REPORTS:

OR,

NEW CASES;

WITH

Divers Reſolutions and Judgements given upon ſolemn Arguments, and with great deliberation.

AND

The Reaſons and Cauſes of the ſaid Reſolutions and Judgements.

COLLECTED

By JOHN MARCH of *Grayes Inne*, *BARRESTER.*

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REPORTS,

Eaſter Terme, 15°. *Caroli*, in the Kings Bench.

IT was agreed by Juſtice *Jones* and Juſtice *Barckley*, (the Lord chiefe Juſtice and Juſtice *Crooke* being abſent:) That if the Sheriffe doe arreſt a man upon *meſne proceſſe*, and returne a *Cepi corpus*, and that the Defendant was reſcued; that no Action lyeth againſt the Sheriffe: but if the party bé taken upon an Execution, an Action upon the Caſe lyeth againſt him, and ſo is the expreſſe Book of 16 *E.*4. 2, 3. *Br. Eſcape* 37. upon which booke Juſtice *Jones* ſaid, That it was adjudged in this Court, as above is ſaid.

2. It was agreed by the Court, That if a man in pleading derive an eſtate from another man, and doth not ſhew what eſtate he had from whom he deriveth his eſtate; that is a good cauſe of Demurrer: and Juſtice *Jones* ſaid, That if a man claime a Rent by Grant out of the land of any other man, it is not ſufficient for him to ſay, That ſuch an one was ſeiſed and *conceſſit*; but he ought to expreſſe of what eſtate he was ſeiſed; ſo is *Dyer*: but in this caſe it was agreed, That the ſhewing of what eſtate, &c. ought to be materiall to the maintenance, and ſupport of the eſtate which he claimeth, otherwiſe it is not neceſſary.

3. An Action upon the Caſe for words, was brought by one who was journeyman and Foreman of a Shoomakers ſhop,

which was his living & livelihood, for theſe words, *viz.* It is no matter who hath him, for he will Cut him out of doores. And farther the Plaintiffe did averre, that the common acceptance of theſe words amongſt ſhoomakers, is, That he will begger his Maſter, and make him run away: and ſhewed that he was particularly endamnified by ſpeaking of thoſe words. And the Court was cleere of opinion, that the Action would lye. And theſe rules were taken and agreed; For ſome words an Action will lye without particular averment of any damage, as to call a man Theefe, Traytor, or the like; theſe are *malum in ſe*: And ſome words will not beare Action without particular averment of ſome damage: as to ſay, Such a one kept his wife baſely, and ſtarved her; theſe words of themſelves will beare no Action: but if the party of whom the words were ſpoken were in election to be married to any other, and by ſpeaking of theſe words is hindred; there with ſuch Averment they will beare an Action. It was farther agreed, That the words ought to be ſpoken to one who knowes the meaning of them, otherwiſe they are not actionable, as in the principall Caſe, they were ſpoken to a ſhoomaker; but if they had been ſpoken to any other who knew the meaning of them, it had been all one: And therefore ſcandalous words which are ſpoken to one in Welch, or any other language, which the party to whom they are ſpoken doth not underſtand, are not actionable: and it was agreed, That ſome words which are ſpoken although of themſelves they are not actionable, yet being equivalent with words which are actionable, they will beare an Action. And therefore it was ſaid by Juſtice *Jones*, That in Yorkeſhire, (as I remember) ſtraining of a mare, is as much as buggering: and becauſe theſe doe amount to as much, with averment they will beare Action. And all words which touch a man in his livelyhood and profeſſion will beare Action. And the opinion of the court alſo was, that the Averment ought to be, That in this, and ſhew it ſpecially, the Plaintiffe was damnified: and ſo it was agreed upon theſe reaſons, that the Action did lye.

4. The

4. The opinion of the Court was upon a Judgement given there, there ought to be two *Scire facias*, one againſt the Principall, the other againſt the Baile; but one onely is ſufficient in the Common pleas, and that two *Nichils* returned do amount to *Scire feci*.

5. There was a contract made at Newcaſtle, that a ſhip ſhould ſayle from Yarmouth to Amſterdam, and there was an action of Debt brought upon the contract at Newcaſtle, and it was adjudged that the Action would not lye: and the difference was taken betwixt a particular and limited juriſdiction, as in this caſe Newcaſtle is, and a generall juriſdiction, as one of the courts at Weſtminſter hath: for in the firſt Caſe, no particular juriſdiction ſhall hold plea of a thing which is done *in partibus tranſmarinis*, although the originall (as the contract in the principall Caſe) be made in England; but contrarie in caſe of generall juriſdiction, as any the courts at Weſtminſter have.

6. The cuſtome of London is, that any man in London may paſſe over, or put over his Apprentiſes to any other man within the City.

King *and* Cokes *caſe*.

7. *William Marſhall*, and other bailiffs had an Execution (*viz.* a *Capias ad ſatisfaciend*) againſt *Coke* and others, which bailiffs came to *Cokes* houſe, and lay one night in his out-houſes privily, and the next morning they came to his dwelling houſe and gave him notice of the Execution, but *Coke* ſhut the doores of his houſe cloſe, ſo as the bailiffs could not enter; whereupon they brake the glaſſe windowes and the hinge of the doore, endeavouring to enter: whereupon *Coke* commanded them to be gone, or he would ſhoot them: notwithſtanding which, they did continue their ill doing, whereupon *Coke* ſhot *Marſhall* one of the bailiffs: and whether this was

Manſlaughter or Murder was the queſtion. And *Rolls* argued, that it was not Murder for theſe cauſes. 1. Becauſe the act of the bailiffs in breaking of the glaſſe and the hinge of the doore, was an unlawfull act, and was at their perill. Where the Kings Officer may break the houſe to ſerve any Meane proces or Execution, the differences are ſuch as are in *Semaynes* caſe. *C.* 5. *part* 91, 92. 1. Betwixt Reall and Perſonall Actions: In Reall Actions they may break the houſe to deliver ſeiſin to him who recovereth: contrary, in Perſonall Actions. 2. There is a difference in the caſe of the King, and of a common perſon; where the King is party, in ſome caſes his officers may juſtifie the breaking of a houſe, but not in the caſe of a common perſon. 13 *E.* 4.9. 18 *E.*4.4. 4 *Rep.* 4. 9 *Rep.* 69. And therefore if they could not juſtifie the breaking of the houſe at the ſuit of a common perſon; then in the principal Caſe, they did a thing which was not warranted by law: and therefore the killing of one of them was not Murder. But cleerely if the bailiffs had lawfully executed their office, then it had beene Murder. 2. It was not Murder, becauſe the perſon was in his Houſe, which is his caſtle and defence, which is a place priviledged by the law. 26 *Aſſ.*23. 3 *E.* 3. 330, 305. Beſides, the party is not bound to tarry till the bailiffs come in and beat him. 2 *H.*4.8. 19 *H.* 6.31. 34 *H.*6.16. 43 *Aſſ.pl.*31. 3. This authority which is given to the Kings officer, is given by the law, and if he execute it according to the law, the law will protect him, but if he exceed the priviledge given him by the law, then all he doth is illegall, and he loſeth its protection. And he reſembled it to the 6. *Carpenters caſe. C.* 6. *part.* Farther, one may pretend he hath ſuch a warrant, when he hath it not, of purpoſe to rob, or doe ſome other miſchiefe. And it was agreed by all the Juſtices, *nullo contradicente*, that it was not Murder, but that it was Manſlaughter; for this reaſon eſpecially, becauſe the officer was doing an unlawfull act, not warranted by law; and therefore it was at his perill if he were killed. And farther upon this difference, there ought to be Malice in fact, or in law, to make Murder; but in this Caſe there is none of them, for it is apparent that there was no malice in fact:

fact : and there is no malice implied, for then it ought to be where a man kills another without any provocation, or the Minister of justice in the due and lawfull execution of his office, which is not our Case; for here he did an unlawfull act at the time he was killed, and therefore it was not Murder but Manslaughter. There was a Case tryed at the Sessions in the Old-baily, which was thus : One *Lovell* had two maid-servants, and one of them, without his knowledge, had received into the house a Chare-woman, who (all being in their beds) by her negligence let a Theefe into the house, and afterwards called out Theeves, Theeves, and afterwards *Lovell* came out of his bed with a sword in his hand, & the Chare-woman calling to minde that she was there without his privity or his wifes, hid her selfe behinde the dresser, and *Lovels* wife espying her there, cryed out Theeves, Theeves; for which *Lovell* came and ran her into the brest with his sword. And the opinion of the Justices at the Old-baily, and also of all the Justices of the Kings Bench, was, That it was neither Murder nor Manslaughter: Not Murder, because there was no forethought malice; Not Manslaughter, because he supposed her to be a Theefe; and if she had been a Theefe, then it was cleare that it was not Manslaughter.

8. It was resolved in the Chancery (as the Judges of the Kings Bench said) That where the Sonne is of full age, and is Ravished, that the Father shall not recover Damages, because the Sonne being of full age might marry himselfe without the consent of the Father: and that was the reason given as I conceive, and the Case was said to be Sir *Francis Lees* case.

9. The Booke of Canons is, That the Parson may Elect one Churchwarden; and the Parishioners another.

10. There can be no Surrender without the Consent of the Reversioner.

11. It was Libelled in the Eccleſiaſtical court for theſe words, Thou art a Drunkard, or uſeſt to be drunk thrice a weeke; And thereupon Prohibition was Prayed and Granted: and it was ſaid and agreed, That ſo it was adjudged betwixt *Vinior* and *Vinior*, in this Court. The caſe in *Dyer*, 254. b. Where the Preſentee was refuſed, becauſe he was a common haunter of Tavernes, &c. was by Juſtice *Barckley* denyed to be law, and ſo agreed by Juſtice *Jones*, the Lord chiefe Juſtice & Juſtice *Crooke* being abſent: But Juſtice *Barckley* was utterly againſt the Prohibition. 1. Becauſe the Action in the Eccleſiaſticall Court is onely *pro ſalute animæ*. And 2. Becauſe that Drunkenneſſe is in their Articles and Preſentable; but Juſtice *Jones* granted a Prohibition, and ſaid that *Linwood* ſaid well, That if all things which are againſt the Law of God (or words to that effect) ſhould be tryed in the Eccleſiaſticall Court, the Juriſdiction of the Temporall Court, ſhould utterly be deſtroyed.

12. If there be an Indictment of Forcible Entry, if it appeare that the Plaintiffe had *ſeiſin* at the time of the Writ brought, there can be no Writ of Reſtitution, for the Statute ſaith, If he Enter with Force, or keepe him out with Force; but yet in that caſe the King ſhall have his Fine: And there was an Indictment, which was a principall Caſe at Barre, which was, That the Defendant *adtunc & adhuc* doth keepe the poſſeſſion forcibly, whereas the Plaintiffe was in poſſeſſion. And thereupon a Writ of Reſtitution was awarded by reaſon of the word [*adhuc*] 3 *E.* 4. 19. It is adjudged, That where there is Forcible entry, and Reteiner with Force, that both are puniſhable although the Statute of 8 *H.* 6. 9. be in the disjunctive.

13. Diſcent of a Copy-hold ſhall not take away Entry. There ought to be a cuſtome to enable the Lord of a Manor to grant a Copyhold in Reverſion.

14. In

14. In the Councell of Marches of Wales, they proceed according to Directions, and they cannot exceed them, and they have nothing to doe with Freehold, for it is not within their Inſtructions. And they cannot hold Plea of Debt above fifty pounds.

15. An Aſſignement of Rent to a Woman, out of Land of which ſhe is Doweable, by Word is good; but if ſhe be not Doweable of the Land, then the Aſſignement by Word, is not good, and void; becauſe that in the firſt Caſe it is according to common Right, but in the laſt, not. 33 *H.* 6.

16. In a Writ of Error to Reverſe a Judgement, in an Action of Debt upon an Arbitrament, the Error aſſigned was this, That two did referre themſelves to Arbitrament of their two ſeverall Arbitrators; and there is no word of Submiſſion: that the ſame is Error, and there was Error in the Entry of the Judgement; the entry of which was in this manner; *Conſideratum eſt*, and *per Curiam* is omitted and left out. And for theſe Errors, the Judgement was Reverſed.

Smiths *caſe*.

17. ONe ſaid of him, Thou art forſworne, and haſt taken a falſe Oath at Hereford Aſſiſes, againſt ſuch a one, naming the party. And the Opinion of the Court (the Chiefe Juſtice and Juſtice *Crooke* being abſent) was againſt the Action. But they conceived that the Action would have lyed, if the Defendant had ſaid, Thou art forſworne, and haſt taken a falſe Oath at the Aſſiſes, againſt ſuch a one, with Averment that he was ſworne in the Cauſe.

18. It was ſaid at the Barre, That it was adjudged in this Court in *Appletons* caſe, That where a man ſaid unto another by

by way of Interrogatory, Where is my peece thou Stoleſt from me? that it was actionable. Juſtice *Jones* remembred this caſe, where one ſaid, *I.S.* told me that *I.N.* Stole a horſe, but I doe not beleeve him. This with averment that *I.S.* did not ſay any ſuch thing, would beare an Action. Juſtice *Barckley* ſaid, that an action was brought upon theſe words, You are no Theefe? and that theſe words with Averment, which imply an affirmative, will beare an Action.

19. It was ſaid to a Merchant, That he was a Couſening knave, and the Opinion of the Court was, (the chiefe Juſtice and Juſtice *Crooke* being abſent) that the words were not actionable, becauſe he doth not touch him in his Profeſſion, for the words are too generall: But it was ſaid, That to call him Bankrupt was actionable. And in all Caſes where a man is touched in his Profeſſion, the words are actionable, But to call a Lawyer a Bankrupt is not actionable. Juſtice *Jones* ſaid, that Serjant *Heath* brought an Action for theſe words: One ſaid of him, That he had Vndone many, and it was adjudged actionable; becauſe he touched him in his Profeſſion.

20. Kingſton upon Hull is a Particular and Limited Juriſdiction, and they held Plea of a Bond which was made out of their Juriſdiction, and thereupon a *Capias* was awarded againſt the Obligor, who was arreſted upon it, and ſuffered by the Sheriffe to eſcape: And the Opinion of the Court was cleere, That no eſcape would lye againſt the Sheriffe, upon the difference in the caſe of the Marſhalſea, That if the Court hold Plea of a thing within their Juriſdiction, but proceed erroneouſly that it is avoidable by Error, but if they have not Juriſdiction of the cauſe, all is void, and *coram non Judice*. 11 *H.* 4. and 19 *E.* 4. *Acc.* So in the principall Caſe, for they held Plea of a thing which was out of their Juriſdiction, and therefore the whole proceeding being void, no Action can lye againſt the Sheriffe, for there was no Eſcape.

21. Where

21. Where a man is Outlawed, and the Outlawry reverſed, notwithſtanding the Originall doth remaine, and the cauſe that the Originall was determined was the Outlawry; and now *Ceſſante cauſa ceſſat effectus.*

22. A man made a Leaſe for yeares, with exception of divers things, and that the Leſſee ſhall have *conveniens lignum, non ſuccidendo, &c. vendendo arbores, &c.* Now the Leſſee cut downe trees, and the Leſſor brought an Action of Covenant; and the opinion of the Court was, That the Action would lye, and that it is as a Covenant on the part of the Leſſee, becauſe that the Law gives him reaſonable Eſtovers, and by this Covenant he abridgeth his priviledge.

23. Juſtice *Jones* ſaid, and ſo it was agreed by the Court, In what caſe ſoever there is a Contract made to the Teſtator or the Inteſtate, or any thing which ariſeth by Contract, there an Action will lye for the Executor or Adminiſtrator, but Perſonall Actions die with the Teſtator or Inteſtate.

24. The Adminiſtrators of an Executor ſhall not ſue a *Scire facias* upon a Judgement given for the Teſtator, becauſe the Teſtator now died Inteſtate, becauſe there is no privity: And ſo it hath been many times adjudged. 1 *Rep.* 96. a. 5 *Rep.* 9. b.

The Earle of Oxford *and* Waterhouſe *caſe*, in a Writ of Error to reverſe a Fine.

25. *Waterhouſe* levyed a Fine, the Earle of Oxford pleaded that he was beyond ſea at the time of the Fine levyed; *Waterhouſe* replyed, That he came here into *England* in *Auguſt*, within the five yeares, and upon that they were at iſſue. The Jury found, that he came over in *July*. And notwithſtanding

ding the Opinion of the Court was cleare, That the writ of Error did not lie: For although the Jury have found that he came over in *July*; yet the ſubſtance of the matter is that he was in *England*, ſo as he might have made his Claime, and therefore the Fine ſhould barre Him. And Juſtice *Barckley* compared it to the Caſe of 10 *Eliz. Dyer* 271. b. which caſe is a *Quære* in *Dyer*, but Reſolved in the *6 Rep.* 47. a. A man brought Debt againſt an Heire, who pleaded that he had nothing by Deſcent; The Plaintiffe pleaded that he had Aſſetts in London, and the Jury found Aſſetts in Cornewall, and good, for the ſubſtance is, whether he had Aſſetts or not.

26. If a Nobleman who is not a Baron or Earle of this Realme, in an Action brought againſt him, or by him, be named Knight, and Earle of ſuch a place, it is good, becauſe that although he cannot be ſued, or ſue another, by the name of Earle, Baron, &c. yet by the name of Knight he may, and that is ſufficient.

27. A Writ of Error was brought here to reverſe a Judgment given in *Ireland*, it is a *Superſedeas* to the Execution: for although the Record it ſelfe is not ſent over for feare of loſing the ſame in the water or otherwiſe, yet a tranſcript is made thereof, which is all one; And Juſtice *Barckley* compared it to the Caſe where a writ of Error is brought in this Court to reverſe a Fine in the *Common Pleas*, there the Record it ſelfe is not ſent, but a Tranſcript thereof, becauſe we have not a Cirographer to receive it, but the Tranſcript is all one.

Sir Iohn Comptons *Caſe upon the Statute of* Wincheſter. 13 E. 1. *&* 27. Eliz. *of Robberies.*

28. SIr *John Compton* Knight, brought an Action againſt the Hundred of Oliſon, (or the like name) for a Robbery done upon Red-hill in the county of Surry, within the afore-

aforesaid Hundred, and the Robbery was done upon his man, and five hundred and ten pounds was taken from him. And in this Case it was agreed by the Justices, That although there be a remisnesse or negligence in the party who was robbed, to pursue the Robbers, or that he did refuse to lend his horse to make Hue and Cry: yet this doth not take away his Action, nor excuse the Hundred, if notice be given with as much convenient speed as may be, as the Stat. of 27 *El.* speaks for them to make Hue and Cry. And although the party who was robbed, doth not know the Robbers at the present time, and thereof takes his Oath before a Justice of Peace; as the Statute of 27 *Eliz.* hath provided, and afterwards comes to know them, and so he affirme, yet this doth not take away his Action. And it was resolved also, that Notice given in one Hundred five miles from the place where he was robbed, is sufficient; and the reason is, because that the party who is a stranger to the Country, cannot have conusans of the neerest place or towne. Chiefe Justice, That notice given at one towne, and Hue and Cry levyed at another, is good. And the Jury found for the Plaintiffe: And thereupon, a *Quere* was made, by one who was of Counsell with the Hundred, Whether such persons who become Inhabitants after the Robbery, and before the Judgement, whether they should contribute? And Justice *Barckley* said, That all who are Inhabitants at the time of the Execution, should pay it.

29. A Vicar cannot have Tithes but by Gift, Composition, or Prescription: For all Tithes *de jure* doe appertaine to the Parson.

30. A man was bound to the Good behaviour, for Suborning of Witnesses.

Plowden *against* Plowden.

31. *Plowden* the Sonne brought Trespasse against *Plowden* the Father, for taking the Plaintiffs Wife *cum bonis viri*.

And the case was, That he did reject and eject his Wife without giving of her Alimony : for which she had Sentence in the High Commission court ; and the Defendant tooke those Goods, for the Alimony of the Wife : And Justice *Barckley* said, That the Defendant might plead, Not guilty.

Lister *against* Hone, *in Trover and Conversion for a Hawke.*

32. Judgement was given for the Plaintiffe ; but it was moved in arrest of Judgement, because it was not said in the Declaration, that it was a Tame Hawke. *Dyer* 13 *Eliz.* 306. b. and 43 *E.* 3. *Acc.* And here it was said, That the words of the Declaration shew that it was a Wilde hawke ; for the words are, For taking *Accipitricem suum, Anglice vocat'* a Ramish Fawlcon ; and it was said that Ramish, is as much as to say, *inter ramos agens* ; but that was denyed, for a Ramish hawke is a Fowle hawke, by which the contrary is implyed, that it was Tame. And here it was farther said, for the Defendant, that if [*reclamato*] be omitted [*de bonis suis propriis*] will not helpe it. But it was said in affirmation of the Judgement, that although [*reclamato*] be omitted, yet, that [*de bonis suis propriis*] will helpe it : and Justice *Barckley* with all the Justices (except the Chiefe Justice, who was absent) did agree very strongly, That the Judgement should be stayed ; because that a Hawke is *feræ naturæ*, and although it be tamed, yet if it fly away and hath not *animam revertendi*, then *occupanti conceditur. vide* 27 *H.* 8. And for the words, *de bonis suis propriis*, they doe nothing, for the party had but a Right of Possession, and not of Property : and if it be, it is but a Qualified property, as 7 *Rep.* 17. b. Hee agreed, that if a man hath a wilde Hawke in his possession, and another man takes it out of his possession, Trespasse will lye ; but if it fly away, then *Capiat qui capere potest* : And thereupon Judgement was stayed.

Parkin-

Parkinson *againſt* Colliford *and others, Executors of a Sheriffe.*

33. THe Caſe was, That Judgement was given againſt another man at the Plaintiffes ſuit in Debt, in the Common Pleas, and upon that a Writ of Error was brought in the Kings Bench, and the Judgement affirmed, and upon that a *Fieri facias* directed to the Sheriffe, who levyed the mony and dyed, the Writ not being returned, and thereupon Debt was brought againſt his Executors: and theſe exceptions were taken. 1. That the writ of *Fieri facias* was not returned, and therefore the Sheriffe ſhould not be charged in Debt, but otherwiſe if it had been returned. 2. That no Debt lyeth againſt the Sheriffe, although it had been returned. 3. Admit that it would lye againſt himſelfe, yet it will not lye againſt his Executors, becauſe it is a Perſonall wrong and dyeth *cum Perſona*. 4. That the *Fieri facias* was awarded out of this Court, and it doth not appeare whether it were awarded after the Record removed into this Court or not. Juſtice *Barckley*, with whom all the other Judges did agree, was of opinion, That Debt would lye againſt the Sheriffe where he ſells goods upon a *Fieri facias*, for now he is Debtor in Law, and the Defendant diſcharged againſt the Plaintiffe, and he may plead it; and therefore it is reaſonable that the Defendant ſhould be anſwerable to the Plaintiffe; and he tooke the difference betwixt *Seiſin* of goods onely, and where the Sheriffe ſeiſeth and ſelleth them: for till Sale no Debt will lye againſt him. And it was ſaid, that Accompt will lye againſt him, and if Accompt, by the ſame reaſon, Debt. As to the returne of the Writ, he ſaid that the Sheriffe is not compellable to make it, & therefore it's nothing to the purpoſe; and the difference ſtands, where the Sheriffe returns a Jury, where not: In caſe of *Elegit* the Writ ought to be returned, but not in caſe of *Fieri facias*, as is 1 *H.*7. Clarke of the Hampers Caſe. Farther I conceive, that it will lye againſt the Executor, and it is not like the Caſes which are Perſonall, where the action *moritur cum Perſona*:

but here the goods came to the Executors, and therefore it is reaſon to charge them. And it is not like the Caſe in *Dier*, 10 *Eliz.* 271. *a.* where it is ſaid, An Action of Debt will not lie againſt the Executor of a Keeper, nor an Eſcape, for there the body comes not to the Executor: And this very difference may be collected out of *Dier* in the place aforeſaid; and the difference will ſtand where there is a perſonall wrong done to him, and where not; And for the Exception, That it doth not appear whether the *Fieri facias* was brought after the Record removed or not: To that they ſaid *una voce*, that it appeareth that it was upon theſe words of Record, *viz.* That the Record was brought hither, and here remained; and it is not needfull to ſhew, that Errour was brought, &c. Iuſtice *Iones*, I conceive, that Debt will lie againſt the Sheriffe, becauſe the Sheriffe had it delivered to him to deliver over: And if I deliver mony to deliver over, Debt will lie for him to whom it ought to be delivered. So in this Caſe. And becauſe alſo the Defendant is diſcharged, and may plead the ſame, and therefore there is reaſon to charge the Sheriffe. Farther I conceive alſo, that it will lie againſt the Executors: and I ſhall take this difference where the wrong is *ex maleficio*, for there it dieth with the perſon, and where *ex contractu*, for there it doth not die with the perſon. If I deliver goods to a man, and he dyeth, an Action of Trover will lie againſt his Executors. And here the Sheriffe could not have waged his Law, for the Debt is brought upon matter of Record, upon which wager of Law lyeth not, but upon ſimple contract. And the Sheriffe hath here made himſelf Debtor in Law upon Record. Iuſtice *Crook*. It is reaſon to charge the Sheriffe becauſe the Defendant is diſcharged, and may plead that his goods were taken in Execution by the Sheriffe in ſatisfaction of the ſame Debt. And the Executors may be charged becauſe no wager of Law lieth, becauſe the Debt is here brought upon matter of Record. And he agreed with Iuſtice *Iones* in the difference betwixt *maleficium* and *contractum*. And therefore they did all conceive that the Action would lie. And in *Spekes* Caſe in the Common Pleas, it was voted, that the Action would lie againſt the Sheriffe.

34. In

34. In a *Habeas Corpus*, the Case was thus; A man would erect a Tavern in *Birchinlane*, and the Mayor and Communalty for his disobedience, because he would not obey them, but would erect a Tavern there against their wills, they knowing the same to be an unfit place, did imprison him. And the opinion of the Court was, That he should be remanded, because that the Mayor and Communalty had authority over him, and they might appoint him a place in which he might erect his Tavern. For it is a disorderly Profession, and not fit for every place. And it was adjudged in this Court, That a Brewhouse ought not to be erected in *Fleetstreet*, because it is in the heart of the City, and would be annoyance to it. And if one would set up a Butchers shop or a Tallow Chandlers shop in *Cheapside*, it ought not to be for the great annoyance that would ensue. And therefore the Mayor and Communalty may redresse it. And therefore the party was remanded, and was advised by the Court to submit to the Government of the City. Note the Recorder certified the Custome, That the Mayor might appoint a place.

35. Upon a Recovery in a Court Baron against one, he offered here to wage his Law. And Iustice *Barckley* doubted whether wager of Law would lie in such Case; To which Iustice *Iones* said, yes; and *Barckley* agreed hereunto, because the Recovery was in a base Court, and not in a Court of Record. *Vide* 2 *E.* 4.

36. No ancient Mill is tithable, but Mills newly erected shall pay Tithes by the Statute of 9 *E.* 2. 5.

Meade *against* Axe, *in a Writ of Error to reverse a Iudgement.*

37. THe Case was, *Axe* brought an Action against *Meade* for these words spoken of the Plaintife a Dier, by the Defen-

Defendant, Thou art not worth a groat; And the Plaintiffe added, that theſe words amongſt Citizens of ſuch place, where they were ſpoken, hath the common acceptation, and doth tant amount as the calling of him Bankrupt: The Errors which were aſſigned by *Meade* Plaintiffe in the Writ of Error were, 1. Becauſe it is added that the words were ſpoken *inter diverſos ligeos*, and doth not ſay Citizens, of the place where they have ſuch acceptation, 2. Becauſe that the Iudgement is, *Conſideratum eſt*, and the words *per Curiam* left out. And the Court was clear that for theſe two Errors the Iudgement ſhould be reverſed: But the Court was clear of opinion, That the words of themſelves are not actionable, and that the averment in this Caſe was idle and to no purpoſe, becauſe the words of themſelves imply a plain and intelligent ſenſe and meaning to every man. And it was compared to the Caſes, Where there is no Latine for words, there where words of no ſignification are put to expreſſe them, there they ought to be explained by an *Anglice*; But where the words are ſignificant, there needs not any *Anglice*. Now if you will explain ſignificant words under an *Anglice*, contrary to the meaning and true intendment of the word it ſelf, the *Anglice* is void; So in our Caſe of averment. The reaſon which was conceived wherefore the words of themſelves are not actionable, becauſe that many men in their beginnings are not worth a groat, and yet their credit is good with the world. But if he had laid ſpecially, That he was damnified, and had loſt his credit, and that none would truſt him, upon this ſpeciall matter, the words would be actionable.

Bonds *Caſe*.

38. IN Treſpaſſe, the Plaintiffe declared, that the Defendant entred in his Land, and did cut downe and carry away two loads of Graſſe in the Plaintiffes ſoile, in a certain peece of ground, in which the Treſpaſſe was ſuppoſed to be done, to ſtrow the floore of the Church, and that he cut two loads there

there, to eſtrew the floore of the Church, and did not ſay, that it is the ſame Treſpaſſe, &c. And it was adjudged Error: But the Court was cleere, that the Preſcription for cutting of graſſe to eſtrew the Church, was good, becauſe it was but in the nature of an Eaſement. And ſo to have a waſhing place in the land of another, and ſo the cuſtome here in London, to ſhoot in the land of another, and ſo for the Inhabitants of a town to have a way over the land of another to their Church. But Mr. *Rolls* who moved the caſe at the Barre, ſaid, That it was adjudged, that Inhabitants of a town by cuſtome, ſhould have an Eaſement over the Freehold, or in the Freehold of a Stranger, but not profit Apprender: But, as I remember, the Plaintiffs Freehold lay neare the Church, and for that reaſon the Court might conceive the ſame to be but an Eaſement, *vi.* 2 *H.*3. cited by Iuſtice *Jones*. *vid. Gatewoods* Caſe, 6 *Rep.*60. b.

Conysbies *Caſe*.

39. VPon the Leaſe of an houſe, the Leſſee Covenanted that he would Repaire the houſe with convenient, neceſſary and tenantable Reparations. The Leſſor brought Covenant, and alleaged a breach of the Covenants, in not repairing for want of Tyles, and dawbing with Morter, and did not ſhew that it was not Tenantable. And the opinion of the Court was, that he ought to have ſhewed it, for the houſe may want ſmall reparations, as a tyle or two, and a little morter, and yet have convenient neceſſary and tenantable Reparations.

40. A writ of Error was brought, and the Error aſſigned was, want of Pledges; And the Iudgement was reverſed, although it was after Verdict; And ſo was it adjudged in Dr. *Huſſies* caſe, and *Young* and *Youngs* caſe, in this Court; and the reaſon was given, becauſe that otherwiſe the King ſhould loſe his Amercement.

41. Fiſh in the River are not Titheable, if not by Cuſtome.

42. Two referred themſelves to Arbitrement, & the Arbitrators arbitrate, that one of them ſhould pay a certaine ſum to the other; and the other in conſideratiõ thereof ſhould acquit him of a Bond, wherein they both were bounden to a third perſon in a 100. *li. & eo circiter*: and it was objected, That the Arbitrators had arbitrated a thing incertaine, by reaſon of theſe words, *eo circiter*. But the Opinion of the Court was, That there was ſufficient certainty, becauſe that in this Caſe it doth not lie in their power to know the direct ſum, and becauſe a ſmall variation is not materiall: but if they (as in *Salmons* caſe 5 *Rep.*) wil arbitrate that one ſhal be bound in a bond to another, and not expreſſe in what ſum; the ſame is utterly void, for the incertainty. Difference was taken where the Arbitrators arbitrate one party to doe a thing which lyeth in his power, and where not, without the helpe of a third perſon, there the Arbitrament is void: and in the principall Caſe, the difference was taken by the Court, where the Bond is forfeit, and the penalty incurred, and where not, or the day of payment is not incurred, there payment at the day is a good diſcharge and acquitance, but where it is incurred, it is not: but Juſtice *Jones* ſaid, That he might compell the Obligee upon payment, although the Bond was forfeit, to deliver the Bond by *Subpœna* in Chancery: or that he ſuffer an Action to be brought againſt him, and then to diſcharge it, and pay it.

Goodman *againſt* Weſt, *Debt upon the Statute of 5 Eliz. Cap. 9.*

43. THere was an Action brought againſt the Plaintiffe in the common Pleas, who procured proces to iſſue againſt the Defendant, for his Teſtimony in his Cauſe, and a Note of the Proces was left at the Defendants houſe, being ſixty miles from London, and twelve pence to beare his charges, which the party did accept. And the party who ſerved the Proces promiſed the Defendant ſufficient Coſts. And here Mr. *Jones*, who was of Counſell with the Defendant, tooke three Excep-

Exceptions. 1. Becauſe the Proceſſe was not ſerved upon the Defendant as the Statute requires, but a Note only thereof; and it being a penall Statute ought to be taken ſtrictly. 2. There was but 12 d. delivered to the Defendant at the time of the ſerving of the Proceſſe; which is no reaſonable ſumme for coſts and charges according to the diſtance of place as the Statute ſpeaks: and therefore the promiſe that he would give him ſufficient for his coſts afterwards is not good. 3. The party who recovers by force of this Statute ought to be a party grieved and damnified, as the Statute ſpeaks, by the not appearance of the Witneſſe: and becauſe the Plaintiffe hath not averred, that he had loſſe thereby by his not appearance; therfore he conceived the Action not maintenable. For the firſt, the Court was clearly againſt him, becauſe it is the common courſe to put divers in one Proces, and to ſerve tickets, or to give notice to the firſt perſons who are ſummoned, and to leave the Proces it ſelf with the laſt only; and that is the uſuall courſe in Chancery, to put many in one *Subpœna*, and to leave a ticket with one, and the Labell with another, and the Writ with the third; and that is the common practice, and ſo the Statute ought to be expounded: But if there be one only in the Proces, there the Proces it ſelf ought to be left with the party. For the ſecond, the Court did conceive, That the acceptance ſhould bind the Defendant, but if he had refuſed it, there he had not incurred the penalty of the Statute. For he ought to have tendred ſufficient coſts according to the diſtance of the place, which 12 d. was not, it being 60 miles diſtant. But for the third and laſt Exception, the Court was clear of opinion, That the Action would not lie for want of averment, that the Plaintiffe was damnified for the not appearance of the Defendant; And ſo it was adjudged that the Plaintiffe, *Nihil capiat per Billam.*

44. The opinion of the Court was, That whereas one ſaid of another, That he will prove that he hath ſtollen his books, that the words are actionable, for they imply an affir-

mative, and are as much as if he had ſaid, that he hath ſtollen my books: And ſo if I ſay of another, that I will bring him before a Iuſtice of Peace, for I will prove that he hath ſtollen, &c. although the firſt words are not actionable, yet the laſt are.

Molton *againſt* Clapham.

45. THe Defendant upon reading *Affidavits* in Court openly in the preſence and hearing of the Iuſtices and Lawyers ſaid, There is not a word true in the *Affidavits*, which I will prove by forty Witneſſes; and theſe words were alledged to be ſpoken maliciouſly. And yet the Court was clear of opinion, that they will not bear Action. And the reaſon was becauſe they are common words here, and uſuall where an Action is depending betwixt two, for one to ſay, That the *Affidavit* made by the other is not true, becauſe it is in defence of his cauſe: And ſo it was here, the Defendant ſpake the words upon the reading of the *Affidavits* in a cauſe depending betwixt the Plaintiffe and the Defendant. And therefore if I ſay, That *I. S.* hath no title to the Land, if I claim or make title to the Land: Or if I ſay, That *I. S.* is a Baſtard, and entitle my ſelf to be right heir, the words are not actionable, becauſe that I pretending title doe it in defence thereof: And Iuſtice *Barckley* ſaid, That there are two main things in Actions for words, the words themſelves, and *cauſa dicendi*, and therefore ſomtimes, although that the words themſelves will bear Action, yet they being conſidered *cauſa dicendi*, ſometimes they will not beare Action: Now in our Caſe *cauſa dicendi* was in his own defence, or his title, and therefore they will not bear Action.

46. Outlawry was reverſed for theſe two Errors. 1. Becauſe it was not ſhewed where the party Outlawed was inhabitant. 2. Becauſe it was ſhewed that Proclamations were made, but not that Proclamation was made at the Pariſh Church where, &c.

Buckley

Buckley *againſt* Skinner.

47. THere was Exception taken, becauſe that the Defendant pleaded and juſtified the Treſpaſſe, *cum equis*; and ſaid nothing to the Treſpaſſe done *porcis & bidentibus*. And the opinion of the Court was, That the plea was inſufficient for the whole: And Iuſtice *Iones* ſaid, That if ſeverall Treſpaſſes are done to me, and I bring Treſpaſſe, and the defendant juſtify for one or two, and ſayeth nothing to the other, that the whole plea is naught, becauſe the plea is intire as to the plaintiffe, and the demurrer is intire alſo. But Iuſtice *Barckley* was of opinion, that the plea was naught *quoad, &c.* only; and that Iudgement ſhould be given for the other. *Vide* 11. *Rep.* 6. *b. Gomerſall & Gomerſalls* Caſe.

48. A man pleaded a deſcent of a Copyhold in fee: The defendant to take away the deſcent pleaded, That the Aunceſtor did ſurrender to the uſe of another, *abſque hoc*, that the Copyholder dyed ſeiſed. And the opinion of the Court was, That it was no good traverſe, becauſe he traverſed that which needed not to be traverſed; for being Copyhold, and having pleaded a ſurrender of it, the party cannot have it again if not by ſurrender. Like the Caſe of a Leaſe for years, *Helliers Caſe. 6 Rep.* 25. *b.* For as none can have a Leaſe for years but by lawfull conveyance, ſo none can have a Copyhold eſtate, if not by ſurrender: But if a man plead a deſcent of inheritance at the Common Law, there the defendant may plead a feoffement made by the Aunceſtor *abſque hoc*, that he died ſeiſed, becauſe he may have an eſtate by diſſeiſin after the feoffment. Traverſe of the deſcent, and not of the dying ſeiſed is not good; ſo was it adjudged in this Court. *Vide* 24 *H.* 8. *Dier.*

49. It was moved in arreſt of Iudgement upon an Action of Treſpaſſe upon the Statute of 2 *E.* 6, *cap.* 13. becauſe that the plaintiſe ſaid, that the defendant was occupier only, and

did not ſhew how he occupied, or what intereſt he had. And the clear opinion of the Court was, that he need not, becauſe here he makes no title; and whoſoever it be that taketh the tithe is a Treſpaſſer. And therefore Iuſtice *Iones* ſaid, That it was adjudged in this Court, that an Action lieth againſt the diſſeiſor for the tithes: ſo againſt a ſervant; and ſo if one cut them, and another carry them away, an Action lieth againſt any of them.

50. The Pariſh of *Ethelburrow* in *London* alledged a cuſtome, that the greater part of the Pariſhioners have uſe to chooſe their Churchwardens, and they chooſe two, the Parſon chooſe a third; The Officiall of the Biſhop gave oath to one of them choſen by the Pariſh, but refuſed to ſwear the other, and would have ſworn the party choſen by the Parſon, but the Pariſh was againſt it; upon which the Parſon Libelled in the Eccleſiaſticall Court. And a Mandat was here praid, That the Officiall ſwear the other who was choſen by the Pariſh; and a Prohibition to ſtay the ſuit in the Eccleſiaſticall Court: Upon the Mandat the Iuſtices doubted, and deſired that Preſidents and Records might be ſearched; and, at length, upon many motions, preſidents and Records ſhewed, a Mandat was granted. But there being ſuit in the Eccleſiaſticall Court, by the other whom the Parſon choſe, a Prohibition was granted without any difficulty: But at firſt the Councell prayed a Prohibition for not ſwearing the other, which the Court refuſed to grant, becauſe there was no proceeding in the Eccleſiaſticall Court, and a Prohibition cannot be granted where there is no proceeding by way of ſuit.

Vaughan *againſt* Vaughan; *in Action upon the Caſe upon* Aſſumpſit.

51. THe defendant did promiſe that he would make ſuch a conveyance of certain Lands: and pleaded, That he had made it, but did not ſhew the place where it was made:

made: And the Court was clear of opinion, that he need not; for it shall be intended upon the Land. And so in case of performance of Covenants, it is not needfull to shew the place where, &c.

Norrice *and* Norrices *Case.*

52. COpyholder for life, where the custome is, That if the Tenant die seised, that he shall pay a Heriot: The Lord granted the Seigniory for 99 years, if the Tenant should so long live: And after that he made a Lease for 4000 years; Tenant for life is disseised, (or more properly, ousted) and dyed: Here were two Questions. 1. Whether there were any Heriot to be paid; & admitting there were; yet, who should have it, whether the grantee for 99 years, or he who had the 4000 years? And the Court was clear of opinion in both points, without any argument. 1. That Heriot was to be paid, notwithstanding that the Tenant did not die seised, because he had the estate in right, and might have entred, although he had not the possession. And Iustice *Barckley* compared it to the Case in *C.* 3. *Rep.* 35. *a.* in *Butler* and *Bakers* Case, where a man hath one acre of Land holden in *Capite*, and a hundred acres of Socage land, and afterwards he is disseised of the *Capite* land, and afterwards makes his will of all his Socage land, in that case he is a person having of *Capite* land, as the Statute speaks. And yet that right of *Capite* land shall make the devise void for the third part; for notwithstanding the disseisin yet he is Tenant in Law. And as to the second point, the Court was clear of opinion also, That he in remainder, or he that had the estate for 4000 years; (For note the Action was brought by him in the Remainder for the Heriot) should not have it; And their reason was, because the Tenant for life was not the Tenant of him who had the future interest of 4000 years, but of him who had the interest for 99 years. But they were not clear of opinion, that the grantee for 99 years should have the Heriot. Iustice *Barckley* was that the grantee for

for 99 *an.* ſhould have it. But Iuſtice *Jones* (there being then none in Court but they) *haſitavit.* And the reaſon of the doubt was, becauſe that *eo inſtante*, that the Tenant dyed, *eodem inſtante*, the eſtate of the grantee for 99 years determineth: Iuſtice *Jones* put this Caſe: A Seigniory is granted for the life of the Tenant, the remainder over in fee, the Tenant dyeth, Who ſhall have the Ward? Iuſtice *Barckley* ſaid, he who is grantee of the particular eſtate: but *Jones* ſeemed to doubt it. *Vide* 44 *E.*3,13.

Lewes *againſt* Jones *in a Writ of Error.*

53. IUdgement was given for *Jones* againſt *Lewes* in an Action brought in the Common Pleas; And *Lewes* here brought a Writ of Error, and aſſigned for Error, That he was an infant at the time of the Action brought againſt him; And that he appeared by Attorney, whereas he ought to appear by Gardian or *procheine amy*: The Defendant pleaded in avoidance of this Writ of Error, That there was no warrant of Attorney; The Plaintiffe *allegando*, ſhewed the Error before; And the Defendant pleaded *in nullo erratum eſt.* And the Iudgement was reverſed: But the opinion of the Court was, That the better way had been for the Plaintiffe to have demurred in Law, for there being no warrant of Attorney, there was no appearance at all; and ſo are the Books, 38 *E.* 3. & 14 *E.*4.

54. In *Vtburt* and *Parhams* Caſe, it was agreed, That a man may be Non-ſuit without leave of the Court, but he cannot diſcontinue his ſuit without conſent of the Court.

Davis *and* Bellamies *Caſe in Attaint.*

55. THe Defendant brought Attaint, and the verdict was affirmed; and coſts prayed upon this Rule that

that where the Plaintiffe ſhall have coſts, there the Defendant ſhall have coſts; But they were denied by the Court; for that ought to be taken in the originall Action, and not in caſe of Attaint; But upon the *reſtituatur*, there coſts ſhall be given; but that is in the Originall Action.

56. If two joyntenants be of a Rectory, and one ſueth for tithes by himſelf only; it is no cauſe of Prohibition: So if a Feme Covert ſue ſolely, upon a defamation; a Prohibition ſhall not be granted.

57. The Sheriffe of a County made a Warrant *Balivis ſuis*, to arreſt the body of ſuch a man; And the Bayliffes of the Liberty return a Reſcous. And Exception was taken to it, becauſe that the Warrant was, *Balivis ſuis*; and the Return was made by thoſe who were not his Bayliffes; And it was adjudged good; for the Liberty might be within his Bayliwick, and ſo are all the preſidents. And there was another Exception, becauſe the place of the Reſcous was not ſhewed; and for that the Book of 10 *E.*4. was cited; for there the Reſcous was, *ad tunc & ibidem*, and did not ſhew the place. To that it was anſwered by the Court and agreed, that *ad tunc & ibidem*, is altogether incertain if the place be not ſhewed; but in the principall Caſe, the place was ſhewed at the firſt, and always after; that *tunc & ibidem* only without naming of the place, and adjudged good. For that *tunc & ibidem* throughout the Declaration, hath reference to the place firſt ſhewed; and it was adjudged good.

58. Outlawry was reverſed for this Error, becauſe that the Exigent was, *Secund' exactus ad Com' meum ibidem, &c.*

59. A Hundred may preſcribe in *Non decimando*, and it is good, for it is the cuſtome of the County; which is the beſt

Law which ever was. But a Pariſh or a particular Town cannot preſcribe in *non decimando*; And thereupon a Prohibition was granted: And a Prohibition was granted in this Court, upon this ſurmiſe, That the Cuſtome was, that tithes ſhould not be paid of Pheaſants.

60. If there be no *Venire facias* it is not Error, but it is helped by the Statute; But if there be a *Venire facias*, and it is erronious, it is not holpen by any Statute.

Trinity Terme, 15°. *Caroli*, in the Kings Bench.

61. A Man indicted others at the Seſſions houſe in the Old-Bayly who were acquited; and the Defendants Councell did remove the indictment into the Kings Bench, and prayed a Copy thereof, to the end they might bring a Conſpiracy, or have other remedy for the wrong done unto them; And it was denied by the whole Court, unleſſe the Recorder will ſay, That there appeared malice in the proſecution; For a man ſhall not be puniſhed for lawfull proſecution upon juſt ground without malice, although the parties be acquited by Law.

The King *againſt the Inhabitants of* Shoreditch.

62. MAſter *Keeling* Clark of the Crown in the Kings Bench did exhibite an Information againſt the Inhabitants of Shoreditch for not repairing the High-way. And the iſſue was, Whether they ought to repaire it or no. And it was ſaid by the Court, That by the Common Law, the Inhabitants of a Pariſh ought to repair all High-ways lying within the Pariſh, if preſcription did not bind ſome particular perſon thereto,

thereto, which was not in this Caſe. And in this Caſe ſome of the Inhabitants would have been Witneſſes to prove that ſome particular Inhabitants lying upon the High-way had uſed time out of minde to repaire it, but were not permitted by the Court, becauſe they were Defendants in the Information; wherefore the Jury found, That the Inhabitants ought to repair the way.

63. Two men and their wives were Indicted upon the Statute of Forcible entry, who brought a *Certiorari* to remove the Indictment into the Kings Bench. Some of them did refuſe to be bound to proſecute according to the Statute of 21 *Jac. c.* 8. and therefore, notwithſtanding the *Certiorari*, the Iuſtices of Peace did proceed to the tryall of the Indictment; and here it was reſolved, That whereas the Statute is, The parties Indicted, &c. ſhall become bound, &c. That if one of the parties offer to finde Sureties, although the others will not, yet that the cauſe ſhall be removed; for the denying of one or any of them ſhall not prejudice the other of the benefit of the *Certiorari*, which the Law gives unto them: And the Woman cannot be bounden. And it was farther reſolved, that where the Statute ſaith; That the parties Indicted ſhall be bound in the ſum of ten pounds, with ſufficient Sureties, as the Juſtices of the Peace ſhall think fit, that if the Sureties be worth ten pounds, the Juſtices cannot refuſe them, becauſe that the Statute preſcribes in what ſum they ſhall be bound. Like to the Caſe of Commiſſion of *Sewers*, 10 *Rep.* 140. a. That where the Statute of 3 *H.* 8. *cap.* 5. enables them to ordaine Ordinances and Lawes according to their wiſdomes and diſcretions, that it ought to be interpreted according to Law and Juſtice; And here it was farther reſolved, that after a *Certiorari* brought and tender of ſufficient Sureties, according to the Statute, all the proceedings of the Juſtices of Peace are *coram non Iudice*.

The Argument of the Lord Chiefe Iuſtice, in the Caſe Betweene James *and* Tintny, *in a Writ of Error to reverſe Iudgement given in the Common Pleas for* Tintny *Defendant, in a* Replevin *brought by* James: *the Caſe was thus*, viz.

64. STowell was Lord of a Manor, and *Iames* one of the Tenants, and there the cuſtome was, That the Steward of the Manor might make Lawes and Ordinances for the well ordering of the Common: And the cuſtome was alſo to Aſſeſſe a penalty or a paine upon thoſe who brake thoſe Lawes and Ordinances. And alſo to preſcribe to diſtrain for the penalty. The Steward made an Ordinance, That he who put his Cattell beyond ſuch a bound, that he ſhould pay 3 s. 4 d. *Iames* offended againſt this Ordinance, upon which the penalty was aſſeſſed, and a diſtreſſe taken by *Tintny* Defendant in the Replevin, Plaintiffe and Bayly of the Lord of the Mannor; And Judgement was given for him in the Common Pleas, and damages aſſeſſed: Upon which a Writ of Error was brought. In this Caſe it was agreed by the whole Court, that the Cuſtome was reaſonable: And the difference taken where the Law or Ordinance takes away the whole profit of the Commoners, and where it abridgeth it only, or addes limits or bounds to it, as in this Caſe. And farther it was agreed, That the Commoners are bound to take notice of theſe Ordinances. But in this Caſe, the Error which was aſſigned was this, That damages were given for the Defendant where no damages ought to have been given: And of that opinion was the Lord chief Juſtice, that no damages ought to have been given, and with him agreed Juſtice *Lones*; but Juſtice *Crook* and Juſtice *Barckley*, *è contra*. It is clear, that at the Common Law, the Defendant ſhall not have damages, although as to ſome intent the Avowant be as it were a Plaintiffe and Actor. 21 *H.*6. 2. 6 *H.*4. 11. 35 *H.*6. 47. Then the Queſtion ariſeth only upon theſe two Statutes, *viz.* 7 *H.*6. *cap.* 4. 21 *H.*8 *ca.* 19. And firſt, whether our Caſe be within the Letter of theſe Laws

Laws; Admitting that not, Whether within the miſchief, ſo as that it ſhall have the ſame remedy: And I conceive, it is not within the Letter or Equity of theſe Statutes: Not within the Letter, for they ſpeak, Where a man diſtrains for Rents, Cuſtomes, and Services, or damage feaſant. And in our Caſe, he doth not diſtrain for any of them, for it is manifeſt, that he doth not diſtrain for Rents, Services, or Damage feaſant; And it is as clear, that he doth not diſtrain for Cuſtomes; for he diſtrained for a penalty aſſeſſed by Cuſtome. 1. In *Alcocks* Caſe it was here reſolved, That where a preſcription was alledged to diſtrain for an Eſtray; and found for the Avowant, that no damages ſhould be in that Caſe. For it was here reſolved, That the Cuſtomes intended in 21 *H.8, cap.* 19. are Cuſtomes which are Services. 2*ly*. I hold it not within the Equity; for the miſchief at the Common Law was, That damages were not to be recovered for ſuch Rents, Services, &c. And this penalty is no Service. And I conceive clearly, That it was not the meaning of the Makers of the Act of Parliament to extend to ſuch penalties. And here I further take the difference which is in *Pilfords* Caſe in the 10 *Rep.* 116. In all Caſes where a man at the Common Law cannot recover damages: If a Statute give damages, there he ſhall recover no coſts, for the ſame is an Act of Creation which gives remedy where none was given before. But where there is an Act of Addition, which increaſeth the damages at the Common Law, there notwithſtanding he ſhall recover coſts alſo. So in our Caſe, theſe being Acts of Creation which give remedy where there was no remedy before, ſhal be taken ſtrictly according to the Letter, and ſhall not extend to ſuch penalties as in our Caſe: And upon this difference he cited the Caſes in *Pilfords* Caſe, and eſpecially the Caſe upon the Statute of 5 *E.* 6. of Ingroſſers; the Plaintiffe ſhall not recover coſts, but only the penalty given by the Statute grounded upon 37 *H.*6. 10. I agree, That there be many preſidents in the Common Pleas, that damages have been allowed in our very Caſe; but that is the uſe of the Clarks, and paſſed *ſub ſilentio*, without any ſolemne debate or controverſie. *Vide Greiſlies Caſe*, and the firſt Caſe of

the Book of Entries, Preſidents and Judgements in this Court. *Paſch.* 33 *Eliz. Rot.* 292. *Haleſworth* againſt *Chaffely*. A Judgement of the Common Pleas was reverſed for this very point. *M.* 36 *Eliz. Ruddall* and *Wilds Caſe*. *M.* 44 & 45 *Eliz. Rot.* 22. *Shepwiths Caſe*. Avowry for relief a ſtronger Caſe, Judgement was reverſed, becauſe damages was aſſeſſed, *Hill.* 14 *Jac. Rot.* 471. *Leader* againſt *Standwell* in a Replevin. Avowry was made for an Amereement in a Leet, and found for the Defendant, and damages aſſeſſed. But the Entry upon the Record was thus, *Super quo nullo habito reſpectu, &c.* The Plaintiffe was diſcharged of the damages, becauſe *nulla damna debent eſſe adjudicanda per Legem terræ*; but he ſhall have his coſts. But it was objected by Juſtice *Crook*, That by the Statute of 4 *Jac. c.* 3. which giveth coſts and damages to the Defendant in certain Actions there ſpecified where the Plaintiffe ſhall recover damages; and that where the Plaintiffe is Non-ſuit, or verdict paſſe againſt him, That Demurrer hath been conſtrued to be within that Statute: Notwithſtanding that it is an Act of Creation: I agree that, and anſwer, that Demurrer is within that Statute, and the miſchief of it, but it is not ſo in our Caſe; for in our Caſe there is no ſuch miſchief: For there is no colour to extend it beyond the words of the Statute; For which cauſe I conclude that the Judgement in this Caſe ought to be reverſed.

65. A Clark of the Court dwelling in London was choſen Churchwarden, and prayed a Writ of Priviledge, which was granted. And it was agreed by the whole Court, That for all Offices which require his perſonall and continuall attendance, as Churchwarden, Conſtable, and the like, he may have his Priviledge, but for Offices which may be executed by Deputy, and do not require attendance, as Recorder and the like; (from which the Juſtices themſelves ſhall not be exempt) for them he ſhall not have his Priviledge: And where he hath his Priviledge, for the not obeying thereof an Attachment lieth.

Swift

Swift *againſt* Heires, *in Debt upon the Statute of* 2 E. 6. *for ſetting out of Tithes.*

66. THe doubt in this Caſe did ariſe upon two ſeverall Indentures found by ſpeciall verdict which were made by the Vicar and Subchauntors Corrols of Lichfield; one 2 *E.6.* the other 2 *&* 3 *Phil. & Mar.* The queſtion upon the Indenture of 2 *E.6.* was, Whether the grant upon the *Habendum*, be a grant of a Freehold to begin at a day to come or not. The Chief Juſtice, Juſtice *Crooke*, and Juſtice *Barckley* were clear of opinion, That it was a grant of a Freehold to begin at a day to come. And for that the Caſe is thus: In the Indenture of 2 *E.6.* there is a recitall of a former Leaſe for years: And by this Indenture in 2 *E.6.* another Leaſe was to begin, after the firſt Leaſe determined, the remainder in Fee to another: And upon that the three Juſtices before were clear in their Judgements, That it was a grant of a Freehold to begin at a day to come, which without doubt is void, 8 *H.7.* 39 *H.6.* and *Bucklers* Caſe, 3 *Rep.* And in 8 *H.7.* the difference is taken betwixt the grant of a Rent in *eſſe*, and Rent *de novo*. A Rent *de novo* may be granted in *futuro*, but not a Rent which is in being. But Juſtice *Jones* in this Caſe was of opinion, That here is not any grant of a Freehold to begin at a day to come, becauſe in this Caſe the Leaſe doth begin preſently, becauſe the Leaſe recited is not found by the Jury, and therefore now it is all one as if there had been no Leaſe at all, contrary in the Caſe of the King, becauſe it paſſeth a good eſtate of inheritance to the grantee. And therefore if I make a Leaſe for years unto a man after the expiration of ſuch a Leaſe, where in truth there is no ſuch Leaſe in being, the Leaſe ſhall begin preſently. The Queſtion upon the Indenture of 2 *&* 3 *Phil. & Mar.* was no more but this. The Vicar and Subchauntors of Lichfield made a grant of all their Tithes in Cheſterton, and name them in certain, and in *ſpecie*, as tithe Wooll, tithe Geeſe, Pigs, Swans, and the like, and that in a diſtinct clauſe with eſpeciall Exception of four certain things. After which came

came this clauſe, All which were in the Tenure of *Margaret Petoe*: And the Jury found that none of theſe Tithes were in her Tenure: And whether that grant were void or not, was the Queſtion; And reſolved by the whole Court *nullo contradicente*, That the grant notwithſtanding this falſe recitall, was good for theſe reaſons. But firſt it was reſolved, That where they grant all their Tithes in Cheſterton, that it is a good grant, and hath ſufficient and convenient certainty, 13 *E.* 4. *& Hollands Caſe*; There are two generalities, 1. Abſolute, 2. Generall in particular, ſo here. And in our Caſe it is as certain, that demand in an Action may be for them by the name of all their Tithes in Cheſterton. So in the like manner an Action of *Ejectione firme* will lie; For an *Ejectione firme* will lie for Tithes as it hath been adjudged here. If the King grant all his Lands, it is altogether incertain and void; but if the King grant all his Lands, in Dale, or which came to him by the diſſolution of ſuch an Abby, it is good, becauſe it is a generalty in particular. And it was agreed, that convenient certainty is ſufficient: And therefore it was ſaid by Juſtice *Jones*, That if I grant all my Rents in Dale which I have of the part of my Mother, that he conceives the ſame to be good. The firſt reaſon wherefore this grant ſhall be good notwithſtanding the falſe recitall, was this, Becauſe the words here, All which, &c. are not words of denotation or reſtriction, but of ſuggeſtion or affirmation, and therefore ſhall not make void the grant. And here the difference was taken between the Caſe of a common perſon, and of the King; Suggeſtion which is falſe in the Caſe of the King makes the Patent void; but contrary in the Caſe of a common perſon: And therefore if the King be deceived either in point of profit or in point of Title, his grant is void, 9 *H.* 6. Where he is not deceived in point of profit, he ſhall not avoid the grant. 26 *H.* 8. The ſecond reaſon, That a Deed ought to be conſtrued, *Vt res magis valeat quam pereat*, 34 *H.* 6. A man having a Reverſion deviſeth his land in *Manibus*, thereby the Reverſion paſſeth, 9 *E.* 4. 42. Releaſe of all Actions againſt Prior and Covent ſhall be conſtrued and intended, all Actions againſt the Prior only,

only, for an Action cannot be brought againſt the Covent. Farther by this conſtruction you would avoid the deed, and by the Rule of Law, the deed and words of every man ſhall be taken very ſtrong againſt himſelf, *ut res magis valeat*, as is ſaid before: And it is againſt reaſon to conceive that it was the meaning of the parties that nothing ſhould paſſe. A third reaſon was, becauſe the grant was a diſtinct clauſe of it ſelf: And the words which were objected at the Barre to be reſtrictive were in another diſtinct clauſe, and therefore ſhall not reſtrain that which was before; for words reſtrictive ought to be continued in one and the ſame ſentence: Wherefore they having granted all their Tithes in Cheſterton by one clauſe, the falſe recitall afterwards in another clauſe ſhall not make the grant void. See 3 & 4 *Eliz. Dier in Waſt* 31 *Eliz.* the Lord *Wentworths* Caſe in the Exchequer upon this Rule of diſtinct clauſes: And *Atkins* and *Longs* Caſe in the Common Pleas, upon which Caſes Juſtice *Jones* did relie. The fourth reaſon was, That conſtruction ought to be made upon the whole Deed: And it appeareth by the context of the Deed, That it was the meaning of the parties to grant the Tithes by the Deed. Further, the Exception of the four things ſheweth, That it was the meaning of the parties to grant all things not excepted, as the tithes in this Caſe; For *Exceptio firmat regulam*; And to what purpoſe ſhould the Exception be, if they did not intend to paſſe all other things not excepted? See 4 *Car. Hoskins* and *Trenchars Caſe*, Sir *Robert Napwiths Caſe*, 21 *Jac.* cited by the chief Juſtice to that purpoſe. Wherefore it was agreed by the whole Court, That Judgement ſhould be given for the Defendant. And the opinion of the Court was clear alſo, That although ſome of the tithes had been in the Tenure of *Margaret Petoe*, that yet the grant was good: And that was after Argument upon the Demurrer, to avoid all ſcruples to be after made by Councell; becauſe it was conceived, That ſome of the Tithes were in her Tenure.

