plaintiffe preſcribed, That he and his predeceſſors, Vicars there, had had the Tithes of that place time out of minde, &c. And the opinion of the Court was, that the right of Tithes came in debate betwixt the Vicar and the Parſon, who were Spirituall perſons, who might try the right of Tithes: And therfore there the Temporall Court ſhould not have the Juriſdiction.

Mich. 28,29 *Eliz. In the Kings Bench.*

56

IN an Indictment upon the Statute of 8. *H.* 6. of Forcible Entry, the Caſe was this: One was Leſſee for yeers, and the Reverſion did belong unto the Company of Goldſmiths: And one was indicted for a forcible Entry, and the words of the Indictment were, That *expulit & diſſeiſivit* the Company of Goldſmiths, *& quendam I. S. tenentem expulit. Cooke* took exception to the Indictment, and ſaid, that a diſſeiſin might be to one although not in poſſeſſion, as to a Reverſioner upon a term for yeers, or upon a Wardſhip; but he could not be expulſed if he were not in poſſeſſion, for *privatio præſupponit habitum*: And after it ſaith, that the Tenant was expulſed; and two cannot be expulſed where one onely was in poſſeſſion: therefore it ought to have ſaid, that the Tenant of the Free-hold was diſſeiſed, and the Termor expelled; and it applyes the word *expulit* to both. And *Fuller* took another Exception, that the Cart is ſet before the horſe: For he

he who had the Free-hold could not be diſſeiſed, if his Termor were not firſt ouſted: and the Indictment is, That the Tenant of the Free-hold was expulſed and diſſeiſed, and then the Termor was expelled. But *Suit* Juſtice, as to that, ſaid, that the later clauſe, *ſcil. et quendam I.S. tenentem, &c.* is but ſurpluſage: For if one enter with force, and expell the Tenant of the Free-hold, it is within the Statute of 8. *H.* 6. Then *Fuller* moved, that the Indictment doth not ſhew the place where he expelled him. But *Clench* Juſtice ſaid, that that was not material, for he could not expell him at another place then upon the Land: As a man cannot make a Feoffment by livery and ſeiſin at another place, but upon the Land, unleſs a Feoffment with Livery within the view. And as to the Objection of *Cook*, that the Indictment is, that he diſſeiſed and expelled the Tenant of the Free-hold out of the poſſeſſion of the Free-hold: To that he anſwered, that the poſſeſſion of the Termor is the poſſeſſion of him in the Reverſion.

Mich. 28,29. *Eliz. in the King's Bench.*

57

A Man ſeiſed of a Copy-hold in Fee, made his Will, and thereby he deviſed the ſame unto his Wife for her life; and that after her death, his Wife or her Executors ſhould ſell the Land: He ſurrendred to the uſe of his Wife, which was entred in *hac forma*; viz. to the uſe of his Wife for life, *Secundùm formam ultimæ voluntatis.* The Woman ſold the Land during her life: The queſtion was, Whether ſhe might ſell or not? *Suit* Juſtice ſaid, That the intent doth appear that ſhe might ſell during her life; for when it ſaith, That ſhe or her Executors ſhould ſell after her death, it is meant the Eſtate which is to come after her death, for the Wife after her death could not ſell. The ſecond Point was, When the ſurrender is to the Wife for life, *ſecundùm formam ultimæ voluntatis*, Whether here ſhe have the Land for life, and the Fee alſo to ſell. *Clenche*, If ſhe had not the Fee to ſell, then the words *Secundùm formam ultimæ voluntatis*, ſhould be void; for the Surrender to the uſe of the wife for life, gives her an Eſtate for life, without any other words. *Suit*, If it were *ad uſum ultimæ voluntatis*, without ſpeaking, what Eſtate the Wife ſhould have; no doubt but ſhee ſhould have for her own uſe for life; and that afterwards ſhe might ſell the Land; but he ſaid, As the Caſe is put, it is a pretty Caſe: And it was adjourned.

Mich.

Mich. 28,29. *Eliz. in the Kings Bench.*

58

THis Caſe was moved in Court. A Copy-holder committed Waſte, by which a forfeiture accrued to the Lord, who afterwards did accept of the Rent: The queſtion was, Whether by this acceptance he were concluded of his Entrie for the Forfeiture. *Cook* ſaid, He was not, for it is not as the Caſe 45 *E.* 3. where a Leaſe is made upon Condition that the Leſſee ſhall not do Waſte, and he commits Waſte, and then the Leſſor accepts the Rent, there he cannot enter; But otherwiſe is it of a Copy-hold, for there is a condition in Law, and here in Fait; and a condition in Fait may ſave the Land by an Acceptance, but a condition in Law cannot; for by the condition in Law broken, the Eſtate of the Copyholder is meerly void. And the Court agreed, That when ſuch a Forfeiture is preſented, it is not to Entitle the Lord, but to give him notice; for the Copy-hold is in him by the Forfeiture preſently without any Preſentment. A man made a Leaſe for years, upon condition that he ſhould not aſſign over his Leaſe, and it was reſerving Rent; and after he did aſſign it, and then the Leſſor accepted the rent, there he ſhall not enter for the condition broken. Leſſee for years, upon condition, that he ſhould not do Waſte, and the Leſſor accepts of the Rent for the quarter in which the Waſte was done, yet he may enter; but if he do accept of a ſecond payment of the Rent, then it is otherwiſe; but if it were upon condition, That if he do waſte, that his Eſtate ſhall ceaſe: There no acceptance of the Rent by the Leſſor can make the Leaſe good. It was adjourned.

Mich. 28,29. *Eliz. in the Kings Bench.*

59

THE Lord Admirall did grant the Office of Clark or Regiſter of the Admirall Court, to one *Parker* and *Herold* for their lives, *& eorum diutius viventi:* And *Herold* bound himſelf in a Bond of Five Hundred Pound to *Parker*, that the ſaid *Parker* ſhould enjoy the Office, *cum omnibus proficuis* during his life; And afterwards *Herold* did interrupt the ſaid *Parker* in his Office; upon which he brought an Action of Debt upon the Bond. The Defendant pleaded, That ſuch is the cuſtome, That the Admirall might grant the ſame Office for the life of the Admirall only; and that he is dead, and ſo the Office void;

and

and that he did interrupt him, as it was lawfull for him to do; and demanded Judgement of the Action. Upon which *Cook* did demur in Law; and he took divers Exceptions to *Herolds* Plea. 1. That hee hath pleaded a Cuſtome, and hath ſo pleaded it, that no Iſſue can be taken upon it; for he ſaith, *Quod Uſitatum eſt, quod Admirallis pro tempore exiſtens non poteſt concedere Officium prædict. niſi pro termino vitæ ſuæ*; and doth not ſhew where the Court is holden; and doth not ſay *Quod talis habetur conſuetudo in curia*, as he ought, and as it is in 4. & 5 *Phil. & Mar. Dyer* 152. in an Aſſize brought of the ſame Office of Regiſterſhip of the Admiralty: for there he brought Aſſize *de libero tenemento ſuo* in *Ratcliffe*; and alledged, *Quod per conſuetudinem in curia Admiral. à tempore, &c.* And he ſaid, That the Court hath been uſed to be holden time out of mind, &c as well at *Ratcliffe* as elſewhere. And if the place be not alledged, then it cannot be known from what place the *Viſne* ſhall come: See alſo that forme obſerved in the Book of Entries 75. *b.* So in an Aſſize of the Office of *Philizer* in the Common Pleas it was alledged where the Bench was, viz. in *Com' Midd'* as it is in my Lord *Dyers* Reports. Alſo 2. he doth not ſay, That *Curia Admirallis* is an ancient Court, &c. as he ought; for in 22. *H.* 6. it is ſaid, That where a preſcription is alledged and pleaded in a Court, he ought to ſay, That it is an ancient Court, *in quâ habetur talis conſuetudo, &c.* for a Preſcription cannot be in any Court, if it be not an ancient Court. The third matter was, Becauſe that in the Condition of the Bond it is ſaid, That they are ſeiſed of that Office to them for their lives, *& eorum diutius viventi*: therefore he ſhall be eſtopped to ſay, That it is good only for the life of the Admirall, as in 18. *E.* 4. 4. He cannot ſpeak againſt the Condition of the Bond, although it be but a ſuppoſal or recital. The fourth matter was, Becauſe he hath bound himſelf, that the other ſhould enjoy the ſame all his life without interruption: although that the Office become void by Forfeiture or otherwiſe, yet he cannot have it againſt his own Bond. And *Cook* ſaid, There is a Caſe in my Lord *Dyers* Reports; where, if the Leſſor warrant the Eſtate of the Leſſee, if he be ouſted by a ſtranger without Title, he ſhall have no action of Covenant: But if the Covenant be, That he ſhall quietly enjoy it againſt him, although that the Leaſe become void; yet the Leſſor ſhall not take advantage againſt him. *Clenche* Juſtice, If the Party occupy the Office by right or by wrong, it is not materiall; he is not to interrupt him againſt his owne Bond.

Mich.

Mich. 28, 29. *Eliz. in the Kings Bench.*

60

AN Action of Debt was brought for an Amerciment in a Court Baron: And the Plaintiffe declared, That the Defendant was amerced at the Court Baron of the Farmor, of the Manor of *Cinkford:* and exception was taken, becauſe it might be that he was amerced at another Court of the Farmor; and therefore he ought to have ſaid; At the Court Baron of the Manor, and not at the Court of the Farmor of the Manor. Another Exception was, That hee ſaid, That at ſuch a Court holden before the Steward there, he was amerced: Whereas, in truth, the Court Baron is holden before the Suitors, becauſe they are the Judges, and not the Steward; and for that was vouched 4. *H.* 6. and *Fitz Nat.* in the Writ of *Moderata Miſericordia. Suit* Juſtice. True it is, that the Suitors are Judges in Real Cauſes, not in Perſonal. Another Exception was taken, That he doth not ſhew, That he had requeſted or demanded the Amercement. But to that it was anſwered, That [*Licet ſepius requiſitus*] was in the Declaration, and that is ſufficient, becauſe it was a Duty before the Requeſt; but if it firſt begin upon the Requeſt to be a Duty, then it ought to be alledged *In facto* that there was a Requeſt. Another Exception was, That no Cuſtome was alledged that they might amerce, for it is not incident of common right unto a Court Baron for to amerce, but to diſtrain or ſeiſe; therefore Cuſtome ought to warrant it. The Caſe was adjourned.

Mich. 28, 29. *Eliz. in the Kings Bench.*

61.

AN Action of Debt was brought upon a *Conceſſit Solvera*, according to the Law Merchant, and the cuſtome of the City of *Briſtow*, and Exception was taken, becauſe the Plaintiff did not make mention in the Declaration of the cuſtome: But becauſe in the end of his Plea he ſaid, *Proteſtando, ſe ſequi querelam ſecundùm conſuetudinem civitatis Briſtow*; the ſame was awarded to be good; and the Exception diſallowed.

Mich. 28,29. Eliz. in the King's Bench.

62.

Vit Juſtice ſaid, That if the cuſtome of a Manor be, That the Homage might make By-Lawes, it ſhall bind the Tenants, as well Freeholders, as Copy-holders: But *Tanfield*, of Councell in the Caſe, ſaid, That it is no good nor reaſonable cuſtome: But ſuch By-Lawes may be made by the greater number of the Tenants, otherwiſe they ſhall not bind them

Mich. 28,29. Eliz. in the King's Bench.

63 *The Vicar of* Pancras *Caſe.*

THE Vicar of *Pancras* ſued one in the Spirituall Court for Tithes: And he pleaded, That ſome of them, for which the Vicar did ſue, did belong to the Parſon; and that he had paid them to the Parſon, and prayed a Prohibition. *Cook*, He ſhall not have a Prohibition; for by this Plea he hath put in Debate the controverſie of the Tithes, betwixt the Parſon and Vicar; and then when both are Spiritual Perſons, the common Law ſhall not hold Plea of them, as is 35. *H.* 6. 39. and 31. *H.* 6. Alſo by this Plea a *Modus decimandi* is not in queſtion, but the right of the Tithes, and that doth appertain to the common Law. And there *Cook* ſaid, That it is holden in 11. *H.* 7. That Unions and Endowments of Vicarages do appertain to the Spirituall Law. Alſo the preſcription of the Defendant was, That he had uſed, time out of mind, &c. to have for horſes a giſtment, herbage, 3. d. *ob. q.* and after that they had uſed to pay for every Cow to the Vicar 4. d. and for the Calfe and Milk of every Cow, 6. d. And *Cook* took exception that ſuch preſcription was double and repugnant in it ſelf, for he preſcribes that he paies for herbage; and then he preſcribes, That he paies for every Cow 4 d. which cannot be meant but for herbage of the Cow, for it is not for Milk or Calfe of the Cow, for he preſcribes to pay for them 6. d. He took another Exception, That he preſcribes that he hath uſed to pay, but doth not ſhew that he hath paid; for ſo he ought to do, for otherwiſe he ſhall out the Spirituall Court of Juriſdiction, and yet not give any remedy in this Court. Alſo, he ſaith, That he hath paid, but doth not ſhew where; and the other may ſay, *non ſolvit*, and ſo an iſſue ſhall be, and no place from whence the *Viſne* ſhall come

come. *Godfrey* contrary. If one be a lay man, and the other a ſpirituall man, then the tryall ſhall be at the common Law, as it is holden 31. *H.*6. and 2. *E.*4. And the defendant here is a lay man, who makes preſcription of a *Modus decimandi*, for the diſcharge of Tithes in kind. As to that which *Cook* ſaid, That he preſcribes that he hath uſed to pay to the Parſon, and doth not ſay, That it was due to the Parſon; and if he pay the Vicars Tithes to the Parſon, he doth wrong to the Vicar; He ſaith, That he hath paid, and uſed to pay 4 d. to the Parſon in full ſatisfaction, &c. and *reddendo ſingula ſingulis*, it is good enough. As to the doubleneſſe or repugnancy of the Preſcription, he ſaid, That the preſcription is ſet forth according to the truth of the matter. As to the place, for that, no iſſue can be taken upon it; he anſwered, That he conceived the iſſue will bee upon the Cuſtome or *Modus decimandi*. And *Gawdy* Juſtice agreed to that. *Suit* Juſtice, There is no *Modus decimandi* alledged; for when he ſaith, That he hath paid to the Parſon that which the Vicar demands, that is no anſwer. *Gaudy* Juſtice, The preſcription is repugnant, as *Cook* ſaid; and he ſaid, That the herbage is for all Kine, as well for thoſe which have Calves, as thoſe which have not. No Prohibition granted.

Mich. 28,29. Eliz. in the Kings Bench.

64. WINDSMORE *and* HULBORD'S *Caſe.*

THe Caſe was this. A man gave lands to *J. S. Habendum* to him, and to three other for their lives, *et eorum diutius viventi ſucceſſivè*: The queſtion was, What eſtate *J. S.* had: and if after his life there were any occupancy in the Caſe? *Cooke*, That *J. S.* had an eſtate but for his life onely, becauſe he cannot have an eſtate for his life, and for the life of another, where the intereſt commenceth both in *præſenti*: but he may have an eſtate for his own life in preſent intereſt, and the remainder thereof for anothers life: But this *Habendum* by no means can create a Remainder. And he ſaid, that as a Leaſe to one for life, *Habendum* to him *& primogenito filio ſuo*, was no Remainder *primogenito filio* (although ſome held to the contrary.) So a Leaſe for years, *Habendum* to him and to another, was no Remainder to the other. Alſo the word *ſucceſſivè* doth not make a Remainder, as 30. *H.*8. *Br. Joynts* 53. where a Leaſe for life to three, or for yeers to three, *Habendum ſucceſſivè*; yet they have a joynt eſtate: and *ſucceſſivè* is void: for he ſaid, It is uncertain who ſhall have it firſt, and who ſecondly. Alſo one cannot have an eſtate for his own life, and for the life of another at the ſame time in preſent intereſt; for

the greater will drown the leſſer: But if the greater be *in præſenti*, and the leſſe *in futuro*, as a leaſe for his own life, the Remainder to him for another mans life, it is otherwiſe. As a leaſe for his own life, the Remainder for yeers, is good. But if I make a leaſe to you for your own life, and 100 years, both to begin at the ſame time, the Leaſe for yeers is drowned: and an eſtate for his own life is greater then an eſtate for anothers life, and ſhall drown the eſtate for anothers life. *Vide* 19.*E*.3. *Surr*. 8. where Tenant for life of a Manor did ſurrender to Tenant for life in Reverſion. And 12. *H*.7. 11. and *Perkins* 113. That if there be a Leaſe for life to one, the Remainder to another for life, and the Leſſee for life doth ſurrender to him in the Remainder, it is good. So *Dyers* Reports. A leaſe is made to one for the term of another mans life, without impeachment of Waſte, the Remainder to him for his own life; he is now puniſhable for waſte, for the firſt eſtate is ſurrendred. *Gaudy* Juſtice, If a leaſe be made to one for his life, and ſo long as another man ſhall live, *quære* what eſtate he hath. 2. If there can be any Occupancy in the Caſe: for if the eſtate be void, the limitation upon the eſtate is void: therefore if the eſtate for the other mans life be drowned in the eſtate for his own life, that can be no Occupancy. Alſo the Occupancy is pleaded, That ſuch a one entred, and doth not ſay, claiming as occupant. For if one come hawking upon the land, he ſhall not by ſuch entry be an Occupant; and in the book of Entries it is pleaded that he entred claymming as Occupant. *Clenche* Juſtice, Every Occupancy ought to be in poſſeſſion; for otherwiſe the Law caſts the intereſt of it upon him in the Reverſion. But *Gaudy* and *Suit* Juſtices were utterly againſt him in that; for then they ſaid, there ſhould be no occupancy, if the party were not in by Leaſe, or ſuch like means.

Mich. 28, 29. Eliz. in the Kings Bench.

65. DIKE and DUNSTON's Caſe.

IN an Action of Treſpaſſe brought, the defendant did juſtifie as Leſſee to the Lord *Mountagu*, and ſaid, that the Lord *Mountagu* for him and his Farmors, had uſed to have a way over the land in which the treſpaſs is ſuppoſed to be done: And that by rooting of a cart wheel the way was ſo digged and drowned, that he could not ſo wel uſe his way as before, and that therefore he did fill up the cart roots, and digged a trench to let out the water: upon which the plaintiffe did demur in law: For 15.*H*.7. is, that a Commoner cannot meddle with the ſoil: ſo is 12.& 13.*H* 8. So he who hath Warren in the land of another man cannot meddle with the ſoile: and as to that, that he could not uſe his way ſo well as before,

it

it is not good: for he ought to have ſaid, That he could not uſe his way at all: otherwiſe the plea is not good. As 6.*E.*4. One is to lop his tree, and he cannot do it unleſs it fall upon the Land of another, there he may well juſtifie the felling of it upon the others Land, becauſe otherwiſe he could not lop it at all. So if I give to one all the fiſh in my Pond, he cannot dig a Trench to draw out the water, unleſſe he cannot otherwiſe take the fiſh, as with Nets, &c. Alſo he juſtifies, by reaſon that the Lord *Mountagu* for him and his Farmors, &c. And he was a Leſſee and paid no rent, therefore no Farmor. *Cowper* contrary, He ſhall not have an Action of Treſpaſs, for it is no loſſe or hinderance unto him, but it is for his profit, for the Land is the worſe being drowned with water. If a man do diſſeiſe me, and fells trees upon the Land, and doth repair the houſes, in an Aſſize brought againſt him, the ſame ſhall be recowped in damages; becauſe that which was done was for his Commodity: alſo it is incident to one who hath a way for to mend it. All Preſcriptions at the firſt did begin by Grants. And if one grant to me his trees, the Law ſaith, That I may come upon the Land to fell them and carry them away off from the Land, and I ſhall not be a Treſpaſſor: And by 9. *E.* 4. and *Perkins*, If one grant to me liberty to lay a Conduit Pipe in his Land, I may afterwards mend it *toties quoties* it ſhall want mending 32.*E.*3. If one grant to me a way, if he will interrupt me in it, I may reſiſt him; and if he dig Trenches in the way to my hinderance in my way, I may fill them up again: The books of 12 & 13.*H.* 8. are not adjudged. If Leſſee for years be of a Meadow, he may dig to avoid the water, and may juſtifie ſo doing in Waſte brought againſt him. But it was ſaid, That in that Caſe the Leſſee hath an intereſt in the ſoil; ſo hath not he who claims the way in this Caſe. *Clenche* Juſtice held, That he could not dig the Soile. Then the Defendant demanded, What remedy he ſhould have. *Suit* Juſtice, If he went that way before in his ſhooes, let him now pluck on his boots. *Gawdy*, The pleading is not good, for he ſaith, That he could not uſe his way ſo well as before, which is not good; but he ought to plead, that he could not uſe the way at all.

Mich. 28,29. *Eliz.* *in the Kings Bench.*

58

IN an *Ejectione firme* The party ought to ſet forth the number of the Acres; for although he give a name to the Cloſe, as Green Cloſe, or the like, it is not ſufficient; becauſe an *habere facias ſeiſinam* ſhall be awarded: But in Treſpaſſe the ſame may be *Quare clauſum ſuum fregit, &c.* without naming the number or the Acres: And ſo it was ſaid it was adjudged in a *Shropſhire* Caſe.

Mich.

Mich. 28,29. Eliz. In the Kings Bench.

67.

IN an Action upon the Caſe, becauſe that the Defendant had made a Gate in one Towne, for which he could not go to his Cloſe in another Town. *Cook* took Exception that the Writ was *Vi & armis*; and it was agreed *per curiam*, that for that cauſe it was not good: Alſo the *Viſne* was of one Towne only, whereas it ſhould have been of both; for he ſaid, That in *Hankford* and *Ruſſels* Caſe, The Nuſance was laid in one Town *per quod* his Mill in another Town could not grinde; and upon Not guilty pleaded, the *Viſne* came from one Town only, and it was adjudged, that it was not good.

Mich. 28,29. Eliz. in the Kings Bench.

68 JOHN JOYCE'S Caſe.

AN Action upon the Caſe was brought againſt *John Joyce*, Inn-keeper of the Bell at *Maidſtone* in Kent, for not ſcowring of a Ditch which ran betwixt the houſe of the ſaid *John Joyce* and of another man; and Judgement was given for the Plaintiffe againſt the Defendant *Joyce*, and a Writ of Error was brought to reverſe the Judgement and divers Errors were aſſigned. The firſt Error which was aſſigned was, That the Plaintiffe doth preſcribe, That all the Inhabitants of the Bell, &c. had uſed to ſcowre the Gutter, &c. And it was ſaid, That that was no good forme of preſcription, as in 12. *H.* 4. 7. *Br. Preſcription* 16. Where the Plaintiffe ſaid, That the Defendant, *& omnes alii tenuram illam prius habentes, mundare debuere & conſuevere talem foſſatam*; and therefore the Writ was abated, for it ought to have been, *quod ipſi & prædeceſſores ſui de tempore cujus contrarium, &c.* Or that ſuch a one and his Anceſtors or Predeceſſors, whoſe Eſtate the Defendant hath, &c. Alſo if a Copy-holder preſcribe, That he and all his Tenants *tenementi prædict'* have uſed to have eſtovers in ſuch a Wood, &c. it is not good: but he ought to preſcribe in the Manor. The ſecond Error was, That the Preſcription was uncertain, for it is, That all Tenants, &c. which extendeth to Tenants in Fee, in Taile, for Life, or years; and the Preſcription is the foundation and ground of the Action, and therefore it ought to be certain: As if one make Title for entry for Mortmaine, he ought to ſhew that he hath entred with-

within the year and day. 7. *E.* 6. *Br. Preſcription* 69. It is holden, That Tenant for years or at will cannot preſcribe for common; for the preſcription ought to be alledged in the Tenant of the Free hold: or to alledge a Corporation, or the like: In reaſon, Tenant for years cannot preſcribe, for his Eſtate hath a certain beginning, and a certain end, therefore it is not of long continuance. The third Error was, That the Plaintiffe hath not alledged, That the Defendant was Tenant at the time of the Action brought, as in the Caſe of Clerkenwell and Black-Friers; where the Plaintiffe brought his Action upon the Caſe, for that the Defendant had turned the courſe of the water of a Conduit Pipe, and the Declaration was, *Quod cum querens ſeiſitus exiſtat*, and doth not ſay *exiſtitit*; and ſo the Plaintiffe was not ſuppoſed Owner of the Scite and Meſſuage of Black-Friers, but only at the time of the Action brought, and not at the time of the diverſion of the Water: But Judgement was given, and Error brought upon it. The fourth Error was, Becauſe it was for ſcowring a Gutter betwixt the houſes, &c. and doth not ſay, That the houſe was *contigue adjacens* to his houſe. 22. *H.* 6. Where Cattell eſcape into the Plaintiffs Cloſe, and thereupon Treſpaſſe brought, the Defendant ſaid, That it was for want of Fence of the Plaintiffs Cloſe, and it was holden no Plea, if he do not ſay that the Plaintiffes Cloſe was *adjacens*. *Clench* Juſtice. The Preſcription ought to be, That ſuch a one, and all thoſe whoſe Eſtate he hath, &c. have uſed for them and their Farmors to repair the Gutter. *Cowper*. When the Preſcription runs with the Land, then he may preſcribe in the Land, as all thoſe who have holden ſuch Lands, have uſed to ſcowre ſuch a ditch, and the ſame is good. *Gawdy* Juſtice. If he had ſaid, All thoſe who had occupied ſuch a houſe, had uſed to ſcowre, it had been good. *Godfrey*, If a man will alledge a Preſcription or Cuſtome, he ought to ſet forth, That it was put in uſe within time of memory. In the Preſcription of *Gavelkind*, the party ought to ſhew, that the Land is partable, and ſo hath been parted. Alſo he preſcribed That *omnes illi qui tenuerunt*, and doth not alledge a Seiſin, but by way of Argument. *Suit* Juſtice held the pleading not good, becauſe the words were not *contigue adjacens*. And for theſe cauſes the firſt Judgment was reverſed.

Mich. 28, 29. *Eliz. in the Kings Bench.*

69 GOMERSALL and GOMERSALLS Caſe.

IN an Action of Account the Plaintiffe charged the Defendant as Bailiffe of his Shop, *curam habens & adminiſtrationem bonorum*. The Defen-

Defendant anſwered as to the Goods only, and ſaid nothing to the Shop. And *Tanfield* moved the ſame for Error in Arreſt of Judgment, as 14. *H.* 4.20. One charged another as Bailiffe of his houſe, *& curam habens bonorum in eo exiſtentium*, the Traverſe was, That he was not *Balivus* of the houſe *prout*: that is good, and goeth to all; but he cannot anſwer to the Goods, and ſay nothing to the houſe. ſo 49. *E.* 3.7. *Br. Accompt.* 21. A man brought an Account againſt the Bailiffe of his Manor *habens curam* of twenty Oxen and Cowes, and certain Quarters of Corne. And by *Belknap*, If he have the Manor and no Goods, yet he ſhall account for the Manor, and it ſhall be no Plea to ſay, That the Plaintiffe ſold him the Goods without Traverſing, without that, that he was his Bailiffe to render Account; and as to the Manor, he may ſay, That the Plaintiffe leaſed the ſame to him for years, without that, that he was his Bailiffe. And he took another Exception, That the Plaintiffe chargeth him with Monies *ad Merchandizandum*; and he Traverſeth that he was not his Receiver *denariorum ad computandum prout*. And ſo he doth not meet with the Plaintiffe, and ſo it is no iſſue; and if it be no iſſue, it is not helped by the Statute of *Jeofailes*, 32. *H.* 8. but miſ-joyning of Iſſue is helped by that Statute. 19. *Eliz. W.* Atturney of the Common Pleas did charge another Atturney of the ſame Pleas with a Covenant to have three years board in marriage with the Defendants Daughter; and he pleaded, That he did not promiſe two years board, and ſo iſſue was joyned and tryed; and the ſame could not be helped by the Statute, becauſe it was no iſſue, and did not meet with the Plaintiffe. So if one charge one with *debet & detinet*, and he anſwer to the *debet* only, it is no iſſue, and therefore it is not helped. In 29. *H.* 6. in Treſpaſſe for entring into his houſe and taking of his Goods, the Defendant pleaded *non intravit*, and the iſſue was tried, and Damages given; and becauſe the taking of the Goods was not alſo in iſſue, all was void, 4. *E.* 3. One ſhall not account by parcells, becauſe the Action is entire. *Vid.* 3. *E.* 3. 8. *acc. lib. Deut.* 202. A Preſident 14. *H.* 7. That the Verdict was not full, and did not go to the whole, and therefore was not good. *Hele* contrary. And he ſaid, as to the firſt, That there is a Caſe 9. *E.* 3. *Accompt* 35. Where the Plaintiffe chargeth the Defendant in Account as Bailiffe of his houſe, and that he had Adminiſtration of his Goods, viz. forty Sacks of wool: And the Jury found that he was not Bailiffe of his houſe, but they found that he had received the Sacks of Wooll to render account, &c. and he had judgement for the Goods, although it was not found for the houſe. *Vide* 5. *H.* 7. 24. *a.* Where if a Jury be charged with ſeveral iſſues, and the one is found, and the other not, it makes no diſcontinuance; or if one be diſcontinued, yet it is no diſcontinuance of the whole. But if the ſame be not helped by the common Law, yet it is helped by the Statute of 32. *H.* 8. which ſayes, *Non obſtante*, Diſconti-

nuance

nuance or miſcontinuance. *Daniel ad idem.* And he ſaid, That the books before of 14. *H.* 4. and 49. *E* 3. were not ruled; in the one book, the Defendant pleaded, That the Plaintiff gave the goods to him; in the other, that he ſold them to him, and demanded Judgement of the Action; and it is no good anſwer, for they are Pleas only before the Auditors, and not in an Action of Account; and although the Verdict be found for part only, yet it is good, for no Damages are to be recovered in an Account. In Treſpaſſe it is true, if one be found and not the other, and joint Damages be given, the Verdict is naught for all; but if ſeverall Damages be given, it is good, as it is ruled in 21. *H.* 6. *Cook* 26. *H.* 8. is, That he cannot declare generally of an houſe, *curam habens & adminiſtrationem bonorum*; but he ought further to ſay, viz. Twenty Quarters of Corn, and the like, &c. In the Principal Caſe it is a joint charge, and one charge for the Shop and Goods, and he anſwers unto one only; but he ought to anſwer to all; or elſe it is no anſwer at all: See 10. *E.* 4. 8. But *Cook* found another thing, *ſcil.* That there is a thing put in iſſue which is not in the Verdict, nor found, nor touched in the Verdict; and that makes all that which is found, not good, and that is not helped by any Statute. I grant that diſcontinuances are helped by the Statute of 32. *H.* 8. of Jeofailes, but imperfections in Verdicts are not helped. It was a great Caſe argued upon a Writ of Error in the Exchequer Chamber; and it was *Brache*'s Caſe. An Information was againſt *Brache* for entring into a houſe and one hundred Acres of Land in *Stepney*; he pleaded, Not guilty; the Jury found him guilty for the one hundred Acres, and ſaid nothing for the houſe; upon which Error was brought, and the Judgement reverſed; and he ſaid, That it was not a diſcontinuance; but no Verdict for part. *Daniel.* That was the fault of the Clark, who did not enter it; and it hath been the uſage to amend the default of the Clark in another terme. All the Juſtices ſaid, True, if the *Poſtea* be in, and not entred: but here it is entred in the Roll in this forme. *Daniel*, Where I charge one in Accompt with ſo much by the hands of ſuch a one, and with ſo much by the hands of ſuch a one; although there be one *abſq; hoc* to them all, yet they are ſeverall iſſues. The Court anſwered, Not ſo, unleſſe there be ſeverall iſſues joyned to every one of them. But by *Gaudy* Juſtice, If there be ſeverall iſſues, yet if one be found and the other not, no Judgement ſhall be given. *Clenche* Juſtice, It is not a charge of the Goods, but in reſpect of the Shop, therefore that ought to be traverſed. *Suit* Juſtice, The traverſe of the Shop alone is not good. The Queens Solicitor ſaid, That the books might be reconciled, and that there needed not a traverſe to the goods, for the traverſe of the Shop *prout* anſwers to all: but now he charges him as Bailiffe of his Shop and Goods, and he takes iſſue upon the Goods only, which iſſue is not warranted by the Declaration. And

he said, That if one charge me as Bailiffe of his Goods *ad merchandizandum*, I shall answer for the encrease, and shall be punished for my negligence. But if he charge me as his Receiver, *ad computandum*, I shall not be answerable but for the bare money, or thing which was delivered.

Mich. 28,29. Eliz. in the King's Bench.

70 GILE'S Case.

A Writ of Error was brought to reverse a Judgement given in an Action upon the Case. The Action upon the Case was brought against one, *Quare exaltavit stagnum, per quod suum pratum fuit inundatum*; and he pleaded Not guilty; and the Jury found *Quod erexit stagnum*; and if *Errectio* be *Exaltatio*, then the Jury find, that the Defendant is guilty; and thereupon Judgement was given for the Plaintiffe. *Glanvile* alledged the generall Error, That Judgement was given for the Plaintiffe, where it ought to have been given for the Defendant. And he said, That *erigere stagnum, est de novo facere*: *Exaltare, est erectum majoris altitudinis facere*; *Deexaltare* is *ad pristinam altitudinem adducere*: *prosternere stagnum, est penitus tollere.* And the precise and apt word according to his Case, in an Action upon the Case, ought to be observed; that he may have Judgement according to his damage and his complaint, viz. either *Deexaltare* or *Prosternere*, &c. 7. *E.* 3. 56. An Assize of Nusans, *Quare exaltavit stagnum ad nocumentum liberi tenementi sui*; The Defendant pleaded, That he had not inhaunced it after it was first levyed. And by *Trew*, There is not any other Writ in the Chancery, but *Quare exaltavit stagnum. Herle* said, That he might have a Writ *Quare levavit stagnum*; and there by that book *Levare stagnum*, & *exaltare stagnum* do differ: And therefore he conceived, That the Writ should abate, for using one word for another, 8. *E.* 3. 21. *Nusans* 5. by *Chauntrell.* In a Writ of Nusans *Quare levavit*, if it be found that it was tortiously levied, the whole shall be destroyed: But in a Writ *Quare exaltavit*, nothing shall be pulled down if it be found for the Plaintiffe, but the inhauncing shall be abated only: So 8. *Ass.* 9. *Br. Nusans* 17. the same Case and difference is put, and 16. *E.* 3. *Fitz. Nusans* 11. If the Nusans be found in any other forme then the Plaintiffe hath supposed, he shall not recover. And in 48. *E.* 3. 27. *Br. Nusans* 9. The Writ was *Quare divertit cursum aquæ: &c.* and shewed that he had put Piles and such things in the water, by which the course of the water was streitned; wherefore, because he might have had a Writ *Quare coarctavit cursum aquæ*, the Writ was holden

den not to be good. *Cook* took another Exception, viz. That the Aſſize of Nuſans ought to be againſt the Tenant of the Free-hold, and therefore it cannot be (as it was here) brought againſt the Workmen, and it is not ſhewed here, that the Defendant was Tenant of the Soil; for 33. *H.* 6.26. by *Moile*, If a way be ſtreitned and impaired, an Action upon the Caſe lieth; but if it be altogether ſtop'd, an Aſſize of Nuſans lieth. But *Priſoit* ſaid, If the ſtopping be by the Terr-Tenant, an Aſſize of Nuſans lieth; but if it be by a Stranger, then an Action upon the Caſe; but for common Nuſanſes no Action lieth, but they ought to be preſented in the Leet or Turne. *Drew*, We have ſhewed That he who brought the Aſſize of Nuſans hath a Free-hold in the Land; and if the Tenant be named, it is ſufficient, although it be not ſhewed that he is Tenant of the Free-hold. And to that, all the Juſtices ſeemed to incline. But then it was ſhewed to the Court, that one of the Plaintiffes in the Writ of Error had releaſed: And if that ſhould bar his Companions, was another queſtion? And it was holden, That the Writ of Error ſhall follow the nature of the firſt Action; and that Summons and Severance lieth in an Aſſize of Nuſans; and therefore it was holden, that it did the like in this Action; therefore the Releaſe of the one was the Releaſe of the other. But then it was asked by *Glanvile*, What ſhould become of the Damages, which were entire? Note, *Paſch.* 29. *Eliz.* the Caſe was moved again, and *Drew* held *exaltare* and *erigere* all one; and that *erigere* is not *de novo facere*, for that is *Levare*. But the Juſtices were againſt him, who all held, That *erigere* is *de novo facere*, and *exaltare* is *in majorem altitudinem attollere*, and at length the Judgment was affirmed, That *Erectio* and *Exaltatio* were all one: For the Chief Juſtice had turned all his Companions when he came to be of Opinion, that it was all one. And ſo the Caſe paſſed againſt *Glanviles* Client.

Mich. 28, 29. *Eliz. in the Kings Bench.*

71

THE Lady *Greſham* was indicted for ſtopping the High-way; and the Indictment was not laid to be *contra pacem*. And *Cook* ſaid, That for a miſ-feaſance it ought to be *contra pacem*; but for a non-feaſance of a thing, it was otherwiſe; and the Indictment was for ſetting up a gate in *Oſterly* Park: And Exception alſo was taken to the Indictment for want of Addition; for *Vidua* was no Addition of the Lady *Greſham*; and alſo *Vi & armis* was left out of the Indictment: And for theſe cauſes ſhe was diſcharged, and the Indictment quaſhed.

Mich. 28, 29. Eliz. in the King's Bench.

72.

IN an *Ejectione firme*, Exception was taken becauſe the Plaintiffe in his Declaration did not ſay, *Extra tenet*: For in every Caſe where a man is to recover a poſſeſſion, he ought to ſay, *extra tenet*. And in Debt he ought to ſay, *Debet & detinet*: And in a Replevin, *Averia cepit, & injuſtè detinet*. But all the Juſtices agreed, That in an *Ejectione firme* thoſe words were not materiall: For if the Defendant do put out the Plaintiff, it is ſufficient to maintain this Action. And *Kempe* Secondary, ſaid, that ſo were all the ancient Preſidents; although of late times it hath been uſed to ſay in the Declaration, *Extra tenet*: and the Declaration was holden to be good without thoſe words.

Mich. 28, 29. Eliz. in the King's Bench.

73

IN a Caſe for Tithes, the Defendant did preſcribe to pay but *ob. q.* for the Tithes of all Willows cut down by him in ſuch a Pariſh. *Cooke*, It is no good preſcription; for thereby, if he cut down all the Willows of other men alſo, but *ob. q.* ſhould be paid for them all. But he ought to have preſcribed for all Willows cut down upon his own land, and then it had been good: But as the preſcription is, it is unreaſonable; and of that opinion was the whole Court.

Mich. 28, 29. Eliz. in the King's Bench.

74 DEIGHTON *and* CLARK'S Caſe.

IN an Action of Debt upon a Bond, the Condition of the Bond was, That whereas the Plaintiff was in poſſeſſion of ſuch Lands, If *I. S.* nor *I. D.* nor *I. G.* did diſturb him by any indirect means, but by due courſe of Law, that then, &c. The Defendant pleaded, That *nec I S. nec I. D. nec I. G.* did diſturb him by any indirect means, but by due courſe of Law. *Godfrey*, The plea in Bar is not good: for it is a Negative *pregnans*, viz. ſuch a Negative which implyes an Affirmative, which yet ſeems to be repugnant to a Negative, as in 21. *H.* 6. 19. In a Writ

Writ of Entrie, the Defendant pleaded the deed of the Demandant after the darrein Continuance : The Demandant ſaid, It was not his deed after the darrein Continuance : And that was holden a Negative *pregnans* : wherefore he was compelled to plead and ſay, he made it by *dures*, before the darrein Continuance ſuch a day, *abſque hoc*, that he made it after the darrein continuance, and then Iſſue was taken upon it. The ſame Caſe is in 5. *H.*7.7. But there it is ſaid, That in Debt upon a Bond to perform an Arbitrement, *Non fecerunt Arbitrementum per diem* is no Negative *pregnans* : The ſame Law, that *non deliberavit arbitrium in Script.* 38.*H.*6. in Formedon *Ne dona pas* in taile is a Negative *pregnans*. *Vide* 39 *H.*6. The Caſe of the Dean and Chapter. The ſecond Exception was, That he hath pleaded *neque* ſuch, nor ſuch, nor ſuch had diſturbed him by any indirect means, but onely by due courſe of Law : And that cannot be tryed, neither by Jury, nor by the Judges. Not by the Jury; becauſe it is not to be put to them, whether they had diſturbed him by indirect means, or by due courſe of Law : for they ſhall not take upon them the conſtruction, What is an indirect means, and what is the due courſe of Law; for it appertaineth to the Juſtices to adjudg that. Not by the Judges, becauſe hee hath not put it certain, that it was a due courſe of Law by which he diſturbed him. As 22. *E.* 4. 40. In Debt upon a Bond, the Defendant ſaith, that it is upon condition, That if the Defendant, or any for him, came to *Briſtow* ſuch a day, and there ſhewed to the Plaintiff or his Councell a ſufficient Diſcharge of an Annuity of forty ſhillings *per annum*, which the Plaintiff claims out of two Meſſuages of the Defendant in *D*, that then, &c. The Defendant ſaid, that *A.* and *B.* by the aſſignement of the Defendant, came the ſame day to *Briſtow*, and tendered to ſhew to *N.* and *W.* of the Plaintiffs Councell, a ſufficient Diſcharge of the Annuity, and that they did refuſe to ſee it, and demanded judgment of the Action. The Plaintiff did demur upon the Plea. And after a long argument, it was adjudged by all the Juſtices to be no Plea, &c. becauſe it lay in the judgment of the Court to judg of it : and he did not ſhew in certain, what diſcharge he tendered, as a Releaſe. Unitie of poſſeſſion, &c. If a man be bound to plead a ſufficient plea before ſuch a day, in Debt upon ſuch a Bond; it is no plea to ſay, That he hath pleaded a ſufficient plea before the day; but hee ought to ſhew what plea he hath pleaded : For the Court cannot tell whether it be a ſufficient plea or not, if it do not appear what manner of plea it is. 35 *H.* 6. 19. The Condition of a Bond was, That where the Plaintiff was indebted to *J. S.* in one hundred pounds; If the Defendant acquit and diſcharge the Plaintiffe, that then, &c. The Defendant pleaded, That hee had diſcharged him &c. and the Plaintiffe did demurre upon the plea, becauſe hee did not ſhew how; and it was holden no good plea. So 38. *H.* 8. *Br.*

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Condition 16. *per curiam* in the Kings Bench; where a man pleaded, That he had ſaved him harmleſſe; it was no Plea, without ſhewing how, becauſe he pleaded in the Affirmative; contrary, if he had pleaded in the Negative, as *Non damnificatus eſt.* *Suit* and *Clenche* Juſtices ſaid, That if he had pleaded, That he was not diſturbed by any indirect means, it had been good enough. *Gaudy*, If he had ſaid, That he was not diſturbed *contra formam conditionis prædict'*, it had been good; as upon a pleading of a Statute, *Ne entra pas contra formam Statuti.* *Clench*, If I be bound to ſuffer *I. S.* to have my houſe, but not *I. D.* I ought to anſwer, That I have ſuffered the one, and not the other to have it. *Suit* Juſtice, They are both ſeverall iſſues, and one ſhall not be repugnant to the other.

Mich. 28,29 Eliz. In the Kings Bench.

75 STURGIE'S Caſe.

A Caſe was moved upon the Statute of 5. *Eliz. Cap.* 14. The Caſe (as I conceive) was thus: Grandfather, Father and Daughter; Land deſcended from the Grandfather to the Father, who made a Leaſe for one hundred years; the Father died, and the Daughter forged a Will of the Grandfather, by which he gave the Land to the Father for life, the Remainder to the Daughter in Fee; and the ſame was forged to have avoided an Execution of a Statute Staple, the Leaſe being defeated; and if it were within the Statute of 5. *Eliz.* was the queſtion. Solicitor, That it was within the ſtatute, and within the firſt Branch; viz. If any ſhall forge any deed, &c. to the intent that the Eſtate of Free-hold, or Inheritance of any perſon, &c. in or to any Lands, Tenements, or Hereditaments, Freehold or Copyhold, or the right Title or Intereſt of any &c. of, in, or to the ſame, or any of them; ſhall or may be moleſted, &c. Leſſee for years hath a Title, hath an Intereſt, hath a right; therefore within the words of the Statute; and thoſe words ſhall be referred to the words Lands, Tenements, &c. But *Cook* ſaid, They ſhall be referred to the words precedent, viz. Eſtate of Freehold or Inheritance; and then a Leaſe for years is not within them. Alſo by the Solicitor, A Teſtament in writing is within the words of the Statute, and therefore he recited a clauſe in the end of the Statute; viz. and if any perſon plead, publiſh, or ſhew forth, &c. to the intent to have or claime thereby any Eſtate of Inheritance, Freehold, or Leaſe for years: And alſo he ſaid a Statute Staple is an eſtate for years, although it be not a Leaſe for years, becauſe it is not certain. *Cook*, If ſhe ſhould be within both branches, then ſhe ſhould be twice puniſhed, which the

Law will not ſuffer. And the Statute is, whereby any Eſtate for years ſhall be claimed; and ſhe would not claim, but defeat an Eſtate for years; and a Statute Staple is not a Leaſe for years; and the Statute is not to be taken by Equity, becauſe it is a Penall Law. Solicitor, When the Statute is extended, then it is an Eſtate for years, although it be uncertain. If a man forge a Leaſe for years, it is directly within the Statute. But if a man have a Leaſe, and another is forged to defeat it, it is a queſtion whether it be within the Statute: And all the doubt of this Caſe is upon the reference of theſe words, Right, Title, Intereſt: And it was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

76

THE Vicar of *Pancras* Caſe was argued again by *Godfrey*: And he ſaid, That no Plea ſhall be allowed in the Eccleſiaſticall Court which tends in diſcharge of Tithes: And to prove that, he cited 8.*E.*4.14. *Br. Tithes* 11. And a Caſe in 6. & 7. *E.* 6. *Dier* 79. *d.* But admit the Plea ſhould be allowed in the Eccleſiaſticall Court (as many of the Doctors have certified the Juſtices) yet becauſe the *Modus decimandi* is a thing pertaining to the common Law, the Prohibition will lie. By *Fitz. Herb.* and the Regiſter, If a Parſon grant to one of his Pariſhoners, That he ſhall be diſcharged of Tithes, he may peradventure plead the ſame in the Spirituall Court, yet there is good cauſe that a Prohibition do lie: So 22. *E.* 4. 20. *Br. Prohibition* 14. The Abbot of Saint *Albans* kept the wife of *I. S.* in his houſe two houres againſt her will, to have made her his Harlot, and the Husband ſpake of it; for which cauſe the Abbot ſued him for ſlander in the Spirituall Court; and becauſe the husband for that act might have a falſe impriſonment, therefore a Prohibition was granted So if I ſwear to pay *I. S.* 10 l. and he ſues for it in the Spirituall Court, a Prohibition lieth; for hee may have an Action of Debt in the common Law for it; for where the common Law may have Juriſdiction, there the Spirituall Court ſhall not intermeddle with the matter. So if an Abbot rob *I. S.* and he ſpeaks of it, and the Abbot ſues him in the Spirituall Court, a Prohibtion will lie. He ſaid further, That the Caſe was betwixt the Vicar and a Pariſhoner, and therefore one of them a Temporall perſon. If the Suit be betwixt the Farmer of the Parſon and another, a Prohibition ſhall be granted. Alſo he ſaid, The right of the Tithes doth not come in queſtion, but only the *Modus decimandi*. *Cook*, The *Modus decimandi* doth not come in queſtion there, therfore it cannot be traverſed; for if it be due to the Parſon, that is the queſtion, as in 40. *E.* 3, 4. In a

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Replevin, the Defendant ſaith, That the place where &c. is Ancient Demeſne, and pleads to the Juriſdiction; *Charl'*, that is a Treſpaſſe, and Perſonall Action, and therefore it is no plea; and yet it was agreed by the Court to be a good plea: for by the Avowry, the realty might come in debate in the Replevin, *Atkins*, If there be contention *de jure Decimarum Originum, habens de jure Patronatus, tunc ſpectat ac Legem Civilem.* And in this caſe, it was ſaid, That *de mero jure*, The Parſon is to have all the tythes, if there be not any Endowment of the Vicarage.

Mich. 28,29. Eliz. in the Kings Bench.

77. MEGOD'S CASE.

THE Caſe was, That a Feoffment was made unto another man, *ad eam intentionem*, that he ſhould convey the ſame to ſuch a one, to whom he ſold it; and he ſold the ſame to another, and did refuſe to convey it, and therefore the other brought an Action upon the Caſe. And *Gaudy* Juſtice held, that the Action would lie. But *Suit* Juſtice held the contrary. *Wray* Chiefe Juſtice did agree with *Gaudy*: for he ſaid, It was a Truſt, that he ſhould aſſure it to another. And it is a good conſideration in the Chancery: the conveyance of a Truſt, and thereupon, an Action upon the Caſe will lie.

Mich. 28 & 29 Eliz. In the Kings Bench.

78.

ALtham of *Grays-Inne*, took many Exceptions to an Indictment of Murder. The firſt was, becauſe the Indictment ſaid, *Quod capta fuit inquiſitio coram Coronatore in Comitatu, &c.* and doth not ſay, *de Comitatu.* And a Crowner in a County is a Crowner in every County in *England*, as it is holden, 9. *H.* 5. 24. *b.* Alſo *de* and *in* do much differ, as in 15. *E.* 4. 15. Where a *Scire facias* was brought againſt the Maſter and Scholers *Beatæ Mariæ, & Sancti Nicholai in Cantabrigia*, where the foundation was *de Cantabrigia*, and not *in Cantabrigia.* And the Writ was abated; For there is a difference betwixt [*in*] and [*de.*] For a thing may be [in] and not [of,] as Saint *Sepulchres* is in *London*, but not of *London.* A ſecond Exception was, becauſe it ſaid, *Inquiſitio capta per Sacramentum, &c.* and did not ſay, *Jurati*; and therefore the partie is not charged upon it; and by 13. *E.* 4. If the

Jury be charged upon one, and they find another felon, it is void; becauſe they were not charged upon him. And 1. *R.* 3. 4. by *Haſſey*. If in Aſſize the Record be ſuch, viz. *Quod jurati exacti comperuerunt, quorum* 12. *ſupra Sacramentum ſuum dicunt*, And give their verdict, If it doth not ſay, *Quorum* 12. *Electi & jurati*, it is errour. For it doth not ſay *in facto*, that they were ſworn, and yet it is implyed by the words *Sacramentum ſuum*, that they were ſworn. The third Exception was, That it doth not ſay, That he was *in pace Dei, & dict' Dominæ Reginæ*; for it might be that the partie was a Traitour, and that he was flying, and in ſuch caſe he might juſtifie the killing of him; and perhaps alſo it was *ſe defendendo*; therefore thoſe words are very neceſſary. An other Exception was, becauſe the Indictment is, *percuſſit*, and it is not ſaid, *ex malitia præcogitata*, for ſo an Indictment of Murder ought to be, as in 2. *E.* 4. The Indictment was, *quod Cepit & abduxit felonicè*, where it ought to have ſaid, *Felonicè cepit & abduxit*; and therefore it did abate. A fifth Exception was, becauſe it ſaith, *Et dedit ei plagam mortalem*; and doth not ſay, *cum gladio prædicto*. And in the Statute *de Coronatore*, there is a charge given him, That hee finde what weapon it was which gave the ſtroke. See the Statute of 4. *E.* 1. *Raſtall*, *Coroners*. 2. The ſixth Exception was, That the Indictment was, That the pan of the knee was cut out, and it doth not ſhew, the length, depth, and breadth of the wound: he granted that if one ſingle member be cut off, it is not neceſſary to ſhew the breadth, &c. but here was no amputation of any member, nor a cutting off, but the cutting of the pan of the knee. *Snag* to the ſame purpoſe, and he finds there is a great difference betwixt cut off, and cut out. And he ſaid, That as to that which the Solicitour hath anſwered unto, to the difference of [*in*] and [*de*,] *viz.* that it is all one, as if I grant a thing *percipiend' de Manerio*, or *in Manerio*, that is all one. To that he anſwered, that that cannot be; and in *Wimbiſhes* caſe, in *Plo. Com.* 75. the ſame Exception was taken in a Writ. But in our Caſe, he ſaid, It is an Indictment, which is favoured, becauſe the life is in queſtion. And he took another Exception, becauſe that the Indictment ſaies, *Tempore felonia & murdredi prædict'*, and there is no ſuch word *murdredum*: To that the Sollicitour ſaid, That it was in equall degree, *murdum* and *murdredum*, for none of them are found amongſt the Latiniſts. *Snag* ſaid, What then? yet one is a word which is received in the Law, and is *vox artis*, but the other not; and therefore it is not in the ſame degree. Alſo he ſaid, That when the Indictment comes to the Acceſſories, It ſaid, *Felonicè præſentes, abbettentes, & aſſiſtentes*: and *felonicè* cannot be applied to (*præſentes*.) Alſo when it comes to the Acceſſories, it doth not ſay, *Ex malitia præcogitata abbettentes & aſſiſtentes, &c.* *Cook* contrary; and he ſaid, That if Indictments have ſufficient ſubſtance, they are not to be overthrown for trifles: As to

the firſt he ſaid, If you will have it to be (*coram Coronatore de Comitatu,*) perhaps it was a Liberty; and then *coram Coronatore* of the Liberty, cannot be *coram Coronatore* of the County. *Gaudy* Juſtice ſaid, that was no anſwer. But as to this point, the Juſtices deſired that Preſidents might be ſearched; and ſaid, that they would follow the greater number of them. *Clenche*, If one ſay, that ſuch a one is a Juſtice of Peace in *Hertfordſhire*; it is all one, as if he had ſaid a Juſtice of Peace of *Hertfordſhire*. As to the 2d. *Jurati*, that is no Exception; for it is true, that it muſt be ſo in an Aſſize, but not in an Indictment: alſo no Preſident can be ſhewed, where *ex malitia propenſa ſua* ſhall be applied to every word, when it runs in ſenſe to all by Conjunctions copulative. As to the Exception, that there ought to be the length, breadth, &c. *Kempe* the Secondary ſaid, That it was not worth the ſtanding upon: and as to the word *Murdredi*, if it had been left out, the Indictment had been ſufficient, and that ſhall not make the Indictment void; for if it be left out, it doth no hurt to it: For if many come together to make an Aſſault, *ex malitia præcogitatâ*; and one of them onely ſtrikes the partie mortally, and he dieth, it is murder in them all. And that was Doctor *Ellis* caſe in the Commentaries; and the Indictment needs not ſay, that they were *præſentes, abbettantes & auxiliantes*: and as to the word *felonicè*, it goes to all the words, although not particularly applied. Note, all the Juſtices did incline that the Indictment was good notwithſtanding the Exceptions; but yet they ſaid, they would adviſe of it, and look upon Preſidents.

Mich. 28, 29. *Eliz. in the King's Bench.*

79.

A Writ of Error was brought againſt two, upon a Recovery in a *Precipe quod reddat, &c.* and one of them died. The queſtion was, Whether the Writ ſhould abate? *Cook* moved, that it might not abate; for he ſaid, That the Writ of Error is but a Commiſſion for to examine the Record, and the partie ſhall recover nothing therby, but ſhall be onely diſcharged from the firſt Recovery: and he ſaid, It is not like unto a *Precipe*. Then the Juſtices demanded of him, if the Recovery were in a reall Action; and he ſaid that it was: Then they ſaid, that 3. *H.* 7. 1. is, That if Error be brought upon a Recovery in a perſonall Action, that death ſhall not abate the Writ; but otherwiſe, if it were upon a reall Action: for there the Judgement ſhall be, that he ſhall be reſtored to the Land. *Quere.*

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Mich. 28,29. *Eliz. in the King's Bench.*

80

AN Appeal of Mayheme was, that *Percuſſit ſuper manum dextram* viz. *inter manum dextram & brachium dextrum.* And Exception was taken to it, that it was repugnant; for if it was *inter brachium & manum dextram*, therefore it could not be *ſuper manum dextram*; for the word [*inter*] excludes both. *Cook*, It is certain enough, becauſe it ſaith, *Super manum dextram*, And an Indictment ſhall not abate for forme, if it be ſufficient in ſubſtance of matter; and alſo being upon the Wriſt, it was upon the riſing of the hand.

Mich. 28,29 *Eliz. in the Kings Bench.*

81

A Man made a Leaſe for years, rendring rent at the Feaſt of Saint *Michael* th'Arch-Angel; and if it were behind by ten days after, being in the mean time lawfully demanded, and no ſufficient diſtreſſe to be found upon the Land, that then it might be lawfull for the Leſſor to re-enter. The laſt of the ten dayes at the hour of two afternoon the Rent was demanded, and there was a ſufficient diſtreſſe upon the Land before the Demand, but not after; and whether the Leſſor might enter or not? was the queſtion. *Daniel*, Theſe words [Sufficient diſtreſſe] ought to be referred to the time of the Demand, viz. to the laſt inſtant, at which time the Demand is only materiall: Upon a *Ceſſavit*, if there be a ſufficient diſtreſſe, the laſt inſtant of the two years, it is ſufficient. *Clenche* Juſtice held, That there ought to be a ſufficient diſtreſſe upon the Land for all the ten dayes. But *Suit* Juſtice held. That it was ſufficient if there were a diſtreſſe for a reaſonable time, ſo as it might be preſumed, that the Leſſor might have knowledge of it. But if a diſtreſſe be put upon the Land only for an hour, or by nights, he held it was not a ſufficient diſtreſſe.

Mich. 28,29. Eliz. in the Kings Bench.

82 Sir EDWARD HOBBYE's Caſe.

IN this Caſe the queſtion was, Whether the Death of one of the Defendants, ſhould abate the whole Writ of Error. *Cook*, The Writ ſhall not abate, for no Defendant is to be named in the Writ; which ſee in the forme of the Writ of Error; and 2 *R.* 3. 1. it is holden, That the Writ ſhall not abate, for it is in its nature but a *Certiorari*, and Judgement only is to be reverſed. *Atkins*, Although that the Defendants have not day in Court by the Writ of Error, yet by the *Scire facias* which is ſued upon it, as in our Caſe it is, they have day; and ſee 3. *H.* 7. and 14. *H.* 7. a difference, where it is a Writ of Error upon a reall Action, and where upon a perſonall. *Cook*. That holds, Where the firſt Writ is abated, and ſo is 3. *H.* 7. See the Caſe a little before, *Gaudy* and *Clench* Juſtices, bring a new Writ of Error for that is the ſureſt way.

Mich. 28,29. Eliz. in the King's Bench.

83 LOVELL and GOLSTON's Caſe.

IN a Writ of Error brought upon a Record removed out of the Court of *Kingſton*, where the firſt Judgement was given in an Action of Debt for an Amercement in a Court Baron: The firſt Error which was aſſigned, was, That he in the Action of Debt did declare, That whereas at a Court holden before *William Fleetwood* Steward, &c. whereas it ought to have been holden before the Suitors, for they are the Judges. The ſecond Error was, That the Preſentment upon which the Amercement is grounded, ſaith, That *Golſton* the Defendant had cut down more Trees *quam debuit, extra boſcum Domini.* 1. That it is repugnant; for he could not cut wood *extra boſcum*, but *in boſco.* 2. When it ſaith many, and doth not ſhew what trees, nor how many he might cut, and that he hath cut down more then he ought, and alſo he doth not ſhew when the cutting of them was. *Vide* 6. *E.* 4. By preſcription they may preſcribe to hold a Court before the Steward; but if there be no cuſtome or Preſcription to warrant it, then as 4. *H.* 6. is, it is *coram Seneſcallo, & Sectatoribus. Gaudy*, Every Court Baron is to be holden before the Suitors, if there be no Preſcription to the contrary: But a

Leet

Leet alwayes before the Steward. The Action of Debt was upon the Preſentment; and the Error is brought upon the defects in the Preſentment; for if that be not good, all is naught. Notwithſtanding it was ſaid by one at the Bar, That the forme of pleading in the book of Entries is, That the Court was holden before the Steward, if the Action be for debt or Treſpaſs for Amercements or ſuch perſonall things: But if the Action be brought for reall things, then it is before the Suitors. But notwithſtanding that, the Judgement for the Cauſes aforeſaid was reverſed.

Mich. 28, 29. Eliz. in the Kings Bench.

84 BARKER and FLETWEL's Caſe.

Barker of *Ipſwich* brought an Action of Covenant againſt the Aſſignee of his Leſſee for years, one *Fletwell*. And ſet forth, That whereas he had made a Leaſe for years reſerving Rent, with re-entry for non-payment of the Rent; and that the Leſſee did covenant to build a houſe upon the Land within the firſt ten years; and that he aſſigned over his terme: And he brought the Action againſt the Aſſignee, who pleaded, That the Leſſor did enter, and had the Poſſeſſion for part of the ninth year; and if thereby the Covenant were diſcharged, was the demurrer in Law. *Godfrey*, Who argued for the Leſſor, ſaid, That by this entrie of the Leſſor, the Covenant was not ſuſpended. As 20. *E.* 4. 12. *Br. Extinguiſhment* 34. The Abbot of *D.* did grant to *W. S.* a Corrodie; viz. ſo much bread, &c. for the term of his life, *faciend' talia ſervitia prout* J. N. *& alii uſi ſunt facere*; The Grantee leaſed back again the Corrodie unto the Abbot for 10. years, rendring 3 l. rent *per annum*, and he brought Debt for the rent; and the Abbot ſaid, That he did not the Services; and the Grantee ſaid, That he was not bound to do them, for that by the Leaſe the Corrodie was ſuſpended: And it was holden, that it was not ſuſpended. *Godfrey* held the reaſon to be, becauſe that the ſervice is a Collaterall thing: And therefore he ſaid, He ought to do it, notwithſtanding that the Abbot had the Corrodie: So in 8. *H.* 7. 7. *Br. Conditions* 134. Where Tenant in taile makes a Feoffment in Fee, and takes back an eſtate in Fee, and afterwards was bounden in a ſtatute Merchant, and then made a Feoffment in Fee upon Condition, and died, his Iſſue within age, who enters for the Condition broken; he was remitted notwithſtanding that execution upon the ſtatute was ſued againſt the Father in his life. So if Leaſe be made of a Manor, except Herriots, Fines, and Amercements; and that the Leſſee ſhall collect them during the Term, al-

although that the Leſſor entreth, yet the Leſſee ought to collect them during the term. Alſo he pleades here, That *Barker* did enter, and that generall pleading is doubtfull; and the Plea ſhall be taken ſtrictly againſt him that pleadeth it; and it may be that he entred by wrong; and ſo it may be that he entred by right, viz. for not payment of the Rent, as in truth his entry was: And if *Barker* did enter lawfully, then it was no ſuſpenſion or extinguiſhment of the Covenant: As 19. *R.* 2. If Leſſee for life commit waſte, and afterwards alieneth, and the Leſſor entreth for the Alienation, yet after his entry he ſhall have an Action of Waſte againſt the Leſſee: So 8. *H.* 6. 10. *Waſt.* 8. but with this difference, If the Leſſor enter wrongfully, there, although Waſte be done before, he ſhall not have Waſte to puniſh it; but otherwiſe if he enter for the Forfeiture done by the Tenant. Alſo if the Covenant was ſuſpended, it was only for the time that the Leſſor had the Poſſeſſion, and the Party hath not anſwered for the time before or after. As 16. *H.* 7. If one be bound to find a Chaplain to ſay Divine Service within ſuch a Chappel, and the Chappel fall down, it is a good excuſe for the time; but if it be built again, he muſt find a Chaplain there. *Clarke* contrary; If Leſſee for years covenanteth to repair the houſes, I grant that the ſame ſhall charge his Aſſignee. But a Collateral thing, (as if the Leſſee covenant to pay ſuch a ſum in groſs, or to enfeoffe him of the Manor of *D*) the ſame ſhall not charge the Aſſignee; no more ſhall a Covenant to build a new houſe: But here it was ſaid, That he had time to build it both before and after the entry of the Leſſor *Barker*. To that he anſwered, Not ſo; for if he once diſturbed, the Covenant is deſtroyed. *Godfrey*, This Caſe was this Terme in the Common Pleas. Leſſee for five years covenanted to build a Mill within the terme; and becauſe he had not done it, the Leſſor brought an Action of Covenant, and the Defendant pleaded, That within the laſt three years, the Leſſor forcibly held him out, &c. ſo as he could not build it; and by the Opinion of all the Juſtices, he ought to plead, That the Leſſor with force held him out, otherwiſe it would be no Plea. *Cook*, As *amicus curiæ*, vouched 35. *H.* 6. *Tit. Barr.* If one be bounden to enfeoffe me of ſuch land before *Michaelmas*, there the Obliger in Debt brought upon the Bond, pleaded, That the Obligee (before the day) had entred with force into the land, ſo as he could not enfeoffe him; and there it was holden, That he ought to prove that he was holden out by force. *Gaudy*, In the principall Caſe he ought to have ſhewed, That he would not ſuffer him to build: And the other Juſtices ſeemed to be of the ſame Opinion; but yet they ſaid, That they would adviſe upon the Caſe.

Mich.

Mich. 28, 29. *Eliz. in the Kings Bench.*

85

OWen took Exception to a Declaration in an *Ejectione firme*, becauſe it was *à Poſſeſſione ſua ejecit*; where it ought to be, according to the ſuppoſal of the Writ, *Quod à firmâ ſua ejecit*. Alſo it was of three cloſes, naming them with a *Videlicet*, containing, by eſtimation, 30. Acres; and that, he ſaid, did contain no certainty; where he ought to have alledged in Fact, that they did contain ſo many Acres. But it was holden by all the Juſtices, That although he doth not put in the Declaration the certainty of the Acres; if he give a certain name to them, as Green-Cloſe, &c. that it is good. And as to the other Exception, viz. *Ejecit à Poſſeſſione* [*inde*], that the word [*inde*] had relation to the Farme; and ſhall be as much as if he had ſaid, *à Poſſeſſione firmæ*; and the Declaration was ruled to be good, notwithſtanding the Exceptions.

Mich. 28, 29. *Eliz. in the Kings Bench.*

86

A Man was indicted upon the Statute of 5. *Elizab.* of Perjury, in a Court Leet; and the Indictment was, That hee at the Court Leet of the Earle of *Bathe*, *Super Sacramentum ſuum coram Seneſcallo, &c.* And Exception was taken, becauſe it ſaid, At the Leet of the Earle of *Bathe*, Whereas every Leet is the King's Court, although that another hath the profit and commodity of it: And it was ſaid, That the Steward of a Leet was an Officer of Record; And alſo his Oath was, if he had made any Reſcous or not, with which he was charged. *Drew*, It is not within the Statute of 5. *Eliz.* for then it ought to be before a Jury in giving of Evidence, or upon ſome Articles: But the Court was clear of Opinion againſt him.

Mich. 28,29. Eliz. in the Kings Bench.

87 *The Earle of* KENT'S *Caſe.*

THE Caſe was this, Three ſeverall perſons did occupie three ſeverall houſes in *Brackley*, to which anſother man had right; and he who had right, went to one of the houſes, and entred, and afterwards went away, leaving him who occupied the ſaid houſe upon the land; and then he entred into another of the houſes, and then went from that, leaving him who occupied the ſame before, upon the land; and then he entred into the third houſe, and there ſealed a Leaſe for years unto another man of that houſe, and naming the two other houſes; and the Leſſee brought an *Ejectione firme* for the two houſes in which the Leaſe was not delivered, and the Opinion of the Court was againſt him, that he was barred in the Action; for the entrie or continuance of him who occupied the ſame before, did defeat the entrie of the Plaintiffe or Leſſor; and the Plaintiffe was forced to be Non-ſuit.

Mich. 28,29. Eliz. in the Kings Bench.

88 SMITH and SMITH'S Caſe.

ONE *I. S.* did aſſume and promiſe, That whereas *I.N.* was indebted to *J. D.* in Forty Pounds by Bond, That if *J. D. ne implacitaret* the ſaid *J. N.* that if the money be not paid ſuch a day, that *J. S* would pay it to *J. D.* The money was not paid: and after the day, *J. D.* brought an Action upon the Caſe, upon the promiſe, and ſhewed *Quod ipſe non implecitavit, &c. Kingſmill*, He cannot have his Action upon the Caſe till *J. N.* be dead, for during his life there is a time in which he might implead him. As if I promiſe unto another, That if he will be Nonſuit in his Action, which he hath againſt a third perſon, that if he doth not pay the money before ſuch a day, that then he will pay the money there; if the day of payment be before the time that he can be Non-ſuit, as before the Terme beginneth, yet he cannot preſently have his Action before that he is Non-ſuit. And therefore in the principall Caſe he ought to ſhew; That he hath diſcharged the other of the Bond, and then the Action lieth, for then he cannot implead him; but as this Caſe is pleaded, though he hath not yet impleaded

pleaded him, yet *in poſterum* he may implead him. *Clench* Juſtice, That is implied, that he will never implead him, and then he ought to ſhew the Bond diſcharged. *Suit*, That is not ſo: for if hereafter he ſue him againſt his promiſe, then the other to whom the promiſe was made ſhall have his Action upon the Caſe, and ſhall recover to the value of the ſum in the Bond.

Mich.28,29. Eliz. in the King's Bench.

89 BILFORD and DODDINGTON's Caſe.

A Writ of Error was brought by *Richard Bilford* againſt *Robert Doddington*, to reverſe a common recovery in the City of *Worceſter*, upon a Writ of Right Patent: And for Error it was aſſigned, 1. That no Warrant of Atturney was entred, but that ſuch a one *poſuit loco ſuo W. H.* and did not write the name at length, but in the Plea Roll it was at length. The ſecond Error was, That the Writ was, *De tribus meſſuagiis ſive tenementis*, and that doth containe no certainty, for [*ſive*] is a word uncertaine. The third Error: It was in the time *Philippi & Mariæ*, and *petit proceſſum Domini Regis & Reginæ*: and it was *eorundum Regis*, and that was in the default of Voucher, that the Recovery was had; but if it were in the Recovery, in which he did appear and plead, it was otherwiſe. The Counſell of the other ſide, as to the firſt, ſaid, That all the Records of the City are of the ſame form, viz. That ſuch a one *Poſuit loco ſuo W. H. &c.* and if it were not good, they ſhould be all overthrown and avoided; and if it ſhould be otherwiſe, it ſhould be contrary to the ancient cuſtome of the City. As to the ſecond, *Quod petit proceſſum eorundum Regis*, the ſame is the miſrecitall of the Clark; for the Writ upon which it is grounded is well; and as to the Proceſs, the party did appear *gratis*. As to the word [*ſive*] the ſame is good, for *tenementum* is but Surpluſage; As in an Action of Waſte, if the party do expreſſe ſome things which are not waſte, and ſome things which are; thoſe which are not waſte, are but Surpluſage. Alſo he ſaid, That the Writ of Error by which the Record is removed, is inſufficient; for the Writ is, That there is Error *manefeſtus*. and doth not ſay [*ut dicitur*,] and therefore it is not good, for otherwiſe the King ſhould forejudge us; And alſo in the Writ, it doth not ſay *Errorem ſiquis fuerit*; and it ought not preciſely to ſay, That there is Error. Alſo the Writ of Error is to certifie a Record *de tribus meſſuagiis & tenementis*; and the Record is, *De tribus meſſuagiis ſive tenementis*; and therefore the Record is not well removed; for it is not ſuch Record. As

12. *Aſſ.* 2. in *Attaint*, Exception was taken, that the Writ of Attaint did not agree with the firſt originall; but becauſe it did agree with the Record, it was good, although it did not agree with the firſt Originall; for the firſt Originall was of the Manor of *Anſti*, and the Attaint was of *Aneſti*, and ſo was the whole Record. But if the Attaint had diſagreed with the Record; it had been Error. Alſo the Writ was good, although *tenementis* were out of the Writ, for it is but ſurpluſage. And alſo *Tenementum* is not a thing demandable; as 11. *H.* 7. 25. it is ſaid, That *Tenementum* is not a name to demand a Meſſuage by: but in Treſpaſs, of Nuſance to it, there *Tenementum* is ſufficient. *Suit* Juſtice, The Record is now before us, and therefore the Writ of Error is not materiall: For if my Lord *Anderſon* bring before us a Record, although no Writ of Error be awarded, yet wee may proceed to examine Whether there be Error in it or not. Alſo hee ſaid, that the Warrant of Atturney was not good, although it was uſuall, for that they ought to follow the courſe of the common Law. *Clenche* Juſtice, There ought to be Writ of Error before that any Judgement upon the Errors can be given for to reverſe the firſt Record. The reaſon wherefore the certain name of the Atturney ought to be put, is, becauſe if one appeare as my Atturney without my Authority, I may have my Action of the Caſe againſt him, which I cannot have againſt *W. H.* It was adjourned.

Mich. 28, 29. *Eliz. in the Kings Bench.*

90 TAYLOR *againſt* REBERA.

T*Aylor* brought an Action of Debt upon a Bond of 800 l. againſt *Rebera*; which Bond was endorſed with this Condition, That if the Plaintiff did bring ſuch a Ship to ſuch a place in *Greece*, and at the ſame place ſhould ſtay for the ſpace of forty dayes, or ſo long of the forty dayes as ſhould pleaſe the Defendant, ſo as he might freight the Ship; the Defendant ſhould freight the Ship within forty dayes, and ſhould bring it to ſuch a Port in *England*: And becauſe he had not freighted the ſhip, and the ſhip was there by the ſpace of forty dayes, he brought his Action upon the Bond: The Defendant pleaded, that within thoſe forty dayes, viz. by the ſpace of four and twenty dayes, the ſaid ſhip was laden with Hoops, ſo as the Defendant could not freight it: And the Plaintiff did demurr in Law upon the plea. *Clark* for the plaintiffe: The Defendant hath not anſwered to all the time, but to part onely; and he had ſufficient time, although the ſhip were laden with Hoops

Hoops for the ſpace of four and twenty dayes: as 35. *H.* 6. *Barr.* 162 The Maſter of S. *Katherines* leaſed three houſes by one Indenture, upon condition that the Leſſee ſhould not ſuffer nor harbour any lewd woman within the ſame houſes, if he were warned thereof by the Maſter or his ſervant for the time, &c. And if he did not put her out within ſix weeks after ſuch warning, that then it ſhould be lawfull for the Maſter and his Succeſſors to enter. And it was ſhewed, That the Leſſee did ſuffer a lewd woman there to continue: wherefore ſuch a one, ſervant of the Maſter, gave him warning, &c. and the Leſſee did not put her out of the houſe, and that therefore the Maſter did enter: which matter, &c. The Leſſee ſaid, that after the ſaid warning given, that the Maſter commanded her to enter, and to dwell there for ſix weeks after, without that, that ſhe coninued there by the Defendant. And it was ruled by the whole Court, that the Replication was not good, becauſe the Indenture is, That he ſhould not ſuffer any lewd woman, &c. As if I be bound to enfeoff you of an Acre of Land by ſuch a time, within which time you diſſeiſe me, the ſame is no plea, for that the Feoffor hath not colour to enter; therefore I may enter upon him, and make the Feoffment. So in that caſe, the Maſter had no colour to put her into poſſeſſion, therefore it was no plea, without ſhewing the ſpeciall matter: Wherefore he ſaid, That he did put her out, and that the Maſter with force, &c. againſt the will of the Leſſee, did put her in; and there made her to ſtay with force and violence, againſt the will of the Leſſee, for the ſix weeks &c. and that was holden to be a good plea. So in the principall caſe, he doth not ſhew, that he was kept out with force, but that he might caſt out the Hoops; and therefore the plea is not good. So 3. *H.* 4.8. *Br. Condition* 35. There was a Covenant betwixt the Leſſor and Leſſee, That the leſſor during the leaſe might be four dayes in a yeer in the houſe without being put out, upon pain of one hundred pounds: and the Leſſor came to enter, and the Leſſee ſhut the doors and the windows; It was held, that was no breach of the Covenant, without ſaying, that the leſſee put him out. *Atkins* contrary: The ſhip was to remain there to be freighted, for ſo many dayes as it ſhould pleaſe the Defendant of the forty dayes for to freight her: therefore the firſt act is to ariſe on the plaintiffs ſide; and the ſame ought to be ſhewed ſpecially to have been done. As 14. *H.* 8. 18. *Br. Condition* 42. Debt upon a Bond, upon Condition That if the Defendant reſigne the Benefice of D. unto the Plaintiff upon a Penſion, as they may agree by a certain day, That then, &c. The Defendant ſaid, that he was always ready to reſigne to him the Benefice, and yet is, in caſe the Plaintiff would aſſure him the Penſion. It was no Replication for the Plaintiff, That he offered him a Penſion, unleſſe he ſhew, that he offered him a Deed thereof. So 33. *H.* 6. A condition was, That if I may enjoy ſuch goods, I will give to you ſuch a ſumm

of money; I ought firſt to enjoy the goods, before that I ſhall pay any money. Alſo in the principall Caſe, it is not ſhewed, That the ſhip was ready there by the ſpace of forty daies; and it is a generall rule in Conditions, That if the Plaintiffe himſelfe be the cauſe of Diſablement, ſo as the Condition cannot be performed, that he ſhall not take advantage of a Condition; as in the Caſe of 9. *H.* 7. Where one is bounden to enfeoffe ſuch a woman before ſuch a day, and the Obligee before the day doth marry the woman: 35. *H.* 6. and 7. *H.* 4. If I be bounden to pay a penſion to one, untill he be promoted to a Benefice, and he diſables himſelfe to take the Benefice, I ſhall no longer pay the penſion. Beſides, he ſaid, That in the principall Caſe, the matter could not be tryed here; for the Jury cannot take notice of a thing done *ultra mare*: But 11. *H.* 7. 16. a difference is taken: If the thing be all to be done beyond the ſea, then it cannot be tried here; but if part be to be done here, and part beyond ſea; ſo as it is mixed, it may be tried here; As a Bond with condition, That if the Obligor bring the Merchandizes of the Obligee from *Norway* beyond the ſea, to *Lynn* here, that then, &c. So contrary, If to carry goods delivered here, to *Burdeaux*, &c. It was adjourned.

Mich. 28, 29. *Eliz. in the Kings Bench.*

91. SHOTBOLTS *Caſe.*

A Man brought an Action upon the Caſe againſt another, becauſe he cauſed him to be indicted, and arraigned, &c. to his damage, &c. And it was for a robbery; and the Plaintiffe did not ſhew in his Declaration, that he was *legitimo modo acquietatus*; The Defendant by way of Barre ſaid, That he was acquitted *modo & forma*, as the Plaintiffe had ſaid; and in truth, he doth not ſay that he was acquitted. *Cook*, If the Declaration be inſufficient, and wanteth ſubſtance, then there is no cauſe of Action. *Clench* Juſtice, A man ſhall not have an Action without cauſe; and if he were convicted, then there is no cauſe of Action: and he hath not ſhewed whether he was convicted or acquitted. And he ſaid, that there was no difference betwixt an Action on the Caſe, and a Conſpiracie, in ſuch caſe, but onely this, That a Conſpiracy ought to be by two at the leaſt; and an Action upon the Caſe may lie againſt one; and he ſaid, that in both, he ought to ſhew, that he was *legitimo modo acquietatus*. See 11. *H.* 7. 25. An Action of Conſpiracy founded upon the Statute of 8. *H* 6. Cap. 10. where it is grounded upon a Writ of Treſpaſſe brought againſt one onely; But ſuch a Conſpiracy which is grounded upon an In-

Indictment of Felony, muſt be againſt two at the leaſt; for the ſame is an Action founded upon the Common Law.

Mich. 28,29. Eliz. In the Kings Bench.

92. BONEFANT *againſt Sir* RIC. GREINFIELD.

Bonefant brought an Action of Treſpaſſe againſt Sir *Richard Greinfield*: The Caſe was this: A man made his Will, and made *A. E. I. O.* his Executors, and deviſed his Lands to *A. E. I.* and *O.* by their ſpeciall names, and to their heirs, and further willed that his Deviſees ſhould ſell the Land to *I. D.* if he would give for the ſame before ſuch a day an hundred pound; and if not, that then they ſhould ſell to any other to the performance of his Will, *ſcil.* the payment of his debts; *I. D.* would not give the hundred pound. One of the Deviſees refuſed to entermeddle, and the other three ſold the Land; and if the Sale were good, or not, was the queſtion. *Cooke.* The Sale is not good. 1. Let us ſee what the Common Law is, At the Common Law it is a plain caſe, that the Sale is not good, becauſe it is a ſpeciall truſt, and a joynt truſt, and ſhall never ſurvive: for perhaps, the Deviſor who is dead, repoſed more confidence in him who refuſed, then in the others. *Vide* 2 *Eliz.* the Caſe of the Lord *Bray*, who covenanted, That if his ſon marry with the conſent of four, whom he eſpecially named: *viz. A. B. C.* and *D.* that then he would ſtand ſeiſed to the uſe of his ſon, and his wife, and to the heirs of their two bodies begotten; One of the four was attainted and executed; The other did conſent that he ſhould marry ſuch a one; he married her, yet no eſtate paſſed, becauſe the fourth did not conſent, and it was a joynt truſt. 38. *H.* 8. *Br. Deviſes* 31. A man willeth that his Lands deviſeable ſhall be ſold by his Executors, and makes four Executors: all of them ought to ſell; for the truſt which is put upon them, is a joynt Truſt. But *Brook* conceiveth, that if one of them dieth, that the others may ſell the Lands. The Caſe betwixt *Vincent* and *Lee*, was this; A man deviſed, That if ſuch a one dieth without iſſue of his body, that then his Sons in law ſhould ſell ſuch Lands: and there were five ſons in law when the Teſtatour died; and when the other man died without iſſue, there were but three ſons in law, and they ſold the Lands, and it was holden that the Sale was good; becauſe the Land was not preſently to be ſold. Alſo he ſaid, that in the principall Caſe here, they have an Intereſt in the Lands, and each of them hath a part; therefore the one cannot ſell without the other. But if the deviſe were, that four ſhould ſell; they have not an Intereſt, but onely an Authority. As to the Statute

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of 21. *H.*8. Cap.4. he ſaid, that that left our Caſe to the Common Law: For that Statute, as it appeareth by the preamble, ſpeaks onely of ſuch Deviſes by which the Land is deviſed to be ſold by the Executors, and not deviſed to the Executors to ſell. And goes further, and ſaith, Any ſuch Teſtament, &c. of any ſuch perſon, &c. therefore it is meant of ſuch a deviſe made unto the Executors; and then no Intereſt paſſeth, but onely an Authority, or a bare Truſt: But in our Caſe, they have an Intereſt, for hewho refuſed, had a fourth part; Then when the other ſell the whole, the ſame is a diſſeiſin to him of his part. If a Feoffment be made to four, upon condition that they make a Feoffment over; and two of them make the Feoffment, it is not good. Alſo the words of the Will prove, that they have an Intereſt; for it is, that his Deviſees ſhall ſell, &c. *Laiton* contrary, And he ſaid, That although the Deviſe be to them by their proper names, and not by the name Executors; yet the intent appeareth that they were to ſell as Executors, becauſe it was to the performance of his laſt Will; and that may be performed as well by the three, although that the other doth refuſe; and the Sale of the Land doth referre to the performance of his Will, in which there are divers Debts and Legacies appointed to be paid. 2.*H.*4. and 3.*H.*6. A man deviſed his Lands to be ſold for the payment of his debts, and doth not name who ſhall ſell the ſame, the Lands ſhall be ſold by his Executors. 39. *Aſſ.* A Deviſe is of Lands unto Executors, to ſell for the performance of his Will, the profits of the Lands before the Sale ſhall be aſſets in the Executors hands. 15. *H.* 7.12. is, That if a man deviſe, that his Lands ſhall be ſold, they ſhall be ſold by his Executors. Alſo if I deviſe that my Executors ſhall ſell my Lands, and they ſell, it is an Adminiſtration, and afterwards they cannot plead, that they never were Executors, nor never adminiſtred as Executors; And although there are divers Authorities to be executed, yet it is but one Truſt. 39. *Aſſ.* 17. is our very Caſe. A man ſeiſed of Lands deviſeable, deviſed them to his Executors to ſell, and died, having two Executors, and one of them died, and the other entred and ſold the Land; and the Sale was good. 49. *E.*3. 15. *Iſabell Goodcheapes* Caſe; Where a man deviſed, that after an Eſtate in taile determined, that his Executors ſhould ſell the Lands, and made three Executors, and one died, and another refuſed, the third after the taile determined, ſold the Land; and the Sale was holden good, and that it ſhould not eſcheate to the Lord, for the Land was bound with a Deviſe, as with a Condition; as to the Statute of 21.*H.*8. Cap.4. the preamble of the Statute is, as it hath been recited: and although for exmaple, the Lands in uſe are only put, yet the Statute is not tied only to that; As in the Statute of Colluſion of *Malbridge*; Examples are put only of Feoffments and Leaſes for years, yet there is no doubt but that a Leaſe for life, or a gift in taile to defraud the Lord, is within the Statute.

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So the Statute of *Donis Conditionalibus* puts onely three manner of eſtate tailes. But *Littleton* ſaith, That there are many other eſtate tailes, which are not recited in the Statute: So here, our Caſe is within the Miſchiefe of the Statute of 21. *H.*8. Cap.4. although it be not within the Example. So the Statute of *Weſt.* 1. is, That if the Gardien or Leſſee for years, maketh a Feoffment in Fee, *Tam Feofator quam feofatus habeantur pro diſſeiſoribus:* yet 22. *Aſſ.* is, That if Tenant by *Elegit* make a Feoffment, it is within the Statute. Alſo it may be a doubt, Whether Land deviſable onely by cuſtome bee intended in the Statute of 21. *H.* 8. Cap.4. And whether Land deviſable by the Statute of 32. *H.*8. be within it or not, *viz.* If a Statute of a puiſne time ſhall be taken by Equity within a more Ancient Statute: and I conceive it may; as 12. *H.*7. the Statue of 4. *H.*7. which ſayes that the heire of *Ceſtuy que uſe* ſhall be in Ward, ſhall extend to the Statute of *Prærogativa Regis*; for if he be in Ward to the King, he ſhall have Prerogative in the Lands, to have other Lands by reaſon thereof. *Gaudy* Juſtice did rely very much upon the word [*Deviſees,*] *viz.* that they have an Intereſt, and that the Sale was not good. *Suit* Juſtice, They are both Executors and Deviſees of the Lands; Deviſees of the Lands, and Executors to performe the Will. *Cook*, he who refuſed to ſell, cannot waive the Freehold, which is in him by a refuſall in *pars*, as 7. *H.* 2. and 7. *E.*4. but ought to waive it in a Court of Record; therefore he hath an Intereſt remaining in him. *Clenche* Juſtice; What if he had deviſed the Lands to four, and made one of them his Executors, and willed that he ſhould ſell; could not he ſell? All the Court agreed that he might. *Cook*, When a man deviſeth that his Executors ſhall ſell, the Fee deſcends to the heir; yet they may ſell that which is in another: but the ſame is not like to our Caſe. It was adjourned.

Mich. 28,29. *Eliz. in the King's Bench.*

93.

A Judgement was given upon a Bond for four thouſand pound; And the *Scire facias* was ſued for three thouſand pound, and he did not acknowledge ſatisfaction of the other thouſand pound. *Haughton* moved, That the *Scire facias* ſhould abate. As if a man brings Debt upon a Bond of twenty pound, and ſhews a Bond for forty pound, and doth not acknowledge ſatisfaction for 20l, it is not good: The Juſtices would adviſe of it. And at another day it was moved againe, Whether the *Scire facias* was good; becauſe it doth recite *Quod cum nuper* ſuch a one, *recuperaſſet* four thouſand pound, and doth not ſhew

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in what Action, or at what day the Judgment was given, or the Recovery had. *Piggot*, That is not material, for such is the Form in an *Audita querela*, or Rediſſeiſin. As to the other, That he doth not acknowledge ſatisfaction, as in the Caſe before cited by *Haughton*, which Caſe is in 1. *H.* 5. That is not like to an Execution, for an Execution is joint, or ſeverall, at the will of him who ſues it forth; as in 19. *R.* 2. *Execution* 163. hee may have part of his Execution againſt one in his life time, and if he dieth, other part againſt his Heir or Executor. Note, the Execution was of the whole, but becauſe the Defendant had not ſo much, he had but part againſt him who had no more; and therefore of the reſidue he had Execution againſt the Heir. *Gawdy* Juſtice, I conceive that he cannot have an Execution, unleſſe he acknowledge Satisfaction. There is no difference, as to that betwixt the Action of Debt upon a Bond and a *Scire facias*; and the intendment, *viz.* that it ſhall be intended that he was paid, becauſe he ſued but for Three thouſand Pound, will not help him. *Piggot*, as to that, vouched a Caſe out of 4 & 5. *Mary*, in *Dyer*, which I cannot find. *Suit* Juſtice ſaid, That if the Defendant in the *Scire facias* ſay nothing by ſuch a day, that Judgement ſhould be entred for the Plaintiffe. *Quod executio fiet.*

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JUdgement was given againſt an Infant by default in a reall Action of Land: And a Writ of Error was thereupon brought; and it was argued, That it is not error; for in many caſes an Infant ſhall be bound by a Judicious act, as 3. *E.* 3. *Infant* 14. Where an Infant and a Feme Covert bring a *Formedon*; and the woman was ſummoned and ſevered: And it was pleaded, That where the Writ doth ſuppoſe the woman was Sole, ſhe was Covert; and Judgment was demanded of the Writ, and that the Infant could not gainſay it, but confeſſed it; this Confeſſion of the Plea which abated his Writ, was taken. And 3. *H.* 6. 10. *Br. Saver Default* 51. An Infant ſhall not ſave his default, for he ſhall not wage his Law; See there, that the Default ſhall not be taken againſt him; therefore that book ſeems rather againſt it, then for it. *Vide* 6. *H.* 8. *Br. Saver Default* 50. That Error lieth upon a Recovery by default againſt an Infant: other wiſe, if it be upon an Action tried; ſo is 2 *Mar. Br. Judgment* 147. It was ſaid, That a generall Act of Parliament ſhall bind an Infant, if he be not excepted. The Juſtices did ſeem to incline, That if Judgement be given by default, that it ſhall bind an Infant; but there was no rule given in the Caſe.

Mich.

Mich. 28, 29. *Eliz. in the Kings Bench.*

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A Clark of the King's Bench, ſued an Officer of the Common Pleas, and he of the Common Pleas claimed his Priviledge, and could not have it granted to him; for it is a generall rule, That where each of the perſons is a perſon able to have Priviledge; he who firſt claimes it, viz. the Plaintiffe, ſhall have it, and not the Defendant; As if an Atturney of the Common Pleas ſueth one of the Clarks of the Kings Bench; yet he of the Kings Bench ſhall not have Priviledge, although the Kings Bench be a more high Court, becauſe the other is Plaintiffe, and firſt claimeth it.

Mich. 28, 29. *Eliz. in the Kings Bench.*

96

AM Action upon the Caſe upon a Promiſe was brought; but the Caſe was ſo long that I could not take it: But in that Caſe, *Tanfield*, who argued for the Defendant, ſaid, That it is not lawfull for any man to meddle in the cauſe of another, if he have not an Intereſt in the thing, for otherwiſe it will be Maintenance. But if a Cuſtome be in queſtion betwixt the Lord of the Manor and Copy-holder; all the other Copy-holders of the Manor may expend their money in maintenance of the other and the Cuſtome; and the Maſter may expend the money of the ſervant in maintenance of the ſervant: So he in the Remainder may maintain him who hath the particular Eſtate. Maintenance is an odious thing in the Law, for it doth encreaſe troubles and Suites. He argued alſo, How that Bonds, Obligations, and Specialties, might be aſſigned over, how not. 34. *H.* 6. 30. *Br. Maintenance* 8. If *J. S.* be indebted to me, and I be indebted to *J. D.* I may aſſign that Debt to *J. D.* with the aſſent of *J. S.* otherwiſe not, as I conceive. And there alſo another difference is taken, That Damages which are to be recovered for Treſpaſs, Battery, &c. cannot be aſſigned over, becauſe they are as yet uncertain; and perhaps the Aſſignee may be a man of great power, who might procure a Jury to give him the greater Damages. If a Bond be for performance of Covenants contained in an Indenture of Leaſe, if he aſſign the Leaſe, he may aſſign the Bond alſo, becauſe they are concomitants; and he hath an Intereſt in the Leaſe, and therefore he may ſue the Bond: But if the

Covenants be firſt broken, and afterwards he aſſign over the Leaſe, if the Aſſignee ſue the Bond, it is directly Maintenance: but if he aſſign over the Leaſe, and afterwards the Covenants are broken, if he ſue there it is no Maintenance: But if he aſſign over the Bond, and reſerve the Leaſe in his own hands, and then the Covenants are broken, and the other ſue the Bond for the performance of Covenants, it is Maintenance: And to all that *Cook* agreed. The ſecond Point; An *Elegit* is awarded to the Sheriffe, and he extends the Lands, and doth not returne it; Whether it be a lawfull Execution to the party or not? is the queſtion. It is a good Execution, unleſſe the words of the Writ be conditionall, for then there muſt be a returne of the Writ; as a *Fieri faciàs* muſt be returned, otherwiſe the Execution is not well done, for it is conditionall, viz. *Ita quod habeas pecúniam in curia, &c.* So is it of a *Capias ad ſatisfaciendum, Ita quod habeas corpus hîc.* But an *Elegit* is not conditionall. Yet *Kemp* the Secondary ſaid, That in the end of the *Elegit* is, *Et de eo quod inde feceris nobis in dicta cancellaria tali die ubicunque tunc fuerit ſub Sigillo diſtinctè & apertè conſtare facias, &c.* And ſo is the forme of the Writ in *Fitz. Nat. Br.* 266. *Tanfield.* That is true, but it doth not make the Writ conditionall: but that is the Entry of the Court and the Sheriffe, and not the Entry of the Party and the Sheriff. 11. *H.* 4. 59. by *Hankford*, who was a man of great knowledge, and lived in learned times. If the Recogniſee of a Statute Merchant ſueth Execution of it, although the Writ be not returned, and the Recogniſee hath Execution, and afterwards the Recogniſor purchaſeth other Lands; and afterwards the Recogniſee comes and ſaies, That the Writ is not returned, and ſues forth another Writ, the Recogniſor ſhall have an *Audita querela* in that Caſe, and ſhall furmiſe in Fact, how that execution was done by the firſt Writ, and yet there is no Record that execution was done by the firſt Writ. So 19. *E.* 3. *Briefe* 370. A Writ iſſued to have Execution in forty Towns, and an Extent was made, and delivered of Lands in forty Towns; and the Return made mention but of Execution in eight Towns, and therefore the Party would have had a new Writ; and the other Party was received to averre againſt the Record of the Returne, that the Extent was in forty Towns. 12. *E.* 3. *Scire facias* 117. Upon an *Elegit* the Sheriffe returned *extendi feci*, and did not ſay, *deliberavi*; and in truth, he did deliver the Lands in extent, and therefore he could not have a new Execution. 20. *Eliz.* betwixt *Colſill* and *Haſtings*. *Colſill* had an extent upon the Lands of *Haſtings*, and the Sheriffe being a friend to *Haſtings*, did not deliver full Poſſeſſion to *Colſill*, but gave him Poſſeſſion in one part in the name of all the others. *Haſtings* continued Poſſeſſion of all the reſt, and being upon Election of new Sheriffs, *Colſill* was not over haſty to put him out, for he was in hope to have a more favourable Sheriffe; and the firſt Writ was not returned,

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and there being a new Sheriff, he ſued forth a new Writ to have Execution. The Defendant ſaid, That he had before ſued forth the like Writ, and had Execution. And *Colſill* ſaid, That the firſt Writ was not returned; and yet the Opinion of the whole Court was, That it was a good Execution, and ſo it was ruled; but the Caſe was overthrown afterwards upon another Point. So the Earle of *Leiceſter* had a Statute extended upon the Land of Mr. *Tanfields* Mother; and it was not returned; and yet when he would have ſued forth another Execution, he could not have it allowed him by the rule of the Court, becauſe the firſt Execution was a good Execution, although it were not returned. 15 *Eliz.* It was the Caſe of the Counteſſe of *Derby*, who married the Earle of Kent: in an *Habere facias ſeiſinam* in a Writ of Dower, Execution was ſerved, but not returned, and therefore ſhe prayed a new Writ, but could not obtain it, becauſe the firſt was well executed, although it was not returned. So alſo was the Lord *Morleyes* Caſe in the Kings Bench, in 28. *Eliz.* the Writ was not returned, and yet the Execution was well done: And therefore he concluded, That the Execution was good, although the Writ was not returned. *Cook* contrary, An *Elegit* ought to be returned, and it is void if it be not returned. As to the Caſe before cited of 19. *E.* 3. which began 9. *E.* 3. 450. And all the other Caſes put out of the old Books, They are upon extents of Statutes; and there is a great difference betwixt an *Elegit* and Extents upon Statutes; as 15. *H.* 7. 14. It was agreed, That where a man recovers Debt or Damages, or hath a Recogniſance forfeit unto him, his Executors ſhall not have Execution, without a *Scire facias* firſt ſued; contrary upon a Statute Staple or Merchant; and the like if the Defendant dieth, the Plaintiffe ſhall not have an Execution by *Fieri facias* againſt his Executors, but he muſt firſt have a *Scire facias*: So if the Court change, as if the Record cometh into the Kings Bench by Error, and Judgement be affirmed; the Plaintiffe who recovered, ſhall not have a *Fieri facias* againſt the Defendant, but muſt firſt have a *Scire facias*: But otherwiſe it is of a Statute, like the Caſe of 14. *H.* 7. 15. *Br. Execution* 59. The Caſe of 12. *E.* 3. doth not ſpeak of *Elegit*, but of Statutes and Extents. Alſo the *Elegit* and the Extent differ in the Entrie; for the *Elegit* hath a ſpeciall and preciſe Entry, as *Elegit ſibi executionem, &c.* And a man ſhall not have a *Capias* after an *Elegit*; as 15. *H.* 7. is: And being a ſpeciall Entry of Record, it ought to be returned; for otherwiſe it doth not appear that Execution is done; and ſo there ſhall be great miſchiefe, becauſe infinite Executions may iſſue forth. There is not any Book in the Law directly in the Point: But I will put you as ſtrong a Caſe: A Judgement is given upon an Exigent by the Coronor; yet by 28. *Aſſ.* 49. If there be no Returne of the Exigent, it is no ſufficient Out-lawry; and one Pleaded the ſame in the plain-

Plaintiffe, and ſaid, that it appeared by the Record, and vouched the Record: and becauſe the *Exigent* was not returned, it was not allowed. And ſo was the Caſe of *Procter* and *Lambert*, 4 & 5. *Philip* and *Marie* adjudged. As to the Reports which are not printed, vouched by *Tanfield*, *eâdem facilitate negantur quâ affirmantur.* Upon an *Elegit*, if there be goods ſufficient, the Sheriff is not to meddle with the Lands; and if there be not ſufficient goods, yet hee is not to meddle with the beaſts of the plough. If a man have an Authoritie, and he doth leſſe then his Authoritie, all is void; as here the Return of the Writ is part of his Authority. As 12. *Aſſ.* 24. If a man have a letter of Atturney to make Livery and Seiſin to two, and he makes it to one, all is void, and he is a diſſeiſor to the Feoffor. So 4. *H.* 7. If he have a letter of Atturney to make Livery of three Acres, and he makes onely Livery of two Acres, and not of the third Acre, it is void for the whole. Alſo the *Elegit* is, *Quod extendi facias & liberari, quouſq;* the Debt be ſatisfied: and therefore if the land be extended onely, and there be no delivery made of the land, *ut tenementum ſuum liberum*, according to the Writ, then there is no execution duly done. And in the principall Caſe, there was no delivery made of the land. It was adjourned.

Mich. 28, 29. Eliz. in the King's Bench.

97 STRANSAM *againſt* COLBURN.

Stranſam brought a Writ of Error againſt *Colburne*, upon a Judgment given in a Writ of *Partitione facienda*; and divers Errors were aſſigned. The firſt Error aſſigned was, That the party doth not ſhew in his Writ, nor in his Declaration, upon what ſtatute of Partition hee grounds his Action. And there are two Statutes; viz. the Statute of 31. *H.* 8. chap. 1. and the Statute of 32. *H.* 8. chap. 32. And yet hee groundeth his Action upon one of the Statutes. As 3. *H.* 7. 5. Where the ſervants of the Biſhop of *Lincoln* were indicted of Murder, *eo quod ipſi in Feſto Sancti Petri* (2. *H.* 7.) *felonicè apud D. murdraverunt &c.* and becauſe there are two Feaſts of Saint *Peter*, viz. *Cathedræ*, & *Advincula*, therefore the Indictment was not good. 21. *E.* 3. One brought a *Ceſſavit* by ſeverall *Precipes*, viz. of one Acre in D. and of another in S. and of the third in *Villa prædicta*: and becauſe it was uncertain to which, *prædict.* ſhall be referred, it was not good. 5. *H.* 7. *Br.* Action upon the Statute 47. An Information was in the Exchequer for giving of Liveries, and the partie did not declare upon what Statute of Liveries; and

Exception

Exception was taken to it, and the Exception was not allowed, becauſe that the beſt ſhall be taken for the King; but if it had been in the Caſe of a common perſon, it had not been good. So, if a man bring an Action againſt another, for entry into his Land againſt the forme of the Statute, it is not good, becauſe hee doth not ſhew upon what Statute hee grounds his Action: Whether 8. *H.* 6. which gives treble damages; or 2. *H.* 2. which gives Impriſonment, and ſingle damages. The ſecond Error which was aſſigned by *Weſton*, was, That the Declaration doth ſhew *Quod tenet pro indiviſo*; and doth not ſhew what eſtate they held *pro indiviſo*. And there is a Statute which gives Partition of an eſtate of an Inheritance. *viz.* 31. *H.* 8. Cap. 1. And another which gives partition for years, or for life; and he doth not ſhew in which of the Statutes it is. As if one claime by a Feoffment of *Ceſtuy que uſe*, as 4. *H.* 7. is, he ought to ſhew, that the *Ceſtuy que uſe* was of full age at the time of the Feoffment, &c. for it is not a good Feoffment, if he be not of full age. So here he ought to ſhew, that he is ſeized of ſuch an eſtate, of which by the Statute he may have a Writ of Partition. For in many Caſes there ſhall be Joynt-Tenants, and yet the one ſhall not have a Writ of Partition againſt the other by any Statute. As if a Statute Merchant be acknowledged to two; and they ſue for the execution upon it, I conceive, that the one ſhall not have partition againſt the other. So if two Joynt-Tenants bee of a Seignorie, and the Tenant dieth without heir, ſo as the Lands eſcheat to them, they are Joynt-Tenants, and yet Partition doth not lye betwixt them by any Statute: Therefore one may be ſeiſed *pro indiviſo*, and yet the ſame ſhall not entitle him to a Writ of Partition. *Shuttleworth* contrary. The Statute doth not give any forme of Writ, but the Writ which was at the Common Law before; And therefore it is not to be recited, what kind of Writ he is to have. As to the ſecond point, It is not neceſſary to ſhew the eſtate, becauſe it cannot be intended, that he hath knowledge of the eſtate of the Defendant. For if one plead Joynt-tenancy on the part of the Plaintiffe, hee ſhall not ſhew of whoſe gift: but if the Defendant or Tenant plead Joynt-tenancy of his part, he ought to ſhew of whoſe gift, and how. 7. *E.* 6. *Plo. Com. Partridges* caſe. In a Caſe upon the Statute of Maintenance, The Plaintiffe may ſay, That he accepted a Leaſe, and ſhall not be forced to ſhew the beginning or the end of it, or for what years it is. In the Caſe of the Indictment before: and the Caſe of ſeverall *Precipes* of ſeverall Acres in ſeverall Towns, that lyeth in the Plaintiffs Cogniſance. But here, how can the Plaintiffe know the Defendants eſtate, becauſe he may change it as often as he pleaſeth; and therefore it is uncertain; for if before he had a Fee, hee might paſſe away the ſame unto another, and take back an eſtate for years. Alſo the Plaintiffe hath appeared, and pleaded to the Declaration;

And

And therefore he ſhall not have a Writ of Error *Gaudy* Juſtice, That is not ſo. *Shuttleworth*; True, if there be matter of Error apparant. *Gaudy* Juſtice, Cannot you take notice of your own eſtate? *Cook*. The Declaration is not good; therefore the Writ of Error is maintainable. By the Common Law, No partition lieth betwixt Tenants in common, as theſe are. And the Statute of 31. *H.*8. gives Partition onely of an eſtate of Inheritance, and preſcribes alſo that the Writ ſhall be deviſed in the Chancery: there he conceived the Ancient Writ is not to be uſed. I grant for a generall rule, That if a Statute in a new Caſe give an old Writ; he ſhall not ſay *Contra formam Statuti*, becauſe it is not needfull to recite the Statute, or make mention of it. And the Statute of 32. *H.* 8. Cap. 32. ſayes, That the Writ ſhall bee deviſed upon his, or their Caſe, or Caſes; If one bring a Writ upon the Statute of 31. *H.* 8. It is not neceſſary to ſhew of what eſtate he is ſeiſed, but *de hæreditate* generally. But upon 32. *H.*8. he ought to ſhew of what eſtate, *viz.* for years, or for life. As it was in the Caſe where Sir *Anthony Cook*, and *Temple*, and *Wood* were parties; which Caſe is in *Bendloes* Reports, *Mich.*7. & 8. *Eliz.* which was a great Caſe twice ſtood upon, and argued. And the reaſon there is given, That every Caſe is not within the Statute; and if at the common Law, and not within the Statute, the Writ ſhall not be grounded upon the Statute. For in the Caſe before, they might have Partition at the common Law, as one Co-parcener againſt the Alienee of the other Co-parcener may have. Alſo he ſaid, That ſeverall Judgements are to be given as the Caſe is, upon the ſeverall Statutes: for the Judgement upon the firſt Statute of 31. *H.*8. of Inheritances is, *Sit firma partitio in perpetuum*; but upon the Statute of 32. *H.*8. it is not ſo; for Judgment given upon that Statute ſhall not bind him in the Reverſion; for there is a *Proviſo* in the Statute in the end of it, That Partition made by force of that Statute ſhall not be prejudiciall or hurtfull to any perſons, other then ſuch who be parties to the ſaid Partition, their Executors, or Aſſignes. But here it is obſerved, That by intendment he cannot have knowledge of his eſtate. *Anſw.* That is at his perill: For if he cannot have knowledge of his eſtate, there cannot be any Partition upon any of the Statutes. If he will have benefit of the Statute, he ought to ſhew that he is within the Statute; and if he cannot ſhew it, then it muſt remaine at the common Law. But it hath been objected, that we have confeſſed the Declaration to bee good, becauſe we have appeared and pleaded. I anſwer, That if the Declaration want ſubſtance, it ſhall never bee made good by Plea, or Confeſſion. But if it want circumſtance, that perhaps may bee made good by pleading, or confeſſion. *Tanfield* contrary. Two principall things are alleadged for Errour; That the Declaration is uncertaine in the Eſtate, and that it is uncertaine

in

in the Statute. I may know my own Eſtate, but not the Eſtate of my Companion, for it is uncertain, and he may ſecretly change it when he pleaſeth. But then *Cook* ſaid, It muſt remaine as at the common Law. *Itane?* Then farewell Statute; for it may eaſily be defrauded, and no uſe of it; for if I cannot know the Eſtate, I cannot have an Action upon the Statute; but our Caſe is better, for our Caſe is, that *recuſat facere partitionem contra formam Statuti in hoc caſu proviſam*: and that is according to the Statute; for be the Eſtate an Eſtate of Inheritance, Free-hold, or Leaſe for Years, we leave it indifferent to be referred to the conſideration of the Law; and according as our Caſe ſhall fall out. Alſo it is but an Incertainty, and you have pleaded to it, and therefore it is no Error; but I grant that if it were matter of ſubſtance, that it were Error. Yet *Fitz. Nat. Br.* 21. *d.* In a Writ of Entrie *Sur diſſeiſin*, if the Originall Writ want theſe words, viz. *Quam clamat eſſe jus & hereditatem ſuam*: If the Tenant do admit of the Writ, and plead to the Action, and loſeth, he ſhall not aſſigne the ſame for Error, becauſe he hath admitted the Writ to be good by his Plea. So in Detinue of Charters concerning Lands, if the Plaintiffe in his Count or Declaration doth not declare the certainty of the Land, &c. if the Defendant doth admit of the Count or Declaration, and plead, the Declaration is made good. As to the Judgement, If the word *Inperpetuum* be in it, either in the one Caſe or in the other, it ſhall be conſtrued, to be but during the Eſtate. In a Writ of Partition there are two Judgements; the firſt, That *Fiet Partitio*; Secondly, When the Partition is made and returned; the Judgement is, That *ſtet firma & ſtabilis Partitio*. *Gawdy* Juſtice, The Writ is to be deviſed upon his or their Caſe or Caſes, therefore the Party ought to ſhew his Caſe in ſpeciall, and what Eſtate he hath. And it is no anſwer, that he cannot know the Eſtate of the Defendant: for in a *Precipe* at the common Law, he ought to take notice of the Eſtate of the Tenant, or otherwiſe his Writ ſhall abate for the miſpriſion of it; for if he bring it againſt a Termor it is not good. And if the Statute of 31. *H.* 8. had only been made, and not the Statute of 32. *H.* 8. If he had brought a Writ of Partition upon the Statute, he ought to have ſhewed that he had an Eſtate of Inheritance againſt whom he brought the Writ. *Suit* Juſtice agreed with *Tanfield* in the whole. *Gawdy* was ſtrongly of the other ſide, That he ought to ſhew within the purview of which Statute he was; and if he will enable himſelf by Law to bring the Writ, he muſt enable himſelfe to be within the Law. And he ſaid, That *Temples* Caſe was adjudged, as it was accordingly vouched by *Cook* before.

Mich.

Mich. 28,29. Eliz. in the King's Bench.

98 DENNIE and TURNER's Caſe.

AN Action was brought upon the Statute of 5. *Eliz.* for Perjury; and the Plaintiffe did declare, That where an Action of Debt was brought *Hill. ultimo præterito*, 27. *Elizabeth* whereas in truth the Action in which he was perjured was, *Hill.* 28. *Eliz.* And ſo the recitall did miſſe the Record. *Bartlet* argued upon the Caſe put in *Leiceſter* and *Heydons* Caſe, in *Plowdens* Commentaries, where time, place, and number, ought to be obſerved, otherwiſe all is void; alſo he ſaid, That if the party ſhould recover here, upon a Perjury, committed upon a Record of 27. *Eliz.* and ſhould alſo recover in another Action upon the Statute of 5. *Eliz.* for a Perjury in an Action begun 28. *Eliz.* that he ſhould be double charged. *Cook*, He cannot bee double charged, for it is betwixt the ſame Parties, and in the ſame Cauſe, and only a Circumſtance is miſtaken. *Clench* Juſtice, It is needfull to ſhew in what Action the firſt Perjury was committed; for if hee ſay in Treſpaſſe, whereas in truth it was in Debt, all is naught. *Gaudy* Juſtice, If no Action be alledged, he cannot ſue upon the Statute of 5. *Eliz.* But the Caſe was upon a ſpeciall Verdict, and the Verdict did find that the Action was brought at another time then any of the Parties had alledged: And that Variance was firſt found by Verdict, and no mention made of it before; and therefore *Cook* ſaid it was void; for he ſaid, That by the book of 22. *Aſſ.* 17. The Jury cannot find any other thing then the Parties have alledged: For there the Jury found a dying ſeiſed after Judgement in a Recovery; whereas a dying ſeiſed was alledged, and did not ſay after a Recovery.

Mich. 28,29. Eliz. in the Kings Bench.

99 EGLINTON and AUNSELL's Caſe.

IN an Action upon the Caſe for Words; the words were theſe, Thou art a Coſening Knave, Crowner, and haſt coſened many of thy Kindred of their Lands. *Cook*, It is adjudged, That Coſener will bear no Action; for the words are too generall. And the word [Coſener] doth not go to the Office in the Principall Caſe: alſo the word [Coſening] is a word abuſed; 30. *H.* 8. *Br. Action upon the Caſe* 104.

Falſe

Falſe perjured man bears an Action; but falſe man without [Perjured] will bear no Action, and is nothing elſe but falſe and fraudulent. There was a Caſe, as *Cook* ſaid, betwixt *Oſborne* and *Frittell*; You did robb me, and took away my Evidences and a *Sub pena*. And it was ruled, That no Action did lie for them: And there it was holden, That the word [And] was a Copulative. *Kirby*'s Caſe, Thou art a crafty coſening Knave, and haſt coſened many of thy Kindred: Adjudged not Actionable. *Snagg* Serjeant contrary, That the Action lieth; for he ſaid, That a Crowner is ſworn to do his Office; and if he be falſe and deceitfull in his Office, then he is forſworn; and the word [And] here begins a new ſentence, and doth not expound the precedent words, as the words [becauſe] or [in that] &c. *Clench* Juſtice If the word Coſener had been left out, it had been a cleer Caſe that the words would not have born an Action: And if one do call him coſening Crowner, it is cleer, the words are Actionable. *Gaudy* Juſtice, We are to go ſtrongly againſt theſe kind of Actions: If the words [Coſening] ſhall go and extend to the word Crowner, then cleerly an Action doth lie, in reſpect of the Office: And then if [And] and all the ſubſequent words had been left out, yet the Action would lie. *Suit* Juſtice, If there were words ſufficient before the word [And] to maintain an Action, the ſubſequent words ſhall not overthrow thoſe that went before: But if the words had been, Thou art a Coſening Knave, Crowner, in coſening of thy Kindred; the Action had not been maintainable: but the word [And] is not a word explantory as the word [In] is. The better Opinion of the Court was, That the words were not Actionable.

Mich. 28,29 Eliz. in the Kings Bench.

100

A Man brought an Action upon the Caſe for ſpeaking theſe words of him, viz. He hath aided Pirats, contrary to the Lawes of the Realme, and againſt a Proclamation in that behalfe. *Snag* ſaid That the words are not Actionable, becauſe there wants the word [*Scienter*] for an honeſt man may unwittingly do ſo: And if a man chargeth one in an Action upon the Statute of 5. *Elizabeth*, and declare that he ſaid, That he was perjured, contrary to the forme of the Statute; hee alſo ought to ſay, That hee did it willingly and corruptly. *Cook*, True, if a man bring an Action upon the Statute of 5. *Elizabeth*. But if he ſaith, Such a one is a perjured man generally, an Action upon the Caſe will lie, without ſaying willingly and corruptly. Alſo thoſe words, viz. [Contrary to the Lawes

of the Realm) do imply *Scienter*; for if it were not *Scienter*, it could not be contrary to the Lawes of the Realme. *Clenche* Juſtice, I conceive that the word [*Scienter*] is a materiall word in this Caſe; and vouched the Lord *Shandoes* Caſe, where one ſaid, That he was a maintainer of Theeves, and it was adjudged that the Action would lie. It was one *Sidenhams* Caſe, Where one ſaid, That a Robbery was done, and that ſuch a one ſmelt of it; and an Action was brought for the words, and adjudged, That an Action would lie. And the words here are as forcible, as if he had ſaid *Scienter*; and the Caſe was adjourned for the ſearch of preſidents untill the next Terme.

Mich. 28, 29. *Eliz. in the Kings Bench.*

101

IF two men be partners of Merchandizes in one Ship; and one of them appoints and makes a Factor of all the Merchandizes; It was moved by *Godfrey*, and not denyed by the Juſtices, That both of them may have ſeverall Writs of Account againſt him, or they may joine in one Writ of Account, if they pleaſe. *Quære* of that.

Mich. 28, 29. *Eliz. in the Kings Bench.*

102

A Man made a Contract with another man, when he dwelt in the City of *London*; and afterwards he who made the Contract went from the City and dwelt within the *cinque* Ports; and he being afterward impleaded in the Kings Bench upon the Contract, claimed the priviledg of the *cinque* Ports; which according to 12. *E.* 4. is, That thoſe of the *cinque* Ports ſhall not be ſued elſwhere then within the *cinque* Ports. *Suit* Juſtice ſaid, That that was true, for any matter or cauſe ariſing within the *cinque* Ports: But otherwiſe, if a man do enter upon a Bond of One hundred, or One thouſand Pound, and then go and dwell in the *cinque* Ports; perhaps ſo the Obligee might loſe his Debt. And it was adjudged That the Defendant ſhould not have Priviledge.

Mich.

Mich. 28, 29. Eliz. in the Kings Bench.