Criſp *againſt* Prat *in* Ejectione firme.

67. THe Caſe upon the four Statutes of Bankrupts, *viz.* 34 *H.*8. 13 *Eliz.* 1 *Jac.* & 21 *Jac.* was thus; *Ralph Briſco* 9 *Jac.* purchaſed copyhold to him and his Son for their lives, the remainder to the Wife in Fee. 11 *Jac.* he became an Inholder; And about twelve years after a Commiſſion of Bankrupt is obtained againſt him; And thereupon the Copyhold land is ſold by the Commiſſioners to the Defendant. *Ralph Briſco* dieth, and his ſon *John Briſco* entred, and made the Leaſe to the Plaintiffe; The Defendant entred upon him, and he brought an *Ejectione firme*. And Judgement was given upon ſolemne argument by the Juſtices for the Plaintiffe. The firſt point was, Whether an Inholder be a Bankrupt within theſe Statutes: And it was reſolved by all the Juſtices, *viz.* *Jones*, *Crook*, *Barckley*, and *Bramſtone* chief Juſtice, That an Inholder *quatenus* an Inholder is not within theſe Statutes: Juſtice *Barckley* and Juſtice *Jones*, one grounded upon the ſpeciall verdict, the other upon the Statutes did conceive, That an Inholder in ſome Caſes might be within theſe Statutes; Juſtice *Barckley* did conceive upon this ſpeciall verdict, that this Inholder was within them, becauſe it is found, That he got his living by buying and ſelling, and uſing the Trade of an Inholder: And he conceived upon thoſe words, Buying and ſelling in the verdict, and getting his living thereby, although that the Jury have alſo found him an Inholder, that the ſame is within the Law: And he agreed, That he who liveth by buying, or ſelling, and not by both, is not within the Law; but in our Caſe the Jury have found both. And it hath been adjudged, That he who buyes and ſells cattell, and ſtocks his ground with them, that he may be a Bankrupt within thoſe Statutes. I agree, that a Scrivener was not within 13 *Eliz.* for he doth not live by buying and ſelling, but by making uſe of the monies of other men; but now he is within 21 *Iac.* But in our Caſe the Inholder buyes his graſſe, hay, and grains, and proviſion alſo for his gueſts, and by ſelling of them he lives, But he agreed,

agreed, That if the Jury had found, that he was an Inholder only, and not that he did get his living by buying and ſelling, that in that Caſe, he was out of the Law; And for theſe reaſons, he did conceive, That this Inholder, as by the ſpeciall verdict is found, was within the Statutes of 13 *Eliz.* and 21 *Iacobi.* Juſtice *Iones*; An Inholder may be, or not be within theſe Laws upon this difference. That Inholder who gets his living meerly by buying and ſelling (as many of the Inholders here in *London* do) they are within theſe Statutes; But thoſe who have Lands of their own, and have hay and grain and all their proviſions of their own, as many have in the Country; thoſe are not within theſe Statutes. Farther he ſaid, That buying and ſelling doth not make men within theſe Statutes, for then all men ſhould be within the Statutes; but they ought to be meant of them who gain the greateſt part of their living thereby, and live chiefly or abſolutely thereby. But *Bramſton* chief Juſtice, and Juſtice *Crook* were clear of opinion, That an Inholder could not be a Bankrupt neither by the Statutes, nor according as it is found by the ſpeciall verdict: And their reaſon was, becauſe that an Inholder doth not live by buying and ſelling, for he doth not ſell any thing, but utter it; He which ſells any thing doth it by way of contract, but an Inholder doth not contract with his Gueſts, but provides for them, and cannot take unreaſonable rates, as he who ſells may; and if he doth, he may be indicted of Extortion, which the ſeller cannot: Wherefore they concluded, that an Inholder is not within the Statute of 13 *Eliz.* & 1 *Iac.* Juſtice *Crook* remembred theſe Caſes; *Webb* an Inholder of *Vxbridge* brewed in his houſe, and ſold his Beer to his Gueſts: And it was adjudged in the Exchequer, that it was not within the Statute of Brewers. And *Bedells* Caſe, who being a Farmer bought and ſold cattell; And adjudged, that he was not a Bankrupt within theſe Statutes: And he put thoſe Caſes upon this reaſon, That where the Statutes ſaid, Get their living by buying and ſelling, that it ought to be for the greater part; that they gain the greater part of their living thereby. And he ſaid, that if a Gentleman buy and ſell land he is not within

the Statutes; for it ought to be taken, thoſe who buy and ſell perſonall things. The ſecond point, It was agreed by all, that Copyhold is within the Statute of 13 *Eliz.* & 1 *Iac.* Firſt, becauſe it is no prejudice to the Lord, becauſe there ought to be Compoſition with the Lord, and the Vendee; And although the ſale ought to be by Indenture, yet the Vendee ought to be admitted by the Lord. And the difference in *Heydons* Caſe in 3 *Rep.* was agreed. Secondly, It is expreſly within 13 *Eliz.* and therefore within 1 *Iac.* Alſo by way of recitall, although the Statute of 1 *Iac.* hath new proviſions. And by the Statute of 21 *Iac.* it was ſaid, That theſe Statutes ſhall be conſtrued moſt beneficiall for the Creditors, becauſe their ground is *ſuum cuique tribuere*, 5 *Eliz. Dier. Vmpton* and *Hides Caſe*, That Acts of explanation ſhall be taken moſt beneficiall and liberally. And the Statute of 13 *Eliz.* ſays expreſly, That the Commiſſioners ſhall diſpoſe of Lands as well Copy as Free; But although a Copyhold be not within the later part of 13 *Eliz.* expreſly, yet by connexion it is: And the Statute of 13 *Eliz.* guides the Statutes of 1 & 21 *Iacobi.* Juſtice *Iones* did agree, That the Copyhold is within 13 *Eliz.* but not the perſon of the Copyholder, although the perſon be within 1 *Iac.* And the chief Juſtice ſaid, That his opinion was, that upon the Statute of 21 *Iac.* which is, That theſe Statutes ſhall be taken liberally: That Copyholds, although they had not been named, had been within theſe Statutes. It was ſaid by Juſtice *Barckley*, who argued for the Defendant, That the verdict hath not found within 13 *Eliz.* becauſe the verdict hath not found Fraud expreſly, but badges only thereof. See *Meriell Littletons Caſe* in the Chancellor of *Oxfords Caſe*, That the Fraud ought to be expreſly found, but ſo it is not here, for here it is found, that the Son was an Infant at the time of the purchaſe; and alſo that the purchaſe was with the mony of the Father, which are only inducements of fraud: But he argued it was within 1 *Iac.* becauſe the Father hath cauſed or procured this conveyance to his child, as the Statute ſpeaks; And here is Fraud apparent, *Et quod conſtat clarè non debet verificari.* And therefore if a man enfeoffe his Son, it is Fraud appa-

apparent,& ought not to be found particularly.But it was reſolved by all the other Juſtices,That here was not fraud apparent, and therefore it ought to be found by the Jury. The third and chief point in this Caſe was, He being no Inholder at the time of the purchaſe,and afterwards becomming an Inholder, whether he were within the Statute of 13 *Eliz.* And it was reſolved he was not: But here Juſtice *Barckley* who argued for the Defendant was againſt it. And he argued, that if a man purchace and ſell, and afterwards become a Tradeſman and Bankrupt, that that was not within the Statute; but if he keepeth the Land in his hands, there he conceived him within the Statute,as it was in this Caſe. And he was againſt the Book of the Chancellor of *Oxfords* Caſe, of relation to deveſt the Advowſon; and he ſaid, It is not like to the Caſe in 6 & 7 *Eliz.* there cited.In *Eriches Caſe* in the 5 *Rep.* there is a Rule taken, that *A verbis legis non eſt recedendum*; and in our Caſe it is within the expreſſe words of the Statute, which are, That if any perſon which hereafter ſhall become a Bankrupt,&c. And here, he after became a Bankrupt. But it was reſolved by the others, with whom Juſtice *Barckley* did concurre after, That it was not within the Statute. Juſtice *Crook* argued, That it is not within the words of the Statute, which are, If the offender purchaſe, and that the ſale ſhall be good againſt the offender; and here, he was not offender at the time of the purchaſe; And uſing no Trade, ſhall he be puniſhed for that after? Beſides, here the ſon ſhould be puniſhed for the offence of the Father,which the Law of God will not ſuffer. *Smith* and *Cullamers Caſe*, 2 *Rep.* he ought to be endebted at the time, otherwiſe he is no offender; And he might give away his goods before he was in Debt. And the miſchief here will be, That lands purchaſed 40 years before ſhould thereby be defeated; And I hold, that if a man be a Tradeſman, and afterwards leaves his trade,and then purchaſeth, and afterwards becomes a Tradeſman again,and a Bankrupt, that he is not within the Statute. But Juſtice *Jones* was of opinion,that if he be a Tradeſman at the time, although not an offender, yet he is within the Statute; But the chief Ju-

ſtice did argue, that he ought to be an offender, and the thing which makes him to be an offender is his intent to defraud his creditors. *Iones*; It ſhall be hard in this Caſe to cauſe the eſtate to be reached by this Statute, for perhaps it was for the mariage of the ſon, and perhaps the ſon might ſell it, and after the father become Bankrupt, it would be hard to void the ſale. The Chancellor of *Oxfords* Caſe was a ſtronger Caſe, for there the party was indicted. And if a man be Accomptant to the King, and afterwards ſells, yet the ſale ſhall be avoided by the King. But if he be not Accomptant and ſelleth, and afterwards becomes Accomptant, the ſale ſhall not be defeated. And here he became Inholder after the purchaſe, and being a clear man at the time of the purchaſe, he ſhall not now be within the Statute. Chief Juſtice; If that ſhould be permitted, all things which the party did ſhould be defeated; and therefore he agreed, That although he be a Tradeſman, yet if he be not in debt: If he purchaſe for another, or give unto another, if no fraud be found, it is not within the Statutes. And Judgement accordingly was given for the Plaintiffe.

Young *againſt* Fowler.

68. *Young* brought an Action upon the Caſe againſt *Fowler* for diſturbing of him to execute the office of Regiſter to the Biſhop of *Rocheſter*; and upon not guilty pleaded, the Jury gave a ſpeciall verdict: They found that the office was granted by one Biſhop to one for life, which was confirmed by the Dean and Chapter, which Biſhop died, and afterwards *John Young* was created Biſhop. And then they found that the office was grantable in Reverſion time out of minde, &c. And that *John Young* Biſhop did grant the ſaid office of Regiſter to *John Young* his ſon, now Plaintiffe in Reverſion. (And that the office was to be executed by the ſaid *John Young* or his Deputy). which *John Young* the ſon was but of the age of 11 years at the time of the grant; but they found, that he was of full age before the Tenant for life died. And then they found that *John Young* the Biſhop died; and that his Succeſſor granted the

the office to the Defendant who executed many things concerning the office; And whether upon the whole matter the Defendant were a disturber or not, was the Question; And it was adjudged by all the Justices without any solemne and open argument, that the Defendant was a disturber: But the Case was argued by councell on both sides, whose arguments and reasons were briefly following. *Maynard* for the Plaintiffe; There are two points. 1. Whether the grant be good within the Statute of 1 *Eliz.* 2ly, Whether the grant to an infant be good: And he held it was, because it was to be executed by his Deputy. The word of the Statute of 1 *Eliz.* are, [*Of any thing belonging to the Bishoprick*] and in our Case the office of Registry is belonging to the Bishoprick. The second doubt is, Whether the grant in Reversion be convenient; and I hold it is, although not absolutely, yet necessarily: And therefore we are to see, 1. What conveniency is requisite, and 2. Whether such conveniency be within the Law: For that, it ought to be enquired, How this office hath used to be granted, and the use ought to guide the conveniency. See the Bishop of *Salisburies* Case; a grant of an office to two, which hath not been used to be so granted, is not good. *Pasc.* 1 *Car. Rot.* 207. the Bishop of *Chichesters Case*. Where the Question was upon the usuall grant of Fees: and there because it was found that there was a grant of greater Fees then the use and custome warranted; It was adjudged good for so much as the custome did warrant, and void for the residue. And the Statute it self speaks of usuall Rent; all which proves, That use ought to guide this conveniency. 2d Point, That the grant to an infant was good, because it is granted to be executed by his Deputy. I grant, that an infant cannot be an Attorney, because an Attorney cannot make a Deputy? And this grant is not inconvenient *ex natura rei*, neither to the Grantor, nor to the Grantee. 1, It is not inconvenient *ex natura rei*, for such an office is grantable to one and his heirs, which by possibility may descend to an infant, and there he shall execute it by Deputy; and the same inconvenience is in this Case, if there be any. And if the execution of an office may be by Deputy where

where the party is not able, the ſame reaſon is in this Caſe. 2. It is not inconvenient to the Grantor, becauſe as it is preſumed, when a man grants an office to one and his heirs, that he ſees that the ſame by poſſibility may deſcend to an infant; ſo he ſays in our Caſe, at the time of the grant, he is an infant. 3. It is not inconvenient to the grantee, for it is for his benefit. 27 *H.*8. 28. 8 *E.*4. 7. But here it may be objected, That this office doth concern the Common-wealth, and if the infant commit any offence he ſhall not be puniſhed, becauſe it ſhould be inconvenient: To that I anſwer, that the infant ought to execute it by his ſufficient Deputy; and he himſelf ſhall be charged for any eſcape, and by forfeiture of his office, as any other may. Beſides, you ſhall never prejudice any *in præſenti* for the future prejudice which by poſſibility may happen to the Common-wealth, 10 *E.*6. 14. *Stone* and *Knights* Caſe. *Hill.* 2 *Car. Rot.* 224. An infant was bound by arbitrament. *Trin.* 3. *Car. Rot.* 119. An infant was bound for his ſchooling. But it may be farther objected, That it concerns the adminiſtration of Juſtice, which an infant cannot do. To which I anſwer, that he may make a Deputy, who ought to be adjudged ſufficient by the Ordinary, and he may well execute it. 26 *H.*6. *Grants* 124 An infant elected Parſon to ſerve a Cure, who ſhall be examined by the Ordinary, 21 *E.*4. 13. An infant may be Mayor, 18 *E.*3. 33. 26 *E.*3. 63. An infant who comes in by purchaſe, makes him more liable then he who comes in by deſcent. But in our Caſe, the grant *à fortiori* ſhall be good becauſe it is executory. And he took the difference between an Executory grant as here, which by poſſibility may be made good, (as in our Caſe it was, becauſe that the grantee was of full age before the office fell in poſſeſſion) and where an intereſt veſts immediately: Farther, he conceived the Caſe the ſtronger, becauſe the Deputy came in by the allowance of the Ordinary. *Ward* for the Defendant: There are four Queſtions. 1. Whether a grant to an infant in poſſeſſion be good: I conceive not; 1. *quoad naturam rei*, it is not good, becauſe that by that grant the Common-wealth is prejudiced. 2. The office doth concern the adminiſtration of Juſtice; and therefore

fore cannot be granted in Fee, and by conſequence there ſhall be no deſcent of ſuch Judiciall office, as hath been objected by Mr. *Maynard*, 1 *Rep.* I agree, that the Grant of a Parkerſhip to an Enfant is good; and where it was objected, that it may be prejudiciall by poſſibility, I conceive it *apparens nocumentum*; as 5 *Rep.* 101. and therefore the like Nuſance, as the caſe is there put, may be deſtroyed. 9 *E.* 4. 5. *Winters* caſe Clarke of the Crowne. 12 & 13 *Eliz. Dyer* 293. 9 *Rep.* 96. Mich. 40, 41 *Eliz. Scamblers* caſe; It was adjudged, That an Enfant is not capable of a Stewardſhip of a Manor; and the reaſon is, becauſe that thereby the Tenants may be prejudiced, ſo in our Caſe the Common wealth. Trin. 13 *Car.* Rot. 493. our very Caſe in the common Pleas, was adjudged. Further, an Enfant is not capable of this Office, becauſe *Misfeaſans & Nonfeaſans* may be, and he ſhall not be puniſhed for it; for an Enfant at the common Law, is not lyable to an action of Waſt, or an action upon the Caſe: 8 *Rep.* 95. *Doct. & Stud.* The 2. Queſtion, Whether the Grant, to him and his deputy, make the Grant good, I hold it doth not. 7 *Eliz. Dyer.* 238, b. 9 *Rep.* 38. 10 *E.* 4. 1. 39 *H.* 6. 54. The Officer is chargeable for his Deputy, and not the Deputy himſelfe; And if it be ſo, if this Grant ſhould be good, here ſhould be a Miſdemeanor in the Office, and none ſhould be puniſhed for it, which ſhould be inconvenient; for the Deputy cannot be charged nor the Officer in our Caſe, becauſe he is an Enfant, and therefore the Grant is not good. The 3. Queſt. Whether this ſubſequent Act of the Enfant coming of Full age, before the falling of the Office into poſſeſſion, hath made the Grant good. I hold, that not, upon the common rule, *Quod initio non valet, &c.* So is the Bp. of Salisburies Caſe, Sr. *George Reignalls* Caſe, and 27 *H.* 6. 10. The 4. Queſtion, Whether this Grant in Reverſion to a man of Full age, be good at the common Law: and I hold it is not; becauſe it is a judiciall Office which is not grantable in Reverſion: with which agrees 11 *Rep.* Auditor *Curles* Caſe. The 5. Queſtion, Whether it be within the Statute of 1 *Eliz.* And I hold it is not, becauſe that muſt take effect from the time of the granting

ting of it, as the Statute ſpeakes. 6. I conceive it is not a neceſſary Grant, becauſe it is not within the exception of the Statute, *Et exceptio firmat Regulam*. It was objected, That Uſage makes theſe Grants good. I conceive the contrary, That Uſage is not a Rule to meaſure a thing, whether it be convenient or not. And a grant may be good, which is not uſed. And the courts of Juſtice ought to judge, what is convenient or neceſſary, and what not. So is *Litt.* and the Commentaries *Say* and *Smiths* Caſe. Beſides, it is not Neceſſary, for he ſtands but for a cypher and doth nothing, and therefore not neceſſary. Beſides, it is Inconvenient, and takes from the Succeſſor *honorem munificentiæ*, for by the ſame reaſon that he may grant one, he may grant all the Offices in Reverſion, ſo as his Succeſſors ſhall not have one to grant; and by this meanes ſhall take away a flower of the Biſhoprick. 10 *Rep.* 61. a. The opinion of *Popham* Chiefe Juſtice, An Office is not Grantable in Reverſion by the Biſhop. But the Court was cleere of Opinion, without argument, for the Plaintiffe; That the Grant is good. *Crooke* he denyed that ſuch an Office is not grantable in Fee, and inſtanced in the Uſhers office, and Chamberlaines of the Exchequer, which are judiciall offices, and yet granted in Fee; And it was denyed that this is an office of Judicature, but Miniſteriall onely. To that which was Objected, That the Action doth not lie againſt an Enfant: It was anſwered, That an action upon the Caſe doth lie againſt an Enfant Executor, An action upon the Caſe will lie againſt an Enfant for a Nuſance, or for words, by the common Law. And in our Caſe he ſhall forfeit his Office. An Enfant may be Executor, in which greater confidence and truſt is repoſed, and in our Caſe the Grant to an Enfant is not void *ab initio*, but voidable onely upon *contingent*; And I conceive, that if the uſage will warrant it, That he may grant all the Offices in Reverſion, and upon that difference depends the opinion of *Popham*, in the 10 *Rep.* for there it doth not appeare, that the cuſtome was to grant in Reverſion: And therefore it was not good. *Barckley*: The King may grant in Reverſion without any cuſtome. 9 *Eliz.* *Savages* caſe. And there

there is no queſtion, but that cuſtome may make an Office grantable in Reverſion, in the caſe of a common perſon. 1 *H.7. Crofts* caſe. Alſo the caſe of the Uſher of the Exchequer granted in Fee. And there is no queſtion, but a Judiciall office may be granted to one and his heires. And the office of Warden of the Fleet, which is an office of great truſt, is granted in Fee. And as ſuch offices may deſcend to an Enfant; ſo a Feme covert may have ſuch an office, for ſhe may have a huſband who may execute it; and ſo an Enfant may have a deputy. 7 *H.6.* There is a difference amongſt Enfants; an Enfant, before the Statute of 10 *Eliz.* might have been Preſented to a Benefice, and he was Parſon *de facto*. So a meere Lay man: but the ſame ought to be underſtood of an Enfant who was of age of diſcretion. A Prebendary was granted to *Prideaux*, at the age of three years, and was adjudged void, becauſe he was not of age of diſcretion, but if he had been, it had been good. And I conceive, that it is neceſſary and convenient that it ſhould be granted in Reverſion, for by that meanes the office would never be vacant, and ſhould be alwaies provided of thoſe who were ſufficient to execute it. So in our Caſe the Enfant may be inſtructed before he come of Full age. And farther, as an Enfant when he is Preſented, is to be allowed or diſallowed by the Ordinary, ſo the Deputy is by the Court. The Statute of 1 *Eliz.* makes againſt you, for although it be not within it, yet it may be good at the common Law, like the Concurrent Leaſe which is good at the common Law, and not within the Statute of 1 *Eliz.* The reſt of the Juſtices did all agree with *Barckley*: And Juſtice *Jones* ſaid, That *Scamblers* caſe, cited by my Lord *Coke* in *Inſtitutes* 3. b. was adjudged contrary, That an Enfant was capable of a Stewardſhip in Reverſion, and he ſaid that it was adjudged in the Exchequer, that an Ignorant man was capable of an Office in Reverſion; which doth not differ from our Caſe.

Sir John Saintjohns *Caſe.*

69. THe Lady *Cromwell* was poſſeſſed of divers Leaſes, and conveyed them in truſt, and afterwards married with the ſaid Sir *John Saintjohn*; and afterwards ſhe received the mony which came of the truſt, and with part of it ſhe bought Jewels, and part ſhe left in Mony and dyed. And Sir *John Saintjohn* tooke Letters of Adminiſtration of the goods of the Wife: And the Eccleſieſticall court would make him accomptable for the Jewels, and for the Mony; and to put them into an Inventory. And the Opinion of the Court was, That he ſhould not put them into the Inventory, becauſe the property is abſolutely in the Husband, and he hath them not as Adminiſtrator: but things in action he ſhall have as Adminiſtrator, and ſhall be accomptable for them: and in that caſe a Prohibition was granted as to the Mony. It was moved againe this Terme; That the Lady *Saintjohn* did receive part of the mony, put it out, and tooke Bonds for it in the names of others, to her uſe; and the Spirituall court would have him accompt for that, and thereupon a Prohibition was prayed; but the Court would not grant it. And there *Barckley* differed in opinion, and ſo did the Court, ſome being for it, and ſome againſt it. The reaſon given wherefore the Prohibition ſhould not be granted, was, becauſe the Mony received upon the truſt, is in Law, the monies of the Truſtees, and the wife hath no remedy for it, but in court of Equity; and therefore that the husband ſhould have it as Adminiſtrator. The reaſon urged wherefore the Prohibition ſhould be granted, was, becauſe here the truſt was executed, when the wife had received the mony, and by the Receipt the husband had gained property therein as husband, and therefore ſhould not be accomptable for it. Farther, here the Eccleſiaſticall court ſhould determine the truſt, of which they have no Juriſdiction, for they have not a court of Equity. And the Court ruled, That the Councell ſhould move in Chancery for a Prohibition, for in Equity the mony did belong to the wife. And here it was agreed,

agreed, That if the Truſtees conſent that the wife ſhall receive the mony, as in our Caſe the contrary doth not appeare, that there the husband might gaine a property as husband; but becauſe the Court conceived, that the Eccleſiaſticall court had not Juriſdiction, a Prohibition was granted. And here it was agreed, That if a woman doe convey a Leaſe in truſt, for her uſe, and afterwards marieth, that in ſuch caſe, it lies not in the power of the husband to diſpoſe of it; and if the wife dye, the husband ſhall not have it, but the Executor of the wife, and ſo it was ſaid, it was reſolved in Chancery.

70. *Barckley* and *Crooke*, there being no other Juſtice at that time in Court, ſaid, That upon a Petition to the Archbiſhop, or any other eccleſiaſticall Judge, no Prohibition lieth. But there ought to be a Suit in the Eccleſiaſticall court. And by them, a Libell may be in the Eccleſiaſticall court, for not repairing a way that leadeth to Church, but not for repairing of a high-way, and upon ſuggeſtion, that the Libell was for repairing a high-way, a Prohibition was granted.

71. Many Indictments were exhibited ſeverally, againſt ſeverall men, becauſe each by himſelfe, ſuffered his doore to be unrepaired, and it was ſhewed in the Indictments, that every one of them ought to repaire: And thereupon it was moved, that they might be quaſhed, but the Court would not quaſh them, without certificate, that the parties had repaired their doores; but it was granted, that Proces ſhould be ſtayed, upon motion of Councell that reparation ſhould be immediately done. But at the ſame time, many Indictments, for not repairing of the high-way, which the Pariſhioners ought to have repaired, according as it was found by Verdict, the ſame Terme were quaſhed for the ſame defect; But in truth, there was another fault in the Indictment, for that it was joynt one onely, whereas there ought to have been ſeverall Indictments; but they were quaſhed for the firſt defect.

72. A Replevine was brought in an Inferiour court, and no Pledges, *de retorno habendo*, were taken by the Sheriffe, according to the Statute of *Weſt.2. ca.2.* After the Plaint was removed into this Court by a *Recordari*, and after Verdict given, it was moved in arreſt of Judgement, want of Pledges, for theſe reaſons, becauſe the Pledges, *de retorno habendo*, are given by that Statute, as 2 *H.6.* 15. and 9 *H.6.* 42. b. And that Statute ſaith, That Pledges ſhall be taken by the Sheriffe, and therefore no other can take them, notwithſtanding that Pledges might be found here in Court. And 3 *H.6.* 3. and *F.N.B.* 72. a. ſay, That where Pledges are found, that they ſhall remaine, notwithſtanding the removall of the Plaint by *Recordari*, and the reaſon is, becauſe the Sheriffe is a ſpeciall Officer, choſen to that purpoſe by the Statute, and therefore no other can take them. Beſides, there would be a failer of Juſtice, if the Court ſhould put in Pledges, for then there might be no remedy againſt the Sheriffe, for that he found no Pledges, and no remedy againſt the Pledges, becauſe they are not found according to the Statute, and ſo a failer of Juſtice, and by that meanes the Sheriffe ſhould fruſtrate and avoid the Statute, for no Pledges ſhould ever be found, and ſo he ſhould take advantage of his own laches and wrong. Farther, it was objected, that theſe proceedings are the judiciall act of the Court, and therefore the Court will not alter or diminiſh them. *L. Entries* 1. and 3 *H.6.* And farther, it was ſaid, That the caſes of *Young* and *Young*, and Dr. *Huſſies* caſe, adjudged in this Court, That Pledges may be found at any time before Judgement were, in action upon the Caſe, and not in *Replevine*, as our Caſe is, for which there is ſpeciall proviſion made by the Statute. But it was anſwered, and agreed by the whole Court, That Pledges may be found by this Court, for the Pledges given by the Statute of *Weſt.* 2. are onely to give remedy againſt the Sheriffe, and if the Sheriffe doe not his duty, but ſurceaſeth, we may as at the common Law put in Pledges, and yet notwithſtanding remedy may be againſt the Sheriffe upon the Statute for his neglect. And farther, it was agreed, That Pledges may be found at any time before Judgement,

ment, as in *Young* and *Youngs* caſe, and Dr. *Huſſies* caſe it was adjudged; And Judgement was affirmed.

73. There can be no ſecond Execution granted out, before that the firſt be returned.

74. Two Joyntenants of a Rectory agree with ſome of their Pariſhioners, that they ſhall pay ſo much for Tithes: and notwithſtanding, one of them ſueth for Tithes in the Eccleſiaſticall court; and a Prohibition was prayed, becauſe that one of them cannot ſue without the other; and the Court would not grant it: and their reaſon was, becauſe although that one of them cannot ſue without the other by our Law, yet, perhaps, the Spirituall court will permit it.

75. Husband and Wife brought a Writ of conſpiracy, and it was adjudged that it would not lye. And *Iones* cited this caſe, That Husband and Wife brought an Action upon the Caſe, againſt another for words. *viz.* That the Husband and Wife had bewitched another; and it was not good, becauſe that the wife cannot joyne for Conſpiracy made againſt the husband, nor for treſpaſſe of Battery, as the booke is, 9 *E.* 4. But Juſtice *Crook* was of opinion, That the Conſpiracy would well lye, becauſe that the Indictment was matter of Record, and therefore not meerely Perſonall: but the whole Court was againſt him, and Juſtice *Barckley* tooke the difference, where they ſue for Perſonall wrong done to them, there they ſhall not joyne, but where they have a joynt Intereſt, as in caſe of a *Quare impedit*, there they ſhall joyne.

Thurſton *againſt* Ummons *in Error to Reverſe a Judgement in* Briſtow.

76. THurſton brought an Action upon the Caſe againſt *Vmmons* & declared, That the Defendant brought an Action againſt him, at the Suit of *Hull*, & without his privity: And there-

thereupon did arreſt and impriſon the Plaintiffe, by reaſon whereof all his Creditors came upon him, and thereby that he had loſt his Credit, &c. And a Verdict was found for the Plaintiffe, and thereupon Error brought, and two Errors were alledged. 1. That the Action will not lie, becauſe in truth there was a juſt Debt due to *Hull*, in whoſe name he ſued. 2. Becauſe it is not ſhewed, that the cauſes of Actions, which the other Creditors had againſt him, did ariſe within the Juriſdiction of the Court of Briſtow. And notwithſtanding the firſt Error alledged, Judgement was affirmed by the whole Court upon this difference; where *Hull* himſelfe ſueth or Commenceth Suit againſt the Plaintiffe, there although by that ſuit he draw all the Creditors upon the back of him, & ſo perhaps undo him, yet becauſe it was a lawful act, no Action upon the Caſe lyeth againſt him; But where one cõmenceth Suit againſt another, in the name of another, and without his priprivity, that is Maintenance which is a tortious act, and therefore an Action wil lie: ſo in the principal Caſe. As to the ſecond Error alledged, the Court differed in opinion. *Barckley*; That the damages were ill aſſeſſed, becauſe they were given aſwell for the actions brought by the other Creditors. But Juſtice *Bramſton contrà*, That the damages were well aſſeſſed, becauſe that the Actions brought by the Creditors were added for aggravation onely, and the cauſe of the Action was the Arreſt and Impriſonment, like the caſe where a man ſpeakes words which are in part actionable, and others onely put in for aggravation, and damages is aſſeſſed for the whole, it is good. There was a third Error aſſigned, That the *Venire facias* was, *de Warda omnium Sanctorum de Briſtowe*, without ſhewing in what Pariſh.

Childe *againſt* Greenhill.

77. *CHilde brought* Treſpaſſe againſt *Greenhill* for Fiſhing *in ſeperali piſcaria* of the Plaintiff, and declared that the Defendant *piſces ipſius cepit, &c.* And Verdict found for the Plaintiffe. And it was moved by *Saintjohn* in arreſt of Judge-

Judgement, becauſe the Plaintiffe declared, of taking of *piſces ſuos*, whereas the Plaintiffe, they being *feræ naturæ*, hath not property in them. *Regiſter* 94, 95. and *F.N.B.* and *Book Entries*. 666. No count, that the Defendant *cepit piſces ipſius*, but *ad valentiam, &c.* without *ipſius*. So *Fines* Caſe in *Dyer*, 7 *H.* 6. 36. 10 *H.* 7. 6. 12 *H.* 8. 10. by *Brudnell*. 13 *E.* 4. 24. 7 *Rep.* caſe of *Swannes*. And the Book of 22 *H.* 6. 59. is overruled by the caſe of *Swannes*. 34 *H.* 6. 24. And the ſame is matter of ſubſtance, and therefore not helped after Verdict. An Action of Trover and Converſion, againſt husband and wife *quia converterunt*, is not good, and it is not helped after Verdict, becauſe it is matter of ſubſtance. *Rolls* for the Defendant; I agree, that *lepores ſuos*, or *piſces ſuos*, without any more, is not good. But where he brings an action of Treſpaſſe for taking them in his Soile, there it is good, becauſe it is within his Soile. So in our Caſe, for taking *piſces ſuos* in his ſeverall piſcary: and with this difference agree, 22 *H.* 6. 59. 43 *E.* 3. 24. ſo *Regiſt.* 93, & 102. 23 *H.* 6. *tit. Treſp.* 59. & 14 *H.* 8. 1. and the Book of 43 *E.* 3. ſaith, That in Treſpaſſe the Writ ſhall not ſay, *Damam ſuam*, if he doe not ſay, that it was taken in his Parke or Warren; or ſaith *damam domitam*, or as the Booke is in 22 *H.* 6. in my Soile or Land, and by *Newton*, he ſhall ſay there *damas ſuas*. And admit that it was not good, yet I hold, that it is helped after Verdict, becauſe it is not matter of Subſtance, for whether they be *piſces ſuos* or not, the Plaintiffe ſhall recover damages. Juſtice *Barckley*; It is true, that in a generall ſenſe they cannot be ſaid, *piſces ipſius*, but in a particular ſenſe they may; and a man may have a ſpeciall or qualified property in things which are *feræ naturæ*, three waies, *ratione infirmitatis, ratione loci, & ratione privilegii*: & in our Caſe the Plaintiffe hath them, by reaſon of Priviledge. And it was agreed by the whole Court, That Judgment ſhould be affirmed, upon the very difference taken by *Rolls*, that where a man brings Treſpaſſe for taking *piſces ſuos*, or *lepores ſuos, &c.* and the like, that the Action will not lye. But if he bring Treſpaſſe for fiſhing in his ſeverall piſcarie, as in our Caſe, or for breaking of his cloſe, and taking *lepores ſuos, &c.* there it will lye.

Pitfield *againſt* Pearce.

78. IN an *Ejectione firme*, the Caſe was thus. *Thomas Pearce* the Father, was ſeiſed of lands in Fee, and by Deed, in conſideration of Marriage, did give and grant this Land to *John Pearce*, the now Defendant, his ſecond Sonne, and to his Heires after his death, and no Livery was made; *Thomas Pearce* dyed, the eldeſt Sonne entred, and made a Leaſe to the Plaintiffe, who entred, and upon Ejectment by the Defendant, brought an *Ejectione firme*. *Twiſden*, The only queſtion is, whether any eſtate paſſeth to the Son by the Deed, and it was ſaid, there did, and that by way of Covenant. And it was agreed, That in this caſe if Livery had been made it had been void, becauſe that a Freehold cannot begin at a day to come. But I may Covenant to ſtand Seiſed to the uſe of my Sonne after my death. So a man may ſurrender a Copyhold, to take effect after a day to come, *Com.* 301. So a man may bargaine and ſell at a day to come. 1 *Mar. Dyer.* 96. *Chudleighs* Caſe. 129. 20 *H.* 6. 10. A uſe is but a truſt betwixt the parties, and 7 *Rep.* 400. there need not expreſſe words of Covenant, to ſtand ſeiſed to an uſe. 25 *Eliz. Blithman* and *Blithmans* caſe, 8. *Rep.* 94. Beſides, theſe words *dedi & conceſſi*, are generall words; and therefore may comprehend Covenant: and words ſhall be conſtrued, that the Deed may ſtand, if it may be. 8 *Aſſ.* 34. 7 *E.* 3. 9. But I agree, that if the intent appeareth that it ſhall paſſe by tranſmutation of poſſeſſion, that there it ſhall be ſo taken; but here his intent doth not appeare to be ſo, for if there ſhould be Livery, then the ſonne ſhould take nothing, for the reaſon before given, which is againſt his meaning. *Mich.* 21 *Jac. Rot.* 2220. *Buckler* and *Simons* caſe. *Dyer* 202. *Vinions* caſe. The caſes cited before, are in the future tenſe, but the words are here, I give, &c. 36 *Eliz. Callard* and *Callards* caſe; ſtand forth *Euſtace* reſerving an eſtate to my ſelfe and my wife, I doe give thee my Land: and the better Opinion was, That in that caſe it did amount to a Livery, being upon the Land, for his intent is apparent. *Mich.*

41 &

41 & 42 *Eliz. Trelfe* and *Popwells* caſe, adjudged in ſuch caſe, That an uſe ſhall be raiſed: For which it was concluded, that in this caſe there is a good eſtate raiſed to *John Pearce* by way of Covenant. *Rolls*; I conceive, that no eſtate is raiſed to *John Pearce* by this conveyance. It was objected, That it ſhall inure by way of Covenant, to raiſe an uſe. I agree, That if the meaning of the party may appeare, that he intended to paſſe his eſtate by way of raiſing of an uſe, otherwiſe not. And here is no ſuch appearance. *Foxes* caſe in 8 *Rep.* is a ſtronger caſe; and here it doth not appeare that he meant to paſſe it by way of uſe. But by the word [give] he intended tranſmutation of poſſeſſion. 8 *Rep. Bedells* caſe, *Mich.* 18 *Car. Rot.* 2220. in the common Pleas it was adjudged, That a gift of aRemainder after the death of the grantor was void; wherefore he concluded for the Plaintiffe, and ſo Judgement was given by the whole Court. And Juſtice *Jones* ſaid, When a man makes a doubtfull Conveyance, it ſhall be intended a Conveyance at the common Law. And it ſhall not be intended that the Father would make him Tenant for life onely puniſhable of waſt.

Mich. 15°. Car' *in the Kings Bench.*

79. IT was moved for a Prohibition to the Councell of the Marches, and the Caſe was ſuch: A man ſeiſed of Lands in Fee, made a Feofment to the uſe of himſelfe for life, the remainder in taile to *I.S.* He in the remainderLevied aFine. And the Councell of the Marches, upon a ſurmiſe, That the Tenant for life dyed ſeiſed, according to their Inſtructions, would ſettle the poſſeſſiō upon the heire of Tenant for life, againſt the Conuſee; For their inſtructions were made, That where a man had the poſſeſſion by the ſpace of three yeares, that the ſame ſhould be ſetled upon him, untill tryall at Law were had. But the whole Court was againſt it, becauſe it doth appeare that he had but an eſtate for life, and ſo the poſſeſſion appertained

to him in the remainder. And here it was ſaid by Juſtice *Barckley*, that their Opinion hath been, That the poſſeſſion of Tenant for Life ſhould be the poſſeſſion of him in the Remainder, as to this purpoſe. Note that the Principall caſe here was (although the Caſe before put, was alſo agreed for Law) thus: Tenant in Taile levyed a Fine, to the uſe of himſelfe for Life, the remainder in Fee to *I. S.* and dyed: In that Caſe the Councell in the Marches would ſettle the poſſeſſion upon the heire of Tenant in taile, againſt the Purchaſer, who held in by the Fine which had barde the eſtate taile, by which the iſſue claimed; and the whole Court was againſt it, for which cauſe a Prohibition was granted.

80. *Habeas corpora* was directed to the Porter of Ludlow, to bring the bodies of *John Shielde* and *William Shielde* into the Kings Bench; the caſe ſhortly (as appeares upon the retorne) was this, *Powell* the Father brought a Bill, in the nature of an Information, againſt the ſaid *John* and *William Shield*, before the Councell of the Marches in Wales, for an unlawfull Practiſe, Combination, and Procurement of a clandeſtine Marriage in the night, betwixt *Mary Shield* a Maid-ſervant, and the Sonne of *Powell*, who was a Gentleman of good credit and worth, the Parſon alſo being Drunke, as he himſelfe ſware, and the ſame alſo being without Banes or Licence; for which offence they were ſeverally Fined to the King, and an hundred Markes damages given to the Plaintiffe, & farther ordered by the Councell, that they ſhould be impriſoned till they paid their ſeverall fines to the King, and damages to the Party, and found Sureties to be bound in Recogniſance, for their good behaviour, for one yeare, and till they knew the farther order of the Councell; and theſe were the cauſes which were retorned. And upon this retorne *Glynn*, who was of Councell with the Priſoners, moved many things; and many of them, as was conceived by the Court, altogether impertinent. But the Objections which were pertinent were theſe. Firſt, That the Councell of the Marches, as this caſe is, have

have no Juriſdiction, becauſe the clandeſtine Marriage is a thing meerely Spirituall, and therefore not within their Inſtructions. The ſecond was, That they have exceeded their Inſtructions, in that they have given damages, to the party, above fifty pounds. For by their Inſtructions, they ought not to hold Plea where the Principall or Damages exceed fifty pounds. But as to the firſt, he ſaid, there may be this Objection, That they did not puniſh them for the clandeſtine Marriage, which in truth is a thing meerly Spirituall, but for the unlawfull Practiſe and Combination, and for the execution of it: To which he anſwered, That they have not Juriſdiction of the Principall, and therefore not of the Acceſſory: (here note that it was afterwards ſaid by *Bramſton* Chiefe Juſtice, That the unlawfull Practiſe, and Combination was the Principall, and the clandeſtine Marriage, but the Acceſſory, which was not contradicted by any:) Farther, it was objected by *Glynn*, That they were Impriſoned for the damages of the Plaintiffe, and it doth not appeare, whether it was at the Prayer of the Party, as he ought by the Law. *Bankes*, the Kings Atturny Generall, contrary. And as to the firſt, Their Inſtructions give them power to hold Plea of unlawfull Practiſes and Aſſemblies; And this is an unlawfull Practiſe and Aſſembly, and therefore within their Inſtructions: And although that Hereſie and clandeſtine Marriage, and ſuch offences, *per ſe* are not within their Inſtructions, yet being clad with ſuch unlawful circumſtances, and practiſes, they are puniſhable by them. As to the ſecond he ſaid, The Inſtruction which reſtraineth them that they doe not hold Plea above fifty pounds is onely in civill Actions, at the ſeverall ſuit of the party: But there is another Inſtruction, which gives them power, where the cauſe is criminall, to aſſeſſe damages, according to the quality of the Offence, and at their diſcretions. As to the third objection he ſaid, That the Retorne, being that they were in execution for the damages, it ought to be meant at the Prayer of the Party, otherwiſe it could not be. For which cauſes he prayed that the Priſoners might be remanded. And the whole Court (*Crooke* being abſent) were cleere upon this Retorne, That they

ſhould be remanded; becauſe it appeareth that their Fines to the King were not payed: And therefore, although that the other matters had been adjudged for them, yet they ought to be remanded for that one. And as to the Objections which were made, the Court agreed with Mr. Atturney, except in the point of Damages, and for the ſame reaſons given by him. But as to the point of the Damages, whether they have gone beyond their Inſtructions, and ſo exceeded their power in giving above fifty pounds damages or not. It ſeemed to the Court they had; and as it ſeemed to them; if the Retorne had been, That the Kings Fines were paid, it would have been hard to maintaine that the aſſeſſing above fifty pounds damages, was not out of their Inſtructions: but becauſe the Kings Fines were not paid, they were Remanded, without reſpect had thereunto; for the reaſons given before.

81. It was ſaid by the Court, That when Judgement is given in this Court againſt another, and Execution upon it, and the Sheriffe levyeth the mony; the Lord Keeper cannot order that the mony ſhall ſtay in the Sheriffes hands, or order that the Plaintiffe ſhall not call for it: for notwithſtanding ſuch Order he may call for it. And it was farther ſaid by the Court, That an Attachment ſhall not be granted againſt the High Sheriffe for the contempt of his Bayliffs. And a Writ of Error is a *Superſedeas* to an Execution, but then there ought to be notice given to the Sheriffe: otherwiſe, if he notwithſtanding ſerve the Execution, he ſhall not runne in contempt, for which an Attachment ſhall be granted.

82. *Serjant Callis* came into Court, and moved this Caſe; *Chapman* againſt *Chapman*, in Treſpaſſe done in Lands within the Dutchy of Cornwall, which were Borough Engliſh, where the cuſtome was, that if there were an eſtate in Fee in thoſe Lands, that they ſhould goe to the younger Sonne, according to the cuſtome, but if in Taile, they ſhould deſcend to the

Heire at common Law; And it was moved by him, that the cuſtome was not good, becauſe it cannot be at one time cuſtomary, and goe according to the cuſtome, and at another guildable; And the whole Court (*Crooke* onely being abſent) were againſt him, that the cuſtome was good.

Hicks *againſt* Webbe.

83. IN Treſpaſſe for a way, the Defandant did juſtifie, and ſaid, that he had a way not onely *ire, equitare & averia ſua fugare*; but alſo *carrucis & carreragiis carriare*. The Plaintiffe traverſed it *abſque hoc*, that he had a way not onely *ire, equitare, &c.* in the words aforeſaid: and thereupon they were at iſſue, and found for the Plaintiffe. *Glynn* moved in arreſt of Judgement, that the iſſue was ill joyned, becauſe it was not a direct affirmative, but by inducement onely. And the whole Court was againſt him: And Juſtice *Jones* ſaid, that if I ſay, that not onely Mr. *Glynn* hath been at ſuch a place, but alſo Mr. *Jones*: without doubt it is a good affirmative, that both have been there. But they all agreed, that the pleading was more elegant then formall.

84. In the Caſe betwixt *Brooke* and *Boothe*, Juſtice *Barckley* ſaid, that it is a rule, That if there be two things alledged, and one of neceſſity ought to be alledged, and he relies onely upon the other, it is no double Plea: As if a man plead a Feofment with warranty, and relyeth upon the Warranty, it is not double.

85. Juſtice *Barckley* ſaid, That in the Court of the Exchequer, they may make a Leaſe for three Lives, by the Exchequer Seale.

Clarke *againſt* Spurden.

86. IN a writ of Error to reverſe a Judgement, given in the court of Common Pleas, the caſe was ſhortly thus;

A.

A. wife of *I.S.* inteſtate, promiſeth to *B.* to whom Adminiſtration was committed: that if he ſhall relinquiſh the Adminiſtration, at the requeſt of *C.* and ſuffer *A.* to Adminiſter, that *A.* will diſcharge *B.* of two Bonds. In *Aſſumpſit* brought by *B.* in the common Pleas, he alledged that he did renounce Adminiſtration; and ſuffered *A.* to Adminiſter, and that *A.* had not diſcharged him of the two Bonds. And it was found for the Plaintiffe. And thereupon Error was brought, becauſe *B.* doth not ſhew, that he did renounce the Adminiſtration at the requeſt of *C.* And *Rolls* for the Plaintiffe, in the writ of Error, did aſſigne the ſame for Error. Juſtice *Barckley* (all the other Juſtices being abſent) held that it was Error; for conſideration is a thing meritorious, and all ought to be performed, as well the requeſt on the part of *C.* as the permiſſion of the part of *B.* which ought to be ſhewed; For perhaps *B.* was compelled to relinquiſh it in the Eccleſiaſticall court, as it might be; for of right the wife ought to Adminiſter. And therefore it ought to have been averred, that it was at the requeſt of *C.* And therefore, if it had been that he ſhould renounce at the charge of *C.* It ought to be averred, that it was at the charge of *C.* And it was adjorned.

87. A man Libelled in the Spirituall court, for Tithes for Barren cattle: and it was moved for a Prohibition upon this ſuggeſtion; *viz.* That he had not other Cattle then thoſe which he bred for the Plough and Pale; and thereupon *Barckley* being alone there, granted a Prohibition; and the ſame Parſon alſo Libelled, for Tithes of Conies. And for that alſo he granted a Prohibition, for they are not titheable, if not by cuſtome: And here *Barckley* ſaid, That if Land be Titheable, and the Tenant doth not plough it, and manure it; yet the Parſon may Sue for Tithes in the Eccleſiaſticall court.

North *againſt* Muſgrave.

88. IN Debt upon the Statute of 1 & 2 *Phil. & Mar. c.* 12. the words of which Statute are, That no man ſhall take for

for keeping in pound, impounding, or poundage of any manner of diſtreſſe, above the ſumme of foure pence, upon paine of forfeiture of five pounds, to be paid to the party grieved. And the Plaintiffe ſhewed that his cattle were diſtreyned and impounded, and that the Defendant tooke of him ten pence for the poundage: And thereupon the Plaintiffe brought an Action for the penalty of five pounds, and found for the Plaintiffe. And the Judgement was, That he ſhould recover the five pounds, and damages, *ultra & præter* the mony taken for the poundage. And thereupon a writ of Error was brought, and three things aſſigned for Error. Firſt, becauſe the Action was brought for the penalty of five pounds onely, and not for the ſix pence, which was taken above the allowance of the Statute, which ought not to be divided: which was anſwered by Juſtice *Barckley* (all the other Juſtices being abſent) That notwithſtanding it is good, for true it is, that he cannot bring his Action for fifty ſhillings, part of the penalty, becauſe it is entire; but here are two ſeverall penalties, and he may divide and disjoyne them if he will, or he may wave the ſix pence. For *quilibet poteſt renunciare, juri pro ſe introducto*. The ſecond was, That he doth not demand that which is *ultra & præter* the foure pence, given by the Statute: and yet the Judgement is given for that, which is not good. To which Juſtice *Barckley* ſaid, That the Judgement was good. For no Judgement is given for that which is *ultra & præter* the foure pence, but onely for the foure pounds, becauſe he doth not demand it. And we cannot judge the Judgement to be erroneous by Implication. The third Objection was, That Coſts and Damages are given, which ought not to be upon a penall Law. For he ought not to have more then the Stature giveth; And therefore upon the Statute of *Perjury*, no Coſts are given: ſo upon the Statute of *Glouceſter* of Waſt, the Plaintiffe ſhall recover no more then the treble value. But *Rolls*, who was on the contrary, ſaid, That there are many preſidents in the common Pleas, that Damages have beene given upon this Statute. But *Barckley*, and *Jones*, who afterwards came, and ſeemed to agree

with Juſtice *Barckley* in the whole, was againſt it; That no Damages ought to be given; and deſired that the Preſidents might be viewed. But here *Rolls* offered this difference, Where the penalty given by the Statute is certaine, as here, upon which he may bring Debt, there he ſhall recover Damages: but where the penalty is uncertaine, as upon the Statute of *Glouceſter*, for treble damages, the Statute which giveth the treble value, and the like; there, becauſe it is incertaine, he ſhall have no more. *Barckley* asked Mr. *Hoddeſdon*, If the Informer ſhould recover Damages. And he and *Keeling* clarke of the Crowne, anſwered, No; but ſaid Damages ſhould be given againſt him, and it was adjorned.

89. *Skinner* Libelled in the Eccleſiaſticall court for the Tithes of Rootes, of a Coppice rooted up. And *Porter* prayed a Prohibition. And it was ſaid by *Jones* and *Barckley* Juſtices, no other Juſtice being preſent, That if cauſe were not ſhewed before ſuch a day, that a Prohibition ſhould be awarded, becauſe it is *ad exheredationem*, and utter deſtruction of it. And the Opinion was, that the branches ſhould be priviledged. And a man ſhall not pay Tithes of Quarries of Stone. And *Barckley* ſaid, It had been adjudged, That a man ſhall not pay Tithes for Brick and Clay.

90. *A.* ſaid to *B.* Haſt thou been at London to change the mony thou Stoleſt from me? And it was Objected, That theſe words are not actionable, becauſe they are an Interrogatory onely, and no direct affirmative. But by *Barckley* and *Jones* (the other Juſtices being abſent) the words are actionable. For the firſt words, Haſt thou been at London, are the words of Interrogation, and the ſubſequent words, *viz.* The mony thou ſtoleſt from me, is a poſitive affirmation. And *Barckley* ſaid, That it had been oftentimes adjudged, That words of Interrogation ſhould be taken for direct affirmation. *Jones* alſo agreed to it, and he ſaid that this Caſe had been adjudged, That where a man ſaid to *I. S.* I dreamed this night, that you Stole an Horſe, That the words are actionable. And if theſe

and

and the like words, ſhould not be actionable, a man might be abuſive, and by ſuch ſubtile words alwaies avoid an Action.

91. *A.* ſaid of *B.* that he tooke away mony from him with a ſtrong hand, and alledged that he ſpoke thoſe words of him *innuendo felonicè*: and for them the Plaintiffe brought an Action upon the Caſe. And by *Barckley* and *Jones* (none other being preſent) the Action doth not lie: for he may take money from him *manu forti*, and yet be but a Treſpaſſer; and therefore the *Innuendo* is void, for that will not make the words actionable, which are not actionable of themſelves.

92. Juſtice *Jones* ſaid, that it was a queſtion, Whether a Barre in one *Ejectione firme*, were a Barre in another. And Juſtice *Barckley* ſaid, that it is adjudged upon this difference, That a Barre in one *Ejectione firme*, is a Barre in another, for the ſame Ejectment; but not for another, and new Ejectment: to which *Jones* agreed.

Dickes *againſt* Fenne.

93. IN an Action upon the Caſe for words, the words were theſe; the Defendant having communication with ſome of the Cuſtomers of the Plaintiffe, who was a Brewer, ſaid, That he would give a peck of malt to his mare, and ſhe ſhould piſſe as good beare as *Dickes* doth Brew. And that he laid *ad grave damnum, &c. Porter* for the Defendant; that the words are not actionable of themſelves, and becauſe the Plaintiffe hath alledged no ſpeciall Damage, as loſſe of his Cuſtome, &c. the Action will not lie. *Rolls*; that the words are actionable: and he ſaid, that it had been adjudged here, That if one ſay of a Brewer, that he brewes naughty Beare, without more ſaying, theſe words are actionable, without any ſpeciall damage alledged. But the whole Court was againſt him (*Crooke* onely abſent) That the words of themſelves

ſelves, were not actionable, without alledging ſpeciall damage; as the loſſe of his Cuſtome, &c. which is not here: And therefore not actionable. And *Barckley* ſaid, That the words are onely comparative, and altogether impoſſible alſo. And he ſaid, that it had been adjudged, that where one ſayes of a Lawyer, That he had as much Law as a Monkey; that the words were not actionable, becauſe he hath as much Law, and more alſo. But if he had ſaid, That he hath no more Law then a Monkey; thoſe words were actionable. And it was adjorned.

Hodges *and* Simpſons *Caſe*.

94. A Man brought an Action of Trover and Converſion, againſt husband and wife, of two Garbes, *Anglice* Sheaves of corne; and ſaid that they did convert thoſe ſheaves *ad uſum ipſorum, viz.* of the husband and wife. And here were two things moved by *Hyde*. Firſt, that he ſhewed the Converſion to be of two Garbes, *Anglice*, Sheaves of corne: which plea is naught and incertaine. And Courts ought to have certainety; but here it is not ſhewed, what Corne it was. And the *Anglice* is void, and therefore no more then Trover and Converſion of ſo many Sheaves, which is altogether incertaine; and therefore not good. The other thing is, That the Plaintiffe ſayeth, that the converſion was *ad uſum ipſorum*, which cannot be, for the wife hath no property during the life of the husband; and therefore cannot be *ad uſum ipſorum*. And he cited two Judgements in the point, where it was adjudged accordingly. And Juſtice *Barckley* ſaid, that it had been many times ſo adjudged. But Juſtice *Jones* ſaid, that there may be a Converſion by the wife to her uſe, as in this caſe to bake the Barley into bread, and to eate it her ſelfe. And *Brumſton*, Chiefe Juſtice, ſaid, that a wife hath a capacity to take to her owne uſe; for there ought of neceſſity to be property in the wife, before the husband can have by gift in Law: and they deſired to ſee Preſidents. And therefore it was adjorned, as to this point. But by the whole Court, the other was not good.

More

More of the Caſe of North *and* Muſgrave.

95. *Maynard* for the Plaintiffe, in the writ of Error, That the Judgement was Erroneous: Firſt, becauſe the damages and coſts were given, where none ought to be given, being a penall Law: and therefore no more then the penalty ſhall be recovered. And he remembred the rule taken in *Pilfords* caſe. 10 *Rep.* 116. a. And he cited divers Preſidents alſo for it. *Cokes* Booke of *Entries* 31. & 41. And Preſidents upon the Statute of *Perjury*. 38. 39. Secondly, becauſe he divided the penalty given by the Statute, which ought not to be, for by ſuch meanes the offender ſhould be doubly vext; for he might ſue him after for the ſix pence *præter & ultra* that which was taken for the diſtreſſe. And he ſaid, it is like to the caſe, of an Annuity which is entire and cannot be divided. Thirdly, he ſaid, That the Judgement it ſelfe was erroneous, becauſe that Judgement is given for more then he demands. For the Judgement is, *quod recuperet* 5. *li. ultra & præter*, that which is above the 4. d. given by the Statute. *Rolls* contrary, that the Damages and Coſts are well given; and the ſame is out of the rule of *Pilfords* caſe: becauſe that the Action is no new Action, but the thing is a new thing, for which the old Action is given: and the Damages and Coſts are here given for the Suit and Delay, and not for the Offence. And he cited alſo Preſidents for him. *viz.* The new Booke of *Entries* 163, 164. For the ſecond point, he ſaid, That they are ſeverall penalties which are given, and therefore he might bring his Action ſeverally for them, if he would. As to the third point, That Judgement is given for more then the partie declares: it is not ſo, for then the Judgement ſhall be made vitious by Implication, which ought not to be. As to the dividing of the penalty, and Judgement, the ſame was good by the whole Court, for the reaſons before given. And as to the giving of Coſts, *Jones* and *Bramſton* Chiefe Juſtice conceived, that they were well aſſeſſed, upon the preſidents before cited: But *Barckley* doubted thereof, and did conceive that

no coſts ſhould be given in this caſe, and that upon *Pilfords* caſe 10 *Rep.* As to the Preſidents, he ſaid, that they did not bind him; for perhaps, they paſſed *ſub ſilentio*. And afterwards it was adjorned.

Johnſon *againſt* Dyer.

96. IN an Action upon the Caſe for words, the Defendant having ſpeech with the father of the Plaintiffe, ſaid to him, I will take my Oath that your Sonne ſtole my Hennes. For which words the Plaintiffe brought the Action. But did not averre that he was his Son, or that he had but one ſon. And it was holden by the whole Court (*Crooke* being abſent) that the plea was not good.

Leake *and* Dawes *Caſe.*

97. *LEake* brought a *Scire facias*, in the Chancery, againſt *Dawes*, to avoid a Statute; and the Caſe, as it was moved by Serjant *Wield*, was ſuch. *Hopton* acknowledged a Statute to *Dawes*, and afterwards conveyed part of the Land lyable to the Statute to *I. S.* who conveyed the ſame to *Leake*, the plaintiffe; and afterwards the Conuſor conveyed other part of the land to *Dawes*, the Defendant, who was the Conuſee, by bargaine and ſale: the Conuſee extended the lands of *Leake*, the Purchaſer; who thereupon brought this *Scire facias*, to avoid the Statute, becauſe that the Conuſee had purchaſed parcell of the land lyable to the Statute, and ſo extinguiſhed his Statute. And this Caſe came by *Mittimus* into the Kings Bench. And here it was moved by Serjant *Wield*, for *Dawes* the Defendant, in arreſt of Judgement. And taken by him for Exception, That the bargaine and ſale is alledged to be made to *Dawes*, but it is not ſhewed, that it was by Deed inrolled; but yet it is pleaded, That *Virtute cujus, viz.* of Bargaine and Sale, the Conuſee was ſeiſed, and doth not ſhew that he entred. And here it was ſaid by the Court, There

are

are two points. Firſt, whether an Inrolment ſhall be intended, without pleading of it. Secondly, Admitting not, what Eſtate the Bargainee hath, as this Caſe is? As to the firſt Juſtice *Jones* tooke this difference. Where a man pleads a Bargaine and ſale to a ſtranger, and where to himſelfe. In the firſt caſe, he need not to plead an Inrolment, but contrary in the latter. *Barckley* agreed it, and tooke another difference, betwixt a Plea in Barre, and a Count: In a Count, if a man plead a grant of a Reverſion without attornement, it is good; contrary in Barre: ſo in this Caſe. The ſecond queſtion is (admitting that the Deed ſhall be intended not to be inrolled without pleading) What eſtate *Dawes*, the Conuſee, hath before Entry, the Deed not being inrolled. For it was agreed by the whole Court, That if he be a diſſeiſor, or if he hath but an eſtate at will, that the Statute is ſuſpended. And firſt, whether he hath an eſtate at will, at the common Law, or not, without Entry. *Barckley*, that he had. But *Jones* and *Bramſton*, contrary; & it ſeemed that he had an eſtate at will by the Statute. And put the caſe of feoffement in *Bucklers* caſe. 3 *Rep.* Where the Feoffee entreth before Livery, that he hath an eſtate at will: and *Barckley* agreed therein with him, for the poſſibility of inrolment. But *Jones* conceived that an eſtate at will, could not be executed by the Statute. And it was adjorned.

Curtiſſe *againſt* Aleway.

98. THe Caſe was thus. A woman was dowable of certaine land, within the Juriſdiction of the Councell of the Marches, of which *I. S.* dyed ſeiſed. She accepted a Rent by paroll, of the Heire, out of the ſame land, in ſatisfaction of her Dower. And afterwards there was a Compoſition betwixt them for defalcation of that Rent. Afterwards there was an Action brought before the Councell of the Marches for the arrerages of the Rent: where the queſtion was, Whether the Rent were in ſatisfaction of her Dower, or not: and it was moved, by *Moreton*, for a Prohibition. And

it

it was granted by the Court; becauſe the ſame did concerne Freehold, of which they have not Juriſdiction, for by the expreſſe Proviſo of the Statute of 34 *H.* 8. of holding of plea of Lands, Tenements, Hereditaments, or Rents. But becauſe, that it appeared by the Bill, that the woman was dead, ſo as the realty was turned into the perſonalty, *viz.* into Debt. And therefore it was conceived by *Evers* Attorney of the Marches, That although it was not within the Juriſdiction before, yet being now turned into a perſonall Action, that they have Juriſdiction. But *Jones* and *Barckley* Juſtices, were of a contrary opinion, and *Jones* ſaid, That an Action of Debt for arrerages would not lye before them, becauſe it touched the realty; which was denyed by none but *Evers* Attorney.

Edwards *againſt* Omellhallum.

99. IN a writ of Error, to reverſe a Judgement, given in *Ireland*, in an *Ejectione firme*, the Caſe was this, as it was found by ſpeciall verdict: A Morgagor made a Leaſe for yeares, by Deed indented, and afterwards performed the Condition, and made a Feoffement in Fee; the Leſſee entred upon the Feoffee, who reentred: & the Leſſee brought an *Ejectione firme*. And the onely queſtion, as it was moved by *Glynn*, was; Whether this Leaſe, which did inure by way of Eſtople, ſhould binde the Feoffee, or no: and by him it did, and *Rawlyns* caſe in the 4 *Rep.* 53. expreſſely, and 1 & 2 *Phil. & Mar. Dyer* agreeth. And the whole Court (*Crooke* onely abſent) without any argument, were cleare, That it ſhould binde the Feoffee, for all who claime under the Eſtople, ſhall be bound thereby, *vid. Edriches* caſe, 13 *H.* 7.

100. Serjant *Jermayn* came into the Court, and ſhewed cauſe why a Prohibition ſhould not be granted in the Caſe of *Skinner*, before; who Libelled for Tithes of Coppice rooted up. He agreed that for tymber trees, above the growth of twenty, no Tithes ſhould be paid; and ſo he ſaid was the common Law,

Law, before the Statute of 45 *E.* 3. which was but a confirmation of the common Law. And he ſaid, That as the body of the tree is priviledged, ſo are the branches and root alſo; which is a proofe, that where the body is not priviledged, there neither ſhall be the root, or branches. And in our Caſe he Libells for roots of underwoods, and the underwood it ſelfe being titheable; therefore the roots ſhall be alſo titheable. And he ſaid, that the roots are not parcell of the Land. But Juſtice *Barckeley* was againſt it; for they are not *creſcentia*, nor *renovantia*, as Tithes ought to be; and therefore no Tithes ought to be paid for them: and he ſaid, that a Prohibition hath many times been granted in the like caſes. But Dr. *Skinner* did alledge a cuſtome for the payment of Tithes of them. And upon that they were to goe to tryall: And here it was ſaid, That Dr. *Skinner* had uſed to have ſome ſpeciall particular benefit of the Pariſhioners, in lieu of Tithe of roots. And thereupon *Barckley* ſaid, That it is a Rule, where the Pariſhioner doth any thing which he is not compellable by the Law to doe, which commeth to the benefit of the Parſon: there if he demand Tithes of the thing in lieu whereof, this is done that a Prohibition ſhall be granted. And there is another rule: That Cuſtome may make that titheable which of it ſelf is not titheable. And here he ſaid to Dr. *Skinner* being then in Court, That he had two matters to help him, and if any of them be found for him, that a Prohibition ought not to be awarded.

101. Juſtice *Barckley* ſaid, That if a man be living at the day of *Niſi prius*, and dyeth before the day in Banck, the Writ ſhall not abate. So if a man be living the firſt day of the Parliament, and dyeth before the laſt day; yet he may be Attainted: and the reaſon is, becauſe in the eye and judgement of Law, they are but one day by relation, which the Law makes.

102. There were three Brothers, the Eldeſt tooke Adminiſtration of the goods of the Father, and after Debts and

Legacies paid, the younger Brothers ſued the eldeſt in the Eccleſiaſticall court, to compell him to diſtribute the Eſtate. And thereupon a Prohibition was prayed, and denyed by the Court, for they having Juriſdiction of the Principall, may have Juriſdiction of the Acceſſary.

103. *A.* Libelled againſt *B.* in the Spirituall court, for theſe words, Thou art a Drunkard, & uſeſt to be Drunk thrice a weeke. And upon that 15°. *Caroli*, in Eaſter Terme (as you may ſee before) a Prohibition was prayed, and granted. And now *Littleton* the Kings Solicitor, came in Court, and moved for a Conſultation: and he ſaid, that the Statute of *Articuli Cleri*, gave power unto the Eccleſiaſticall court, to have conuſance of thoſe and the like words. *Regiſter* 49 *F. N. B.* 51. They may hold plea for defamation; as for calling Adulterer, or Vſurer. 13 *H.* 7. *Kellaway*. 27 *H.* 8. 14. And he cited many Judgements, in the like caſes, where Prohibitions had not been granted: and amongſt others this Caſe. Mich. 20 *Jac. inter Lewis & Whitton*, Libell in the Eccleſiaſticall court, for calling him Pander, and no Prohibition granted. And the like caſe was, for calling another Pimpe, and no Prohibition granted. Juſtice *Jones*; That a Prohibition ſhould be granted; for they have conuſance for defamation, for any thing which is meerely Spirituall, or which doth concerne it, where they have conuſance of the Principall, elſe not: as in Hereſie, Adultery, and the like: but in this Caſe they have not Conuſance of the Principall. True it is, that it is *peccatum*: But if they ſhould puniſh every thing which is Sinne, they would altogether derogate and deſtroy the Temporall Juriſdiction. And therefore if I ſay, that another is an Idle man or envious, theſe are deadly Sinnes; and yet they have not Conuſance of them. And hee cited *Coltrops* Caſe, adjudged in the Common pleas, which was our very Caſe in point: and there he ſaid that upon ſolemne debate it was adjugded, That a Prohibition ſhould be awarded. *Bramſton* Chiefe Juſtice agreed. *Barckley* contrary, That a Conſultation ſhould be

be awarded: and he ſaid, in many Caſes, although they have Juriſdiction of the Principall, yet they ſhall not have Conuſance; as in the Caſe of 22 *E.* 4. *tit'* Conſultation. But he ſaid, that the Offence of Drunkenneſſe is mixt, and is an offence againſt the Spirituall, and Common Law alſo; and if it be mixt, both may hold Plea: and Adultery and Murder, are the common effects of Drunkenneſſe; which are offences againſt both Lawes, and therefore he ſhall be puniſhed by both. But yet *Barckley* yeelded to the Judgement cited by *Iones*. And therefore the whole Court (*Crooke* being abſent) was, That a Prohibition ſhould be awarded.

104. *Rolls* moved this Caſe, The Pariſhioners of a certaine pariſh in Devonſhire, did alledge a Cuſtome to chooſe the two Churchwardens of the pariſh, and they did ſo; the Parſon choſe another: and the Archdeacon ſwore one of the Churchwardens choſen by the pariſh, and refuſed to ſweare the other, but would have ſworne him who was choſen by the Parſon. And becauſe they did refuſe him, they were Excommunicate. *Rolls* prayed a *Mandat* to the Archdeacon, to compell him to ſweare the other choſen by the pariſh; and a Prohibition alſo, by reaſon of the Excommunication. And he cited a precedent for it, which was the caſe of *Sutton Valence* in Kent. And the whole Court (*Crooke* being abſent) inclined to grant them: for they ſaid, they conceived no difference betwixt London and the Country, as to that purpoſe: for as in London they are a Corporation, and may take Land for the benefit of the Church: So throughout *England*, they are a Corporation, and capable to take, and purchaſe Goods for the benefit of the Church. And therefore they did conceive there was no difference. See the Caſe before, the Caſe of the pariſh of Saint *Ethelborough*, London.

105. *Keeling* moved to quaſh an Indictment of Reſcous, becauſe it is ſhewed that the Reſcous was at *W.* and doth not

ſhew that *W.* was within the County; and if it was not within the County, then it was an Eſcape, and no Reſcous: And we cannot averre in this caſe, that it was out of the County; farther it was not ſhewed, where the Reſcous was, ſo that upō the matter it is no Arreſt; nor was the Indictment *vi & armis*, as it ought to be. As to the firſt, the Court ſtrongly inclined, that they might well intend it to be within the County, becauſe the Indictment ſayes, *in Com. meo. apud W. tent.* But for the other Exceptions, the Indictment was quaſhed.

106. In Treſpaſſe of Aſſault and Battery, and Wounding the Defendant pleaded Not guilty, as to the Wounding, and pleaded ſpeciall matter of juſtification: as to the Aſſault and Battery; and found for the Plaintiffe, and it was moved in arreſt of Judgement, That the plea was repugnant, for Aſſault and Battery doth imply Wounding, and therefore it is repugnant for him to juſtifie it, for it is a confeſſion of wounding. But Juſtice *Crooke* and Juſtice *Barckley* (the others being abſent) were cleere, that the plea was good, for ſo is the common forme of pleading: and farther, he might be guilty of the battery, and not of the wounding: for *Crooke* ſaid, Wounding implyed aſſault and battery; but not *è contra*.

Brookes *againſt* Baynton.

107. IN a Writ of Error to reverſe a Judgement, given in the court of Common pleas, in Treſpaſſe for aſſault, battery and wounding; it was aſſigned for Error, by *Maynard*, That there was variance betwixt the Originall and the Declaration; for the Originall was onely of Battery and Wounding of himſelfe; and he declared of Battery and wounding of him and his horſe alſo: for he ſaid, that *quendam equum*, upon which the Plaintiffe *equitavit, percuſſit, ita quod cecidit, &c.* and that was not helped by the Statute. But *Rolls* contrary, and here is no variance: for the alledging of ſtriking of the horſe was onely inducement to alledge the battery of himſelfe; for he doth not bring the Action for the bea-

beating of his horſe, for it was not alledged that it was his owne horſe, but *quendam equum*; and for that reaſon, by the whole Court the Judgement was affirmed.

More of the Caſe of Leake *againſt* Dawes.

108. SErjant *Mallet* for the Plaintiffe, That the *Scire facias* is good, notwithſtanding the exceptions, for theſe reaſons. Firſt, becauſe it is not a Declaration, but a Writ, which is not drawne by Councell, and it is to declare the matter riefly; but if it were in a Declaration, yet I hold it good; becauſe he ſaith, that it was *modo & adhuc ſeiſitus exiſtit*, which I as conceive, helps it: and beſides, it is not his title, but the title of his Adverſary, which he is not bound to plead ſo exactly as his owne title. See for that, 14 *Eliz. Dyer.* 204. 2 *Car.* betwixt *Green* and *Moody*, in *Audita Querela*, he ſhewed that there was Debt brought upon a Leaſe for yeares, to begin at a day to come, and did not ſhew whether the Leſſee entred before the day or not, ſo as he might be a diſſeiſor: and yet notwithſtanding, it being in *Audita querela*, which is an equitable Action, it is good. *Hil.* 1 *Jac.* betwixt *Blackſton* and *Martin* in this Court, a *Scire facias* was brought to avoid a Statute, and it was ſhewed that the Defendant was Tenant, but doth not ſhew how Tenant; but it ſaid *ad grave damnum*, which could not be if he were not lawfull Tenant: and therefore adjudged good notwithſtanding that generall allegation. See new booke of *Entries*, *Mollins* caſe, 98, 99. a ſtrong caſe to this purpoſe. Beſides, he ſaid, That here iſſue was taken upon another point, Whether he bargained or not; and therefore he conceived in this *Scire facias*, that it is not here needfull to ſhew the Inrolment; and for theſe reaſons, prayed Judgement for the Plaintiffe. Serjant *Weild* for the Defendant, That the ſhewing of the Inrolment, is not helped by the iſſue joined, being matter of ſubſtance: for he ſaith, that *virtute cujus*, and of the Statute of 27 *H.* 8. of uſes that the Defendant was ſeiſed, and we ought not to intend an eſtate by any other meanes or ſeiſin, then himſelfe hath alledged. And there-

fore it ought to be adjudged upon his owne pleading, whether the Defendant hath any eſtate without inrolment or entry, by force of the Statute of Uſes. And I conceive he hath not. True it is, that all circumſtances ought not to be pleaded, but the ſubſtance, *viz.* the Inrolment; and therefore it ought to be pleaded: as *Fulmerſton* and *Stewards* caſe is in the Commentaries, and 2 *Eliz. Dyer*. And no eſtate paſſeth without Inrolment: not a Fee ſimple; for then there ought to be inrolment according to the Statute: and no eſtate at will can paſſe without Entry, for that is as *oppoſit' in objecto*, that a man ſhall be tenant at will, againſt his will, for his Entry proves his intent to hold at will. For *Littleton* ſaith, By force whereof he is poſſeſſed, ſo that there ought to be poſſeſſion to make an Eſtate at will: and in caſe of a Leaſe for yeares, although it be true that he is a Leſſee for yeares, to many purpoſes, before Entry; yet an Entry ought to be pleaded. And *Dyer* 14. is *non habuit, non occupavit*, is no good plea in a Leaſe for yeares; contrary in the caſe in a Leaſe at will; which is a ſtrong proofe, that he is not Leſſee at will before entry. 3 *Jac.* betwixt *Bellingham* and *Fitzherbert*. 5 *El. Dyer*. 10 *Eliz. Mockets* caſe, & *Mich.* 15 *Jac.* betwixt *Coventry* and *Stacy*, reſolved that a releaſe to the Bargainee before Inrolment is not good: And by conſequence he hath not an eſtate at will before Inrolment, or Entry made, for if he had, the Releaſe ſhould be good. 18 *H.* 8. the Lord *Lovells* caſe, that no eſtate at Will. Laſtly, *Parrolls font plea*, and the caſe of a man ſhall not be taken to be otherwiſe then he hath pleaded it; and he having pleaded that *virtute cujus*, and of the Statute of Uſes, that the Defendant was ſeiſed, he ſhall be concluded thereby. 5 *H.* 7. A man ſhewed, that another licenced him to enter into his land and occupy for a yeare, it is not good, but he ought to plead it as a Leaſe. Beſides, the *virtute cujus* is not traverſable, as the 11 *Rep. Pridle* and *Nappers* caſe is. *Rolls* accord, and he ſaid, That if it ſhall be conſtrued, That the Conuſee ſhall have an eſtate by Diſſeiſin, the Plaintiffe ought to plead it, that the Defendant was ſeiſed by way of diſſeiſin. And where it was objected, That this is a Writ, and

and not a Declaration: he anſwered, It is a Writ and Declaration alſo; and therefore he ought to declare his caſe at large, and the defect of the Conveyance, *viz.* the want of Inrolment, is not ſupplyed by the *virtute cujus*. And he having made that his Title, you ought to judge upon it, and not otherwiſe. But the whole Court, *viz. Bramſton*, Ch. Juſt. *Crooke*, *Jones*, & *Barckley*, Juſtices; That the *Scire facias* was good, for it was ſaid that the Defendant *perquiſivit ſibi & heredibus ſuis*, and concludes, *virtute cujus*, and of the Statute of Uſes, he was ſeiſed; which is a good averment that he hath a Fee, and it was not materiall how he hath it: and he need not ſhew his Title ſo fully, being a ſtranger to it. And this being an equitable Action, if the Court upon this Writ ſhall conceive ſufficient matter, upon which the Plaintiffe may bring his Action, it is good: and the Court ought to give Judgement for him: for being but matter of forme, it is not materiall, unleſſe a *Demurrer* had been ſpeciall upon it. And whereſoever there is damnification, there the Court ought to give Judgement for the Plaintiffe, notwithſtanding a defect of forme in the Writ. And *Barckley* ſaid, That if a man be ſeiſed of *Bl.* acre and *Wh.* acre, and acknowledgeth a Statute. And afterwards makes a Leaſe for years of *Wh.* acre, the remainder over in Fee, and then the Conuſee purchaſe *Bl.* acre, and extendeth the land of the Leſſee for yeares; he held, that he in the remainder ſhould have an *Audita querela*, or a *Scire facias* for the damnification, which came to his intereſt. And he held, that he who had but *intereſſe termini* ſhould have an *Audita querela*, That one jointly onely might have an *Audita querela*, and that the death of one of them ſhould not abate the Writ. And he held that *Ceſtui que uſe* before the Statute, might have an *Audita querela*: all which proves it to be but an equitable Action, upon which the Law doth not looke with ſo ſtrict an eye, as upon other Actions. And as to the Objection which was made by *Rolls*, that he ought to ſhew, That the Conuſee had an eſtate by diſſeiſin: *Jones* was againſt that, for that no man is bound to betray his Title. And for theſe reaſons it was adjudged by the whole Court, That the Judgement ſhould be affirmed.

109. A writ of Error was brought to reverſe a Judgement given in the Common pleas, and after a *Certiorari*, and Errors aſſigned, they in the Common pleas did amend the Record. And by the whole Court (*Crooke* onely abſent) they cannot doe it, for after a *tranſmittitur*, they have not the Record before them. And *Barckley* ſaid, That the difference ſtands betwixt the Common pleas and the Kings bench. And betwixt the Kings bench and the Exchequer. For the Record remaines alwaies in this Court, notwithſtanding a writ of Error brought in the Exchequer chamber; and therefore we may amend after. Wherefore the Court ſaid, that if the thing were amendable, that they would amend it. But the court of Common Pleas cannot.

Sewell *againſt* Reignalls.

110. THe caſe was thus, Husband and Wife did joine in an Action of Debt, in the right of the wife, as Adminiſtratrix to *I. S.* And the Defendant being arreſted at their ſuit, did promiſe to the husband in conſideration that the husband would ſuffer him to goe at large, that he would give him ſo much. The husband and wife did joyne in an Action upon the Caſe, upon the promiſe made to the husband alone. And upon *Non aſſumpſit* pleaded, it was found for the Plaintiffe. *Porter* moved in arreſt of Judgement, that the promiſe being made to the husband onely, that they ought not to join in the Action; *Barckley*, the Action is well brought, for the husband is Adminiſtrator in the right of the wife: for otherwiſe the conſideration were not good. For if he were not Adminiſtrator, then he could not ſuffer him to goe at large: and then if he be Adminiſtrator in the right of his wife, the promiſe which is made to the husband, is in judgement of Law alſo made to the wife; and they ought to joyne in the Action. But *Crooke*, *Jones*, and *Bramſton* Chiefe Juſtice contrary, That the Action will not lye, becauſe the promiſe is of a collaterall thing, and not touching the duty due to the wife, as Executrix, for then perhaps it would have been otherwiſe.

wiſe. And they ſaid (againſt the opinion of *Barckley*) that this ſumme received ſhould not be aſſets in their hand. And *Bramſton* ſaid, that it is not like the caſe, where a man promiſeth to the father of *Jane Gappe*, in conſideration of a marriage to be had betwixt his daughter and him, that he would make her a joynture; there as well the daughter as the father, may bring the Action. And it was adjorned.

111. A Parſon Libelled in the Eccleſiaſticall court for Tithes. And after Sentence *Rolls* moved for a Prohibition upon the Suggeſtion of a *Modus decimandi*; but it was not granted, becauſe too late. But *Rolls* tooke this difference, and ſaid, that ſo had been the opinion of the Court, where the partie pleads the *Modus*, and where not; for if he plead it there notwithſtanding a Sentence, Prohibition hath been granted; contrary where he doth not plead it. But notwithſtanding the Court refuſed to grant a Prohibition.

112. The Pariſhioners of a pariſh, together with the Parſon, ſued the Churchwardens in the Eccleſiaſticall court, to render Accompt, and recovered againſt them and Coſts taxed. Afterwards the Parſon releaſed the Coſts, and notwithſtanding the Pariſhioners ſued for the Coſts: and thereupon a Prohibition was prayed; becauſe that the Coſts are joyntly aſſeſſed, and the releaſe of one would barre the others. But the opinion of the whole Court, that a Prohibition ſhall not be granted: For the coſts recovered there, an Action might be ſued in the Eccleſiaſticall court: and therefore although that in our Law, the releaſe of one ſhall bar the others; yet the Action being ſued there, and they having conuſance thereof, the ſame is directed according to their Law. And therefore it hath been adjudged, that if the husband and wife ſue in the Eccleſiaſticall court, for the defamation of the wife, and Sentence be given for them, and Coſts taxed, and afterwards the huſband releaſeth the coſts, in the ſuit commenced in the Eccle-

ſiaſticall court, it ſhall not barre the wife, for the reaſons given before.

Brooke *and* Boothe *againſt* Woodward *Adminiſtrator of* John Lower.

113. IN Debt upon a Bond, the Defendant prayed Oyer of the Condition, which was entred *in hæc verba*. The condition of this Obligation is ſuch, That if the Obligor did deliver to the Plaintiffes two hundred weight of hops in conſideration of ten pounds already paid, and fifty five pound to be paid at the delivery; and the Plaintiffes to chooſe them out of twenty foure bagges, of the Obligors own growing, and to be delivered at *F.* at a day certaine. Provided, that if the Plaintiffes ſhould diſlike their Bargaine, that then they ſhould loſe their ten pounds: and if they liked, they ſhould give ten pounds more, &c. Upon Oyer of which the Defendant pleaded, that the Plaintiffes *non elegerunt*. And upon that, the Plaintiffes did Demurre in Law: and ſhewed for ſpeciall cauſe of Demurrer, that the Plea was double. *Withrington* for the Plaintiffes, that the plea is double, in that the Defendant hath alledged, that he was ready, and that the Plaintiffes *non elegerunt*: which are both iſſuable pleas, and each of them, of it ſelfe (admitting no requeſt of the part of the Defendant requiſite) is ſufficient in barre of the Action. Beſides he conceived, as this caſe is, that the firſt act ought to be done by the Defendant; for he ought to ſhew the bags, and requeſt the Plaintiffes to make election. And he compared it to the caſe of 44 *E.* 3. 43. and alſo to *Hawlins* caſe, 5 *Rep.* 22. Farther he conceived, that the Defendant ought to have alledged, that he had twenty foure bagges, and twenty foure bagges of his owne growing: for if he have not them, it was impoſſible for the Plaintiffes to make choice, & by conſequence the condition broken. *Twiſden* contrary, That the plea is not double, for the alledging himſelfe to be ready, was but inducement to the ſubſequent matter, *quod non elegerunt*.

gerunt. And he relyed onely upon their election; and in proof thereof he relyed upon the bookes, 1 *H*.7.16. and 24 *E*.3.19. Farther, here no notice is requiſite, nor he ought not to averre that he had them; for he being bound to deliver them, he is eſtopt to ſay that he hath them not. 19 *Eliz. Dyer* 314. and 3 *Eliz. Dyer*. As to the ſhewing of them, we ought not to doe it, for the Plaintiffes ought to doe the firſt Act, *viz*. Requeſt the Defendant to ſhew the bagges, for them to make choiſe of. And the whole Court ſtrongly enclined againſt the Plaintiffes, for the reaſons before given, and they adviſed them to waive the Demurrer, and plead *de novo*; which they did.

Thorps *Caſe*.

114. IN an Action upon the Caſe upon *Aſſumpſit*, it was agreed by the whole Court, That where there is a mutuall promiſe, *viz*. *A*. promiſeth to *B*. that he will doe ſuch a thing: and *B*. promiſeth to *A*. that in conſideration thereof, that he will do another thing; If *A*. bring an Action againſt *B*. and alledge a breach *in non faciendo*, and ſaith that he is ready to doe the thing which he promiſed, but that the other refuſed to accept of it. Notwithſtanding the breach is well laid, and the Action well lyeth; for it was a idle and more then the Plaintiffe was compelled to doe, to ſhew that *paratus eſt* to do the thing which he promiſed: So that if there were a breach upon the part of the Defendant, it is ſufficient. and if there was a Breach on the Plaintiffes part, the Defendant ought to bring his Action for it. And the difference was taken by *Bramſton*, Where the promiſe is conditionall, and where abſolute, as in our caſe. And agreeing with this difference, it was ſaid at the Barre and Bench, That it was adjudged.

115. *Hutton* moved to quaſh certaine Preſentments becauſe they were taken in a Hundred court, which is not the Kings Court; and therefore *coram non judice*. It was ſaid by Juſtice *Jones*, That a Hundred may have a Leet appendent to it; and

then they were lawfully taken. *Barckley*, and the whole Court anſwered; becauſe it doth not appeare to the Court, whether there was ſo or not, that the Preſentments were void.

116. Concerning damage cleere, It was agreed, that it was hard that the Plaintiffe ſhould be ſtopt of his Judgement untill he had paid his damages cleere. For perhaps, if the Defendant be *inſolvant*, the Plaintiffe ſhould pay more for damages cleere, then he ſhould ever get. And therefore the Court was reſolved to amend it. This damage cleere, is twelve pence in the pound of the damages given to the party in this Court, and two ſhillings in the Common pleas. See the *Regiſter*, where is a writ for damage cleere.

Harris *againſt* Garret.

117. IT was agreed by the whole Court, that it is no good plea to ſay, That ſuch an one was bound in a Recogniſance, and not to ſay *per ſcriptum obligat'*, & to conclude that it was *ſecundum formam Statuti*, doth not help it. But in a Verdict it was agreed to be good. And according to this difference, it was ſaid by the Court, That it was adjudged in *Goldſmiths* caſe, and *Fulwoods* caſe.

118. It was agreed by the Court, That upon a *Certiorari*, to remove an Indictment out of an Inferiour court, that the Defendant ſhall be bounden in a Recogniſance to proſecute with effect, *viz.* to Traverſe the Indictment, or to quaſh it for ſome defect. And if he doth not appeare, an Attachment ſhall iſſue out againſt him.

Iuſtice Crookes *Caſe*.

119. IT was agreed by the Court, That although a Bill be preferred in the Starchamber againſt a Judge for Corruption, or any other, for any great miſdemeanour: yet if the Plaintiffe

Plaintiffe will tell the effect of his Bill in a Tavern, or any other open place, and by that meanes ſcandaliſe the Defendant; that the ſame is puniſhable in another Court, notwithſtanding the ſuit dependant in the Starchamber: And ſo *Jones* ſaid, that it was adjudged in a bill in the Starchamber againſt Juſtice *Crook*; which was abated, becauſe it was brought againſt him, as Sr. *George Crooke* onely, without addition of his Office and Dignity of Judge.

Trinit. 16°. Car' *in the Common Pleas.*

120. AN Apothecary brought an Action upon the Caſe, upon a Promiſe for divers wares, and medicines, of ſuch a value, and ſhewed them in certaine. The Defendant pleaded in barre, that he had paid to the Plaintiffe *tot & tantas denarior' ſummas*, as theſe medicines were worth, and doth not ſhew any ſumme certaine. And the plea was holden to be no good plea; wherefore Judgement was given for the Plaintiffe.

121. A Contract was made betwixt *A.* and *B.* Mercers, That *A.* ſhould ſell to *B.* all his Mercery wares, and take his Shop of him: In conſideration of which, *A.* promiſed that he would not ſet up his Trade in the ſame Towne. And adjudged a good *Aſſumpſit* in the Kings Bench, as *Littleton* Chief Juſtice ſaid. But if one be bound, that he will not uſe his Trade, it is no good Bond.

122. *Rolls* moved this Caſe, A writ of Error was brought upon a Judgement given in Yarmouth, and the Caſe was thus. *A.* and *B.* were bound to ſtand to the Arbitrament of *I. S.* concerning a matter which did ariſe on the part of the wife of *B.* before coverture. *I. S.* awarded, That *A.* ſhould pay to *B.*

and his wife ten pounds, at a place out of the Juriſdiction. And thereupon, upon an Action brought upon the Bond, a Breach was aſſigned for not payment of the mony at the place. And here it was objected, That it was Error, becauſe it was there aſſigned, for Breach, the not payment of the mony at a place out of Juriſdiction: and for that cauſe the Judgement was not well given. Secondly, becauſe that the Award was, That payment ſhould be made to *B.* and his wife, which was out of the Submiſſion. But notwithſtanding, Judgement was affirmed by the whole Court. For as to the firſt, iſſue could not be taken upon payment or not payment out of the Juriſdiction; becauſe it was not Traverſable. As to the ſecond, the Controverſie did ariſe by reaſon of the wife: and therefore the Award was within the Submiſſion, being made that the payment ſhould be to both.

123. It was ſaid by the Court, that it was one *Kellwayes* Caſe, adjudged in this Court, That a Promiſe made to an Atturny of this Court, for Solliciting of a Cauſe in Chancery, was good; and that it was a good conſideration, upon which the Atturney might ground his *Aſſumpſit*: For it was reſolved, That it was a lawfull thing for an Atturney to Sollicite.

124. The Court would not give way for Amendements in Inferiour Courts.

125. By *Jones* and *Barckley* Juſtices, If there be an inſufficient Barre, and a good Replication, after a Verdict, there ſhall be a Repleading. Contrary, where there is no Verdict.

Smithſon *againſt* Simpſon.

126. *A.* and *B.* were bound to ſtand to, and obſerve ſuch Article, Agreement, Order, or Decree, as the Kings Councell of the Court of Requeſt ſhould make. *A.* brought an

an Action upon the Bond againſt *B.* & pleaded that the Kings Councell of the Court of Requeſt made ſuch Order, and Decree, and that the Defendant did not obſerve it. The Defendant pleaded, That the King and his Councell did not make the Decree: and adjudged by the Court that the plea was not good.

127. Sir *Matthew Minkes* was indicted of Manſlaughter, and found guilty. And it was moved by *Holborne*, of Councell with Sr. *Matthew*, that the Indictment was inſufficient, becauſe there was *dans &c.* without *ad tunc & ibid.* according to preſidents; as alſo becauſe it was *plagam ſeu contuſionem*, which is incertaine: as alſo that the party killed *languebat à pred' 15. die uſque decimam ſextam*. And he ſaid, That there was no time betweene thoſe two daies, but it ought to have been, That he languiſhed from ſuch an houre till ſuch an houre; and that, he ſaid, were the ancient Preſidents. And he ſaid, That an Indictment that *A.* killed *B. inter horam decimam & undecimam* was adjudged to be naught. And he tooke many exceptions: all which were diſallowed by the Court. For which cauſe Sir *Matthew* Prayed his Clergy, and had it.

Paſch. 17°. Car. *in the Common Pleas.*

Weeden *againſt* Harden.

128. CUſtome to pay Tithes in kinde for Sheep, if they continue in the pariſh all the yeare, but if they be ſold before ſhearing time but an halfe penny for every one ſo ſold. And cuſtome in the ſame pariſh alſo, to pay no Tithes of Loppings or Wood for fire, or Hedges &c. The firſt is an unreaſonable cuſtome; for by ſuch meanes the Parſon ſhall be defeated of his Tithes. But the laſt cuſtome is good, by the whole Court.

Sir

Sir Edward Powells *Caſe.*

129. THe Lady *Powell* ſued Sir *Edward Powell*, her huſband, in the high Commiſſion Court, for Alimony. Whereupon a Prohibition was prayed in this Court, and granted. Serjant *Clarke*, who argued for the Prohibition, The Spirituall court cannot meddle with any thing which is not redreſſable by them; they may compell a man *tractare uxorem*, or Divorce them; but not grant Alimony, which doth appertaine to the Judges of the Common Law. 7 & 8 *H.* 3. there is a writ directed to the Sheriffe, to ſet out reaſonable Eſtovers for the Alimony of the wife. Preſident ſince the Statute of 1 *Eliz.* where Prohibitions have been granted in this Caſe. *viz.* Sr. *William Chenyes* Caſe, *Mich.* 8 *Jac. in Comm' Banco*, who committed Adultery, and was ſeparated, and the wife ſued for Alimony, and a Prohibition granted. *P.* 8 *Jac.* A Prohibition granted. And by the Statute of 1 *Eliz.* they have not power to hold Plea of Alimony. The words of the Statute are, Reforme, Redreſſe, &c. And it is not apt to ſay, that Alimony ſhall be Reformed, or Redreſſed. And beſides, Alimony is a Temporall thing, and chargeth a mans Inheritance: and therefore they ſhall not intermeddle with it. Serjant *Rolls* contrary, She may ſue for Alimony in the Eccleſiaſticall court, but if they proceed to Fine or Impriſonment, then a Prohibition lyeth. They have power of Separation which is the Principall; and therefore of Alimony which is Incident. And the high Commiſſion have the ſame power given to them by the Statute of 1 *Eliz.* as the Spirituall court hath, and therefore they may meddle with Alimony. And where it was before objected, The great inconvenience to the party, by the citing him out of his Dioces, for by that, he ſhould loſe the advantage of his Appeale. *Rolls* ſaid, It was good for any within the Province: and that is the Court of the Province. *Banks* Chiefe Juſtice; Although that there be Preſidents, that the high Commiſſion have holden Plea of Alimony, and granted the ſame, yet it was not Law. And although

though that Alimony be expreſſed in their Commiſſion, that doth not make it Law, if it be not within the Statute. As to the citing out of the Dioces, he conceived, the Commiſſion ſhould be uſeleſſe, if they might not doe it: and therefore he granted a Prohibition. *Crawly*, *Reeve*, and *Foſter*, Juſtices, agreed. But they doubted whether the citing out of the Dioces, were good or not; for the great prejudice which might enſue to the party in loſing his Appeale. And in anſwer to the objection of *Rolls*, the Chiefe Juſtice ſaid, That the Eccleſiaſticall court had not Juriſdiction of Alimony; but if they had, yet all the Juriſdiction of the Spirituall Court is not given to the high Commiſſion, by the Statute of 1 *Eliz.* And they all agreed, That they might as well charge my Land with a Rent charge, as grant Alimony out of it; and a Prohibition was granted.

130. No Sequeſtration can be granted by a Court of Equity, untill the Proces of contempt, are run out. And by *Reeve* and *Foſter*, Juſtices, The granting of Sequeſtration of things Collaterall, as of other Lands or Goods, is utterly illegall.

131. Whereas upon Suggeſtion of a *Modus decimandi*, a Prohibition was granted: now a Conſultation was prayed as to Offerings, and granted; becauſe the *Modus*, *&c.* doth not goe to the Perſonalty.

132. Vpon a Jury retorned, a ſtranger who was not one of the Jury, cauſed himſelfe to be ſworne in the name of one who was of the Jury. And he againſt whom the Verdict paſſed, moved the Court for a new Tryall upon that matter. But the Court would not give way to it; becauſe it appeareth to them that he is ſworne upon Record. But all the Court agreed that he might be Indicted for that Miſdemeanour: and by *Reeve* and *Foſter*, Juſtices, the parties may have an Action upon the Caſe againſt him.

133. It was taken for a Rule by the Court, That no Amendment ſhould be after a Verdict, without a conſent.

134. Trover and Converſion againſt husband and wife, and declared that they did convert *ad uſum eorum*. The Jury found the wife not guilty. And by the Court, this naughty Plea, is made good by the Verdict.

Sir Richard Greenfeilds *Caſe, in the Kings Bench.*

135. THou (*innuendo*, Captaine *Greenfeild*) haſt received mony of the King to buy new Saddles, and haſt couſened the King, and bought old Saddles for the Troopers. *Trever*, It is not actionable. 8 *Car.* The Mayor of *Tivertons* caſe: one ſaid of him, That the Mayor had couſened all his Brethren, &c. not actionable. 9 *Jac.* in the Kings Bench, That the Overſeers of the Poore had couſened the poore of their Bread; not actionable. 26 *Eliz.* in the Kings Bench, *Kerby* and *Wallers* caſe, Thou art a falſe Knave, and haſt couſened my two kinſmen, not actionable. *K.* is a couſening Knave, not actionable. 18 *Eliz.* in the Kings bench. Serjant *Fenner* hath couſened me and all my kindred, is not actionable. Words are actionable either in reſpect of themſelves, or in relation to the perſon, of whom they are ſpoken: where Liberty is infringed, the Eſtate impaired, or Credit defamed; there they are actionable. *Mich.* 29 *H.* 8. *Rot.* 11. Villain, is not actionable. *Morgan* and *Philips* caſe, That he is a Scot, actionable, becauſe he is an Alien borne. *Hill.* 1 *Car.* *in Com. Ban.* Sir *Miles Fleetwoods* caſe. Mr. Receiver hath couſened the King, actionable in reſpect of his Office of Receiverſhip. And ſo it was afterwards adjudged upon Error brought in the Kings Bench. If theſe words had been ſpoken of the Kings Saddler, they had been actionable, for thereby he might loſe his Office: but there is no ſuch prejudice in our caſe; and he is of another Imployment, and is but for a time onely. But by *Heath* Juſtice,

Justice, and *Bramston* Chiefe Justice, the words are actionable, for it is not materiall what imployment he hath under the King, if he may lose his imployment or trust thereby. And it is not material whether the imployment be for life or years, &c.

136. A Lawyer who was of Councell may be examined upon Oath as a Witnesse to the matter of Agreement, not to the validity of an assurance, or to matter of Councell. And in Examining of a Witnesse Councell cannot question the whole life of the Witnesse, as that he is a Whoremaster, &c. But if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was *Onbies* Case of Grayes Inne; and by all the Judges it was agreed as before. And by *Reeve* Justice, If a Counsellor say to his Client, that such a Contract is Simony, and he saith, he will make it Simony, or not Simony; And thereupon the Counsellor that a Simoniacall Contract, it is no offence in the Counsellor.

Pasch. 17°. Car' *in the Kings Bench.*

137. PRescription to have Common for all his cattell Commonable, is not good, for thereby he may put in as many beasts as he will. But a prescription to have Common for his cattell commonable levant and couchant, is a good prescription. And it was said, that that was *Sayes* Case of the County of Lincoln adjudged in this Court.

138. In *Tompson* and *Hollingworths* Case, it was agreed, That a Court of Equity cannot meddle with a cause after it hath received a lawfull triall and Judgement at the Common Law, although that the Judgement be surreptitious.

139. The Statute of 31 *Eliz.* enacts, That if a man be preſented, admitted, inſtituted, and inducted upon a Simoniacall contract, that they ſhall be utterly void, &c. Whether the Church ſhall be voyd without deprivation, or ſentence declaratory in the Spirituall Court or not, was the Queſtion in a *Quare impedit* brought by Sr *John Rowſe* againſt *Ezechiell Wright*. *Rolls* and *Bacon* Serjants, That it is abſolutely void without ſentence declaratory, &c. Where the Statute makes a thing void, it ſhall be void according to the words of the Statute, unleſſe there ſhall be inconvenience or prejudice to him for whom the Statute was made. The Statute of 8 *H.6. cap.*10. That an utlagary ſhall be void if proceſſe doe not iſſue to the place where the party is dwelling; yet it is not void before Errour brought. The Statutes of 1 *Eliz.* & 31 *Eliz.* That all Leaſes by a Biſhop not warranted, &c. ſhall be void: They are not void but voidable onely, which agreeth with the reaſon of the Rule given before. The Statute of 18 *H. 6. 6.* That if the King grant Lands by Patent not found in the Office, that the Patent ſhall be void; it is void preſently, *M.*30. *H.6. Grants* 92. and *Stamford* 61. although they be matter of Record. The Statute of 31 *Eliz.* is expreſſely that it ſhal be void, fruſtrate, and of none effect, therefore by the Rule before given it ſhall be abſolutely void. *M.* 10 *Jac. Samford* and Dr *Hutchinſons* Caſe. Reſolved that an Incumbent preſented by Simony cannot ſue for Tythes againſt his Pariſhioners; a villain purchaſeth an Advowſon, the Church becomes void, the Lord preſents by Simony, and the Clark is admitted, Inſtitute, and inducted, yet it is void and doth not gain the Advowſon to the Lord. *Inſtitut.* 120.*a* If an Incumbent take a ſecond Benefice, the firſt is meerly void. 4 *Rep. Hollands* Caſe. The difference is where it is of the value of 8 l. where not. And there is difference betwixt avoydance by Statute and avoydance by the Eccleſiaſticall Law. Avoydance is a thing of which the Common Law takes notice, and ſhall be tried by Jury if it be avoydance in fact, if an avoydance in Law, by the Judges. If a Parſon doth not read the Articles according to the Statute of 13 *Eliz.* it is *ipſo facto* void, without ſentence.

6 *Rep.* 29, *Greenes* caſe. 30 *Eliz. Eatons* caſe. *Inſtit.* 120, a. expreſſe in the point. And the difference is, that before the Statute of 31 *Eliz.* it was onely voidable by deprivation; but now by the Statute it is abſolutely void, *Mich.* 9 *Jac. Cobbert* and *Hitchins* caſe. *Mich.* 42 *Eliz. Baker* and *Rogers* caſe. 2 *Jac. Goodwins* caſe, in *Com' Banc.* in all which caſes it was not reſolved but paſſed tacitely, and without denyall: That a Preſentation by Simony was void, without declaratory Sentence. It was objected, that it is cleere by the Eccleſiaſticall law, it is not void without a Sentence declaratory. It is anſwered, Of things of which our Law and the Eccleſiaſticall law take conuſance, we are onely to relie upon our Law, and not upon the Eccleſiaſticall law; eſpecially when the Eccleſiaſticall is repugnant or contrary to our Law, as in this Caſe it is. The Judges of the Common Law ſhall judge the Church void, or not void. *Fitz. Annuity* 45. 12 & 13 *Jac.* in the Kings Bench *Hitchen* and *Glovers* caſe, in an *Ejectione firme.* In this caſe it was reſolved, That if *I. S.* marry two wives; the Judges of the Common law may take conuſance of it: yet mariage is meerely an Eccleſiaſticall thing. It was objected, That the firſt branch of the Statute of 31 *Eliz.* that it ſhall be void, &c. Secondly, that it ſhall be void, as if he were naturally dead, &c. So that the adding of theſe words (as if he were naturally dead) in the latter clauſe, prove that it was the meaning of this Statute, that it ſhould not be void in the firſt caſe, without Sentence declaratory. It is anſwered, There is a difference in words, not in ſubſtance, or the intent. *& qui hæret in litera, &c. Jermin* and *Taylor* Serjants, That it is not void before Sentence, &c. Firſt, Admiſſion, Inſtitution, and Induction, are Judiciall acts, and done by the Biſhop: and therefore ſhall not be void before an act done to make them void, which is Sentence declaratory, or deprivation. Secondly, the Statute of 31 *Eliz.* ſaith, it ſhall be void, not that it is, &c. Thirdly, the Eccleſiaſticall law is, That no Preſentation, &c. ſhall be void before Sentence, &c. Fourthly, the Eccleſiaſticall law is Judge of it, &c. Plenarty ſhall be tryed by the Biſhop, not by Jury. 6 *Rep.* 49, a. Refu-

ſall ſhall not be tryed by Jury, but Death ſhall. 5 *Rep.* 57. 9 *H.* 7. Profeſſion ſhall be tryed by the Spirituall court 4 *Rep.*71.b.4 *vid.*4 *Rep.*29.a.the credit which our Law gives to the Eccleſiaſticall law. It is there put, That one was divorced without his knowledge, which was ſaid to be a ſtrange caſe. Fiftly, the Preſentee by Simony doth remaine Incumbent *de facto*, although not *de jure*; and that by the words of the Statute which makes the Church void, as to the King onely, not as to the Incumbent, without declaratory Sentence: and the Church is no more capable to have two Incumbents, then a woman to have two husbands. There is a difference where the Incumbent preſented by Simony is alive, the ſame is not void *in facto*, without ſentence declaratory: but if he be dead, there it is. And this difference ſtands upon the two clauſes in the Statute of 31 *Eliz.* And the Statute of 17 *Car.* of Election of Burgeſſes, takes notice of Avoidance *de facto & de jure*, *Trinit.* 16 *Car. in Com. Banc. Ogelies* caſe. One was Preſented within the age of twenty three yeares, it did not give Laps without notice: for it was avoidance in Law, not in Fact, *vid.* Statut. 9 *Eliz.* for Excommunicating a ſtriker in the Churchyard, &c. This Statute of 31 *Eliz.* differs from the Statute of 1 *Eliz.* for not reading of the Articles. Thoſe ſtatutes ſay, that it ſhall be void *ipſo facto*, but not ſo in our Caſe. And the Caſes cited for Authority in the point, are betwixt party and party, and not in caſe of a third perſon, as our Caſe is. 18 *Eliz. Dyer.* A meere Lay-man is Preſented, it is not *ipſo facto* void, without Sentence. So it is of one within the age of nine yeares; for he cannot governe others. *Trinit.* 4 *Jac.* in the Common pleas, *Cooke* and *Stranges* caſe. The King Preſents, and before Inſtitution Preſents another, it is good: but in the interim, the King ought to repeale his firſt preſentment, and that is a revocation. *vid. Dyer* 292. a. where it is a Quere, Whether he need not to alledge, that a Repeale was brought, and ſhewed, &c. The King grants, and afterwards makes a ſecond Grant of the ſame thing, There are many Examples in *Brooke* and *Fitzherbert*, that it is not good without a Repeale. But this Caſe, *viz.* of 6 *H.* 8. 9. extends onely

to

to Land, and not to an Advowſon, &c. But it was reſolved by all the Judges, That the Church was void by the Statute of 31 *Eliz.* to all purpoſes, and to all perſons, as to the Pariſhioners, as to a Stranger, who brings Treſpaſſe, or *Ejectione firmæ* as to the King, as to him who Preſents; and that without deprivation, or Sentence declaratory in the Eccleſiaſticall court: And accordingly Judgement was given.

Hichcocke *againſt* Hichcocke.

140. THe Caſe was this, The Vicar did contract with a Pariſhioner, to pay ſo much for encreaſe of Tithes, and dyed; and his Succeſſor ſued in the Eccleſiaſticall court for them. And a Prohibition was prayed, & granted by all the Juſtices. And here it was ſaid, That a reall Contract made by the Parſon, and confirmed by the Ordinary, could not be altered in the Spirituall court. And by Serjant *Mallet*, a reall accord though it be between Spiritual Perſons, and of Spiritual things; yet it is onely queſtionable at the Common Law. 20 *E.* 3. *Annuity* 32. 38 *E.* 3. 6. 8. & 19. And by Serjant *Clarke*, Reall compoſition by a Parſon, who claimes not any encreaſe of the endowment to the Parſonage, ſhall not binde his Succeſſor. The words of the Contract here were, *inter ſe convenerunt*: and that is no reall Compoſition, although that the Biſhop call it ſo, *realis Compoſitio*, and his calling of it ſo doth not alter the nature of it, but it remaines a Perſonall agreement; and ſo ſhall not bind the Succeſſor, although it be confirmed by the Biſhop. A Parſon cannot doe any thing to the damage of his Succeſſor. The Vicar tooke oath, That they were not for encreaſe of Tythes: the Ordinary being a ſtranger to the Compoſition, is not made a party by his Confirmation, nor is the Compoſition altered by it, *Littleton Sect.* 335. The Lord Confirmes the Land to the Tenant, the ſame doth not alter the Tenure, nor prejudice the Lord. The power of the Biſhop, *augendi & minuendi* the Portion of the Vicar, is by the Common Law, for generall Cure of Soules. The Parſon and Vicar have privity betwixt them. 40 *E.* 3. 28. 31 *H.* 6. 14.

6, 14, 16 *Aſſ. Annuity* 32. 2 *Rep.* 44. *Plow. Com.* 496, 21 *E.* 3. 5, 10 *H.* 7. 18 *Dyer* 43. & 84.

141. A Prohibition was prayed to the Court of Requeſts, and the Caſe was thus: A Feme Sole poſſeſſed of a Tearme, conveyed the ſame over in Truſt for her, and Covenanted with *I. S.* whom ſhe did intend to marry, that he ſhould not medle with it, and for that purpoſe tooke a Bond of him. They intermarryed; he may intermedle with it, but he ſhall not have it, and by Equity he cannot aſſigne it, by reaſon of the Covenant before marriage. A Feme Sole conveyes a Terme in Truſt and then marrieth, the husband aſſignes it, the Truſt, not the Eſtate ſhall paſſe, by *Reeve* and *Foſter*. But by all the Judges a Prohibition ſhall not be, for it is matter onely for Equity: But if they direct *Demiſit*, or *non demiſit*, *Aſſignavit*, or *non*, &c. then they exceed their Juriſdiction, and a Prohibition lyeth.

142. A woman brought a Writ of Dower, and recovered, and upon a ſuggeſtion made upon the Roll, that the husband dyed ſeiſed, a Writ of enquiry of Damages, iſſued forth. And before the Retorn thereof, a Writ of Error was brought; and it was by *Steward* againſt *Steward*, and two things were moved. 1. Whether Error would lye before the Retorne of the Writ of Enquiry, or not. 2. Whether the Writ of Error be a *Superſedeas* to the Writ of Enquiry. And by *Taylor* and *Rolls* Serjants, That Error doth not lye before Judgement upon the Writ of Enquiry. And this caſe they compared to *Medcalfes* caſe 11 *Rep.* 38. But by Serjant *Bacon* it is well brought. Dower is by the Common Law, and damages are given by the Statute of *Merton*, and that is the maine Judgement. 5 *Rep.* 58, 59. And the very caſe is put in *Medcalfes* caſe, 11 *Rep.* and diſtinguiſhed from other caſes. And it was argued by another Serjant, That the Error was well brought, becauſe that in Dower the Judgement doth determine the Originall: and therefore at the Common Law Error will well lye. And the

the damages are given by the Statute of *Merton*, but that doth not alter the Judgement, or the nature of the Action. It differs from the caſe of Judgement in an *Ejectione firme*, and Accompt; for after ſuch Judgements *Nonſuit* may be: but not ſo in the caſe of Dower, in which Judgment is, *quod recuperet, &c.* A *Precipe* is brought againſt two, one pleades to iſſue, the other an inſufficient Plea, upon which Judgement is given, No Error lyeth before Judgement be given for the other: for the whole matter is not determined. But in ſeverall *Precipes* againſt two, it is otherwiſe. 34 *H.* 6. 18 *Fitz. Scire facias.* 11 *Rep.* 39, a. b. In caſe of *Ejectione firme* it is a Quere if Error may be brought, &c. And *Bankes* Chiefe Juſtice ſaid, That it had been adjudged both waies; but that differs from our caſe, for in that damages are given by the Common Law. Judgement is, in a *Quare impedit* Error may be brought before, &c. which is like to our caſe, for damages in both caſes are given by Statute. And where it was objected, That thereby damages ſhould be loſt. He anſwered, No. For the Kings Bench may award a Writ of Enquiry of Damages. And the 11 *Rep.* is expreſſe authority. 2. The Error is no *Superſedeas, &c.* 11 *Jac.* In *Tincke* and *Brownes* caſe, it was ruled and reſolved, That a Writ of Error brought, was not a *Superſedeas* to the Writ of Enquiry of damages. But it was reſolved by all the Judges, that the Error was well brought, for the reaſons before given: and that Error is a *Superſedeas* to the Writ of Enquiry. And it was entred for a Rule, That in all Writs of Enquiry of damages, notice ought to be given aſwell in Reall as Perſonall Actions.

143. If a Priſoner will remove himſelfe by a *Habeas Corpus*, he ſhall pay the Coſts of the Removall: but if the Plaintiffe will remove the Priſoner, he ſhall pay reaſonable charges.

144. *Dickinſon* Libelled againſt *Barnaby* in the Spirituall court, for theſe words, *D.* is a Beaſtly Queane, Drunken

Queane, Coppernoſe Queane, and ſhe was one cauſe wherefore *Barnaby* left his wife, and hath miſpended five hundred pounds, and that ſhe keepes company with Whores. And a Prohibition was prayed and granted, becauſe that the words are not actionable.