103. Sir JERVIS CLIFTON's Caſe.

IN a *Quo Warranto*. The Information was, That where the Defendant was ſeiſed of a Mannor, and of a Houſe within it, That he claimed to have a Court or View of *Frankpledge infra meſſuagium prædictum*; and further it was, that *Sine aliqua Conceſſione ſive authoritate uſurpavit Libertates prædictas*. The Defendant pleaded, That *Non uſurpavit Libertates prædict' infra Meſſuagium prædictum, modo & forma*. *Piggot*, The Plea is not good; for the naturall Anſwer to a *Quo Warranto* is, either to claime or diſclaime, and he doth do neither of them; And if a man will tender a generall iſſue, he ought ſo to tender it as the Nature of the Action doth require. That he was never ſeiſed after time of memory is no plea in Reſcous. In Debt *rein arere*, is no plea, but he ought to anſwer to the *Debet*. The ſpeciall matter alledged in the Action, ought to be anſwered, and the generall not to be pleaded; as it is pleaded here, *Non uſurpavit, &c.* as in 21. *E.* 3. Detinue of Charters was pleaded in a Writ of *Dower*; and ſhe ſaid, That ſuch a one was ſeiſed, and did enfeoffe her, and her Husband; and ſo the Deeds did belong unto her. The Partie ſhall not traverſe, that they did not belong unto her; but muſt anſwer unto the eſpeciall matter: *viz.* the Feoffment. Alſo he ſaid, *Quod non uſurpavit, &c. infra Meſſuagium prædictum*; where he ought to have ſaid, *Infra Manerium prædictum*. An Account was brought upon a Receipt for ſeven years, and the Defendant pleaded to two of the years; and iſſue was joyned upon it: And it was adjudged error. *Godfrey*. He ought to ſay, *Non uſurpavit Libertates prædictas, nec earum aliquam*: for he ought to anſwer *ſingulatim*, as 4. *H.* 7. Where one was bounden that hee, and his ſervants ſhould keep the Peace; he ſhall not ſay generally, that he and his ſervants have kept the Peace; but he ought to anſwer for every one particularly; So here he ought not to anſwer generally, *Non uſurpavit Libertates prædictas, &c.* without ſaying, *Nec earum aliquam*. Alſo it is naught, becauſe he ſaith, *Non uſurpavit infra Meſſuagium prædictum, &c.* For although it be ſufficient for us to ſay, *Quod uſurpavit infra Meſſuagium prædictum*; becauſe if hee hath uſurped upon any part of the Mannor, *Uſurpavit infra Manerium*; yet it is not good for him to anſwer ſo: for if he hath uſurped in any part of the Mannor, although not in the Meſſuage, it is ſufficient for us: as 33. *H.* 8. *Br. Travers ſans ceo.* 367. Information was in the Exchequer, *eo quod* the Defendant had bought certaine Wools

of *W. N. contra formam Statuti*, where he is not a Draper, nor was a Draper. It is no iſſue, that he did not buy them of *W. N.* but hee ought for to anſwer, that he did not buy them *modo & forma*. For whether he bought them of *W. N.* or of *I. S.* it is not materiall, for that is not traverſable; but the buying contrary to the forme of the Statute is the matter traverſable: Beſides, he doth not anſwer, that he hath theſe Liberties *Conceſſione*, or *Authoritate Regia*. And it followes, neceſſarily, That if he hath them not by Royall Authority, that then he hath uſurped them: as 3. *H.6.* and 33. *H.* 6. One alledged a Deviſe, that the Lands were deviſable in ſuch a Town, &c. And the other pleads, That the Lands are not deviſable; it is no plea, becauſe he doth not anſwer to the Cuſtome of the Town. So here hee pleads, *Non uſurpavit*, but he doth not anſwer, Whether he hath them *Authoritate Regia*, or not. *Cook*, The Queen demands *Quo Warranto?* He ſayes, *Non uſurpavit*, Doth not that anſwer the queſtion? Doubtleſſe it is a direct Anſwer: as 3. *E.* 3. *Itin. North*, If he doth not uſe any Liberty, a *Quo Warranto* doth not lie. And as to that Objection, That he ought to anſwer directly to your queſtion, it is not ſo; for 31. *E.* 3. Voucher. I may vouch in a *Quo Warranto*, yet there I do not directly anſwer to your queſtion. So in *Tempore E.* 1. *ibidem*, in a *Juris utrum*, is a Queſtion, Who hath right: yet he is not bound directly to anſwer the queſtion. 17. *E.* 3. he may plead the generall iſſue. And it is a generall rule: Where a thing is materiall, without which you cannot have an Action; that there I may traverſe it: as 8. *H.*6. and 21. *H.*6. upon the Statute of Maintenance. *Ne mainteina pas*, is a good plea, and yet it doth not anſwer to the ſpeciall matter alledged. And upon *Non uſurpavit*, all the ſpeciall matter may be given in evidence. 14. *H.*4. Where one is charged as Bayly of a Manor, *Curam habens & adminiſtrationem bonorum*; there it is a good plea to ſay, That he was not his Receivor *modo & forma*; and that ſhall go to the goods as well as to the Mannor: and ſo is 49. *E.* 3. But it was objected, That the iſſue is *multiplex* and uncertain, for he might uſurp by *Miſuſer*, or *non uſer*; becauſe it had been uſed, and now it is not uſed; To that I anſwer; That upon *Non intruſit*, or Not guilty; he may give in evidences 100. titles; and the Court might be enveigled therewith as well as in this iſſue. But then it was objected, That he ought to ſay, *Non uſurpavit Libertates prædictas, nec earum aliquam*. I anſwer, That he ought not ſo to do; for if a *Quo Warranto* be brought of 100. Manors, or Liberties: *Non uſurpavit modo & forma* goes to them all. And he ſhall not ſay, *Non uſurpavit in hoc, nec in illo, nec in illo*; The book before vouched by *Godfrey*, 33. *H.*8. of buying of Wools of *I. S.* is not Law; But then it was further objected, That he doth not anſwer whether he hath them *Authoritate Regia*, or not? To that I anſwer, That is anſwered in theſe words, *Modo & forma*. But now let us ſee if the Information be

good,

good,or not. For it was ſhewed,that the Defendant was ſeiſed of a Manor,within which there is an houſe,within which houſe he claims to have a Court with view of Frankpledg,and to ſummon the Tenants *ad eandem Curiam*; and this is uncertain, where he ſaith, *ad eandem Curiam*: for there are two alledged before, and therefore it is uncertain to which it ſhall be referred. Alſo he ſaith, that he claimeth to have a Court,and it may be it is a Court of Pipowders,or Torne; as 10.*E.*4.15. Where it is ſaid, That an Indictment was taken at the Court or view of Frankpledg,and there holden it was not good; for it cannot be intended what Court. And as to that,that he ſayes,that he clayms to have a Court &c. *infra Meſſuagium prædictum, &c.* and to call twelve men to it, and that theſe twelve men ought to be of the Jury: there is an ancient Reading which goes under the name of *Frowicks* Reading upon the Statute of *Quo Warranto:* And there it is holden, That a *Quo Warranto* doth not lie of the claim of a thing which cannot be claimed; as to claim Felons goods, or to pardon Felons: for thoſe are things which lie onely in point of Charter. If the claim be within the Meſſuage, then he cannot call men out of the Meſſuage: as if he claime within the Manor, hee cannot call men out of the Manor. But a man may have a Leet belonging to a houſe, or within a houſe. *Suit* Juſtice, It is *Habere & tenere infra Meſſuagium prædictum*: and that he may well do. A *Quo Warranto* contains but two things in it: Firſt, it is demanded *quo Warranto* hee claymes ſuch Liberties. Secondly, It chargeth him with a tortious uſurpation of them. And here in the principall Caſe he hath anſwered to the uſurpation of them; but hee doth not anſwer, nor ſhew by what title he clayms them. And the like Caſe was adjudged here in this Court; That *Non uſurpavit modo & forma* was no ſufficient Anſwer. The Caſe was adjourned.

Mich. 28,29. *Eliz. in the Common Pleas.*

Intratur Trinit. 28. *El. Rot.* 256.

104 LEEDES *and* CROMPTON'S Caſe.

A Leaſe was made to *A. B.* and *C.* upon Condition that they nor any of them ſhould alien without licence: And the Leſſor made a Licence that *A. B.* or *C.* might alien: the ſame is a good licence, notwithſtanding the uncertainty; and thereby they have ſeverall authorities to alien: As a Letter of Atturney to *A.* or *B.* to make Livery; but a gift to *A.* or *B.* is void for the uncertainty. But if a licence be to *A.* and *B.* or *C.* ſome conceived that *A.* or *B.* might alien; but not *C.* *Et è converſo.*

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

105

IT was agreed by the whole Court, That a Partition made by word betwixt Joyntenants, is not good. See *Dyer* 29. *Pl.* 134. and 350. *Pl* 20. doth agree; and ſee there the reaſon of it.

Mich. 28,29. Eliz. in the Common Pleas.

105

IT was holden by the whole Court, That if the Father do deviſe Lands unto his Son and Heir apparant, and to a ſtranger, that it is a good Deviſe; and that they are Joyntenants for the benefit of the Stranger.

Mich. 28,29. Eliz. in the Common Pleas.

106 FULLER'S Caſe.

A. Promiſes unto the eldeſt ſon, that if he will give his conſent that his Father ſhall make an Aſſurance unto him of his Lands, that he will give him ten pounds: If he give his aſſent, although no aſſurance be made, yet he ſhall maintain an Action upon the promiſe. But at another day *Periam* Juſtice ſaid, that in that caſe the ſon ought to promiſe to give his aſſent, or otherwiſe *A.* had nothing, if his ſon would not give his conſent. And ſo where each hath remedy againſt the other, it is a good Conſideration. In *Hillary* Term after, *Fenner* ſpake in arreſt of Judgment upon the ſpeciall Verdict, That becauſe that the Aſſumpſit is but of one part, and the other is at liberty, whether he will give his conſent or not; that therefore although that hee do conſent, that hee ſhall not recover the ten pounds. Alſo he ſaid, That the promiſe was, that if hee would give conſent that his Father ſhould make aſſurance to him: and here the aſſurance is made to *A.* to the uſe of the Defendant and his Wife in taile, ſo as it varies from the firſt Communication; and alſo it is in tail. *Shuttleworth* contrary; in as much as he hath performed it by the giving of conſent, then when he hath performed. It is not to the purpoſe, that he was not tyed by a croſſe

croſſe *Aſſumpſit* to do it; but if he had not given his conſent, he ſhould have nothing. At length Judgment was given for the Plaintiff. And *Periam* Juſtice ſaid in this Caſe, That if a covenant be to make an Eſtate to *A.* and it is made to *B.* to the uſe of *A.* that he doubted whether that were good or not.

Mich. 28,29 Eliz. In the Common Pleas.

Intratur Hill. 28. *Eliz. Rot.* 1742.

107 WISEMAN and WALLINGER's Caſe.

A Man ſeiſed of two Cloſes called Bl. Acre, makes a Leaſe of them rendring Ten Shillings rent: The Leſſee grants all his Eſtate in one of them to *A.* and in the other to *B.* The Leſſor doth deviſe all his Land called Bl. Acre in the tenure of *A.* and dieth. The Deviſee brings an Action of Debt for the whole Rent againſt the firſt Leſſee. And the Opinion of the whole Court was, That the Action would not lie, becauſe they conceived, That but the Reverſion of one Cloſe paſſed, and alſo that the rent ſhould not be apportioned in that Caſe, becauſe a terme is out of the Statute; and a Rent reſerved upon a Leaſe for years ſhall not be apportioned by the act of the Leſſor; as where he takes a Surrender of part of it. But otherwiſe by Act in Law; as where the Tenant maketh a Feoffment in Fee of part of the Land, and the Leſſor entreth. And at another day *Anderſon* Chief Juſtice ſaid, That if the Leſſor of two Acres granteth the Reverſion of one Acre, that the whole Rent is extinct.

Mich. 28,29. Eliz. in the Common Pleas

108

A Leaſe for years is made of Land by Deed rendring Rent; the Leſſee binds himſelfe in a Bond of Ten Pound to perform all Covenants and Agreements contained in the Deed; the Rent is behind, and the Leſſor brings an Action of Debt upon the Bond for not payment of the Rent; the Obligor pleads performance of all Covenants and Agreements; the Leſſor ſaies, That the Rent is behind; it was holden, That it is no Plea for the Obligor to ſay, That the Rent was never demanded: But in this Bar he ought to have pleaded, That he had performed all Covenants and Agreements, except the payment of the Rents. And as to that, That he was alwayes ready to have paid

it,

it, if any had come to demand it; but as the firſt Plea is, it was held not to be good. And as to the demand of the Rent, the Court was of opinion, That it was to be demanded, for the payment of the Rent is contained in the word [Agreements] and not in the word [Covenants]: and then if he be not to performe the Agreements in other manner then is contained in the Deed; of that agreement the Law ſaith, That there ſhall be a demand of the Rent: But if the Leſſee be particularly expreſſed by covenant to pay the Rent, there he is bound to do it without any Demand.

Mich. 28, 29. Eliz. in the Common Pleas.

109 HOLLENSHEAD *againſt* KING.

THomas *Hollenſhead* brought Debt againſt *Ralph King* upon a Recovery in a *Scire facias* in *London*, upon a Recognizance taken in the Inner or Ouſter Chamber of *London*; and doth not ſhew, That it is a Court of Record; and that they have uſed to take Recogniſances and Exception was taken unto the Declaration, and a Demurrer upon it; and divers Caſes put, That although that the Judgement be void, that yet the Execution ſhall be awarded by *Scire facias*, and the party ſhall not plead the ſame in a Writ of Error. But *Periam* Juſtice took this difference, Where Execution is ſued upon ſuch a Judgement, and where Debt is brought upon it: for in Debt it behoves the Party that he have a good Warrant and ground for his Action, otherwiſe he ſhall not recover; but upon a voidable Judgement he ſhall recover, before it be reverſed.

Mich. 28 & 29 Eliz. In the Common Pleas.

Intratur Trinit. 28. Eliz. Rot. 507.

110 COSTARD and WINGFIELD's Caſe.

IN a Replevin, the Defendant did avow for Damage Feaſans by the commandment of his Maſter the Lord *Cromwell*: The Plaintiffe by way of Replication did juſtifie the putting in of his Cattell into the Land, in which, &c. by reaſon that the Towne of N. is an ancient Town, and that there hath been a uſage, time out of mind, That every Inhabitant of the ſame Towne had had common for all his cattel Levant and Couchant in the ſame Town; and ſo juſtified the putting

in

in of his cattell. The Defendant ſaid, That the houſe in which the Plaintiffe did inhabite in the ſame Towne, and by reaſon of Reſidency in which houſe he claimed common, was a new houſe built within 30. years, and within that time there had not been any houſe there; and upon that Plea, the Plaintiffe did demurr in Law. *Shuttleworth* Serdeant for the Plaintiffe, That he ſhall have common for cauſe of Reſiance in that new houſe; and the Reſiancy is the cauſe and not the Land, nor the Perſon; and to that purpoſe he cited 15. *E.* 4. 29. And he agreed the Caſe, That if the Lord improve part of the Common, that he ſhall not have common for the Reſidue, becauſe of the ſame Land newly improved; for he cannot preſcribe for that which is improved by 5. *Aſſ* 2. But here he doth preſcribe not in the perſon, or in, or for a new thing; but that the uſage of the Towne hath been, That the Inhabitants ſhall have common, and that common is not appendent, nor appertinent, nor in groſſe, by *Needham* 37 *H.* 6. 34. *b.* Beſides he ſaid, That if the houſe of a Freeholder who hath uſed to have ſuch common fall down, and he build it up again in another place of the Land, that he ſhall have common as before. And he put a difference betwixt the caſe of *Eſtovers*, and this Caſe; where a new Chimney is ſet up, for that makes a new matter of charge: and he much ſtood upon the manner of th Preſcription. *Gaudy* Serjeant contrary, and he took Exception to the Preſcription; for he ſaith, that it is *antiqua villa*, and doth not ſay time out of mind; and ſuch is the Preſcription in 15. *E.* 4. 29. *a.* and if it be not a Town time out of mind, &c. he cannot preſcribe that he hath uſed time out of mind, &c. And he ſaid, That if it ſhould be Law, that every one who builds a new houſe ſhould have common, it ſhould be prejudiciall to the Ancient Tenants, or impaire the common: And ſo one who hath but a little land might build 20 houſes, and ſo an infinite number, and every houſe ſhould have common, which were not reaſon *Anderſon* chief Juſtice, He who builds a new houſe cannot preſcribe in common, for then a preſcription might begin at this day, which cannot be; and he inſiſted upon the generall loſs to the ancient Tenants. *Periam* Juſtice, If it ſhould be Law, that he ſhould have common, then the benefit of improvement which the Statute giveth to the Lord ſhall be taken away by this means by ſuch new buildings, which is not reaſon: So as all the Juſtices were of opinion, That he ſhould not have common: but Judgement was reſpited untill they had copies of the Record. And *Hillary* Term following, the Caſe was moved again; and *Anderſon* and *Periam* were of Opinion as they were before, and for the ſame reaſons. But *Windham* Juſtice did incline to the contrary: But they did all allow, That he who new bulids an old Chimney ſhall have Eſtovers, ſo a houſe common. So if a houſe fall down, and the Tenant build it up again in another place. *Periam*, If a man hath a Mill and a Watercourſe time out of mind, which he hath uſed to cleanſe; if the Mill fall

down, and he ſet up a new Mill, he ſhall have the liberty to cleanſe the Watercourſe as he had before. And that Terme Judgement was given for the Defendant, to which *Windham* agreed.

Mich. 28, 29. *Eliz. in the Common Pleas.*

111

IN a Replevin, the parties were at Iſſue upon the Property, and it was found for the Plaintiff, and Damages intire were aſſeſſed; and not for the taking by it ſelf, and for the value of the Cattell by themſelves; for the Judgement upon that is abſolute and not conditionall; and alſo if the Plaintiffe had the Cattell, the Defendant might have given the ſame in Evidence to the Jury, and then they would have aſſeſſed Damages accordingly, viz. but for the taking.

Mich. 28, 29. *Eliz. in the Common Pleas.*

112

A. bargaines with *B.* for twenty Loads of Wood, and *B.* promiſes to deliver them at *D.* if he fail, an Action upon the Caſe lieth. But *Periam* Juſtice ſaid, That upon a ſimple contract for wood upon an implicative promiſe, an Action upon the Caſe doth not lie. *Rodes* Juſtice, If by failer of performance the Plaintiff be damnified, to ſuch a ſum; this Action lieth.

Mich. 28, 29 *Eliz. in the Common Pleas.*

113

A Leaſe of Lands is made excepting Timber-Woods, and Underwoods. And the queſtion was, Whether Trees *Sparſim* growing in Hedge rowes and Paſtures, did paſſe. And difference was taken, betwixt Timber-wood being one Wood, and Timber Woods being ſeverall Words (although it bee *Arbor dum creſcit, lignum dum creſcere neſcit*) yet in common ſpeech that is ſaid Timber, which is fit to make Timber. Then it was moved, Who ſhould have the Lops and Fruits of them, and the Soile after the cutting of them downe; and alſo the Soile after the Under Woods; and as to that, a difference was taken, where the words are generally, All

woods;

woods; and where they are his woods growing. And in speaking of that case, another case was moved: *viz.* If a stranger cut down woods in a Forrest, and there is no fraud or collusion betwixt him, and the owner of the Land; Whether the King should have them, or the owner of the Soile? And it was holden, That the owner of the Soile should have them; and yet the owner could not cut them downe, but is to take them by the Livery of one appointed by the Statute.

Mich. 28,29. Eliz. in the Common Pleas.

114.

A. makes a Lease of Lands to *B.* for ten years, rendring rent. And *B.* covenants to repaire, &c. Afterwards *A.* by his Will, deviseth, that *B.* shall have the Lands for thirty years after the ten years, under the like Covenants as are comprised in the Lease. *Fenner* moved it as a question, If by the Devise those which were Covenants in the first Lease, should be Conditions in the second; for they cannot bee Covenants for want of a Deed; And if they should not be Conditions the heir of the Lessor were without remedie, if they were not performed. A Devise for years paying ten pounds to a stranger, is a Condition, because the stranger hath no other remedy. *Gaudy* Justice, By the Devise to him to do such things as he was to do by the Lease, makes it to be a Condition: which was in a manner agreed by all the other Justices. Yet *Periam* and *Rodes* Justices, said, That the first Lease was not defeisable for not performance of the Covenants; nor was it the intent of the Devisor, that the second should be so, notwithstanding that his meaning was, that he should do the same things: *Periam*, The Covenant is in the third person, *viz. Conventum, & Aggreatum est.* And see 28. *H.* 8. *Dyer*, where the words, *Non licet* to the Lessee to assigne, make a Condition.

Mich. 28,29. Eliz. in the Common Pleas.

115. Barber *and* Topesfeild's Case.

A. being Tenant in taile of certain Lands, exchanged the same with *B.* *B.* entred, and being seised in Fee of other Lands, devised severall parcels thereof to others, and amongst the rest a particular estate unto his heir; *Proviso*, That he do not re-enter nor claim any

of his other Lands in the deſtruction of his Will. And if he do, that then the eſtate in the Lands deviſed to him to ceaſe. *A.* dieth, his iſſue entreth into the Lands in taile, and waives the Lands taken in Exchange; and before any other entry, the heir of *B.* enters upon the Land which was given in Exchange; and the opinion of the whole Court was, That it was no breach of the Condition, becauſe that was not the Land of the Devifor at the time of the deviſe; therefore, it was out of the Condition.

Mich. 28,29. Eliz. In the Common Pleas.

116. PLYMPTON'S Caſe.

AN Action of Debt was brought by one *Plympton* and his wife, Executors of one *Dorrington*, upon a Bond with Condition to perform Covenants, of an Indenture of Leaſe, whereof one Covenant was, That he ſhould pay forty ſhillings yearly at the Feaſt of the *Annunciation*, or within fourteen days after. And the breach aſſigned was for not payment at ſuch a Feaſt in ſuch a year. The Defendant ſaid, That hee paid it at the Feaſt; upon which they were at iſſue. And upon evidence given to the Jury, it appeared, That the ſame was not paid at the Feaſt, but in eight dayes after it was paid. And the opinion of the Court was, That by his pleading, that hee had paid it at ſuch a day certain, and tendring that for a ſpeciall iſſue, That hee had made the day part of the iſſue, and then the Defendant ought to have proved the payment upon the very day: But if the Defendant had pleaded, That hee paid it within the fourteen dayes, *viz.* the eighth day, &c. that had not made the day parcell of the iſſue; but then hee might have given evidence, that he paid it at another day, within the fourteene dayes: Then for the Defendant it was moved, That the Plaintiffe had not well aſſigned the breach; in ſaying that he had not paid it at the Feaſt; without ſaying, Nor within the fourteen dayes. But the Court ſaid, That the Jury was ſworn at the Barre, and bid the Councell proceed and give in their evidence; for the time to take exception was paſt.

Mich.

Mich.28, 29. Eliz. in the Common Pleas.

117.

IT was the opinion of *Anderſon* Chiefe Juſtice, and ſo entred by the Court, That if a Copie-holder doth ſurrender to him who hath a Leaſe for years of the Mannor, to the uſe of the ſame Leſſee, That the Copie-hold eſtate is extinct: For the eſtate in the Copie-hold is not of right, but an eſtate at will, although that cuſtome and preſcription had fortified it. And *Wray* ſaid, That it had been reſolved by good opinion, That if a Copie-holder accept a Leaſe for years of the Mannor, that the Copie-hold eſtate is extinct for ever.

Mich.28,29. Eliz. in the Common Pleas.

118.

ANderſon Chiefe Juſtice, and *Periam* Juſtice, being abſent in a Commiſſion upon the Queen of *Scots*, *Shuttleworth* moved this caſe to the Court. If the Queen give Lands in taile to hold in *Capite*, And afterwards granteth the Reverſion, how the Donee ſhall hold? *Windham* Juſtice, and *Fenner* Serjant, The tenure in this caſe is not incident to the Reverſion; and the Donee ſhall hold of the Queen, as in groſſe; and ſo two Tenures in *Capite*, for one and the ſame Land. And thereupon, *Windham* Juſtice cited 30. *H.* 8. *Dyer* 45,46. That the Queen by no way can ſever the tenure in chiefe from the Crown. And therefore, if the Queen do releaſe to her Tenant in *Capite*, to hold by a penny, and not in *Capite*, it is a void Releaſe; for the ſame is meerly incident to the Perſon and Crown of the Queen. But *Rodes* Juſtice, held the contrary, *viz.* That the Tenure in *Capite* doth not remain. But it was ſaid by *Windham*, That if the Queen had reſerved a Rent upon the gift in tail, the Grantee of the Reverſion ſhould have it; Alſo he ſaid, That the Queen might have made the Tenure in ſuch manner: *viz.* to hold of the Mannor, or of the Honor of *D. Shuttleworth*. If Lands holden of the Mannor of *D.* come to the King, may he give them to be holden of the Mannor of *S?* that ſhould be hard. *Windham*, I did not ſay, That Lands holden of one Mannor may be given to be holden of another Mannor; perhaps that may not bee. But Lands which is parcell of any Mannor, may be given *Ut ſupra*.

Mich.

Mich. 28,29. *Eliz. in the Common Pleas.*

119

SErjeant *Fenner* moved this Caſe: If Lands be given to the Huſband and Wife, and to the heirs of their two bodies, and the Huſband dieth leaving Iſſue by his Wife, and the Wife makes a Leaſe of the lands, according to the Statute of 32. *H.* 8. If the Leaſe be good by the Statute? *Windham* and *Rodes* Juſtices, conceived, that it is a good Leaſe. *Fenner*, The Statute ſaith, that ſuch Leaſe ſhall be good againſt the Leſſor and his Heirs; and the Iſſue doth not claim as Heir to the Wife onely, but it ought to be Heir to them both: and he cited the caſe, That the Statute of *R.* 3. makes Feoffments good againſt no heirs but thoſe which claim onely as Heirs to the ſame Feoffors, &c. So here. *Rodes* Juſtice, There the word [*only*] is a word of efficacy; And *Windham* agreed cleerly, That the Leaſe ſhould binde the iſſue by the ſaid Statute of 32. *H.*8.

Mich. 28,29. *Eliz. In the Common Pleas.*

120

W*Almeſley* Serjeant moved this Caſe, If a man deviſeth Lands in taile, with divers Remainders over, upon condition that if any of them alien, or &c. that then he who is next heir to him to whom the land ought to come after his deceaſe, if the ſaid alienation had not been made, might enter, and enjoy the land as if he had been dead. (But *Ady* of the Temple ſaid, That the words of the Deviſe are, viz. That if any of them alien, or &c. that then his eſtate to ceaſe, and hee in the next Remainder to enter and retain the land untill the alienor were dead.) *Rodes* Juſtice, The Deviſe is good; and an eſtate may ceaſe in ſuch manner, ſo as it ſhall not be determined for ever, but that his Heir after him ſhall have it. And he put the caſe of *Scholaſtica*, *Plow. Com.* 408. where (*Weſton fo.*414.) was in ſome doubt, that if the Tenant in taile had had Iſſue, if the Iſſue ſhould be excluded from the land; or whether hee ſhould have the land by the intent of the Deviſor? And therefore if it were neceſſary to ſhew that the Tenant in taile had not Iſſue? But *Dyer* ſaid, that the words of the Will were, that ſuch perſon and his Heirs who alien, or &c. ſhould be excluded preſently; ſo as the eſtate by expreſſe words is to be determined for ever. But it is otherwiſe in this Caſe. *Windham* doubted of the Deviſe. *Fenner* cited the Caſe,

22.*E.*

22. *E.* 3. 19. Where a Rent was granted, and that it ſhould ceaſe during the Nonage of the Heir of the Grantee, and it was good. *Windham*, When a thing is newly created, he who creates it may limit it in ſuch manner as he pleaſeth. *Fenner* 30. *E.* 3. 7. *Det.* 10. A Feoffment was made, rendring Rent, upon Condition that if the Rent be behinde, the Feoffor might enter, and retain *quouſque*: there the eſtate ſhall be determined *pro tempore*, and afterwards revived again. *Windham*, There the Feoffor ſhall have the land as a diſtreſs, and the Free-hold is not out of the Feoffee. *Fenner*: The Book proves the contrary; for the Feoffor had an Action of Debt for the Rent.

Mich. 28, 29. *Eliz. in the Common Pleas.*

121

IN a *Formedon*, the Tenant pleaded a Fine with proclamations: The Plaintiff replyed, No ſuch Record. It was moved, that the Record of the Fine which remained with the Chyrographer, did warrant the Plea; and the Record which did remain with the *Cuſtos Brevium* did not warrant the Plea: and both the Records were ſhewed in Court; and to which the Court ſhould hold, was the queſtion? *Shuttleworth*, To that which was ſhewed by the *Cuſtos Brevium*: and he cited the Caſe of *Fiſh* and *Brocket*, where the Proclamations were reverſed becauſe that it appeared by the Record which was ſhewed by the *Cuſtos Brevium*, that the third proclamation was alledged to be made the ſeventh day of June; which ſeventh day of June was the Sunday: and yet hee ſaid, It appeared by the Record certified by the Chyrographer, that it was well done, and yet the Judgment reverſed. *Rodes* Juſtice, There is no ſuch matter in the ſame caſe. And 26. *El.* by all the Juſtices and Barons of the Exchequer, in ſuch caſe the Record ~~which~~ remains with the *Cuſtos Brevium* ſhall be amended, and made according as it is in the Record of the Office of Chyrographer. *Windham* agreed. And afterwards the ſaid Preſident was ſhewed, in which all the matter and order of proceedings was ſhewed and contained, and all the names of the Juſtices who made the Order. And by the command of the Juſtices it was appointed, that the ſaid Preſident ſhould be written out, and ſhould remain *in perpetuam rei memoriam*. And the reaſon of the ſaid Order is there given, becauſe the Note which remains with the Chyrographer is *principale Recordum*.

Mich.

Mich. 28, 29. *Eliz.* in the Common Pleas.

122.

AN Infant was made Executor, and Adminiſtration was committed unto another, *durante minore ætate* of the Executor; and that Adminiſtrator brought an Action of Debt for money due to the Teſtator, and recovered, and had the Defendant in Execution; and now the Executour is come of full age. *Fenner* moved that the Defendant might be diſcharged out of Execution, becauſe the Authority of the Adminiſtrator is now determined; and he cannot acknowledge ſatisfaction, nor make Acquittances, &c. *Windham* Juſtice, Although the Authority of the Plaintiffe bee determined; yet the Recovery and the Judgement do remaine in force. But perhaps you may have an *Audita querela*. But I conceive, That ſuch an Adminiſtrator cannot have an Action; for he is rather as a Bayliff to the Infant Executor, then an Adminiſtrator. *Rodes* agreed with him, and he ſaid, I have ſeen ſuch a Caſe before this time, *viz.* Where one was bound to ſuch a one to pay a certaine ſum of money to him, his Heirs, Executors, or Aſſignes: And the Obligee made an Infant his Executor, and adminiſtration was committed during his minority, and the Obligor paid the money to that Adminiſtrator; And it was a doubt whether the ſame was ſufficient, and ſhould excuſe him, or not. And whether he ought not to have tendred the money to them both. *Fenner*, That is a ſtronger Caſe then our Caſe: One who is Executor of his own wrong, may pay Legacies, and receive Debts, but he cannot bring an Action. *Windham*, Doth it appear by the Record, when the Infant was made Executor, and that Adminiſtration was committed as before? *Fenner*, No truely. *Windham*, Then you may have an *Audita querela* upon it. *Fenner* ſaid, So we will. Note *Hil.* 33. *Eliz.* in the Exchequer. *Miller* and *Gores* Caſe, An Infant pleaded in a *Scire facias* upon an Aſſignement of Bonds to the Queen, That *Saint-John* and *Eley* were Adminiſtrators during his minority. And it was holden by the Court to be no plea. But he ruled to anſwer as Executor.

Mich.

Mich. 28,29. *Eliz.* *in the Common Pleas.*

123

SUggeſtion was made, that a Coroner had not ſufficient Lands within the Hundred; for which a Writ iſſued forth to chooſe another; and one was choſen. It was moved by Serjeant *Snag*, If thereby the firſt Coroner did ceaſe to be Coroner preſently, untill he be diſcharged by Writ. *Rodes* and *Windham* Juſtices, He ceaſes preſently, for otherwiſe there ſhould be two Officers of one Coronerſhip, which cannot be. Alſo the Writ is *Quod loco* I. S. *eligi facias, &c. unum Coronatorem*; and he cannot be in place of the firſt, if the firſt do not ceaſe to be Coroner. So if any be made Commiſſioners, and afterwards others are made Commiſſioners in the ſame cauſe, the firſt Commiſſion is determined. *Snagg* ſaid, That in the Chancery they are of the ſame Opinion; but *Fitz. Nat. Brevium* 163. *N.* is, That hee ought to be diſcharged by Writ.

Mich. 28,29 *Eliz* *in the Common Pleas.*

124

IN an Action of Debt brought againſt Leſſee for years for rent; he pleaded, That the Plaintiff had granted to him the reverſion in Fee, which was found againſt him. *Walmeſley* Serjeant moved, Whether by that Plea he had forfeited his terme or not. *Rodes* and *Windham* Juſtices, He ſhall not forfeit his Term; and *Rodes* cited 33. *E.* 3. *Judgement* 255: Where in a Writ of Waſte the Tenant claimed Fee, and it was found againſt him, that he had but an Eſtate for life, and yet it was no Forfeiture. *Fenner* and *Windham*, It is a ſtrong Caſe, for there the Land it ſelfe is in demand, but not ſo in our Caſe. *Rodes*, The Tenant ſhall not forfeit his Eſtate in any Action by claiming of the Fee-Simple, but in a *Quid juris clamat*. *Walmeſley* and *Fenner*, Where he claimes in Fee generally, and it is found againſt him, there perhaps hee ſhall forfeit his Eſtate; but where he ſhewes a ſpeciall conveyance, which reſts doubtfull in Law, it is no reaſon that his Eſtate thereby ſhould bee forfeited, although it be found againſt him. *Rodes*, 6. *R.* 2. *Quid juris clamat* 20. The Tenant claimed by ſpeciall conveyance, and yet it was a forfeiture. But in the prin-

cipall Caſe at Bar, he and *Windham* did agree cleerly, That it was no forfeiture.

Mich. 28,29 *Eliz. In the Common Pleas.*

125

AN Action upon the Caſe was brought, becauſe that the Defendant had ſpoken theſe words, viz. That the Plaintiffe hath ſaid many a Maſſe to *J. S. &c.* *Anderſon* Chief Juſtice, *Primâ facie*, did ſeem to incline, That no Action would lie for the words, although that a Penalty is given by the Statute againſt ſuch Maſſe-Mongers. For he ſaid, That no Action lieth for ſaying, That one hath tranſgreſſed againſt a Penall Law. *Periam* Juſtice contrary. *Anderſon*, If I ſay to one, That he is a diſobedient Subject, no Action lieth for the words. *Windham* Juſtice, That is by reaſon of the generality. *Puckering*, No Action lieth for the ſlandering of one in a thing, which is but *malum prohibitum*. *Periam*, The ſaying of Maſſe is *Malum in ſe*. *Puckering*, If I ſay to one, That he hath eaten fleſh on Fridayes, an Action doth not lie for that. *Periam*, Is that like this Caſe? Note, the Declaration was uncertaine, viz. The places where the Maſſes were ſaid, &c. were not alledged, nor the day when they were ſaid, &c. And therefore *Periam* ſaid, that the Action did not lie, for it might be that the Maſſes were celebrated in *France*, or ſome other place out of the Kingdom: And the Statute doth not appoint any penalty, If they be not indicted thereof within the year and a day, &c.

Mich. 28,29. *Eliz. in the Common Pleas.*

126

AN Act of Common Councell, according to the Cuſtome of the City of *London*, was, By which it was Decreed, That none ſhould bring any Sand, nor ſell, nor uſe any within the City or Suburbs of *London*, but that only which was taken out of the River of Thames, &c. And that if any did the contrary, that he ſhould forfeit for the firſt fault five Pound, and for the ſecond fault Ten Pound, to be recovered in an Action of Debt, wherein no Eſſoine, Protection, or Wager of Law ſhould be allowed. And ſuch a Plaint, for the forfeiture of One hundred and twenty Pound, was removed out of *London* into the Common Pleas by a Writ of Priviledge: and it was debated amongſt the Juſtices and Serjeants, Whether the Plaint ſhould be remanded or not. *Anderſon* Chief Juſtice, *Windham* and *Periam* Juſtices, did great-

ly

ly ſpeak againſt the ſaid Act, not only for the matter and ſubſtance of the Act, but alſo for the forme of it. 1. They were informed by *Snagg* Serjeant, That the ſaid Thames Sand was a great deal worſe then the Land Sand, and yet the price of the ſame was greater, and the meaſure of it leſſe: For of the Thames Sand there were but eleven Buſhels to make a Load: and of the other Sand there were eighteen Buſhels, which, he ſaid, was a very great Deceit and Miſchief. And 2. they ſaid, That is againſt reaſon, that any Freeman ſhould be ſo reſtrained from Merchandizing and ſelling. And alſo it might concerne the Inheritances of ſome who might have Sand in their Lands. Alſo the ſaid Juſtices ſaid, That they were very preſumptuous in making Acts ſo Parliament-like, viz. That no Eſſoine, Protection or Wager of Law ſhould be allowed, &c. and that they did arrogate to themſelves too high Authority: And they ſtirred up the Plaintiffe at the next Parliament to exhibite a Bill againſt them for it, and to ſue them in the King's Bench for their preſumption and inſolency in that their dealing; and ſaid, That it would ſhake their Liberties, and grow to a greater matter then they thought or were aware of. And thereupon *Anderſon* cited the Caſe 22. *H.* 8. Where Sir *Edward Knightly*, Executor of Sir *William Spencer*, made certain Proclamations in certain Townes, That Creditors coming in, and proving their Debts; that they ſhould be paid; and for that Preſumption hee was committed to the Fleet, and was fined Five hundred Marks. And hee ſaid, That ſuch were the Miſdemeanors of *Empſon* and *Dudley*.

Mich. 28,29. *Eliz. in the Common Pleas.*

127 Boxe and Mounslowe's Caſe.

Thomas Boxe brought an Action upon the Caſe againſt *John Mounſlowe*, That the Defendant had ſlandred him, in ſaying, That the ſaid *Thomas Boxe* is a Perjured Knave, and that he would prove, That he the ſaid *Thomas Boxe* had forſworne himſelfe in the Exchequer, &c. and ſuppoſed the ſaid words to be ſpoken in *London* 4. *Feb.* 28. *El. Et prædict'* Johan. Mounſlowe, *per* Johannem Lutrich, *atturnat' ſuum venit & defendit vim & injuriam quando, &c. Et dicit quod prædict' Thomas Boxe actionem ſuam verſus eum habere non debet; quia dicit, quod prædict' Thomas Boxe* being one of the Collectors of the Subſidies before the ſpeaking of the ſaid words, viz. *M.* 27. and 28. *Eliz. in Curia Scaccarii apud Weſtminſt'.* did exhibit a Bill againſt the ſaid *John Mounſlow*, containing, That the ſaid *John* being aſſeſſed

in ten pounds in goods, The ſaid *Thomas Boxe* came to him, and demanded ſixteen ſhillings eight pence, which the ſaid *John Monuſlow* did refuſe to pay, &c. And that demand and refuſall was ſuppoſed to be in *London* in *Breadſtreet*. *Et pro verificatione præmiſſorum ad tunc & ibidem Sacrament' corporale per Barones præfat' Thomas Boxe præſtito.* The ſaid *Thomas Boxe* ſwore the ſaid Bill in ſubſtance was true, *ubi revera* the ſaid *John Mounſlow* did not refuſe, &c. *per quod* the ſaid *John Mounſlow poſtea*, viz. *prædicto tempore quo &c. dixit de præfato Thoma Boxe prædicta verba, &c. prout ei bene licuit.* The Plaintiffe replied, that the Defendant ſpake the words *de injuria ſua propria, abſque Cauſa per præfat' Johannem Mounſlow ſuperius allegata, &c. Et hoc petit quod inquiratur per Curiam: Et prædict' defendens ſimiliter.* And a *Venire facias* was awarded to the Sheriffe of *London*, and it was found for the Plaintiffe, and damages four hundred pound. And now it was moved in arreſt of judgement, that there was no good triall, nor the iſſue well joyned; for the iſſue doth conſiſt upon two points tryable in ſeverall Counties: *viz.* the Oath which was in the Exchequer, and that ought to have been tried in *Middleſex*, and the matter which he affirmed by his oath to be, viz. the demand and refuſall to pay the Subſidie, &c. and that was alledged to be in *London*, and therefore is there to be tried, And the iſſue viz. *de injuria ſua propria abſque tali cauſa* goeth to both; for the *ubi revera* will not mend the caſe, as *Periam* Juſtice ſaid, and both are materiall; for the Defendant ought to prove, that the Plaintiffe made ſuch oath, and alſo that the ſubſtance and matter of the oath was not true, for otherwiſe the Plaintiffe cannot be proved perjured. And therefore the Counties here (if they might) ſhould have joyned in the triall. And the opinion of the Court was againſt the Plaintiffe; for *Anderſon* and *Windham* ſaid, That if this iſſue could have been tried by any one of the Counties without the other, It ſhoud be moſt properly and naturally tried in *Middleſex*, where the oath was made; for the perjury (if any were) was in the Exchequer. But they ſaid, that the iſſue here was ill joyned, becauſe it did ariſe upon two points triable in ſeverall Counties, which could not joyne: whereas the Plaintiffe might have taken iſſue upon one of them well enough, for each of them did go to the whole; and if any of them were found for the Plaintiffe, that he had ſufficient cauſe to recover. *Gawdy* moved, that it ſhould be helped by the Statute of *Jeofailes*, which ſpeakes of miſ-joyning of iſſues. *Anderſon*, the iſſue here is not miſ-joyned; for if the Counties could joyne, the iſſue were good: but becauſe that the Counties cannot joyne, it cannot be well tried: But the iſſue it ſelfe is well enough. *Windham* and *Rodes* were of the ſame opinion, that it was not helped by the Statute: but *Periam* doubted it. *Anderſon* ſaid, That if an iſſue triable in one Countie be tried in another, and judgement given upon it, it is errour.

And

And afterwards *Lutrich* the Atturney ſaid, That it was awarded, that they ſhould re-plead, *Nota quia mirum*: for 1. The Statute of 32. *H.*8. Cap.30. ſpeaks of miſ-joyning of proceſſe, and miſ-joyning of iſſues; and admit that this caſe is not within any of thoſe clauſes, each of them being conſidered by it ſelfe; yet I conceive, it is contained within the ſubſtance and effect of them, being conſidered together. Alſo I conceive, That it is within the meaning of both Statutes, viz. 32. *H.*8. Cap.30. and 18. *Eliz.* Cap. 14. for I conceive the meaning of both the Statutes was to ouſt delayes, circuits of actions and moleſtations, and that the partie might have his judgement, notwithſtanding any defect, if it were ſo, that notwithſtanding that defect, ſufficient title and cauſe did appeare to the Court. And here the Plaintiffe hath ſufficient cauſe to recover, If any of the points of the iſſue be found for him. For if it bee found, that the matter and ſubſtance of the oath be found true (which might be tried well enough by thoſe in *London*) the Plaintiffe hath cauſe to recover; Wherefore I conceive, that the verdict in *London* is good enough, and effectuall: And note, That *Rodes* ſaid, that hee was of Councell in ſuch a caſe in the Kings Bench betwixt *Nevell* and *Dent*.

Mich. 28,29. *Eliz.* in the Common Pleas.

128

IN an Action of Treſpaſſe, the Defendant pleaded, that at another time before the Treſpaſſe, he did recover againſt the ſame Plaintiffe in an *Ejectione firme*, and demanded judgement. And the opinion of the whole Court was, That it is a good plea, *primâ facie*, and that the poſſeſſion is bound by it; for otherwiſe the recovery ſhould be in vaine and uneffectuall. And *Anderſon* chiefe Juſtice, ſaid, That if two claime one and the ſame Land by ſeverall Leaſes, and the one recovereth in an *Ejectione firme* againſt the other; that if afterwards the other bring an *Ejectione firme* of the ſame Land, the firſt recovery ſhall be a barre againſt him. *Rodes* ſaid, That hee can ſhew authority, that a recovery in an *Ad terminum quem præteriit* ſhall bind the poſſeſſion.

Mich. 28,29. *Eliz.* in the Common Pleas.

129

IN Treſpaſſe, the Defendant did juſtifie as Bailiffe unto another, The Plaintiffe replied that he took his cattell of his own wrong; with-

without that that he was his Bailiffe. *Anderſon* chiefe Juſtice, If one have cauſe to diſtreine my goods, and a ſtranger of his own wrong, without any warrant or authority given him by the other, take my goods not as Bailiff, or ſervant to the other. And I bring an Action of treſpaſſe againſt him; can he excuſe himſelf, by ſaying, that he did it as my Bailiffe or Servant? Can he ſo father his miſ-demeanours upon another? He cannot; for once he was a treſpaſſer, and his intent was manifeſt. But if one diſtrein as Bailiffe, although in truth, he is not Bailiffe; if after he in whoſe right he doth it, doth aſſent to it, he ſhall not be puniſhed as a treſpaſſour; for that aſſent ſhall have relation unto the time of the diſtreſſe taken; and ſo is the book of 7. *H.*4. And all that was agreed by *Periam*. *Shuttleworth*, What if hee diſtraine generally, not ſhewing his intent, nor the cauſe wherefore he diſtrained? &c. *ad hoc non fuit reſponſum*. *Rodes* came to *Anderſon*, and ſaid unto him, If I having cauſe to diſtrain, come to the Land, and diſtraine, and another ask the cauſe why I do ſo? if I aſſigne a cauſe not true or inſufficient, yet when an Action is brought againſt me, I may avow or juſtifie, and aſſigne any other cauſe. *Anderſon*, That is another caſe; but in the principall caſe clearly the taking is not good; to which *Rodes* agreed.

Mich. 28, 29. *Eliz. in the Common Pleas.*

130 HOODIE *and* WINSCOMB's Caſe.

IN an Attaint brought by *Hoodie* againſt *Winſcombe*, &c. One of the Grand Jury was challenged, becauſe he was a Captain, and one of the Petie Jury, was his Lieutenant; And it was holden by the whole Court, that that was no principall challenge. *Windham*, It hath been holden no principall challenge, notwithſtanding that one of the Jurours was Maſter of the Game, and one of the Petit Jury was Keeper of his Park. And in that caſe, it was holden by all the Juſtices, That if a man make a Leaſe, rendring rent upon condition, that if the rent be behind, and no ſufficient diſtreſſe upon the Land, that then the Leſſor may re-enter; If the Rent be behind, and there be a piece of lead, or other thing hidden in the Land, and no other thing there to be diſtrained, the Leſſor may re-enter; for the diſtreſſe ought to be open, and to be come by; for if it ſhould be otherwiſe ſaid a ſufficient diſtreſſe, one might incloſe money, or other things within a wall; and thereby the Leſſor ſhould be excluded of his re-entry.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

131

IN a *Quare Impedit*, the Plaintiffe counted, That the Defendant being Parſon of the Church in queſtion, was preſented to another Benefice, and inducted 15 *Aprilis*, and that the other Church became void, &c. The Defendant ſaid, That he was qualified at ſuch a day, which was after 15 *Aprilis*, without that, that he was inducted 15 *Aprilis*. And the Court was of opinion (*Anderſon* being abſent) that it was no good Traverſe, for he ought to have ſaid generally; without that, that he was inducted before the day in which he is alledged to be qualified. As if one declare in Treſpaſſe done 1 *Aprilis*, and the Defendant plead a Releaſe 1. *Feb.* he ought to traverſe without that, that the Treſpaſſe was done before the Releaſe, by *Periam* Juſtice.

Mich. 28, 29. Eliz. in the Common Pleas.

132 HALES and HOME's Caſe.

IN an Avowry for Damage feaſance, one pleaded a Leaſe made unto him by *I. S.* the other ſaid, that before the Leaſe, *I. S.* did enfeoff him; the other replied and maintained the ſaid Leaſe *abſque hoc quod* J. S. *ſeiſitus feoffavit*. *Gawdy*, The Traverſe is not formall, for the word *ſeiſitus* is idle, and ought to be left out; for he cannot enfeoff if that he were not ſeiſed; and it hath never been ſeen that the ſeiſin in ſuch Caſe hath been traverſed; but generally in Pleading the Traverſe hath been *abſque hoc*, that *Feoffavit*, without ſpeaking of ſeiſin, which is ſuperfluous. And ſo was the opinion of the whole Court.

Mich. 28, 29. Eliz. in the Common Pleas.

133

THE Queen granted Lands unto the Earle of *Leiceſter* by her Letters Patents; the Patentee made a Leaſe of the Land unto another. *Shuttleworth* moved it to the Court, Whether the Patentee ought to ſhew the Letters Patents; and he conceived, He need not, becauſe he hath not any intereſt in them, but the ſame do belong only to the Earle. As if a Rent be granted to one in Fee, and he taketh a wife and dieth

eth, and the Wife bringeth a Writ of Dower, ſhe is not bound to ſhew the firſt Deed by which the Rent was granted to her Huſband, becauſe the Deed doth not belong unto her. So hee who ſues for a Legacie, is not tied to ſhew the Will, becauſe the ſame belongs to the Executor, and not him. *Periam* Juſtice, The Caſes are not alike, for they are Strangers and not Privies, but the Leſſee in the principall Caſe deriveth his intereſt from the Letters Patents, and therefore he ought to ſhew them. *Rodes* Juſtice remembred *Throgmorton's* Caſe, *Com.* 148. *a.* where a Leaſe was made by an Abbot to *J. S.* and afterwards the ſame Abbot made a Leaſe unto another to begin after the determination of the firſt Leaſe made to *J. S.* and exception was taken, That he ought to have ſhewed the Deed of the firſt Leaſe, and the Exception was diſallowed by the Court. *Periam*, That caſe, is not like this caſe; and he ſaid, That, as he conceived, the Leſſee in this caſe ought to ſhew forth the letters Patents; and if any Books were againſt his Opinion, it was marvellous.

Mich. 28,29 Eliz. in the Common Pleas.

134

ONE intruded after the death of Tenant for life, and died ſeiſed, and the land deſcended to his Heire; and a Writ of Intruſion was brought in the *Per* againſt the Heir; and *Gawdy* Serjeant prayed a Writ of Eſtrepment againſt the Tenant. And firſt the Court was in doubt what to do; but afterwards when they had conſidered of the Statute of *Glouceſter*, *Cap.* 1. in the end of it, *Anderſon* ſaid, If the Writ be in the *Per*, take the Writ of Eſtrepment; but if the Writ be not in the *Per*, we doubt whether a Writ of Eſtrepment will lie or not.

Mich. 28 & 29 Eliz. In the Common Pleas.

135 WOOD *againſt* ASH and FOSTER.

CErtain Lands with a Stock of Sheep was leaſed by Indenture; and the Leſſee did covenant by the ſame Indenture, to reſtore unto the Leſſor at the end of the Terme, ſo many Sheep in number as he took in Leaſe, and that they ſhould be betwixt the age of two and four years. Afterwards the Leſſee granted the ſame Stock unto a Stranger, viz. to *Elizabeth Winſor*, who was the wife of *Aſhe*; whereas in truth,

all

all the ancient Stock was ſpent. And it was holden by all the Juſtices upon an Evidence given unto a Jury at the Bar, That when ſuch a Stock of Sheep is leaſed for years, the principall Property doth remain in the Leſſor, as long as thoſe Sheep which were in *eſſe* at the time of the Leaſe, ſhould live; but if any of them do die, and other come in their roomes, then the property of thoſe new Sheep doth belong to the Leſſee; and therefore they held, that the ſecond Leſſee ſhould have ſo many of the Sheep as were left, and did remaine at the end of the Leaſe, and no other. And yet it was objected by *Walmeſley*, That the Stock was entire, and that as ſoon as any other came in the room of the ancient Sheep which were dead, that they were accounted part of the ſame ſtock; and although they be all dead, and ſo changed ſucceſſively two or three times; yet (he ſaid) it ſhall be ſaid the ſame ſtock. And he reſembled the ſame to the caſe of a Corporation, which although all the Corporation die, and other new men come in their places, it ſhall be ſaid the ſame Corporation. But notwithſtanding his Opinion, all the Juſtices were of opinion as before. *Walmeſley* ſaid, That agreeing with his opinion was the opinion of all the civill Lawyers: but the Court was angry, and rebuked him, that he did in ſuch manner croſſe their opinions, and that he cited the opinion of Civilians in our Law; and they reſolved the contrary; and they ſaid, there is a difference betwixt the Leaſe of other Goods; and a leaſe of live Cattel; for in the firſt Caſe if any thing be added for mending, repairing, or otherwiſe by the Leſſee, at the end the Leſſor ſhall have the additions, for of them he hath alwayes the property, and they are annexed to the principall; but Lambs, Calves, &c. are ſevered from the principall, and are the Profits ariſing of the Principall, which the Leſſee ought to have, elſe he ſhould pay his Rent for nothing: And as to the iſſue upon the *Cepit* by *Foſter*, it was ſhewed, That he did but ſtay the Sheep in his Manor, where he had Fellons Goods, Waifes, and Strayes, and that the Sheep were ſtayed upon a Huy and Cry; and that he had taken Bond of one, to whom he had delivered the Sheep, to render them to him who had the right of them. And that ſtay was holden by the Court to be out of the point of the Iſſue; For that he who doth ſtay, doth not take.

Mich. 28, 29. Eliz. in the Common Pleas.

136 The Heirs of Sir ROGER LEWKNOR *and* FORD'S Caſe.

Intratur Paſch. 28. El. Rot. 826.

SIR *Roger Lewknor*, ſeiſed of *Wallingford* Park, made a leaſe thereof unto *Ford* for years, and died: the Leſſee granted over his term to another, excepting the Wood: the term expired; and now an action of Waſte was brought againſt the ſecond leſſee by the two Coparceners and the Heir of the third Coparcener, her Husband being tenant by the courteſie. And *Shuttleworth* and *Snag* Serjeants did argue, that the action would not lie in the form as it was brought. And the firſt Exception which was taken by them was, becauſe the action was generall, viz. *Quod fecit Vaſtum in terris quas Sir* Roger Lewknor *pater prædict'* the plaintiffs, *cujus hæredes ipſæ ſunt, præfat' defend' demiſit, &c.* and the Count was, that the Reverſion was entailed by Parliament unto the Heirs of the body of Sir *Roger Lewknor*; and ſo they conceived, that the Writ ought to have been ſpeciall, viz. *cujus hæredes de corpore ipſæ ſunt.* For they ſaid, that although there is not any ſuch form in the Regiſter, yet *in novo caſu novum remedium eſt apponendum:* And therefore they compared this caſe to the caſe in *Fitz. Nat. Brevium* 57. *c.* viz. If land be given to Husband and Wife, and to the Heirs of the body of the Wife, and the Wife hath iſſue and dieth, and the Husband committeth Waſte, the Writ in that caſe and the like, ſhall be ſpeciall, and ſhall make ſpeciall recitall of the eſtate: And ſo is the caſe 26. *H.* 8. 6. where *Ceſtuy que uſe* makes a leaſe, and the leſſee commits Waſte: the action was brought by the Feoffees, containing the ſpeciall matter; and it was good, although there were not any ſuch Writ in the Regiſter, *cujus hæredes de corpore:* and we are not to deviſe a new form in ſuch caſe, but it is ſufficient to ſhew the ſpeciall matter to the Court. Alſo the words of the Writ are true; for they are Heirs to Sir *Roger Lewknor*: and the count is ſufficient purſuant and agreeing to their Writ: for they are Heirs, although they are not ſpeciall Heirs of the body: and ſo the Court was of opinion that the Writ was good, notwithſtanding that Exception. And *Anderſon* and *Periam* Juſtices, ſaid, That the caſe is not to be compared to the caſe in *F. Nat. Br.* 57. *c.* for there he cannot ſhew by whoſe Demiſe the Tenant holdeth, if he doth not ſhew the ſpeciall conveyance; viz. that the land was given to the Husband and Wife, and the Heirs of the body of the Wife: Nor is it like unto the caſe of 26. *H.* 8. 6.

for

for the ſame cauſe: for alwayes the demiſe of the Tenant ought to be eſpecially ſhewed and certainly; which it cannot be in theſe two caſes, but by the diſcloſing of the Title alſo to the Reverſion. Another Exception was taken, becauſe that the Writ doth ſuppoſe *quod tenuerunt*, which (as they conceived) is to be meant, that *tenuerunt* joyntly; whereas in truth they were Tenants in common. *Walmeſley* contrary; becauſe there is not any other form of Writ: for there is not any Writ which doth contain two *Tenuerunts*. And the words of the Writ are true, *quod tenuerunt*, although *tenuerunt* in Common. But although they were not true, yet becauſe there is no other form of Writ, it is good enough. As *Littleton*, If a leaſe be made for half a year, and the Leſſee doth waſte, yet the Writ ſhall ſuppoſe, *quod tenet ad terminum annorum:* and the count ſhall be ſpeciall, 40. *Ed.* 3. 41. *E.* 3. 18. If the Leſſee doth commit waſte, and granteth over his term, the Writ ſhall be brought againſt the Grantor, and ſhall ſuppoſe, *quod tenet*; and yet in truth, he doth not hold the Land. 44. *Ed.* 3. and *Fitz.* If one make divers leaſes of divers lands, and the Leſſee doth waſte in them all, the Leſſor ſhall have one Writ of waſte ſuppoſing *quod tenet*; and the Writ ſhall not contain two *Tenets*: And ſuch was alſo the opinion of the Court. The third Exception was becauſe that the Writ was brought by the two coparceners, and the Heir of the third coparcener, without naming of the Tenant by the Courteſie. And thereupon *Snagg* cited the Caſe of 4. *Ed.* 3. That where a Leaſe is made for life, the Remainder for life, and the tenant for life doth waſte, he in the Reverſion cannot have an Action of waſte during the life of him in the Remainder. So in this caſe, the Heir of the third coparcener cannot have waſte, becauſe the mean eſtate for life is in the Tenant by the courteſie: And to prove that the Tenant by the courteſie ought to joyn, he cited 3. *E.* 3. which he had ſeen in the Book it ſelf at large, where the Reverſion of a tenant in Dower was granted to the Husband, and to the Heirs of the Husband, and the tenant in Dower did waſte, and they did joyn in an Action of waſte, and not good. And ſo is 17. *E.* 3. 37. *F. N. B.* 59. *f.* and 22. *H.* 6. 25. *a. Walmeſley* contrary: for here in our caſe there is nothing to be recovered by the tenant by the courteſie, for he cannot recover damages, becauſe the diſinhereſin is not to him; and the term is expired, and therefore no place waſted is to be recovered: and therefore it is not like unto the Books which have been cited; for in all thoſe the tenant was in poſſeſſion, and the place waſted was to be recovered, which ought to go to both according to their eſtates in reverſion. But it is not ſo here; for in as much as the term is expired, the land is in the tenant by the courteſie, and ſo he hath no cauſe to complain. And ſuch alſo was the opinion of the whole Court, viz. that becauſe the term was ended, that the Writ was good notwithſtanding the ſaid Exception.

Then concerning the principall matter in Law, which was, Whether the Writ were well brought againſt the ſecond Leſſee, or whether it ought to have been brought againſt the firſt Leſſee; It was argued by *Shuttleworth*, that it ought to have been brought againſt the firſt Leſſee; for when he granted over his term, excepting the trees, the Exception was good: *Ergo*, &c. For when the Land upon which the trees are growing, is leaſed out to another, the trees paſſe with the Leaſe as well as the Land, and the property of them is in the Leſſee during the term; and therefore when he grants his term, hee may well except the trees, as well as the firſt Leſſor might have done. And that is proved by the Statute of *Marlebridge*, Cap. 23. for before that Statute the Leſſee was not puniſhable for cutting downe the trees, and that Statute doth not alter the properties of the trees, but onely that the Leſſee ſhall render damages if he cut them down, &c. Alſo the words of the Writ of Waſt proveth the ſame, which are, viz. *in terris, domibus &c. ſibi dimiſſis.* Alſo the Leſſee might have cut them down for reparations, &c. and for fire-wood, if there were not ſufficient underwoods; which he could not have done, if the trees had been excepted. And in 23. *H.*8. in *Brooke*, It is holden, that the excepting of the trees, is the excepting of the Soile. And ſo is 46. *E.*3. 22. Where one made a Leaſe, excepting the woods, and afterwards the Leſſee did cut them down, and the Leſſor brought an Action of Treſpaſſe *quare vi & armis clauſum fregit, &c.* and it was good, notwithſtanding that Exception was taken to it. And it is holden in 12. *E.* 4. 8. by *Fairfax* and *Littleton*, That if the Leſſee cut the trees, that the Leſſor cannot carry them away, but he is put to his Action of Waſte. *Fenner* and *Walmeſley* Serjeants contrary: and they conceived, that the Leſſee hath but a ſpeciall property in the trees, viz. for fire-boot, plough-boot, houſe-boot, &c. And if he paſſe over the Lands unto another, that he cannot reſerve unto himſelfe that ſpeciall property in the trees, no more then he who hath common appendant can grant the principall, excepting and reſerving the Common; or grant the Land, excepting the foldage. The grand property of the trees doth remain in the Leſſor, and it is proved by 10. *H.*7. 30. and 27. *H.*8. 13. *&c.* If Tenant for life, and he in the reverſion, joyne in a Leaſe; and the Leſſee doth waſt, they ſhall joyne in an Action of Waſt, and Tenant for life ſhall recover the Free-hold, and the firſt Leſſor the damages; which proves that the property of the trees is in him. As to that that he was diſpuniſhable at the common law, that was the folly of the Leſſor; and although it was ſo at the common law, yet it is otherwiſe at this day. For when the Statute ſayes, That the Leſſor ſhall recover damages for the Waſt, that proves ſufficiently that the property of the trees is in him, as the Statute of *Merton* Cap. 4. enacts. That if the Leſſor do approve part of the Waſt, leaving ſufficient for the Commo-

ners.

ners; and they notwithſtanding, that bring an Aſſize, they ſhall be barred in that Caſe; and the Lord may have an Action of Treſpaſs againſt them if they break the Hedges by force of that Statute, as it hath been adjudged; for the intent of the Statute was, to ſettle the Inheritance of the Land approved without interruption of the Commoners: And ſo in this caſe. But Note, that by the Statute of *Marlebridge*, the Leſſor ſhall recover damages for the houſes, &c. which are waſted, &c. and yet a man cannot inferre thereupon, that therefore the Leſſee hath no Intereſt or property in them; and ſuch intereſt hath he in the trees, notwithſtanding the words of the Statute, (which is contrary to this meaning, as it ſeems.) And, therefore *Quære*, If there be any difference betwixt them, and what ſhall be meant by this word [Property.] But the damages are given by the Statute in reſpect of the property which the Leſſor is to have in reverſion, after the Leaſe determined. *Anderſon* Chiefe Juſtice, The Leſſor hath no greater property in the trees, then the Commoner hath in the ſoile. *Walmeſley*, 2. *H.* 7. 14. and 10. *H.* 7. 2. The Leſſor may give leave to the Leſſee to cut the trees, and the ſame ſhall be a good plea in an Action of Waſt; and the reaſon of both the books, is, becauſe the property of them is in the Leſſor; and to this purpoſe the difference is taken in 2. *H.* 7. betwixt Gravell and trees. 42. *H.* 3. If a *Prior* licence the Leſſee to cut trees, the ſame ſhall diſcharge him in Waſt, brought by the Succeſſour. But if the Leſſee cutteth down the trees, and then the *Prior* doth releaſe unto him, the ſame ſhall not barre the Succeſſour; and ſo is 21. *H.* 6. Alſo he cited *Culpepers* caſe, 2 *Eliz.* and 44. *E.* 3. *Statham*, and 40. *Aſſ.* 22. to prove that the Leſſor ſhall have the Wind-falls. If a ſtranger cutteth down trees, and the Leſſee bringeth an Action of Treſpaſſe, he ſhall recover but according to his loſſe, *viz.* for lopping and topping. As to that which was ſaid, That if the Leſſee cut down trees, that the Leſſor cannot take them away, that is true; for that there is a contract of the Law, that if the Leſſee doth cut them down, that he ſhall have the trees; and the Leſſor ſhall have treble damages for them. Alſo he ſaid, That the trees are no part of the thing demiſed, but are as ſervants, and ſhall be for reparations. As if one hath a Piſcarie in the land of another man, the land adjoyning is as it were a ſervant, viz. to drie the Nets; So, if one have conduit-pipes lying in the land of ather, he may dig the land for to mend the pipes, and yet he hath no Intereſt, nor Free-hold; To that which was ſaid, That by the excepting of the trees, the land upon which they ſtood is excepted; It is true, as a ſervant to the trees, for their nouriſhment, but not otherwiſe; for if the Leſſor ſelleth the trees, he afterwards ſhall not meddle with the land, but it ſhall be wholly in the Leſſee, *quia ſublata cauſa, tollitur effectus*; And if the Leſſee tieth a horſe upon the land, where the trees ſtood the Leſſor may diſtraine the ſame for his rent, and avow as upon land

land within his diſtreſs, and Fee, and holden of him; And he ſaid, that the leſſor may grant the trees, but ſo cannot the leſſee; and therefore he ſaid, That the property is in the leſſor, and not in the leſſee: Alſo if the leſſor granteth them, they paſſe without Atturnment: But contrary, if the leſſor had but a Reverſion in them: Alſo if the leſſor cutteth them down, his Rent ſhall not be apportioned, and therefore they are no part of the thing demiſed: For 16. *H.* 7. and *temps E.* 1. *Fitz. Waſte*, in two or three places it is holden, That if the Waſte be done *Sparſim* in a Cloſe or Grove, the leſſor ſhall recover the whole: Then admit that the trees excepted are cut down *ſparſim*; if the Exception ſhall be good, how ſhall the thing waſted be recovered, and againſt whom? *quod nota.* *Anderſon* Chief Juſtice did conceive that the Exception was void, and that the Action was well brought; and he ſaid, It was a Knaviſh and Fooliſh demiſe; and if it ſhould be good, many miſchiefs would follow, which he would not remember. *Windham* Juſtice was of the ſame opinion, and he ſaid, The leſſor might have excepted them, and ſo take from the leſſee his fire wood and Plough bote, &c. But the leſſee could not grant his eſtate excepting the trees, becauſe he had but a ſpeciall intereſt in them, viz. for his fire-bote, &c. which ſhall go with the land. *Periam* Juſtice agreed, That as to ſuch a ſpeciall property, none can have it, but ſuch a one who hath the land; and therefore the exception of the Wood by the leſſee was void. But as to the other things, perhaps if they were Apple trees, or other Fruit-Trees, the exception had been good. Alſo although the trees are not let directly, yet they are after a ſort by a mean, as annexed to the land; and if the Action be brought againſt him who made the exception, he cannot plead that they were let unto him, and therefore he doubted of the exception. *Rodes* Juſtice alſo ſaid, That he doubted of the Exception: And he ſaid, That the Book of 44 *E.* 3. is, That the leſſee ſhould have the Wind-falls, and he did not much regard the Opinion of *Statham*. But *Anderſon* Chief Juſtice was of opinion, that the leſſor ſhould have the Wind-falls. Note, the Caſe was not adjudged at this time.

Hill. 29. Eliz. in the King's Bench

137

EXceptions were taken by *Fuller* to an Indictment upon the Statute of 1. *Eliz. cap.* 2. for the omitting of the Croſſing of a Child in Baptiſing of him. The Caſe was, That a Miniſter out of his Cure, at another Church, viz. at *Chelmesford* in *Eſſex*, did Baptize a Child without the

the Sign of the Croſſe; for which he was indicted. The firſt Exception was, That the Statute ſpeaks of Miniſters which do not uſe the adminiſtring of the Sacrament in ſuch Cathedrall Churches, or Pariſh Churches, as he ſhould uſe to adminiſter the ſame; that this was not the Pariſh Church in which he ſhould uſe the ſame. *Suit* Juſtice was of opinion, That it was good, notwithſtanding that; for otherwiſe the Statute might be greatly defrauded. The words of the Statute are farther [Or ſhall wilfully or obſtinately, ſtanding in the ſame, uſe any other Rule, Ceremony, Order, Forme, &c.] 2. He took another Exception upon thoſe words; For the omitting of the Croſſing only is put, and it is not ſhewed that he uſed any other rite or Ceremony, &c. for there ought to be ſome Poſitive thing. 3. He doth not ſhew the Place or Pariſh where he perſiſted in it, and that is materiall and iſſuable. The fourth Exception was, Becauſe it was *Inquiſitio cæpta coram Johanne Peter, Waltero Mildmay*, and ſo named four of them, by vertue of a Commiſſion directed to them and to others, and doth not ſhew what others, *nec quod illi fuerunt præſentes*; and then if the Commiſſion were to them all jointly, and two only were preſent, then it was *coram non judice*, and ſo void. 5. The Statute ſaies, That if any Parſon or Vicar; but doth not ſay, being *Miniſter Dei.* The ſixth was, That it was at another Church, &c. *Wray* Chief Juſtice, If this Evaſion ſhould be allowed, the Statute were not to the purpoſe. The ſeventh was, That it doth not ſhew where the perſiſting was, for that is a ſpeciall thing, and materiall and iſſuable. *Wray* Chief Juſtice conceived, That that only was a materiall Exception, and that the other Exceptions were but frivolous; and were not good.

Hill. 29. Eliz. In the Kings Bench.

138 WARREN'S Caſe.

ONE *Warren* demanded by a Writ of Debt in the Common Pleas Forty Pound, and upon his Declaration did confeſs himſelfe ſatisfied of Twenty Pound, and thereupon Error was brought in the King's Bench: And the Judgement reverſed, becauſe by his Declaration he had abated his Writ; and he ought to have Judgement according to his Writ, and not accoding to his Declaration. The Error aſſigned was in the Outlawry; and it was holden by all the Juſtices, That if the principall Record be reverſed for Error, that the Outlawry which is grounded upon it ſhall be reverſed alſo.

Hill.

Hill. 29. Eliz. in the Kings Bench.

139 ROOTE'S Caſe.

THE Caſe was in a Prohibition touching Tithes; and the libell in the Spirituall Court was for Corn and Hay, and other things: and the Tenant of the land did preſcribe to pay in one part of the land, the third part of the tenth; and in another part, the moity of the tenth of Corn, for all manner of Tithes. And the Court did incline that the ſame was a good preſcription. And a Prohibition was granted to the Eccleſiaſticall Court.

Hill. 29. Eliz. in the King's Bench.

140

A Man was poſſeſſed for the terme of ſix years of a Tavern in *London*, and leaſed the ſame unto another for three years; and it was covenanted betwixt them, that during the three years, *quolibet menſe*, monthly the leſſee ſhould give an Account to the leſſor of the Wine which he ſold, and ſhould pay unto him for every Tun ſold, ſo much money. And afterwards the leſſor granted the three years which were remaining of the ſix years to another; and he did requeſt the leſſee to account, and he would not; whereupon he brought an Action of Covenant; and the Defendant pleaded, That he had accounted to the Aſſignee of the three years: and upon that there was a Demurrer joyned. And the better opinion of the Court was, that it was no Plea, becauſe it was not a Covenant, which did go with the land, or the Reverſion; but was a collaterall thing, and did not paſs by the aſſignment of the three years.

Hill. 29. Eliz. in the King's Bench.

141

IT was adjudged. That the bringing of a Writ of Error to reverſe a Fine by an Infant, during his nonage, is not ſufficient; but the Fine by Judgement in the Writ of Error muſt be reverſed during his Nonage.

Hill.

Hill. 29. Eliz. in the Common Pleas.

142 WIDALL and Sr. JOHN ASHTON'S Caſe.

A Writ of Error was brought by *Widall*, againſt Sr. *John Aſhton*, becauſe in the other action being an action of Waſt: The Plaintiff there did declare, that he was ſeiſed, and ſo ſeiſed *demiſit pro termino annorum, &c.* and did not ſhew of what eſtate he was ſeiſed; And yet he did ſuppoſe that it was *ad exhæredationem ejus, &c.* And the ſame by *Beamount* was taken for an exception: as 7. *H.* 6. A man pleaded a Feoffment to two *& hæredibus*, and doth not ſay, *ſuis*, it is uncertain: And in the principal Caſe it ſhall be ſuppoſed, that he hath but an eſtate for life, for it ſhall not be intended that he hath an eſtate of Inheritance, without expreſſing of words to carry an Inheritance. As 7. *Aſſ.* If I grant a Rent to *I. S.* and do not name what eſtate he ſhall have in it, he ſhall have but an eſtate for life. But he ſaid, that the Preſidents are, that if the word [ſeiſed] had been left out, it had been good enough; For by the Book of Entries, a man may ſay [*demiſit*] without ſaying that he was ſeiſed *& demiſit*: But if a man will plead a thing which is not neceſſary to be pleaded, and miſtake it, it ſhall make his Plea naught: as in *Patridges* Caſe: Where a ſuite was upon the Statute of Maintenance, It is ſufficent to ſay, *contra formam Statuti.* But if he will plead ſpecially, the day and place of the Statute, and miſ-plead it, it makes all naught. *Suit* Juſtice, I conceive that, that is a fault incurable. But upon the other ſide it was argued, that in 21. *H.* 7. It is holden, that he might plead *quod demiſit*, without that, that he was ſeiſed and *demiſit*, as there in an Action of Debt. And therefore it is but ſurpluſage in the principal Caſe. *Vide* 15. *E.* 4. A good Caſe, where ſurpluſage ſhall not hurt, becauſe it is not traverſable: And he urged that by the Statute of 18. *El.* the Declaration doth not abate for matter of form: And he ſaid that Counts and Declarations ſhall be taken by Intendment; and it ſhall be intended, that if he bringeth Waſt, that he hath ſuch an eſtate, that he may maintain ſuch Action. In *Adams* Caſe, in the Commentaries, One ſhewed that ſuch an Abbot was ſeiſed, and that the Land came unto the King by Diſſolution, and that the King being ſeiſed, did grant the ſame, and did not ſhew of what eſtate the King was ſeiſed, and yet it was holden good. See a good Caſe to this purpoſe, 18. *E.* 3. *Formedon* 58. And he ſaid that the Defendant had pleaded *Nul waſt fait*, and therefore he had by his Plea affirmed the Declaration to be good. *Beamount*, He ought to have ſaid, *reverſione inde ſibi & hæredibus*

dibus, &c. Clenche Juſtice, I conceive that the Statute of 18. *El.* helps that. *Suit* Juſtice, No truly. It was adjourned.

Hill. 29. Eliz. in the Common Pleas.

143

AN Action of Covenant was brought by a Man, againſt another who had been his Apprentize. The Defendant pleaded that he was within age. The plaintiff did maintain his Action by the Cuſtome of *London*: Where one by Covenant may binde himſelf within age; And Exception was taken to it, That that was a Departure. *Daniel*, It is no Departure, for by 18. *R.* 2. an Infant brought an Action againſt *Gardian* in Socage, and the *Gardian* pleaded, that the plaintiff was within age; And the plaintiff did maintain his Declaration, that by the Cuſtome of ſuch a place, An Infant of 18. yeares might bring an Action of Account againſt his *Gardian* in Socage, and it was there holden to be no Departure. I conceive, that an Infant cannot have an Account againſt his *Gardian*, before his full age: But I conceive that they held, that it was by Statute, That an Infant ſhould not have an Account againſt *Gardian* in Socage, until he was of the age of 21. yeares. *Wray* Chief Juſtice was of opinion, that it was no Departure; For he ſaid, it ſhould be frivolous to ſhew the whole in his Declaration, viz. That he was an Infant; And that by Cuſtome he might make a Covenant which ſhould beinde him; But *quære* of his opinion, for that many doubt of it. *Vide* the Caſe 118. *R.* 2.

Hill. 29. Eliz. in the King's Bench

144 Coney's Caſe.

AN Action of Treſpaſs was brought againſt *John Coney*, for digging of the plaintiffs Cloſe, and killing of 18. Coneys there: The Defendant Pleaded as to all the Treſpas, but killing of two Coneys, Not Guilty; And as to them he ſaid, that the place where &c. the Treſpaſs is ſuppoſed, is a Heath in which he hath common of paſture, and that he found them eating of the Graſs, and that he killed them and carried them away, as it was Lawfull for him to do, &c. *Cook*, The Point is; Whether a commoner having common of paſture, may kill the Coneys which are upon the ground; and he ſaid, he might not. And

firſt,

firſt he ſaid, it is to be conſidered what intereſt he who hath the Freehold, may have in ſuch things as are *feræ Naturæ*. Secondly, What authority a commoner hath in the ground in which he hath common: To the firſt, he ſaid, that although ſuch Beaſts are *feræ Naturæ*, yet they are reduced to ſuch propertie when they are in my ground, by reaſon of my poſſeſſion, which I then have in them, that I may have an action of Treſpaſs againſt him who takes them, as 42. *E.* 3. 24. If one have Deer in his Park, & another taketh them away, he may have an action of Treſpas forthe taking. 12. *H.* 8. If a Forreſter follow a Buck, which is chaſed out of the Park or Forreſt, although that he who hunteth him, killeth him in his own ground, yet the Forreſter or Keeper may enter into his ground, & retake the Deer, for the propertie and poſſeſſion which he hath in it by the purſuit. 7. *H.* 6. 38. It is holden, that if a wilde Beaſt go out of the Park, then the owner of the ground hath loſt the propertie in it. *Brook* thereupon collects, that he had a propertie in it whileſt it was in his Park. 18. *E.* 4. 14. It is doubted whether a man can have propertie in things which are *feræ Naturæ*; But 10. *H.* 7. 6. It is holden, that an Account lieth for things *feræ Naturæ*. *Vide* 14. *H.* 8. 1. The Biſhop of *Londons* Caſe, and 22. *H.* 6. 59. as long as they are in his ground, they are in his poſſeſſion, and he ſhall have an Action of Treſpaſs for the taking of them, and the Writ ſhall be *damas ſuas*, by *Newton*. And in the Regiſter 102. It is *Quare ducent's cuniculos ſuos precij &c. cepit.* But it is ſaid, that he hath common there: What then? Yet he cannot meddle with the Wood, Sand, Graſs, but by taking of the ſame with the mouthes of his Cattel: If he who hath the Freehold bring an action againſt the Commoner for entring into his Land; If he plead, Not guilty, he cannot give in Evidence, that he hath Common there. 22. *Aſſ.* A Commoner cannot put in Cattel to Agiſt: So is 12. *H.* 8. And of late it was holden in this Court, That where the Commoners did preſcribe, that the Lord had uſed to put but ſo many of his Cattel upon the Lands; That it was a void preſcription. *Godfrey*, Contrary. That it is Lawfull for the Commoner to kill them: And he agreed the Caſes which were put by *Cook*. And he ſaid, that the owner of the ground had not the very propertie, but a kind of propertie in them. 3. *H.* 6. and *F. N. B.* If the Writ of Treſpaſs be, *Quare cuniculos ſuos, &c.* The Writ ſhall abate; And yet he hath a propertie in them, or rather a poſſeſſion of them. I grant, that againſt a ſtranger he might have this Action of Treſpas, but not againſt the Commoner: for he hath a wrong done unto him, by their being upon the Land, and therefore he may kill them, although he may not meddle with the Land, becauſe he hath not an Intereſt in it; and yet he may meddle with the profit of it: as 15. *H.* 7. A Commoner may diſtrain damage feaſant. 43. *E.* 3. Coneys dig the Ground and eate the Graſs of the Commoner, &c. I grant, that it is not lawfull for the Tenant for life for to kill the Coneys of him, who

hath a free Warren in the ground. For if a man bring an Action of Treſpas, *Quare Warranem ſuum intravit & cuniculos ſuos cepit, &c.* It is no Plea, that it is his Free-hold. *L.* 5. *E.* 4. In Treſpaſs, *Quare clauſum fregit & cuniculos cepit.* The Defendant ſaid, that the plaintiff made a leaſe at will unto ſuch a man, of the Land; and he as his Servant did kill the Coneys, and it was holden no Plea, and yet it is there ſaid, that by the grant of the Land the Coneys doth not paſs; but the reaſon (as I conceive) is, becauſe it tends to his damage, and therefore that he may kill them. And ſo in this Caſe, 2. *H.* 7. and 4. *E.* 4. If I have Common of paſture in Land, and the Tenant plougheth the Land, I ſhall have my Action upon the Caſe in the Nature of a *quod permittat.* 9. *E.* 4. If one hath Land adjoyning to my Land, and levy a Nuſans, I may enter upon his Land and abate the Nuſans. So if a man take my goods and carrie them into his own Land, I may enter thereupon and retake my goods. So if a Tenant of the Freehold plough the Land, and ſow the ſame with Corn, the Commoner may put in his Cattel, and there whit eate the Corn growing upon the Land, and may juſtifie the ſame, becauſe the wrong firſt begins by the Tenant; So if a man do falſly impriſon me, and put me in his houſe, I may break his houſe to get forth. 21. *H.* 6. in Treſpaſs, All the Inhabitants of ſuch a Town do preſcribe to have Common in ſuch a field every year after harveſt: And one froward fellow amongſt the reſt will not gather in his Corn within convenient time, If the Townſmen put in their Cattel, and they eate the Corn, he hath no remedie for it; And he asked what remedie the Commoner ſhould have for the eating of the Graſs, which his Cattel is to have, if he ſhould not kill the Coneys? He cannot take them damage feaſants, for he cannot impound them; Nor doth a Replevin lye of them. 19. *E.* 3. and *F. N. B.* If the Lord ſurcharge the Common, the Commoner may have an Action againſt him: but in this Caſe, he can have no Action. *Gaudy*, Chief Juſtice. He cannot kill the Coneys, becauſe he may have other remedie. *Suit* Juſtice, A Commoner cannot take or diſtrain the Cattel of a Freeholder damage feaſants; And therefore he cannot kill or deſtroy the Coneys, and he hath a remedy; for he may have an Action upon the Caſe, or an Aſſize againſt him for putting in of the Coneys, if he do not leave ſufficient Common, for the Commoner. Judgment was afterwards given for the Plaintiff.

Hill. 29. Eliz. in the King's Bench.

145 YARRAM and BRADSHAWE'S Caſe.

Y*Arram* and *Wilkenſon*, Sheriffs of the City of *Norwich*, brought an Action upon the Caſe againſt *Bradſhawe*, becauſe that they being Sheriffs of *N.* A *Capias ad ſatisfaciendum* (and ſhewed at whoſe Suit, and in what action) was awarded unto them; And they, 20. Feb. *Anno* 25. *El.* directed their Warrant in writing to three Sergeants of the ſame City to arreſt him; by force of which the Sergeants the 26. of Feb. in the ſame year, did Arreſt him in Execution, and that he was reſcued and eſcaped: And that they had ſpent divers ſumms of Money in enquiring after him, *ad grave damnum eorum, &c.* The Defendant pleaded, Not Guilty; And upon Tryal of the iſſue, a ſpecial Verdict was found, that *about* 20. Feb. *Anno* 25. ſuch a Warrant was made by them unto the Sergeants, but not 20. Feb. and that the Sergeans by force thereof, *about* 26. Feb. did Arreſt him, but not the 26. of Feb. and upon the whole matter, there was a demurrer in Law. *Tanfield*, for the Defendant, and he ſaid, It was no Lawfull Arreſt. For by 8. *E.* 4. A Bailiff without a Warrant in writing may take goods in Execution, and it is good, if it be by commandment, by word onely of the Sheriff; but he cannot Arreſt the body of a man without a Warrant in writing, *& ſigillo ſignatum*, which is not ſhewed here in the plaintiffs Declaration: If one in debt declare *per factum ſuum obligatorium*, and doth not ſay, *ſigillo ſuo ſigillatum*, it is not good. *Quære* of that, for the Book of Entries is not ſo. Secondly, he ſaid, it muſt be a preſent loſs or damage to the plaintiffs, or elſe they cannot maintain the action: They are chargeable, but not charged; for if the Sheriffs dye before he begin any Suit againſt them, their Executors ſhall not be charged: But if the plaintiffs have been Arreſted, then they are endamaged. Thirdly, as to the Verdict, the foot and foundation of the action is the wrong; and the wrong here is not found certain; for it is ſuppoſed to be 26. Feb. And alſo that the Warrant was *Circa* 26. Feb. but not 26. Feb. and if it were any day before, then the action is maintainable; but not, if it were any day after. A man brings an action, of Treſpaſs, ſuppoſing by his writ the ſame to be done 1. May; If in truth the Treſpaſs was before, then it is good, but if it were 2. May or at any time after 1. May, then it is not good. It was a great Caſe betwixt *Vernon* and *Gray* in an *Ejectione firme*, The Ejectment was ſuppoſed 1. May, and the Jury did finde the Ejectment to be *Circa* firſt May, and adjudged not good. If an *Ejectione firme* be brought upon a leaſe made 1. May, and the Jury finde the Ejectment to be *circa* 1. May, it is not good. Alſo here they could not take him in Execution again, although they

they had found him. For if a man be once out of Execution, by 14. *H.* 7. He ſhall not be taken again in Execution for the ſame cauſe. The Court held it not material whether he ſhewed or not that the Warrant was *ſub ſigillo ſigillat'*, and therefore thy did not ſpeak to it. *Godfrey*, for the plaintiff, What if they be not charged, but chargeable? yet they ſhall have their action upon the Caſe, for the wrong done. viz. The Reſcous and the Eſcape, becauſe the Defendant ſhall not take advantage of his own wrong; and ſo is the opinion of *Frowick*, 13. *H.* 7. 1. *Reporter*. *Quære*, For *Frowick* ſaith, He ſhall have an action upon the Caſe or Treſpas for breaking of priſon, againſt him, and ſhall recover in damage as much as he loſt by the eſcape, and ſo he ſhall be helped, and not by taking of him again: And *Fitzherbert*, in his *Natura Brevium*, in the Writ of *Ex parte talis*, holds, that upon an Eſcape the Gaoler ſhall have a ſpecial Writ upon the Caſe againſt the Priſoner to anſwer for the Eſcape, and the damages which the Gaoler ſhall ſuſtain thereby: and it was holden in a great Caſe, viz. One *Holts* Caſe: That it is not neceſſary to ſhew that there was a recovery againſt them. *Tanfeild*, but there it was after a Suit begun, although before recovery. *Godfrey*, they have alſo put it in their Declaration, that they have expended great ſums of Money in looking for him; therefore they have ſhewed that they were damnified. *Tanfeild*, it was fooliſh for them to ſpend their Money, for they could not have taken him again, although they had found him. *Godfrey*, A man ſhall have an action for fear of vexation, or trouble, or charge, as one ſhall have a *Warrantia Charta*, before he be impleaded. A man ſhall have a *Curia Claudenda*, before any breach of the encloſure: As to the Verdict, It is certain enough, for it ſaith, *Quod tunc & ibidem ſeipſum recuſſit*; and that cannot but be referred to a time certain before. viz. 26. Feb. *Tanfeild*, It ſhall be referred to *circa*, and therefore *ad tunc & ibidem* do remain uncertain. *Suit* Juſtice, Preſently by the eſcape, there was a wrong done, therefore for that he may have an action. *Clenche* Juſtice ſaid, That he had experience in a Caſe of Treſpas: And it was the opinion of almoſt all the Judges of *England*, That if the Treſpaſs ſhould be done after the day wherein it is ſuppoſed to be done by the Writ; Yet the Writ ſhall not abate, and therefore he ſaid, That the difference of the Treſpas done before and after the day ſuppoſed by the Writ, is to no purpoſe: Further he ſaid, that it ſtandeth them upon to have their action before they be ſued by the party, at whoſe Suit he was in Execution: for perhaps, he who was in Execution might dye, and other changes might happen, ſo as they might loſe all. *Tanfeild*, What damages ſhall the Sheriffs have here, if they ſhall recover before any action be brought againſt them, when as it is uncertain whether ever they ſhall be ſued or not; and ſo uncertain how much they ſhall be damnified? But notwithſtanding all which was ſaid by *Tanfeild*, Judgment was given for the Plaintiffs. *Hill.*

Hill. 29. Eliz. in the Common Pleas.

146

LONDON doth preſcribe to have a Cuſtom, That after Verdict given in any of the Sheriffs Courts, or ſuch like Court there, that the Maior may remove any ſuch Suit before himſelf, and as Chancellor *ſecundùm bonam & ſanam conſcientiam* moderate it, and it was moved, whether it were a reaſonable cuſtom or not, becauſe that after tryal by ordinary courſe at Law, he ſhould thereby ſtay judgment. *Gaudy* Juſtice, It ought to be before judgment, otherwiſe it cannot be, for the Statute of 4. *H.* 4. is, that judgment given in any Court ſhall not be reverſed, but by Error or Attaint; *Vide Raſtal, Tit. Judgment.*

Mich. 28. Eliz. in the Common Pleas.

Rot. 2619.

147 GREENE *and* HARRIS Caſe.

IN an *Ejectione firme* upon a ſpecial Verdict, it was found, that one *John Brenne* was ſeiſed of a Manor where there were Copyholders for life, and by Indenture leaſed a copyhold called *Harris* Tenure, parcel of the Land in queſtion, to *Peter* and *John Blackborow*, for eight years, to begin after the death of *Brenne* & his *Wife*; and by the ſame Indenture leaſed all the Manor to them as before: The Copyholder did ſurrender, and *Brenne* granted a copy to hold according to the cuſtom of the Manor. *Brenne* and his *Wife* died: So as the leaſe of *Blackborow* was to begin; *Peter* entred and granted all his Intereſt unto a ſtranger, and died. *John* entred into the whole as Survivor, and made a leaſe thereof to the Plaintiff, and the Copyholder entred, and he brought the action. *Shuttleworth* for the plaintiff: The queſtion is, whether the plaintiff ſhall have *Harris* Tenure, as in groſs, or as parcel of the Manor? and he conceived, that becauſe it is named by it ſelf, that it ſhall paſs as in groſs; for ſo their intent appeareth to be. In 33. *H.* 8. *Dyer* 48. A Feoffment was made of a Manor to which a Villein was Regardant, by theſe words, viz. *Dedi unam acram, &c.* And further, *Dedi & conceſſi Villanum meum*: and there it was holden that the Villein ſhould paſs as in groſs, and that they were ſeveral gifts, although there was but one Deed. The ſame Law ſhall be of an Advowſon appendant. 14. and 15. *El. Dyer.* Husband and

Wife

Wife were joint-tenants in Fee of a Manor out of which the Queen had a Rent of twenty pound *per annum*, and ſhe by her Letters patents, in Conſideration of Money paid by the Husband, did give, grant, releaſe, and remiſe unto the Husband and his heirs the ſaid twenty pound Rent, *habendum & percipiendum* to him and his heirs; The Husband did deviſe the Rent unto another and his heirs, and dyed: There it is debated, whether the Wife ſhould pay the Rent or not; and it was holden that ſhe ſhould pay it, for the deed having words of grant and releaſe, it ſhall be referred to the Election of the Husband, and for his beſt avail how he will take it; and there is no neceſſity that the Rent be extinguiſhed in his poſſeſſion; for it is a maxime in Law, that every grant ſhall be taken beneficially for the grantee: ſo is it, if it contain words of two intents, he may take that which makes beſt for him. 21. and 22. *H.* 6. A deed comprehending *Dedi & conceſſi*, was pleaded as a Feoffment. In 5. *E.* 3. A Rent iſſuing out of Lands in Fee was granted to Tenant by the courteſie, to have and to hold to him and his heirs; It ſhall not be taken as extinct, but the Rent ſhall go to his heires, although he himſelf could not have it; Then in our Caſe, becauſe it is more beneficial for the Termor, he ſhall have it in groſs; And ſo he ſhall avoid the Eſtate of the Copyholder afterwards; and here is an Election made by *Peter* ſo to have it by the grant of his Intereſt over. Our Caſe is not like unto the Caſe of 48. *E.* 3. 14. Where a *Ceſſavit* was brought, ſuppoſing that the Houſe was holden of the Plaintiff by five Shillings, and the Defendant pleaded, that the Anceſtor of the Plaintiff, by his deed, which he ſhewed forth, gave the houſe to him and a ſhop, which are holden by one intire ſervice, and demanded judgment, &c. And there it was holden, that that deed did not prove, but that the ſhop might be parcel of the houſe, and not a ſhop in groſs by it ſelf. And there *Finchdon* ſaith, That if a man grant the Manor of *F.* to which an Advowſon is appendant, and the Advowſon of the Church of *F.* ſo as it is named in groſs, yet it ſhall paſs as appendant; I yeild to that, for there it is not more beneficial for him the one way or the other, as it is in our Caſe. It may be perhaps objected, That the Plaintiff here ſhall not recover at all for the cauſe alleadged in *Plo. Comm.* 424. in *Bracebridges* Caſe, becauſe that the action is brought for a certain number of Acres, as one hundred Acres, and it is found that the Plaintiff hath right but to a moyty of them: But it hath been ruled againſt that; viz. that he ſhall recover. *Walmeſley* Sergeant contrary. Notwithſtanding that this Copyhold be twice named; yet it ſhall paſs as parcel of the Manor, and not as a thing in groſs, and there is but one Rent, one Tenure, and one reverſion of both. 45. *E.* 3. A Fine was levyed of a Manor unto which an Advowſon was appendant, wherein a third part was rendred back to one for life, with divers Remainders over,

And

And ſo of the other two parts, with the advowſon of every third part, as aboveſaid; and there it is debated who ſhall have the firſt avoidance. And it is holden notwithſtanding the Deviſor as aforeſaid, and the naming of one before the other, that they are all Tenants in common of it: So as if they cannot agree to preſent, that Lapſe ſhall incurre to the Biſhop; and there no Prerogative is given to him who is firſt named, nor any prejudice to the laſt named; for being by one Deed, it ſhall paſſe *uno flatu*. 14. *H.*8. 10. A Leaſe was made for a year, *Et ſic de anno in annum, &c.* And there it was debated, whether it were a ſeverall Leaſe for every year; and it was ruled, That an Action might be brought, ſuppoſing that he held for one and twenty years, if in truth by force of the ſame Demiſe the Leſſee occupy the Land ſo long: And if I by my Deed grant unto *A.* and *B.* the ſervices of *I. D.* and by the ſame Deed the ſervices of *I.S.* are alſo granted unto them, they are Joyn-tenants of the Services or Seignories: So if I leaſe a Manor, reciting every parcell of the Land of the Manor, for the whole conſiſts in ſeverall parcels; In 33. *H.*8. (before remembred,) It is ſaid, That the Advowſon ſhall be appendant, if the whole Manor be granted, &c. But if it be admitted that there be ſeverall Leaſes, and that it paſſeth as a thing in groſſe; yet in the *interim* during the life of *Brenne*, and his wife, it is one entire Manor. For if *Blackborow* had levied a Fine thereof before entry, his Intereſt in the Land had not paſſed. And if a Fine be levied of the Manor, and the Conuſee render back part to one for life, and another part to another for life, the rent of the whole to a third; untill the Two enter, it is one entire Manor in the hands of the Counſee. If I deviſe that my Executors ſhall ſell ſuch Lands which are parcell of a Manor, and dye; untill they ſell, it remains parcell of the Manor: So if the heir ſelleth the Manor, that Land ſhall paſſe, for it is but executory, and remains parcell untill it be executed. Wherefore in the principall Caſe here, the Copy-hold is good. The reaſon of the Caſe 33. *H.*8. *Dyer* 48. is, becauſe before the grant, the advowſon was not appendant to that acre onely, but to the whole Manor, and to that acre as parcell of it. Alſo he ſaid, that the Copy-hold ſhall be good againſt the Leſſee, being granted before execution of his term, when as the Manor was entire: For he who hath a Manor but for one year, may grant Copies, and the grant ſhall be good to bind him in the Reverſion. And if one recovereth an acre, parcell of a Manor before execution, it is parcell of the Manor, and by grant of the Manor ſhall paſſe. *Periam* Juſtice, But yet now being executed by the death of the Leſſor and his wife, it is no part of the Manor if they be ſeverall Leaſes. *Walmeſley*, But the Defendant is in by Cuſtome, by one who is *Dominus pro tempore*. *Anderſon* Chief Juſtice, The Caſe of 48. *E.*3. is like our Caſe. And I conceive clearly here is no ſeverance; but if there had

been any ſeverance, it had been otherwiſe; but I doubt of the other point. *Periam* Juſtice, In 13. *H.*4. the difference is taken betwixt a grant of a Manor *una cum advocatione*; and a grant of a Manor, *et ulterius*, a grant of the Advowſon. In 14. *Eliz. Dyer* 311. in the Caſe of the Lord *Cromwell* and *Andrews*, it is moved, If a man bargain and ſell, give and grant a Manor and Advowſon to one, and afterwards levieth a Fine, or inrolleth the Deed, *Dyer* held, that the Advowſon ſhall paſſe by the Bargain and Sale, as in groſs before that the Deed be enrolled. But I conceive, that it cannot paſs if the Deed be not enrolled, and then it ſhall paſs as appendant, by reaſon of the intent of the parties: and ſo in this Caſe. And for the laſt matter, I conceive, very ſtrongly, that when the Leaſe which is executory takes effect, that it ſhall avoid the Copy-hold; for although at once, *viz.* during the expectancy of the ſaid Leaſe, to begin at a day to come, the Copy-hold be not extinct; yet now he may ſay, That all times, as in reſpect to him, the Copy-hold Cuſtome was broken. I hold, That a Tenant in Dower ſhall not avoid a Copy-hold made during the Coverture; and ſo it hath been adjudged in the Kings Bench. But I conceive, there is a difference betwixt that Caſe, and the Caſe in queſtion; for in that Caſe the title of the wife to have Dower is not conſummate till the death of the Husband. *Anderſon* Chief Juſtice, I can ſhew you an Authority, That if I grant unto you ſuch Land, and the Manor of *D.* there the Land ſhall paſs as parcell of the Manor. *Periam*, True there, for it doth enforce the firſt grant. But here the intent of the parties doth appear, and the ſame is to be reſpected. *Anderſon*, But their intent ought to be according to the Law: as in 19. *H.*8. it is holden it ſhall be in a Deviſe. *Anderſon*, upon the Argument of this Caſe, ſaid, That if a Warranty be to a whole Manor, and alſo to an Advowſon, the party cannot have Two *Warrantia Chartæ*. *Periam*, If he had further ſaid in the Deed, That his intent was that it ſhould be ſeverall, the ſame had altered the Caſe. *Anderſon*, No truely; becauſe his intent did not ſtand with the rule of Law. As if a man deviſe that his Lands ſhall be ſold, and doth not ſay by whom, it is void, and yet the intent is expreſſed. If the Leaſe had been by ſeverall Deeds, *Periam* ſaid, The Copy-hold had beene ſevered. *Windham* denied that, If both the Deeds bee delivered at one time. It was adjourned.

Hill.

Hill. 29. *Eliz. In the Common Pleas.*

148

AN Information was upon the Statute of 5. & 6. *E.* 6. for buying of ſeed Corn, having ſufficient of his own, and not bringing ſo much unto the Market of his own corn; and a generall iſſue was found upon it. And it was delivered for Law to the Jury by the Juſtices, That a Contract in Market, for corn not in the Market, or which was not there that day, is not within the Branch of the Statute. But if corn or graine be in the Market, although that the Contract be made in a houſe out of the Market, and delivered to the Vendee out of the Market, yet it is within the Statute. And in the Argument of that Caſe, *Anderſon* ſaid, That the Market, ſhall be ſaid, The place in the Town where it hath uſed to be kept, and not every place of the Town: And a Sale in Market overt in *London*, ought to be in a Shop which is open to the ſtreet, and not in Chambers or inward rooms, otherwiſe the property is not altered. And ſo it is of all Statutes in open Markets. And the Recorder of *London* ſaid, That ſuch was their Cuſtome in *London*.

Hill. 29. *Eliz. in the Common Pleas.*

149

IT was holden by *Anderſon* chiefe Juſtice, That if one deviſeth Lands to the heirs of *I. S.* and the Clerk writes it to *I. S.* and his heirs, that the ſame may be holpen by averrment, becauſe the intent of the Deviſor is written, and more; And it ſhall be naught for that which is againſt his intent, and againſt his will, and good for the reſidue. But if a Deviſe be to *I. S.* and his heirs, and it is written but to the heirs of *I. S.* there an averrment ſhall not make it good to *I. S.* becauſe it is not in writing, which the Statute requires: and ſo an averrment to take away ſurpluſage is good, but not to encreaſe that which is defective in the Will of the Teſtator.

Mich. 29. Eliz. in the Common Pleas.

150

A Feoffment was made unto *A.* unto the uſe of him, and his wife, diſ-puniſhable of Waſt during their lives; one died, and the Survivor committed Waſt; It was the opinion of the whole Court, that an Action of Waſt ſhould not lie by him in the Reverſion; for it is a Priviledge which is annexed to the Eſtate, which ſhall continue as long as the Eſtate doth continue.

Mich. 29 Eliz. in the Common Pleas.

151

A. grants *annualem redditum* out of Lands in which he hath nothing. The opinion of the Court was, That it is a good grant of an Annuity by theſe words (*annualem redditum.*) But whether Husband ſhall have a Writ of Annuity after the death of the wife for an Annuity, during the Coverture, they were in ſome doubt; becauſe it is but a thing in Action, as is an Obligation: Otherwiſe were it of a Rent which ſhe had for life: Note, in pleading for a Rent, he ſhall plead, That he was ſeiſed, &c.

Mich. 29. Eliz. in the Common Pleas.

152 WINKFEILD'S Caſe.

Winkfeild deviſed Land in *Norfolk*, to one *Winkfeild* of *London*, *Goldſmith*, and to his heirs in Fee. And afterwards, he made a Deed of Feoffment thereof to divers perſons unto the uſe of himſelfe for life, without impeachment of waſte, the Remainder unto the Deviſee in fee. But before he ſealed the Deed of Feoffment, he asked one, if it would be any prejudice to his Will; who anſwered, No. And the Deviſor asked again, if it would be any prejudice, becauſe he conceived that he ſhould not live untill Livery was made. And it was anſwered, No. Then he ſaid, that he would ſeale it, for his intent was, that his Will ſhould ſtand; And afterwards Livery was executed upon part of the Land, and the Deviſor died. *Rodes*

and

and *Periam* Juſtices; The Feoffment is no Countermand of the Will, becauſe it was to one perſon: but perhaps it had been otherwiſe, if it had been to the uſe of a ſtranger, although it were not executed. *Anderſon* Chiefe Juſtice, and others, the Will is revoked in that part where the Livery is executed. And he ſaid, It would have been a queſtion, if he had ſaid nothing. And all the Juſtices agreed, That a man may revoke his Will in part, and in other part not. And he may revoke it by word; and that a Will in writing may he revoked by word. *Periam* ſaid, It is no revocation by the party himſelfe, but the Law doth revoke it; to which *Windham* agreed. But he ſaid, That if the party had ſaid nothing when he ſealed the Feoffment, it had been a revocation of the party, and not of the Law. *Periam*, If the Witneſſes dye, ſo as he cannot prove the words ſpoken at the ſealing of the Feoffment, the Feoffment will deſtroy the Will; and ſo he ſpake to *Anderſon*, who did not deny it. All this was delivered by the Juſtices upon an Evidence given to a Jury at the Barre.

Mich. 29. Eliz. in the Common Pleas.

153

NOte; That it was ſaid by *Anderſon* Chiefe Juſtice. That if one intrude upon the poſſeſſion of the King, and another man entreth upon him, that he ſhall not have an Action of Treſpaſſe; for he who is to have treſpaſſe, ought to have a poſſeſſion; and in this caſe he had not, for that every Intruder ſhall anſwer the King for his time; and therefore he ſhal not anſwer to the other party: To which, *Walmeſley* and *Fenner*, Serjeants agreed. *Periam* doubted of it; for he conceived, That he had a poſſeſſion againſt every ſtranger. *Snagg* Serjeant conceived, That he might maintain an Action of Treſpaſſe; but *Windham* and *Rodes* Juſtices, were of opinion that he could not maintain Treſpaſs. *Walmeſley*, he cannot ſay in the Writ, *Quare clauſam fregit, &c.* *Rodes* vouched 19. *E.*4. to maintain his opinion.

Mich. 29. Eliz. in the Common Pleas.

154 NORRIS *and* SALISBURIE's Caſe.

IN an Action of Debt upon a Bond, the Caſe was this, *Norris* was poſſeſſed of wools, for which there was a contention betwixt the Defen-

Defendant, and one *A.* And *Norris* promiſed *A.* in conſideration that the goods were his; and alſo that he ſhould ſerve proceſſe upon *Saliſbury* out of the Admiral Court, that he would deliver the goods to *A.* And afterwards he delivered the goods to *Salisbury* the Defendant, who gave him Bond with Condition to keep him harmleſſe from all loſſes, charges and hinderances, concerning and touching the ſaid wools. Afterwards *A.* ſerved proceſſe upon him, and he did not deliver to him the goods: for which *A.* brought his Action upon the Caſe againſt *Norris*, who pleaded, That he made no ſuch promiſe, which was found againſt him. And afterwards, *Norris* brought an Action of Debt upon the Bond againſt *Salisbury*, becauſe he did not ſave him harmleſſe in that Action upon the Caſe. And the opinion of the whole Court was, That the Action of Debt would not lie, becauſe that the Action upon the Caſe did not concern the wools directly; for the Action is not brought but for breach of the promiſe; And that is a thing of which the Defendant had not notice, and it was a ſecret thing not concerning the wools, but by circumſtances, and ſo out of the Condition. *Anderſon* Chiefe Juſtice ſaid, That if *A.* promiſe *B.* in Conſideration, that *B.* is owner of goods, and hath them, to deliver them to *C.* the ſame may be a good conſideration; yet he ſomewhat doubted of it. But *Walmeſley* did affirme it to be a good Conſideration.

Mich. 29 Eliz in the Common Pleas.

155.

IT was holden by the whole Court, That in an Action of Treſpaſſe, It is a good plea in barre, That the Plaintiffe was barred in an Aſſize, brought by him againſt the Defendant, and iſſue joyned upon the Title; But otherwiſe, if it were upon the generall iſſue; *viz. Nul tort, nul diſſeiſin*; For then it might be that the Plaintiffe was never ouſted nor diſſeiſed; and ſo no cauſe to recover: In which caſe, it was no reaſon to put him from his Writ of Right.

Mich.

Mich. 29. Eliz. in the Common Pleas.

Intratur Mich. 27. Rot. 1627.

156 BRAGG'S Caſe.

A Woman having cauſe to be endowed of a Manor in which are Copy-holders, doth demand her Dower by the name of certain Meſſuages, certain Acres of land, and certain Rents; and not by the name of the third part of the Manor, and ſhe doth recover, and keeps Courts, and grants Copy-holds: It was holden by the whole Court, that in ſuch Caſe that the Grants were void, for ſhe hath not a Manor, becauſe ſhe hath made her demand as of a thing in groſſe. Otherwiſe, if the demand had been of the third part of the Manor, for then ſhe had a Manor, and might have kept Courts and granted Copies. And the pleading in that Caſe was, That ſhe did recover the third part of the Manor *per nomen* of certain Meſſuages, and Acres, and Rents; which was holden to be no recovery of the third part of the Manor.

Hill. 29. Eliz. in the Common Pleas.

157

NOte, it was holden for Law, That the Juſtices may increaſe, but not decreaſe damages, becauſe the party may have an Attaint, and ſo is not without remedy. But note, contrary by *Anderſon* and *Periam* Juſtices.

Hill. 39. Eliz. in the Common Pleas.

158

SErjeant *Fenner* moved this Caſe, That the Lord of a Manor doth preſcribe, That if the Tenant do a Reſcous, or drive his Cattel off from the Land when the Lord comes to diſtrain, that the Tenant ſhall be amerced by the Homage; and that the Lord may diſtrain for the ſame. *Anderſon* Chief Juſtice did conceive it might be a good cuſtome: and ſo alſo was the opinion of *Rodes* Juſtice; and he vouched 11 *H. 7.* where the Lord had Three Pound for Pound-breach. *Fenner*, It is extortion, if the amercement be not for a thing which is a common Nuſans;

and

and cited 11 *H.* 4. to prove it. *Periam* Juſtice ſaid, That hee ſaid well.

Paſch. 28 Eliz. In the Common Pleas.

Rot. 1962.

159 GILE's and NEWTON's Caſe.

THE Caſe was, That the Queen ſeiſed of the Manor of *Gaſcoigne*, and of the Graunge called *Gaſcoigne* Graunge in D. did grant all her Lands, Tenements, and Hereditaments in D. and it was adjudged by the whole Court, that the Manor did not paſs. And ſo *Anderſon* Chief Juſtice ſaid it is, if it were in the Caſe of a common perſon; but an Advowſon ſhall paſſe by the Feoffment of the Manor without Deed, without the words *cum pertinentiis*, for that is parcell of the Manor; which the whole Court granted.

Paſch. 23. Eliz. in the Common Pleas.

160

J. S. was arreſted by force of a *Latitat* out of the King's Bench, at the Suit of *J. D.* and the Sheriffe took an Obligation of him with two Sureties, upon condition that he appear ſuch a day in the King's Bench, and alſo that *ad tunc & ibidem* he anſwer the ſaid *J. D.* in a Plea of Treſpaſs. It was moved by *Rodes* Serjeant, That the Obligation was void by the Statute of 23. *H.* 6. by which Statute no Obligation ſhall be ſaid to be good, if not for appearance only; and this Obligation is for appearance, and alſo that he ſhall anſwer to *J. D.* which is another thing then is contained in the Statute, and therefore it is void. But all the Juſtices were of opinion, That the Obligation was good, notwithſtanding that; becauſe that the words of the Writ directed to the Sheriffe, are *Quod capias* ſuch a man, *Ita quod habeas corpus ejus hîc*, ſuch a day, *ad reſpondendum tali*, in a Plea of Treſpaſſe; and ſo nothing is contained in the Bond, which is not compriſed within the Writ directed unto him, but if any other collaterall thing be put into the Obligation, then the Bond ſhall be void for the whole.

31. *Eliz. in the Common Pleas.*

161 BUCKHURST's Caſe.

LEſſee for ten years granted a rent charge unto his Leſſor for the years: Afterwards the Leſſor granted the Remainder in Fee to the Leſſee. It was the opinion of the whole Court that the rent was gone and extinct, becauſe the Leſſor who had the rent, is a party to the Deſtruction of the Leaſe, which is the ground of the Rent.

29. *Eliz. In the King's Bench.*

162 ALLEN and PATSHALL's Caſe.

A Copy-holder doth ſurrender unto the uſe of a Stranger for ever; and the Lord admits the Surrendree to have and to hold to him and his Heirs. It was adjudged in this Caſe; That if it were upon a deviſe, that ſuch a one ſhould have the Copyhold in Fee; and afterwards a ſurrender is made unto the Lord to grant the Copyhold according to the Will; and he grants it in Fee to him and his Heirs, that the Grant is good. But *quære* in the firſt Caſe, for it was there but a bare Surrender only.

Mich. 27,28. *Eliz. in the King's Bench.*

163 STRANGDEN and BARNELL's Caſe.

AN Action of Trover and Converſion was brought of Goods in *Ipſwich*; the Defendant pleaded, That the Goods came to his hand in *Dunwich* in the ſame County; and that the Plaintiffe gave unto him the goods which came to his hands in *Dunwich*, *abſq; hoc* that he is guilty of any Trover, and Converſion of Goods in *Ipſwich*. And by the opinion of the Court, the ſame is a good manner of Pleading by reaſon of the ſpeciall Juſtification. *Vide* 27. *H.* 6. But when the Juſtification is generall, the County is not traverſable at this day. *Vide* 19. *H.* 6.6, & 7.

Mich. 27. Eliz. in the Kings Bench.

164 BARTON and EDMOND's Caſe.

AN Infant and another were bounden in a Bond for the Debt of the Infant: The Infant at his full age did aſſume to ſave the other man harmeleſſe againſt the ſaid Bond; afterwards the Infant died. It was reſolved by the whole Court, that upon this Aſſumpſit an Action upon the Caſe would lie againſt the Executors of the Infant. But if a Feme Covert, and another at her requeſt had been bounden in ſuch a Bond, and after the death of her Husband, ſhe had aſſumed to have ſaved the other harmeleſſe againſt ſuch Bond, ſuch Aſſumpſit ſhould not have bound the Wife.

Trinit. 29. Eliz. in the Common Pleas.

165 ZOUCH and BAMPORT's Caſe

THis Caſe was moved, When the Defendant pleads in Bar to the Action, and the Plaintiffe replies, and the Defendant doth demur ſpecially upon the Replication, and the Bar is inſufficient, Whether the Juſtices ſhall give Judgment upon the Replication, or ſhall reſort unto the inſufficient Bar, the Replication being alſo inſufficient? And the opinion of the Court was, That when the Action is of ſuch a nature, that the Writ and the Count doth comprehend the Title, as in a Formedon and the like, then becauſe there is a ſufficient title for the demandant by the Writ and the Count, ſo as the Judges may ſafely proceed to Judgement for the Plaintiffe, there they ſhall reſort to the Barr. Contrary in Caſes where the Title doth commence only by the Replication, as in Aſſize, Treſpaſs, and the like.

40. Eliz. in the Exchequer.

166

NOte, it was ſaid by Sir *Francis Bacon* the King's Solicitor, That it was adjudged 40. *Eliz.* in the Exchequer, That where the King had made a Leaſe for life, who was ouſted by a Stranger, that the ſame

ſhould

should be said a Disseisin of the particular estate, against the common ground, which is, That a man cannot be disseised of lesse estate then of a Fee-Simple.

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40. *Eliz. in the Kings Bench.*

167

IT was holden and adjudged by *Popham* Chief Justice of the Kings Bench, That where a Lease was made unto the Husband and Wife for their lives, the remainder to the Heirs of the Survivor, that the same was a good remainder, notwithstanding the uncertainty, and that in that Case the Husband after the death of the Wife should have Judgement to recover the Land

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33. *Eliz. in the Common Pleas.*

168 PROCTER'S Case.

IT was adjudged in this Case, That the Lacheſs of the Clark in not entring of the Kings Silver, shall not prejudice the King or the Crowne.

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30 *Eliz. In the Kings Bench.*

169 HARDING'S Case.

IT was holden by the whole Court of Kings Bench (as it was reported by Sir *Robert Hitcham* Knight) That if a man make a Lease of Copy-hold land, and of Free-hold land, rendring Rent; and the Copy-hold descends to one, and the Free-hold to another, that the rent shall be apportioned.

Trinit. 25. Eliz. in the Common Pleas.

Rot. 1702.

170 LEONARD and STEPHEN'S Case.

IN Trespas, the issue joyned was, Whether it were a Feoffment or not; and upon Evidence to the Jury, the Case appeared to be, viz.

That there was Leſſee for years, and afterwards the Leſſor made a Deed of Feoffment, in which were words of Confirmation, and in the end of the Deed, there was a ſpecial Letter of Atturney to make Livery to the Leſſee for years, and his heirs. And it was agreed by all the Juſtices, That the Leſſee for years had Election to take the ſame by way of confirmation, or by Feoffment; and that the Law doth ſuſpend and expect untill he hath declared his pleaſure. And it was further adjudged, That when he hath made his Election, to take it by Livery, that it ſhall be a Feoffment, *ab initio*; and by the delivery of the Deed in the mean time, *nihil operatur.*

Mich. 31. Eliz. in the Common Pleas.

171

A Copy-holder did alledge the cuſtome to be, That the Lord of the Manor might grant Copies in Remainder with the aſſent of the Tenants, and not otherwiſe: and that Copies in remainder otherwiſe granted ſhould be meerly void. The queſtion was, Whether it were a good cuſtome? The Juſtices did not deliver any opinion in the point. But *Walmeſley* Serjeant, ſaid, That it was a void cuſtome; for a Copy-hold Eſtate is an eſtate of which the Law doth not take notice, and Copy-holders are meer Tenants at will by the common Law; and therefore to ſay, That he who hath not an intereſt ſhould have me at his pleaſure, aſwell as I who am intereſſed ſhould have him at my pleaſure, is prepoſterous and repugnant to reaſon: as 2. *H.* 4. 27. A cuſtome that the Commoner ſhall not uſe his Common before that the Lord hath put in his Cattel, is not good, for the Commoner hath an intereſt in the Common, which is not reaſonable to be reſtrained at the pleaſure of another; and 19. *Eliz. Dyer* 257. A cuſtome that a man ſhall not demiſe or leaſe but for ſix years is a void cuſtome. *Shuttleworth* Serjeant contrary, and he ſaid, That the reaſon that this Copy-hold is not within *Littletons* Eſtates by Copy, is no reaſon; for by the ſame reaſon you may overthrow all Copy-hold Eſtates. And he ſaid, That this cuſtome might have a lawfull beginning, and it ſeems to bee grounded upon the reaſon of the common Law, that a remainder ſhould not be without the aſſent of the particular Tenant, and therefore it is a good cuſtome. And ſo is the cuſtome, that a Woman ſhall not have Dower if ſhe do not claim it within a year and a day. And a cuſtome, that a free Tenant ſhall not alien without a ſurrender in the Court of the Lord, is a good cuſtome. It was adjourned.

31. *Eliz. in the King's Bench.*

172 Sir RALPH EGERTON's Case.

UPon a speciall Verdict the Case was this, A man being Tenant for life in the right of his Wife, he made a Deed of Feoffment *Habendum* to the Feoffee and his Heirs, *ad solum opus & usum* of the Feoffee and his Heirs for the life of the Wife; and the Court was cleer of opinion, that it was a forfeiture, because the *Habendum* is absolute; and the use is another clause; and although he doth not limit the use but for life, yet the Law limits the remainder of the use to the party who maketh the Feoffment.

Trinit. 29. Eliz. in the King's Bench.

173 MAYE's Case.

IF a man sendeth a Letter by a Carrier to a Merchant for certain Merchandizes to send them to him by the Carrier, receiving certain monies; and the Merchant sendeth the Goods by the Carrier, without the receipt of the Money, the same shall not bind the Buyer (as it was holden by the Court) because it was but a conditionall Bargain, and it was the folly of the Merchant to trust the Carrier; and therefore in that Case the Vendee was admitted to wage his Law. And so if one writeth for Wares, and the party sends them by the same Carrier, yet if the Carrier doth not deliver them, the other may wage his Law in such Case.

Mich. 30. Eliz. in the Common Pleas.

174 HALTON's Case.

THE case was, That a Recognizance was acknowleged before Sir *N. Read*, one of the Masters of the Chancery. The Recognizee died before the same was enrolled. And whether it might be enrolled at the Petition of the Executors of the Recognizee was the question? And

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it was agreed by all the Juſtices, That the ſame might be enrolled; for it was like unto the Conuſans of a Fine before a Judge, which might be removed out of the hands of the Judge by a *Certiorari*, and yet it is no record untill it be perfected. And at that time, it was doubted whether the Chancery might help a man who was a purchaſer for valuable conſideration, where there wanteth the word [heirs] in the Deed of purchaſe: But it was agreed by all the Juſtices, That after a Fine is levied of Land, That the Chancery may compell the Tenant to attorne.

Trinit. 31. Eliz. in the Common Pleas.

Rot. 1704.

175 BLAGROVE *and* WOOD'S Caſe.

IN Treſpaſs, the Queſtion was, If a Copy-hold was ſurrendred, or not. And the cuſtome was alledged to be, That a Copy-holder might ſurrender out of the Court to the Steward out of the Manor, And the Steward was retained onely by word, but had no Patent. *Walmeſley*, He may be Steward by word well enough. But *Windham* and *Anderſon* held, That he might be Steward by word onely in poſſeſſion, that is, when he holds a Court in poſſeſſion; But he cannot be Steward out of Court without a Patent, becauſe he is then out of poſſeſſion; And therefore, it was the opinion of the whole Court, That the ſurrender out of Court to the Steward by word, was not good.

Hill. 36. Eliz. in the Common Pleas.

176

THe Summons of a Copy-holder to appear at the Lords Court was at the Church; and thereupon the Copy-holder did not appear: And it was the opinion of the whole Court, that the ſame was no cauſe of forfeiture of the Copy-hold, becauſe it was not eſpecially ſhewed to be the Cuſtome: And it ſhall be hard to make it a Forfeiture; for perhaps the Copy-holder had not notice of it; And to that purpoſe was vouched the Lord *Dacres* and *Harleſtons* caſe. And they held, that notice ought to be given to the perſon; and the Refuſall muſt be willfull; for if a Copy-holder be demanded his rent, and he ſaith, that he hath it not, the ſame is no forfeiture, but

but the deniall ought to be a wilfull deniall; and ſo it was ſaid to have been adjudged in one *Winters* Caſe.

Trinit. 1. *Jacobi in the Common Pleas.*

Rot. 854.

177 SAPLAND *and* RIDLER'S Caſe.

AFter long Arguments on both ſides, It was adjudged by all the Juſtices in this caſe: That where the Cuſtome of a Copy-hold Manor was to admit for life, and in remainder for life, at any time when there was but one Copy-holder for life in poſſeſſion; and during the minority of the Heir within fourteen years, the Gardian in Socage in his own name did admit a Copy-holder in Remainder for life, That the ſame was a good admittance according to the Cuſtome; And that he was a ſufficient *Dominus pro tempore* as to this purpoſe. Although it was objected by *Walmeſley*, That the Gardian is but *Servus*, and not *Dominus*. But becauſe it was agreed that he had a lawfull Intereſt, the admittance was good, and ſo it was adjudged.

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33. Eliz. In the Common Pleas.

178 SHIPWITH *and* SHEFFIELD'S Caſe.

THe Cuſtome of a Copy-hold Manor was, That a feme Covert might give Lands to her Husband. And if it were a good Cuſtome, or not, was the Queſtion? *Fleetwood.* The Cuſtom is good, and vouched 12. *E.* 3. That in *York* there is ſuch a cuſtome, That the Husband might give the Land of his own purchaſe to his wife during the Coverture; and it is a good Cuſtome, That an Infant at the age of fifteen years may make a Feoffment, 29. *E.* 3. and the ſame is good at the Common Law; and yet the ſame all began by cuſtome. But the Court was of opinion, That the Cuſtome is unreaſonable, becauſe it cannot have a lawfull Commencement. And *Anderſon* Chiefe Juſtice ſaid, That a Cuſtome that an Infant at the age of ſeven years might make a Feoffment, is no good cuſtome; becauſe he is not of age of diſcretion. And in this caſe at Barre, It ſhall be intended that the wife being *ſub poteſtate viri*, did it by the Coheriſon of her Huſband; The ſame Law is of a Cuſtome, That the wife may ceaſe to her

her Husband. *Fleetwood* urged, That the cuſtome might be good, becauſe the wife was to be examined by the Steward of the Court; as the manner is upon a Fine, to be examined by a Judge. To which the Court ſaid nothing.

31. *Eliz. in the King's Bench*

179

AN Action upon the Caſe upon an *Aſſumpſit* was brought. And the Plaintiff layed his Action, That ſuch a one did promiſe him, in reſpect of his labour in another Realme, &c. to pay him his contentment. And he ſaid, That Twenty five Pound is his contentment, and that he had required the ſame of the Defendant. *Cook* moved in arreſt of Judgement; it being found for the Plaintiffe, upon *Non Aſſumpſit* pleaded, that no place was alledged where the contentment was ſhewed: And the opinion of the Court was againſt him; for *Gawdy* and *Wray* were of opinion, that he might ſhew his contentment in any Action; and ſo it is, where it is to have ſo much as he can prove, he might prove it in the ſame Action. *Cook* ſaid, That it had been moved in ſtay of Judgement in this Court upon an *Aſſumpſit*, becauſe the requeſt was not certain. And that caſe was agreed by the Juſtices, becauſe the requeſt is parcell of the *Aſſumpſit*; and the entire *Aſſumpſit* together in ſuch caſe is the cauſe of the Action; but in this caſe, that he ſhould content him, is not the cauſe of the *Aſſumpſit*, but only a circumſtance of the matter; and it was reſembled to the Caſe of 39. *H.* 6. where a Writ of Annuity was brought for Arrerages againſt an Abbot *pro conſilio, &c.* And the Plaintiffe declared that the Councel was *ad proficuum Domus*, and was not alledged in certain; and it was holden that the ſame was not materiall; although it were uncertain, becauſe it was but an induction and neceſſary circumſtance to the Action: And ſo the Plaintiffe recovered and had Judgement.