145. *Hill.* 16 *Car.* in this Court. *A.* a poore man ſold his eſtate for twenty pound yearely, to be paid during his life: for the ſecurity of which the Vendee was bound to *A.* and another in a thouſand pounds; the other releaſeth the Bond, the mony not being paid, *A.* is compelled to have Reliefe of the Pariſh for his maintenance. The Churchwardens and *A.* exhibited a Bill in the Court of Requeſts, & there had remedy.

146. *A.* and *B.* his wife Preſent to a Church, to which they have have no Right. Queſtion, Whether that doth grant any thing to the wife or no: reſolved, No. For the wife is at the will of her husband, and Preſentation is but Commendation, or the Act of the husband, &c. And it is not like unto an Entry in Land by them. *Mich.* 16 *Car.* betwixt *Neſſon* and *Hampton.* Otherwiſe it is when the wife hath Right.

Sir John Pits *Caſe.*

147. IN the caſe of Sir *John Pits* Phillizor of London, it was moved, that his Executors might have the profits of the Writ, which are to be ſubſcribed with his name, foraſmuch as all Proces of the ſame ſuit, ought to have the ſame name ſubſcribed to them, for the attendance of them being neceſſary, they to ought have the Profits according to it. *Tooleys* caſe, *Hobarts Reports.* The reaſon which was given to the contrary was, becauſe there was another Officer, who is to anſwer any damages, by reaſon wherof he is to have the benefit

148. Judges are the onely expoſitors of Acts of Parliaments.

ments, although they concerne Spirituall things, *Searles* caſe, *Hobarts Rep.* 437. 4 *E.* 4. 37, 38.

149. If horſes be traced together, they are but one diſtreſſe: And note, Fetters upon a horſe legge, may be diſtreined with the horſe.

Hillary 16°. Car. *in the Kings Bench.*

150. A Merchant goeth beyond Sea and marrieth an Alien. It was reſolved, the the Iſſue is a Denizen; for the husband being the Kings Subject, the wife is not reſpected, becauſe ſhe is at the will of her husband, and alſo becauſe they are but one perſon in Law. *Bacon* and *Bacons* caſe.

151. If a Towne hath a Chapell, and bury at the Mother church, and therefore have time out of minde repaired part of the Wall of the Church, it is good to excuſe them of repairing the Church. Inhabitants of ſuch a place preſcribe to repaire a Chapell of Eaſe: and in regard thereof, that they have time out of minde been free from all Reparations of the Mother Church, it is good. But if ſuch a Chapell hath been built within time of memory, then they ought to have proofe of ſome agreement, by virtue of which they are diſcharged of Reparations of the Mother church. *Paſch.* 17 *Car.* in the Kings Bench. The Inhabitants within the Pariſh of H. having a Chapell of Eaſe, and cuſtome that thoſe within ſuch a Precinct ought to finde a Rope for the third Bell, and to repaire part of the Mother church: in conſideration of which they have beene freed from payment of any Tithes to the

Mother church. Whether it be a good Cuſtome, or not, *Quære* for it was Adjorn.

Hillary 16°. Car. *in the Common Pleas.*

152. WHere the Eccleſiaſticall court hath conuſance of the cauſe, there proceedings although they be Erroneous, are not examinable in this Court. And it was given for a Rule, That it is no cauſe to grant a Prohibition.

153. The Sheriffe in the Retorne of a Reſcous, ſaid, that he was in *Cuſtodia Balivi Itinerantis*. And that a Reſcous was made to his Bayly *Itinerant*; and it was not good: otherwiſe, if he had been Bailife of a Liberty, for the Law taketh notice of him. And therefore the Court did award that the Reſcouſors ſhould be diſmiſſed, and that the Sheriffe ſhould bring in the man by a certaine day at his perill. Otherwiſe it is in the Kings Bench.

154. One cannot be Attorney within age, becauſe he cannot be ſworne.

155. Commiſſioners have a Warrant, and they execute it with another who is a ſtranger to the Warrant, It is good; and the other perſon is but Surpluſage.

156. A Prohibition after Sentence ſhall not be granted but in ſome eſpeciall caſe.

157. It was ordered by the Lords houſe of Parliament, That

That onely Meniall ſervants, or one who Attended upon the perſon of a Knight or Burgeſſe of the Parliament, ſhould be free from Arreſt.

158. Adminiſtration is granted to the wife, the husband having many children. Whether it be in the power of the Ordinary to make diſtribution, or not. Firſt, if there be an Executor, then not. Secondly, After diſtribution there may be a Debt which was not known at the time, and then the Adminiſtrator ſhould pay it of his owne goods: and therefore there can be no Diſtribution. On the other ſide, it was ſaid, If the Ordinary ſhall not diſtribute, then if a man dyeth Inteſtate, and hath goods of the value of an hundred pounds, & Adminiſtration be committed to the wife, ſhe ſhould have all, and the children nothing, which would be hard.

159. A thing which may be tryed by a Jury at the Common Law, is not tryable in Chancery: for in the firſt Caſe, if they give not their Verdict according to their Evidence, an attaint lyeth: but in the other there is no remedy.

160. After a Writ of Error granted, a Warrant of Atturney cannot be filed, if the party be alive who made the Warrant: but otherwiſe if he be dead.

161. A Declaration cannot be amended in matter of Subſtance, without a new Originall: otherwiſe of Amendments of matter of Forme.

162. The Statute of 5 & 6 *E.* 6. *cap.* 1. and 1 *Eliz. cap.* 2. prohibite any man to be abſent from Church, having no lawfull or reaſonable cauſe. A man was ſued in the Eccleſiaſticall court for being abſent from Church; and he pleaded ſome-

thing by way of excuſe. *Hyde* Serjant prayed a Prohibition, becauſe they ought not to hold Plea of the excuſe: but the Court did agree that they might hold Plea of the excuſe, otherwiſe upon a falſe ſuggeſtion you would defeat the Eccleſiaſticall Court of all Conuſans in ſuch caſes. And therefore they were all againſt the Prohibition, and by the Court they ought to plead their excuſe there, and if they will not admit of it, then a Prohibition ſhall be granted. And note, that it was ſaid by *Bankes* Chief Juſtice, that before the Statute of 1 *Eliz.* the Eccleſiaſticall Court might puniſh any perſon for not coming to Church, *pro reformatione morum & ſalute animæ.*

163. Where there are ſeverall Modus alledged, there ſeverall Prohibitions ſhall be granted; but where divers are ſued joyntly, and they alledge one Modus onely, there they ſhall have but one Prohibition by *Reeve* and *Foſter* Juſtices, the others being abſent.

Paſch. 15°. Car' *in the Kings Bench.*

Edwards *and* Rogers *caſe.*

164 THe Caſe was thus, Tenant for life, the Reverſion to an Ideot; an unkle heire apparant of the Ideot levied a Fine and dyed, Tenant for life dyed, the Ideot dyed; the onely queſtion was, Whether the iſſue of the Vnckle, who levied the Fine ſhould be barred or not? *Jones*, that it ſhould; his chiefe reaſon was, becauſe the Sonne muſt make his conveyance by the Father, and as to him hee is barred. As in a writ of Right, hee ought of neceſſity to name his father, and that by way of title, ſo here. But *Crook* and *Barkley* contrary, and their reaſon was, becauſe that here the iſſue of the unkle doth not claime in the right line, but in the collaterall. Secondly, be-

becauſe the naming of the father here is not by way of title, but by way of pedigree onely. Note, that Serjant *Rolls*, in the Argument of the Serjants Caſe (which was the very point) ſaid, that this caſe was adjudged, according to the opinions of *Crook* and *Barkley*, *viz.* that the fine ſhould not barre the iſſue, the Serjants Caſe aforeſaid was *Trin.* 17. Car'

165. *Payne* the elder and *Payne* the younger were bound joyntly and ſeverally in an Obligation to *Dennis*, who afterwards brought debt upon the bond againſt both. And after appearance *Dennis* entred a Retraxit againſt *Payne* the younger; and whether this were a diſcharge of *Payne* the elder alſo, was the queſtion. And this Term, it was argued by *Maynard* for the Defendant that it was a diſcharge of *Payn* the elder alſo, for it doth amount to a Releaſe, and it is cleer, that a releaſe to one, ſhall diſcharge both. *Rolls* contrary, that it goeth onely by way of Eſtoppell, and not as a releaſe, and therefore ſhall not barre. *Barkeley* Juſtice; that it amounts to a Releaſe, and therefore ſhall diſcharge both, 7. E. 4. *Hickmots* caſe in the 7. *Rep.* the Plaintife ſhall not have judgment where he hath no cauſe of Action. And here by his Retraxit he hath confeſſed, that he hath no cauſe of Action, and therefore he ſhall not have judgment. Further, a Retraxit is not an Eſtoppell, but a Barre of the Action; beſides, here he hath altered the deed, and it is not joynt, as it was before, like as where hee interlines it or the like, there the deed is altered by his own act, and therefore the other ſhall take advantage of it. *Crook* Juſtice contrary, for it is not a Releaſe but *quaſi* a Releaſe, and if the Obligee ſueth one, and covenanteth with him that he will not further ſue him, the ſame is in the nature of a Releaſe, and yet the other ſhall not take advantage of it. So in this caſe, 21 *H.* 6. there ought to bee an actuall Releaſe, of which the other ſhall take advantage, and therefore in this Caſe, becauſe it is but in the nature of an Eſtoppell, the other ſhall not take advantage of it.

Sprigge

Sprigge *againſt* Rawlenſon.

166. IN a Writ of Error to reverſe a judgement given in the Common Pleas in an *Ejectione firme*, the Caſe was, *R.* brought an *Ejectione firme* againſt *S.* and declared of an Ejectment *de uno meſuagio & uno repoſitorio.* And the Jury found for the plaintife and aſſeſſed dammages entire: upon which a Writ of Error was brought here, and the Error which was largely debated was, that *Repoſitorium* which was here put for a warehouſe, is a word uncertain, and of divers ſignifications, as appeareth by the Dictionary. And therefore an *Ejectione firme de uno repoſitorio* is not good, and by conſequence the dammages which are joyntly aſſeſſed are ill aſſeſſed. And in an *Ejectione firme* ſeiſin ſhall be given by the Sheriffe, upon a Recovery, as in a *Precipe quod reddat*, and therefore the Ejectment ought to be of a thing certain, of which the Sheriffe may know how to deliver ſeiſin, otherwiſe it is not good. *Barckley* and *Crook* Juſtices were that the judgment ſhould be affirmed, and that it was certaine enough; but *Jones* and *Bramſton* Chief Juſtice contrary, that it was utterly uncertaine. For that is *Repoſitorium* in which a man repoſeth any thing, and an *Ejectione firme de uno tenemento* is not good, becauſe there are ſeverall tenements. So here, becauſe there are ſeverall Repoſitories, and the Sheriffe cannot *tradere poſſeſſionem*, and afterwards *Barckley* releaſed his opinion, and judgment was given, that the judgment given in the Common Pleas ſhould be reverſed.

Trin. 17° Car' *in the Common Pleas.*

167. A Man having a Legacie deviſed unto him out of a Leaſe for yeares, which indenture of Leaſe was in the hands of a ſtranger. The Legatee ſued the executors in the Spirituall court to aſſent to the Legacie

Legacie. And *Evars* ſerjant prayed a Prohibition, becauſe they order that the Leaſe ſhould be brought into Court, which they ought not to have done, being in the hands of a ſtranger. But the Prohibition was denyed by the whole Court, for they may make an executor aſſent to a Legacie out of a Leaſe, and therefore may order that although that the Leaſe be in the hands of a third perſon that it ſhall be brought in to execute it. For the order, although it be generall, bindes onely the Defendant; and it was agreed by the Court, that aſſets or not aſſets is tryable by them.

Juxon *againſt* Andrewes, & *others*.

168. IN an *Ejectione firme*, the Defendants pleaded not guilty, the Iury found them not guilty for part, and guilty in *tanto unius meſſuagii in occupatione*, *&c. quantum ſtat ſuper ripã*; and whether this verdict were ſufficiently certain, ſo as the Court might give judgment upon it and execution thereupon might be had, was the queſtion. And by *Whitfield* Serjant the verdict is certain enough: it hath been adjudged that where the Iury find the defendant guilty of one Acre, parcell of a Manor, that it was good: ſo of the moity of a Manor which is as uncertain as in this caſe. And it is as certain as if they had ſaid, So many feet in length and ſo many in breadth, for if the certainty appeareth upon the view of the Sheriffe, who is to deliver the poſſeſſion it ſufficeth: and *Clark* Serjant who was of the ſame ſide ſaid, that it is a rule in Law, *Quod certum eſt quod certũ reddi poteſt*, & this may be reduced to certainty upon the view of the Sheriffe, and therefore it is certain enough. Beſides, it is the finding of the Jury who are lay gents. *M.* 8. *Jac.* in the Kings Bench, an *Ejectione firme* was brought for the Gate-houſe of Weſtminſter, & the Jury found the Defendant guilty, for ſo much as is between ſuch a roome and ſuch a roome, and adjudged good, and here it is as uncertaine as in our caſe, *Mich.* 19. *Jacobi*. *Smalls* caſe in *Hobarts Rep.* The Jury in an *Ejectione firme* found the Defendant guilty of a third part, and good. *Mallet* Serjant, that the

verdict is uncertain, and therefore not good. And it is not ſufficient that the certainty appear to the Jury, for it behooveth that *certa res deducatur in judicum Inſtitut.* 227 *a.* 3. *E.* 3. 23. *b.* 18 *E.* 3. 49. 40 *E.* 3. 5. *Rep. Playtors* caſe. Secondly, here is no certainty for the Sheriffe to give execution, for ſo much in length or in breadth that is, *quod ſtat ſuper ripam*, doth not appear. And, Thirdly, thereupon great inconvenience wil ariſe, that no attaint wil lye upon ſuch uncertain verdict, ſo as the defendant ſhal be without remedy: & the whole court (except Juſtice *Crawley*) *Bankes Reeve* and *Foſter*, did reſolve that the verdict was inſufficient for the incertainty, and all agreed, That there is great difference betwixt Treſpaſſe and *Ejectione firme*, for ſuch verdict in Treſpaſſe may be good, for there damages are onely to be recovered, but in an *Ejectione firme* the thing it ſelfe. And their reaſon in this Caſe was, That although the certainty may appear to the Jury, yet that is not enough, for they ought to give judgment, *& oportet quod certa res deducatur in judicium.* And they agreed, that if they had found him guilty of a Roome, it had been good, and ſo the Caſes on the Acre of land, and of the third part of a Manor is good, for thoſe are ſufficiently certaine, for of them the Law takes notice. The opinion of *Crawley*, wherefore the verdict ſhould be good, was becauſe the demand here was certain, although the Jury found it in *tanto* &c. And where there may bee certain deſcription for the Jury it is good enough, and the rather becauſe the verdict is the finding of lay gents, and he compared it to the caſe of the Gate-houſe aforeſaid: but he agreed, that if the writ of *Ejectione firme* had been brought *de tāto unius meſſuagii, &c. quod ſtat ſuper ripam*, that it would not have been good, but the verdict is good for the reaſon aforeſaid. But Juſtice *Reeve* ſaid that that which is naught in the demand, is naught in the verdict, and therefore naught in the judgment, and therefore the Court would not give judgment, and therefore a *Venire facias de novo* was prayed and granted by the Court.

169. *Couch* libelled againſt *Tolt ex officio* in the Eccleſiaſti-

call

call Court for incontinency without a Citation or preſentment,& for that the Defendant was excommunicated, & *Gotbold* prayed a Prohibition, which was denyed by *Crawley* and *Reeve* Juſtices (the others being abſent) and it was ſaid by *Reeve*, That where they proceed *ex officio* a Citation is not needfull, but put caſe it were, yet they ſaid, that no Prohibition is to be granted as this caſe is, becauſe, that where the Eccleſiaſticall Court hath Juriſdiction, although they proceed erroneouſly, yet no Prohibition lyeth, but the remedy is by way of Appeale, and there he ſhall recover good coſts, and it was ſaid by *Crawley*, That if the party be retorned cited, and he is not cited, That an Action upon the caſe lyeth.

170. A woman libelled in the Arches againſt another for calling of her Jade, and a Prohibition was prayed and granted, becauſe the words were not defamatory, and doe not appertain unto them. And *Reeve* ſaid that for Whore or Bawd no Prohibition would lye, but they doubted of Quean.

171. *Bacon* Serjant prayed a Prohibition to the Court of Requeſts upon this ſugeſtion, That one Executor ſued another to accompt there, and an executor at the common law before the *Statute* of *Weſt.* 2. *cap.* 11. could not have an accompt for cauſe of privity, and now by that Statute they may have an accompt, but the ſame ought to be by writ, and therefore no accompt lyeth in the Court of Requeſts. Secondly, they have given damages where no damages ought to be given in an Accompt. And laſtly, they have ſequeſtred other lands which is againſt the law, and for theſe reaſons he prayed a Prohibition. *Whitefield* Serjant contrary.

1. It is cleer that an accompt by bill lyeth for an Attourny in this Court, and ſo in the Kings Bench and Exchequer: and as to damages it is cleer that in an accompt a man ſhall recover damages upon the ſecond judgment, but as to the ſequeſtration he could not ſay any thing, but further he ſaid, That

it was not an accompt but onely a bill of diſcovery againſt Truſtees, who went about to defeat an Infant, and upon the reading of the bill in Court it appeared that the ſuit was meerly for the breach of a truſt, and for a confederacy and combination, which is meerly equitable. Wherefore a Prohibition was denyed becauſe it was no accompt, but as to the decree for ſequeſtring others lands, the Prohibition was granted.

Trin. 17°. Car' *in the Kings Bench.*

172. EAſte brought an Action upon the Caſe upon an *Aſſumpſit* againſt *Farmer*, becauſe that where the Plaintiffe had ſold to the Defendant ſo much wood, the Defendant in conſideration thereof did aſſume and promiſe to pay ſo much money to the Plaintiffe, and to carry away the wood before ſuch a day; the Defendant pleaded that he paid the money at the day aforeſaid, but as to the carrying of it away before the day, he pleaded *non aſſumpſit*, and the Jury found that he did not pay the money at the day, but as to the other they found that he did aſſume and promiſe as aforeſaid, and it was moved in Arreſt of judgment, that the finding of the Jury was naught, for being but one *Aſſumpſit* and the ſame being an intire thing, it could not be apportioned, and therefore they ought to find the intire *Aſſumpſit* for the Plaintiffe, or all againſt him. And the Court agreed all that and awarded, that there ſhould bee a Repleader; and the Chief Juſtice *Bramſton* ſaid, That for the reaſon given before the Defendants plea was not good, and therefore the Plaintiffe might have demurred upon it, which he hath not done, and therefore they agreed, that the vetdict was nought for the reaſon aforeſaid.

173.

173. *Williams* was indicted at Briſtow, upon the Statute of 1 *Jac. cap.* 11. for having two wives, and upon not guilty pleaded, the Jury found a ſpeciall verdict, which was thus, That the ſaid *Williams* marryed one wife, and was afterwards divorced from her *cauſa adulterii*, and afterwards marryed the other, and if that were within the Proviſo of that Statute which provides for thoſe who are divorced, was the queſtion. And it was reſolved without argument by *Bramſton* Chiefe Juſtice, and *Heath* Juſtice (the other being abſent) That it is within the Proviſo, for the Statute ſpeakes generally of Divorce, and it is a penall Law: and *Heath* ſaid, That by the Law of Holy Church the parties divorced *cauſa adulterii* might marrie, but *pars rea* not without licence, and he cited the caſe of *Anne Porter* of late in the Kings Bench, who was divorced *cauſa ſævitiæ*, and afterwards marryed one *Rootes*, and upon an indictment upon this Statute it was doubted and debated whether it were within the Proviſo of this Statute or not? but reſolved it was not, becauſe onely a Divorce *à cohabitatione*, and a temporall ſeparation untill the anger paſt, but the divorce here is *à vinculo matrimonii*.

174. One was choſen to be Clarke of a Pariſh Church, and was put in and continued Clarke three or four yeers, but was never ſworn; and now a new Parſon put him out, and ſwore another in his place, *Keeling* and *Rolls* Serjant prayed a writ of Reſtitution, and compared the ſame to the Caſe of diſfranchiſement where Reſtitution lyeth. But *Bramſton* & *Heath* Juſtices (the other abſent) would not grant it. And the Chief Juſtice ſaid, that the Doctor had not power to ouſt him, for he ſaid that it is a temporall office, with which the Parſon had not to doe: and further, they conceived that the Clarke hath remedy at law, wherefore they would not award a writ of Reſtitution, but they ſaid, that if the Clark was never ſworn they would award a *Mandat* to ſwear him, to which the councell aſſented.

Trin. 17° Car'. *in the Common Pleas.*

175. WHite exhibited a Bill in the Court of Requeſt againſt *Grubbe* for mony due upon account, upon which *Mallet* moved for a Prohibition, becauſe its no other then in the nature of a debt upon account, of which, a Court of Equity hath no Juriſdiction for by ſuch meanes the King ſhould loſe his Fine, the Defendant ſhould be put to another anſwer upon his oath, and which is above all, they would refer the merits of the cauſe to others, and according to their Certificates make a decree, ſo that by this means they would create courts of Equity without number. Serjant *Clark* contrary againſt the Prohibition, for he ſaid the Defendant had exhibited a Croſſe Bill, & ſo had affirmed the Juriſdiction, & he ought to have demurred to the Juriſdiction, & he ſaid that where parties aſſent to a decree, there the Kings Bench wil not grant a Prohibition. For hee ſaid, that by the ſame reaſon that a man may chooſe Arbitrators, hee may elect his Judges; and further, he ſaid that the ſuit was for moneys due for divers things delivered by the Plaintiffe being a Chandler in a country town, which he ought to prove to be delivered, and he had no proofe: but *Crawley* and *Reeve* Juſtices, the others being abſent, granted a Prohibition, becauſe it is no other but an Action of debt upon account, and *Crawley* ſaid that the particulars are out of doores by the account, and in debt brought it is ſufficient to ſay, that the Defendant was indebted to him for divers commodities. And they accounted, & upon the account the Defendant was found to be in debt to him ſuch a ſum, &c. And note, it was ſaid in the bill that the Plaintiffe had no witneſſes to prove the delivery of the things aforeſaid, and notwithſtanding they granted a Prohibition, for they ſaid, there is no remedy in the Court of Requeſts if you have no proofe.

But

But it was ſaid that the Defendant in the Court of Requeſts had confeſſed the delivery of the things in his anſwer there. For which cauſe the Judges ſaid, that this confeſſion there might be given in evidence againſt him at law.

176. Three covenanted joyntly and ſeverally with two ſeverally, and afterwards one of the covenanters marryed with one of the covenantees: by Serjant *Mallet* the covenant is gone; beſides, a man cannot covenant with two ſeverally, as a man cannot bind himſelf to two ſeverally. Further, they joyned in Action where the covenant is ſeverall that which they ſhould not do. *Crawley* and *Reeve* Juſtices did conceive that a man might covenant with two ſeverally, becauſe that it differs from the Caſe of a Bond, for a covenant ſounds onely in damages, but they conceived cleerly that they ought not to joyn in action, and it was adjourned.

177. It was ſaid in a Caſe at the Barre by Serjant *Godbold* that it was a Rule in the Kings Bench, That although an Atturney be dead, yet the warrant of Atturney might be filed, which was not denyed by the Court here.

Lawſon *and* Cookes *Caſe.*

178 IN a ſecond deliverance, which was entred, *Hill.* 16. *Car. Rot.* 1530. the Caſe was thus, A man had a Rent Charge in Fee, and for arrerages thereof, did diſtraine & then granted the ſame over. And the queſtion here was, Whether he ought to avow or juſtifie, and the doubt reſted upon this, *viz.* Whether the arrearages be gone by the grant of the rent, notwithſtanding the diſtreſſe before taken or not. By ſerjant *Callis* the arrearages are loſt, for without queſtion he cannot have debt. And he cannot avow, for that depends upon the inheritance which is gone by the grant, 4 *Rep.* 5. *Ognels* Caſe & 19 *H.* 6. 42 *b.* *Acc.* And here he hath avowed and not juſtifyed, as hee ought

ought for to excuſe himſelf of damages, and therefore it is naught. But he took this difference betwixt the Act of God, and the Act of the party as here it s, where it is by the Act of God, as where there is grantee for anothers life of a rent, and *ceſtui qne vie* dyeth, or where a man hath a rent in the right of his wife and ſhe dyeth, in thoſe caſes the arrearages ſhall not be loſt: But where a man grants over the rent as in our Caſe which is his own Act, there the arrearages are loſt. *Inſtitut.* 285. A man intitled to waſt accepts of a ſurrender, it deſtroys his Action, otherwiſe where it is by act of Law. So if a man bring debt for twenty pounds, and afterwards accepts ten pounds, that ſhall abate the writ, becauſe that it is his own Act, and this difference may be collected out of the book of 19 *H.* 6. Beſides, untill avowry it doth not appear upon Record for what the diſtreſſe is taken, whether for rent, or for damage feaſant. Serjant *Godbold* contrary, that he ought to avow, becauſe the rent in this caſe is not gone, and he ſaid, there was a difference between this Caſe and *Ognells* caſe, for there was no diſtreſſe taken before the rent granted, as here is; and there the privity is gone and the diſtreſſe follows the rent, but here we have a pledg for the rent which is the diſtreſſe, and return of the cattell if it be found for us, 19 *H.* 6. 41. *a.* Where the diſtreſſe was lawfully taken at the beginning there we may avow, and it is good to intitle us to a return, 22 *E.* 4. 36. Where there is a duty at the time of the diſtreſſe there he ſhall always avow and not juſtify, and at leaſt it turnes the Avowry into a Iuſtification in our Caſe ſo as you ſhall not make us Treſpaſſers, but that we may well juſtify to ſave our damages. *Crawley* Juſtice that the Avowry is turned into a Iuſtification, and that there is ſufficient ſubſtance in the Plea to anſwer the unjuſt taking the diſtreſſe. Juſtice *Reeve* that it is good by way of Avowry, for the diſtreſſe being lawfully taken at the time it ſhall not take away his avowry, and therfore he ſhall have Retorn, for that was as a gage for the rent, and therefore differs from the other Caſes. Juſtice *Foſter* put this Caſe at the common law diſtreſſe was taken and before avowry Tenant for life dyed, Whether he ſhall avow or juſtify.

But

But all agreed, that at the leaſt the Avowry is turned into a Iuſtification, but it was adjourned.

179. The Court demanded of the Protonotharys, Whether a man might make a new aſſignment to a ſpecial Bar; and they ſaid no, but to a common Barre onely, *viz.* that the Treſpaſſe (if any were) was in Bl. Acre, there ought to be a new aſſignment by the plaintiffe: But *Reeve* and *Crawley* Juſtices (the other being abſent) held cleerly, that the Plaintiffe might make a new aſſignement to a ſpeciall barre; and further they ſaid, that the Plaintiffe if he would might triſe the Defendant upon his plea, but we wil not ſuffer him to do ſo, becauſe that his Plea is meerly to make the Plaintiffe to ſhew the place certain in his Replication in which the Treſpaſſe was done.

180. The Diſſeiſee levyeth a Fine, by *Reeve* and *Crawley* Juſtices, it ſhall not give right to the Diſſeiſor, becauſe that this Fine ſhall enure meerly by way of Eſtoppell, and Eſtoppels bind onely privies to them and not a ſtranger, and therefore the Diſſeiſor here ſhall not take benefit of it, and therefore they did conceive the 2 *Rep.* 56. *a.* to be no law, *v.* 3. *Rep.* 90. *a.* & 6. *Rep.* 70. *a.*

181. Serjant *Callis* prayed a Prohibition to the Court of Requeſts for cauſe of priority of ſuit, but by *Foſter* and *Crawley* Juſtices (the other being abſent) priority of ſuit was nothing, the bill being exhibited there before judgment given in this Court.

182. The Caſe of *White* and *Grubbe* before being moved again, it was ſaid in this caſe by *Reeve* and *Foſter* Juſtices, that where a man is indebted unto another for divers wares, and the debt is ſuperannuated according to the Statute of 21 *Jac.*

cap. 16. and afterwards they account together, and the party found to be indebted unto the other party, in ſo much mony for ſuch wares, in that Caſe although that the party were without remedy before, yet now he may have debt upon accompt, becauſe that now he is not bound to ſhew the particulars, but it is ſufficient to ſay, that the Defendant was indebted to the Plaintiffe upon accompt, *pro diverſis mercimoniis, &c.*

183. A Prohibition was prayed unto the Counſell of the Marches of Wales, and the Caſe was thus, A man being poſſeſſed of certain goods deviſed them by his Wil unto his wife for her life, and after her deceaſe to *I.S.* and dyed. *I.S.* in the life of the wife did commence ſuit in the Court of Equity there to ſecure his Intereſt in Remainder, & thereupon this Prohibition was prayed. And the Juſtices, *viz. Banks* Chief Juſtice, *Crawley*, *Foſter*, (*Reeve* being abſent) upon conſideration of the point before them did grant a Prohibition, and the reaſon was becauſe the deviſe in the remainder of goods was void, and therefore no remedy in equity, for *Æquitas ſequitur legem.* And the Chief Juſtice took the difference, as is in 37 *H.* 6. 30. *Br. Deviſe* 13. and *Com. Welkden & Elkingtons* caſe betwixt the deviſe of the uſe and occupation of goods, and the deviſe of goods themſelves. For where the goods themſelves are deviſed, there can be no Remainder over; otherwiſe, where the uſe or occupation onely is deviſed. It is true that heire looms ſhall deſcend, but that is by cuſtome and continuance of them, & alſo it is true that the deviſe of the uſe & occupation of land is a deviſe of the land it ſelfe, but not ſo in caſe of goods, for one may have the occupation of the goods, and another the Intereſt, and ſo it is where a man pawnes goods and the like. For which cauſe the Court all agreed that a Prohibition ſhould be awarded.

Trin 17°. Car'. *in the Kings Bench.*

184. A Man was ſued in London according to the cuſtome there for calling a woman Whore, upon which a *Habeas corpus* was brought in this Court, and notwithſtanding *Oxfords* caſe in the 4 *Rep.* 18. *a.* which is againſt it, a *Procedendo* was granted: and it was ſaid by Serjant *Pheaſant* who was for the *Procedendo*, and ſo agreed by *Bramſton* Chief Juſtice and Juſtice *Mallet*, That of late times there have been many Procedendoes granted in the like caſe in this Court.

185. An Orphan of London did exhibite a Bill in the Court of Requeſts againſt another for diſcovery of part of his eſtate. And Serjant *Pheaſant* of Councell with the Defendant came into this Court and Prayed a Prohibition, upon the cuſtome of London, That Orphans ought to ſue in the Court of Orphans in London: but the whole Court which were then preſent, *viz.* Chief Juſtice *Bramſton*, *Heath* and *Mallet* Juſtices were againſt it, becauſe that although the Orphan had that priviledg to ſue there, yet if he conceive it more ſecure and better for him to ſue in the Court of Requeſts, then hee may waive his priviledge of ſuing in the Court of Orphans, and ſue in the Court of Requeſts; for *quilibet poteſt renunciare juri pro ſe introducto, &c.* & *Heath* ſaid, that he always conceived the Law againſt the Caſe of Orphans, 5 *Re.* 73, *b.* But which is ſtronger in this Caſe, the Court of Orphans did conſent to the ſuit in the Court of Requeſts; and therefore there is no reaſon, that the Defendant ſhould compell the Infant to ſue there, wherefore they would not grant a

Prohibition, but gave day untill *Mich. Terme* to the Defendants Counſell to ſpeake further to the matter if they could.

Trin. 17°. Car' *in the Common Pleas.*

Dewell *againſt* Maſon.

186. IN an Action upon the Caſe upon an Award, the caſe was this, The Awarde was that the Defendant ſhould pay to the Plaintiffe eight pound or three pound and Coſts of ſuit in an Action of Treſpaſſe betwixt the Plaintiffe and Defendant, as appeares by a note under the Plaintiffes Attorneys hand, *ad libitum defendentis, &c.* And the Plaintiffe doth not averre that a note was delivered by the Atorney of the Plaintiffe to the Defendant; and the Defendant pleaded *Non aſſumpſit*, and it was found for the Plaintiffe, and it was moved in arreſt of Judgment for the reaſon given before: *Rolls* contrary, that there needs no averrement, and he ſaid it was *Wilmots* Caſe adjudged in this Court, *Hill.* 15. *Car.* where the Caſe was that the Defendant ſhould pay to the Plaintiffe ſuch coſts as ſhall be delivered by note of the Attorneys hand, and it was here adjudged that there needs no averrement, becauſe it is to be done by a ſtranger, but otherwiſe it had been, if it had been to be done by the Plaintiffe himſelfe, and by the Juſtices: the onely queſtion here is, Whether the Attorney ſhall be taken for a ſtranger or not? Juſtice *Foſter*, that the Defendant ought firſt to make his election; which is, to pay either the eight pound which is certain, or the coſts which ſhall be delivered by a note of the Attorney. Beſides, here the Attorney is a ſtranger, becauſe the ſuit is ended, and to the Defendant he is totally a ſtranger, and therefore he ought to ſeek him to have the note delivered to him. But notwithſtanding he did conceive that as this Caſe is Judgement ought to bee ſtayed, becauſe the Plaintiffe hath not well entitled himſelf to the Action, becauſe he hath not

not averred that there were coſts expended in ſuch a ſuit: and in the Caſe cited by *Rolls*, the Plaintiffe did averre the coſts incertain. Juſtice *Crawley*; it is without queſtion, the Defendant hath Election in this caſe, but as this Caſe is, he ought to have notice, and if the Caſe had been ſuch, that the Plaintiffe himſelfe had been to have delivered the note, then without queſtion there ought to bee notice, and here the Attorney is no ſtranger, but is a ſervant to the Plaintiffe as every Attorney is. And I conceive, that if the Caſe had been that the Plaintiffes ſervant had been to deliver ſuch a note, that there notice ought to be given: And for want thereof, in this Caſe I conceive that the judgment ought to bee ſtayed; *Bankes* Chief Juſtice; I doubt upon the different opinions of my brethren, whether Judgement ought to be ſtayed or not. I agree that the Defendant hath Election in this Caſe: and further, I agree that where a thing is to bee done by the Plaintiffe or Defendant himſelf, there notice ought to be given; but otherwiſe, in Caſe of a ſtranger, and upon this difference ſtands our bookes: as 10 *H.* 7. And all our books; but the queſtion here is, Whether the Attorny be a ſtranger or not? and I conceive that it is not in the power of the Plaintiffe to compell him to bring the note, and is all one as a ſtranger, and therefore the Defendant ought to ſeeke the Attorney to deliver this unto him, but the Caſe was adjorned becauſe Juſtice *Reeve* was not preſent in Court.

187. *A.* ſaid to *B.* Thou haſt killed my brother: for which *B.* brought an Action upon the Caſe, and by Serjant *Whitfield* it will not lie, becauſe it is not averred that the brother of the Defendant was dead at the time, and if he were not dead, then it is no ſlander, becauſe the Plaintiffe is not in danger for it, 4 *Rep.* 16. a. *Snaggs* Caſe, Acc. Serjant *Evers* contrary, becauſe the words imply that he is dead, and beſides, in the (*Innuendo*) it is alſo ſhewed that he was dead, for that is the *innuendo C, &c. fratrem nuper mortuum*: But by the whole Court the words are not actionable without a-

verment that he was dead, and the *Innuendo* doth not help it, *Hobarts Rep. p.* 8. *Miles* & *Jacobs* Caſe, *acc.*

188. A Frenchman had his Ship taken by a Dunkirk upon the Sea, and before that it was brought *infra præſidia* of the King of Spain, it was driven by a contrary winde to Waymouth; and there the Dunkirk ſold the Ship and goods to a Lord in Waymouth: whereupon the Frenchman having notice of his ſhip and goods to be there, libelled in the Admiralty *pro intereſſe ſuo*, againſt the Lord the Vendee of the Ship, ſhewing that it was taken by Piracy and not by letters of Mart, as was pretended, and thereupon a Prohibition was prayed, and by *Foſter* a Prohibition ought to be granted, for whether the Dunkirk took it by letters of Mart or as a Pirate, it is not materiall, the ſale being upon the land and *infra corpus comitatus*; and ſo he ſaid it was adjudged in ſuch a caſe, for whether the ſale were good or not, *Non conſtat.* Juſtice *Crawley* conceived it ſhould be hard that the ſale being void, if it were taken as a Pirate, or by letters of Mart, not being brought *infra præſidia* of the King of Spain, that by this meanes you ſhould take away the Juriſdiction of the Admiralty, but he ſaid he did conceive it more fit for the Frenchman to have brought a Replevin, which he ſaid lyeth of a Ship, or Trover and Converſion, and ſo to have had the matter found ſpecially. *Bankes* chiefe Juſtice, conceived that there ſhould be a Prohibition, otherwiſe upon ſuch pretence that it was not lawfull prize, and by conſequence the ſale void, you would utterly take away the Juriſdiction of the common law. But becauſe there was ſome miſdemeanor in the Vendee the Court would not award a Prohibition, but awarded that the buyer ſhould have convenient time given him by the Court of Admiralty to find out the ſeller to maintain his title, and in the mean time that he give good caution in the Admiralty, that if it be found againſt him, that then hee reſtore the ſhip with damages. But note, the Court did agree (Juſtice *Reeve* onely abſent) that if a ſhip be taken by Piracy, or if by letters of Mart, and be not brought

brought *infra præsidia* of that King by whose subject it was taken, that it is no lawfull prize, and the property not altered, and therefore the sale void; and that was said by the Proctor of the Frenchman to be the law of the Admiralty.

Rudston *and* Yates *Case.*

189. RUdston brought an Action of debt upon an Obligation against *Yates* for not performance of an Award according to the Condition of the Bond, the Defendant pleaded that the Arbitrators *Non fecerunt arbitrium*, upon which they were at issue and found for the Plaintiffe, and it was now moved in arrest of judgement by *Trevor* that the Defendant was an Enfant, and therefore that the submission was void, and by consequence the Bond which did depend upon it: and he conceived the submission void. First, because it is a Contract, & an Enfant cannot contract, and he took a difference betwixt acts done which are *ex provisione legis* and acts done *ex provisione* of the Infant; an Enfant may binde himselfe for his dyet, schooling, and necessary apparell, for that is the provision of the Law for his maintenance, but a bond for other matters, or Contracts of other nature which are of his own provision, those he cannot doe. Secondly, an Arbitrator is a Judge, and if an Enfant should be permitted to make an Arbitrator, he should make a Judge, who by the law is not permitted to make an Attorny, which were against reason. Thirdly, it is against the nature of a Contract, which must be reciprocally binding; here the Enfant should not bee bound, and the man of full age should be, which should bee a great mischiefe. And where it is objected, it may be for his benefit: To that he answered, that the law will not leave that to him to judge what shall be for his benefit, what not: and to this purpose amongst other he cited it to be adjudged, That where an Enfant took a shop for his trading, rendring rent, and in debt brought for the rent, the Enfant pleaded his infancy, the other replyed that it was for his benefit and livelyhood,

hood, and yet it was adjudged for the Enfant, *v.* 13 *H.* 4. 12. & 10 *H.* 6. 14. bookes in the point, and therefore he prayed that judgment might be ſtayed. *Bramſton*, *Heath* and *Mallet* Juſtices, (*Barckley* being then impeached for high Treaſon by the Parliament) were clear of opinion, That the ſubmiſſion by an Enfant was void, & they all agreed, That if the Enfant was not bound, that the man of full age ſhould not be bound; ſo that it ſhould be either totally good; or totally void. But *Ward* who was of Counſell with the Plaintiffe ſaid that the Caſe was not that the Enfant ſubmitted himſelf to the award, but that a man of full age bound himſelf, that the Enfant ſhould perform the Award, which was ſaid by the Court quite to alter the Caſe. To that *Trevor* ſaid, that the Caſe is all one; for there cannot be an Award if there be not firſt a ſubmiſſion: and then the ſubmiſſion being void, the Award will bee void, and ſo by conſequence the Bond: and to prove it he cited 10 *Rep.* 171. *b*, where it was adjudged that the non-performance of a void Award did not forfeit the Bond, & many other Caſes to that purpoſe. And the Court agreed, That if the Condition of a Bond recite, that where an Enfant hath ſubmitted himſelf to an Award, that the Defendant doth bind himſelf that the Enfant ſhall perform it, that the ſame makes the Bond void, becauſe the ſubmiſſion being void, all is void, and therefore day was given to view the Record.

190. *A.* and *B.* are indicted for murder, *B.* flies, and *A.* brings a *Certiorare* to remove the Indictment into the Kings Bench, Whether the whole Record be removed or but part? *Keeling* the younger ſaid, that all is removed, and that there cannot be a Tranſcript in this Caſe; becauſe he ſaid the writ ſaith, *Recordum & proceſſus cum omnibus ea tangentibus* but the Chief Juſtice doubted of it, and he ſaid that the opinion of *Markham* in one of our bookes is againſt it, and hee ſaid it ſhould be a miſchievous Caſe if it ſhould be ſo, for ſo the other might be attainted here by Outlawry who knew not of it; and note, that *Bramſton* Chief Juſtice, ſaid, That the Clark

of

of the Aſſiſes might bring in the Indictment *propriis manibus* if he would without a *Certiorare*.

190. A man was outlawed for Murder and dyed, his Adminiſtrator brought a writ of Error to reverſe the Outlawry, and it was prayed that he might appear by Atturney, and by *Bramſton* Chief Juſtice and Juſtice *Mallet* (none other being then in Court) it was granted that he might, for they ſaid that that the reaſon wherefore the party himſelf was bound to appear in proper perſon is, that he may ſtand *rectus in Curia*, and that he may anſwer to the matter in fact, which reaſon failes in this Caſe, and therefore the Adminiſtrator may appear by Attorney.

191. One ſaid of Mr *Hawes* theſe words, *viz.* My couſen *Hawes* hath ſpoken againſt the book of Common Prayer; and ſaid it is not fit to be read in the Church: upon which, *Hawes* brought an Action upon the Caſe, and ſhewed how that he was cited into the Eccleſiaſticall Court by the Defendant, and had paid ſeverall ſummes, &c. The Defendant denyed the ſpeaking of theſe words: upon which they were at iſſue, and it was found for the Plaintiffe; and now it was moved by *Keeling* for ſtay of judgment, That the words are not Actionable; as for ſay, A man hath ſpoken againſt a penall Law, which doth not inflict puniſhment of life and member, will not bear Action; and the pnniſhment which is inflicted by the Statute of 1 *Eliz. cap.* 2. is pecuniary onely and not corporall; but in default of payment of the ſum, that he ſhall be impriſoned for ſuch a time, which meerly depends upon the non-payment, and is incertain: And by the ſame reaſon hee ſaid, to ſay of a man, that he hath not Bowe and Arrowes in his houſe; or not a Gun: or to ſay of a man, That hee hath ſpoken againſt any penall Law whatſoever, would beare Action, which ſhould be unreaſonable: wherefore he prayed that judgment might be ſtayed. *Brown* contrary; the words are

actionable, becauſe that if it was true that he ſpoke them, he ſubjected himſelf to impriſonment by the Statute of 1 *Eliz.* although not directly, yet in default of payment; ſo as there might be corporall damage, and to prove it, he cited *Anne Davies* Caſe 4 *Rep* 17. *a.* where it is ſaid, that to ſay, that a woman hath a Baſtard will bear Action, becauſe that if it were true ſhe was puniſhable by the Statute of 18 *Eliz.* Further, he ſaid, that if the words are not Actionable, yet the Action will lye for the ſpeciall damage, which the Plaintiffe hath ſuffered in the Eccleſiaſticall Court. Juſtice *Mallet*; the words of themſelves are not Actionable, becauſe that the corporall puniſhment given by the Statute doth depend upon the non-payment, and is not abſolute of it ſelfe, but the Action will lye for the temporall damage, and therefore he conceived that the Plaintiffe ought to have Judgment. Juſtice *Heath*, that the Plaintiffe ought to have judgment for the pecuniary Mulct is a good cauſe of Action, there being in default of payment, a corporall puniſhment given. But here is not onely *injuria*, but *damnum* alſo, which are the foundations of the Action upon the Caſe, and if the words of themſelves be not Actionable, yet the Action will lye for the damage that the Plaintiffe here ſuffered by the citation in the ſpirituall Court. *Bramſton* Chief Juſtice, doubted it, and he conceived it hard that the words ſhould bear Action, becauſe as he ſaid the corporall puniſhment doth meerly depend upon the not payment: and upon the ſame reaſon, words upon every penall Law ſhould bear Action, and therefore this being a leading Caſe, he took time to conſider of it. It was ſaid, To ſay of a man, that he had received a Romiſh Prieſt, was adjudged Actionable, and that was agreed, becauſe it is Felony. At another day, the Caſe was moved again, and Juſtice *Mallet* was of the ſame opinion as before, *viz.* That the words themſelves were not actionable, but for the ſpeciall damage, that the Action would lye; and he ſaid, that one ſaid of another, That he was a Recuſant, for which an Action was brought in the Common Pleas, and he conceived the Action would not lye. Juſtice *Heath* was of the ſame opinion, as before, that the words of themſelves would bear Action, and he

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conceived, That if a man ſpeak ſuch words of another, that if they were true, would make him lyable to a pecuniary, or corporall puniſhment, that they would bear an Action, and here the Plaintiffe was endamaged, and therefore without queſtion, they will bear an Action. *Bramſton* Chief Juſtice, as before alſo; That the words are not Actionable, neither of themſelves nor for the damage; not of themſelves, for no words which ſubject a man to a pecuniary Mulct if they were true, either at the common Law, or by the Statute, will bear an Action. For by the ſame reaſon, to ſay that a man hath erected a Cottage, orto ſay that a man hath committed a Ryot would bear Action, 37 *Eliz.* in the *Common Pleas*. One ſaid of another, that he did aſſault me and took away my purſe from me, and upon not guilty pleaded it was found for the Plaintiffe, and judgment was ſtayed, becauſe he might take his purſe from him, and yet be but a Treſpaſſer: So as it appeareth that words ought to have a favourable conſtruction to avoid multiplicity of ſuits; and if theſe words would bear an Action, by the ſame reaſon words ſpoken againſt every penall law ſhould bear Action, which againſt the reaſon given before ſhould be a meanes to increaſe ſuits: And he took it for a rule, If the words import ſcandall of themſelves, by which damage may accrue, then the words will bear Action without damage, otherwiſe not, and therefore the damage here ſhall not make the words Actionable which of themſelves are not actionable, as I conceive they are not. Beſides, by this meanes the Act of a third perſon ſhould prejudice mee, which is againſt reaſon, as here the Act of the ordinary by the Citation and damage thereupon accrued, which perhaps might be *ex officio* onely, for which cauſe he conceived that judgment ſhould be ſtayed, but becauſe there were two Judges againſt one, judgment was given for the Plaintiffe.

Mich. 17°. *of the King in the Common Pleas.*

192 BAine brought an Action upon the Caſe againſt for theſe words, *viz.* That he kept a falſe Buſhell, by which

did cheat and couſen the poor, and he ſaid in his Declaration, That he was a Farmor of certain lands, and uſed to ſow thoſe lands, and to ſell the corne growing on them, and thereby *per majorem partem* uſed to maintain himſelf and his family, and that thoſe words were ſpoken to certain perſons, who uſed to buy of him, and that by reaſon of thoſe words, that he had loſt their cuſtom; the parties were at iſſue upon the words, and found for the Plaintiffe, and it was moved by Serjant *Gotbold* in arreſt of judgment, that the words were not actionable, becauſe that the Plaintiffe doth not alledg that he kept the falſe Buſhell, knowing the ſame to be a falſe Buſhell, for if he did not know it to be a falſe Buſhell, he was not puniſhable, and by conſequence no Action will lye, and compared it to the Caſe, Where a man keeps a dog that uſeth to worry ſheep, but he doth not know of it, no Action lyeth againſt him for it: but yet notwithſtanding, *Bankes* chief Juſtice and *Crawley* were of opinion, that the words were Actionable, for of neceſſity it ought to be taken that he kept the Buſhell knowingly, for otherwiſe it is no couſenage; and here being ſpeciall damage alledged, which was the loſſe of his cuſtome as he had pleaded it, the maintenance of his livelihood they hold the words cleerly actionable, and gave judgment accordingly. Note the other Judges were in Parliament.

193. Doctor *Brownlow* brought an Action upon the Caſe for words againſt ſpoken of him as a Phyſitian, which words were agreed to be Actionable, but yet Serjant *Gotbold* conceived that although that the words were actionable, that the Plaintiffe had not well intitled himſelf to his Action, becauſe although that he ſaid, that he is *in medicinis Doctor*; yet becauſe he doth not ſhew that he was licenſed by the College of Phyſitians in London, or that he was a graduate of the Univerſities according to the Statute of 14 *H.* 8. *cap.* 5. that therefore the Action will not lye, ſee Doctor *Bonnchams* caſe 8 *Rep.* 113. *a.* where he ſhewed the Statute aforeſaid, and pleaded it accordingly, that hee was a graduate of the Univerſity of Cambridge, wherefore he prayed that judgement might

might be ſtayed. *Bankes* Chief Juſtice and *Crawley* doubted whether the Act were a generall Act or not; for if it were a particular Act, he ought to have pleaded it; otherwiſe that they could not take notice of it, but upon reading of the Statute in Court, they agreed that it was a generall Act, wherefore they gave day to the Party to maintain his Plea.

194. By *Bankes* Chief Juſtice, upon an *Elegit* there needs no *Liberate*, otherwiſe upon a Statute and note, the *Elegit* doth except *Averia Carucæ*.

Dye *and* Olives *Caſe*.

195 IN an Action of falſe impriſonment, the Defendant ſhewed, that London hath a Court of Record by preſcription, and that the ſame was confirmed by Act of Parliament, and that he was one of the Sergeants of the Maſe of that Court, and that hee had a warrant directed unto him out of that Court to arreſt the Plaintiffe *pro quodam contemptu* committed to the Court for not paying twenty ſhillings to *K. B.* and that in purſuance of the command of the Court he accordingly did arreſt the Plaintiffe. *Maynard*, that the juſtification was not good, becauſe the Defendant doth not ſhew what the contempt was, nor in what Action, ſo as it might appear to the Court whether they had Juriſdiction or not: And if ſuch generall Plea ſhould be tolerated, every Court would uſurpe Juriſdiction, and every officer would juſtify, where the proceeding is *Coram non Judice* and void, and thereby the Officer lyable to falſe impriſonment, according to the Caſe of the Marſhalſy in the 10 *Rep.* And here the pleading is incertain that the Jury cannot try it: and he put the Caſe of the Mayer of Plymouth. The Mayer hath Juriſdiction in Debt and Treſpaſſe is brought there, which is *Coram non Judice*. But in this Action the party is impriſoned *pro quodam contemptu*, ſhall this be a good Juſtification in a falſe impriſonment brought againſt the Officer? certainly no. Serjant

Rolls contrary, that the Plea was good, becauſe that the Defendant hath ſhewed that the Court was holden *ſecũdum conſuetudinẽ*, and therefore it ſhall be intended that the contempt was committed in a Caſe within their Juriſdiction, and therefore he cited the 8. *Rep. Turners* Caſe, to which *Maynard* replyed, that that doth not make it good, becauſe that iſſue cannot be taken upon it. At another day, the Judges gave their opinions, Juſtice *Mallet*, that the Plea is not good, becauſe that it is too general, and *non conſtat* whether within their Juriſdiction or not: and where it was objected that he is a Miniſter of the Court, and ought to obey their commands, and therefore it ſhould go hard, that he ſhould be puniſhed for it, he conceived that there is a difference betwixt an officer of an inferiour Court which ouſts the common Law of Juriſdiction, and one of the four Courts at Weſtminſter; for where an officer juſtifies an Act done by the command of an Inferiour Court, he ought to ſhew preciſely that it was in a Caſe within their Juriſdiction, and he cited 20 *H.* 7. the Abbot of St. *Albans* Caſe. Juſtice *Heath* contrary; the party is ſervant to the Court, and if he hath done his duty, it ſhould be hard that he ſhould be puniſhed for it: and he agreed that there is a difference betwixt the Act of a Conſtable and Juſtice a of peace, and the Act of a ſervant of a Court, for the ſervant ought to obey his Maſter; and although it be an inferiour Court, yet it is a Court of Record and confirmed by Act of Parliament; and all that is confeſſed by the Demurrer. *Bramſton* Chiefe Juſtice; that the Plea is naught, becauſe that it is too generall and incertain; true it is, that it is hard that the Officer ſhould be puniſhed in this Caſe for his obedience to which he is bound, and it is as true that the Officer for doing of an Act by the command of the Court whether it be iuſt or unjuſt, is excuſed, if it appear that the Court hath Jurisdiction, but here it doth not appear that the Court had Juriſdiction; and if the Court had not Juriſdiction, then it is cleer that the Officer by obeying the Court when they have not Juriſdiction, doth ſubject himſelfe to an Action of falſe impriſonment, as it is in the Caſe of the Marſhalſy in the 10 *Rep.* but it was adjorned, &c.

The

The Biſhop of Hereford *and* Okeleys *Caſe.*

196. THe Biſhop of Hereford brought a writ of Error againſt Okeley, to reverſe a Judgement given in the Common Pleas, the point was briefly this. One under the age of twenty three yeers is preſented to a Benefice, Whether the Patron in this caſe ſhall have notice, or that lapſe otherwiſe ſhall not incurre to the Biſhop, which is grounded upon the Statute of 13 *Eliz. cap.* 12. And upon debate by the Councell of the Plaintiffe in the writ of Error, that which was ſaid being upon the generall law of notice, nothing moved the Court againſt the judgment given in the Common Pleas upon ſolemn debate, as it was ſaid; and therefore they gave day to ſhew better matter, or elſe that judgment ſhould be affirmed. The reaſons of the Judgment in the Common Pleas were two. Firſt, upon the Proviſo of the Statute, which ſaies, That no Lapſe ſhall incurre upon any deprivation *ipſo facto* without notice. Second reaſon was, upon the body of the Act; which is, That admiſſion, inſtitution, and induction ſhall be void, but ſpeakes nothing of preſentation, ſo as the preſentation remaining in force, the Patron ought to have notice, and that was ſaid was the principall reaſon upon which the Judgment was given: and upon the ſame reaſons the Court here, *viz. Mallet Heath* and *Bramſton* Juſtices, held cleerly that the notice ought to be given, or otherwiſe that Lapſe ſhall not incurre, but they agreed that if the Act had avoyded the preſentation alſo; that in ſuch caſe, the Patron ought to have taken notice at his perill, being an avoydance by Statute, if the Proviſo helpe it not.

Mich'. 17°. of the King in the Common Pleas.

197 *A* Said of *B.* that he kept falſe weights, for which words *B.* brought an Action upon the Caſe, and ſhewed how that he got his living by buying and ſelling, but did not ſhew of what profeſſion he was, and by all the Court, *viz. Foſter, Reeve, Crawley* and *Bankes* in the Common Pleas, the Action will

will not lye. Firſt, becauſe he doth not ſhew of what trade or profeſſion he was, and it is too generall to ſay that hee got his living by buying and ſelling. Secondly, becauſe although that he had ſhewed of what trade he was, as that he was a Mercer, as in truth he was, that yet the words are not actionable, becauſe there is nothing ſhewed to be done with them, or that he uſed them, and it can be no ſcandall, if the words doe not import an Act done by the falſe weights, for he may keep them and yet not uſe them; and he may keep them that another doe not uſe them; and the keeping of falſe weights is preſentable in Leete if the party uſe them, otherwiſe not. And where one ſaid of another, That he kept a falſe Buſhell, by which he did cheat and couſen the poore, the ſame was adjudged actionable, that is. True, and differs from this caſe, for there he ſaid, he not only kept them, but uſed them and cheated with them; but it is otherwiſe in our caſe, and this Caſe was compared to *Hobarts Reports*, where one ſaid of another, That hee kept men which did robbe upon the highway: and adjudged that the words were not actionable, for he might keep them and not know of it. *Bankes*; the action upon the Caſe for words is to recover damages, and here it can be no damage. Firſt, becauſe he doth not ſhew of what profeſſion he was: and Secondly, becauſe although he had ſhewed it, yet the words will not bear Action: and judgment was given againſt the Plaintiffe.

198. It was moved by Serjant *Weild*, That depoſitions taken in the Eccleſiaſticall Court might be given in evidence in a tryall in this Court, and the Court was againſt it, becauſe they were not taken in a Court of Record; and they ſaid, although the parties were dead, yet they ought not to be allowed, and by *Bankes* chief Juſtice, no depoſitions ought to be allowed which are not taken in a Court of Record: and *Foſter* and *Reeve* were of opinion that although the parties would aſſent to it, yet they ought not to be given in evidence againſt the conſtant rule in ſuch Caſe. *Crawley* contrary, for he

he ſaid, that a writing which by the law is not Evidence, might be admitted as Evidence by the conſent of the parties.

200. A man was bound to keep a Pariſh harmeleſſe from a Baſtard child, and for not performance thereof, the Obligee brought debt upon the Bond, the Defendant pleaded that he had ſaved the Pariſh harmeleſſe, and did not ſhew how the Plaintiffe replyed, and ſhewed how that the Pariſh was warned before the Juſtices of peace at the ſeſſions of peace, and was there ordered by Record to pay ſo much for the keeping of the childe, and becauſe the Defendant had not ſaved him harmeleſſe, &c. The Defendant pleaded, *Nul tiel Record*, upon which the Plaintiffe did demurre. And here two things were reſolved: Firſt, that the Plea *Nul tiel Record* upon an Order at Seſſions of peace is a good Plea, becauſe that an Order at the Seſſions of peace is a Record. Secondly, that notwithſtanding Judgment ought to be given for the Plaintiffe, becauſe the Defendants barre was not good, in that he hath pleaded in the affirmative that he hath ſaved the Pariſh harmleſſe, and doth not ſhew how as he ought to have done, but he ought to have pleaded *non damnificatus*, and that had been good without any further ſhewing, which he hath not done, and therefore the Plea was not good, and it was agreed that the ſame was not helped by the Demurrer, becauſe the ſame was matter of ſubſtance, but the plaintiffe might take advantage of it notwithſtanding, and therefore Judgment was given for the Plaintiffe.