Mich. 29 Eliz. in the King's Bench.

180

THE Statute of 23. *Eliz. cap.* 25. is, *Quod non licuit alicui* to engroſſe Barley, &c. and in the Statute there is a Proviſo, That he may ſo do, ſo as he convert it into Malt. The queſtion was, If in an Information upon that Statute, That the Defendant had converted it to Malt, he might plead the generall Iſſue, Not guilty, and give in Evidence

vidence the ſpeciall matter, or whether he ought to plead the ſpeciall matter. *Clench* Juſtice, He may plead, Not guilty, &c. for the *Proviſo* is parcel, and within the body of the Statute, as 27.*H.* 8.2. where, upon an Information upon the Statute of Farmors, it is holden by *Fitzherbert*, That the Vicar may plead, *Non habuit ſeu tenuit ad firmam, contra formam Statuti, &c.* and yet the Statute in the premiſes of it, reſtrains every Spirituall Perſon to take in Farme any Lands, &c. and afterwards by a *Proviſo* gives him liberty to take Lands for the maintenance of his houſe, &c. As upon the Statute of *R.* 2. If he do plead, That he did not enter *contra formam Statuti*, he may give in Evidence that he entred by Title, as that his father was ſeiſed and died: and the ſame is not like unto the condition of a Bond, for that is a ſeverall thing; But the *Proviſo* and the Statute is but one Act.

Mich.29. Eliz. in the King's Bench.

181

NOte; It was ſaid by Maſter *Kemp* Secondary of the King's Bench, That there is a Court within the Tower of *London*, but he ſaid, That it was but a Court Baron; and ſaid, That he can ſhew a Judgement, That no Writ of Error lieth of a Judgement given there. And it was a queſtion, Whether Proceſs might be awarded to the Lieutenant of the Tower for Execution upon a Judgment given in the KingsBench, becauſe the Defendant was removed and dwelt within the Liberty of the Tower? And it was ſaid, It could not; but the Writ ought to be awarded to the Sheriffs of *London*; and if they returne the Liberties of the Tower, then a *Non omittas* ſhall be awarded. But ſome Counſellors ſaid, That although a *Non omittas* be awarded, yet the Sheriffs durſt not go unto the Liberties of the Tower to ſerve the Proceſs.

2 Jacobi, in the Common Pleas.

182 *The Lady* STOWELL'S *Caſe.*

IT was adjudged in this Caſe, That the wife who is divorced *cauſa adulterii*, ſhall have her Dower.

3. *Jacobi, in the Common Pleas.*

183 WARNER'S Caſe.

LEſſee for twenty years doth ſurrender, rendring rent during the term. It was adjudged a good rent for ſo many years as the term might have continued.

3. *Jacobi, in the King's Bench.*

184 WHITLOCK and HARTWELL'S Caſe.

TWO Joint-Tenants for life, the one demiſed and granted the moyty unto his companion for certain years to begin after his death. Adjudged void, becauſe it is but a poſſibility. And ſo is it of a Covenant to ſtand ſeiſed to the uſe, &c. as it was adjudged in *Barton* and *Harvey*'s Caſe, 37. *Eliz.*

3. *Jacobi, In the Kings Bench.*

185 PINDER'S Caſe.

A. deviſed lands in Fee to his ſon, and many other lands in tail: And afterwards he ſaid, I will that if my ſon die without iſſue, within age, that the lands in Fee ſhall go to ſuch a one. *Item*, I will that the other lands in tail ſhall go to others; and doth not ſay in the ſecond *Item*, if the ſon dieth without iſſue, within age. It was adjudged, That the ſecond *Item* ſhould be without condition.

3 *Jacobi, in the Star-Chamber.*

186 RUSWELL'S Caſe.

A Man took away Corne in the night time to which he had a right, and was puniſhed for a Riot in the Star-Chamber, becauſe of his company only.

Hill.

Hillar. 3. Jacobi.

187 KINGSTON and HILL's Case.

AN Action upon the Case was brought for saying these words, viz. Thou art an arrant Papist, and it were no matter if such were hanged; and thou, and such as thou, would pull the King out of his Seat if they durst. Adjudged that the words were not actionable: *Et quod querens nihil capiat per Billam.*

Pasch. 3: Jacobi, in the Common Pleas.

188

NOte; It was holden by the Court, That if a *Fieri facias* go to the Sheriffe to do Execution, and he levieth the money, and delivereth the same to the party; yet if it be not paid here in the Court, the party may have a new Execution; and it shall not be any Plea to say, That he hath paid the same to the party; for it is not of Record without bringing of the money in Court. *Vide* 11. *H.* 4. 50. *ar.*

Pasch. 3. Jacobi, in the Common Pleas.

189 DUKE and SMITH's Case.

NOte; That if he in the reversion suffer a recovery to divers uses, his Heirs cannot plead, That his father had nothing in the Land at the time of the recovery; for he is estopped to say, That he was not Tenant to the *Præcipe.* And it was agreed, That it was a good recovery against him by estoppel. *Quære* this case.

Mich. 3. Jacobi, in the King's Bench.

190 BIRRY's Case.

BIrry was committed by the High Commissioners, and removed by *Habeas corpus* into the Kings Bench: They returned the Writ

with a Certificate, That they did commit him for certain cauſes Eccleſiaſticall; which generall cauſe the Court did not allow of. They certified at another time, That it was for unreverent Carriage and ſawcie Speeches to Doctor *Newman.* The Court alſo diſallowed of that cauſe. *Birry* put in Bail to appear *de die in diem,* and was diſcharged. It was holden. That if *Birry* did not put off his Hat to him, or not give him the wall, the ſame were not ſufficient cauſes for them to commit him. And it was agreed by the whole Court, That whereas the ſaid Commiſſioners took Bonds of ſuch as they cited to appear before them, to anſwer unto Articles, before that the party had ſeen the Articles, that ſuch Bonds were void Bonds.

Mich. 3. Jacobi, in the King's Bench.

191 Ann Mannock's Caſe.

ANN *Mannock* was indicted in *Suffolk,* upon the Statute of 1. *El. cap.* 2. for not coming to Church twelve Sundayes together; which Indictment was removed into the Kings Bench; and Exceptions taken unto it. 1. That the Statute is, That all Inhabitants within the Realme, &c. and it is not averred *in facto,* that ſhe did inhabit within the Realme; and the Exception was diſallowed, for if it were otherwiſe, it ought to be ſhewed on the Defendants part. The ſecond Exception, That by a *Proviſo* of the Statute of 28. *Eliz. cap.* 6. it is ordained, That none ſhall be impeached for ſuch offence, if he be not indicted at the next Seſſions; and it appears by the Indictment, That the Offence was almoſt a year before the Indictment, and in the mean time many Seſſions were, or *debuerunt* to have been. And that Exception was alſo diſallowed, for perhaps the truth is, That there was not any Seſſions in the mean time, although there ought to have been. The third Exception, That the Indictment was, That ſhe was indicted, *Coram* A. B. *& ſociis,* Juſtices of Peace, and it doth not name them particularly. The Exception was diſallowed, for that it doth not appear that there were any other Juſtices there, and what was their names. And therefore it was ſaid, That it differs from the Caſe of 1. *H.* 7. of a Fine levied *Coram* A. B. *& ſociis ſuis.* The fourth Exception was, That the words of the Statute are, Ought to abide in the Church till the end of Common Prayer, Preaching, or other Service of God in the Disjunctive: and the Indictment was in the Conjunctive. The Exception was diſallowed, for although the words are in the disjunctive, yet a man cannot depart ſo ſoon as the Service is ended if there be preaching but he ought to continue there for the whole time.

Paſch.

Paſch. 4. Jacobi, in the King's Bench.

192

AN Enfant did acknowledge a Statute, and during his Nonage brought an *Audita querela*, to avoid the Statute, and had judgment; The Conuſee at the full age of the Enfant brought a Writ of Error and reverſed the judgment given in the *Audita querela*, and the Enfant the Conuſor prayed a new *Audita querela*; but it was denyed by the whole Court.

Mich. 4. Jacobi, in the Common Pleas.

193 PETO and CHITTIE's Caſe.

IT was adjudged in the Court of Common Pleas in this Caſe; That concord with ſatisfaction is a good plea in Barre in an *Ejectione firme*.

Mich. 5. Jacobi, in the King's Bench.

194

TWo Men were bound joyntly in a Bond, one as principal and the other as ſurety; the principal dyed Inteſtate, the ſurety took Adminiſtration of his goods; and the principal having forfeited the Bond, the ſurety made an agreement with the Creditor, and took upon him to diſcharge the Debt: In Debt brought by another Creditor, the queſtion was upon fully adminiſtred, pleaded by the Adminiſtrator, If by ſhewing of the Bond, and that he had contented it with his own proper Mony, whether he might retain ſo much of the Inteſtates eſtate: and it was adjudged that he might not: For *Flemming* Chief Juſtice ſaid, that by joyning in the Bond with the principal, it became his own Debt.

Paſch. 5. Jacobi, in the Common Pleas.

195 TAYLOR *and* JAME'S Caſe.

IN a Replevin by *John Taylor*, againſt *Richard James*, for taking of a Mare and a Colt in *Long Sutton*, in a place called *H.* in the County of *Somerſet*; The Defendant did avow the taking, and ſhewed. That Sir *John Spencer* was ſeiſed of the Manor of *Long Sutton*, whereof the place where &c. is parcel, and that he and all thoſe whoſe eſtate he hath in the ſaid Manor &c. have had all Eſtrayes within in the ſaid Manor; and ſhewed that the Bailiff of Sir *John Spencer* ſeiſed the ſaid Mare and Colt as an Eſtray, and proclaimed them in the three next Market Towns, and afterwards the Bailiff did deliver them to the Defendant to keep in the place where &c. And if any came and challenged them, and could prove that the ſame did belong to him, and pay him for their meate, that he ſhould deliver them unto him; and then ſhewed how that the Plaintiff came, and claimed them for his own; and becauſe he would not prove that they did belong unto him, nor pay him for their meate &c. he would not deliver them; upon which plea there was a Demurrer in Law. After argument by the Serjeants, *Cook* Chief Juſtice, ſaid, that it was a plain Caſe for the Plaintiff: the reaſon of Eſtrayes was, becauſe when there is none that can make title to the thing, the Law gives it to the King, if the Owner doth not claim it within a year and a day; and alſo becauſe the Cattel might not periſh, which are called *Animalia vagantia &c.* But the Defendants plea is not good, becauſe the Defendant is to keep them until proof be made unto him, and the Law doth not take notice of any proof, but by twelve Men, which the Defendant cannot take, 7. *H.* 2. *Barre* 241. But if the Owner can make any reaſonable proof, as if he ſhew the Markes &c. it is ſufficient, and the party *ſuo periculo* ought to deliver to him the Eſtray. Secondly, It is not ſufficient to keep the Eſtray within the Manor, but it ought to be kept in a place parcel of the Manor. Thirdly, It ought to be in Land in the poſſeſſion of Sir *John Spencer*, and not of any other; and it doth not appear that that Land was in his poſſeſſion. Fourthly, If they do go in the Land of Sir *John Spencer*; Yet it is abſurd to maintain that the Bailiff might delegate his power to another to keep them until he be ſatisfied. *Wilmeſley* Juſtice, agreeeth; for when it is ſpoken generally of proof, it ſhall be taken for judicial proof, which needeth not in his Caſe, for theſe Vagrant Beaſts; and the party ſhall not be his own Judge, but as it hath been remembred upon the Statute of Wrecke, *ſi dicere poterit*, if he can inſtruct him

him, and give him any reaſon wherefore the Eſtray doth appertain unto him, he ought to deliver it *ſuo periculo*. Alſo it is cleer, that agreement ought to be made with the party for the victual, and the quantity thereof ſhall be tryed in this Court if it come in queſtion, as the quantity of Amends in a Replevin. *Warbarton* agreed, and ſaid, That an Eſtray ought not to be wrought, but the party muſt agree for his meate; alſo the Lord cannot put the Owner to his Oath; but if the party doth tell the Marks, it is ſufficient, and he ought to deliver it at his peril: and if he require more then belongs to him for the Meate, it is at his peril, for this Court ſhall jugde of that. *Daniel* agreed, and ſaid, That the Lord ought to proclaim them, and in his Proclamation ought to ſhew of what kinde the Eſtray is, whether ſheep, Oxe, Horſe, &c. and ought to tell his name who ſeiſed them, ſo as the Owner might know whither he might reſort for his Cattel; and then it ought to be kept within the Lordſhip and Manor, which may extend into ſeveral Counties. *Cook* ſaid, that the Owner ought not to be preſſed to his Oath, *Pr. Caſes.* 217.

Paſch. 5. Jacobi, in the Common Pleas.

196 LANGLEY *and* COLSON'S Caſe.

AN Action upon the Caſe was brought by *Langley* againſt *Colſon*, for theſe words, viz. *Richard Langley* is a Bankrupt Rogue, I may well ſay it, for I have payed for it: and it was adjudged for the Plaintiff; for by all the Juſtices the firſt words are Actionable, although the word Bankrupt be ſpoken *adjectivè*, becauſe they ſcandalize the Plaintiff in his Trade. At the ſame time another Action was brought by another Man for ſpeaking theſe words, viz. Thou art a Bankruptly Knave, and canſt not be truſted in *London* for a Groat; and it was adjudged that the words were not Actionable, becauſe the words were ſpoken *adjectivè* and *adverbialiter*, and are not ſo much as if he had called him Bankrupt Knave, but Bankruptly, viz. like a Bankrupt.

Paſch. 5. Jacobi, in the Common Pleas.

197 BALLET *and* BALLE'TS Caſe.

A *Warrantia Charta* was brought by *Thomas Ballet* the younger, againſt *Thomas Ballet* the elder; and the Writ was of two Meſſuages

ſuages and the moytie of an Acre of Land, *unde Chartam habet &c.* and declared, whereas himſelf and the Defendant and one *Francis Ballet* were ſeiſed in the new Buildings, and of one piece of Land adjoyning &c. in the Tenure &c. containing from the Eaſt to the Weſt twenty foot by aſſize, and from the North part to the South thirty foot, and the ſaid *Thomas* the elder, and *Francis* did releaſe unto him all their Right in &c. the ſaid *Thomas* the elder for him and his heirs, did Warrant *tenementa prædict'* to the ſaid *Thomas* the younger and his heirs: The Defendant did demand Oyer of the deed, and thereby it appeared that the ſaid *Thomas* and *Francis* and one *R.* did releaſe to him all their Right in, &c. And that *Thomas* the elder for him and his heirs did Warrant *tenementa prædict'* to *Thomas* the younger & his heirs, and that *Francis* by another clauſe for him and his heirs did Warrant *tenementa prædict'* to *Thomas* the younger and his heirs: upon which it was Demurred in Law, and after Argument by the Serjeants, ſome matters were unanimouſly agreed by all the Juſtices. Firſt, that upon ſuch a releaſe with Warranty, *contra omnes gentes*, a Writ of *Warrantia Charta* lyeth. Secondly, although that every one paſſeth his part onely, viz. a third part, yet every one of them doth Warrant the whole: and becauſe they may ſo do, and the words are general without reſtraint by themſelves, the Law will not reſtrain them. The words are, that they do Warrant *tenementa prædict'*, which is, all the premiſſes. Thirdly, For the reaſon aforeſaid, It needs not to be ſhewed how they hold in jointure. Fourthly, that the Writ is well brought againſt one onely, becauſe the Warranties are ſeveral; But if they had been joint Warranties, then it ought to have been brought againſt them both ſo againſt the Survivor & the heir of one of them; and if they had both dyed, againſt both their heirs; ſo as it differs from an Obligation perſonal which onely binds the Survivor. Fifthly, that the Writ was well brought for the things as they are in truth, without naming of them according to the Deed. Sixthly, that if there be new Buildings of which the Warranty is demanded which were not at the time of the Warranty made, and after the Deed is ſhewed, the Defendant ſhall not have any benefit by Demurring upon it; But if he will be aided, he ought for to ſhew the ſpecial matter, and enter into the Warranty for ſo much as was at the time of the making of the Deed, and not for the reſidue: *Vide Fitz. Warrantia Charta* 31. Seventhly, that a *Warrantia Charta* doth not lye of a piece of Land, no more then a *Præcipe quod reddat*, nor of a Selion of Land.

Mich. 5. Jacobi, in the Kings Bench.

198

AN Action upon the Caſe was brought for theſe words, *viz.* Thou haſt ſpoken words that are treaſon, and I will hang thee for them. It was adjudged by the whole Court, that the words were actionable.

Mich. 5. Jacobi, in the Kings Bench.

199

A Man was bound to pay twenty pound to another, when he ſhould be out of his Apprentiſhip, and he died within the time, the Executors ſhall not have the money; otherwiſe, if the Bond had been to pay money, after the expiration of ten years. Adjudged.

Mich. 5. Jacobi, in the Kings Bench.

200 GAGE and PEACOCK's Caſe.

IT was adjudged in this caſe: That if Leſſee for years of a Manor take a Leaſe of the Bailiwick of the Manor, that it is no ſurrender of his term, becauſe it is of a thing which is collaterall.

Mich. 5. Jacobi, in the Common Pleas.

201

IF a Parſon have a Benefice above the yearly value of eight pound; and afterwards he taketh another Benefice with a diſpenſation, and afterwards he taketh a third Benefice; his firſt Benefice is onely void. Adjudged *per Curiam.*

Mich. 5. Jacobi, in the Common Pleas.

202

A Man, in consideration of Marriage, doth assure and promise to do three severall things: For the not performance of one of them, the party to whom the promise is made, bringeth an Action upon the case; and to enable him to the Action, sayes, That the Defendant in consideration of Marriage, did promise him to performe the said thing, for which the Action is brought, without speaking of the other two things: The Defendant by plea in barre said, *Non assumpsit modo & formâ.* And the opinion of the Court was, that it was a good issue; For the Contract being entire, if it be not a good plea, the Defendant might be charged for the severall things; which cannot be, being but one contract by word: But it is otherwise of severall contracts in writing.

Trinit. 5. Jacobi, in the Kings Bench.

203 Sir JOHN SPENCER *and* POYNT's Case.

SIr *John Spencer* made a Lease for years unto Sir *John Poyntr*, rendring rent by Indenture: The Lessee covenants, that if the rent be behind at any time of payment according to the forme of the Indenture, that the Lessor shall have two hundred pound *Nomine pœnæ*, for such default. The rent is behind, Sir *John Spencer* brought Debt for the *Nomine pœnæ*. The Question was, Whether without Demand of the rent, debt did not lie for the *Nomine pœnæ*: And the better opinion of the Court was, that the Action of Debt did not lie. *Vide: Fitz N.B.* 120. seems contrary.

5. Jacobi, at the Sessions at Newgate.

204

IT was adjudged upon the Statute of 1 *Jacobi*, of desperate Stabbing to be Felony without Clergy, That because that the party had a cudgell in his hand, That that was a weapon drawn within the intent of the Statute. And the party was thereupon arraigned of Felony, and not of Murder, and admitted to his Clergy.

Mich.

Mich. 5 Jacobi, in the Kings Bench.

205

NOte, It was holden by the whole Court, That if a man appeareth upon a *Scire facias*, That he ſhall not have an *Audita Querela*, becauſe he had notice *in facto*; otherwiſe if he had appeared upon the 2. *Nichil* returned, which amounts to a *Scire feci*, for there he hath not notice in fact; But it was ſaid, That the courſe is otherwiſe in the Common Pleas.

Mich. 6. Jacobi, in the Kings Bench.

206 JOHNSON'S Caſe.

IN an Accompt, the Defendant was adjudged to account; and the parties were at iſſue before Auditors, and the Plaintiffe was Nonſuit: The Queſtion was, Whether he ſhould have a *Scire facias* againſt the Defendant to account upon the firſt Originall; and the better opinion of the Court was, That he ſhould not; but ſhould be put to a new Writ of Account according to the opinion of *Townſend*, in 1. *H.* 7. againſt 21. *E.*3. and 3. *H.*4.

Mich. 6. Jacobi, in the King's Bench.

207

NOte, It was holden by Juſtice *Williams*, and not denied by any other of the Juſtices, That if Lands be given to one, and his heir, that the ſame is a Fee-ſimple, becauſe the word (*Heir*) is *Collectivum.*

Mich. 6. Jacobi, in the Kings Bench.

208 HARLOW *and* WOOD'S Caſe.

IN an Action of Trover and Converſion, the Caſe was, A ſtranger delivered the Horſe of *Harlow* to an Inholder: *Harlow* came to

him, and demanded his horſe, who refuſed to deliver it to him if hee would not ſave him harmeleſſe and indamnified. But becauſe the pleading was, *Quod quidem homo* did deliver to him, and did not ſhew his name certain; The Plea was adjudged not to be good.

Mich. 6. Jacobi, in the Kings Bench.

209 Sir ROBERT BARKER and FINCHE's Caſe.

A Man made a Leaſe for years rendring Rent at Michaelmas and the Annunciation of our Lady; he in the reverſion bargained and ſold the ſame to a Stranger, who gave notice thereof to the Leſſee; The day of the payment came, the Leſſee paid the rent to the Bargainor, and then the Deed was enrolled. The queſtion was, Whether the Bargainee ſhould have the rent by relation, ſo as the Bargainor ſhould be charged in account to the Leſſee for the rent firſt paid. And the Court was of opinion, That the Bargainee ſhould not have the rent. *Dodderidge* Serjeant, If the rent be paid to an adminiſtrator who hath right for a time, and afterwards a Will is found and proved, ſo as it appeareth upon the matter that there was an Executor, and by conſequence no adminiſtation could be; the rent ſhall be paid by him again to the Executors. *Quære.*

Mich. 6. Jacobi, in the Kings Bench.

210 Griſſell *and Sir* Chriſtopher Hodſdens *Caſe.*

IN this Caſe it was agreed for Law, That if two Lords be Tenants in Common of a Waſte, and each of them hath a Court, in which are divers By-lawes made; it ought to be preſented by the Homage, That ſuch a one hath not any thing in the Common *ad exhæredationem Domini*, and not *Dominorum*, notwithſtanding that they are Tenants in common.

Mich. 6. Jacobi, in the Kings Bench.

211 LEE and SWAN's Caſe.

AN Action upon the Caſe was brought for ſpeaking of theſe words, viz. The Plaintiffe being a Town Clark, took forty ſhillings for a Bribe. And by the whole Court the words adjudged Actionable.

Mich. 6. Jacobi, in the King's Bench.

212 BRIGG'S Caſe.

ACtion for the Caſe for words, You have bought a Roan ſtollen Horſe, knowing him to be ſtollen. It was adjudged, That the words were Actionable.

Mich. 6. Jacobi, in the Kings Bench.

213

IT was adjudged in this Court, That an *Ejectione firme* doth lie *de aqua curſu.*

Mich. 6. Jacobi, in the Kings Bench.

214

A Man was indicted for a common Barrator, *Anno Regni Domini noſtri* Jacobi *ſexto*; and the word [*Regis*] was left out of the Indictment, and for that cauſe the Indictment was quaſhed. It was *Nelſon* and *Toyes* Caſe.

Mich

Mich. 6. Jacobi, in the Kings Bench.

215

IT was adjudged in this Court, That if the Wife of a Leſſee for years doth aſſent a to Livery made of the houſe in the abſence of her Huſband, although that the ſervants and children be, and continue in the houſe, that it is a good Livery. *Quære,* If the wife notwithſtanding her aſſent doth continue in the houſe. But if a man doth commit his houſe to his ſervants, and the one doth aſſent to the Livery, and departeth the houſe, if the other do continue there, and Livery be made, it is no good Livery of Seiſin.

Mich. 6. Jacobi, in the Kings Bench.

216

IT was holden for Law in this Court, That if a man do offend againſt any Penal Law, the Informer ought to begin his Suit within one year after the Offence done, otherwiſe he ſhall not have the moity of the Penalty. And if the Informer hath put in his Information, although that the party be not ſerved with Proceſs to anſwer it, yet the ſame doth appropriate the Penalty unto him.

Hill. 6. Jacobi, in the Common Pleas.

217 PEREPOYNT'S Caſe.

PErepoynt procured one to convey the daughter of a Gentleman, and to marry her to a Ploughman in the night, and procured a Prieſt to marry them, and was there preſent, for which matter he was excommunicate by the Ordinary of the Dioceſs; and after abſolution he was for the ſame committed to Priſon by the High Commiſſioners. It was holden by the Court, That matters concerning Tithes, Marriage, or Teſtaments, are not examinable before them: yet becauſe that he had ſuffered impriſonment for ſuch things; and that neither the Statute of 23. *H.* 8. nor the Cannon doth extend to the High Commiſſioners; it was reſolved, That if upon ſubmiſſion to the Commiſſioners, they would not ſet him at liberty, that this Court would do it.

Mich.

Mich 6. Jacobi, in the Star-Chamber.

218

IT was reſolved by the whole Court of Star-Chamber, That if a man doth aſsiſt one who is a Plaintiffe in that Court, that it is not maintenance, becauſe that it is for the benefit and advantage of the King: But if a man do aſsiſt an Informer in another Court, in an Information upon a Penall Law; the ſame is ſuch a Maintenance for which he may be puniſhed in this Court.

6. Jacobi in the Common Pleas.

219

IT was adjudged in this Court, That if Land which was ſowed be leaſed to one for life; the Remainder to another for life, That if the Tenant for life dieth before the ſeverance of the Corn, that he in the Remainder ſhall have the Corn.

Mich. 6. Jacobi, in the King's Bench.

220

THE Leſſee of a Copy-holder was diſtrained for rent behind in the time of his Leſſor; and the Leſſee did aſſume and promiſe, That he would ſatisfie the Lord his rent, if he would ſurceaſe the ſuing of him. It was adjudged by the whole Court, That it was a good Aſſumpſit, and a good conſideration.

Mich. 7. Jacobi, in the King's Bench.

221 PIGGOT and GODDEN'S Caſe.

NOte; It was in this Caſe agreed by the whole Court, and ſo adjudged, That in an *Ejectione firme* a man ſhall not give colour, becauſe the Plaintiffe ſhall be adjudged in by title.

Mich.

Mich. 7. Jacobi, in the King's Bench.

222

TWo Tenants in Common brought an Action upon the Case for stopping of a water course against a Stranger, whereby the profits of their Lands were lost, and it was shewed in pleading that the water had run time out of minde, *& ante diem Obstructionis*: and Judgment was given for the Plaintiffs: And two Exceptions were taken by *Coventry*. First, that Tenants in Common ought to have several Actions, and not have joyned. Secondly, that the Custom ought to have been pleaded to continue *ante & usque diem Obstructionis*, and both the Exceptions were disallowed by the Court; and it is not like the Case of Falsefails; in which Action they must join because the same is in the Realty.

Mich. 7. Jacobi, In the King's Bench.

223 CROSSE *and* CASON'S Case.

AN Action of Debt was brought upon due Obligation, the condition of which was, that the Obligee the 18. of August *anno* 4. *Jacobi*, should go from *Algate* in *London* to the Parish Church of *Stow-Market* in *Suffolk*, within 24. hours; and the Obligee shewed, that he went from *Algate* to the said place, and because he did not shew in his Declaration in what Ward *Algate* was: It was holden not to be good.

Mich. 7. Jacobi, in the King's Bench.

224

NOte, That it was adjudged to be Law by the whole Court, that if a man bail goods to another at such a day to rebail, and before the day the Bailee doth sell the goods in market overt: Yet at the day the Baylor may seise the goods, for that the property of the goods was alwaies in him; and not altered by the Sale in market overt.

Mich.

Mich. 7. Jacobi, in the Common Pleas.

225 ZOUCH *and* MICHIL'S Case.

AN Enfant Tenant in tail did suffer a Recovery by his Gardian; It was holden by the Court, that the same should binde him, because he might have remedy over against the Gardian by Action upon the Case: But otherwise if he suffer a Recovery by Attorney, for that is void, because he hath not any remedy over against him, as it was adjudged 4. *Jacobi*, in *Holland* and *Lees* Case.

Pasch. 8. Jacobi, In the Common Pleas.

226 WILSON *and* WORMAL'S Case.

IN an Evidence given to a Jury, it was admitted without Contradiction, that if judgment in an action of Debt be given against Lessee for years, and afterwards the Lessee alieneth his Term, and after the year the Plaintiff sueth forth a *Scire facias*, and hath Execution; That the Terme is not lyable to the Execution, if the Assignement were made *bona fide*. Also in that *Cook* Chief Justice said, that if Lessee for years assignee over his Terme by fraud to defeat the Execution: And the Assignee assigneth the same over unto another *bona fide*, that in the hands of the second Assignee, it is not lyable to Execution: Also in this Case it was said for Law, That if a Man who hath goods but of the value of 30. pound, be endebted unto two Men, viz. to one in 20. pound, and to another in 10. pound: and the Debtor assignes to him who is in his debt 10. pound, all the goods which are worth 30. pound, to the intent that for the residue above the 10. pound debt, he shall be favourable unto him: This Assignement is altogether void, because it is fraudulent in part. But *Foster* Justice said, that it shall not be void for the whole, but onely for the surplusage, as *Twynes* Case, *C.* 3. *part.* 81. *Quære.*

Pasch. 8. Jacobi, in the Common Pleas.

227 BRISTOW *and* BRISTOWE'S Case.

IN an Action of Covenant, the Case was this, Lessee for 90. years made an Assignement for part of the Term, viz. for 10. years,

and the Aſſignee covenanted to repair &c. The firſt Leſſee deviſed the Reverſion of the Term, and dyed; the Deviſee of the Reverſion brought an Action of Covenant againſt the Aſſignee for 10. years; and the queſtion was, If the Deviſee of the Reverſion being but a Termor, were within the Statute of 32. *H.* 8 of Conditions? Secondly, whether the Action would lye, becauſe no notice was given of the grant of the Reverſion. *Dodderidge* Serjeant, to the firſt point ſaid, that this grant of the Reverſion was not within the Statute; for the Statute is, that the grantee ſhall have ſuch remedy as the ſaid Leſſors or Grantors themſelves or their heirs or ſucceſſors ſhould have had, ſo as the Statute ſhall be intended of a Reverſion in Fee; for the Statute doth not provide, but in caſe where heirs or ſucceſſors ſhall have Action, and not in caſe where the Action doth belong to Executors. For the ſecond point, he relyed upon *Mallories* Caſe, where it is ſaid, that the Tenant is to have notice of the Aſſignement of the Reverſion. *Cook* Chief Juſtice, I hold that the Aſſignee of the Reverſion for years in this Caſe ſhall have an Action of Covenant by the Statute: It was *Leonards* Caſe in the time of the Lord *Dyer*, when I was a Reporter in this Court In *Leonards* Caſe Leſſee for years leaſed over part of the Term upon condition (which is ſo much as a Covenant,) and afterwards granted the Reverſion: and it was ruled, that the grantee might enter for the condition broken, and the reaſon (as I remember) was, becauſe that Executors are named in the Statute; (but I will not charge my memory with the reaſon,) but I am well aſſured that the Caſe was ruled as I have ſaid. *Dodderidge*, It is ſo, that within the Statute Executors are named, but not the Executors of him who hath the Reverſion, but onely the Executors of the Leſſee, and therefore the naming of Executors in the Statute doth not make againſt us. But the Lord *Cook* ſaid, What anſwer you to *Leonards* Caſe? For the third point, *Cook* Chief Juſtice, and *Foſter* Juſtice held, that there needed not any notice in this Caſe; becauſe there is not any Penalty in the caſe, as was in *Mallories* caſe: For there was a condition. *Warbarton* Juſtice, I doubt the firſt point, for he who bringeth the Action upon the Statute, ought to have the whole Reverſion: and ſo is *Winters* caſe, in *Dyer* 309. *Cook* and *Foſter* ſaid, It needs not that he who is to take advantage by this Statute, ſhould have the whole Reverſion; for it hath been adjudged, That if the Reverſion be granted in tail, that the grantee ſhall take advantage of this Statute, and ſhall enter for the condition broken.

Paſch. 8. Iacobi, in the Common Pleas.

228 CANDICT *and* PLOMER's Caſe.

THe Pariſhoners had uſed time out of memory of man, &c. to chuſe the Pariſh Clark of the Church of St. *Auſtins* in *Canterbury*; and the old Clark being dead; they choſe a new Clark, and the Parſon by force of a new Canon choſe another man for the Clark: upon which, the Clark choſen by the Pariſhoners was ſued in the Spiritual Court, and he had a Prohibition: And afterwards he was ſued again in the Spiritual Court, for ſetting of the Bread upon the Communion Table, and for ſinging in another Tune then the Pariſhoners and the other Clark did, and was deprived by Sentence there. *Haughton* Serjeant moved for a Prohibition, and ſaid, that although the laſt Suit in the Spiritual Court was not directly for the uſing of the Office of Clark, yet by the matters contained in the Libell, it is drawn in queſtion, whether he were lawfull Clark or not, and therefore prayed a Prohibition. *Cook*, You ſhall have a Prohibition, for the Canon is againſt the common Law. For particular cuſtoms are part of the common Law: and ſaid, that the Canon Law would not endure Gun-ſhot. And he ſaid, that by the Suit in the Spiritual Court, they would examine whether he were a Lawfull Clark or not: For if he be a Lawfull Clark, then he hath good authority to ſet the Bread upon the Communion Table. *Haughton*, But what ſhall we do? for we are deprived by Sentence given there? *Cook*, There is no queſtion, but that the Prohibition lyeth notwithſtanding the Sentence there; and for the Deprivation, it is meerly void. For the Clarkſhip is a Lay Office, and may be executed by a Lay Man, and therefore the Ordinary hath no power to deprive him. But he may have an Action as Clark notwithſtanding the Deprivation, for ſo is the Book in 8. *Aſſ.* 29. for an Hoſpital. And I wiſh, that an Information be drawn againſt them for holding plea of a thing, which is a meer Lay thing: as it was *in temps. H.* 8. *Br. Caſes. Waimeſley* Juſtice, The Office is Lay, and the Deprivation by the Ordinary is void; For he cannot deprive him becauſe he hath nothing to do in the Election: and a Prohibition was granted. At another day, the Caſe was moved again, and the Court was of the ſame opinion, that the Clark could not be deprived, becauſe the Clarkſhip was a Lay Office. And 3. *E.* 3. *tit. Annuity* 40. was cited, and 18. *E.* 3. Where a Formedon was brought of the Office of Serjeancy of the Church of *L.* But *Cook* ſaid, the ſame day in another caſe, which was moved in Court, and gave it for a rule, that after Sentence given in the Spiritual Court,

he would not grant a prohibition, if there were not matter apparent within the proceedings; For I will not allow, that the party ſhall (to have a Prohibition) ſhew any thing not grounded on the Sentence to have a Prohibition, becauſe he hath admitted of the Juriſdiction; and there is no reaſon for him to try if the ſpirituall Court will help him, and afterwards at the common Law to ſue forth a Prohibition. All which was agreed by the whole Court.

Paſch. 8. Jacobi, in the Common Pleas.

229

A Writ of Eſtrepment was granted in Waſte, becauſe that for Waſte done pendant the Writ, the Plaintiffe cannot recover damages. *Per totam Curiam.*

Paſch. 8. Jacobi, In the Common Pleas.

230 PITS *and* WARDAL'S Caſe.

Pits the Butler of *Lincolnes-Inne* brought an Action of Debt againſt *Wardall*; and declared upon a Bond with Condition indorſed for the performance of an Arbitrement: The Defendant pleads in barre, That the Arbitrators *nullum fecerunt arbitramentum*; the Plaintiffe replied, That they did make an Arbitrement: *viz.* That the Defendant and one of the Arbitrators ſhould enter into a Bond of eight pound to the Plaintiffe; And that after the Bond entred into, that the Plaintiffe and Defendant ſhould releaſe all Actions each to other, and ſaid, That the Defendant and the Arbitrator did not enter the Bond to the Plaintiffe; The Defendant did maintain his barre; viz. *quod nullum fecerunt arbitramentum*; upon which iſſue was joyned, and it was found for the Plaintiffe. *Dodderidge* for ſtay of judgement, ſaid, That upon the Plaintiffes own ſhewing, it appeareth, That the Arbitrament is void; for the Arbitrament is, that a ſtranger, viz. one of the Arbitrators, ſhould enter Bond, and alſo that after the Bond entred into, That the Plaintiffe ſhould releaſe all actions, whereby the Bond ſhould be releaſed, and therefore it was void; and a void arbitrament is no arbitrament. It was admitted by the Court, that the arbitrament was void as to the Bond, to be entred into by the Arbitrator, and alſo that it was void as to the extinguiſhment of the Bond, by the releaſe of all Actions: But the Court conceived, That the Arbitrament

bitrament did conſiſt of two matters which were diſtinct, and might be ſevered. For although that the Arbitrament be void as to one matter, yet it ſhall ſtand good, and ſhall be a good Arbitrament for the other matter. And *Foſter* Juſtice ſaid, That in that caſe, the Award to make the Releaſe might be ſevered; viz. That it ſhould be good for all Actions except the Bond. *Cook* contrary, And ſaid, That it is ſo entire that it cannot be divided. But the Court conceived, That the Arbitrament was good as to the Bond to be made by the Defendant, although it were void as to the Arbitrator. At another day *Dodderidge* ſaid, That the Plaintiffe had not alledged any Breach of the Arbitrament: for he hath put it, That the Defendant and the Arbitrator had not entred into the Bond; and although they two joyntly had not entred into the Bond; yet it might be that the Defendant alone had entred into the Bond, and it needed not that the Arbitrator enter the Bond; for as to him, the Arbitrament was void. And that Exception was allowed as a good Exception by the whole Court. For they ſaid, That the Plaintiffe ought for to ſhew, and alledge a breach according to the Book of *L.* 5. *E.* 4. 108. And they ſaid, That although it be after verdict, yet it is not remedied by the Statute.

Paſch. 8. *Jacobi, in the Common Pleas.*

231 FOLIAMBES Caſe.

IN a Writ of Dower brought by the Lady *Foliambe*, It was agreed by the whole Court. That if the Husband maketh a Leaſe for years, rendring rent, and dieth; the wife ſhall recover her Dower, and ſhall have preſent Execution of the Land, and thereby ſhe ſhall have the third part of the Reverſion, and of the Rent, and execution ſhall not ceaſe: And all the Juſtices ſaid, That the Sheriffe ſhould ſerve execution of the Land as if there were not any Leaſe for years, for it may be that the Leaſe for years is void; And although it be ſhewed in pleading, that there is a Leaſe for years, the wife cannot anſwer to it; and it may be there is not any Leaſe, and therefore the Execution ſhall be generall; And he who claimes the Leaſe for years, may reenter into the Land, notwithſtanding the Recovery and the Execution of the Dower. And if he be ouſted, he ſhall have his Action: *Nichols* Serjeant, who was of Councell againſt the Demandant, ſaid, That he would agree that the Caſe in *Perkins* 67. was not Law. But the Juſtices ſaid, That there is a difference betwixt the Caſe of *Perkins*, and this Caſe: for in the Caſe in *Perkins*, the Husband had but an eſtate in Remainder, ſo as no rent or attendancy was due; ſo as the wife during

ring that Term could not have any benefit. Alſo in this caſe, it was agreed by the Court, That after judgement for part, the Demandant might be Non-ſuit for the reſidue, and yet have execution of that part for which he had judgment.

Paſch. 8. Jacobi, in the Common Pleas.

232 RAPLEY *and* CHAPLEIN'S Caſe.

IT was ruled by the whole Court, That if a Cuſtome be alledged, That the eldeſt daughter ſhall ſolely inherit, that the eldeſt ſiſter ſhall not inherit by force of that Cuſtome. So if the Cuſtome be, That the eldeſt daughter and the eldeſt ſiſter ſhall inherit, the eldeſt Aunt ſhall not inherit by that Cuſtome; And ſo if the Cuſtome be that the youngeſt ſon ſhall inherit, the youngeſt brother ſhall not inherit by the Cuſtome. And *Foſter* Juſtice ſaid, That ſo it was adjudged in one *Denton's* Caſe.

Paſch. 8. Jacobi, in the Common Pleas.

233 SEAMAN'S Caſe.

Barker Serjeant prayed the opinion of the Court in this Caſe. Leſſee for an hundred years made a Leaſe for forty years to *Thomas Seaman*, if he ſhould live ſo long; and afterwards he leaſed the ſame to *John* his ſon, *Habendum* after the Term of *Thomas* for 23. years, to be accounted from the date of theſe preſents: The Queſtion is, If the Leaſe to *John* ſhall be ſaid to begin preſently, or after the Term of *Thomas*. And the Juſtices were cleer of opinion, That the Leaſe to *John* ſhall not be accounted from the time of the date, but from the end of the Term of *Thomas*, becauſe, that when by the firſt words of the Limitation, it is a good Leaſe to begin after the Term of *Thomas*; it ſhall not be made void by any ſubſequent words. And *Cook* Chiefe Juſtice ſaid, That this is no new reaſon, for there is the ſame reaſon given in 2. *E.* 2. *Grants*. And he put the Caſe in *Dyer* 9. *Eliz.* 261. and ſaid, That if the Limitation be not certain when the Term ſhall begin, it ſhall be taken moſt beneficiall for the Leſſee.

Paſch.

Paſch. 8. Jacobi, in the Common Pleas.

234 WARD *and* POOL's Caſe.

AN Action upon the Caſe was brought for ſpeaking theſe words, Thou mayeſt well be richer then I am, for thou haſt coined thirty Shillings in a day, thou art a Coiner of money,&c. I will juſtifie it: It was moved in arreſt of Judgment, That the words were not Actionable, becauſe he might have a good Authority to coine Money; for men who work in the Mint, are ſaid to coine Money, and are called Coiners of Money; And ſo it was adjudged, *Quod Querens nihil capiat per Billam.*

Paſch. 8. Jacobi, in the Common Pleas.

235 CHALK and PETER's Caſe.

Chalk brought a *Replevin* againſt *Peter*; the Defendant did avow the taking as Bailiff of Sir *Francis Barrington* in ſixteen Acres of wood in *Hatfield* Chaſe; and ſhewed that an Arbitrament was made by the Lord *Burghley* late Lord Treaſurer, betwixt the Lord *Rich* and the Anceſtors of Sir *Francis*; by which it was awarded, That the ſaid Anceſtors of the ſaid Sir *Francis Barrington* and his Heirs ſhould have the herbage of a certain number of Acres within the ſaid Chaſe; and alſo that he ſhould have to him and his Heirs the Trees and Buſhes of the ſaid number of Acres within the ſaid Chaſe; and that he might fell and cut ſixteen Acres every year of the ſaid Acres; and that he ſhould encloſe them according to the Laws and Statutes of the Realm; and that Aſſurance was made by the Lord *Rich* accordingly; and that the ſame was confirmed by a ſpeciall Act of Parliament, with a ſaving of the right and intereſt of all ſtrangers; and ſaid, That Sir *Francis Barrington* did incloſe and cut down ſixteen Acres, and did encloſe the ſame, and there took the Defendants cattel Damage feaſants; upon which the Defendant did demurr in Law. The Queſtion in the caſe was, If by the Statute of 22. *E.* 4. *cap.* 7. or the Statute of 35. *H.* 8. *cap.* 17. which give Authority to make incloſures of Woods, the Commoner ſhall be excluded. *Harris* Serjeant, I conceive, That the Commoner ſhall be excluded by the Statute of 22. *E.* 4. *cap.* 7. which gives Authority to incloſe and exclude all Beaſts, and therefore the Commoner ſhal

be

be excluded: But it will be objected, that the Statute is, that the Owners of the Ground may encloſe: But Sir *Francis Barrington* is not Owner, for the Lord *Rich* is the Owner of the Ground; I ſay, that Sir *Francis Barrington* is the Owner, for he hath the Herbage and the Trees, ſo as he hath all the profit, and he who hath the profit ſhall be ſaid to have the Land it ſelf: and he vouched *Paramour* and *Yardleys Caſe in Plow. Com.* & *Dyer* 285. and 37. *H.* 6. 35. and 17. *E.* 4. 16. Alſo the Statute is in the disjunctive, viz. the Owner, or the Vendee: and although he be not Owner of the ſoil; yet he is Vendee of the Trees. Secondly, It will be objected, that the ſame is not a general Law of which the Judges are to take notice, and therefore he ought to plead it: I hold it to be general enough, of which you are to take knowledge although it be not pleaded: & he cited *Hollands* Caſe. Thirdly, It will be objected, that by ſuch general Law the particular intereſt of a private man ſhall not be deſtroyed. To that I ſay, that ſuch general Statutes will include ſuch particular intereſts, and therefore the Caſe betwixt Sir *Foulke Grevill* and *Stapleton* was adjudged, that where *Willoughby*, Lord *Brookes* had Lands to him by Act of Parliament, with authority to make Leaſes for one life, and no more. By the Statute of 32. *H.* 8. of Leaſes, that authority is enlarged, and he might make Leaſes for three lives. *Haughton* Serjeant, Although he be Owner of the profits, he is not Owner of the ſoil, and there is a difference betwixt the ſame and the ſoil. And the Statute ſpeaks of Trees growing in his own ſoil. *Foſter* Juſtice, The Arbitrament, the Aſſurance, and the eſpecial Act of Parliament is nothing to the purpoſe in this Caſe, and to plead them was more then was needfull; For by the Arbitrament and the Aſſurance, the Commoner being a third perſon, cannot be bounden in which he was not a party; And by the ſpecial Act of Parliament he ſhall not be bound, becauſe the Act is againſt the Lord *Rich*, and his Heirs, ſo as a ſtranger ſhall not be bound by the Act: And therefore upon the Statute of 18. *Eliz. cap.* 2. of Patents, the Caſe was, That the Queen made a Leaſe for years, which was void for not reciting of a former Leaſe; and afterwards ſhe granted the Inheritance unto another. And then came the Statute of 18. *Eliz.* which confirmed all Patents againſt her, her Heirs and Succeſſors; by that Statute the Grantee in Fee was not bounden, but he might avoid the Leaſe for years, for the Statute is againſt the Queen and her ſucceſſors; and that caſe was adjudged. But our caſe is without doubt, as to that point, for the right and intereſt of eſtrangers is ſaved by the Act: then all reſts upon the Statute of 22. *E.* 4. and I conceive that the ſame is a ſpeciall Act, and ought to be pleaded; for it is not generally of all Woods, but only of Woods in Forreſts and Chaſes. But admitting it to be a generall Act, yet I conceive, That it was not the meaning of it to exclude a Commoner; and that appears fully by the later words of the Statute,

viz.

viz, Without licence of &c. which excludes only the Owners of the Forreſt; and it was not the meaning that he might incloſe without the leave of the Commoner. One thing hath troubled me in the Statute, becauſe it is ſaid that before that time he could not incloſe more then for 3. years; ſo as before that ſtatute he might encloſe for 3 years, as it ſeems, without Licence, and now by the Statute, for 7 years. Alſo for another cauſe I conceive, that the Defendant ſhall not take advantage of the Statute as he hath pleaded; for he hath pleaded that he did encloſe and cut, whereas the ſtatute ſaies, that he ſhall encloſe after the Cutting: ſo as I hold cleerely, that he hath not purſued the authority of the Stat. for upon the St. of 35. *H.*8. w^ch^ is penned contrary to this Stat. *ſcil.* that the Owner of the wood ſhall make encloſure and diviſion for the Cõmoner, and then he is to cut, I hold cleerly that after the felling he cannot make any encloſure. Alſo admitting that by the Stat. the Cõmoner ſhall be excluded, I hold that by the Stat. of 35. *H.*8. that that Stat. is repealed in that point; for the Stat. of 35. *H.*8. is, That no man ſhall fell woods wherein Commoners have Intereſt by Preſcription until he hath divided the fourth part: ſo that the Authority, if any were, is reſtrained by that Stat. if he be a Cõmoner by Preſcription, as he is in our Caſe. But if it had been a Common by grant, it had not been within the Clauſe of Reſtraint. And *Leges poſteriores priores contrarias abrogant*, eſpecially the Stat. being in the Negative, as it is here: For by a Negative Statute the Cõmon Law ſhall be reſtrained: otherwiſe, if the Stat. were in the affirmative: & for theſe reaſons I conclude, That the plaintiff ought to have Judgment. *Warburton* Juſtice contrary. All the matter reſts upon the Statute of 22. *E.*4. Firſt, I hold that the ſame is a general act, although it be particular in ſome things. So you may ſay of all ſtatutes, which are particular in ſome one point or other. I hold alſo, That the Stat. of 22. *E.*4. is not repealed in this point by the Stat. of 35 *H.* 8. becauſe they were made to ſeveral purpoſes: The one was for Forreſts and Chaſes, the other onely for other particular Woods: And I hold, that the Cõmoner ſhall be excluded; for otherwiſe the Stat. ſhould be void and contrary; *viz.* to give power to one to encloſe and exclude all beaſts; and yet to permit another to put in his cattel. And by the words of the Statute, which exclude all beaſts and cattell, the Deer ſhall not be excluded or intended, for they ſhall not be ſaid beaſts or cattel. As in 30. *E.*3. One who chaſeth a cow in a Park ſhall be ſaid within the Statute *de Malefactoribus in Parcis*: And then if the authority of encloſure be not to exclude the Deer, it ſhall be to exclude the cattell of the Commoner, and other the like eſtrangers, or otherwiſe it ſhould be to no purpoſe. As to that which hath been ſaid, That there is not a perſon who may incloſe by the Statute; the Statute is, that the Owner ſhall incloſe, or he to whom the Wood ſhall be ſold: ſo that although that hee be not Owner, yet he is to have the Trees and the profits; and the Statute doth intend, that he may incloſe who ought to have the profit: and although the ſale be not for mo-

nie, yet such a person may be said Vendee well enough; Wherefore I conclude, that Judgment ought to be for the Defendant. *Walmesley* Justice, I hold, that he hath not authoritie by the Statute to enclose: For the Statute is, When any man fels trees in his proper soile: so that he not being owner of the ground, he is not within tha Statute: and that was the effect of his argument. And as to the other point, he did not speak at all. *Cook* chief Justice: I hold, that the plaintiffe ought to have judgment: all the matter doth consist upon the Statute of 22. *E* 4 which is to be considered. And first is to be considered, what was the common Law before that Statute; and that was, That one who had a Wood within a Forrest, might fell it, as it appeareth by the Statute *de Forresta*: and the Statute of 1 *E*. 3. 2. by licence: and also he might enclose it for three yeers, as it appeareth by the Statute of 22. *E*.4. but the enclosure was to be *cum parvo fossato & haia bassa*, as it appeareth by the Register in the Writ of *Ad quod damnum*: so as before that Statute, there was an enclosure. But the Law is cleer, That before that Statute, by the enclosure, the Commoner shall not be excluded. Then wee are to consider of the Statute: And first, Of the persons to whom the Statute doth extend: and that appeareth by the preamble, to be betwixt the King and other owners of Forrests and Chases, and the owners of the Soil: so as a Commoner is not any person within the meaning of the Statute. And for the body of the Statute, you ought to intend, that the sentence is continued, and not perfected untill the end of the Statute; and the words [Without licence, &c.] prove, That no persons were meant to be bounden by the statute, but the Owners of the Forrests and Chases, and not the Commoners: Like the case in *Dyer*. And although you will expound the words of the bodie of the statute generally; yet they shall be taken according to the intent of the preamble; and therefore the Case of 21. *H*.7.1. of the Prior of *Castleacre*, although it be not adjudged in the Book, yet Judgment is entred upon the Roll; which Case is *Pasch*. 18. *H*. 7. *Rot*. 460. By which case it appeareth, that although that a Statute be made which giveth Lands to the King; yet by that statute the Annuity of a stranger shall not be extinguished. And the Case which hath been put by Justice *Foster* upon the Statute of 18. *Eliz*. was the case of *Boswel*, for the Parsonage of *Bridgwater*, That although that one who hath a lease for years of the King, which was void for misrecitall, might by the said Statute hold it against the King; yet the Patentee in Fee shall not be prejudiced by the said Statute: So I conclude, That the Commoner is not a person within this Statute of 22. *E*. 4. Secondly, It is to be considered, if a Wood, in which any one hath Common, be within the statute: and I hold, it is not, but onely severall Woods: For (as I have said) the Wood which before the statute might be enclosed for three years, was onely a severall Wood, and

and not ſuch a Wood in which any one had common. And the ſtatute of 22. *E.* 4. doth extend onely to ſuch Woods which might be felled and encloſed for three yeers: and I conceive (contrary to my Brother *Warburton*) That the Deer of the Forreſt ſhall well enough be ſaid to be beaſts and cattell. And whereas by the common Law, before this ſtatute, the encloſure was onely to be (as I have ſaid) *cum parvo foſſato & haia baſſa*, by which the Deer were not excluded: now by this ſtatute I hold, that they may make great hedges, to exclude aſwell the Deer as other beaſts. And I agree with Juſtice *Foſter*, that if he will take advantage of the Statute, that hee ought to have pleaded, that firſt hee felled, and afterwards encloſed; and *è contrà*, upon the Statute of 35. *H.* 8. *ſcil.* that hee ought firſt to divide, and afterwards to fell, &c. And alſo I agree with him, that in that point the Statute of 35. *H.* 8. being contrary, doth repeal the Statute of 22. *E.* 4. if by that Statute the Commoner ſhall be excluded. But I am of opinion with my Brother *Warburton* cleerly, That hee is a Vendee of the Trees, and ſo within the Statute: for it is not neceſſary, that in the Grant there be the word [Sell,] or that money by given, nor that it be a contract for a time onely, and not to have cantinuance, as it is in our caſe. But he who hath the Trees to him and his heirs, ſhall be ſaid to be a Vendee well enough. As to the other matter which hath been moved, Whether the Statute of 22. *E.* 4 be a generall law or not: I hold cleerly, that we are to take knowledg of it although it be not pleaded, becauſe it concerneth the King; for it is made for the Kings Forreſts: and of all the Acts made between the King and his ſubjects, wee ought to take knowledg: for ſo was *Stowel's* Caſe. And alſo it was adjudged, that wee ought to take knowledg of the act concerning the Creation of the Prince, becauſe it concerneth the King. And *Cook* in his argument ſaid, That if there had not been a ſpeciall proviſin for the Commoner in the Statute of 35. *H.* 8. the Commoner had not been excluded by that Statute. And afterwards Judgment was entred for the plaintiffe.

Paſch. 8. *Jacobi, in the Common Pleas.*

236

NOte, That it was holden by three of the Juſtices, viz. *Walmeſley*, *Warburton* and *Foſter* (*Cook* and *Daniel* being abſent) for law cleerly, That a Tenant at will cannot by any cuſtome make a Leaſe for life by licence of the Lord: and that there cannot be any ſuch cuſtome for a leaſe for life, as there is for a leaſe for years.

Paſch. 8. Jacobi, In the Common Pleas.

237 BERRY'S Caſe.

NOte, That upon an Evidence given to a Jury, in a Caſe betwixt *Berry* and New Colledg in *Oxford*, it was ruled by *Walmeſley*, *Warburton* & *Foſter*, Juſtices, in an Action of Treſpaſs, If it appear upon the Evidence that the plaintiff hath nothing in the land but in common with a ſtranger; yet the Jury ought to finde with the Plaintiff; and if the Defendant will have advantage of the Tenancy in common in the plaintiff, he ought to have pleaded it. *Nichols* Serjeant was very earneſt to the contrary, and took a difference, where the Plaintiffe and Defendant are Tenants in common, and where the Plaintiff is tenant in common with a ſtranger. But he was over-ruled; the action was an action of Treſpaſs, *Quare clauſum fregit*, &c. *Cook* and *Daniel* were abſent.

Paſch. 8. Jacobi, in the Common Pleas.

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IT was holden by *Walmeſley*, *Warburton*, and *Foſter*, Juſtices, That if a Rent be granted to one and his heirs for the life of another man, and the grantee dieth; that his heir ſhall not be an occupant of the Rent. And *Foſter* ſaid, that the reaſon was, becauſe he cannot plead a *Que eſtate* of a Rent. And *Warburton* held, that the heir ſhould have the Rent as a Freehold deſcended; and for that he cited 26. *H.* 6. *Statham Recognizance.* But *Foſter* ſaid, that he ſhould not have the Rent at all. *Warburton* and *Walmeſley* doubted whether the Rent were deviſable by the Statute; and they ſaid, that although the heir ſhould have it by deſcent, yet it ſhould not be in the nature of a deſcent of Inheritance; for he ſhould not have his Age. *Cook* and *Daniel* were abſent.

Paſch. 8. Iacobi, in the Common Pleas.

239 HEYDON *and* SMITH'S *Caſe.*

IN an Action of Treſpaſs the Plaintiff declared of breaking of his Cloſe, and cutting down of a Tree, viz. an Oak. The Defendant pleaded, that

that it was his Free-hold; The plaintiff in his Replication ſhewed that he held of the Defendant by Coppy of Court Roll a Tenement, whereof the place in queſtion is parcell: And that the Cuſtome of the Manor is, That all the Copy-holders within the Manor have uſed to take wood for houſe-bote, hay-bote, *&c. et pro ligno combuſtibili in dicto tenemento.* And ſaid, that he had alwayes preſerved the wood and trees growing upon the ſaid Tenement; And that he had nouriſhed and foſtered the ſaid Oake; And that ſufficient wood was not left upon the ſaid Tenement for houſe-bote &c. upon which, the Defendant did demurre in Law. *Foſter* Juſtice, Judgment ought to bee given for the plaintiff; I hold that a Copy-holder, of common right, without any Cuſtome, ſhall have wood for Reparations and for fire-bote, and ſo is 9. *H.* 4. *Fitz.* Waſt 59. the opinion of *Hall*; And I hold that the plaintiff hath an Intereſt in the Trees, according to *Palmers Caſe. C.* 5. part. And 2. *H.* 4. 12. is, That a Coppy-holder may bring An Action of Treſpaſs for the Trees. And I hold, That without a Cuſtome, the Lord cannot fell the trees growing upon the Copy-hold no more then upon a Leaſe for years. But in this Caſe by Implication of Cuſtome, the Lord may take the Trees, if he leave ſufficient for Reparations, &c. For the Cuſtome is, That a Copyholder ſhall have ſufficient for Reparations; by which is implyed, that he ſhall not have more, and then the Reſt the Lord ſhall have. And I am of opinion, that in this Caſe, and in caſe where the trees are excepted upon a Leaſe, that the Lord and the Leſſor may enter and take the Trees, although there be not any clauſe of ingreſſe, or regreſſe. But in the principall Caſe, becauſe there are not more Trees then are ſufficient for Reparation, the Lord cannot take them, but Treſpaſſe lieth againſt him. *Warburton* Juſtice, The matter of preſcription is not materiall in this caſe: for of common right a Copyholder ought to have Trees for Reparations; and to that purpoſe, he hath a ſpeciall propertie. But the onely queſtion in this Caſe (as I conceive) is, If one who hath a ſpeciall property, may bring an Action of Treſpaſſe againſt him who hath the generall propertie? And I conceive, that he may well enough. As if I lend my horſe for a week, and within the week I take him again, Treſpaſſe lieth. *Walmeſley* Juſtice, For the ſubſtance, I am of opinion for the Plaintiff, but I doubt; For I would not that Copyholders have ſo great libertie; and he hath preſcribed to take all trees: and to take them *ad libitum*, is too great a liberty. And I hold, that a Copyholder hath no greater property then one who ought to have Eſtovers: And in this caſe hee ought to have ſaid, *quando opus fuerit*: and he ought to have ſhewed, that the houſes were in decay for want of Reparations, for which cauſe *opus fuerat, &c.* And ſo for the pleading, I hold that it is not ſufficient.

Cook chief Juſtice, The Plaintiff ought to have Judgment: For I hold

hold cleerly, That the Lord cannot take trees without leaving ſufficient for Reparations, no more then he can pull down or overthrow the houſe of the Copyholder. For of common right, without Cuſtome or preſcription, the Trees do belong unto the Copyholder for Reparations, and for that purpoſe hee may take them without any Cuſtome; and the Lord cannot take the Trees without leaving ſufficient for the Copyholder, if there be not a ſpeciall Cuſtome ſo to do. But I hold, that without any cuſtome the Lord may take the Trees, if he leave ſufficient to the Copyholder for the Reparations. *Mich.* 25. & 26. *Eliz. Doylies* Caſe. A Copyholder, who hath uſed to take Timber for Reparations, brought an action of Treſpaſſe. *Trinit.* 26. *Eliz.* An action of Treſpaſſe was brought by a Copyholder againſt the Lord. *Paſch.* 37. *Eliz.* the Caſe of *Mutford* Wood. *Trinit.* 40. *Eliz. Stebbings* Caſe; but there the action was an action upon the Caſe. To the Exceptions taken by Juſtice *Walmeſley*, that the Plaintiff ought to have ſhewed that the houſes wanted Reparations; I hold, as hee ſaid, That if the action had been brought againſt him, and hee juſtifie the cutting, hee ought to have ſhewed that the houſes wanted Reparations. But in our Caſe he brings the Action againſt another, which lyeth, although that the houſes were not then in decay. And for the ſignification of the word *Houſe-boot*, &c. *Bote* is an ancient Saxon word, which ſignifies in ſome caſe *Recompence*, and in ſome caſe *Reparatio*. For the manner of preſcription, That all the Tenants may take wood *pro ligno combuſtibili in dicto Tenemento*, the ſame is no good preſcription, That all ſhall take to burn in that Tenement. But for the reaſons beforeſaid, Judgment was given for the Plaintiffe.

Paſch. 8. *Jacobi, in the Common Pleas.*

240 NEWTON *and* RICHARD'S *Caſe.*

IT was ruled by the whole Court in an Action of Treſpaſſe, *Quare clauſum fregit, & cuniculos ſuos vel ipſius A. &c. cepit, &c.* was good.

Paſch.

Paſch. 8. Jacobi, In the Common Pleas.

241 MEERES *and* KIDOUT's Caſe.

UPon an Evidence to a Jury in this Caſe, it was Ruled by the whole Court, That if there be Copyholder for life, and the Lord leaſeth for years, and the Copy-holder commit a forfeiture, that the Leſſee may enter for the forfeiture. And *Cooke* Cheife Juſtice ſaid, That if there be Tenant for life, the Remainder for life; If the Tenant for life committeth a forfeiture, he in the Remainder for life may enter; and that the Caſe 29. Aſſ 64. is not Law. For the particular eſtate in poſſeſſion is determined by the forfeiture. And if hee in the Remainder could not enter, then it ſhould be at the will of the Leſſor whether hee ſhould ever have it. The ſame Law is, if the Remainder be for yeers. *Foſter* Juſtice, The reaſon that is given for an Entrie for a forfeiture, is, becauſe that the Reverſion or Remainder is deveſted by the Feoffment. But in this Caſe, becauſe it is but *intereſſe termini*, nothing is deveſted: For notwithſtanding the Feoffment, the *Intereſſe termini* may be granted: to which *Cook* agreed. But *Foſter* ſaid, that hee did agree in opinion with *Cook*, becauſe that the particular eſtate was determined. The cauſe of forfeiture was, becauſe that the Copiholder had made a leaſe for life.

Paſch. 8. Iacobi, in the Common Pleas.

242 *Dr.* NEWMAN's Caſe.

IN this Caſe it was ſaid by *Cook* Chief Juſtice, That it had of late time been twice adjudged, that if Timber trees be oftentimes topped and lopped for fuell, yet the tops and lops are not Tithable; for the body of the trees being by law diſcharged of Tithes, ſo ſhall be the branches: and therefore he that cutteth them, may convert them to his own uſe, if he pleaſe.

Paſch.

Paſch. 8. Jacobi. In the Exchequer Chamber.

243 KERCHER's Caſe.

AN Action upon the Caſe was brought in the Common Pleas, upon a ſimple contract made by the Teſtator; which afterwards came into the Exchequer Chamber before all the Judges. *Cook* in the Common Pleas was of opinion, that the Action would lie. *Tanfield* Chief Baron, ſaid, That in theſe caſes of Equitie it were moſt reaſon to enlarge and affirme the Authoritie of the Common law, then to abridge it, and the rather, becauſe the like Caſe had been oftentimes adjudged in the Kings Bench, and there was no reaſon (as he ſaid) that there ſhould be a difference betwixt the Courts; and that it would be a Scandall to the Common Law, that they differed in opinion. Afterwards at another day the Caſe was moved in this Court; And *Walmeſley* Juſtice doubted if as before. But *Foſter* held that the Action was maintainable; And *Cooke* deſired that Preſidents might be ſearched; And he ſaid, That he could not be perſwaded, but if the Executor be adverred to have Aſſetts in his hands ſufficient to pay the ſpecialties, but that he ſhould anſwer the debt. Note, the money demanded was for a Marriage portion promiſed by the Teſtator.

Paſch. 8. Jacobi, in the Common Pleas.

244 ADAMS and WILSONS Caſe.

NOte, It was ſaid, That when a falſe Judgment paſſeth againſt the Defendant, he may pray the Court that it be entred at a day peremtory; ſo as he may have Attaint, or a Writ of Error. And *Cook* Chief Juſtice ſaid; That if Judgment in the principall Action be reverſed, the Judgment given upon the *Scire facias* ſhall alſo be reverſed, becauſe the one doth depend upon the other. *Walmeſley* in this Caſe ſaid, That it had been the uſual courſe of this Court, That if one deliver a plea unto An Aturney of the Court as the Laſt Terme, and it is not entred, that now at another Terme the Defendant might give in a new plea if he would, becauſe the firſt is not upon Record.

Paſch. 8. Iacobi, in the Common Pleas.

245 Cullingworth's Caſe.

IF one be bounden in an Obligation, That he will give to *J. S.* all the Goods which were deviſed to him by his father; in Debt brought upon ſuch an Obligation, the Defendant cannot plead, that he had not any Goods deviſed unto him, for the Bond ſhall conclude him to ſay the contrary; *Vide* 3. *Eliz. Dyer* 196 *Rainsford* Caſe.

Paſch. 8. Iacobi, in the Common Pleas.

246 Quod's Caſe.

Quod had Judgement in an Action upon the caſe at the Aſſizes, and damages were given him to Thirty Pound. *Hutton* Serjeant moved in Arreſt of Judgement, That the *Venire facias* was *de duodecim*, and that one of them did not appear, ſo as there was one taken *de circumſtantibus*; and the entry in the Roll was, That the ſaid Jurour *exactos venit*; but the word *juratus* was omitted: And for that cauſe the Judgement was ſtayed.

Mich. 8. Jacobi, in the Common Pleas.

247 Stone's Caſe.

Stone an Atturney of the Court was in Execution in *Norfolk* for One thouſand Pound, and by practice procured himſelf to be removed by *Habeas corpus* before *Cook* Chief Juſtice at the Aſsizes in Lent, and eſcaped to *London*; and in Eaſter Terme the Bailiffe took him again, and he brought an Action of falſe Impriſonment againſt the Bailiffe: and it was holden by the Court, That the freſh Suit had been good although he had not taken him in the end of the year, if enquiry were made after him; and ſo by conſequence the Action was not maintainable.

Mich. 8 Jacobi, in the Star-Chamber.

248 MARRIOT'S Case.

NOte: It was agreed in this Case for Law, That the Sheriffe cannot collect Fines or issues after a generall pardon by Parliament; and therefore one *Thorald*, the under Sheriffe of *N.* who did so, was questioned and punished in the Star-Chamber.

Mich. 8 Jacobi, in the Common Pleas.

249 JOLLY WOOLSEY'S Case.

Jolly Woolsey of *Norfolk* brought an Action of Trespas against a Constable, of Assault and Battery, and Imprisonment: the Defendant as to the Assault and Battery pleaded, Not guilty, and justified the imprisonment by reason of a Warrant directed unto him by a Justice of Peace for the taking, and to imprison the Plaintiffe for the keeping of an Ale-house, contrary to the Statute 12 *Feb.* 5. *El.* whereas the Statute was 12 *Feb.* 5. *Ed.* 6. and the matter was found by speciall Verdict. And it was holden by all the Justices, That the misrecitall of the Act was not materiall, for it being a generall Act, the Justices ought to take knowledge of it. And *Cook* Chief Justice said, That a man cannot plead *Nul tiel* Record against an Act of Parliament, although that in truth the Record be imbezelled if the Act be generall, because every man is privy to it.

Mich. 8. Iacobi, In the Common Pleas.

250 NEWMAN and BABBINGTON'S Case.

IT was resolved in this Case, That if Debt be brought against an Executor, who pleads, that he hath fully administred; and it is found that he hath Assets to 40 l. whereas the Debt is 60 l. that a Judgement shall be given for the 60 l. against the Defendant; and upon that Judgmeut, if more Assets come after to the Executors hand, the Plaintiffe may have a *Scire facias*.

Mich.

Mich. 8. Jacobi, in the Common Pleas.

251 WALLER'S Case.

NOte; It was said by *Cook* Chief Justice, That if the King present one to a Benefice, and afterwards presenteth another, who is admitted, instituted, and inducted, the same is a good repeal of the first presentation. And he said, That if the Lord doth present his Villain to the Church, the same is no enfranchisement of him, for that presentation is but his commendation. And if the King will present a French man, or a Spaniard, they shall not hold the Benefice within this Realm, for that the same is contrary to a special Act of Parliament.

Mich. 9. Jacobi, in the Common Pleas.

252

NOte; It was holden by all the Justices, That Perjury cannot be commited in the Court of the Lord of Copy-holds, or in any Court which is holden by Usurpation; otherwise is it in a Court Leet, or Court Baron, which is holden by Title.

Trinit. 8. Jacobi, in the Common Pleas.

253 BURY and TAYLOR'S Case.

IN an *Ejectione firme* brought upon Not guilty, pleaded by the Defendant, it was given in Evidence to the Jury to this effect; viz. That one *J. S.* who did intend to entermarry with *Alice S.* by Indenture did covenant with *J. D* that he would marry the said *Alice*, being then of the age of seventeen years; and that after the marriage had betwixt them, that they would levy a Fine of divers Lands, which said Fine should bee unto the use of the said *J. D.* and his Heirs; and accordingly after the entermarriage the said *J. S.* and *Alice* his Wife did levy a Fine unto the said *J. D.* and his Heirs, without any other use implied or expressed, but what was contained in the said Indenture before marriage; and according to the said Fine, the Conusee con-

tinued the poſſeſſion of the ſaid Lands for a long time: viz. for thirty years. *Cook* Chiefe Juſtice ſaid, That this continuance of poſſeſſion was a ſtrong proofe, and could not otherwiſe be intended, but that the Conuſee came to the poſſeſſion of the ſaid Lands by the ſaid Fine, which was ſo levied to him, and his heirs. And he ſaid, That it was adjudged in this Court in the Caſe betwixt *Claypoole* and *Wheſtone*, That in a Recovery, the Covenant did not lead the uſe of the Recovery, for that it was but an evidence that ſuch was the intent of the parties. And in this Caſe it was agreed by the whole Court, and was ſo ſaid to be reſolved in *Clogat* and *Blythes* caſe, 30. *Eliz.* That when no uſe is expreſſed or implyed by Indenture, or other agreement, that it ſhall be to the ancient uſe, viz. to the uſe of the Conuſor. As if Husband and wife be ſeiſed of one moytie of the Land in the right of the wife, and the Husband of the other moytie by himſelfe; and they joyne in a Fine generally, the Conuſee ſhall be ſeiſed to the former uſes, as it is agreed in *Beckwiths* caſe, *C.* 2. part. And ſo it was agreed, That if the Husband doth declare the uſe, and the wife doth not diſagree, or vary from it, that the declaration of the Husband ſhall bind the wife. And *Cook* ſaid, That it is not alwayes neceſſary that the wives name be ſet to the Indenture, which doth declare an uſe. And further *Cook* ſaid, That if a Fine be levied of Lands, yet the uſes may be declared by ſubſequent Indentures. And it was ſaid (*Obiter*) in this Caſe, That if a man for valuable conſideration doth purchaſe a Leaſe for years; and hee nameth two of his ſervants as joynt-purchaſers with him in the Deed; and afterwards the Maſter would ſell the Lands alone, and the ſervants do interrupt the ſale, or will not joyne with him; that he hath no remedy to compell them to do it, but by a Bill of Chancery.

Trinit. 8. Jacobi, in the Common Pleas.

254

A Vicar was endowed in the time of King *Henry* the 3d. of divers Tithes; and afterwards he libelled for thoſe Tithes in the ſpirituall Court; The Defendant alledged a *Modus Decimandi*, and prayed a Prohibition, and day was given to the party to ſhew cauſe, why the ſame ſhould not be granted; and at the day the Deed of Endowment was produced, and ſhewed in Court. By which it did appear, That the Vicar was endowed of Hay, *viz.* of the tenth part of it; and ſo of the remnant of the Tithes for which he libelled; whereupon the Court refuſed to award a Prohibition; *Quære Cauſam.* For as I conceive, a *Modus Decimandi* may accrue after the Endowment.

Trinit.

Trinit. 9. Jacobi, in the Common Pleas.

255 Sir W. DETHICK *and* STOKE's Case.

STokes libelled againſt Sir *William Dethick* in the ſpirituall Court, for calling of him Bald Prieſt, Raſcally Prieſt, and for ſtriking of him; and for thoſe offences he was fined by the ſpirituall Court an hundred pound, and impriſoned. And the opinion of the whole Court was, That neither the Fine nor Impriſonment were juſtifiable, becauſe the Statute of *Articuli Cleri*, is, *Non imponant pœnam pecuniariam, niſi propter redemptionem, &c.* And *Cook* ſaid, They might onely excommunicate: and thereupon a Writ *de Excommunicato capiendo*, might be awarded; and that is their onely courſe, and then the Party may have his *Cautione admittenda*; And the Court ſaid, That if the ſpirituall Court would not enlarge the party upon ſufficient Caution offered them, that then the Sheriffe ſhould deliver him.

Trinit. 8. Jacobi, in the Common Pleas.

256

IT was the opinion of the whole Court, That if a man have a Judgment againſt two men upon a joynt Bond; That he cannot have ſeverall Executions; viz. a *Capias ad ſatisfaciendum* againſt the one, and an *Elegit* againſt the other; for he ought to have but *unicam ſatisfactionem*, although he ſue them by ſeverall Actions. And if he ſue forth ſeverall Executions, an *Audita Querela* will lye.

Mich. 9. Jacobi, in the Common Pleas.

257 CARLE's Case.

NOte, it was adjudged in this Caſe, That if a man ſay of another, that he hath killed a man, an Action upon the caſe will not lie for thoſe words; for he may do it as Executioner of the Law, or *ſe defendendo*; So if one ſay of another, That he is a Cutpurſe, an Action will not lie; for that a Glover doth, and a man may cut his own purſe, and the ſame Term it was holden in the Kings Bench, That an Action will not lie for calling one Witch.

Mich.

Mich. 9. Jacobi, in the Common Pleas.

258

IT was holden by the whole Court, That a Commoner cannot generally juſtifie the cutting and taking away of Buſhes off from the Common; but by a ſpeciall preſcription he may juſtifie the ſame. So he may ſay, That the Commoners have uſed time out of mind to dig the Land, to let out the water, that he may the better take his Common with his cattell; and it was agreed, That if the Lord of the Waſte doth ſurcharge the Common, that the Commoner cannot drive his cattell off the Common, or diſtraine them damage feaſance, as he may the cattell of a ſtranger. But the remedy againſt the Lord, is either an Aſſize, or an Action upon the Caſe.

Mich. 9. Jacobi, in the Common Pleas.

259

IT was agreed by the whole Court, That if a man deviſeth unto his daughter an hundred pound when ſhe ſhall marry, or to his ſon, when he ſhall be of full age, and they die before the time appointed, that their Executors ſhall not have the money; otherwiſe, if the deviſe were to them to be paid at their full ages, and they die before that time, and make Executors; there the Executors may recover the Legacy in the ſpirituall Court.

Hill. 9. Jacobi, in the Kings Bench.

260 ROYLEY *and* DORMER'S Caſe.

TWo Boyes did contend and fight near unto their houſes, and the one ſtroke the other, ſo as he did bleed; who went and complained to his father, who having a rod with him, came to the other boy, and beat him; upon which he died. And the opinion of the whole Court was, That it was not murder.

Mich.

Mich. 9. Jacobi, in the King's Bench.

261 EDWARDS and DENTON'S Caſe.

UPon a ſpecial Verdict, the Caſe was, that a Man was ſeiſed of the Manor of *D.* and of a houſe called *W.* in *D.* and alſo of a Leaſe for years in *D.* and he did bargain and ſell unto another his Manor of *D.* and all other his Lands and Tenements in Dale; and in the indenture did covenant, that he was ſeiſed of the premiſſes in Fee (which was left out of the Verdict) and if the Leaſe for years ſhould paſs by the general words, was the queſtion; *Quære* of the caſe, becauſe *Trinit.* 10. *Jacobi*, the Court was divided in opinion in this Caſe.

Mich. 9. Iacobi, In the King's Bench.

262 HUGHES *and* KEENE'S Caſe.

THe Plaintiff declared, that whereas he was poſſeſſed of a Meſſuage for years which had ancient lights, and the Defendant poſſeſſed of another Houſe adjoyning, and a Yard, that the Defendant upon the ſaid Yard had built a Houſe, and ſtopped his lights; The Defendant pleaded, that the cuſtom of *London* was, that every man might build upon his old Foundation, and if there be not any agreement, might ſtop up the Windows of his Neighbour; upon which the Plaintiff did demurre in Law: and it was adjudged for the Plaintiff, becauſe that the Defendant did not anſwer the Plaintiffs charge, that he had built upon the new, and not upon the old Foundation. And it was holden by the whole Court in this Caſe, that a man may build upon an old Foundation by ſuch a cuſtom, and ſtop up the lights of his Neighbour, which are adjoyning unto him, and if he make new Windows higher; the other may build up his houſe higher to deſtroy thoſe new Windows: But a man cannot build a Houſe upon a place where there was none before, as in a Yard, and ſo ſtop his Neighbours lights: And ſo it was adjudged in the time of Queen *Elizabeth*, in *Althans* Caſe, upon ſuch a cuſtom in the City of *York*. And it was ſaid by *Cook* Chief Juſtice; That one preſcription may be pleaded againſt another, where the one may ſtand with the other, as it was adjudged in *Wright* and *Wrights* Caſe. That a Copy-holder of a Biſhop did preſcribe, that all Copy-holders

holders within the Manor have been diſcharged of Tithes : But not where one preſcription is contrary to the other; whereas one preſcribes to have lights, and the other preſcribes to ſtop the ſame lights. *Quære.*

Hill. 9. Iacobi, in the King's Bench.

263 SAMFORD *and* HAVEL'S Caſe.

IN an Action of Treſpaſs for 30. Hares, and 300. Coneys hunted in his Warren, taken and carried away, which Treſpaſs was layd with a *continuando*, from ſuch a time, till ſuch a time: the Defendant juſtified, becauſe he had common in the place where, &c. to a Meſſuage, ſix Yard Lands for 240. Sheep, and that he and all thoſe whoſe eſtate he hath, time out of mind, have uſed at ſuch time as the Common was ſurcharged with Coneys, to hunt them, kill and carry them, as to his Meſſuage appertaining: upon which the Plaintiff did demurre in Law, becauſe a man cannot make ſuch a preſcription in the Free-Warren, and Free-hold of another Man: And ſecondly, becauſe a man cannot ſo preſcribe to hunt, kill, and carry away his Coneys, as pertaining to his Meſſuage: But a Man may preſcribe to have ſo many Coneys to ſpend in his Houſe: and for theſe cauſes in the principal caſe, the preſcription was holden for a void preſcription; and Judgment was given for the Plaintiff.

Hill. 9. Jacobi, in the Common Pleas.

264 COX and GRAY'S Caſe.

IT was adjudged upon a Writ of Error, brought upon a Judgment given in the Marſhalſey, in an Action of trover and converſion of goods: That if none of the parties be of the Kings houſhold, and judgment be given there that the ſame is Error, and for that cauſe the Judgment was reverſed.

Hill.

Hill. 9. Iacobi, in the Common Pleas.

265 MORRIS'S Caſe.

IN an Action upon the caſe for putting of cattel upon the common, it was adjudged; that if the cattel of a Stranger eſcape into the common, the Commoner may diſtrain them damage feaſance, as wel as where the cattel are put into the common by the ſtranger.

Paſch. 10. Jacobi, in the Common Pleas.

266 *The Lord* MOUNTEAGLE *and* PENRUDDOCK'S Caſe.

IT was holden by the whole Court in this caſe, and agreed by all the Serjeants at the Barre, That if two men ſubmit themſelves to the arbitrament of *I. S.* And the Arbitrator doth award, that one of them ſhall pay ten pound, and that the other ſhall make a releaſe unto him, that the ſame is a void Award, if the ſubmiſſion be not by Deed; and hee to whom the Releaſe is to be made by the Award, may have remedy for it, for otherwiſe the one ſhould have the ten pound, and the other without remedy for the Releaſe. And it was reſolved, That upon ſubmiſſion and arbitrament, that the party may have an Action upon the Caſe for not making of the Releaſe. And *Cook* chief Juſtice ſaid, That it was wiſely done by *Manwood* chiefe Baron, when he made ſuch award, That a Leaſe or ſuch like Collaterall thing ſhould be done, to make his Award, that he ſhould make the Releaſe, or pay ſuch a ſum of money, for which the party might have a remedy. I conceive, that the reaſon is, That no Action upon the caſe upon an Arbitrament lieth; becauſe it is in the Nature of a Judgement. At another day, the opinion of the Court was with *Cook*, and 20. *H.6.* and 8. *E.4*, 5. cited to the purpoſe, that there ought to be reciprocall remedy. It was alſo ſaid in this Caſe, That by the Statute of 5. *H.5.* A man cannot be Nonſuit after Verdict.

Paſch. 10. *Jacobi, In the Common Pleas.*

267 COOK *and* FISHER's Caſe.

IN a Replevin, the Defendant did avow for rent granted to him by a private Act of Parliament. The Plaintiffe did demand *Oyer* of the Act; and the opinion of the Court was, that he ought to have *Oyer*: for they held, that the *Oyer* of no Record ſhall be denied to any perſon, in caſe he will demurre. And the Record of the Act ſhall be entred in *hæc verba*.

Paſch. 10. *Jacobi, in the Common Pleas.*

268 *The Bakers Caſe of Gray's-Inne againſt* Occould.

AN Action of Debt was brought in *London* againſt *Occould* late Steward of *Gray's-Inne*: upon a generall *indebitatas aſſumpſit*, without ſhewing the particulars, which plea was removed into the Common Pleas. And it was holden by the Court, That the Action as it was brought, would not lie, for the inconvenience which might follow. For the Defendant ſhould be driven to be ready to give an anſwer to the Plaintiffe to the generality. And therefore the Plaintiffe ought to bring a ſpeciall Action for the particular things; The like Caſe was in the *Marſhalſey*; and becauſe they did not declare in a ſpeciall manner, Exception was taken to it, and adjudged, the Action upon a generall *Indebitatas aſſumpſit* did not lie. *Quære.*

Trinit. 10. *Jacobi, in the Common Pleas.*

269 READ *and* HAWE's Caſe.

IN a Replevin, *Trinit.* 10. *Jacobi*, *Rot.* 2504. The Plaintiff counted, that the Defendant, *Cepit avena* of the Plaintiff *apud Occould:* and doth not ſay, *In quodam loco, &c.* upon which the Defendant did demurre in Law. *Hutton* Serjeant argued for the Plaintiffe, and ſaid, That notwithſtanding the many preſidents which had been ſhewed, that yet the Declaration was well enough: For he ſaid, That the preſidents did not prove,

prove, that it was neceſſary that it ſhould be therein ſhewed, *in quodam loco vocat'*, becauſe the Defendant upon the matter is the Actor; and therefore he beſt knows the place where he took the Cattel. And in 9. *E.* 4. *In a Homine replegiando*, the Towne onely was named; and it is not there debated whether the ſame were good without mentioning *in quodam loco*. 49. *E.* 3. 14. and 24. 9. *H.* 6. and 3. *H.* 6. There the traverſe was of the taking at *Dale*, *ſans ceo*, *&c.* that the ſame was at Sale, and *in quodam loco* is not expreſſed. *Cook* Chief Juſtice ſaid, That there is no book which taketh this Exception: and ſaid, That notwithſtanding the Preſidents cited, that it was well enough: For hee ſaid, There is a difference betwixt Preſidents, which are the Inventions of Clarks, and of judiciall Preſidents: And the effect of the Suit in this caſe, is, not the ſhewing of the place, but the having of the Cattel; and it is on the part of the Defendant to ſhew where hee took the Cattel, for perhaps the Plaintiffe doth not know where he took them: and if he did know the place where they were taken, yet perhaps hee hath not witneſſes to prove the ſame; and ſo by this means the Plaintiffe ſhould be at a great miſchiefe, and delayed in his Suit. Whereas a Replevin is *feſtinum remedium*, to have his Cattel again, which perhaps are his plough Cattel. *Warburton* Juſtice ſaid, That there is a difference betwixt Actions brought in the King's Bench, and in this Court: For there in an Action of Treſpaſſe the ſame may be abutted, becauſe it is no Originall Writ as it is here, and hee ſaid, That there although the place bee not certainly abutted, yet it may be good. And he compared the Caſe at barre, to the pleading of a Joynt-tenancy; for he ſaid, In caſe it bee pleaded of the part of the Tenant himſelfe, hee is to ſhew how the Joynt-tenancy came, becauſe it lyeth in his knowledge; but contrary, if it were on the Plaintiffs part. And in this Caſe, he who beſt knowes when the taking was, ought to ſhew it, and that is the Avowant; for it is no reaſon that the Plaintiffe for miſſing of the place, not being the ſubſtance, ſhould be triced. *Cook*, If one in the night drive my Cattel into his Land, and afterwards doth diſtrein them, it is no lawfull diſtreſſe. At another day, *Cook* ſaid, That in the Book *Nov. Narration'*, it is ſaid, That the Town, place, and collour of the beaſts ought to bee ſhewed by the Plaintiffe in the Replevin; and he ſaid, If the Colour had been left out, he would have given credit to the Book; but becauſe it is clear that the Colour is not needfull to be ſhewed, therefore he did not approve of the Authority for the place. And he cited 4. *E.* 3. 13. where the Defendant ſaid it was in the Hamlet. And 18. *E.* 3. 10. *E.* 3. and 49 *E.* 3. 14. where the Towns only are mentioned. And it was ſaid, That in an *Ejectione firmæ* brought in the Kings's Bench, the uſuall courſe is to abutt

the Land, yet he ſaid, It might be omitted in Treſpaſſe, although the ſame be the uſuall forme of that Court; and it may be generall: but if a place be alledged, then the ſame is materiall, and the Plaintiffe doth thereby give an advantage unto his Adverſary.

At another day *Haughton* Serjeant argued for the Defendant, That the expreſſing of the place where the taking was, is materiall in the Declaration; and he ſaid, That as the Regiſter is the rule for Originall Writs, from which forme a man may not vary; ſo, he ſaid, The Book of Entries and Preſidents of the Courts, were rules for pleadings, from which there ought to be no variance; and therefore he cited 33. *H.* 6. 14. Where in a Writ of Entry, in the nature of an Aſſize, the Demandant counted, How that *A.* gave Lands unto *J. S.* his Coſen, whoſe Heir he is in tail, and ſhewed the deſcent. And Exception was taken unto the Count, becauſe it was not the forme of the Pleading in that Court; wherefore it was awarded, That he ſhould count, that *ipſe fuit ſeiſitus ut de libero tenemento*, which is not repugnant, although that he had an Eſtate in tail, becauſe the ſame was the Ancient form uſed in the Court. So he ſaid in the principall Caſe, the ancient uſed forme of the Court ought to bee obſerved, which was to expreſſe in the Count the place in which the taking was; and hee cited 35. *H.* 6. 40. Where Exception was taken by the Defendant, becauſe the Plaintiff in the *Replevin* did not alledge the place where the taking was; and therefore *per curiam* the Plaintiffe took nothing by his Writ: and he denyed the opinion of 9. *E.* 4. 41. and ſaid, That in reaſon the place ought to be ſhewed, becauſe if the Defendant would plead any matter to the Juriſdiction of the Court, the place muſt be ſhewed; and he ſaid, That thoſe Records which were ſhewed on the other ſide were but of later times; and the Point in queſtion, in none of thoſe Caſes came in debate judicially; wherefore he concluded for the Defendant. *Hutton* Serjeant argued again, and ſaid, That the Formes of Originall Writs are certain, from which a man is not to vary; but he ſaid, That Counts and Declarations are to be according to the matter. And in the principall Caſe he conceived, That it was not neceſſary that the place where the taking was, be ſhewed; and hee cited 4. *Ed.* 3. 13. in a Replevin, the Plaintiff declared of the taking of his Cattel in Holme, without ſaying, *In quodam loco vocat'*, *&c.* and it was holden good, becauſe the Towne or Hamlet is ſufficient certain; and 21. H. 7. 22. *a.* in a Replevin, the Plaintiffe declared of a taking at *D.* the Defendant ſaid, That he took them at *S.* and not at *D.* and avowed; and no Exception was taken thereunto for want of expreſſing the

place

place in *quo, &c.* And he ſaid, That in 9. *Ed.* 4. 41. and 25. it is ſaid, That in a Replevin the uſe is to declare in a certain place; but if the place be omitted, yet it is good enough; and that Book is after 33. H. 6. 40. and hee ſaid, That the cauſe of the Judgement in 33. H. 6. might be, becauſe there were Blanks left for the place; and the Plaintiff had begun to alledge the certain place; for the Record is, *In quodam loco vocat'*, without expreſsing the place, but Blank, which he could not affirme; and therefore it was adjudged againſt the Plaintiffe; as in a *Valore Maritagii*; if the Defendant will ſhew that hee tendered a mariage, whereas it is not needfull for him ſo to do, yet if the ſame be not true, and iſſue be taken upon it, Judgement ſhall be given againſt him; wherefore hee concluded for the Plaintiffe. The principall Caſe was adjourned.

Trinit. 10 *Jacobi, in the Common Pleas.*

270 GOODMAN and GORE's Caſe.

Goodman brought an Aſſize againſt *Gore* and others, for erecting of two houſes at the Weſt end of his Wind-Mil, *per quod ventus impeditur, &c.* And it was given in Evidence, That the ſaid houſes were ſituate about eighty feet from the ſaid Mill; and that in height it did extend above the top of the Mill, and in length it was twelve yards from the Mill; and notwithſtanding this neerneſſe, the Court directed the Jury to find for the Defendant. And in that Evidence it appeared by a Deed, procured by the Plaintiff himſelf, That his Wife was Joint-tenant with him; and therefore it was holden by the Court, That the Aſſize brought in his own name alone, was not well brought. And *Cook* Chief Juſtice alſo ſaid, That the Count was not good, by reaſon of theſe words, viz. *Per quod ventus impeditur*; for he ſaid, That theſe were the words of an Action upon the Caſe, and not of an Aſſize. But the Clarks ſaid, That ſuch was the uſuall forme, *ad quod non fuit reſponſum*: and in that Caſe it was ſaid *obiter* by *Cook* Chief Juſtice, That if the Husband and Wife be Joint-tenants, and the Husband ſowes the Land and dieth, and the Wife doth ſurvive, that ſhe ſhall have the emblements.

Trinit.

Trinit. 10. Jacobi, in the Common Pleas.

271 HARDINGHAM'S Case.

IN an Action of Treſpaſs, *Quare clauſum fregit*, the Defendant did juſtifie, That he did enter and diſtrain for an Amercement in the Sheriffs Torne, which was impoſed upon the Plaintiffe for enchroaching upon the Kings High-way, without ſhewing that the ſame was preſented before the Juſtices of Peace at their Seſſions, as the Statute of 1. *E.* 4. *cap.* 2. requireth. *Haughton* Serjeant for ſtay of Judgement in this Caſe, ſaid, That the Statute is, That the Juſtices of Peace ſhall award Proceſs againſt the perſon who is ſo indicted before the Sheriffe, which was not done in this Caſe. And he ſaid, That the Statute did not extend to Amercements only in Treſpaſſes, *Quare vi & armis*, but to every other Treſpaſs; for the Statute ſpeaks of Treſpaſſes, and other things, which ſhall be extended to all Treſpaſſes. *Cook* Chief Juſtice ſaid, That the Statute of 1. *E.* 4. *cap.* 2. did not extend to Treſpaſſes which were not *contra pacem* (as the encroachment in this Caſe is) for otherwiſe the Lord of a Leet could not diſtrain for an amercement without ſuch preſentmennt before Juſtices of the Peace. And although the Statute ſpeaks of Felony, Treſpaſs, &c. the ſame is to be meant of other things of the ſame nature; which is proved by the clauſe in the Statute, viz. That they ſhall be impriſoned; which cannot be in the principall Caſe at Bar. *Warburton* and *Winch* Juſtices, agreed in opinion with *Cook* Chief Juſtice.

Trinit. 10 Iacobi, in the Common Pleas.

272 FRAUNCES, and POWELL's Caſe.

IT was moved for a Prohibition to the Spirituall Court, for citing the Plaintiffe out of his Dioceſs upon the Statute of 23. *H.* 8. and by the Libel it appeared, That *Powell* the Defendant had complained againſt the Plaintiffe in the Court of Arches, for ſcandalous words ſpoken in the Pariſh of Saint *Sepulchers*, *London*. *Cook* Chief Juſtice held, That a Prohibition would lie, unleſſe the Biſhop of *London* had given liberty to the Arch-Biſhop of *Canterbury* to entermeddle with matters within *London*; for, he ſaid, that in the Statute of 23. *H.* 8. there is a clauſe of exception in caſe where ſuch liberty is given by the inferior

Dioce-

Dioceſan; and therefore a day was given by the Court to procure a certificate of the opinion of the Civilians, whether ſuch authority given by the Inferiour Ordinary to the Arch-Biſhop, were Warranted by there Law or not; for the Statute of 23. *H* 8. is ſo; and then if the authority be lawfully granted, no prohibition will lye. And *Cook* ſaid; that the Statute of 23. *H.* 8. was made but in affirmance of the common Law, as appears by the books of 8. *H.* 6. and 2. *H.* 4. For there it is ſaid, that if one be excomenge in a forrain Dioces, that the ſame is void, *& coram non judice*; and he ſaid, that the principal cauſe of making of the ſaid Statute, was to maintain the Juriſdiction of Inferiour Dioceſſes. But it was holden, that if the Plaintiff had defamed the Defendant within the Peculiar of the Arch-Biſhop, that in ſuch caſe he might be puniſhed there, although that he did inhabit within any remote place out of the Peculiar of the Arch-Biſhop: and in this Caſe it was ſaid, that the Arch-Biſhop had in thirteen Pariſhes in *London* Peculiar Juriſdiction. It was adjorned.

Trinit. 10. *Jacobi, in the Court of Wards.*

273 Cottons Caſe.

SIR *John Tirrel* Tenant *in Capite*., made a Leaſe unto *Carrel* for 1000. years; and further covenanted with *Carrel* and his Heirs, that upon payment of five Shillings, that he and his heirs would ſtand ſeiſed of the ſame Lands unto the uſe of *Carrel*, and his Heirs: And in the Deed there were all the ordinary clauſes of a conveyance *bona fide*; viz. That the Leſſee ſhould enjoy the Lands diſcharged of all Incumbrances, and that he would make further aſſurance, &c. *Carrel* aſſigned this Leaſe to *Cotton*, who died in poſſeſſion, his Heir within age; and in two Offices, the Jury would not find a Tenure, becauſe it was but a Leaſe for years. And in a *que plura*, the matter came in queſtion in the Court of Wards: And *Cook* Chief Juſtice of the Common Pleas, and *Tanfeild* Chief Baron of the Exchequer, were called for Aſſiſtants to the Court of Wards, and they were of opinion, that becauſe it was found by the Offices, that *Cotton* died in poſſeſſion, that the ſame was ſufficient to entitle the King to Wardſhip of the Lands. But before the Judges delivered there opinions, the Leſſee was compelled to prove the Sealing of the Leaſe by witneſſes, which was dated 12. years before: For if they have not ſufficient witneſſes to prove the Sealing of the Leaſe, without all doubt, there was ſufficient matter found to entitle the King, viz. that the party died in poſſeſſion; which ſhall be intended of an eſtate in Fee ſimple, till the contrarie be proved;

proved; But the two Juſtices moved the Attorney, That he would not trouble himſelf with the proof of a matter in fact: For they ſaid, It was confeſſed on all ſides, that there was ſuch a Leaſe, and that the Aſsignee of it died in poſſeſsion of the Land: and therefore they ſaid, that they were cleer of opinion, that the Heir of ſuch a Leſſee who died in poſſeſsion ſhould be in Ward: For *Cook* Chief Juſtice ſaid, that all Offices which are found to deceive the Crown of ſuch an ancient flower of the Crown as Wardſhip, ſhould be void, as to that purpoſe, and moſt beneficial for the King. And he cited the Caſe in 36. *H.* 8. Where the Kings Tenant made a Feoffment, and took back an eſtate unto himſelf for life, the Remainder to his Grand-child for 80. years, and died; that in that Caſe the Heir was in Ward: and they ſaid, that in the caſe at Barre the Heir had power of the Inheritance upon payment of five Shillings; and if the Leaſe for years be found, and proved by witneſſes, yet it carrieth with it the badges of fraud. And *Tanfeild* Chief Baron ſaid, that if a Leaſe for 100. years ſhall be accounted Mortmain, *à fortiori* this Leaſe for 1000. years, ſhall be taken to be made by fraud and colluſion: And *Cook* ſaid, that the Lord Chancellour of *England* would not relieve ſuch a Leſſee in Court of Equity, becauſe the begining and ground of it is apparant fraud. Note, the lands did lye in *Springfield* in *Eſſex*.

Trinit. 10. *Jacobi, in the Common Pleas.*

274 MEADES Caſe.

AN Action of Debt was brought upon a Bond againſt *Meade*, who pleaded, that the Bond was upon condition, that if he paid ten pound to him whom the Obligee ſhould name by his laſt will, that then &c. and ſaid, that the Obligee made his Will, and made Executors thereof, but did not thereby name any perſon certain to take the ten pound. *Sherley* Serjeant moved, that the Executors ſhould have the ten pound, becauſe they are Aſsignees in Law, as it is holden in 27. *H.* 8. 2. But the whole Court was of opinion, that the Executors were not named in the Will for ſuch a purpoſe. viz. to take the ten pound; For they ſaid, It is requiſite that there be an expreſs naming who ſhall take the ten pound, otherwiſe the Bond is ſaved, and not forfeited. And *Cook* put this Caſe, If I be bounden to pay ten pound to the Aſsignee of the Obligee, and his Aſsignee makes an Executor, and dieth, the Executor ſhall not have the ten pound. But if I be bounden to pay ten pound to the Obligee, or his Aſsignees, there the Executor ſhall have it, becauſe it was a duty in the Obligee himſelf; the ſame Law, if I be bound to enfeoffe

enfeoffe your Aſsignees, &c. Wherefore it it was adjudged for the Defendant.

Trinit. 10. *Jacobi, in the Common Pleas.*

275 GREENWAY *and* BAKER'S Caſe.

IT was moved, and afterwards reſolved in the Caſe of a Prohibition, prayed to the Court of Admiralty, That if a Pirat taketh goods upon the Sea, and ſelleth them; that the property of them is changed no more, then if a theife upon the Land ſteales them, and ſelleth them. And in this Caſe it appeared by the Libell, That *bona piratica fuerint infra Portam Argier ſuper altum mare.* And for that cauſe a Prohibition was denied, becauſe *Argier* being a forrain Port, the Court could not take notice whether there were ſuch a place of the Sea called the Port, or whether it were within the Land, or not: Afterwards upon the mediation of the Juſtices, the parties agreed to try the cauſe in the *Guild-hall* in *London*, before the Lord Chiefe Juſtice *Cook*.

Trinit 10. *Jacobi, in the Common Pleas.*

276. Sir FRANCIS FORTESCUE, *and* COAKE'S Caſe.

UPon an Evidence in an *Ejectione firme* betwixt the Plaintiffe and Defendant, The Court would not ſuffer Depoſitions of witneſſes taken in the Court of Chancery, or Exchequer, to be given in Evidence, unleſſe *affidavit* be made, that the witneſſes who depoſed were dead. And *Cook* Chiefe Juſtice ſaid (*nullo contradicente*) That it is a principall Challenge to a Jurour, That he was an Arbitrator before in the ſame caſe, becauſe it is intended, that he will incline to that partie to which he inclined before: but contrary is it of a Commiſſioner, becauſe he is elected indifferent. And it was alſo ſaid in this Caſe, That one who had been Solicitor in the Cauſe, is not a fit perſon to be a Commiſſioner in the ſame Cauſe.

Trinit. 10. *Jacobi, in the Common Pleas.*

277

Barker Serjeant, in Arreſt of Judgement, moved, That the *Venire facias* did vary from the Roll in the Plaintiffs name; for the Roll was *Peter Percy*, and the *Venire facias*, *John Percy*, and the *poſtea* was according to the Roll, which was his true name. The Court doubted whether it might be amended, or whether it ſhould be accounted as if no *Venire facias* had iſſued, becauſe it is betwixt other parties. But it was holden, That in caſe no *Venire facias* iſſueth, the ſame is holpen by the Statute of *Jeofailes*, and in this caſe it is in effect as if no *Venire facias* had iſſued forth; and ſo it was adjudged. And *Cook* Chiefe Juſtice ſaid, that if there be no *Venire facias*, nor *habeas Corpora*, yet if the Sheriffe do return a Jury, the ſame is helped by the Statute of *Jeofailes*. *Warburton* Juſtice contrary, *vide C.* 5. part Biſhops caſe. And *Harris* Serjeant vouched *Trinit.* 7. *Jacobi*, *Rot.* 787. in the Exchequer, *Herenden* and *Taylors* caſe to be adjudged as this Caſe is.

Trinit. 10. *Jacobi, in the Common Pleas.*

278 BROWN'S Caſe.

IT was holden by the whole Court in this caſe, That if a man hath a *Modus Decimandi* for Hay in Black-acre; and he ſoweth the ſaid acre ſeven years together with corn, that the ſame doth not deſtroy the *Modus Decimandi*, but the ſame ſhall continue when it is again made into hay. And when it is ſowed with corn, the Parſon ſhall have tithe in kind; and when the ſame is hay, the Vicar ſhall have the tithe hay, if he be endowed of hay.

Trinit. 10. *Jacobi, in the Common Pleas.*

279 JAMES *and* RATCLIFF'S Caſe.

IN Debt upon a Bond to perform ſuch an agreement, The Defendant pleaded *Quod nulla fuit concluſio ſive agreeamentum*: The Plaintiff ſaid, *Quod fuit talis concluſio & agreeamentum, & de hoc ponit ſe ſuper patriam.* The Court held the ſame was no good iſſue, becauſe a Negative and an Affirmative.

Trinit.

Trinit. 10. Jacobi, in the Common Pleas.

280 WETHERELL and GREEN'S Case.

IT was said by the Pronothories, That if a *Nihil dicit* be entred in Trinity Term, and a Writ of Enquiry of Damages issueth the same Term, that there needs not any continuance; but if it be in another Term, it is otherwise. The Court said, If it were not the course of the Court, they would not allow of it; but they would not alter the course of the Court: the words of continuance were, *Quia vicecomes non misit brev.*

Trinit. 10. Jacobi, in the Common Pleas.

281 PARROT and KEBLE'S Case.

A Man levied a Fine unto the use of himself for life, the remainder in tail, &c. with power reserved to the Conusor to make Leases for eighty years in Possession or Reversion, if *A.B.* and *C.* did so long live, reserving the ancient rent; afterwards he granted the Reversion for eighty years, reserving the ancient rent: The question was, Whether he had pursued his Authority, because by the meaning of the Proviso a Power was, That the Conusor should have the rent presently, or when the Term did begin. But the opinion of the Court was, That he had done lesse then by the Proviso he might have done, for this Grant of the Reversion doth expire with the particular estates for life. But if he had made a Lease to begin after the death of the Tenants for life, the same had been more then this grant of the Reversion. And *Cook* chief Justice said, That the Grantor may presently have an Action of debt against the Grantee of the Reversion for the rent. But because it was not averred that any of the *Cestuy que vies* were alive at the time when the Grantor did distrain for the rent, Judgement in the principall case was respited.

Trinit. 10. Jacobi, in the Common Pleas.

282

UPon the Statute of Bankrupts, this Case was moved to the Court, If a Bankrupt be endebted unto one in Twenty Pounds,

and to another in Ten Pounds; and he hath a Debt due to him by Bond of Twenty Pounds; Whether the Commiſsioners may aſsigne this Bond to the two Creditors jointly; or whether they muſt divide it, and aſsigne Twenty Marks to the one, and Twenty Marks to the other. And the Court was of opinion, That it was ſo to be divided as the words of the Statute are, viz, to every Creditor a portion, rate and rate like, &c. And then it was moved, How they might ſue the Bond, whether they might joine in the Suit or not? *ad quod non fuit reſponſum* by *Cook*. *Warburton* Juſtice ſaid, That when part of the Bond is aſsigned to one, and part to another, that now the Act of Parliament doth operate upon it, and therefore they ſhall ſue ſeverally; for he ſaid, That by the cuſtome of *London*, part of a debt might be attached: And therefore he conceived part might be ſued for.

Trinit. 10. Jacobi, In the Common Pleas.

283 SPRAT and NICHOLSON's Caſe.

SPrat Sub-Deacon of *Exeter*, did libel in the Spiritual Court againſt *Nicholſon* Parſon of *A. pro annuali penſione*, of Thirty Pound, iſſuing out of the Parſonage of *A.* and in his Libel ſhewed, How that *tam per realem compoſitionem, quam per antiquam & laudabilem conſuetudinem, ipſe & predeceſſores ſui habuerunt & habere conſueverunt prædictam annualem penſionem* out of his Parſonage of *A. Dodderidge* Serjeant moved for a Prohibition in this Caſe, becauſe he demands the ſaid Penſion upon Temporall grounds; viz. preſcription and reall compoſition. But *Cook*, Chief Juſtice, and the other Juſtices were of opinion, That in this Caſe no Prohibition ſhould be granted; for they ſaid, That the party had Election to ſue for the ſame in the Spirituall Court, or at the common Law, becauſe both the parties were Spirituall perſons; but if the Parſon had been made a party to the Suit, then a Prohibition ſhould have been granted; *Vide Fitz. Nat. Brev.* 51. *b. acc.* And they further ſaid, That if the party ſueth once at the common Law for the ſaid Penſion; that if he afterwards ſue in the Spirituall Court for the ſame, that a Prohibition will lie, becauſe by the firſt Suit he hath determined his Election. And *Cook* cited 22. *E.* 4. 24. where the Parſon brought an Action of Treſpaſs againſt the Vicar for taking of Under-Woods, and each of them claimed the Tithes of the Under-Woods by preſcription to belong unto him; and in that Caſe, becauſe the right of the Tithes came in queſtion, and the perſons were both of them Spirituall perſons,

ſons, and capable to ſue in the Spirituall Court; the Temporal Court was ouſted of Juriſdiction. But he ſaid, That if an iſſue be joined, whether a Chappel be Donative or Preſentative, the ſame ſhall be tryed by a Jury at the common Law. And in this caſe it was ſaid by the Juſtices, That the Statute of 34. H. 8. doth authorize Spiritual perſons to ſue Lay-men for Penſions in the Spiritual Courts; but yet they ſaid, That it was reſolved by all the Judges in Sir *Anthony Ropers* caſe, That ſuch Spiritual perſons could not ſue before the High Commiſsioners for ſuch Penſions; for that Suits there muſt be for enormious Offences only: And in the principall caſe the Prohibition was denyed.

Trinit. 10. Jacobi, in the Common Pleas.

284 Sir Baptist Hix, and Fleetwood and Got's Caſe.

Fleetwood and *Gots* by Deed indented, did bargain and ſell *Weſton* Park, being three hundred Acres of Lands, unto Sir *Baptiſt Hix*, at Eleven Pound for every Acre, which did amount in the whole to Two thouſand five hundred and thirty Pounds: and in the beginning of the Indenture of Bargain and Sale, it was agreed betwixt the parties, That the ſaid Park, being much of it Wood-land, ſhould be meaſured by a Pole of eighteen foot and a halfe. And further it was covenanted, That *Fleetwood* and *Gots* ſhould appoint one Meaſurer, and Sir *Baptiſt Hixe* another, who ſhould meaſure the ſaid Park; and if upon the meaſuring it did exceed the number of Acres mentioned in the Indenture of Sale; that then S. *Baptiſt Hixe* ſhould pay to them acording to the proportion of 11 l. for every Acre; and if it wanted of the Acres in the deed, that then *Fleet'* and *Gots* ſhould pay back to S. *Baptiſt* the ſurpluſage of the mony according to the proportion of 11. l. for every Acre. And upon this Indenture Sir *Baptiſt Hixe* brought an Action of Covenant againſt *Fleetwood* and *Gots*, and aſſigned a Breach, that upon the meaſuring of it, it wanted of the Acres mentioned in the Deed 70 Acres: And upon the Declaration, the Defendants did demurre in Law; and the cauſe of the Demurrer was, becauſe the Plaintiff did not ſhew by what meaſure it was meaſured. And therefore *Sherley* Serjeant, who was of Councel with the Defendants, ſaid, that although it was agreed in the beginning of the Deed, that the meaſure ſhould be made by a Pole of 18 feet and a half: Yet when they come to the covenants, there it is not ſpoken of any meaſure at all; and therefore (he ſaid) it ſhall be taken to be ſuch

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a meaſure which the Statute concerning the meaſuring of Lands ſpeaks of, viz. a meaſure of ſixteen foot and a half to the Pole; and he ſaid, that by ſuch meaſure there did not want any of the ſaid three hundred Acres mentioned in the Deed. *Dodderidge* Serjeant contrary for the Plaintiff, and he layed this for a ground: That if a certainty doth once appeare in a Deed, & afterwards in the ſame Deed it is ſpoken indefinitely, the ſame ſhall be referred to the firſt certainty, and to that purpoſe he vouched the caſe in *Dyer*: Lands were given by a Deed to a man, *& hæredibus maſculis*; and afterwards in the ſame Indenture it appeared, that it was *hæredibus maſculis de Corpore*, and therefore it was holden but an eſtate in tail, becauſe the firſt words were indefinite, and the later words were certain, by which his intent did appeare to paſs but an eſtate in tail. He alſo cited 4. *E.* 4. 29. *B.* The words of an Obligation were *Noverint univerſi per præſentes, me I. S. teneri, &c. W. B.* in ten pound *ſolvendum eidem I.* And it was holden by the whole Court, that the ſame did not make the Bond to be void, becauſe it appeared by the promiſes of the Bond, to whom the mony was in Law to be paid, and the intent ſo appearing, the Plaintiff might declare of a *ſolvendum* to himſelf; and the word (I) ſhould be ſurpluſage. And 22. *E.* 4. 9. *A. B.* The Abbot of *Selbyes* caſe: Where the Abbot of *Selby* did grant *annualem penſionem* to *B. ad rogatum I. E. illam ſcilicet quam I. E. habuit ad terminum vitæ ſuæ, ſolvendum quouſque ſibi, &c. de beneficio proviſum fuerit*, and it was holden by the whole Court in a Writ of annuity brought, that [*ſibi*] did referre to *B.* the grantee, and not to *I. E.* And *Cook* Chief Juſtice ſaid, that the original Contract doth leade the meaſure in this Caſe; and to that purpoſe he cited *Kiddwellies* caſe in the Commentaries, where a Leaſe was made rendring Rent at Mich. at *D.* and if it were behind by a month after demand, that the Leſſor might reenter; the demand muſt be at the firſt place, which is in that caſe alledged to be certain: viz. at *D.* The caſe was adjorned.

Trinit. 10. *Jacobi, in the Common Pleas.*

285 Sir Henry Lea *and* Henry Leas Caſe.

SIR *Henry Lea* was committed to the Fleet, for the diſobeying of a Decree made in the Court of Requeſts: and having Suits depending in the Court of Common Pleas, he prayed a Writ of *habeas Corpus*, which was granted; and upon the return of the Writ, the cauſe of his Commitment appeared to be for a contempt

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for not performing of the ſaid Decree, and no other cauſe appeared in the return: and the Court were of opinion, that they could not deliver him, becauſe that no cauſe appeared in the return to warrant their delivery of him: And the Court ſaid, that if the return be falſe, yet they cannot deliver the party; But the party may have his Action of falſe Impriſonment, if the Impriſonment be not Lawfull: But then it was ſhewed by *Mountague* Serjeant to the Court, that the Decree was made in the Court of Requeſts upon a Bill containing this matter, viz. That *Henry Lea* pretending Title unto Lands which Sir *Henry Lea* held by deſcent from his Unkle Sir *Henry Lea*; ſhewed his Title to the Kings Majeſtie, and thereupon the King upon the Petition of *Henry Lea*, ſends for Sir *Henry Lea*, and had ſpeech with him, that he would give unto the ſaid *Henry Lea* ſome recompence for his Title which he pretended to have to the ſaid Lands: And that thereupon the ſaid Sir *Henry Lea*, at the inſtance of the Kings Majeſtie, did promiſe the King, that if the ſaid *Henry Lea* would not moleſt him for any of the ſaid Lands, which he had by deſcent from his ſaid Unkle; that then he the ſaid Sir *Henry Lea* would give unto the ſaid *Henry Lea* two hundred pound *per Annum*: And for not performance of this promiſe made to the King, *Henry Lea* Exhibited his Bill in the Court of Requeſts, upon which the ſaid Decree was grounded: The ſaid Sir *Henry Lea* anſwered, that he did not know of any ſuch promiſe he made to the Kings Majeſtie; and pleaded to the Juriſdiction of the Court: But upon a Certificate made by the Kings Majeſtie, that he made ſuch a promiſe unto him, the Court of Requeſts made the ſaid Decree, which Certificate was mentioned in the body of the ſaid Decree: And *Mountegue* prayed, that becauſe it appeared that the ſaid *Henry Lea* had remedy by way of Action upon the caſe at the common Law, upon the ſaid promiſe, That this Court would grant a Prohibition in this caſe unto the Court of Requeſts, and deliver the party from his Impriſonment. But the Court ſaid, that they would adviſe of the Caſe, becauſe they never had heard of the like caſe. But *Cook* Chief Juſtice adviſed Sir *Henry Lea* to agree the matter betwixt Him, and his Kinſman *Henry Lea*; For he ſaid, that he had learned a Rule in his youth, which was this, viz.

Cum pare luctare dubium, cum Principe ſtultum eſt;
Cum puero pœna; cum Muliere pudor.

Trinit. 10. *Jacobi, in the Common Pleas.*

286 GARVEN *and* PYM's Caſe.

GArven libelled againſt *Pym* for a Seat in the Church before the Biſhop of *Exeter*, in the ſpiritual Court there; which by Appeal

was

was removed into the Court of Arches; And the Defendant did ſurmiſe in the Court of Common Pleas, That he and his Anceſtors have uſed time out of mind, &c. to have an Iſle with a ſeat in the ſaid Church, for himſelf and his family; and thereupon prayed a Prohibition. But becauſe it did appear upon Examination of the party himſelf, That the Pariſh have alwayes uſed to repair the ſaid Iſle and ſeat, the Court would not grant a Prohibition in this caſe, for that proves that his Anceſtors were not the Founders of the ſaid Iſle and Seat; Alſo another man hath alwayes uſed to ſit with him in the ſame ſeat, which alſo proves that it doth not belong to him alone. *Cook* chief Juſtice ſaid, That if a Gentleman with the aſſent of the Ordinary, hath built an Iſle *juxta Eccleſiam*, for to ſet convenient Seats for him and his family, and hath alwayes repaired the ſame at his own coſts and charges; In ſuch caſe, if the Ordinary place another man with the Founder, without his conſent, in the ſame Seat, that he may have his Action upon the Caſe againſt the Ordinary: And if he be impleaded in the ſpirituall Court for ſuch Seat, that a Prohibition will lie: And he ſaid, That the *Heydons* in *Norfolk* have built ſuch an Iſle next to the Church, and placed convenient Seats there for them, and their family. But he ſaid, That if a man with the aſſent of the Ordinary, ſet up a Seat in *navi Eccleſiæ* for himſelfe, and another man doth pull up the ſame, or defaceth it, *Treſpas vi & armis* will not lie againſt him, becauſe the Freehold is in the Parſon; and he hath no remedy for the ſame, but to ſue the party in the Eccleſiaſtical Court. And 9. *E.* 4. 14. the *Dame Wiches* Caſe was vouched, where ſhe brought an Action of Treſpaſſe againſt the Parſon, for taking away her Husbands Coat-armour, which was fixed to the Church at his Funerall, and it was adjudged that the Action would lie; and ſo will an Action in ſuch caſe brought by the heir. And *Cook* ſaid, That the Ordinary hath the onely diſpoſing of Seats in the Body of the Church; with which agrees the opinion of *Haſſey*, in 8. *H.* 7. And if the Ordinary long time paſt hath granted to a man and his heirs ſuch Seat, and he and his heirs have uſed to repair the ſaid Seat: If another will libell againſt him in the Spirituall Court for the ſame Seat, he ſhall have a Prohibition. And he ſaid, That he had ſeen a Judgement in 6. *E.* 6. That if Executors lay a Grave Stone upon the Teſtator in the Church, or ſet up his Coat-armour in the Church; If the Parſon or Vicar doth remove them, or carry them away, that they, or the heir, may have their Action upon the Caſe againſt the Parſon or Vicar. Note, in the principall, no Prohibition for the reaſons before.

Trinit.

Trinit. 10. *Jacobi, in the Common Pleas.*

287 The Archbiſhop of *York* & *Sedgwick's* Caſe.

THe Archbiſhop of *York* and Doctor *Ingram*, brought and exhibited a Bill in the Exchequer at *York*, upon an Obligation of ſeven hundred pound, and declared in their Bill, in the nature of an Action of Debt brought at the common Law: which matter being ſhewed unto the Court of Common Pleas by *Sedgwick*, the Defendant there; A Prohibition was awarded to the Archbiſhop, and to the ſaid Court at *York*. And *Cook* chief Juſtice gave the reaſons, wherefore the Court granted the Prohibition. 1. He ſaid, becauſe the matter was meerly determinable at the common Law; and therefore ought to be proceeded in according to the courſe of the common Law. 2. Although the King hath granted to the Lord Preſident, and the Councel of *York*, to hold pleas of all perſonall Actions; yet (he ſaid) they cannot alter the form of the proceedings. For as 6. *H.*7.5. is, The King by his Grant cannot make that inquirable in a Leet, which was not inquirable there by the Law; nor a Leet to be of other nature then it was at the common Law. And in 11. *H.*4. it is holden, That the Pope, nor any other perſon can change the common Law, without a Parliament. And *Cook* vouched a Record in 8. *H.* 4. That the King granted to both the Univerſities, that they ſhould hold plea of all Cauſes ariſing within the Univerſities, according to the courſe of the Civil Law; and all the Judges of *England* were then of opinion, That that grant was not good, becauſe the King could not by his Grant alter the Law of the Land; with which caſe agrees 37. *H.*6. 26. 2. *E.*4. 16. and 7. *H.*7. But at this day, by a ſpeciall Act of Parliament, made 13. *Eliz.* not printed. The Univerſities have now power to proceed and judge according to the Civil Law. 3. He ſaid, That the Oath of Judges, is, viz. You ſhall do and procure the profit of the King, and his Crown, in all things wherein you may reaſonably effect and do the ſame. And he ſaid, That upon every Judgement upon debt of forty pound, the King was to have ten ſhillings paid to the Hamper, and if the debt were more, then more. But he ſaid, by this manner of proceeding by *Engliſh* Bill, the King ſhould loſe his Fine. 4. He ſaid, That if it was againſt the Statute of *Magna Charta*, viz. *Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, vel per legem terræ.* And the Law of the Land, is, That matters of fact ſhall be tried by verdict of twelve men; but by their proceedings by *Engliſh* Bill, the partie ſhould be examined upon his oath; And it is a Rule in Law, That *Nemo tenetur ſeipſum prodere*: And alſo he ſaid, That upon their Judgement

there, no Writ of Error lyeth: ſo, as the Subject ſhould by ſuch means be deprived of his Birth-right. 5. It was ſaid by all the Juſtices, with which the Juſtices of the King's Bench did agree; That ſuch proceedings were illegall. And the Lord *Chancellor* of *England* would have caſt ſuch a Bill out of the Court of *Chancery*: And they adviſed the Court of *York* ſo to do: and a Prohibition was awarded accordingly.

Trinit. 10. *Jacobi, in the Common Pleas.*

288 Doctor Hutchinson's Caſe.

DOctor *Hutchinſon* libelled in the Spirituall Court againſt one of his Pariſhioners for Tithes; The Defendant there ſhewed, that the Doctor came to the Parſonage by Symony and Corruption: And upon ſuggeſtion thereof made in the Common Pleas, prayed a Prohibition. Doctor *Hutchinſon* alledged that he had his pardon, and pleaded the ſame in the Spirituall Court. And notwithſtanding that, the Court granted a Prohibition, becauſe the Pardon doth not make the Church to be *plena*, but maketh the offence onely diſpuniſhable. But in ſuch caſe, If the King doth preſent, his preſentee ſhall have the Tithes.

Trinit. 10. *Jacobi, in the Common Pleas.*

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NOte, by *Cook* Chief Juſtice, that theſe words, viz. Thou wouldeſt have taken my purſe from me on the high way, are not actionable; But Thou haſt taken my money, and I will carry thee before a Juſtice, lay felony to thy charge, are actionable.

Mich. 11. *Jacobi, in the Common Pleas.*

290 Hatch *and* Capel's Caſe.

IN an Action upon the Caſe upon an *Aſſumpſit* brought againſt the Defendant, The Plaintiffe declared, How that one *Hallingworth* who was the Defendants Husband, was indebted unto the Plaintiffe eight pound ten ſhillings for beer; and that he died, and that after his death the Plaintiff demanded the ſaid mony of the Defendant his wife; and ſhe, in conſideration that he would ſerve her withbeer, promiſed that

that she would pay unto the said Plaintiff eight pound ten shillings, and for the rest of the beer, at such a day certain. And the Plaintiffe did averr, That he did sell and deliver to her Beer, and gave her day for the payment of the other money, as also for the Beer delivered unto her; and that at the day she did not pay the Money. *Cook* and all the other Justices agreed, That the Action would well lie, and that it was a good Assumpsit, and a good consideration; for they said, That the forbearance of the money is a good consideration of it selfe; and they said, That in every Assumpsit, he who makes the promise ought to have benefit thereby; and the other is to sustain some losse. And judgement was given for the Plaintiff.

Mich. 11 *Jacobi, in the Common Pleas.*

291 Norton and Lysters Case.

IN the Case of a Prohibition, the Case was this, Queen *Elizabeth* was seised of the Manor of *Nammington*, which did extend into four Parishes, viz. *Stangrave* and three other. And the Plaintiff shewed, That he was seised of three Closes in *Stangrave*; and prescribed, That the said Queen, and all those whose Estate he hath in the said Closes, had a *Modus decimandi* for the said three Closes, and for all the Demeanes of the said Manor in *Stargrave*. And whether the *Venire facias* should be *de parochia de Stangrave*, or of the Manor, was the question. And it was resolved by the whole Court, That the *Visne* should be of the Parish of *Stangrave* and not of the Manor. And the Difference was taken, when one claimes any thing which goes unto the whole Manor, and when only to parcel of it; for in the one Case the *Visne* shall be of the Manor, in the other not; *Vid.* 9. *Eliz. Dyer.* ar. But it was said, That in this Case the *Modus* did extend only to things in *Stangrave*, and therefore the *Visne* should be of *Stangrave* only. *Nichols* Justice said, That although the Parish be a Town, and of one name, yet the *Visne* shall be from the Parish, to which the Court agreed. And in the principall Case, the Pleading was, That the Manor was *in Parochia*, and the *Modus* alledged to be *in Parochia*, and the Prohibition *de Parochia*; and therefore the *Venire facias* ought to be *de Parochia*, and not *de Manerio*, or *de Villa*. *Cook* cited 4. *E.* 4. and 23. *E* 4. that in Trespass *de Parochia* is a good addition, for it shall not be intended, that there are two Towns in one Parish: And it was said by the Court in this Case, That before the Statute of 2. *E.* 6. all Prohibitions to the Spirituall Court were *quia secutus est de Laico feodo*: for when a man had a *Modus dicimandi*, the Corn and other things were

la y things. Then it was moved by a Serjeant at Bar, That at the Aſſizes where the tryall of the *Modus decimandi* was, one of the principal Panel did appear only upon the *Venire facias*; and the queſtion was, If in ſuch Caſe a *tales* might be awarded *de circumſtantibus*. And it was holden by the Court, that ſuch *tales* might be well awarded; and 10. *Eliz. Dyer* vouched to prove the ſame. It was alſo ſaid by the Court, That at the common Law (if not in appeal) the *tales* might be of odd number, as *quinque tales*, or *novem tales*; but now ſince the Statute of 35. *H.* 8. the *tales* may be even or odd, as pleaſeth the party. But it was adjudged in this Caſe, That in no Caſe where a triall is at the Bar, ſhall any *Tales de circumſtantibus* be awarded. And ſo are all the Preſidents.

Mich. 11. *Jacobi, in the Common Pleas.*

292 LEIGHTON againſt GREEN and GARRET.

THomas *Leighton* an Adminiſtrator *durante minori ætate* of *J. S.* did libell in the Court of Admiralty againſt the Defendants; and ſhewed in the Libel, That there were Covenants made betwixt them by a Charter party, they being Owners of the Ship called the *Mary* and *John* of *Lynn*, that the Defendants ſhould victuall the ſaid Ship for a Voyage into *Denmark*; and that the Ship ſhould be ſtaunch and without leak. And ſhewed in his Libel, that the Ship being upon the Seas did ſpring a leak, by reaſon of which the Plaintiff did loſe a great part of the Freight of the ſaid Ship, conſiſting in divers Commodities, viz. Coney skins. The Defendant pleaded, That the Covenants were made *infra Portum de Lynn*: And further pleaded, That the Plaintiffe had before that time brought an Action of Covenants againſt the ſame Defendant, upon the ſame Deed, in which Action the Plaintiffe was Non-ſuit; and it was adjudged, That it was a good Plea in Bar; and thereupon a Prohibition was awarded to the Court of Admiralty. *Cook* Chief Juſtice in this Caſe ſaid, That charter party, *eſt charta partita*, and is all one in the Civil Law, as an Indenture is in the Common Law. And in this Caſe it was adjudged, That the Triall ſhould be there where the contract was made; and ſo was it adjudged in *Conſtantine* and *Gynns* Caſe. Where the Originall Act was in *England*, and the ſubſequent matter upon the Sea, the Tryall ſhall be where the Originall Act is done. And ſo it was agreed in this Caſe, that the Tryal ſhould be.

Mich.

Mich. 11 *Jacobi, in the Star-Chamber.*

293 MILLER againſt REIGNOLDS and BASSET.

SIr *Henry Mountagu* the Kings Serjeant did informe the Lords in the Star-Chamber, How that the Defendants had conſpired and practiſed *Malitioſe* to draw the Plaintiffs life in queſtion, being a man of One thouſand Pounds *per annum*, and otherwiſe very rich. The Caſe was ſhortly thus, *Baſset* the Defendant was Tenant unto the Plaintiffe of a houſe in *R.* in Kent, rendring a Rent; the rent was behind, and the Plaintiff demanded his Rent of him; the Defendant told him, That he was not able to ſatisfie him the Rent, but he promiſed to give unto the Plaintiffe all his Goods in ſatisfaction of the Rent, or ſo many of them as ſhould countervaile the Rent; and it was agreed betwixt the Plaintiff and the Defendant *Baſset*, that the Goods ſhould be appriſed by two men, which was done accordingly, and the Plaintiff came to the Defendants houſe at the time the ſaid Goods were appriſed, but it was depoſed and proved, did not go out of the room where the appriſement was made at the time he was in the ſaid houſe, which was the 10 of *May* 7. *Jacobi*, *ar.* Afterwards the Defendants, *Reignolds* (being an Atturny at Law) and *Baſset* did conſpire to accuſe the Plaintiffe, becauſe that when he came to the Defendant *Baſsets* houſe at the time of the appriſing of the ſaid Goods, that the Plaintiffe went up into an upper Chamber in the ſaid houſe, and broke up a Cheſt, and out of the ſame took a Gold Ring, 10. s. in Money, and the Defendant *Baſsets* Leaſe of his houſe; and thereupon brought the Plaintiff before divers Juſtices of the Peace, who upon Examination of the matter, found no ground of ſuſpicion againſt the Plaintiff, and therefore they did not bind him over to the Seſsions to anſwer the ſame Accuſation. After this the Defendants made ſeverall motions to the Plaintiff that he would give unto them 300 *l.* and ſo he ſhould be acquitted, and there ſhould be no proceeding againſt him; and becauſe the Plaintiffe refuſed ſo to do, they told him that divers Courtiers had begged his Eſtate of the King, and that the ſame was granted unto them; when as in truth, there was not any thing moved to any Courtier of any ſuch matter, but all this was ſaid in a ſhew only, to the end they might get great ſums of mony from him. And in that matter they layed the ſcandall upon S. *Rob. Car* then Viſcount *Rocheſter*, that he was made privy to it, who then was the Kings Maj. great Favorite. And when all this could not prevail to gain any Compoſition from the Plaintiff, the Defendants did prefer a Bill of Indictment at the Aſſizes in Kent againſt the Plaintiff; and there, upon Evidence given unto the Grand Jury, they found an *Ignoramus* upon

on the Bill: and divers other plots and diviſes were contrived by the Defendants,& all to the end,the Plaintiff might loſe his life & his eſtate. And this matter came to Sentence before the Lords, and the Bill proved in every point and circumſtance, as well by the confeſſion of the Defendants themſelves,as by divers writings, depoſitions of witneſſes, and letters read and ſhewed in open Court; and it was ſaid by the whole Court of Lords in this caſe, that this was a very great offence, and an offence *in Capite*; and that if ſuch practices ſhould be ſuffered and go unpuniſhed, that no mans life was in ſafety, but in continual jeopardy: And therefore in this caſe, it was ſaid, that pregnant preſumption had been ſufficient to have acquited the Plaintiff; but here the caſe was very cleer; becauſe the matter was confeſſed by the parties Defendants themſelves. And in this caſe, *Cook* Chief Juſtice, and the Lord Chancellour ſaid, that a conſpiracy ought not to be onely falſe, but *malitioſè* contrived, otherwiſe it will not be a conſpiracy, and ſuch malice ought to be proved: For if a poor Man travelling upon the High-way, be robbed by another Man, and he knows not the party, if afterwards he do accuſe ſuch a one of the Robbery, and the party accuſed be found not Guilty; he ſhall not have an Action of conſpiracy againſt the accuſer; for although he was falſly accuſed, yet he was not malitiouſly accuſed; and it might be, that he took him to be the Offender, becauſe he was like unto him who robbed him. Secondly, It was ſaid by them, that by the Law, no Man may Begg the Lands or Goods of another man upon ſuch an accuſation, until the party be convict of the fact; and that for divers cauſes. 1. Becauſe before conviction,the King hath not an Intereſt in them;for the goods are not forfeit. And 2. Becauſe the party till his conviction, ought to have his goods to maintain himſelf with them. And 3. Becauſe the goods cannot be ſeiſed upon for the Kings uſe before conviction, although they may be put *in Salva cuſtodia*; and therefore they ſaid,that this was a very great ſlander which the Defendants layed upon the Lord Viſcount *Rocheſter*, viz. that he had begged the Plaintiffs goods of the King before he was convicted; and it was ſaid, that if ſuch goods ſhould be begged before conviction of the party, that the ſame would be a main cauſe, that the Jury will not find the Indictment againſt the party,when they are ſure his Lands, goods,and other eſtate ſhall be in anothers perſon, and ſo by conſequence ſhould be a great cauſe that the King might be defrauded of the forfeiture of the goods of Fellons: and further,it would be a great cauſe of Rebellion, if ſuch Lands,and goods ſhould be ſeiſed upon and given away before conviction of the party accuſed. And as the Lord Chancellour ſaid, the ſame was the cauſe of the great Rebellion in the time of King *Henry* the ſixth, becauſe the goods of divers were given away to other men before the parties were convicted: And *Cook* ſaid, that it appeareth

peareth, that this was not onely a ſcandal of divers Gentlemen of Worſhip whom the Defendants had abuſed in this thing, But even of the King himſelf: And it was not onely *ſcandalum Magnatum*: But *ſcandalum Magiſtr. Magnatum*: And he ſaid, that it appears in *Britton*, that if a Rebel or baſe fellow do ſtrike a Man of Dignity, that he ſhall loſe his right hand: *à fortiori*, in ſuch caſe when they defame and ſcandalize them by ſuch impudent practices, that they be grievouſly puniſhed: And it ſhould be a very unhappy eſtate to be a Rich-Man, if ſuch Offences ſhould not ſeverely be puniſhed, *& multi delicti propter inopiam*. The Sentence againſt the ſaid Defendants was this: *Reignolds* being an Attorney to be degraded, caſt over the Common Pleas Barre, and both the Defendants to loſe their Eares; to be marked in the Face with a *C*. for Conſpirators, to ſtand upon the Pillory with Papers of there Offences, to be Whipped, and each of them fined to the King in 500. pound: and according to this Sentence, *Reignolds* the ſame Mich. Term was caſt over the Common Pleas Barre by the Cryers of the Court; and the other part of the Sentence executed on them both.

Mich. 11. *Jacobi, in the Common Pleas.*

294 COOKES Caſe.

IN a Writ, *Quare intruſit, maritagio non ſatisfacto*: It was found for the Plaintiff, but no damages were aſſeſſed by the Jury; and the value of the Marriage was found to be 500. pound. And now the queſtion was, whether the ſame might be ſupplied by a Writ of Enquire of Damages, and the Court *primâ facie* ſeemed to doubt of the caſe: For where the party may have an attaintment, there no damages ſhall be aſſeſſed by the Court, if the ſame be not found by the Jury; and therefore the Court would be adviſed of it: but afterwards in the ſame Term it was adjudged, that no Writ of Enquire of damages ſhould Iſſue; But a *venire facias de novo* was granted to try the Iſſue again. *Vide* 44. *E.* 3. the opinion of *Thorpe* acc. Note, this was the laſt Caſe that *Cook* Chief Juſtice did ſpeak to in the Common Pleas, for this day he was removed from that Court, and made Chief Juſtice of the Kings Bench.

Mich. 11. *Jacobi, in the Common Pleas.*

295 WEDLOCK *and* HARDING's Caſe.

THE Caſe was this: a Man ſeiſed of a Meſſuage holden in Socage in Fee, by his will in Writing deviſed the ſame to his

his Cosen by these words, viz. I devise my Messuage where I dwell to my Cosen *Harding*, and her Assignes, for eight years. And also my Cosen *Harding* shall have all my Inheritances, if the Law will. And it was adjudged by the whole Court without argument, That this was a devise of the Messuage in Fee by these words, and that all his other Inheritances passed by the said Will by those generall words.

Mich. 11. *Jacobi, in the Common Pleas.*

296 ROSSER *against* WELCH *and* KEMMIS.

IN an Action of Debt brought against the Defendants, upon severall *Præcipes* one Judgement is given; and the Plaintiffe takes forth a *Capias* against one of them, and arrests his body, and afterwards hee takes a *Fieri facias* against the others: And the question was, Whether the severall Executions should be allowed? and the Court was of opinion, they should not; for that a man shall have but one satisfaction. And therefore in the principall Case, because that upon the *Fieri facias* twenty five pounds was levied; if the other who is in prison upon the Execution will pay the other twenty five pound, (the whole Judgment being but fifty pound) the Court awarded that the prisoner should be discharged: and the Court was clear of opinion, that the partie cannot have a *Fieri facias* against one, and a *Capias ad satisfaciendum* against the other: But it was agreed, That he might have a *Capias* against them both. As if a man hath one Judgement against seven persons, he may take all their bodies in execution, because the body is no satisfaction, but onely a gage for the Debt; and therewith agreeth 4. *H.*7.8. 5 *E.*4.4. and *C.* 5. part *Bamfeild's* Case.

Mich. 11. *Jacobi, in the Common Pleas.*

297 JENOAR *and* ALEXANDER'S Case.

IT was moved for a Prohibition to the Court of Requests, because that the Court held plea of an Attornment; for the complaint there was to compel a man to attorn upon a Covenant to stand seised to uses. And *per Curiam* a Prohibition shal be awarded. And *Cook* chief Justice said, That there were three Causes in the Bill, for which a Prohibition should be granted, which he reduced to three Questions. 1. If a Copy-holder payeth his rent, and the Lord maketh a Feoffment of the Manor, Whether the Copy-holder shall be compelled to attorn? 2. If a man be seised of Freehold Land, and Covenants to stand seised to an use, Whether

in

in ſuch caſe an Attornment be needfull? 3. If a Feoffment be made of a Manor by Deed, Whether the Feoffee ſhall compell the Tenants to attorn in a Court of Equity? And for all theſe Queſtions, It was ſaid, That the Tenants ſhall not be compelled to attorn; for upon a Bargain and Sale, and a Covenant to ſtand ſeiſed, there needs no attronement. And *Cook* in this caſe ſaid, That in 21. *E.*4. the Juſtices ſaid, That all Cauſes may be ſo contrived, that there needed to be no Suit in Courts of Equity; and it appears by our books, That a Prohibition lies to a Court of Equity, when the matter hath been once determined by Law. And 13. *E.*3. *Tit. Prohibition*, and the Book called the Diverſity of Courts, which was written in the time of King *Henry* the eighth, was vouched to that purpoſe: And the Caſe was, That a man did recover in a *Quare Impedit* by default; and the Patron ſued in a Court of Equity, viz. in the Chancery: and a Prohibition was awarded to the Court of Chancery.

Mich. 11: *Jacobi, in the Common Pleas.*

298 Sir JOHN GAGE *and* SMITH's Caſe.

AN Action of Waſte was brought, and the Plaintiffe did declare, that contrary to the Statute, the Leſſee had committed Waſte and Deſtruction in uncovering of a Barn, by which the timber thereof was become rotten and decayed; and in the deſtroying of the ſtocks of Elmes, Aſhes, Whitethorn, and Blackthorn, to his damage of three hundred pound. And for title ſhewed, That his Father was ſeiſed of the Land, where &c. in Fee, and leaſed the ſame to the Defendant for one and twenty years, and died; and that the Land deſcended to him as his ſon and heir; and ſhewed, that the Waſte was done in his time, and that the Leaſe is now expired. The Defendant pleaded the generall iſſue, and it was found for the Plaintiffe, and damages were aſſeſſed by the Jury to fifty pound. And in this caſe it was agreed by the whole Court, 1. That if ſix of the Jury are examined upon a *Voyer dire*, if they have ſeen the place waſted, that it is ſufficient, and the reſt of the Jury need not be examined upon a *Voyer dire*, but onely to the principall. 2. It was agreed, if the Jury be ſworn that they know the place, it is ſufficient, although they be not ſworn that they ſaw it; and although that the place waſted be ſhewed to the Jury by the Plaintiff's ſervants, yet if it be by the commandment of the Sheriffe, it is as ſufficient, as if the ſame had been ſhewed unto them by the Sheriff himſelfe. 4. It was reſolved, That the eradicating of Whitethorn is waſte, but not of the Blackthorn; according to the Books in 46. *E.*3. and 9. *H.* 6. but if the blackthorn grow in a hedg, and the whole hedg be deſtroyed the ſame is Waſte by *Cook* chief Juſtice. It was holden al-

o, that it is not Waſt to cut Quick-ſet hedges, but it ſhall be accounted rather good husbandry, becauſe they will grow the better. 5. It was agreed, That if a man hath under-woods of Haſell, Willowes, Thornes, if he uſeth to cut them, and ſell them every ten years; If the Leſſee fell them, the ſame is no waſt; but if he dig them up by the roots, or ſuffereth the Germinds to be bitten with cattel after they are felled, ſo as they will not grow again, the ſame is a deſtruction of the Inheritance, and an Action of waſt will lie for it. But if he mow the Stocks with a wood-ſythe, (as he did in the principall Caſe) the ſame is a malicious Waſt; and continuall mowing and biting is deſtruction. 6. It was ſaid, That in an Action of Waſt a man ſhall not have coſts of Suit, becauſe the Law doth give the party treble damages. And when the generall iſſue (*Nul. Waſt*) is pleaded, and the Plaintiff counted to his damages 100l. the Court doubted whether they could mitigate the damage. But 7. It was agreed, That in the principal Caſe, (although the iſſue were found for the Plaintiff;) that he could not have judgment, becauſe he declared of Waſt done in 8. ſeveral cloſes, to his damage of 300l. generally, and did not ſever the damages. And the Jury found, That in ſome of the ſaid Cloſes there was no Waſt committed. Wherefore the Court ſaid, he could not have judgement through his own default. But afterwards at another day, *Hobart* then chief Juſtice, and *Warburton* Juſtice, ſaid, That the verdict was ſufficient, and good enough; and ſo was alſo the declaration, and that the Plaintiffe might have judgment thereupon. But yet the ſame was adjourned by the Court untill the next Term.

Mich. 11. *Jacobi, in the Common Pleas.*

299 CLARK's Caſe.

NOte, It was ſaid by Cook, chief Juſtice, and agreed by the whole Court, and 41. and 43. *E.* 3. &c. That if a man deliver money unto *I. S.* to my uſe, That I may have an Action of Debt, or account againſt him for the ſame, at my election. And it was agreed alſo, That an Action of Trover lieth for money, although it be not in bags: but not an Action of *Detinue*.

Mich. 11. *Jacobi, in the Common Pleas.*

300 IRELAND *and* BARKER's Caſe.

IN an Action of Waſt brought, the Writ was, That the Abbot and Covent had made a Leaſe for years, &c. And it was holden by the Court

Court that it was good, although it had been better, if the Writ had been, That the Abbot with the aſſent of the Covent made the Leaſe, for that is the uſuall form; but in ſubſtance the Writ is good, becauſe the Covent being dead Sons in Law, by no intendment can be ſaid to make a Leaſe; But the Dean and Chapter ought of neceſſity to joyne in making of a Leaſe, becauſe they are all perſons able; and if the Dean make a Leaſe without the Chapter, the ſame is not good, *per curiam*, if it be of the Chapter Lands. And in *Adams* and *Wroteſley's* Caſe, *Harris* Serjeant obſerved, That the Leaſe is ſaid to be made by the Abbot and Covent; and it is not pleaded to be made by the Abbot with the aſſent of the Covent.

Mich. 11 *Iacobi, In the Common Pleas.*

301 *The Dean and Canons of* Winſor *and* Webb's *Caſe.*

IN this Caſe it was holden by the Court, That if a man give Lands unto Dean and Canons, and to their Succeſſors, and they be diſſolved; or unto any other Corporations; that the Donor ſhall have back the Lands again, for the ſame is a condition in Law annexed to the Gift; and in ſuch Caſe no Writ of Eſcheat lieth, yet the Land is in him in the nature of an Eſcheat. And the principall Caſe was, That a preſcription was ſhewed of a diſcharge of Tithes in an Abbot, Prior, and Covent, and that the Corporation was afterwards diſſolved, becauſe all the Monks died, and the Abbot alſo. And it was holden by the Court, That he who is now Owner of it, and holdeth the Lands, ſhall pay Tithes; for a Lay man cannot preſcribe in *Non decimando*; and the Preſcription continues no longer then the Lands continued in the Abbot and Covents hands. And in this Caſe it was ſaid by *Cook*, That there are only three manner of Eſcheats: 1. *Abjurat Regnum.* 2. *Quia ſuſpenſus per collum.* 3. *Quia utlagatus*: But becauſe they ſued for the treble value in the Spiritual Court, a Prohibition was awarded; but the Parſon may ſue for the double value in the Spirituall Court, and no Prohibition will lie, for that is given by the expreſſe words of the Statute of 2. *E.*6. and ſo it was adjudged in *Manwoods* Caſe in the Exchequer. And the word [Forfeiture] in the Statute doth not give the treble value to the King, but to the Parſon himſelf. Alſo it was holden by *Cook* and *Warburton*, Juſtices, That if a Rent be granted to one and his Succeſſors, and the Corporation be diſſolved, that the Rent ſhall revert to the Donor: and there is no difference as to the matter, betwixt things which lie in Prender, and things which lie in render. *Nichols* Juſtice contrary, That the Rent extinguiſhes in the Land it ſelf. And in the principall Caſe, becauſe they ſued in the Spirituall Court for the treble value, a Prohibition was granted

Mich. 11. *Jacobi, in the Common Pleas.*

302 PORTER's Caſe.

IN a Writ of Dower brought, the Defendant was eſſoygned, and had the view, and afterwards pleads *tout temps priſt* to render Dower; and they were at iſſue, which was found for the Plaintiff, and Judgment was given for the Plaintiff. It was holden by the whole Court, That before Execution be awarded, the Plaintiff in Dower may aver, That her husband was ſeiſed to have Damages; and therewith agrees the books 14. *H.* 8. 25. 22. *H.*6.44. *b.*

Mich. 11. *Jacobi, In the Common Pleas.*

303 Sir DANIEL NORTON *and* SYMM's Caſe.

AN Action of Debt was brought upon a Bond, which was conditioned to performe Covenants in an Indenture; and it was ſhewed there were divers Covenants in the Deed, ſome of which were Covenants againſt the Law, and ſome not; and for breach, the Plaintiff alledged, That it was covenanted by the Indenture, that *Chamberlain*, for whom the Defendant was a Surety, being under Sheriff to the Plaintiffe, ſhould ſave the Plaintiffe harmeleſſe, and ſhould diſcharge all manner of eſcapes, and ſhould alſo ſave him harmeleſs from all Fines and Amercements to which he ſhould be liable by reaſon of any eſcape. And ſhewed, how that one was arreſted in execution by the ſaid *Chamberlain*, *& evaſit.* And another Covenant was, That hee ſhould not ſerve any Execution above Twenty Pounds, without Warrant from the Plaintiffe; and alſo that he ſhould not return any Juries without his Privity. *Hutton* Serjeant argued for the Defendant and ſaid, That this Indenture of Covenants was againſt the Law, for it is as much as if he had ſaid, That he ſhould not he under Sheriff. And by the Statute of 27. *El.* under Sheriffs are ſworn to return Juries, and proceſs of Courts, and therefore theſe Covenants are both againſt the common Law and Statute Law; alſo the Covenants are in delay of Juſtice; for *Non conſtat* when the Sheriffe will give him warrant to return Juries, or to execute the Kings Writs. Alſo the Covenant is too generall, *viz.* That he ſhall ſave him harmeleſſe from all Eſcapes, and of any other matters whatſoever; and there the Bond taken to performe ſuch Covenants is void. *Vide* 7. H. 7. and 8. *E.*4.13. where a Bond taken to ſave a man harmeleſſe againſt all men, is void: but contrary if it be to ſave harmeleſſe againſt one particular perſon: ſo here, to ſave harmeleſs from all

all matters whatſoever, is void; but if it had been only from Eſcapes, then it had been good. *Vide* 2.H.4.9. If a man be bound to ſave another harmleſſe againſt all the world, the Bond is void, *Vide* 4. H.4. 2. *Will. Rices* caſe. And he compared theſe Covenants againſt the Law to Perpetuities which kill themſelves. Then he argued, That although ſome of the Covenants were lawfull, yet the Bond was void in all; and that, he ſaid, is the better opinion of the book in 14. H. 8. 25. And if *A.* be bounden to enfeoff *J. S.* of the Manor of *D.* and to diſeaſe *J. N.* of another Manor, the Bond is void for the whole. 3. He ſaid, That there was not a ſufficient breach laid by the plaintiffe; for it is only layed, That ſuch a one in Execution *evaſit*; and it is not ſaid, That the under Sheriff did ſuffer him to eſcape. 4. It is not layed, That the plaintiff did requeſt the under Sheriffe to pay the Money upon the eſcape, but he went and paid the Money voluntarily of himſelf, and requeſt and notice are needfull; 46. *E.* 3. 27. 22. *E.* 4. 14. 40. *E.* 3. 20 *Non damnificatus* is a good plea generally; and the other ſide ought to come and ſhew ſpecially how he is damnified. 5. It is not layed, That he gave him warning to arreſt the party in Execution for Fifty pounds; and therefore as to that, he was not under Sheriff, becauſe as Sheriff, without warning, by his former Covenants, hee was not to ſerve any Executions, but ſuch as were under Twenty pounds; and therefore he ought to have layed it, That he gave him a Warrant to arreſt the party upon this Execution, otherwiſe there is no breach. *Harris* Serjeant contrary, and he ſaid, The Covenants are ſufficient in part, and ought to be performed; and ſo the Bond good. And as *Kible* ſaid in 13. H. 7. 23. ſo he ſaid, That there are three conditions which are not allowable, but the Caſe at Bar is not within the compaſſe of any of them; and the words here [Diſcharge and ſave harmeleſſe] ſhall be meant from all eſcapes ſuffered by the under Sheriff himſelf; and the words [from all Amercements whatſoever] ſhall be intended by reaſon of his Office: And he ſaid, That when an Indenture of Covenants is good in part, and void in part, thoſe Covenants which are good ſhall ſtand and ought to be performed; and the book of 14. *H.* 8 by four Juſtices, is, that all legal and lawful Covenants ought to be performed: and he vouched *Lee* and *Colſhills* Caſe 39. *Eliz.* which *Vide c.* 5. *part* 82. to that purpoſe; and he ſaid, that this Caſe is not like the caſe in 9. *Eliz. Dyer*, of *Raiſure*: Alſo, he ſaid, that the Defendant hath pleaded That he hath performed all the Covenants; and if theſe Covenants be void, and no Covenants, then the Defendants plea is not good. Alſo there are divers Covenants in the Negative, and to thoſe he ought in pleading to ſhew in certain that he hath not broken them. The Court ſaid, nothing at all to the caſe; but yet *Cook* chief Juſtice ſeemed to be cleer of opinion, That the Bond was void; and ſo he ſaid, he conceived it had been adjudged before in this Court in the ſame Sir *Daniel Nortons* caſe againſt *Chamberlain*, *Paſch.* 9. *Jacobi*, *Rs.* And it was adjourned.

Mich.

Mich. 11. *Jacobi, in the Common Pleas.*

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AN Action upon the Caſe was brought by an Attorney of the Court againſt another Man, for ſpeaking theſe words of him, viz. Thou art an Ambodexter; and the words were adjudged actionable, becauſe the ſame ſlandred him in his Profeſſion, for it is as much in effect as if he had ſaid, that he was corrupt in his Office.

Mich. 11. *Jacobi, in the Common Pleas.*

305

IT was Ruled by the whole Court, that a *Fieri facias*, or *Capias ad ſatisfaciendum*, or other Judicial Proceſs did not run into *Wales*; But it was agreed that a *Capias utlagatum* did run into *Wales*: And *Brownloe*, one of the Pronothories, ſaid, that an Extent hath gon into *Wales*.

Mich. 11. *Jacobi, in the Common Pleas.*

306 HUGHE'S Caſe.

A Man who dwelt in *Somerſetſhire* made his Will, and by his ſaid Will did bequeath to each of his children being Enfants, a Legacy of 20. pound a piece: the Procurators of the Enfants did Libel in the Court of Arches againſt the Executors of the Teſtator, for the ſaid Legacies, being out of the Dioceſs, and a Prohibition was awarded: and in this Caſe it was ſaid by Juſtice *Warburton*, to have been agreed by all the Juſtices, that the exception in the Statute of 23. *H.* 8 *cap.* 9. doth extend onely to probate of Wills. It was alſo holden in this caſe, That an Averrment might be, that the parties were ſued out of there proper Deoceſs, if the ſame doth not appeare in the Libel: as it may be in like caſe where one ſueth in the Court of Admiralty for a thing done upon the land; and Averrment may be, that the contract was made *infra Corpus Comitatus*. And in this caſe it was alſo agreed by the Court, that if an Infant bringeth an action againſt his Gardian for mony, and recovereth, and he bringeth the mony into Court, and there depoſite it, that the ſame is a good diſcharge againſt the Enfant, and he ſhall not anſwer the Suit again in an account.

Mich.

Mich. 11. *Jacobi, in the Common Pleas.*

307 Sir THOMAS SEYMORE's Caſe.

M*Ountagne* Serjeant ſhewed to the Court, that the Wife of Sir *Thomas Seymore* did Libel againſt her Husband in the Spiritual Court, for that he did threaten her, and beat her; and in the end of the Libel ſhe prayed allowance of Allimony; and a Prohibition was prayed by him, becauſe the Suit in that Court was for a force, which was not triable in that Court; and to that purpoſe he remembred the caſe of 11. *H.* 4. 88. Where a Clark ſued in the Spiritual Court for a battery, and laying of violent hands upon him, and becauſe in ſuch caſe an action of Treſpas of aſſault and battery did lye at the Common Law, a Prohibition was awarded, *Vide.* 22. *E.* 4. 29. *pl.* 9. the Abbot of St. *Albans* caſe, and 12. *H.* 7. 23. *Cook* Chief Juſtice agreed all thoſe Caſes: And ſaid, that if a Clark ſueth in the Spiritual Court for damages, a Prohibition ſhall be awarded; and no damages are given in the Spiritual Court, if not for repairing of the Church, as appeareth by the Statute of *Articuli Cleri*. *Quære & Vide.* 20. *E.* 4. 10. *profeſſione Fidei, &c.* And *Linwood* ſaith, that if a Clark walketh in his doublet and hoſe, *& non habet habitam Clericalem*, but goeth in colours; if another man doth beat him, he ſhall not ſue for the ſame in the Spiritual Court: But in the principal Caſe it was agreed by the whole Court, that no prohibition ſhould be awarded, becauſe the Wife cannot have remedy againſt the Husband at the Common Law for the beating of her, becauſe ſhe is *ſub virga viri*; and alſo becauſe the Suit there is, but by way of inducement, to have a Divorce *cauſâ metus*. And *Warburton* ſaid, that ſhe ſhould recover there *expenſas litis* againſt her Husband. *Cook* held, that the Husband could not give correction to his Wife: But *Nicols* and *Warburton* Juſtices, held the contrary; and that the Wife may have a Writ *de ſecuritate Pacis* againſt the Husband, as appeareth by *F. N. B.* 80. *f. quod benè & honeſtè tractabit & gubernabit, nec malum aliquod ei aliter quàm ad virum ſuum canſa regiminis & caſtigationis uxoris ſuæ, licitè & rationabiliter pertinet, non faciet &c.* and *F. N. B.* 238. *f. acc.* *Cook* vouched 31. *E.* 3. *Fitz. Tit. Attachment for Prohibition* 8. where the Wife Libelled againſt her Husband in the Spiritual Court for beating and impriſoning of her, and no Prohibition was granted, and the Suit in the Spiritual Court was there as an Inducement to have a Divorce.

Mich 11. *Jacobi, in the Common Pleas.*

308 PAYNE's Case.

IT was moved by *Hutton* Serjeant, for a Prohibition to the Court of Requests: The Case was this, A man in consideration, That *Alice S.* would obtain the good will of his Master, that hee the Defendant might have a shop in his Masters house, did promise her, that when she was married, that he would give unto her ten pound; And the Plaintiff shewed, That she did get the good will of her Master, and that the Defendant had a shop in his Masters house, and that she the said *Alice* was afterwards married to the Plaintiff *Payn.* And the opinion of the whole Court was, That a good Action upon the Case would lie upon such promise. And a Prohibition was awarded unto the Court of Requests; a Suit being there brought for the same matter; which matter being a thing meerly triable at Law, and not in a Court of Equity, that Court had no Jurisdiction of it.

Mich. 11. *Jacobi, in the Common Pleas.*

309

MOuntague Serjeant, demanded the opinion of the Justices in a Case upon the Statute of 3. *Jacobi*, of Recusants, in the behalfe of the University of *Oxford.* viz. That if a Recusant convict do avoid, the said Statute doth grant his Patronage for years to one of his friends in trust; Whether the same were void, or not within the said Statute? The Justices did deny to deliver any opinion in the case, for they said, perhaps it might be that that point and case might come judicially before them; and such they said was the answer of *Hussey* in 1. *H.*7. in *Humfrey Staffords* case, which was, King *Henry* the seventh came *in Banco*, and demanded a queston of the Justices. But yet the Court *tacitè* seemed to agree, That such a Lease of the Patronage was void by the said Statute of 3. *Jacobi.* And they said, That they would not have the University discouraged in the case, which implyed their opinions to be for the Universitie. And 21. H.7 was vouched, That the Patronage was only matter of favour, and was not a thing valuable; And in this case *Cook* chief Justice said, That *Apertus hæreticus melius est quam fictus Catholicus.*

Mich. 11. *Jacobi, in the Common Pleas.*

310 BOND *and* GREEN's Case.

AN Action of Debt was brought against an Administrator, the Defendant shewed how that there were divers Judgments had against him in *London*; And also that there was another Debt due by the Testator, which was assigned over unto the Kings Majesty, and so pleaded,

That

That he had fully Adminiſtred. *Barker* Serjeant took Exception to the pleading, becauſe it was not therein ſhewed that the King did aſſent to the Aſſignment; and alſo becauſe it was not ſhewed, that the Aſſignment was enrolled. The Court ſaid nothing to the Exceptions; But whereas the Defendant as Adminiſtrator, did alledge a Retayner in his own hands for a debt due to himſelfe; The opinion of the whole Court was, that the ſame was good, and that an Adminiſtrator might retayne to ſatisfie a debt due to himſelfe. But it was agreed by the Court, That an Excecutor of his own wrong, ſhould not Retayne to ſatisfie his own debt; See to this purpoſe, *C.* 5. part *Coulters* Caſe.

Mich. 11. *Jacobi, in the Common Pleas.*

311 STROWBRIDG *and* ARCHERS Caſe.

IN An Action of debt upon a Bond the Defendant was Outlawed. And the Writ of Exigent was, viz. *Ita quod habeas corpus ejus hîc &c.* whereas it ought to be *coram Juſticiariis noſtris apud Weſtminſter*: And for that defect the utlagary was reverſed, and it was ſaid, that it was as much as if no Exigent had been awarded at all: And upon the Reverſall of the utlagary, a Superſedeas was awarded; and the party reſtored to his goods which were taken in Execution upon the *Capias utlagatum.* It was alſo reſolved in this Caſe, That if the Sheriffe, upon a Writ of Execution ſerved, doth deliver the mony or goods which are taken in Execution to the Plaintiffs Atturney, it is as well as if he had delivered the ſame to the Plaintiff himſelf; for the Receipt by his Atturney is in Law his own Receipt. But if the Sheriff taketh goods in Execution, if he keep them, and do not deliver them to the party at whoſe ſuit they are taken in Execution, the party may have a new Execution, (as it was in the principal Caſe) becauſe the other was not an Execution with Satisfaction.

Mich. 11. *Jacobi, in the Common Pleas.*

312 CHAVVNER *and* BOVVES *Caſe.*

Bowes ſold three Licences to ſell Wine unto *Chawner*; who Covenanted to give him ten pounds for them; and *Bowes* Covenanted that the other ſhould enjoy the Licences. It was moved in this Caſe, whether the one might have an Action of Covenant againſt the other in ſuch Caſe: And the opinion of *Warburton* and *Nichols* Juſtices, was, That if a Man Covenant to pay ten pound at a day certain, That an action of Debt lyeth for the money, and not an action of Covenant. *Barker* Serjeant, ſaid, he might have the one or the other: But in the principall Caſe the ſaid Juſtices delivered no opinion.

313

Note, That this Day *Cooke* Chief Juſtice of the Common Pleas, was removed to the Kings Bench, and made *Lord* Chief Juſtice of England. And Sir *Henry Hobart*, who was the Kings Atturney generall, was the day following made *Lord* Chief Juſtice of the Court of Common *Pleas*. Sir *Francis Bakon* Knight, who before was the Kings *Solicitor*, was made Atturney Generall. And Mr *Henry Yelverton* of Grays-Inn was made the Kings Solicitor: and this was in *October*, *Term. Mich.* 11 *Jacobi.* 1613.

Mich. 11. *Jacobi*, *In the Common Pleas.*

314

THis Caſe was put by *Mountague* the Kings Serjeant, unto the Lord Chief Juſtice *Hobart*, when he took his place of Lord Chief Juſtice in the Common Pleas; viz. Tenant in taile the Remainder in taile, the Remainder in Fee; Tenant in tail is attainted of Treaſon, Offence is found: The King by his Letters Patents granteth the lands to *A*, who bargaineth and ſelleth the land by Deed unto *B*. *B*. ſuffers a common Recovery, in which the Tenant in tail is vouched, and afterwards ths Deed is enrolled. And the queſtion was, Whether it was a good Bar of the Remainder? And the Lord Chief Juſtice *Hobart* was of opinion, That it was no barre of the Remainder, becauſe before enrollment nothing paſſed but only by way of concluſion. And the Bargainee was no Lawfull Tenant to the Precipe.

Mich. 11. *Jacobi*, *in the Common Pleas.*

315 WHEELER'S Caſe.

IT was moved for a Prohibition upon the Statute of 5. & 6. for working upon Holy days; and the Caſe was, That a man was preſented in the ſpirituall Court for working, viz. carriage of Hay, upon the feaſt day of Saint *John* the Baptiſt, when the Miniſter preached and read divine ſervice; and it was holden by the whole Court of Common Pleas, That the ſame was out of the Statute by the words of the Act it ſelf, becauſe it was for neceſſity; And the Book of 19 *H.*6. was vouched, That the Church hath authority to appoint Holy days, and therefore if ſuch days be broken in not keeping of them Holy, that the Church may puniſh the breakers thereof; But yet the Court ſaid, That this day, viz. the Feaſt day of S[t] *John* the Baptiſt was a Holy day by Act of Parliament, and therefore it doth belong unto the Judges of the Law, whether the ſame be broken by doing of ſuch work upon that day, or not. And a Prohibition was awarded.

Mich.

Mich. 11 *Jacobi, in the Common Pleas.*

316 REARSBY *and* CUFFER'S *Case.*

IT was moved for a Prohibition to the Court of Requests, because that a man sued there by English Bill for money which he had layd out for an Enfant within age for his Meat, drink & necessary apparel; and set forth by his Bill that the Enfant being within age, did promise him to pay the same. And a Prohibition was awarded, because as it was said, he might have an action of Debt at the common Law, upon the contract for the same, because they were things for his necessary livelihood and maintenance. And it was agreed by the Court, That if an Infant be bounden in an Obligation for things necessary within age, the same is not good, but voidable. *Quære*, for a difference is commonly taken, When the *Assumpsit* is made within age, and when he comes to full age. For if he make a promise when he cometh of full age, or enters into an Obligation for necessaries which he had when he was within age, the Law is now taken to be, that the same shall binde him. But see 44. *Eliz. Randals* Case, adjudged, that an Obligation with a penaltie for money borrowed within age, is absolutely void.

Mich. 11. *Jacobi, in the Common Pleas.*

317 SMITH'S *Case.*

Smith, one of the Officers of the Court of Admiralty, was committed by the Court of Common Pleas to the prison of the *Fleet*, because he had made Return of a Writ, contrary to what he had said in the same Court the day before: and 11. *H.* 6. was vouched by *Warburton* Justice, That if the Sheriff do return that one is *languidus in prisona*, whereas in truth he is not *languidus*, the Sheriff shall be sued for his false Return: which was agreed by the whole Court. *Quod nota.*

Mich. 11. *Jacobi, in the Common Pleas.*

318

Warburton Justice asked the Pronothories this question, If in Trespass the plaintiff might discontinue his action within the yeer? To which the Pronothories answered, That if it be before any plea be pleaded, that he might: But the Justices were of a contrary opinion, that he could not; because then costs which are given by the Statute should be lost.

Mich.

Mich. 11. *Jacobi, In the Common Pleas.*

319 LAISTON'S Caſe.

IN Treſpaſs for a Way, the Defendant pleaded a plea in bar which was inſufficient; and afterwards the plaintiff was Non-ſuit; yet it was reſolved by the Court, that the defendant ſhould have his coſts againſt the plaintiff. But if a default be in the originall Writ; and afterwards the plaintiff is Non-ſuit there, the defendant ſhall not have coſts; becauſe that when the Original is abated, it is as if no ſuit had been. And ſo was the opinion of the whole Court.

Mich. 11. *Iacobi, in the Common Pleas.*

320 HILL *and* GRUBHAM'S Caſe.

THe Caſe was this. A Leaſe was made unto *Grubham* by a deed paroll, *Habendum* to him, his wife, and his daughter *ſucceſſivè, ſicut ſcribuntur et nominantur in ordine*: Afterwards *Grubham* dyed, and then his wife dyed; And if it were a good eſtate in Remainder to his daughter, was the Queſtion. *Harris* Serjeant, The Remainder is void, and not good by way of Remainder for the incertainty. *C.* 1. part in *Corbets* caſe. In all Contracts and bargains there ought to bee certainty. And therefore 22. *H.*6. is, That if a Feoffment be made to two *et hæredibus*, it is void, although it be with warranty to them and their heirs. *Vide* 9. H.6. 35. Where *renunciavit totam communiam* doth not amount unto a Releaſe, becauſe it is not ſhewed to whom the Releaſe is: and ſo in 29. *Eliz.* in the Kings Bench, in *Windſmere & Hulbards* caſe. Where an Indenture was to one, *Habendum* to him and to his wife, and to a third perſon *Succeſſivè*, it was holden that it was void by way of Remainder to any of them. And there it was Reſolved, 1. That they did not take preſently. 2. That they could not take by way of Remainder: And 3. that They could not take as Occupants, becauſe that the intent of the Leſſor was, that they ſhould take but as one eſtate. But the Court was of opinion againſt *Harris*; And Reſolved, That the daughter had a good eſtate in Remainder, and that the ſame did not differ from the Caſe in *Dyer*, Where a Leaſe was made by Indenture to one, *Habendum* to him & to another *ſucceſſivè, ſicut nominantur in Charta*, for that thoſe words *Sicut nominantur in Charta*, maketh the eſtate to be certain enough. And ſo they ſaid in this Caſe, *Sicut ſcribuntur et nominantur in Ordine*, is certain enough, and ſhall be taken to be *Sicut ſcribuntur et nominantur in eadem charta.* But they agreed according to the Caſe in *Brooks* Caſes, That a Leaſe to three, *Habendum ſucceſſivè*, is not good.

Mich

Mich. 11. *Jacobi*, *in the Common-Pleas.*

321. TRAHERNS *Caſe.*

AN Aſſize of Nuſans was brought againſt the Defendant, becauſe that *Levavit quandam domum ad nocumentum*, *&c.* And the Plaintiff ſhewed how that he had a Windmil, and that the Defendant had built the ſaid houſe, ſo as it hindred his Mill: And the Jury found that the Defendant *levavit domum*; and that but two feet of it did hinder the Plaintiffs Mill, and is *ad nocumẽtum.* And how Judgment ſhould be given, was the queſtion. And the Court was of opinion, That Judgment ſhould be, that but part of the houſe ſhould be abated, *viz.* That which was found to be *ad nocumentum.* And it was ſaid by ſome, That the Aſſiſe is ſuch a Writ which extends to the whole houſe; and therefore that the whole houſe ſhould be abated according to the Writ. But a difference was taken betwixt the words *Erexit* and *Levavit*: For, *Erexit* is but when parcel of a houſe is ſet up *ad nocumentum*; but *Levavit* is when an entire houſe is levied from the ground. And it was ſaid by *Hobart* Chief Juſtice, That if the Defendant had not levied the houſe ſo high by two yards, it had been no Nuſans: for the Jury find, that the two yards only are *ad nocumentum.* And therefore he conceived that the Writ was anſwered well enough; and that but part of the houſe ſhould be abated: For the Writ is, *Quod levavit quandam domum*, *&c.* And the Verdict is, *Quod levavit domum*; But that but two yards of it is *ad nocumentum*: And therefore he ſaid, the Writ is anſwered well enough; and that the Judgment ſhould be given, That that only ſhould be abated which was *ad nocumentum*, *&c.* *Quare*; for the Caſe was not reſolved: And *vid. Batten* & *Sympſons* Caſe, *C. par.* 9. to this purpoſe.

Mich. 11. *Jacobi*, *in the Common-Pleas.*

322. BAGNALL *and* POTS *Caſe.*

IT was reſolved by the Court in this Caſe, That when an Iſſue is joyned upon *Non conceſſit*, that the Iſſue ſhall be tryed where the Land is: But if a Leaſe be in queſtion, and *Non conceſſit* be pleaded to it, it ſhall be tryed where the Leaſe was made. 2. It was reſolved, That if Copyhold land be given to ſuperſtitious uſes, and the ſame cometh unto the King by the Statute; That the Copyhold is deſtroyed, and the Uſes ſhall be accompted void: But it was reſolved, That in ſuch Caſe by the Statute which giveth this Land ſo given to ſuperſtitious uſes to the King, that the King hath not thereby gained the Freehold of the Copyhold, but that the ſame remaineth in the Lord of the Mannor.

Mich. 11. *Jacobi, in the Common Pleas.*

324. Jucks & Sir Charls Cavendish's *Caſe.*

A Parſon ſued for the ſubſtraction of Predial Tythes, upon the Statute of 2 *E.6.* in the Spiritual Court. The Defendant made his ſuggeſtion, That for ſuch a Farm upon which the Tythes did ariſe, there was this cuſtom; That when the Tythes of the Lands were ſet forth, that the Owners of the ſaid Lands had uſed time out of mind to take back thirty ſheafs of the Tythe-corn: and ſhewed that he was the Owner of the ſaid Farm; and that according to the ſaid cuſtom, after the Tythes were ſet forth, that he did take back thirty ſheafs thereof, and thereupon prayed a Prohibition. And in this Caſe it was ſaid by the Court, That it ought to be averred, that the Farm was a great Farm; for otherwiſe it ſhould be the impoveriſhing of the Church, and would take away a great part of the profit of the Parſon. And it was further ſaid by the Court, That if there were but thirty Tythe-ſheafs in all, that the Owner ſhould not have them, for then the Cuſtom ſhould be unreaſonable: And Day was given to the other ſide, to ſhew Cauſe why the Prohibition ſhould not be awarded.

Mich. 11. *Jacobi, in the Common-Pleas.*

325. Canden *and* Symmon's *Caſe.*

NOte, That where a Juror is not challenged by one party, who had ſufficient cauſe of challenge; and afterwards is challenged by the other ſide, and afterwards the party doth releaſe his challenge; in that caſe, the firſt party cannot challenge the ſame Juror again, becauſe he did foreſlow his time of challenge, and he had admitted the party for to be indifferent at the firſt.

Mich. 11. *Jacobi, in the Common-Pleas.*

326. *The Biſhop of* Chichester *and* Strodwick's *Caſe.*

IN an Action of Treſpaſs for taking away of Timber, and the Boughs of Trees felled: The Defendant, as to the Timber, pleaded *Not guilty*; And as to the Boughs, he made a ſpecial Juſtification, That there is a Cuſtom within the Mannor of *Aſhenhurſt* in the County of *Suſſex*, That when the Lord fels or ſels Timber-trees, that the Lord is to have only the

the Timber, and that the poor Tenants in *Coſcagio parte Manerii*, time out of mind have uſed to have the Branches of the Trees for neceſſary Eſtovers to be burnt *in neceſſario focali in terris & tenementis*. And the Opinion of the Court was, That the Cuſtom was not well expreſſed, to have Eſtovers to burn *in terris & tenementis*; for that Eſtovers cannot be appertaining to Lands, but to Houſes only: And therefore whereas the Defendant in the Caſe did entitle himſelf to a houſe and lands, and gave in Evidence that the Cuſtom did extend to Lands, it was holden that the Evidence did not maintain the Iſſue; And the Cuſtom was alleadged to be, That the Lord ſhould have *Quicquid valeret ad maremium*, and that the Freeholders ſhould have *ramillos*. Which as *Hobart* Chief Juſtice ſaid, is to be meant all the Arms and Boughs; for whatſoever is not *maremium*, is *ramillum*. 2. It was holden in this Caſe, That the Non-uſe or Negligence in not taking of the Boughs, did not extinguiſh nor take away the Cuſtom, as it hath been oftentimes reſolved in the like caſe. And note that in this Caſe, to confirm the ſaid Cuſtom, the Book-caſe was cited, which is in 14. *E.* 3. *Fitz. t'. Bar.* 277. and the ſame was given in and avowed for good Evidence: where the Caſe was, That the Biſhop of *C.* (which ſhall be intended the Biſhop of *Chicheſter*) brought an Action of Treſpaſs for felling of Trees, and carrying them away: where the Defendant pleaded, That he held a Meſſuage and a Verge of Land of the Biſhop; and that all the Tenants of the Biſhop within the Manor of *A.* ought to have all the Windfals of Trees, and all the Boughs and Branches, *&c.* Which Caſe, as *Harris* Serjeant conceived, was the Caſe of the very Mannor now in queſtion; and the Tenant there (as in this Caſe) made a ſpecial Juſtification, and there it was holden that it was good, and adjudged for the Defendant: Alſo in that Caſe it was adjudged, That the Lord ſhould have *Maremium*, and that the Tenants ſhould have *Reſiduum*, which ſhall be intended the Boughs and Branches. And the Cuſtom in the Caſe was adjudged good. But becauſe the Defendant alleadged the Cuſtom to be, to have the ſame as Eſtovers to be burned *in terris*, and gave Evidence only to the Meſſuage, it was found againſt the Defendant, for that the Evidence did not maintain the Iſſue.

Mich. 11. *Jacobi, in the Common-Pleas.*

327. VAUGHAN's *Caſe.*

IN a *Formedon* in the Diſcender, the Tenant had been eſſoined upon the Summons, and alſo upon the View. And after was pleaded *Ne dona pas*, the general iſſue; and thereupon iſſue was joyned: And if he might be eſſoined again after iſſue joyned, was the Queſtion: And the

Court was of opinion, That in a real action the Tenant may be essoined after Issue joyned, but not in a personal action, by the Statute of *Marlebridge*. And *Hobart* Chief Justice said, That the Statute of *Marlebridge* gave not any Essoin, but only did restrain Essoins: and therefore in real Actions the same is left as it was at the Common Law; and by the Common Law the Tenant might be Essoined after Issue joyned. And note, *per totam Curiam*, That if an Essoin be not taken the first day, it shall never after be taken.

Mich. 11. *Iacobi, in the Common-Pleas.*

328. Clay *and* Barnets *Case.*

IN an *Ejectione Firme*, the Case was this. Sir *Godfrey Foliamb* had issue *James* his son, who had issue *Francis*: And Sir *Godfrey Foliamb* was seized in Fee of divers Lands as well by purchase as by discent, in sundry Towns, *viz. Chesterfield, Brampton*, &c. in the Tenures of *A.B.C.* &c. and dyed. *James Foliamb* his son, 7 *E.6.* made a Conveyance of divers Lands to *Francis Foliamb* being his younger son, *in hæc verba*, viz. *Omnia mea Messuagia, terras, & tentam in Chesterfield, Brampton, &c. modo in tenuri* of the said *A.B.C. quæ pater meus Galfrid: Foliamb perquesivit* from divers men, whom he named in certain: And also convey a House called the *Hart* to the same *Francis*, which came to him by discent, by the same Conveyance which was in the occupation of one *Celie*, and not in the Tenures of the said *A.B.C.* And the great Question upon the whole Conveyance was, Whether all the Lands which he had by Discent in the said Towns, and in the Occupations and Tenures of the said *A. B.* & *C.* did pass, or only the purchased Lands. And it was resolved by the whole Court, That the Conveyance did pass only the Lands which he had by purchase, except only the said House which was precisely named and conveyed; and did not pass the Lands which he had by Discent. For if all the Lands which he had by Discent should pass by the general words, then the special words which passed the House which he had by Discent should be idle and frivolous; and that was one reason *ex visceribus causæ*, that only the purchased Lands did pass. 2. It was said by Justice *Warburton*, That if a man giveth all his Lands in *D.* in the Tenures of *A.* & *B.* and he hath Lands in *D.* but not in their Tenures, that in that case all his Lands in *D.* passeth: So if a man give all his Lands in *D.* which he had by Discent, from his son, there all his Lands whatsoever shall pass. *Hobart acc'* and said, That if a man gives all his Lands in the County of *Kent*, if he have Lands within the County, they do pass. And he said, that in a Conveyance every restriction hath his proper operation; and in the Conveyance in the principal case there were three restrictions: 1. All his lands,

ands in ſuch Towns, *viz. Cheſterfield, Brampton, &c.* 2. All his lands in the Tenures of ſuch men, *viz. A.B.C.* 3. All his lands which he had by Purchaſe, *&c.* And the words (*All my Lands*) are to be intended all thoſe my Lands which are within the reſtrictions. And he ſaid, that the word (*Et*) being in the copulative, was not material; for all was but one ſentence, and it did not make ſeveral ſentences and the word *Et* is but the concluſion of the ſentence. 3. They reſolved, That general words in a Grant may be overthrown by words reſtrictive; as is 2 *E.* 4. and *Plow. Com. Hill & Granges* Caſe. And therefore if a man giveth all his lands in *D.* which he hath by Diſcent from his Father; if he have no lands by Diſcent from his Father, nothing paſſeth. 4. They agreed, That a Reſtriction may be in a ſpecial Grant, as in *C.* 4. *par. Ognels* Caſe: but they ſaid, that if the Reſtriction doth not concur and meet with the Grant, that then the Reſtriction is void. Note, the principal Caſe was adjudged according to theſe Reſolutions.

Mich. 11. *Iacobi, in the Common-Pleas.*

329. Cooper *and* Andrews *Caſe.*

TO have a Prohibition to the Spiritual Court, ſuggeſtion was made, That the Lord *De la Ware* was ſeiſed of 140 Acres of lands in the County of *Suſſex*, which were parcel of a Park. And a *Modus Decimandi* by Preſcription was ſaid to be, That the Tenants of the ſaid 140 Acres for the time being had uſed to pay for the tythes of the ſaid 140 Acres two ſhillings in mony, and a ſhoulder of every third Deer which was killed in the ſame Park, in conſideration of all tythes of the ſaid Park: And it was ſhewed, how that the Lord *De la Ware* had enfeoffed one *Cumber* of the ſaid 140 acres of land; who bargained and ſold the ſaid 140 acres of land to the Plaintiffe who prayed the Prohibition. The Defendant ſaid, that the ſaid Park is diſparked, and that the ſame is now converted into arable lands and paſture-grounds, and ſo demanded tythes in kind; upon which the Plaintiffe in the Prohibition did demur. *Hutton* Serjeant. By the diſparking of the Park, the Preſcription is not gone nor extinct; becauſe the Preſcription is ſaid to be to 140 acres of lands, and not to the Park: and although the ſhoulder of the Deer, being but caſual and at the pleaſure of the party, be gone, yet the ſame ſhall not make void the Preſcription. 2. He ſaid, that the act of the party ſhall not deſtroy the Preſcription: and although it be not a Park now in form and reputation, yet in Law the ſame ſtill remains a Park. And he compared the Caſe unto *Lutterels* Caſe, *C.* 4. *par.* 48. where a Preſcription was to Fulling-Mils, and afterwards the Mils were converted to Corn-Mils; yet the Preſcription remained. 3. He ſaid, Admit it is not now a Park, yet there

there is a poſſibility that it may be a Park again, and that Deer may be killed there again. For the Diſparking in the principal Caſe is only alleadged to be, that the Pale is thrown down; which may be amended: For although that all the Park-pale, or parcel of it be caſt down, yet the ſame doth ſtill remain in Law a Park: and a Park is but a Liberty; and the not uſing of a Liberty doth not determine it, nor any Preſcription which goes with it. And if a man have Eſtovers in a Wood by Preſcription, if the Lord felleth down all the Wood, yet the right of Eſtovers doth remain; and the Owner ſhall have an Aſſiſe for the Eſtovers, or an Action upon the Caſe. *Vid. C. 5. par. 78.* in *Grayes* Caſe, the Caſe vouched by *Popham*. Further he ſaid, That in the beginning a *Modus Decimandi* did commence by Temporal act, and Spiritual; and the mony is now the tythe, for which the Parſon may ſue in the Spiritual Court: And a Caſe *Mich. 5. Jacobi* was vouched, where a Preſcription to pay a Buck or a Doe in conſideration of all Tythes, was adjudged to be a good Preſcription. And the Caſe *Mich. 6. Jacobi*, of *Skipton*-Park, was remembred: where the difference was taken, when the Preſcription runs to Land, and when to a Park. In the one caſe, although the Park be diſparked, the Preſcription doth remain; in the other not. And *6 E. 6. Dyer 71.* was vouched: That although the Park be diſparked, yet the Fee doth remain. And ſo in the Caſe at Bar, although the caſual profit be gone, yet the certain profit, which is the two ſhillings, doth remain. *Harris* Serjeant contrary. And he ſaid, that the Conveyance was executory, and the Agreement executory, and not like unto a Conveyance or Agreement executed: And ſaid, that Tythes are due *jure divino*; and that the party ſhould not take advantage of his own wrong, but that now the Parſon ſhould have the tythes in kind. And upon the difference of Executory and Executed, he vouched many Authorities, *viz. 16 Eliz. Dyer 335. Calthrops* Caſe, 15 *E.* 4. 3. 5 *E.* 4. 7. & 32 *E.* 3. Anuitie 245. And in this caſe he ſaid, that the Parſon hath no remedy for the ſhoulder of the Deer; and therefore he prayed a Conſultation. *Hobart* Chief Juſtice ſaid, That the Pleading was too ſhort, and it was not ſufficiently pleaded: For it is not pleaded, That the Park is ſo diſparked, that all the benefit thereof is loſt. But he agreed it, That if a man doth pull down his Park-pale, that the ſame is a diſparking without any ſeiſure of the Liberty into the Kings hands, by a *Quo Warranto*. But yet all the Court agreed, That it doth yet remain a Park in habit: And they were all alſo of opinion That the diſparking the Park of the Deer, was not any diſparking of the Park as to take away the Preſcription. The Caſe was adjourned till another day.

Mich.

Mich. 11. *Iacobi, in the Common-Pleas.*

330. PIGGOT *and* PIGGOT'S *Caſe.*

IN a Writ of Right, the Donee in tail did joyn the Miſe upon the meer Right; and final Judgment was given againſt the Donee, in which caſe the Gift in tail was given in Evidence. Afterwards the Donee in tail brought a Formedon in the Diſcender: and it was adjudged by the whole Court, that the Writ would not lie: For when final Judgment is given againſt the Donee in tail upon iſſue joyned upon the meer Right, it is as ſtrong againſt him as a Fine with Proclamations: and the Court did agree, That after a year and day, where final Judgment is given, the party is barred; and alſo that ſuch final Judgment ſhould bar the Iſſue in tail.

Mich. 11 *Iacobi, in the Exchequer-Chamber.*

331.

AN action upon the Caſe was brought for ſpeaking theſe words: *Thou doeſt lead a life in manner of a Rogue: I doubt not but to ſee thee hanged for ſtriking Mr.* Sydenhams *man who was murdered.* And it was reſolved by all the Juſtices in the Exchequer-Chamber, That the words were not actionable. At the ſame day in the ſame Court, a Judgment was reverſed in the Exchequer-Chamber, becauſe the words were not actionable: The words were theſe, *viz. Thou uſeſt me now, as thy Wife did when ſhe ſtole my goods.*

Mich. 11. *Iacobi, in the Common Pleas.*

332. ROES *and* GLOVE'S *Caſe.*

AN action of Debt was brought upon a Bond in *Mich.* Term 9 *Jac.* and in *Hillary* Term after the parties were at iſſue upon the Statute of Uſurie; and it was found againſt the Defendant. Afterwards *Ter. Trin.* a Writ of Error was brought retornable *Mich.* 10. *Jacobi*, in which Term no Errors were aſſigned. And afterwards in *Hillary Term* following two Errors were aſſigned: the one, That there was no ſuch Statute as the Statute of 37 *H.* 8. of Uſurie, which was againſt what he had before confeſſed by his Plea; the ſecond Error was, That whereas *J. S.* of *Exeter* was retorned of the Jury, it was aſſigned for Error, that *J. S.* of another

place

place was ſworn upon the Inqueſt: and in this *Caſe* the Court adviſed the Defendant in the Writ of Error to plead *In nullo erratum eſt.* By which the Court did ſeem to incline, that they were no Errors.

Mich. 11. *Iacobi, in the Common-Pleas.*

333. BRADLEY *and* JONES *Caſe.*

IN an action upon the Caſe, the caſe was, That the Defendant did exhibite Articles againſt the Plaintiff in the Chancery before Dr. *Cary*, and there ſwore the Articles; and afterwards he ſued in the Kings Bench, and had Proceſs out of that Court upon the Articles ſworn in Chancery: and for this an action upon the Caſe was brought, and it was adjudged that the action would lie. The articles exhibited in the Chancery were, That the Plaintiff being an Attorney at Law, was a Mainteinor of Juries and Cauſes, and a Barretor: and the Defendant prayed the Peace againſt him in the Kings Bench. And in this Caſe it was reſolved, 1. That a man might pray the Peace or Good Behaviour of any other man in any of the Kings Courts: but then it muſt be done in due form of Law: and if he do it ſo, no action upon the *Caſe* will lie, as it was reſolved 27 *Eliz.* in *Cutler* and *Dixons* caſe in the Kings Bench. But it was agreed, that if a man ſueth in a Court which hath not juriſdiction of the *Cauſe*, an action upon the *Caſe* will lie, but not where the Court hath juriſdiction of the *Cauſe*. 2. It was reſolved, That the action did lie in the *Caſe* at Bar, becauſe he did exhibite the articles in Chancery, and did not purſue them there: For when he had ſworn the articles in the Chancery, he could not have a *Supplicavit* out of the Kings Bench; and the Oath and *Affidavit* in the Chancery doth remain as a Scandal upon Record. And *Hobart* Chief Juſtice ſaid, That every Court ought to intermeddle with their own proper cauſes; and that two Courts are not to joyn in one puniſhment, for puniſhment is not to be by parcels. And he ſaid, That if a man claimeth right to the Land of another, he is not puniſhable for it; but if he make title vnto a Stranger, then he ſhall be puniſhed: for every one ought to meddle with his own buſineſs. 3. It was reſolved, That when a thing doth concern the Commonwealth, the ſame doth concern every one in particular. And ſo it is lawful for any man to require the Good behaviour of another, for the publique good: *Intereſt etenim reipublicæ ut maleficia punientur.* 4. It was reſolved, that the action did lie; becauſe the Defendant made the articles in Chancery but a colour of the Good Behaviour: and although that the Kings Bench might grant the Good Behaviour without any articles preferred, yet when firſt they begin in another Court, they ought to follow the cauſe there. And *Hobart* the Chief Juſtice, in this caſe ſaid, that an Attorney may not labour Jurors in the behalf of his Client, for that is Imbracery.

Mich.

Mich. 11. *Iacobi, in the Common-Pleas.*

334. Fial and Varier's Case.

IN an Action upon the Case, upon an *Assumpsit*, the Case was this. A man did promise to stand to the Arbitrement of *J.S.* & *J.D.* if they made their Arbitrement and Award within ten dayes: and if they do not make their Award within ten dayes, that if they nominate an Umpier, and he make an Award within the said ten dayes, that then, *&c.* *J.S.* & *J.D.* did not make any Award within ten dayes: but the fourth day after the Submission they did nominate *J. N.* to be Umpier, who made an Award within the said ten dayes; and the Defendant would not perform the Award, wherefore the Plaintiffe brought the action. *Sherley* Serjeant. It is repugnant: For the first Arbitrators had the whole ten dayes to make their Award, and then cannot the Umpier make an Award within the said ten dayes. But the opinion of the whole Court was, that the action would lie; and that it should be construed thus, *viz.* That if an arbitrement and award be made within ten dayes by the first Arbitrators or by the Umpier: For the first Arbitrators may examine the matter for two or three dayes; and if they cannot make any award, then the Umpier shall have the rest of the ten dayes to make the award: and so it was adjudged.

Mich. 11. *Iacobi, in the Common-Pleas.*

335. Colt and Gilbert's Case.

AN action upon the Case brought for these words, *He is a Thief, and stole a Tree*: adjudged that the action would lie; for the later words do not extenuate the former: But, *Thou art a Thief, for thou hast robbed my Orchard*, are not actionable, *v. C.* 4 *par. Bretridges* Case.

Mich. 11. *Iacobi, in the Common-Pleas.*

336. Brook's Case.

AN action upon the Case was brought for words. The Plaintiffe set forth in his Declaration, That he was a Mercer by his trade, and did sell wares and commodities in his shop, and did keep divers Books of his trade, and Debt-books: and that the Defendant said unto Mr. *Palmer*, being the Plaintiffs Father-in-Law, these words of the Plaintiffe, *viz.*

Your Son-in-Law Brooks *deceived me in a Reckoning, and he keepeth in his shop a false Debt-book, And I will shame him in his Calling.* *Nichols* Justice, and *Hobart* Chief Justice were of opinion, that the action would not lie for those words: 1. Because the words single of themselves are not any slander; and when words will bear an action, it ought to be out of the force and strength of the words themselves. 2. The first words, *Thou hast deceived me in a Reckoning* will bear no action, because it is impossible but that Tradesmen and Merchants which keep Debt-books will sometimes mistake one Figure for another, and so the same doth turn to the prejudice and damage of another against the will of the party himself. And so the subsequent words, *He keepeth a false Debt-book*, are not actionable, because it may be falsified by the Servants of the party, and not by the Defendant himself; and also it may be false written. *Et interest reipublicæ ut sit finis litium:* and it should be a cause of many Suits, if such a nice construction should be made of words as to make them actionable; and words shall be taken *in mitiori sensu*, if there be no particular description and declaration that the words were spoken maliciously. And therefore general words which of themselves are actionable, by construction shall be taken to bear no action; as *C. 4. par. Stanhops* case. And so if a man saith of another, that he hath the Pox, they shall be taken *in mitiori sensu*, because they are not described by any subsequent words which declares malice in the party. And *Nichols* vouched a Case which was in this Court this Term, where an action was brought for these words; *Thou usest me now, as thy Wife did when she stole my Cushions:* that the words were not actionable. *Warburton* Justice. When words are spoken which scandal a man in his trade or profession, they are actionable: as if one say of an Attorney, *Thou cosenest Mr.* Winsor *of his Fees:* and so if words are spoken maliciously. And therefore an action was brought by one who was a Jury-man, for these words, viz. *Thou hast deceived me and my children of eight hundred pounds*; they were adjudged actionable. And so *Hill. 6. Jacobi. rot. 1159. Thou art a Jury-man, and hast been the death of a hundred men by thy false means:* Being maliciously spoken, (although in themselves they are not actionable) yet they will bear an action. But it was adjudged in the principal Case, for the reasons given by the two other Justices, that the words would bear no action; to which *Warburton* Justice in the end did seem to agree.

Hill. 11. *Iacobi, in the Common-Pleas.*

337. AYLIFFE *and* BROWNS *Caſe.*

A Woman who was poſſeſſed of a Term for divers years, had iſſue two Daughters; the one married to *Ayliffe*, and the other to *Brown*. *Ayliffe* had iſſue four Daughters, and *Brown* had alſo iſſue; and the Woman did demiſe Legacies to the children of *Ayliffe* out of the Rent reſerved upon the Leaſe, and made *Brown* her Executor, and dyed. *Ayliffe* required *Brown* in the behalf of his children to pay the money to him, that he might imploy the ſame for the benefit of the children: which he refuſed to do, and thereupon he ſued him in the Spiritual Court, and there Sentence was given for the Plaintiffe. *Brown* the Executor moved for a Prohibition, and alleadged for ground of it, that he was Executor, and chargeable in an accompt for the money. But becauſe he came after ſentence, and alſo after he had appealed to the Court of Delegates, and after a ſentence given there alſo againſt him, the Court refuſed to grant a Prohibition in the Cauſe; and alſo becauſe he did refuſe to give ſecurity for the payment of the Legacies to the children.

Hill. 11. *Iacobi, in the Common-Pleas.*

338. WORMLEIGHTON *and* HUNTERS *Caſe.*

TWo men are bounden with *J. S.* as Sureties in an Obligation. One of the Sureties, viz. *Wormleighton*, was ſued upon the Bond, and the whole penalty recovered againſt him. He exhibited an Engliſh Bill into the Court of Requeſts againſt the Defendant, being the other Surety, to have contribution: and it was moved to the Court for a Prohibition to the Court of Requeſts, and the ſame was granted, becauſe by entring into the Obligation it became the debt of each of them jointly and ſeverally, and the Obligee had his election to ſue which of them he pleaſed and take forth Execution againſt him: and the Court ſaid, That if one Surety ſhould have contribution againſt the other, it would be a great cauſe of ſuits, and therefore the Prohibition was awarded; and ſo it was ſaid it was lately adjudged and granted in the like caſe, in Sir *William Whorwoods* caſe.

Hill. 11. *Iacobi, in the Common-Pleas.*

339. LAMBERTS *Caſe.*

TWo men were Partners in goods: the one of the Partners ſold unto *J.S.* at ſeveral times goods to the value of 100 l. and for the goods at one time bought he paid the money according to the time; afterwards an action was brought by one of the Partners for the reſt of the money, and the Plaintiff declared upon one contract for the whole goods, whereas in truth they were ſold upon ſeveral contracts made, and the Defendant in that caſe would have waged his Law: But the Court adviſed the Plaintiff to be Non-ſuit, and to bring a new action, becauſe that action was not well brought, for it ought to have been a ſeveral action upon the ſeveral contract. And in this caſe it was agreed by the Court, that the ſale of one Partner is the ſale of them both; and therefore although that one of them ſelleth the goods, or merchandizeth with them, yet the action muſt be brought in both their names; and in ſuch caſe the Defendant ſhall not be received to wage his Law, that the other Partner did not ſell the goods unto him, as is ſuppoſed in the Declaration.

Hill. 11. *Jacobi, in the Common-Pleas.*

340. WHITE *and* MOORS *Caſe.*

A Man did recover in an action of Debt brought in the Common-Pleas, and had Judgment; and afterwards before Execution was taken forth, the Defendant in the Debt exhibited an Engliſh Bill into the Court of Requeſts to overthrow the Judgment and to ſtay Execution, pretending in his Bill that there was a parol agreement betwixt him and the other, that he ſhould not be charged with that Judgment nor the payment of the money. It was moved for a Prohibition in this caſe, which was granted by the Court, becauſe the Plaintiffe there by practice did endeavour to ſubvert a Judgment given at the Common-Law. And in ſpeaking of this Caſe, the Court did very much condemn the courſe uſed in the Court of Requeſts in taking Bonds of the parties to perform their Decrees made there; for it was ſaid that ſuch Bonds were againſt Law, and ſo it had been oftentimes adjudged.

Hill.

Hill. 11 *Jacobi, in the Common-Pleas.*

341. BALDWYN *and* GIRRIES *Caſe.*

A Parſon did Libel in the Spiritual Court for Tythes, and the ſubſtraction of them; and grounded his Libel upon the Statute of 2 *E.6.* The Defendant alleaged that he was to be diſcharged from the payment of tythes, by reaſon of priviledge within the Statute of 31 *H.*8. of Diſſolutions: and the Plaintiffe here had a Prohibition. And afterwards they were at iſſue here, Whether he ought to be diſcharged by Priviledge or not; and after iſſue joyned, the Plaintiffe in the Prohibition was Nonſuit: And thereupon the Parſon had a Conſultation, and proceeded in the Spiritual Court, and there obtained a ſentence; and the ſentence there was, That he ſhould recover the ſingle damages, and the ſame was ſet in certain; and *ulterius* that *recuperet duplicem valorem*, which was alſo by the ſaid ſentence ſet in certain. And it was reſolved in that Caſe by the whole Court, That a Prohibition ſhould be granted grounded upon the ſentence, becauſe the Spiritual Court in their ſentence did exceed the damages which was to be given by the Statute in that Court: and it was ſaid, That although the ſentence there given be not expreſsly that he recover treble damages, yet becauſe it did amount to ſo much, if the words of the ſentence be joyned together, It was directed that a ſpecial Prohibition, in which the Statute and the whole matter is to be mentioned, be awarded. And in this caſe it was agreed by the whole Court, That the Statute of 2 *E.6.* for ſubſtraction of Tythes meerly, doth not give any damages: but if the Tythe be firſt ſet forth, and then they are ſubſtracted, there becauſe the Parſon had once an intereſt in them, he ſhall recover treble damages. And the principal Caſe was reſembled by *Warburton* Juſtice to the caſe of Waſte; that if the Jury give damages 20l. there the Court ſhall treble the damages and make the ſame 60l. and ſo it was done in the principal caſe.

Hill 11 *Iacobi, in the Common-Pleas.*

342. GIPPE'S Caſe.

A Man Libelled for Tythes in the Spiritual Court: the Defendant alleadged a *Modus Decimandi*, and thereupon had a Prohibition; and

and afterwards the Plaintiffe in the Prohibition did not prove his ſuggeſtion within ſix months: and therefore the Court granted a Conſultation, becauſe the Law hath appointed a certain time within which time the ſuggeſtion is to be proved, Otherwiſe the Parſon ſhould be delayed and prejudiced in his Tythes; and ſo it was adjudged in Parſon *Bugs* caſe, *Mich.* 8. *Jacobi*, in this Court.

Hill. 11 *Jacobi, in the Kings Bench.*

343. Crosse and Stanhop's Caſe.

AN action of falſe Impriſonment was brought againſt the Defendant and two other Juſtices of Peace of the County of *York*. The Defendants juſtified the Impriſonment, by reaſon of the Statute of 1 *M. cap.* That it ſhould not be lawful for any maliciouſly and contumeliouſly to moleſt or diſquiet any perſon or perſons which are Preachers, or after ſhould be Preachers. And the Plaintiffe demurred upon the Plea in Bar generally; and two Exceptions were taken to the Pleading: 1. Becauſe the words of the Statute were miſrecited; for the words of the Statute are in the disjunctive, *maliciouſly or contumelioufly*: And the opinion of the Court was, that when the precedent & ſubſequent words disjunctive are all of one ſenſe, that the word (*Or*) is all one with the copulative; but where they are of divers natures (as by word or deed) it is otherwiſe. The ſecond Exception was, That where the words were (by the greater part of the Juſtices) the Recital was (by the better part of the Juſtices.) But notwithſtanding theſe Exceptions, it was adjudged againſt the Plaintiffe.

Paſch. 12 *Iacobi, in the Kings Bench.*

344. Cartwright's Caſe.

CArtwright prayed a Prohibition; and the Caſe was this. *A.* lying ſick upon his bed, made his Will; and afterwards ſaid unto his Executors named in the Will, *I will, that B. ſhall have twenty pounds more, if you can ſpare it.* And the Executor anſwered and ſaid, *Yes forſooth*: but no Codicil was made of the ſame Legacie. And a Bill was preferred in the Spiritual Court for the Legacie; whereupon the Executor prayed a Prohibition. And it was holden by this Court, that although this Court

Court hath not power to hold plea of the thing Libelled for there in the Spiritual Court, yet it hath power to limit the Juriſdictions of other Courts; and if they abuſe their authority, to grant a Prohibition. *Vid.* 2 *H.*4.10. But it was doubted whether the Spiritual Court, as this caſe is, might give remedy to the perſon for the Legacie: For the ſame not being annexed to the Will by a Codicil, it was but *fidei commiſſum*: and ſo the doubt was, Whether the Spiritual Court might hold plea of it: For if they cannot hold plea of it, then in this caſe a Prohibition may be lawfully granted, although that this Court have not power nor juriſdiction of the thing it ſelf. The Court would be adviſed of it, and therefore it was adjourned.

Paſch. 12 *Iacobi, in the Kings Bench.*

345. Sir CHRISTOPHER HEYDON's Caſe.

Godſall, Shepard & Smith brought an Aſſiſe of *Novel diſſeiſin* againſt Sir *Chriſtopher Heydon*, which was tryed at the Aſſiſes in *Norfolk* before Sir *Tho. Fleming* Lord Chief Juſtice of *England*, and Juſtice *Dodderidge*, which was found for the Plaintiffs, and Judgment was given for them in the Court of Common-Pleas. And thereupon Sir *Chriſtopher Heydon* brought a Writ of Error in the Kings Bench; and aſſigned for Error, That whereas the Judgment was given upon his own Confeſſion, the Judgment was entred, That the Plaintiffs did recover *per viſum Recognitorum Aſſiſe predict.* And after argument in the Kings-Bench, it was adjudged by the whole Court, that the Judgment given in the Common-Pleas ſhould be affirmed, notwithſtanding the Error aſſigned. And now to reverſe the Judgment given in the Kings Bench, he brought another Writ of Error in Parliament. *Cook* Chief Juſtice ſaid, That the Clarks of the Chancery ought not to make a Writ of Error to the Parliament, unleſſe they have the Kings licence ſo to do. And it was agreed by the whole Court, that a Writ of Error lieth in Parliament upon the Tranſcript of the Record, without bringing of the Record it ſelf in Parliament: For the Parliament is holden at the Kings pleaſure, and may be diſſolved before the Errors be diſcuſſed; and ſo the Record it ſelf cannot be brought here again, becauſe the Parliament which is a higher Court was once poſſeſſed of it. 8 *H.*5. *Error* 88. The ſame Law in Error upon a Judgment given in *Ireland*, 5 *E.*2. *Error* 89. where only the Tranſcript of the Judgment is removed: For if the Record it ſelf ſhould be brought into *England*, it might be that before it came hither it ſhall be drowned in the ſea; and it is dangerous to commit a Record

to

to the mercy of the winds and ſea. And Error lieth to reverſe a Fine upon the Tenor of the Record: and it is not neceſſary to bring the Fine it ſelf, becauſe there is not any Chirographer in this Court to examine it. At another day the ſame Term, *George Crook* and *Noy* took five Exceptions to the ſaid Writ of Error: the firſt was, Becauſe the Writ doth recite the Judgment to be *in Aſſiſ. capt. coram Tho. Fleming Capital. Juſticiar. ad Placita, & Johannem Dodderidge milit. unum Juſtic. ad Placit. coram nobis tent.* And the Exception was, becauſe that this latter addition was not to them both. *Dodderidge* Juſtice held, that the ſame was no good Exception to abate the Writ of Error, becauſe the omiſſion is only in the addition of Honour which is ſurpluſage, and the Perſon is certain, and his power appears to take the Aſſiſe: and that Exception is not in point of juriſdiction, but of denoting of the perſon; and therefore is like the *Caſe* in 19 *Eliz. Dyer*, 356. which is a ſtronger *Caſe*, and 6 *E.6. Dyer* 77. *Haughton* and *Cook contr.* But *Crook* Juſtice did agree with *Dodderidge*, that the addition of the ſame was but ſurpluſage, and that the Writ had been well enough without it. *Cook* Chief Juſtice held the contrary: For then he varieth from their Commiſſion, which is their authority; but if it had been left out in their Commiſſion, then the Writ had been good enough. And he ſaid, that when a man meddles with a thing which is but ſurpluſage, which he needed not to do, he muſt recite the ſame ſubſtantially, otherwiſe his plea will be vitious. *6. 4 par. Palmers caſe.* And when he maketh *Tho. Fleming Capit. Juſtic. ad Placita* indefinitely, he varieth from the truth: for the ſtile is, *Tho. Fleming Capit. Juſtic. ad Placita coram Rege tent. Haughton* Juſtice *acc'* and he ſaid, that in every Writ of Error which is to remove a Record three things ought to be expreſſed. 1. Mention is to be made before what perſon it was taken, as the book is in 28 *H.6.* 11. 2. It is to mention betwixt whom it was, 9 *H.6.* 4. 3. The manner of the caption is to be mentioned, whether by Writ or without Writ, 2 *R.* 3. 2 & 3. and this Writ faileth in the firſt of them, therefore he concluded that the VVrit ſhould abate. *Cook* Chief Juſtice was of the ſame opinion, and agreed that Miſnoſmer and variance are not to be favoured, if they be not ſubſtantial and eſſential, *quæ dant eſſe rebus*: and he ſaid that the variance in this caſe is of ſuch nature; For in many Records yet extant, and in the time of King *H.3.* it is to be found, that the Chief Juſtice of *England* did ſit and give Judgment in the Common-Pleas and in the Exchequer; and ſo then *Capital. Juſtic. ad Placita* is too general, becauſe he might ſit and give Judgment in any of the ſaid Courts. The ſecond Exception was, becauſe that the VVrit ſaith, *Aſſiſa capta, &c.* and doth not ſay *per breve*, nor *ſine breve*, nor doth ſay *ſecundum legem & conſuetudinem, &c.* For in 43 *Eliz.* in the *Caſe* betwixt *Cromwell* and *Andrews*, it was adjudged not good to ſay, That ſuch an Action came into the *Common*-Pleas out of the *Country*, and doth not ſhew that it came by adjournment, or by *Certiorari*,

Certiorari, or *Mittimus*. To which it was anſwered by *Dampart* Counſellor for the Plaintiff, that it is a ſtrong intendment that the Aſſiſe was taken *per breve*, and therefore it needed not to be expreſſed, becauſe it is a general, and not a ſpecial Aſſiſe. *Crook* Juſtice. The Exception is good; for it is ſo general, that it cannot be intended which Aſſiſe it was: For put caſe there were two Aſſiſes betwixt the ſame parties, it cannot be known which Aſſiſe is intended. And of the ſame opinion was *Haughton* Juſtice. *Dodderidge* contrary; and he ſaid, Notwithſtanding the Exception the Record ought to be removed by the Writ: For the Judges Conſcience may be well ſatisfied which Record is to be removed; And here the Record which is to be removed is ſo preciſely ſhewed, that no body can doubt of it which ought to be certified: And there are Records removed by Writs of Error which are more dubious then this is, *v.* 19 *Eliz. Dyer* 356. 20 *E.*3. But in this caſe the Writ is much enforced by the words *Sommon. & Capt.* For in every Aſſiſe there are four Commands to the Sheriffe. 1. *Facere tenementum eſſe in pace*, to quiet the poſſeſſion. 2. *Facere recognitionem*, or *Recognit. videre tentam.* 3. *Summoneas.* 4. *Ponas eos per vadios, &c.* For which cauſe of neceſſity it muſt be meant an Aſſiſe *per Breve*. The third Exception was, becauſe in the Writ it was not ſhewed who was Plaintiffe, and who Defendant. *Dodderidge*. It is generally to be agreed, That the Writ of Error ought to agree with the Record: which Rule is taken in 3 *H.*6.26. *C.*3. *par.* the Marqueſs of *Winchеſters* Caſe. But yet every Variance doth not abate this VVrit: For if the variance be only in matter of circumſtance, as it is in this Caſe, the VVrit ſhall not abate. *vid.* 9 *H.*6.4. 4 & 5 *Phil. & Ma. Dyer* 164. 2 *Eliz. Dyer* 173. & 180. 28 *H.* 6. 11. & 12. The fourth Exception was, becauſe it doth not ſhew the place of the Caption of this Aſſiſe, but ſayes generall *in Com. Norfolk*. *Haughton* held that rather to be examinable in the Parliament then here. The laſt Exception was, becauſe the VVrit is directed to *Cook* Chief Juſtice, that he certifie the Record *ſub ſigillo ſuo*: whereas it was ſaid the Record it ſelf was to come in Parliament, and there a Tranſcript thereof is to be made, and the Record to be remanded. *V.* 22 *E.*3. 23 *Eliz. Dyer* 357. 1 *H.*7.29. againſt the Book of Entries 302. To which it was anſwered, That it is at the pleaſure of the Parliament to have either the one or the other, 22 *E.*3.3. 8 *H.*5. Error 88. To which *Cook* agreed. And note, that upon this VVrit of Error a *Superſedeas* was fraudulently procured, and a VVrit of Attachment iſſued forth againſt *Bacon* who procured it; And the *Superſedeas* was diſallowed, becauſe that another *Superſedeas* was granted in the firſt VVrit of Error, And a man can have but one *Superſedeas*. But the Queſtion in this Caſe was, Admitting that the VVrit of Error be good and not abateable, If the ſame be a *Superſedeas* in it ſelf? And the Court doubted of that point: For *Cook* Chief Juſtice ſaid, That he had viewed 26 or 27 VVrits of Error which were brought

in Parliament, where the firſt Judgment was diſaffirmed, and but one where the Judgment was affirmed; and that is in 23 *Eliz. Dyer* 357. the Record of which cannot be found: *Et quod in praxi eſt inuſitatum, in jure eſt ſuſpectum.* The Books where Error was brought in Parliament are 2 *E.*3.34 & 40 in the old print. 22 *E.*3.3.42 *Aſſ. pl.* 22. 9 *H.*5.23. 1 *H.*7.29. 23 *Eliz. Dyer* 375. And it ſhould be miſchievous for delay, for a Parliament is only to be ſummoned at the Kings pleaſure. *Haughton*, *Dodderidge* and *Crook* held cleerly, That this VVrit of Error was a *Superſedeas* in it ſelf, and that upon the Book of 8 *E.* 2. Error 88. & 1 *H.* 7. 19. where it is ſaid, That the Juſtices did proceed to Execution after the Judgment affirmed in Parliament, and therefore *ex conſequente ſequitur* not before: And therefore the VVrit of Error is a *Superſedeas* that they cannot proceed. But there is no Preſident of it in the Regiſter, but a *Scire facias*, *fo.*70. And the Court held, That if a *Superſedeas* be once granted and determined in default of the party himſelf, that he ſhall never have another *Superſedeas*: but otherwiſe if it fail by not coming of the Juſtices. Alſo *Cook* Chief Juſtice held, That by this VVrit of Error in Parliament Sir *Chriſtopher Heydon* could not have the effect of his ſuit, becauſe it is to reverſe a Judgment *coram Rege*, and ſo the Judgment given in the Common-Pleas ſtands firm, and Sir *Chriſtopher Heydon* is put to a new VVrit of Error in this Court: for the Judgment in the Kings Bench is, *Judicium affirmetur, & ſtet in pleno robore & effectu*: And it is not as the Judgment is in 20 *E.*4 44. *Judicium ſtet in æternum.* And ſo that not being the fundamental Judgment, the Reverſal thereof is but the beginning of another ſuit, 38 *H.*6.3. And admit that the VVrit of Error be a *Superſedeas* for the ſecond Judgment, yet it is a Queſtion whether it ſhall be for the firſt which is not touched by the VVrit: And whether they may grant Execution upon it or not. *Vide* 13 *E.* 4. 4: 43 *E.*3.3. 8 *H.* 7.20. And therefore the Court adviſed Sir *Chriſtopher Heydon* to ſue unto the Kings Majeſty by Petition to have a new Writ of Error, for without Petition he cannot have the Writ 22 *E.*3 1. 8 *E* 2. Error 88. And the Juſtices gave him warning to do it in time convenient, otherwiſe they would award Execution if they did perceive the ſame to be meerly for delay, according to the Caſes in 6 *H* 7. & 8 *H.*7. And afterwards the Parliament being upon a ſudden diſſolved without any thing done therein, Execution was awarded.

Paſch. 12 *Iacobi, in the Kings Bench.*

346. Blithman and Martin's Caſe.

John Blithman brought an Action upon the Caſe againſt *Martin* upon an *Aſſumpſit*, and recovered. And it was moved, That becauſe the

Conſideration which was the Cauſe of the Action was againſt Law, that the Judgment might be ſtayed. For the Plaintiffe did alleadge the ſame to be in conſideration, That if the Plaintiff being Goaler of ſuch a Priſon in *Devonſhire*, would deliver one who was in Execution for Debt, he promiſed to give him Twenty pounds: And he alleadged *in facto*, that he did deliver him, the Debt not being ſatisfied: And becauſe the Conſideration was to do a thing which was againſt the Law, the opinion of the Court was that it was void, and that the Plaintiffe ſhould not have Judgment.

Paſch. 12 *Iacobi, in the Kings Bench.*

347. Sherloe's Caſe.

Sherloe brought an Action of Aſſault and Battery, and declared *Quod eum* the Defendant *verberavit*: And did not ſhew certain, nor alleadge preciſely in his Declaration, That the Defendant did beat him: Exception was taken unto it: For there is a difference betwixt a Declaration in an *Ejectione Firme*, *Debt*, and this Action; for in thoſe Actions ſuch Declaration is good, but not in this Action. And to prove the ſame, one *Sheriffe* and *Bridges* Caſe in 39 *Eliz.* was cited, where ſuch Declaration was adjudged void. But yet the opinion of the Juſtices was, That the Declaration was good enough notwithſtanding the ſaid Judgment in 39 *Eliz.*

Paſch. 12 *Iacobi, in the Kings Bench.*

348. Grubb's Caſe.

IT was moved in Arreſt of Judgment upon iſſue joyned *inter Mathiam Grub*, and in the *Venire facias* he was called *Matheum Grub.* And *Cook* Chief Juſtice ſaid, That the *Venire facias* was vitious: but becauſe that the Jury did appear upon the *Habeas Corpora*, the Trial was well enough.

Pasch. 12 *Iacobi, in the Kings Bench.*

349. Crook and Averin's Case.

Crook Merchant brought an Action upon the Case against *Averin* for speaking these words, viz. *Mr.* Crook *came into* Cornwal *wit a blue Coat: but now he hath gotten much wealth by trading with Pirat. and by cosening by tale of Pilchers, and by Extortion.* And *Cook* Chie Justice said, That the Law giveth no favour to those verbal Actions, an we see there is not any such Action brought in our old Law-books. An therefore he said, Words ought to be certain: And he examined th words in this Case by themselves; and said, That the first words are no actionable, because they are not material; And the other words *(b trading with Pyrats)* are too general; for an honest man might trad with a Pyrate, not knowing him to be a Pyrate, and so no damage migh come to him. But as to the other words he gave no opinion.

Pasch. 12 *Jacobi, in the Kings Bench.*

350. Claydon & Sir Jerom Horsey's Case.

Claydon brought an Action upon the Case against Sir *Jerom Horse* for erecting of a house in a certain place called *Risborough. Common* and alleadged in certain, That every one who had Common in *Risborough pred. &c.* and did not alleadge, That the Common is in the Mannor o *Risborough:* But he declared, That there is such a Custome within th Mannor of *Risborough.* And the opinion of the Court was, That th Declaration was good, because there is but one *Risborough* alleadged and therefore of necessity it must be meant *de Manerio.*

Pasch. 12 *Iacobi, in the Kings Bench.*

351. The Clothworkers of Ipswich Case.

The Masters and Wardens of the Clothworkers of *Ipswich* in th County of *Suffolk*, brought an Action of Debt for 3l. 13s. 4d against

againſt *D.* and declared, That the King who now is had incorporated them by the ſame name, *&c.* And had granted unto them by Charter, *Quod nullus exerceat artem ſive occupationem in aliqua ſhoppa, domo ſive camera infra villam predict.* of a Clothworker or Tailor, *niſi ante eos vel duos eorum probationem faceret quod Apprentic. fuit per ſpacium* 7 *annorum, & per eos ſive duos eorum ſit approbat. ſub pœna* 3*l.* 13*s.* 4*d. pro qualibet ſeptimana qua exerceat predict. artem contra hanc conſtitutionem.* And layed *in facto*, That the Defendant had uſed the Trade of a Tailor for the ſpace, *&c.* againſt *&c.* The Defendant pleaded, That he was retained in ſervice with one Mr. *Pennel* Gen: of *Ipſwich*, and had been an Apprentice for the ſpace of ſeven years *in tali loco, &c.* And that he made garments for his ſaid Maſter and his wife and their children, *infra &c. quæ quidem exercitio eſt eadem exercitio artis* which is ſuppoſed by the Plaintiffs in their Declaration. Upon which the Plaintiffs did demur in Law. *Goldſmith* for the Plaintiffs, That the Plea in Bar is void: For every Plea in Bar ought to confeſſe and avoid, traverſe or deny that which is alleadged in the Plaintiffs Declaration: But this Plea in Bar had not done any of them, and therefore was void: For the exerciſing of the Trade which he hath confeſſed in his Bar, cannot be intended the ſame matter with which the Plaintiffs have charged him in their Declaration, and therefore it is no good bar at all: And to prove the ſame, *vide* 14 *H.*6. 2. 35 *H.*6. 53. 12 *H.*7. 24. 27 *H.* 8. 2. Sir *Robert Hitcham* for the Defendant: And he held that the matter is well confeſſed and avoided; becauſe that uſage which he hath confeſſed in the Bar is colourable the ſame uſage with which the Plaintiffs have charged him in their Declaration. As in a Writ of Maintenance, the Defendant ſaith That he was of Councel with the party, being a Serjeant at Law, *&c.* which is the ſame Maintenance which is ſuppoſed by the Plaintiffe: *vide* 28 *H.*6. 7. & 12. 19 *H.*6. 30. 18 *E.*4. 2. 36 *H.*6. 7. Alſo he ſaid, When a Declaration is general, the Defendant need not traverſe, 1 *E.*4. 9. 2 *E.*4. 28. And further he ſaid, That the Statute of 27 *Eliz. cap.*5. of Demurs helped that defect, for that it is but only in matter of form. But the Juſtices did not argue that point: But the Queſtion which they made was, Whether the Conſtitution or Ordinance were lawful or not: And as to that it was holden by the whole Court, That the ſaid Ordinance was unlawful: And it was agreed by the Court, That the King might make Corporations, and grant to them that they may make Ordinances for the ordering and government of any Trade; but thereby they cannot make a Monopoly, for that is to take away Free-trade, which is the birthright of every Subject. And therefore the Caſe was in 2 *H.* 5. 5. in Debt upon a Bond upon Condition, That one ſhould not uſe his Trade of a Dyer in the Town where the Plaintiffe did inhabit for one year: And there ſaid, That the Obligation was void, becauſe the Condition was againſt the Law; And he ſwore (by God) if the Plaintiffe were;

were preſent, that he ſhould go to priſon till he had paid a Fine to the King: Yet regularly, *Modus & Conventio vincunt legem.* 2. It was reſolved, That although ſuch Clauſe was contained in the Kings Letters Patents, yet it was void: But where it is either by Preſcription or by Cuſtome confirmed by Parliament, there ſuch an Ordinance may be good; *Quia Conſuetudo Legalis plus valet quam Conceſſio Regalis.* The King granted unto the Abbot of *Whitny* the Cuſtody of a Port which is as it were a Key of the Kingdom; and therefore the Grant was void and ſo adjudged: And ſuch Grants are expreſly againſt the Statute of 9 *E* 3. *cap.* 1. And the Charter granted by King *Henry* the 8. to the Phyſitians of *London* hath the ſame Clauſe in it: But if it had not been confirmed by Act of Parliament made 33 *H.* 8. it had been void. The King granted unto *B.* that none beſides himſelf ſhould make Ordnances for Battery in the time of war: Such Grant was adjudged void. But if a man hath brought in a new Invention and a new Trade within the Kingdom, in peril of his life, and conſumption of his eſtate or ſtock, *&c.* or if a man hath made a new Diſcovery of any thing, In ſuch Caſes the King of his grace and favour, in recompence of his coſts and travail, may grant by Charter unto him, That he only ſhall uſe ſuch a Trade or Traſique for a certain time, becauſe at firſt the people of the Kingdom are ignorant, and have not the knowledge or skill to uſe it: But when that Patent is expired, the King cannot make a new Grant thereof: For when the Trade is become common, and others have been bound Apprentices in the ſame Trade, there is no reaſon that ſuch ſhould be forbidden to uſe it. And *Cook* Chief Juſtice put this Caſe: The King granted to *B.* That he ſolely ſhould make and carry Kerſies out of the Realm; and the Grant was adjudged void, which *Crook conceſſit.* 3. It was reſolved, That this Charter was void, becauſe of the words, *viz. Niſi ante eos vel duos eorum probationem fecerit, &c.* And therefore it was conſidered what proof ſhould be ſufficient for the party: And as to that it was agreed, That the proof cannot be upon Oath; for ſuch a Corporation cannot admiſter an Oath unto the party: And then the proof muſt be by his Indentures and Witneſſes; and perhaps the Corporation will not allow of any of them: For which the party hath no remedy againſt the ſaid Corporation, but by his Action at the Common Law; and in the mean time he ſhould be barred of his Trade which is all his living and maintenance, and to which he had been Apprentice for ſeven years. Another reaſon was given, becauſe that by this way they ſhould be Judges in their own cauſe, which is againſt the Law; And the King cannot grant unto another to do a thing which is againſt the Law. And afterwards *Trin.* 12 *Jacobi,* Judgment was entred, *Quod Querentes nihil capiant per Billam.* And Judgment was then given for the Defendant.

Paſch.

Paſch. 12 Iacobi, in the Kings Bench.

352. LINSEY and ASHTON's Caſe.

Linſey brought an Action of Debt againſt *Aſhton* upon a Bond, the Condition of which was to perform an Award. The Defendant ſaid that the Award was, That the Defendant ſhould ſurceaſe all ſuits depending betwixt them, which he had done: The Plaintiffe in his Replication ſaid, That the Arbitrators made ſuch Award *ut ſupra*, and alſo that the Defendant ſhould pay unto the Plaintiffe 25*l.* at the houſe of *J. S. abſque hoc*, that they made the other Award only. Upon which the Defendant did rejoyn and ſaid, That well and true it is that they made thoſe Awards, *&c.* But they further awarded that the Plaintiffe ſhould releaſe unto the Defendant, which he had not done. And upon the Rejoynder the Plaintiffe did demur in Law. And the opinion of the Court was without queſtion, That the Plea was a departure, 19 *H.6.* 19. But it was argued by *Finch*, That the Replication was inſufficient: For the Plaintiffe ought not to have traverſed, as this Caſe is, becauſe that a man ought not to traverſe a thing alleadged by Implication, but ought to traverſe that which is alleadged *de facto*, upon which there may be an iſſue joyned. And to prove the Traverſe void, the Caſe in 11 *H.6.* 50. was put: But the Exception was not allowed by the Court. Another Exception was taken, becauſe the Award it ſelf was void, becauſe it was to do a thing upon the Land of another man, which he might not lawfully do: And although the Arbitrators might award him to do the thing which is inconvenient, yet they cannot award him to do a thing which is impoſſible and againſt the Law: as in 17 *E.* 4, 5. Two were bound to ſtand to the Arbitrement of *J. S.* of all Treſpaſſes; who awarded that the one ſhould pay unto the other 40*s.* and that he find Sureties to be bounden for the payment of it. And by the opinion of the Juſtices the Award was void, becauſe he could not award a man to do that which did not lie in his power, and he hath no means to compel the ſtranger to be bound for him. But the opinion of the whole Court was againſt *Finch*: For firſt, the mony is to be paid *apud domum J. S.* and not *in domo*; And it might be, for any thing that appeareth, that the ſaid Houſe is adjoyning to the High-way, ſo as every Stranger might lawfully come unto it, although he might not come into it without being a Treſpaſſor: But admit it be not adjoyning to the High-way, yet he might come as neer unto the houſe as he could, or he might get leave to come thither. Secondly, It was reſolved, That although

though the Award was void as to that part, yet for the reſidue it ſtood good, and therefore for not performance of the ſame the Bond is forfeited. As if *J.* be bounden to perform the Award of *J.S.* for White-Acre, and that he award that I enfeoffe another of White-Acre, and that he give unto me Ten pounds: If I tender unto him a Feoffment of White-Acre, and he refuſeth it, and will not give to me the 10*l.* I ſhall have an Action of Debt upon the Bond, as it is adjudged in *Osborn's* Caſe *C.*10.*par.*131. The ſame Law, If *J.S.* and *J.N.* ſubmit themſelves unto the Award of *J.D.* who awardeth that *J.S.* ſhall ſurceaſe all ſuits, and procure *J.N.* to be bounden with a ſtranger, and make a Feoffment of his Mannor of *D.* which is a thing out of the Submiſſion: In that caſe there are three things enforcing the Arbitrement; the firſt is only good, the ſecond is againſt the Law, and the other is out of the Submiſſion: yet being in part good, it ought to be performed in that, otherwiſe the Bond is forfeited. But this Caſe was put: If *J.* be bounden to ſtand to the Award of *A. ita quod* it be made *de & ſuper premiſſis*, and afterwards *A.* maketh an Award but of part of the premiſes, there it is void in all, becauſe it is not according to the authority given unto him. And afterwards in the principal Caſe Judgment was given for the Plaintiffe.

Paſch. 12 *Jacobi, in the Kings Bench.*

353. Dockwray and Beal's Caſe.

IN an *Eſſex* Jury, The opinion of the Court was, That Wood will paſſe by the name of Land, if there be no other Land whereby the words may be otherwiſe ſupplied. Alſo it was agreed, That the Tenant for Years might fell Underwoods of 25 years growth, if the ſame hath uſed to be felled.

Paſch. 12 *Jacobi, in the* Kings Bench.

354. Wrotesiey and Candish's Caſe.

E*Lizabeth Wroteſley* did recover Dower 6 *Jacobi* in the Common-Pleas; in which Writ ſhe demanded *tertiam partem Manerii de D. cum pertinaciis, Nec non tertiam partem quarundam terrarum jacent. in Hovelan.* And upon *Ne unque ſeiſe que Dower* the parties were at iſſue, and the *Venire facias* awarded *de Hovelan*: And it was found for the Plaintiffe,

Plaintiffe, and Judgment was given for her. And *Candiſh* the Defendant brought a Writ of Error in the Kings Bench; and aſſigned for Error, That it was a Miſ-trial: For that the *Venire facias* ought to have been *de Manerio*, and not of *Hovelan*, 6 *H.* 7. 3. 11 *H.* 7. 20. *C.* 6. *par.* 14. 19 *H.* 6. 19. 19 *E.* 4. 17. Yet the Councel of the Defendant moved, That the Trial was good for the Land in *Hovelan*: And it being found that the Husband was ſeiſed of the Mannor of *D.* that now the Trial was good for the whole.

Paſch. 12 *Jacobi, in the Kings Bench.*

355. Cowley and Legat's Caſe.

Cowley brought an *Audita querela* againſt *Legat*, and the Caſe was this: *Cowley* and *Bates* bound themſelves in a Bond of 200*l.* jointly and ſeverally to *Legat*; And afterwards 6 *Jacobi*, *Legat* brought an action of Debt upon the Bond againſt *Bates*, and had Judgment; and 7 *Jacobi* the ſaid *Legat* brought Debt againſt *Cowley* in the Kings Bench upon the ſame Bond, and obtained Judgment; and afterwards he ſued forth Execution upon the firſt Judgment by *Elegit*, and had the Land of *Bates*, who was Tenant thereof only for another mans life, in Execution; and afterwards he took forth a *Capias ad ſatisfaciendum* againſt *Cowley* upon the Judgment in the Kings Bench: And thereupon *Cowley* brought an *Audita querela*, containing in it all the whole matter. And the opinion of all the Juſtices was, That the *Audita querela* was well brought. And firſt it was holden, That when a man may plead the matter in bar, he ſhall not have an *Audita querela* upon the matter, becauſe it was his lacheſs that he did not take advantage of it by way of plea. But ſecondly in this Caſe it was ſaid, That he could not have pleaded the ſpecial matter; and therefore as to that point the *Audita querela* was well brought. But the onely doubt in the Caſe was, Whether *Legat* the Defendant might have a new Execution by *Capias ad ſatisfaciendum*, after that he had Execution againſt one of the Obligers by *Elegit*: and the doubt was, becauſe the Judgments upon which he grounded his Executions were given at ſeveral times, and in ſeveral Courts, and againſt ſeveral perſons: For it was agreed by the whole Court, That a *Capias* doth not lie after Execution ſued by *Elegit* againſt the ſame perſon; but after a *Capias* an *Elegit* is grantable: And the reaſon of the difference is, becauſe upon the prayer to have an *Elegit*, it is entred in the Roll, *Elegit ſibi executionem per medietatem terræ*, ſo as he is eſtopped by the Record to have another Execution; but upon a *Capias* nothing at all

is entred upon Record. Yet *Cook* Chief Juſtice ſaid, That it is the common practice of a good Attorney to deferre the entry in the Roll of Execution upon an *Elegit*, until the Sheriffe hath retorned it ſerved: And in ſuch caſe it was agreed, That if the Sheriffe retorn upon the *Elegit*, That the party hath not Lands, *&c.* then the party may take forth a *Capias*. Alſo the *Elegit* is in it ſelf a ſatisfactory Execution; and by the Common-Law a man ſhall have but one Execution with ſatisfaction. And therefore at the Common-Law, if after Execution the Land had been evicted, the party had no remedy: And *Cook* ſaid, If part of the Land be evicted, the party ſhall not have remedy upon the Statute of 32 *H.*8. *cap.*5. to which *Crook* Juſtice agreed. And the Court held it to be no difference, although that the Judgments were given in ſeveral Courts againſt perſons ſeveral, and at ſeveral times, and where it is but one Judgment againſt one perſon. *Vide* the Caſe 43 *E.*3. 27. where in Debt the Defendant ſaid, That the Plaintiffe had another Action for the ſame Debt depending in the Exchequer by Bill, Judgment, *&c.* And by *Mowbray* and *Finchden* cleerly it is a good plea, although it be in another Court: And *Dodderidge* Juſtice ſaid, That in the firſt caſe the ſaid *Legat* might ſue the ſaid *Cowley* and *Bates* ſeverally, and after Judgment he might chooſe his Execution againſt which of them he pleaſed: But he could not have Execution by *Elegit* againſt them both. And therefore he ſaid, That although there be an Eviction of the Land, or that the Judgment be reverſed by Error after that he hath Execution againſt one by *Elegit*, yet *Legat* could not have Execution againſt the other: for by the firſt Execution he had determined his Election, and he could not ſue the other: which *Cook* agreed.

Mich. 12 *Iacobi, in the Kings Bench.*

356. Fox and Medcalf's Caſe.

IN a Writ of Accompt brought in the Court of *York*, the Plaintiffe had Judgment that the Defendant ſhould accompt: And upon that Judgment the Defendant in the Court there brought a Writ of Error in the Kings Bench. And it was adjudged, That no Writ of Error lay in that caſe, becauſe the Judgment to Accompt is but the Conveyance, and the Plaintiffe hath not any benefit until he be ſatisfied by the Award of the Auditors; for upon their Award the final Judgment ſhall be given.

Mich.

Mich. 12 *Iacobi, in the Kings Bench.*

357. The Bishop of SALISBURY'S Case.

IT was holden in this Case, That if a Bishop, Parson, or other Ecclesiastical person do cut down Trees upon the Lands, unless it be for Reparations of their Ecclesiastical houses; and do or suffer to be done any delapidations: That they may be punished for the same in the Ecclesiastical Court, and a Prohibition will not lie in the Case; and that the same is a good cause of deprivation of them of their Ecclesiastical Livings and Dignities. But yet for such Wastes done they may be also punished by the Common Law, if the party will sue there, *Vide* 2 *H.*4.3.

Trin. 13 *Iacobi, in the Kings Bench.*

358. PRAT and the Lord NORTH'S Case.

A Man was distreined by the Bailiffe of the Lord *North*, for 20s. imposed upon him in the Court-Leet for the erecting and storing of a Dove-Cote: And it was said, That it cannot properly be called a Nusance, but for the destroying of Corn, which cannot be but at certain times of the year: And therefore it was conceived, That the party who was presented might traverse the Nusance to be with his Pidgeons; and it was said that a man might keep Pidgeons within his new house all the year, or put them out at such a time as they could not destroy the corn: And *Cook* Chief Justice said, That there is not any reason that the Lord should have a Dove-Cote more then the Tenant; and he asked the Question, where the Statute of *E.*2. saith, *Inquiratur de* Dove-Cotes erected without Licence, Who should give the Licence? *Ad quod non fuit responsum.* In *Mich.* Term following the Case was argued by *Dam-port*, who said, That the erecting of a Dove-Cote by a Freeholder was no Nusance: For a Writ of Right lieth of a Dove-Cote, and in the Register it is preferred and named before Land, Garden, *&c.* But he said that there was a fatal defect in the Plea; which was, That the Presentment at the Leet was, That *Prat* had erected a Dove-Cote unlawfully, and did not say *ad commune nocumentum*, as it ought to be, otherwise it is not presentable in the Leet: And therefore although it was otherwise in the Plea, That it was *ad commune nocumentum*, the same did not help the defective Presentment.

Mich. 10 *Jacobi, in the Common Pleas.*

359. GREENWAY and BARKER's Caſe.

BEtwixt *Greenway* and *Barker*, It was moved for a Prohibition to the Court of Admiralty; and the Cauſe was for taking of a Recogniſance in which the Principal and his Sureties, his heirs, goods and lands were bounden: And it was in the nature of an Execution at the Common-Law; and thereupon they in the Admiral Court made out a Warrant to arreſt the body of the Defendant there. *Dodderidge* Serjeant ſaid, That it was not a Recogniſance at the Common-Law, but only a Stipulation, in the nature of a Bail at the Common-Law; and he ſaid, That it was the uſual courſe to pledge goods there in Court to anſwer the party if ſentence were given againſt him. *Nichols* Serjeant: They cannot take a Recogniſance; and by the Civil Law, if the party render his body the Sureties are diſcharged; and Execution ought to be only of the goods, for the ſhip is only arreſted; and the Libel ought to be only againſt the ſhip and goods, and not againſt the party, 19 *H.* 6. *acc'*. And afterwards Dr. *Steward* and Dr. *James* were deſired by the Court to deliver their opinions what the Civil Law was in this Caſe: and Doctor *Steward* ſaid, He would not reſt upon the Etymologie of the word; for if it be a Recogniſance, Bail, or Stipulation, it is all one in the Civil Law; and in ſuch caſe he ſaid by their Law Execution might be againſt the ſureties. And he argued, 1. That *ex neceſſitate* it muſt be agreed that there is an Admiral Court. 2. That that Court hath a Juriſdiction: And by a Statute made in *Henry* the 8. time, and by another in the time of Queen *Elizabeth*, divers things as Appeals, *&c.* were triable by the Civil Law. And he ſaid, That every Court hath his ſeveral form of proceedings; and in every Court that form is to be followed which it hath antiently uſed: And as to the proceedings he ſaid, That firſt they do arreſt the goods; 2. That afterwards the party ought to enter Caution, which is not a Bond, but only a Surety or Security, which doth bind the parties. And he ſaid, That the word *Hæredes* was neceſſary in the Inſtrument, For for the moſt part the Sureties were ſtrangers: And he ſaid, That Court took no notice of the word (*Executors*) and therefore the word *Hæredes* is uſed, which extends as well to Executors and Adminiſtrators as to Heirs: And he ſaid, That upon a Judgment given in the Court of Admiraltie, they may ſue forth an Execution of it in forein parts, as in *France*, *&c.* And he ſaid, That if Contracts be made according to other Laws, the ſame muſt be tryed according to the Law of that Country where

the Contract is made. Dr. *James* said, That in the same Court there are two manners of proceedings; 1 The Manner, 2 the Customs of the Court are to be observed. And he said, that Stipulation ought to be in the Court by coertion, which word is derived *(à stipite)* by which the party is tyed (as he said) as a Bear to the stake, or as *Ulisses* to the Mast of the ship. And he said, In a Judicial stipulation four things are considerable: 1. The Judicial Sistem; 2. *Reparratum habere*; 3. *Judicatum solvere*; 4. *De expensis solvendis*, as appeareth in *Justinians* Institutes *cap. de Satisdationibus*: For *Satisdatio* and *Stipulatio* are all one in the Civil Law. And after *Cook* Chief Justice said, That it ought to be confessed that there hath been a Court of Admiralty; 2. That their proceedings there ought to be according to the Civil Law. And he observed four things, 1. The Necessity of the Court, 2. The Antiquity of it, 3. The Law by which they proceed, and lastly the Place to which they are confined. And as to the necessity of the Court he said, That the Jurisdiction of that Court ought to be maintained by reason of Trade and Traffique betwixt Kingdom and Kingdom; for Trade and Traffique is as it were the life of every Kingdom. 2. A mans life is in danger by reason of traffique, and Merchants venture all their estates; and therefore it is but reasonable that they have a place for the trial of Contracts made upon the Sea by them or their Factors. And for the Antiquity of the Court, *v. t' E. 1. fitz. t' Annuity. 7 R. 2. t' trespas in Statham.* And so long as there hath been any Commerce and Traffique by this Kingdom, so long there hath been a Court of Admiralty. 3. He said, The Court of Admiralty is no Court of Record in which a Writ of Error lieth, 37 *H. 6. acc'*. 4. He considered the place: And that he said was of things *super altum mare* only, as appeareth by the Stat. of 13 *R. 2.* And he said, That all the Ports and Havens within *England* are *infra corpus Comitatus*; and vouched 23 *H. 6.* & 30 *H. 6. Hollands* Case, who was Earl of *Exeter* and Admiral of *England*: who because he held plea in the Court of Admiralty of a thing done *infra Portam de Hull*, damages were recovered against him of 2000l. And he said, That if the Court and Civil Law be allowed, then he said the Customs of that Court ought to be allowed; and he said, That the Custome of the Civil Law is, That in no case the Surety is chargeable, when the Principal is sufficient: And he agreed with the Doctors, That the word *Hæredes* ought to be in the Stipulation, because those beyond the Seas did not take any cognisance of the word *Executors*. Also he said, That they may take the body in Execution, which are for the most part the Masters of the ships and Merchants, who are *transeuntes*, and therefore if they could not arrest their bodies they might perhaps many times lose the benefit of their suits. But he said that in no case they might take forth Execution upon Lands. And he said, That if a Contract be made in *Paris* in *France*, it shall be tryed either by the Common Law, or by the Law of *France*: and if it be tryed here,

here, then those of *France* shall write to the Justices of *England*, and shall certifie the same unto them. And he said, That in Sir *Robert Dudley's* Case it was allowed for good Law; where a Fine was levied and acknowledged in *Orleance* in *France*, which was certified and allowed for good by the Common Law here in *England*: But he said, That the Civil Law could not determine of the Fine. And to conclude, he said, That no Custome can be good which is against an Act of Parliament. The principal Case was adjourned.

Mich. 13 *Jacobi, in the* Kings Bench.

360. The Major of York's Case.

IN an Action of False Imprisonment brought, It was holden by the whole Court, 1. That no man can claim to hold a Court of Equity, *viz.* of Chancery, by Prescription; because every Prescription is against Common Right, and a Chancery-Court is founded upon Common Right, and is by the Common Law. 2. It was holden *per Curiam*, That the King by his Charter cannot grant to another any of the Customs of *London*: But the like Liberties, Franchises and Customs as *London* holdeth or useth, the King by his Letters Patents may grant. *Quære*, because the Customs in *London* are confirmed by Act of Parliament.

Mich. 13 *Jacobi, in the Kings Bench.*

361. Lambert and Slingby's Case.

A Man brought an Action of Debt as Administrator, and took the Defendants body in Execution. The Sheriffe suffered him to escape. And afterwards a Will was found, by which Will the said Administrator is nominated Executor. The Question now was, Whether he might maintain an Action against the Sheriffe for the Escape as Executor when he was but Administrator at the time: and it was the opinion of the Court that the action of Debt against the Sheriff upon the Escape would lie, and that the same Debt should be assets in the Executors hands. And it was holden cleer, That the Executor of an Executor might have Debt upon the Escape, for that he is Executor to the first Testator; and therefore *à fortiori* the Action in the principal Case would lie.

Mich.

Mich. 13 Iacobi, in the Common-Pleas.

362.

IT was holden by the Court, That if a man preſent by Uſurpation to my Advowſon, within ſix moneths I may have a *Quare Impedit*: But after the ſix moneths paſt, if the Church become void, I cannot preſent, but am put to my Writ of Right of Advowſon. And that if a man uſurpeth upon the King, he is put to his *Quare Impedit* within the ſix moneths. And it was holden, That a double Uſurpation upon the King doth put him to his Writ of Right. *v.* 22 & 24 *E.*3 *acc.*

Paſch. 13 Iacobi, in the Kings Bench.