201. In debt Judgment was given againſt the principall, whereupon a *Scire facias* iſſued forth againſt the Baile, and Judgment upon *Nihil dicit* was given againſt them, whereupon a writ of Error was brought, and Error aſſigned, that there was no warrant of Attorny filed for the Plaintiffe; and upon debate whether the warrant of Attorny ought to be filed or no, the Court ſeemed to incline their opinion upon theſe differences, but gave not any Judgment. Firſt, where it may

appear to the Court, that there was a warrant of Attorny, and where not. If there was not any warrant of Attorny, there they cannot order the making of one, but if there was one, they conceived that they might order the filing of it. Second difference, Where the warrant wanting, were of the part of the Defendant, and where of the part of the Plaintiffe, in the writ of Error; if it be of the part of the Plaintiffe, ſuch a warrant of Attorney ſhall not be filed, becauſe hee ſhall not take advantage of his own wrong: the laſt thing was, where the Record by the lacheſſe of the Plaintiffe in the writ of Error is not cerifyed in due time, there the warrant of Attorny ſhall be filed: And the books cited to warrant theſe differences were, 2 *H.* 8. 28. 7 *H.* 4. 16. 2 *Eliz. Dyer* 180. 5 *Eliz. Dy.* 225. 1 & 2 *Phill.* & *Ma. Dyer* 105. 15 *Eliz. Dyer* 330. 20 *Eliz. Dyer* 363. and 6 *El. Dyer* 230. Note that it was ſaid by *Crawley*, That it is all one where there is no warrant of Attorney, and where there is, and he ſaid, there are many preſidents accordingly, and that the ſame is holpen by the Statute of 8 *H.* 6. *cap.* 1, 2. But *Bankes* Chief Juſtice contrary, That it is not helped by the Statute of *H.* 6. and ſo is it reſolved in the 8 *Rep.* 162. And he cauſed the protonotaries to ſearch preſidents, but yet hee ſaid they ſhould not ſway him againſt the printed law, becauſe they might paſſe *ſub ſilentio*: And the chief juſtice obſerved alſo, that the ſame is not holpen by the Statute of 18 *Eliz.* for that helpes the want of warrant of Attorney after verdict onely, and not upon *Nihil dicit*, as this caſe is, or upon wager of Law, or upon confeſſion, or *non ſum informatus*: And the the Court ſaid, That it ſhall be a miſchievous caſe, that Attornies ſhould be ſuffered to file their warrants of Attorny when they pleaſed, and therefore they gave warning, that none ſhould be filed after the terme, and willed that the Statute of 18 *Eliz. ca.* 16. ſhould be put in execution.

Mich.

Mich. 17°. Car' *in the Kings Bench.*

202. A *Certiorare* was directed to the Commiſſioners of Sewers, who according to the writ made a certificate, to which Certificate divers exceptions were taken by *Saintjohn* the Kings Sollicitor. Firſt, that it appeareth not by the Certificate, that the Commiſſion was under the Great Seal of England, as it ought to bee by the Statute of 23 *H.* 8. *cap.* 5. Secondly, the Certificate doth not expreſſe the names of the Jurors, nor ſhew that there were twelve ſworn, who made the preſentment as by the Law it ought to be, but onely *quod præſentatum fuit per Jurator'*, ſo that there might bee but two or three. Thirdly, it appeares by the Certificate, that it was preſented by the Jury, That the Plaintiffe ought to repaire ſuch a Wall, but it is not ſhewed for what canſe; either by reaſon of his land, preſcription or otherwiſe. Fourthly, they preſent that there wants reparation, but doth not ſhew that it lies within the Levell and Commiſſion. Fiftly, there was an Aſſeſſement without a preſentment, contrary to the Statute, for it is preſented that ſuch a Wall wanted reparation, and the Commiſſioners aſſeſſed the Plaintiffe for reparation of that wall and another, for which there was no preſentment. Sixtly, the taxe was laid upon the perſon, whereas by the Statute it ought to be laid upon the land. Seventhly, there was no notice given to the Plaintiffe, which as he conceived ought to have been by reaſon of the great penalty which followes for non-payment of the aſſeſſement: for by the Statute the land ought to be ſold for want of payment. Theſe were the principall exceptions taken by the Sollicitor, *Lane* the Princes Attorney tooke other exceptions. Firſt, becauſe they aſſeſſe the Plaintiffe upon information; for they ſaid, that they were

credibly informed, that ſuch a Wall wanted reparation, and that the Plaintiffe ought for to repair it, whereas they ought to have done it upon preſentment, and not upon information, or their private knowledge. Secondly, that they aſſeſſed the Plaintiffe, and for not payment ſold the diſtreſſe, which by the Law they ought not to doe, for that enables them onely to diſtreine, and it was intended by the Statute, that a Replevin might be brought in the Caſe, for it gives Avowry or Juſtification of a diſtreſſe taken by reaſon of the Commiſſion of Sewers, and there ought to be a Replevin, otherwiſe no avowry, and if Sale of the diſtreſſe ſhould be ſuffered, then that priviledge given by the Parliament ſhould be taken away, which is not reaſonable; *Keeling* of the ſame ſide, and he ſaid, that it was adjudged, *Paſc.* 14. *Car.* in this Court in *Hungers* caſe, That the Certificate of the Commiſſioners was inſufficient, becauſe that it was not ſhewed that the Commiſſion was under the Great Seal of England, as by the Statute it ought to be, and the Judges then in Court, *viz.* *Mallet*, *Heath* and *Bramſton*, ſtrongly inclined to many of the exceptions, but chiefly to that, that there wanted *virtute Litterarum Patent*. But day was given to heare Councell of the other ſide.

203. A man acknowledgeth a Statute, and afterwards grants a rent charge, the Statute is afterwards ſatisfyed, Whether the grantee of the rent may diſtrein without ſuing a *Scire facias* was the queſtion; which was twice or thrice debated at the Barre, but becauſe it was before that *Mallet* the puiſne Judge was Judge, the Court gave order that it ſhould be argued again.

Thornedike *againſt* Turpington *in the Common Pleas.*

204. IN Debt upon a Bond, the Defendant demanded *Oyer* of the Condition and had it, which was that the Defendant

fendant ſhould pay ſo much in a houſe of the Plaintiffes at Lincoln, the Defendant pleaded payment at Lincoln aforeſaid, upon which they were at iſſue, and the *Venire facias* was *De Vicinet civitatis Lincoln*, and found for the Plaintiffe. And now it was moved in arreſt of Judgment that it was a miſ-triall; becauſe the *Venire facias* ought to have been of the body of the county, and not of the City, which was alſo a county of it ſelfe: but it was reſolved by the Judges, *viz. Feſter, Reeve*, and *Bankes* chiefe Juſtice, Juſtice *Crawley* onely againſt it) that the tryall was good, & this reſolution was grounded upon the booke of 34 *H.* 6. 49. & 50. *pl.* 17. there being no authority in the Law (as was agreed) in point to this caſe, but the Caſe aforeſaid. And it was taken for a rule, that where it doth not appear upon the Record, that there is a more proper place for tryal, then where the tryal was, that there the tryal is good, but here is not a more proper place. Further, the chief Juſtice ſaid, that it was not poſſible to be tryed in the body of the county, becauſe that the payment was to be in the city; and he ſaid, it is true, that if a man ſpeak generally of the County of Lincoln; it ſhall be intended of the body of the County, and not the City, becauſe that the city is but derivative out of the county: and further he ſaid, that the Judges are bound to take notice of a County, not of a particular liberty: Yet it was reſolved here, becauſe the tryall was in the moſt proper place and could not be otherwiſe, that the *Venire facias* was well awarded and the tryall good: ſee the booke of 34 *H.* 6.

Bayly *againſt* Garford.

205. BAyly brought an Action of Debt upon a Bond againſt *Garford* executor of another, the Defendant pleaded *Non eſt factum* of the Teſtator, upon which a ſpeciall verdict was given, *viz.* That the Teſtator was bound in that bond with two others joyntly and ſeverally, and that afterwards the ſeales of the two others were eaten with mice and rats, and whether now that were the bond of the Teſtator or not was the queſtion: which the Jury referred to the Court, and

it was now argued by Serjant *Whitfield* for the Plaintiffe, that the Obligation ſtood good againſt the Defendant, notwithſtanding the eating of the Seales of the two others: and his reaſon was, Becauſe that where three are bound jointly and ſeverally, that it all one as if they had been ſeverall obligations: for as when three are bound joyntly and ſeverally, there may be one *Precipe*, one Declaration and one Execution againſt them all together; ſo when three are bounden joyntly and ſeverally, there may be ſeverall *Precipes*, ſeverall Declarations and ſeverall executions againſt them, ſo it is as it were ſeverall & diſtinct obligations, and therefore the avoiding of part, is not the avoiding of the whole. Further, he put Caſes where a deed which is intire may be void in part and good for the reſidue, 14 *H.* 8. 25. & 26. 9 *H.* 6. 15. and *Piggotts* caſe 11 *Rep.* 27. Where it is reſolved that if ſome of the Covenants of an Indenture, or conditions of a Bond are againſt the Law, and ſome good and lawfull, that in that caſe the Covenants and Conditions which are againſt the law, are void *ab initio*, and the others ſhall ſtand good: and he cited the 5 *Rep.* 23. *Mathewſons* caſe, as a ſtrong Caſe to this purpoſe. But the Court ſaid, that that Caſe of the 5 *Rep.* differed from this Caſe, for there certain perſons covenant *ſeparatim*, and there the breaking of the Seale of one of the parties from the deed ſhall not avoid the whole deed, for it is as ſeverall deeds, but here they are bound joyntly and ſeverally which altereth the Caſe. Beſides, he ſaid the book in 3 *H.* 7. 5. made not againſt it, for there it ſhall be taken that they were bound joyntly and not ſeverally as in this Caſe, and he cited a Report in the point, which was *Trinit.* 2. *Jac.* in this Court betwixt *Banning* and *Symmonds*, where the Caſe was, That twenty eight Merchants were bound joyntly and ſeverally (as our Caſe is) and three of their ſeales were broken from the deed, but notwithſtanding it was reſolved that the deed did remain good againſt the others, (note, that the Court doubted of that Report and therefore ordered that the Roll ſhould be ſearched) and the objection here, that it is joynt, is worth nothing, becauſe it is ſeverall alſo, and he ſaid, that if two levy

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a Fine, one within age, and the other of full age, he ſaid, it is good in part and voidable in part; and if a Fine which is a matter of Record, may be good in part and voidable in part, *à fortiori* he conceived a matter in fait as a bond: and the caſe of the Fine he ſaid was *Engliſhes* caſe adjudged; and he would have taken adifference betwixt Raſing, Interlineation & Addition, as is in *Piggots* caſe, that the ſame ſhal avoid the whole deed. But that the breaking of the Seal of one ſhould not avoid it but for part. But the Court ſaid, That it was cleerly all one, wherefore he prayed judgment for the Plaintiffe. Serjant *Pheaſant* contrary, That the whole deed is avoided, and *non eſt factum* of the Defendant, it is not the ſame bond in nature and effect as it was before, and as 5 *Rep.* 119. *Whelpdales* caſe is if the deed were altered by interlineation, addition, raſure and breaking of the Seal, there the Defendant may plead *non eſt factum*, becauſe it is not the ſame deed: ſo in this Caſe it is not the ſame deed, for whereas it was joynt at the firſt, now if the deed ſhould ſtand good againſt the Defendant onely, it ſhould bee his bond onely, where it was his bond, and the bond of another at the firſt, and ſo not the ſame bond; and 3 *H.*7. 5. ought to be taken of a Bond joynt and ſeverall, becauſe that moſt Bonds are ſo, and then it is cleere our very Caſe, and there it is reſolved, That if two be bounden in a bond, and the Seale of one is diſſolved and taken from the Bond that it avoids the whole deed, and it is not an Obligation joynt and ſeverall, but joynt or ſeverall at the Election of the Obligee, for he cannot uſe both; and when he hath by his own Act deprived himſelf of this Election (as in our Caſe) which goes in prejudice of the Obligor, who is the Defendant, the whole bond is thereby gone, for by that meanes the Defendant onely ſhall bee charged, where both were, and therefore he conceived that if I grant unto a manan Annuity, or a robe, if the grantee releaſe one of them, both are gone becauſe he hath deprived himſelf of Election: ſo in this caſe: he by his default ſhould prejudice the defendant here, wch ought not to be, and he compared this Caſe to *Laughters* caſe *C.* 5. *Rep.* 21. Beſides, if the whole deed ſhould not thereby be avoided.

avoided, it ſhould be a great prejudice to the Defendant, in as much as if all happen to be in execution for the debt due upon that Bond, as by the Law they may, and the one eſcape, the ſame ſhould give advantage to the others to have *Audita querela*, and by that to diſcharge themſelves, which the Defendant here ſhould loſe if the Obligation ſhould ſtand in force as to him onely, 8 *Rep.* 136. Sir *John Needhams* caſe, If a woman Obligee taketh one of the Obligors to be her Huſband, the ſame is a diſcharge to the other. Two commit a treſpaſſe, the diſcharge of one is the diſcharge of both, yet it is there joynt or ſeverall at the will of the party who releaſeth. But it may be objected, that it is a Caſuall act here, and therefore ſhall not be ſo prejudiciall to the Plaintiffe here. To that he anſwered, That that ſhall not help him, becauſe it is his own lacheſſe and default; and the ſame objection might have been made in *Piggots* caſe, where the obligation is altered in a materiall place by a ſtranger without the privity of the Obligee, and yet there it was reſolved that the ſame ſhall avoid the deed. Beſides, if the Obligee had delivered the ſame over to another to keep, and it had been eaten with Rats and Mice, yet that would not excuſe him, and by the ſame reaſon ſhall not helpe the Plaintiffe here, *Mathewſons* caſe, *C.* 5: *Rep.* differs much from this caſe, becauſe there the Covenants are ſeverall and not joynt as in this Caſe, and therefore if the covenantee doth releaſe to one of the covenanters, that ſhall not diſcharge the others, for the Caſes of 14 *H.* 8. and *Piggotts* caſe they differ much from our Caſe, for there the covenants or conditions againſt the Law are void *ab initio* by the conſtruction of the Law, and no alteration as in our caſe by the Act or default of the party by matter *ex poſt facto*, and therefore thoſe Covenants or Conditions againſt the law cannot vitiate thoſe which were good and according to Law, becauſe they took not any effect at all. So if a Monk and another be bound, the Bond is void as to the Monk and good as to the other, becauſe there is no ſubſequent alteration by the party, but the ſame is void by conſtruction of law *ab initio*: & upon the ſame reaſon ſtands the Caſe of the Fine

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put of the other ſide. For which cauſes he prayed judgment for the Defendant. Note the Court, *viz. Foſter, Reeve, Crawley* and *Bankes* chief Juſtice did ſtrongly incline that judgement ought to be given for the Defendant, and their reaſon was, That if the Obligee by his Act or own lacheſſe diſcharge one of the Obligors, where they are joyntly and ſeverally bound, that the ſame diſcharges them all, but gave day for the further debating of the Caſe, for that this was the firſt time it was argued.

207. By Juſtice *Foſter* and *Bankes* Chief Juſtice, a Truſt is not within the Statute of 21 *Jac. cap.* 16. of limitations; and therefore no lapſe of time ſhall take away remedy in Equity for it, but for other Actions which are within the Statute and the time elapſed by the Statute, there is no remedy in Equity, and that (they ſaid) was alwaies the difference taken by my Lord Keeper *Coventry*: but Juſtice *Crawly* ſaid, that he had conferred with the Lord Keeper, and that he told him that remedy in equity was not taken away in other Actions within the Statute.

208. It was ſaid by the whole Court, that they never grant an Attachment without an *Affidavit* in writing.

209. The Caſe before of the warrant of Attorney, was betwixt *Firburne* and *Cruſe*, and was entred *Trinit.* 17. *Car.* And now it was reſolved upon reading of preſidents in in Court, that no warrant of Attorney ſhall be made or filed, becauſe that it is anerror and not helped being after judgment in *Nihil dicit*, and that none of the preſidents came to our caſe, the greateſt part of preſidents were theſe, *viz.* the firſt was 1° *Car. Taylor* againſt *Thellwell*, the ſame appeared to be upon demurrer, and no judgment given; Another was *Mich.* 3° *Car. Peaſgrove* againſt *Brooke*, and in that Caſe it did not appeare.

peare that any writ of Error was brought. Another was *Pasc.* 5 *Car. Tayler* againſt *Sands*. Another *Hill.* 6. *Car. Smith* againſt *Bland*, in that it was conceived to be amendment onely, and it was agreed for law, that where there was a warrant of Attorney, it might bee amended for any defect in it, as where there is a miſpriſion of the name or the like, as it is reſolved *Br.* amendment 85. and ſo is 1 and 2 *Phill.* and *Ma. Dyer* 105. *pl.* 6. expreſſely, where *Alicia* for *Elizabetha* in the warrant of Attorney was amended, and that after a writ of Error brought by conſtruction of the Statute of 8 *H.* 6. and ſo is 9 E. 4. *Br.* amenment 47. and Juſtice *Reeve* ſaid, it cannot appear to us by any of the ſaid preſidents, whether there was a warrant of attorney or not: & perhaps upon examination it might appear to the Judges that there was a warrant of attorny, which is helped by the Statute of 8 *H.* 6. & that might be the reaſon wch cauſed them to order that it ſhould be fyled, but that doth not appear to us, & therefore the preſidents were not to the purpoſe. Beſides, it doth not appear by any of them whether judgment were given or not, and before judgment it may be amended as the book is, 9 *E.* 4. 14. *br.* amenment 47. Beſides, in one of them the Plaintiffe did neglect to remove the Record, which is the very Caſe in *Dyer*, and that was the reaſon that the warrant of Attorny was filed, but in this Caſe there appearing to bee no warrant of Attorney it is not helped by the Statute of 8 *H.* 6. and after a judgment, and that upon *Nihil dicit*, which is not holpen by the Statute of 18 *Eliz.* and there is no Lacheſſe in removing of the Record by the Plaintiffe, and for theſe reaſons the whole Court was againſt the Defendant in the writ of Error, that it was Error, and therefore ought not to be amended. Note, that in this Caſe it was moved that the warrant of Attorney might be filed in this Court, after Error brought in the Kings Bench, but obſerve that if it had been a thing amendable, that had been no impediment to it, for things amendable before Error brought are amendable after, and if the inferior Court doe not amend them, the ſuperior may, and ſo it is adjudged 8 *Rep.* 162 in *Blackmores* Caſe, and

and ſo is the Caſe expreſſe in the point, 1 and 2 *Phill.* and *Ma. Dyer* 105. *pl.* 16. Where a warrant of Attorny was amended *in Banco* after Error brought and the Record certified, this is onely my own obſervation upon the Caſe.

Mich. 17°. Car' *in the Kings Bench.*

210. AN information was brought for the King againſt *Edgerly* Carrier of Oxford, becauſe that where by the cuſtome of England, no Carrier or other perſon ought to carry above two thouſand weight, and that with a wagon, having but two wheeles, and but for horſes, that the Defendant had uſed for the ſpace of a yeere laſt paſt to drive *Quoddam geſtatorium, Anglicè* a Dragge or Wagon, *Cum quatuor rotis & cum inuſitato numero equorum, viz.* with twelve horſes betwixt Oxford and London, and he had uſed to carry with it five thouſand weight, ſo that he had digged and ſpoiled the way in a Lane, called Lobbe Lane, that the people could not paſſe. To which the Defendant pleaded not guilty, and was found guilty by verdict; and many exceptions were taken to the Information: all which were over-ruled by the Court, *viz. Mallet*, & *Heath* Juſtices, and *Bramſton* Chief Juſtice, to be miſpriſions: the firſt was, That he drave a wagon *Cum inuſitato numero equorum*, and doth not ſhew the certain number of them, and therefore the Information which was in the nature of a Declaration was not good for the incertainty. But *Per Curiam* the ſame was miſtaken, for it ſaith, that he drave with eleven horſes. The ſecond exception was, That the uſuall weight which it ought to carry is not ſhewed, but that was ruled alſo to be a miſtake, for it ſaith 2000 weight. The third was, that it is not ſhewed in the Information that the way did lead to other market townes then from Oxford to London, but it

was ruled to be good notwithſtanding that exception, becauſe that the place *à quo*, and the place *ad quem* is ſet down. And it is not materiall whether it lead to other towns or not. The fourth exception was, That the Nuſance is ſaid to be in a place called Lobbe Lane, and it is not ſhewed of what quantity or extent that Lane is, *viz.* how many poles or the like: but it was ruled to be good, notwithſtanding that, Firſt, becauſe that the Jury have found that the way was ſtopt that the people could not paſſe; and if it was ſo, then it's not materiall how long it was. Secondly, Lobbe lane is ſaid onely for the certainty of the place, that the Viſne might come from it for of neceſſity it will be a Nuſance through the whole way betwixt Oxford and London. And Laſtly, the Nuſance is laid to be through all Lobbe Lane, and therefore it is good notwithſtanding that exception alſo. And therefore the matter and forme of the Information being admitted good, then the queſtion was, what judgment ſhould bee given in this Caſe, whether that the Carrier ſhould repair it at his own coſts, or ſhould be fined for the Nuſance to the commonwealth or not: Juſtice *Mallet*; there are ſeverall judgements in Caſes of Nuſance; if it be an aſſiſe *quia levavit* or *quia exaltavit*, it ought to be part of the judgement, that the Defendant demoliſh it at his own coſts: ſo where a Nuſance is to a River, 19 *Aſſ. pl.* 6. But our Caſe differs much from the caſe of the River, for that is a High-way which leadeth to a Port to which all reſort, and therefore a ſtronger Caſe: but he conceived that the judgment ſhould not be that he ſhould repaire it, becauſe it is ſaid in the Information, that the Townſhip ought, and therefore it differs from thoſe Caſes, and he doubted whether hee ſhould be fined or no: becauſe that the Information is not *vi & armis*, and not againſt any Statute, for then it ſhould be a contempt and ſo fineable, but notwithſtanding he agreed, that he ſhould be fined. Firſt, becauſe it is layed to be *Contra pacem Domini Regis & ad nocumentum* of the Kings people, which is a contempt, and therefore fineable. Secondly, becauſe that although it i not laid to be *vi & armis*, yet it is laid to bee a rooting and ſpoiling which implyeth force,

11 *Aſſ.*

11 *Aſſ.* & 19. *Aſſ.* 6. where a Nuſance was with force, there the Defendant was fined. Then admitting that the Defendant ſhall be fined; the queſtion then is, What fine ſhall be ſet upon him, and he ſaid, that it ſhall be *Secundum quantitatem delicti & ſalvo wainagio ſuo*, according to the Statute of *Magna Charta cap.* 14 & *Weſt.* 2. So that we ought not to aſſeſſe a fine upon any freeholder to take away his contenement, nor upon any Villaine to take away his wainage; and he ſaid, that he conceived that the fine ſet upon him ought to be the leſſe for the great prejudice which might come to the Defendant, becauſe that the Townſhip might have an Action upon the Caſe againſt him, becauſe they are bound to repair it, and therefore he cited 27 *H.* 8. 27. Further, he took exception to it that it is not ſhewed of what value or eſtate the Defendant is, ſo as we might know what fine to impoſe, for ſuch fine ought to be impoſed *Salvo wainagio ſuo* as aforeſaid: and he compared it to the Caſe in 4 E. 4. 36. a Juror is demanded, and doth not appear, he ſhall be fined to the value of his eſtate for a year, but that ought to be inquired of by the Jury and not ſet by the Court becauſe they doe not know the value of his eſtate; ſo in this Caſe: but notwithſtanding he agreed, that he ſhould be fined, becauſe it appeareth to us how great his fault was, and the fine ought to be as aforeſaid, and therefore he ſet a fine upon him of four Marks. Juſtice *Heath*; two things are here conſiderable, whether there ſhall be any judgment as this Caſe is, and admitting that there ſhall, what Judgment ſhall be given, and he agreed that judgment ſhould be given, becauſe that the Information is good, as well for the forme as for the matter of it: it is good for the matter of it, becauſe *Malum in ſe & ad nocumentum publicum*, and therefore it is properly puniſhable in this Court, & the rather now, becauſe not puniſhable in another Court, the Star-Chamber being now taken away, and it is good for the forme of it, for it hath ſufficient certainty as is before ſhewed. Now for the judgement what ſhall be given, he agreed that he ſhould be fined and impriſoned, for impriſonment is incident to a fine, but he did not determine what the

fine ſhould be, he agreed the Rule that the fine ſhal be *ſecundū quantitatē delicti*, and that cannot be ſo little as it is made, for although Lobbe Lane bee layed in which the Nuſance ſhould be, that is onely for neceſſity that there may be a certaine place for the Viſne, but of neceſſity the Nuſance is through the whole high-way betwixt Oxford and London; and becauſe we will not offend as the Star-Chamber did by aſſeſſing too high fines, for which it was juſtly condemned; ſo upon the other ſide, we ought not to ſet ſo ſmall fines, that we injure juſtice, and be thereby an occaſion to increaſe ſuch faults where we ought to ſuppreſſe them: and therefore he conceived the fine ſet by *Mallet* too little, but he agreed, that the judgement ſhould be fine and impriſonment, but hee adjorned the ſetting of the fine, untill he had conſulted with the Clarkes whether it ſhould be inquired of by Commiſſion, or other good information. *Bramſton* Chief Juſtice, that the Information is good for the matter and the forme, but he objected that where it is ſaid, that he did drive *quoddam geſtatorium*, that *geſtatorium* is a word incertain, and that therefore the Information ſhould bee inſufficient, but he agreed that notwithſtanding that that it was good by reaſon of the *Anglicè* for that reduceth it to certainty, and he cited the Caſe betwixt *Sprigge* and *Rawlinſon*, *Paſc.* 15. *Car.* in this Court, where the Caſe was that a man brought an *Ejectione firme de uno repoſitorio*, which word was put for a warehouſe, and reſolved that it was naught for the incertainty, but the Chief Juſtice here ſaid, that it had been good if it had been explained by an *Anglicè*; and ſo he ſaid it was reſolved in that Caſe, and therefore he agreed that the Information here was good notwithſtanding that exception by reaſon of the *Anglicè*, this offence is an offence againſt the common wealth, and ſuch an offence for which a man may be indicted, for it is layd in the Information to be *ad nocumentum Ligeorum Domini Regis*, wherefore he agreed that the Judgment ſhould be a fine with *Capiatur*, and he ſaid, that it cannot be part of the Judgement in this Caſe, that the Defendant ſhould repaire it becauſe it is ſaid in the Information expreſſely that the

the Pariſhioners ought to repair it, and the Chief Juſtice ſaid, (and ſo Juſtice *Heath* which I before omitted) that the Townſhip cannot have their Actions, for ſo there ſhould bee multiplicity of Actions, which the law will not ſuffer; but he conceived that if any man had a ſpeciall and peculiar damage, then he might have his Action, otherwiſe not: as if a man were bound by preſcription or tenure to repair that place called Lobbe Lane, or any part of it, then he might have his action upon the Caſe againſt the defendant, otherwiſe not: he agreed that the fine ſhould be *ſecundū quantitatem delicti*, bnt yet not too high, becauſe the other pariſhes may have their Information in like manner againſt the Defendant, but he agreed to adjorne the ſetting of the fine.

Southward *againſt* Millard.

209. IN an *Ejectione firme*, the Defendant pleaded not guilty upon which a ſpeciall verdict was found, *Nicholls* poſſeſſed of a Terme for 1000 yeers deviſed the ſame to *E.* his daughter for life, the remainder to *Iohn Holloway*, and made *Lowe* the huſband of the Daughter his Executor and dyed, *Iohn Holloway* deviſed his intereſt to *Henry* and *George Holloway*, and made *Oliver* and others his Executors and dyed; afterwards *Lowe* ſpake theſe words, If *E.* my wife were dead, my eſtate in the premiſſes were ended and then it remaines to the *Hollowaies*, *E.* dyed, the executors of *Iohn Holloway* made the Leaſe to the Plaintiffe, and *Lowe* made the Leaſe to the Defendant, who entred upon the Plaintiffe, who brought *Ejectione firme*, and whether upon the whole matter the Defendant were guilty or not of the treſpaſſe and ejectment ſuppoſed the Jury referred to the Court, and the points upon the Caſe are two. Firſt, whether the words ſpoken by *Lowe* the Executor be a ſufficient aſſent to the deviſe or not: admitting that it is, then the Second point is, Whether this aſſent came in due time or not: as to the intereſt of *Iohn Holloway* in the remainder, becauſe hee dyed before the words ſpoken which ſhould make the aſſent; and as to that the point is

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no other, but that the Legatee dyeth before aſſent to the Legacy, whether aſſent afterwards came too late, or that the Legacy ſhall be thereby loſt or not, that is the queſtion: and by Juſtice *Mallet*, it is a good aſſent, and that in due time, and here ſome things ought to be cleered in the Caſe. Firſt, that the deviſe to *John Holloway* in the Remainder is good by way of executory deviſe. Secondly, that the deviſe by *John Holloway* to *Henry* and *George* is a void deviſe becauſe but a poſſibility. Thirdly, that the aſſent to the firſt deviſe is an aſſent alſo to him in the remainder, And laſtly, that if an Executor enter generally, he is in as Executor and not as deviſee, all which are reſolved in *Lampetts* and in *Matthew Mannings* Caſe. Now theſe Caſes being admitted, the queſtion is, Whether that *Lowe* the Executor here hath made a ſufficient Declaration, to take the terme as Deviſee in the right of his wife, or not: for he hath his Election to take it as executor or in the right of his wife; and as I conceive he hath made a good Election to have it as Legatee in the right of his wife: the laſt words, *viz.* That then it remaines to the *Hollowaies*, which is impoſſible by law to be, becauſe that the deviſe to them was void, he did not waigh, becauſe but additionall, and the firſt words of themſelves are ſufficient to make an aſſent, it is not a transferring of an intereſt but an aſſent onely to it, which was given by the firſt Teſtator, and after aſſent, the deviſee is in by the firſt Teſtator, and that being but a perfecting Act like an Attornment, and admittance of a copy-holder, the Law alwaies favours it, for the law delights in perfection, and therefore an aſſent by one Executor ſhall binde all, ſo an aſſent by one Enfant Executor above 14. yeeres ſhall binde the other, ſo an aſſent to the particular Tenant is good to him in the Remainder, Admittance of a Copiholder for life is admittance of him in the remainder: which Caſes ſhew that an aſſent being but a perfecting act, the law ſhall alwaies make a large conſtruction of it: and he ſaid, that *Mannings* caſe in the 8 *Rep.* is the very Caſe with our Caſe, as it appeareth in the pleading of it in the new book of Entries 149. *b.* and alſo in *Mannings* Caſe aforeſaid, but that Caſe was not reſolved upon

upon that point, for the deviſe there was, paying ſo much, & the deviſee being alſo executor payed the money, and therefore it was ruled to be a ſufficient aſſent to the Legacy, and therefore our caſe may be doubted notwithſtanding that caſe, and for my part I conceive it a good aſſent to the Legacy in our Caſe. And for the ſecond point I hold that the aſſent coms in due time to ſettle the Remainder, although that *John Holloway* were dead before, for otherwiſe by this common caſualty of death, which may happen ſo ſuddenly that an aſſent cannot be had before, or by the wilfull obſtinacy of the executor, that he will not aſſent Legatees ſhould be defeated of their Legacies which would be a great inconvenience. Beſides, I hold that the deviſe by *John Holloway* was void, he having but a poſſibility at the time of the deviſe, and therefore that it remain to his executors, and by conſequence, that the *Ejectione firme* brought by their Leſſee will lye: Juſtice *Heath* acc. for the Plaintiffe; Three things are here conſiderable. Firſt, whether there need any aſſent at all of the Executor to a Legacy. Secondly, whether here be an aſſent or not. Thirdly, whether this aſſent come in due time or not; the firſt hath been granted that there ought to be an aſſent for the great inconvenience which might happen to Executors if Legatees might be their own carvers, and ſo are all our books except 2 *H.* 6. 16. and 27 *H.* 6, 7. which ſeeme to take a difference where the Legacy is given in certain and in *ſpecie*, there it may be taken without aſſent, but where it is not given in certain, there it cannot, but he held cleerly the law to be otherwiſe, that although it be given in certain, yet the Legatee cannot take it without aſſent of the Executor; for ſo the executor ſhould be ſubject to a *Devaſtavit* without any fault in him, or any meanes to helpe himſelf, which ſhould be very inconvenient. Then the ſecond thing here to be conſidered is, Whether there be an aſſent or not; it is cleere, that if an Executor enter generally, he ſhall be in as Executor, and not as Legatee, for that is beſt for him to prevent a *Devaſtavit*; and it is as cleere, that if he declare his intention to be in as Legatee, that then he ſhall be ſo: then the queſtion here is, Whe-

ther the words in our Caſe be a ſufficient declaration of the mind of the Executor to take the ſame as Legatee in the right of his wife or not: and I hold that it is, he aggrees that the ſecond words are not ſo weighty as the firſt; but hee held the firſt words are ſufficient of themſelves to make an aſſent, and when he ſaith, that then it remaines to the *Hallowaies*, that proves that he took notice thereof as a Legacy, and that he would have it in that right, although in truth the deviſe by *John Holloway* was void, ſo as it could not remaine to them. For the third, he held that the aſſent came in due time, otherwiſe it might be very prejudiciall to Legatees, for elſe by that meanes they may be many times defeated of their Legacies: for put Caſe that an Executor will not aſſent, and the Legatee dyeth before hee can compell him to aſſent, or that the Legatee dyeth in an inſtant after the deviſor, in the 5 *Rep. Princes* Caſe it is reſolved that an Infant under 17. may not aſſent to a Legacy, nor the adminiſtrator *Durante minori ætate*; then put Caſe that the Legatees dye during the adminiſtration, *durante minori ætate*, in whoſe time there cannot bee an aſſent, It would be a very great miſchiefe, if that in any of theſe Caſes the Legatees ſhould be defeated of their Legacies, when by poſſibility they could not uſe any meanes to get them: wherefore he held cleerly that the aſſent of the Executor after the death of the Legatee came in good time, and therefore hee concluded for the Plaintiffe. *Bramſton* Chiefe Juſtice alſo for the Plaintiffe. For the firſt point, he held that there is a good aſſent, and he ſaid, that *Mannings* Caſe hath the very words which our Caſe hath, but my Lord *Cooke* did not ſpeak of theſe words in the Report of the Caſe, becauſe he conceived that the payment of the money was a ſufficient aſſent to the Legacy, but further I conceive, that it differs fully from *Mannings* Caſe, for there it is found expreſſely, that the Executor had not aſſets, and therefore it ſhould bee hard to make him aſſent by implication thereby to ſubject himſelfe to a *Deveſtavit*, for as I conceive an Executor ſhall never bee made to aſſent by implication where it is found that he hath not aſſets, but there ought to

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be an expreſſe aſſent by reaſon of the great prejudice which might come unto him, but in our Caſe it is not found that *Lowe* had not aſſets, an Infant cannot aſſent without aſſets, but if there be, then it ſhall bind him, and perhaps that was the reaſon that my Lord *Coke* did not report any thing of theſe words, whether they were an aſſent or not, and his paſſing over them without ſaying any thing of them ſeemes partly to grant and agree, that they did not amount to an aſſent. A man deviſeth unto his Executor paying ſo much, and he payeth it, it is a good aſſent to the Legacy; ſo is *Mathew Mannings* Caſe 8 *Rep.* and *Plowd. Comment Welcden* and *Elkingtons* Caſe: and he ſaid, that an aſſent is a perfecting act which the law favours, and therefore he ſaid that it was adjudged, that where an Executor did contract with the deviſee for an aſſignement of the terme to him deviſed, that it was a good aſſent to the Legacy, for the ſecound point alſo he held, cleerely that the aſſent came in due times for otherwiſe it ſhould be a great inconvenience, for by that meanes it ſhould be deſtructive to all legacies, for of neceſſity there ought to be an aſſent of the Executor, and if he will not aſſent, and the Legatee dyeth before he can compell him to aſſent, or if the Legatee dyeth immediately after the Deviſor before any aſſent to the Legacy, in the firſt Caſe it ſhould be in the power of the Executor, who is a ſtranger to prejudice me, and in the latter Caſe, the Act of God ſhould prejudice me, which is againſt two rules of Law, that the Act of a ſtranger, or the Act of God ſhall not prejudice me, wherefore without queſtion the aſſent comes in due time. Beſides, if a Legatee dyeth before aſſent to a Legacie, the ſame ſhall be aſſets in the hands of his Executors, and the Legatee before aſſent hath an intereſt demandable in the Spirituall Court. An Executor before probate ſhall not have an Action, but he may releaſe an Action becauſe that the right of the Action is in him: ſo in this Caſe, although that the Legatee before aſſent hath not an intereſt grantable, yet he hath an Intereſt releaſable. A man ſurrenders copyhold land to the uſe of another, and the ſurrenderee dyeth before admittance, yet his heire may be admitted;

and this caſe is not like thoſe Caſes put at the barre, where there is but a meer poſſibility and not the leaſt intereſt, as where the grantee of a reverſion dyeth before attornment, or the deviſee before the deviſor, in thoſe Caſes the parties have but a meer poſſibility, and therefore countermandable by death: but it is otherwiſe in our Caſe as I have ſhewed before, and therefore I conclude that here is a good aſſent, and that in due time, and therefore that the *Ejectione firmæ* brought by the Plaintiffe well lyeth.

Dale *and* Worthyes *Caſe.*

212. DALE brought a writ of Error againſt *Worthy* to reverſe a judgement given in the County Palatine of Cheſter, and the writ of Error bore *Teſte* before the Plaint there entred, and whether the Record were removed by it or not was the queſtion: and the Court, *viz. Mallet, Heath* and *Bramſton* were cleer of opinion without any ſolemn debate, that the Record was not removed by that writ of Error, becauſe that if there be not any plaint entred at the *Teſte* of the writ, how can the *Proceſſus* according to the writ be removed, when there is no *Proceſſus* entred; and that failing, all failes; and beſides, it is meere for delay of Juſtice: and they agreed that a writ of Error bearing *Teſte* before judgment is good as is the book of 1 *E.* 5. 4. becauſe that there the foundation ſtands good, and it is the uſuall courſe of practiſe for the preventing and ſuperſeding of Execution.

Tuder *againſt* Rowland.

213. AN *Ejectione firmæ* was brought; and in the writ was *vi & armis*, but it wanted in the Declaration, and whether it were Error or not, or whether it were amendable or not, was the queſtion, and *Shaftoe* for the Plaintiffe held cleerely that it was not Error; but the Court did not heare it at that time, the Caſe was Entred *Paſc.* 16 *Car. Rot.* 333.

214 *Bolſtrood*

214. *Bolſtrood* prayed a Prohibition to a Court Baron, as alſo an Attachment againſt the Steward for dividing of Actions to bring the ſame within their Juriſdiction to defeat the common law, as alſo for refuſing to ſuffer the Defendant to put in any other Attorney for him then one of the Attorneys of that Court, and the Court awarded a Prohibition, and the Steward *Darey* of Lincolnes Inne, then at the Barre, the Court ruled that he ſtand committed untill hee had anſwered to interrogatories concerning that miſdemeanor; and they ſaid, That an Attorney at common law is an Attorney in every inferiour Court, and therefore ought not to be refuſed.

Rudſton *and* Yates *Caſe entred Hill.* 15. *Car. Rot.* 313.

215. *Rudſton* brought an Action of debt upon a bond againſt *Yates*, the Defendant demanded *Oyer* of the deed and condition thereof, and upon *Oyer* it appeared, that the bond was conditioned to perform an award, to which the defendant pleaded that the Arbitrators made no arbitramẽt, upon which they were at iſſue, and the Jury found this ſpeciall verdict, that the Defendant *Yates* and one *Watſon* ſubmitted themſelves to arbitrament, and found that the Arbitrators made an Award and found the Award *in hæc verba*; but further, they found that *Watſon* was within age at the time of the ſubmiſſion, and whether upon the whole matter the Arbitrator had made any award or not the Jury left it unto the Court, ſo as the queſtion is no other but whether an Infant may ſubmit himſelf to an award or not: for it was agreed that if the ſubmiſſion were void, that the award was void, and by conſequence the bond void; and note that the Caſe was, that *Yates* bound himſelf that *Watſon* who was an Infant ſhould performe the award, and the condition recites that where

Watſon who was an Infant had ſubmitted himſelf to an award, that the Defendant bindes himſelfe that he ſhould perform it, &c. So then if the Submiſſion be void, all is void; no ſubmiſſion, no award, and ſo no breach of the Condition, and therewith the bookes agree, 17 *E.* 4, 5. 19 *E.* 4. 1. 28 *H.* 6. 13. 5 *Rep.* 78. 10 *Rep.* 131. *b.* And by Juſtice *Mallet*, the ſubmiſſion is void, and void in part, void in all, for a ſubmiſſion is an entire thing, and therefore cannot be void as to the Enfant, and ſtand good as to the man of full age. There are but two bookes expreſſe in the point, 14 *H.* 4. 12. & 16 *H.* 6. 14. and none of thoſe are of any authority, in the firſt there is no debate of the Caſe. And the ſecond is a flat quere, and as I conceive the better opinion is, that the award is void, for where it is there objected that it may be for the availe of the Infant, *Br. tit.* Coverture and Infancy 62 ſaies quere of that, for it may be that the recompence given by the award, may be of greater value then the law would give in the Action, and therefore by poſſibility it may be a diſadvantage unto him, and the Caſe betwixt *Knight* and *Stone Hill.*, 2 *Car.* in this Court, *Rot.* 234. where this very point was in queſtion, it was reſolved that if the Infant had been bound to perform the award, that th Obligation had been void. Further it was agreed, that if it appear afterwards to be to his prejudice, that that ſhall make the award void, but the principall point was not adjudged becauſe that the parties agreed. But whereas it was then, and now alſo objected, That if an Infant cannot ſubmit himſelf to an arbitrament, that thereby he ſhould bee in a worſer caſe then a man of full age, for he may have done a Treſpaſſe which ſubjects himſelfe to damages by ſuit in Law, which if he cannot diſcharge by this way, he ſhould be in a worſe condition then a man of full age, for he ſhould loſe that advantage. To that, he anſwered, that if an Infant ſhould be permitted to that he might have loſſe thereby, for he hath not diſcretion to chuſe a competent Arbitrator, and an Arbitrator might give greater damages then the cauſe did require, and he is worſe then a Judge of the Court is, he is not ſworn, a Judge is: Beſides an Infant hath divers priviledges which the

the Court would allow, but an Arbitrator not; if an Infant make default, the ſame ſhall not bind him, ſo if he confeſſe an Action, the ſame ſhall not bind him, and therefore he is in better Caſe without ſubmiſſion, then by it: and if an Infant cannot chuſe an Attorney, much leſſe a Judge, for an Arbitrator is a Judge: an Infant cannot binde himſelf Apprentice, although it may be pretended to be for his benefit, ſo 21 *H.* 6. 31. he cannot chuſe a Baylie, yet that is for his benefit; hee cannot give an acquitance if he doe not receive the money, 5 *Rep. Ruſſels* caſe, but if it be apparent for his benefit it may be good, as a Leaſe of Ejectment to try a title made by an Enfant is good, becauſe it is apparent for his benefit; an Infant is *in cuſtodia Legis*, and therefore we are bound by oath to defend him. Beſides, an Infant hath not power to diſpoſe of his goods himſelfe, and then how can he give ſuch a power to another? For which reaſons he conceives the ſubmiſſion void, and if no ſubmiſſion no award, and therefore hee gave judgement againſt the Plaintiffe *Quod nihil capiat per billam.* Juſtice *Heath* alſo againſt the Plaintiffe, True it is, that in this Caſe a ſtranger is bound that the Infant ſhall perform the award, but that recites the ſubmiſſion by the Infant, and the iſſue is, whether they made any award or not, ſo as the ground is, whether there be any ſubmiſſion or not; for no ſubmiſſion no award, that ſo by conſequence judgement ought to be given againſt the Plaintiffe: and he held cleerly that the ſubmiſſion is void, and an infant cannot ſubmit himſelf to an arbitrament, the judgement of Arbitrators (Provided that they keep themſelves within their Juriſdiction) is higher then any judgement given in any Court; for if they erre, no writ of Error lyeth to reverſe their judgement, and there is not ſo much as equity againſt them, and therefore it ſhould be a hard caſe, that an Infant ſhould have power to ſubmit himſelfe to that which ſhould be finall againſt him and no remedy, for *conſenſus tollit errorem*: wherefore hee conceived that the ſubmiſſion was void, and if that which is the ground failes, all failes. An Infant may take any thing, for that is for his advantage and cannot prejudice him, and the Church like an

Infant

Infant is in perpetuall Infancy, and *conditionem meliorem facere poteſt*, but *deteriorem nequaquam*: And where it was objected in this Caſe, that this ſubmiſſion might be for the availe of the infant, and therefore ſhould be good; he anſwered, and tooke this for a rule, that an Infant ſhall never ſubmit himſelfe to any thing under a pretence of benefit, which by poſſibility may prejudice him; and with that agreeth the better opinion of 10 *H.* 6. 14. that it ſhall not bind him becauſe it may be to his prejudice, for they may give greater damages then peradventure the law would give in any Action brought againſt an Infant. But 14 *H.* 4. is not any authority. Where it was objected, that it ſhall be voidable at the election of the Infant. To that he anſwered, that it is abſolutely void, and therefore there cannot be any Election, and it ſhould be hard, that the man of full age ſhould be bound and the Infant not, an enfant ſhall not be an accomptant becauſe that Auditors cannot be aſſigned to him; and he conceived, that an enfant cannot bind himſelfe an Apprentice, but it is uſuall in ſuch caſes for ſome friend to be bound for him, and as this Caſe is, it appeareth by the Award that it might be for the prejudice of the Infant. For the Arbitrators award, that the enfant ſhall pay five pound for quit Rents and other ſmall things, now what theſe ſmall things were *Non conſtat*, and they might be ſuch things, for which by the Law the Infant was not chargeable; and by the ſame reaſon that they may aſſeſſe five pound they might have ſet twenty pound and more and it ſhould be inconvenient that an Infant ſhould have ſuch a power to ſubmit himſelf to the judgement of any which might charge him in ſuch manner. Beſides, part of the Award is void for the incertainty, for it is ſaid ſmall things; and it doth not appear what in certain, and void in part, void in all; and for theſe reaſons he gave judgement againſt the Plaintiffe. *Bramſton* Chief Juſtice agreed, that the ſubmiſſion is void and not voidable onely, as it was objected; for then it ſhould be *tale arbitrium* untill reverſall of it, 10 *H.* 6. & 14. *H.* 4. are no authorities, or if they be, the beſt opinion is for the Infant, as it hath been obſerved, and *Knight* and *Stones*

caſe

Caſe cited before is no authority, for no judgement was given in the Caſe. But all in that caſe agreed that the award was void; becauſe it was awarded that the Enfant upon the payment of an hundred pounds ſhould make a releaſe, which proves that the ſubmiſſion was alſo void; becauſe that if it ſhould be good, by the ſame reaſon the releaſe: Where it was objected that it ſhall be voidable at the Election of the Enfant; To that he anſwered, that the ſubmiſſion ought to be either abſolutely good, or abſolutely void, for the end of an Arbitrament is to conclude and compoſe controverſies, and the Arbitrators are Judges to determine them, which ſhould never be done if it ſhould lie in the power of the Enfant to make good or fruſtrate the arbitrament at his Election; for which cauſe to ſay that it ſhall be conditionall is againſt the nature of an Arbitrament; and to ſay, that it ſhall binde the enfant abſolutely cannot be, and to ſay, that it ſhall bind the one and not the other is unequall: Beſides, there can bee no election in this caſe, for if he were within age, nothing binds him if at full age he ought to performe it. Beſides, the Arbitrament it ſelfe as this Caſe is and as it was before obſerved by *Heath* is void: for the award was, That the Enfant ſhould pay five l. for quit Rents and other ſmall things, and it doth not appear what thoſe ſmall things were, ſo that for any thing that appeareth it might be for ſuch things, for which the Enfant by the Law was not chargeable, and therefore is void for the incertainty, and void in part, void in all, and by the ſame reaſon as the Arbitrators might award five pound, they might award twenty pound or more. But he conceived that if it had appeared in certain, that the things had been ſuch, for which the Enfant is by the law chargeable, perhaps it had been good, but here it doth not appear what the things were, and therefore it was not good, *Trinit.* 4. *Car.* *Pickering* and *Jacobs* caſe, it was reſolved that a bond taken for neceſſaries of an Enfant was good, 8 *E.* 4. arbitrators Award more then the debt is, the ſame is naught, ſo here for any thing that appeareth to the contrary, the Award was to pay ſuch things as the Infant was not liable to pay; and therefore void. But

note *Reader*, I conceive that an Infant cañot ſubmit himſelf to an Arbitrament for things for which by the Law he is chargeable; for the reaſon given before, becauſe the Arbitrators may charge him farther then by the law he is lyable, which ſhould be to his prejudice, and he hath not any remedy for it. Judgement was given againſt the Plaintiffe *Quod nihil capiat per billam.* The Caſe was entred *Hill.* 15. *Car. Rot.* 313.

The Serjants *Caſe Trin.* 17° *Car. in the Common Pleas.*

216. THe Serjants Caſe was this, *A.* ſeiſed of Land in fee, *B.* his brother levyed a Fine *come ceo* to *C.* *B.* had iſſue *D.* and dyed, *A.* dyed without iſſue, *C.* entred, *D* entred and gave it to *C.* and *R.* his wife and to the heires of their two bodies, *C.* levyed a Fine *come ceo* with proclamations to *D. C.* and *R.* have iſſue, *L. C.* dyeth, *D.* confirmeth to *R.* his eſtate to have to her and the heires of her body by *C.* begotten, *R.* dies, *D.* enters, *L.* ouſtes him, *D.* brings entre in the *Quibus.* In this Caſe there are two points; Firſt, Whether the Fine levied by *B.* ſhall barre his iſſue as this Caſe is, or not: and that is the very point of *Edwards* and *Rogers* Caſe, *Paſc.* 15° *Car.* in the Kings Bench, and admitting it ſhall not barre *D.* Then the ſecond point is, what is wrought by the confirmation, if by that the iſſue in taile ſhall inherit or not, and that is the very point in the 9 *Rep. Beaumonts* Caſe.

Saunderſon *and* Ruddes *Caſe in Common Pleas Trin.* 17. *Car.*

217. *Saunderſon* brought an Action upon the Caſe for words againſt *Rudde*; the Caſe was this, The Plaintiffe being a Lawyer, was in competition for a Stewardſhip of a Corporation; and the Corporation being met together for Election of a ſteward, the Plaintiffe was propounded to bee Steward

Steward, and then the Defendant being one of the Corporation ſpake theſe words of the Plaintiffe to his brethren of the the Corporation: He (*predict.* the Plaintiffe *innuendo*) is an ignorant man and not fit for the place; and he ſaid, that by reaſon of ſpeaking of theſe words, that they refuſed to elect him Steward, and whether theſe words were actionable or no, was the queſtion, this Caſe was argued twice in Trinity terme by *Callis* and *Gotbold* Serjants, and the Judges ſeemed to incline to opinion, That the words were Actionable, but yet no judgment is given.

Selden *againſt* King *in Common Pleas Trin.* 17. *Car. Regis*

218. IN a Replevin the Caſe was thus, A man granted a rent out of certain Lands, and limited the ſame to be paid at a houſe, which was another place off the land, and in the grant was this clauſe, that if the rent were behind and lawfully demanded at the houſe, that then it ſhould be lawfull for the grantee to diſtrein, the rent was afterwards behind, and the grantee diſtreined, & upon traverſe taken upon the demād, whether this diſtreſſe upon the Land (which had been good in law if there had not been a ſpeciall limitation of demand at a place off the land) bee a good demand as this Caſe is, was the point. *Mallet* Serjant, the diſtreſſe is a demand in it ſelf & there needs not any other demand, although the rent be to be paid off the Land as here. And it was adjudged in this Court about three yeers paſt, that the diſtres was a ſufficient demand: but I confeſſe that a writ of Error is brought in the Kings Bench, and they incline there to reverſe it, and there is no difference where the rent is payable upon the Land where not, and ſo it was adjudged *Trin.* 3. *Car. Rot.* 1865 or 2865 betwixt *Berriman* and *Bowden* in this Court, and he cited alſo *Fox* and *Vaughans* Caſe *Paſc.* 4. *Car.* in this Court, and Sir *John Lambes* Caſe *Trin.* 18. *Car. Rot.* 333. in this Court, both adjudged in the point, and he cited many other Judgements.

Jermyn Serjant contrary, that the diſtreſſe is no ſufficient demand as this Caſe is, he ought to demand it at the place appointed by the grant, for it is part of the grant, and the words of the grant ought to be obſerved, 28 *H.* 8 *Dyer* 15. and in the Comment. 25. *a.* it is ſaid that *Modus legem dat donationi*, and therefore by the ſame reaſon that the grantor may appoint the time and place of payment, as here he hath done; by the ſame reaſon he may appoint a place for the demand, and that he ſhall make that demand before he diſtrein; for the ſame is neither repugnant nor impoſſible nor againſt the Law, and therefore good, and by conſequence ought to be obſerved: and then he anſwered the Caſes which were cited to be adjudged againſt him. In *Symmons* caſe in the Kings Bench there it was reſolved that a diſtreſſe was a demand in in Law, and a demand in law is as ſtrong as a demand in fact, as it was ſaid by Juſtice *Barckley* in debate of that Caſe: But note, that in that Caſe there was no time in certain limited, and further, in that Caſe the Rent was payable upon the land, and therefore in that Caſe I agree that a diſtreſſe will bee a good demand, becauſe that the demand is to be made upon the land, but it is not ſo in our Caſe, in *Sands* and *Lees* Caſe, *Trin.* 20. *Jac.* in this Court, there alſo the rent was payable upon the land. *Berriman* and *Bowdens* caſe *Trin.* 3. *Car.* cited before, I agree was our very Caſe in point, but there judgment was given upon Confeſſion, and therefore doth not rule our Caſe, and in Sir *John Lambes* Caſe there was no judgement given, and therefore that doth not rule our Caſe, but *Melſam* and *Darbies* caſe *M.* 6. *Car. Rot.* 389. in the Kings Bench a Caſe in the point, where judgement was reverſed upon a writ of Error there brought for want of demand, and *Selden* and *Sherleys* caſe in that Court, a Caſe alſo in the point was reverſed, *Mich.* 16. *Car.* in the Kings Bench upon a writ of Error brought for want of demand, wherefore I conclude, that there ought to have been an actuall demand at the houſe according to the grant in our Caſe, & therefore the traverſe in this Caſe taken by the grantor is well taken. Note, that Juſtice *Crawley* ſaid, that *Lambes* Caſe was adjudged that there

there needed no demand; and he ſaid, that there were three judgements accordingly in this Court: but *Rolls* Serjant ſaid, that *Darbies* Caſe was reverſed in the Kings Bench for want of a demand. But note, that *Foſter* and *Reeve* Juſtices did incline that there ſhould be a demand, and ſo *Bankes* chiefe Juſtice, for he ſaid, that it is part of the contract, and like a condition precedent; for as in a condition precedent, a man ought to performe the condition before he can take any thing by the grant, ſo in this Caſe the grantee ought to make a demand to enable him to diſtreine, for before the demand hee is not by the manner of the grant (which ought to be obſerved) entitled to a diſtreſſe, wherefore hee gave direction to the Counſell that they would view the Records and ſhew them to the Court; and further he ſaid to them, that where it appeareth, that the Rent was demandable upon the land, that thoſe Caſes were not to the purpoſe, and therefore wiſhed, that they would not trouble the Court with them.

Levett *and Sir* Simon Fanſhawes *Caſe in Common Pleas Trin.* 17. Car. Regis

219. LEvett brought debt againſt Sir *Simon Fanſhawe* and his wife as Executrix of another, and ſued them to the *Exigent*, and at the return of the *Exigent*, the Defendant Sir *Simon Fanſhawe* came in voluntarily in Court, and prayed his priviledge becauſe he was an Officer of the Exchequer: and whether he ſhould have his priviledge in that Caſe or not, was the queſtion, and that reſts upon two things. Firſt, becauſe he is ſued as this caſe is meerly for conformity and neceſſity ſake and in the right of another, *viz.* in the right of his wife as Executrix. And ſecondly, becauſe he demands his priviledge at the *Exigent*. *Whitfield* Serjant that he ought to have his priviledge, and he cited preſidents as he ſaid in the point, as *Paſc.* 44 *Eliz.* in the Exchequer *James Aſhtons* caſe ſervant to the Treaſurer, and *Paſc.* 23. *Iac. Rot.* 1211. *Stantons*

caſe alſo in the Exchequer, in both which caſes he ſaid the huſband and wife were ſued in the right of the wife, and the huſband had his priviledge. But he cited a Caſe which was neerer our Caſe, and that was *Hill.* 8 *Jac.* in the Exchequer, *Watts* and *Glovers* caſe, where husband and wife were ſued in the right of the wife as Executrix, and he ſaid, that it was over-ruled that the husband ſhould have his priviledge, 22 *H.* 6. 38. and 27 *H.* 8. 20. in thoſe Caſes the husband and wife were ſued in the right of the wife, and yet the husband was allowed his priviledge, but ſee Reader 34 *H.* 6. 29. & 35 *H.* 6. 3. againſt it, and note, that many of theſe caſes come to the ſecond point, whether he may demand his priviledge at the *Exigent* or not, but for that ſee 9 *E.* 4. 35. *Br.* Priviledge 22. & 10 *E.* 4. 4. *Br.* Priviledg 40. *Rolls* Serjant contrary, that the Defendant ought not to have his priviledge, and he ſaid, that uſe, practiſe, and reaſon is againſt it; and he took theſe differences. Firſt, where the Defendants are comming to make their appearance and are arreſted, as in 22 *H.* 6. 20. and where they are ſued in one Court, and the husband demands his priviledge, becauſe he is an officer in another Court as in our Caſe. Secondly, where he is Defendant and where he is Plaintiffe. And laſtly, where he is ſued in his own right and where in the right of another as in our Caſe. For in the firſt of theſe differences he ſhall have his priviledge, in the latter not, and it is to ouſte this Court of Juriſdiction, and therefore ſhall be taken ſtrictly. Beſides, if in this Caſe the Defendant ſhould have his priviledge we ſhould be without remedy, for we cannot have a Bill againſt the wife, and wee have no remedy to make the wife to appeare, and therefore it ſhould be a great prejudice to us, if he ſhould have his priviledge. Wherefore he prayed that the Defendant might not have his priviledge; note that *Bankes* Chief Juſtice, ſeemed to agree the differences put by *Rolls*, and alſo he conceived that point conſiderable, whether the Defendant had not ſurceaſed his time in this Caſe, becauſe he demands his priviledg at the *Exigent* and not before. And note the whole Court, *viz. Foſter, Reeve, Crawley* and *Bankes* Chief Juſtice ſeemed to incline

ncline, that the Defendant ſhould not have his priviledge, becauſe that the Action was brought againſt him and his wife in *auter droit*, *viz.* in the right of the wife as Executrix, but no' judgement was then given.

Hill. 17. Car' *in the Common Pleas.*

Moſſe *and* Brownes *Caſe.*

220. MOſſe exhibited a Bill in the Court of Requeſts againſt *Brown*, and in his Bill ſet forth that the Defendant was indebted unto him in the ſumme of 400. pounds for wares delivered to him: and further he ſhewed how that the Defendant was decayed in his eſtate and was not able to pay him, and therefore he was content to accept of a hundred pound for the whole, and that the Defendant at the payment of the ſaid hundred pound required the Plaintiffe to give to him a generall releaſe, and then promiſed him in conſideration that hee would make him a generall releaſe, that he would pay to him the reſidue of his debt whenſoever God ſhould pleaſe to make him able, and the defendant divers times afterwards did renew his promiſe with the Plaintiffe. Further he ſhewed that now a great eſtate to ſuch a value is fallen to the Defendant, and that now he is able to pay him, and notwithſtanding refuſeth ſo to doe, which is the effect of the Plaintiffes Bill. To that the Defendant anſwered and pleaded the Statute of limitations of Actions, and the Court of Requeſts would not admit this Plea. But note, the Defendant pleaded firſt the generall iſſue, that he made no ſuch promiſe, upon which they were at iſſue and found againſt him, and afterwards he pleaded the Statute of limitation, and upon the whole matter Serjant *Clarke* moved for a Prohibition. Firſt, becauſe the Bill is in the nature of an Action upon the Caſe at the common law, and whether he promiſed or not promiſed is tryable at Law.

Secondly

Secondly, becauſe the Court refuſed the Plea of the Statute of Limitations, which they ought not to doe, becauſe there is no remedy in Equity againſt a ſtatute. Serjant *Whitfield* contrary, that no Prohibition ought to be granted. Firſt, becauſe the Plaintiffe hath no other remedy but in Equity, becauſe that the *Aſſumpſit* made before the releaſe is diſcharged by the releaſe, and the *Aſſumpſit* which was after, is void; becauſe there is no conſideration the debt being releaſed before. Secondly, our Caſe is not within the Statute of limitations, for it is but a truſt repoſed in the Defendant that he would paythe reſidue when God ſhould make him able, & being a bare truſt is not taken away by the ſtatute of Limitations. But he agreed for any Action which is within the Statute, and is ſuperannuated that there is no remedy in Equity. But in anſwer to that it was ſaid by *Clarke*, that there is no truſt expreſſed in the Bill. But notwithſtanding that, it was reſolved by the whole court, *viz.* *Foſter*, *Reeve*, *Crawley* Juſtices, & *Banks* chief Juſtice that no Prohibition ought to be granted for the reaſons given before by *Whitfield*, & they ſaid, that although no truſt be expreſſed, yet if it appeareth upon the whole Bill that there is a truſt, itis enough, & he needs not to expres it. And note, there was an order of the Court of Requeſts produced by *Clarke*, by which it was ordered, That the parties ſhould take iſſue onely upon the ſubſequent promiſe, and ſhould not meddle with the firſt, which as the Court conceived made the Caſe a little worſe; notwithſtanding the Court would not award a Prohibition, for they ſaid, ſo long as they order nothing againſt the law it is good, and they ought to be expoſitors of their own orders, and therefore if it appeareth upon the merits of the Cauſe and the body of the Bill, that they have Juriſdiction of the Cauſe, and proceed as they ought, be their orders what they will, it is not material, and therefore it was reſolved by the whole Court that no Prohibition ſhould bee granted in this Caſe.

Hill.

Hill. 17° Car' *in the Common Pleas.*

221. *Dudley* who was a Parſon did libell in the Arches againſt *Crompton* for ſcandalous and defamatory words, which words were theſe; Thou, (meaning the Plaintiffe) lyeſt, thou art a foole, and (putting his hand behind him) bid him kiſſe there, and further ſaid to him, thou haſt ſpent (ſo much a yeare) in drunkenneſſe: and ſentence was given for the Plaintiffe, and now four yeers after ſentence the Defendant prayed a Prohibition, and the Court, *viz.* *Foſter*, *Reeve*, *Crawley* Juſtices and *Bankes* chiefe Juſtice, were againſt the Prohibition becauſe the Defendant came too late, but if he had come in due time the three Juſtices did incline that a Prohibition would have lien, becauſe that the words are words onely of paſſion and anger, and God forbid, that all words ſpoken onely in wrangling and anger ſhould bear Action: But the Chief Juſtice inclined that the Defendant was puniſhable in the Eccleſiaſticall Court for thoſe words; for he ſaid, that the ſuit there is *pro ſalute animæ & reformatione morũ*, & it was fit, that his manners ſhould be reformed, who ſpake ſuch words of a man in orders & a reverend Miniſter. And he ſaid, that although that he held not, that where there is no remedy at Law, that there they might ſue in the Eccleſiaſticall Court, yet he ſaid, that in many caſes, where there is no remedy at Law, yet there is remedy in the Eccleſiaſticall Court, and ſo hee conceived in this Caſe. But that which made Juſtice *Reeve* to doubt whether a Prohibition ſhould iſſue as this Caſe was, or not, was for the incertainty of their ſentence, which was for ſpeaking of theſe words contained in the Articles, *aut eorum aliqua*, which he ſaid is therefore not good, for he ſaid, that judgements or ſentences ought to have theſe two things, Verity and Certainty, and if there

want any of theſe two, it is not good; and if it ſhould be ſuffered it were a miſchievous caſe, for by this tricke they might hold Plea of words not within their Juriſdiction, and wee ſhould not have power to prevent it; for if ſome of the words ſhould be actionable, ſome not, they might by this way hold Plea as well of words which were not actionable or puniſhable by them as of thoſe which were. To which *Foſter* agreed, but Juſtice *Crawley* and the Chief Juſtice conceived that no Prohibition would lie notwithſtanding that, for that might be the courſe amongſt them, and although it be incertain, yet it may be allowed by them for Law: and *Reeve* was of opinion, that a man might be indicted at the Aſſiſes before the Commiſſioners of *Oyer* and *Terminer* for ſpeaking of ſuch defamatory words, & that he grounded upon the Commiſſion of *Oyer* and *Terminer*, which giveth them power to hold Plea *de prolationibus verborum*, & he conceived that a man might be fined for them. But the Chief Juſtice contrary, for the Commiſſion giveth them power to hold Plea *ſecundum legem & conſuetudinem Angliæ*: Now if the ſpeaking of ſuch words be not puniſhable by the Law and Cuſtome of England, then we cannot hold Plea of them by way of indictment or otherwiſe at the Aſſiſes for them.

222. It was ſaid by the whole Court, that a bare Information at the Barre is not ſufficient to cauſe the Court to examine any man upon interrogatories, wherefore they ruled, that the party ſhould make an *Affidavit*.

223. Judgement was given againſt the principall, and after a *Scire facias* was brought againſt the Baile, who appeared & pleaded *Nul tiel Record* of the Judgment given againſt the principall, upon which day was given to bring in the Record in Court, at which day the principall tendred his body in diſcharge of the Baile, and now it was prayed by *Pheaſant* Serjant

jant, that it might be admitted; but *Reeve*, *Foſter* and *Bankes* Chief Juſtice inclined againſt it: True it is, that the condition of the Baile is, that they render his body (indefinitely) without limiting any time incertaine when they ſhall doe it, or pay the condemnation, but yet they conceived, that if they appear and plead ſuch a dilatory plea as this is, that thereby they have waived the benefit of bringing in his body: and Juſtice *Foſter* ſaid, that the ſame being generall and uncertaine, the law ought to determine a time certain when it ſhall be done, for otherwiſe by the ſame reaſon that they may do it now they may do it twenty yeers after, which ſhould be inconvenient & againſt the meaning of the condition. And *Reeve* ſaid, that if this trick ſhould be ſuffered, that the Baile might plead ſuch a dilatory plea, & afterwards bring in the body of the Principal, the Plaintiffe ſhould loſe all his coſts of ſuit wch he had expended in the ſuit againſt the Baile, which would be miſchievous. But Juſtice *Crawley*, that the uſage hath alwaies been, that the Baile might bring in the body of the Principall at any time before judgement given againſt them upon the *Scire facias*, and there are many preſidents in this Court to that purpoſe. To that the Court ſeemed to agree, if they plead not ſuch a dilatory plea, as in this caſe: Therefore the Court awarded, that the Pronotharies ſhould conſider of it, and ſhould certify the Court what the uſe hath been in ſuch caſe.

224. Serjant *Pheaſant* came to the Barre, and ſaid to the Court, that anciently (as appeareth by our old bookes) the uſage was, that the Serjants in any difficult point of pleading, did demand of the Court their adviſe concerning it, and accordingly were uſed to be directed by the Court; wherefore he humbly prayed of the Court to be reſolved of this doubt. A man was impriſoned for not ſubmitting to Patentees of a Monopoly, after ſeven or eight yeeres paſt, and then hee brought an Action of falſe impriſonment, & that is grounded upon the Statute of Monopolies, 21 *Jac. c.* 3. whether in this caſe the Defendant might plead the Statute of 21 *Jac. c.* 16. of

Limitations of Actions, or not, was the queſtion; But the whole court was againſt him, that they cannot be Judges & Counſellors, & that they ought not to adviſe any man, for by that means they ſhould prevent their judgement; and they confeſſed that that was the uſe, when the Serjants uſed to count at the barre, as appeareth in our books. But they ſaid, you ſhall never finde the ſame to be uſed ſince they counted and declared before they came to the barre, and theſe Counts and declarations are upon Record, wherefore the Court upon theſe conſiderations would not adviſe him.

Dewell *and* Maſons *Caſe.*

225. THis Caſe of *Dewell* and *Maſon*, which ſee before, *pl.* 184. came now again in debate, and it was adjudged by the whole Court, *viz.* *Foſter*, *Reeve*, *Crawley* Jnſtices, and *Bankes* Chief Juſtice, *nullo contradicente*; that the Plaintiffe ought to have judgement, and that upon theſe differences. Firſt, where the Defendant is to doe a ſingle Act onely, and where he hath election of two things to doe. Secondly, the ſecond difference ſtood upon this, that no notice is to be given, or tender made of a thing which lyeth not in the power or proper conuſance of the Plaintife, ſo as the difference ſtands where it is a thing which lies in the conuſance of the Plaintiffe, and where not, and therefore where the award was that the Defendant ſhould pay to the Plaintiffe eight pound or three pound and coſts of ſuit, as ſhould appear by a note under the Attorneys hand of the Plaintiffe, it was reſolved in that Caſe, that although the Attorney be in ſome reſpect as a ſervant to his Maſter, yet to this purpoſe he is a meere ſtranger, and therefore the Plaintiffe was not bound to make any tender of that note, but the Defendant ought to have gone to the Plaintiffes Attorney and required a note of him of the coſts of ſuit, ſo as he might have made his Election: But they all agreed, that where it is a thing which lyeth in the knowledge of the Plaintiffe, that there he ought to have made a tender, or given notice, but in this Caſe it lieth not in the knowledge of the Plaintiffe

Plaintiffe, and he cannot compell the Attorney to make it, wherefore it was reſolved, that the Plaintiffe ſhould have judgment.

226. A man libelled for tythes in the Eccleſiaſticall Court, and in his libel he ſet forth, how that the tythes were ſet forth, but that the Defendant did ſtop and hinder the Plaintiffe to carry them away any other way, then through the Defendants yard, and when he was carrying them that way, the Defendant being an Officer did attach them for an aſſeſſement to the poor, and did convert them to his own uſe, upon which a Prohibition was prayed, becauſe that the tythes being ſet forth an Action of treſpaſſe lyeth at the common law: but Serjant *Clarke* was againſt the Prohibition, becauſe that the Libell is grounded upon the Statute of 2 *E.* 6. *cap.* 13. which is, That if the Parſon, &c. be ſtopt or lett in carrying his tythes, that the party ſo ſtopping or letting ſhould pay the double value to be recovered before the Eccleſiaſticall Judge. But notwithſtanding that it was reſolved that a prohibition ſhould iſſue; becauſe he that will ſue upon the Statute ought to mention the Statute, or to make his demand *ſecundum formam Statuti*, But here the Plaintiffe doth not ſue upon the Statute, for hee doth not mention it nor the double value as he ought; for they all agreed, that he ought to ground his Action upon the expreſſe clauſe of the Statute for the double value, wherefore a Prohibition was granted.

227. It was reſolved upon the Certificate of the Pronotharies, *viz.* *Gulſon*, *Cory*, and *Farmer*, that the cuſtome of the Court was, That if a man ſueth another for ſuch a ſumme, or thing for which the Plaintiffe ought to have ſpeciall baile, and doth not declare againſt him in three Termes, that the Defendant being brought to the barre by a *Habeas corpus*, ought to be diſcharged upon an ordinary appearance, and that they ſaid is the courſe and practiſe in the Kings Bench, and

that was now reſolved to be as a certain Rule from thence-forth in this Court by all the Judges, *viz. Foſter, Reeve, Crawley* and *Bankes* Chief Juſtice.

228. It was ſaid by Juſtice *Reeve*, that if *A.* being ſeiſed of an Advowſon, grant the next preſentation to *B*, and *B.* makes a Bond to *A.* to pay him twenty pounds when the Church ſhall fall void, that that is Simony, and ſo he ſaid it was adjudged in this Court in *Pooles* caſe: and the whole court did agree that it was Simony, for otherwiſe, by this way the Statute ſhould be utterly defeated; and note, that it was ſaid by Serjant *Rolls* at the barre, That it had been often adjudged, that the Obligor could not avoid ſuch an Obligation without ſpeciall averment.

Palme *againſt* Hudde.

229. PAlme brought a *Quare impedit* againſt *Hudde*, and the caſe was thus: It was debated by Serjant *Godbold*, the Plaintiffe brought a *Quare impedit* againſt the Defendant, the Defendant ſhewed how the King was intitled by reaſon of Simony, and that the King had preſented the Defendant, and that he was *perſona imperſonata* of the preſentation of the King; the Plaintiffe denyed the Simoniacall contract, upon which they were at iſſue, and it was found for the Defendant, ſo as that judgement was given for the Defendant. And the ſame Plaintiffe brought this ſecond *Quare impedit* againſt the ſame Defendant, who pleaded all the matter before and the judgement, but did not ſay that he was now *perſona imperſonata*, but that he was *tunc perſona imperſonata*, and that was ſaid by the Serjant to be naught: for he ſaid, that at the common law, no parſon might plead to the title of the parſonage but onely in the abatement of the writ, or ſuch like Pleas: ſee *Lib. Entries* 503, & 522. and 8 *Rep. Foxes* caſe: and he ſaid, that that is a Plea at the common law, and not upon the Statute

tute of 25 *E*, 3. for then he ought to have pleaded, that *Eſt perſona imperſonata*, and not that *fuit*, and that to enable him to plead to the title of the patronage, according to the Statute, for he who will plead according to the Statute ought to purſue it, or otherwiſe his plea is not good, & he cannot plead to the title ofthe patronage without ſhewing that he is *perſona imperſonata*: the books are cleer, 7 *Rep.* 25, 26. 15 *H.* 7. 6. & 7. 2 *R.* 2. *Incumbt.* 4. 4 *H.* 8. *Dyer.* 1. & 27. And to ſay, that *tunc fuit perſona imperſonata*, is but an argumentative Plea, that becauſe he was then, ſo he is now, and ſuch plea is not good, for it ought to be poſitive and not by way of argument, or illation. Beſides, it may be that he was *perſona imperſonata*, *tunc*, and not *nunc*, for he might reſigne or be deprived after, or the like, and therefore it is a *Non ſequitur* that he was *perſona imperſonata* then, and therefore now, and it ſhall bee intended rather that he is not *perſona imperſonata nunc*, for *paroles font Plea*, and the Plea of every man ſhall bee taken ſtrong againſt himſelfe, wherefore he concluded that the Plea was not good. *Foſter* agreed that the Parſon cannot plead to the title of the Patronage without ſhewing that he is *perſona imperſonata*; but the queſtion here is, as he conceived, Whether the Plaintiffe be not ſtopped by this recovery and judgement yet remaining in force to ſay the contrary. *Bankes* chief Juſtice, It is true, that generally the parſon without ſhewing that he is *perſona imperſonata*, cannot plead to the title of the Patronage. But whether the Defendant cannot plead the Record and judgment, yet in force againſt the Plaintiffe, without ſhewing that he is *perſona imperſonata*, that is the queſtion here. Note, it was the firſt time it was argued.

Harwell *againſt* Burwell *in a Replevin in the Kings Bench.*

230. THe Caſe was thus, A man acknowledged a Statute to the Plaintiffe, and afterwards granted a rent charge to the Defendant, afterwards the Statute is extended and ſatisfied

fied, and then the grantee of the rent diſtreines. And whether hee might diſtreine without bringing a *Scire facias*, was the queſtion. And by Serjant *Rolls*, he cannot diſtreine without a *Scire facias* brought, and he tooke it for a rule, That becauſe the Conuſee came in by matter of Record, he ought not to be put out or diſturbed without matter of Record, for if that ſhould be ſuffered, it would be a great diſcouragement to Debtees to take this manner of ſecurity for their debts, and the Conuſor cannot enter without bringing a *Scire facias*; and if the Conuſor himſelf cannot enter, it is a good argument *à fortiori* that the grantee of a rent cannot diſtreine without a *Scire facias*, and that the conuſor himſelfe cannot enter without bringing a *Scire facias*, *vid.* 15 *H.* 7. 15. 4 *Rep.* 67. *Full-Woods* caſe. And the grantee of the rent is as well within the ground and rule before put as the conuſor himſelfe, and therefore he compared the caſe to the caſe in the 10 *Rep.* 92. that he who claims under another ought to ſhew the original conveyance. But he took a difference where the party comes in by act of law, and where by the act of the party; he who comes in by act of law, ſhall not be put to his *Scire facias*, for ſo hee ſhould be without remedy, and if that ſhould be permitted, it ſhould be a ſubtile way for the conuſor to avoid the poſſeſſion of the conuſee, and then he himſelf to take benefit of it, and that ſhould be a fine way to defeat the Statute. Beſides, by this way if the Statute ſhould be ſatisfied by caſuall profit, or if the time ſhould be expired and the Statute ſatisfyed by effluxion of time, if in that Caſe the grantee ſhould be permitted to diſtreine the beaſts of the conuſee for a great rent, perhaps before that the Conuſee by poſſibility might remove from the land, it would be a great diſturbance to the Conuſee. Beſides, if a ſtranger enter upon the conuſee, the conuſee upon his regreſſe may hold over: but not ſo in this Caſe, where the grantee of the rent diſtreines, and that ſhould bee alſo a great prejudice to the conuſee. But it was objected that the grantee of the rent could not have a *Scire facias*, and therefore if he might not diſtreine, he ſhould be without remedy; To which hee anſwered, that if it ſhould be ſo it is his own fault

fault, for he might have provided for himſelf by way of covenant. But he conceived, that he might have a *Scire facias*, for he ſaid, that it is a judiciall writ iſſuing out of the Rolls, which might be framed and made according to the caſe of any man, and it is not enough to ſay, that there never was ſuch a writ granted in the like caſe, but he ought to ſhew where it was ever denyed: beſides it is not alwaies neceſſary that he that ſhal have this writ ſhould be party or privy to the Record, as appeareth by theſe bookes, 46 *Aſſ. Scire facias* 134. 32 *E.* 3. *Scire facias* 101. and 38 *E.* 3. 12. *Br. Scire facias* 84. Again, it is not neceſſary, that the *Scire facias* ſhould be either *ad computandum* or *ad rehabendum terram* as it was objected, for as I have ſaid before, it may be framed according to the caſe of any man and vary accordingly: wherefore he prayed judgment for the Plaintiffe; and note that at this time Juſtice *Heath* ſeemed to incline for the Plaintiffe.

Thorne *againſt* Tyler *in a Replevin.*

229. THe Plaintiffe ſhewed that the Defendant took certaine beaſts of the Plaintiffe ſuch a time and place, and detained them againſt gages and pledges, &c. The Defendant as Baily of the Mannor of the Lord *Barckly* made conuſance of the taking of the cattell, and ſaid that long time before the taking of them, the Lord *Barckley* was ſeiſed in fee of a Mannor in Glouceſterſhire within which there were copyhold Tenants time out of mind demiſeable for one, two, or three lives, that there was a cuſtome within the ſame Mannor, that if any copyhold tenant did ſuffer his meſſuage to be ruined for want of repairing, or committed waſt, and that is preſented by the homage; that ſuch tenant ſo offending, ſhould be amerced, and that the Lord had uſed time out of mind to diſtreine the beaſts as wel of the tenant as of the undertenant of ſuch cuſtomary tenements, *levant* and *couchant* upon ſuch cuſtomary tenements for ſuch amercement: and further ſaid, that one *Greening* was tenant for life of a cuſtomary tenement within

that Mannor, and made a leaſe unto the Plaintiffe for one yeere, and that 15 *Car.* the homage did preſent that *Greening* had ſuffered his Barne, parcell of the cuſtomary tenements aforeſaid, to fall for want of repaire, for which he was amerced to ten ſhillings, and that in *July* 16 *Car.* the Defendant as Baily of the Lord *Barckley* did diſtreine the Plaintiffes cattell being undertenant for the ſaid amercement upon the ſaid cuſtomary tenement, and ſo he made conuſance and juſtified the taking of the beaſts as baily of the Lord *Barckley*. The Plaintiffe confeſſed that *Greening* was tenant, and that hee made a leaſe to the Plaintiffe for a yeere, and further he confeſſed the want of repairing and preſentment and the amercement upon it, but he denyed that there is any ſuch cuſtome: upon which they were at iſſue, and the Jury found for the Defendant, that there was ſuch a cuſtome, and it was moved in arreſt of judgement that the cuſtome was not good, becauſe it was unreaſonable, for here the tenant offended, and the undertenant is puniſhed for it, which is againſt all reaſon that one ſhould offend and another ſhould be puniſhed for it. Beſides, the undertenant here is a ſtranger, and the cuſtome ſhall never extend to a ſtranger, and therefore the cuſtome to puniſh a ſtranger who is not a tenant of the Mannor is a void cuſtome. Further, it was ſaid that the amercement properly falls upon the perſon, and therefore being perſonall it cannot be charged upon the undertenant. But notwithſtanding all theſe objections, it was reſolved by all the Juſtices upon ſolemn debate, that the cuſtome was good, and therefore that the avowant ſhould have judgement. Juſtice *Mallet*; cuſtome *ſi aliqua defalta fuerit in reparatione* to amerce the tenant and to diſtreine *averia ſua, vel averia ſubtenentis levant* and *couchant* upon the cuſtomary tenement, is a good cuſtome. I agree that a cuſtome cannot extend to a ſtranger who is not within the Mannor, and therewith agreeth 3 *Eliz. Dyer.* 194. *b. pl.* 57. *Davis Rep.* 33. *a.* & 21 *H.* 6. and many other books; but the matter here is whether the Plaintiffe be a ſtranger or not, and I conceive that he is no ſtranger but a good cuſtomary tenant, and he ſhall have any benefit or priviledge that a cuſto-

cuſtomary tenant ſhall have, although he holdeth but for one yeere, and by the ſame reaſon that he ſhall enjoy the priviledge of a cuſtomary tenant hee ſhall undergoe the charge, for *Qui ſentit commodum ſentire debet & onus*; and by the generall cuſtome of England every copiholder may make a leaſe for one yeere, as is reſolved in the 4 *Rep.* 26. *a.* and it is good; and if ſo, then the Plaintiffe here cometh in by cuſtome, and is no ſtranger but a good cuſtomary tenant, and therefore the cuſtome may well extend to him: as there is *Dominus pro tempore*, ſo there is *tenens pro tempore*, and ſuch is the Plaintiffe here: and he held, that the wife that hath her widows eſtate, according to the cuſtome of the Mannor, is a good cuſtomary tenant. A woman copyholder for life, where the cuſtome is that the huſband ſhall be tenant by the curteſie, dieth, I hold the husband in that caſe a good cuſtomary tenant. In Glouceſter where this Land is, there is a cuſtome that executors ſhall have the profits for a yeer, and I conceive them good cuſtomary tenants. Beſides, this undertenant here is diſtreinable by the Lord for the rents and ſervices reſerved by the Lord, or otherwiſe by this way he might defeat the Lord of his ſervivices. The cuſtome was, That a woman ſhould have her widows eſtate, the copy tenant made a leaſe for one yeer and dyed, and adjudged that the woman ſhould have her widows eſtate as excreſcent by title Paramount, the eſtate made for one yeere: ſee *Hob. Rep.* And as there the eſtate of the wife was derivative; ſo here: and although it be not the intire copyhold eſtate, yet it is part of it, and a continuation of it, and is liable to every charge of the Lord, 6 *Rep. Swaines* caſe; wherefore he concluded that the cuſtome is good, and that the avowant ought to have judgement. Juſtice *Heath*, the cuſtome is good both for the matter and forme of it, where it was objected, that for a perſonall injury done by one the cattell of another cannot be diſtreined, I agree, that it is unjuſt that where *alius peccat alius plectitur*, but our caſe differs from that rule, for this was by cuſtome, for *Tranſit terra cum onere*, he who ſhall have the land ought to undergoe the charge. Beſides, whereſoever a cuſtome may have a good

beginning and *ex certa & rationabili cauſa*, it is a good cuſtome, *Bracton lib.* 1. *cap.* 3. But this might have a reaſonable ground at the beginning, for here the puniſhment is a qualification of the law, for where by the law the copyhold tenant is to forfeit his copyhold tenement for waſt, either voluntary or permiſſive, now this penalty is abridged and made more eaſie, and therfore is very reaſonable, 43 *E.* 3. 5. & 44 *E.* 3. 13. cuſtome, that if a tenant be indebted to the Lord that hee may diſtrein his other tenants for it is not good, but if it were for rent it ſhould be good, becauſe it may be the tenants at the firſt granted it to the Lord, 22 *H.* 6. 42. 12 *H.* 7. 15. & 35 *H.* 6. 35. cuſtome to ſell a diſtreſſe is good, and yet it cannot be done but by Act of Parliament. And where it was objected that the amercement is perſonall, and therefore cannot extend to the Plaintiffe, to that he anſwered, that it is not meerly perſonall, but by cuſtome (as aforeſaid) is now made a charge upon the land, and therefore not meerly perſonall. Beſides, if the cuſtome in this caſe had been, that the plaintiffe for waſt ſhould forfeit his copyhold tenement, it had been reaſonable *à fortiori* in this caſe that hee ſhall be onely amerced: wherefore he concluded, that the cuſtome is good, and therefore that the avowant ſhould have judgement. *Bramſton* Chief Juſtice, that the cuſtome is good, and that he conceived to be cleere. Firſt, he conceived that the cuſtome is reaſonable as to the copy tenant, for cleerly by the common Law, if he ſuffer, or doe waſt, he ſhall forfeit his copyhold, and therefore this cuſtome is in mitigation of the penalty; and therefore is reaſonable, and that is not denyed; but the onely doubt here is, whether the cuſtome to diſtreine the undertenant for an amercement layed upon the tenant be a good cuſtome or not: and he conceived it is, for the cuſtome which gives the diſtreſſe knits it to the land, and therefore not meerly perſonal as it was objected. And if the cuſtome had not extended to the undertenant, he might have diſtreined him, for otherwiſe the Lord by ſuch deviſe as there is, *viz.* by the making of a leaſe for one yeere by the tenant ſhould bee defeated of his ſervices, 3 *Eliz. Dyer.* 199. reſolved, cuſtome

to

to ſeiſe the cattell of a ſtranger for a Heriot is not good, becauſe that thereby the property is altered. But cuſtome that he may diſtreine the cattell of a ſtranger for a Heriot is a good cuſtome, becauſe the diſtreſſe is onely as a pledge, and meanes to gaine the Heriot: and in our caſe the land is charged with the diſtreſſe, and therefore the cattell of any one which come under the charge may be diſtreined for it, and therefore hee held cleerly that the cuſtome was good, and that the avowant ſhould have judgement. Juſtice *Barckley* at this time was impeached by the Parliament of high treaſon.

232. A man was indicted for murder in the county Palatine of Durham, and now brought a *Certiorare* to remove the indictment into this Court, and it was argued by *Keeling* at the Barre that *Bre' Domini Regis de Certiorare non currit in Com' Palatinum.* But the Juſtices there upon the Bench, *viz.* *Heath* and *Bramſton*, ſeemed ſtrongly to incline, that it might goe to the county Palatine, and they ſaid, that there were many preſidents in it, and Juſtice *Heath* ſaid, that although the King grant *Jura regalia*, yet it ſhall not exclude the King himſelfe; and he ſaid, their power is not independent, but is corrigible by this Court, if they proceed erroneouſly; and he ſaid, that in this caſe, the party was removed by *Habeas corpus*, and by the ſame reaſon that a *Habeas corpus* might goe thither, a *Certiorare* might: for which cauſe it was awarded, that they returne the writ of *Certiorare*, and upon the return they would debate it.

Hill. 17° Car' *in the Common Pleas.*

Layton *againſt* Grange *in a ſecond deliverance.*

231. *JOhn Layton* brought a ſecond deliverance againſt *Anthony Grange*, and declared of taking of certaine cattel in a place called Nuns field in Swaffam Bulbeck, and detainer of them againſt gages and pledges, &c. the defendant made conuſance as Baily to *Thomas Marſh* and ſaid, that long time before the taking alledged, one *Thomas Marſh* the father of the Plaintiffe was ſeiſed of the Mannor of Michell Hall in Swaffam Bulbeck aforeſaid, of w^ch^ the land in which time out of mind, &c. was parcell, & that one *Anthony Cage* & *Dorothy* his wife, & *Thomas Grange* and *Thomaſine* his wife were ſeiſed of the land in which, &c. as in the right of the ſaid *Dorothy* & *Thomaſine* their wives in demeſne as of fee, & that they held the land in which, &c. as of his Mannor of Michell Hall, by ſoccage, *viz.* fealty; & certain rent payable at certain daies, and that the ſaid *Thomas Marſh* was ſeiſed of the ſaid ſervices by the hands of the ſaid *Anthony Cage* & *Dorothy* his wife, *Thomas Grange* and *Thomaſine* his wife, as by the hands of his very tenants, and he derived the tenancy to one Sir *Anthony Cage*, and the ſeigniorie to *Thomas Marſh* the ſonne, by the death of the ſaid *Thomas Marſh* the Father, and becauſe that fealty was not done by Sir *Anthony Cage*, he as Baily of the ſaid *Thomas Marſh* the ſonne did juſtify the taking of the ſaid cattell, *ut infra feodum & dominium ſua, &c.* The Plaintiffe by proteſtation ſaid, that *Non tenet* the lands aforeſaid of the ſaid *Thomas Marſh*, as of his Mannor of Michell Hall in Swaffam Bulbeck aforeſaid by ſoccage, *viz.* fealty and rent, as aforeſaid, and *pro placito* ſaid, that the Defendant took the cattell as aforeſaid and detained them againſt gages and pledges, and then traverſed, *Abſque hoc*, that the ſaid *Thomas Marſh* the Father was ſeiſed of the ſaid ſervices by the hands of the ſaid *Anthony Cage* and *Dorothy* his wife, and *Thomas Grange* and *Thomaſine* his wife, as by the hands

hands of his very tenants: upon wch the defendant did demurre in law, and ſhewed for cauſe of demurrer, that the Plaintiffe had traverſed a thing not traverſable, and if it were traverſable, that it wanted forme, and this Terme this caſe was debated by all the Judges, and it was reſolved by them all, that the traverſe as it is taken, is not well taken. Juſtice *Foſter*, that the traverſe taken by the Plaintiffe is not well taken at the common law, the Lord was bound to avow upon a perſon certain, but now by the Statute of 21 *H.* 8. *cap.* 19. he may avow upon the land, and this avowry cleerely is an avowry upon the Statute, for it is *infra feodum & dominium ſua*, &c. and ſo is the old Entries 565; then the queſtion here is, whether the Plaintiffe be privy or a ſtranger; for if he be a ſtranger, then cleerly at the common law he may plead no plea, but out of his fee, or a plea which doth amount to ſo much, as appeareth by the books, 2 *H.* 6. 1. 17 *E.* 3. 14. & 15. 34 *E.* 3. Avowry 257. and many other bookes as you may finde them cited in the 9 *Rep.* 20. in the caſe of Avowry, and here it doth not appear but that the Plaintiffe is a ſtranger, and therefore whether he be inabled by the Statute of 21 *H.* 8. to take this traverſe or not, is the queſtion: and I conceive that he is: true it is, as it was objected, that this Statute was made for the advantage of the Lord, but I conceive, as it ſhall enable the Lord to avow vpon the land, ſo it ſhall enable the tenant to diſcharge his poſſeſſion, as if the avowry were upon the very tenant, and ſo is the Inſtitutes 268 *b.* and ſo is *Brown & Goldſmiths* caſe in *Hobarts Rep.* 129. adjudged in the point, and the Plaintiffe here who is a ſtranger is in the ſame condition, as a ſtranger was at the common law, where the avowry was made upon the land for a rent charge, in ſuch caſe he might have pleaded any diſcharge although he were a meer ſtranger, and had nothing in the land, ſo may he now after the Statute of 21 *H.* 8. Then admitting, that the Plaintiffe might take this traverſe by the Statute, then the queſtion is whether the Plaintiffe hath taken a ſufficient traverſe by the common law or not: for the Statute ſaith, that the Plaintiffe in the Replevin or ſecond deliverance ſhall have the like Pleas as at common law, and

and I conceive, that this plea is not a good plea at the common law. And now I will conſider whether if the Plaintiffe had been a very tenant, he might have pleaded this plea or not; and I conceive that if this traverſe had been taken by a very tenant, it had not been good, I agree the 9 *Rep.* 35. *Bucknells* caſe, that *Ne unq; ſeiſie* of the ſervices generally is no good plea, but *Ne unq; ſeiſie* of part of the ſervices is a good plea; and ſo is 16 *E.* 4. 12. & 22 *H.* 63. and the reaſon that the firſt Plea is not good, is becauſe that thereby no remedy is left to the Lord, neither by avowry, nor by writ of cuſtoms and ſervices. And therefore the plea here is not good, becauſe it is a traverſe of the ſervices generally. Beſides, here the traverſe is not good, becauſe that the Plaintiffe hath traverſed the ſeiſin, and hath not admitted the tenure: and it is a rule in law, that no man may traverſe the ſeiſin of ſervices, without admitting a tenure, and therewith agreeth, 7 *E.* 4. 28. 20. *E.* 4. 17. & 9 *Rep. Bucknells* caſe, and then if the very tenant could not have taken this traverſe, much leſſe a ſtranger here. Further, here the tenure was alledged to be by rent and fealty, & the avowry was for the fealty, and the Plaintiffe hath traverſed the ſeiſin as well of the rent which is not in demand, as of the fealty, and therefore the traverſe is not good. But it was objected, that ſeiſin of rent is ſeiſin of fealty, and therefore of neceſſity both ought to be traverſed. I agree, that ſeiſin of rent is ſeiſin of fealty, but it is no actuall ſeiſin of the fealty in point of payment or to maintaine an aſſiſe for it, as is 44 *E.* 3. 11. & 45 *E.* 3. 23, and the diſtreſſe here is for actuall ſeiſin of fealty. Every traverſe ought to be *ad idem*, as 26. *H.* 8. 1. & 9. *Rep.* 35. but here the traverſe is of the rent which is not in queſtion, and therefore is not good in matter of form. Wherefore he gave judgement for the avowant. Juſtice *Reeve*, the firſt thing here conſiderable is, whether this be a conuſance at the common law or upon the Statute, and I hold cleerly that it is within the Statute, and for that ſee new *Entries* 597 & 599 & 27 *H.* 8. 20. and it is cleere that the Lord hath Election either to avow upon the Statute, or at the common law, and that is warranted by Inſtitutes 268.

and

and 312, 9 *Rep.* 23. *b.* 36. *a.* & 136. *a.* and then admitting, that it be an avowry upon the Statute. The ſecond point is, whether the Plaintiffe be inabled by the Statute to take this traverſe or not, for it is cleere, that at the common law the Plaintiffe could not have this plea, for a ſtranger could not plead any thing, but *hors de ſon fee*, or a plea which did amount to as much, I agree the books of *Br.* Avowry 113. & 61. & 9 *Rep.* 36. & 27 *H.* 8. 4. & 20. & *Br.* Avowry 107. & *Inſtit.* 268. which are againſt me; yet I conceive under favour, that notwithſtanding any thing that hath been ſaid, that the Plaintiffe is not enabled by the Statute to take this traverſe, and I ground my opinion upon the reaſon at common law, as alſo upon the Statute; the firſt reaſon at the common law, I ground upon the rule in law, *res inter alios acta, alteri nocere non debet*; it is not reaſon that he who is a ſtranger ſhall take upon himſelf to plead to the title of the tenure, with which he hath nothing to doe in prejudice of the very tenant, and this reaſon is given by the books of 22 *H.* 6. & 39 *E.* 3. 34. My ſecond reaſon is grounded upon the maxime in law, which is, That in pleading every man ought to plead that which is pertinent for him and his Caſe. And that's the reaſon that the Incumbent at the common law cannot plead to the right of the patronage wherein he hath nothing, but the patron ſhall plead it, as appeareth by the 7 *Rep.* 26. and many other books there cited; and theſe are my reaſons at the common law, wherefore the Plaintiffe being a ſtranger cannot plead this Plea. Secondly, I ground my ſelfe upon the purvieu of the ſtatute to prove that the Plaintiffe cannot plead this plea, the words of which are, That the Plaintiffs ſhall have ſuch pleas and Aidprayers as at the common law, and if the Plaintiffe could have pleaded this Plea by the Statute, the ſtatute would not have enacted that there ſhould be the like Aidprayers as at the common law, for if the Plaintiffe might plead this plea, then there need not any Aidprayer; and as at the common law no Aidprayer was grantable of a ſtranger to the avowry, ſo neither is it ſo now, and to prove that he cited 27 *H.* 8. 4. 19 *Eliz.* New *Entries* 598. & 26 *H.* 8. 5. againſt the Inſti-

tutes, 312. *a.* Beſides, the Statute gives the like pleas as at the common law, & therefore no new pleas, & that cauſed me to give thoſe reaſons before at the common law: & if this ſhould be ſuffered, every wrangler by putting in of his cattell, ſhould put the Lord to ſhew his title, which would be a great prejudice to him, the Statute of 25 *E.*3.*cap.*7. enables the poſſeſſor to plead to the title of the patronage, & that is not till induction if it be againſt a common perſon, which he ought to ſhew, otherwiſe he is not inabled to plead to the title, as it is in the 7 *Rep.*26.*a.* & *Dyer fo.*1.*b.* But note, there the Statute enables him to plead to the title which is not ſo in our Caſe, the generall words of the Statute of *Weſt.*2. have alwaies received conſtruction at the common law, as appeareth by 18 *E.*3.310. 22 *E.* 3. 2. & 9 *Rep. Bucknells* caſe, and 11 *Rep.* 62, 63. there you may ſee many Caſes cited which have the like words of reference to the common law, as the Statute in that Caſe, and there alwaies they have received conſtruction by the common law: the authorities cited before againſt me, are not againſt me, for they ſay that the Plaintiffe after this Statute may have any anſwer which is ſufficient, ſo cleerely by theſe authorities the anſwer ought to be ſufficient, and that is the queſtion in our Caſe: Whether the anſwer be ſufficient or no. which as I have argued, it is not; becauſe the Plaintiffe is not enabled to take this traverſe by the common Law, and the Statute doth not give any other Plea then at the common law, 26 *H.* 8, 6. is expreſſe in the point, That the Plaintiffe being a ſtranger, is not enabled by this Statute to meddle with the tenure, wherefore I conceive that the Plaintiffe is not a perſon ſufficient within the Statute to take this traverſe without taking ſome eſtate upon him as in fee for life, or yeeres, &c. But for the latter point, admitting that the Plaintiffe were enabled by the Statute to take this traverſe; yet I hold cleerly, that as this Caſe is, he hath not purſued the form of the common law in the taking of it, & I agree, the rule that the Plaintiffe cannot traverſe the ſeiſin without admitting of a tenure, and therefore the traverſe here is not good, becauſe he takes all the tenure by proteſtation. Beſides, I agree that traverſe of ſeiſin, gene-

generally is not good, 9 *Rep. Bucknells* Caſe, and I agree that traverſe of ſeiſin *per manus* is not good without confeſſing the tenure for part, and here he takes all the tenure by proteſtation, and therefore not good, 18 *E.* 2, *Fitz.* Avowry 217. is expreſſe in the point that the traverſe is not good. Wherefore I conclude that judgement ought to be given for the avowant. Juſtice *Crawley*, that judgment ought to be given for the avowant; he held cleerly that the avowry is within the Statute, and that being within the Statute the Plaintiffe is enabled to take this traverſe, and that he grounded upon the bookes of 34 *H.* 8. *Br.* Avowry 113. 24 *H.* 4. 20. 9 *Rep.* 36. and *Hobarts Rep.* 129. *Brown* and *Goldſmiths* Caſe. Then he being inabled by this Statute to take this plea as a very tenant, the queſtion is, Whether the traverſe here *per manus* be good or not, and he held not, but he ought to have traverſed the tenure as this Caſe is: that the traverſe of the ſeiſin *per manus* generally is not good I ground me upon the 9 *Rep. Bucknells* Caſe 35. *a.* and I agree the third rule there put that *Ne unq; ſeiſie per manus* is a good plea, but that muſt be intended where the Plaintiffe confeſſeth part of the tenure wch he hath not done in this Caſe as it appeareth by the fourth rule there taken, which is an exception out of the precedent rule, upon which I ground my opinion, and therfore the traverſe here is not good. Beſides, Homage and Fealty are not within the Statute of Limitations, and therefore not traverſable: and if it ſhould be permitted the rule in *Bevills* Caſe 4 *Rep.* 11, 12. and *Com.* 94. *Woodlands* Caſe, which reſolve that they are not traverſable, ſhould be by this meanes quite defeated. Further, in this Caſe the fealty onely is in demand, and the Plaintiffe hath traverſed the ſeiſin of the rent as well as of the fealty, which is not good; I agree the book in the 9 *Rep. Bucknells* Caſe *fo.* 35. that ſeiſin is not traverſable but onely for that for which the avowry is made, if not that ſeiſin be alledged of a ſuperior ſervice (for which the avowry is not) which by the law is ſeiſin of the Inferiour ſervice, with which agrees 26 *H.* 8. 1. & 21 *E.* 4. 64. But in our Caſe ſeiſin is not alledged of a ſuperiour ſervice, for which the avowry is not made but of

an inferiour, *viz.* of a rent which is inferiour to fealty (as the bookes are of 21 *E.* 3. 52 Avowry 115. and 19 *E.* 4. 224.) and which of right ought to be ſo unleſſe a man eſteeme and value his money above his conſcience, and therefore the traverſe of the rent which is inferiour ſervice and not in demand, is not good. Beſides, you cannot traverſe the ſeiſin of the fealty without the traverſe of the ſeiſin of the rent, becauſe the ſeiſin of rent is the ſeiſin of fealty, and the rent is nót here in demand, and therefore not traverſable, & therefore you ought to have traverſed the tenure, for although it be ſaid, that rent which is annuall is inferiour to all other ſervices, 4 *Rep.* 9. *a.* yet it is reſolved that the ſeiſin of rent is ſeiſin of all other ſervices: further, I conceive that if you avow for one thing you need not to alledge ſeiſin of other ſervices, 24 *E.* 3. 17. & 50. ſeemeth to croſſe the other authorities before cited, but I beleeve the latter authorities. Wherefore I conclude that judgment ought to be given for the avowant. *Bankes* Chief Juſtice, I conceive that it is a plain avowry upon the Statute, & therefore I need not to argue it; here are two queſtions only. The firſt, Whether this Plaintiffe who is a ſtranger be enabled by the Statute of 21 *H.* 8. to plead in barre of this conuſance or not. Secondly, admitting that he be inabled by the Statute to plead this plea, whether the traverſe be here wel taken or not. To the firſt, I hold that he is inabled by the Statute to take this traverſe: but for the ſecond, I hold cleerly, that the traverſe is not well taken, here the Plaintiffe & defendant are both ſtrangers, ſo as here is neither the very Lord nor the very tenant. And now I wil conſider what the common Law was before the Statute, it is cleer that by the common law a ſtranger might plead nothing in diſcharge of the tenancy, nor could plead a releaſe as the bookes are 34 *E.* 3. Avowry 257. and 38 *E.* 3. Avowry 61. he could not plead *rien arrere*, or levyed by diſtreſſe he could plead no Plea but *hors de ſon fee*, or a Plea which did amount to ſo much I confeſs that the book of 5 *E.* 4, 2. *b.* is that the tenant in a replevin could not plead *hors de ſon fee*, but the book of 28 *H.* 6. 12. is againſt it. True it is, that in ſome ſpecial Caſe, as where there is Covin or Colluſion in the avowant, there the

the Tenant ſhall ſet forth the ſpeciall matter as it is in 9 *Rep.* 20. *b.* Now there are two reaſons given in our books, wherefore the Plaintiffe in a Replevin being a ſtranger, could not plead in barre of the Avowry. The firſt is, that the Seignory being in queſtion, it is matter of privity betwixt the Lord and the Tenant. The ſecond, that the Law doth allow unto every man his proper plea, which is proper to his Caſe, and that he ought to plead and no other, as appeareth by the bookes, 12 *Aſſ.* p. 2. 13 *H.* 8. 14. 2 *H*7. 14. 13 *H.* 7. 18. *Lit.* 116. 35. *H.* 6. 13. & 45 *E.* 3. 24. Now ſeeing that the Plaintiffe being a ſtranger could not plead this Plea at the common law, the queſtion now is, Whether he be inabled by the Statute to take this Plea or not, the words of the Statute are, That the Plaintiffe and Defendant ſhal have the like Pleas and aid-prayer as at the common law, and therefore it was objected that it doth not give any new Plea; true it is, that by the expreſſe words thereof, that it gives not any new plea, but yet I conceive that any ſtranger is enabled to plead any plea in diſcharge of the Conuſance by the equity of this Statute; at the common law avowry was to bee made upon the perſon, and therefore there was no reaſon that the Plaintiffe being a ſtranger ſhould plead any thing in barre of the Avowry or Conuſance, but now the Statute enables the Lord to avow upon the land not naming any perſon certain, it is but juſtice and equity that the Plaintiffe ſhould be inabled to plead any thing in diſcharge of it; I compare this Caſe to the Caſe in the 3 *Rep. fo.* 14. *Harberts* Caſe, where it is reſolved that feoffee of a Conuſor of a Statute being onely charged, may draw the other in to be equally charged, and if execution be ſued againſt him onely that he may diſcharge himſelfe by *Audita querela* for ſo much, 8 *E.* 4. 23. *a.* there the Defendant avowed for a rent charge, the Plaintiffe ſhewed how that one *E.* leaſed the land to him and prayed in aid of him, and reſolved that he ſhould not have aid becauſe the avowry is for rent charge, ſo as the Plaintiffe might plead any plea that he would in diſcharge of the land, now by the ſame reaſon where the lands of the Plaintiffe were charged with a rent charge he might at the common

law have pleaded any thing in diſcharge of his land; by the ſame reaſon where there is an avowry upon the land according to the Statute, the land being charged, the Plaintiffe may plead any thing in diſcharge therof; and this is my firſt reaſon: My ſecond reaſon is, that this law hath been conſtrued by equity, for the benefit of the Lord, and therefore it ſhall bee conſtrued by equity for the benefit of the Tenant alſo, *Inſtit.* 286. *b.* My third reaſon is, Although the Plaintiffe bee a ſtranger and claimeth no intereſt in the land, yet for the ſaving of his goods he may plead this plea; I may juſtify an aſſault upon another who indeavoureth to take away my goods, and I may juſtifie maintenance where it is in defence of my intereſt, as it appeareth in 15 *H.* 7. 2. and 34 *H.* 6. 30. Fourthly and laſtly, upon the authorities in law after the making of this Statute, I conceive that the Plaintiffe may well take the Plea, 27 *H.* 8. 4. The Plaintiffe prayed in aide of a ſtranger and had it, which could not be at the Common law, as appeareth by 3 *H.* 6. 54. and 34 *H.* 6. 46. and many other bookes, and for bookes in the point, 34 *H.* 8. *Petty Brooke* 235. *Inſtitutes* 268. 9 *Rep.* 36. & *Hobarts rep.* 150, 151. *Brown* and *Goldſmiths* Caſe: wherefore I hold that the Plaintiffe may by the equity of the Statute plead this plea. But it was objected by my brother *Reeve*, that by the Statute of 25 *E.* 3. *c.* 7. It is enacted that the poſſeſſor ſhall plead in barre, and therefore the incumbent before induction cannot plead in bar, as it is reſolved in 4 *H.* 8. *Dyer* 1. and 31 *E.* 3. *Incumbt.* 6. and upon the ſame reaſon he conceived it ſhould be hard in our Caſe, that the Plaintiffe who is but a ſtranger, not taking upon him any eſtate, ſhould be admitted to plead this plea; eſpecially the Statute in this Caſe ſaying, that the Plaintiffe ſhall have the like pleas, as at the common law: To that I anſwer, that by the Statute of 25 *E.* 3. it is enacted that the poſſeſſor ſhall plead in barre, and therefore cleerely there he ought to ſhew that he is poſſeſſor: otherwiſe, he cannot plead in barre, and therefore not like to our Caſe: and the Novell *Entries* 598, 599. doth not make againſt it, for there it was not upon the Statute; and 26 *H.* 8. 6. is expreſſe that the plaintiffe being a ſtranger

ſtranger is enabled by the Statute of 21 *H.* 8. to take this plea: Wherefore I conclude this point, that the Plaintiffe is inabled by the Statute to plead any thing in barre of the avowry: But for the ſecond point, I hold cleerly that the traverſe as it is here taken is not well taken, it is onely an equitable conſtruction that the plaintiffe ſhall plead this Plea, as I have argued before, and therefore hee ought to purſue the forme of the Common Law, in the forme of his traverſe, which he hath not here done, and therefore the traverſe is not good, and where the ſeiſin is not materiall, there it is not traverſable, and in this Caſe the ſeiſin of the fealty is not materiall, for it is out of the Statute of limitations, and therefore not traverſable: and ſo is it in the Caſe of a gift in taile, and grant of a rent charge, it is not traverſable becauſe that the ſeiſin is not materiall, 7 *E.* 4. 29. *Com.* 94. 8. *Rep.* 64. *Foſters* Caſe. Secondly, where the ſeigniorie is not in queſtion there no traverſe of ſeiſin, ſo it is in Caſe of writ of Eſcheat, *Ceſſavit Reſcous*, &c. and therewith agree the bookes of 22 *H.* 6. 37. 37 *H.* 6. 25. & 4 *Rep.* 11 *a. Bevills* Caſe. Thirdly, where the Lord and Tenant differ in the ſervices there no traverſe of the ſeiſin but of the tenure, but where they agree in the ſervices, there the ſeiſin may be traverſed, and therewith agree the bookes of 21 *E.* 4. 64. & 84. 20 *E.* 4. 17. 22 *Aſſ. p.* 68. & 9 *Rep.* 33. *Bucknells* Caſe, and therefore the traverſe here is not good. Firſt, becauſe it is a generall traverſe of the ſeiſin *per manus* the tenure not being admitted as it ought to be by the fourth rule in *Bucknells* Caſe, and therewith agreeth 23 *H.* 6. Auowry 15. Beſides, it is a rule in law, That a man ſhal never traverſe the ſeiſin of ſervices, without admitting of a tenure, and in this Caſe he tooke the tenure by proteſtation, and therefore the traverſe here is not good, and therewith agrees 15 *E.* 2. Avowry 214. Further, the traverſe here is not good becauſe he hath traverſed a thing not in demand which is the rent, for he ought to have traverſed the ſeiſin of the fealty onely for which the diſtreſſe was taken, and not the rent as here he hath done, and therewith agreeth 9 *Rep.* 35. *a.* and 26 *H.* 8. 1. But as this Caſe is, he could not traverſe the fealty onely becauſe

becauſe that ſeiſin of rent is ſeiſin of fealty, and therewith agreeth 13 *E.*3. Avowry 103. 3 *E.*2. Avowry 188. & 4 *Rep.* 8. *b. Bevills* Caſe, and therefore he ought to traverſe the tenure. True it is as it was objected by my Brother *Foſter*, that ſeiſin of rent is not an actuall ſeiſin of fealty as to have an aſſiſe, but is a ſufficient ſeiſin as to avow. And we are here in Caſe of an avowry, and therewith agreeth the 4 *Rep.* 9. *a. Bevills* Caſe: wherefore I conclude that judgement ought to bee given for the avowant. Here note, that it was reſolved by all the Judges of the Common Pleas, that a traverſe of ſeiſin *per manus* generally without admitting of a tenure is not good, and therefore ſee 9 *Rep.* 34. *b.* & 35. *a*, which ſeemeth to bee contrary.

Hill. 17° Car' *in the Kings Bench.*

Hayward *againſt* Duncombe *and* Foſter.

234. THe Caſe was thus, The Plaintiffe here being ſeiſed of a Mannor with an advowſon appendant, granted the next avoidance to *I.S.* and afterwards bargained and ſold the Mannor with the advowſon to the Defendants *D* and *F.* and a third perſon, and covenanted with them, that the land is free from all incumbrances. Afterwards the third perſon releaſed to the Defendants, who brought a writ of covenant in the common Pleas, and there judgement was given that the Action would lye. Whereupon *Hayward* brought a writ of Error in this Court. The point ſhortly is this, Whether the writ of covenant brought by the Defendants without the third perſon who releaſed were good or not; and that reſts onely upon this, Whether this Action of covenant to which they were all intitled before the releaſe, might be transferred to the other Defendants onely by the releaſe or not. And it was objected, that it could not, becauſe it is a thing in Action and a thing veſted

veſted which cannot be transferred over to the other two only by the releaſe; But that all ought to joine in the Action of covenant notwithſtanding *Rolls* contrary, becauſe that after this releaſe it is now all one as if the bargaine and ſale had been made to thoſe two onely, and now in an Action brought againſt them two, they may plead a feoffement made to them onely, without naming of the third who releaſed, and ſo it is reſolved in 33 *H.*6. 4,& 5,& 6 *Rep.fo.* 79. *a.* Beſides, this covenant here is a reall covenant and ſhall goe to aſſignees, as it is reſolved in 5 *Rep. Spencers* Caſe, and here is as violent relation as if the feoffement had been made to them two onely. It was objected by Juſtice *Heath*, What if the other dyed? it was anſwered, perhaps it ſhall there ſurvive, becauſe that it is an Act in law, and the law may transferre that which the Act of the party cannot, becauſe that *Fortior eſt diſpoſitio legis quam hominis, &c.*

Booremans *Caſe.*

235. *Booreman* was a Barriſter of one of the Temples, and was expelled the houſe, and his chamber ſeiſed for non-payment of his Commons, whereupon he by *Newdigate* prayed his writ of reſtitution, and brought the writ in Court ready framed; which was directed to the Benchers of the ſaid Society, but it was denyed by the Court becauſe there is none in the Inns of Court to whom the writ can be directed, becauſe it is no body corporate but onely a voluntary ſociety, and ſubmiſſion to government, and they were angry with him for it, that he had waived the ancient and uſuall way of redreſſe for any grievance in the Innes of Court, which was by appealing to the Judges, and would have him doe ſo now.