363. OWEN alias COLLIN's Caſe.

John Owen alias *Collins* of *Godſtow* in the County of *Oxford*, was indicted and arraigned of High-Treaſon, for ſpeaking theſe traiterous Engliſh words at *Sandwich* in the County of *Kent*, viz. *If the King be excommunicate by the Pope, it is lawfull for every man to kill him, and it is no murder: For as it is lawfull to put to death a man that is condemned by a Temporal Judge, ſo it is lawfull to kill the King if he be excommunicate by the Pope: For that is the execution of the Law, and this of the Popes ſupreme ſentence; The Pope being the greater, includes the King being the leſſer.* To which words he pleaded Not guilty. And the Evidence to the Jury was, the Major of *Sandwich*, a Parſon of the ſame Town, and the Servant of the Town-Clark. And this was the ſum of the Evidence, That the ſaid *Owen* coming from S. *Lucar* in *Spain*, ſpake the ſaid words to divers perſons, who told them to the Major: whereupon the ſaid Major had conference with *Owen*, and then he ſpake the like words unto the Major; and thereupon the Major tendred unto him the Oath of Allegiance, which he refuſed to take, and he put his hand to a writing containing the ſaid words as his opinion; and further ſaid, That if he had twenty hands he would put them all to it. The Exception which *Owen* took unto the Evidence given againſt him was, That he did not ſpeak of the King of *England*. But the ſame was ſaid to be a ſimple Exception: For before he ſpake the words to the Major, the Major asked him if he were

were an Engliſhman, or not? To which he anſwered, that he was; and then after, he ſpake the ſaid words to the Major, which muſt neceſſarily have reference to the ſpeeches which were before betwixt him and the Major. And *Cook* Chief Juſtice ſaid, That if he had not ſpoken of the King of *England*, but of the King generally, yet it had included the King of *England*. The matter of his Indictment of Treaſon was not grounded upon the Statute of Supremacie, but upon the Common-Law, of which the Statute of 25 *E.* 3. is but an Explanation; which was, his intent to compaſs the death of the King. And he ſaid, That notwithſtanding that the words as to this purpoſe were but conditional, viz. *If he were Excommunicate*, yet (he ſaid) it was High-Treaſon. For proof of which two Caſes were cited. The Duke of *Buckingham*, in the time of King *Henry* the 8. ſaid, That if the King ſhould arreſt him of High-Treaſon, that he would ſtab him with his dagger: and it was adjudged a preſent Treaſon. So was it alſo adjudged in the Lord *Stanley's* Caſe, in the time of King *Henry* the 7. who ſeeing a Young-man, ſaid, That if he knew him to be one of the Sons of *E.* 4. that he would aid him againſt the King. In the like manner a woman in the time of *Hen.* 8. ſaid, That if *Henry* the 8. would not take again his wife Queen *Katherine*, that he ſhould not live a year, but ſhould die like a dog. So if diſcontented perſons with Incloſures ſay, That they will petition unto the King about them, and (if) he will not redreſs the ſame, that then they will aſſemble together in ſuch a place and rebell: In theſe Caſes it is a preſent Treaſon: and he ſaid, That in point of Allegiance none muſt ſerve the King with *Ifs* and *Ands*. Further *Cook* Chief Juſtice ſaid, That *Faux* the Gunpowder Traitor being brought before King *James*, the King ſaid to him, *Wherefore would you have killed me? Faux* anſwered him, viz. *Becauſe you are excommunicated by the Pope. How?* ſaid the King. He anſwered, *Every Maunday-Thurſday the Pope doth excommunicate all Heretiques who are not of the Faith of the Church of* Rome; *and you are within the ſame Excommunication.* And afterwards *Owen* was found guilty, and Judgment of Treaſon was given againſt him.

Mich. 13 *Jacobi, in the Kings Bench.*

364. SIMPSON's Caſe.

RIchard *Simpſon* a Copy-holder in Fee, *jacens in extremis*, made a Surrender of his Copyhold *habendum* to an *Enfant in ventreſamier* and his heirs; and if ſuch Enfant die before his full age or marriage, then to *John Simpſon* his brother and his heirs. The Enfant is born, and dieth within

within two moneths: Upon which *John* was admitted, and a Woman as Heir-general to the Deviſor and to the Enfant is alſo admitted and entreth into the Land, againſt whom *John Simpſon* brought an Action of Treſpaſſe, and it was adjudged againſt the Plaintiffe. And two points were reſolved in this Caſe. 1. That a Surrender cannot begin at a day to come, no more then a Livery, as it was adjudged 23 *Eliz.* in this Court in *Clarks* Caſe. 2. That the Remaindor to *John Simpſon* cannot be good, becauſe it was to commence upon a Condition precedent, which was never performed: And therefore the Surrender into the hands of the Lord was void; for the Lord doth not take but as an Inſtrument to convey the ſame to another. And it was therefore ſaid, That if a Copyholder in Fee doth ſurrender unto the uſe of himſelf and his heirs, becauſe that the Limitation of the uſe is void to him who had it before, the Surrender to the Lord is void.

Trin. 13 Jacobi, in the Chancery.

365. The Lord GERARD'S Caſe.

IT was holden in the Chancery in the Lord *Gerards* Caſe againſt his Copyholds of *Audley* in the County of *Stafford*, That where by antient Rolls of Court it appeareth that the Fines of the Copyholds had been uncertain from the time of King *Hen.* the 3. to the 19 of *H.* the 6. and from thence to this day had been certain, Except twenty or thirty: That theſe few antient Rolls did deſtroy the Cuſtome for certainty of Fine. But if from 19 *H.* 6. all are certain except a few, and ſo incertain Rolls before, the few ſhall be intended to have eſcaped, and ſhould not deſtroy the Cuſtome for certain Fines.

Hill 13 Jacobi, in the Common-Pleas.

366. BAGNAL and HARVEY'S Caſe.

IN a Writ of Partition it was found for the Plaintiffe: And a Writ was awarded to the Sheriffe, that he ſhould make the partition: And the Sheriffe did thereupon allot part of the Lands in ſeveralty; and for other part of the Lands, the Juroſs would not aſſiſt him to make the partition. All which appeared upon the Retorn of the Sheriffe. And an

Attachment was prayed againſt the Jurors who refuſed to make the Partition; and a new Writ was prayed unto the Sheriffe. And the Court doubted what to do in the Caſe, whether to grant an Attachment or not, and whether a new Writ to the Sheriffe might be awarded; And took time to adviſe upon it, and to ſee Preſidents in the Caſe.

Hill. 13 *Iacobi, in the Kings Bench.*

367. BLANFORD'S Caſe.

A Man ſeiſed of Lands in Fee deviſed them unto his Wife for life, and afterwards to his two Sons, if they had not iſſue males, for their lives; and if they had iſſue males, then to their iſſue males; and if they had not iſſue males, then if any of them had iſſue male, to the ſaid iſſue male. The wife died, the ſons entred into the lands, and then the eldeſt ſon had iſſue male who afterwards entred, and the younger ſon entred upon the iſſue and did treſpaſſe and the iſſue brought an Action of Treſpaſſe: And it was adjudged by the whole Court, that the Action was maintainable, becauſe by the birth of the iſſue male the lands were deviſed out of the two ſons, and veſted in the iſſue male of the eldeſt. *Crook* Juſtice was againſt the three other Juſtices.

Hill. 13 *Iacobi, in the Kings Bench.*

368. BROOK and GREGORY'S Caſe.

IN a *Replevin* the Defendant did avow the taking of the Cattel damage feaſants. And upon iſſue joyned it was found for the Plaintiffe in the Court at *Winſor*, being a Three-weeks Court. And the Defendant brought a Writ of Error, and aſſigned for Error, That the Entry of the Plaint in the ſaid Court was the 7. day of *May*, and the Plaintiffe afterwards did Declare there of a taking of the Cattel the 25. day of *May*. And whether the ſame was Error, being in a Three-weeks Court, was the Queſtion: and 21 *E.*4.66. was alleadged by *Harris*, that it was no Error. But the Court held the ſame to be Error, becauſe no Plaint can be entred but at a Court; and this Entry of the Plaint was meſne betwixt the Court-dayes, and ſo the Declaration is not warranted, no Cuſtome being alleadged to maintain ſuch an Entry. 2. It was holden by the Court in this

this Case, That after *In nullo est erratum* is pleaded, the Defendant cannot alleadge Diminution, because there is a perfect issue before. 3. It was holden, That a man cannot alleadge Diminution of any thing which appeareth in the Record to be true. And because the Defendant did alleadge Diminution in this Case of the Record, and by the Record it was certified that the Plaint was entred the 25 day of *May*, the same was not good after issue joyned, and after Judgment is given upon the said Record upon the first Declaration and Pleading in the said Court of *Winsor*. And therefore the Judgment was reversed by the opinion of all the Justices.

Hill. 13 Iacobi, in the Kings Bench.

369. Bisse and Tyler's Case.

IN an Action of Trover and Conversion of goods, the Defendant said, That *J.S.* was possessed of the said goods, and sold them unto him in open market. *Quære* whether it be a good Plea, because it doth amount to the general issue of Not guilty. *Curia avisare vult.* And *v. Tompsons* Case, 4 *Jac.* in the Kings Bench, It was adjudged that it was no good Plea.

Hill. 6 Jacobi, in the Common-Pleas.

370. Paginton and Huet's Case.

IN an *Ejectione Firme* the Case was this, That the Custome of a Manor in *Worcestershire* was, That if any Copyholder do commit Felony, and the same be presented by twelve Homagers, That the Tenant should forfeit his Copyhold: And it was presented in the Court of the Mannor by the Homage, That *Hunt* the Defendant had committed Felony. But afterwards at the Assises he was acquitted: And afterwards the Lord seised the Copyhold. And it was adjudged by the Court that it was no good Custom, because in Judgment of Law before Attaindor it is not Felony. The second point was, Whether the special Verdict agreeing with the Presentment of the Homage, That the party had committed Felony, did entitle the Lord to the Copyhold notwithstanding his Acquital. *Quære*, For it was not resolved.

Mich. 7 Iacobi, in the Common Pleas.

371.

THe Cuſtom of a Mannor was, That the Heirs which claimed Copyhold by Diſcent, ought to come at the firſt, ſecond, or third Court upon Proclamations made, and take up their Eſtates, or elſe that they ſhould forfeit them. And a Tenant of the Mannor having Iſſue inheritable beyond the Seas, dyed: The Proclamations paſſed, and the Iſſue did not return in twenty years. But at his coming over he required the Lord to admit him to the Copyhold, and proffered to pay the Lord his Fine: And the Lord, who had ſeiſed the Copyhold for a Forfeiture, refuſed to admit him. And it was adjudged by the whole Court, That it was no Forfeiture, becauſe that the Heir was beyond the Seas at the time of the Proclamations, and alſo becauſe the Lord was at no prejudice becauſe he received the profits of the Lands in the mean time.

Mich. 14 Iacobi, in the Kings Bench.

372.

A Copyholder in Fee did ſurrender his Copyhold unto the uſe of another and his heirs, which ſurrender was into the hands of two Tenants according to the cuſtome of the Mannor to be preſented at the next Court. And no Court was holden for the Mannor by the ſpace of thirty years; within which time the Surrenderor, Surrenderee, and the two Tenants all dyed: The heir of the Surrenderor entred, and made a Leaſe for years of the Copyhold according to the cuſtome of the Mannor; And it was adjudged *per Curiam*, That the Leaſe was good.

Mich. 14 Iacobi, in the Common-Pleas.

373. FROSWEL and WEICHES Caſe.

IT was adjudged, That where a Copyholder doth ſurrender into the hands of Copy-Tenants, That before Preſentment the Heir of the Surrenderor

Surrenderor may take the profits of the Lands againſt the Surrenderee: For no perſon can have a opyhold but by admittance of the Lord. As if a man maketh Livery within the view, although it cannot be countermanded, yet the Feoffee takes nothing before his entry: But it was agreed, That if the Lord doth take knowledge of the Surrender, and doth accept of the cuſtomary Rent as Rent due from the Tenant being admitted, that the ſame ſhall amount unto an Admittance, but otherwiſe if he accept of it as a duty generally.

Mich. 5 Iacobi, in the Exchequer.

374.

IT was adjudged in the Exchequer, That where the King was Lord of a Mannor, and a Copyholder within the ſaid Mannor made a Leaſe for three lives, and made Livery; and afterwards the Survivor of the three continued in poſſeſſion forty years: And in that caſe becauſe that no Livery did appear to be made upon the Endorſment of the Deed, (although in truth there was Livery made) that the ſame was no forfeiture of which the King ſhould take any advantage. And in that caſe it was cited to be adjudged in *Londons* caſe, That if a Copy-Tenant doth bargain and ſell his Copy-Tenement by Deed indented and enrolled, that the ſame is no forfeiture of the Copyhold of which the Lord can take any advantage. And ſo was it holden in this Caſe.

Paſch. 14 Iacobi, in the Kings Bench

375. FRANKLIN'S Caſe.

LAnds were given unto one and to the heirs of his body, *Habendum* unto the Donee, unto the uſe of him, his heirs and aſſignes for ever. In this Caſe two points were reſolved. 1. That the Limitation in the *Habendum* did not increaſe or alter the Eſtate contained in the premiſſes of the Deed. 2. That Tenant in Tail might ſtand ſeiſed to an uſe expreſſed, but ſuch uſe cannot be averred.

Hill. 13 *Iacobi, in the Chancery.*

376 Winscomb and Dunches Case.

W *Inscomb* having issue two sons, conveyed a Mannor nnto his eldest son, and to the daughter of *Dunch* for life, for the joynture of the wife, the Remainder to the son in fee. The son having no issue, his Father-in-law *Dunch* procured him by Deed indented, to bargain and sell to him the Mannor. The Bargaynor being sick, who died before enrolment of the Deed within the six moneths, the Deed not being acknowledged: And afterwards the Deed coming to be enrolled, the Clark who enrolled the same, did procure a Warrant from the Master of the Rolls, who under-writ upon the Deed, *Let the Deed be enrolled upon Affidavit made of the delivery of the Deed by one of the Witnesses to the same.* And afterwards the Deed was enrolled within the six moneths. And the opinion of the Court was, *That the Conveyance was a good Conveyance in Law.* And therefore the younger brother exhibited his Bill in Chanchery, pretending the Conveyance to be made by practice, without any Consideration.

Mich. 15 *Iacobi, in the Kings Bench.*

377 Ludlow and Stacies Case.

A Man bargained and sold Land by Deed indented, bearing date 11 *Junii* 1 *Jacobi.* Afterwards 12 *Junii.* The same year Common was granted unto the Bargainee for all manner of Cattell commonable upon the Land. 15 *Junii* the Deed of Bargain and Sale was enrolled. And it was adjudged a good grant of the Common. And the Enrolment shall have Relation as to that, although for collaterall things it shall not have relation.

Hill. 15 *Iacobi, in the Kings Bench.*

378.

NOte that it was held by *Dodderidge* Justice, and *Mountagu* Chief Justice, against the opinion of *Haughton* Justice, That if Lessee for years

years covenanteth to repair and ſuſtein the houſes in as good plight as they were at the time of the Leaſe made; and afterwards the Leſſee aſſigneth over his Term, and the Leſſor his Reverſion: That the Aſſignee of the Reverſion ſhall maintain an Action of Covenant for the breach of the Covenants againſt the firſt Leſſee.

Hill. 15 *Jacobi, in the Common-Pleas.*

379. SMITH and STAFFORD's Caſe.

A Man promiſed a Woman, That if ſhe would marry with him, that if he dyed, and ſhe did ſurvive him, that he would leave unto her 100l. They entermarried; and then the husband dyed, not performing his promiſe. The wife ſued the Executor of her husband upon the ſaid promiſe. And whether the duty did ſurvive with the wife, or were extinguiſhed by the entermarriage, was the Queſtion. And *Hobart* Chief Juſtice and *Warburton* were againſt *Winch* and *Hutton* Juſtices, That the marriage was a Releaſe or diſcharge of the 100l. *Quære.*

Hill. 15 *Jacobi, in the Kings Bench.*

380. PLOT's Caſe.

AN Enfant brought an Aſſiſe in the Kings Bench for Lands in *Midd.* depending which, The Tenant in the ſame Aſſiſe brought an Aſſiſe for the ſame Lands in the Common-Pleas; which laſt Writ bore date and was retornable after the firſt Writ. And the Demandant in the ſecond Writ did recover againſt the Enfant by default, by the Aſſiſe who found the Seiſin and Diſſeiſin. And upon a Plea in bar of the firſt Aſſiſe of that Recovery, the Enfant by way of Replication ſet forth all the ſpecial matter, And that the Demandant at the time of the ſecond Writ brought was Tenant of the Land: And prayed that he might falſifie the Recovery. And it was adjudged, That he might falſifie the Recovery. For in all Caſes where a man ſhall not have Error, nor Attaint, he may Falſifie: But in this caſe he could not have Error nor Attaint, becauſe the Judgment in the Common-Pleas was not given only upon the Default, but alſo upon the Verdict. And it ſhould be in vain for him to bring an Attaint, becauſe he ſhall not be admitted to give other Evidence then what was given at the firſt Trial. Alſo he ſhall falſifie the Recovery, becauſe it was a practiſe to defeat and take away the Right of the Enfant, and to leave him without any remedy whatſoever.

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Pasch. 16 Iacobi, in the Kings Bench.

381. INGIN and PAYN's Case.

LEssee for years was bounden in a Bond to deliver the possession of a house unto the Lessor, his heirs and assignes upon demand at the end of the term. The Lessor did bargain and sell the Rendition by Deed enrolled to two: One of the Bargainees at the end of the term demanded the Delivery of the Possession: The Lessee refused, pretending that he had no notice of the bargain and sale. It was adjudged that the Bond was forfeited.

Pasch. 16 Iacobi, in the Common-Pleas.

382. JERMYN and COOPER's Case.

A Man by Deed gave Lands to *A.* and to a Feme sole, and to their heirs and assigns for ever; *Habendum* to them and to the heirs of their bodies, the Remainder to them and the survivor of them for ever. And it was adjudged by the Court, That they had an Estate in tail, with the Fee-simple Expectant.

Pasch. 16 Jacobi, in the Kings Bench.

383.

A Man was Indicted *De verberationem & vulnerationem* of *J. S.* and the words (*vi & armis*) were left out of the Indictment. And the same was adjudged to be helped by the Statute, and that the Indictment was good.

Mich. 16 Jacobi, in the Kings Bench.

384. BARNWEL and PELSIE's Case.

A Parson did Covenant and grant by Deed with one of his Parishioners, That in consideration of Six pounds thirteen shillings and four

four pence *per annum* be paid unto him, that the ſaid Pariſhioner ſhould be diſcharged of all Tythes upon condition to be voyd upon default of payment. Afterwards the Parſon againſt his grant did ſue the Pariſhioner in the Spirituall Court for Tythes in kind; and it was moved for a Prohibition. But the Court would not grant it, becauſe that the Originall, *viz.* the Tythes, do belong to ſpirituall juriſdiction. But it was ſaid, that the Pariſhioner might have an Action of Covenant againſt the Parſon upon the Deed in the Temporall Court.

385.

Poſch: 16 Jacobi, in the Kings Bench.

AN Action upon the Caſe was brought for ſpeaking of theſe words, *viz. J. S.* 34 years ſince had two Baſtards, and hath paid for the nurſing of them. And the Plaintiff ſhewed, that by reaſon of theſe words, contention grew betwixt him and his wife, almoſt to a Divorce. And it was adjudged, That an Action would not lye for the words. Aud the Chief Juſtice ſaid, That an Action upon the Caſe doth not lye for every ill word, but for words by ſpeaking of which the Plaintiff is damnified, and that cannot be in this Caſe, the time being ſo long paſt. And the cauſes wherefore a man ſhall be puniſhed for ſaying that a man hath a Baſtard, are two; the one, becauſe by the Statute of 14 *Eliz.* the offender is to be puniſhed for the ſame: And ſecondly, becauſe the party by ſuch means is diſcredited, or hindered in his preferment.

Hill. 16 Iacobi in the Kings Bench.

386 HURLSTON and WODROFS Caſe.

HEnry *Hurlſton* was Plaintiff againſt *Robert Wodroffe* in an Action of Debt upon a Demiſe of a Meſſuage with a Sheep-walk, the Latin word being (*Ovile.*) And it was moved in arreſt of Judgement after a verdict found for the Plaintiff, That the ſheepwalk was not alledged to be appurtenant nor pleaded to be by Grant by Deed. But notwithſtanding that it vvas ruled by the vvhole Court, becauſe it reſted indifferent

whether there was a grant by Deed or not: That when the Jury find that the Sheep-walk did passe, it shall be intended that there was a Deed. *Dodderidge* Justice in the Argument of this Case did hold, That by the word (*Ovile*) although it be translated in English a Sheep-walk, yet a Sheep-walk did not passe by it but a Sheep-Cote, and by that the Land it self did passe.

Hill. 16 *Iacobi, in the Kings Bench.*

387. HILL and WADE's Case.

HIll brought an Action upon the Case against *Wade*, and declared upon an *Assumpsit* to pay mony upon request; and did not alleadge the Request certain: but issue was joyned upon another point, and found for the Plaintiffe, That the failing of certain alleadging of the Request in the Declaration made the same insufficient. And so it was adjudged by the Court with this difference, where it was a duty in the Plaintiffe before, and where the Request makes it a duty: For in the first case the Plaintiffe need not alleadge the Request precisely, but otherwise in the later. *Dodderidge* Justice put this Case. If I promise *J.S.* in consideration that he will marry my daughter, to give him 20*l.* upon request, there the day and place of the request ought to be alleadged in the Declaration. *Montagu* Chief Justice cited 18 *E.*4. and 5 *H.*7. to be contrary, *viz.* That the finding of the Jury made the Declaration which was vitious to be good: As if Executors plead, That they have nothing in their hands the day of the Action brought, it is insufficient; But if the Jury find Assets it is good, and so by consequence the Verdict shall supply the defect of Pleading. But the Court held these books to be good Law, and not to be contrary, and well reconciled with this difference: For there the Plea was naught only in matter of circumstance; but otherwise it is where it is vitious in substance, as in this case it is. And a difference also was taken where the Verdict doth perfect all which is material and ought to be expressed, and where not: For in the principal Case, notwithstanding that the Jury find the *Assumpsit*, yet the same doth not reach to the Request, and without that the *Assumpsit* is void. *Dodderidge* Justice cited 5 *E.*4. That if the Declaration be vitious in a point material, and issue is taken upon another point, there the finding of it by the Jury doth not make the Declaration to be good. And so in the principal Case Judgment was given for the Defendant. In this Case it was agreed, That if a man bring an Action of Trover and Conversion, and not alleadge a place where the Conversion was, Although the issue for the Trover be found for the Plaintiff, yet he shall not have Judgment.

Hill.

Hill. 16 *Iacobi, in the Kings Bench.*

388. GODFREY and DIXON's Caſe.

Cornelius Godfrey brought an Action of Debt upon a Leaſe againſt *Dixon*, and declared, That *Cornelius Godfrey* his Father being an Alien, had iſſue *Daniel Godfrey* born in *Flanders*: the Father is made a Denizen, and hath iſſue the Plaintiffe his ſecond ſon born in *England*. The Father dieth: *Daniel* is Naturalized by Act of Parliament, and made the Leaſe to *Dixon* for years rendring Rent, and dyed without iſſue: And the Plaintiffe his brother brought an Action of Debt for the Arrearages as heire, and upon that it was demurred in Law. And *George Crook* in his Argument ſaid, That Inheritance is by the Common-Law, or by Act of Parliament: And that three perſons cannot have heirs *in tranſverſali linea*, but *in recta linea*, viz. 1. A Baſtard, 2. A perſon Attainted, 3. An Alien; ſee for that 39 *E.*3.39. *Plow. Dom.* 445. 17 *E.*4.1. 22 *H.*6.38. 3 *E.*1. *fitz. t'* Couſinage 5. & *Dr. & Student.* And he ſaid, That Denization by the Kings Charter doth not make the heir inheritable, 36 *H.*8. *Br.* to *Denizen*, and *C.* 7. *part.* 77. And he ſaid, That he who inheriteth ought to be, 1. Next of blood, 2. Of the whole blood, and 3. He ought to derive his Pedigree and diſcent from the ſtock and root, *Bracton lib.*2. *fol.*51. And he ſaid, That if a man doth covenant to ſtand ſeiſed to the uſe of his brother being an Alien, that the ſame is not good and the uſe will not riſe: But that was denyed by the Court. And he ſaid, That an Alien ſhould not have an Appeal of the death of his brother: And he took a difference betwixt an Alien and a perſon Attainted; and ſaid, that the one was of corrupt blood, the other of no blood, and cited 9 *E.*4.7. & 36 *Eliz. Hobby's* Caſe. *Dodderidge* upon the argument of this Caſe ſaid, That if a man claim as Couſin and Heir, he muſt ſhew how he is Couſin and Heir; but not when he claims as Brother, or Son and Heir. The Caſe was adjourned.

Hill. 16 *Iacobi, in the Kings Bench*

389 GRAY's Caſe.

AN Action of Debt was brought upon a Bond with Condition to ſtand to an Arbitrement, and alſo that he ſhould not begin, proceed

in, or proſecute any ſuit againſt the Obliger before ſuch a Feaſt. The Obliger did continue a Suit formerly brought. *George Crook* ſaid, That the Bond was forfeited, becauſe it is the act of the Obliger to continue or diſcontinue a ſuit, and profit accrues to him, therefore it ſhall be adjudged his act: But it is otherwiſe of an Eſſoin, becauſe that that may be caſt by a ſtranger. And he cited the books of 36 *H.* 6. 2. 5 *H.*7.22. 14 *E.*41. 18 *H.*6.9. And he held, That it was a good Award to continue, or diſcontinue a ſuit, becauſe it is in the power of the party to do it, or not.

Hill. 16 *Jacobi, in the Kings Bench.*

390 Slye's Caſe.

IN a *Scire facias* to have Execution, the Sheriffe retorned, That by vertue of a Writ of *Fieri facias* he took the goods in Execution *ad valentiam* of 11l. which remained in his cuſtody for want of buyers, and that they were reſcued out of his poſſeſſion. *Mountagu* Chief Juſtice and *Dodderidge* Juſtice, The Plaintiffe ſhall have an Execution againſt the Sheriff; & relyed upon the book of 9 *E.*4.50. & 16 *E.*4. *Faulconbridge* Caſe. 7 *Eliz. Dyer* 241. 5 *E.*3. *t'* Execution, & *C.*5. *par. Pettifers* Caſe. And *Dodderidge* ſaid, That by this Retorn he had concluded himſelf, and was liable to the value of 11l. And he took this difference, where the Sheriffe by vertue of the Writ *Venditioni exponas* ſels the thing under the value, there he ſhall be diſcharged, but otherwiſe where he ſels the goods *ex officio*. *Crook* and *Haughton* Juſtices, The Plaintiffe ſhall not have a *Scire facias* againſt the Sheriffe, but where he hath the money in his purſe: And they ſaid, That the Plaintiffe muſt have a *Diſtringas* directed to the new Sheriffe, or a *Venditioni exponas*. Note, the Court was divided in opinion: But the Law ſeems to be with *Crook* and *Haughton*; and the books before cited prove their difference, and warrant it.

Hill 16 *Iacobi, in the Kings Bench.*

391 Sir John Bret and Cumberland's Caſe.

IN an Action of Covenant brought by Sir *John Bret* againſt *Cumberland* Executor of *I.C.* the Caſe was this. Q. *Eliz.* by her Letters Patents did

did demiſe a Mill unto the Teſtator for 30 years reſerving Rent; and theſe words were in the Letters-Patents viz. *That the Leſſee, his Executors and Aſſignes ſhould repair the Mill during the Term.* The Leſſee aſſigned over all his intereſt unto *Fiſh*, who attorned Tenant and paid the Rent to the Queen; and afterwards the Queen granted the Reverſion to Sir *John Bret* and *Margaret* his wife. The Aſſignee is accepted Tenant; the Mill came to decay for want of Reparations, and Sir *John Bret* brought an Action of Covenant againſt the Executor of the firſt Leſſee; And it was adjudged for the Plaintiffe. And *Dodderidge* Juſtice gave the reaſons of the Judgment, 1. Becauſe that by the Statute of 32 *H.*8. all the benefit which the Queen had was transferred to the Grantee of the Reverſion. 2. It might be parcel of the Conſideration, to have the Covenant againſt the Leſſee: For a Mill is a thing which without continual Reparations will be ruinous and periſh and decay: And he ſaid, That the Aſſignee had his election to bring his Action againſt the Leſſee or againſt the Aſſignee, becauſe it was a Covenant which did run with the Land. *Mountagu* Chief Juſtice ſaid, That the reaſon of the three Caſes put in *Walkers* Caſe is in reſpect of the Intereſt: And took a difference where there is privity of Contract, and where not. It was adjourned.

Hill. 16 *Jacobi, in the Kings Bench.*

392. Webb and Tuck's Caſe.

IN an Action of Falſe Impriſonment it was agreed, That a Fine may be aſſeſſed for Vert and Veniſon. And it was ſaid in this Caſe by the Juſtices, That a Regarder is an Officer of whom the Law takes knowledge; and ſo are Juſtices in Eyre. 2. It was agreed, That ſuch things of which the Law takes notice ought to be pleaded. 3. That if a man in his pleading is to ſet forth the juriſdiction of the Court of Juſtices in Eyre, if he ſay *Curia tent. &c.* he need not ſet forth all the Formalities of it. And *Mountagu* Chief Juſtice in this Caſe ſaid, That if a man do juſtifie for divers cauſes, and ſome of the cauſes are not good, the ſame doth not make the whole Juſtification o be void, but it is void for that only, and good for the reſidue.

Hill. 16 Iacobi, in the Kings Bench.

393. Cullifords Caſe.

Culliford and his Wife brought an Action upon the Caſe againſt *Knight* for words: And declared upon theſe words, *viz. Thou art Luſcombs Hackney, a pockey Whore, and a theeviſh Whore, and I will prove thee to be ſo*; which was found for the Plaintiffe; And in arreſt of Judgment it was moved that the words were not Actionable, which was agreed by the whole Court *quia verba accipienda ſunt in mitiori ſenſu*: And Judgment was ſtaied accordingly.

Hill. 16. Jacobi, in the Kings Bench.

371.

IN an Action upon the Caſe for Words: The Plaintiffe did relate that he was brought up in the Studie of a *Mathematition*, and a Meaſurer of Land: And that he was a Surveyor: and that the Defendant ſpake theſe words of him, *viz. Thou art a Coſener and a cheating Knave, and that I can prove.* And the opinion of the Court was, That the words were actionable: And *Montague* Chief Juſtice, ſaid that it was ruled accordingly in *36 Eliz. Rot.* 249. betwixt *Kirby* and *Walter*. And a Surveyor is an Officer of whom the Statute of 5. *E.6.* takes notice: And he ſaid, that *Verba de perſona intelligenda ſunt de Conditione perſonæ*: And he ſaid that the words are Actionable in regard it is a faculty to be a Meaſuror of Lands. But *Dodderidg* Juſtice put it with a difference, *viz.* Betwixt a Meaſurer of Land by the Pole, and one who uſeth the Art of Geometrie or any of the Mathematicks; for he ſaid that in the firſt Caſe it is no ſcandal, for that his Credit is not impeached thereby; but it is contrary in the other Caſe, becauſe to be a Geometritian or Mathematitian is an Art or faculty which every man doth not attain unto. And he put this Caſe: If a man be Bailiffe of my Mannor, there no ſuch words can diſcredit him; and by conſequence he ſhall not have an Action for the words, becauſe the words do not ſound in diſcredit of his Office; becauſe the ſame is not an Office of Skill, but an Office of Labour. *quod nota.*

Hill.

Hill. 16 Jacobi, in the Kings Bench.

395. BISHOP *and* TURNERS Caſe.

IN a Prohibition it was holden by the whole Court, That for ſuch things as a Church-Warden doth *ratione officii* no Action will lie by his ſucceſſor againſt him in the Spiritual Court; and a Churchwarden is not an Officer but a Miniſter to the Spiritual Court; But it was holden that a Churchwarden by the Common Law may maintain an Action upon the Caſe for defacing of a Monument in the Church.

Trin. 16 Jacobi, in the Kings Bench.

396. BLACKSTON *and* HE AP's Caſe.

IN an Action of Debt for Rent, the Caſe was this: A man poſſeſſed of a Tearm for 20 years in the right of his Wife made a Leaſe for 10 years, rendring Rent to him his Executors and aſſignes and died. The Queſtion was, whether the Executors or the Wife ſhould have the Rent: *Haughton* and *Crook*, Juſtices againſt *Montague* Chief Juſtice (*Doddridg* being abſent) that the Rent was gon: But it was agreed by them all that the Executors of the Husband ſhould not have it; But *Montague* held that the Wife ſhould have it. But it was agreed that if Leſſee for 20 years maketh a Leaſe for 10 years, and afterwards ſurrendreth his Tearm, that the Rent is gon: And yet the Tearm for 10 years continues. And in the principal Caſe, If the Husband after the Leaſe made had granted over the Reverſion, his grantee ſhould not have the Rent. But *Montague* ſaid, that in that Caſe the Wife in Chancery might be Releived for the Rent.

Mich.

Mich. 16 Iacobi, in the Kings Bench.

397. WAIT and the Inhabitants of STOKE's Caſe.

WAyte a Clothier of *Nubery* was robbed in the Hundred of *Stoke* of 50*l.* upon the Saboth day in the time of Divine Service. The Queſtion was whether the Hundred were chargeable or not for not making out Hue and Cry. And 3 of the Juſtices were againſt *Montague* Chief Juſtice, that they were chargeable, For they ſaid that the apprehending of Theeves was a good work, and fit for the Saboth day, and alſo fit for the Commonwealth. *Montague* Chief Juſtice agreed that it was *bonum opus*; and that it might be lawfully done: But he ſaid that no man might be compelled upon any penalty to do it upon that day: For he ſaid, That if he hath a Judgment againſt *I. S.* and he comes to the Pariſh-Church where *I. S.* is with the Sheriffe, and ſhews unto the Sheriffe *I. S.* upon the Saboth day, and commandeth the Sheriffe to do his Office, If the Sheriffe do arreſt *I. S.* in Execution upon that day, it is good, but if he doth not arreſt him it is no eſcape in the Sheriffe. And he took a difference betwixt Miniſterial Acts and Judicial Acts, for the firſt might be done upon the Saboth day; but Judicial Acts might not. But the caſe was adjudged according to the opinion of the three other Juſtices.

Paſch. 17 Iacobi, in the Kings Bench.

398. SPICER and SPICE's Caſe.

UPon a ſpecial Verdict the Caſe was this: *A* man ſeiſed of Gavilkind Land, deviſed the ſame to his Wife for life, paying out of it 3*l. per annum* to his eldeſt ſon, and alſo deviſed the Land to his ſecond Son paying 3*l. per annum* to his third Son, and 20*s* to ſuch a one his Daughter: and whether the ſecond Son had the Land for his life or in Fee, was the Queſtion. And it was adjudged that he had a Fee-ſimple in it by reaſon of the payment of the Collateral Sums of 3*l.* and 20*s.* to his brother and ſiſter: which charge to the brother might continue after

after the death of the Deviſee; and if he ſhould have but an eſtate for life, his charge ſhould continue longer then his own eſtate: And ſo it was adjudged.

Mich. 17 Iacobi, in the Kings Bench.

399.

IN a *Habeas Corpora*, which was to remove two men who were impriſoned in *Norwich*, The Caſe was this, That within *Norwich* there was a Cuſtom that two men of the ſaid place ſhould be choſen yearly to make a Feaſt for the Bailiffs; and upon refuſal for to do it, that they ſhould be Fined and impriſoned, which two men brought to the Barr by the *Habeas Corpora* were impriſoned for the ſame cauſe; It was urged and much ſtood upon, That the Cuſtom was no good Cuſtom for the cauſes and reaſons which are delivered in *Baggs* Caſe in *C.* 11. *part.* But yet at the laſt the Court did remand them, and held that the Cuſtom might be good.

Mich. 17 Jacobi, in the Kings Bench.

400.

IN an Evidence, in an *Ejectione firmæ* for Land in the Countie of *Hartford* the Caſe was this, A man was married unto a woman and died. The wife after 40 weeks and 10 days was delivered with child of a daughter; and whether the ſaid daughter ſhould be heir to her Father, or ſhould be baſtard, was the Queſtion; and Sir *William Padde* Knight, and Dr *Montford* Phyſitians, were commanded by the Court to attend and to deliver their opinions in the Caſe; who being upon their Oaths, delivered their opinions, That ſuch a child might be a lawfull daughter and heir to her Father; For as well as an *Antenatus* might be heir, *viz.* a child born at the end of 7 months, ſo they ſaid might a *Poſtnatus*, *viz.* a child born after the 40 weeks; although that 40 weeks be the ordinary time: And if it be objected that our *Saviour Chriſt* was born at 9 months and five days end, who had the perfection of Nature, To that it may be anſwered, That that was *miraculum*, *& amplius*. And they held that by many Authorities and by their own Experiences a child might be *Legitimate*, although it be born the laſt day of the 10th Month after the conception of it, accounting the Months, *per Menſes ſolares*, *& non Lunares*.

Hill. 17 *Iacobi, in the Kings Bench.*

401. WEBB and PATERNOSTERS Case.

A Man gave Licence unto another to set a Cock of Hay upon his Medow, and to remove the same in reasonable time; and afterwards he who gave the Licence, made a Lease of the Medow to the Defendant, who put his Cattel into the Medow, which did eat the Hay: And for that the Paintiffe brought his Action of Trespas. And upon Demurrer joyned, the Court was of opinion against the Plaintiffe: For upon the whole matter it appeared, That the said Hay had stood upon the said ground or Medow for 2 years: which the Court held to be an unreasonable time.

Mich. 18 *Iacobi, in the Kings Bench.*

402. BROWN and PELL's Case.

IN an *Ejectione firme* upon a special Verdict found, the Case was this. *Browne* had issue two Sons, and devised his Lands to his youngest Son and his Heirs; And if it shall happen his said youngest Son to die without issue living his eldest Son, That then his eldest Son should have the Lands to him and his Heirs in as ample manner as the youngest Son had them; The youngest Son suffered a Common Recovery, and died without issue living the eldest Son; The Question was whether the eldest Son or the Recoverer should have the Lands; *Montague*, *Haughton* and *Chamberlain* Justices; The same is a Fee-simple Conditional, and no Estate Tail in the youngest Son, *Doddridge* Justice contrarie.

Mich. 18. *Iacobi in the Kings Bench.*

403. POLLYES Case.

IN an Action of Trespas, It was agreed by the Court: If 2 Tenants in Common be of Lands upon which Trees are growing, and one of

of them felleth the Trees and layeth them upon his Freehold, If the other entreth into the Land and carrieth them away, an Action of Treſpaſſe *Quare clauſum fregit* lyeth againſt him; becauſe the taking away of the Trees by the firſt was not wrongfull, but that which he might well do by Law: And yet the other Tenant in Common might have ſeized them before they were carried off from the Land; But if a man do wrongfully take my Goods, as a Horſe, &c. and putteth the ſame upon his Land, I may enter into his Land and ſeize my Horſe again; But if he put the Goods into his Houſe, in ſuch Caſe I cannot enter into his Houſe and retake my Goods; becauſe every mans Houſe is his Caſtle, into which another man may not enter without ſpecial Licence.

Hill. 19 *Iacobi, in the Kings Bench.*

404.

THe Caſe was, That two Tenants in Common of Lands made a Leaſe thereof for years rendring Rent, and then one of them died: And the Queſtion was, who ſhould have the Rent; And if the Executor of him who died and the other might joyn in an Action for the Rent; And as this Caſe was, The opinion of the whole Court was, That the Executor and the other might joyn in one Action for the Rent, or ſever in Action at their pleaſures. But if the Leaſe had been made for life rendring Rent; The Court was cleer of opinion that they ought to ſever in Actions.

Trin. 20 *Jacobi, in the Kings Bench.*

405.

A Man was bounden in a Bond by the name of *Edmond*, and his true name was *Edward* And an *Action* of Debt was brought againſt the Executors of *Edmond* upon the ſaid Bond, who demanded *Oyer* of the Bond, and then pleaded that it was not the Deed of their Teſtator; and iſſue being thereupon joyned, It was found by Inqueſt in *London* to be his Deed, *viz.* the Deed of *Edmond*; And it was moved in *Arreſt* of Judgment, *Quod querens nihil caperet per Billam*, and ſo it was reſolved and adjudged by the Court (*Doddridge* only being abſent) And a Caſe was vouched by *Henage Finch* Recorder of *London*, to prove this caſe, That it was ſo adjudged in a Caſe of Writ of Er-

Error brought in the Exchequer-Chamber; in which Caſe the party himſelf upon ſuch a Miſnoſmer, and after a Verdict and Judgment given in the ſame Caſe, did reverſe the Judgment for this Error.

Mich. 14 *Iacobi, in the Kings Bench.*

406. VESEY's Caſe.

WIlliam *Veſey* was indicted for erecting of a Dove-houſe. And Serjeant *Harvey* moved, That the Indictment was inſufficient. the words were, That the Defendant *erexit Columbare vi & armis ad commune nocumentum, &c.* and that he was not *Dominus Manerii nec Rector Eccleſiæ.* And the Indictment was quaſhed, becauſe it was not contained in the Indictment that there were Doves in the Dove-cote: For the meer erecting of a Dove-cote, if there be no Doves kept in it, it is no Nuſans, as it was holden by the Juſtices.

Mich. 15 *Iacobi, in the Kings Bench.*

407 Sir WILLIAM BRONKER's Caſe.

SIR *William Bronker* brought an Action upon the Caſe for ſlanderous words: And he ſhewed in his Declaration how that he was a Knight, and one of the Gentlemen of His Majeſties Privy-Chamber; And that the Defendant ſpake of him theſe ſcandalous words, viz. *Sir* William Bronker *is a Coſening Knave, and lives by Coſenage.* Which was found for the Plaintiffe. In arreſt of Judgment it was moved that the words were not actionable, And ſo it was adjudged *per Curiam.*

Paſch. 21 *Iacobi, in the Kings Bench.*

408. YATE and ALEXANDER's Caſe.

YAte brought an action upon the Caſe againſt *Alexander* Attorney of the Kings Bench; and declared, That the Plaintiffe in an action

of

of Debt brought againſt *Alexander* the Defendant who was Executor to his Father, had Judgment to recover againſt him as Executor, and that he ſued forth a *Fieri facias* to the Sheriffe to have Execution; and that before the Sheriffe could come to levy the debt and ſerve the Execution, the Defendant *A ſecretè & fraudulenter vendidit, amovit & diſpoſuit* of all the Teſtators goods, For which cauſe the Sheriffe was conſtrained to retorn *Nulla bona, &c.* *Ley* Chief Juſtice ſaid, That the Action would well lie, becauſe the Sheriffe could not retorn a *Devaſtavit*, becauſe the goods were ſecretly conveyed away, ſo as the Sheriffe could not tell whether he had ſold or otherwiſe diſpoſed of the ſaid goods, and alſo becauſe the Plaintiffe is deſtitute of all remedy by any other Action. To which *Dodderidge* Juſtice did agree. But *Haughton* Juſtice was againſt it: For he ſaid, That if one be to bring an action of Debt againſt the Heir, if the Heir ſelleth the Land which he hath by diſcent from his anceſtors before the action brought, an action upon the Caſe will not lie againſt him for ſo doing. *Dodderidge* ſaid, That the Caſe which was put by *Haughton* was not like to this Caſe: For in this Caſe if the Sheriffe had, or could have retorned a *Devaſtavit*, the action upon the Caſe would not have lien; But here the Sheriffe hath not retorned any *Devaſtavit*: And the ſale being ſecretly made, the Sheriffe could not ſafely retorn a *Devaſtavit*, for ſo perhaps he might be in danger of an action upon the Caſe to be brought againſt him for making of ſuch a Retorn. The Caſe was adjourned till another day.

Paſch. 21 *Jacobi, in the Kings Bench.*

409. WILLIAMS and GIBB'S Caſe.

NOte in this Caſe it was ſaid by *Ley* Chief Juſtice, That whatſoever is allowed for Divine ſervice, or whatſoever cometh in lieu of Tythes and Offerings, the ſame is now become a thing Eccleſiaſtical. And *Dodderidge* Juſtice alſo ſaid, That no Law doth appoint that the Vicar or Parſon ſhould read Divine Service in two ſeveral Pariſh-Churches, but only the Eccleſiaſtical Law.

Pasch. 21 *Iacobi, in the Kings Bench.*

410. STEWRY and STEWRY's Case.

A Bill was exhibited into the Court of Chancery for the traversing of an Office, who found one to be in Ward to the King: and the parties were at issue *super seperales exitus*; And a *Venire facias* was awarded out of the Chancery retornable in the Kings Bench, directed to the Sheriffe *Quod venire faciat* 12 *homines triare (placita traversiæ) super seperales exitus.* And it was moved, That the several Issues ought to be expressed in the *Venire facias. Dodderidge* Justice, It ought not to be *(Placita traversiæ)* For it shall never be called *Placitum*, but when it is at the Kings suit. And the opinion of the Court was, That the *Venire facias* should be amended, and that the several Issues should be expressed therein; and *Young's* Case 20 *Jacobi* was cited for a President in the very point.

Pasch. 21 *Jacobi, in the Kings Bench.*

411. ASTLEY and WEBB's Case.

IN an *Ejectione Firme* the words *(vi & armis)* were omitted out of the Plaintiffs Declaration: And although this was the default of the Clark, yet the same could not be amended, but it made the Declaration not to be good.

Pasch. 21 *Jacobi, in the Kings Bench.*

412. WHITE and EDWARD's Case.

IN Trespasse, *Edwards* the Defendant being a Clark of the Chancery, after an Imparlance could not be suffered to plead his Priviledge. It was moved in this Case, That the Declaration was *viginti opali vocatè Wythies*; And it was said it should have been *(anglicè)* and not *vocatè*: But the opinion of the Court was, that *(vocatè)* was as good as *anglicè*.

Then

Then it was moved, that the Declaration was, That the Defendant had felled twenty Pearches of Hedging; whereas it ought to have been, that the Defendant had felled a Hedge containing twenty Pearches; for a man cannot cut a Mathematical Pole. But the Court ſaid, That the Declaration was good notwithſtanding that; and cited 17 *E.*4.1. where a man ſells twenty Acres of Corn, and there Exception was taken to it as it is here, *viz.* That it ought to have been twenty Acres ſowed with Corn: but it was no good Exception there, No more was it as the Court ſaid in this Caſe; for it is the common ſpeech to ſay, Twenty perches of hedging, A pint of wine, An acre of corn, *&c.* And therefore the Declaration was ruled to be good, notwithſtanding theſe Exceptions which were taken to it by Serjeant *Headley*.

Paſch. 21 *Jacobi, in the Kings Bench.*

413. Bridges and Mill's Caſe.

AN action upon the Caſe was brought for ſpeaking of theſe words, *viz. Thou (innendo* the Plaintiffe) *haſt raviſhed a Woman twice, And I will make thee ſtand in a White ſheet for it. Henden* Serjeant moved in arreſt of Judgment, That the action would not lie for the words: For he ſaid, That by the Common-Law Rape was not Felony, but Treſpaſs, *v. Stamford* 23. 6. But now by the Statute of *Weſt.*2. *cap.*34. it is made Felony: And he ſaid, That the later words, viz. *(ſtand in a white ſheet)* doth mitigate the former words, by reaſon that in the former words the word *(Felonice)* was omitted; as the Caſe is in *C.* 4. *par.* 20. *Barham's* Caſe, where the words *Thou didſt burn my Barn*, and did not ſay, My Barn full of Corn, nor that it was parcel of his Manſion-houſe, and therefore the action would not lie: For unleſſe the Barn were full with corn, or part of a dwelling-houſe, it is not Felony. Like unto *Humfries* Caſe adjudged in the Common-Pleas, where an action upon the Caſe was brought for theſe words, *Thou haſt pick'd my Pocket and taken away ten ſhillings:* And it was adjudged that the action would not lie, For he did not ſay that he had ſtollen ten ſhillings; But if he had ſaid nothing but *Thou haſt pick'd my pocket*, then the action would have been maintainable. *Ley* and *Dodderidge* Juſtices, By the Common-Law Rape was Felony, and in the ſaid Statute the word *Felony* is not, although it be uſed in the Indictment. It was adjourned: But the opinion of the Court ſeemed to be, That the action would lie for the words.

Paſch.

Paſch. 21 Iacobi, in the Star-Chamber.

414. Sir HENRY FINES Caſe.

IN the Caſe of Sir *Henry Fines* in the Star-Chamber, Exception was taken to one of the Witneſſes, *viz.* to Dr. *Spicer*, becauſe that he ſtole Plate, and had been pardoned for it. But notwithſtanding the Exception, the Court did allow of the Teſtimony of the ſaid Dr. *Spicer*. And then *Hobart* Chief Juſtice of the Common-Pleas cited *Cuddingtons* Caſe *Hill.* 13 *Jacobi*, to be adjudged. *Cuddington* brought an action upon the Caſe for calling him *Thief:* The Defendant juſtified that ſuch a day and year he ſtole a Horſe: The Plaintiffe replied, That the King had given him a Pardon for all Felonies: And it was adjudged that the Action did lie. Afterwards at another day *Jones* and *Dodderidge* Juſtices put the Caſe more largely, viz. *Cuddington* committed Felony 44 *Eliz.* and 1 *Jacobi* by the General Pardon he was pardoned. And they ſaid, That he who procures a Pardon, confeſſeth himſelf to be guilty of the offence: But by the general Pardon it is not known whether he be guilty or not; and in *Cuddingtons* Caſe it was a general Pardon, and that was the cauſe that the Action did lie, for that it is not known whether he committed the Felony or not. But they conceived that if it had been a particular Pardon, that then in that caſe the Action would not have been maintainable. For the procuring of a ſpecial Pardon doth preſuppoſe, and it is a ſtrong preſumption that the party is guilty of the offence. Note, it did not appear in the Caſe of *Fines* the principal Caſe, whether the Pardon by which Dr. *Spicer* was pardoned were a general Pardon, or whether it were a particular and ſpecial Pardon.

Paſch. 21 Iacobi, in the Kings Bench.

415. DAVER's Caſe.

IN *Davers* Caſe who was arraigned for the death of *William Dutton*, *Ley* Chief Juſtice delivered it for Law, That if two men voluntarily fight together, and the one killeth the other, if it be upon a ſudden quaarel,

quarrel, that the ſame is but Man-ſlaughter. And if two men fight together, and the one flieth as far as he can, and he which flieth killeth him who doth purſue him, the ſame is *Se defendendo.* Alſo if one man aſſaulteth another upon the High-way, and he who is aſſaulted killeth the other, he ſhall forfeit neither life, nor lands nor goods, if he that killed the other fled ſo far as he could. *Quod nota.*

Paſch: 21 Jacobi, n the Court of Wards.

416. Sir EDWARD COKE's Caſe.

THis Caſe being of great conſequence and concernment, The Maſter of the Court of Wards was aſſiſted by four of the Judges in the hearing and debating of it: and after many Arguments at the Barr, the ſaid four Judges argued the ſame in Court, *viz. Dodderidge* one of the Juſtices of the Kings Bench, *Tanfield* Lord chief Baron of the Exchequer, *Hobart* Lord Chief Juſtice of the Court of Common Pleas, and *Ley* Lord Chief Juſtice of his Majeſties Court of Kings Bench. The Caſe in effect was this: Queen *Elizabeth* by her Letters Patents did grant to Sir *Chriſtopher Hatton* the Office of Remembrancer and Collector of the firſt Fruits for his life, *Habendum* to him after the death or ſurrender of one *Godfrey* who held the ſaid Office then in poſſeſſion; Sir *Chriſtopher Hatton* being thus eſtated in the ſaid Office in Reverſion, and being ſeiſed in Fee-ſimple of diverſe Mannors, Lands and Tenements, did Covenant to ſtand ſeiſed of his ſaid lands, &c. unto the uſe of himſelf for life, and afterwards to the uſe of *J. Hatton* his ſon in tail, and ſo to his other ſons intail; with the Remainder to the right heirs, of *J. Hatton* in Fee, with *Proviſo* of Revocation at his pleaſure during his life. *Godfrey* the Officer in poſſeſſion died, and Sir *Chriſtopher Hatton* became Officer and was poſſeſſed of the Office, and afterwards he became indebted to the Queen by reaſon of his ſaid Office; And the Queſtion in this great Caſe was, Whether the Mannors and Lands which were ſo conveyed and ſetled by Sir *Chriſtopher Hatton*, might be extended for the ſaid Debt due to the Queen, by reaſon of the *Proviſo* and Revocation in the ſaid Conveyance of Aſſurance of the ſaid Mannors and Lands, the debt due to the Queen was aſſign'd over, and the Lands extended, and the Extent came to Sir *Edward Coke*, and the heir of *John Hatton* ſued in the Court of Wards to make void the Extent: And it was agreed by the ſaid four Juſtices, and ſo it was afterwards decreed by *Cranfield* Maſter of the Court of Wards, and the whole Court, That the ſaid Mannors and Lands were liable to the ſaid Extent.

And *Dodderidge* Justice who argued first, said that the Kings Majestie had sundry prerogatives for the Recovery of Debts and other Duties owing unto him: First he had this prerogative, *ab origine legis*, That he might have the Lands, the Goods, and the Body of the Person his Debtor in Execution for his Debt. But at the Common Law a common person; a common person could not have taken the body of his debtor in execution for his debt: but the same privileg was given unto him by the Statute of 25. *E.*3.*cap.*17. At the Common Law he said that a common person Debtee might have had a *Levari facias* for the Recovery of his Debt, by which Writ the Sheriffe was commanded *Quod de terris & Catallis ipsius*, the Debtor, &c. *Levari faciat, &c.* but in such Case the Debtee did not meddle with the Land, but the Sheriffe did collect the Debt and pay the same over to the Debtor: But by the Statute of *West.* 2. *cap* 20. The Debtee might have an *Elegit*, and so have the moyetie of the Lands of his Debtor in Execution for his Debt, as it appeareth in *C.*3. *part.* 12. in Sir *William Harberts* Case.

Secondly, He said, That the King had another prerogative, and that was, to have his Debt paid before the Debt of any Subject, as it appeareth 41. *E.* 3: *Execution* 38. and *Pasc.* 3. *Elizabeth. Dyer.* 197. in the Lord *Dacres* and *Lassels* Case, and in *M.*3. *E.* 6. *Dyer*, 67. *Stringfellows* Case; For there the Sheriffe was amerced, because the King ought to have his Debt first paid, and ought to be preferred before a Subject *vid.* 328 *Dyer*, There the words of the Writ of Privileg shew that the King is to be preferred before other Creditors: By the Statute of 33. *H.* 8.*cap.* 39. The Execution of the Subject shall be first served, if his Judgment be before any Processe be awarded for the Kings debt. In the Statute of 25. *E.* 3. *Cap.* 19. I find that by the Common Law, the King might grant a Protection to his Debtor that no other might sue him before that the King was satisfied his debt. See the Writ of Protection, *Register* 281. *B.* the words of which are, *Et quia nolumus solutionem debitorum nostrorum cæteris omnibus prout ratione Perogativæ nostræ totis temporibus retroactis usitatæ, &c.* But that grew such a Grievance to the Subject, that the Statute of 25. *E.*3. *Cap.* 19. was made. And now by that Statute a common person may lawfully sue to Judgment, but he cannot proceed to Execution (and so the Kings Prerogative is saved) unless the Plaintiffe who sueth will give security to pay first the Kings Debt; For otherwise if the Paty doth take forth Execution upon his Judgment and doth levy the money, the same money may be seized upon to satisfie the Kings Debt, as appeareth in 45. *E.*3: *title Decies tantum* 17.

The third Prerogative which the King hath, is That the King shall have the Debt of the Debtor to the Kings Debtor paid unto him. *v.* 21 *H.*7.12. The Abbot of *Ramseys* Case. The Prior of *Ramsey* was indebted

debted to the King, and another Prior was indebted to the Prior of *Ramſey*: and then it was pleaded in Barr, that he had paid the ſame Debt to the King, and the Plea holden for a good Plea. And if Rent be due and payable unto me by my Leſſee for years, the ſame may be taken for the Kings Debt, and the ſpecial matter ſhall be a good barr in an *Avowry* for the Rent, 38. *E.* 3. 28. A Prior Alien was indebted to the King for his Farm Rent: And being ſued for the ſame, he ſhewed, That there was a Parſon who held a certain portion of Tythes from him which were part of the Poſſeſſions of the ſame Priory, which he kept in his hands, ſo as he could not pay the King his Farm-Rent unleſſe he might have thoſe Tythes which were in the Parſons hands Wherefore a Writ was awarded againſt the Parſon to appear in the Exchequer, and to ſhew cauſe why he ſhould not pay the ſame to the King for the ſatisfying of the Kings Rent: And there *Skipwith* Juſtice ſaid, That for any thing which toucheth the King and may turn to his advantage to haſten the Kings buſineſs, that the Exchequer had juriſdiction of it, were it a thing Spiritual or Temporal. *V.* 44 *E.* 3. 43, 44. the like Caſe, but there it is of a Penſion; And the Caſe of 38 *Aſſ.* 20. was the Caſe for Tythes: See alſo 12 *E.* 3. *Swalds* Caſe to the ſame purpoſe. If two Coparceners be in ward to the King, upon a ſuggeſtion that one of them is indebted to the King, the ſtaying of his Livery ſhall be for his moytie untill the King be ſatisfied his debt; but the other ſiſter ſhall have Livery of the other moytie which belongs unto her, *Fitz. N.* 5. 263. *a. Mich* 19 *E.* 3. and *Hill.* 20. *E.* 3. which was one and the ſame Caſe. The Kings Debtor brought a *Quo minus* in the Exchequer againſt his Debtor: the Defendant appeared, And the Plaintiffe afterwards would have been Nonſuit, but the Court would not ſuffer him ſo to be: And it was there ſaid, That a Releaſe by the Kings Debtor unto his Debtor would not diſcharge the Kings Debtor as to that Debt. In a *Quo minus* in the Exchequer upon a Debt upon a ſimple Contract, the Defendant cannot wage his Law, becauſe the King is to have a benefit by the ſuit, although the King be no party to the ſuit, *C.* 4. *par.* 95.

The fourth Prerogative which the King hath, is, That the King ſhall have an Accompt againſt Executors, becauſe the Law there maketh a privity; it being found by matter of Record, that the Teſtator was indebted to the King, which Record cannot be denied. But in the Caſe of a common perſon an Accompt will not lie againſt Executors for want of privity. The Accompt which the King brings is *ad computandum ad Dominum Regem, &c.* without ſetting forth how the party came liable to accompt: But a common perſon in his accompt brought ought to ſhew how that the party was Receiver, Bailiff, *&c.* If a man doth entermeddle with the Kings Treaſure (the King pretending a title to it) he ſhall be chargeable for the ſame to the King, *C.* 11. *part* 89. the Earl of *Devonſhire's* caſe. The Maſter of the Ordnance pretending that the old broken

and unſerviceable Ordnance belonged unto him by reaſon of his Office, procured a Privy-ſeal, *&c.* and afterwards diſpoſed of them to his own uſe, and dyed: And his Executor was forced to accompt for them. Sir *Walter Mildmay's* Caſe, *Mich.* 37. *&* 38 *Eliz. Rot.*312. in the Exchequer. Sir *Walter Mildmay* was Chancellor of the Exchequer, and ſuggeſted unto the Lord Treaſurer of *England*, That his Office was of great attendance, and deſired the Lord Treaſurer that he would be pleaſed to allow unto him 100l. for his dyet, and 40l. *per annum* for his attendance; which the Lord Treaſurer did grant unto him, and he enjoyed it accordingly, and afterwards dyed, and his Executors were forced to accompt for it, and to pay back the mony for all the time that their Teſtator received it. *C.*11. *part.*90,91. there is cited, That Sir *William Cavendiſh* was Treaſurer of the Chamber of King *H.*8. *E.*6. and Queen *Mary*, and that he was indebted to K. *E.*6. and to Q. *Mary*; and that being ſo indebted he purchaſed divers lands, and afterwards aliened them, and took back an eſtate therein to himſelf and his wife, and afterwards dyed without rendring any Accompt: the Terre-Tenants of the land were charged to anſwer to Q. *Elizabeth* for the monies, to which they pleaded the Queens ſpecial Pardon; and it was in concluſion ſaid, That the Pardon was a matter of grace *ex gratia*, but in Law the Terre-Tenants were chargeable to the ſaid Queen for the monies, *v.Com.*321. 5 *Eliz. Dyer* 244,245. in the Exchequer, *Mich.*24.*E.*3. *Rot.*11. *ex parte Rememb.Regis. Thomas Farel* Collector of the Fifteenths and Tenths, being ſeiſed of lands in Fee, and being poſſeſſed of divers goods and chattels, at the time when he entred into the ſaid Office (being then indebted to the King) did alien them all, and afterwards dyed without heir or Executor: And a Writ went out unto the Sheriffe to enquire what lands and tenements goods and chattels he had at the time he entred into the ſaid Office; and Proceſſe iſſued forth againſt the Terre-Tenants and the Poſſeſſors of his goods and chattels *ad computand. pro collectione predict. & ad reſpondendum & ſatisfaciendum inde Domino Regi*, *V.Dyer*,160, 50 *Aſſ.*5. A notable Caſe to this purpoſe, *Mich.*30.*E.*3. *rot.*6. *William Porter* Mint-Maſter did covenant with the King by Indenture enrolled, That for all the Bullion which ſhould be delivered *ad Cambium Regis pro Moneta faciend.* that mony ſhould be delivered for it within eight dayes: which Covenant he had broken, and therefore the King paid the Subject for the Bullion: And afterwards becauſe *John Walweyen* and *Richard Piccard duxerunt & præſentaverant dict. William Porter in officium illud tanquam ſufficientem*, (and that they offered to be Sureties for him, but were not accepted of) which they did confeſſe; *Ideo conſideratum eſt quod predict. Walweyen & Piccard onerentur erga Dominum Regem:* And they afterwards were charged to ſatisfie the King for all the monies which the King had paid for the ſaid *Porter:* And although that none of the Kings treaſure came to

their

their hands, nor they had not any benefit as appeared by any matter in the Caſe, yet becauſe they were the means and cauſers that the King ſuſtained damage and loſſe, they were adjudged to be chargeable to the King, *C.*11.*par.*92. this Caſe is there cited.

Upon theſe Caſes vouched by me, I make divers Obſervations. 1. I obſerve, That from Age to Age what care the Judges had for the advancing and the recovering of the Kings Debts; becauſe *Theſaurus Regis eſt vinculum Pacis & Bellorum nervus*, And it is the flowing fountain of all bounty unto the Subject. 2. I obſerve, That the King hath a Prerogative for the Recovery of Debts due unto him. 3. I obſerve, That although the Debt due to the King be puiſne or the leſſer Debt, and although the Debtor be able and ſufficient to pay both Debts, *viz.* the Kings Debt and the Debt owing to the Subject, yet the Kings Debt is to be firſt paid.

Now to apply theſe caſes to the Caſe in queſtion Here is a Subject who is indebted to the King; And I ſay, That the Lands which ſuch a Debtor hath in his power and diſpoſe (although he hath not any Eſtate in the Lands) ſhall be liable to pay the Debt to the King: And I ſay, That Sir *Chriſtopher Hatton* had a Fee in the Mannors and Lands in this caſe; And although he did convey them *bona fide*, yet untill his death by reaſon of the *Proviſo* of Revocation they were extendable. *Trin.*24.*E.*3.*Rot.*4. *Walter de Chirton* Cuſtomer, who was indebted to the King for the Cuſtoms, purchaſed Lands with the Kings monies; and cauſed the Feoffor of the Lands to enfeoffe certain of his friends, with an intent to defraud and deceive the King; and notwithſtanding he himſelf took the profits of the Lands to his own uſe: And thoſe Lands upon an Inquiſition were found, and the values of them, and retorned into the Exchequer; and there by Judgment given by the Court the Lands were ſeized into the Kings hands, to remain there untill he was ſatisfied the Debt due unto him; And yet the Eſtate of the Lands was never in him: But becauſe he had a power, *viz.* by *Subpena* in Chancery to compell his Friends to ſettle the Eſtate of the Lands upon him, therefore they were chargeable to the Debt. You will ſay perhaps, there was Covin in that Caſe: But I ſay, that neither Fraud, Covin, nor Colluſion is mentioned in the Report in *Dyer* 160.*C.*11.*par.*92. And that Caſe was a harder Caſe then our Caſe is: For *Walter de Chirton* in that Caſe was never ſeiſed of the ſaid lands: But in our Caſe Sir *Chriſtopher Hatton* himſelf had the lands; And when he had the lands he was aſſured of the Office, although he had not the poſſeſſion of it, For he was ſure that no other could have it from him, and no other could have it but himſelf. And for another cauſe, our Caſe is a ſtronger Caſe then the Caſe of *Walter de Chirton*: For *Chirton* had no remedy in Law to have the lands; but his remedy was only in a Court of Equity, and a remedy in Conſc' onely: But in our Caſe, Sir *Chriſtopher Hatton* had a time in

which

which he might let the land to paſſe, and yet he had a power to pull it back again at his pleaſure: So as he had the diſpoſition of it; but before the alteration of the uſes he dyed: And if he had been living (being indebted to the King) the King might have extended the lands, becauſe that then he had the poſſeſſion of them. There were two Conſiderations which moved Sir *Chriſtopher Hatton* to Convey the Lands: the firſt was honorable, *viz.* For the payment of his Debts; the ſecond was natural, *viz.* For the preferment of his Children. Although the Conveyance of the Lands for payment of his Debts was but for years, yet the ſame was too ſhort, like unto a Plaiſter which is too ſhort for the ſore: For the Covenanters were not his Executors, and ſo they were not liable to Debts: And although he be now dead and cannot revoke the former uſes, yet he had the power to revoke the uſes during his life; And ſo he was chargeable for the Debt due to the King.

Tanfield Chief Baron agreed with Juſtice *Dodderidge* in all as before: And he ſaid, That all powerful and ſpeedy courſes are given unto the King for the getting in of his Revenues; and therefore he ſaid he had the ſaid Prerogatives as have been recited: And in 25 *E.* 3 *in libro rubro* in the Exchequer, there the Foundations of the ſaid Prerogatives do appear. If a common perſon arreſt the body in Execution, he ſhall not reſort to the lands, *contr.* to *Blumfields* Caſe, *C.* 5. *par.* The courſe of the Exchequer makes a Law every where for the King. If any Officer be indebted unto the King and dyeth, the courſe of the Exchequer is, For to call in his Executors or the Heir, or the Terre-Tenants to anſwer the Debt; and if he hath no lands, then a Writ iſſueth out of the Exchequer to know what goods he had, and to whoſe hands they be come. All Inquiſitions concerning Lands in the like Caſes are, *Habuit vel ſeiſitus*; and not that he was ſeiſed onely. The word *Habuit* is a large word, and in it is contained a diſpoſing power. But in this Caſe Sir *Chriſtopher Hatton* had a power every day to revoke the uſes; And when he had once revoked them, then was he again as before *ſeiſitus*. 7 *H.* 6. in the Exchequer, the Kings Farmor had Feoffees to his uſe, and dyed indebted to the King: And upon an Inquiſition it was found that (*Habuit*) for he had them in his power by compelling his Feoffees by Equity in Chancery; and therefore it was adjudged that the *King* ſhould have the Lands in the Feoffees hands in extent. But in this caſe Sir *Chriſtopher Hatton* might have had the Lands in him again without compulſion by a Court of Equity, for that he had power to revoke the uſes in the Conveyance at his pleaſure. *Mich.* 30. *H.* 6. *rot.* in the Exchequer: A Clark of the Court was aſſigned to receive monies for the *King*, who had Feoffees of lands to his uſe: And the lands were found and ſeiſed for the *Kings* monies, by force of the word *Habuit*. 32 *H.* 6. *Philip Butler's* Caſe, who was Sheriffe of a County, being indebted to the *King*; his Feoffees were chargeable to the *Kings* debt by force of the

the word *Habuit*, For *habuit* the lands in his power. 6 *E.*4. *Bowes* Case *acc'*. 34 *H.*6. A widow being indebted to the King, her Feoffees were chargeable to pay the Kings debt, becauſe ſhe had power of the lands, It being found by Inquiſition that *habuit*. 1 *R.*3. the like Caſe. And 24 *Eliz.* in *Morgan's* Caſe it was adjudged, That lands purchaſed in the names of his Friends for his uſe, were extended for a debt due by him to the King.

Hobart Lord Chief Juſtice of the Common Pleas argued to the ſame purpoſe, and agreed with the other Juſtices; and he ſaid in this caſe it was not material whether the Inquiſition find the Deed to be with power of Revocation; For he ſaid that the Land is extended, and that the extent remains good untill it be avoided: And he ſaid that a revocable Conveyance is ſufficient to bind the Parties themſelves, but not to bind the King; but the Lands are lyable into whoſe hands ſoever they come. When a man is ſaid to forfeit his body, it is not to be intended his life, but the freedom of his body, Impriſonment. At the Common Law a Common perſon could neither take the bodie nor the Lands in Execution; But yet at the Common Law a *Capias* lay upon a force, although it did not lie in caſe of Debt, Agreement, &c. The King is *Parens Legum*, becauſe the Laws flowed from him: he is *Maritus Legum*, For the Law is as it were under *Covert Baron*; he is *Tutor Legum*, for he is to direct the Laws, and they deſire aid of him: And he ſaid that all the Land of the Kings Debtor are liable to his Debt. The word (*Debitor*) is *nomen equivocum*, and he is a Debtor who is any ways chargeable for Debt, Damages, Dutie, Rent behind, &c. The Law amplifies evry thing which is for the Kings benefit, or made for the King. If the King releaſeth all his Debts, he releaſes only debts by Recognizance, Judgment, Obligation, Specialtie or Contract: Every thing for the benefit of the King ſhall be taken largely, as every thing againſt the King ſhall be taken ſtrictly; and the reaſon why they ſhall be taken for his benefit is becauſe the King cannot ſo nearly look to his particular, becauſe he is intended to conſider *ardua regni pro bono publico*. The Prerogative Laws is not the Exchequer Law, but is the Law of the Realm for the King, as the Common Law is the Law of the Realm for the Subject: The Kings Bench is a Court for the Pleas of the Crown, The Common Pleas is for Pleas betwixt Subject and Subject, and the Exchequer is the proper Court for the Kings Revenues, 13. *E.*4.6. If the King hath a Rentcharge, he by his Prerogative may diſtrein in any the Lands of the Tenant, beſides in the Lands charged with the Rent, 44. *E.* 3. 15. although that the partie purchaſeth the Lands after the Grant made to the King, but then it is not for a Rent, but as for a dutie to the King: And the King in ſuch caſe may take the Body, Lands and Goods in Execution. See the Lord *Norths* Caſe, *Dyer*, 161. where a man became Debtor to the King upon a ſimple Contract. *N.* When he was Chancellor of the

the Augmentation received a Warrant from the Privy Councel, teſtifying the pleaſure of King *E.* 6. That whereas he had ſold to *R.* &c. That the ſaid Chancellor ſhould take Order and ſee the delivery of &c. and ſhould take Bond and Sureties for the King for the payment of the money; By force of which Warrant, he ſent one *T.* his Clark to take a Bond of *W.* for the payment of the money, and he took Bond for the King accordingly, and brought the ſame to the Chancellor his Maſter, and delivered the ſame to him to the Kings uſe; and preſently after he deliverd the ſame back to *T.* to deliver over to the Clark of the Court, who had the charge of the keeping of all the Kings Bonds and Specialties: And when *T.* had received the ſame back, he practiſed with *R.* and *W.* to deliver them the Bond to be cancelled, and ſo it was done, and cancelled: And it was holden in that Caſe, becauſe that the ſaid Bond was once in the power and poſſeſſion of *N.* that he was chargeable with the Debt: But the Queen required the Debt of *R.* and *W.* who were able to ſatisfie the Queen for the ſame.

In *Mildmay's* Caſe cited before, there it was holden, That the Queen might take her Remedy either againſt the Parties who gave the inſufficient Warrant, or againſt *Mildmay* himſelf at her Election. So a man (he ſaid) ſhall be lyable for damages to the King, for that is taken to be within the word (*Debita.*) In *Porters* Caſe cited before, there was neither Fraud, Covin, nor Negligence; and yet the perſons who preſented *Porter* to the King to hold the Office were chargeable for his negligence, whom they preferred to be Maſter of the Mint. But in that Caſe, The Bodie and Goods of *Porter* were delivered to his Sureties as in Execution, to repay them the monie which the *King* had levied of them. Theſe Caſes prove that the word (*Debitor*) is taken in a large ſence: That the *King* ſhall have for the Debts due to him, the Bodie, Goods and Lands in Execution. The word (Goods) doth extend to whatſoever he hath, 11. *H.* 7. 26. The *King* ſhall have the Debt which is due to his Debtor upon a ſimple Contract, and therein the Debtor of the Debtor ſhall not wage his Law: For after you ſay that you ſue for the *King*, it is the *Kings* Debt, and the *King* if he pleaſe may have Evecution of it. An *Ejectione firme* was brought in the Exchequer by *Garraway* againſt *R. T.* upon an Ejectment of Lands in *Wales*; and it was maintainable in the Exchequer, as well as a Suit ſhall be maintainable here for an Intruſion upon Lands in *Wales* upon the *King* himſelf: and the *King* ſhall have Execution of the thing, and recover Damages, as he ſhall in a *Quo minus*, in ſatisfaction of a Debt which is due by his Debtor to the *King*: 8. *H.* 5. 10. There the *Kings* Debtor could not have *Quo minus* in the Exchequer; The Caſe there was, That a man Indebted to the *King* was made Executor, and by a *Quo minus* ſued one in the Exchequer who was indebted unto his Teſtator upon a ſimple Contract, as for his proper debt; and the *Quo minus* would

would not lie, becauſe the *King* in that Caſe could not ſue forth Execution: and every *Quo minus* is the *Kings* Suit, and is in the name of the *King*, 38. *Aſſ.* 20. A Prior Alien was arrear in Rent to the *King*, The Prior brought a *Quo minus* in the Exchequer againſt a Parſon for detaining of Tythes, (here is a variance of the Law and the Court; for the Right of Tythes ought to be determined by the Eccleſiaſtical Law) and it was found by Verdict for the Prior. A Serjeant moved, That the Court had not juriſdiction of the Cauſe; To whom it was anſwered, that they had and ought to have Juriſdiction of it: For that when a thing may turn to the advantage of the *King* and haſten his buſineſs, that Court had Juriſdiction of it; and divers times the ſaid Court did hold juriſdiction in the like Caſe: and thereupon iſſue was joyned there, and the Reporter made a *mirum* of it; But it ſeems the Reporter did not underſtand the *Kings* Prerogative: For it is true, That ſuch Suit for Tythes doth not fall into the Juriſdiction of the *Kings* Bench, or Common Pleas; but in the Exchequer it is otherwiſe; And if the Suit be by *Quo minus*, it is the *Kings* Suit.

At a common perſons Suit the Officer cannot break the houſe and enter, but at the *Kings* Suit he may: And a common perſon cannot enter into a Liberty, but the *King* may if it be a common Liberty: But for the moſt part when the *King* granteth any Liberty, there is a clauſe of Exception in the Grant; That when it ſhall turn to the prejudice of the King, as it may do in a ſpecial Caſe, there the *King* may enter the Liberty; and a houſe is a Common Liberty, and the Execution of Juſtice is no wrong when it is for the *King*. The *King* hath the precedency for the payment of his Debts to him, as it appeareth in *Stringfellows* Caſe cited before by Juſtice *Dodderidge*: And when Lands are once lyable to the payment of the *Kings* debts, let the Lands come to whom you will, yet the *Land* is lyable to his debt, as it appeareth in *Cavendiſhes* Caſe, *Dyer* 224, 225. which was entred *Paſc.* 2. *Eliz. Rot.* 111. in the Exchequer, 50. *Aſſ.* 5. A man bindeth himſelf and his heirs and dieth, and the heir alieneth the Land; the Land is diſcharged of the Debt as to the Debttee; But in the *Kings* Caſe, if at any time the Land and Debt meet together, you cannot ſever them without payment of the *Kings* debt. *Vid. Littleton:* Executors, and ſoe Adminiſtrators are chargeable in an Account to the *King*: and the Sayings of Mr. *Littleton* are adjudged for *Law*, and are Judgments: A ſale in Market over, nor a Fine and *Nonclaim* ſhall not bind the *King*; and ſo it is of things bought of the *Kings* Villeyn, becauſe *Nullum tempus occurrit Regi:* A common perſon in *London*, by Cuſtom may attach a Debt in anothers hands: As he may come into Court and ſhew that his debtor hath not any thing in his hand to ſatisfie his debt, but only that debt which is in the hands of another man; and that Cuſtom is allowable and reaſonable,

ſonable: And if it ſhall be reaſonable for a Subject ſo to attach a Debt, will you have it unreaſonable for the King? Before the Statute of 25. *E.3.cap.19.* The King might protect his Debtor as it appeareth by the Regiſter 281. and *Fitz.* 28. 6. But the Statute of 25. *E.3.* gave the Partie a liberty to proceed to Judgement, but doth barr him from taking forth of Execution upon the Judgment, untill the King be ſatisfied his Debt. In *Dyer* 296, & 297. a man condemned in the Exchequer for a Debt due to the Queen, was committed to the Fleet, and being in Execution he was alſo condemned in the Kings Bench at the Suit of a Subject upon a Bill of Debt in *Cuſtodia Mariſcalli Mariſcalciæ*: Afterwards upon prayer of the Partie, a *Habeas Corpus cum cauſa* was awarded out of the *K*ings Bench to the Warden of the Fleet, who retorned the Cauſe *ut ſupra*, and he was remanded to the Fleet in Execution for the Debt: Afterwards a Command was given by the Lord Treaſurer upon the Queens behalf, to ſuffer the Priſoner to go into the Countrie to collect and levie monie, the ſooner to pay the Queen her Debt: In that Caſe the Subject brought an Action of Debt againſt the Warden of the Fleet upon the Eſcape, who juſtified the Eſcape by the ſaid Commandment; It was holden in that caſe, That although the Partie was in Execution for both the Debts, yet before the Queen was ſatisfied, the Execution for the Subject did not begin, For the King cannot have equall to have intereſt in the Body of the Priſoner *Simul cum illo*: But if the Caſe were as *Laſſels* caſe, 3. *Eliz. Dyer*, then he might be in Execution for the King, and for the Subject.

Laſſels was taken in Execution at the Suit of a Subject, and before the Writ was retorned, a Writ for the Queen came to the Sheriffe, and *Laſſels* was kept in Execution for the Queen: In that caſe *Laſſels* was in Execution for them both, *viz.* the Queen and the Subject. So there is a difference where the Partie is firſt taken for the King, and where he is firſt taken for the Subject.

Now I will conſider of the Caſe at Barr; Whether the Land might be extended notwithſtanding the Conveyance made. The Kings Debt is to be taken largely, and ſo Goods in ſuch caſe are to be taken largely, and ſo is it likewiſe of *L*ands, *viz.* any *L*and, be it *L*and in Uſe, upon Truſt, by Revocation. By the Law, Debts are firſt to be paid, then Legacies, then childrens preferments; There is a difference where the *L*and was never in the man, and where it was once in him, *C.8. part.* 163. *Mights* Caſe: *Might* purchaſed lands to him and to his heir; It was reſolved that this original Purchaſe could not be averred to be by Colluſion, to take away the Wardſhip, which might accrue after the death of *Might*, for they were Joynts, and the ſurvivor ſhall have the whole: Note, that there was no fraud, for that it was never in him; but if it had once been the *L*ands only of *Might*, and then *Might* had made the conveyance to him and his heir, then it would have been fraud

to

to have deceived the King of the Wardſhip. In the Caſe at Barr, *Hatton* hath not aliened the land, For an Alienation is, *alienum facere*, and here he hath not made it the land of another, having a power of Revocation. Sir *John Packington* Mortgaged his lands for 100*l.* The Mortgagee enfeoffed *W.* and within the time of Redemtion, *Packington* and he to whom the money was to be paid, agreed that *Packington* ſhould pay him 30*l.* of the ſaid 100*l.* and no more; and yet in appearance for the better performance of the Condition, it was agreed that the whole 100*l.* ſhould be paid; and that the reſidue above 30*l.* ſhould be repaid back to *Packington*, which was done accordingly. It was reſolved in that Caſe, that the ſame was no performance of the Condition, becauſe it was not a payment *animo ſolvendi*: And ſo in this Caſe there was not any allienation *animo allienandi*; For Sir *Chriſtopher Hatton* gave the Lands, but yet he kept the poſſeſſion, and received the profits of them; And if Sir *Chriſtopher Hatton* had given the land with power of Revocation, or reſerving as in this Caſe he did an Eſtate for his own life, it had been all one. If a man deviſeth the profits of ſuch lands, the lands themſelves do paſs. And a Conveyance of lands upon Condition not to take the profits, is a void condition in Law, *Lit.* 462, 463. A Feoffment is made upon confidence, and the Feoffor doth occupie the land at the will of the Feoffees, and the Feoffees do releaſe unto the Feoffor all their right, *Litt.* 464. there it was ſaid that ſuch a Feoffor ſhall be ſworn upon an Inqueſt, if the lands be of the value of 40*s. per annum*, and that by the Common Law; Therefore it ſeemeth that the Law doth intend, That when a man hath Feoffees in Truſt, that the lands are his own; and then if in ſuch caſe the Commonwealth ſhall be ſerved, ſhall not the King who is *Pater reipublicæ* be ſerved, ſo as he may be ſatisfied his debts? If the Caſe of *Walter de Chirton* had never been, yet I ſhould now have the ſame opinion of the Law in ſuch Caſe as the Judges then had. The King is not bound by Eſtopels, nor Recoveries had betwixt ſtrangers, nor by the fundamental Juriſdiction of Courts, as appeareth 38. *Aſſ.* 20. where a Suit was for Tythes in the Exchequer, being a meer ſpiritual thing; and ſhall he be bound by a Conveyance? *Anno.* 16. *H.* 6. then in the time of Civil War Uſes began; and of Lands in uſe the Lord Chief Baron *Tanfield* in his Argument hath cited diverſe caſes where the lands in uſe were ſubject and lyable to the debt of *Ceſtuy que uſe* in the Kings Caſe, and ſo was it untill the Statute of 27. *H.* 8. of Uſes was made. *Babbington*, an Officer in the Exchequer, had lands in the hands of Feoffees upon Truſt, and a Writ iſſued out, and the lands were extended for the Debt of *Babbington* in the hands of his Feoffees. Sir *Robert Dudley* having lands in other mens hands upon Truſts, the lands were ſeized into the Kings hands for a contempt (and not for debt or damages to the King;) And in this Caſe although that the Inquiſition do find the Conveyance, but have not found it to be with power of

Revocation, ; yet the Land being extended, it is well extended untill the contrary doth appear, and untill the extent be avoided by matter of Record, *viz.* by Plea, as the Lord Chief Baron hath ſaid before.

Ley Chief Juſtice of the *Kings* Bench argued the ſame day, and his Argument in effect did agree with the other Juſtices in all things, and therefore I have forborne to report the ſame at length. And it was adjudged, That the Extent was good, and the Land well decreed accordingly.

Paſch. 21 Jacobi, in the Exchequer-Chamber.

417. The Lord SHEFFIELD and RATCLIFF's Caſe.

IN a Writ of Error brought to reverſe a Judgment given in a *Monſtrans de Droit* in the Court of Pleas, The Caſe was put by *Glanvile* who argued for *Ratcliffe* the Defendant, to be this. 2 *E.* 2. *Malew* being ſeiſed of the Mannor of *Mulgrave* in Fee, gave the ſame to *A. Bigot* in tail, which by divers diſcents came to Sir *Ralph Bigot* in tail, Who 10 *Jannarii* 6 *H.* 8. made a Feoffment unto the uſe of his laſt Will, and thereby after his Debts paid declared the uſe unto his right heirs in Fee, and 9. *H.* 8. dyed. The Will was performed: *Francis Bigot* entred being Tenant in tail, and 21 *H.* 8. made a Feoffment unto the uſe of himſelf and *Katherine* his wife, and to the uſe of the heirs of their two bodies. Then came the Statute of 26 *H.* 8. *cap.* 13. by which Tenant in tail for Treaſon is to forfeit the Land which he hath in tail. Then the Statute of 27 *H.* 8. of Uſes is made. Then 28 *H.* 8. *Francis Bigot* did commit Treaſon, And 29 *H.* 8. he was attainted and executed for the ſame. *Anno* 31 *H.* 8. a private Act of Parliament was made, which did confirm the Attaindor of *Francis Bigot*, and that he ſhould forfeit unto the King (word for word as the Statute of 26 *H.* 8. is) ſaving to all ſtrangers except the Offendor and his heirs, *&c.* 3 *E.* 6. The heir of *Francis Bigot* is reſtored in blood, *Katherine* entred into the Mannor and dyed ſeiſed. 8 *Eliz.* their Iſſue entred, and married with *Francis Ratcliffe*, and had Iſſue *Roger Ratcliffe*, who is heir in tail unto *Ralph Bigot*, And they continue poſſeſſion untill 33 *Eliz.* And then all is found by Office and the Land ſeiſed upon for the Queen, who granted the ſame unto the Lord *Sheffield*. *Francis Bigot* and *Dorothy* die, And *Roger Ratcliffe* ſued a *Monſtrans de Droit* to remove the *Kings* hands from off the lands, and a *Scire facias* iſſued forth againſt the Lord *Sheffield* as one of the Terre-Tenants, who pleaded all this ſpecial matter; and Judgment was there-

upon

upon given in the Court of Pleas for *Roger Ratcliffe*; And then the Lord *Sheffield* brought a Writ of Error in the Exchequer-Chamber to reverse the said Judgment: And *Finch* Serjeant argued for the Lord *Sheffield*, that the Judgment ought to be reversed; And now this Term *Glanvile* argued for *Roger Ratcliffe*, that the Judgment given in the Court of Pleas ought to be affirmed.

There are two points: The first, If there were a Right remaining in *Francis Bigot*, and if the same were given unto the *King* by the Attaindor and the Statute of 31 *H.*8. Second, If a *Monstrans de Droit* be a proper Action upon this matter, which depends upon a Remitter; for if it be a Remitter, then is the Action a proper Action. The Feoffment by *Ralph Bigot* 6 *H.*8. was a Discontinuance, and he had a new use in himself, to the use of his Will, and then to the use of his Heirs: Then 9 *H.*8. *Ralph Bigot* dyed, And then *Francis Bigot* had a right to bring a Formedon in the Discendor to recover his estate tail. 21 *H.*8. (then the point ariseth) *Francis Bigot* having a right of Formedon, and an use by force of the Statute of 1 *R.*3. *cap.*1. before the Statute of 27 *H.*8. by the Feoffment he had so setled it, that he could not commit a forfeiture of the estate tail. When a man maketh a Feoffment, every Right, Action, *&c.* is given away in the Livery and Seisin, because every one who giveth Livery giveth all Circumstances which belongs to it: For a Livery is of that force, that it excludes the Feoffor not only of all present Rights, but of all future Rights and Tytles, *v.C.*1.*par.*111. and there good Cases put to this purpose. 9 *H.*7.1. By Livery, the Husband who was in hope to be Tenant by Courtesie, is as if he were never seised. 39 *H.* 6. 43. The Son disseiseth his Father, and makes a Feoffment of the lands; the Father dyeth, the hope of the heir is given away by the Livery.

It was objected by Serjeant *Finch*, 1. Where a man hath a right of action to recover land in Fee or an estate for life which may be conveyed to another, there a Livery doth give away such a Right, and shall there bind him: But an estate in tail cannot be transferred to another by any manner of Conveyance, and therefore cannot be bound by such a Livery given. I answer, It is no good Rule, That that which doth not passe by Livery, doth remain in the person which giveth the Livery. 19 *H.*6. Tenant in tail is attainted, Office is found; The estate tail is not in the *King*, is not in the person attainted, but is in abeyance: So it is no good Rule which hath been put. When Tenant in tail maketh a Feoffment, *Non habet jus in re, neque ad rem*: If he have a Right, then it is a Right of Entre, or Action; but he cannot enter nor have any action against his own Feoffment, 19 *H.*8.7. *Dyer.* If Discontinuee of Tenant in tail levieth a Fine with proclamations, and the five years passe, and afterward Tenant in tail dyeth, his issue shall have other five years, and shall be helped by the Statute, for he is the first to whom the right doth accrue after the Fine levied; for Tenant in tail himself after his Fine with the

Proclamations hath not any right: But if Tenant in tail be diſſeiſed, and the Diſſeiſor levieth a Fine with proclamations, and five years paſſe, and afterwards Tenant in tail dyeth, there the iſſue in tail is barred; for there after the Fine levied the Tenant in tail himſelf had right, ſo as the iſſue in tail was not the firſt to whom the Right did accrue after the Fine levied, *C.* 3. *part* 87. *Com.* 374. *a.* When *Ralph Bigot* made the Feoffment 6 *H.* 8. *Francis Bigot* had a Right; by his own Feoffment 21 *H.*8. his Right was extinguiſhed.

The ſecond Objection was upon the Form of pleading in a *Formedon*, viz. *Poſt cujus mortem diſcendere debet* to him, *viz.* the iſſue. Then the Anceſtor had ſuch a Right, which after his death might have diſcended to his iſſue; Then that proveth that the Anceſtor by his Feoffment hath not given away all the Right. I anſwer, The form is not *Poſt cujus mortem*, but *Per cujus mortem*; and the *Poſt cujus mortem diſcendere debet* is not traverſable; and therefore it is but matter of form, and not of ſubſtance. *Old Entres* 240. One *dum non fuit compos mentis* maketh a Feoffment, he ſhall not avoid the Feoffment, becauſe that the Law doth not allow a man to ſtultifie himſelf, *C.* 4 *part* 123. But his heir after his death may avoid the Feoffment of his Anceſtor; for *de ipſo diſcendit jus*, although the Father had not a Right in his life.

It was thirdly objected out of *C.* 4. *part* 166. *b.* where it is ſaid, That if an Ideot maketh a Feoffment, the King ſhall avoid the ſame after Office found. I anſwer, That the Book it ſelf doth cleer the objection: For it is in regard of the Statute of *Prerogativa Regis*, *cap.* 9. *Ita quod nullatenus per eoſdem fatuos alienentur*, *&c.* and not in reſpect of any Right which the party hath who maketh the Feoffment. By the Common Law, Tenant in tail, *viz.* He who had a Fee-ſimple conditional, had not any right after his Feoffment: Then the Act of *Weſt* 2 *cap.* 1. makes ſuch a Fee an Eſtate in tail, and provides for the iſſue in tail, for him in the Remaindor or in Reverſion, but not for the party who made the Feoffment or Grant; for a Grant of Tenant in tail is not void as to himſelf. *Magdalen*-Colledge Caſe; A Leaſe by a Parſon is good againſt himſelf, but voidable againſt his Succeſſor: And ſo the ſame is no Exception, *Diſcendit jus poſt mortem*, *&c.*

The fourth Objection was, That although Tenant in tail had made a Feoffment, yet he remained Tenant to the Avowry of the Donor, and therfore ſome right of the old eſtate tail did remain in him. I anſwer, 5 *E.* 4. 3 *a.* 48 *E.* 3. 8. *b.* 20 *H.* 6. 9. 14 *H.* 4. 38. *b.* *C.* 2. *part* 30. *a.* The matter of the Avowry doth not ariſe out of the Right or Intereſt which a man hath in the Land, but out of the Privity: As when the Tenant maketh a Feoffment, he hath neither right nor intereſt in the Land, yet the Lord is not compellable to avow upon the Alienee before notice. In a *Precipe quod reddat* the Tenant alieneth, yet he remaineth Tenant as to the Plaintiffe, and yet he hath not either a Right or any Eſtate as to the Alienee.

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The fifth Objection was upon the Statute of 1 *R.*3.*cap.*1. All Feoffments *&c.* by *Ceſtuy que uſe* ſhall be effectual to him to whom it was made againſt the Feoffor and his heirs. I anſwer, The words of the Statute are to be conſidered, *All Feoffments*, &c: I deſire to know how this affirmative Law doth take away the power of the Feoffees: And the Feoffees are bound by the Feoffment of *Ceſtuy que uſe*, and are ſeiſed to the uſe of ſuch Alienees. 27 *H.*8.23.*b.* by *Fitzherbert*: If *Ceſtuy que uſe* enter and maketh a Feoffment with warrantie, *&c.* but there are not words that the old rights are given away. The Feoffees to uſe before the Statute of 1 *R.*3.*c.*1. might only make Feoffments; but after that Statute *Ceſtuy que uſe* might alſo make Feoffments of the Lands: And ſo the Statute of 1 *R.*3. did not take away the power of the Feoffees, for they yet may make Feoffments; but it did enlarge the power of *Ceſtuy que uſe*, *Com.*351,352. Then the Queſtion further riſeth: If *Francis Bigot* had any Right in the Tail which might be forfeited by the Statutes, by 26 *H.*8. and 31 *H.*8. A particular Act made for the Attaindor of the ſaid *Francis Bigot*. From the time of *Weſt.*2.*cap.*1. untill the Statute of 26 *H.*8.*cap.*13. there were many Bills preferred in Parliament to make Lands which were entailed to be forfeited for high Treaſon; but as long as ſuch Bils were unmasked, they were ſtill rejected: But *Anno* 26 *H.*8. then at a Parliament a Bill was preferred, That all Inheritances might be forfeited for Treaſon; (ſo that as under a vail) lands in tail were forfeited for Treaſon) which was accepted of. The Statutes of 26 *H.*8. & 31 H.8. are not to be taken or extended beyond the words of the Statute, which are, *That every Offender hereafter lawfully convict of any manner of high Treaſon, by Preſentment, confeſſion, Verdict, or Proceſs of Outlawry, ſhall forfeit, &c.* It doth not appear that *Francis Bigot* was attainted in any of theſe wayes; For the Inquiſition is, That he was Indicted and convicted, but *Non ſequitur* that he was convict by any of thoſe wayes, *viz.* Verdict, Confeſſion, or Outlawry; And one may be attainted by other means: 4 *E.*4. in *Placito Parliamenti*, *Mortimer* was attainted by Parliament; 1 *R.*2. *Alice Percy* was attainted by Judgment of the Lords and Peers of the Houſe of Lords in Parliament.

It was objected, That after an Indictment Verdict ought to follow: I anſwer, *Non ſequitur*: for it may be without Verdict, *viz.* by ſtanding mute; And then the Statute of 26 H. 8. doth not extend unto it; *C.*3. *part* 10,11. Admit it were an Attaindor within the Statute of 26 H.8. yet *Francis Bigot* had not ſuch lands which might be forfeited, *C.*3. *part* 10. For this Statute doth not extend to Conditions or Rights, And *C.*7. *part* 34. this Act of 26 H. 8. doth not extend to Rights and Titles: And it is cleer that *Francis Bigot* had not any Eſtate within the letter of the Act.

It was objected, That if we have not ſet forth the full Title of the King in the *Monſtrans de Droit*, then is the *Monſtrans de Droit* naught, and

and void. I anſwer 9 *E.*4.51. 16 *E.*4.6. I find no book that in a *Monſtrans de Droit* we ſhould be put to obſerve that Rule: For a Petition were a going about; The Statute of 2 *E.6. cap.6.* gives the *Monſtrans de Droit*: 16 *E.*4.7. If a Petition be void for want of inſtructing the King, and if all his Title be not ſet forth in it, then the Court is to abate the Petition; but after Judgment to find ſuch a fault, he muſt have a *Scire facias*, and not a new Petition; and in our Caſe there was none who gave in ſuch matter for the King.

Now I come to the Statute of 31. *H.* 8. The particular Act for the Attainder of *Francis Bigot*, and that he ſhould forfeit all ſuch Lands, &c. Conditions, Rights, &c. in Fee, and Fee tail ſaving, &c. and as the lands of *Francis Bigott* ſtood ſtated at the time of the making of this Act of 3 . *H.* 8. the Statute did not extend to him to make him forfeit any thing In the Statute of 33. *H.* 8. *Cap.* 20. there were as many words as in this Statute of 31. *H.* 8. and many Caſes upon the Statute of 33. *H.* 8. are adjudged upon the words, ſhall loſe and forfeit. There is a difference betwixt an Act of Aſſurance, and an Act of Forfeiture; If the words be, That the King ſhall enjoy and have, it is then an Act of Aſſurance, and the lands are given to the King without Office; but by an Act of Forfeiture the Lands are not in the King without Office found. *Exceptio firmat regulam*, but our Caſe is out of the Rule. Savings in Acts of Parliaments were but of late days: 1. *E.* 4. there was a private Act: A Petition was preferred againſt divers in Parliament for ſundry miſdemeanours, and it was Enacted that they ſhould forfeit unto the King and his heirs, &c. in that Act there was no exception of ſaving for it was but a forfeiture of their Rights, and Savings were but of late times, *Trin.* 8. *H.* 8. *Rot.* 4. A Petition of Right in the Chancery, upon that was a plea which was after the Attainder of the Duke of *Suffolk*) That the Duke did diſſeiſe him; it was ſhewed that the Attainder was by Parliament, and he ſhewed no ſaving to be in the Statute in the Petition; and yet it was well enough, *Com.* 552. *Wyat* Tenant in tail of the Gift of the King, made a Feoffment, and by Act of Parliament 2 *Mariæ* was attainted of Treaſon, by which he was to forfeit, &c. as in our Caſe.

I anſwer, That within two years after that Judgment, upon ſolemn argument it was adjudged contrarie, *Com.* 562. It was objected that in that Caſe a Writ of Error was brought, *Com.* 562. and that the Judgement was affirmed in the Caſe of *Walſingham.* I anſwer, that the ſame was by reaſon of the Plea in Barr; And *Com* 565. there *Plowden* confeſſeth that the Judges were not agreed of the matter in Law, and the Lands in queſtion in *Walſingams* Caſe do remain with *Moulton*, and at this day are enjoy'd contrary to the Judgment given in *Walſinghams* Caſe: It was objected, That although this Act of 31. *H.* 8. was made after the Attainder, yet that it ſhould relate to all the Lands which *Francis Bigot* had

had at the time of the Treason committed. I answer, That this Act of 31. *H.* 8. is but a description what Lands he shall forfeit, *viz.* all the Lands which he had at the time of the Treason committed.

The second Point is upon the Remitter of *Roger Ratcliff* before the Inquisition, for there was a discent to *Roger Ratcliff*. When Tenant in Tail is attainted of Treason, his blood is not corrupted, *C. 9. part.* 10. *Lumleys* Case. And the Statute of 33. *H.* 8. is the first Statute which vests Lands forfeit for Treason in the King without Office found: So as according to the Lord *Lumley's* Case, *C.* 3. *part.* 10. before this Statute of 33 *H.* 8. the Land did discend to the issue in tail. The Rule of *Nullum tempus occurrit Regi*, is to be meant for the preserving of the Kings Right, but not to make the King to do wrong. *Com.* 488. there the Remitter is preferred before the King. 49. *E.* 3. 16. there the Devise of a Common person was preferred before the Right of the King. 3. *H.* 7. 2. the Lord *Greistock's* Case: The Dean of *York* did recover against him, and before Execution the Lord died, his heir within age; the Dean shall have his Execution, notwithstanding that the King hath right to have the Ward: A *fortiori* a Remitter shall be preferred before the Kings Title. *C.* 7. *part.* 28. The Rule *Nullum tempus occurrit Regi*, is to be intended when the King hath an Estate or Interest certain and permanent, and not when his Interest is specially limited, when and how he shall take it, and not otherwise.

The third Point was, Whether *Ratcliff* hath brought his proper Action. The words of the Act of 2 *E.* 6. *cap.* 8. which giveth the *Monstrans de Droit*, are to be considered: A Remitter is within the words of the Act, Divers Errors were assigned by the other side for matter of Form. 1. Because the *Venire facias* want these words (*tam milites quam alios.*) *Sheffield* being a Noble man, and a Peer of the Realm, It appeareth by the Register 7. that the same was the ancient Form in every common persons Case; but of late that Form was left. 2. Admit that it were a good Exception, then it ought to have been taken by way of Challenge, as it appeareth 13. *E.* 3. *Challenge* 115. *Dyer* 107. 208. 3. The Statute of 35. *H.* 8. *Cap.* 6. makes a new Law, and prescribes a Form. *Precipimus, &c. quod Venire facias coram, &c.* 12 *Liberos & Legales homines, &c.* and then if it ought to be by the Register (*tam milites quam alios*) yet here is a new Statute against it: And by the Statute of 2. *E.* 6. *Cap.* 32. this Statute of 35 *H.* 8. is made perpetual. And by the Statute of 27. *Eliz. Cap.* 6. the Statute of 35. *H.* 8. is altered in *parvo*, and augmented in the worth of the Jurors: and by the Statute of 18. *Eliz. Cap.* 14. It is Enacted, That after Verdict, &c. the Judgment thereupon shall not be stayed or reversed by reason of any default in Form, or lack of Form, or variance from the Register. The second Error assigned was, because that there are two *Venire facias*, and two *Distringas*, after that Issue was joyned. The

Lord *Sheffield* ſueth unto the King to have the firſt *Venire facias*, and firſt *Diſtringas* quaſhed, and it was quaſhed with *Ratcliff's* conſent. Secondly, admit there were two *Venire facias*, yet it ought to be intended that the proceedings was but upon one of them, and that the beſt: *M.* 17. *Jacobi*, in the *Common Pleas*, *Bowen* and *Jones's* Caſe: In Error upon a Recovery in Debt, there were two Originals certified, and there the one was good, and the other naught; the Judges did take it that the Judgment and proceedings were upon the good Original, and the Judgment was affirmed in the Kings Bench: *M.* 15 *H.* 8. *Rott.* 20. the ſame Caſe. Two Originals, one bearing date after the Judgment, the other before the Judgment; and upon a Writ of Error brought, the Judgement was affirmed, for by intendment the Judgment was given upon the firſt Original, which bore date before the Iudgment. Another Error was aſſigned, becauſe the Plea was, That ſuch a one was ſeiſed of the Caſtle and Mannor of *Mulgravè predictis* in the plural number: I anſwer, that there is not any colour for that Error, for the word (*predictis*) doth ſhew that the Mannor and Caſtle are not one and the ſame thing: So upon the whole matter, I pray that the Iudgment given in the Court of Pleas may be affirmed: Sir *Henry Yelverton* argued for the Lord *Sheffield*, that the Iudgment might be reverſed. There are three things conſiderable in the Caſe: Firſt, If any right of the ancient eſtate tail was in *Francis Bigot* who was attainted, at the time of his Attainder: Secondly, admit that there was an ancient right, if it might be forfeited being a right coupled with a Poſſeſſion, and not a right in groſs: Thirdly, Whether ſuch a Poſſeſſion diſcend to *Francis Bigot*, that he ſhall be remitted, and if this Remitter be not overreached by the Office. Firſt, If by the Feoffment of *Francis Bigot*, 1. *H.* 8. when he was *Ceſtuy que uſe*, and by the Livery the right of the ancient entail be deſtroyed; And I conceive it is not, but that the ſame continues, and is not gone by the Livery and Seiſin made: There is a difference, when *Ceſtuy que uſe* makes a Feoffment before the Statute of 1 *R.* 3. and when *Ceſtuy que uſe* makes a Feoffment after the ſaid ſtatute of 1 *R.* 3. For, before the ſtatute hee gives away all, *Com* 352. but after the ſtatute of *R.* 3. *Ceſtuy que uſe* by his Feoffment gives away no Right. In 3 H. 7, 13. is our very caſe almoſt; For, there the Tenant in Tail made a Feoffment unto the uſe of his Will (ſo in our Caſe,) and thereby did declare that it ſhould be for the payment of his debts, and afterwards to the uſe of himſelf and the heirs of his body, and died; the heir entred before the debts paid (but in our Caſe he entred after the debts paid) there it is ſaid that the Feoffment is made as by *Ceſtuy que uſe* at the Common Law, for his entrie was not lawfull before the debts paid. But when *Francis Bigot* made a Feoffment 21 H. 8. he was *Ceſtuy que uſe* in Fee, and then is the Right of the Eſtate tail ſaved by the Statute

tute of 1. *R* 3. And by the Statute of 1. *R*. 3. he gives the Land as Servant, and not as Owner of the Land, and so gives nothing but a possession, and no Right. 5 H.7. 5. *Cestuy que use* since the Statute of 1 R. 3. is but as a Servant, or as an Executor to make a Feoffment. And if an Executor maketh a Feoffment by force of the Will of the Testator, he passeth nothing of his own Right, but only as an Executor or Servant: 9 *H*. 7. 26. proves that *Cestuy que use* since the Statute of 1 *R*. 3 hath but only an Authority to make a Feoffment, For *Cestuy que use* cannot make a Letter of Attorney to make Livery for him, for he hath but a bare Authority, which cannot be transferred to another: *Cestuy que use* hath a Rent out of Land, and by force of the Statute of 1 R. 3 he maketh a Feoffment of the Land, yet the Rent doth remain to him, for he giveth but a bare possession: So in our Case, the right of the Estate Tail doth remain in *Francis Bigot*, notwithstanding his Feoffment as *Cestuy que use* by the Statute of 1 R. 3. If *Cestuy que use* by force of the Statute of 1 R. 3, maketh a Feoffment without Warranty, the Vouchee shall not Vouch by force of that Warranty; For as *Fitzherbert* saith, *Cestuy que use* had no possession before the Statute of 27. *H*. 8. *Cap*. 10. 27 *H*. 8. 23. If Feoffees to Use make a Letter of Attorney to *Cestuy que use* to make a Feoffment, he giveth nothing but as a Servant. The Consequent of this Point is, That the right of the old Estate Tail was in *Francis Bigot* at the time of his Attainder, and was not gone by the Feoffment made 21 *H*. 8.

The second Point is, Whether a right mixt with a possession of *Francis Bigot* might be forfeited by the Statutes of 26. *H*. 8. and the private Act of 31. *H*. 8. The Statute of 31. *H*. 8. doth not save this Right no more then the Statute of 26. *H*. 8. For they are all one in words. I say that he hath such a right as may be lost and forfeited by the words of the Statute of 26. *H*. 8. *Cap*. 13. For that Statute giveth three things. First, It gives the Forfeiture of Lands, and not of Estates. Secondly, How long doth that Statute give the lands to the King? For ever, *viz*. to the King his Heirs and Successors. Thirdly, It gives the lands of any Estate of Inheritance, in Use or Possession, by any Right, Title or means. This Estate Tail is an Estate of Inheritance, which he hath by the Right, by the Title, and by the means of coming to the Right, it is forfeited. These two Statutes were made for the punishment of the Child, For the Common Law was strict enough against the Father, *viz*. he who committed the Treason; And shall the same Law which was made to punish the Child, be undermined to help the Child? The ancient Right shall be displaced from the Land, rather then it shall be taken from the Crown, which is to remain to the Crown for ever. And this Statute of 26 *H*. 8. was made *pro bono publico*, and it was the best Law that ever was to preserve the King and his Successors from Treason, for it is as it were a hedg about the King; For before this

Statute, Tenant in Tail had no regard to commit Treaſon, For he forfeited his Lands but during his own life, and then the Lands went to the iſſue in Tail: But this Statute doth puniſh the Child for the Fathers offence, and ſo maketh men more careful not to offend, leaſt their poſterity may beg. I take two grounds which are frequent in our Law: Firſt, That the King is favoured in the Expoſition of any Statute. *Com.* 239, 240. The ſecond, That upon the conſtruction of any Statute, nothing ſhall be taken by equity againſt the King. *Com.* 233, 234. Here in this Caſe although the Right were not in poſſeſſion, yet it was mixed with the poſſeſſion, from *Anno* 13. *E.* 1. untill 26. *H.* 8. Tenant in Tail feared not to commit Treaſon, For the Statute of *Weſt.* 2. did preſerve the Eſtate Tail, ſo as the Father could not prejudice his iſſue *per factum ſuum*: And therefore the Commonwealth conſidering that a wicked man did not care what became of himſelf, ſo as his iſſue might be ſafe, provided this Statute of 26. *H.* 8. *Cap.* 13. although the Statute of 16. *R.* 2. *Cap.* 5. which giveth the Premunire, doth Enact that all Lands and Tenements of one attainted in a Premunire ſhall be forfeited to the King: Yet Tenant in Tail in ſuch Caſe did not forfeit his Lands: *C.* 11. *part.* 63. *b.* as the Statute of *Weſt.* 2. *Cap.* 1. ſaith in particular words, That Tenant in Tail ſhall not prejudice his iſſue; Therefore the Statute of 26. *H.* 8. in particular words ſaith, That Tenant in Tail ſhall forfeit his Lands for Treaſon. The Right of *Francis Bigot* is not a right in groſs, but a Right mixed with a poſſeſſion. The Statute of *Weſt.* 2. *Cap.* 1. brought with it many miſchiefs; For by that Statute, the Anceſtor being Tenant in Tail, could not redeem himſelf out of priſon, nor help his wife, nor his younger children; and that miſchief continued untill 12. *E.* 4. *Taltaram's* Caſe, and then the Judges found a means to avoid thoſe miſchiefs by a common Recovery; and this Invention of a common Recovery was a great help to the Subject. Then came the Statute of 32. H. 8. *Cap.* 36. which Enacted, That Fines levied by Tenant in Tail, ſhould be a good barr to the iſſue of any Eſtate, any way entailed. If the Son, iſſue in tail, levieth a Fine in the life of his Father who is Tenant in tail, it ſhall be a barr to him who levieth the Fine, and to his iſſues. And both theſe, *viz.* the Common Recovery, and the ſaid Statute did help the Purchaſer; And ſhall not this Statute of 26. H. 8. help the King? The Statute of 26. H. 8. *Cap.* 13. hath not any ſtrength againſt the Anceſtor, but againſt the Child. For the Conſtruction of Statutes I take three Rules; Firſt, When a Caſe hapneth which is not within the Letter, then it is within the intent and equity of the Statute, *Com.* 366. 464. Secondly, All things which may be taken within the miſchief of the Statute, ſhall be taken within the Equity of the Statute 4. H. 6. 26. *per Martin.* Thirdly, When any thing is provided for by a Statute, every thing within the ſame miſchief is within the ſame Statute, 14. H. 7. 13. The Eſtate tail of *Francis Bigot.*

Bigot and *Katharine* his wife is forfeited by the Statute of 26 *H.* 8. There is a difference when the Statute doth fix the forfeiture upon the perſon, As where it is enacted that *J.S.* ſhall forfeit his lands which he had at the time of his Attaindor; The Judges ought expound that Statute only to *J.S.* But the Statute of 26 H.8. doth not fix the forfeiture upon the perſon, but upon the land it ſelf: And Expoſition of Statutes ought to extend to all the miſchiefs. 8 *Eliz.* Sir *Ralph Sadler's* Caſe in *B.R.* where an Act of Parliament did enact, That all the lands of *Sadler* ſhould be forfeited to the King, of whomſoever they were holden: *Sadler* held ſome lands of the King; in that caſe the King had that land by Eſcheat by the Common-Law, and not by the ſaid Statute. *Com.* 563, The Law ſhall ſay, that all the rights of the tail are joyned together to ſtrengthen the eſtate of the King. Tenant in tail, before the Statute of 1 *E.6.cap.*14. of *Chauntries*, gave lands to ſuperſtitious uſes, which were enjoyed five years before the ſaid Statute of 1 *E.6.* made: Yet it was adjudged that the right of the iſſue was not ſaved, but that the land was given to the Crown; for the iſſue is excluded by the *ſaving* in the ſaid Statute. If Tenant in tail give the lands to charitable uſes, the iſſue is barred, For the *ſaving* of the Statute of 39 *Eliz. cap.*5. excludes him, And he is bound by the Statute of *Donis.* So the Statute of 26 H. 8. *cap.*13. and the private Act of 31 H.8. do ſave to all but the heirs of the Offenders.

The third Objection was, That *Ratcliffe* was not excluded by the *ſaving*; for it was ſaid, That the ſame doth not extend but to that which is forfeited by his Anceſtors body: And here *Ratcliffe* had but a Right, and that was ſaved; And the Statute doth not give Rights. I anſwer, firſt, The Statute of 26 *H.* 8. is not to be expounded by the letter, for then nothing ſhould be forfeited but that only which he had in poſſeſſion and uſe. Tenant in tail is diſſeiſed and attainted for treaſon: By the words of the ſaid Statute of 26 *H.*8. he forfeits nothing, yet the iſſue in tail ſhall forfeit the lands; for the iſſue in tail hath a right of Entrie which may be forfeited, 6 *H.*7.9. A right of Entrie may eſcheat, and then it may be forfeited. Secondly, The Statute is not to be conſtrued to the poſſeſſion; but if he hath a mixt right with the poſſeſſion, it is forfeited, but a right in groſſe is not forfeited. Tenant in tail of a Rent or Seignorie purchaſeth the Tenancie or the Land out of which the Rent is iſſuing, and is attainted; He ſhall forfeit the Seignorie and Rent, or the Land, for the King ſhall have the Land for ever, And then the Seignorie or Rent ſhall be diſcharged, for otherwiſe the King ſhould not have the Land for ever; For the King cannot hold of any Lord a Seignorie, 11 *H.*7.12. The heir of Tenant in tail ſhall be in Ward for a Meanaltie deſcended unto him, the Meanaltie not being in *eſſe*; and yet it ſhall be ſaid to be in *eſſe*, becauſe of the King, *C.*3. *part* 30. *Cars* Caſe: Although the Rent was extinguiſhed, yet as to the King it ſhall be in *eſſe*.

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The difference is betwixt a Right clothed with a poſſeſſion, and a right in groſſe, *viz.* where the Right is ſevered from the poſſeſſion, there it is in groſſe, For there the Right lieth only in Action; and therefore neither by the Statute of 26 *H.*8. nor by the private Act of 31 *H.*8. ſuch a Right is not forfeited, *C.*3. *part* 2. *C.*10. *part* 47,48. Right of Action by the Common-Law nor by Statute-Law ſhall eſcheat, and therefore it is not forfeited: For no Right of Action is forfeitable, becauſe the right is in one, and the poſſeſſion in another. *Perkins* 19. A Right *per ſe* cannot be charged. 27 *H.*8.20 by *Mountague*, A man cannot give a Right by a Fine, unleſs it be to him who hath the poſſeſſion; *C.*10. *part Lampits* Caſe; Sever the poſſibility from the right, and it doth not lie in grant or forfeiture; but unite them (as they are in our Caſe) and then the Right may be granted or forfeited, for that Right clothed with a poſſeſſion may be forfeited. A Right clothed with the poſſeſſion, 1. It taſtes of the poſſeſſion, 2. It waits upon the poſſeſſion, 3. It changes the poſſeſſion. The Biſhop of *Durham* hath all Forfeitures for Treaſon by the Common-Law within his Dioceſs, *viz.* the Biſhoprick of *Durham*: And if Tenant in tail within the Biſhoprick commits Treaſon and dyeth, the Iſſue in tail ſhall enjoy the land againſt the Biſhop, *Dyer* 289 *a. pl.*57. For the Biſhop hath not the land for ever, but the Iſſue in tail may have a *Formedon* againſt the Biſhop: But in our Caſe it is otherwiſe: Tenant in tail maketh a Feoffment, and takes back an eſtate unto himſelf in tail, the remainder in Fee to his right heirs; The Biſhop in ſuch caſe ſhall not have the land forfeited for Treaſon, becauſe that the Biſhop cannot have the eſtate tail; but in ſuch caſe the King ſhall have the Land by the Statute of 26 *H.*8. *cap.*13. And the Biſhop in ſuch caſe ſhall not have the Fee, becauſe it is one eſtate, and the King ſhall not wait upon the Subject, *viz.* the Biſhop. The Right waits upon the poſſeſſion: For 11 *H.*7.12. If the ſon and a ſtranger diſſeiſeth the father, and the father dyeth, this right infuſeth it ſelf into the poſſeſſion, and changeth the poſſeſſion, And it is a Releaſe in fact by the father to the ſon, 9 *H.*7.25. *Br' Droit* 57. A Diſſeiſor dyeth ſeiſed, and his heir enters and is diſſeiſed by *A.* The firſt Diſſeiſee doth releaſe unto *A.* all his right; All the right is now in the ſecond Diſſeiſor, *viz. A.* becauſe the right and the poſſeſſion meet together in *A.* 40 *E.*3. 18. *b.* Tenant in tail makes a Leaſe for life with warranty: If Tenant for life be impleaded by the heir to whom the warranty doth diſcend, he ſhall rebut the right in tail being annexed with the poſſeſſion, for that is in caſe of a ſaving of the land by that right: But where one demands land, there all the Right ought to be ſhewed. 11 *H.*4.37. If a man be to bring an Action to recover, then he ought to make a good title by his beſt right, if he hath many rights: But if a man be in poſſeſſion, and an Action be brought againſt him, then he may defend himſelf by any of his rights, or by all his rights. 11 *H.*7.21. Tenant in tail maketh a Feoffment to his uſe upon

upon Condition, and afterwards upon his Recogniſance the land is extended, and afterwards the Condition is performed, yet the intereſt of the Conuſee ſhall not be avoided; For although the Extent come upon the Fee, and not upon the Tail, yet when the Extent was, it was extracted out of all the rights. *C. 7. part* 41. A Tenant in tail makes a Leaſe for life, now he hath gained a new Fee by wrong; and afterwards he makes a Leaſe for years, and Tenant for life dyeth; He ſhall not avoid his Leaſe for years, although he be in of another eſtate, becauſe he had a defeicible title and an ancient right, the which if they were in ſeveral hands ſhall be good, as the Leaſe of the one, and the Confirmation of the other; And being in one hand, it ſhall be as much in Law as a ſaving of the Right.

In our Caſe, the Right and Poſſeſſion both were in *Francis Bigot*; And *Ratcliffe* is entitled to the old eſtate tail, and to the new alſo. There is a difference betwixt him who claims the land ſo forfeited to the King, and the heir of the body of the perſon attainted: *Litt.* 719. Land is given to *A* and the iſſue males of his body, the remainder to the heirs females of his body: If the Father commit Treaſon, both heir male and female are barred, for they both claim by the Father; but if the heir male after the death of his Father be attainted of Treaſon, the King ſhall have the lands as long as he hath iſſue male of his body, and then the heir female ſhall have the lands, for ſhe ſhall not forfeit them, becauſe ſhe claimeth not by the brother, but by the father. *Com. in Manxels caſe*, A man hath three ſeveral rights of eſtate tails, and comes in as Vouchee; If the Recovery paſs, it ſhall bar all his Rights for one Recompence, and they ſhall be all bound by one poſſeſſion. There is a difference where the Kings title is by Conveyance of the party, and where for forfeiture for Treaſon by this Statute of 26 *H.* 8. *cap.* 13. *v.* the Abbot of *Colcheſters* Caſe: The Abbot ſeiſed in the right of his houſe, did commit Treaſon, and made a Leaſe for years, and then ſurrendred his houſe to the King after the Statute of 26 *H.* 8. The queſtion was whether the King ſhould avoid the Leaſe: It was adjudged, That the King was in by the ſurrender, and ſhould not avoid the Leaſe, and not by the Statute of 26 *H.* 8. But if the King had had it by force of the Statute, then the King ſhould have avoided the Leaſe. *Com.* 560. Tenant in tail, the reverſion to the King; Tenant in tail maketh a Leaſe for years, and is attainted of Treaſon; The King ſhall avoid the Leaſe upon the conſtruction of the Statute of 26 *H.* 8. which gives the lands unto the King for ever.

The third point is upon the Remitter. This point had been argued by way of Admittance: For as I have argued, The ancient right is given away unto the King; and then there is no ancient right, and ſo no Remitter. There is a difference where the iſſue in tail is forced to make a Title, and where not: In point of defence he is not ſo preciſely forced

to

to make his Title, as he is in caſe of demand. Whereas the Defendant demands the lands from the King, the Diſcent will not help him, becauſe the Attaindor of the Anceſtor of *Ratcliffe* hinders him in point of title to make a demand, *Dyer* 332 *b.* In this caſe he ought to make himſelf heir of the body of *Francis Bigot* and *Katharine*. *C.* 8. *part* 72. *C.* 9. *part* 139, 140. There *Cook* couples the Caſe of Fine levied, and the Caſe of Attaindor together. *C.* 8. *part* 72. Land is given to husband and wife, and to the heirs of their two bodies: The husband alone levies a Fine with proclamations, Or is attainted of Treaſon and dyeth; The wife before Entry dyeth: The iſſue is barred; and the Conuſee, or King hath right unto the land, becauſe the iſſue cannot claim as heir to them both, *viz.* father and mother, for by the father he is barred. 5 *H.* 7. 32, 33. *C.* 9. *part* 140. Husband and wife Tenants in tail; If one of them be attainted of Treaſon (as it was in our Caſe) the lands ſhall not diſcend to the iſſue, becauſe he cannot make title. And there *Cook* puts the Caſe, That if lands be given to an Alien and his wife, they have a good eſtate tail, and yet it is not diſcendable to the iſſue. The Conſequence then of all this is, That if *Ratcliffe* cannot take advantage of the diſcent by reaſon of the diſability by Attaindor, *à fortiori* he ſhall not be remitted: And yet I confeſs that in ſome Caſes one may be remitted againſt the King, *Com.* 488, 489, 553. But that is where the King is in by matter of Law by Conveyance; but in this Caſe the King is in by an Act of Parliament, and there ſhall be no Remitter againſt a matter of Record. Another reaſon is, becauſe that the poſſeſſion is bound by the Judgment of Attaindor and the Act of Parliament. 5 *H.* 7. 31. 7 *H.* 7. 15. 16 *H.* 7. 8. A diſcent of land ſhall not make a title againſt the King or any other who hath the land by an Act of Parliament.

But then in our Caſe, If there ſhould be a Remitter, yet the ſame is overreached by the Office. *C.* 3 *part* 10. before the Statute of 33 H. 8. *cap.* 20. there ought to have been an Office found in the Caſe of Attaindor of Treaſon, *Br. Caſes* 103. *Brook Office Devant, &c.* 17. I do not mean an Office of intitling, but an Office declaratory of a conſpicuous title. *C.* 5. *part* 52. There are two manner of Offices; One which veſteth the eſtate and poſſeſſion of the land &c. in the King; Another which is an Office of Inſtruction; and that is when the eſtate of the land is lawfully in the King, but the particularity thereof doth not appear upon record: And the Office of Inſtruction ſhall relate to the time of the Attaindor, not to make Queen *Elizabeth* in our Caſe in by diſcent, but to avoid all meſne Incombrances; And is not this Remitter an Incombrance? And for that purpoſe the Office ſhall relate: For in things of Continuance *Nullum tempus occurrit Regi*, *C.* 7. *part* 28. For ſo the rule of *Nullum tempus &c.* is to be underſtood of a thing of Continuance, and not a thing *unica vice*, v. *Fitz. Entre Congeable*, 53. *Trav.* 40. where it is ſaid, Where the King hath cauſe to ſeiſe for the forfeiture of

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Tenant for life, if the Tenant for life dyeth, the Reverſion may enter; for in that caſe *Tempus occurrit Regi*, and the King cannot ſeize after the death of the Tenant for life. 35 *H.*6.57. There is no diſcent againſt the King; and if there be no diſcent, then there is no Remitter. The conſequence of all this is, That the Office doth relate to the Right, And that the *Monſtrans de Droit* doth not lie: And the want of Office found for all this time, was the fault of the Kings Officers, and ſhall not prejudice the King. But if the Office ſhould not relate, then the *Monſtrans de Droit* would lie, becauſe then the King was in but by one ſingle matter of Record. We ſhew in the Office, 33 *Eliz.* That there iſſued forth a Commiſſion directed to certain of the Privy-Councel to enquire of the Treaſon; and if *Francis Bigot* upon the Treaſon were Indicted. And in our Caſe we ſhew immediately another Commiſſion was directed to the Lord Chancellor and the two Chief Juſtices &c. to arraign *Francis Bigot*. And all that is confeſſed by *Ratcliffe* himſelf, *viz. modo & forma*. And therefore the Objection which *Glanvile* made was frivolous, *viz.* That it did not appear that *Francis Bigot* was attainted by Verdict, by Confeſſion, or by Outlawry. And ſo he concluded, That for theſe cauſes the Judgment given in the Court of Common-Pleas ought to be reverſed.

George Crook argued for *Ratcliffe*, and he prayed that the Judgment might be affirmed. I will argue only theſe points following. 1. That *Francis Bigot* had not ſo much as a right of Action at the time of his Attaindor, for he had not any right at all. 2. Admit that he had a right of Action, If this right of Action be given to the King by the ſaid Statutes of 26 & 31 *H.*8. It was objected, That the right being clothed with a poſſeſſion, that the ſame is given to the King: But I will prove the contrary. 3. When *Francis Bigot* being Tenant in tail, and being attainted and executed for Treaſon, and then *Katherine* his wife dyeth being one of the Donees in tail, 21 *H.*8. and the lands diſcend to *Ratcliff*, If the Office afterwards found ſhall relate to take away the Remitter. I ſay it doth not, but that his Remitter doth remain to maintain his *Monſtrans de Droit*, and he is not put to his Petition. The chief point is, What right *Francis Bigot* had at the time of his Attaindor. 1. When *Ralph Bigot* being Tenant in tail, 6 *H.* 8. made a Feoffment in Fee, what right remained in *Francis* his Son? The right is in abeyance, *viz. in nubibus*, that is *in cuſtodia Legis*: And then *Francis Bigot* had no right of that entail 21 *H.*8. when he made the Feoffment. *Com.*487. There *Jus* is divided, *viz. Jus recuperandi, Jus intrandi, Jus habendi, Jus retinendi, Jus percipiendi, Jus poſſedendi*; but here *Francis Bigot* had not any of theſe rights. *Com.*374. If the Diſcontinuee of Tenant in tail levieth a Fine with proclamations, and five years paſſe, and Tenant in tail dyeth, the iſſue in tail ſhall have other five years, becauſe he is the firſt to the right. 19 *H.* 8. 7. *C.* 7. *part* 81. If Donee in tail maketh a

Feoffment in Fee, *in rei veritate* the Donee hath not *jus in re, neque ad rem. C.* 3. *part* 29. *Litt.* 649. There it appeareth that the right to an eſtate tail may be in abeyance. *Com.* 552. *Walſinghams* Caſe: There the King gave land in tail to *Wyat*, who made a Feoffment unto *Walſingham*; Afterwards *Wyat* was attainted of Treaſon, and there the eſtate tail of *Wyat* was forfeited; but the cauſe there was, becauſe that the reverſion was in the Crown, and ſo no diſcontinuance by his Feoffment, becauſe that the reverſion was in the Crown. In our Caſe, no right of the eſtate tail was in *Francis Bigot* after the Feoffment unto his own uſe, but the right is in abeyance. It was objected, That the Writ of *Formedon* is *Diſcendit jus*, and the *Monſtrans de Droit* was ſo: I anſwer It is ſo in point of form in the Writ, but not in ſubſtance. *C.* 7. *part* 14. Tenant in tail makes a Leaſe for life, and Tenant for life dyeth: Now he hath an ancient right, and the Donor may avow upon the Tenant in tail notwithſtanding his Feoffment, but that is by reaſon of privity, and not by reaſon of any right he hath. *Jus recuperandi* did diſcend to the iſſue in tail, *viz. Francis Bigot*, 21 *H.* 8. He who hath a right of Action giveth the ſame away by his Livery and Feoffment, as appeareth by the Caſes put in *C.* 1. *part* 111. It was objected, That *Ceſtuy que uſe* was an Attorney or Servant, therefore he doth not paſſe his own right, for he cannot make an Attorney to make Livery; and 9 *H.* 7. 26. was cited to be adjudged ſo: But it is adjudged to the contrary, *M.* 25 *H.* 8. in the Kings Bench, *rot.* 71. betwixt the Biſhop of *London* and *Kellet*, as it appeareth in *Dyer* 283. and *Bendloe's* Reports, and *C.* 9. *part* 75. For there it is expreſſe, that *Ceſtuy que uſe* may make a Letter of Attorney to make Livery; which proves that he makes not the Feoffment as a Servant, but as Owner of the Land. It was objected, That *Cueſty que uſe* was as an Executor: but that I deny. 49 *E.* 3. 17 *a. Perſay*: Executors cannot make a Feoffment, but they ought to make a Sale; and the Vendee, *viz.* the Bargainee is in without Livery and Seiſin: But if they do make a Feoffment by the Livery, all their right is given away: But if an Attorney giveth Livery in the name of his Maſter, nothing of his own right to the ſame Land is given away by the Livery and Seiſin; but if he maketh Livery in his own name, then he giveth away his own right; and the Statute of 1 *R.* 3. *cap.* 1. maketh the Feoffment good which is made by *Ceſtuy que uſe* againſt him and his heirs. *C.* 1. *pt.* 111. By Livery and Seiſin his whole right is given away. *Com.* 352. The Feoffees of *Ceſtuy que uſe* are diſſeiſed; the Diſſeiſor enfeoffeth *Ceſtuy que uſe*, who enfeoffs a ſtranger: And the Queſtion was, If by this Feoffment made by *Ceſtuy que uſe* the right of the firſt Feoffees were determined and extinct. *Fitzherbert* held that the right was gone; and in that caſe the Uſes were raiſed after 1 *R.* 3. and before 27 *H.* 8. *cap.* 10. Although *Yelverton* held that it was meant of a Feoffment before the Statute of 1 *R.* 3. *Jus recuperandi* was in *Francis Bigot*. Then the

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queſtion is, Whether this Right were given away by the Statutes of 26 & 31 *H.*8. The Statute of 26 *H.*8. & 31 *H.*8. are ſeveral and diſtinct Statutes: The words of the Statute of 26 *H.* 8. are, *That the party offending ſhall forfeit all his Poſſeſſion and Uſe*; but there is no word of *Right* in the Statute; and that Statute doth not extend to give any land but that which was in poſſeſſion or uſe: And the cauſe was, becauſe before that Statute of 26 *H.* 8. Uſes were not given unto the King for Attaindor for Treaſon, they being but a Truſt and Confidence. *C.*11. *part* 36 *b.* The Statute ſayes, *By any wayes, title, or means:* But obſerve when this Statute was made; It is a penal Statute, and therefore ſhall be taken ſtrictly, *Stamford* 129 *b.* *C.*11. *part* 36 *b.* The Statute of 5 & 6 *E.*6. takes away Clergy; but if a ſtranger be in the houſe by licence of the Owner, the party ſhall have his Clergy, becauſe out of the words, and being a penal Law, it ſhall be taken ſtrictly. The Statute of 33 *H.*8. *cap.*20. forfeits for Treaſon Right to the Land, *viz.* right of Entry; but the Statute of 26 *H* 8. giveth not any Right. Before the Statute of 33 *H.*8. a right of Entry was not given to the King for Treaſon; *à fortiori* a right of Action was not forfeited to the King. It is the Statute of 31 *H.*8. the private Act which hurteth us, which expreſly gave Rights: But this Right in our Caſe is not forfeited by this Statute, which giveth Rights which a man hath; But in our Caſe *Francis Bigot* had not the Right, but the Right was in abeyance. Statutes in points of Forfeiture forfeit no more then a man hath: But yet a Statute may give to the King that which a man hath not. *C.*11. *part* 13. The ſtatute of *Monaſteries* gave that to the King which was not, *viz.* Monaſteries in reputation, ſaving to none but ſtrangers, no not to the Donors. *Huſſies* Caſe: Tenant in tail doth bargain and ſell to the King; and a ſtatute gave it to the King, ſaving to ſtrangers; but neither the Donor nor his iſſue were within the ſaving. *Old Entries*, 423. *b*, *c*, *d.* It was enacted, That the Duke of *Suffolk* ſhould forfeit for Treaſon all his Lands, Rights, and Tenements, and all ſuch Rights and Titles of Entry which he had: But thereby rights of Action were not given to the King, but only rights of Entries. The ſtatutes of 31 & 33 *H.* 8. are alike in words: If Tenant in tail, the Remainder over, forfeit &c. the Remainder is ſaved without words of ſaving: But if the ſtatute giveth the land by name unto the King, then the Remainder is not ſaved, but is deſtroyed. If a Right of Action be given unto the King, the ſtatutes of Limitation and Fines are deſtroyed, for he is not bound by them. *C.*485, 486. in point of forfeiture, *Stamf.*187, 188. There is a difference betwixt real and perſonal Rights given to the King. *C.*3. *part* 3. A right of Action concerning Inheritances are not forfeited by Attaindor, &c. But Obligations, Statutes &c. are forfeited by Attaindor. *C.*7. *part* 9. A right of Action is not given to the King by general words of an Act, becauſe it lieth in privity, and it would be a vexation to the ſubject if they ſhould be given. *C.*4. *pt.* 124.

Although that a *Non compos mentis* cannot commit Felony, yet he may commit Treaſon; for the King is *Caput & ſalus reipublicæ*. If *Non compos mentis* maketh a Feoffment, and then committeth Treaſon, the King ſhall not have an Action to recover the Land of the *Non compos mentis*, as the party himſelf may have: But if *Non compos mentis* be diſſeiſed, and then be attainted of Treaſon, then the King may enter into the Lands, becauſe the party himſelf had a right of Entry which is given to the King.

It was objected, That a right of Action clothed with a poſſeſſion might be given to the King. Tenant in tail diſcontinues, and takes back an eſtate, and is attainted of Treaſon: This right of Action ſhall not be forfeited to the King, for his right of Action was to the eſtate tail. In our Caſe the right of Action was to *Katherine*, for ſhe was Tenant for life. The Attaindor was 29 *H.* 8. and the Act which forfeited the Right was made 31 *H.* 8. and then the right and poſſeſſion were divided. 30 *H.* 6. *Grants* 91. The King may grant the Temporalties of a Biſhop before they happen to be void, And ſo he may grant a Ward: But the King cannot grant the Lands of *J. S.* when he ſhall be attainted of Treaſon; for the Law doth not preſume that *J. S.* will commit Treaſon. The Deviſe of a Term, the Remainder over is good: But if the Deviſe be of a Term to one in tail, the Remainder over, the Remainder is void, becauſe the Law doth preſume that an eſtate in tail may continue for ever. *C.* 8. *part* 165, 166. The Law did not preſume that *Digby* at the time of the Conveyance intended to commit Treaſon.

It was objected, That whatſoever may be granted, may be forfeited: I deny that, *C.* 3. *part* 10. by *Lumley's* Caſe: If the iſſue in tail in the life of his Father be attainted of high Treaſon and dyeth, it is no forfeiture of the eſtate tail: But if the iſſue in tail levieth a Fine in the life of his Father, it is a bar to his iſſues. *C.* 3. *part* 50. Sir *George Brown's* Caſe, 10 *E.* 4. 1. there Executors may give away the goods of the Teſtator, but they cannot forfeit the goods of their Teſtator. *Com.* 293. *Osborns* Caſe, Guardian in Soccage may grant the Ward, but he cannot forfeit him. *C.* 3. *part* 3. Right of Actions reals, becauſe they are in privity by general words of a Statute, are not given to the King, *v. Dyer* 67. *Stringfellow's* Caſe: That which is in *cuſtodia Legis* cannot be taken as a Diſtreſs in a Pound overt, cannot be taken out of the Pound upon another Diſtreſs.

The third Point is, If he were remitted; And I conceive that he was remitted: When Tenant in tail is attainted of Treaſon, the iſſue at the Common Law ſhould inherit as if he had not been attainted, *Lit.* 747. *C.* 1. *part* 103. for as to the Eſtate tail, there was no corruption of blood. *C.* 10. *part.* 10. If Tenant in tail before the Statute of 26. *H.* 8. commit Treaſon, the land ſhall diſcend to his iſſue, for the iſſue doth not claim by the Father, but *per formam doni*. *C.* 8. *part* 166. ſuch a diſcent

ſcent ſhall take away entrie; But in our Caſe *Ratcliff* had both poſſeſſion and right, and therefore is remitted; the ſpeciall Verdict finds that he was remitted, and the Judgment given in the Court of Pleas in the Exchequer was, that he was remitted. It was objected, that the Remitter was deſtroyed by the relation of the Office; but the ſame is not ſo, for the Office relates only to avoid Incombrances, *viz.* acts done by himſelf; but to deveſt the Freehold, and to ſettle the ſame in the King, the Office ſhall not relate: And if it ſhould relate, then the King ſhould loſe many Lands which he now hath: *Com. Nichols* Caſe. Tenant for life upon condition to have Fee, &c. If the Office ſhall relate, then the ſame takes away the Freehold out of the perſon attainted, *à principio*, and then the Fee cannot accrue; and ſo by that means the King ſhould loſe the lands. A Remitter is no incombrance, for it is an ancient right, and the Act of the King cannot do wrong. *C.* 1. *part* 44. *b.* 27 *Aſſ.* 30. There Tenant for life with clauſe of re-entrie is attainted the reverſioner entreth, the Office ſhall not relate to take the Freehold out of the reverſioner, *C.* 3 *part* 38. *Relatio eſt fictio juris*, and ſhall never prejudice a third perſon; and the Office found in the life of *Katherine* ſhal not prejudice him, *C.* 9. *part*, *Beamounts* Caſe; the husband and wife are Tenants in tail, the husband is attainted of Treaſon and dyeth, yet the wife is tenant in tail, when it is not to the damage or prejudice of the King, there *tempus occurrit Regi*: *C.* 7. *part* 28 *Baskervile's Caſe*. From 29 *H.* 8. untill 33 *H.* 8. *Katherine*; and afterwards *Ratcliff* had the poſſeſſion; and then the Law was taken to be, that *Ratcliff* had a lawfull poſſeſſion. For theſe reaſons he concluded, that the Judgment ought to be affirmed.

In *Trinity* Term following, *viz.* *Trin.* 21 *Jacobi Regis*, the Caſe was argued again: and then *Coventry* the Kings Attorney general, argued for the Lord *Sheffield*, That the Judgment given in the Court of Pleas in the Exchequer, ought to be reverſed. He ſaid, I will inſiſt only upon the right of the Caſe, Whether upon the right of the Caſe *Ratcliff* may maintain a *Monſtrans de Droit*. Firſt, If by the Attainder, the right of the old Eſtate tail, as well as of the new Eſtate tail be forfeited: Secondly, Admitting that the old right of entail be not forfeited, then if the Office do overreach the Remitter, for then a *Monſtrans de Droit* doth not lie, but a Petition for the reaſon of the diſcontinuance. Firſt it is evident, that when *Ralph Bigot* Tenant in tail in poſſeſſion 6 *H.* 7. made a Feoffment, that that was a diſcontinuance, and it is as clear that the right of the old Eſtate tail veſted in *Francis Bigot*. The Feoffment made by *Francis Bigot*, 21 *H.* 8. did not deveſt the right of the old tail: Firſt for the weakneſſe of the Feoffment; Secondly for the inſeparableneſs of the Eſtate tail, which is incommunicable, and not to be diſplaced by weak aſſurance. That Feoffment was made according to the Statute of 1 *R.* 3. and not by the Common Law, but only by force of the

ſaid

ſaid Statute. The Feoffment is without Deed, and ſo nothing paſſeth but only by way of Livery, or elſe nothing at all. Alſo at the time of the Feoffment in 21 *H.* 8. the Feoffees were in ſeiſin of the Lands; and *Ratcliff* ſhews in his *Monſtrans de Droit*, that *Francis Bigot* did diſſeiſe the Feoffees, and ſo the Feoffment had no force as a Feoffment at the Common Law, but only by the Statute of 1 *R.* 3. For at the Common-Law, if *Ceſtuy que uſe* had entred upon the Feoffees, and made a Feoffment, nothing had paſſed. There is a difference betwixt a Feoffment at the Common Law, and a Feoffment according to the Statute of 1 *R.* 3. which operates *ſub modo*. Feoffments are the ancient Conveyances of Lands, but Feoffments according to the Statute of 1 *R.* 3. are upſtarts and have not had continuance above 150 years. In caſe of Feoffments at the Common Law, the Feoffor ought to be ſeiſed of the lands at the time of the Feoffment; but if a Feoffment be according to the Statute of 1 *R.* 3. in ſuch Caſe the Feoffor needeth not be in poſſeſſion: Feoffments at the Common Law give away both Eſtates and Rights; but Feoffments by the Statute of *R.* 3, give the Eſtates, but not the Rights: In caſe of Feoffment at the Common Law, the Feoffee is in the *Per, viz.* by the Feoffor; but in caſe of Feoffments by the Statute of *R.* 3. the Feoffees are in in the *Poſt, viz* by the firſt Feoffees, 14 *H.* 8. 10. *Brudnel* ſays, that a Feoffment by *Ceſtuy que uſe* by the Statute of 1 *R.* 3, *is like to fire out of a flint, ſo as all the fire which cometh out of the flint will not faſten upon any thing but tinder or gunpowder*: So a Feoffment by *Ceſtuy que uſe* by force of the Statute of 1 *R.* 3, will not faſten upon any thing but what the Statute requires, 5 *H.* 7. 5. 21 *H.* 7. 25. 8 *H.* 7, 8. 27 H. 8. 13. 23. by theſe books it appeareth, that if *Ceſtuy que uſe* maketh a Leaſe for life, during the Leaſe he gaines nothing, and after the Leaſe he gains no reverſion; for the Leſſee ſhall hold of the Feoffees, and of them he ſhall have aid, and unleſs it be by deed Indented; in ſuch a Caſe a Reſervation of Rent is void, and the Leſſor in ſuch a Caſe cannot puniſh the Leſſee for waſte; for he makes the Leaſe meerly by the power which the Statute gives him. 8. *H.* 7. 9. *Ceſtuy que uſe* makes the Feoffment as ſervant to the Feoffees, and if not as ſervant to the Feoffees, yet at leaſt as ſervant to the Statute of 1 *R* 3. If a man entreth upon another, and maketh a Leaſe for life, he gains a reverſion to himſelf, and ſhall maintain an Action of Waſte; but *Ceſtuy que uſe*, when he entreth and maketh a Leaſe, he hath no reverſion, nor ſhall puniſh waſte. And as it is in the Creation, ſo is it in the Continuance. 4 *H.* 7. 18. If *Ceſtuy que uſe* for life or in tail maketh a Leaſe for life, it is warranted during his own life, by the Statute of 1 *R.* 3. but if Tenant for life at the Common Law, maketh a Feoffment, or a leaſe for life: there the firſt Leſſor ought to avoid this forfeiture by entrie, and it is not void by the death of the ſecond Leſſor, *viz.* the Tenant for life, 27 H. 8. 23. A *Feme Covert* is *Ceſtuy que uſe*; the husband maketh a Feoffment

Feoffment and dieth, the Feoffment is void by his death: *Br.* Feoffments to Uses 48. If *Cestuy que use* for life levieth a fine, it is no forfeiture, but good by the Statute of 1 *R.*3. during his own life. And if in such case Proclamations pass, there needeth no claim nor entrie within five years; but the Law is contrarie of Tenant for life by the Common Law: for if Tenant for life at the Common Law levieth a fine, it is a forfeiture. *Dyer* 57. *Cestuy que use* for life or in tail, maketh a Lease for life, the Lease is determined by the death of *Cestuy que use*, and the Lessee is become Tenant at sufferance; but a Lease for life by Tenant for life at the Common Law, is not determined by the death of *Lessee* for life who was *Lessor*, and his Tenant is tenant for life, and not at sufferance, as in the Case before, and the first *Lessor* ought to avoid it by entrie. *Br.* Feoffments to Uses 48. A Recovery by *Cestuy que use* in tail or in fee, is ended by his death.

By these Cases appears a main difference betwixt the validitie of a Feoffment by *Cestuy que use*, and the Feoffment at the Common *Law*: The Statute of 27 H.8. of Uses, doth not execute Uses which are in abeyance, *C.* 1. *part*, *Chudleigh's* Case 9 H. 6. by the Common *Law*, the Devise to an Enfant *in ventre samier* is good but by the Statutes of 32, and 34 H.8. of Wills such a Devise is not good, for the Statute *Law* doth not provide for the putting of lands in abeyance. By the Statute of 1 *R.* 3. All Feoffments and Releases, &c. shall be good and effectual to those to whom they are made to their uses And this *Feoffment* in our Case, was not made to a man *in Nubibus*. *Cestuy que use* by this Statute of 1 *R.* 3. makes a lease for years, the remainder over to the right heirs of *I. S.* the remainder is not good, for the Statute doth not put it in abeyance, for the remainder ought to be limited to one in *esse*. 21 H. 8. *cap.* 4. giveth power to Executors to sell: that Executor who proveth the Will, shall sell, and when he selleth, if he have any right to the land, the right of the said Executor is not gone by that Statute.

So if Commissioners upon the Statute of *Bankrupts*, sell the Lands of the *Bankrupt*, and one of the Commissioners hath right to the land so sold, his right is not extinct: And so in this Case the Statute limits what shall pass. Upon the Statute of 13 *Eliz. cap.* 4. which makes the lands of Receivers liable for their debts; if the King selleth, the right of the Accomptant passeth, but not the Kings right 17 *E.* 3. 60. An Abbot having occasion to go beyond the Seas, made another Abbot his Procurator, to present to such Benefices which became void in his absence: That Abbot presents in the name of him who made him Procurator, to one of his own Advowsons, the right of his own Advowson doth not pass; but yet it is an usurpation of the Abbot which went beyond sea, to that Church. What is the nature of this right? All rights are not given away by Feoffments at the Common Law, *Lit.* 672. Land is given unto husband and wife in tail, the husband maketh a Feoffment, and takes back

back an Eſtate to him and his wife, both of them are remitted. Which Caſe proveth that the husband hath left in himſelf a right notwithſtanding the Feoffment. 41 *E.* 3. 17. 41 *Aſſ.* 1. *John at Lee's* Caſe. So at the Common Law a Feoffment doth not give away all the right; This right doth ſtick ſo faſt in the iſſue, as the Statute of *Weſt.* 2. *cap.* 1. can back it unto him. 2 *E.* 3. 23. 22 *E.* 3. 18. At the Common Law, if Tenant in tail had offered to levie a fine, the Judges ought not to receive it, but ought to have refuſed it, if it had appeared unto them that the *Conuſor* was Tenant in tail: the ſame was before the Statute of 4 *H.* 7. which gave power to Tenant in tail to levie a fine; for the Statute of *Weſt.* 2. *Cap.* 1. ſaies, *Quod finis ſit nullus.* 2. *E.* 2. *age* 77. 2 *E.* 3. 33. 3 *E.* 3. 1. 24 *E.* 3. 25. If Donee in tail levieth a Fine, yet there is no remedie againſt his Tenant, for he ſhall not be compelled to attorn, for that the right is in the Donor. 2 *E.* 2. *Avowry* 181. 48 *E.* 3. 8. *Avowry* was made upon the Donee in tail, notwithſtanding that he made a Feoffment: and *Avowry* is in the realtie and right. 4 *E.* 3. 4. 4 *H.* 6. 28. 10 *H.* 7. 14. In a *Replevin*, ancient *Demeſne* is a good plea, becauſe the *Avowry* is in the realtie: The Donor ſhall know for homage upon the Donee, after that the Donee hath made a Feoffment. 7 *E.* 4. 28. the Donee ſhall do homage. And *Litt.* 90. ſaith, That none ſhall do homage, but ſuch as is ſeiſed in his own right, or in the right of another. 2 *E.* 2. *Avowry* 85. 7 *E* 54. 28. 15 *E.* 4. 15 *Gard.* 116. the iſſue ſhall be in Ward notwithſtanding a Feoffment by Tenant in tail, *Com.* 561. Tenant in tail maketh a Feoffment, yet the right of the tail doth remain in the Tenant in tail. 21 *H.* 7. 40. Tenant in tail of a Rent, grants the ſame in Fee; if an Anceſtor collateral releaſeth with Warranty, the ſame bindeth the Tenant in tail.

There is a common Rule, That a Warranty doth not bind when a man hath not a right: The Caſes cited in *C.* 1. *part*, *Albonies* Caſe, where Feoffments give Rights, I agree. *Barton* and *Ewers* Caſe, A man made a Feoffment of Land, of which he had cauſe to have a Writ of Error, he gave away his Writ of Error by the Feoffment; I agree all thoſe Caſes, for that is in Caſes of Feoffments at the Common Law; but in our Caſe the Feoffment is by the Statute of 1 *R.* 3. In our Caſe there is *Jus habendi, poſſedendi, & recuperandi*: It is like unto a plant in Winter, which ſeemeth to be dead, yet there is in it *anima vegitativa*, which in due time brings forth fruit: So the right in our Caſe is not given away, nor is it in abeyance, but in *Francis Bigot*, which may be regained in due time. *Dyer* 340. there was *Scintilla juris*, as here in our Caſe. 19 *H.* 8. 7. Where Tenant in tail maketh a Feoffment, and the Feoffee levieth a fine, and five years paſs, there it is ſaid that the Iſſue in tail ſhall have five years after the death of Tenant in tail who made the Feoffment; and the reaſon is, becauſe he is the firſt to whom the right doth diſcend. This Caſe was objected againſt me: yet I anſwer, that

Tenant

Tenant in tail in that Case hath right, but he cannot claim it by reason of his own Feoffment; he cannot say he hath right, but another may say he hath right.

In our Case *Francis Bigot* cannot say he hath a Right in him, but another may say he hath a Right. It is like where Tenant in Fee taketh a Lease for years by Deed Indented of his own Lands; He, during the years cannot say that he hath Fee, yet all other may say that he hath the Fee. *C.4. part* 127. The King shall avoid the Feoffment for the benefit of a *Lunatique*, which Feoffment the *Lunatique* had made; and shall not the King avoid a Feoffment which a *Lunatique* hath made, for his own benefit, *viz.* for the benefit of the King himself? I conceive that he shall. Secondly, Admit the right be in the person, *viz.* in *Francis Bigot*; yet they object that it is a right of Action, and so not forfeited. If this right be in the person at the time of the Attainder, it shall be forfeited; if it be not in his person, but in *Nubibus*, yet it shall be forfeited. Tenant in tail makes a Feoffment unto the use of himself and his wife in tail; if the old right of entail rest, or not, in his person, it is forfeited to the King. 34 *Eliz.* this very Point was then adjudged, Where Tenant in tail before the Statute of 27 *H.* 8. of Uses, made a Feoffment unto the use of himself and his wife in tail. It was resolved upon mature deliberation by all the Judges of *England*, that the old Estate tail was in such case forfeited for Treason. Set this Judgment aside, yet it rests upon the Statute of 26 *H.* 8. A general Act for forfeiture for Treason, and the particular Act of 31 *H.* 8. which was made for the particular Attaindor of *Francis Bigot*.

I will argue argue only upon the Statute 26 *H.* 8. which hath three clauses. First, to take away Sanctuary; Secondly, to provide that no Treason be committed, and the Offender punished; The third, which clause I am to deal with, which giveth the forfeiture of Lands of Inheritance, &c These three clauses do depend upon the Preamble. It was high time to make this Statute: For when *H.* 8. excluded the Pope, he was to stand upon his guard: And that year of 26 *H.* 8. there were five several Insurrections against the King, therefore it was great wisdom to bridle such persons: King *Ed.* 6. and Queen *Mary* repealed divers Statutes for Treason and Felony, yet left this Statute of 26 *H.* 8. to stand in force. *Anno* 5 *E.* 6. *cap.* 5. this Statute of 26 *H.* 8. somewhat too strict was in part repealed, *viz.* That the Church lands should not be forfeited for the Treason of the Parson. This third branch doth insist upon a *Purview*, and a *Saving*, and both agree with the Preamble: The *Purview* is ample; Every Offender, and Offenders of any manner of High Treason, shall forfeit and lose, &c. I observe these two words in the Statute, shall (*Forfeit*) those things which are forfeitable, and (*Lose*) those things which are not forfeitable. But it shall be lost, that the heir of the Offender shall not find it, shall Forfeit and lose to the

King his heirs and ſucceſſors for ever, ſo it is a perpetual forfeiture; ſhall forfeit all his Lands, which includes, Uſe, Eſtate and Right, by any right, title or means: So you have Eſtate, Right, Title and Uſe. Here *Francis Bigot* ſhal forfeit the Caſtle and Mannor of *Mulgrave* unto the King, his heirs and Succeſſors, and he muſt forfeit the Land, Right Title and Uſe, otherwiſe it cannot be to the King for ever; and what is ſaved to ſtrangers, all ſhall be ſaved; and what will you not ſave to the Offender and his heirs, all his Lands, Right, &c. as was ſaved to ſtrangers.

It was objected, that it was not an Act of Aſſurance, but an Act of Forfeiture, which is not ſo ſtrong as an Act of Aſſurance. I do not doubt of the difference; but how much will that difference make to this Caſe? doth the Statute goe by way of Eſcheat? it doth not; but in caſe of Petty Treaſon Land ſhall Eſcheat; but when the Statute of 25 *E.* 3. ſpeaketh of High Treaſon, the words of the ſaid Statute are, Shall forfeit the Eſcheat to the King: But is the Right devided from the King? Truely no; the word (*Forfeit*) take it in *nomine*, or in *natura*, is as ſtrong a word, as any word of Aſſurance. *Alienare* in the Statute of *Weſt.* 2. *cap.* 1. *Non habeant illi poteſtatem alienandi*; ſo *non habent illi poteſtatem forisfaciendi*, is in the nature of a Gift. *Com.* 260. Forfeiture is a gift in Law, *Et fortior eſt diſpoſitio legis quam hominis*, and ſo as ſtrong as any aſſurance of the partie. , If a Statute give the Land to the King, then there needeth not any Office, 27 *H.* 8. *Br. Office. Com.* 486. The Right veſts before Office. It was objected that the Statute of 26 *H.* 8. doth not extend to a right of Action, but to a right of Entrie. The purpoſe of this Act of 26 *H.* 8. is not to attaint any particular perſon, as the Statute of 31 *H.* 8. was made for the particular Attaindor of *Francis Bigot*. 5 *E.* 4. 7. *Ceſtuy que uſe* at the Common Law, did not forfeit for Felony or Treaſon; but by this Act of 26 *H.* 8. *Ceſtuy que uſe* ſhall forfeit both Uſe and Lands, out of the hands of the Feoffees. 4 *E.* 3. 47 4 *Aſſ.* 4. The husband ſeiſed in the right of his wife at the Common Law for Treaſon ſhall not forfeit but the profits of the lands of his wife during his life, and not the Freehold it ſelf; but by this Act of 26 H. 8. the Freehold it ſelf is forfeited. 18 *Eliz.* in the Common Pleas, *Wyats* Caſe, *C.* 10. *Lib. Entries* 390. And if the Statute of 26 H. 8. had had no ſaving, all had been forfeited from the wife. 7 H. 4. 32. there it is no forfeiture, yet by this Statute it is a forfeiture. A right of Action ſhall not Eſcheat, 44 *E.* 3. 44. *Entre Cong.* 38 *C.* 3 *part* the Marqueſs of *Wincheſters* Caſe, and *Bowties* Caſe, and *C.* 7 *part. Ingleſield's* Caſe A right of Action *per ſe* ſhall not be forfeited by the Rules of the Common Law, nor by any Statute can a right of Action be transferred to another; but by the Common Law a right of Action may be quaſhed, and exonerated, and diſcharged in the poſſeſſion of the King. For it is out of the Rule which is in *C.* 10. *part* 48. for the cauſe of

of quieting and repoſe of the Terre-Tenants, otherwiſe it would be a cauſe of Suits; But all Rights, Tythes, Actions, &c. might for the ſame reaſons, *viz.* for the quiet of the Terre-Tenants, and the avoidance of Suits and Controverſies, be releaſed to the Terre-Tennants. By the ſame reaſon here the right of Action of *Francis Bigot* ſhall be diſcharged and exonerated by this forfeiture, *viz.* for the quiet and repoſe of the Terre-Tenants; for the Law delights in the quiet and repoſe of the Terre-Tenants. If *Francis Bigot* had granted a Rent, the ancient right of the tail had been charged. *C.* 7. *part* 14. Where Tenant in tail makes a leaſe for life, and grants a Rent charge, and Tenant for life dieth, he ſhall not avoid his charge, although he be in of another Eſtate, becauſe he had a defeiſible poſſeſſion, and an ancient right, the which, &c. ſo as they could not be ſevered by way of conveyance and charge, and no lawfull act, Then I admire how he will ſever this from himſelf by his unlawfull act, *viz.* the Feoffment, the diſcontinuance: *Lit.* 169. If a man commit Treaſon, he ſhall forfeit the Dower of his wife, yet he doth not give the dower of his wife, but it goes by way of diſcharge in thoſe Lands. 13 *H.* 7. 17. Tenant by the Curteſie in the life of his wife, cannot grant his Eſtate of Tenant by the Curteſie to another, but yet he for Felony or Treaſon may forfeit it, *viz.* by way of diſcharge. A Keeper of a Park commits Treaſon, there the King ſhall not have the Office of Keeper for a forfeiture, becauſe it is an Office of truſt; but if he had been Keeper of the Kings Park, and had been attainted, there he ſhould forfeit his Office by way of diſcharge and exoneration. This Statute of 26 *H.* 8. hath been adjudged to make Land to revert, and not ſtrictly to forfeit.

Auſtin's Caſe cited in *Walſingham's* Caſe. Tenant in tail, the reverſion in the King, the Tenant makes a Leaſe for years and dies, the iſſue accepts of the Rent, and commits Treaſon, the Leaſe is avoided, for the King is not in by forfeiture by the Statute of 26 *H.* 8. but by way of Reverter by the Statute of 26 *H.* 8. It was objected, that if Tenant in tail maketh a Feoffment, and takes back an Eſtate for life, and is attainted of Treaſon, that he ſhall not forfeit his old right, I agree that Caſe: For indeed it is out of the Statute of 26 *H.* 8. which ſpeaks of Inheritance, and in that Caſe the Tenant hath but a Freehold. The Statute of 26 *H.* 8. ſaith, that it ſhall be forfeited to the King, his heirs and Succeſſors. And if in our Caſe the old right ſhould remain, then it ſhould be a forfeiture but during the life of the Teſtator. When the Common Law, or Statute Law giveth Lands, it gives the means to keep them, as the Evidences; So here the King is to have by force of this Statute of 26 H. 8. the Evidences. The forfeiture of right is expreſly within the Statute of 26 H. 8. as the forfeiture of Eſtate, as by any right, title or means, for the old Eſtate tail is the means of Eſtates ſince 6 H. 8. And if you will take away the Foundation, the Building will

fail. For all the Estates are drawn out of the old Estate tail. The Statute of 26 H.8. is not an Act of Attaindor, for none in particular is attainted by the Act; but the Act of 31 H 8. doth attaint *Francis Bigot* in particular. It was objected, that here in this case there needed not to be any expres Saving. I answer, that there are divers Statutes of Forfeitures: yet the Statutes have Savings in them, so as it seems a saving in such Acts were not superfluous, but necessary. The Act of 33 H. 8. for the attainder of Queen *Katharine*, there is a saving in the Act, and yet an Act of Forfeiture. *Dyer* 100. there the land vested in him in the Remainder by force of a saving in the Act, so the saving is not void, but operative. *C. 3. part Dowlies* Case, *vid.* the Earl of *Arundels* Case, there the saving did help the wife, so it appears savings are in Acts of Parliaments of Forfeiture, and Acts of Attaindor. *Dyer* 288, 289. The Bishop of *Durham* had *Jura Regalia* within his Diocese, and then the Statute of 26 H. 8. came: now whether the Forfeiture for Treason should be taken away from the Bishop, by reason of that Statute, and given to the King, was the doubt? It was holden, that of new Treasons the Bishop should not have the Forfeitures, for those were not at the Common Law, as the Forfeitures of Tenant in tail; but that he should have the Forfeitures of Lands in Fee within his Diocese; and that he had by force of the saving in the Statute; so that a Saving is necessary and operative. *Com. Nichols's* Case, there *Harpers* opinion, that there needs no saving to strangers; but yet a saving is necessary for the Partie and the Issue, if they have any thing, as well as strangers. *vid. C. 3. part Lincoln* Colledg Case. It is the Office of a good Interpreter, to make all the parts of a Statute to stand together. *Com.* 559. By these general words (*Lose and Forfeit*) and by excluding of the heir in the saving, the heir is bound; So the Judges have made use of a Saving, for it is operative.

2 *Ma. Austin's* Case cited in *Walsinghams* Case. Tenant in tail the Reversion in the Crown: Tenant in tail made a Lease for years, and levied a Fine to the King, the King shall not avoid the Lease, for the King came in in the Reverter; but in such Case, if he be attainted of Treason, then the King shall avoid the Lease. So a Statute of Forfeiture is stronger then a Statute of Conveyance. By this Statute of 25 H. 8. Church Land was forfeited, for so I find in the Statute of Monasteries, which excepts such Church Lands to be forfeited for Treason, *Dyer*. Cardinal *Poole* being attainted, did forfeit his Deanary, and yet he was not seised thereof in *jure suo proprio*, for it was *jus Ecclesiæ*. 27 *E.* 3. 89. A Writ of Right of Advowson by a Dean, and he counteth that it is *Jus Ecclesiæ*, and exception that it is not *Jus suæ Ecclesiæ*; But the Exception was disallowed, for the *Jus* is not in his natural capacitie, but in his politique capacitie; and yet by this Statute of 26 H. 8. such Church Land was forfeited for Treason: this is a stronger Case then our Case.

Vid. C.

Vide C. 9. part. Beaumont's Case: Land is given to husband and wife in tail, and the husband is attainted of Treason; the wife is then Tenant in tail, yet the Land is forfeited against the issue, although it be but a possibility for the whole estate is in the wife; but the cause thereof is, because it was once coupled with a possession. *C. 7. part, Nevils* Case, There was a question whether an Earldom might be entailed and forfeited for Treason, which is a thing which he hath not in possession nor use, but is inherent in the blood: And there resolved that the same cannot be forfeited as to be transferred to the King, but it is forfeited by way of discharge and exoneration. 12 *Eliz. Dyer*, the Bishop of *Durhams* Case: There, if it had not been for the *saving*, the Regal Jurisdiction of the Bishop had been given to the King by the Statute of 26 *H.* 8. This Statute of 26 *H.* 8. was made for the dread of the Traitor: For the times past saw how dangerous Traitors were, who did not regard their lives, so as their lands might discend to their issue; It was then desperate for the King, Prince, and Subject; For the time to come it was worse. The Law doth not presume that a man would commit so horrid an act as Treason: so it was cited by Mr. *Crook*, who cited the case, That the King cannot grant the goods and lands of one when he shall be attainted of Treason, because the Law doth not presume that he will commit Treason: If the Law will not presume it, wherefore then were the Statutes made against it? If the Land be forfeited by the Statute of 26 *H.* 8. much stronger is it by the Statute of 31 *H.* 8. But then admit there were a Remitter in the Case, yet by the Office found the same is defeated: Without Office the Right is in the King, *Com.* 486. *c.* 5. *part* 52. where it is said, There are two manner of Offices, the one which vests the estate and possession of the Land &c. in the King, where he had but a Right, as in the case of Attaindor the Right is in the King by the Act of Parliament, and relates by the Office. *Com.* 488. That an Office doth relate. 38 *E.* 3. 31. The King shall have the mean profits. The Office found was found in 33 *Eliz.* and the same is to put the King in by the force of the Attaindor which was 29 *H.* 8. and so the same devests the Remitter. Tenant in tail levieth a Fine, and disseiseth the Conusee and dyeth, the issue is remitted, then proclamations pass; now the Fine doth devest the Remitter. *C.* 1. *part* 47 Tenant in tail suffereth a common Recovery, and dyeth before Execution; the issue entreth, and then Execution is sued; the Estate tail is devested by the Execution; and so here in our Case it is by the Office. *C.* 7. *part* 8. Tenant in tail maketh a Lease and dyeth (his wife *priviment ensient*) without issue; the Donor entreth, the Lease is avoided; afterwards a Son is born, the Lease is revived. *Com.* 488. Tenant *in capite* makes a Lease for life rendring rent, and for non-payment a re-entry, and dyeth: the rent is behind, the heir entreth for non-payment of the rent, and afterwards Office is found of the dying seised, and that the land is holden

den *in capite*, and that the heir was within age: In that caſe the Entry for the Condition broken was revived, and the Eſtate for life revived. 2 *E.* 4. 25. A Diſſeiſor is attainted of Felony, the Land is holden of the Crown; the Diſſeiſee entreth into the Land, and afterwards Office is found that the Diſſeiſor was ſeiſed, the Remitter is taken out of the Diſſeiſee: which is a ſtronger caſe then our Caſe; for there was a right of Entrie, and in our Caſe it is but a right of Action, which is not ſo ſtrong againſt the King. And for theſe Cauſes he concluded, That the Judgment given in the Court of Pleas ought to be reverſed, And ſo prayed Judgment for the Lord of *Sheffield* Plaintiffe in the Writ of Error.

This great Caſe came afterwards to be argued by all the Judges of *England*: And upon the Argument of the Caſe the Court was divided in opinions, as many having argued for the Defendant *Ratcliffe* as for the Plaintiffe: But then one new Judge being made, *viz.* Sir *Henry Yelverton*, who was before the Kings Sollicitor, his opinion and argument ſwayed the even ballance before, and made the opinion the greater for his ſide which he argued for, which was for the Plaintiffe the Lord *Sheffield*; And thereupon Judgment was afterwards given, That the Judgment given in the Court of Pleas ſhould be reverſed, and was reverſed accordingly: And the Earl Lord *Sheffield*, now Earl of *Mulgrave*, holdeth the ſaid Caſtle and Mannor of *Mulgrave* at this day according to the ſaid Judgment. Note, I have not ſet here the Arguments of the Judges, becauſe they contained nothing almoſt but what was before in this Caſe ſaid, by the Councel who argued the Caſe at the Bar.

Paſch. 21 *Jacobi, in the Kings* Bench.

418.

IT was the opinion of *Ley* Chief Juſtice, *Chamberlain* and *Dodderidge* Juſtices, That a Defendants Anſwer in an Engliſh Court is a good Evidence to be given to a Jury againſt the defendant himſelf; but it is no good Evidence againſt other parties. If an Action be brought againſt two, and at the Aſſiſes the Plaintiffe proceeds only againſt one of them, in that caſe he againſt whom the Plaintiffe did ſurceaſe his ſuit may be allowed a Witneſſe in the Cauſe. And the Judges ſaid, That if the Defendants Anſwer be read to the Jury, it is not binding to the Jury; and it may be read to them by aſſent of the parties. And it was further ſaid by the Court, That if the party cannot find a Witneſſe, then he is as it were dead unto him; And his Depoſition in an Engliſh Court in a Cauſe betwixt

betwixt the same parties Plaintiffe and Defendant may be allowed to be read to the Jury, so as the party make oath that he did his endeavour to find his Witnesse, but that he could not see him nor hear of him.

Pasch. 21 *Iacobi, in the Kings Bench.*

419.

THe Husband, a wife seised of Lands, in the right of the wife levied a Fine unto the use of themselves for their lives, and afterwards to the use of the heirs of the wife; *Proviso* that it shall and may be lawfull to and for the husband and wife at any time during their lives to make Leases for 21 years or 3 lives. The wife being Covert made a Lease for 21 years; And it was adjudged a good Lease against the husband, although it was made when she was a Feme Covert, and although it was made by her alone, by reason of the *Proviso*.

Pasch. 21 *Jacobi, in the Common-Pleas.*

420.

NOte that *Hobart* Chief Justice said, That it was adjudged *Mich.* 15 *Jacobi* in the Common-Pleas, That in an Action of Debt brought upon a Contract, the Defendant cannot wage his Law for part, and confesse the Action for the other part. And it was also said, That so it was adjudged in *Tart's* Case upon a Shop-book. And *vide* 24 *H.*8. *Br. Contract* 35. A Contract cannot be divided. 38 *H.*6. 14. If the Law doth not lie for parcel, then it is suspended for the whole where the debt is an entire debt And so it was adjudged in this Case.

Pasch. 21 *Jacobi, in the Kings Bench.*

421.

NOte it was cited by *Chamberlain* Justice, 15 *Jacobi*, to be adjudged, That where a man brought an Action upon the Case against another man for calling of him Bastard, that the Action was maintainable.

The

The Defendant brought a Writ of Error, and ſhewed for Error, That the Plaintiffe did not claim any Inheritance, or to be heir to any perſon certain: But notwithſtanding that Error aſſigned, the Judgment was affirmed. And he ſaid, That if one ſaith of *J. S.* that his Father is an Alien, that an Action upon the Caſe will lie, becauſe it is a diſability to the Son. *Quære.*

Trin. 21 Jacobi, in the Kings Bench.

422. YOUNG and ENGLEFIELD's Caſe. *Intratur, Paſch. 21 Jac. Rot. 102.*

YOung brought an Action of Treſpaſs for entring his Cloſe, &c. abutted upon one ſide with *Pancras*, and butted on the other ſide with *Grayes-Inne-Lane*. Upon *Not guilty* pleaded, the parties were at iſſue: Aud the Record of *Niſi prius* was *Graves-Inne-Lane*; And thereupon the party was Nonſuit. And now it was moved to have a *Venire facias de novo*. And a Caſe was cited expreſſe in the point, betwixt *Farthing* and *Dupper*, 9 *Jacobi Rot.* 1349. Where in an Action upon the Caſe upon *Aſſumpſit*, the Plea-Roll was *Six weeks*, and the Record of *Niſi prius Six moneths*: And the Jury being ſworn, the Plaintiffe was Nonſuit; and a *Venire facias de novo* was awarded, and the Nonſuit was recorded. *Ley* Chief Juſtice, You cannot have a new *Venire facias* if the Nonſuit be recorded: And if the Record of *Niſi prius* varieth from the Record, then it can be no Nonſuit, becauſe there is no Record upon which the Nonſuit can be, and the *Niſi prius* was proſecuted without warrant. Judicial Proceſs are of Record, becauſe they are by the Award of the Court: But if the Tranſcript of a Record be miſtaken by a Clark, it iſſueth out by the Award of the Court; and if it vary, then it is no Record. The preſident cited is direct in the point: There was a *Venire facias de novo*; But I conceive there is a difference where the Jury is ſworn, as it is in the Preſident, and then the Plaintiffe is Nonſuit; but in our Caſe the Plaintiffe was Nonſuit before the Jury was ſworn. But *per Curiam* the Caſe is the ſtronger to have a new trial.

Trin. 21 *Iacobi, in the Kings Bench.*

423. PRITCHARD and WILLIAMS Caſe.

IN an *Ejectione Firme*, the Jury found for the Defendant. Now it was moved for the Plaintiffe, That the Defendant might not have Coſts, becauſe the *Venire facias* is miſtaken. And the Defendants Councel cited a Preſident in the Caſe, *viz. Mich.* 18 *Jacobi*, betwixt *Done* and *Knot*; where the Defendant had Judgment for his Coſts, notwithſtanding that the Plaintiffe miſtook his *Venire facias* in an *Ejectione Firme*, where the Jury found for the Defendant.

Trin. 21 *Iacobi, in the Kings Bench.*

424. WISEMAN and DENHAM's Caſe.

Wiſeman brought an Action upon the Caſe againſt *Denham* Parſon, and declared that there is a Cuſtom within the Town and Pariſh of *Landone*, of which the Defendant is the Parſon. That every Pariſhoner who keeps ſo many Kyne within the ſaid Pariſh, ſhould give and pay to the Parſon, for his Tythe-Milk, ſo many Cheeſes at *Michaelmas*: and ſhewed how that he kept ſo many Kyne, *viz.* 20, &c. within the ſaid Pariſh, and that he did tender *apud Landone* ſo many Cheeſes at *Michaelmas* to *Denham* the Defendant, being Parſon, who refuſed them, and to take them away, but ſuffered them to be and continue in the Plaintiffs houſe, for which cauſe he brought the Action: The Defendant did demur upon the Declaration. *George Crook*, the Action will lie; for the Plaintiffe hath a damage, by reaſon that the Parſon doth not take away his Tythe-Cheeſe. And it is like unto the Caſe in 13 *H.* 4. *Action ſur le* Caſe 48. Where a man ſold unto another Hay, and becauſe that the Vendee took not away his Hay, an Action upon the Caſe did lie, for it was a damage to the Plaintiffe to let it ſtand upon his ground, for he durſt not put his Cattel into his ground to feed, leſt they ſhould eat the Hay and ſpoil it, and ſo he ſhould be lyable to an Action to be brought by the Vendee: So if Tythe be lawfully ſeforth, and the Parſon refuſeth the Tythe, but will ſue in the Spiritual

Court for the Tythe, an Action upon the Caſe will lie: *à fortiori* in this Caſe, for the Cheeſes may be cumberſome and troubleſome to the Partie, ſo as he cannot make the beſt uſe or benefit of his houſe. *Paul Crook* contrarie: and he took exception becauſe the tender is alledged to be *apud Landone*, and it is not ſhewed that it was at his houſe at *Landone*, or in any place certain; and he ſaid that the Action will not lie, becauſe here is no damage to the Plaintiffe: and it is like the Caſe when a man makes a Leaſe rendring Rent, Cheeſe, or Corn, and the Tenant tendreth it, and the Leſſor refuſeth it; the Leſſee cannot have an Action upon the Caſe againſt his Leſſor, but he may plead the matter in barr, in an Action brought by the Leſſor. And the Caſe of 13 *H.* 4. before put, is not to the purpoſe, for there it was part of the Bargain to take it away by ſuch a time: And in our Caſe the Plaintiffe may plead the matter in barr to the Plaint'. 43 *Eliz.* betwixt *Criſpe* and *Jackſon*, an Action upon the Caſe was brought for ſuing in the Eccleſiaſtical Court for Tythes which were due, and he recovered damages.

Secondly, Admit that the Action doth lie, then it is becauſe it is a damage unto him that they remain in his houſe; but it doth not appear that the tender was made at his houſe, but *apud Landone*, which might be a mile from the houſe; and ſo becauſe it was his own fault, the Action will not lie as this Caſe is, by reaſon of the tender. *George Crook*, It was adjudged in a *Corniſh* Caſe, that an Action upon the Caſe lieth againſt a Parſon which doth not take away his Tythe corn, or hay, becauſe it ſpoyles the ground upon which it ſtands, and becauſe the partie cannot have the free uſe of his Land: So in our Caſe, he cannot have the free uſe of his houſe, the cheeſes cumbring his houſe, and offending him with their ſmell. *Haughton* Juſtice, If the Action were well laid, it would lie for the Cauſe, but in this Caſe it is not well laid: If any thing makes the Action to lie, it is the damage which the Plaintiffe doth ſuſtain by the cheeſes being in his houſe; but here it is laid to be tendred *apud Landone*, and it is not ſaid at his houſe, and *non conſtat* how the cheeſes came to his houſe; for if they were brought back by the Plaintiffe, or by his commandment, then the Action will not lie; but if he had laid his Action, that he gave notice to the Parſon that he had ſo many cheeſes ready for him for his Tythe, and had required him to ſend for them, then if the Parſon had not carried them away, the Action would have lien; but for the reaſon before the Action as it is laid is not maintainable. *Dodderidge* Juſtice, There are two matters in this caſe: Firſt, If the Action will lie for the matter. Secondly, If the Action will lie by reaſon of the Tender: as to the firſt, I put this difference, That in ſome caſe it will lie, and in ſome caſe it will not lie; in this caſe the Action is not maintainable.

Where a tender is of a thing which the Partie ought to have, by the tender the property is changed, and there a damage may ariſe by reaſon that

that he will not take it away, as in the caſe of 13 *H.* 4. put before; there the Plaintiffe had damage by the ſtanding of the hay upon the ground, for he could not put in his cattel, for then he might be in danger of an Action, becauſe the cattel might eat the hay.

If one ſetteth forth his Tythe, and the Parſon having notice thereof will not take it away, an Action lyeth, becauſe it as a damage to the Land: But in our Caſe, admit the tender were at his houſe, yet this tender doth not alter the Property in the perſon, and they being his own cheeſes, he hath no loſs; ſo the difference is, where the partie hath damage and loſs, and where he hath none, as here in our Caſe he hath no damage; the tender of the Rent ſaves from the penaltie, but doth not diſcharge the dutie; but admit that the Action will lie, yet in this Caſe the Declaration is inſufficient, For the tender is not alledged to be at any place certain in the Village, for it may be that he tendred them to the Parſon in the Church-yard of *Landone*, and then by the carrying of them home to his houſe again, he hath loſt the Action which he might have had if he had tendred them at his houſe. *Ley* Chief Juſtice, There is a difference in the caſe of Tenders: If I tender ſuch a thing which is due, and the other refuſeth it, and I muſt pay the ſame thing in kinde, if by the keeping of it I be endamaged, I may have an Action upon the Caſe: and that is our Caſe.

If a man ſetteth out his Tythe hay, or Corn (the tender in our Caſe is a ſetting forth of the Tythe Cheeſe) and the Parſon refuſeth to take it away, and it periſh in keeping, I am excuſed for the periſhing of it; but I may have an Action againſt the Parſon, for letting it ſtay upon my Land to my anoyance. So if *A.* commit goods to me to keep in my houſe, and I require him to take them away, and he refuſeth to do it, I may have an Action upon the Caſe againſt him, for it is a trouble to me to remove them for him: and ſo in our Caſe; but it is otherwiſe where I pay Rent-Corn, and the Leſſor doth refuſe it, I may pay him in other corn. If one be to pay ſo much corn, and the other will not receive it being tendred unto him, untill it be dearer, an Action upon the Caſe will lie, for he is thereby endamaged. In our Caſe the partie is damnified, for his houſe is anoyed by the ſmell, and alſo encombred therewith, and the rooms of his houſe are valuable, and he cannot make uſe of them at his pleaſure: the Tender ought to be, where by the ordinary courſe the thing hath its beeing: As at the place of the ſhearing of the Sheep, the Parſon is to demand his Tythe wool, and there it is to be paid, if there be be a perſon who hath power to deliver it; the things which are ordinarily in the houſe, as butter, cheeſe, &c. are to be tendred there, and there they are to be demanded, and thereof notice is to be given to the Parſon; and the partie is not bound to carry them to the Parſons houſe. The cheeſes which are to be paid by this Cuſtom, are to be paid of cheeſes made upon that Land, and not of cheeſes which the

Pariſhoner ſhall buy elſewhere : The tender is alledged to be in the Town of *Landone*, and the Law intends the cheeſes to be in the Pariſhoners houſe and this general tender is to be underſtood at the place where the cheeſes by intendment of Law are to be ; and on the other ſide it ought to be alledged, that the tender was not at the houſe : ſo as I conceive that the tender is good. *Dodderidge*. The intendment is not good in this caſe; for in every Declaration there ought to be certainty and verity; but in a plea in bar, there if it be a common intendment, it is ſufficient. If a man ſpeak generally of a Town, it is to be meant at the Hamlet where the Church ſtands. *Ley*, when a tender is pleaded, it is ſuppoſed to be at the place where the tender ought to be by the Law. As a man is bound to pay money, if he plead that he tendred it at *D.* it ſhall be intended that *D.* is the place where it ought to be paid. If the partie goeth to the Parſons houſe, and tells the Parſon that he hath at his houſe ſuch Tythe cheeſes for him, and requires the Parſon to ſend for them; here the notification is at the Parſons houſe, but the real tender is at the parties own houſe : And the partie plaintiffe in our Caſe cannot plead it otherwiſe then at *Landone*. *Haughton*, In this caſe the Law requires a ſpecial place of tender expreſſed, or elſe he ſhews no cauſe of Action : For if it were at any place out of his houſe, the Action will not lie, and the cheeſes ought to be perſonally tendred. *Ley* Chief Juſtice; That would be inconvenient, for then he muſt carry them to him, and ſo he ſhould be forced to wait upon the Parſon. *Dodderidge*, 40 *E.* 3. If I tender to one a marriage, or a Ward, the woman, or Ward ought to be preſent at the time of the tender. Tender of money in a bag, as to ſay, I have money for you, is no good tender : and ſo it is of cheeſes; to ſay, I have cheeſes for you, is but a verbal tender, and it is not good; but it ought to be tendred perſonally and in kinde. You will intend that the Parſon was at the plaintiffs houſe at the time of this tender, and here is nothing in the caſe to direct you ſo to think. *Ley*, The place is but circumſtance, for the Parſon is tyed to demand them at the houſe, being the proper place of tender, by reaſon of their being there. *Dodderidge*, The cheeſe muſt be ſhewed the Parſon, and that proves that he muſt be preſent : *Ley*, If he were preſent, then the tender is good : But if he be not there, but at another place, the notice is ſufficient *Dodderidge*, The Law requires certainty in a Declaration, and the matter cannot be taken by intendment; ſo we ought to have a certainty ſet forth, otherwiſe no certain Judgment can be given. It was adjourned, for *Dodderidge* and *Haughton* Juſtices were againſt *Ley* Chief Juſtice : But as I have heard, the Caſe was afterwards adjudged for the Plaintiffe. There *quære* the Record of the Judgment.

Trin.

Trin. 21 *Iacobi, in the Kings Bench.*

425.

A Man made a Leaſe for life, and covenanted for him and his heirs, That he would ſave the Leſſee harmleſs from any claiming by, from or under him. The Leſſor dyed, and his wife brought a Writ of Dower againſt the Leſſee, and recovered; and the Leſſee brought an Action of Covenant againſt the heir. And it was adjudged againſt the heir, becauſe the wife claimed under her husband, who was the Leſſor: But if the woman had been mother of the Leſſor who demanded Dower, the Action would not have layen againſt the heir, becauſe ſhe did not claim by, from, or under the Leſſor. And ſo it was adjudged, *v.* 11. *H.*7. 7.*b.*

Trin. 21 *Iacobi, in the Kings Bench.*

426. SNELL and BENNET's Caſe.

A Parſon did contract with *A.* his Executors and Aſſigns, That for ten ſhillings paid to him every year by *A.* his Executors and Aſſigns, that he, his Executors or Aſſigns ſhould be quit from the payment of Tythes for ſuch Lands during his life, *viz.* the life of the Parſon. *A.* paid unto the Parſon ten ſhillings, which the Parſon accepted of; And made *B.* an Enfant his Executor, and dyed. The mother of the Enfant took Letters of Adminiſtration *durante minori ætate* of the Enfant, and made a Leaſe at Will of the Lands. The Parſon libelled in the Eccleſiaſtical Court for Tythes of the ſame Lands againſt the Tenant at Will; who thereupon moved for a Prohibition. *Dodderidge*, During the life of the Parſon the Contract is a foot; but the Aſſignee cannot ſue the Parſon upon this Contract, yet he may have a Prohibition to ſtay the ſuit in the Eccleſiaſtical Court, and put the Parſon to his right remedy, and that is to ſue here. This agreement is not by Deed, and ſo no Leaſe of the Tythes. The Parſon ſhall have his remedy againſt the Executor for the ten ſhillings, but not againſt the Tenant at Will: and the Executor hath his remedy againſt the Tenant at Will. *Crook*, 21 *H.*6. A Leaſe of Tythes without Deed is good for one, but not for more years, *v.* 16 *H.*7. And afterwards a Prohibition was granted.

Trin.

Trin. 16 Jacobi, in the Kings Bench.

427. PHILPOT and FEILDER's Case.

THe Parties are at issue in the Chancery, and a *Venire facias* is awarded out of the Chancery to try the issue; and the *Venire facias* was, *Quod venire facias coram &c. duodecim liberos & legales homines de vicineto de &c. quorum quilibet habeat quatuor lib. terræ, tenementorum, vel reddituum per annum ad minus, per quos rei veritas melius sciri poterit &c.* And it was moved in arrest of Judgment, That the *Venire facias* is not well awarded; for it ought to be *Quorum quilibet habeat quadraginta solidos terræ, tentorum vel reddit. per an. ad minus*, according to the Statute of 35 *H.*8.*cap.*6. which appoints that every one of the Jurors ought by Law to expend forty shillings *per annum* of Freehold, and it ought not to be *quatuor libras terræ &c.* according to the Statute of 27 *Eliz cap.*6. which Statute of *Elizabeth* doth not speak of the Chancery, but only of the Kings Bench, Common-Pleas, and the Exchequer, or before Justices of Assise. Before the Statute of 35 *H.* 8. no certain Land of Jurors was named in the *Venire facias*; but since the Statute of 35 *H.*8. it was *quadragint. solidos*, untill the said Statute of 27 *Eliz.* and now it is *quatuor libras* in the Kings Bench, Common-Pleas, and Exchequer. It was adjourned.

At another day the Case was moved again, That the *Venire facias* ought to be 40 *solidos &c.* according to the Statute of 35 *H.* 8. *cap.*6. And 10 *H.*7. 9. & 15 were vouched, That if a Statute appoint that the King shall do an act in this form, the King ought to do it in the same form and manner: So if a Letter of Attorney be to make a Bill in English, and the same is made in Latine, it is not good, although it be the same in form and matter. *Cook lib. Entries* 578. *Waldrons* Case is, That in the Chancery the *Venire facias* was but 40. but that Case was between 35 *H.*8. and 27 *Eliz. cap.*6. *Dodderidge* and *Haughton* Justices, It is a plain case, For the *Venire facias* ought to be according to 35 *H.*8.*cap.*6. becaus the Statute of 27 *Eliz. cap.*6. speaks nothing of the Chancery, *Quod nota.*

Trin.

Trin. 21 *Iacobi, in the Kings Bench.*

428. HEWET and BYE's Caſe.

IN an *Ejectione Firme* of a houſe in *Wincheſter*, the Ejectment was laid to be of a houſe which was *in auſtrali parte vici, Anglice* the High-ſtreet. *Ley* Chief Juſtice, If it had been *ex auſtrali parte vici*, then the South part had been but a Boundary: but here it is well laid. Then it was moved, That the *Venire facias* is *Duodecim liberos & legales homines de Winton*, and doth not ſay of any Pariſh in *Winton*. But notwithſtanding it was holden good: For *Dodderidge* Juſtice ſaid, That it is not like unto *Arundels* Caſe, *C. 6. part* 14. For there the Offence was laid to be done *in parœchiæ Sanctæ Margaret de Weſtminſter*, therefore the *viſne* ought to be of the Pariſh; but in this caſe it being laid generally in *Winton* it is ſufficient that the *viſne* come out of *Winton*. Judgment was given for the Plaintiffe.

Trin. 21 *Iacobi, in the Kings Bench.*

429 WATERER and MOUNTAGUE's Caſe.

A Man made a Leaſe for ſix years; and the Leſſor covenanted, That if he were diſpoſed to leaſe the ſaid lands after the expiration of the ſaid term of ſix years, that the Leſſee ſhould have the refuſal of it. The Leſſee within the ſix years made a Leaſe thereof to *J. S.* for 21 years. *Dodderidge, Haughton*, and *Ley* Chief Juſtice, The Covenant is not broken, becauſe it is out of the words of the Covenant. But *Dodderidge* ſaid, *Temp. E.* 1. *Covenant* 29. The Leſſee covenanted to leave the houſes, trees and woods at the end of the term in as good plight as he found them; and afterwards the Leſſee cut down a tree, that in that caſe the Covenant was broken, and the Leſſor ſhall not ſtay untill the end of the term to bring his action of Covenant, becauſe it is apparant that the tree cannot grow again and be in as good plight as it was when he took the Leaſe.

Trin.

Trin. 21 Iacobi, in the Kings Bench.

430. OWFIELD againſt SHIERT.

A Writ of Error was brought to reverſe a Judgment given in an Action of Debt; The Action of Debt was upon a *Conceſſit ſolvere, &c. pro diverſis ſummis pecuniæ*; and the opinion of the Court was, That Debt doth not lie upon *Conceſſit ſolvere pro diverſis ſummis*, &c. becauſe it is incertainty: But the ſame Term in another Caſe, *viz. Stacies* Caſe, That by Cuſtom of *London*, it was holden that Debt doth lie upon a *Conceſſit ſolvere pro diverſis ſummis*: And it was then ſaid, That in an Action upon the Caſe, it was good to ſay, That in conſideration *de diverſis ſummis Conceſſit ſolvere*: and ſo it hath been adjudged.

Trin: 21 Jacobi, in the Kings Bench.

HAWKSWITH and DAVIES Caſe. *Intratur.*

431. *Paſch. 19. Jur. Rot. 83.*

LEſſee for years of divers parcels of Lands, reſervant Rent, and for not payment a reentrie: The Leſſee aſſignes part of the Land to *A.* and other part to *B.* and keeps a part to himſelf: afterwards the Leſſee levies a Fine of all the Lands unto the uſe of the Conuſee and his heirs; afterwards the Leſſee paies the Rent for the whole unto the Conuſee, and afterwards the Rent becomes behind; and the Conuſee enters for the Condition broken, and made a Leaſe to the Plaintiffe, who thereupon brought an *Ejectione firme*; and all this matter was found by ſpecial Verdict: and it was moved, that by the aſſigning of the Leſſee of part of the lands to one, and part to another, that the Condition was gone and deſtroyed; but notwithſtanding, it was agreed by all the Juſtices, that the Condition did remain, and was not gone nor deſtroyed. And they ſaid that this Caſe was not like unto *Winters* Caſe, in *Dyer* 308, & 309. where the Leſſor did aſſigne over part of the Reverſion to one, and part unto another; for that in that Caſe the Leſſor by his own Act had deſtroyed the Condition, but in this Caſe it is the Act of the Leſſee,

Leſſee, and therefore no colour that the Condition be gone and deſtroyed. And ſo it was reſolved for the Plaintiffe, and Judgment given accordingly.

Trin. 21 *Jacobi, in the Kings Bench.*

432. KILLIGREW and HARPER's Caſe.

H*Arper* in conſideration of 100l. doth aſſume and promiſe to *Killigrew*, That the Lady *Weſton* and her Son ſhall ſell to *Killigrew* ſuch Lands, *Proviſo* that *Killigrew* ſuch a day certain pay to the ſaid Lady and her Son 2000l. At which time the Lady and her Son ſhall be ready to aſſure and convey to *Killigrew* the ſaid lands; And for want of payment of the ſaid 2000l. at the ſaid day, that *Killigrew* ſhall loſe the ſaid 100l. and that the Contract for the Land ſhall be void. *Killigrew* brought an Action upon the Caſe *ſur Aſſumpſit* againſt *Harper*, and all this matter was found by ſpecial Verdict. *Athow* Serjeant argued that the Action would lie, becauſe the Lady and her Son were to do the firſt act, *viz.* to make the Aſſurance. 22 *H.*6.57. Rent is reſerved upon a Leaſe for years in which are divers Covenants, and a Bond is given for the performance of all the Covenants within ſuch Indenture of Leaſe: the Rent is behind, the Bond is not forfeited unleſſe the Leſſor doth make a demand of the Rent, becauſe the Leſſor is to do the firſt act, *viz.* to demand the Rent. *Yelverton contr'* That the Action will not lie. The queſtion is, Of whoſe part is the breach? The *Aſſumpſit* is grounded upon the Conſideration, and not upon the Promiſe: The Jury find that *Killigrew* was not ready to pay the 2000l. and that the Lady and her Son were not ready to aſſure the land. The Agreement was (for which not time is expreſſed) That the Lady and her Son ſhould convey ſuch lands: Then the Agreement was, That *Killigrew* ſhould pay at ſuch a day certain, at which day the Lady ſhould be ready, *&c.* and if *Killigrew* made default of the payment of the 2000l. then he was to loſe the ſaid 100l. which he gave to *Harper* to procure the Bargain, and alſo that the Bargain ſhould be void. *Ley* Chief Juſtice, If *Killigrew* had paid or tendred the 2000l. at the ſaid day, and the Lady and her Son had not been ready at that time to have aſſured the lands, *Killigrew* ſhould have had an Action upon the Caſe for the 100l. and recovered damages: If the Lady had been to have done the firſt action, then the Action would have been maintainable; but in this caſe *Killigrew* is to do the firſt act, and therefore the Action will not lie. *Dodderidge*, If it had been inde-

finite, then the Assurance and Conveyance is to be before the Payment; but here the bargain is to pay the mony first. *Harper* promiseth to *Killigrew* in consideration of 100l. that *Killigrew* shall buy such lands; then comes the time of payment, and assurance of the land at that time shall be made; *Proviso*, that if he do not pay the 2000l. then *Killigrew* to lose the 100l. and the Contract to be void: so there are two penalties; so as of necessity the 2000l. must first be paid, for otherwise how can the Contract be void for not payment? For if the Conveyance shall be first made, then it was present before the mony paid, and so the clause *(viz.) Then the Contract to be void*, should be of no effect. *Haughton* Justice agreed. *Chamberlain* Justice, You have bound your self with a penalty, and the bargain ought to be performed as it was made. And so being made, that the mony should be first paid, at which time the conveyance shall be made; and for want of payment, that *Killigrew* should lose the 100l. and also the Contract to be void: The opinion of the whole Court was against the Plaintiffe, that the Action would not lie; and so Judgment was given *Quod nihil capiat per Billam*.

Trin. 21 *Jacobi*, *in the Kings Bench.*

433. Sir Arthur Gorge and Sir Robert Lane's Case.

AN Action of Debt was brought upon a Bond for not performance of Covenants. The Case was: *Lane* did marry with the daughter of *Gorge*; and in consideration of marriage, and also of 3000l. portion given in marriage by *Gorge*, *Lane* did covenant, That he within one year would make a Jointure of lands within *England* then of the value of 500l. *per annum* over and above all Reprises, to his said wife, so as Sir *Henry Yelverton* and Sir *John Walter* Councellors at Law should devise and advise. In Debt for the breach of these Covenants, *Lane* pleaded, That he did inform *Gorge* of lands which he was determined should be for her Jointure, but neither *Yelverton* nor *Walter* did devise the Assurance. *Paul Crook* did demur upon the Plea; and first shewed, That *Lane* did not give notice to *Yelverton* and *Walter*, as he ought to have done by law: For in this case it is not sufficient to give notice to *Gorge*, but the notice ought to be to the Councellors, otherwise how could they devise the assurance for her jointure? 2. Heer is no place named where the Notice was, for it is issuable whether he gave Notice or not; and then there being no certain place named, no *visne* can be upon it.

3. He

3. He doth not ſhew where the Lands are; for it might be (as in truth it was) the Lands were out of *England*, and by the Covenant they ought to be within *England*. 4. He doth not ſhew that the Lands were of the value of 500l. *per annum* over and above all Repriſes, as they ought to be by the Articles. 5. He ſheweth that they were his Freehold, but doth not ſhew that the lands were his lands of Inheritance of which a Jointure might be made. The opinion of the whole Court was, that the Exceptions were good, and that the Plea in bar was no good plea. *Dodderidge*, If the words had been (*Such as his Councel ſhall deviſe*) then the Notice ought to have been given to the party himſelf, and he is to inform his Councel of it, 6 *H.*7.8. But here two Councellors were named in certain, and therefore the Notice ought to be given to them, for he hath appointed Councellors. The whole Plea in bar is naught; For if he hath an eſtate in tail, then there ought to be a Fine in making of the Jointure; and if there be a Remainder upon it, then there ought to be a Recovery: So becauſe that *Lane* hath not informed the party what eſtate he had in the lands, they could not make the Aſſurance. *Ley* Chief Juſtice. Where a man is bound to make ſuch Aſſurance of lands as *J.S.* ſhall adviſe, here he need not ſhew his Evidences, but he ought to ſhew to the party what the land is, and where it lieth, and the Obligee is to ſeek out the eſtate at his peril: And then *J.S.* may adviſe the Aſſurance conditionally, *viz.* That if he hath Fee, then to have ſuch an aſſurance; and if an Eſtate in tail, then ſuch an aſſurance; and if there be a Remainder over, then to deviſe a Recovery. *Curia*, All the Errors are material.

The Bail for *Lane*, before any Judgment given againſt him, brought *Lane* into Court, and prayed that they might be diſcharged, and *Lane* taken into cuſtody. *Dodderidge* Juſtice ſaid, There is a difference betwixt *Manucaptors*, which are that the party ſhall appear at the day, for there the Court will not excuſe them to bring the party in Court before the day: But in caſe of Bail, there they may diſcharge themſelves if they bring the body of the Defendant into Court at any time before the Retorn of the 2. *Scire facias* againſt the Defendant: For when one goeth upon Bail, it is intended that he notwithſtanding that is *in cuſtodia Mariſcalli*; For the Declarations are in *cuſtodia Mariſcalli Marſchalſiæ*. *Quod nota*, ſo is the difference.

Trin. 21 Jacobi, in the Kings Bench.

434. Wheeler and Appleton's Caſe

AN Action upon the Caſe was brought for theſe ſcandalous words, viz. *Thou haſt ſtollen my Peece, and I will charge thee with ſuſpition*

of Felony: Which were found for the Plaintiffe. It was moved for the ſtaying of Judgment, That the Action was not maintainable: For the Declaration is *A Peece, innuendo* a Gun: And here the *innuendo* doth not do its part; for it might be a peece of an Oak, or a 22s. peece of Gold, which is commonly called a Peece; and in this Caſe the words may be intended ſuch a Peece. 17 *Jacobi* in the Kings Bench, betwixt *Palmer* and *Reve: Thou haſt the Pox, and one may turn his finger in the holes of his legs:* Adjudged that for theſe words the Action would lie, becauſe it cannot be meant otherwiſe then of the French pox. 41 *Eliz.* in the Kings Bench, the Defendant ſaid of the Plaintiffe, *Thou art forſworn, and thou haſt hanged an honeſter man then thy ſelf:* the Action did lie. For the firſt words, *Thou art forſworn,* no Action will lie, *C.*4. *part* 15. but the later words prove that it was in courſe of Juſtice, and that he was perjured. So in this Caſe, admitting that the firſt words will not bear an action, yet the later words make them actionable; For the firſt words ought to be meant of a thing which is Felony. *Heck's* Caſe, *C.*4. *part* 15. there it was adjudged for the Plaintiffe, although the firſt words would not bear action, yet the later words make them actionable. *I will charge thee with ſuſpition, or flat Felony,* an Action doth not lie, *Hecks* Caſe proves it. Another Councellor argued that the Action would not lie: The firſt words are not actionable; For ſo many things as there are in the world, ſo many peeces there may be, and here it might be a peece of a thing which could not be Felony. Betwixt *Roberts* and *Hill,* 3 *Jacobi* in the Kings Bench it was adjudged, *Roberts hath ſtollen my wood,* the words were not actionable; for it might be wood ſtanding, and then to cut and take it away it is not Felony, but Treſpaſs. *Ley* Chief Juſtice, *I charge thee with flat Felony,* If the words be ſpoken privately to a man no Action lieth for them; but if they be ſpoken before an Officer, as a Conſtable, or in a Court which hath conuſance of ſuch Pleas, then the Action will lie, for the party by reaſon of ſuch words may come into trouble: But if a man charge one with flat Felony, and chargeth the Conſtable with him, then an Action will not lie, becauſe it is in the ordinary courſe of Juſtice. *C.*4. *part* 14. If a man maketh a Bargain with another to pay him twenty Peeces for ſuch a thing, it ſhall be taken by common intendment twenty 22s. peeces of gold, which vulgarly are called Peeces. But to endite a man for 20 Peeces is not certain and therefore ſuch Indictment is not good; and the Action in our Caſe will not lie, for *(my Peece)* is an incertain word. *Dodderidge. Thou haſt ſtollen my Peece,* What is that? For we call 22s. in gold a Peece. You ought to tell it in certain: And here the *innuendo* will not make the ſcandal, but the words of ſcandal ought to proceed out of the parties own mouth; and an *Innuendo* cannot make that certain, which was uncertain in the words of the ſpeaker: And therefore the Action here will not lie. *Haughton* Juſtice, If the whole matter had been ſet forth in the Declaration,

ration, as to have ſhewed that the parties before this ſpeech had had ſpeeches of a Gun, then the Action in this caſe would have been maintainable; but here, the word (Peece) is incertain, and the Action will not lie. *Chamberlain* Juſtice, If the ſpeeches had been concerning a Gun loſt, then upon theſe words ſpoken the Action would have lien, but not as they are here ſpoken; For the two words there, ought to have been matter ſubſequent, as upon the charging with Felony, to have delivered him to an Officer. And ſo by the whole Court it was adjudged, *Quod querens nihil capiat per Billam.*

Trin. 21 *Jacobi, in the Kings Bench.*

435. Shoeter againſt Emet and his Wife.

THe plaintif being a midwife, the Defendants wife ſaid to the plaintif, *Thou art a Witch, and wert the death of ſuch a mans child, at whoſe birth thou wert Midwife.* In an Action upon the Caſe in Arreſt of Judgment it was moved, that the words were not actionable. *Hill* 15 *Jacobi*, in the Common Pleas: *Stone* and *Roberts* Caſe adjudged, That an Action upon the Caſe doth not lie for ſaying thou art a Sorcerer, 9 *Jac.* *Godbolds* Caſe in the Kings Bench, *Thou art a Sorcerer or an Inchanter.* 30 *Eliz.* betwixt *Morris* and *Clark*, for ſaying, *Thou art a Witch*, no Action will lie; for of the words Witch, or Sorcerer, the Common Law takes no notice; but a Witch is puniſhable by the Statute of 1 *Jacobi*, *cap.* 12. *Paſch.* 44 *Eliz.* *Lowes* Caſe, *Thou haſt bewitched my cattel, or my child*; there becauſe an Act is ſuppoſed to be done, an Action upon the Caſe will lie for the words. 1 *Jacobi*, Sir *Miles Fleetwoods* Caſe, He was Receiver for the King in the Court of Wards; and Auditor *Curle* ſaid of him, *Thou haſt deceived the King*: and it was adjudged, that an Action upon the Caſe would lie for the words, becauſe it was in his calling by which he got his living. *Chamberlain* Juſtice, Since the Statute 1 *Jacobi*, for calling one Witch generally an Action will lie; For, for the hurting of any thing, a Witch is puniſhable by ſhame, *viz.* Pillory in an open place. *Dodderidge* Juſtice, Thief or Witch will bear Action; and the reaſon of the Caſe before cited by the Councel is, becauſe that the common Law doth not take notice of a Witch: But puniſhment is inflicted upon a Witch by the Statute of 1 *Jacobi*, and by that Statute a Witch is puniſhable. *Trin.* 21 *Jacobi*; Betwixt *Mellon* and *Horn*, Judgment was ſtayed where the words were, *Thou art a Witch, and haſt bewitched my child*, becauſe that the words ſhall be taken in *mitiori ſenſu*, as thou haſt bewitched him with pleaſure. And in that ſenſe Saint *Paul* ſaid, *Who hath bewitched you, O Galatians!* That caſe was adjudged in the Common Pleas.

Trin.

Trin. 21 *Iacobi in the* Kings Bench.

436. KNOLLIS and DOBBINE's Case.

KNollis did assumē and promise *apud London*, within such a Parish that he would cast so much Lead and cover a Church in *Ipswich* in *Suffolk*, and one *Scrivener* promised him to give him 10*l.* for his costs and pains: *Scrivener* died, *Knollis* brought an Action upon the Case against *Dobbins* who was Administrator of *Scrivener*, and declared that he such a day did cast the Lead and cover the said Church, *apud London*. The Defendant pretended that the Intestator made no such promise, and it was found for the Plaintiffe: and in arrest of Judgment it was moved, That the Declaration was not good, by reason that the Agreement was to cover a Church in *Ipswich*, and he declared he had covered such a Church *apud London*, which is impossible, being 60 miles asunder; and so the Declaration is not pursuing the promise. *Dyer* 7 *Eliz.* 233. In Avowry for Rent upon a Lease for life, &c. That the Prior and Covent of &c. at *Bathe*, *demiserunt* Lands which was out of *Bathe*; it was void; for they being at *Bathe*, could not make Livery of Land which was out of *Bathe*. *Vi. Dyer* 270. The second Exception to the Declaration was, That the Commissary of the Bishop of *Norwich apud London*, did commit Administration of the Goods and Chattels of *Scrivener* to *Dobbins apud London*; which was said not to be good, because he had not power in *London* to execute any power which appertained unto him at *Norwich*. *Dodderidge* Justice, The plaintiffe declares that *apud London* he did cover the said Church, that is not good, and makes the Declaration to be insufficient, because it is not according to the promise. The place where the Commissary of the Bishop of *Norwich* did grant the Administration is not material; For if the Bishop of *Norwich* be in *London*, yet his power as to granting of Letters of Administration, and making of Deacons and Clarks in his own Diocese, doth follow the person of the Bishop, although his other Jurisdiction be Local, to which the Court agree. And it was adjudged that the Declaration was not good, and therefore Judgment was given *Quod querens nihil capiat per Billam.*

Trin. 21 *Iacobi, in the Kings Bench.*

437. BULLEN and SHEENE's Caſe.

Sheene brought a Writ of Error upon a Judgment given in the Common Pleas. The Caſe was, *Bullen* being a Commoner, intituling himſelf by thoſe whoſe Eſtate he had in the Land, brought an Action upon the Caſe againſt *Sheene*, becauſe he had digged clay in the land where the Plaintiffe had Common, and had carried away the ſame over the Common, *per quod* he loſt his Common, and by that could not uſe his Common in as ample manner as he did before. *Sheene* entitled himſelf to be a Commoner, and have common in the ſaid land alſo, and ſo juſtified the Entrie, and ſet forth a preſcription, That every Commoner had uſed to dig clay there, and the firſt iſſue was found for the Defendant *Sheene*, *viz.* that he was a Commoner; but the other iſſue was found for the Plaintiffe *Bullen*, *viz.* that there was no ſuch preſcription, That a Commoner might dig clay: And the Jury did aſſeſſe damages to the Plaintiffe generally; and the ſame was moved to be Error, becauſe that the Plaintiffe had not damage by carrying away of the clay, becauſe the ſame did not belong to him, for that he was but a Commoner; and ſo the Judgment given in the Court of Common Pleas was Erroneous. *Ley* Chief Juſtice, By the digging of a pit the Commoner is prejudiced, by the laying of the clay upon the Common the Commoner is prejudiced, and ſo the damages are given for the digging and carrying away of the clay, *per quod Commoniam ſuam amiſit*, and the damages are not given for the clay. *Chamberlain* Juſtice, If he had ſuffered the clay to lie by the pit, it had been damage to the Commoner. If the Owner of the ſoil plough up or maketh conyburies in the Land, an Action upon the caſe lyeth againſt him by the Commoner, for thereby the Common is much the worſe, and the Commoner prejudiced If the pit be deep, it is dangerous to the Commoner, and ſo a damage unto him, for it is dangerous leſt his cattel ſhould fall into it, and it will not ſuddenly be filled up again, and ſo no graſs there for a long time, and the longer, becauſe that which ſhould fill up the pit is carried away. *Haughton* Juſtice, The proceedings are Erroneous, both Plaintiffe and Defendant are Commoners, The wrong is in two points. Firſt, That the Defendant had with his cattell fed the Common: Secondly, That the Defendant had digged clay there, and carried the ſame away; The Defendant makes Title to both: Firſt he preſcribes to have Common there;

Secondly,

Secondly, That the Commoners by preſcription have uſed to have and dig clay there. The firſt point is found for the Defendant, and the laſt iſſue is found againſt the Defendant, and damages are given generally: All the queſtion is upon the Declaration *Cœpit & aſportavit* the clay, which implies a propertie and intereſt in the clay to be to the Plaintiffe. It is not ſaid that the clay was carried over the land; I conceive that the property of the clay is in iſſue, and the Commoner hath nothing to do with that: So damages being given to him for that which doth not belong unto him, I hold the Judgment to be Erroneous, and that it ought to be reverſed. *Dodderidge*, The Declaration is well enough, and of neceſſity it cannot be otherwiſe: Here the Plaintiffe challengeth nothing but Common; In an Action upon the Caſe there ought to be injurie and damage, which is the conſequent upon injurie; For an Action upon the Caſe will not lie for an injurie without damage. Here *Bullen* doth not complain for any thing but the loſs of his Common, which is the firſt wrong: The ſecond wrong is the digging of the pit, in the which his cattel may fall and periſh: The third wrong is, for carrying away of ſix loads of clay over the Common, which is a great detriment to the Common, to carrie it either by Carts or otherwiſe: and for theſe three wrongs he concludes his damages, *ratione cujus* he could not have his Common in as ample manner as before he was uſed to have it, and he doth not conclude any damage for the clay: Every one of theſe injuries doth increaſe the damages, and ſo it would have been if he had left the clay to lie upon the land by the pit, for thereby ſo much Common would have been loſt. Here he makes himſelf title only to the Common, and theſe Acts do increaſe the damages only. 2 *E.* 4. & 7 *E.* 4. Where one was unlawfully and falſly impriſoned, and being impriſoned, compelled to levie a Fine or make a Feoffment, or other Deed. In an Action of falſe Impriſonment the Jurie gave damages, by reaſon of his reſtraint of his Liberty, and increaſed them by reaſon of the levying of the Fine, or making the Feoffment or other Deed, which he then made. The Jurie found that he is not to have any clay, and *cœpit & aſportavit* doth not alter the Caſe; for that is a ſpecial Action of treſpaſs. And by three of the Juſtices againſt *Haughton*, the Judgment given in the Court of Common Pleas was affirmed.

Trin. 21 *Iacobi, in the Kings Bench.*

438.

C*Althrope* Councellor, cited this Caſe to have been adjudged, 25 *Eliz.* The husband ſeiſed in the right of his wife of Copyhold Land,

Land, made a Leaſe for years; and it was holden by the Court then, That by the death of the husband the forfeiture of the Copyhold was purged, and that the wife ſhould have the land again, notwithſtanding this forfeiture by the husband, by making a Leaſe for years without Licence: And the Court ſeemed to allow of the ſaid Caſe to be Law. And afterwards, this very Term the like Caſe came in queſtion in this Court, betwixt *Severne* and *Smith*, where in an *Ejectione firme*, a ſpecial Verdict found, That a Copyholder ſeiſed in the right of his wife, made a Leaſe for years; and it was a queſtion whether it were a forfeiture of the inheritance of the wife. *Hitcham* Serjeant ſaid it was no forfeiture: *Doddridg* Juſtice took this difference, Where a *Feme Sole* is a Copyholder, and ſhe takes a husband, who makes a leaſe for years without licence, the ſame is a forfeiture, becauſe it is her folly to take ſuch a husband as will forfeit her Land: But where a Copyhold is granted to a *Feme Covert*, and the husband maketh a Leaſe without Licence, in ſuch caſe it is no forfeiture; and ſo in the Caſe of a *Feme Leſſee* for life at the Common Law, againſt *Whitinghams* Caſe, *C.* 8. *part* 44. It was adjourned.

Trin. 21 *Iacobi, in the Kings Bench.*

439.

NOte, It was the opinion of all the Juſtices, and ſo declared, That if the Plaintiffe in an *Ejectione firme* doth miſtake his Declaration, That the Defendant in ſuch Caſe ſhall have his Coſts of the Plaintiffe, by reaſon of his unjuſt vexation.

Trin. 21 *Iacobi, in the Kings Bench.*

440.

FOur ſeveral men were joyntly Indicted for erecting and keeping of four ſeveral Inns in *Bathe*; It was moved that the Indictment was inſufficient, becauſe the offence of the one is not the offence of the other, like unto the Caſe in *Dyer* 19. Where two joyn in an Action upon the Caſe for words, 'tis not good, but they ought for to ſever in their Actions, becauſe the wrong to the one, is no wrong to the other. *Dodderidge* Iuſtice, One Indictment may comprehend ſeveral offences, if they be particularly laid, and then it is in Law ſeveral Indictments: It

may be intended that the Inns were lawfull Inns; for it is not laid to be *ad nocumentum*, and therefore not punishable; but if they be an anoyance and inconvenient for the Inhabitants, then the same ought particularly to appear, otherwise it is a thing lawfull to erect an Inn. An Action upon the Case lyeth against an Inn-keeper who denies lodging to a Travailer for his money, if he hath spare lodging, because he hath subjected himself to keep a common Inn. And in an Action upon the Case against an Inn-keeper, he needeth not to shew that he hath a Licence to keep the Inn.

If an Inn-keeper taketh down his Signe, and yet keepeth an Hosterie, an Action upon the Case will lie against him, if he do deny lodging unto a Travailer for his money; but if he taketh down his Signe, and giveth over the keeping of an Inn, then he is discharged from giving lodging. The Indictment in the principal case is not good, for want of the words (*ad Nocumentum*,) *Haughton* and *Ley* Iustices argued. *Ley*, If an Indictment be for an Offence which the Court *ex Officio*, ought to take notice to be *ad Nocumentum*, there the Indictment being general, *ad Nocumentum & contra Coronam & dignitatem*, is sufficient, without shewing in what it is *ad Nocumentum*. But for Inns, it is lawfull for to erect them, if it be not *ad Nocumentum*, &c. and therefore in such Indictments, it ought to be expressed that the erecting of them is *ad Nocumentum*, &c. and because in this Case there wants the words *ad Nocumentum*, the Indictment was quashed. *Vi.* The Lord *North* and *Prat's* Case before to this purpose.

Trin. 21 Iacobi, in the King's Bench.

441. Bridges and Nichols's Case.

THey were Indicted for the not repairing of such a Bridg, and the Indictment was, *debent & solent reparare pontem*, &c. It was moved that the Indictment was insufficient, because it is not alledged in the Indictment, that the the Bridg was over a Water, and no needfull that it be amended. Secondly, It did not appear in the Indictment, that at the time of the Indictment the said Bridg was ruinous and decayed. Thirdly, The Indictment is, that *Bridges* and *Nichols*, *debent & solent reparare pontem*, and it is not shewed that their charge of repairing of the same is *ratione tenare*. 21 *E.* 4. 38. Where it is said, That a prescription cannot be, that a common person ought to repair a Bridg, unless it be

be said to be by reason of his Tenure; but it is otherwise in case of a Corporation. For these Errors the Indictment was quashed by Iudgment of the Court.

Trin: 21 Jacobi, in the Kings Bench.

Intratur, Trin. 20. Rot. 1609.

442. Sir Thomas Lee and Grissel's Case.

Grissel brought an Action upon the Case against *Lee* in the Common Pleas, and shewed that *diu fuit, & adhuc seisitus existens* of a house &c. and he did prescribe that he and all those whose Estate he hath in the said house, &c. had used to have Common in the waste of *L.* and that *Lee* in *Jacobi*, made Coniburies in the waste, *quorum quidem premissorum* he lost his Common. The Action was brought 18 *Jacobi*, and Iudgment given in the Common Pleas for the Plaintiffe there: and thereupon a Writ of Error was brought in the Kings Bench, and it was assigned for Error,

First, That (*diu seisitus*) is not good, because it hath not any limitation of time, for it may contain as well forty years as one year: He laid the wrong to be 15 *Jacobi*, and doth not shew that at that time he was seised, for (*diu*) doth not express any certain time; and then it is like unto the case of Waste, where the Grantee of a Reversion brings an Action of waste, and doth not shew that he committed waste to his disinheresin, but doth not shew when the waste was done; for it might be that it was done betwixt the Grant and the Attornment, and then he had no cause to have waste; or otherwise it might be that the waste was done in the time of the Grantor, and then the Grantee had no cause of Action; But in such case he ought to have shewed that he was seised of the Reversion at the time of the waste done. 4 *E.* 4. 18. There Trespass was brought upon the Statute of *R.* 2. and the Writ was, That he did enter *in diversa terras & tenementa*, There it was holden that the Writ being insufficient, the Court should not make it good, because it is too general. In our Case it ought to have been, that he was (*diu*) *& adhuc est seisitus, Et sic seisitus*, that the Defendant did do the wrong.

Another Error was assigned because he doth not conclude, *quorum quidem premissorum prætextu*, he lost his Common; but he saies *quorum quidem premissorum* he lost his Common; and leaves out the word

(*prætextu*) which word ought to have been in the Declaration. The Action is brought three years after the wrong done, and he ought to have ſhewed, that he 15 *Jacobi* (which was the time of the wrong done) *fuit ſeiſitus, & diu ante fuit ſeiſitus in dominico ut de feodo.*

All before the clauſe, *quorum quidem, &c.* is but collection; and he ought to have concluded with a cauſe of grievance, *viz. quorum quidem premiſſorum prætextu,* he loſt his Common. 7 *H.* 7. 3. There it is ſaid that this word (*prætextu*) is a concluſion that the particular wrong doth contain, and doth affirm that which went before; but in this caſe the word (*prætextu*) is wanting, and a Seiſin firſt ought to be laid, and then *prætextu quorum* is good. *Vi. Bullen* and *Sheenes* caſe before, where the Plaintiffe firſt made him title to the Common, *viz.* that he was ſuch a time ſeiſed in Fee, *& adhuc ſeiſitus exiſtens*, that the Defendant did dig clay: *Vi. Brown* and *Greens* Caſe in the Common Pleas. 40 *Eliz.* Where a man pleaded a Feoffment and Livery, *Virtute cujus* he was ſeiſed in fee, and did not ſhew that he entred, and yet the ſame was good, becauſe the *Virtute cujus* was a good concluſion. *Ley* Chief Juſtice, (*diu*) doth not denote any time certain; If in a Caſe it had been *poſtea*, or *ſic inde ſeiſitus*, the Defendant did the wrong, then the Declaration had been good; but here is nothing to which (*diu*) may have reference: If he had ſaid, that he being (*diu ſeiſitus*) that the Defendant had ſuch a day done the wrong, it had been good.

Secondly, Here ought to have been either *quorum quidem premiſſorum ratione*, or *prætextu*, he loſt his Common: here the *Latine* is good, *viz. quorum quidem premiſſorum Commoniam perdidit*, but it is not good in Law. *Dodderidge* Juſtice, You ought to have coupled the damage and the wrong; and in this caſe there wants the coupling, for want of the word (*prætextu*) for the word (*prætextu*) is the application of the precedent matter: The matter of wrong is the making of the conyburies, by reaſon of which he loſt his Common: and the *quorum quidem* here hath not any ſenſe: The Declaration wants matter of form alſo; *diu fuit ſeiſitus & adhuc ſeiſitus exiſtens.* Might you not have purchaſed this Common after the wrong done by the making of the conyburies? for it doth not appear otherwiſe by the Declaration; for as well as (*diu*) may comprehend forty years, ſo it may but one moneth. If it had been (*diu ſeiſitus & ſic ſeiſitus*) that he made the conyburies, then the Declaration had been well; but as this caſe is, it is not good. *Haughton* Juſtice, Your Action ought to have contained your matter of time, as well as your matter of wrong. (*Diu*) includes no certainty of time; and *quorum quidem premiſſorum, &c.* is a ſpeech without ſenſe. If a man maketh title to have Common *pro omnibus averiis*, and the word (*ſuis*) is omitted, it is not good.

Ley Chief Juſtice, here the wrong and damage are not knit together by theſe words; and it might be that in this caſe he had loſt his Common

Common by ſome other means: For he doth alleadge that he loſt his Common; but how he loſt it, that doth not appear to us. If he had ſaid, *Virtute cujus*, or *per quod*, or *ratione cujus* he had loſt his Common, then the Declaration had been certain, and had been well enough: But here it being incertain, both in the *Seiſitus*, and alſo in the alleadging the damage, The Judgment given in the Court of Common-Pleas for theſe Errors was reverſed.

Trin. 21 *Iacobi, in the Kings Bench.*

443. Pye and Bonner's Caſe.

AN Information was in the Common-Pleas by *Pye* againſt *Bonner*, for buying of Cattel & ſelling of them again in the ſame Market, againſt the Satute. Which was found againſt the Defendant; and the Judgment was entred *Quod ſit in miſericordia*, whereas it ought to have been *Capiatur*, being upon an Information; For it is a Contempt, and puniſhable by Impriſonment. And in this Caſe upon a Writ of Error brought in the Kings Bench, by the opinion of the whole Court the Judgment was reverſed.

Trin. 21 *Jacobi, Intratur Hill.* 20 *Jac. Rot* 137. *in the Kings Bench.*

444. Kite and Smith's Caſe.

ONe Recovered by Erronious Judgment; and the Defendant did promiſe unto the Plaintiffe, That if he would forbear to take forth Execution, that at ſuch a day certain he would pay him the debt and damages. And Action upon the Caſe was brought upon that Promiſe. And now it was moved by the Defendants Councel, That there was not any Conſideration upon which the Promiſe could be made, becauſe the Judgment was an Erronious Judgment. It was adjourned. But I conceive that becauſe it doth not appear to the Court but that the Judgment is a good Judgment, that it is a good Conſideration: Otherwiſe, if the Judgment had been reverſed by a Writ of Error before the Action upon the Caſe brought upon the Promiſe; for there it doth appear judicially to the Court, that the Judgment was Erronious.

Trin

Trin. 21 *Jacobi, in the Kings Bench.*

445. TOTNAM and HOPKIN's Caſe.

AN Action upon the Caſe was brought upon an *Aſſumpſit*: And the Plaintiff did declare, That in Conſideration of *&c.* the Defendant 1 *Martii* did promiſe to pay and deliver to the Plaintiffe 20 Quarters of Barley the next Seed-time. Upon *Non Aſſumpſit* pleaded it was found for the Plaintiffe. It was moved for the Defendant, That the Plaintiffe ought to have ſhewed in his Declaration when the Seed-time was, which he hath not done. But it was anſwered, That he needeth not ſo to do, becauſe he brings his Action half a year after the Promiſe, for not payment of the ſame at Seed-time, which was between the Promiſe and the *Aſſumpſit*. *Dodderidge* Juſtice, If I promiſe to pay you ſo much Corn at Harveſt next, If it appeareth that the Harveſt is ended before the Action brought, it is good without ſhewing the time of the Harveſt, for it is apparent to the Court that the Harveſt is paſt: And here the Action being brought at *Michaelmas*, it ſufficiently appears that the Harveſt is paſt. And Judgment was given for the Plaintiffe.

Trin. 21 *Iacobi, Intratur Hill.* 17 *Iacobi, Rot.* 652. *inter* Hard & Foy, *in the Kings Bench.*

446. KELLAWAY's Caſe.

IN an *Ejectione Firme* brought for the Mannor of *Lillington* upon a Leaſe made by *Kellaway* to *Foy*, It was found by a ſpecial Verdict, That *M. Kellaway* ſeiſed of the Mannor of *Lillington* in Fee, holden in Soccage, did deviſe the ſame by his Will in writing in theſe words, *viz. For the good will I bear unto the name of the* Kellawayes, *I give all my Lands to* John Kellaway *in tail, the Remainder to my right Heirs, ſo long as they keep the true intent and meaning of this my Will. To have to the ſaid* John Kellaway *and the heirs of his body, untill* John Kellaway *or any of his iſſues go about to alter and change the intent and meaning of this my Will. Then, and in ſuch caſe it ſhall be lawfull to and for* H. Kellaway *to enter and have the Land in tail with the like limitation.* And ſo the Lands was

put

put in Remainder to five ſeveral perſons, the Remainder to the right heirs of the Deviſor. *M. Kellaway* dyed without iſſue, *John Kellaway* is heir, and entred and demiſed the ſame to *R. K.* for 500 years, and afterwards granted all his eſtate to *Hard.* Afterwards *John Kellaway* did agree by Deed indented with *W. K.* to levy a Fine of the Reverſion to *W.* and his heirs. *H. Kellaway* entred according to the words of the *Proviſo* in the Will, and made the Leaſe to *Foy*, who brought an *Ejectione Firme* againſt *Hard.* And whether *H. Kellaway* might lawfully enter or no was the Queſtion. It was objected, That in the Caſe there is not any Forfeiture, becauſe the Fine was without proclamations, and ſo it was a Diſcontinuance only. The firſt Queſtion is, If the Remainder doth continue: The ſecond is, If it be a Perpetuity, or a Limitation. *John Kellaway* is Tenant in tail by Deviſe, untill ſuch time as *John Kellaway* or any of his iſſues agree or go about to alter or change the eſtate tail mentioned in the Will; with *Proviſo* to make Leaſes for 21 years, 3 lives, or to make Jointures: Then his Will is, That it ſhall be lawfull for *H. K.* to enter and to have the Land with the ſame limitations. If it be a Perpetuity, then it is for the Plaintiffe; but if it be but a Limitation, then it is for the Defendant. The Fine was levied without proclamations, and *H. K.* entreth for the Forfeiture.

Damport, It is no Perpetuity, but a Limitation, which is not reſtrained by the Law as Perpetuities are, Untill ſuch time as *&c.* ſhall diſcontinue *&c.* The Jury find an Agreement by Indenture: The act which is alleadged to be the breach, is, *Concluſivit & agreavit*, not to levy a Fine with proclamations, but to levy a Fine without proclamations, which is but a Diſcontinuance. *Yelverton*, If the Fine had been with proclamations, then without doubt he in the Remainder during the life of him who levied it had been barred. The Deviſe was, To have to them and to the heirs of their bodies, ſo long as they and every of their iſſues do obſerve, perform, fulfill and keep the true meaning of this my Will touching the entailed Lands in form following, and no otherwiſe. And therfore I *M. Kellaway* do deviſe unto *John Kellaway* & the iſſue of his body the Remainder *&c.* To have to the ſaid *John Kellaway* and the iſſue of his body untill he or any of his iſſue ſhall go about to conclude, do, or make any act or acts to alien, diſcontinue, or change the true meaning of this my Will. That then my Will is, and I do give and bequeath to *H. K* in tail, And that it ſhall be lawfull for him the ſaid *H. K.* or his iſſue to enter immediately upon ſuch aſſent, concluſion, or going about to conclude *&c.* And that *H. K.* and his iſſue ſhall have it untill he or any of them go about *&c.* *C. 9 part*, *Sundayes* Caſe, 128. where it was reſolved, That no Condition or Limitation, be it by act executed, or by limitation of an Uſe, or by a Deviſe, can bar Tenant in tail to alien by a common Recovery, *v. C. 3. part acc.* The Caſe was not reſolved, but it was adjourned to another day to be argued, and then the Court to deliver their opinions in it. *Trin.*

Trin. 21. Intratur Trin. 20 Jacobi, Rot. 811. in the Kings Bench.

447. KNIGHT'S Caſe.

IN this Caſe *George Crook* ſaid, That Land could not belong to Land: yet in a Will, ſuch Land which had been enjoyed with other, might paſs by the words *cum pertinaciis*. As where *A.* hath two houſes adjoyning, *viz.* the *Swan* and the *Red-Lyon*; and *A.* hath the *Swan* in his own poſſeſſion, and occupieth a Parlour or Hall (which belongs in truth to the *Red-Lyon*) with the *Swan*-houſe, and then leaſeth the *Red-lyon* houſe, and then by his Will deviſeth his houſes called the *Swan*; The rooms of the *Lyon* which *A.* occupied with the *Swan* ſhall paſs by the Deviſe, although of right thoſe rooms do belong to the *Lyon*-houſe. *Paſc. 36 Eliz. Ewer* and *Heydon's* Caſe. A man hath a houſe and divers lands in *W.* and alſo a houſe and lands in *D.* And by his Will he deviſeth his houſe and all his lands in *W.* & *D.* there the houſe which is in *D.* doth not paſs, for his intent and meaning plainly appears that his houſe in *D.* doth not paſs: But if he had deviſed all his lands in *W.* and had not ſpoken of the houſe, the houſe had paſſed. A Caſe was in the Common-Pleas betwixt *Hyam* and *Baker*: The Deviſor had two Farms, and occupied parcel of one of the Farms with the other Farm, and deviſed the Farm which he had in his poſſeſſion; The part of the other Farm which he occupied with it, did paſs with the Farm deviſed.

Dodderidge Juſtice, The Deviſe is in the Caſe at Bar: All his Farm called *Locks* to his eldeſt Son, and all his Farm called *Brocks* to his younger Son; And the Land in queſtion was purchaſed long after that the Deviſor purchaſed *Brocks*; but that Land newly purchaſed was not expreſly named in the Will, and therefore it ſhall diſcend to the heir, *viz.* the eldeſt Son. Land is not parcel of a houſe, and in ſtrictneſs of Law cannot appertain to a houſe: Yet Land is appertaining to the Office of the *Fleet* and the *Rolls*; but that is to the Office, which is in another nature then the Land is. For the Land newly purchaſed, (the Jury did not find the ſame to be uſually occupied with *Brocks*) it ſhall not paſs with *Brocks*, although it be occupied together with *Brocks*. I do occupie ſeveral Farms together, and then I deviſe one of the Farms called *D.* and all the lands to the ſame belonging; the other Farms ſhall not paſs with it, although they be occupied all together. *Haughton* Juſtice, What time will make lands to belong unto a houſe? All the profits

ſits of the lands uſed with the houſe for a ſmall time will ſerve the turn. *Ley* Chief Juſtice, There are two manner of belongings; One belonging in courſe of Right, and another belonging in caſe of Occupation. To the firſt belonging there ought to be Preſcription, *viz.* time out of mind: But in our Caſe, Belonging doth borrow ſome ſenſe from occupying for a year, or a time; And then another year to occupie it will not make it belonging in the later ſenſe. In ſtrictneſs of Law, Land cannot be ſaid to belong to a houſe, or land; but in vulgar reputation it may be ſaid belonging: And in ſuch caſe, in caſe of grant, the Land will not paſs as appertaining to Land, *C.* 4. *part. Terringham's* Caſe. But in our Caſe, it is in caſe of a Will. Uſually occupied, is not to be meant time out of mind. Here other lands were belonging to *Brocks*; and ſo the words of the Will are ſatisfied. But it might have been a Queſtion, if there had been no other lands belonging to it. *Dodderidge* Juſtice, If the Deviſor had turned all the profits thereof to *Brocks*, then it had paſſed by the Will. *Ley* Chief Juſtice, This occupying of it promiſcuouſly doth make it belong to neither.

At another day, *Ley* Chief Juſtice ſaid, Here is nothing which makes it appear to us that this Land doth belong to *Brocks*: For the Jury find not that it was occupied either with *Brocks* or *Locks*; and ſo this Land belongs to neither of them. *Dodderidge*, There is not any Queſtion in the Caſe: It is not found that it doth belong; And then we muſt not judge it belonging. The ground of this Queſtion ariſeth out of the matter of fact; and it ought to be found at the leaſt, that it is appertaining in Reputation. *Haughton*, The Jury find that *Knight* was ſeiſed of *Brocks* and of lands belonging to it, And that he was ſeiſed of *Locks* and of lands belonging to that, And laſtly they find that he was ſeiſed of this Land in queſtion, but they do not find that it was any wayes belonging to *Brocks* or *Locks*. It was adjudged for the Plaintiff, and that the Land did not paſs by the Deviſe, but that it did diſcend to the heir.

Trin. 21 *Jacobi, in the Kings Bench.*

448. Sely againſt Flayle and Farthing.

IN an *Ejectione Firme* the Verdict was found for the Defendant. Three of the Jurors had Sweet-meats in their pockets; and thoſe three were for the Plaintiffe, untill they were ſearched and the Sweet-meats found with them, and then they did agree with the other nine, and gave their Verdict for the Defendant. *Haughton* Juſtice, It doth not appear that

 theſe

theſe Sweet-meats were provided for them by the Plaintiffe or Defendant; and it doth not appear that the ſaid three Jurors did eat of the Sweet-meats before the Verdict given: And ſo I conceive there is not any cauſe to make void the Verdict given; but the ſaid three Jurors are fineable. *Dodderidge* Juſtice, Whether they eat or not, they are fineable for the having of the Sweet-meats with them, for it is a very great miſdemeanour. And now we cannot tell which of the Jurors the three were; and becauſe it was not moved before the Jurors departed from the Bar, it is now too late to examine the Jurors, for we do not know for which three to ſend for. The nine drew the three which had the Sweet-meats to their opinions, and therefore there is no cauſe to ſtay Judgment: But if the three Jurors had drawn the nine other to them, then there had been ſufficient cauſe to have ſtayed the Judgment; but as this caſe is there is no cauſe. And therefore *per Curiam* Judgment was given for the Defendant according to the Verdict.

Trin. 21 Iacobi, in the Kings Bench.

449.

NOte, It was vouched by *George Crook*, and ſo was alſo the opinion of the whole Court, That by way of Agreement Tythes may paſs for years without Deed, but not by way of Leaſe without a Deed. But a Leaſe for one year may be of Tythes without Deed.

Trin. 21 Iacobi, in the Kings Bench.

450.

THe Plaintiffe recovered in Debt in the Kings Bench, and a *Capias ad Satisfaciendum* was awarded; and immediately upon the awarding of the *Capias* the Defendant dyed. *Quare* if in ſuch caſe an Action of Debt lieth againſt the ſpecial Bail. (The Executors having nothing, a *Scire facias* doth not lie againſt the Bail.) And in the Common-Pleas in that caſe the Court was divided, two Judges being againſt the other two Judges. *Ideo quære.*

Trin. 21 Jacobi, in the Kings Bench.

451. LEONARD'S Caſe.

IN a *Scire facias* to have Execution of a Recognizance, the Caſe was, That a ſpecial *Supplicavit* for the Peace was directed out of the Chancery to *A* and *B.* Juſtices of the Peace, and to the Sheriffe of the County of *&c.* to take a Recognizance of *L. M.* & *N.* for the Peace and good behaviour; and the Commiſſion was to *A. B.* and the Sheriff, *& cuilibet eorum.* The *Supplicavit* was delivered to the two Iuſtices, who took a Recognizance from *L.* but *M.* & *N.* could not be found: The Sheriffe was afterwards out of his Office, becauſe his year of Sheriffwick expired. The new Sheriffe made a Retorn, That *M.* & *N. non ſunt inventi in balliva mea*; And alſo Retorned, That *A.* & *B.* had taken a Recognizance of *L.* as appeareth *per quandam ſchedulam huic annex. in hæc verba &c.* This Caſe was argued, and 21 *H.*7. 20.& 21. vouched, That if the Writ be firſt delivered to the Sheriffe, then he only is for to execute the Writ, and retorn the *Supplicavit*: But if it be firſt delivered to the Iuſtices, then they ought to execute it and retorn it. 9 *E.* 4. 31. A *Supplicavit* is a Iudicial Writ, and cannot be executed by a Deputy; but a Miniſterial Writ may be executed by a Deputy. In this caſe the ſucceeding Sheriffe did retorn the Writ, and it was not directed unto him: And the ſame being delivered to the Chancellor, whether the ſame ſhould be a Record or not was the Queſtion. 4 *H.*7. 17. Debt was brought upon an Obligation; The Kings Serjeant prayed the Bond for the King, becauſe that the Plaintiffe was a perſon Outlawed.

Bryan Iuſtice, You ought to bring a Writ of Detinue to recover the Bond, which is a legal courſe for the King: And ſo in this caſe here is no Record for the King, becauſe the Recognizance comes not in by a legal courſe, *viz.* a lawful Retorn; for it was retorned by the new Sheriffe, and alſo by him who did not execute the Commiſſion. *Heath* ſaid cleerly, There was no Record for the King; and vouched 21 *H.*7. 20, 21. Note the whole Caſe there. 1. Where it is ſaid, *In caſu ſuperiori ipſe Juſticiarius qui primo illud breve de Supplicavit recepit, tota executione ejuſdem Brevis tantummodo tenetur, & reliqui ſociorum ſuorum tangent. dictum Breve exonerentur, & Juſticiarius hanc recipiens nomine ſuo proprio illud retornabit.* And in our Caſe it was directed to the Sheriffe and Iuſtices; and being delivered to the Iuſtices, the Sheriffe had not to do to make Certificate of it, and in this caſe he is but as a private

man. This ſuit is a *Scire facias* to have Execution upon the ſaid Recognizance. A *Dedimus poteſtatem* is directed to two, and one of them doth execute it; the other cannot certifie it, for the Execution of it ought to be upon his own knowledge. A Record taken by one cannot be certified by another; for if it be, it is not any Record upon which a *Scire-facias* can be awarded. In our Caſe, the Juſtices made the Record, and the Sheriffe did certifie it.

Ley Chief Juſtice, When the Recognizance is put to writing, or Notes of Remembrance taken of the Recognizance before the Commiſſioners, it is immediately a Record. One takes Notes of a Recognizance, and dyeth. He to whoſe hands the Notes come may certifie the ſame, for it is a perfect Record by the taking of the Notes of Remembrance: But that is to be underſtood when no Writ is directed to Commiſſioners, but when a Juſtice takes is. In our Caſe the Sheriffe may retorn the Writ *ex officio*, and alſo retorn, That *executio iſtius brevis patet in quadam ſchedula annexa*. And it doth not appear but that the now Sheriffe was at the Execution of this Commiſſion: But admit that he was not, yet now the Writ being retorned into the Chancery, your pleading and taking iſſue upon another matter hath made it a good Record: And therefore I hold that the Judgment ought to be given for the King according to the Verdict. *Haughton* Juſtice, Judgment cannot be for King: If the Record doth not come duly into the Chancery according to courſe of Law, it is not any Record upon which there can be any Procution. If a Judge take a Fine and dyeth before it be certified, a *Certiorari* ought to be directed to the Executors of the Judge, *v.* 2 *H.* 7. 10: but the *Certiorari* ought not to be to a ſtranger. If two Iuſtices of Peace have Commiſſion to take a Recognizance, and one of them taketh it and dyeth, the *Certiorari* muſt be to his Executors, and not to the other Iuſtice. In this Caſe the Record came into the Chancery by undue courſe: The Commiſſion was ſeveral, *Cuilibet eorum*; and thoſe who took upon them the Execution thereof are now made Officers by the expreſs words of the Writ; and it is not ſo here retorned, and therefore Iudgment ought to be againſt the King. A *Dedimus poteſtatem* is directed to four to take a Fine of Lands in ſeveral Counties: Two of them take it in one County, and they certifie it, and the two other take it in another County, and they certifie it: None of the Certificates are good.

Dodderidge Iuſtice, Iudgment ought to be againſt the King. There are two Queſtions in the Caſe. 1. Whether the Sheriffe, as this Caſe is, may onely make the Retorn. 2. Admitting that he cannot, but the ſame being retorned, and the Chancery accepting of it, and ſending it to this Court, whether we can damn the Record. 1. This is a ſpecial Recognizance upon the grievance of the party; and by the Kings Commiſſion they are made eſpecial Iudges in this caſe: And when the party who

who ſues delivers the ſame to the two Juſtices, the Sheriff cannot entermeddle therewith; for then the Juſtices ought to retorn the Recognizance by vertue of that Commiſſion. 21 *H.* 7. 20, 21. there the Caſe is direct in the point, That they to whom the Writ is firſt delivered, they only are to execute it, and retorn it; for they only have power by vertue of the ſpecial Commiſſion. The Writ was againſt three, and two of them are not to be found, The Sheriff cannot retorn *Non ſunt inventi*, for the two by force of this Commiſſion: and he is not to make his Retorn as a Miniſter or Officer to the other, becauſe the Writ is Judicial. If a Challenge be to the Sheriff and Coroners, and proceſs is directed to *Eſliors*; they are to execute the proceſs as particular Officers, by vertue of the Writ, and they are to retorn the ſame, and not the Sheriff, becauſe their authority is by vertue of a ſpecial Writ. To the 2. point it hath been ſaid, That the Record is in the Chancery, and the partie hath pleaded to it to iſſue, and it is now ſent into this Court, and now fault is found with it, but not before.

Though all this be ſo, yet we cannot accept of it here, if it have not due proceedings: If proceſs be directed to the Coronors for Challenge to the Sheriff, and then a new Sheriff is made, againſt whom there is no cauſe of challenge, yet the Coronors muſt execute and finiſh the proceſs, and not the new Sheriff; for the Law will not endure that Officers do make a mingling of their Offices. *Vi.* 13 *E.* 4 & 10 *E.* 3. By *Hill* and *Herle*. For Trials out of the Chancery: the Chancery and Kings Bench are but as one Court, and if the Record come not in duely as it ſhould, the Court was never well ſeiſed of the Record. *Ley* Chief Juſtice, The coming of the Writ to the hands of one or two of the Commiſſioners, ſhall not ſtay the Commiſſion, but the receipt of the one of them, is the receit of them all having notice of it; and the others may joyn with him to whom the Commiſſion is delivered: So it is in all caſes, every one of the Commiſſioners are intereſſed therein upon notice, and not he only to whom the Commiſſion is delivered. If one Juſtice of peace taketh a Recognizance, and dieth before it be certified, the *Certiorari* ſhall be directed to the other Juſtice to certifie it, if it come to his hands, and he may retorn the Recognizance, and it ſhall not be directed to the Executors of the Iuſtice, who have not the Recognizance; for the *Certiorari* is but the hand for the Court to receive it, for otherwiſe the King might loſe the benefit of the Recognizance: And in our Caſe the Sheriff by a ſpecial Commiſſion hath Authority to take the Recognizance, and to retorn it upon Record. One may do part of the Office, as to make and take the Recognizance, and the other may retorn it; but one cannot execute a thing in part, and another in another part; the taking of the Recognizance by the two Iuſtices, doth exclude the Sheriff from medling with the taking or making of it, but it doth not hinder him but that he may retorn it well enough; and the

VVrit

Writ or Commiſſion is general, *Vicecomiti*, which may extend as well to the new Sheriff as to the old Sheriff. The Caſe was adjourned: for by two Iudges, the *Supplicavit* and *Recognizance* were not well retorned by the new Sheriff; but *Ley* Chief Juſtice was againſt them. *Quære.*

Trin. 21 *Iacobi in the* Kings Bench.