Bambridge *againſt* Whitton *and his wife.*

236 IN an *Ejectione firme* upon not guilty pleaded a ſpeciall verdict was found, & the Caſe upon the ſpeciall verdict

this; A copyhold tenant in fee doth ſurrender into the hands of two tenants, unto the uſe of *I. W.* immediately after his death, and whether it be a good ſurrender or no, was the queſtion. *Harris*, that the ſurrender is void. Eſtates of copyholds ought to be directed by the rule of law, as is ſaid in 4 *Rep.* 22. *b.* 9 *Rep.* 79. & 4 *Rep.* 30. And as in a grant, a grant to one in *ventre ſa mier* is void, ſo alſo in a wil or deviſe, & as it is reſolved in *Dyer* 303 *p.* 50. ſo it hath been adjudged that the ſurrender to the uſe of an infant *in ventre ſa mier*, is void: and as at common law a freehold cannot begin in *futuro*, ſo neither a copyhold, for ſo the ſurrenderer ſhould have a particular eſtate in him without a donor or leſſor, which by the rule of law cannot be: and he tooke a difference betwixt a Deviſe by will and a Grant executed, in a deviſe it may be good, but not in a grant executed: and here he took a difference where the grant is by one intire clauſe or ſentence, and where it is by ſeverall clauſes, 32 *E.* 1. *taile* 21. *Dyer* 272 *p.* 30. *Com.* 520 *b.* 3. *Rep.* 10. *Dowties* Caſe, and 2 *Rep. Doddingtons* caſe. For inſtance, I will put onely the Caſe in *Dyer* and the *Comment*. A termor grants his terme *Habendum* after his death, there the *Habendū* onely is void, & the grant good; but if he grant his terme after his death, there the whole grant is void, becauſe it is but one ſentence: So I ſay in our Caſe, becauſe it is but one clauſe, the whole grant is void. Another difference is, Where the diſtinct clauſe is repugnant and where not, where it is repugnant there it is void and the grant good, *quia utile per inutile non vitiatur*: But in our Caſe as I have ſaid before it is one intire ſentence, *M.* 13. or 23. *Jac.* in this Court, *Rot.* 679. *Sympſon and Southwells* Caſe the very Caſe with our Caſe. There was a ſurrender of a copytenant to the uſe of an infant *in ventre ſa mier* after the death of the ſurrenderor, and there it was reſolved by all the Judges except *Dodderidge* that the ſurrender was void. Firſt, becauſe it was to the uſe of an infant *in ventre ſa mier*; and Secondly, becauſe it was to begin *in futuro*, which is contrary to the rule in law: and copytenants as it was there ſaid ought to be guided by the rules of law, but *Dodderidge* doubted of it, and he agreed the

Caſe

Caſe at common law, that a freehold could not commence *in futuro*, but he doubted of a copyhold, and he put the Caſe of ſurrender to the uſe of a will: But he ſaid, that judgement was afterwards given by *Coke* Chief Juſtice in the name of all the other Judges that the ſurrender was void, and therefore *Quod querens nihil capiat per billam*, wherefore he concluded that the ſurrender was void, and prayed the judgement of the Court.

Langhams *Caſe.*

237. LAngham a Citizen and freeman of London was committed to Newgate by the Court of Aldermen, upon which he prayed a *Habeas corpus* which was granted, upon which returne was made, Firſt, it is ſet forth by the return, that London is an ancient City and incorporate by the name of Mayor, Comminalty and Citizens, and that every freeman of the City ought to be ſworne, and that a Court of Record had been held time out of mind, &c. before the Mayor and Aldermen. And that there is a cuſtome, that if any freeman be elected Alderman that he ought to take an oath *cujus tenor ſequitur in hæc verba, viz.* You ſhall well ſerve the King in ſuch a ward in the office of Alderman of which you are elected, and you ſhall well intreat the people to keep the peace & the Laws and priviledges within and without the City, you ſhall well obſerve & duly you ſhal come to the Court of Orphans and Huſtings if you be not hindred by command of the King, or any other lawfull cauſe, you ſhall give good counſell to the Mayor, you ſhall not ſell bread, ale, wine, or fiſh by retaile, &c. Then is ſet forth a cuſtome, that if any perſon be choſen Alderman, he ſhal be called to the Court, & the oath tendred to him, & if he refuſe to take it then he ſhal be comitted, until he take the oath. Then is ſet forth, that by the Statute of 7 *R.* 2. all the cuſtomes of the city of London are confirmed. And laſtly, is ſet forth that the 11 of January *Langham* being a freeman of London, & having taken the oath of a freeman was

debito modo electus Alderman of Portſoken ward, and being *habilis & idoneus* was called the firſt of February to the Court of Aldermen, and the oath tendred to him, & that he refuſed to beſworn *in contemptū Curiæ & cōtra conſuetudines, &c.* wherfore according to the cuſtome aforeſaid, he was committed by the Court of Aldermen to Newgate untill he ſhould take the oath, *& hæc fuit cauſa, &c.* To this retorne many exceptions were taken. *Mainard*; the retorn is inſufficient for matter and forme; for forme it is inſufficient, for the *debito modo electus*, without ſhewing by whom and how, is too generall: then it is inſufficient for the matter, for he is impriſoned generally, and not untill he takes the oath, which utterly takes away the liberty of the ſubject, for by this meanes he may be impriſoned for ever. Beſides, here is no notice given to him that he was choſen Alderman, but they elect him, and then tender him the oath, without telling him that he was choſen Alderman, and therefore the retorne not good, for it ought to be certaine to every intent. Further, the Oath is naught and unreaſonable, for he ought to forſweare his trade, for if he ſell bread, ale, wine, or fiſh before, now he muſt ſweare that hee ſhall never ſell them by retaile after, which is hard and unreaſonable, for perhaps he may be impoveriſhed after and ſo neceſſitated to uſe his trade, or otherwiſe periſh, wherefore for theſe reaſons he conceived that the Retorn was inſufficient. *Glynn* upon the ſame ſide, that the retorne is inſufficient, and he ſtood upon the ſame exceptions before, and he conceived, that notice ought tobe given to him that he was choſen Alderman, for this reaſon, becauſe of the penalty which hee incurres which is impriſonment, and he compared it to the Caſes in the 5 *Rep.* 113. *b.* & 8 *Rep.* 92. That the feoffee of land or a bargaine of a reverſion by deed indented and inrolled ſhall not take advantage of a condition for not payment of rent reſerved upon a leaſe upon a demand by them without notice given to the leſſee for the penalty which inſues of forfeiture of his terme: So in our Caſe, he ſhall not incurre the penalty of impriſonment for refuſing to be ſworn without notice given him that he was choſen Alderman: He took another

nother exception to the oath, becauſe he is to ſweare, that he ſhall obſerve all lawes and cuſtomes of the ſaid City generally, which is not good, for that which was lawfull before, peradventure will not be lawfull now; for ſome cuſtomes which were lawfull in the time of *R.* 2. are now ſuperſtitious, and therefore are not to be kept. Further, it is to keep all the cuſtomes within and without the City, which is impoſſible to doe. Wherefore for theſe reaſons he conceived the retorne not to be good, and prayed that the priſoner might be diſcharged. *Saintjohn* Sollicitor of the ſame ſide. The cuſtome to impriſon is not good. Beſides, here the impriſonment is generall, ſo that he may be impriſoned for ever, which is not good; and the Statute confirmes no cuſtomes but ſuch as are good cuſtomes: I agree that a cuſtome for a court of Record to fine & for want of payment to impriſon maybe good, becauſe the cuſtome goes onely to fine & not to impriſonment, the Caſe of 1 *H.* 7. 6. of the cuſtome of London for a Conſtable to enter a houſe & arreſt a Prieſt, and to impriſonhim for incontinency comes not to our Caſe, for that is for the keeping of the peace which concernes the commonwealth as it is ſaid in the book, and therefore may be good, but it is not ſo in our Caſe. A corporation makes an ordinance and injoyns the obſervance of it under the paine of impriſonment, it hath been adjudged that the ordinance is againſt the Statute of *Magna Charta*, that *Nullus liber homo impriſonetur, &c.* and therefore naught, and that is the 5 *Rep.* 64. *a. Clarkes* Caſe, and therewith agrees the caſe of the City of London, 8 *Rep.* 127. *b. Mic.* 14 & 15 *Eliz. Marſhalls* Caſe in *Harpers Reports*, there a *Habeas corpus* was directed to the Mayor of Exeter who returned a cuſtome there that none but a freeman ſhould ſet up a ſhop there, and if any other did that he ſhould be impriſoned, and it was adjudged no good cuſtome, *Mich.* 21. *E.* 1. in the common Pleas *Rot.* 318. upon a *Habeas corpus* the cuſtome of Cambridge was retorned, which was that the Vice chancellor might impriſon a Scholler taken in a ſuſpitious place, I conceive the ſame no good cuſtome, but it is not reſolved. Beſides, I conceive the return here is inſufficient, becauſe that no

notice was given to the party that he was choſen Alderman, which I conceive ought to have been for the great penalty which followes, wherefore he prayed that the priſoner might be diſcharged. *White* of the ſame ſide; the retorn is not good for want of notice, and he ſaid, that it doth not appeare that he was preſent at the election and no other notice appeareth by the Retorne; and he ſaid, that the tender of the oath did not imply notice: further he ſaid, that the oath is not good, becauſe he is to abjure his trade. Beſides, it is ſaid in the retorn that the cuſtome is, That *Si aliquis liber homo* be elected Alderman, &c. and doth not ſay *habilis & idoneus*, as it ought to be, and therefore not good. True it is, that it is averred in the Retorne that he was *habilis & idoneus*, but it is not alledged to be part of the cuſtome, and therefore that doth not help it, wherefore he prayed that the priſoner might be diſcharged. *Gardiner*, Recorder for the City, that the Retorne is ſufficient, and firſt for the *debito modo electus*, where it was objected that the ſame was too generall, to that he anſwered, that no traverſe can be taken upon it, and therefore it is ſufficient, for there is not ſuch certainty required in a retorn upon a *Habeas corpus* as in pleading, as it is reſolved in the Caſe of the City of London, 8 *Rep.* 127. *b.* 128. *a.* and according to that it is reſolved in 9 *H.* 6. 44. *a.* where it is ſaid, that if the cauſe in it ſelfe be ſufficient upon the retorn, it ſufficeth although it be falſe, and although there be not ſo preciſe certainty in it, and there it is reſolved that the party cannot take iſſue upon the Retorn, and yet there is no prejudice by it, for if it be falſe you may have a writ of falſe impriſonment, and therewith agrees 11 *Rep.* 99. *a. b. James Baggs* Caſe, and *Anne Bedingfields* Caſe, 9 *Rep.* 19. where upon a *Ne unq*; *accouple* in legall matrimony pleaded the Biſhop certified *quod infra nominat' E & A legitimo matrimonio copulati fuerunt*, to which Certificate (ſaith the book) being briefe and direct in the point, no exception was ever taken; and if a retorne upon a *Habeas corpus* ſhould have all circumſtances, it would be ſo long and perplexing that there would be no end of it, and he conceived the retorn ſufficient notwithſtanding that

that objection. Now for the exception that the Plaintiffe had not notice of his election to be Alderman, to that he anſwered, that it appeareth cleerly that he had notice, for it appeareth that the ſame day that he was elected, he was called to take the oath, and that was tendred to him and he refuſed to be ſworne, which certainly implyes that he had notice. For the exception that the oath is unreaſonable; becauſe he was to abjure his trade, which is in prejudice of the Commonwealth from the uſing of which no man can binde himſelfe, much leſſe abjure againſt it. To that he anſwered, that notwithſtanding that the Oah is law full, and you forſweare no more then the Law doth prohibit you, for it doth not extend to all trades, but onely to ſuch as ſell bread, ale, wine and fiſh, and it is againſt law and reaſon that he who hath the Juriſdiction of bread, ale, &c. and may puniſh the miſuſage of it that he ſhould exerciſe the ſame trade himſelfe, wherefore he conceived that notwithſtanding that exception the Retorn is ſufficient. For the objection to the Oath that he ought to ſweare that he will keep all the priviledges of the City, whereas in truth there are many priviledges which are now unlawfull, although that before they were lawfull, and therefore the ſame ought not to be kept; to that he anſwered, that the oath is good notwithſtanding that objection, for it ought to be intended that he ſhall keep all priviledges and cuſtomes reaſonable, which agree with the times in which wee live, and not ſuch as are ſuperſtitious and unreaſonable. For the objection, that the cuſtome is unreaſonable, becauſe it trencheth much upon the liberty of the ſubject, and againſt the Statute of *Magna Charta* that the body of a freeman ſhould be impriſoned, and the rather becauſe here the impriſonment is generall, and he may be impriſoned for ever: to that it was anſwered, that the City hath cuſtomes as unreaſonable as in this Caſe, as the cuſtome in *L.* 5. *E.* 4, 30. 11 *H.* 6. 3. & 2 *H.* 4. 12. That the creditor may arreſt the debtor before the day of payment to give better ſecurity, and that is altogether againſt the rule of law. Beſides they have a cuſtome which you ſhall find in 1 *H.* 7, 6. and 2 *H.* 4. 12. That a Conſtable upon

on ſuſpition of incontinency may enter the houſe of a ſtranger and arreſt the body of the offendor and commit him to priſon, and that is a good cuſtome, and yet it is againſt the law, and trencheth alſo upon the liberty of the ſubject. Beſides, they have a cuſtome, that no perſon being free of the City ſhall keep ſhop there, and that is adjudged a good cuſtome, although it be to reſtraine trading, which is againſt the rule of the law alſo, 8 *Rep.* 125. The Caſe of the City of London. And for the objection that it is unreaſonable becauſe that the impriſonment is generall: to that he ſaid it was a good objection if it were true, but that is miſtaken; for the retorne is expreſſely that he ſhall be impriſoned untill he hath taken the oath, which is not generall, for if he take the oath he ſhall bee diſcharged; and here he ſaid that this government by Aldermen in this City is one of the moſt ancient governments in the Kingdome, beyond time of memory and is a government wch of neceſſity ought to be ſupported or otherwiſe the City would immediately be brought to ruine, for we cannot hold a Court without thirteen Aldermen which ought to have care of the Orphans and make lawes for the well government of the City, and that is of great conſequence to all the kingdome and concernes the government of it; and if this City be well governed the whole kingdome will fare the better; and at this time we want many Aldermen, and if theſe ſhall eſcape, by the ſame reaſon others will doe ſo, and ſo the government utterly ſhould faile. And where it was objected that it is uſuall to make them to take the oath, and accept a fine of them after. To that he ſaid, that they would not doe ſo now in this Caſe, for he ſaid, that the party choſen is an able man, and a man whom they reſpect and not his money: And therefore he ſaid that the cuſtome to impriſon him for refuſing is more reaſonable then if the cuſtome were to fine him, for he ſaid, that that cuſtome is the moſt reaſonable cuſtome which is moſt fit for the attaining of its end, and he ſaid, that impriſonment is moſt apt for the obtaining the end, for when wee accept a fine, there is no end of it, for hee may bee choſen after, and how can the government bee ſupported which

which is the end of the election if all ſhould be fined, wherefore the cuſtome to impriſon is more reaſonable, then if the cuſtome had been to fine, becauſe it is more apt to attain the end, which is to maintain the government: it is ſaid in 38 *Aſſ. p.* 22 *Br.* impriſonment 100. That it was reſolved 2 *Ma.* in parliament, that impriſonment almoſt in all Caſes is but to detaine him untill he makes a fine, and if he tender that to be diſcharged. To that he ſaid, that the ſame ought to be underſtood, where a fine is impoſed, but we doe not intend to accept of a fine. Further he ſaid, that there is a judgement in the point, and that is the Statute of 3 *Jac. cap.* 4. which injoynes an oath for Recuſants to take, and for refuſall that they ſhall be committed untill, &c. here he ſaid that an Act of Parliament hath done it in the like Caſe, and therefore he conceived the cuſtome reaſonable: and then hee cited many preſidents of commitment in this very Caſe. 2 *H.* 5. *John Gidney* was dealt with in the ſame manner, 8 *E.* 4. *Charls Faman* was impriſoned, 36 *H.* 8. *Thomas White*, 1 *Jac.* Sir *Thomas Midleton*, all which were impriſoned for refuſing to take the oath. And laſtly, he cited one 3 *Jac.* and that was Sir *William Bonds* Caſe, who was impriſoned by the Court of Aldermen for the ſame cauſe, and it came judicially in queſtion; and he ſaid, that upon ſolemn debate it was reſolved, that he ſhould be remanded, wherefore he concluded that the commitment being by a Court of Record, and that for a contempt againſt the Court, and that for not obſerving of the cuſtomes of the City which is againſt the oath of a freeman, and which are confirmed by Act of Parliament, that the commitment is good and lawfull, and therefore prayed that the priſoner might be remanded. And now this terme it was reſolved by the Judges upon ſolemn debate, that the retorn notwithſtanding any of the ſaid exceptions was ſufficient. Juſtice *Mallet*; the Retorn is ſufficient in matter and form, but for the matter of it, I ſhal not ground my ſelf upon the cuſtom but upon part of the record, w^ch^ is upon the contempt; for although I agree that *Conſuetudo loci* is of great regard, yet I conceive it is not ſtrong enough to take away the liberty of a freeman by

impriſonment. Power to impriſon the body of a freeman cannot be gained by preſcription or grant; and a grant is the ground of a preſcription, and therefore if it be not good in a grant, not in a preſcription: and I conceive that it is the common law onely or conſent to an Act of Parliament, that ſhall ſubject the body of a freeman to impriſonment; and it is reſolved in the 5 *Rep.* 64. *acc.* in *Clarkes* Caſe, and agreed in 8 *Rep.* 127. That a conſtitution cannot bee made by a Corporation, who have power to make by laws upon pain of impriſonment; becauſe it is againſt the Statute of *Magna Charta*, wherefore I conceive the power to impriſon the body of a freeman cannot be gained by cuſtome, but although it cannot be gained by cuſtome, yet *Qui non tranſeunt per ſe, tranſeunt per aliud*, it will paſſe as a thing incident to a Court of Record, and therefore although I hold that the cuſtome to impriſon is not good, yet I hold that the impriſonment here by a Court of Record for a contempt made unto it, as appeareth by the Retorne, here it was, is good; for in the concluſion of the Retorn it ſaith, that he refuſed *in contemptū Curiæ, &c.* And that it is incident to a Court of Record to impriſon, 8 *Rep.* 38. *b.* it is there reſolved, that for any contempt done to a Court of Record the Judges may impoſe a fine, and 8 *Rep.* 59. *b.* It was reſolved, that to every fine, impriſonment is incident. Further, I conceive that by the ſame reaſon that a Court of Record may impriſon for a fine, they may impriſon for a contempt, and in 8 *Rep.* 60. it is ſaid, that to impriſon doth belong onely to Courts of Record, but which is in the point, it is reſolved, 119. *b.* in *Doctor Bonhams* Caſe, that it is incident to every court of record, to impriſon for a contempt done to the court, and hee ſaid, that if a Court of Record ſhould not have ſuch a coercive power they ſhould bee in effect no Court. Wherefore hee conceived that the refuſing to take the Oath being a contempt, and that to a Court of Record, as it appeareth by the Retorn, that they may lawfully commit him for this contempt. For the objection that the *debito modo electus*, without ſhewing how, is too generall: To that he anſwered,

that

that it is onely matter of inducement, and there is no neceſſity to ſhew all matter of inducement. For the objection that he had not notice of the election: To that he anſwered, that here is good notice, for by the Retorne it appeareth, that according to the cuſtome after he was elected, he was called to the Court, and the Oath tendred to him, and he refuſed, which without doubt implies notice, *& quod conſtat clare non debet verificare*; & as after appearance, all exceptions to proceſs are taken away, as the books of 9 *E.* 4. 18. & 12 *H.* 4. 17, & 18. & many other bookes are, ſo I ſay in this Caſe after appearance, you ſhall never ſay that you had not notice, for by your appearance you admit it and the proces good. For the objection to the Oath, that it is not good, becauſe it makes a man abjure his trade, which is againſt Law and reaſon. To that I anſwer, that the Aldermen are intruſted with the aſſize of Bread and Ale, and ſo with Wine and Fiſh, and therefore as it is unreaſonable, ſo it is againſt the law, that duringhis office, he ſhould uſe the trade of which he hath Juriſdiction and power to regulate and to puniſh the miſdemeanors of it, and therefore it is enacted by the Statute of 12 *E.* 2. *cap.* 6. That no officer of a city or Burrough ſhall ſell Wine or Victuals during his office. It is true, that this Statute is repealed by the Statute of 3 *H.* 8. *cap.* 8. but there is a Proviſo in the Statute that it extend not to London, ſo as the Statute of 12 *E.* 2. is in force ſtill as unto London. Then the Oath makes him to abjure no more then the law forbids him to doe, and which to doe by him were unlawfull, wherefore that exception is not good. For the exception that the impriſonment is generall; to that I anſwer, that it is miſtaken, for it is onely untill he take the Oath, and therefore the retorn is good notwithſtanding that exception alſo: Now the end of impriſonment being obedience, and the party here not obeying but refuſing to take the Oath, for which he is committed, for my part, I conclude that he be remanded to priſon. Juſtice *Heath*, that the Retorn is good in matter and forme, and I ground my ſelfe upon the cuſtome, for I conceive that it is a good cuſtome, becauſe that the ground of it is good and reaſonable,

which is the government of the City, for that totally depends upon the cuſtome, and I hold that the refuſing to take the Oath onely is no ſufficient cauſe of impriſonment, but as it is an introduction to the ſupport of government, by keeping of the cuſtomes and priviledges of the City which every one by the Oath of a freeman is bound to keep, and this cuſtome is not againſt the Statute of *Magna Charta 9 H. 3. cap. 29.* For that ſaith that no freeman ſhall be taken and impriſoned &c. but *per legem terræ:* Now *Conſuetudo loci eſt lex terræ*, for in the Statute of 52 *H. 3. cap. 3.* There the law and cuſtome of the Realme are joyned together as Synonyma, words of the ſame intent. For the objection, That the cuſtome is not that they who ſhall be choſen Aldermen, ſhould be *idonei & habiles*, but it is onely averred in the Retorn, that *Langham* here choſen to be Alderman is *idoneus & habilis*: to that I ſay, that we are to judge upon the Retorn as it is before us, and if upon the whole matter there appeareth ſufficient matter for us to adjudge the commitment lawfull, be it true or falſe wee ought to judge according to it, and if the Retorn be falſe, you have your remedy by way of Action upon the Caſe; and in this Caſe it is expreſſely averred that the party choſen is *idoneus & habilis*, and it lies not in your power or in ours to gaine-ſay it, wherefore I conceive that exception worth nothing; I agree that the Statute doth not confirm ill and unreaſonable cuſtomes, but here I ſay (as before) that this cuſtome hath a good and lawfull foundation, and therefore it may be well confirmed, and the Oath although it be in generall termes, yet it ought to be taken, that he doe keep and obſerve ſuch reaſonable and lawfull priviledges and no other. For the notice I ſay that it is manifeſt, that he had notice, which he conceived would be good evidence to a Jury, and that upon ſuch evidence they would finde for the Plaintiffe, and for the *debito modo electus*, he conceived it is good enough becauſe that in the Retorn upon a *Habeas corpus* ſuch preciſe certainty is not required as in pleading, and for the impriſonment it is not in generall, and ſo may happen to be perpetuall as was objected, but it is untill he take the Oath, wherefore

fore upon the whole matter I conceive the retorn is ſufficient, & that the priſoner ought to be remanded. *Bramſton* Chief Juſtice; the cuſtome is good, and none of the exceptions to the Retorn good, and therefore the priſoner ought to be remanded. The queſtion upon the cuſtome is onely whether this cuſtome as it is here ſet forth by the retorn to impriſon the body of a freeman be good or not, and as I have ſaid before, I hold it to be a good cuſtome, & that upon this difference, that a cuſtome generally to impriſon the body of a freeman is not a good cuſtome. But a cuſtome (as it is here) for a Court of Record to impriſon the body of a man who is choſen a great officer for refuſing to take the office upon him without which the government cannot ſubſiſt, is a good cuſtome: Beſides, here being a contempt refuſing to take the Oath, the Court may impriſon the body for it, without any cuſtome to helpe it, for it is incident to a Court of record to impriſon. I agree the Caſe which was objected by Maſter *Sollicitor* of 21 *E.* 1. where the cuſtome of *Cambridge* is, that the Vicechancellor may impriſon a ſcholler taken in a ſuſpitious place, that is no good cuſtome, for it no way concerns the ſupportation of government or the Commonwealth, and they may puniſh him another way, which may be good and as effectual as impriſonment: but not ſo in our Caſe, for if in this time in which there are many Aldermen wanting, all ſhould be fined, what will become of the government? Further, I agree that the cuſtome to impriſon for forein buying and ſelling is no good cuſtome; upon the difference before taken, all great Officers have a proper Oath belonging to them, which is very needfull for the greater ingagement of men in the due execution of their offices, which ſo much concerns the Publike; and if they refuſe to take it, they are puniſhable for it; and this place in which Maſter *Langham* is choſen Alderman is the moſt great place of government in the Realme, and of greateſt conſequence to the whole Kingdome, and therefore if it ſhould not be ſupplyed with Aldermen, who is it who doth not ſee the great inconvenience which would follow? and therefore I hold that the cuſtome to impriſon untill

he take the Oath, and ſo by conſequence the office upon him (for refuſing of the Oath is refuſing of the Office) is a good cuſtome; now for the Oath, it is the uſuall Oath which hath been taken time out of mind, &c. And it is reaſonable, and wel penned; for the Objection that it is unreaſonable, becauſe it makes a man to abjure his trade. To that I anſwer, that it is reaſonable and makes him abjure no more then the law forbids him to doe, for it is not reaſonable that he who hath the Juriſdiction of aſſiſe of bread and ale, wine and fiſh, that hee during his Office ſhould ſell thoſe things by retaile. Now that the Mayor and Aldermen of London hath this Juriſdiction: See the Statute of 31 *E.* 3. *cap.* 10. for fiſh, the Statute of 23 *H.* 8. *cap.* 4. for ale and beere, and 28 *H.* 8. *cap.* 14. for wine, where in theſe Caſes power is given to all head officers of Cities, Burroughs and townes corporate to puniſh the offenders againſt the rates and Aſſiſes of the things aforeſaid; & by the Statute of 12 *E.* 2. *cap.* 6. it is expreſſely ordained, that no Officer of a City or Burrough ſhould ſell Wine or Victuals during his office. I confeſſe this Statute is repealed by the ſtatute of 3 *H.* 8. but yet there is a Proviſion in that Statute that it extend not to London, then the law being that none of thoſe things ſhall be ſhould by any Officer by retaile during his office, the Oath which makes a man to abjure that which the law forbids of neceſſity ought to be taken as lawfull: beſides, there is a writ grounded upon the Statute of 12 *E.* 2. which you ſhall find in the Regiſter 184. *a.* & *Fitz. N. B.* 173. *b.* that the party grieved might have directed to the Juſtices of aſſiſes commanding them to ſend for the parties and to do right, &c. Wherefore I hold the oath good and lawfull notwithſtanding this objection. For the point of notice, I conceive it is not needfull, and if it be, I aske who it is ought to give notice in this Caſe; and I ſay that no perſon is tyed to do it, wherefore he ought to take notice of it at his perill, for the *debito modo electus*, I ſay that it is good, being in a Retorn upon a *Habeas corpus*, & it is ſaid, that it was *ſecundũ conſuetudinem*, which includes all things needfull for the objection, that it is averred in the retorn that he was *idoneus & habilis*, but that

that it is no part of the cuſtom that it ſhould be ſo, for it is only in generall, *Si aliquis liber homo*, & doth not ſay *habilis & idoneus*, and therefore the cuſtome ſhould not be good : I anſwer, that it is averred in the Retorn, that it is ſo, that he is elected, and that is ſufficient for us to ground our judgement, but further I conceive that the *debito modo* helpes it, wherefore upon the whole matter I conclude that the cuſtome is good, and the Retorn ſufficient, and therefore that the priſoner bee remanded.

Paſch. 18° Car' *in the Common Pleas.*

Barrow *againſt* Wood *in debt.*

238. IN Debt upon an Obligation brought by *Barrow* againſt *Wood* the defendant demanded *Oyer* of the condition *& ei legitur, &c.* and the effect of it was this, That the Defendant ſhould not keep a Mercers ſhop in the town of Tewkesbury, and if he did that then within three moneths he ſhould pay forty pound to the Plaintiffe : upon which the Defendant did demurre in law, and the point is onely whether the condition be good or not. Serjant *Evers*, the condition is good, becauſe it is no totall reſtraint, for it is a reſtraint here onely to Tewkesbury, and not to any other place, wherefore I conceive the condition good; I agree the Caſe in 11 *Rep.* 53.*b.* where a man bindes himſelf not to uſe his trade for two yeeres, or if a husbandman be bound he ſhall not plough his land, theſe are conditions againſt law, becauſe where the reſtraint is totall although it bee temporall, there the Condition is not good, but the condition is not totally reſtrictive in our Caſe; and he compared this Caſe to the Caſe in 7 *H.* 6. 43. feoffee with warranty; Proviſo, that the feoffee ſhall not vouch it is a good condition, becauſe not totally reſtrictive, for although that the feoffee cannot vouch, yet he may rebut ; ſo in this Caſe, although the Obligor cannot uſe his trade in Tewkesbury, yet he may uſe it in any other place, and the Condition is not againſt law, for if

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it were ſuch a condition, then I agree it would be naught; but yet the bond would ſtand good, for this is not a condition to do an act w^ch is *Malum in ſe*, for there the condition is naught & the Bond alſo, as 2 *E.*4.2. *b.* by *Choke* & *Inſtit.* 206. *b.* But although a man cannot make a feoffement upon condition that the feoffee ſhall not alien, yet the feoffee may bind himſelfe that he will not alien and the bond is good; and ſo I ſay in our Caſe, and if the condition in this Caſe ſhould not be good, it would be very inconvenient; for it is a uſuall thing in a towne in the Country, for a man to buy the ſhop of another man and all his wares in it, and if (the ſame being a ſmall town where one of that profeſſion would ſerve for the whole towne) he who bought the ſhop and wares ſhould not have the power to reſtrain him (the ſame being the ground & reaſon of the contract) from uſing of that trade in that place it would be very inconvenient, wherefore he conceived that the condition was good, and prayed judgement for the Plaintiffe. Serjant *Clarke* for the Defendant, that the condition is not good, for it is againſt the law, and void, becauſe it takes away the livelihood of a man, & that is one of the reaſons againſt Monopolies, 11 *Rep.* 86, & 87. And that I conceive is grounded upon the law of God, for in *Deut. chap.* 24. *ver.* 6. it is ſaid, that *you ſhall not take in pledge, the nether and upper milſtone, for that is his life.* So that by the law of God the reſtraining of any man from his trade which is his livelihood is not lawfull. And ſurely, our law ought not to be againſt the law of God; and that is the reaſon as I conceive, wherefore by our law the utenſils of a mans profeſſion cannot be diſtreined, becauſe by that meanes the meanes of his livelihood ſhould be taken away. And 2 *H.* 5. *fo.* 5. *b.* by *Hull*, the condition is againſt law, and yet the Caſe there is the very Caſe with our Caſe, for there a man was bound, that he ſhould not uſe his Art in *D* for two yeeres, whereupon *Hull* ſwore by God, that if the Obligee were preſent he ſhould goe to priſon till he had paid a fine to the King, becauſe the Bond is againſt law, and therewith agrees the 11 *Rep.* 53. *b.* & 7 *E.* 3. 65. A farmor covenants not to ſow his land; the covenant is void, ſo as I conceive

ceive that although the condition be reſtrictive onely to one place, or for a time, yet becauſe it takes away the livelihood of a man for the time, the condition is againſt law, and void, and he cited a Caſe in the point againſt *Clegat* and *Batcheller Mich.* 44. *Eliz.* in this Court, *Rot.* 3715. where the condition of a Bond was, That he ſhould not uſe his trade in ſuch a place, and it was adjudged that the condition was againſt law, and therefore the bond void, and for theſe reaſons he prayed that judgement might be entred, that the Plaintiffe *nihil capiat per billam.* Juſtice *Reeve* did produce ſome Preſidents in the point; and he ſaid that the law as it had been adjudged, ſtood upon this difference betwixt a contract, or *Aſſumpſit*, and an Obligation: A man may contract or promiſe that he will not uſe his trade, but he cannot binde himſelfe in a bond not to doe it; for if he doe ſo it is void. And for that he cited *Clegat* and *Batchellers* Caſe before, that the obligation in ſuch Caſe is void, and he ſaid, that the reaſon which was given by one, why the bond ſhould be void was grounded upon the Statute of *Magna Charta*, *cap.* 29. which wills, That no freeman ſhould be oulted of his liberties but *per legem terræ*, and he ſaid, that the word, Liberties, did extend to trades; and *Reeve* ſaid, that by the ſame reaſon you may reſtrain a man from uſing of his trade for a time, you may reſtrain him for ever. And he ſaid, that he was confident that you ſhall never find one Report againſt the opinion of *Hull*, 2 *H.* 5. For the other part of the difference he cited *Hill*, 17 *Jac.* in this Court, *Rot.* 1265. and 19 *Jac.* in the Kings Bench *Braggs* caſe, in which Caſes he ſaid, it was adjudged againſt the Action upon a bond, but with the Action of the Caſe upon a promiſe that it would lye. But note, that all the Judges, *viz.* *Foſter*, *Reeve* and *Crawley* (*Bankes* being abſent) held cleerely, that if the condition be againſt the law, that all is void, and not the condition onely as was objected by *Evers*, and it was adjorned.

Apſly *againſt* Boys *in the Common Pleas in a Scire facias to execute a fine upon a Grant and Render, Intrat' Trin.* 16. Car. *Rot.* 112.

239. THe Caſe upon the Pleading was this, a fine upon a Grant & Render was levyed in the time of *E.* 4. upon which afterwards a *Scire facias* was brought, and judgement given, and a writ of ſeiſin awarded but not executed. Afterwards a fine *Sur conuſans de droit come ceo*, &c. with proclamations was levied, and five yeers paſſed, and now another *Scire facias* is brought to execute the firſt fine, to which the fine *Sur conuſance de droit come ceo* is pleaded, ſo as the onely queſtion is, Whether the fine with proclamations ſhall barre the *Scire facias* or not. Serjant *Gotbold* for the Plaintiffe, it ſhall not barre; and his firſt reaſon was, becauſe not executed, 1 *Rep.* 96, 97. and 8 *Rep.* 100. If a diſſeiſor at the common law before the Statute of Non-claime, had levyed a fine, or ſuffered judgement in a writ of right untill execution ſued, they were no barres, and a fine at common law was of the ſame force as it is now, and if in thoſe Caſes no barre at common law untill execution, that proves that this intereſt by the fine upon grant and render is not ſuch an intereſt as can barre another fine, before execution. Beſides, this judgement by the *Scire facias* is a judgement by Statute, and judgement cannot be voided but by error or attaint: further, a *Scire facias* is not an Action within the Statute of 4 *H.* 7. and therefore cannot be a barre, 41 *E.* 3. 13. & 43 *E.* 3. 13. Execution upon *Scire feci* retorned without another plea; and it is not like to a judgement; for there the party may enter, but not here. Beſides, it ſhall be no barre, becauſe it is executorie onely and *in cuſtodia legis*, and that which is committed to the cuſtody of the law, the law

law doth preſerve it, as it is ſaid in the 1 *Rep.* 134. *b.* and he compared it to the Caſes there put, and a fine cannot fix upon a thing executorie, and the eſtate ought to be turned to a right to be bound by a fine as it is reſolved in the 10 *Rep.* 96. *a.* & 9 *Rep.* 106. *a. Com.* 373. And the eſtate of him by the firſt fine upon grant and render is not turned to a right by the ſecond fine. Laſtly, the Statute of 4 *H.* 7. is a generall law, and in the affirmative, and therefore ſhall not take away the Statute of *Weſt.* 2. which gives the *Scire facias*, and in proof of that he cited 39 *H.* 6. 3. 11 *Rep.* 63. & 68. and 33 *H.* 8. *Dyer* 15. I agree the Caſe which hath been adjudged, that a fine will barre a writ of error, but that is to reverſe a judgement which is executed, but here the judgment is not executed & therefore cannot be barred by the fine: wherefore he prayed judgment for the Plaintiffe. Note, that it was ſaid by the Judges, that here is no avoiding of the fine, but it ſhal ſtand in force, but yet notwithſtanding it may be barred; and they all ſaid, that he who hath judgment upon the *Scire facias* upon the firſt fine might have entred, and they ſtrongly inclined, that the *Scire facias* is barred by the fine, and doth not differ from the Caſe of a writ of error, but they delivered no opinion.

Taylers *Caſe.*

240. THe Caſe was thus, The iſſue in taile brought a *Formedon in Deſcend.* and the Defendant pleaded in barre and confeſſed the eſtate taile; but ſaid, that before the death of tenant in taile *I. S.* was ſeiſed in fee of the lands in queſtion and levied a fine to him and five yeeres paſſed, and then tenant in tail dyed; and whether this plea be a bar to the Plaintiffe or not was the queſtion, and it reſted upon this, Whether *I. S.* upon this generall plea ſhall be intended to bee in by diſſeiſin or by feoffement; for if in by diſſeiſin, then hee is barred, if by feoffement, not: and the opinion of the whole Court was cleere without any debate, that he ſhall be intended in by diſſeiſin, and ſo the Plaintiffe is barre as the bookes

are, 3 *Rep.* 87. *a. Plow. Com. Stowels* Caſe, and *Bansey* Chief Juſtice ſaid, that it ſhall not be intended that tenant in taile had made a feoffement to barre his iſſues unleſſe it be ſhewed, and it lies on the other part to ſhew it; and a feoffement is as well an unlawfull Act as a diſſeiſin, for it is a diſcontinuance.

Commins *againſt* Maſſam *in a Certiorare to remove the proceedings of the Commiſſioners of Sewers.*

241. THe Caſe upon the proceedings was thus, Leſſee for yeeres of lands within a levell, ſubject to be drowned by the Sea, covenanted to pay all aſſeſſements, charges and taxes, towards or concerning the reparation of the premiſſes: a wall which was in defence of this levell and built ſtraight, by a ſudden and inevitable tempeſt was thrown down; one within the levell ſubject to be drowned, did diſburſe all the mony for the building of a new wal; and by the order of the Commiſſioners a new wall was built in the form of a Horſhooe, afterwards the Comiſſioners taxed every man within the levell towards the repaying of the ſum diſburſed, one of which was the leſſee for yeers, whom they alſo truſted for the collecting of al the mony; & charge him totally for his land, not levying any thing upon him in the reverſion, and alſo with all the damages, *viz.* uſe for the mony; Leſſee for yeeres dyed, the leaſe being within a ſhort time of expiration, his executor enters, and they charge him with the whole; and immediately after the yeeres expired, and the executors brought this *Certiorare*, upon which there was many queſtions. Juſtice *Mallet*, I conceive that the proceedings of the commiſſioners are not lawfully removed into this Court, becauſe as I conceive no *Certiorare* lies, to remove their proceedings at this day, becauſe that their proceedings are in Engliſh upon which I cannot judge, for all our proceedings ought to be in Latine.

Beſides,

Beſides, I cannot judge upon any Caſe if it be not before us by ſpeciall verdict, demurrer or writ of error, and it is not here in this Caſe by any of thoſe waies; and if it be here by *Certiorare*, yet we are not enabled to judge as this Caſe is; for the concluſion of the writ is. *Quod faciamus quod de jure & ſecundum legem, &c. fuerit faciend.* And as I have ſaid before, wee cannot judge upon Engliſh proceedings, and they have power to proceed in Engliſh by the Statute of 23 *H.* 8. *cap.* 5. by which Statute they have a kinde of legiſlative power given, for it doth not reſerve any power to us, to redreſſe their proceedings, and as I conceive no writ of error lyeth at this day to correct their proceedings, becauſe that they are in Engliſh, and if they have Juriſdiction and proceed according to it, we have no power to correct them; becauſe that the Statute leaves them at large to proceed according to their diſcretions. But where they have no jurisdiction, there we may correct them. True it is, that before the Statute of 23 *H.* 8. there are many preſidents of *Certioraries* to remove the proceedings of the Commiſſioners of Sewers into this Court, for then their proceedings were in Latine, but I doe not finde any ſince the Statute: wherefore I conclude that no *Certiorare* will lie in this Caſe, and then the proceedings not being lawfully removed I cannot judge upon them, wherefore I ſpeak nothing to the matter in law contained in the proceedings of the commiſſioners. *Heath*; I conceive notwithſtanding any thing alledged by my brother *Mallet* that this Court is well poſſeſſed of the Cauſe, and may well determine it: the queſtion here was not, whether the Cauſe be well removed, but whether the Commiſſioners have well proceeded as this Caſe is, or not; I hold that the cauſe is well removed by the *Certiorare*, there is no Court whatſoever but is to be corrected by this Court: I agree that after the Statute no writ of Error lyeth upon their proceedings, but that proves not that a *Certiorare* lies not, they are enabled by the Statute to proceed according to their diſcretions, & therefore if they proceed *ſecundum æquum & bonum*, we cannot correct them, but if they proceed where they have no Juriſdiction, or without Commiſſion, or contra-

ry to their Commiſſion, or not by Jury, then they are to bee corrected here: if a Court of Equity proceed where they ought not, we grant a prohibition. Without queſtion in treſpaſſe or Replevin their proceedings are examinable here, and I ſee no reaſon but upon the ſame ground in a *Certiorare* they cannot make a decree of things meerly collaterall, or concerning other perſons; here they have certifyed their Commiſſion, and that the aſſeſſement was by a Jury of twelve men, but if they had certifyed that it was *per ſacrament. juratorum* generally without ſaying twelve men, it had not been good, as it was by us lately adjudged, becauſe that for any thing appeares to the contrary it might be by two or three onely where it ought to be by twelve, and I conceived they have well done here in laying all upon the leſſee for yeeres, by the law of Sewers all which may be endamaged, or have benefit, are chargeable, and it is in their diſcretion ſo to doe. But in this caſe they may charge the leſſee or leſſor (if not for the ſpeciall covenant of the leſſee) at their diſcretions; for the Statute ſaith, *owners* or *occupiers*; & I conceive that the covenant here doth bind the leſſee, for it is preſumed that he hath conſiderable benefit for it and the Commiſſioners may take notice of it. But if the covenant doth not bind the leſſee, yet I for my part will not reverſe their decree for that, becauſe that where they have Juriſdiction they may proceed according to their diſcretions, & he covenanted to pay all taxes cõcerning the premiſſes, and here it concerns the premiſſes although the wall be in a new form: & it was objected, that it is now fallen upon an executor which is hard, which is not ſo becauſe the teſtator was chargeable, and here the executor occupies although it be but for a ſhort time, and he was an occupier at the time of the decree; and therefore it is reaſon that he ſhould bee charged, But it was further objected that he hath not aſſets, I anſwer, that was not alledged before the Commiſſioners, and if an Action be brought againſt executors at the common law, and they plead, and take not advantage of not having aſſets, it is their own fault, and therefore ſhall be charged: ſo here. But it was further objected, that the Commiſſioners have

have not Juriſdiction of damages, *viz.* with the intereſt of the money. But I hold cleerely otherwiſe, that they having Juriſdiction of the principall ſhall have Juriſdiction of the damages, wherefore I conclude that the Commiſſioners have well done, and that their decree is good. *Bramſton* Chiefe Juſtice; in this Caſe there are five points. Firſt, whether the covenant ſhall extend to this new wall or not. Secondly, whether this collaterall covenant be within their Jurisdiction or not. Thirdly, whether their power doe extend to an executor or not. Fourthly, whether they have Juriſdiction of damages or not. And laſtly, whether their proceedings bee lawfully removed by this *Certiorare* or not: for the latter I hold that their proceedings are lawfully removed, and that the *Certiorare* lyeth at this day to remove their proceedings; but I confeſſe if I had thought of it, I would not have granted it ſo eaſily, but it was not made any ſcruple at the bar nor any thing ſaid to it, and hereafter I ſhall be very tender in granting of them. True it is, before the Statute of 23 *H.* 8. they were common, but there are few to be found after the Statute, and we ought to judge here as they ought to judge there, and we cannot determine any thing upon Engliſh proceedings, and at firſt I put that doubt to the Clarks of the court, Whether if we confirm their decree, we ought to remand it, or whether we ought to execute it by Eſtreat into the Exchequer or not, & they could not reſolve me; wherfore I much doubted whether we might proceed to queſtion their decree upon this *Certiorare* or not. But becauſe I was enformed that the parties by agreement have made this Caſe as it is here before us upon the *Certiorare*, & have bound themſelvs voluntarily in a recogniſance to ſtand to the judgement of the Court upon the proceedings as they were removed upon the *Certiorare* by the agreement of the parties, therefore I did not ſticke upon the *Certiorare*, becauſe what was done was by conſent, *& conſenſus tollit errorem*, if any be. Now for the points as they ariſe upon the proceedings of the Commiſſioners, and for the firſt, I hold that the covenant doth well extend to this new wall and the making of it in the forme of a horſhooe is not materiall.

riall, ſo as it be adjoyning to the land as it here was, for that may be ordered according to their diſcretions: it is a rule in law, that the covenant of every man ought to be conſtrued very ſtrong againſt himſelfe, and although that in this Caſe the new wall be not parcell of the premiſſes, as it was at the time of the covenant, becauſe that the wall then in *eſſe* and to which the covenant did extend was a ſtraight wall, yet according to the words of the covenant this tax is towards the reparation of the premiſſes, and if it ſhould not extend to this new wall the covenant ſhould be idle and vaine, and cleerely, the meaning of the parties was, that it ſhould extend to all new wals. For the ſecond point, I hold the covenant although it be a collaterall thing within their Jurisdiction: true it is, as it is ſaid in 28 *H.* 8. that contracts are as private laws betwixt party and party: but you ought to know that their commiſſion gives them power to charge every man according to his tenure, portion, and profit; and he who is bound by cuſtome or preſcription to repaire ſuch walls is not within the words of their Commiſſion, yet it is reſolved in the 10 *Rep.* 139, 140. in *Kighleys* caſe that the Commiſſioners may take notice of it, and charge him onely for the reparations, where there is default in him and the danger not inevitable, and by the ſame reaſon you may exclude this covenant to be out of their Juriſdiction you may exclude preſcription alſo. I agree that where the covenant is meerly collaterall, as if a man who is a ſtranger covenants to pay charges for repairing of ſuch a wall, that that is not within their Juriſdiction, becauſe he is a meer ſtranger, & cannot be within their commiſſion, but in our Caſe it is otherwiſe, for the covenantor is occupier of the land, and it hath been adjudged, that if lands or chattels are given for the reparation of a Sea wal that it is within their Juriſdiction, and they may meddle with it, and that is as collaterall as the covenant in queſtion, wherefore I hold that the covenant is within their Juriſdiction. For the third point, I hold that they may well charge the executor, for the executor here hath the leaſe as executor: but it was objected, that the terme is now determined, and peradventure the executor hath not

not aſſets; To that I anſwer, that it is admitted that hee hath aſſets, for the Commiſſioners cannot know whether he hath aſſets or not, and therefore he ought to have alledged the ſame before the Commiſſioners, and becauſe he hath not done it he hath loſt that advantage, and it ſhall be intended that he hath aſſets by not gain-ſaying of it. Fourthly, for the damages, I firſt chiefly doubted of that, but now I hold that it is within their Juriſdiction: Put caſe that one in extreme neceſſity, as in this Caſe, disburſe all the money for the reparations of the wall, or Sea-banke, if the Caſe had gone no further cleerely, he ſhall be repaid by the tax and levy after, and I conceive by the ſame reaſon they have power to allow him damages and uſe for his mony, for if it ſhould not be ſo, it would be very inconvenient, for who would after disburſe all the money to help that imminent danger and neceſſity if he ſhould not be allowed uſe for his money, and the Leſſee here is onely charged with the damages for the money collected which he had in his hands, and converted to his own uſe, and therefore it is reaſonable that he ſhould be charged with all the damages. Beſides, they having conuſans of the principall, have conuſans of the acceſſory as in this Caſe of the damages, and he urged *Fitz.* 113. *a.* to prove that before the Statute of 23 *H.* 8. they had a Court, and were called Juſtices: but he held as it was agreed before, That no writ of error lyeth after this Statute, but yet he ſaid that the party grieved ſhould be at no loſſe thereby, for he ſaid, that where the party cannot have a writ of error, nor *Audita querela*, there he ſhall be admitted to plead, as in 11 *H.* 7. 10. *a.* Where a Recogniſance of debt paſſed for the King upon iſſue tryed, and afterwards the King pardons it, the party after judgement may plead it, becauſe *Audita querela* doth not lie againſt the King, and where a man is not party to a judgement, there he cannot have a writ of error, but there hee may falſify, ſo I conceive that he may in this Caſe, becauſe he cannot have a writ of error; and I conceive as it hath been ſaid before, that after the Statute of 23 *H.* 8. the Commiſſioners of Sewers have a mixt Juriſdiction of law and equity.

For the *Certiorare* I will adviſe hereafter how I grant it, although I conceive(as I have ſaid before) that a *Certiorare* lies after the Statute, and is not taken away by the Statute, and I conceive in ſome cleerneſſe that it may be granted where any fine is impoſed upon any man by Commiſſioner, which they have authority to doe by their Commiſſion as appeareth by the Statute to moderate it in Caſe that it be exceſſive. But as I have ſaid before, becauſe that the parties by agreement voluntarily bound themſelves by Recogniſance to ſtand to the judgement of this Court upon the proceedings as they are certifyed, that made me at this time not to ſtand upon the *Certiorare*, wherefore I do confirm the decree.

242. *Rolls* moved this Caſe, *A* did ſuffer *B* to leave a trunk in his houſe, Whether *B* might take it away without the ſpeciall leave of *A* was the queſtion. Juſtice *Mallet* leave is intended; but *Rolls* conceived that he could not take it without leave.

Hammon *againſt* Roll *Paſ.* 18. Car° *in the Common Pleas.*

243. IN an Action upon the Caſe upon *Aſſumpſit*, the Caſe upon the ſpeciall verdict was this, *A* and *B* were bound jointly and ſeverally in a bond to *C*, who releaſed to *A*, afterwards there being a comunication betwixt *B* & *C* concerning the ſaid debt, *B* in conſideration that *C* would forbeare him the payment of the ſaid money due and payable upon the ſaid bond till ſuch a day promiſed to pay it, &c. *C* for default of payment at the ſaid day, brought this Action upon the Caſe, *B* pleaded the generall iſſue, and thereupon the whole matter before was found by the Jury. Serjant *Clarke*; here is not any good conſideration whereupon to ground an *Aſ-*

ſumpſit

pſit, becauſe by the releaſe to one obligor the other is diſcharged; and then there being no debt there can be no conſideration,& therfore the promiſe void, becauſe it is but *nudum pactum. Rolls* contrary, that there is a good conſideration, becauſe that although by the releaſe to one obligor, the debt of the other be diſcharged *ſub modo, viz.* if the other can get it in his power to plead, yet it is no abſolute diſcharge, for if he cannot get it into his hand to plead it, he ſhall never take advantage of it, and then if it be no abſolute diſcharge, but onely *ſub modo, viz.* if he can procure it into his hand to plead, then the conſideration is good, for perhaps he ſhall never get it. Juſtice *Foſter* asked him if by this releaſe the debt be not intirely diſcharged: to which he anſwered No, as to *B* onely, but *ſub modo* as I have ſaid before; but he ſaid, and with him agreed the whole Court, that the law is cleerely otherwiſe that the debt is intirely gone and diſcharged; and then cleerly there can be no conſideration in this Caſe. Juſtice *Reeve*; every promiſe ought to have a conſideration, and that ought to be either benefit to him that makes it, or diſadvantage to him to whom it is made, and in this Caſe the conſideration which is the ground of the *Aſſumpſit* is neither benefit to him that made it, nor diſadvantage to him to whom it was made, becauſe there was no debt, for if it was totally diſcharged by the releaſe made to *A. Crawley* agreed to it, *Bankes* Chief Juſtice was abſent. But becauſe the obligation was laid to be made in London, and no Ward or Pariſh certaine put from whence the Viſne ſhould come, they conceived cleerly that it was not good.

Paſch. 18. Car' *in the Kings Bench*

Heamans *Habeas Corpus*.

244. *Richard Heaman* was impriſoned by the Court of Admiralty, upon which he prayed a *Habeas corpus*, & it was granted, upon which was this retorn, *viz.* Firſt, the cuſtome of the Admiralty is ſet forth, which is to attach goods *in cauſa civili & maritimi*, in the hands of a third perſon, and that upon four defaults made, the goods ſo attached ſhould be delivered to the Plaintiffe upon caution put to reſtore them if the debt, or other cauſe of Action be diſproved within the yeere, and after four defaults made if the party in whoſe hands the goods were attached, refuſed to deliver them, that the cuſtome is to impriſon him untill, &c. Then is ſet forth how that one *Kent* was indebted unto *I. S.* in ſuch a ſumme upon agreement made *Super altum mare*, and that *Kent* dyed, and that afterwards *I. S.* attached certain goods of *Kents* in the hands of the ſaid *Heaman* for the ſaid debt, and that after upon ſummons foure defaults were made, and that *I. S.* did tender caution for the redelivery of the goods ſo attached and condemned, if the debt were diſproved within the yeere; and that notwithſtanding the ſaid *Heaman* would not deliver the goods, for which he was impriſoned by the Court of Admiralty untill, &c. *Widdrington* of counſell with the priſoner, tooke this exception to the Retorne, that it appeareth by the Retorn that *Kent* who was the debtor was dead before the attachment, and you ſhall never attach the goods of any man as his goods after his death, becauſe they are not his goods, but the goods of the executor in the right of the teſtator. Beſides, although the attachment be upon the goods, yet the Action ought to be againſt the perſon which cannot bee he being dead, wherefore he prayed that the priſoner might be

bee diſcharged. *Hales*; that the attachment is well made, notwithſtanding that the party was dead at the time of attachment, for it is the cuſtome of their Court ſo to proceed, although that the party be dead. Beſides, he ſaid, that although that the party were dead, yet the goods are *bona defuncti*, and to prove that he cited 10 *E.* 4. 1. the opinion of *Danby* and *Cateſby*. That the grant of *Omnia bona & catalla ſua* by an executor will not paſſe the goods which he hath as executor, becauſe they are the goods of the dead. But note that it was here ſaid by *Bramſton* Chief Juſtice, that it had been adjudged divers times againſt the opinion aforeſaid, that it paſſeth the goods which the executor hath as executor: and hee ſaid, that if a man hath a judgement againſt an executor to recover goods, the judgement ſhal be that he recover *bona defuncti*. To that the Court ſaid, that the judgement is not *quod recuperet bona defuncti*, but *quod recuperet* the goods which *fuerunt bona defuncti*. For the objection, that the plaint ought to be againſt the perſon, which cannot be when he is dead, to that *Hales* ſaid, that in the Admiralty the Action is againſt the goods, and therefore the death of the perſon is not materiall; to that Juſtice *Heath* ſaid that it is the party who is charged, the goods are onely chargeable in reſpect of the perſon, and you ſhall never charge the goods alone, but there ought to be a party to anſwer. *Hales*, if they have juriſdiction they may proceed according to their law, and we cannot hinder it: to which *Heath* ſaid, take heed of that, when it concerneth the liberty of the ſubject, as in this Caſe. And note, that *Bramſton* Chief Juſtice asked the Proctor of the Admiralty then preſent this queſtion, Whether by their law the death of the party did not abate the Action; and he ſaid that it did; then ſaid the Chief Juſtice, it is cleere that an attachment cannot be againſt the goods the party being dead, wherefore by the whole Court the cuſtome to attach goods after the death of the party is no good cuſtome, and therefore they gave judgement that the priſoner ſhould be diſcharged.

245. Note that *Bramſton* Chief Juſtice and *Heath* Juſtice ſaid in evidence to a Iury, that a will without a ſeale is good to paſſe the land, and that it is Forgery expreſſely by the Statute of 5 *Eliz. cap.* 14. to forge a will in writing.

Paſch. 18. Car' *in the Kings Bench.*
Fulham *againſt* Fulham *in a Replevin.*

246 THe Caſe was thus, *Henry* the 8. ſeiſed of a Manor, in which are Copyholds, grants a copyhold for life generally, & whether this be a deſtroying of the copyhold or not, was the queſtion. And it was argued by *Harris* that the grant was utterly void, becauſe the King was deceived in his grant, for he ſaid, the King had election to grant it by copy, and therefore it ſhall not be deſtroyed by a generall grant without notice, and cited many Caſes to prove that where the King is deceived in the law, his Grant ſhall bee void; but *Bramſton* Chief Juſtice and the Court ſaid, that it never recited in any of the Grants of the King what is Copyhold, and they were cleere of opinion that the Grant was not void. But whether it deſtroy the copyhold or not ſo as the King hath not election to grant the ſame after by copy, that they agreed might be a queſtion. Serjant *Rolls* at another day argued that the copyhold was deſtroyed by the Kings grant, but hee agreed that it is not reaſon that the Patent ſhould bee utterly void, for that he ſaid would overturne all the Kings grants, for there is not any Patent that ever recited copyhold, and therefore the queſtion is, whether the copyhold be deſtroyed or not; and he argued that it is, becauſe there needeth not any recitall of copyhold, *Br. Pat.* 93. It is agreed that where the King grants land which is in leaſe for terme of yeers of one who was attainted

tainted, or of an Abby or the like, that the grant is good without recitall of the leaſe of him who was attainted, &c. For he ſhall not recite any leaſe but leaſes of Record, and therewith agreeth 1 *Rep.* 45. *a.* and *Dyer, fo.* 233. *pl.* 10, & 11. Now he ſaid there is no Record of theſe copyholds, and therefore there needs not any recitall of them, and therefore the King is not deceived. Further he ſaid, that no man is bounden to inform the King in this Caſe, and therefore the King ought to take notice, and then the reaſon of the Caſe of a common perſon comes to the Kings Caſe, becauſe the copyhold was not demiſeable for time as before according to the nature of a copyhold, and therefore of neceſſity is deſtroyed, and the Court as I ſaid before, did conceive the Caſe queſtionable.