452. RANDAL and HARVEY's Caſe.

THe Caſe was, *Harvey*, in conſideration that *Brown* might go at large, who was arreſted at the ſuit of *Randal*, gave his word that *Brown* ſhould pay the money at ſuch a day certain; and for non-payment of the money, *Randal* brought his Action againſt *Harvey*, and being at iſſue upon the promiſe, it was found for the Plaintiff.

Yelverton moved in arreſt of Iudgment, that the arreſt of *Brown* was not warrantable by Law; and that being the conſideration, the Promiſe was void: and he ſaid, A man cannot make another his Attorney to arreſt another man without Deed, neither can the Sheriff give Warrant to his Baylie to arreſt another without a Deed ſealed. And in the principal caſe, *Randal* gave one a VVarrant to *T.* being an Attorney, to demand, receive, and recover money from *Brown*; but it did not appear by the Declaration, that the VVarrant was by Deed in writing. *George Crook* ſaid that it was no Exception; For, be the Arreſt lawfull or unlawfull, yet he ſaid the conſideration was good.

Randal gave to his Attornie Authority to receive, demand, and recover, thereby he gave him Authority to arreſt *Brown*, becauſe the arreſt is incident to the Recoverie. 2 *R.* 2. *Grants*, One grants to another, all the Fiſh in his Pond, he may fiſh with Nets: For when he giveth the principal, the incidents do follow. VVhen *Brown* had yielded himſelf to be lawfully arreſted; and then *Harvey*, in conſideration that *Brown* might go at liberty, made the promiſe, the ſame was good: The Declaration was, That *Randal* gave Authority to *T.* being an Attorney, to receive, deliver, and recover the Debt, by force of which Letter of Attorney *T.* did arreſt *Brown*; and ſo in the Declaration it is ſhewed that the Warrant was a Letter of Attorney. *Yelverton*, 34 *H.* 6. In Debt upon a Recoverie in the 5 *Ports*: If a man will declare and ſet forth a thing in particular, if he faileth in any thing, it overthroweth his Action; But if a man alledge generally a Recoverie in the 5 *Ports*, then the ſame is good enough. I agree the Caſe of 9 *E.* 4. Where a man

man gives leave to another to lay Pipes of Lead through his Lands, that he may dig the ground to lay them there, becauſe it is incident to it. And I agree the Caſe of 2 *R.* 2. for there the one thing cannot be done without the other, *viz.* the Fiſh cannot be taken without Nets; but in this Caſe, the partie might have come by his money by *Outlawrie*, and ſo there needed no arreſting of the partie.

Ley Chief Juſtice, If he had declared *debito modo arreſtatus*, it had been generally good, and it muſt be intended that the Arreſt was by vertue of a Letter of Attorney: For he alledges that he gave him Authority to recover; and then he ſhall have and uſe the means to recover, as to arreſt the partie, or to *outlaw* him. *Haughton* Juſtice, Things incident and acceſſary may be comprehended in the principal, as to dig for to mend the Pipe. 9 *E.* 4. Becauſe he grants him leave to lay them in the ground; and ſo he may dig, and juſtifie the ſame for the amending of the pipes. If *A.* Licence *B.* to hunt in his Park, and to kill a Deer, yet *B.* cannot carry away the Deer, for that is not incident to the thing granted. In this caſe the Declaration is not good, for he ought to ſet forth that the VVarrant was by Deed in writing; and yet one may plead a Judgment generally, *quod debito modo* he recovered, and the ſame is good; but here in this caſe he ought to ſet forth and ſhew the VVarrant and Authority by which he was arreſted; but not ſo in the caſe of pleading of a Judgment, becauſe there it doth refer to matter of Record. *Dodderidge* Juſtice, The promiſe was to free him from the arreſt, and if the arreſt was unlawfull, then there was no conſideration, and ſo by conſequent the promiſe was void: It ought to be ſhewed that *Brown* was lawfully arreſt; and if the arreſt had been only matter of inducement, and no cauſe of the Action, then it had been ſufficient to have ſaid *debito modo arreſtatus*, but in this caſe the arreſt it ſelf is material; and the Plaintiff hath ſhewed that the arreſt was (*per debitum legis Curſum*) by vertue of a VVarrant of Attorney, and it doth not appear but that it was a Letter of Attorney to deliver Seiſin: and ſo becauſe the Plaintiff hath not ſhewed the arreſt to be lawfull, there was no good conſideration whereupon to ground the promiſe, and ſo no cauſe of Action.

Yelverton took another Exception, *viz.* That the Plaintiff doth not ſhew that the arreſt was *per breve Regis*, or how it was. *Chamberlain* Juſtice, If the partie had brought an Action of falſe Imprisonment, this Plea had not been good, and in this caſe there appeareth to be no good conſideration, for it doth not appear that it was a lawfull arreſt, for no time is ſhewed, nor no place, nor how it was done. *Ley*, The Jury have found it to be *debito modo*, and in this caſe the arreſt is not in queſtion by matter of Plea, but by Declaration, and the finding of the Jury hath made the ſame to be good. *Dodderidge* Juſtice, If *A.* be indebted to *B.* *B* may have either an Action upon the Caſe, or an Action of

Debt.

Debt for the money; but in an Action of Debt, unleſs it be in *London* by the Cuſtome, *Conceſſit ſolvere* is no good Plea: But in an Action upon the Caſe, the Plaintiff may declare, That whereas *A.* was indebted to him in a certain ſum of money, that *Conceſſit ſolvere*, and there he needeth not to ſhew how he became indebted unto him, as he ought to do in an Action of Debt.

Chamberlain Juſtice, If a man be arreſted upon a void arreſt, and another in conſideration of ſetting him at liberty doth promiſe to pay the Debt, there it is a thing Collateral, and an Action will lie: But if the arreſt cometh in queſtion, then in that Caſe the Action will not lie, but he may avoid it by ſpecial pleading; for the arreſt being unlawfull, there is no conſideration whereupon to ground the promiſe. *Yelverton*, If the Plaintiff had ſaid in the Declaration, That in conſideration that he would forbear his Debt, that he would pay, &c. there for not payment, the Action would have been maintainable: but in this caſe, the conſideration is the ſetting him at Liberty, and ſo it is Collateral. At another day, *Ley* Chief Juſtice, If I arreſt a man generally, and the party promiſe for the diſcharge of the arreſt, to give 20*l.* it is no good conſideration, if I do not ſhew that he had cauſe to arreſt him; For if the arreſt be upon an ill ground, the conſideration is not good. *Haughton* Juſtice, To make it a lawfull arreſt, the partie ought to ſhew the Proceſs, the Letter of Attorney, and the proceedings; and an agreement afterwards made, will not make the arreſt good. *Legitimo & debito modo arreſtatus* is too general, for he ought to ſhew how he became indebted to him: For if I be bounden to make unto *I. S.* a lawfull aſſurance or conveyance of ſuch Lands, it is too general for me to ſay that I have made him a lawfull aſſurance; but I ought to ſhew what manner of aſſurance it is, that the Court may judge whether it be a lawfull and good aſſurance or not. In *Mich.* Term followinging 21 *Jacobi*, It was adjudged, That Judgment ſhould be arreſted.

Trin. 21 *Jacobi, in the Kings Bench.*

Intratur, Mich. 19. *Rot.* 52.

453 SEIGNIOR and WOLMER's Caſe.

IN an Action upon the Caſe upon an Aſſumpſit, the Declaration was general, that the Defendant Aſſumpſit to the Plaintiff; and the Jury found

found that the promiſe was made to *I. N.* who *Seignior* the Plaintif ſent and appointed *ad componendum & agreandum* the Debt of *Wolmer* the Defendant. It was argued, That the promiſe made to the Servant, was a promiſe to the Maſter. *Vi.* 2 *E.* 4. Where the ſale of the Servant is the ſale of the Maſter. 8 *H.* 5. *in treſpas*, The Defendant ſaid that the Prior of &c. was ſeiſed, &c. and that ſuch a one his Steward made a Demiſe unto him; there it was ruled that he ought to have pleaded that the Prior did demiſe. *V.* 27 *H.* 8. *Jorden* and *Tatams* Caſe, which is expreſs in the point: *Jorden* brought an Action upon the Caſe againſt *Tatam*, and declared that he did aſſume to him (as the words of the book are.) The Evidence was, That *Tatam* came in the abſence of *Jorden* the huſband, and aſſumed to the wife of *Jorden*, (and our Caſe is a ſtronger Caſe then that, for there the husband gave no authority to the wife to take ſuch Aſſumpſit; but in our Caſe he did authorize *I. N.*) and it was adjudged that the agreement of the husband afterwards, made the Aſſumpſit to be good to the husband: But in our Caſe, *I. N.* had authority to take the Aſſumpſit, *viz.* *Seignior* ſent *I. N.* *ad componendum & agreandum* the Debt: and *Wolmer* aſſumed to pay the money, &c. and *I. N.* gave notice thereof to *Seignior*, and he agreed unto.

Dodderidge Juſtice, An Aſſumpſit to the Servant for the Maſter, is good to the Maſter: and an Aſſumpſit by the appointment of the Maſter of the Servant, ſhall bind the Maſter, and is his Aſſumpſit. 27 *Aſſ.* If my Baily of my Mannor buy cattel to ſtock my grounds, I ſhall be chargeable in an Action of Debt: and if my Baily ſell corn or cattel, I ſhall have an Action of Debt for the money; For whatſoever comes within the compaſs of the ſervants ſervice, I ſhall be chargeable with, and likewiſe ſhall have advantage of the ſame. If a Servant ſelleth a horſe with Warranty, it is the ſale and contract of the Maſter, but it is the Warranty of the Servant, unleſs the Maſter giveth him authority to warrant it, for a Warranty is void which is not made and annexed to the contract; but there it is the Warranty of the Servant, and the Contract of the Maſter: But if the Maſter do agree unto it after, it ſhall be ſaid that he did agree to it *ab initio*. As where a Servant doth a diſſeiſin to the uſe of his Maſter, the Maſter not knowing of it, and then the Servant makes a Leaſe for years, and then the Maſter agrees, the Maſter ſhall not avoid the Leaſe for years; for now he is in by reaſon of his agreement *ab initio*. When the Servant promiſeth for the Maſter, that the Maſter ſhall forbear to ſue, &c. and ſhall by ſuch a day deliver to the Defendant the Obligation, &c. and the Defendant promiſeth to pay the money at ſuch a day; and the Maſter having notice thereof agreeth to it, it is now the promiſe of the Maſter *ab initio*, for it is included in his authority that he ſhould agree, compound, &c. and he hath power to make a promiſe. Judgment in the principal Caſe was given for the Plaintiff.

Trin. 21 *Jacobi, in the Kings Bench.*
Intratur, Paſch. 18. *Rot.* 139.

454. Gleede and Wallis Caſe.

A Writ of Error was brought to Reverſe a Judgment given in the Court of *Northampton* in an Action upon the Caſe, upon a Promiſe: The Error which was aſſigned was, becauſe that it appeareth that the Action was brought before the Plaintiff had made requeſt. The Caſe was, a Contract was made betwixt *Gleede* and *Wallis*, and *Wallis* was to pay to *Gleede* 10*l.* when *Gleede* ſhould require him. *Gleede* brought an Action in the ſaid Court 1 *Martii*, 16 *Jacobi*; and the Requeſt is laid to be 7 *Martii* 16 *Jacobi* following. Where a Contract is made, and no time is expreſſed for payment of the money, If the partie bring his Action before he make his requeſt, he ſhall not have damages; but if he maketh an actual requeſt, and the Defendant doth not pay the money, there he ſhall recover damages beſides the dutie: Here the Action was brought before the requeſt made, and ſo no damage to the Plaintiff; and the Judgment was, that the Plaintiff *recuperet damna predict*, viz. the damages laid in the Declaration. *Dodderidge* Juſtice, The Judgment ought to be *Conſideratum eſt quod Gleede recuperet damna quæ ſuſtinuit*, and not *damna predict*, which are mentioned in the Declaration, and then a Writ is awarded to enquire of the damages *quæ ſuſtinuit*. The Judgment was reverſed per *Curiam*.

Mich. 1 *Caroli, in the Kings Bench.*
Rot. 189.

455. Taylor and Hodskin's Caſe.

IN an *Ejectione firme* upon a ſpecial Verdict it was found, That one *Moyle* was ſeiſed of divers Lands in Fee, holden in *Socage*; and having iſſue four daughters, *viz.* *A*, *B*, *C*, & *D*. *A* had iſſue *N*. and died: And afterwards *Moyle* deviſed the ſaid Lands unto his wife for life; and after her deceaſe, then the ſame equally to be divided amongſt his daugh-

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ters or their heirs: *Moyle* died, and afterwards his wife died; and *Hodskins* in the right of *B*, *C*, & *D*. three of the daughters, did enter upon the Lands; *N*. the daughter of *A*. married *F*. who entred and leaſed the Lands to the Plaintiff *Taylor*. *Whitfield* for the Plaintiff, The only point is, Whether *N*. the daughter of *A*. one of the ſiſters ſhall have the fourth part of the lands or not, by reaſon of the word (*Or*) in the Will.

It is apparent in our books, *C*. 10. *part* 76, the Chancellor of *Oxfords* Caſe. *C*. 3. *part*, *Butler* and *Bakers* Caſe, That Wills ſhall be conſtrued and taken to be according to the intent of the Deviſor: And therefore *Br. Deviſe* 39. A deviſe to one to ſell, to give, or do with at his will and pleaſure, is a Fee-ſimple. And in our Caſe if *N*. ſhall not take a fourth part, the word (heirs) ſhould be of no effect. *C*. 1. *part* in *Shellies* Caſe, All the words in a Deed ſhall take effect, without rejecting any of them; and if it be ſo in a Deed, *à fortiori* in a Will, which is moſt commonly made by a ſick man who hath not Councell with him to inform or direct him. In this Caſe the three ſiſters who were living at the time of the Deviſe, took preſently by way of remainder; and the word (heirs) was added only to ſhew the intent of the Deviſor, That if any of the three ſiſters had died before his wife, that then her heir ſhould take by diſcent, becauſe her mother had taken by purchaſe. And by reaſon of the word (heirs) the heir of *A*. ſhall take by purchaſe; and the disjunctive word (or) ſhall be taken for (and) as in *Mallories* Caſe, *C*. 5. *part*. A reſervation of a Rent to an Abbot or his Succeſſors; there the word (or) ſhall be taken for (and) *reddendo ſingula ſingulis*. *Trin*. 7. *Jacobi*, in the Common Pleas, *Arnold* was bound in a Bond upon Condition, that he ſuffer his wife to deviſe Lands of the value of 400*l*. to her ſon or her daughter; and ſhe deviſed the Lands to her ſon and her daughter: And it was reſolved that it was a good performance of the Condition. And there the word (or) was taken for (and): And there Juſtice *Warburton* put this Caſe, If I do deviſe all my goods in *Dale* or *Sale*, it ſhall be a Deviſe of all my goods in both places; and (or) ſhall be taken for (and.) In this Caſe the word (heirs) was not added of neceſſity for the heir of any of the ſiſters to take by purchaſe; but only to make the heir of *A*. to take part of the Lands. The Court was of opinion that it was ſtronger for the Plaintiff to have it (or) in the disjunctive; For they ſaid that if it were (and) then it would give the three ſiſters the Fee, and not give the heir of *A*. a fourth part; but being (or) there is more colour that ſhe ſhall take a fourth part by force of the Deviſe. It was adjourned.

Trin: 2 Caroli, Rot. 913. in the Kings Bench.

456. Ashfield and Ashfield's Case.

THe Case was, An Enfant Copyholder made a Lease for years by word, not warranted by the Custome rendring Rent; The Enfant at his full age was admitted to the Copyhold, and afterwards accepted of the Rent: The question was, Whether this Lease, and the acception of the Rent should bind, or conclude the Enfant. *Crawley* Serjeant argued, That it was a void Lease, and that the acception should not bar him. It is a ground in Law, That an Enfant can do no Act by bare contract by word, or by writing can do any Act which is a wrong either to himself or unto another person, or to his prejudice. In this Case, if the Lease should be effectual, it were a wrong unto a stranger, *viz.* the Lord, and a prejudice unto himself, to make a forfeiture of the Inheritance. If an Enfant commandeth *A.* to enter into the land of *I. S.* and afterwards the Enfant entreth upon *A.* *A* is the Disseisor and Tenant, and the Enfant gaineth nothing. So if *A.* entreth to the use of the Enfant, and the Enfant afterwards agreeth to it, in this Case here is but a bare contract; and an agreement will not make an Enfant a Disseisor: No more shall he be bound by a bare Deed, or matter in writing without Livery. 26 *H.* 8. 2. An Enfant granteth an Advowson, and at full age confirmeth it, all is void. *Br. Releases* 49. Two Joynt-Tenants, one being an Enfant releaseth to his Companion, it is a void Release. 18 *E.* 4. 2. An Enfant makes a Lease without reserving Rent, or makes a Deed of grant of goods, yet he shall maintain Trespass; nay though he deliver the goods, or Lease with his own hand, the same will not excuse the Trespass, nor will it perfect the Lease, or make the grant of the goods good. If the Contract have but a mixture of prejudice to the Enfant, it shall be void. 5 *Jacobi* in the Kings Bench, *Bendloes* and *Holydaies* Case. An Obligation made by an Enfant with a Condition to pay so much for his apparel; because the Bond was with a penaltie, it was adjudged void. If Tenant at Will make a Lease for years, he was a Disseisor at the Common Law, before the Statute of *West.* 2. *cap.* 25: 12 *E.* 4. 12. Tenant at Will makes a Lease for years. 10 *E.* 4. 18. 3 *E.* 4. 17. But if an Enfant be Tenant at will, and he maketh a Lease, he is no Disseisor. In our Case, if he had made Livery, then I confess it had been a defeisible forfeiture, and he mignt have been remitted by his entrie upon the Lord. *Farrer* for the Plaintiff, The Lease is not void, but

but voidable. 7 *E.*4. 6. *Brian.* 18 *E.*4. 2. 9 *H.*6.5. An Enfant makes a Leaſe for years, and at full age accepts of the Rent, the Leaſe is good, becauſe the Law ſaith that he hath a recompence. *Com.* 54. A Leaſe for years, the remainder for years rendring Rent by an Enfant, and afterwards at his full age he accepts the Rent of the particular Tenant, it is a good comfirmation of the eſtate of him in the remainder. *Litt.* 547. If he at full age confirm, it is good; which could not be if the Leaſe were void: and yet in that Caſe it doth not appear that there was any Rent reſerved: The Enfant being a Copyholder makes no difference in the Caſe. And in *Murrels* Caſe, *C.* 4. *part,* It is ſaid, That if a Copyholder make a Leaſe not warrantable by the Cuſtome, it is a forfeiture, which proves it is a good Leaſe, otherwiſe it could not be a forfeiture. *Hill.* 37 *Eliz.* in the Kings Bench, *Rot.* 99. *Eaſt* and *Hardings* Caſe. A Copyholder makes a Leaſe for three years by word, to begin at *Michaelmas* next enſuing; it is a forfeiture of the Copyhold, and a good leaſe betwixt the parties.

Hill. 18 *Jacobi, Haddon* and *Arrowſmiths* Caſe One licenſed his Copyholder for life, to make a Leaſe for 20. if he ſhould ſo long live; and he made a leaſe for 20 years, and left out the words (if he ſhould ſo long live) yet becauſe he was a Copyholder for life, and ſo the leaſe did determine by his death, and ſo he did no more then by Law he might do, it was adjudged a good Leaſe, and no forfeiture; otherwiſe if he had been a Copyholder in Fee. All Conditions in Fact ſhall bind an Enfant, but Conditions in Law. *C.* 8. *part* 44. *Whittinghams* Caſe, An Enfant, Tenant for life or years, makes a Feoffment in Fee, it is no forfeiture; For if the Leſſor entreth, the Enfant may enter upon him again; yet it is a good Feoffment, but he ſhall avoid it by Enfancy; but if it be by matter of Record, then it is otherwiſe: For if an Enfant be Leſſee foa life, and levieth a Fine, it is a forfeiture; and in that caſe if the Leſſor enter for the forfeiture, the Enfant ſhall not enter again. The ſame Law if an Enfant committeth Waſte which is againſt a Statute, it is a forfeiture; and if the Leſſor recovereth the place waſted, the Enfant ſhall not enter again. 9 *H.* 7. 24. A woman an Enfant, who hath right to enter into lands, taketh a husband, and a diſcent is caſt, yet ſhe ſhall avoid the diſcent after the death of her husband.

The Court ſaid, That if in the Caſe at Barr the Enfant had been Tenant in Fee at the Common Law, and made a leaſe without Deed, and had accepted the Rent at his full age, that the ſame had been good, for that there he had a recompence; but being a Copyholder it is a queſtion. *Jones* Juſtice, It was adjudged in the Common Pleas in *Peters* Caſe, That if a Copyholder without licence maketh a Leaſe not warranted by the Cuſtome, That ſuch Leſſee ſhould maintain an *Ejectione firme.* The Councel againſt the Enfant in the Caſe at Barr ſaid, That

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the Enfant made the Leaſe as Tenant by the Common-Law, for that he made it by Conveyance of the Common-Law: And ſo the Leaſe was voidable, and not void; and then the acceptance of the Rent had made the Leaſe to be good. It was adjourned to another day.

Hill. 2. Caroli, Rot. 389. in the Kings Bench.

457. George Busher againſt Murray Earl Tillibarn.

A *Scire facias* was brought dated 28 *Junii* retornable in *Mich.* Term 2 *Car. Regis*, why Execution ſhould not be awarded againſt the Defendant upon a Iudgment had againſt him in this Court. The Defendant pleaded, That King *Charles*, 7 *Octob.* in the ſecond year of his Reign, did take him into his protection for a year, and did grant unto him that during that time he ſhould be free from all manner of Plaints but *Dower*, *Quare Impedit*, and *Placit. coram Juſticiariis Itinerantibus.* It was ſaid that this Protection was not warrantable by Law for three cauſes. 1. Becauſe it is after the purchaſe of the *Scire facias*, and before the Retorn. 10 *H.6.3.* 11 *H.4.7.* A Protection depending the Suit is not allowable, although it make mention that the party is to go a voyage with the Kings Son. 2. Becauſe he doth not ſpecifie any particular cauſe why the Protection was granted unto him. All our books do expreſs a cauſe, *viz. Quia moratur &c. quia profecturus &c.* Regiſter 22, 23. there three Protections are *Quia incarceratus.* 39 *H.6.38,39,* 40. *per Curiam*, The Protection ought to expreſs a ſpecial cauſe, otherwiſe it is not good. *Fitz.28.a.b.* the cauſe is expreſſed. 12 *R.2.cap.16.* The particular cauſe ought to be in the Protection. A Protection being general, the party hath no remedy againſt him to traverſe it, or to procure it to be repealed. 3. This Court is greater then a Iuſtice in Eyre, and he is excepted *in placitis itinerantibus.* That Court was of opinion that there was no colour for allowing of the Protection. A Safe-conduct will only keep the party ſafe from harm, but will not protect him from Actions.

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Mich. 2 Caroli, Intratur Paſch. 18. Jur. Rot. 298. in the Common Pleas.

458. ROYDEN and MOULSTER's Caſe.

IN Treſpaſs for entring into his Cloſe called *Dipſon* in *Suffolk*, upon Not guilty pleaded, the Jury gave a ſpecial verdict, That the ſaid Cloſe was parcel of the Mannor of *Movedon*, and demiſable by Copy of Court-Roll; and that the ſame was granted to *G. Starling* in Fee by Copy of Court-Roll, who had iſſue two ſons, *John and Henry*: And that 35 *Eliz. George Starling* did ſurrender the ſame to the uſe of his Will, and thereby demiſed the ſame to *John* and the heirs males of his body, with divers Remainders over, and dyed ſeiſed: And that the Surrender was preſented according to the Cuſtom; and that *John* was admitted to have to him & his heirs; And that the ſaid *John* had iſſue 3 ſons, *Harry*, *George* and *Nicholas*; And that the ſaid *John* 43 *Eliz.* did ſurrender to the uſe of his Will, and thereby deviſed the ſame to *Katherine* his wife and dyed, and that the ſaid Surrender 9. *Martii* 45 *Eliz.* was preſented, and the ſaid *Katherine* was admitted: *Harry*, *George* and *Nicholas* dyed without iſſue. They further found, That the Cuſtom of the Mannor is, That the youngeſt brother is to have the Copyhold by diſcent. And alſo That no Copyholder by the Cuſtome could make any Eſtate *in feodo*, and that the ſaid *Katherine* took to her husband *Francis Robinſon*, who 1 *Sept.* 17 *Iacobi* leaſed the ſame to *Royden* the Plaintiffe for one year, who entred and was thereof poſſeſſed, untill *Moulſter* the Defendant by the commandment of *&c.* did out him *&c.* In which caſe, the only Queſtion was, Whether a Copyhold be within the Statute of *Weſt.* 2. ſo as an eſtate thereof ſo limited ſhould be a Fee tail, or a Fee conditional. And by the opinion of the Juſtices of the Common-Pleas it was adjudged, That a Copyhold could not be entituled within the Statute of *Weſt.* 2.

Firſt they ſaid, That Copyholds are not within the letter of the Statute, which ſpeaks onely *de tenementis per chartam datis*, *&c.* Secondly, they are not within the meaning of it: 1 Becauſe they were not untill 7 *E.* 4. 19. of any accompt in Law, becauſe they were but Eſtates at will. 2. The Statute of *Weſt.* 2. provides againſt thoſe who might make a *diſſen hereſin* by Fine or Feoffment, which Copyholders could not do. 3. Becauſe if Copyholders might give lands in tail by the Statute, then the Reverſion ſhould be left in themſelves, which cannot be.

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4. The Makers of the Statute did not intend any thing to be within the Statute of *Donis* whereof a Fine could not be levied; For the Statute provides *Quod finis ipſo jure ſit nullus.* 5. Great miſchiefs would follow, if Copyholds ſhould be within the Statute of *Weſt.* 2. becauſe there is no means to dock the eſtate, and no cuſtomary conveyance can extend to a Copyhold created at this day. 37 *Eliz. Lane* and *Hills* caſe adjudged in the Common-Pleas was cited by Juſtice *Harvey*, where a Surrender was unto the uſe of one in tail, with divers remainders over in tail: The firſt Surrenderee dyed without iſſue; And firſt it was agreed and adjudged, That it was no diſcontinuance. 2. If it were a diſcontinuance, yet a *Formedon* in the Remainder did not lie, becauſe there ought to be a Cuſtom to warrant the Remainder as well as the firſt Eſtate tail: For when a Copyholder in Fee maketh ſuch a gift, no Reverſion is left in him, but only a poſſibility; And the Lord ought to avow upon the Donee, and not upon the Donor. And there is a difference when he maketh or giveth an eſtate of inheritance, and when he maketh a Leaſe for life or years; for in the one caſe he hath a Reverſion, in the other not. 2. A Recovery ſhall not be without a ſpecial cuſtom, as it was agreed in the Caſe of the Mannor of *Stepney*, becauſe the Warrantie cannot be knit to ſuch an Eſtate without a Cuſtom. And for expreſs authority in the principal Caſe he cited *Pits* and *Hockley's* Caſe, which was *Ter Paſc.* 35 *Eliz. rot.* 334. in the Common-Pleas; where it was reſolved, That Copyholds were not within the Statute of *Donis* for the weakneſs and meanneſs of their eſtates: For if they were within the Statute of *Weſt.* 2. the Lord could not enter for Felony, but the Donor; and the Services ſhould be done to the Donor, and not to the Lord of the Mannor. And ſo, and for theſe miſchiefs he conceived, That neither the meaning nor the words of the ſaid Statute did extend to Copyholds. *Hill.* 34 *Eliz. Rot.* 292. in the *Kings Bench*, *Stanton* and *Barney's* Caſe. A Surrender was made of Copyhold within the Mannor of *Stiverſden* unto one and the heirs of his body; and after iſſue he ſurrendred unto another: And it was agreed by all the Juſtices, That the iſſue was barred. And *Popham* did not deny that Caſe, but that it was a Fee conditional at the Common-Law, and that *poſt prolem ſuſcitatam* he might alien. And ſo it was agreed in *Decrew* and *Higdens* caſe, *Trin.* 36. *Eliz. rot.* 547. in the Kings Bench; and in *Eriſh* and *Ives* caſe 41 & 42 *Eliz.* in the Common-Pleas, in an Evidence for the Mannor of *Iſteworth*, That no Eſtate tail might be of a Copyhold without a Cuſtom to warrant it. *Mich.* 36 & 37 *Eliz.* in the Kings Bench it was adjudged, That a Copyholder could not ſuffer a common Recovery; and the reaſon was, becauſe that the Recovery in value is by reaſon of the Warrantie annexed to the Eſtate at the Common-Law, which could not be annexed to a Cuſtomary eſtate: And another reaſon was given, becauſe that he who recovers in value, ſhall be in by the Recovery, and the

the Copy of the Court-Roll only ſhould not be his Evidence, as *Littleton* and other books ſay it ought to be. And *Crook* ſaid, That the Statute of *Donis* was made in reſtraint of the Common-Law. And it ſhould be very diſadvantagious to the Lord, if Copyhold ſhould be conſtrued to be within that Statute. And therefore he conceived that the ſaid Statute did not extend to Copyholds by any equitable conſtruction.

And ſuch difference was taken by *Popham* Chief Juſtice, 42 *Eliz.* in the Kings Bench, *rot.* 299. in *Baſpool* and *Long's* Caſe: For he ſaid, That a Cuſtom which did conduce to maintain Copyholds, did extend to them; But a Statute or a Cuſtom which did deprave or deſtroy them, did not. As if one ſurrender to the uſe of one for life, the Remainder in Fee, where the Cuſtom is to ſurrender in Fee, the Cuſtom doth not extend thereunto, becauſe a Cuſtom which goes in deſtruction of a Copyhold ſhall be taken ſtrictly. But if a man be Copyholder in Fee, he may grant a Fee conditional.

Harvey Juſtice put ſome Caſes to prove the ſmall account the Law had of Copyholds at the time of the making of that Statute, as 40 *E.* 3. 28. 32 *H.* 6. *br. Copyhold* 24. And he ſaid, That there is not any book in the Law but only *Mancels* caſe in *Plow. Comment.* That the Statute of *Weſt.* 2. doth extend to Copyholds.

Hill. 2 *Caroli, rot.* 235 *in the Kings Bench.*

459. Litfield and his Wife againſt Melherse.

A Writ of Error was brought upon a Judgment given in an Action upon the Caſe brought by Husband and Wife in the Common-Pleas for words ſpoken of the Plaintiffs wife: And the Judgment in the Common-Pleas was, That the husband and wife ſhould recover. And that was aſſigned for Error in this Court, becauſe the Husband only is to have the damages; and the Judgment ought to be, That the Husband alone ſhould recover. But notwithſtanding this Error aſſigned, the Judgment was affirmed by the opinion of the whole Court.

Pasch. 2 Caroli, rot. 362. in the Kings Bench.

460 HOLMES and WINGREEVE'S Case.

A Writ of Error was brought to reverse a Judgment given in the Court at *Lincoln*, in an Action of Trespass there brought for taking away a Box with Writings. And four Errors were assigned. 1. Because the Plaintiffe did not appear by Attorney or in person at the retorn of the Attachment against the Defendant; so as there was a discontinuance, for the Plaintiffe ought to appear *de die in diem*. 2. Because in his Declaration there he saith, That the Defendant took a Box with Writings, and doth not make any title to the Box, nor shews that the same was lockt, nailed, or sealed. 2 *H.*7.6.*a*. The certainty of the writings ought to be shewed, that a certain issue may be taken thereupon. *Com.* 85. 22 *H.*6.16. 14 *H.*6.4. 21 *E.*3. He ought to shew the certainty of the writings. 18 *H.*6.1. Chartersin a Box sealed. *C.*9.*part*, *Bedingfields* case. *C.* 5. *part*, *Playters* case; The Declaration was insufficient, because the Plaintiffe therein did not name the certain number of the Fishes. 3. He pleaded, That he made a Bill Obligatory, and doth not shew that it was delivered. *Dyer* 156. *Per scriptum suum gerens datum*, and doth not say *Primò deliberatum*, is not good. The fourth Error was, That in the Replication the Plaintiffe saith (*dixit*) whereas it ought to be *dicit* in present tense. 10 *H.*7.12. The title to the Assise took Exception to the Plaintiffs title, because that he said (*fuit seitus*) of a Messuage, whereas he ought to have said (*est seitus*) But yet it was there holden good, because he saith, that all those whose title he hath, *&c.* by which words the possession shall be intended to continue. 35 *H.*6.11. 85. *vi.* 68. A Writ a False Judgment directed to the Sheriffe, *Recordare loquelam (que est)* and the form, and the presidents are (*quæ fuit*) 9 *H.*6.12. The Sheriff retorns *Non est* (*inveni*) whereas it ought to be (*Non est inventus*) and adjudged Error. And he said, That *Detinue* is only to be brought when it self is to be recovered in as good plight, and no other Action. It doth appear by the Record, that in this Case at Trial 18 were only retorned upon the Pannel, wheras there ought to have been 24 retorned. By the Statute of *West.*2. *cap.*38. 24 ought to be retorned on the Pannel. 8 *H.*4.20. More then 24. shall not be retorned. 2 *H.*7.8. The Sheriffe retorned but 12. and it was ruled to be an insufficient retorn, because 24 ought to have been retorned. 36 *H.*6.27. Trespass is brought for a

Box

Box and Charters which concerned the Plaintiffs lands, and damages were given entirely; and there it was adjudged not to be good, becauſe the Plaintiffe did not make any title to the Box, nor did ſhew that the ſame was locked or ſealed: For the Box may belong to one, and the Charters to another, as the Evidences to the heir, and the Box to the Executors, unleſs the Box be firſt locked.

Note, The opinion of the whole Court was, becauſe that the iſſue was particular, That he was not guilty of the Treſpaſs and detaining untill the Plaintiff had entred into a Bond. And the Jury found him guilty of the Treſpaſs generally, That the Verdict was not good to make the Defendant guilty by implication. And Juſtice *Dodderidge* ſaid, That the Plaintiff hath brought his Action of Treſpaſs, and doth not lay any poſſeſſion of the Box; And Treſpaſs is a poſſeſſory Action. Alſo he ſaid, That the Plaintiff did not ſet forth the Quality of the Evidences, *viz.* Whether they were Releaſes, Deeds of Feoffments, or other particular Evidences. And for theſe cauſes, and for the cauſes before alleadged, the Judgment given in the Court at *Lincoln* was reverſed.

Paſch. 3 Caroli, in the Kings Bench.

461. Sir William Fish and Wiseman's Caſe.

Judgment was given in the Common-Pleas againſt Sir *William Fiſh*; and after the year and day Execution was awarded by *Capias*, where it ought to have been by a *Scire facias* firſt: And the Plaintiff was taken in Execution, and brought a Writ of Error in this Court, where the Judgment was affirmed; but the Execution was reverſed, becauſe the Execution was not warrantable, the Proceſs being erronious. And out of the Kings Bench another Execution was awarded by *Capias ſicut alias*, within the year of the affirmance of the Judgment in the Kings Bench. And it was moved by *Banks*, That the Execution was erronious, becauſe he ought to have a *Scire facias*, becauſe the year is paſt after the Judgment in the Common-Pleas; and although that the Court be changed, yet the Plaintiffe ought to have the ſame Proceſs for Execution as he ought to have in the firſt Court. 14 *H.*7.15. The firſt Proceſs was reverſed for Error; and then he cannot have a *Sicut alias*, but ought to have a new Original. We pray a *Superſedeas* of the Execution for Sir *William Fiſh* the Plaintiffe, and that he may be delivered out of Execution. Sir *William Fiſh* had a Releaſe, and that was the cauſe that *Wiſeman* would not take a *Scire facias*. Sir *William Fiſh* upon the Judgment in the Common-Pleas was taken in Execution; and upon a Writ

of Error brought, Bail was put in to proceed with effect, and then he was delivered out of Execution; And then he cannot now be taken in Execution again upon the ſame Judgment. 16 *H.* 7. 2. *per Curiam*, If one be in Execution upon Condemnation in the Common-Pleas, and the Record and the body is removed into the Kings Bench by Error; then the party ſhall find collateral Securities by their Recogniſance to pay the Condemnation in caſe the Judgment be affirmed, and further to proceed with effect. In this caſe the body is diſcharged of Execution as to any Proceſs to take the body, unleſs he render himſelf to priſon of his own accord to diſcharge his Sureties: And if he will not do it, he who recovereth hath no remedy but to make the Sureties to pay the Condemnation by reaſon of their Recogniſance. 2 *E.* 4. 8. A man is condemned in *London tempore Vacationis*, and hath Execution in the Term; and the Defendant ſueth a *Corpus cum cauſa*, and had his priviledge in the Common-Pleas.

Danby, The Plantiffe ſhall not have Debt; for at the beginning when the Defendant was in Execution, the Action of Debt was gone; and then he being diſcharged, here the Action of Debt doth not lie. To which *Needham* agreed. And *Choke* ſaid, He did not know any remedy that the party had, and conceived that he could not have a new Execution. 14 *H.* 7. 1. If one eſcape out of Execution, the Plaintiffe cannot take him again in Execution, but his remedy is againſt the Gaoler. The Court may *ſuperſedeat* this Execution, becauſe it is erronious: 34 *H.* 6. 45. *b.* An Action of Debt was brought againſt an Executor, who pleaded that he had fully adminiſtred; And it was found that he had Aſſets, and Judgment was given againſt the Defendant, and a *Capias* was awarded againſt him, and after that an *Exigent*: And the Court granted a *Superſedeas*, to ſuperſede that Erronious proceſs; For a *Capias* doth not lie againſt an Executor where he pleads, *&c.* but a *Fieri facias*. And therefore in the principal Caſe *Banks* prayed a *Superſedeas*.

Jones Juſtice, If Error be brought within the year of the Judgment in the Common-Pleas, and the Judgment be affirmed here, the party ſhall have a *Capias* although the Judgment be affirmed two years after the bringing of the Writ of Error: For he ſhall take the ſame Execution in the Kings Bench, as in the Common-Pleas; and the altering of the Court makes no difference in it. And ſo was *Garnon's* caſe: The Writ of Error was brought within the year of the Judgment in the Common-Pleas, but it was not affirmed in two years after, and yet there he had the ſame Proceſs in the Kings-Bench as he was to have had in the Common-Pleas. *Dodderidge* Juſtice, If the Execution be lawfull and upon lawfull Proceſs, and the party be delivered out of Execution, then he ſhall not be taken again in Execution: But if he be taken in Execution upon an erronious Proceſs, if he be delivered out, he may be taken again in Execution; for the firſt Execution was erronious, and is no Record being reverſed.

Hyde

Hyde Chief Juſtice, If a man recover in Debt upon an Obligation, and the Judgment be reverſed by Error, he is reſtored to his firſt Action, and may plead *Nul tiel record*. *Dyer* 59, 60. *Trivingards* Caſe, A man in Execution had a VVrit of Privileg out of the Parliament; upon which the Sheriff ſets him at liberty by Law for a time, yet he ſhall be in Execution again, and the Law ſaves the others right. *Broome* Secondarie of the Kings Bench, If Error be brought after the year of the Judgment in the Common Pleas, and the Judgment be affirmed here, the partie may take forth a *Capias* within the year of the Judgment affirmed; although in the Common Pleas he cannot have a *Capias*, becauſe the year is paſt: For we are not to reſpect what proceſs he ought to have in the Common Pleas; but after the year of the Judgment affirmed here, the partie is to have a *Scire facias*. *Jones* Juſtice ſaid, That when he was a Reporter, the Judges delivered their opinions in *Garnons* Caſe, *C.* 5. *part* 88. That if after the year and day he bring Error, and the Judgment be affirmed, that he ought to have the like proceſs here as in the Common Pleas: And that was a *Scire facias*, becauſe that the year was paſt in the Common Pleas, although it were within the year of the Judgement affirmed here. *Dodderidge* Juſtice, The Caſes which *Banks* cited are Law, but are not well applyed. The whole Court was of opinion, That if the Common Pleas award erronious proceſs, the Court cannot award a *Superſedeas*; but the partie is put to his VVrit of Error here: and upon that erroneous Proceſs we cannot grant a *Superſedeas*, but the partie is put to his new VVrit of Error. And according to the opinion of the Court, Sir *William Fiſh* brought a new VVrit of Error.

Mich. 2 Caroli, Rot. 179. in the Kings Bench.

462. BELLAMY and BALTHORP's Caſe.

IN an Action of *Trover* and *Converſion*, The Plaintiff did lay it, that he was poſſeſſed of twenty Loads of Wheat, and that he loſt them, and that they came to the Defendants hands, who converted the ſame to his own uſe. The Defendant did juſtifie and ſaid, That the Pariſh of *O.* is an ancient Pariſh, in which there is a Rectorie impropriate, &c. and the Earl of *Clare* was ſeiſed of the Rectorie, and made a Leaſe unto him of the Tythes of that Pariſh for one year, by force of which he was poſſeſſed; and that the Corn was ſet forth by the Pariſhoners, and that one *T.* gathered the Tythe, and delivered the ſame to the Plaintiff, and that the Defendant his Servant took away the Tythe as it was lawfull

for

for him to do: Upon which the Plaintiff did demurr; Firſt becauſe the Plea did amount to no more then the general iſſue, *viz.* Not guilty: and if the Plea do amount to no more then the general iſſue, then it is no good plea; but he ought to have taken the general iſſue. *H.* 7. 11. *Aſſ.* For if in an Aſſiſe the Tenant ſaith that the Plaintiff did diſſeiſe him, and that he entred upon him, the plea is not good, becauſe it amounts but to the general iſſue, *viz. Nul tort nul diſſeiſin*, and the other party may demurr upon it. 22 *E.* 4. 40. In Treſpaſs for Batterie, it is no plea to ſay that he did not beat him, becauſe it is but Not guilty by Argument. 34 *H.* 6. 28. *b.* If I bring Treſpaſs for breaking of my Cloſe, It is no good plea to ſay that I have no Cloſe; or if it be for carrying away my Goods, to ſay that I had not any Goods; but the Party ought to have pleaded Not guilty.

It may be objected, That in this Caſe the Defendant makes Title to the Corn. To that we ſay, He derives a Title to Tythes without a Deed, which gives no title to them; For Tythes do not paſs by Demiſe alone without Deed; but by the demiſe of the Rectorie without Deed they will paſs: So by a Feoffment of a Mannor without Deed the Services will paſs; but the Services alone will not paſs without a Deed. 21 *H.* 7. 21. 19 *H.* 8. 12. A Warren may be demiſed without Deed. 9 *E.* 4. 47. But the profits of Courts will not paſs without Deed. 22 *H.* 6. 34. *b.* By way of Contract a Demiſe may be of Tythes without Deed, but in pleading it ought to be ſet forth that there was a Deed. *C.* 10. *part* 92. Where the Deed ought to be ſhewed; which proves that there ought to be a Deed. In the Common-pleas in an Action of Trover and Converſion of certain Goods, the Defendant ſaid, That *A.* was poſſeſſed of them, and made him Executor, &c. And the Plaintiff did demurre, and had Judgment, becauſe it amounted but to the generall Iſſue. *Dodderidge* Juſtice; The Parſon may demiſe his Tythe to the Owner of the Land without Deed; but he cannot grant them to a ſtranger without Deed. If the Defendant make Title from a ſtranger, then it doth amount to the generall Iſſue; but if both Plaintiff and Defendant make Title from one Perſon or Donor, then the plea is a good plea. Otherwiſe, *per Curiam*, it doth amount to the generall Iſſue. But the Opinion of the Court was, becauſe that the Defendant did make a title of Tythes without a Deed; therefore Judgment in the principall Caſe was given for the Plaintiff.

Trin. 3 Caroli, in the Kings Bench.

436. The Dean and Chapter of Carliſle's Caſe.

A Writ of Error was directed unto the City of *Carliſle*, to remove the Record of a Judgment given there in *Curia noſtra*, whereas the Judgment was given *tempore Jacobi*: And the Opinion of the Court was, That it was not good, nor the Record thereby well removed. *Dyer* 4. *Eliz.* 206 *b*. There was a *Certiorari* to remove a Record *cujuſdam inquiſitionis capt. &c. in Curia noſtra*; Whereas in truth it was taken in the time of the predeceſſor of the King, and ſo thereby the Record was not well removed. *Dodderidge* Juſtice, If a Writ of Error doth abate upon the Plea to the Writ, and the Record be well removed, the partie may have a new Writ of Error, *coram vobis reſidet, &c.* but if the Record be not well removed, as in this Caſe at Barr it is not, then the partie ſhall not have a new Writ of Error here. We do many times grant a *Scire facias* to ſue forth Execution in the inferior Court, which proves that the Record by an ill and inſufficient Writ of Error is not removed, but doth remain there ſtill. If there be variance betwixt the Record and the VVrit of Error, the Record is not well removed; but if the VVrit of Error want only form, but is ſufficient for the matter in ſubſtance, the VVrit ſhall not abate, but the partie may have a new VVrit of Error *coram vobis reſidet, &c.*

Trin. 3 Caroli, in the Kings Bench.

464. Mill's Caſe.

ACtion upon the Caſe for theſe words, *Thou haſt Coyned Gold, and art a Coynet of Gold*; Adjudged the Action will not lie, for it may be he had Authority to Coyn; and words ſhall be taken in *mitiori ſenſu*.

Paſch. 3 Car. in the Kings Bench.

465. BROOKER'S Caſe.

THe queſtion was, VVhether the Feoffee of the Land might maintain a VVrit of Error to reverſe an Attaindor by *Utglary*: and the Caſe was this, *William Iſley* ſeiſed in Fee of the Mannor of *Sundridge* in Kent, had iſſue *Henry Iſley*, who was Indicted of Felony 18 *Eliz.* and 19 *Eliz.* the Record of the Indictment was brought into this Court; and thereupon 20 *Eliz. Henry Iſley* was outlawed, *William Iſley* died ſeiſed, *Henry Iſley* entred into the Mannor and Land as ſon and heir, and being ſeiſed of the ſame, deviſed the Mannor and Lands to *C.* in Fee, who conveyed the ſame to *Brooker*, and *Brooker* brought a Writ of Error to reverſe the Outlawry againſt *Henry Iſley*. *Holborn* argued for the King, and ſaid that *Brooker* was no way privy to the attaindor of *Henry Iſley*, but a meer ſtranger, and therefore could not maintain a Writ of Error; And firſt he ſaid, and took exception, that he had not ſet himſelf down Terre-Tenant in poſſeſſion. Secondly, he ſaith in his Writ of Error, That the Mannor and Lands deſcended to *Henry Iſley* as ſon and heir, when as he was attainted. The third exception was, That he ſaith that *Henry Iſley* did deviſe the Lands, and that he could not do becauſe he was a perſon Attainted. Fourthly, he ſaid that *Brooker* was not Tenant ſo much as in *poſſe*. 4 *H.* 7. 11. If it were not for the words of Reſtitution, the partie could not have the mean profits after the Judgment reverſed. 16 *Aſſ.* 16. Leſſee for years pleaded to a *Precipe*, and reverſed it; the queſtion was, whether he ſhould be in *ſtatu quo? vi. Librum*, for it is obſcure. If this Attaindor of *Henry Iſley* were reverſed, yet it cannot make the deviſe good; For there is a difference betwixt Relations by Parliament which nullifie Acts, and other Relations. *Vi.* 3 *H.* 7. *Sentlegers* Caſe, *Petition* 18. The violent Relation of Acts of Parliament. If a Bargain and Sale be, the Inrollment after will make Acts before good; but a Relation by Common Law, will not make an Act good, which was before void. *C.* 3. *part*, *Butler* and *Bakers* Caſe, A gift is made to the King by Deed enrolled, and before the enrollment the King granteth away the Land, the Grant is void; yet the enrollment by Relation makes the Lands to paſs to the King from the beginning. Admit in this Caſe that *Brooker* were Terre-Tenant, yet he is not a party privy to bring a Writ of Error to reverſe the Attaindor of him who was Tenant of the Land; and I have

have proved, That although the Attaindor were reverſed, yet he hath nothing, becauſe the Deviſe was void, and is not made good by Relation. It is a rule in our Books, that no man can bring a VVrit of Error but a partie or privy. 9 *E.* 4. 13. 22 *E.* 4. 31, 32. 9 *H.* 6. 46. *b. Aſſ.* 6: *C.* 3. *part*, in the Marquiſs of *Wincheſters* Caſe, The heir of the part of the mother cannot have the VVrit of Error, but the heir of the part of the father may. So if erronious Judgment be given in the time of profeſſion of the eldeſt ſon, and afterwards he is dereigned, he ſhall have the Writ of Error. In 22 *H.* 6. 28. The heir in ſpecial taile, or by Cuſtom, cannot have Error: But yet *M.* 18 *Eliz.* in Sir *Arthur Henninghams* Caſe it was adjudged, That the ſpecial heir in tail might have a Writ of Error: The Baile cannot maintain a Writ of Error upon a Judgment given againſt the Principal, becauſe he was not privy unto the Judgment, therefore it ſhall be allowed him by way of plea in a *Scire-facias*. I never find that an Executor can have Error to reverſe an Attaindor; but for the miſawarding of the Exigent, *Marſhes* Caſe was cited, *C.* 5. *part* 111. *Fitz.* 104. Feoffee at the Common Law could not have an *Audita Querela*, in regard he was not privy. 12 *Aſſ.* 41. *Kellaway* 193. There the Terre-Tenant brought a Writ of Error in the name of the heir, and not in his own name. 24 *H.* 8. *Dyer* 1. There it is ſaid, That he who is a ſtranger to the Record ſhall have Error. To that I anſwer, That he in the Reverſion, and the particular Tenant, are but one Tenant; for the Fee is demanded and drawn out of him: But in the principal Caſe at Barr, no Land is demanded, but a perſonal Attaindor is to be reverſed. Alſo there it is put, That if the Conuſee extend before the day, there it is ſaid that the Feoffee may have Error. 17 *Aſſ.* 24. 18 *E.* 3. 25. *Fitz.* 22. To that I anſwer, That the Feoffee is privy to that which chargeth him, for the Land is extended in his hands; and if the Feoffee there ſhould not have a Writ of Error, the Law ſhould give him no manner of remedy; for there the Conuſor himſelf cannot have Error, becauſe the Lands are not extended in his hands. Alſo it is there ſaid, that the Feoffee brought a *Scirefacias* againſt him who had execution of the Land. To that I anſwer, That that is by ſpecial Act of Parliament. Alſo there it is ſaid, That if the Parſon of a Church hath an Annuity and recovereth, and afterwards the Benefice is appropriated to a Religious houſe, the Soveraign of the houſe ſhall have a *Scirefacias*. I anſwer, That in that Caſe he is no ſtranger, for that he is perpetual Parſon, and ſo the Succeſſor of the Parſon who recovered. 12 *H.* 8. 8. There a Recovery was againſt a Parſon, and there *Pollard* ſaid that the Patron might have Error. I anſwer, That *Pollard* was deceived there; for it is ſaid before that the Parſon hath but an Eſtate for life, and then he, *viz.* the Patron is as a Recoverer who ſhall have a Writ of Error. *Dyer* 1. But the Parſon hath the Fee, and therefore *Pollard* was miſtaken, as it appeareth by *Brook Fanxi fier de Recovery* 51. 19 *H.* 6. 57. *Newton*

ton; A falſe verdict is had againſt a Parſon, the Patron cannot have an Attaint: There is a difference if one be partie to the Writ, although not partie to the Judgment. *Error* 72. A *Quare Impedit* was brought by the King againſt the Patron and the Incumbent, and Judgment only was had againſt the Patron, and the Incumbent Parſon brought a Writ of Error; but if he had not been partie to the Writ, he could not have maintained Error. So in Attaint, the partie to the Writ, though not to the Judgment, ſhall have Attaint. 44 *E.* 3. *b.* 7. But if he be not partie to the Writ, he ſhall not maintain Attaint; as if he pretend Joynt-Tenancy with a ſtranger who is not named, and the verdict paſs againſt him, he ſhall not have attaint. But *Jones* Juſtice ſaid that he might have Attaint.

Admit the firſt Feoffee, *viz. C.* might have a Writ of Error, yet *Brooker* in this caſe cannot becauſe he is the ſecond Feoffee; and a Writ of Error is a thing in Action; and not transferable over. *C.* 3. *part*, The Marquiſs of *Wincheſters* Caſe. *C.* 1. *part*, *Albanies* Caſe. One recovers againſt *A.* who makes a Feoffment to *B.* neither the Feoffee nor Feoffor ſhall have Error; for he, *viz. B.* comes in after the title of Error, and the Feoffor ſhall not have the Writ of Error, becauſe he is not a partie griev'd. 34 *Eliz.* in the Common Pleas. *Sherrington* and *Worſleys* Caſe, *Sherrington* had Judgment againſt *Worſley*, and afterwards acknowledged a Statute to *B.* *Sherrington* ſued forth Execution, *B.* brought Error upon the Judgment, and it was adjudged that it would not lie; Firſt becauſe he was a ſtranger, Secondly becauſe he came in under and after the title of Error. See the reaſon *C.* 3. *part*, the Marquiſs of *Wincheſters* Caſe, where it is ſaid that a Writ of Error is not transferrable. This Attaindor doth not work upon the Land; and ſo it doth not make the Terre-Tenant privy, but it works upon the perſon and blood of *Henry Iſley*, the Land is not touched: For *Henry Iſley* was attainted in the life of his Father, and ſo it did not touch the Land. For if *Henry Iſley* had died without iſſue in the life of his father, the youngeſt ſon ſhould have had the Land by diſcent; which proves that it works not upon the Land, but upon the perſon. *Bankes* for the Plaintiff, and he deſired that the *Outlawrie* might be reverſed: As this Caſe is, there is no other perſon who can maintain Error. *Henry Iſley* had his pardon before the *Outlawrie*, but he came not in to plead it; and now having enjoyed it ſo long a time, we hope a Purchaſor ſhall be favoured before him who beggs a concealed title. The firſt Exception was taken: To the Deviſe by a perſon attainted. I anſwer, That that is but the conveyance to the Writ of Error. Secondly it was ſaid, that none but privies or parties could maintain Error; and the adverſe partie would diſable the heir on the part of the Mother, and by Cuſtome. Thirdly, he would diſable the Feoffees and make them as ſtrangers. Firſt the *Outlawrie* was 20 *Eliz.* againſt *Henry Iſley*, which was after the ſeiſin of the

the Land; and *Brooker* is a party able to bring a Writ of Error, being the heir of the purchaſor: Error and Attaint go with the Land, 13 *H.* 4. 19. *Dyer* 90. *Br. Caſes* 337. But Eſtopels and Conditions go to the heir, *Fitz.* 21. Error brought by a ſpecial heir. It is not neceſſary that alwaies the heir and partie to the Record have the Writ of *Error*, but ſometimes he who is grieved by the Record. A *Scirefacias* is a Judicial Writ founded upon a Record, and hath as much in privity as Error; and yet a ſtranger to the Record ſhall have it. 16 H. 7. 9. The heir of the purchaſor brought a *Scirefacias* to execute a Fine; It was objected that he was not a partie to the Record; but it was reſolved in reſpect he was to have the benefit, that he was a ſufficient perſon to maintain the Writ. 17 *Aſſ.* 24. 18 *E.* 3. 25. *Execution* was upon a Statute before the time that it ought to have been, and a Feoffee brought *Error*; It was objected that he was not partie, nor privie to the Record; yet becauſe he was was grieved by the *Execution*, he did maintain the Writ of *Error*. *Trin.* 34 *Eliz.* in the Kings Bench, *Sherrington* and *Worſleys* Caſe, (not rightly remembred) *Sherrington* did recover in debt againſt *Worſley*, who aliened the Land to *Charnock*; afterwards an *Elegit* is awarded upon the Roll: and *Charnock* brought *Error*, and it was admitted good, and *Sherrington* forced to plead to it: Now in the principal Caſe we are the partie grieved by the *Outlawrie*, and therefore may maintain the Writ. 21 H. 6. 29. A Reverſioner, or he in the Remainder without aid, prayer, or Reſc'. ſhall have a Writ of Error, becauſe they are damnified, although they be not parties to the Record. I agree, that where one is not grieved by the Judgment, there a ſtranger ſhall not have Error. 21 *E.* 4. 23. A Recovery is in Debt, and the Defendant is taken and eſcapes, the Sheriff ſhall not have a Writ of Error, for he is not grieved by the Record, but by the eſcape. 2 *R.* 3. 21. The Principal is Outlawed in Felony, afterwards the Acceſſory is condemned, he ſhall not have a Writ of Error to reverſe the *Outlawrie* of the Principal; for he is not grieved by that *Outlawrie*, but by his own Condemnation. Another Objection was, becauſe here was an *Outlawrie* againſt him, and therefore he ſhall be diſabled to ſue: I anſwer, Our Writ of Error is brought to reverſe that *Outlawrie*; and we ſhall not be rebutted by that *Outlawrie*, when we are to reverſe it. 7 H. 49, 40. Error brought to reverſe an *Outlawrie*, the Defendant would have diſabled the Plaintiff by another *Outlawrie*, and it was not allowed becauſe he ſeeks to avoid it. 10 H. 7. 18. For the Maſterſhip of an Hoſpital, Exception was taken to the Writ, becauſe the Aſſiſe is brought to undoe the name of Maſter; and therefore he ought not to name him Maſter. 22 H. 6. 26. Abbot and Covent, the Abbot is preferred, and the Covent elected another Abbot; And the Patron brought a *Quare Impedit* to defeat the Election: It was ruled, becauſe he goes about to overthrow the Election, he need not name him Abbot. *Garranty* 29. and 18 *E.* 3. 8.

to the ſame purpoſe. The matter of deviſe is but conveyance to the Writ of Error, and the Writ ſhall not be abated for ſurpluſage. 9 *E.* 4. 24. 7 *E* 4. 19. Surpluſage is no barr nor Eſtopel The *Outlawrie* was againſt *Henry Iſley* and *Peckham*, and wants theſe words, *Nec eorum alter comparuit*. *Dodderidge* Juſtice, To ſay where a Feoffee ſhall have a Writ of *Error*, is a large field: If this Feoffee bring *Error* and reverſe the Judgment, he muſt reſtore the heir in blood, and who can have a Writ of *Error* to reſtore blood; but he who is privie in blood, and that is the heir. *Jones* Juſtice, *Marſhes* Caſe, *C.* 8. *part* 111. was never adjudged; There an *Executor* could not reverſe an Attaindor by *Outlawrie*, becauſe it doth reſtore the blood. The Caſe of *Sherrington* and *Charnock* was to reverſe the *Execution* and not the Judgment: An Executor ſhall have a general Writ of Error to reverſe an *Outlawrie*. It was adjourned.

Paſch. 3 Car. in the Kings Bench.

466. GUNTER and GUNTER's Caſe.

A Writ of Error was brought to reverſe a Judgment in the Court of *Ely*, and divers Errors were aſſigned: Firſt that he did not ſhew in the ſtile of the Court, how *Ely* hath power to hold plea, either by Charter or by preſcription: Secondly becauſe he ſaid, That at ſuch a place in *Ely* he did promiſe; but did not ſhew that it was within the Juriſdiction of *Ely*: Thirdly, that it was upon a Conſideration to ſurceaſe a Suit in the Chancery that the Defendant did promiſe; but did not ſhew that at the time of the promiſe there was a Suit depending: Fourthly it was ſaid, That the Defendant did promiſe to ſurrender certain Cuſtomary Lands, and it is not ſhewn what the Lands were; and ſo no certainty for the Jurie to give damages. *Jermyn* argued for the Defendant in Writ of Error, and ſaid, The Declaration is good in ſubſtance, *Diverſas terras Cuſtomarias proxim. adjacend. lib. tenem'* of the Defendant; and the Defendant pleaded that he had offered *predict. tenem' Cuſtomaria*, and ſo no difference is betwixt them; for that Tenement is ſufficiently known, and although it be not ſo certainly laid as it ought to be in a real Action, yet it is certain enough in an Action upon the Caſe. *Dyer* 355, 356. *Only* who was Sollicitor to the Councel of *D.* did ſpend 1500*l. circa diverſa ſecta & negotia*, there the Declaration was ſufficient by two Judges, there the Lands are certain, *viz. proxim' lib. tenem'* Secondly, *Ely* is in the Margent, which is as much as the County in the Margent; and then when no County is named in the Declaration wherein the land doth lie, it ſhall be intended to lie in the County which is in the Margent.

Hetley

Hetley, Our Case differs from *Onlyes* Case in *Dyer* 355. For there 1500*l.* was received. But if I bring an Action upon the Case *pro diversis merchandisis*, the same is not good; but if I bring the Action for 10*l.* *pro diversis merchandisis*, then it is good. *Jones* Justice, *Chester* and *Durham* are generally known, and therefore it is good to say *Placita tent. apud Chester, &c.* and the party need not shew how *Chester* hath Jurisdiction: but it is not so of *Ely*. *Whitlock* Justice, *Ely* hath *Jura regalia*; and we read in our books, that they have had Conusans of Pleas. *Hyde* Chief Justice. In all particular and private Jurisdictions, if they come to be certified here in a Writ of Error, you must set out their power: But if they have their power by a Statute, as *Wales*, then it need not be set forth. A Writ of Error doth not lie upon a Judgment in *London*, but when the Plea is before Commissioners. *Curia*, We cannot grant a new *Certiorare* to an inferior Court, but only to the Common-Pleas, or *Wales*. The writ of Error to remove the Record out of the Court of *Ely* is directed *Justiciario nostro*, which proves that this Court takes notice of him as the Kings Justice: And in other Courts it is *Seneschallo Cunig.* and not *Seneschallo nostro*. *Whitlock* Justice, It is since the Statute of 27 *H.* 8. that it is directed *Justiciario nostro de Ely*; for before it was *Justiciario Episc. Hyde* Chief Justice, It is a Book-Case: If *Midd.* be in the margent, and you say *apud D.* and name no County, *D.* shall be intended to be in *Midd.* The Judgment was reversed.

Pasch. 3 Caroli, in the Kings Bench

467. WATERMAN and CROPP's Case.
Intratur M. 2 Car. Rot. 419.

AN Action of Trespass for Battery and Imprisonment. The Defendant did justifie the Imprisonment, *&c.* If it be not a Court of Record, they cannot fine and imprison; but if it be a Court of Record, then they may, for it is *Curia Domini Regis*.

468.

IN a Writ of Error, Error was assigned, That an Action was laid in *Lancester*, and the *Venire facias* was awarded *de vicineto de Lancester*. And it was said, That the neighbourhood might be of those of which the Maior and Bailiffs had no power over, *viz.* those out of their jurisdiction. And therefore Error was assigned in the mis-awarding of the *Venire facias*. 10 *Jacobi* in the Common-Pleas, *Buckley*'s case, There it

the *Venire facias* was *de vicineto civitatis Eborum*, and well enough, for (*vicineto*) shall imply those within the jurisdiction, and not the neighbours. 10 *Jacobi*, *Procter* and *Cliffords* case adjudged contrary, where it was, That the *Venire facias* was *de vicineto civitatis Coventry*, and adjudged not good, for it ought to have been *de civitate Coventry*.

Dodderidge, (*Vicineto*) goeth about the Precinct. When I was a Councellor, then I moved for *Bristol*, and to maintain it good *de vicineto de Bristol*: but it was ruled not good, but ought to be *de civitate Bristol*.

Pasch. 3 Caroli, in the Kings Bench.

469. Tollyn and Taylor's Case.

AN Action upon the Case was brought in the Common-Pleas by an Enfant who declared by Attorney. The Defendant brought a Writ of Error in the Kings Bench, and assigned the same for Error, For he ought to have declared *per Prochyn amy*, and not by Attorney. If an Action be brought, and the Defendant plead that he is an Enfant, the Enfancie is to be tryed where the Writ is brought. Here he assigns the Error in fact that he was an Enfant, and shewed no place where he was an Enfant, and so no place set where to prove it. To this Error the Plaintiffe pleaded, That he was at full age. And upon that they are at issue upon this matter in fact: And it was tryed at *Halsworth* in *Suffolk*, whereas it ought to have been in this Court where the Enfancie is pleaded, because he names no place where he was of full age. And notwithstanding that it was found that he was of full age, yet the Trial was not good. The first Action was brought before the Statute of 21 *Jacobi*, *cap.* 13.

Hitcham Serjeant, Age or not age is not local; and a place must be set down for formalitie sake, and so it is no matter of substance. And the *Venire facias* might be awarded from the place where the first Action was, *viz.* at *Halsworth* in *Suffolk*: For that is a matter dependant and pursuant the first Action, and now since the Statute is helped. *Denny* contrary, It hath no dependance upon the first Action, but is a new thing sprung up. If any place had been set down, and the *Venire facias* had been mistaken, that is helped by the Statute, and not where no place is set down at all. *Whitlock* Justice, Every *Venire facias* properly is to be from the place where the Writ is brought, unless it be drawn away by Plea. He ought to have alleadged a place; For this is a new matter in this Court, and not helped by the Statute of 21 *Jacobi*, nor any other, for the *Venire facias* is totally mistaken. *Dodderidge* Justice, The Statute

tutes of *Jeofaites* have ever been taken ſtrictly according to the letter: For if they had been taken by equity, what need had there been of more Statutes to have been made? The want of a letter out of a word, is out of the Statute, *C.* 8. *part.* You ſhould have alleadged ſome place. The Statute of 21 *Jacobi* is not of any *Venire facias* which is miſawarded generally: but the Statute helpeth when there are two places, and the *viſne* ought to come from both places, and the *viſne* comes but from one place; and when there is but one place, and the *viſne* comes from two places. If Enfancie be to be tryed (*ſc.*) If he were at ſuch a time within age, it ought to be tryed by the Country. This matter is collateral to the firſt Record, and it is a new Record (*ſc.*) upon Error.

The whole Court was of opinion that it was out of the Statute, and a Repleader was granted. *Whitlock* Juſtice, There is no Trial at all, for there is no *Venire facias* at all. *Dodderidge* Juſtice, If the Defendant in Error plead an ill plea, he ſhall replead: But if in this Action he had alleadged a place of his Enfancie (*ſc.*) at *Dale*, and the *Venire facias* had been of *Sale*, there it had been good trial; and there he ſhould not replead, for that he hath pleaded well; but there he ſhall have a *Venire facias de novo.*

Paſch. 3 Caroli, in the Kings Bench.

470. Day's Caſe.

DAY was Indicted for erecting of a Cottage. It was moved, that the Indictment was inſufficient, for that the words of the Statute of 31 *Eliz. cap.* 7. are, (*Shall willingly uphold, maintain, and continue*) And the Indictment is only, *That he continued*, and ſo wants the words (*voluntarily upheld*) according to the Statute. 2. It did not appear in the Indictment that it was newly erected; for it is only that he continued, but not that he erected. The Indictment was quaſhed, becauſe being a penal Law, it was not purſued.

Paſch. 3 Caroli, in the Kings Bench.

471. Man's Caſe.

MAN was Indicted, That he *fuit & adhuc eſt* a common Barrettor, and no place is expreſſed where he was a Barrettor, ſo as no

no trial can be. *Dodderidge* Justice, If he be a Barrettor in one place, he is a Barrettor in all places. The Indictment was, *Per quod* he did stir up contentions, *Jurgia*; And no place alleadged where he did stir up *Jurgia*, contentions. And it was said that in that case the place was very material: And so the Indictment was quashed for want of setting forth the place where he did stir up many Contentions, *Jurgia &c.*

Pasch. 3 Caroli, in the Kings Bench.

472. Green and Moody's Case.

AN Action of Debt was brought for Rent; and it was found for the Plaintiff. *Thyn* Serjeant moved in arrest of Judgment, and set forth the Case to be, That a Lease was made for years to begin at *Michaelmas* after; And the Plaintiff in the Action of Debt for the Rent did declare, *Virtute cujus* the Lessee did enter, and did not shew what day, according to *Cliffords* Case 7 *E.* 6. *Dyer* 89. But the Court said, It is said in this Case, *Virtute cujus dimissionis* he did enter and was possessed; and that must be intended at *Michaelmas*. *Alexander* and *Dyer's* Case, 33 *Eliz.* was resolved accordingly. And *Cliffords* Case, *Dyer* 89. is not *virtute cujus dimissionis*. And the Court held a difference betwixt *Debt* and *Ejectione firme*: *Cliffords* case was an *Ejectione firme*, but here it is Debt. *Jones* Justice, If he did enter before *Michaelmas*, yet Debt will lie for the Rent upon the privity of contract; for the Lessee cannot destroy the contract, unless he make a Feoffment. It was adjudged for the Plaintiff.

Quære, If when the Lessor in the case which *Jones* put hath brought his action and recovered when the Lessee hath entred before the day, If the Lessor shall put him out as a Disseisor by reason of the Recovery in the action of Debt, in which he hath admitted him to be Lessee for years: Or if the Lessor after he hath recovered in Debt dyeth, whether his heir shall be estopped by the Record to say otherwise then that he is in by the Lease; Or whether the Recovery in Debt hath purged the wrong. Like unto the Case 14 *H.* 8. 12. by *Carret*. If one entreth into my lands, and claims 20 years therein, and I suffer him to continue there and accept of the Rent, and afterwards he committeth Waste, I shall maintain an action of Waste, and declare upon the special matter. If one entreth into my Land claiming a Lease for years, *per Curiam* he is a Disseisor, and he cannot qualifie his own wrong, *Dyer* 134. *Traps* case. But Sir *Henry Yelverton* said, That I may admit him to be Tenant for years, if I accept of the Rent, or bring Waste, as *Carret* said 14 *H.* 4.

But

But he hath not but for years, in reſpect of his claim: But I am concluded by acceptance of the Rent or by bringing of the action of Waſte. So here by the bringing of the action of Debt, the Leſſor is concluded. But *Quære* if it ſhall bind his heir. It was conceived it ſhall, becauſe it is by Record, the ſtrongeſt concluſion that is.

Paſch. 3 Caroli, in the Kings Bench.

473. Smith's Caſe.

A Leaſe for years was made of Lands in *Middleſex*, and the Leſſor brought Debt in *London* againſt the Aſſignee. The opinion of the whole Court was, that it was not well brought, but the Action ought to have been brought in *Midd.* *Jones* Juſtice, Debt for Rent upon the privity of Contract may be brought in another County; but if it be brought upon the privity of Eſtate, as by the Grantee of the Reverſion, or againſt the Aſſignee of the Leſſee, then it ought to be brought in the County where the Land is. *Quod nota.*

Paſch. 3 Caroli, in the Kings Bench.

474. Cremer and Tookley's Caſe.

AN action of Debt was brought for ſuing in the Court of Admiralty againſt the Statutes of 13 *R.* 2 *cap.* 5. & 15 *R.* 2. *cap* 3. whereby it is enacted, That of manner of Contracts, Pleas and Complaints ariſing within the body of the Counties as well by land as by water, the Admiral ſhall in no wiſe have conuſans: And the Statute gives damages, part to the party, and part to the King. And the Plaintiff in the action of Debt did declare, That the Defendant *Tookley* did implead *Cremer* the Plaintiff in the Court of Admiralty; And in his Declaration ſet forth, That one *Mullebeck* was Maſter of a Ship, *&c.* and that the Contract was made in *London*; And that *Tookley* the Defendant did force the Plaintiff to appear, and proſecuted the ſuit upon the Contract in the Admiral Court. And by ſpecial Verdict it was found, That a Charter-party was made betwixt *Mullibeck* and *Cremer* at *Dunkirk*, and that *Tookley* did proſecute *Cremer* in the Admiral Court by vertue of a Letter of Attorney, and ſo that he as Attorney to *Mullibeck* did proſecute the ſuit there.

The Caſe was argued by *Andrewes* for the Plaintiff. There are two points: The firſt upon the Juriſdiction of the Admiralty, the Contract being made at *Dunkirk*, but to be performed in *England*: The ſecond, If *Tookley* being the Attorney, be ſuch a party proſecutor as is within the Statutes. The ancient Law of the Admirals Juriſdiction appears in our Books. 8 *E.*2. *Corone* 399. *Staunton* Juſtice, It ſhall not be accounted the Sea, where a man may ſee the land over the water: And the Coroners were to do their office in ſuch caſe, and the County was to take notice thereof, 40 *Aſſ.*25. *Stamford* 11. This Commiſſion was at the Common-Law before the Statutes of Pyracie. 46 *E.* 3. *tras.* 38. *Statham* It is pleaded that the Defendant took the goods as Pyracie,&c. I infer thereupon that it was a good Juſtification. 7 *R.* 2. *tras* 54. *Statham*, Treſpaſs was brought for a Ship and Merchandiſes taken upon the Sea, and holden good; which proves that the Common-Law had juriſdiction upon the Sea, and not the Admiral. 6 *R.*2. *Protection* 46. *Protection quia profecturus ſuper altum mare. Belknap*, The Sea is within the Kings juriſdiction; and the Sea is as well in the Kings protection as is the Land.

It may be objected, That the Contract was made at *Dunkirk*, and ſo out of the body of the County, and ſo our Law cannot take notice of it; and if the Admiral ſhall not have juriſdiction in ſuch caſe, it ſhould remain undetermined. To that I anſwer, If all the matter were to be done at *Dunkirk*, then all were a Marine caſe, and the Admiral ſhould have juriſdiction; but if any part were to be done in *England*, then it is otherwiſe. *M.*30,31 *Eliz.C.*6:*part* 47.in *Dowdales* caſe. In an Action upon the Caſe upon *Aſſumpſit*, the Plaintiff did declare, That the Defendant at *London* did aſſume that ſuch a ſhip ſhould ſail from *Melcomb Regis* in *Suffolk* to *Abvile* in *France*: The iſſue was tryed in *London*, becauſe the Contract was made in *England*. *Paſch.* 28 *Eliz. Gynne* and *Conſtantines* Caſe: there becauſe it was part upon the Sea, and part upon the Land, the tryal was at the Common-Law, and not in the Admiral Court. 48 *E.*3.2. One did retein three Eſquires to ſerve in *France*; there becauſe the Reteiner was here, the tryal was here. If a Mariner contract with me for wages to ſail in ſuch a ſhip, he ſhall demand his wages at the Common-Law, and not in the Admiral Court. *vi.*39 *H.*6.39. There a Protection *ſuper vetilationem Caliſiæ,&c.* cannot be *moraturus*, becauſe that the Sea is ever ebbing and flowing, and doth not ſtand ſtill. So that if any part of the Contract be to be done upon the Land, then Common-Law ſhall have the juriſdiction. Wreck of the Sea ſhall be tryed at the Common-Law, becauſe it is caſt upon the Land. *Dyer* 326. *t' E.* 1. *Avowry* 192. A *Replevin* was brought of a ſhip taken upon the coaſt of *Scarborough*, and carried into *Norfolk*; and it was alleadged to be within the Statute of *Malebridge* for taking a Diſtreſs in one County, and carrying of it into another County.

Bereford,

Bereford, The King wills that the Peace be kept as well upon the Sea as upon the Land. And our Caſe differs from *Lacy's* caſe, *C.* 2. *part*: For in that caſe of Felony it is meer local; but Contracts are not ſo local. The ſecond point, Whether this be a proſecution within the Statutes, becauſe it was done by vertue of a Letter of Attorney from *Mullibeck*. 32 *E.* 3. *barr.* 264. *Annuity* 51. *Qui per alium facit, per ſeipſum facere videtur.* The Statute of *Merton cap.* 10. gave power to make Attorneys in any Court, *Com.* 236. but the Attorney muſt look at his peril that that which he doth be a lawful act. Here *Mullibeck* himſelf could not have juſtified this proſecution, nor ſhall his Attorney, 9 *H.* 7. 24. 28 *H.* 8. 2. *Quod per me non poſſum, per alium non poſſum.* If an Enfant make a Letter of Attorney to make Livery and Seiſin, and the Attorney maketh Livery accordingly, he is a Diſſeiſor. *C.* 10. *part* 76. If the Court have not juriſdiction of the Cauſe, the Miniſter muſt look to it at his peril, otherwiſe he is puniſhable. *Tres.* 253. One may do that himſelf, which he cannot do by Attorney: The Lord may beat his villein, but a ſtranger cannot do it for the Lord: the Lord may diſtrein for Rent when it is not behind, and the Tenant ſhall not have treſpaſs; but if the Bailiff diſtrein when no Rent is arrear, treſpaſs lieth againſt him. 2 *H.* 4. 4. 9 *H.* 7. 14. In Treſpaſs all are Principals. Then the Attorney here and *Mullibeck* are both Treſpaſſors againſt the Statutes: And the doing of the Attorney at the command of the Maſter ſhall not avail him. *vi. Dyer* 159. doth conduce to the reaſon, that the Attorney ſhall be puniſhed. It ſeems this ſuing in the Court of Admiralty is a Contempt, for it is *malum prohibitum*; and ſo either *Mullibeck* or the Attorney are puniſhable. And in this caſe the Plaintiff hath his Election to ſue *Mullibeck* or the Attorney; and therefore having ſued the Attorney, the Action brought againſt him will well lie.

Calthrop for the Defendant. It was objected, That the Court of Admiralty did begin but in the time of King *Edw.* 3. But *Dyer* 152. proves the contrary: For there in an Aſſiſe brought of the Office of Admiralty, the Plaintiff doth declare the ſame to be an Office time out of mind &c. which proves it to be a more ancient Office: And in the Statute of 2 *H.* 5. *cap.* 6. There the words are to enquire of all offences &c. as the Admirals after the old cuſtom; which proves that it is an ancient Office. It's true, *Avowry* 192. makes againſt me; but the Notes of that Caſe in writing proves that the book is miſprinted. I confeſs, if part of the thing be to be done here upon the Land, that it is triable at the Common-Law. The Defendant in this our Caſe is not liable to the penalty, becauſe at the time of the making of theſe Statutes it was not known that any Charter-partie was made beyond the Seas. 2 *E.* 3. *Oblig.* 15. Debt was brought upon an Obligation made at *Barwick*; where becauſ this Court had not juriſdiction, It was adjudged, That the Plaintiff *nihil capiat per breve. Teſtament* 16. A Teſtament bore date at *Cane* in *Normandy*,

which was proved in *England*: *Pole*, Upon an Obligation which bears date in *Normandy*, a man ſhall not have an Action here; but it is good in caſe of a Will proved here. 6 *E.* 3. 17, 18. The Abbot of *Crowland* granted an Annuity, and the Deed was made in *Scotland*: If the Deed had been the ground of the Action, then the Action would not have lien; but becauſe the Deed bore date before time of memory, the Annuity did lie; for the Action was not brought upon the Deed, but upon the Preſcription. 1 *E.* 3. 1. 18. 8 *E.* 3. 51. It is ruled, where the title is made by a Deed which bears date beyond Sea, that the Action will not lie. 13 *H.* 4. 5 & 6. An Obligation bore date in *France*, and was made according to the Law of *France*. 6 *R.* 2 *cap.* 2. Where the Specialtie bears date, there the Action ſhall be brought. The firſt book that ſpeaks of Deeds bearing date out of *England*, 26 *H.* 6. 28, 29. 20 *E.* 4. 1. 21 *E.* 4. 72. You muſt ſuppoſe then, That it was at a place in *England*; and that is but a fiction of Law, and you ſhall never make a man ſubject to the penalty of a Statute upon a fiction of Law. *C.* 11. *part* 51. A Diſſeiſor makes a Leaſe for life or years; the Diſſeiſee ſhall not not have an Action of Treſpaſs *vi & armis* againſt him; becauſe he comes in by title: For this fiction of Law, That the Frank-tenement hath always been in the Diſſeiſee, ſhall not have Relation to make him who comes in by title to be a Treſpaſſor *vi & armis*. 18 *H.* 6. 23. A Reverſion is expectant upon an eſtate for life; and in the mean time betwixt the Grant and the Attornment the Leſſee commits Waſte: yet although the Attornment relate to make the Grant good *ab initio*, yet the Relation being a fiction of Law will not make the Leſſee puniſhable for Waſte. Then in this our Caſe, the Deed bears date beyond the Sea; and then to make *Dunkirk* to be in *England* by a fiction in Law, ſhall not be prejudicial to the Defendant. *Com.* 369. The preamble of a Statute is the beſt Interpreter of the Statute. In the Statute of 13 *R.* 2. the preamble ſaith, *Becauſe the Admirals and their Deputies do hold their Seſſions &c. in prejudice of the King and of the Common-Law, and in deſtruction of the common people, &c.* But this Deed bearing date beyond the Sea, is no prejudice to the King, nor to his Franchiſes, nor to his people to be ſued in the Admiralty. 32 *H.* 8. *cap.* 14. The ſuit within the Admiralty ought to concern Charter-partie, and Fraighting of a Ship. For by that Statute it was enacted, That if any Merchant-ſtranger (as *Mullibeck* was) by long delaying and protracting of time (as in our Caſe) otherwiſe then was agreed between the ſaid Merchants in or by the ſaid Charter-partie, &c. ſhall have his remedy before the Admiral, which Lord Admiral ſhall take ſuch Order, &c. In our Caſe at Bar, It was a Charter-partie made beyond Sea. 2. It was for the freighting of a Ship. 3. For the breach of it was the the ſuit in the Court of Admiralty. But admit that this point be againſt me, then for the ſecond point I do conceive, that he who is puniſhable by the Statutes muſt be Proſecutor, which the Defendant

fendant is not; for what he hath done, he did by vertue of a Letter of Attorney, and he did it in the name of another, and it is the Act of the other. *C. 9. part 76. Combes* Case, If a man have power to do an Act by force of a Letter of Attorney, it ought to be done in the name of him who gives the power. *3 Ma. Dyer* 132. If *Surveyors* have power to make Leases, if they make the Leases in their own names, it is not good; but they ought to be made in his name who giveth the power. *11 Eliz. Dyer* 283 The *Statute* of *R. 3.* giveth power to *Cestuy queuse* to make Leases, and he makes a Letter of Attorney, the Attorney must make the Leases in the name of *Cestuy que use*, who hath the power by the *Statute*. *C 9. part* 75. A Copyholder may surrender by Attorney, because it is his own surrender. *Vi. Perkins* 196. 199. A Feoffment with a Letter of Attorney to the wife to make Livery, is good; but then the wife must make the Livery in the name of her husband. Secondly, in this Case at Barr, the beginning and the prosecution of the Suit was altogether for the benefit of *Mullibeck*, and so it appears by the Records of the Court, and no notice is there taken of the Attorney but of the Master. *L. 5. E. 45.* A Writ is directed to the Sheriff, and the Under-Sheriff makes a false return, the Sheriff shall be amerced; and not the Under-Sheriff, for the Law doth not take notice of him. *7 Eliz. Dyer* 239. The Customer himself and not his Deputie, shall be charged. And so in our Case *Mullibeck* being partie to the whole, ought to be accounted the partie prosecuting within the words of the Statutes. The Statute of *4 H. 7. cap.* 27. is so as they pursue their claims within five years; such prosecuting or pursuing ought to be by the partie himself. *C. 9. part* 106. If one of his own head make claim, it is not good claim for to avoid the Fine, &c. The Statute of *16 R. 2. cap. 5.* of *Premunire* makes against me; for there the Procurours, Councellors, Sollicitors, Abettors and Attorneys are named by the expres words of the Statute, and there is an expres provision against them: But in our Case it is not so; for if our Statute had intended to extend to Councellors, Attornies, &c. it would have expresly named them. There are divers exceptions which I take to the Verdict. First, There is variance in the place, betwixt the Declaration and the special Verdict; for the Declaration layeth the Contract to be made at *Dunkirk* in *England*, and the special Verdict finds it to be made at *Dunkirk extra partes transmarinas*. Secondly, The Declaration is to take in Mariners, and the special Verdict is to take in Men. Thirdly the Declaration is, A Ship to be prepared, and the Verdict is to be in readines. Fourthly, The Statute of *15 R. 2.* and *2 H. 4.* gives the Action by way of VVrit; and here it is by Bill. *42 Ass. 11.* There one was taken in Execution and escaped, and there a Bill was exhibited for the escape: and it was holden because the Statute of *West. 2.* gave a Writ of Debt, it shall not be extended by equity to a Bill of Debt. *Com. 38. a.* and *Com. 36, 37. Plats* Case.

There

There the Judgment is given upon a Bill for an eſcape; but Mr *Plowden* ſaid that it ſeemed to divers a hard Caſe. The Statute of 18 *Eliz. cap.* 5. of Informers is in the negative, *viz.* That none ſhall be admitted or received to purſue any perſon upon any penal Law, but by way of Information, or original Action, and not otherwiſe. *Mich.* 29 *Eliz.* in *Clarks* Caſe it was reſolved, that the Statute of 18 *Eliz.* was a penal Law, and the partie muſt not be ſued by Bill, but as the Statute hath preſcribed. 27 *H.* 6. 5. There upon *Premunire facias*, it was adjudged good by Bill; but there the Action was not directed ſo preciſely by the Statute, *viz.* in what manner the partie ſhould proceed. There are no preſidents that an Action of Debt hath been brought for purſuing in the Court of Admiralty, but in ſuch Caſe a Prohibition granted only: and for theſe cauſes he prayed Judgment for the Defendant. Obſerve Reader, the Argument of *Calthrope*; he doth not ſpeak to the point, where part of the thing or Contract is upon the Sea, and part upon the Land, as it was urged by *Andrews* who argued on the other ſide. The Caſe was adjourned.

Paſch. 3 *Caroli, rot.* 362. *in the Kings Bench.*

475.

IT was cited to be adjudged, That if a man purchaſe the next Avoidance of a Church, with an intent to preſent his ſon, and afterwards he preſent him, that it is *Symony* within the Statute.

Paſch. 3 *Caroli, in the Kings Bench.*

476. SUTTON the Chancellor of Glouceſter's Caſe.

IN the Caſe of *Sutton* who was Chancellor of *Glouceſter*, and put out of his place for inſufficiency in the Eccleſiaſtical Court, *Trotman* moved for a Prohibition to the Spiritual Court, and ſaid that the Biſhop had power to make his Chancellor, and he only hath the Examination of him, and the allowance of him, as it is in the Caſe of a Parſon who is preſented to the Biſhop, and ſaid, that if his ſufficiency ſhould be afterwards reexamined, it would be very perilous. *Doddridg* Juſtice, If an Office

of

of Skill be granted to one for life who hath no skill to execute the Office, the grant is void, and he hath no Frank-tenement in it. A Prohibition is for two cauſes: Firſt to give to us Juriſdiction of that which doth belong unto us: And ſecondly, when a thing is done againſt the Law, and in breach of the Law, then we uſe to grant a Prohibition. *Jones* Juſtice, *Brook* had a grant of the Office of a Herald at Arms for life; and the Earl Marſhal did ſuſpend him from the execution of his Office, becauſe he was ignorant in his profeſſion, and full of Error contrary to the Records: and it was the opinion of the Juſtices, that becauſe he was ignorant in ſuch his Office of Skill, that he had no Freehold in the Office. In the Principall Caſe, the Prohibition was denyed: And afterwards *Sutton* was put out of his Office by Sentence in the Spiritual Court, for his inſufficiency.

Paſch. 3 Caroli, in the Kings Bench.

477. Symm's Caſe.

TWo men having ſpeech together of *John Symms* and *William Symms*, one of them ſaid *The* Symmſes *make Half-crown peeces, and* John Symms *did carrie a Cloak-bag full of clippings.* And whether the Action would lie was the Queſtion, becauſe it was incertain in the perſon; For he did not ſay Theſe *Symmſes*, but The *Symmſes:* Like unto the Caſe where one *Farrer* being ſlain, and certain perſons being Defendants in the Star-Chumber, one having ſpeech of them, ſaid, *Theſe Defendants did murder* Farrer; and it was adjudged that the Action would not lie, for two cauſes: Firſt becauſe the words (*Theſe*) was uncertain in the perſon: And ſecondly it was incertain in the thing; For it might be that they had Authority to do it, as in *Mills* Caſe 13 *Jac.* in the Kings Bench, *Thou haſt Coyned Gold, and art a Coyner of Gold.* Thirdly, a Cloakbag of clippings, that is alſo uncertain; for it might be clippings of Wooll, or other things, or it might be clippings of Silver from the Goldſmith; For the Goldſmith that maketh Plate, maketh clippings. And fourthly, It is not ſhewed any certain time when the words were ſpoken: And for theſe cauſes it was adjudged that the Action would not lie.

Paſch.

Paſch. 3 Caroli, in the Kings Bench.

478. WHITTIE and WESTON's Caſe.

AN Action of Debt was brought upon the Statute of 2 *E.* 6. and the Plaintiff declared, That at the time of the Action brought, he was Parſon of *Merrel*, and that *Weſton* the Defendant did occupie ſuch Lands, and ſowed them with corn, *Anno* 21 *Jac.* and that he did not ſet forth his Tythe-corn, &c. The Defendant pleaded in barr of the Action, That *W. W.* Prior of the Hoſpital of St *John* of *Jeruſalem*, was of the Order of Hoſpitalers, &c. and that he held the ſaid Lands free from the payment of Tythes, and that the Priory came by the Statute of 32. *H.* 8. to the King: By vertue of which Statute the King was ſeiſed thereof, and that the ſame deſcended to Queen *Elizabeth*, who granted the Lands unto *Weſton* to hold as amply as the late Prior held, and that he was ſeiſed of the Lands by vertue of that grant, *Et propriis manibus ſuis excolebat*. Upon this Plea the Plaintiff did demurr in Law. *Noy* argued for the Plantiff, There are three points in the Caſe. Firſt, If theſe Lands the poſſeſſions of the Hoſpitalers of St *John*, which they held in their own hands were diſcharged of Tythes. Secondly, If there be any thing in the Statute of 32 *H.* 8. by which the Purchaſor of the King ſhould be diſcharged. Thirdly, Admitting that it ſhall be a diſcharge, if the Defendant hath well entitled himſelf to ſuch diſcharge or Priviledg. Firſt it is not within the Statute of 31 *H.* 8: *cap.* 13. for that Statute did not extend to the Order of St *John*. Secondly, the Statute of 31 *H.* 8. *cap.* 13. doth not diſcharge any but what was then diſſolved. Thirdly, The Statute of 32 *H.* 8 *cap.* 24. gives the poſſeſſions of the Hoſpitalers of St *Johns* to the King, and not the Statute of 31 *H.* 8.. Note that the Defendant did recite the branch of the Statute of 31 *H.* 8. *cap* 13. That as well the King, his heirs and ſucceſſors, as all and every ſuch perſon and perſons their heirs and aſſignes, which have or hereafter ſhall have any Monaſterie, &c. or other Religious or Eccleſiaſtical houſes or places ſhall hold, &c according to their Eſtates and Titles diſcharged and acquitted of the payment of Tythes, as freely and in as large and ample manner as the ſaid Abbots, &c. had or uſed: Alſo he recited the Statute of 32 *H.* 8. *cap.* 7. which Enacts that none ſhall pay Tythes, who by Law, Statute, or Priviledg ought to be diſcharged. The Statute of 31 *H.* 8. recites that divers Abbies, &c. and other Religious and Eccleſiaſtical houſes and places have been granted and given up to the King: The Statute enacts that the

the King ſhall have in poſſeſſion for ever all ſuch late Monaſteries, &c. and other Religious houſes and places, &c. And alſo enacts that the King ſhal have not only the ſaid Monaſteries, &c. but alſo all other Monaſteries, &c. and all other Religious and Eccleſiaſtical houſes which hereafter ſhall happen to be diſſolved, ſuppreſſed, renounced, relinquiſhed, forfeited, given up, or by any other means come to the King; and ſhall be deemed, adjudged, veſted by Authority of this preſent Parliament, in the very actual poſſeſſion and ſeiſin of the King for ever, in the ſtate and condition they now be. *Vi.* The Statute. And ſhall have all priviledges, &c. in as ample manner and form as the late Abbots, &c. had, held or occupied, &c. The Queſtion then is, Whether the men of the Hoſpital of St *John* at *Jeruſalem*, are intended to be within the ſaid Statute of 31 *H.* 8. And I conceive that they are not: It doth not appear in the pleading, that the Priory of St *John* was an Eccleſiaſtical Houſe, therefore it ought to have been averred. It is true, to plead that ſuch a man hath entred into Religion, is intended that he is a perſon dead in Law. They were never Eccleſiaſtical, nor ſo accounted; they muſt be both Religious and Eccleſiaſtical, who are within the Statute of 31 *H.* 8. For the ſaid Statute doth not extend to Religious houſes unleſs they be Eccleſiaſtical. *Tryal* 99. proves that they were Religious, 21 *H.* 7.7. And the Statute of Templers, 17 *E.* 2. do ſhew that they were Canonized (which is) admitted unto a Rule of their own Law, and not that they were made Saints, or that they were Eccleſiaſtical, 1 *E.* 3.7. *Nonability* 4. They were dead perſons in Law. *Feoffments* 68. proves that they were religious; but whether they were Lay or Eccleſiaſtical, I have not read. In the difference of Summons to Parliaments unto the Templers, the Summons is, *Vobis mandamus in fide & legeantiis*; but the Summons to a Spiritual Lord is, *in fide & electione*; and ſo was the Summons to the Prior of St *Johns* of *Jeruſalem*, but that was becauſe he held in *Frankalmoign*, but that doth not prove him to be Eccleſiaſtical; for firſt they exerciſed themſelves in Arms, It was part of their Order, *armis ſe exercere*; and that is againſt the Rule of the Common Law, to meddle with blood. *Secondly*, They uſed no Impoſition of hands, but only a Robe, nor had they ſo much Ceremony as a Knight of the Bath; and yet the Knights of the Bath are not Eccleſiaſticall. *So* there is nothing in their Creation or Order, that makes them Eccleſiaſtical; For they were Lay-Monks of the Order of St *Anthony*. The Jeſuites have Lay-Brethren, and not Eccleſiaſtical. 44. *Aſſ.* 9. There the Defendant pleaded in barr, That the Prior was a Lay-man, and ſo not under any Rule; and it is there admitted that he was a Lay-man, and yet that he might be Prior, and bring the Action in his own name, and not as Prior with his brethren, which proves that the reſidue were dead perſons in Law. If there be profeſſions alledged in one of the Hoſpitals of St *John* of *Jeruſalem*, how ſhall it be tryed? By the Country. *Tryal* 99. Profeſſion

was alleadged in the Plaintiff, who was a Knight of the Order of the Templers; and it was commanded to certifie it: And the Biſhop could not enquire of it, becauſe the Order of a Knight Templer was exempted by the Pope: But *Tryal* 98. there it was certified by the Biſhop; yet all our books are contrary to it. 2 *R.* 3. 4. *Si profeſſio allegata ſit in quodam militi Sancti Johannis Jeruſalem, quia immediate ſub Papa ſunt, non habere cuiſcribere poſſunt*, &c. 21 *H.* 7. 7. *Selden* 121. in his Hiſtory of Tythes, that they were accounted no part of the Clergy, but meerly Lay. With us they were accounted Lay, and therefore it is not material what they were accounted of in other places. A Colledg is a Lay Corporation: If they be diſſeiſed, an Aſſiſe muſt be brought. The Statute of 1. and 2. *Philip* and *Mary* is, That men might deviſe to ſpiritual Corporations, notwithſtanding the Statute *de terris ad manum mortuum non ponend.* or any other Statute to the contrary. *Dyer* 254. There a Deviſe was unto a Colledg and Grammar-School, and holden a good Deviſe, becauſe the Statute of *Philip* and *Mary* ought to be favourably expounded, being for the benefit of the Corporation. I take another reaſon from the manner of payment of Tythes: Eccleſiaſtical perſons payed Tythes; but no Tythes were paid by the Hoſpitalers of St *Johns* of *Jeruſalem*. The Statute of 27 *H.* 8. diſſolves Abbies, &c. but doth not relate to any formerly given up, &c. and the reaſon was, becauſe they were but petty Abbies. The Statute of 31 *H.* 8. diſſolves none; but recites that whereas divers have given up, &c. or were to be given up, but ſhews no reaſon; for divers Inquiſitions iſſued forth to enquire of their Lands; but the Statute of 32 *H.* 8. doth not ſhew any ſuch reaſons, but other reaſons; becauſe that *Rodes* was taken away, and that they held of the Pope. And if they were diſſolved by the Statute of 31 *H.* 8. then what need a Statute the next year after, *viz.* 32 *H.* 8. to diſſolve the Corporation? By the Statute of 26 *H.* 8. *cap.* 3. the King hath the firſt Fruits and Tenths of all that ſhall be promoted to any Benefice or promotion ſpiritual. This doth not extend to *St John* of *Jeruſalem*; and therefore afterwards in the ſame Statute it is Enacted, That every one which ſhall be elected, or by other means appointed to the Dignity of the Prior of *St Johns* of *Jeruſalem*, ſhall before their real and actual entrie into the Dignity or medling with the profits, ſatisfie the King, &c. Now if they were intended in the words *Spiritual promotion*, it was in vain anew to enact for them. The Act of 32 *H.* 8. extends to *Ireland*, and ſo doth not the Statute of 31 *H.* 8. the Statute of 31 *H.* 8. extends only to Eccleſiaſtical and Religious; ſo they were not intended within the Statute of 31 *H.* 8. Next, If they were intended within the Statute of 31 *H.* 8. then the Statute of 32 *H.* 8. gives them abſolutely by name to the King: The Statute of 31 *H.* 8. gives nothing to the King, but thoſe that are or were to be given up, forfeited, ſurrendred, or otherwiſe given up; but gives nothing to the King but by the help of

ſome other Act, *viz.* forfeiture, ſurrender, or otherwiſe given up. The word (Otherwiſe) never intended Diſſolution by Act of Parliament; for that is *paramount* the particulars recited. The Statute of *Malebridg cap.* 30. *n. Proviſum eſt quod ſi depredationes vel rapini aliqui fiant Abbatibus, &c. vel aliis Prelatis Eccleſiaſticis, &c.* That Statute never intended to extend to Biſhops, who are *paramount* and ſuperior to Abbots: The word (*aliis*) will bear no ſuch ſenſe, to make the ſuperior to be intended, when as the inferior is recited. The Statute of 13 *Eliz.* recites, That no Colledg, Dean and Chapter, Parſons, Vicars, &c. may make a new Leaſe, unleſs within a year of the end of the Leaſe in being. Now a Biſhop is ſuperior and above theſe particularly named, and may make concurrant Leaſes: ſo here the word (Otherwiſe) doth not intend that (Otherwiſe) to be by Act of Parliament, and to extend to greater then the particulars recited. The Statute of 32 *H.* 8. ſayes that the Corporation ſhall be diſſolved and void; but the Statute of 31 *H.* 8. doth not ſay that the Corporation ſhall be diſſolved and void. The Statute of 32 H. 8. ſayes that the Corporation and poſſeſſions ſhall be in the King by vertue of that Act; then not in the King by vertue of the Act of 31 H. 8. A Feoffment in Fee is made unto the uſe of *A.* in Tail, he hath the Uſe by the Statute of *Weſt.* 2. *cap.* 1. Now when the Statute of 27 H. 8. *cap.* 10. came, he hath the poſſeſſion by force of that Act, *viz.* of 27 *H.* 8. and not by force of the Statute of *Weſt.* 2. If the King be not in by the Statute of 31 H. 8. then he ſhall not have every of the Priviledges which the Act of 31 H. 8. giveth. *C.* 2. *part*, The Biſhop of *Canterbunies* Caſe. The Colledg of *Maidſtone* was Religious, but not Eccleſiaſtical; and it was adjudged that the Purchaſors of the Lands of the ſaid Colledg were not diſcharged from the payment of Tythes, becauſe the Colledg was not Eccleſiaſtical, but Religious only; and Religious and not Eccleſiaſtical, came not to the King by the Statute of 31 H. 8. 18 *Jacobi*, in the Common Pleas, *Wrights* Caſe; The Priory of *Hatfield* being of ſmall value, *viz.* not having Lands of the value of 200*l. per annum* was diſſolved by the Statute of 27 H. 8. and the Lands were not Tythe-free in the hands of the Purchaſors, becauſe the Priory came not to the King by the Statute of 31 H. 8. and yet they were Tythe-free in the hands of the Prior himſelf.

The ſecond point upon the Statute of 32 H. 8. The words are, That the King ſhall have all Rights, Intereſts and Priviledg, as it was in the hands of the Abbots, Priors, &c. It is objected, To be free from payment of Tythes is a Priviledg: I anſwer, That neither Right, Intereſt, nor Priviledg do free him from the payment of Tythes: Firſt, there is no diſcharge of Tythes by the word (Intereſt) in the Statute, for that is plain; Then the queſtion is, if the word Priveledg will diſcharge the Lands from the payment of Tythes; and if that word would have ſuf-

ſiced to have diſcharged the Tythe, what need was there of the ſpecial Clauſe to diſcharge Tythes? The *Statute* of 27 H. 8. diſſolves Chaunteries, and there it is ſaid, That the King ſhall have and enjoy, &c. and there alſo all Priviledges are given; then the *Statute* of 1 *E.* 6. came, and gave all Chauntries to the King, and there the word (Priviledg) was not in the Act; yet by thoſe words the Lands were not diſcharged from the payment of Tythes: The *Statute* of 31 H. 8. is, Conditions and Rights of Entrie; yet there was another Act made to give Conditions to the King. But admit that the King himſelf be diſcharged, yet his Patentees are not diſcharged. The Priviledg was perſonal, and perſonal Priviledges are not transferrable. 35 H. 6. 56. A *Statute* diſſolves the Templers, and gives the Lands to the Hoſpitalers to hold by the ſame ſervice as the Templers did, which was *Frankalmoign*; yet the Grantee held by Fealty, for that *Frankalmoign* is a perſonal priviledg, and cannot be transferred by general words. The King (it's true) ſhall have the priviledg, for he is a priviledged perſon; for of his goods he ſhall not pay Tythes, if he do not grant them over: and the Grants prove, That unleſs he had granted them, he ſhould have paid no Tythes. The *Statute* of 31 H. 8. ſayes, All Conditions which the Abbots, &c. have; yet untill the *Statute* of 32 H. 8. no Purchaſor could take advantage of a Condition. *Hill.* 44. *Eliz.* in the Common Pleas, *Rot.* 1994. *Spurlings* Caſe. The Purchaſors of Lands of the Hoſpital of St *Johns* of *Jeruſalem*, were not priviledged from the payment of Tythes. *Paſch.* 8 *Jacobi* in the Common Pleas, *Urry* and *Bowyers* Caſe, In a Prohibition it was holden by *Cook* and *Nichols*, That the Purchaſor of St *Johns* of *Jeruſalem* ſhould pay Tythes; but *Winch* and *Warburton* cont. 18 *Jacobi*, in the Common Pleas, All the Judges but *Warburton*, held that the Purchaſor ſhould pay Tythes. 10 *Eliz. Dyer*, There it doth not appear whether they were of the Order of Templers or Ciſtertians.

The third point in this Caſe, The Defendant doth make no title to the Diſcharge, for he hath not averred that the Priory were Eccleſiaſtical perſons. If a man plead that A. is profeſſed, the Court cannot take notice of it that he is a dead perſon in Law; But if he ſaith that he was of ſuch an Order, he ought to ſet forth of what Rule the Order is. Secondly, The manner of their diſcharge was, when they did Till and ſow their Lands, *propriis ſumptibus & manibus.* If they grub up Roots, and make the Lands fit for Tillage; but if their Tenants ſow the Lands, they ſhall pay Tythes, for they had the priviledg in reſpect they ſhould not be idle; unleſs all theſe do concur, they ſhall pay Tythes, *viz.* plough, ſow, reap, and carrie the Corn. Theſe Priviledges are to be taken ſtrictly, becauſe they are to defeat the Church of her endowment; and therefore in this Caſe the Defendant doth not well entitle himſelf to the Diſcharge, unleſs he do ſhew that he did occupie the Land

for

for one whole year before, and that he did plow, ſow, and reap the corn; But he ought for to have ſhewed, that ſuch time he plowed the Land, ſuch a time he ſowed it, and ſuch a time he reaped the corn; Otherwiſe the Court will intend that another man did plow and ſow the land, and that he only reaped it: For if Leſſee of the Hoſpital doth plow the Land, and ſow it, and afterwards doth ſurrender to the Prior of the Hoſpital who reaps the ſame, he ſhall pay Tythe of the ſame, for the Priviledge was granted unto them who were Labourers. And the Defendant perhaps might have the Lands to halfs: that is to ſay, to have half the Corn growing upon the Lands. The pleading is not good. When you plead two Bars, each Bar muſt ſtand of it ſelf, and the ſurpluſage of the one Bar ſhall not help the defect of the other Bar. The word (*Priviledge*) in the Act of 32 *H.* 8. doth not extend to Tythes: If it doth, yet the Purchaſor ſhall not have the Priviledge. *Dodderidge* Juſtice, The Statute of 32 *H.*8. was made, becauſe that thoſe of *S. Johns of Jeruſalem* ſaid, that they could not ſurrender their Hoſpital, becauſe they had a Supreme Head over them, *viz.* their great Maſter the Pope.

Crawley Serjeant argued for *Weſton* the Defendant. The pleading was over-ruled to be good, the laſt day the Caſe was argued. We have well entitled our ſelves to the Diſcharge: For we have pleaded that we had the occupation of the Lands for one whole year; and that *Weſton* the Defendant plowed, ſowed, and reaped the Corn upon the lands at his own coſts and charges; And the Plaintiff hath not ſhewed that any other plowed, ſowed, or reaped the ſame. Our title is by preſcription, which is confeſſed. This Society was erected in the time of King *Henry* the 1. and it continued untill 32 *H.*8. 44 *Eliz.* in *Spurlings* caſe, there were two reaſons of the Judgment. 1. There the Statute of 31 *H.*8. was not found, and ſo the King was not entitled to rights and priviledges, and by conſequence ſo was not his Pattentee. 2. It did not appear that the Councel of *Lateran* (15 *Johannis*) did extend to theſe Orders, which was ſaid to have been created 17 *E.* 3. whereas indeed it was created in the time of *Henry* the 1. Regularly this priviledge is not transferrable, for it is *ratione Ordinis*: As when the King makes a Duke, and gives to him poſſeſſions, thoſe poſſeſſions annexed to the Dukedom are not transferrable over but by ſpeciai Act of Parliament. 35 *H.*6.36. *Moile*, There if there had been ſpecial words in the Act of Parliament, it had been *Frankalmoigne*. This Priviledge is transferred to the King by the Act of 32 *H.* 8. and that Statute requires no aid of Regular or Eccleſiaſtical perſons. Secondly, the words are ſpecial, *And all other things of theirs*. This Caſe oppoſeth not the Biſhop of *Canterbury's* Caſe, *C.* 2 *part*; For that refers to the Statute of 1 *E.*6. which had not ſo large words. The intent of an Act ſhall be taken largely and beneficially to inlarge the Kings poſſeſſions; as the grants of the King ſhall

ſhall be taken largely and beneficially for the King. There is a difference betwixt this Statute of 32 *H.*8. and the Statute of 27 *H.*8. The copulative words of the Statute of 27 *H.*8. are, *To have all Rights and Intereſts, and Hereditaments. C.*11. *part* 13. *pro omnibus demandis, &c.* there the demand ſhall extend to Temporal demand; ſo, All rights and Intereſt, and Inheritance, ſhall be conſtrued, All temporal rights, &c. But the Statute of 32 *H.*8. is larger, *viz. Of what name and nature ſoever.*

If by the words of the Statute of 31 *H.* 8. (*Priviledges*) Tythes had been given to the King without eſpecial proviſion after made, then what needed the ſpecial Clauſe after? was the Objection which hath been made. I anſwer, The ſpecial Clauſe was neceſſary: For in pleading otherwiſe he ought to have ſhewed what Priviledge and Diſcharge it was in particular; and ſo the Clauſe was added for the eaſe of pleading. *C.*9. *part*, The Abbot of *Strata Mercellos* caſe; there it is ſaid, That if a man plead to have ſuch priviledges as ſuch a one had, he ought to ſhew in particular what thoſe priviledges were: But this proviſion in the Statute of 31 *H.*8. was made for the benefit of pleading. The Statute of 17 *E.*2. which gave the Tythes to the Hoſpitalers, gave them by the word of Priviledges, for they had their poſſeſſions as it were by a new purchaſe. *Cook Entries* 450. there the Caſe much differs from this: ſo then the general word (Priviledges) doth extend to Tythes. 14 *H.*8. 2. By a grant of All trees, Apple-trees will not paſs; yet if it be of all trees *cujuscunque generis, naturæ, nominis aut qualitatis*, then they will paſs. *C.*3 *part* 81. By grant of all goods, Apparel will not paſs. Here are ſpecial words in the Statute, *cujuſcunque naturæ, nominis, &c. Nomina ſunt ſymbola rerum:* And then call them what you will they are given to the King, and intended to be transferred to the King; and ſo there needs no ſpecial proviſion for the diſcharge of the Tythes; For to ſay, that the Priory was of the Order of the *Ciſtertians*, is ſufficient.

Admit then that the King ſhall have the Tythes, as I have argued he ſhall; then his Pattentee ſhall have them. It is a real diſcharge in the King, and not a diſcharge in reſpect of his perſon only. Priviledges of diſcharge may be transferred as well as Priviledges of profit. Then the queſtion further is, Whether they of *S. Johns of Jeruſalem* were Eccleſiaſtical? They were Regular, as appeareth by the Statute of 32 *H.*8. for that ſaith that they ſhall be free from Obedience. *Trin.* 8 *Jacobi* in the Common-Pleas, *Bowyers* caſe: *Whore, Cook, Nichols, Warburton* and *Winch* did agree that they were Eccleſiaſtical Prieſts. The Prior had Parſonages; and none could have Parſonages but Eccleſiaſtical perſons. 3 *E.*3.11. They had Appropriations, which could not be unto Lay-men. 22 *E.*4.42. There a Writ of Annuity was brought againſt the Prior of *S. Johns of Jeruſalem*; and it was ruled there that he ought to be named Parſon, which proves that he was Eccleſiaſtical. 26 *H.*8. *cap.*2. there it

is

is said, That he shall pay First-fruits as other Parsons; which proves that he was Parson, 42 *E.*3.22. there they are called Ecclesiastical. 35 H.6. 56. they were seised in the right of the Church. *Linwood lib.*2. *cap.*47. *de Judiciis*, That they were Ecclesiastical. It was objected, that Knighthood cannot be given to Ecclesiastical persons; and they were Knights. *Popham* once Chief Justice of this Court said, That he had seen a Commission directed unto a Bishop to Knight all the Parsons within his Diocese; and that was the cause that they were called Sir *John*, Sir *Thomas*; and so they continued to be called untill the Reign of Queen *Elizabeth*. *Jones* and *Dodderidge* Justices, They were Ecclesiastical persons, although they were divided from the jurisdiction of the Bishop. The Case was adjourned to be further argued.

Pasch. 3 *Caroli, in the Kings Bench.*

479. Langley and Stote's Case.

IN an *Ejectione firme*, the Plaintiff declared of an Ejectment 26 *Martii* 23 *Jacobi, contra pacem dicti Domini Regis nunc*: which could not be, because King *James* dyed the 27 of *March*, and so it was not *contra pacem Caroli Regis*. 8 H.4.21. An Appeal of *Maheim* was brought; and the Plaintiff declared, That he meyhemed in the time of the King that now is; and the Writ did suppose the same to be in the time of King *R.* 2. And for that cause it was adjudged, *Quod nihil capiat per Breve.*

Pasch. 3 *Caroli, in the Kings Bench.*

480. Mutle and Doe's Case.

DEbt was brought upon a Bond; and the Plaintiff in his Declaration doth not say, *hic in Curia prolat.* It was holden by the Court, That although it be in the election of the Defendant to demand *Oyer* of it, yet the Plaintiff ought to shew it. The Judgment also was entred, *Concessum est*; whereas it ought to have been, *Ideo consideratum est.* And for these causes the Judgment was reversed: So was it adjudged also the same Term in this Court, in *Barret* and *Wheeler's* Case.

Pasch.

Paſch. 3 Caroli, in the Kings Bench.

481. Serjeant Hoskin's Caſe.

HE was Indicted for not paving of the Kings high-way in the County of *Middleſex* in *S. Johns ſtreet, ante tenementa ſua:* And in the Indictment it was not ſhewed, How he came chargeable to pay the ſame; Nor was it ſhewed that he was ſeiſed of any houſe there, nor that he dwelt there, nor was it averred that he had any Tenement there. The opinion of the Court was, that the Indictment was incertain; for it might be that his Leſſee dwelt in the houſe, and ſo the Leſſee ought to have repaired it, and alſo mended the high-way. And for theſe Incertainties the Indictment was quaſhed.

Paſch. 3 Caroli, in the Kings Bench.

482. Samson and Gatefield's Caſe.

ERror was brought to reverſe a Judgment given in the Court of *Virge* in an Action upon the Caſe; where the original Proceſs *fuit* a Sommons, whereas it ought to have been an Attachment.

Paſch. 3 Caroli, in the Kings Bench.

483. Hern and Stub's Caſe.

IN an Action of Detinue, the Plaintiff did declare upon the Bailment of a Cloak of the value of 10*l.* to the Defendant to be ſafely kept, and to be redelivered unto him upon requeſt: And ſhewed, That he did requeſt the Defendant to redeliver it, and that yet he doth detain it to his damage, &c. The Defendant juſtified the Detainer by reaſon of a Forain Attachment in *London:* And ſaid, That *London* is an ancient City; and that there is a Cuſtom in *London* &c. That if any one be indebted unto another, that if he will enter his ſuit or plaint into the Counter

Counter of the Sheriff of *London*, that a Precept ſhall be awarded unto a Sergeant at *Mace* to ſummon the Defendant; and if he retorn *Nihil viz.* that he hath nothing within the City by which he may be ſummoned, and *Non eſt inventus*; And if he be ſolemnly called at the next Court, and makes default, that then if he can ſhew that the Defendant hath goods in the hands of one within the Liberty of the City, that the ſaid goods ſhall be attached. And if the Defendant make default at four Court-dayes, being ſolemnly called, that then if the Plaintiff will ſwear his Debt, and put in Bail for the goods, *viz.* That if the Debt be diſproved within one year and a day, or the Judgment be reverſed, That he ſhall have Judgment for the ſaid goods. And he ſhewed, That he entred his plaint againſt the now Plaintiff in the Counter of *Woodſtreet* for the Debt of 20l. and that a Precept was awarded to a Sergeant at Mace to ſummon him; And becauſe he had not any thing by which he could be ſummoned, he ſhewed that the now Plaintiff had goods in his the Defendants hands, which were attached in his hands: And that he ſware his Debt, and put in bail for the goods, and had Judgment thereupon. Upon which Plea the Plaintiff did demur in Law.

Ward argued for the Plaintiff. There are four Reaſons of the Demurrer. 1. He ſets forth, That *J. S.* did levy a plaint againſt the now Plaintiff for the Debt of 20l. but doth not ſet forth expreſly that he did owe him 20l. And he ought to have ſet down how the Debt grew due; for that is traverſable by the Plaintiff, and now hee cannot traverſe it. *C.* 10. *part* 77. The generall Count in an Action upon the Caſe, *Quod cum indebitatus fuit* in ſuch a ſumme, *Super ſe Aſſumpſit*, without ſhewing the Cauſe of the Debt is inſufficient. 5 *H.* 7. 1. Treſpaſs was brought for taking of a Chain of Gold; The Defendant ſaid, That the Plaintiff before the treſpaſs ſuppoſed did Licenſe him to take the ſame Chain, and to retain it untill he paid him 200 Marks, which he ought to pay him. *Keble* took Exception, becauſe the Defendant did not alledge for what cauſe the 200 Marks was due, which Cauſe the Plaintiff might traverſe: to which *Brian acc'.* 9 *E.* 4. 41. Treſpaſs for taking a Bagg with Money; the Defendant ſaid, That the Plaintiff was indebted unto him in a certain Summ, and delivered unto him the Bagg of Money in ſatisfaction. *Littleton*, The plea is not good, for he ought to ſhew how he was indebted unto him. *Old Entries* 155, 156. there in a Forraign Attachment the certainty of the Debt was expreſſed and averred. 2. He pleads a Cuſtom, and doth not proſecute his Caſe according to Cuſtom. The Cuſtom is, That if the Sergeant retorn, that he hath nothing within the City whereby he may be ſummoned; And *Non eſt inventus*. And at the next Court day he be ſolemnly demanded, and make default, &c. And he ſaith, That becauſe he had nothing by which he could bee ſummoned; but doth not ſay, That the Officer did return that he had not any thing whereby to be ſummoned, nor that he was not to be found,

nor doth he plead or ſay, That at the next Court day he was ſolemnly demanded. *Dyer* 196. *b.* where this Caſe of Forraign attachment was; there the Cuſtom is ſet forth, *viz.* That the Debt ought to be affirmed by the Oath of the party in *Curia Guildhall*; and this was pleaded to be in *Curia Vicecomit. in Computatorio.* Alſo he doth not averr, That he had found pledges according to the Cuſtom, and therefore the plea is inſufficient, becauſe he hath not purſued the Cuſtom. 3. He ſheweth that the goods were attached in the Defendants hands, but he doth not ſhew that it was within the Liberty of the City and it might be out of the liberty of the City, and all the Preſidents are *infra Juriſdictionem &c.* And the Plea of every perſon ſhall be taken ſtrongeſt againſt the Pleader. And he ought to have ſhewed that it was within the Liberty of the City, becauſe it is a peculiar Juriſdiction. 34 *E.* 3. *breve* 789. Debt was brought in the Common Pleas; the Defendant ſaid, That the Plaintiff had a Bill for the ſame Debt depending in the Exchequer; and demanded Judgment of the Writ, *& non allocatur:* for it doth not appear by the Plea that the Plaintiff or Defendant were priviledged in the Exchequer, and then by the Statute of *Articuli ſuper Chartas, cap.* 4. it is provided, That no Common plea ſhall be holden in the Exchequer. 4 *E.* 4 36. *a.* In treſpaſs for Impriſonment, the Defendant doth juſtifie, &c. there he ought to ſhew that the Tower of *London* hath priviledges &c. For where a man will take advantage of a particular Priviledge and Liberty, he ought to ſhew that he was within the Priviledge or Liberty. *Mic.* 2 *Car. Willis* was Indicted before the Juſtices of *Northampton* for frequenting of a Bawdy-houſe in *Northampton*; and the Indictment was quaſhed, for it might be within *Northampton*, and yet out of the Liberties and Juriſdiction of *Northampton*. 4. He doth not ſhew in his Plea that his Debt was a due Debt: and it was pleaded in *Dyer* 196. that it was a due Debt, *vi Entries* 155, 156. It is not enough to ſwear his Debt, but he muſt ſwear his Debt to be a due Debt.

Stone for the Defendant. 1. I agree, that if the Action had been brought in that Court to recover a Debt, then he ought to ſet forth how it became due: but here he pleads to bar him, and not to recover, and ſo the Debt is not traverſable. 5 *H.* 7 1. there *Brian* took the Exception; but two Judges are againſt him, becauſe he brought not Debt, but another Action for the Chain. 9 *&* 4. 41. It is good by *Moile*, without ſhewing the Debt, becauſe it is by way of excuſe. 39 *H.* 6. 9. is ruled in the point: there the Attachment is in his own hands; there the other pleaded there was no debt: It is there ruled, that the debt is not traverſable; for if there be no debt, then he ſhall have reſtitution in *London* upon the pledges. It was objected, That he is to ſwear his debt to be a true debt. I anſwer, It ought to be ſo intended: and then if he lay a Cuſtom to ſwear the Debt, and we ſay we have ſworn our Debt, then we have purſued the Cuſtom. 3. It was objected, that it

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is not ſhewed where the goods were, whether within the juriſdiction of the City. 4 *E.*4.36. there the place came not in queſtion: But in our Caſe we lay, That the Cuſtom is, that the goods muſt be in *London*. *Old Entries*, 155,156. there it is not alleadged that the goods were within the City of *London* at the time of the Attachment. If a Precept be awarded to the Officer, who retorns that he hath not any thing within the City; and upon the allegation of the Plaintiff that ſuch a one hath goods of the Defendant in his hands, was the Objection. I anſwer, If we have not proceeded well, yet the Proceſs is well enough; for here is a Judgment againſt him in *London*: then ſo long as the Judgment is in force againſt him, he cannot have the goods. 21 *E.*4 23.*b*. It is a Rule, That a ſtranger unto a plaint ſhall not be received to alleadge diſcontinuance in the proceſs: So the Sheriff ſhall not excuſe himſelf upon an Eſcape, that there was Error in the Judgment, nor a privy ſhall not take advantage of it. *Ognels* Caſe *Trin.* 31 *Eliz.* there lies no proceſs of *Capias* by the Law upon a Recogniſance, but Extent, or *Levari facias*: Yet there a *Capias* was awarded; and if the party taken eſcape, the Sheriff ſhall not take advantage of the Erronious proceſs. So I deſire Judgment for the Defendant. And he took an Exception to the Declaration: In Detinue, if the Declaration be general, it is good, (*ſc.*) *Licet ſepius requiſitus, &c.* But here he ſhews that he delivered the Cloak to be redelivered upon Requeſt, and he doth not ſhew any particular Requeſt, but ſayes generally *Licet ſepius requiſitus*. *Ward*, There is a difference betwixt Detinue, and Action upon the Caſe: For in an Action upon the Caſe he ought to ſhew a particular Requeſt. 26 *H.* 6. If I bail goods to redeliver upon requeſt, yet I may ſeiſe them without requeſt. *Dodderidge* Juſtice, The reſeiſure of the goods is a Requeſt in Law, a Requeſt with a witneſs, a Requeſt with effect; and untill Requeſt, he hath juſt cauſe to keep them. *Jones* Juſtice, In Debt and Detinue the very bringing of the Action and demand of the Writ is a demand and requeſt: And if he appear at the firſt Summons, then he excuſes himſelf, otherwiſe he ſhall be ſubject to damages: but the Requeſt ought not to be ſo preciſely alleadged. But if a collateral thing be to be done upon Requeſt, there to ſay *ſepius requiſitus*, is not ſufficient. So if I ſell a horſe for 10*l.* to be paid upon Requeſt, there the Requeſt muſt be preciſely laid, for it is parcel of the Contract: And in Action upon the Caſe, and upon Debt, you muſt lay a Requeſt. *Dodderidge* Juſtice, The Requeſt is no part of the Debt; for the Debt is preſently due; but if I make the Requeſt to be part of the Contract, there it is otherwiſe: As if I deliver goods to redeliver to me, there needeth no preciſe Requeſt: but if it be to redeliver upon Requeſt there the Requeſt ought to be alleadged, for there the Requeſt is part of the Contract. The Caſe was adjourned till the next Term.

Paſch. 3 Caroli, in the Kings Bench.

484. Mole and Carter's Caſe.

IN an Action upon the Caſe upon an Aſſumpſit, it was moved in arreſt of Judgment, That the Plaintiff declares that he was poſſeſſed of certain Goods (*viz.* ſuch, &c.) at *London*, And that in conſideration of two ſhillings, That the Defendant at *London* did promiſe to carrie the ſaid Goods aboard ſuch a Ship, if the Plaintiff would deliver the Goods to him; And he ſhewed that he did deliver the Goods to him, and that he had not carried them aboard. He ſhewed that he was poſſeſſed of the Goods, but did not ſhew when or where he delivered the ſaid Goods to the Defendant; but ſaid only *deliberavit, &c.* And then the Law ſaith that they were not delivered. *Jones* Juſtice, The ſame is but matter of Inducement to the promiſe, and ought not to be ſhewed ſo preciſely.

Paſch. 3 Caroli, in the Kings Bench.

485. Fryer and Dew's Caſe.

DEW being ſued, prayed his Priviledg, becauſe he is a Commoner in *Exeter* Colledg in *Oxford*, and brought Letters under the Seal of the Chancellor of *Oxford*, certifying their Priviledg: and he certifies that *Dew* is a Commoner, as appeareth by the Certificate of Doctor *Prideaux*, Rector of the ſaid Colledg, Whereas he ought to certifie that he is a Commoner upon his own knowledg, and not upon the Certificate of another. But afterwards Certificate was made of his own knowledg, and then it was allowed as good. The Declaration came in *Hill.* 2 *Caroli*. The Certificate bore date in the *Vacation*, and he prayed his Priviledg this *Eaſter* Term. After *Imparlance* he comes too late to pray his Priviledg: The Certificate is not, that at the time of the Action brought he was a Commoner in *Exeter* Colledg, but that now he is a Commoner. And the Certificate bears date after the Action brought; He ought to have ſaid that at the time of the Action brought, and now he is a Commoner in *Exeter* Colledg. The Priviledg was allowed *per Curiam*. *Trin.*

Trin. 21 Jacobi, in the Kings Bench.

486. TANFIELD and HIRON's Caſe.

THe Plaintiff brought an Action upon the Caſe againſt the Defendant, for delivering of a ſcandalous Writing to the Prince, and in his Declaration he ſet forth what place he held in the Commonwealth, and that the Defendant ſeeking to extenuate and draw the love and favour of the King, Prince, and Subjects from him, did complain that the Plaintiff did much oppreſs the Inhabitants of *Michel Tue* in the County of *Oxford*, and that he did cauſe Meerſtones to be digged up, which might be a cauſe of great contention amongſt the Inhabitants of *Tue*. The Plaintiffe denyed the oppreſſion alledged againſt him; and the Defendant did juſtifie, and ſaid that *I. S.* being ſeiſed of the Mannor of *Tue*, did demiſe certain Lands, parcel thereof unto *I. F.* for eighty years; who made a Leaſe of the ſame at Will; and afterwards *I. S.* did Enfeoff *Tanfield* the Plaintiff of the ſaid Mannor, to whom the Tenants did attorn Tenants: And the Defendant ſhewed, That time out of mind, the Inhabitants of the Town of *Tue* had Common in the Waſte of the ſaid Mannor, and that a great part of the ſaid Mannor was incloſed, and the Meerſtones removed (but doth not ſhew by whom:) And ſhewed that the Lands incloſed, out of which the Inhabitants had their Common. And ſaid, That there were divers other Grievances to the Inhabitants of *Tue*, (but did not ſhew by whom they were, nor what they were) and ſhewed, that at a Parliament the Defendant did deliver ſuch a Writing to the Prince, as one of the Peers of Parliament, ſuppoſing that the grievances were ſet upon the Inhabitants by the Plaintiff, by reaſon the Plaintiff occupied the Lands ſo incloſed; and for Reformation thereof, that he delivered the Writing to the Prince *Abſque hoc*, that he did deliver it in any other manner. And upon this Plea in Barr, *Tanfield* the Plaintiff did demurr in Law.

Noy for the Plaintiff ſaid, That the Defendant complains of wrong, and doth not ſhew any wrong to be done by *Tanfield* the Plaintiff; It is a grievous ſcandal to deliver this Writing; for it is a ſcandalous Writing, and no Petition: for therein he doth not deſire any Reformation, but complains generally. Betwixt *John Friſel* and the Biſhop of *Norwich*, The Caſe touched in 21 *E.* 3. was, That *Friſel* brought a Prohibition to

the

the Biſhop, and the Biſhop excommunicated him for the delivering of it unto him; The Biſhop was fined: And there it is ſaid, As Reverence is due to the King, ſo it is due to his Miniſters. Our Action is brought at the Common Law, and not upon the Statute of *R.* 2. *de ſcandalis magnatum*. *M.* 18 *E.* 3. *Rot.* 162. *Thomas Badbrook* ſent a Letter to *Ferris*, one of the Kings Councel, the effect of which was, That *Scot* Chief Juſtice of the Kings Bench, and his Companions of the ſame Bench, would not do a vain thing at the Command of the King; yet becauſe he ſent ſuch a Letter to the Kings Councel, although he ſpake no ill, yet becauſe it might incenſe the King againſt the Judges, he was puniſhed, for it might be a means to make the King againſt his Judges. We are to ſee here, if the Defendant hath made any good Juſtification; If there were no wrong, then there was no cauſe to complain. Secondly, If he had demeaned himſelf as he ought, he ought to have had the wrong, if there were any) reformed, and that he did not do. 11 *H.* 4. 5 *H.* 7. A voice of Fame is a good cauſe for to Arreſt a man of Felony; but then ſome Felony ought to be committed. 7 *H.* 4. 35. A certain perſon came and ſaid to one, that there were certain Oxen ſtoln, and that he did ſuſpect ſuch a one who he arreſted upon the ſuſpition: It is a good cauſe of Juſtification if any Oxen were ſtoln; but if no Fellony was committed, if one be arreſted upon ſuſpicion that he hath committed Fellony, it is not good: If Fellony be done, then a good cauſe to ſuſpect him; but if no Fellony be done, nor he knoweth not heareth of any Fellony committed, there is no cauſe for to ſuſpect that the partie hath committed Fellony; but there ought to be ſuſpition that the partie hath committed ſuch a particular Fellony: Where Fellony is committed certainly, one may be arreſted upon ſuſpition but unleſs a Fellony be committed he cannot be arreſted: For where no Fellony is committed at all, he ſhall not be drawn to a Tryal to clear himſelf of the ſuſpition; but if a Fellony be certainly committed, and he be arreſted upon the ſuſpition, there he being forced to anſwer to the Fellony, he may clear and purge himſelf of the infamy upon his tryal, and ſo the infamy is not permanent, as in caſe when no Fellony is committed; for there he may bring his Action upon the Caſe. Here he ſaith that parcel of the Waſte is incloſed, and doth not ſhew what parcel, ſo as no certain iſſue can be taken upon it. *Moor* and *Hawkins* Caſe in an *Ejectione firme*, It was alledged that he entred into parcel of the Land, and the Land was alledged to lie in two ſeveral Towns; and it was not good, becauſe no certain iſſue could be thereupon: He ſaith the ſame was incloſed, but doth not ſhew by whom it was incloſed, *viz.* whether by the Feoffor, or *Tanfield* the Feoffee: he complains of many grievances, but doth not ſhew what they are, and he ought not to be his own Judge.

Secondly,

Secondly, He hath not demeaned himself as he ought; for he hath not desired in the Letter any Reformation, but only he complains of the oppression of *Tanfield*: He ought to have directed the Writing unto the Parliament, and he directed the same unto the Prince by name; In the Letter he doth not shew that *Tanfield* the Plaintiff did oppress, but that the Plaintiff was an oppressor, but he doth not shew in what thing. The Case was adjourned.

Trin. 21 *Iacobi in the Kings Bench.*

487. Scot's Case.

Rohorum & legalium hominum is omitted in the Certificate of an Indictment by the Clark of the Sessions: *Curia*, If it had been in Trespass, the omission of the said words had vitiated the Indictment; but not in Case of Felony. *Quare* the reason.

Trin. 21 *Iacobi, in the Kings Bench.*

Intratur, M. 19 *Jac. Rot.* 322.

488. Crouch and Hayne's Case.

IN a Writ of Error the Record is removed out of the Common Pleas. The Defendant pleads *in nullo est Erratum*, and a Demurrer is joyned; and the Defendant afterwards alledgeth Diminution of the Original. 7 *E.* 4. 25. The Assignement of Errors is in lieu of the Declaration. 4 *E.* 4. *Error* 44. After that *in nullo est erratum* is pleaded, the Defendant shall not alledg Diminution; for they are agreed before, that that is the Record. The Writ of Error was general, and did not shew when the

the Judgment was, when the Ejectment was, what the Lands were; and nothing is certain in the Writ of Error, but the persons and the Action: He shall not be concluded by the general retorn of the Record by the Chief Judg of the Common Pleas. *Fitz.* 25. *a. C.* 6. *Entr.* 231. The Record was removed, and a *Scire facias* awarded *ex recorde;* and Diminution was alledged for omitting of certain words; yet the Retorn there was of the Record, *& omnia ea tangentia.* *Dyer* 330. The Court certifie that the partie was not essoigned; there then cannot be any Certificate of the Chief Justice to the contrary. The Principal Case was, An Original bore date in *June* 18 *Jacobi*, and another Original in *September* 18 *Jacobi*, and both were retornable *S. Mich.* And the Trespas was done after the first Original sued forth, and before the later, and both the Writs are in Court: The question was, upon which of the Originals the Judges should judge. 4 *E.* 4. 26, 27, 28. There it is holden that the Judges ought not to suppose any Error. 22 *E.* 4. 45: Error was brought to reverse a Judgment in a Writ of Dower, And the Error assigned was, That there was not any Issue joyned; but because there was sufficient matter upon which the Judges might give their verdict, therefore the Judgment was affirmed: for the Judgment was not given upon the verdict. *Pasch.* 25 *H.* 8. *Rot.* 25. *Plot* and his wife against *Treventry* in a Writ of Error, after the Record removed, Diminution of the Original was alledged; and there it was pretended that the Judgment was given upon another Original, and one of the Originals was before, and the other after the Judgment; and there the Judgment was reversed, because it cannot appear to the contrary but that the Judgment was given upon the later Original. *Trin.* 18 *Jacobi*, *Rot.* 1613. *Bowen* and *Jones*'s Case, In an Action upon the Case brought upon *Assumpsit*, Error assigned was, because that no place was limited where the payment should be made: The Original was, That the promise was in consideration that the Plaintiff did lend to the Defendant so much, he at *London* did promise to pay the same to him again; There were two Originals which bore date the same day, Judgment was in that Case for the Plaintiff: And the Defendant brought a Writ of Error, and alledged Diminution of the Original, then the other Original was certified; The Defendant in the Writ of Error said, That the Original upon which the Recoverie was grounded, was an Original which had a place certain; The Judges did affirm the same to be the true Original which did maintain the Judgment, and agree with the proceedings, otherwise great mischief would follow. *George Crook* contrarie, and recited the Case, *viz.* *Hayns* brought a Writ of Error against *Crouch*, and the Writ of Error is to reverse a Record upon a Judgment which was given in the Common Pleas; The Original which is certified, bears date *Trin.* 18 *Jacobi*; and the *Ejectione firme* is brought *Trin.* 18 *Jacobi*,

for

for an Ejectment which is made in *September* following; and now upon this Errour aſſigned, the partie had a *Certiorari* to remove the Record upon which you alledge Diminution: For you ſay, That the Originall upon which the Judgment was given, bore date in *September* 18. *Jacobi*, which was after the Ejectment. The bodie of the Record is *Trin.* 18. Contrary to this Record, you ſay that there was an Originall *Mich.* 18 *Jacobi*, and ſo that is contrary to the Record. *Error* 2. upon the Record, The Originall is not part of the Record; but you ought to aſſigne Errour in that which is alledged in Diminution. 6 *H.* 7 4 *Fitz.* 21 *a.* To alledge any thing againſt a Record, is void: The Ejectment was after the Originall which warrants the Record, and it was after the Action brought. They alledge that the Originall was not truely certified, and that then after an *Imparlance*, an Originall Writ is made to Warrant the Action. *Jones* and *Bowens* Caſe before cited. There a vitious Originall was certified, and then upon the Complaint of the Defendant, the true Originall was certified; both were retornable at the ſame day.

And in the Caſe before cited of *Plott* and *Treventris*, The Originall which was firſt certified did not bear date according to the Record which was certified: But in our Caſe the laſt Originall doth not agree with the Record, but the firſt. But in the Caſe of *Plott* the Judgement was reverſed for another Error. The Diminution when it ſtands with the Record ſhall be allowed, but when it differs from the Record, then it ſhall not be allowed.

The Ejectment was layed after the firſt Originall purchaſed, which agrees with the Record, and after the Action brought. *Quod nota.* It was adjuorned till another Terme, viz. *Mich.* 21. *Jacobi.*

Trin. 21. Jacobi in the Kings Bench.

489. SOMMERS Caſe.

THe Caſe was between *Sommers* and *Mary* his Wife Plaintiffs, who Traverſed an Office found after the death of one *Roberts*: The parties were at Iſſue upon one point in the Traverſe; and it was found againſt the King. *Henden* Serjeant moved: The Office finds, That *Roberts* dyed ſeiſed of two Acres in Soccage, and four foot of Lands holden *in Capite*: (which was alledged *Roberts* had by Encroachment.) *Sommers* and his Wife pleaded, That *Roberts* in his life time did enfeoffe them of one of the Acres, *Abſque hoc* that that Acre did diſcend. And for the other Acre they pleaded and entitled themſelves by the Will of *Roberts*, *Abſque hoc*, that *Roberts* was ſeiſed thereof. That I take to be an inſufficient Traverſe.

Firſt, it is found by the Office, That *Roberts* dyed ſeiſed, and that the ſame diſcended to four Daughters, and One of the Daughters is the Wife of *Sommers*: And hee and his Wife traverſe the Office, and confeſſe that the Anceſtor died ſeiſed, *Abſque hoc* that the ſame diſcended. The Traverſe is repugnant in it ſelf, for if he did Deviſe it, then untill Entry by the Deviſee it doth diſcend: but if they had pleaded the Deviſe only, and Entry by force thereof, it might have been a good Traverſe. The Office findes that it did diſcend to four Daughters, and the Wife of *Sommers* is one of the four Daughters, and he and his Wife Traverſe the diſcent, and that is not good, for one cannot Traverſe that which makes a Title to himſelf. 37 *Aſſ.* 1. The Rule there put is; That a Man cannot Traverſe the Office by which he is intitled; but in point of Tenure he may Traverſe it: wherewith agrees *Stamford Prerogat.* 61 & 62. 42 *Aſſ.* 23. One came and Traverſed an Office, and thereby it appeared that Two there had occaſion to Traverſe it, and it was holden that, they all ought to joyne in the Traverſe. *Finch* Recorder of *London*, *contr*. The Office found generally, That *Roberts* had four Daughters, and had two Acres and four Foot of Lands, and that the ſame diſcended to four Daughters: *Sommers* and his Wife Traverſe the Office, and plead, That as to one

one Acre; *Roberts* made a Feoffment thereof unto them, *Absque hoc* that he died seised thereof. 2. That *Roberts* devised the other Acre to them *Absque hoc* that the same did discend. 5 *Eliz. Dyer* 221: *Bishops* Case, There it is resolved, That a Devise doth prevent a Remitter; and then by consequent, it shall prevent a Discent. 49 *E.* 3, 16. There a Devise did prevent an Escheat to the King.

As to the four Foot (gained by Encroachment) which is holden of the King *in Capite*, They traverse *Absque hoc* that *Roberts* was seised thereof; I agree that where their Title is joynt, there all must Traverse; but in our Case we Traverse for our selves, and deny any thing to be due to the three other Sisters.

The four Foot of Waste, was part of the Mannor of *Bayhall*; and the *Venire facias* was out of that Mannor, and the Towns where the other lands lay. 9 *E.* 4. *A.* disseises *B.* of a Mannor and *A.* severs the Demeasnes from the Services: Now *B* shall demand the Mannor as in Truth it now is: *Henden* contr'. It is no part of the Mannor of *Bayhall*, for it is encroached out of it; therefore the *Venire facias* ought not to be of the Mannor of *Bayhall*. The Jury finde that he had encroached four Foot *Ex vasto Manerii, &c.* *Dodderige* Justice, the encroachment doth not make it to be no parcell of the Mannor. *Ley* chief Justice, it is not layed to be a Disseisin, but an Encroachment, and therefore it is not so strong as a Disseisin with a Discent, but in Right it belongs to the Mannor: Tenant in Tail makes a Feoffment to the use of himself, and deviseth the Lands to *A.* the Devise doth prevent the Remitter.

Haughton Justice the Discent is Traversed: The Father dieth seised, and hath issue two Sons; and that the Lands discended to him; the other may say, That the Land is borough English, and that the Lands discend unto him *Absque hoc* that they discended to the Eldest.

Dodderidge Justice, Regularly, you shall not Traverse the Discent but by the dying seised; but in this Case it ought to be of necessity (*sc.*) in case of a Devise, the Traverse must be of the Discent; for here they cannot traverse the dying seised, for if they traverse the dying seised, then they overthrow their own Title, *sc.* the Devise; but here in Case of a Will, the partie shall traverse the Discent; for he cannot say that it is true that the Lands did discend, and that he Devised it, &c. The heir cannot traverse that which entitles him by Discent; but here his Title is by the Devise, and not as heir. *Finch* Recorder, the Devise is not of the four Foot, for if we confess the dying seised of the four Foot which

was holden in *Capite*, then we ſhould overthrow our own Deviſe. The Office finds that he died ſeiſed of the whole, and therefore of the four foot. He being never ſeiſed, we traverſe the dying ſeiſed thereof, and we deny that he ever had it; ſo the Traverſe is good without making of us any Title unto it, for we deſire not to have it. *Dodderidge* Juſtice, If a man deviſeth to his heir, it is a void Deviſe; for the diſcent ſhall be preferred: But if one hath Iſſue four daughters, and he deviſeth to one of them, it is good for the whole Land ſo deviſed to her; and no part of the Land ſo deviſed ſhall diſcend to the other, the Lands being holden in Socage. *Ley* Chief Juſtice and the whole Court did agree, That they might deny and traverſe the four Foot, if the Anceſtor had no Title unto it: and Judgment was given accordingly againſt the King, *quod nota.*

Trin. 21 Jac. in the Kings Bench.

490. PAYNE and COLLEDGES Caſe.

AN Agreement was made between *Payne* and *Colledg*, That if *Payne* (being *Chirurgion*) did Cure *Colledg* of a great Diſeaſe, *viz.* A *Noli me tangere*, That then he ſhould have 10*l.*, and that if he did not cure him, That then for his pains and endeavours, *Colledg* would give him 5*l.* In an Action upon the Caſe brought by *Payne*, he doth not ſhew in his Declaration in what place he uſed his endeavour and Induſtry: And there is a difference where the Plaintiff is to do any thing of Skill and Induſtry, for there he may do the ſame at ſeveral times, and in ſeveral places; and ſo this Caſe differs from the Caſes in our books. 15 *H.* 6. *Accord.* 1. is expreſly in the point, There the Defendant pleaded an Accord, That if the Defendant by his Induſtry, &c. And exception was taken becauſe that he did not ſhew a place. 3 *E.* 4. 1. Debt brought by a Servant, and declares that he was reteined by the predeceſſor of the Defendant, &c. and that he had performed his Service, &c. It was moved in Arreſt of Judgment, and Exception taken as in our Caſe, becauſe he did not ſhew where he did the Service, for that is iſſuable: and *Denly* there ſaid, That he need not ſhew the place, becauſe he might do it in ſeveral places. *Bridgeman* Serjeant contrarie, If the iſſue had been upon a Collateral matter, it had been good

good enough; but here the issue is taken upon an endeavour, and you ought to alleadg a place for the tryal of it. *Dodderidge* Justice, The Jury was from the place where the Agreement was made, the verdict will not make good the Declaration, although the Jury have found the whole matter of fact; for it doth not appear to us, That that was the Jury which could try his endeavour. The Case of 3 *E.* 4. of the Servant was to serve him seaven years, and there he need not shew any place where he did his Service, but only that he obeyed his Master in his Service for the seaven years: If the Plaintiff in this Case had shewed but any one place of doing, his endeavour in it, had been sufficient; but here he sheweth no place at all: And therefore Judgment was given, That *Querens nihil Capiat per Billam.*

Trin. 21 *Jacobi, in the Kings Bench.*

491. The Lord Zouch and Moores Case.

IN an Action of Trespas for cutting down of Trees in *Odiham* Park in *Hampshire*, It was found by special Verdict, That King *Henry* the eighth was seised of the Mannor and Park of *Odiham*, And by his Letters Patents 33 of his Reign, did grant unto *Genny* the Office of Stewardship of the said Mannor, and the Office of Parkership of the said Park, with reasonable Herbage; and by the same Letters Patents did grant unto him the Mannor of *Odiham cum pertinaciis*, and 100. Loads of Wood, excepting the Park, the Deer, and the Wood, for fifty years, if he should so long live. Then they found, That after that *Genny* did surrender and restore the Letters Patents in the Chancery to be cancelled, and that in truth they were cancelled, and that the said Surrender was made to the intent to make a new Lease thereof unto *Pawlet*; and that this Lease of 33 *H.* 8. being surrendred, That King *Henry* the 8. *Anno* 36. of his Reign, reciting the Letters Patents made to *Genny* to be dated *anno* 32 *H.* 8. (whereas in truth they were dated 33 *H.* 8.) and that they were surrendred, and that the intent of the Surrender was to make a new Lease to *Pawlet*; Did grant the same to *Pawlet*, as before they were granted to *Genny*, excepting as before.

They

They further found, That King *Philip* and Queen *Mary*, 5 & 6 of their Reigns, being ſeiſed of the ſaid Mannor and Park *in jure Coronæ*, reciting that *Henry* the 8. *anno* 36. of his Reign had granted unto *Paulet* as before, (omitting the *Proviſo* which was for 50 years if he ſhould ſo long live) and the Exceptions before; And reciting that thoſe Letters-Patents were ſurrendred *ea intentione* to make a new Leaſe *in forma ſequente*. They in conſideration of good ſervice and 200l. paid did grant the Office as before, and by thoſe Letters-Patents did grant Herbage generally (whereas the firſt Patent was reaſonable Herbage) And by theſe Letters-Patents did grant to him the Mannor *cum pertinaciis* (except the grand trees and woods in the Park) and Felons goods which were granted by the firſt Letters Patents for 50 years: And here was a Rent reſerved; and a *Proviſo* that for doing of Waſte that the Letters-Patents ſhould be be void: And there was no ſuch *Proviſo* in the firſt Letters-Patents.

27 *Eliz.* Queen *Elizabeth* reciting the Letters-Patents of 5 & 6 *Phil. & Mary verbatim* and truly, did grant the Parkerſhip unto Secretary *Walſingham*, and Leaſed the Mannor unto him with the Appurtenances, with power to take 100 loads of wood, Excepting the Deer, *Habendum* from the end of the Leaſe to *Pawlet* either by ſurrender or forfeiture for 21. years rendring rent, and for not payment a Re-entry. *Walſingham* granted the ſame to *H.* who granted to the ſame to *Moor* and other Defendants. King *James anno* 1. of his Reign granted the ſaid Mannor, and the Offices of Stewardſhip and Parkerſhip all by one Letters-Patents to the Lord *Zouch*, who thereupon entred. *Moore* entred upon him and cut down the Trees; and the Lord *Zouch* brought the Action of Treſpaſs.

Sir *Henry Yelverton* argued for the Plaintiff, and ſaid, 1. The Leaſe made unto *Pawlet* 36 *H.*8. is a void Leaſe in Law. 2. The ſecond Leaſe unto *Pawlet* made by King *Philip* and Queen *Mary* 5 & 6. is alſo void in Law. 3. The Leaſe made by Queen *Elizabeth* to *Walſingham*, *anno* 27 of her Reign, is alſo void in Law. And that the Leaſe made by King *James* is good in Law; and the Action of Treſpaſs brought by him will well lie. The firſt Leaſe is void; For it is granted upon a falſe ſuggeſtion made by *Genny*, *ſcil.* a ſuppoſed Surrender: For the Leaſe which he did ſurrender did not bear date 32. but 33 *H.*8. and the Surrender to the King was falſe; for the Leaſe ſuppoſed to be ſurrendred by *Genny* beareth date 32 *H.*8. whereas there was no ſuch Leaſe made to *Genny*: And therefore both being the ſuggeſtions of the party, the King was deceived;

For

For what Lease *Genny* had, the King could not know but by the suggestion of *Genny*; and upon his information the King was contented to accept of a Surrender, which was but a shew of a Surrender. The King could not know with what *Genny* treated him, but by his Information; and in both the King was deceived: For it was not the Kings intent to charge the lands but with one Lease.

C. 6. part, The Lord *Shandoe's* Case; The reason of the Judgment there proves our Case: For there all which grew by the Information of the party was true, and then the King made a wrong Collection thereupon; but that which he collected was not upon the Information of the party. And there it was agreed, That if in any part the party had mis-informed the King, that the whole had been void. *Dyer* 352. Lessee for 60 years of the Queen made Lease for 80 years; The 60 years expire; the Assignee doth surrender unto the Queen his Lease for 80 years, *ea intentione* that the Queen shall make unto him a new Lease for 20 years. The Queen reciting that the said Lessee did surrender a Lease for 80 years, did grant to him a Lease for 20 years: The Lease for 20 years was adjudged void; For he did surrender no Lease unto the Queen. And there *Dyer* said, That it is all one where the Consideration is false, and where the Information is false; there, and here is but a shew of a surrender, And it was not the Queens intent to pass more then she took by the Surrender. *Henry* the 8. recites, That *Genny* hath surrendred up the Patent which bore date 32 *H.* 8. And there was not any such Patent. *Genny* suggested that he had given up the Patent, dated 32 *H.* 8. when he had not any such Patent. So the King was deceived in the suggestion.

A difference hath been taken betwixt Consideration and Information: Here the Consideration was Service, and Two hundred pounds paid; And it was objected, That he took here by the Consideration, and not by force of the Information. But I say that the Information was the ground upon which the Patent was made; For it was not the Kings intent to charge the lands with two leases. *C.* 2. *part* 17. there it is cited, That in a Patent of King *Henry* the 7. four Letters, *viz. H R F H.* of the first words were left out, intending afterwards *propter honorem* to be set out with gold: but the great Seal was put to the Patent, leaving out the said four letters; and yet the Patent was adjudged good being referred to the Inrollment, Privy-seal &c. For thereby it appeareth that it was the grant of the King.

If

If Queen *Elizabeth* recite, That whereas her Father made ſuch a Leaſe, and doth not recite it by the name of *Henry* the 8. her Father, it is good enough, if *Henry* the 8. made ſuch a Leaſe: But in ſuch caſe, if *Henry* the 7. made the Leaſe, then the Leaſe of the Queen had not been good, for that ſhe miſtook her Anceſtor, for *Henry* the 7. was her Grandfather. 10 *H.* 7. 20. 20 *H.* 7. 7, 8. The Kings Patent may be without Date; for he may reſort to the Inrolment and Privy-Seal, and ſo help it: But in ſuch caſe if he doth ſurmiſe a falſe Date, the ſame makes the Patent void. 21 *E.* 4. 45. Miſrecital of the year of the Reign of the King will make void a Patent: And in our Caſe, by the miſrecital of the year of the King there is a year gained.

It was objected, That it ſhall be helped by the Statute of 34 *H.* 8. which helps Miſ-recital, and Non-recital: But in our caſe it is not a Miſ-recital: For Miſ-recital is when part of that which is recited is true, and part falſe; but Non-recital is, when nothing at all is recited. But in our Caſe, it is a falſe Recital of the ſubject in the thing which is ſurrendred; *Genny* ſurrendred nothing, and the King took nothing.

Trin. 9 *Jacobi*, *Roper* and *Roden's* Caſes. *Henry* the 8. reciting by his Grant, That where he had a Reverſion expectant upon a Demiſe made unto *M.* whereas in truth it was made unto *N.* He granted the Reverſion unto *Roden*. It was adjudged, That that recital was not helped by the Statute of 34 *H.* 8. for that the King had not any ſuch Reverſion. 19 *Jacobi*, *Tucker* and *Carr's* Caſe was adjudged upon the ſame point. *Doddington's* Caſe, *C.* 2. *part*, There a general Grant is not helped by the Statute of 34 *H.* 8. In our Caſe here is a miſtaking of the thing it ſelf: If he had recited the ſame to be 33 *H.* 8. and then had miſtaken any thing in it, it had been helped by the Statute of 34 *H.* 8.

Dyer 195. *Kemp* was Nonſuit, (there 32 *H.* 8. was miſtaken for 33 *H.* 8.) There the Surrender was of a Patent bearing date 32 *H.* 8. whereas in truth it bore date 33 *H.* 8. And there it is adjudged, That the Patent of 32 *H.* 8. cannot be the Patent of 33 H. 8. by which the Office was granted to him: And therefore it was adjudged void, notwithſtanding the Act of 34 H. 8. and other Statutes of Miſrecital. So in our Caſe 33 *H.* 8. is miſtaken, and it is 32. whereas in truth it was 33 H. 8.

The

The second Point then is, If the Leaſe of 36. H. 8. be void, then of neceſſity the Leaſe of 5. & 6. *Philip* and *Mary* is void, for therein is falſity of three things. 1. The thing recited is the cuſtody of the Park, with reaſonable Herbage, and the Patentee would have nothing but *præmiſſa*, and he truſts the King to give that; and he takes from the Queen Herbage (leaving out reaſonable) and ſo hee takes more then was intended him, and therefore hee hath deceived the Queen; and if you are to have reaſonable Herbage; the King may put one to be Overſeer, that you have that which is fitting and reaſonable, and the Queen may agiſter Cattel there; but in our Caſe the Queen can neither ſet any Overſeer, nor can ſhe agiſt Cattel there. *Dyer* 285. 2. *H.* 8. *Killoway* 159. He who hath reaſonable Herbage cannot incloſe, but hee which hath Herbage may incloſe. Then foraſmuch as here the Patent is larger then it was before, *ſcil.* that which was ſurrendred, the Patent is void; for the Queen Grants more then ſhe took by the ſurrender: For hee did ſurrender *eâ intentione*, that the Queen ſhould regrant him *præmiſſa*; and by this new Grant he hath more. 2. He recites, That hee had a Leaſe for fifty years abſolutely, whereas it was determinable upon death; and the Queen grants the ſame for fifty years abſolutely, and that was by reaſon of his falſe Suggeſtion. It may be objected, That the Queen is not deceived, for the limitation for life is not annexed to the *Habendum*. 20. *Eliz.* in the Kings Bench, *Hunts* Caſe; The Queen made a Leaſe to begin at a day to come, and afterwards the Queen by the ſuggeſtion of the party, and for the ſurrender of the preſent Leaſe, did make a new Leaſe unto the party; it was adjudged, That the new Leaſe was void. So here, the Queen was deceived in the quality of the Leaſe. 9. *E.* 4. 12. *Baggots* Caſe; The King reciting that *Baggot* was born in *Normandy* (whereas in truth he was born in *France*) made him a Denizen; and the Patent, notwithſtanding this falſe recital of the party, was adjudged good, for the intent was to make him a Denizen: That Caſe was objected againſt me. But put the Caſe a little further, and it is otherwiſe; for if at that time *Edward* the fourth had had Wars with *France*, then the Patent had been void, for it was not the Kings intent to protect a man who was an Enemy, and to nouriſh him in his own boſom. If

the Queen had made the new Leaſe to begin after the firſt fifty years, then it had been void. *C.* 1. *part* the Rector of *Chedington's* Caſe; It is not the years, but the death of the Patentee which determins the Leaſe. *C.* 2. *part* 72. In a Deed there is not any proper place where the Proviſo ſhall be inſerted, then if it come in any place, ſo as it doth not ſean upon a Covenant, it is a good condition. 35. *Eliz.* betwixt *Throgmorton* and Sir *Moile Finch.* Queen *Mary* made a Leaſe unto *Throgmorton* for 21 years, and in the end of the Leaſe there is a Proviſo, That the Leaſe ſhall ceaſe if the Rent be behind. *Popham* Chief Juſtice ſaid, That *Throgmorton* hath ſuch a Leaſe which is abſolute, but ſhortned by limitation in the end of the Leaſe; and he might plead it generally and abſolutely, That thoſe who will take advantage of the Proviſo, ought to ſhew where the Proviſo comes in another clauſe. So here *Pawlet* ſhould have informed the Queen of the Proviſo, for hee truſts the Queen, and the Queen truſts him. The third Falſity is, It is pretended, That the Park of *Odiham* doth paſſe with the Manor; for the Manor is granted by King *Philip* and Queen *Mary*, *cum pertinentiis*; and it is found by the Jury that the Park is parcel of the Manor. He hath deceived and miſ-informed the Queen; for in the Leaſe which he ſurrendred, the Park is excepted, and now he would ſteal it in by the general words, *cum pertinentiis*. If the Park doth not paſſe, then the Defendants are Treſpaſſors to the Plaintiffe; and if the Manor doth not paſſe, then they are Treſpaſſors; ſo as they are in a *Dilemma*. This Park (admit the Manor paſſeth) doth not paſſe: for Queen *Mary*, ſhortly after, made *Pawlet* a Marqueſs, and then ſhe granted unto him by Letters Patents. The cuſtody of the Park, and the Intereſt of the Park cannot ſtand together in one perſon; and he cannot be the Queens Parker, when as it is his own Park. *C.* 8 *part* 117. The beſt Expoſitor of Letters Patents, are the Letters Patents themſelves, joyning one part of the Letters Patents with the other. And here in one clauſe the cuſtodie of the Park is granted by expreſs name; and the general words, viz. Grant of the Manor *cum pertinentiis* doth not convey it. There is a difference betwixt the Cuſtody of a Park, and the Intereſt of the Park. In *Com.* 399. If a Parker be attainted and pardoned, hee loſeth not his Park, but hee may be a Parker notwithſtanding ſuch Attainder; but if the Owner of a Park be attainted and pardoned, he loſeth his

Park;

Park; a Parker is a matter of ſervice, and cannot be forfeited; but an Intereſt may. 10. *H.* 7. 6. The Keeper ſhall render account for the Hawks, for it is parcel of the profits of the Park; but Leſſee for years of a Park ſhall not render account for them: So there is a difference betwixt the Intereſt in a Park, and a Parkerſhip. 12. *H.* 8. 1. Leſſee for years of a Park ſuffereth the Pale to fall down or decay, Waſte lieth; but if a Parker ſuffereth the Pale to decay, he can onely loſe his Office. *Dyer* 71. The Owner of a Park may diſpark it, but he who hath only the Herbage of it, cannot. A man hath the cuſtody of a houſe, and afterwards he becomes the Owner of the houſe; his cuſtodie therein ceaſeth. There are four Miſchiefs in our Caſe: 1. By expreſſing himſelfe to be Parker, hee excludes himſelfe from being Owner. 2. The Keeper is Accountable, but Leſſee for years is not. 3. If he be only Keeper of it, then the Queen might diſpark: but if he were Leſſee, the Queen could not. 4. Where he is Keeper, all will reſt upon account, as well the Deer which hee findes there when hee became Keeper, as thoſe which came after. But that makes the Queen in doubt, whether the Exception ſhould extend to the Deer; then whether to thoſe Deer which came after.

The third Point was concerning WALSINGHAM'S Leaſe; It is of the Manor, and *Cuſtodiam Parci.* Firſt, This Leaſe hath one of the wounds of the former Leaſes: for the Parkerſhip is granted expreſly. Secondly, The leaſes before being void, then this Leaſe muſt needs be void alſo. Thirdly, This Leaſe is to take effect upon the end, Surrender, or Forfeiture of the Leaſe to *Pawlet*, which was made 5. & 6. *Philip* and *Mary*, and that leaſe had not any beginning, and therefore was void; and ſo the three limitations, End, Surrender, or Forfeiture cannot happen. *Dyer* 197, 198. From the death of the Father the leaſe which is made to the Son ſhall begin, the Father being dead, it is a void leaſe to the Son. *C.* 6. *part* 35. Enumeration of particular times, if it do not happen within the particular, then it ſhall never begin: And ſo it is of this leaſe to *Walſingham* in our Caſe. Note, it was ſaid by Sir *Henry Yelverton*, That it was the opinion of the Judges in this Caſe, That he had but the cuſtody of the Park, and not the intereſt of the Park; for by the acceptance of the cuſtody of a Park, when he hath a leaſe of

the Park it selfe before, it is a surrender of his lease. *Davenport* argued for the Defendant *More*. The question which is made of the lease of 27. *Eliz.* rests upon the lease made to *Genny* 33. *H.*8. which was determined upon the surrender of the lessee. 2. It rests upon the lease made to *Pawlet*. 36. *H.*8. which was for fifty years, determinable by two Provisoes; the one for not payment of a sum in gross. 3. It rests upon the lease made to *Pawlet*. 5 & 6. *Ph. & M.* for 50 years from Mich. last past, upon the death of *Pawlet*, or committing of Waste. The lease of 27. *Eliz.* is a lease in reversion for 31 years, to begin after the surrender, forfeiture or expiration of the lease made 4 & 5 *Ph. & M.* to *Pawlet*. Exception is taken to the lease 36. *H* 8. because it hath two falsities; the first, Because it mis-recites the lease of 33 *H.*8. reciting the same to be dated 32 *H.*8. whereas in truth it was dated 33 *H.* 8. and that varies the term of years, and that lease is not good at the common law, nor as they objected, is it helped by the Statute of 34. *H.* 8. of Mis-recitalls. Secondly, Because it is upon a false suggestion of the Patentee, and therefore it is void. It was also objected, That the lease of 5 & 6 *Philip* and *Mary* was void for two causes; first, Because that that recites the lease of 36. *H.* 8. to bee for fifty years, without the Proviso of determination by the death of *Pawlet*. 2. The King is deceived in his Grant; for they objected, That it was recited to be surrendred *eâ intentione* to regrant *eadem præmissa*; and there are other things granted which were not surrendred; They say, That the Lease is said to be of the Parkership, and not of the Park; for that doth not passe by the generall words *cum pertinentiis*; for by expresse words the Parkership is granted, and then not the Park it selfe. The Lease of 33. *H.* 8. was truly surrendred; But the King reciting that the Patent bearing date 32. *H.* 8. was surrendred in consideration of service, did grant the office of Parkership, &c. And *insuper* the Manor for fifty years, &c. The question is, If this misrecitall be helped by the Common Law: if it be not, then if the Statute of 34. *H.* 8. doth help it? The Lease which was mis-recited was not in *esse*; and there is a difference when the Lease which is recited, is not in *esse*, but determined; and when former Leases are recited, as Leases in *esse*. There are three things in which misrecitall is materiall, and doth vitiate the Patent. 1. Misrecitall of the Tenant to whom the Lease was made,

or

or of the Tenant which was laſt poſſeſſed 2. Miſrecitall of the thing demiſed. 3. Of the Eſtate in *eſſe*, and the Limitation. If in ſuch caſe of miſrecitall, there be not a *Non obſtante*, then the Patent is void at the Common Law, C. 4. part 35. The King by the Law ought to be truely informed of eſtates in *eſſe*, and alſo of his Rents and Revenue; But by the Common Law, if the former Leaſes be recited to be determined, (and in truth, they are,) and the new grant is upon another conſideration, then it is not materiall, if they be miſrecited; for that it is not any part of the conſideration. *Vide* 38. *H.* 6. 37. *Darby*. If the miſrecitall be in any thing not materiall, which need not to be recited: and no part of the conſideration of the new Leaſe, then it ſhall not make void the Patent; for that the miſrecitall was not of any thing materiall. If the miſrecitall be of a thing determined, and the ſecond Patent depend thereupon, then the ſecond Patent is void; for if the King recite a Leaſe made to *I. S.* which is determined, and demiſe *tenementa prædict' ſic ut præfertur*; and in truth the Leaſe recited was made to *I. D.* the ſecond Leaſe is void: 38. *H.* 8. *Br.* Patents 101. The King Tenant in taile makes a Leaſe for life, the ſucceſſour King may make a new Leaſe without recitall, and if he do miſrecite the leaſe which is determined, it is not materiall. If our Leaſe ſhould be void at the Common Law, yet it is helped by the Statute of 34. *H.* 8. cap. 21. by expreſſe words, the ſame extends to all Leaſes, with, or without conſideration, notwithſtanding miſrecitall, or non-recitall; yet all miſrecitals are not helped by that Statute: if the miſrecitall be of Leaſes, which are not the guide of the ſecond Patent, and need not to be recited, ſuch miſrecitall is helped by the Statute. But if the former Patent begetteth the later, then the Statute doth not extend unto it, for then the laſt is void, for that the King is deceived, and not by reaſon of the miſrecitall. *Dyer* 194, 195. The Caſe there is direct to prove our Caſe; for there the recitall was of the grant of an Office, 33. *H.* 8. whereas it was dated, 32. *H.* 8. *Et quia omnia, &c.* And there was not any ſurrender, for in truth it was not ſurrendred to the Maſter of the Rolls, who died before it was entred: There it is reſolved, That it is not helped by the Statute of Queen *Mary*: for in that Act there is an expreſſe clauſe, that it extend not to the grant of an Office, (as in the Caſe of *Dier* it was) and then it was left at the Common Law, and the Queen was deceived, becauſe the ſurrender was not good. The defect of the ſecond Patent was, That it was not in the Crown by the ſurrender, but if it had been well

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ſurrendred, the miſrecitall had been helped by the Statute of 34. *H.*8. for it was the miſrecitall of the year, that the Patent bore date. *C.*2. part, *Doddingtons* Caſe, *Dyer* 129. upon the Statute of 34. *H.* 8. The miſrecitall of the Town is not helped; for it doth not appear unto the Court what Land was intended to be granted: But if the thing had been certainly and particularly named, ſo as it might appear to the Court what Land was intended to paſſe; then the miſ-recitall of the Town had been helped by the Statute of 34. *H.*8. A thing granted generally with reference to a miſrecited Patent, is not helped by the Act of 34. *H.* 8. But when the thing granted is particularized with reference to a thing which is determined in a miſrecited Patent, then the Statute of 34. *H.*8. will help it; but in our Caſe, the miſrecitall is of a thing which needed not to be recited. The ſecond Objection which hath been made, is, That the King is deceived; by reaſon of the falſe ſuggeſtion: And then the Letters Patents made by reaſon thereof are void. I anſwer, That if the falſe Suggeſtion tendeth to the detriment of the Crowne, and to the apparant prejudice of the King, then the Letters Patents may bee avoided: But where the Suggeſtion is of a thing not materiall, and doth not tend either to the deceit of the Crowne, or to the Kings prejudice, neither in his profit, nor his Inheritance, there it ſhall not make void the Letters Patents. *Dyer* 352. Where an Abbot Leſſee for ſixty years of the Queen, made a Leaſe for eighty yeares; the ſixty years expired, the Leſſee for eighty years ſurrendred to the Crown, and in conſideration of that Surrender, to have a new Leaſe; there the ſecond Patent was void, for the King was deceived in the reall conſideration. And *Dyer* there ſaid, That it was but the Suggeſtion of the party, and the Collection of the Queen. *C.*5. part 93. 94. Where Leſſee for yeares of the King did aſſigne part of his Terme and Land to another, and then ſurrendred, the ſurrender there was the conſideration; and that was not good. If the recital be made of a thing which needeth not to be recited, and the Patent is made upon another conſideration, there the miſrecital ſhall not hurt it, *C.*1. part 41. where *Henry* the ſeventh, reciting *cum poſt &c. virtute cujus, &c.* the eſtate is recited, as determined; the Reverſion ſhall paſſe; for the King was certified of the eſtate: And in our Caſe it is determined. Where the falſitie of the ſuggeſtion is not in deceit, nor to the prejudice of the King; If the thing miſrecited be not materiall, it ſhall not make void the Patent. *C.*10 part 110. *Le-*

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gates Caſe. *Quæ quidem &c.* the falſe ſuggeſtion ſhall make void the Patent; for the King did not intend to abate his Revenue. *Fitz. Nat. Brev. Grams* 58. Falſitie of Tenure of the King ſhall make void the Kings Licence: For the falſitie of ſuggeſtion which came from the party, did tend to the prejudice of the King in his Tenure. *C.* 10. part 110. *Quod quidem manibus &c. ratione Eſcheatæ &c.* It ſhall make void the grant by this ſuggeſtion of the party which doth prejudice the King in his title. But where the Suggeſtion is not to the prejudice of the King in his revenue, tenure, nor title, it ſhall not make the Letters Patents void. *C.* 10. part 113. MARKHAM'S caſe. The King grants the office of Parker, *quod quidem Officium* the Earle of RUTLAND late had; And the ſaid Earl never had it; the Suggeſtion was of a thing not materiall to the ſecond Patentee, nor to the Kings prejudice, therefore it was good. 10. *H.* 6. 2. *Quod quidem Manerium ſeiſitus fuit in manus noſtras*; the falſe ſuggeſtion there ſhall not make void the Patent, becauſe it was not of a thing materiall. If the King grant a Manor, *quod quidem Manerium nuper fuit in tenura I.S.* and in truth it was not in the Tenure of I.S. yet it was adjudged good: For *Nuper* is a Recitall of the thing that was, and not of a thing that is. For if it had not been in the poſſeſſion of I. S. whereas in truth he was not ſeiſed or poſſeſſed thereof, there it had not been good. It is found in our Caſe, That the Leaſe is actually ſurrendred, and ſo the miſrecitall is of a thing that was, *ſcil. nuper*; and not of a thing that is, or in *eſſe*.

The next Exception is to the Letters Patents of *Philip* and *Mary*. Firſt, becauſe thereby the Leaſe of 36. *H.* 8. is not fully recited; For there was a *Proviſo*, That if he did not pay a ſumme, in groſſe, that it ſhould be void; And that it ſhould determine by the Death of *Pawlet* the Patentee. The miſrecitall of that Collaterall matter by the Common Law, ſhall not make void the Grant. There are three things neceſſary in Recitalls: Firſt, The Certainty of the particular eſtate in *eſſe*, with the Limitations. Secondly, The Tenant to whome the particular eſtate was made, or the Tenant which then is in poſſeſſion. Thirdly, The thing granted, by the ſame name as it is granted in the firſt Patent. But Covenants, Reſervations, Proviſions, Conditions, and the like, need not to be recited. The Recitall ought to be of a thing in *eſſe*: *Avowry* 112. A Towne was granted by the King. And afterwards he granted unto another a Leet in the ſame Towne; the King in this caſe needed not to recite the grant of the ſaid Towne. Secondly, The Recitall ought to bee in the ſame name as it was granted in the firſt Patent. And cannot be helped

helped by averment, if it be miſrecited. Thirdly, the Tenant of the Land, or the Tenant which was before the grant, ought to be recited, *ſcil.* that ſuch a man *habuit*, to whom the firſt Patent was granted; Or, that he now hath the Lands, or lately had the thing granted in poſſeſſion. *Brook Pat. 96.* Such things ought to be recited as ought to be pleaded againſt the King in an Information of Inſtruction. In our Caſe, the miſrecitall being of a thing determined and not materiall, and not to be the guide of the ſecond Patent, doth not make void the Grant to *Pawlet*.

It was objected, That Queen *MARY* was deceived: for the Grant was *de eiſdem præmiſſis*: And in the former Patent the Park was excepted; but ſo it was not in the Letters Patents to *Pawlet*: In the firſt Patent reaſonable Herbage was granted; but in the ſecond to *Pawlet*, the Grant was of Herbage generally. If the King except the Deer, as hee doth in this caſe, then hee ought to have ſufficient herbage for his Deer: The Jury finde, That the Letters Patents of 36. *H.* 8. were abſolutely ſurrendred *eâ intentione*, that the King might make a new Leaſe *in forma ſequente*, which is not *de præmiſſis*, *ſed de præmentionatis*. Now the King for two hundred pounds Fine, is pleaſed to grant, *tam* in conſideration of the Surrender, *quàm* for the Fine of two hundred pounds: And here the King took knowledg, that it ought to be *in forma ſequente*: and then by reaſon of the Fine and Surrender, hee is pleaſed to vary from the former Patent, and it is to the prejudice of the Patentee: The firſt was reaſonable Herbage; and here it is Herbage, and in the Kings Caſe it amounts to as much, as if hee had ſaid, Reaſonable Herbage: for becauſe the King excepts the Deer, it is implyed, That the Patentee is but to have reaſonable Herbage. Here the Grant is not *De omnibus groſſis arboribus, bonis & catellis Felonum*; and of the Goods of Felons themſelves: and in the former Patent theſe were granted, and ſo the Grant is for the Kings benefit, and to the prejudice of the Patentee. Alſo this Patent is *ad proficuum Domini Regis*: For here is a Rent reſerved, and here is a *Proviſo* for the committing of Waſte in the premiſſes, which were not in the firſt Letters Patents; and in theſe Letters Patents there are divers Covenants which were not in the former Patents: and ſo it is *in forma ſequente*: And ſo the Leaſe of *Philip* and *Mary* is good. The King ſeiſed of a Manor to which he hath a Park, doth grant the Stewardſhip of the Manor, and the Cuſtodie of the ſaid Park, with reaſonable Herbage: Afterwards in the ſame Letters Patents hee grants the ſaid Manor of *O.* and all the Lands in *O.* excepting groſſe trees in the Park.

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If this Grant be not good for the Manor, it is not good for the Park. that was the Objection: It is good for the Manor, and alſo for the Park. It was objected, That the King grants the cuſtody of the Park, and ſo not the Park it ſelfe; for how can the King grant the cuſtody of the Park, if he grant the Park it ſelfe; it is dangerous, that upon an implication in one part of a Patent, the expreſſe words which follow ſhould be made void; the ſubſequent words in this Caſe, are, The King grants the Manor, and all the Lands to the ſame belonging; now the Park doth belong to it, and the King excepts only the Deer, *C.* 10 *part* 64. The King at this day grants a Manor unto a man, as entirely as ſuch a one held the ſame before it came into his hands, &c. the Advowſon doth paſſe without words of grant of the Advowſon; for the Kings meaning is, That the Advowſon ſhall paſſe: The meaning of the King is manifeſt in our Caſe; *C.* 3. *Part* 31,32. *Carr's* Caſe, There the Rent was extinct betwixt the Parties, yet for the benefit of the King for his tenure, it hath continuance; for a thing may be extinct, as to one purpoſe, and in *eſſe* as to another purpoſe. 38. *Aſſ.* 16. a Rent extinct, yet *Mortmain. Dyer* 58,59. The Exception ought to be of the thing demiſed. In our Caſe the Park doth paſſe, but the King ſhall have the liberties in it; and ſo here the Park ſhall paſſe, and the Exception is of the liberties; *Com.* 370. the Exeception ought to be of that which is contained in the former words, in the former Patents; the Offices were firſt granted; and in the ſame Letters Patents the Manor was afterwards granted. But now King *James* grants the Manor firſt, and then the Offices. Conſtruction of Statutes ought to be *ſecuncundùm intentionem* of the makers of them; and conſtruction of Patents *ſecundùm intentionem Domini Regis*, *C.* 8. *part* 58. You ought to make ſuch a conſtruction, as to uphold the Letters Patents, *C.* 8. *part.* 56. Auditor *Kings* Caſe; There the Letters Patents were conſtrued *ſecundùm intentionem Domini Regis*, and adjudged good: But to make void the Patent, they ſhall not be conſtrued *ſecundùm intentionem*, but to make a Patent good, they ſhall be conſtrued *ſecundùm intentionem Domini Regis*. The Caſe was adjourned till Michaelmas Terme next. Note, I have heard Sir *Henry Yelverton* ſay, That it was the opinion of the Judges in this Caſe, That he had but the cuſtody of the Park, and not the intereſt of the Park; for that by the acceptance of the cuſtody of the Park, when he had a Leaſe of the Park before, it was a ſurrender of his Leaſe.

Trinit. 21. Jacobi, in the Kings Bench.

492 SHORTRIDGE *and* HILL's Caſe.

Shortridge brought an Action upon the Caſe againſt *Hill* for raviſhing of his Ward; and the Writ was *contra pacem*, without the words *Vi & armis*, *Lib. Dent.* 366. where three Preſidents are of Actions upon the Caſe, without *Vi & armis*: An Action upon the caſe for doing of any thing againſt a Statute, muſt be *contra pacem*. *Ley* Chief Juſtice, Recovery in this Action may be pleaded in Barre in a Writ of Raviſhment of Ward brought. *Dodderidge* Juſtice, The Action of Treſpaſſe at the common Law, is only for the taking away of the Ward; and here he hath elected his Action at the common Law, and then he ſhall not have an Action upon the Statute, viz. a Raviſhment of Ward; but here the Action upon the Caſe is brought for the taking and detaining of the Ward, ſo as he cannot preferr him in marriage; and upon this ſpeciall matter the Action upon the Caſe lieth without the words *Vi & armis*. A Writ of Raviſhment of Ward ought to be brought in the Common Pleas; but yet you may bring a Writ of Raviſhment of Ward in this Court, if the Defendant be in the cuſtody of the Marſhal of the Marſhalſey, for in ſuch ſpecial Caſe it ſhall be brought in this Court: if there be an extraordinary matter beſides the Treſpaſs, then an Action upon the Caſe lieth; as when *A.* contracts with *B.* to make an eſtate unto *B.* of Bl. Acre at Michaelmas, if *C.* enter into Bl. Acre, *A.* may have an Action upon the Caſe againſt *C.* for the ſpeciall damage which may happen to him, by reaſon that he is not able to perform that contract by reaſon of the entry of *C.* and he ſhall declare *contra pacem*, but not *Vi & armis*.

Trinit. 21. Jacobi, in the King's Bench.

493 BAKER *and* BLAKAMORE's Caſe.

IN Treſpaſs, the Defendant pleaded, That *J. S.* being ſeiſed in Fee, gave the Lands unto *Baker* and the Heirs of his body, and conveyed the Lands, by deſcent, to four Daughters; and *Blakamore* the Defendant, as ſervant to one of the Daughters, did juſtifie. The Plaintiff did reply, That the ſaid *J. S.* was ſeiſed in Fee, and gave the ſame to *Baker* and the Heirs Males of his Body, and conveyed the Land

Land by deſcent to himſelf, as Heir Male, *abſq; hoc*, that *J. S.* was ſeiſed in Fee. *Henden* Serjeant did demur in Law upon the Replication; and took Exception to the Traverſe, for that here he traverſeth the Seiſin of *J. S.* whereas he ought to have traverſed the gift in tail made by *J. S.* for the being ſeiſed is but an inducement not traverſeable, and therefore he ought to have traverſed the gift in taile, for then he had traverſed the ſeiſin; for he could not give the Lands in tail, if that he were not ſeiſed thereof in Fee, *L. 5. E. 49.* there in Formedon, the Tenant would have traverſed the Seiſin of the Donor, but the book is ruled, that the Traverſe ought to be of the gift in tail, and that includes the Seiſin. *Bridgment* for the Plaintiffe, and ſaid, That the Serjeant is of opinion contrary to the Books, when he ſaith poſitively, that you ought to traverſe the gift in tail, and not the ſeiſin of the Donor. The Caſe ſhortly is, *A.* being ſeiſed in Fee, makes a gift in tail to *B.* and that deſcends to four daughters, &c. And the Plaintiff replies, That *A.* was ſeiſed in Fee, and gave the Lands to *B.* and to his Heirs Males; and the Plaintiffe claimes the entail as Heir Male: and the Defendants under the generall tail, *abſq; hoc* that *A.* was ſeiſed in Fee, 27 H. 8. 4. by *Englefield*, If in Treſpaſs the Defendant plead the Feoffment of a ſtranger, and the Plaintiff ſaith, That he was ſeiſed in Fee, and made a Leaſe for years to the ſaid ſtranger, who enfeoffed the Defendant, he need not to traverſe, *abſq; hoc*, that he was ſeiſed in Fee, *C. 6. part* 24. The ſeiſin in Fee is traverſable, *Br. Traverſ.* 372. *acc. Dodderidge* Juſtice, The ſeiſin in this Caſe is traverſeable. *Ley* Chief Juſtice, Take away the Seiſin and then no gift, and therefore the Seiſin here is Traverſeable. *Haughton* and *Chamberlain* Juſtices agreed. The Court reſolved, That either the Seiſin in Fee, or the gift in tail, is traverſeable. *Dodderidge* Juſtice, If you both convey from one and the ſame perſon, then you muſt traverſe the conveyance. It is a rule *C. 6. part* 24. there the Books are cited, which warrants the traverſe of either. *Quod nota.* It was adjudged for the Plaintiff.

Trinit. 21. Jacobi, In the Kings Bench.

494 Sir EDWARD FISHER *and* WARNER's Caſe.

THE Teſtator being indebted unto *Fiſher*, made *Warner* his Executor: and *Warner* in conſideration that *Fiſher* would forbear ſuing of him upon the Aſſumpſit of the Teſtator, did promiſe to pay him Fifty Pounds; and in an Action upon the Caſe upon this promiſe, *Warner* pleaded *Non Aſſumpſit* in the Common Pleas, and it was found for the Plaintiff. And a Writ of Error was brought in this Court, be-

cauſe it was not ſhewed for what conſideration the Teſtator did promiſe. 2. Becauſe it was not ſhewed, That *Warner* the Executor had Aſſets in his hands. It was ſaid by the Councel of Sir *Edward Fiſher*, That they need not ſhew that he hath Aſſets, becauſe the Defendant *Warner* was ſued upon his own promiſe. *C. 9. part* 94. The Teſtator made a promiſe to pay to *Fiſher* fifty pound, and died; The Executor in conſideration of the forbearance of a Suit upon that promiſe of the Teſtator, doth aſſume to pay, &c. The Jury find for the Plaintiff. The Error is, that no time is limited, nor no place where the promiſe was made; and alſo it is not ſhewed when the Teſtator died, and ſo it is not ſhewed whether the promiſe were made in the life time of the Teſtator, or not? for if it were in the life time of the Teſtator, then the promiſe was void. Nor is the time of the forbearance ſhewed: and ſo no good conſideration. *Hill.* 5. *Jacobi*, a conſideration to forbear *paululum tempus*, is no good conſideration by *Cook*. And the like caſe was adjudged, 36. *Eliz. Rot.* 448. *Sackbdos* caſe. We do alledge *de facto*, that we have forborn our Suit, and that the Defendant hath not paid us the money: *Dodderidge* Juſtice, It is alledged, that the Plaintiff paid money to the Teſtator, upon which he promiſed; And the Action now brought, is upon the promiſe of the Executor: Part of the promiſe, is, That he paid the fifty pound to the Teſtator, and that ought to be proved in evidence to the Jury: *C. 6.* part *Gregories* caſe, if it be not ſpecially named how he ſhall prove it. *Haughton*, to forbear to ſue him, is for all his life time, and not *paululum tempus*. *Dodderidge* Juſtice, Exception was taken, that he doth not ſhew that the Teſtator was dead at the time of the promiſe by the Executor: It was ſhewed, That after the death of the Teſtator, that he took upon him the Execution of the Will, and then promiſed; and that of neceſſity muſt be after the death of the Teſtator.

Trinit. 21. *Jacobi, in the King's Bench.*

495 WILLIAM'S *and* FLOYD'S Caſe.

IN an *Ejectione firme*, The Array was challenged, becauſe it was made at the Nomination of the Plaintiffe: And by conſent of the parties, two Atturneys of the Court did try the Array: The queſtion was, Whether the Triall of the Array was good? It was ſaid by the Councel which argued for the Defendant, That it was not good. If one of the four Knights be challenged, the three other Knights ſhall try that challenge; and if he be found favourable, he ſhall be drawn; and if another of the Knights be challenged, hee ſhall be tried by the other two;

two; and if one of the two be challenged, then a new Writ ſhall iſſue forth to cauſe three Knights to appear. 9. *E.* 4. 46. The two which quaſh the Array ought to try the Array of the *Tales*; for that they are ſtrangers to them. The aſſent of the parties in this caſe is to no purpoſe; for the conſent of the parties cannot alter the Law, neither can the King alter the Law, but an Act of Parliament may alter the Law. 29. *Aſſ.* 4. 19. H. 6. 9. by *Newton.* 27. H. 8. 13. Where a triall cannot be out of the County by the aſſent of the parties; and if it be, it is errour. By the Councel of the other ſide, contrary, This triall of the Array is much in the diſcretion of the Judges; for ſometimes it is tried by the Coroners, and they are ſtrangers to the Array. 21. *Aſſ.* 26. 20. *Aſſ.* 10. there the Judges at their diſcretion appointed one of the Array, and the Coroners to try it; 27. *Aſſ.* 28. there, upon ſuch a challenge it was tried by the Coroners: and *Skard* ſaid, That the triall by any of them was ſufficient, and by *Forriners de Circumſtantibus*, 31. *Aſſ.* 10. ſo as it reſts much in the diſcretion of the Judges. 29. *Aſſ.* 3. there it was denied: But note, That that was in *Oyer* and *Terminer*; and there it did not appear that the Array was made at the Nomination of one of the parties: but in other challenges it may be tried by one of the Panell. But in our caſe, they were all challenged, was the objection. 9. *E.* 4. 20. *Billing*. For if one of the parties will nominate all of the Jurours to the Sheriffe, it is preſumed that they are all partiall: and in this caſe, the whole Array is challenged: but in other caſes he may challenge one or two of the Array, and yet the others may be indifferent. But admit it had been errour, yet being by the aſſent of the parties, it is no errour. *Baynams* caſe in *Dyer*. A *Venire facias* by aſſent of the parties was awarded to one of the Coroners, and good: *Dyer* 367. 43. *E.* 3. Office of Court, 12. One of the twelve doth depart; If the Juſtices do appoint one of the panell to ſupply his place, it is erroneus; but yet if it be with the aſſent of the parties, it is good; So in our caſe, 21. *E.* 4. 59. *Brian* ſaith, That he hath not ſeen more then two to try the Array, yet by aſſent of the parties more may try it, 30. *E.* 3. 2. or 39. *E.* 3. 2. In a Writ of Right, proceſſe iſſued to the Sheriff to return four Knights; he returns two Knights, and two Eſquires, without making any mention that there were no more Knights in the County, the ſame is errour; yet if two Knights and two Eſquires had been returned by the aſſent of the parties, it had been good. 6. *E.* 6. *Dyer*. A man cannot enter for Non-payment of Rent without a demand, yet by aſſent of the parties it may be good. 22. *H.* 6. 59. the triall in favour of Liberty ought to be in the ſame County where the Action is brought, and not where the Manor is: But 44. *E.* 3. 6. by the aſſent of the parties it is ſufficient. In the Abridgement of the Book of Aſſizes 48. the books are cited to the contrary; there it is ſaid to be no Law, where the Coroners try the panell: I agree, that where it is not againſt a fundamentall

point.

point of the common Law, that the conſent of the parties *tollit errores*: *Dodderidg* Juſtice, Two queſtions are in this caſe, 1. If this tryall be good. 2. Admitting it be not good, whether the aſſent of the parties doth make it good. Firſt it is a meer matter in the diſcretion of the Juſtices, which is not tied to any ſtrict rule in Law: In the Book of the Aſſizes it was tried by the Coroners, becauſe it was in the diſcretion of the Juſtices: And the Coroners are Miniſters to the Court, and ought to attend at the Aſſizes. The Book of the Aſſizes is the Report of the Caſes which happened at the Aſſizes in the Circuits of the Juſtices; and they are not Term caſes. For the Exception which is taken by him who made the Abridgment of the Book of Aſſizes, is of no moment; for the Authour thereof was but a Student, and no Councellor at Law. In theſe Courts the Coroners do not attend; therefore ſometimes two, four, or ſix of the Panell are choſen to try thoſe who are challenged, as the Court ſhall think fit; and if the Triers cannot agree, we put them together into a room, and ſwear one to keep them, (as a Jury is kept:) ſo as you ſee it reſts much in the diſcretion of the Juſtices, & Court: And if there were a certain rule to try it, then it ought to be ſtrictly obſerved. 31. *Aſſ.* 10. there the triall was *de Circumſtantibus*. 2. The aſſent of the parties doth make it good. It is not a triall in point of the right of the cauſe, but only of the indifferency of the Miniſters: The Array was challenged, becauſe the Sheriffe made it at the requeſt of one of the parties; and the Sheriffe hath confeſſed it upon his Examination. The principal Array ſhal be firſt tried; and if that be quaſhed, then the *Tales* ſhall not be tried; but if it be affirmed, then two of the Panell ſhall try the Panell, and two of the *Tales* ſhall try the *Tales*. This is a triall only of indifference, and not of the fundamentall point of the Cauſe. If the Plaintiffe require the *Venire facias* to the Coroners, becauſe that the Sheriffe is choſen; the Defendant ſhall be examined if he will agree to it: if he will not agree, but the Sheriffe returneth the Jury, the Defendant in that caſe ſhall not challenge the Jury, or any of the Array: The four Knights in the Writ of Right ſhall chooſe the other twenty of the Grand Aſſize, who ſhall be joyned with them, and they ſhall be the Judges of the twenty, when they are named by them, 39. *E* 3.2. *Haughton* Juſtice, The appearance by Atturney by aſſent of the parties, is not errour, although by the Law the Plaintiffe ought for to appear in proper perſon. *Chamberlain* Juſtice would be adviſed, becauſe he had not ſeen the Books. *Ley* chief Juſtice, When the whole Panel, as in this caſe, comes to be challenged, then it is in the diſcretion of the Juſtices to chooſe triers; and chiefly in this caſe, becauſe all the Array is partiall. If the Coroners be abſent, it is good to take two Atturneys of the Court, who the Court know to be honeſt by their honeſt carriage, and fair practice. The aſſent of the parties ſtrengthens this caſe. It is a rule, That the aſſent

of

of the parties cannot make that good which is againſt any fundamentall point of the Law: therefore it is beſt to view the Preſidents, and to draw a Jurour; but that we cannot do of our ſelves by the Law, yet with the aſſent of parties we may do it. It is a contempt and a deceit to the Court, if his aſſent be entred upon record, and notwithſtanding that the Defendant will queſtion the matter by a Writ of Error, or otherwiſe relinquiſh his conſent; and for ſuch contempt the Court may commit him, and fine him alſo: But if the matter be not a matter of Record, but be onely by a Rule of the Court, then we may award an Attachment onely againſt the party. In this caſe, the triall of the Panell was good, and ſo was it afterwards adjudged by the whole Court. *Quod nota.*

Paſch. 3. Caroli, in the King's Bench.

496 EVERS *and* OWEN's Caſe.

Samſon Evers the Guardian of *Compton Evers*, did ſue *Owen* the Executor of the Lady *Anne Evers* for a Legacy, before the Councell of the Marches of *Wales*. *Henden* Serjeant moved for a Prohibition, and ſaid, That by Law, no intent of a Will ought to be averred contrary to the words of the Will, *C.* 5. part 68. *Cheyneys* caſe: And ſo no equity ſhall be taken upon a forrain intent, contrary to that which is in the Will. 2. He ſaid, That the party might not ſue in the Marches of *Wales* for a Legacie; for that the party ought to ſue for the ſame in the Eccleſiaſticall Court. *Banks* contrary, They may proceed there in an Eccleſiaſticall Cauſe, wherein there is cauſe of equity: The Statute of 34. *H.* 8. cap. 26. giveth power unto them to proceed as they proceeded heretofore by Commiſſion. And before that Statute they proceeded there in caſe of a Legacy; and ſo are divers Preſidents; therefore no Prohibition is to iſſue. *Samſon Evers* is the Kings Atturney for the Marches of *Wales*, and his perſonall attendance is requiſite there: And this Court cannot grant a Prohibition to ſtay a Suit, when he cannot ſue in this Court for the ſame thing. *Finch* Recorder contrary. If you ſhew Preſidents, yet they will not bind this Court, and give power unto them to hold plea of that which they ought not to hold plea of. It is uſuall to grant a Prohibition, if the Court of Requeſts holds plea of a Legacy, if it be not by reaſon of ſome ſpeciall circumſtance; and it is uſuall to diſmiſſe Legacies out of the Chancery: And no Priviledges ſhal be granted unto an Executor, Adminiſtrator, or Guardian. *Hyde* Chief Juſtice: Two have an Obligation as Executors, and the one releaſeth; it is good, and a good

good cauſe of equity againſt him who releaſeth: A Will is made, and *A.* is made Executor, and no truſt is declared in the Will; and at his death the Teſtator declares, That his Will is for the benefit of his children: May not this intent be averred? there is nothing more common. *Dodderidg* Juſtice, For the making of an Eſtate, you cannot averre otherwiſe then the Will is; but as to the diſpoſition of the eſtate, you may averre. *Jones* Juſtice, There are two Executors; one commits waſt, or releaſeth, &c. the other hath no remedy at the common Law, for that breach of Truſt. The reaſon of *Chenyes* caſe, *C.* 5. part is, Whoſoever will deviſe Lands, ought to do it by writing; and if it be without the writing, it is out of the Will, although his intent appeareth to be otherwiſe. Before the Statute of 34. *H.*8. cap.26. The Marches of *Wales* held plea of all things, for things were not then ſetled. But the ſaid Statute gave them power and authority to hear and determine ſuch cauſes and matters as are, or afterwards ſhall be aſſigned to them by the King, as heretofore had been uſed, and accuſtomed: Now if it be aſſigned by the King, yet if it be not a thing accuſtomed and uſed to be pleaded there, it is not there pleadable. So if it be within the Inſtructions made by the King, yet if it be not uſed and accuſtomed, it is not pleadable there; but it ought to be within the Inſtructions, and alſo accuſtomed and uſuall; Adultery, Symony, and Incontinency are within their Inſtructions, and are accuſtomed. The things being accuſtomed to be pleaded there, have the ſtrength of an Act of Parliament; but by the Inſtructions they have no power to proceed in caſe of Legacy. Then let us ſee if the ſame be included within the generall words (things of Equity) within the Inſtructions: And then I will be tender in delivering of my opinion, If a Legacy be pleadable there or not? *Whitlock* Juſtice: The Clergy deſired that they might forbear to intermeddle with Legacies: Five Biſhops one after the other, were Preſidents of the Marſhes there: and they draw into the Marches ſpirituall buſineſſe: but originally it was not ſo; their power was larger then now it is, for they had power in criminall cauſes, but now they are reſtrained in that power. There is a common Law Eccleſiaſticall, as well as of our common Law. *Jus Commune Eccleſiaſticum*, as well as *Jus Commune Laïcum*. The whole Court was of opinion, That the Kings Atturney in the Marches being out, we ought to have priviledge there. In the Chancery, there is a Latine Court for the Officers of the Court, and the Clarks of the Court for to ſue in. But in the principal Caſe, a Prohibition was not granted, becauſe there was much matter of Equity concerning the Legacy. It was adjourned.

Paſch.

Paſch. 3. Caroli, in the Kings Bench.

497 HARLEY *and* REYNOLD'S Caſe.

HArvey brought an Action of Debt upon an Eſcape againſt *Reynolds* (*Hill.* 1. *Car.*) *Reynolds* pleaded, That before the day of Eſcape, *ſcil.* the twentieth day of *January* 1. *Car.* That the Priſoner brake Priſon and eſcaped; and that he afterwards, *viz.* before the bringing of this Action; *viz.* 8. *die Maii* 2. *Car.* took the Priſoner again upon freſh Suit. *Anderws* for the Plaintiff, *Reynolds* is bound to the laſt day. *viz.* 8. *Maii*, and not the day before the bringing of the Action; for the Bill bears date, *Hill.* 1. *Car.* and the terme is but one day in Law, *c.* 4 *part* 71. and ſo no certain day is ſet for the Jury to find. The day which *Reynolds* ſets that he retook the Priſoner is the eighth day of May, and he ſhall be bound by that, *Com.* 24. *a.* 33. *H.* 6. 44. Where a day is uncertain, a day ought to be ſet down, for a day is material for to draw things in iſſue, *C.* 4. *part* 70. the Plaintiff ſhewed, That 7 *Maii* 30. *Eliz.* by Deed indented and inrolled in the Common Pleas *Ter. Paſc.* in the ſaid thirtieth year (within ſix monthes according to the Statute) for the conſideration of One hundred Pounds, did bargain and ſell: But he further ſaid, That after the ſaid ſeventh day of May, in the ſaid thirtieth year, he levied a Fine of the Lands to the now Plaintiff; after which Fine, viz. 29. *Aprilis*, in the ſaid thirtieth year, the ſaid Deed indented was enrolled in the Common Pleas. Note, That another day more certain was expreſſed, therefore the miſtaking of the day ſhall not hurt: And there it was helped by Averment, 8. *H.* 6. 10. *Repleader* 7. In Waſte, the Defendant ſaid, That ſuch a day, before the Writ brought, the Plaintiff entred upon him, before which entry no Waſte was done, &c. *Strange*, It might be that he entred again; wherefore the Court awarded that he ſhould recover. *Co. Entries* 178. In Dower the Tenant vouched a ſtranger in another County, who appeared; and there the Replication is, viz. *die Lunæ, &c.* ſo the day ought to be certain. 19. H. 6. 15. In a Formedon, If the Defendant plead a thing which by the Law he is not compelled to do; and the Plaintiffe reply, That ſhe is a Feme ſole and not Covert, it is good; but if he plead, That ſuch a day, year and place, there the Trial ſhall be at the particular place, otherwiſe the Trial ſhall be at the place where the Writ bears date. *C.* 4 *part*, *Palmers* Caſe; If the Sheriff ſell a Term upon an Extent, and puts a Date to it, *ſcil.* recites the Date, and miſtakes it, the ſale is not good, for there is no ſuch Leaſe, *Dyer* 111. Then it is ſaid 31. *Octobris*, and there by the computation of time it

was impoſſible; and ſo here the time is impoſſible, *ſcil.* that 8. *Maii* 2. *Car.* ſhould be before *Hill.* 1. *Caroli*; for the taking is after the Action brought, and ſo naught to bar the Plaintiff: it is the ſubſtanre of his bar upon which he relieth, and ſo no matter of form: 20. H. 6. there upon an Eſcape, the Defendant ſaid, That ſuch a day, *ante impetrationem billæ* in this Court; *ſcil.* ſuch a day, he retook him; and the day after the *ſcilicet*, is after the purchaſe of the Writ: there the *ſcilicet* and the day expreſſed ſhall be void, and it ſhall be taken according to the firſt day expreſſed: if the Sheriff had retaken him before the filing of the Writ, it had been a good plea in Bar, otherwiſe not. *Calthrope* contrary, H. brought debt, *Hill.* 16. *Jacobi* againſt *Cropley*; and 9. *Junii* 19. *Jacobi*, *Cropley* was taken in Execution, and delivered in Execution to R. by *Habeas Corpus*; afterwards 1. *Caroli*, *Cropley* eſcaped, and H. brought debt againſt R. who pleaded a ſpecial Plea, and ſhewed, That 20. *Januarii* 1. *Caroli*, *Cropley* brake priſon and eſcaped, and that he made freſh Suit untill he took him; and that before the purchaſe of the Bill; *ſcil.* 8 *Maii* 2. *Caroli*, he was retaken, 16. *E.* 4. If he retake him before the Action brought, it is a good bar; ſo if the taking be before the Action brought, R. is excuſed. We ſay, That *poſtea*, *& antè* the purchaſing of the Bill; and I ſuppoſe we need not lay down any day, but the *poſtea*, *& antè* makes it certain enough. If the *viz.* be repugnant to our allegation, it is ſurpluſage. 41. *Eliz.* in *Communi Banco*, *Biſhops* Caſe, Treſpaſs is brought for a Treſpaſs ſuppoſed to be done 4. *Maii* 39. *El.* It is ruled in that Caſe, That the *videlicet* doth not vitiate the premiſes; becauſe it is ſurpluſage. *Trinit.* 34. *El.* in the Kings Bench, *Garford* and *Gray's* Caſe, In an Avowry: it was ſhewed, That ſuch an Abbot ſurrendred, 32. *H.* 8. and that the King was ſeiſed of the poſſeſſions of the ſaid Abby; and that *poſtea*, *ſcilicit* 28. *H.* 8. the King did demiſe, and that the ſame deſcended to King *Ed.* 6. there it was ruled that *poſtea* had been ſufficient, though he had not ſhewed the year of the demiſe of the King; ſo here, *poſtea*, *& ante* do expreſſe that he was taken before the Bill brought. *Dodderidge* Juſtice, If the day had been certain at the firſt, and then he cometh and ſueth, that *poſtea*, *videlicet* ſuch a day, and alledgeth another day which is wrong, there the *videlicet* is not material; but if the firſt day be uncertain, then the *videlicet* ought to be at a certain day, otherwiſe it is not good. *Curia*, If you had left out your time, (your *videlicet*) it had been good, for you muſt expreſſe a certain time; for when the time is material, it ought to be certain. If you had layed down a certain day of the purchaſe of his Bill, then the *ante* would have been well enough. *Dodderidge* Juſtice, If a thing is alledged to be done in the beginning of the Term, *quære* if that ſhall be intended the firſt day of the Term; if you can make it appear that it muſt be intended of neceſſity of the firſt day of the Term, then you

ſay.

ſay ſomewhat, and then the *videlicet* is void and ſurpluſage. Judgement was given for the Plaintiff.

Paſch. 3. Caroli, in the Kings Bench.

498 DEAN *and* STEELE'S Caſe.

AN Action upon the Caſe for words, was brought for words ſpoken in the Court of *Sudbury*; and it was layed, That he did ſpeak the words at *Sudbury*, but did not ſay *Infra juriſdictionem curiæ*. 2. The Judgement in the Action upon the Caſe was, *capiatur*: And for theſe two Errors the Judgement was reverſed.

Paſch. 3. Caroli, in the Kings Bench.

499 GOD *and* WINCHE'S.

THIS Caſe was put by Serjeant *Aſtley*: A Leaſe is made for life by Husband and Wife; and the Covenants were, That he ſhould make ſuch reaſonable aſſurance as the Counſel of the Leſſee ſhould adviſe; and the Counſel adviſed a Fine with warranty by the Husband and Wife, with warranty againſt the Husband and his Heirs; and the Defendant did refuſe to make the aſſurance; in an Action of Covenant brought, it was moved, That it was not a reaſonable aſſurance to have a Fine with Warranty, becauſe the Warranty did trench to other Land. But the Court did over-rule it, and ſaid, That it is the ordinary courſe in every Fine to have a Warranty, and the party may rebut the Warranty.

Paſch. 3. Caroli, in the Kings Bench.

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IT was cited to be adjudged, That if a man purchaſe the next avoidance of a Church with an intent to preſent his ſon, and afterwards he doth preſent his ſon, that it is Symony within the Statute of 31. *Eliz.*

Ter. Mich. 4. Caroli, in the King's Bench.

501 HILL *and* FARLEY'S Case.

IN Debt brought upon a Bond, the Case was, A man was bound in a Bond, That he should perform, observe, and keep the Rule, Order, and finall end of the Councel of the Marches of *Wales*. And in Debt brought upon the Bond, the Defendant pleaded, That the Councel of the Marches of *Wales nullum fecerunt ordinem*. The Plaintiffe replied, That *Concilium fecerunt ordinem*, that the Defendant should pay unto the Plaintiffe an hundred pound. The Defendant did demurre in Law upon the Replication: And the only Question was, If the Plaintiffe in his Replication ought to name those of the Councel of *Wales*, who made the Award by their particular names. *Jermyn*, who argued for the Plaintiffe, said, That he ought not to name the Councellors by their proper names; and therefore he said, That if a man be bounden to perform the Order that the Privy Councel shall make, or the Order which the Councel should make, That in Debt upon the same Bond, If the Defendant saith that he hath performed *Consilium* generally of the Councel, without shewing the particular names of the Councellors, it is good. And he vouched 10. *H.* 7. 6. 10. *E.* 4. 15. and *Com.* 126. Sir *Richard Buckleys* case, That the number of the *Eslior's* ought not to be particularly shewed: But in an Action brought upon the Statute of 23. *H.* 6. he may declare generally, that he was chosen *per majorem numerum*, and that is good. And 10. *E.* 4. 15. In debt upon a Bond, That the Defendant shall serve the Plaintiffe for a year, *in omnibus mandatis suis licitis*: The Defendant said, That he did truely serve the Plaintiff untill such a day as he was discharged; And it is there holden, that he is not compellable to shew the certainty of the services. *Banks* contrary, and said, That he ought to name the Councel by their particular names: And therefore in this case he ought to have pleaded specially, as in 9. *E.* 4. 24. If a man will plead a Divorce, Deprivation, or a Deraignment, he ought to shew before what Judge the Divorce, Deprivation, or Deraignment was: So 1. *H.* 7. 10. If a man will plead a Fine, he must shew before what Judges the Fine was levied, although they be Judges of Record. And he took this difference, That the Judges ought to take notice of the Jurisdiction of generall Courts, which are Courts of Record, and of the Customes of those Courts: but of particular Courts which have but particular Jurisdictions, and particular Customes, the Judges are not to take notice of them, nor of the Lawes and Customes of such Courts, if they be not specially shewed unto

unto them. And therefore although it was alledged, That it was the generall uſage to plead Awards, or Orders made before the Councel of the Marches of *Wales*, as in the principall Caſe, yet he held that the Judges were not to take notice thereof. And therefore the Councellors who made the Order, ought to be particularly named. 2. He ſaid that the Replication was not good, becauſe the Plaintiffe in his Replication doth not ſhew that the Order was made by the Preſident, and the Councel; for by the Statute of 34. *H.* 8. it ought to be made by the Preſident, and the Councel. 3. He ſaid, That the Replication was not good, becauſe the Plaintiffe doth not ſhew within the Record, that the matter of which the Order was made, was a matter which was within their Juriſdiction. It was adjourned.

Mich. 4. Caroli, in the King's Bench.

502. SHUTFORD *and* BOROUGH's Caſe.

IN an Action upon the Caſe upon a Promiſe, the Caſe was this, The Defendant had a dog which did kill five of the Plaintiff's ſheep, and the Defendant in conſideration the Plaintiffe would not ſue him for the ſaid ſheep; and alſo in conſideration that the Plaintiff would ſuffer the Defendant to do away the ſheep, promiſed to give him recompence for the ſaid ſheep upon requeſt: and the Plaintiffe alledged the promiſe to be made, 18. *Jacobi*, and that afterwards 2. *Caroli*, he did requeſt ſo much of the Defendant for the ſaid ſheep: The Defendant pleaded in Bar the Statute of 21. *Jacobi*, cap 16. of Limitation of Actions, and alledged, That the Action was not brought within ſix years after the cauſe of action accrued: which was the promiſe. And it was adjudged that the plea in Bar was not good; for it was reſolved, That where a thing is to be done upon requeſt, that there, untill requeſt, there is no cauſe of Action; and the time and place of the requeſt is iſſuable. And ſo was reſolved, 1. *Caroli*, in the Kings Bench in *Peck's* Caſe: and *Hil.* 16. *Jacobi*, in the ſame Court in *Hill* and *Wades* Caſe; and in the principall Caſe the requeſt was, 2. *Caroli*, and that was within the time limited by the Statute of 21 *Jacobi*. And the meaning of the Statute was, but to barre the Plaintiffe but from the time that he had compleat cauſe of Action, and that was not untill the requeſt made. And when divers things are to be done and performed before a man can have an Action, there all theſe things ought to be compleated before the Action can be brought. And therefore, If a man promiſe to pay *I.S.* ten pound when he is married, or when he is returned from *Rome*, and ten years after the promiſe, *I.S.* marrieth, or returneth from *Rome*, becauſe the marri-

age,

age, or the Returne from *Rome* are the cauſes of the Action, that the party ſhall have ſix years after his marriage, or return to bring his Action, although that the promiſe was made ten years before. And in the principall Caſe, the cauſe of Action is the breach, and that cannot be untill after the Requeſt made; and where a Requeſt is material, it ought to be ſhewed in pleading. And ſo it was reſolved by the whole Court, (*nemine contradicente*) that the Action was well brought, and within the time limited by the Statute. And Judgement was entred for the Plaintiffe.

Mich. 4. Caroli, in the Star-Chamber.

583 FLOYD *and* S^r THO. CANNON'S Caſe.

IT was agreed by the Lord Keeper *Coventry*, and the whole Court in this Caſe, That if a man did exhibite a Bill againſt another for oppreſſion; and layeth in this Bill, That the Defendant did oppreſs *A.B.* and *C.* particularly, and an hundred men generally; That the Plaintiffe by his witneſſes muſt prove that the Defendant hath oppreſſed *A. B.* and *C.* particularly, and ſhall not be allowed to proceed againſt the Defendant upon the oppreſſion of the others layed generally, before his particular oppreſſion of *A. B.* and *C.* be proved. But if the charge layed be generall, and not particular, as if the Plaintiffe in his Bill ſaith, That the Defendant hath oppreſſed an hundred men generally, there he may proceed and examine the oppreſſion of any of them. And *Richardſon* Chief Juſtice of the Common Pleas ſaid, That if a man exhibiteth a Bill againſt another for extortion, there the Sum certaine which he did extort, muſt be laid particularly in the Bill. And he cannot ſay, that the Defendant did extort divers ſums from divers men generally. And ſo was it adjudged in *Reignolds* Caſe in this Court. Alſo in every oppreſſion there ought to be a threatning of the party, for the voluntary payment of a greater ſum where a leſſer is due, cannot be ſaid extortion. And afterwards the Bill of Sir *Thomas Cannon* was diſmiſſed for want of proofs *ex parte Querentis.*

Mich. 4. Caroli, in the Star-Chamber.

504 HUET *and* OVERIE'S Caſe.

IN a Ryot for cutting of corn, It was agreed by the whole Court, That if a man hath title to corn, although that he cometh with a great

great number to cut it with Sickles, it is no Riot; but if he hath not any title, although that he doth not come with other Weapons then with Sickles, and cutteth down the Corn, it is a Riot. And it was agreed by the whole Court in this Case, That Witnesses which were Defendants, and which are suppressed by order of the Court, although that afterwards there be no proceedings against them, yet they shall not be allowed of at the hearing of the Cause in that Court. And this was declared to be the constant rule of that Court.

Trinit. 5. Caroli, in the Kings Bench.

505 *The Earle of* PEMBROKE *and* BOSTOCK'S *Case.*

IN a *Quare Impedit* Judgment was given; and the same Term a Writ of Error is delivered to the same Court, before a Writ to the Bishop is awarded to admit the Clark. It was holden by the whole Court, That the Writ of Error ought to have been allowed, without any other Superfedeas, because a Writ of Error is a Superfedeas in it self. *Whitlock* Justice, If in this Writ of Error the Judgement be affirmed, the Defendant in the Writ of Error shall have damage.

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506 *The Bailiffs, Aldermen, Burgesses, and Commonalty of* Yarmouth *and* COWPER'S *Case.*

IN a *quo Warranto* brought against the Bailiffs, Aldermen, &c. they did appear by Warrant of Atturney; and one of the Bailiffs named in the Warrant did not appear nor agree to it. It was holden by the whole Court, That the appearance of the major or greater part, being recorded, was sufficient. And it was also holden, *per curiam*, that although the Warrant of Atturney was under another Seal, then their common Seal, yet being under Seal, and recorded, it cannot be annulled; *Vide* 14. *H.* 4. If two Coroners be, and one maketh a return, the same is good; but if the other doth deny it, then it is void.

Mich.

Mich.8. Caroli, in the Kings Bench.

507 LANCASTER'S *Caſe againſt* KIGHTLEY *and* SINEWS.

JUdgement was given in a *Scire facias* againſt the Bail. A Writ of Error was brought by the Defendant in the principall Action and the Bail. And the opinion of the Court was, That a Writ of Error would not lie, becauſe the Judgements againſt them were ſeverall, but they ought to have ſeverall Writs of Error. And the books of 3. *H.*7. 14. 3. *E.* 4.10. and 2. *Eliz. Dyer* 180. were vouched. And ſo was it adjudged, *Hill.* 11. *Jacobi, Rot.* 1377. in the Exchequer Chamber, in Doctor *Tennants* Caſe. Where a Writ of Error was brought by the Defendant and the Bail; and it was adjudged, that they could not joine in an Writ of Error, but ought to have ſeverall Writs.

Mich.8. Caroli, in the Kings Bench.

508 EVELEY *and* ESTON'S Caſe.

IN Treſpaſs; It was found, That a man was Tenant in tail of certain Farme Lands called *Eſtons*; and that a Fine was levied of Lands in *Eſlington, Eſton* and *Chilford*, whereas *Eſton* lay in another Pariſh, *appell D. Calthrope* argued, That the Land in *Eſton* did paſſe by the Fine, although the Pariſh was not named; for that the Writ of Covenant is a perſonall Action, and will lie of Lands in a Hamlet or *lieu conus*, 8. *E.* 4.6. *Vide* 4. *E.* 3 15. 17. *Aſſ.* 30. 18. *E.* 3. 36. 47. *E.* 3. 6. 19. *E.* 3. *Brev.* 767 2. He ſaid, That it was good, for that the Plea went only to the Writ in abatement; but when a Concord is upon it, which admits it good, it ſhall not be avoided afterwards. 3. He ſaid, That a Fine being a common aſſurance, and made by aſſent of the parties, will paſſe the Lands well enough, 7 *E.* 4.25. 38. *E.* 3. 19. And he vouched *Paſch.*17. *Jacobi*, in the Kings Bench, *Rot.*140. *Monk* and *Butlers* Caſe. Where it was adjudged that a Fine being but an arbitrary aſſurance, would paſſe Lands in a *Lieu conus*; and ſo he ſaid it would do in a common recovery. And *Richardſon* ſaid, That if a *Scire facias* be brought to execute ſuch a recovery, *Nul tiel ville ou Hamlet*, is no plea, and the Fine or recovery ſtands good, *Vide* 44. *E.* 3. 21. 21 *E.* 3. 14 *Stone.* And the opinion of the Court was, That the Lands did well paſſe by the Fine.

Mich.

Mich. 8. Caroli, in the Kings Bench.

509 CAWDRY *and* TETLEY'S Case.

Cawdry being a Doctor of Physick, the Defendant *Præmissorum non ignorans*, to discredit the plaintiff with his Patients, as appeared by the Evidence, spake these words to the plaintiffe, viz. Thou art a drunken Fool, and an Asse; Thou wert never a Scholer, nor ever able to speak like a Scholer. The opinions of *Jones* and *Crook* Justices, were, that the words were actionable, because they did discredit him in his Profession; and hee hath particular losse, when by reason of those words, others do not come to him. And *Palmers* Case was vouched: Where one said of a Lawyer, Thou hast no more Law then a Jackanapes; that an Action did lie for the words: Contrary, if he had said, No more Wit. And *William Waldrons* Case was also vouched; where one said, I am a true Subject, thy Master is none; that the words were actionable.

Mich. 4. Caroli, in the Kings Bench.

510 *The* King, *and* BAXTER & SIMMON'S *Case.*

THE Case was this, Tenant in tail the Remainder in taile, the Remainder in Fee to Tenant in tail in possession: Tenant in tail in Remainder by Deed enrolled, reciting that he had an estate tail in Remainder, Granted his Remainder and all his estate and right unto the King and his Heirs, *Proviso*, that if he pay ten shillings at the Receipt of the Exchequer, that then the Grant shall be void. Tenant in tail in possession suffers a common Recovery, and afterwards deviseth the Lands to *I. S.* and dieth without Issue 18. *Jacobi*. Afterwards 21. *Jac.* he in the Remainder in tail dieth without issue; but no seisure is made, nor Offence found, that the lands were in the Kings hands.

Noy, who argued for the King: The first Point is, When Tenant in taile recites his estate, and grants all his estate and right to the King and his Heirs, what estate the King hath? And if by the death of Tenant in tail without issue, the estate of the King be so absolutly determined, that the Kings possession needs not to be removed by *Amoveas manum*: And he argued, That when the Lands are once in the King, that they cannot be out of him again, but by matter of Record. 8. *E.* 3. 12. *Com.* 558. And

a bare entry upon the King, doth not put the King out of poſſeſſion of that which was once in him: And ſo was it adjudged 34. *Eliz.* in the Lord *Paget's* Caſe, as *Walter* chief Baron ſaid. And *Noy* took this difference, 8. *H.* 5. *Traverſe* 47. and 8. *E.* 2. *Traverſe* 48. If a particular eſtate doth determine before that the King ſeiſe, there the King cannot afterwards ſeiſe the Lands. But if the King hath once the Lands in his hands or poſſeſſion, there they cannot be deveſted out of him but by matter of Record. So *F. Nat. Br.* 254. If a man be ſeiſed of Lands in the right of his Wife, and be outlawed for Felonie, for which the Lands come into the Kings hands, and afterwards hee who is outlawed dieth; there a Writ of *Diem clauſit extremum* ſhall iſſue forth: which proveth, That by the death of the Husband the Lands are not immediately out of the King, and ſetled in the Wife againe. 22. *E.* 4. *Fitz. Petition* 9. Tenant in taile is attainted of Treaſon, and the Lands ſeiſed into the Kings hands; and afterwards Tenant in taile dieth without Iſſue, he in the Remainder is put to his Petition: which proveth, that the Lands are not preſently after the death of Tenant in taile without iſſue, out of the King. But he agreed the Caſes: If Tenant in taile acknowledgeth a Statute, or granteth a Rent charge, and dieth, that the Rent is gone and determined by his death, as it is agreed in 14. *Aſſiſarum.* The ſecond point argued by *Noy*, was; That although that there was not any ſeizure or Offence found which entituled the King, Yet the Deed enrolled in the Chancery which is returned in this Court, did make ſufficient title for the King: & as 8. *E.* 3. *p.* 3. is, The Judges of Courts ought to Judge upon the Records of the ſame Courts. In 8. *H.* 7. 11. a Bayliff ſhewed, That a Leaſe was made to *T.* his Maſter for life, the Remainder to the King in Fee, and prayed in Ayd of the King: And the Plaintiff in Chancery prayed a *Procedendo:* And it was ruled That a *Procedendo* ſhould not be granted without examination of the Kings title. Thirdly, he ſaid, That in this caſe he who will have the Lands out of the poſſeſſion of the King, ought to ſhew forth his title; and in the principall caſe it doth not appear that the Defendant had any title. *Vide* 10. *H.* 7. 13. *Athowe* Serjeant argued for the Defendant, & he ſaid, That in this caſe the King had an eſtate but for the life of Tenant in tail. And therefore he ſaid, That If Tenant in tail grant *totum ſtatum ſuum*, that an eſtate but for his own life paſſeth, as *Litt.* is, 145. and 13. *H.* 7. 10. *acc.* So If Tenant for life the remainder in taile bee, and he in the Remainder releaſeth to Tenant for life in poſſeſſion, nothing paſſeth but for the life of Tenant in tail. 19. *H.* 6. 60. If Tenant in tail be attainted of Treaſon or Felonie, and Offence is found, and the King ſeiſeth the lands, he hath an eſtate but for the life of Tenant in tail. And he cited 35. *Eliz. C.* 2 part 52. *Blithmans* caſe. Where Tenant in tail Covenanted to ſtand ſeized to the uſe of himſelf for his own life, and after his death to the uſe of his eldeſt ſon in tail, and afterwards he married a wife and died; that the wife ſhould not be endowed:

dowed: for when he had limited the uſe to himſelf for his life, he could not limit any Remainder over. And *Edwards* Caſe, adjudged in the Court of Wards, which was, That there was Tenant for life the Remainder in tail, he in the Remainder granted his Remainder to *I. S.* and his heirs; and afterwards Tenant for life dyed, and then the grantee dyed, his heirs within age, & it was adjudged that the heir of the garntee ſhould not be in ward, becauſe the Tenant in tail could not by his Grant grant a greater eſtate then for his own life. But he ſaid, That in the principall Caſe it appeareth, That the Tenant in tail in Remainder hath particularly recited his eſtate. And where it appeareth in the Conveyance it ſelf, that he hath but an eſtate in tail, a greater eſtate ſhall not paſſe. As if Tenant for life granteth a Rent to one and his heirs, the ſame at the firſt ſight ſeems to be a good Rent in Fee; but when it appeareth in the Conveyance that the grantor was but Tenant for life, there, upon the Conſtruction of the Deed it ſelf, it cannot be intended that he granted a Fee, but that an eſtate for life paſſed only in the Rent. Secondly, he argued, That although the eſtate in tail in the principall caſe was an abeyance; Yet a Common Recovery would barr ſuch eſtate tail in abeyance. And therewith agreeth *C.* 2. part Sr *Hugh Cholmleys* Caſe. 3. He ſaid, That the eſtate was out of the King, and veſted in the party without any Offence found, as 49. *E.* 3. *Iſabell Goodcheaps* caſe. A man deviſed houſes in *London* holden of the King in tail, and if the Donee dyed without Iſſue, that the Lands ſhould be ſold by his Executors. The deviſee died without Iſſue, The bargain and ſale of the Lands by the Executor doth divert the eſtate out of the King without Petition, or *Monſtrans de Droit*. So, If there be Tenant in tail the Remainder in tail, and Tenant in tail in Remainder levieth a fine of his Remainder to the King, and afterwards dyeth without Iſſue, the Kings eſtate is determined, and there needs no Petition or *Monſtrans de Droit*. 4. He ſaid, That in the principall caſe, nothing was in the King, becauſe it doth not appeare that there was any ſeiſure, or Offence found to entitle the King. And the Tenant in tail in the Remainder died in the life of King *James*; and then if the Kings eſtate were then determined as before by the death of the Tenant in taile, the King which now is never had any title. And hee ſaid, that he needed not to ſhew a greater title then he had. And hee took a difference when Tenant in taile doth onely defend or make defence, and when he makes title to Lands; in the one Caſe he ought for to ſhew, That the Tenant in taile died without iſſue, and in the other Caſe not: And therefore in the principall caſe he demanded Judgment for the Defendant. The Caſe was adjourned to another day.

Mich. 4. Caroli, in the Star-Chamber.

511 TAILOR and TOWLIN's Caſe.

A Bill was preferred againſt the Defendant, for a Conſpiracy to Indict the plaintiff of a Rape. And the Plaintiff aleadged in his Bill, That an Indictment was preferred by the Defendant againſt the Plaintiff before the Juſtices of Aſſiſe and *Niſi prius* in the County of Suffolk; And did not lay it in his Bill, that the Indictment was preferred before the Juſtices of *Oyer and Terminer*, and Gaole delivery: and the ſame was holden by the Court to be a good Exception to the Bill, for that the Juſtices of Aſſiſe and *Niſi prius*, have not power to take Indictments. But afterwards upon veiw of the Bill, becauſe the Conſpiracy was the principall thing tryable and examinable in this Court, and that was well layd in the Bill, the Bill was retayned, and the Court proceded to Sentence. And in this Caſe *Richardſon* Juſtice ſaid, That in Conſpiracy the matter muſt bee layed to be *falſè et malitioſè*: and if it be layed for a Rape, It muſt be layd, that there was *recens perſecutio* of it, otherwiſe it will argue a Conſent. And therefore, becauſe the Defendant did not preferre an Indictment of Rape, in convenient time after the Rape ſuppoſed to be done, but concealed the ſame for half a years time, and then would have preferred a Bill of Indictment againſt the plaintiff for the ſame Rape, he held that the Indictment was falſe and malitious. And *Hyde* Chief Juſtice ſaid, That upon probable proof a man might accuſe another before any Juſtice of Peace, of an Offence; and although his accuſation be falſe, yet the Accuſer ſhall not be puniſhed for it. But where the Accuſation is malitious and falſe, it is otherwiſe; and for ſuch Accuſation he ſhall be puniſhed in this Court.

Trinit. 8. Caroli, in the King Bench.

513 JONES and BALLARD's Caſe.

AN Action upon the Caſe was brought for theſe words, viz Theſe *Jones* are proper Witneſſes, they will ſweare any thing; They care not what they ſay; They have already forſworn themſelves in the Chancery, and the Lord keeper Committed them for it. *Jermyn.* took Exceptions, becauſe it was not ſaid to be in the Court of Chancery;

cery; nor that it was in any Depoſition there taken upon Oath. But it was adjudged *per Curiam*, That the Action would lie; and *Jones* Juſtice ſaid, that the Addition [in the Chauncery] was as much as if he had ſaid, he was perjured there. And *Hemſies* caſe was vouched by him: Where one ſaid of a Witneſs, preſently after a Tryall at the *Guild Hall* in *London*, You have now forſworn your ſelf, That it was adjudged that the words were actionable.

Trinit. 8. Caroli, in the Kings Bench.

513. SYMME's and SMITH's Caſe.

A Woman being entituled to copyhold Lands of the Manor of *D*, did covenant, upon reaſonable requeſt to be made unto her, to ſurrender the Copy-hold Land according to the Cuſtome of the Manor. And it was found That the Cuſtome of the Manor is, That a ſurrender may be made either in perſon, or by Letter of Atturney: and that the plaintiff did requeſt the woman to make the ſurrender by a Letter of Atturney; which ſhee refuſed to do. And whether ſhee ought to ſurrender preſently, or might firſt adviſe with her Councell, was the Queſtion. It was argued for the plaintiff, that ſhee ought to do it preſently: And *Munſer's* Caſe, *C.* 2. part, and 16. *Eliz. Dyer.* 337. Sir *Anthonie Cooks* Caſe were vouched, that ſhe was to do it at her perill: And the Election in this Caſe was given to the Covenantee; and hee might require it to be done either in Court in perſon, or by Letter of Atturney: And *C.* 2. part, Sir *Rowland Heywards* Caſe: and *C.* 5. part, *Hallings* Caſe was vouched to that purpoſe. *Rolls* contrary, for the Defendant: And he ſaid, That the woman was to have convenient time to do it: and the words are upon reaſonable requeſt, which implies a reaſonable time to conſider of it: And there might be many occaſions, both in reſpect of her ſelf and of the Common wealth, that ſhe could not at that time do it. And *Hill.* 37. *Eliz. in the Common Pleas*, PERPOYNT and THIMBELBYES Caſe: A man Covenants to make Aſſurances; It was adjudged hee ſhall have reaſonable time to do it: In 27. *Eliz.* the opinion of *Popham* was, That if a man be bounden to make ſuch an Aſſurance as Councell ſhall adviſe: there, if Councell adviſe an Aſſurance, he is bound to make it. But if it were ſuch [Reaſonable Aſſurance] as Councell ſhall adviſe; There, If the Councell do adviſe, That he ſhall enter into, ſeale and deliver a Bond of

of a thouſand pound for the payment of an hundred pound at a day; hee is not bound to doe it, becauſe it is not reaſonable. *Vide* 9. *Ed.* 4. 3. *cap.* 6. part *Bookers* Caſe. *Doct. & Stud.* 56. 14. *H.* 8. 23. Secondly, He ſaid, That the requeſt in the principall Caſe was not according to the Covenant: for the election in this caſe was on the womans part, and not on the Covenantees part, and ſhee was to doe the act, viz. to ſurrender: And where election is given of two things, the ſame cannot be taken from the party: and if it ſhould be ſo in the principall Caſe, the Covenantee ſhould take away the election of the Covenanter. And where the manner of Aſſurance is ſet down by the parties, there they cannot vary from it; and in this caſe the manner is ſet down, in which the Covenanter hath the election, becauſe ſhee is to do the act. And hee ſaid, That the woman was not bounden afterwards to ſurrender in Court upon this requeſt, becauſe the requeſt was as it were a void requeſt: And it is implyed by the words, That ſhee in perſon ought to make the Surrender: and ſo hee prayed Judgment for the Defendant. It was adjourned.

Trinit. 8. Caroli, in the King's Bench.

514. HYE *and Dr.* WELLS *Caſe.*

DOctor *William Wells* ſued *Hye* in the Eccleſiaſticall Court for Defamation, for ſaying to him, that hee lyed: And the Plaintiffe prayed a Prohibition: It was argued for the Defendant, that in this Caſe no Prohibition ſhould goe; For it was ſaid, that by the Statute of 21. *Edw.* 1. of Conſultation; When there is no Writ given in the Chancery for the party grieved in the Temporall Court, there the Spirituall Court ſhall have the Juriſdiction: and in this Caſe there is no Writ given by Law. And *Fitzherbert Natura Brevium* 53. *b.* a Conſultation doth not lie properly, but in caſe where a man cannot have his Recovery by the Common Law in the Kings Courts: for the words of the Writ of Conſultation are, viz. *Proviſo quod quicquid in juris noſtri regii derogationem cedere valeat aliqualiter per vos nullatenus attemptetur*: And *Vide Regiſter* 149. *Falſarius* is to be puniſhed in the Spirituall Court. And *Fitzherb. Nat. Brev.* 51. *I.* A man may ſue in the Spirituall Court, where a man defames him, and publiſheth him for falſe. *Vide Linwood in cap. de foro competenti. acc.*

Trin.

Trin. 6. *Jacobi*, in the Common Pleas, *Boles* Case, *Rot.* 2733. A man called a poor Vicar, poor rascally Knave; for which the Vicar sued him in the spirituall Court: And by the opinion of the whole Court, after a Prohibition had been granted, upon further advice a Consultation was granted. 1. It was objected, That the party might be punished by the Temporall Judges and Justices for the words. To which it was answered, That although it might be so, (which in truth was denied,) yet the party might sue for the same in the spirituall Court. And many Cases put, That where the party might be punished by either Lawes, that the partie had his election in what Court he would sue. And therefore it was said, That if a man were a drunkard, he might be sued in the Ecclesiastical Court for his drunkennesse; and yet he might be bounden to his good behaviour for the same by the Justices: so the imputed father of a Bastard child, may be sued for the offence either in the spirituall Court, or at the Common Law by the Statute of 18. *Eliz.* and 7. *Jacobi.* So *F.N.B.* 52. *k.* If a man sue in the spirituall Court for taking and detaining his wife from him to whom he was lawfully married; if the other party sue a Prohibition for the same, yet he shall have a Consultation *quatenus, pro restitutione uxoris suæ duntaxat prosequitur*; and yet he may have an Action at the Common Law *De uxore abducta cum bonis viri*; or an Action of Trespasse. *Maynard*, contrary. By the Statute of *Articuli Cleri*, although that the words be generall, yet they do not extend to all defamations. And by Register 49. where the Suit is for defamation, there the Cause ought to be expressed & ought to be wholly spirituall, as the Book is in 29. *E.* 3. and *C.* 7. part in *Kenn's* Case: And in the principal Case, It is not a matter affirmative which is directly spirituall: And therefore 22. *Jacobi*, where a Suit was in the Ecclesiasticall Court for these words; Thou art a base and paultery Rogue, a Prohibition was awarded. And so *Vinor* and *Vinors* Case, *Trinit.* 7. *Jacobi*, in the King's Bench, Thou art a drunken woman, Thou art drunk over night, and mad in the morning. 2. Hee said, That *Crimen falsi* in the spirituall Court, is meant of counterfeiting of the Seal, or of Forgery: and *Crimen falsi* cannot be intended a lie. If in ordinary speech one sayes, That's a lie; If the other reply, You lie; that is no defamation: for *Qui primum peccat ille facit rixam. Trinit.* 42. *Eliz. Lovegrove* and *Browns* Case. A man said to a Clark, a spirituall Person, Thou art a Woodcock, and a Foole: for which words he sued him in the spirituall Court; and in that Case, a Prohibition was awarded. It was adjourned.

Trinit.

Trinit. 8. Caroli, in the Kings Bench.

515 GWYN *and* GWYN's Caſe.

A *Quod ei deforceat* was brought againſt two, they appeared and pleaded ſeverall Pleas, and the iſſues were found againſt both of them, and a joint Judgement was given againſt them both; and they brought a Writ of Error thereupon in the Kings Bench. And the opinion was, That the Judgement was Erroneous, and that the Writ of Error would well lie. So in a Writ of Dower brought againſt two Tenants in common, who plead ſeverall Pleas, the Judgement muſt be according to the Writ. But *Barkley* ſaid, That if in a Writ of right by two, the Miſe is joyned but in one Iſſue, where ſeverall Iſſues are, the Judgment ought to be ſeverall. *Quære, quia obſcurè.*

Trinit. 8. Caroli, in the Kings Bench.

516 BLAND's *Caſe.*

THE Caſe was this, *Thomas Spence* was a Leſſee of Lands for one hundred years; and he and *Jane* his Wife, by Indenture, for valuable conſideration, did aſſign over to *Tiſdale*, yeilding and paying to *Thomas Spence* and his Wife and the Survivor, the Rent of ſeventeen Pounds yearly, and every year during the terme; *Proviſo*, that if the Rent be arrere by forty daies, that *Thomas* and his Wife, or the Survivor of them ſhould enter. *Thomas Spence* died, his Adminiſtrator did demand the Rent, and being denied, entred for the Condition broken. *Calthrope* argued, That the reſervation to the Wife was void becauſe ſhe had not any intereſt in the Land, and alſo never ſealed the Indenture of Aſſignment, but was as a ſtranger to the Deed, and ſo he ſaid that the Wife could not enter for the condition broken, nor make any demand of the Rent. The 2d Point was, Admitting that the wife could not enter, nor demand the Rent; Whether the Adminiſtrator of the Huſband might demand it and enter for the condition broken; becauſe the words are, Yeilding and paying to *Thomas Spence* and *Jane* his Wife, and the Survivor of them during the term, and no words of Executors or Aſſigns are in the Caſe: and he conceived the Adminiſtrator could not; and ſo he ſaid it had been reſolved in one *Butcher* and *Richmonds* Caſe, about 6. *Jacobi*. *Danks* contrary, and he ſaid, It was a good Rent and well demanded, and the reſervation is good during the Term, to the Huſ-

Husband and Wife; and although the word *Reddendo* doth not create a rent to the Wife, becauſe the Husband cannot give to the Wife; yet the *Solvendo* ſhall gain a good rent to the Wife, during the life of the Wife; and the reſervation ſhall be a good reſervation to him and his Adminiſtrators during the Survivor. *Vide C.* 5. *part Goodales* Caſe 38. *E.* 3. 33. 46. *E.* 3. 18. and admitting that the rent ſhall be paid to the Wife, yet the condition ſhall go to the Adminiſtrator. 2. The word *Solvendo* makes the Rent good to the Wife, and amounts to an agreement of the Leſſee to pay the Rent to them, and the Survivor of them; and that which cannot be good by way of reſervation, yet is good by way of grant and agreement; and many times words of reſervation or preception, ſhall enure by way of grant. *Vide* 10 *E.* 3 500. 10. *Aſſ.* 40. 8. *H.* 4. 19. *Richard Colingbrooks* Caſe. 41. *E.* 3. 15. 13. *E.* 2, *Feaſts and Faſts* 108. *Richardſon* Juſtice, The Reſervation being during the term, is good, and ſhall go to the Adminiſtrator. *Jones* Juſtice contrary, It is good only during the life of the Leſſor; and ſo was it adjudged in *Edwyn* and *Wottons* Caſe, 5. *Jacobi*. *Crook* Juſtice accorded, The Adminiſtrator hath no title, and the Wife is no party to the Deed, and therefore the Rent is gone by the death of the Husband. If it had been *durante termino* generally, perhaps it had been good; but *durante termino prædicto* to him and his Wife, it ceaſeth by his death. And the words *durante termino*, couple it to him and his Wife, and the Survivor; and it cannot be good to the Wife who is no party, nor ſealed the Deed; neither can it inure to the Wife by way of Grant. And the words *Reddendo* and *Solvendo* are *Synonima*; and the Adminiſtrator is no Aſſignee of the Survivor, for ſhe cannot aſſign becauſe ſhe hath no right in the Rent. *Barkley* Juſtice, The intention of the parties was, That it ſhould be a continuing Rent, and Judges are to make ſuch Expoſition of Deeds, as that the meaning of the parties may take effect. I do agree, That the Wife could not have the Rent, neither by way of Reſervation, nor by way of Grant, if ſhe were not a party to the Indenture: but here ſhe is a party to the Deed; for it is by Deed indented made by the husband and wife, and the husband hath ſet his Seal to it. And 2. The *Solvendo* doth work by way of Grant by the intent of the parties: The *Reddendo* ſhall go and relate as to the husband, and the *Solvendo* to the wife; and he agreed the Caſe 33. *H.* 8. *Br.* Caſes: becauſe there *expreſſum facit ceſſare tacitum*; but in caſe of a Leaſe for years, the words, [Reſerving Rent to him] ſhall go to the Executor, who repreſents the perſon of the Teſtator; and 27. *El.* it was adjudged in *Conſtables* Caſe; and *Littleton* agrees with it, That the Executor ſhall be poſſeſſed and is poſſeſſed in the right of his Teſtator. And therefore if an alien be made an Executor, in an Action brought by him the Tryal ſhall not be *per medietatem linguæ*. And this Caſe is the ſtronger, becauſe the Reſervation is during the Term. And *C.* 3. *part*

in *Malleries* Caſe, That the Law ſhall make ſuch a conſtruction upon reſervation of Rent upon a Leaſe as may ſtand with the intent and meaning of the parties; and therefore in that, where an Abbot and Covent made a Leaſe for years, rendring Rent yearly during the Term, to the Abbot and Covent or to his Succeſſors, it is all one as if it had been to him and his Succeſſors; and although the words be joint or in the Copulative, yet by conſtruction of Law, the Rent ſhall be well reſerved during the terme; for if the reſervation had been only Annually during the terme, it had been ſufficient, and his Succeſſors ſhould have had the Rent. *Quære* the principall Caſe, for the Judges differed much in their opinions.

Hill. 8. Caroli, in the Kings Bench.

517 *The* KING *againſt* HILL.

AN Information was by the Kings Atturney againſt *Hill* and others, upon the Statute of 32. *H.* 8. of Maintenance. Where the Point was, A man was out of Poſſeſſion, and recovered in an *Ejectione firme* in *May* 2. *Car.* and *Habere Poſſeſſionem* was awarded; and 29. *Sept.* 4. *Car.* he ſold the Land: And whether he might ſell preſently, or not? was the Queſtion. And it was determined, That he being put in poſſeſſion by a Writ of *Habere facias poſſeſſionem*, that he might ſell preſently. *Vide Com. Crookers* Caſe; and *C. Littl. acc.* and ſo was it holden in Sir *John Offley's* Caſe 7. *Car.* in this Court. *Barkley* Juſtice, If a Diſſeiſor doth recover in an *Ejectione firme*, if he afterwards ſell the Land, it is a pretended Title. *Jones* Juſtice, It was adjudged 36. *El.* in the Common Pleas, in *Pages* Caſe, in the Caſe of a Formedon, That if a man be out of Poſſeſſion for ſeven years, and afterwards he recover, that he may ſell the Lands preſently. *Crook* Juſtice, There is a difference where the recovery is in a reall Action, and where it is in an *Ejectione firme*. It was Maſter *Browneloes* Caſe in the Star-Chamber, reſolved by all the Judges of *England*, That a Suit in Chancery cannot make a Title pretended nor Maintenance. *Barkley* Juſtice put this Caſe, If Husband and Wife bargaineth and ſelleth, whereas the Wife hath nothing in the Land, and afterwards a Fine is levied of the ſame Lands by the Husband and Wife, it ſhall have a relation to conclude the Wife, and to make the Wife to have a Title *ab initio*. It was adjourned.

Paſch.

Pasch. 10. *Caroli, in the Kings Bench.*

518 BARKER *and* TAYLOR'S Case.

IN an *Ejectione firme*, the Case upon the Evidence was this, Two Coparceners, Copy-holders in Possession; the one did surrender his reversion in the moity after his death. *Charles Jones* moved, That nothing did passe, because he had nothing in Reversion. *Vide C.* 5. *part Saffyns* Case, If a man surrendreth a Reversion, the Possession shall not passe. 2. It is not good after his death; so was it adjudged in *C.* 2. *part Buckler and Harvey's* Case. *Curia*, The Surrender is void, and the same is all one, as well in the Case of Copy-hold as of Free-hold: and so was it adjudged 26. *El.* in *Plats* Case; and so also was it adjudged in this Court, 3. *Caroli* in *Simpsons* Case.

Pasch. 13. *Caroli, in the Kings Bench.*

519 HUMFREYS *and* STUDFIELD'S Case.

IN an Action upon the Case for words, the Plaintiff did declare, That he was Heir apparant to his Father, and also to his younger Brother, who had purchased Lands, but had no Issue, either Male or Female; and that the Defendant, with an intent to bring him in disgrace with his Father, and also with his younger brother; and thereby to make the Father and younger Brother to give away their lands from the Plaintiff, did maliciously speak these words to the Plaintiff, Thou art a Bastard, which words were spoken in the presence of the Father and younger Brother; by reason of speaking which words, the Father and younger Brother did intend, and afterwards did give their Lands from the Plaintiff. And by the opinion of the whole Court it was adjudged, That the words were Actionable, and Judgement entred accordingly.

FINIS.

I have perused this Collection of Reports, and think them fit to be printed.

Per me JOHANNEM GODBOLT,
Unum Justiciar' de Banco
18. *Jun.* 1648.

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FINIS.