Burwell *againſt* Harwell *in a Replevin.*

247 THe caſe was ſhortly thus, a man acknowledged a Statute and afterwards granted a Rent charge, the land is extended, the Statute is afterwards ſatisfied by effluxion of time, and the grantee of the rent did diſtrain; and whether he might without bringing a *Scire facias*, was the queſtion. And the Caſe was ſeverall times debated at the Barre, and now upon ſolemn debate by the Judges at the Bench, reſolved. But firſt, there was an exception taken to the pleading, which was, that the avowant ſaith, that the Plaintiffe took the profits from ſuch a time to ſuch a time by which he was ſatisfyed, that was ſaid to be a plea onely by argument, and not an expreſſe averrement, and therefore was no good matter of iſſue, and of this opinion was Juſtice *Heath* in his argument, but *Bramſton* Chief Juſtice, that it is a good poſitive plea, and the Plaintiffe might have traverſed without that, that he was ſatisfyed *modo & forma*, and in *Plowd. Comment.* in *Buckley* and *Rice Thomas* Caſe, there, *ut, cum, tam, quam*, are good iſſues. Now for the point in law, Juſtice *Mallet* was for the avowant, that the diſtreſſe was lawfull, the grantee

tee of the Rent cannot have a *Scire facias*, becauſe he is a ſtranger, and a ſtranger cannot have a *Scire facias*, either to account, or have the land back again. The Caſes which were objected by my brother *Rolls*, *viz.* 32 *E.* 3. *tit. Scire facias* 101. *Br. Scire facias.* 84. & *Fitz. Scire facius.* 134. That the feoffee ſhall have a *Scire facias*, doe not come to our Caſe, for here the grantee of the Rent is a ſtranger not onely to the Record but to the land, which the feoffee is not. Further it was objected, that the grantee of the rent claimes under the conuſor, and therefore ſhall not be in better condition then the Conuſor, there are divers Caſes where grantee of a rent ſhall be in better condition then the Conuſor, the Lord *Mountjoyes* Caſe, a man makes a leaſe for yeeres rendring rent, and afterwards acknowledgeth a Statute, and afterwards grants over the rent, now it is not extendable. Beſides it was objected, that if this ſhould be ſuffered it would weaken the aſſurance of the Statute and diſturbe it: I agree that may be, but if there be not any fraud nor colluſion, it is not materiall, and then he being a ſtranger, if he cannot have a *Scire facias*, hee may diſtrain: it is a rule in law *Quod remedio deſtituitur ipſa re valet, ſi culpa abſit.* 21 *H.* 7. 33. Where there is no Action to avoid a Record, there it may be avoided by averrement, &c. 18 *E.* 4. 9. & 5 *Rep.* 110. 32 *Eliz. Syers* Caſe, a man indicted of felony done the firſt day of May where it was not done that day, he cannot have an averrement againſt it, but his feoffee may, 12 *H.* 7. 18. The King grants my land unto another by Patent, I have no remedy by *Scire facias*, 19 *E.* 3. *Br. Fauxifer* of recovery, 57. *F. N. B.* 211, 20 *E.* 3, 6. 9 *E.* 4. 38. *a.* A man grants a rent, and afterwards ſuffers a recovery, the grantee ſhall not falſify the recovery becauſe he is a ſtranger to the recovery, but he may diſtraine which is the ſame Caſe in effect with our Caſe: for which cauſe I conceive that the diſtreſſe is good, and that the Replevin doth not lie. Juſtice *Heath*; the diſtreſſe is unlawfull for he ought to have a *Scire facias*, cleerly the conuſor ought to bring a *Scire facias*, See the Statute of 13 *E.* 1. *Fulwoods* Caſe, 4 *Rep.* 2 *R.* 3. & 15 *H.* 7. and the reaſon why a *Scire facias* is granted is, becauſe that

that when a poſſeſſion is ſetled, it ought to be legally evicted. Beſides, it doth not appear in this Caſe when the time expired: beſides, coſts are to be allowed in a Statute as *Fulwoods* Caſe is, and the ſame ought to be judged by the Court and not by a Jury, which is a reaſon which ſtickes with mee, ſee the Statute of 11 *H.* 6. it is objected that the Grantee of the rent cannot have a *Scire facias*, it will be agreed that the conuſor himſelfe cannot enter without a *Scire facias*, and I conceive *à fortiori* not the grantee of the rent, I doe not ſay here there is fraud, but great inconvenience and miſchief if arrerages incurred for a great time (as in this Caſe it was) ſhall be all levyed upon the conuſee, for any ſmall diſagreement, as for a ſhilling, without any notice given to him by *Scire facias*, and he ſhould be ſo ouſted and could not hold over. I hold that of neceſſity there ought to be a *Scire facias*, and he ought to provide with the grantor to have a *Scire facias* in ſome fit time, but I hold that the grantee here may well have a *Scire facias*. I agree the Caſes where it is to avoid a Record, there ought to be privity, as the bookes are, but here he doth not avoid the Record, but allowes it, for the *Scire facias* ought to be onely to account, 38 *E.* 3. The ſecond conuſee of a Statute ſhall have a *Scire facias* againſt the firſt conuſee, and I conceive that by the ſame reaſon the grantee of the rent here ſhall have it, and in that Caſe there is no privity betwixt the firſt conuſee and the ſecond conuſee; for which cauſe he did conclude that the diſtreſſe was unlawfull, and that the Replevin would well lie. *Bramſton* Chief Juſtice for the Avowant, that he may well diſtrein, and cannot have a *Scire facias*, but if he may have a *Scire facias*, yet he may diſtreine without it. There is no authority in the law directly in the point in this Caſe: I agree that if there be any prejudice to the conuſee, there it is reaſon to have a *Scire facias*. It was objected that it is a conſtant courſe to have a *Scire facias* in this Caſe. But I beleeve you will never finde a *Scire facias* brought by the grantee of a rent, or other profit apprender. Beſides, the beſt way to judge this Caſe is to examine what the *Scire facias* is which ought to be brought, and

what the judgement is which is given upon it; whether hee may recover the thing in demand or not, *v.* 32 *E.* 3. *Fitz. Scire facias* 101. & 47 *E.* 3. 11: which are brought to have account, and to ſhew cauſe wherefore he ſhould not have the land: ſee *Fitz. Scire facias* 43. *v.* The old entries, the judgement which is given thereupon, and the demand there is *quod tenement. prædict. redeliberatur*, and may the grantee in this Caſe have the land and thing in demand? certainly not, and that gives ſufficient anſwer to the Caſes objected by my brother *Heath*, where the ſecond conuſee ſhall have a *Scire facias* againſt the firſt. Beſides, you ſhall never finde in all our bookes that a man ſhall have an attaint or a writ of error, but he who may be reſtored to the thing loſt by the judgment or verdict, 2 *R.* 3. 21 *Dyer.* 89. 9 *Rep.* the Lord *Sanchars* Caſe, ſo in debt and erroneous judgement upon it wherewith agreeth Doctor *Druries* Caſe, 8 *Rep.* 12. & 18 *E.* 3. 24. the feoffee ſhall have a writ of Error, becauſe he ſhall have the land, and ſee 32 *E.* 3. *Scire facias* 101. And the grantee ſhall not have a writ of Error in this Caſe upon erroneous judgement, and for the ſame reaſon he ſhall not have a *Scire facias*, and the grantee cannot have a *Scire facias* for want of privity, and therefore I conclude that he cannot have a *Scire facias*, for if he might, certainely it would have been brought before this time, either for this cauſe, or for ſome other profit apprender. It was objected that he ſhall not be in better condition then the conuſor, that is regularly true as to the right, but he may have another remedy. It was objected that the reaſon why that a Statute without a *Scire facias* ſhal not be defeated is, becauſe he is in by Record, and therefore ſhall not be defeated without Record, but that is not the true reaſon, but the reaſon is, becauſe the conuſee ought to have coſts and damages, beſides his debt, as is *Fullwoods* Caſe 4 *Rep.* and 15 *H.* 7. 16. is, that the Chancellor ſhall judge of the coſts and damages But 47 *E.* 3. 10. & 46 *E.* 3. *Scire facias* 132. by all the Judges that they lie in averrement. But here an inconvenience was objected, that great arrerages ſhould be put upon the conuſee for a little miſtaking; to that he ſaid, that of a ſmall miſtate the

Court

Court ſhall judge& it ſhal not hurt him,but if he hold over being doubly ſatisfyed, it is reaſon that he pay the arrerages;and he put this Caſe, A man acknowledgeth a Statute, and afterwards makes a leaſe to begin at a day to come, the leſſee ſhall have a *Scire facias*; for where remedy doth faile, the law will helpe him, for which cauſe he concluded, and gave judgement for the avowant.

Trin. 18. Car' *in the Kings Bench,* Paulin *againſt* Forde.

248. AN Action upon the Caſe brought for words,|the words were theſe,Thou art a theeviſh Rogue,& haſt ſtolen my wood,*innuendo lignum &c.Gard*; the words are not actionable, becauſe it ſhall be intended wood ſtanding or growing and not wood cut down, and ſo he ſaid it had been adjudged, ſo if a man ſaies of another,that he hath ſtollen his corne or apples,the words are not actionable, becauſe they ſhall be intended growing. *Bramſton* Chief Juſtice, that the words are actionable, becauſe that wood cannot otherwiſe be meant,but of wood cut down, becauſe it is *Arbor dum creſcit,lignum dum creſcere neſcit*, for which cauſe he conceived that the words were actionable, and it was adjorned.

Chambers *and his* wife *againſt* Ryley.

149. ACtion upon the Caſe for words, the words were theſe, *Chambers* his wife is a Bawde and keepes a Bawdyhouſe; for which words the Action was brought, and the concluſion of the Plea is *ad damnum ipſorum*. *Wright*; the words are not actionable, becauſe it is not the wife that keeps the houſe but the husband, and therefore the ſpeaking the words of the wife cannot be any damage to him; but admit the words were actionable, the husband onely ought to bring the Action, becauſe the ſpeaking of the words is onely to his damage. *Bramſton* Chief Juſtice; the wife only is to be indicted for the keeping of a Bawdyhouſe, and therefore ſhe onely is damnifyed by the words, and the husband ought to joyne in the Action, but that is onely for conformity, and the concluſion of the Plea is good, for the damage of the wife is the damage of the husband, and therefore *ad damnum ipſorum* good. And here it was agreed that to ſay that a woman is a Bawde, will not beare an Action, but to ſay, ſhe keepes a Bawdyhouſe, will. *Porter*, who was for the Action cited a Caſe, which was thus. One ſaid of the wife of another that ſhe had bewitched all his beaſts; and ſhe and her husband joined in an Action, and upon debate it was adjudged good, and there the concluſion alſo of the plea was *ad damnum ipſorum*.

Ricke-

Rickebies *Caſe.*

250. RIckebie was indicted in Durham for murder, and afterwards the indictment was removed into the Kings Bench, where he pleaded his pardon; which pardon had theſe words in it, *viz. Homicidium feloniam, felonicam interfectionem, necem, &c. ſeu quocunque alio modo ad mortem devenerit.* And note, there was a *Non obſtante* in the pardon of any Statute made to the contrary, and whether theſe words in the pardon were ſufficient to pardon Murder or not, was the queſtion. *Hales* for the priſoner ſaid, that the pardon was ſufficient to pardon murder, and in his argument firſt he conſidered whether murder were pardonable by the King at the common law or not, and he argued that it was, the King is intereſſed in the ſuit, and by the ſame reaſon he may pardon it. It is true that it is *Malum in ſe*, and therefore will not admit of diſpenſation, nor can an appeal of murder which is the ſuit of the ſubject be diſcharged by the King, but the King may pardon Murder although he cannot diſpenſe with it: ſee *Bracton lib.* 3. *cap.* 14. And the law of the Jewes differs from our law, & ſo the conſtitutions of other Realms; then the queſtion is, Whether this prerogative of the King to pardon murder be taken away by any Statute or not, and firſt for the Statute of 2 *E.* 3. *cap.* 2. upon which all the other Statutes depend: that Statute was made onely to prevent the frequency of pardons, but not totally to take away the Kings prerogative, for the words of the Statute are, That offendors were incouraged becauſe that charters of pardon were ſo eaſily granted in times paſt; &c. And the Statute of 13 *R.* 2. *cap.* 1. admits the power and prerogative of the King of pardoning murder notwithſtanding the former Statute, for that Statute preſcribes the forme onely, and 13 *R.* 2. in the Parliament Roll, *Number.* 36. the King ſaith, ſaving his prerogative. The next thing conſiderable here is, admitting murder pardonable by the King, Whether in this pardon there be ſufficient words

to pardon murder or not, and he argued that there was; and firſt for the word (felony) and he ſaid, that by the common law pardon of felony is pardon of murder; the Statute of 18 *E.* 3. *cap.* 2. inables Juſtices of peace to heare and determine felonies, and in 5 *E.* 6. *Dyer*, 69. *a.* it is holden cleerely that the Juſtices of peace by virtue of that Act haye authority to inquire of murder, becauſe it is felony, and in *Inſtit.* 391. *a.* By the law at this day under the word (felony) in commiſſions, &c. is included Petit Treaſon, Murder, &c. Wherefore murder being felony, the pardon of felony is the pardon of murder. Further he ſaid, that the pardon of manſlaughter is a good pardon of murder, for hee ſaid that murder and manſlaughter are all one in ſubſtance, and differ onely in circumſtance, as the booke in *Plowd. Comment. fol.* 101. is, and if they were divers offences, then the Jury could not finde a man indicted of murder guilty of manſlaughter, as it was in the Caſe before cited. The laſt words are, *& quocunque alio modo ad mortem devenerit*, which extends to all deaths whatſoever, and if it ſhould not be ſo the Statute of 13 *R.* 2. ſhould be in vaine. I agree the books of 1 *E.* 3. 14. 22. *Aſſ.* 49. & 21 *E.* 3. 24. objected on the other ſide, that the pardon of felony doth not extend to treaſon, with which the *Inſtitutes*, 391. agrees, they make not againſt me, ſee the Statute of 25 *E.* 3. *cap.* 2. and the bookes of 9 *E.* 4. 26. by *Billing*. & 8 *H.* 6. 20. by *Strange*, they are but bare opinions. It was objected that an indictment at the comon law ſhal not extend to murder unleſſe the word (*Murdravit*) be in the indictment: I anwer that a pardon of felony may pardon robbery, and yet here ought to be alſo *Robberia* in the indictment. A pardon need not nor can follow the forme of indictments, the offence apparent it ſufficeth. Further he argued, that the King might diſpenſe with the Statute of 2 *E.* 3. & 13. *R.* 2. by a *Non obſtante*. It was objected that the Kings grant with a *Non obſtante* the Statute of 13 *R.* 2. *cap.* 5. of the admiralty is not good, and that ſo of a pardon of murder with a *Non obſtante*: to that he anſwered, and tooke this difference, Where the ſubject hath an immediate intereſt in an Act of Paliament, there

there the King cannot diſpenſe with it, & ſuch is the caſe of the Admiralty, but where the King is intruſted with the managing of it, and the ſubject onely by way of conſequence, there he may: ſee 2 *R.* 3. 12. & 2 *H.* 7. 6. It was objected that the King cannot diſpenſe with the inquiry of the Court upon the Statute of 13 *R.* 2. *cap.* 1. To that he anſwered, that the inquiry is the Kings ſuit, and therefore he may diſpenſe with it: See 5 *E.* 3. 29. It was objected further that the pardon ſaith *Vnde indictatus eſt.* To that he anſwered, That if it bee left out it is good without it, for the ſame is onely for information: See 36 *H.* 6. 25. And the words of pardon are uſuall to ſay, *Vnde indictatus vel non indictatus, utlegat' vel non utlegat'*: and that would avoid all pardons before if it ſhould bee ſuffered, and for theſe cauſes hee concluded and prayed that the pardon might be allowed. *Shaftoe* of Grays Inne at another day argued for the King, that the pardon was inſufficient, and firſt hee ſaid, That the words of the pardon were not ſufficient to pardon murder. For the words *Homicidium* and *Felonicam interfectionem* are indifferent words, and therefore ſhall not bee taken in a ſtrict and ſtrained ſenſe. It is true that killing is the *Genus*, but there are ſeverall ſpecies of it and ſeverall offences. Now for the word (Felony) I conceive that the pardon of felony will not pardon murder, *vi.* 33 *H.* 8. 50. *fo.* 4. *Dyer.* But yet I conceive that felony in the generall ſenſe will extend to murder, but not in a pardon, for there ought to bee preciſe and expreſſe words, and ſo are the bookes of 8 *H.* 6. 20. by *Strange*, and 22 *H.* 7. *Keilway* 31. *b.* expreſſe in the point, *Hill.* 2. *Jac. Inſtitut.* 391. *a.* and *Stamford* Pleas of the Crowne, 114. *a.* If a man bee indicted for an offence done upon the Sea, it is not ſufficient for the indictment to ſay *Felonicè*, but it ought alſo to ſay *Piraticè.* And pardon of all felonies is not a pardon of Piracy, by the ſame reaſon, here pardon of Felony is no pardon of Murder: for the laſt words *Quocunque alio modo*

modo ad mortem pervenerit, theſe words doe not pardon Murder, becauſe they are too generall, *v.* 8 *H.* 4. 2. & 29 *Aſſ. Pl.* 24. And cleerely if there were but theſe generall words they would not pardon Murder. It was objected that theſe words are as much as if murder had been expreſſed in the pardon. To that hee anſwered, that the Statute of 13 *R.* 2. *cap.* 1. ſaith that the offence it ſelfe ought to bee expreſſed and doth not ſay by words equipollent, and the title of the Statute is, that the offence committed ought to be ſpecifyed. In all pardons the King ought to be truly informed of the forme, as alſo of the indictment and proceeding upon it : See *6 Rep. fo.*13. and here is no recitall in the pardon, 9 *E.* 4. 28. 8 *H.* 4. 2. Pardon of Attainder doth not pardon the felony, and pardon of felony doth not pardon the Attainder. I agree that the King may pardon his ſuit, but the ſame ought to bee by apt words. The words of *Licet indictatus*, or *non indictatus*, will not help it, it goeth to the proceedings onely, and not to the matter. Beſides, the law preſumes that the Patent or pardon is at the ſuggeſtion of the party, and therefore if the King be not rightly informed of his Grant, hee is deceived, and the grant void, and perhaps if the King had been informed that the fact done was murder, hee would not have pardoned it, and the words *Ex certa ſcientia* ſhall not make the Grant good, where the King is deceived by falſe ſuggeſtion of the party: See *Altonwoods* Caſe, 1 *Rep.* 46. *a.* & 52. *b.* 9 *E.* 4. 26. *b.* is an authority in the point by *Billing* Charter of pardon ought to make expreſſe mention of murder, or otherwiſe it will not pardon it; and 22 *H.* 7. 91. *b. Keilway*, Pardon of all felonies will not pardon murder, *Br. Charter de pardon* 10. there ought to be expreſſe words of murder in the pardon: See the *Old Entries*, 455. 2 *H.* 7. 6. by *Ratcliffe* objected, that the King may pardon murder with a *Non obſtante*, that I agree, but it ought to bee by expreſſe words: See *Stamford* Pleas of the Crown

fo.

fo. 103, 104. and 19. *a.* Where it is ſaid, that a pardon of all felonies doth not extend to murder. Beſides, I conceive that a *Non obſtante* cannot diſpence with the Statute of 13 *R.* 2. I agree that where there is a penalty onely given by the Statute, there the King may diſpence with it, I agree the booke of 2 *H.* 7. 6. there it was a penalty onely. I agree alſo that the King may diſpence with the Statute of *Quia emptores terrarum*, as the booke is, *N. B.* 3. 211. *f.* But when a Statute is abſolute and not *Sub modo*, there hee cannot diſpence with it: See 18 *Eliz. Dyer.* 352. and 8 *Rep.* 29. *Princes* Caſe, Inſtitut. 120. *a.* and *Hoberts Rep.* 103. The King with a *Non obſtante* cannot diſpence with the Statute of Simony, becauſe it is a poſitive law and not *Sub modo*, and this Statute of 13 *R.* 2. is for the common good. It was objected that the King may pardon murder by the common law, and that the Statute of 13 *R.* 2. takes away the inquiry onely; further, it was objected, that the Statute of 2 *E.* 3. did allow that the King might pardon murder, but not ſo eaſily, and the Statute of 13. *R.* 2. is ſaving our regality, by which was concluded that his prerogative is ſaved. *Bracton fo.* 133. *a.* ſaith that the Kings pardoning of murder was *contra juſtitiam*, and *Regiſter fo.* 309. *Se defendendo* and *per infortunium* onely are pardonable, and that well expounds the Statute of 2 *E.* 3. *cap.* 2. which enacts that Charters of pardon ſhall bee onely granted where the King may doe it by his Oath; that is to ſay, where a man kills another *Se Defendendo*, or *per infortunium*: and for the ſaving of the regality which is in the Statute of 13 *R.* 2. To that I ſay, that the Judges ought to judge according to the body of the Act, and that is expreſſe that the King cannot pardon murder, 5 *E.* 3. 29. and *Kelway* 134. there it is diſputed, but yet it came not to our Caſe, for that is onely of a pardon of the Kings ſuit: and for theſe reaſons he prayed that the pardon might not be allowed. *Keeling* for the King, that the pardon is not ſufficient to pardon murder: The Kings pardons ought to be taken ſtrictly, and ſo is the 5 *Rep.* The queſti-

on here is not, whether the generall words ſhall extend to murder, but whether it ought to be preciſely expreſſed in pardon or not, and he held that it ought; and he held that the King cannot diſpence with the Statute of 13 *R.* 2. by a *Non obſtante* the books of 2 *R.* 3. & 2 *H.* 7. 6. & 11. *Rep.* 88. That the King may diſpence with a penall law he agreed, but he ſaid that this Act of 13 *R.* 2. bindes the King in point of juſtice, and therefore the King cannot diſpence with it, and Inſtitutes 234. the King by a *Non obſtante* cannot diſpence with the buying and ſelling of offices contrary to the Statute, becauſe it toucheth and concerneth Juſtice. Wherefore hee prayed that the pardon might not be allowed.

FINIS.

AN EXACT TABLE TO THESE REPORTS Alphabetically compoſed by the Author.

Abatement of Writ. See Title Writ.

Acceptance.

WHere a Witneſſe hath not a reaſonable ſum delivered to him, for Coſts and charges, according to the diſtance of place, as the Stat. of 5 Q. 9. ſaith, yet if he accept it, it ſhall bind him. See Tit. *witneſſes.* 1.

Accompt.

For what things a husband who is adminiſtrator to his wife, ſhall be accomptable in the Eccleſiaſticall Court; for what not. pa.44.pl.69.

Where an accompt by Bill lyes for an Atturney of the Common Bench, Kings Bench, or Exchequer; and where in an accompt a man ſhall recover Dammages upon the ſecond judgement. 99, & 100.pl.171.

In Debt upon an accompt it ſufficeth to ſay that the Defendant was indebted to the Plaintiffe upon an accompt *pro diverſis mercimoniis* without reciting the particulars. 102. pl.175.

Action upon the caſe.

Where if a man ſue another, in the name of a third perſon, without his privity, an action upon the caſe will lye againſt him, where not? 47.pl.76.

Where one who is not of the Jury, cauſeth himſelfe to be ſworne, in the name of one returned of the Jury, and gives his Verdict, either party may have an action upon the caſe againſt him. 81. pl.132.

A man returned cited in the Eccleſiaſticall Court where he was not cited, ſhall have an action upon the caſe. 99.pl.169.

Action upon the caſe for words.

What words ſhall be actionable and what not? pa.1. pl.3.pa.7. pl. 17, 18, & 19. pa. 15.pl. 37. 19.pl. 44. 20.pl. 45. 58. pl. 90. 59 pl. 91. & 93. 76. pl. 119. 82. pl.135. 107. pl. 184. 109. pl.187. 113. pl.191. 115. pl.192. 116. pl.193. 119. pl. 197. 146. pl. 217. 62. pl. 96. 211. pl. 248. & 212. 249.

Actio perſonalis moritur cũ perſona.

What ſhall be ſaid to be an action perſonall, and to dye with the perſon, what not. 9. 13, & 14.

Alimony.

Where a man puts his wife from him, he is compellable by the Eccleſiaſticall Court to allow her Alimony. 11. pl.31.

The High Commiſſion Court had not power to allow Alimony. 80. pl.129.

Amendement.

Where amendment may be in the inferiour Court after Error brought, where not. 72.pl.109.

No amendements allowed in Courts below. 78.pl.124.

No amendement after a Verdict without conſent. 82.pl.133.

A Declaration cannot be amended in ſubſtance, without a new originall, otherwiſe of forme. 93. pl.161.

A Warrant of Atturney may be amended after Errour brought. 121. pl. 201. & 129. pl. 209.

In an Ejectione firme *vi et armis* was in the writ, but wanted in the Count, whether it be amendable or not? *quære.* pa. 140. pl. 213.

Appendant.

Leet may be appendant to a Hundred. 75. pl. 115.

Apportionment.

Where a Debt, or other duty may be apportioned, and ſeverall actions brought, where not? 57. & 61.

Aſſumpſit, being an entire thing, cannot be apportioned. 100. pl. 172.

Where an arbitrament ſhall be ſaid to be incertaine, where not. 18. pl. 42.

Where an award ſhall be ſaid to be according to the ſubmiſſion, where not. 77. pl. 122.

The ſubmiſſion of an Infant to an Arbitrament is voyd. 111. pl. 189. 141. pl. 215.

Arrerages.

Grantee of a Rent charge in fee, diſtraines for arrerages, and then grants it over, whether the arrerages are loſt or not, *quære.* 103. pl. 178.

Aſſent & Conſent.

An executor is compellable in the Eccleſiaſticall Court to aſſent to a Legacy. 96. pl. 167.

What ſhall be ſaid a good aſſent to a Legacy? and where an aſſent after the death of the Deviſee ſhall be good, where not? 137. pl. 209.

Aſſets.

Where Aſſets, or not Aſſets may be tryed by the Spirituall Court? See Tit. *Juriſdiction.*

Aſſignee & Aſſignments.

A Feme ſole conveyes a terme in truſt, and marries, the husband aſſignes it over, the truſt paſſes, not the eſtate. 88. pl. 141.

Aſſumpſit.

Where there is a mutual and abſolute promiſe, he that brings the action, needs not to ſay, *quod paratus eſt*, to doe the thing which he promiſed, and that the other refuſed to accept it; otherwiſe, where the promiſe is conditionall. 75. pl. 114.

Promiſe not to exerciſe ones Trade in ſuch a Towne is good, otherwiſe in caſe of a Bond. 77. pl. 121. 191. pl. 238.

Promiſe made to an Attorny of one Court, for ſollicitation of a cauſe in another Court, is a good conſideration upon w^ch to ground an Aſſumpſit. 78. pl. 123.

Promiſe is an entire thing, and cannot be apportioned. See Tit. *Apportionment.*

Attachment.

An Attachment lyes againſt the Steward of an inferiour Court for dividing of actions. 141. pl. 214. See more of Attachments in Title *Contempt.*

Attorney.

Infant cannot be an Attorney. 92. pl. 154.

An Adminiſtrator brought a writ of Error, to reverſe the Outlawry of the inteſtate, for murder, and allowed to appear by Attorny. 115. pl. 190.

An Attorney at Common Law, is an Attorney in every inferiour Court, and therefore cannot be refuſed. 141. pl. 214.

Audita querela.

In an *Audita querela* the Law doth not require such strictnesse of pleading, as in other actions. 69.pl.108.

Averrement.

Where, and in what cases, an Averrement shall be good, and necessary, and where not. 1.pl.3.15.pl.37. 19.& 62.pl.96

Avowry.

Grantee of a Rent charge in fee, distrains for arrerages, and then grants it over, whether he ought to avow, or justifie, *quære.* 103.pl.178

Bailiffe.

SHeriffe of a County makes a *Mandat Balivis suis* to take the body of a man, and the Bailiffs of a Liberty retourne a Rescous, and good. 25. pl.58.

Bankrupts.

An Inholder is not within the Statutes of Bankrupts. Coppyhold Land is. No Inholder at the time of the purchase but afterwards not, within the Statutes. 34. pl.67.

Baron & Feme.

What things of the wives, are given by the Law, and the intermariage to the husband, what not? and what things hee shall gaine by Letters of Administration after her decease. 44. pl.69.

Baron and Feme cannot joyne in a Writ of Conspiracy, in what other cases they may joyne. 47.pl.75.See 212.pl.249.

Whether Trover and convention against a Baron and Feme, and a count of a conversion *ad usum ipsorum* be good or not; *quære.* 60.pl.94.See 82.pl.134.

Feme Sole conveyes a terme in trust, her husband that shall be, covenants with her not to intermeddle with it, and yet afer mariage assignes it over, the Feme shall have remedy in Equity. 88.pl.141.

Baron and Feme present to a Church, to which they have no right, this gaines nothing to the Feme; otherwise when they enter into land, or when the Feme hath right. 90.pl.146.

One said of the wife of another that shee was a baud and kept a baudy house, for which they joyned in action, and declared *ad damnum ipsorum*, and held good. 212.pl.249.

Barre.

Barre in one *Ejectione Firme*, is a Barre in another brought for the same ejectment, but not for a new ejectment. 59.pl.92.

Plea in barre, incertaine, is naught. See Tit. *Pleadings*, &c.

Tenant for life, the Reversion to an Ideot, an Uncle heire apparant to the Ideot, levyes a fine, and dyes, tenant for life dyes, the Ideot dyes, whether the issue of the Uncle, who levied the Fine, shall be barred by it, or not, *quære.* 94.pl.164, & 146.pl.216.

Certiorari.

UPon a Certiorari to remove an Indictment of forcible entry denier of one, shall not prejudice the others, of the benefit of the Certiorari, they offering security according to the Statute of 21 *Jac'*, and the Sureties being worth ten pounds cannot be refused, and after

a Certiorari brought, and tender of sufficient sureties, the Justices proceedings are *coram non judice*. 27.pl.63.

A. and B. were indicted for a murder, B. flyes, and A. brings a Certiorari to remove the indictment into the Kings Bench, whether all the Record be removed, or but part, *quære*. 112.pl.190.

Certiorari lyes to remove the proceedings of the Commissioners of Sewers. See Title *Sewers*.

Cessante causa cessat effectus.

Outlawry reversed, the Originall is revived, for *cessante causa, &c.* 9. pl.21.

Chancery.

After execution and moneys levied, the Lord Keeper cannot order the money to remaine in the Sheriffs hands, or that the Plaintiffe shall not call for it. 54. pl.81.

Charter of Pardon.

Whether a Pardon of the King of Felony, homicide, &c. doth pardon murder, or not? *quære*. 213.pl.250.

Commission & Commissioners.

Commissioners execute a warrant with a stranger to the warrant, yet good. 92. pl.155.

Confirmation.

Baron and Feme Donees in speciall Taile, the baron levyes a Fine, and dyes, he in the Reversion confirmes to the wife her estate to have to her and her heires of her body by the husband ingendred, what is wrought by this Confirmation, *quære*. 146.pl.216.

Consideration.

What shall be said a good Consideration upon which to ground an Assumpsit, what not? 55. pl. 86. & 78. pl. 123.

Contempt.

Attachment ought not to be granted against the Sheriffe for contempt of his Baylifs. 54.pl.81.

Upon Error brought, notice ought to be given to the Sheriffe, otherwise he shall not incurre a contempt for serving execution. 54. pl. 81.

No Attachment, without an Affidavit in writing. 129 pl.208.

Attachment lyes against the Steward of an inferiour Court, for dividing of actions. 141.pl.214.

Copyhold.

Copyholds not grantable in Reversion, except by Custome. 6.pl.13.

Copyhold is within the statutes of 13 Q.7. and 1 Jac.1. of Bankrupts. 36.

The King grants a Copyhold for life generally, whether this destroyes the Copyhold, or not? *quære*.

Descent of a Copyhold shall not take away an entry. 6.pl.13

Coram non judice.

After a Certiorari brought to remove an Indictment of forcible entry, and tender of sufficient sureties according to the Statute of 21 Jac. the proceedings of the Justices of peace are *coram non judice*. 27.pl.63.

Presentments taken in a Hundred Court, are *coram non judice*. 75.pl.115.

Corporation.

Churchwardens in London are a Corporation, and may purchase Lands to the benefit of the Church: but Churchwardens in the Country, though a Corporation, are capable onely to purchase Goods

Goods to the benefit of the Church. 67.pl.104.

Covenant.

A man makes a Leaſe, and that the Leſſee ſhall have *conveniens lignum non succidend' & vendend' arbores*, the Leſſee cuts downe Trees, the Leſſor may bring an action of Covenant. 9. pl.22.

Leſſee of a houſe covenants to repaire it *with convenient, neceſſary, and tenentable reparations*, in Covenant the Leſſor alſeadgeth a breach in not repairing, for want of Tyles and daubing with morter, and doth not ſhew that it was not tenetable, & therefore nought. 17. pl.39.

A man by Deed conveyes Land to his ſecond ſon by theſe words, *I doe give and grant this Land to* I. S. *my ſecond ſon and his heires after my death*; and no livery made, and dyes; the eſtate paſſeth not by Covenant, and therefore the ſon taketh nothing. 50.pl.78.

Covenant with two ſeverally, and good. 103.pl.176.

Counſell & Counſellors.

Counſell ſaith to his Client, that ſuch a contract is Simony, and he ſaith, that Simony or not Simony, he will doe it, and thereupon the Counſellor maketh this Simoniacall contract, this is no offence in him. 83.pl.136.

Cuſtome and Preſcription.

By the Cuſtome of London, a man may transferre over his Apprentices to another. 3. pl.6.

By the cuſtome of London, the Maior may reſtraine any man from ſetting up his Trade within the City, in a place unapt for it, and for his diſobedience may impriſon him. 15.pl.34.

Cuſtome to cut graſſe in the ſoyle of another to ſtrow the Church, good Cuſtome. 16.pl.38.

Cuſtome or Preſcription *in non decimando* by a Hundred is good, but not by a Pariſh or particular Towne. 25. pl.59.

A Law or ordinance, where the cuſtome will warrant it, that he that puts in his beaſts in the Common beyond ſuch a limit or bound, ſhall pay 3. s. 6. d. is a good Law. 28.pl.64.

Cuſtome that if a man have fee in Land, that it ſhall deſcend to the youngeſt ſon, and if Taile, that then to the heire at Common Law, is a good Cuſtome. 54. pl.82.

Preſcription to have Common for all beaſts commonable is naught; but for all beaſts commonable levant & couchant, is good. 83.pl.137.

A Hille hath a Chappell, and buries at the Mother Church, and for this, have time out of mind repaired parcell of the wall of the Church, it is good for to excuſe them from repairing the Church. Inhabitants of a place preſcribe to repaire the Chappell of eaſe, and in regard of this, that they have beene time out of mind freed from all reparations of the Mother Church, good preſcription. 91.pl 151.

Hille hath a Chappell of eaſe, and a Cuſtome that thoſe within ſuch a precinct ought to find a Rope for the third Bell, and repaire part of the wall of the Mother Church, in conſideration of which they have been freed of payment of any Tythes to the Mother Church, whether this be a good cuſtome or not. *quære ubi ſupra.*

Damage Cleere.

WHat Damage Cleere is; and the prejudice that a man may have in this, that he cannot have his judgement before that he hath payed

the Damage Cleere. 76.pl.116.

Damages and coſt.

Heire apparant raviſhed of full age, his Father ſhall not recover Damages. 5.pl.8.

In Attaint, the Verdict was affirmed, and the Defendant in the Attaint prayed Coſts, but was denyed by the Court. 24.pl.55.

A man diſtraines for a penalty aſſeſſed by Cuſtome, and diſtrainable by Cuſtome, and upon a Replevin brought, judgement was given for the avowant, and Damage aſſeſſed, and whether Damage ought to have been given, or not; *quære.* 38.pl.64.

Where Damages entire ſhall be nought, and where not? 47.pl.76. & 96.pl.166. & 47.pl.76.

Where Coſts and Damages ſhall be recovered upon a penall Law, where not? 56.pl.88. 61.pl.95.

Priſoner removing himſelfe by *Habeas corpus*, ſhall pay the coſts of the removall, otherwiſe where he is removed by the Plaintiffe. 89.pl 143.

In an Accompt a man ſhall recover Damages upon the ſecond judgement. 99.pl.171.

Debt.

A Sheriffe levyes money upon a *Fieri facias*; Debt will lye againſt him, and if he dyes, againſt his Executors. 13. pl.33.

In Debt upon an accompt, it ſufficeth to ſay that the Defendant was indebted to the Plaintiffe upon an accompt *pro diverſis mercimoniis*, without reciting the particulars. 102.pl.175. & 105.pl.182.

Defamation.

If a man Libell in Court Chriſtian for calling of him Drunkard, Prohibition lyes. See Tit. *Prohibition.* 1.

D. Libelled in the Eccleſiaſticall Court for theſe words, *She is a beaſtly quean, a drunken quean, a copper noſed quean, and ſhe was one cauſe why* B. *left his wife, and hath miſ-ſpended* 500 l. *and ſhe keeps company with whores and rogues*: upon which a Prohibition was prayed & granted. 89.pl.144.

A woman Libelled in the Spirituall Court againſt one for calling her Jade, upon which a Prohibition was prayed, and granted: but if it be Libelled for calling one whore or bawd, no Prohibition lyes. 99.pl.170.

By the Cuſtome of London an action lyes for calling a woman Whore, and ruled a good cuſtome. 107.pl.184.

Default & Appearance.

Adminiſtrator of one Outlawed for murder, brought Error to reverſe the Outlawry, and was allowed to appeare by Attorney. 113.pl.190.

Demands & Demandable.

Grantee of a Rent to be payd at the houſe, and if the Rent be behind and lawfully demanded at the houſe, that then it ſhall be lawfull for the Grantee to diſtraine, whether a diſtreſſe upon the Land be a ſufficient demand as this caſe is, or not; *quære.* 147.pl.218.

Denizen & Alien.

Merchant goes beyond Sea, and maries an Alien, who have Iſſue, the Iſſue is a Denizen. 91.pl.150.

Deprivation.

Where a Church ſhall be voyd, without ſentence of Deprivation. See Title *Void & Voidable.*

Deviſes.

Deviſe of Goods to one for life, the Remainder

mainder to another, the Rem. is void. 106. pl.183.

Divorce.

A man divorced *cauſâ adulterii* is within the proviſo of the Statute of 1 of King *James* ca. 11. but not a man divorced *cauſâ ſævitiæ.* 101.pl.173.

Diſcontinuance.

A man may Nonſuite without the conſent of the Court, but not diſcontinue without the Courts conſent. 24. pl.54.

Diſpenſations.

Whether the King by a *Non obſtante* in his Charter of Pardon may diſpenſe with the Statute of 13 R.2.ca.1.or not; *quære.* If you peruſe this caſe, you ſhall find much excellent learning upon that point, in what caſe the King may diſpenſe with Statutes, in what not. 213. pl.250.

Diſtreſſe.

Horſes traced together are but one Diſtres, Fetters upon a Horſe legge may be diſtrained with the Horſe. 91.pl.149.

Diſtribution.

Whether the Ordinary after Debts and Legacies paid may inforce a Diſtribution, or not; *quære.* 65. pl. 102. & 93. pl. 158.

Double plea.

Where two things are alleadged, and the one of neceſſity onely, or by way of inducement, and the party relies onely upon the other, that is no double plea. 55. pl 84. & 74. pl.113.

Ejectione Firme.

EJectione Firme *de uno repoſitorio*, nought for the incertainty. 56. pl.166.

Ejectione Firme *de tanto unius meſſuagii &c. quantum ſtat ſuper ripam*, is nought for the incertainty, and ſo where the trover of the Jury is ſuch, it is nought. 97.pl.168.

Elegit.

Upon an Elegit there needs no Liberate, otherwiſe upon a Statute. Note, the Elegit excepts *averia Carucæ.* 117. pl. 194.

Equity.

Certaine ſpeciall caſes where there ſhall be remedy in Equity, where not. pa.83. pl.138. 88. pl.141. 90. pl.145. 93. pl. 159. 99. pl.171. 102. pl.175. 105. pl. 182. 106. pl. 183. & 129. pl. 207.

Errors.

In error to reverſe a judgment in Debt upon an arbitrament, judgement was reverſed, firſt becauſe that in the reference to the arbitrament, there was no word of the ſubmiſſion. Secondly, becauſe that the entry of the judgement was, *Conſideratum eſt*, and *per Curiam*, omitted. 7. pl. 16.

In an action for words, judgement was reverſed, becauſe that it was averred, that the words were ſpoken *inter diverſos ligeos*, and doth not ſay *Cives* of the place, where they have ſuch an acceptation: as alſo for that the judgement was *Conſideratum eſt*, and *per Curiam* omitted. 15.pl.37.

In

In Treſpaſſe, the Defendant juſtifies by a ſpeciall Cuſtome, by vertue of which he did it, and doth not ſay, *quæ eſt eadem tranſgreſſio*, for which judgement was reverſed. 16.pl.38.

Judgement was reverſed for want of Pledges. 17.pl.40.

Outlawry was reverſed, becauſe it did not appear where the party outlawed was inhabitant; as alſo for that it did not appear that Proclamations were made at the Pariſh Church where &c. 20.pl.46.

Judgement reverſed for the appearance of an Infant by Attorney. 24.pl.53.

Outlawry reverſed becauſe the Exigent was *Secund. exact' ad Com' meum ibm', &c.* 25.pl.58.

A. wife of I. S. inteſtate promiſe to B. to whom adminiſtration was committed, that if he would relinquiſh adminiſtration at the requeſt of C. and permit A. to adminiſter, that A. would, &c. in Aſſumpſit by B. he ſhewed, that he renounced adminiſtration, and permitted A. to adminiſter, but doth not ſhew that it was at the requeſt of C. by *Bartley* Juſt. it is error. 55.pl.86.

Judgement ought not to be judged erroneous by implication. 56.pl.88.& 61.pl.95.

A writ of Error upon Dower, well lyes, before the retorne of the writ of enquiry of damages; but whether a writ of Error lyes in an *Ejectione Firme*, before judgement given upon the writ of enquiry, *quære*, 88.pl.142.

Want of warrant of Attorny for the Plaintiffe after judgement upon *nihil dicit*, is error, and not amendable. 121.pl.201. & 129.pl.209.

Writ of Error bearing Teſte before the Plaint entered is nought, otherwiſe, where it beares Teſte before judgement. 140.pl.112.

In an *Ejectione Firme* the writ was *vi & armis*, but it wanted in the Count, and whether this is error, or amendable, or not, *quære*. 140.pl.213.

Eſcape.

Upon meane Proceſſe, if the Sheriffe retorne a *Ceſsi* and *Reſcous*, no action lyes againſt him for the eſcape, otherwiſe in caſe of Execution, 1.pl.1.

Eſtoppell.

Morgager makes a Leaſe for yeares by Deed indented, after performes the condition, and makes a feoffement in fee, the feoffee claiming under the Eſtoppell, ſhall be bound by the Leaſe. 64.pl.99.

If a man bind himſelfe to deliver any thing, he is eſtopped to ſay, that he hath it not. 74.pl.113.

Eſtoppell binds only parties. 105.pl.180.

Evidence to an inqueſt upon iſſues joyned.

Depoſitions taken in the Eccleſiaſticall Court cannot be given in evidence, at Law, though the parties were dead. 120.pl.198.

Executions & prayer in execution.

A ſecond execution cannot be granted, before the retorne of the former. 47.pl.73.

Where a man is impriſoned for the Kings Fine, and upon a *Habeas corpus* it is retorned that he is in execution alſo for the Damages of the party, it ought to be intended at the prayer of the party. 52.pl.80.

Executor & Adminiſtrator.

An Executor or an Adminiſtrator may maintaine an action for any contract made to the teſtator, or inteſtate, or for

for any thing which riſeth *ex contractu*. 9.pl.23.
Adminiſtrator of an Executor ſhall not ſue a *Scire Fac'* upon a judgement given for the Teſtator. 9.pl.24.
A Sheriffe levyes money upon a *Fieri Fac'* and dyes, Debt will lye againſt his Executors. 13.pl.33.
Whether the Executor of a Phillizer ſhall have the profits of the writs which are to be ſubſcribed with his name, or his ſucceſſor, *quære*. 90. pl.147.

Expoſitors of Statutes.

The Judges are the ſole Expoſitors of Acts of Parliament, though they concerne ſpirituall matters. 90.pl.148.

Extinguiſhment and Suſpenſion.

Three covenant joyntly, with two ſeverally, after one of the covenantors marries one of the covenantees, whether the covenant be good or not. 103. pl.176.

Fine to the King.

IF a Carrier ſpoile the high wayes, by drawing a greater weight then is warrantable by the cuſtome of the Realme, he is finable to the King. 135 pl.210.

Fines of Lands.

Diſſeiſee levies a Fine to a ſtranger, this doth not give the right to the Diſſeiſor. 105.pl.180.
Tenant for life, the Reverſion to an Ideot, an Uncle heire apparant to the Ideot levies a Fine, and dyes, tenant for life, dieth, the Ideot dies, whether the iſſue of Uncle who levied the Fine ſhal be barred by this, or not, *q.* 4.pl.164, & 146.pl.216.

Forcible Entry.

Reſtitution cannot be awarded to the Plaintiffe, if it doth appeare that he hath ſeiſin, yet the King ſhall have his Fine: and if the Indictment be *adtunc & adhuc*, the Defendant keepes the poſſeſſion forcibly, where the Plaintiffe was in poſſeſſion, Re-reſtitution ſhall be awarded 6.pl.12

Forgery.

To forge a Will in writing, though without a Seale, is forgery within the Statute of 5 Q.ca 14.

Freehold.

What ſhall be ſaid a grant of a Freehold to commence at a day to come, what not. 31.pl.66.

Gardeins of a Church.

WHere the cuſtome is for the Pariſhioners to chuſe the Churchwardens, the Parſon by colour of the Cannon cannot chuſe one; and if the Miniſter of the Biſhop refuſe to ſweare one of them choſen by the Pariſh, a *Mandat* lies to inforce him to it; and if the Parſon thereupon doth Libell in the Eccleſiaſticall Court, a Prohibiton lyes. 22. pl.50. & 67. pl. 104.
The Gardeins of a Church in London are a Corporation, and may purchaſe Lands to the uſe of the Church: and in the Country they are a Corporation, capable to purchaſe Goods to the benefit of the Church. 67.pl.104.

Good behaviour.

A man was bound to his good behaviour for

for ſuborning of witneſſes. 11. pl.30.

Grants of common perſons.

Grant of all Tythes in C. is a good grant, for it is not abſolutely generall, but a generall in a particular. 31. pl.66.
Where a grant ſhall be good notwithſtanding a falſe recitall. ibidem.
The King may grant an Office in Reverſion, without Cuſtome, but not a Common perſon, or a Biſhop. 42,& 43
Where a Truſt is grantable over: See Tit. *Aſſignee & Aſſignments* 1.
An Executor grants *omnia bona & catalla ſua*, this ſhall paſſe the Goods which he hath as Executor. 205.

Grants of the King.

The King may grant an Office in Reverſion, without cuſtome. 42, & 43.
Grants of the King need not recite Leaſes not of Record, nor Coppiholds. 206. pl.246.

Habeas Corpus.

UPon a *Habeas Corpus*, if all the cauſes retorned ſhall be adjudged for the Priſoner, but one, yet he ought to be remanded for this one. 53,& 54.

Hariots.

Copyholder for life, where the cuſtome is, that if the Tenant die ſeiſed that he ſhall pay a Hariot, the Lord grants the Seigniory for 99. years, if the Tenant ſhould ſo long live, and after makes a Leaſe for 400. yeares, Tenant for life is diſſeiſed, and dies, who ſhall have the Hariot; *quære.* 23.pl.52.

Hue and Cry.

What Hue and Cry ſhall be ſufficient upon the Statute of Wincheſter and 27 Q. of Robberies.

Jeofaile.

NO *Venire Fac'* is helped by the Statute of Jeofailes, but not an erroneous one. 26. pl.60.
If a man plead an affirmative plea, as that he hath ſaved one harmleſſe, and doth not ſhew how, it is naught, See pa.49: and is matter of ſubſtance, and therefore not helped by the Statute, upon a general Demurrer. 121.pl.200. See p.49.

Implicative & Implie.

Judgement ought not to be judged erroneous by implication. 56.pl.88.& 61.pl.95.

Incertainty.

Trover and converſion of two Garbes, & counts of a converſion of two Garbes, *Anglicè* Sheafes of Rye, the count is incertaine and void, and the *Anglicè* doth not helpe it. 60.94.
Where a Verdict incertaine ſhall be void. 97.pl.168.
Ejectione Firme *de tanto unius meſuagii, &c. quantum ſtat ſuper ripam*, is naught for the incertainty. *ubi ſupra.*

Indictment.

Upon an acquitall, and removall of the indictment into the Kings Bench, the Court refuſed to grant a copy of it to the party acquitted, that he might bring a conſpiracy, except it did appeare that there was malice in the perſecution. 26. pl.61.

Moved

Moved to quaſh Indictments for not paving of doores, becauſe it was not ſhewn that they ought to pave them : which the Court would not grant, without a Certificate that the doores were paved. Indictments quaſhed, becauſe joint, where they ought to be ſeverall. 45.pl.71.

Indictment of Reſcous quaſhed, becauſe it was not ſhewn, where the arreſt was, as alſo, for that, *vi & armis* wanted in the indictment. 67.pl.105.

Exceptions to an indictment of murder, all diſallowed by the Court. 79.pl.127.

One not returned of a Jury, cauſeth himſelfe to be ſworne in the name of one that was, and gives Verdict, he may be indicted for this miſdemeanor. 81.pl.132.

Infant.

Grant of an Office of truſt to an Infant to execute by Deputy, is good : or a grant to him in Reverſion is good; for it may be granted in fee, and ſo deſcend to an Infant; or a Feme Covert may have ſuch an office, becauſe that by poſſibility ſhe may have a husband which may execute it. 38.pl.68.

Where an action ſhall lye againſt an Infant, where not. 39,40,41, & 42.

Infant cannot be an Attorney, becauſe he cannot be ſworne. 92. pl.154.

Infant cannt ſubmit to an arbitrament, and if he doth, it is void. 111. pl. 189. & 141. pl.215.

Informations.

Information lyes againſt a Carrier for ſpoiling the high ways, by drawing an extraordinary weight contrary to the cuſtome of the Realm, upon which he ſhall be fined and impriſoned. 135.pl.210.

Inrollments.

Where a man in pleading of a bargaine and ſale ought to plead an inrolment, and where not. 62. pl. 97. & 69.pl.108.

Inſtance & Inſtant.

Copyholder for life Heriotable, the Lord grants the Seigniory for 99. years, if the Tenant ſhould live ſo long, the Tenant dyes, whether the grantee for 99. yeares ſhall have the Heriot by force of this inſtantany title, or not ; *quære.* 23. pl.52.

Intent & Intention.

Where an eſtate ſhall paſſe by way of raiſing of a uſe, and where by way of tranſmutation of poſſeſſion, according to the intention of the party. 50.pl.78.

Joynder in action.

A promiſe is made to a baron of a Feme executrix, in that right as executrix, whether they may joyn in action or not; *quære.* 72.pl.110.

Three covenant with two ſeverally, they cannot joyne in action. 103.pl.176.

One ſaid of the wife of another, that ſhee was a bawd, and kept a bawdy houſe, upon which they joyned in action, & good. 212. pl.249.

Baron and Feme cannot joyne in conſpiracy. 47.pl.75.

Iſſues joyned.

In Treſpaſſe, the Defendant juſtifies, and ſayes, *quod habuit viam non ſolum ire, equitare, & averia ſua fugare, verum etiam carucis & carreragiis carriare, &c.* the Plaintiffe Traverſed it in the words aforeſaid, and it was reſolved that the iſſue was well joyned. 55.pl.83.

What words are ſufficient, upon which an iſſue may be taken, what not. 207. pl. 247.

Jurisdiction.

The Courts at Weſtminſter may hold plea upon a contract made here in England, for things to be done *in partibus tranſmarinis*; otherwiſe in caſe of any

any particular Court, or limited Jurisdiction. 3. pl. 5.

If a particular & limited jurisdiction hold plea of a thing out of their jurisdiction, all is *coram non judice*, and void. 8 pl. 20.

The jurisdiction of the Counsell of the Marches of Wales, of what things they may hold plea, of what not, and of of what value. See Title *wales*. 1, 2, 3.

Court which hath jurisdiction of the principall, shall have jurisdiction of the accessory also. 52. pl. 80. & 66. pl. 103. See Tit. *Distribution*. 1. & pa. 201.

If a man be sued in the Ecclesiasticall Court for not comming to Church, and pleads in excuse of it according to the Statute, the Ecclesiasticall Court may hold plea of the excuse. 93. pl. 162.

Legatee may sue an executor in the Spirituall Court for to make him assent to a Legacy; and if it be issuing out of a Lease for yeares, they may order the Lease to be brought in Court, though it be in the hands of a third person, but this binds onely the Defendant and Assets or not Assets is tryable by them. 96. pl. 167.

In false imprisonment brought against an Officer of an inferior Court, if he justifies the arrest by vertue of a warrant directed to him out of the Court, he ought to intitle the Court to jurisdiction, or otherwise his plea is naught, and the action will lye against him. 117. pl. 195.

Justification.

In Trespasse, if the Defendant justifies for part, and saith nothing to the other part, the plea is insufficient for the whole. 21. pl. 47.

In false imprisonment brought against the Officer of an inferior Court, if he justifies the arrest and imprisonment by vertue of a warrant directed to him out of that Court, he ought to intitle the Court to jurisdiction, or otherwise his justification is naught. 117. pl. 195.

Leases.

IT is the course in the Exchequer, that they may make Leases for three lives by the Chequer Seale. 55. pl. 85.

Legacy.

Executor is compellable in the Ecclesiasticall Court to assent to a Legacy. 96. pl. 167.

What shall be said a sufficient assent to a Legacy, what not, & when it shall come in due time, when not. See Title *Assent* and *Consent*. 2.

Letters of Mart or Reprisall.

If a Ship be taken by Letters of Mart, and is not brought *infra presidia* of the King who granted the Letters, it is no lawfull prize, and the property not altered, and therefore the sale void. 110. pl. 188.

License.

A man may be Nonsuite without the license of the Court, but he cannot discontinue without the consent of the Court. 24. pl. 54.

Limits & Limitations.

If a Debt be superannuated by the Statute of 21 of King *James* ca. 16. which limits a man to bring his action with six years, and after the parties account together, & he is found to be indebted so much for such wares, though the party were before without remedy, yet now he may have Debt upon the accompt. 105. pl. 182. & 129. pl. 207.

A Trust is not within the Statute of 21 aforesaid, and therefore no time lapsed shall take away remedy in equity for it. 129. pl. 207. See pa. 152.

Maintainance.

IF a man commence an action at the ſuit of another without his privity, it is Maintainance. 47.pl.76.

Mandat.

Mandat granted to ſwear a Churchwarden elected by the Parish, where the Parſon would have put one in by force of the Canon Law. See Tit. *Gardeins of the Church.* 1.

Mandat granted to ſweare a Pariſh Clerke who continued two or three yeares in quiet poſſeſſion, not being ſworne, and whom the new Parſon would have put out without cauſe. 101.pl.174.

Name.

AN Earle of any other Realme may implead, or be impleaded, by the name or title of Knight and Earle of ſuch a place, and good, becauſe the Knight is not locall, though the Earle be. 19.pl.26.

New Aſſignement.

A man may make a New Aſſignement to a ſpeciall barre, as well as to a common barre, if he will. 105.pl.179.

Nonſuite.

A man may be Nonſuite without the conſent of the Court, but not Diſcontinue without the conſent of the Court. 24. pl.54.

Notice.

What notice upon the Statutes of Wincheſter 13 E.1. and 27 Q. of Robberies ſhal be ſufficient, what not. 10. pl.28.

Upon Error brought, notice ought to be given to the Sheriffe, otherwiſe he ſhal not incurre a contempt, for ſerving execution, for which an Attachment ſhall iſſue. 54.pl81.

In all writs of enquiry of Damages, as well in reall as perſonall actions, notice ought to be given. 82.

The Defendant upon an award was to pay to the Plaintiffe 8.l. or 3. l. and coſts of ſuit expended in an action of Treſpaſſe betwixt the Plaintiffe and Defendant, as ſhould appeare by a note under the Attornies hand of the Plaintiffe, &c. the Plaintife is not bound to cauſe his Attorney to give notice or make tender of the note to the Defendant, bnt he ought to ſeeke the Attorney, and requeſt it. 108.pl.184. & 156.pl.225.

If one be preſented to a Benefice under the age of 23. yeares, no Lapſe ſhall incurre to the Biſhop without knowledge given to the Patron. 119.pl.190.

The King grants a Copyhold for life generally, whether the Copyhold be deſtroyed or not; *quære*: which depends upon this, whether the King be bound to take notice of it to be a Copyhold, or not. 206.pl.246.

Obligation.

IF a man be bound not to exerciſe his Trade in ſuch a Towne, the Obligation is void. See Tit. *Aſſumpſit.* 2.

If an Infant bind himſelfe to performe an award, the bond is void; ſo if a ſtranger bind himſelfe that an Infant ſhall perform an award, the bond is void. 111. pl.189. & 141.pl.215.

Three are bound joyntly and ſeverally in an Obligation, the ſeales of two of them are eaten with Miſe and Rats; whether this ſhall avoid the bond as to the third perſon, as well as to the other two; *quære.* 125.pl.205.

Office & Officers.

Where an Infant may be an Officer, where not, and what office may be granted in fee, what not. See Title *Infant.* 1.

The King may grant an Office in Reverſion, without cuſtome, but not a common perſon. 42,& 43.

Biſhop may grant an Office in Reverſion, if the cuſtome will warrant it, otherwiſe not. *ubi ſupra.*

Parſon cannot put out the Clerke of the Pariſh, without cauſe, if he doth, no Reſtitution lyes,but he hath his other remedy,for it is a temporal office.101.pl.174.

Orphanes.

An Orphan may waive the Court of Orphanes, and ſue in Equity,for it is a priviledge which the Orphan hath, *et quilibet poteſt renunciare juri pro ſe introducto.* 107.pl.185.

Outlawry.

Outlawry reverſed, the Originall ſtands. 9.pl.21.

Phyſitians.

IF a Phyſitian bring an action againſt one for ſcandalous words to his profeſſion,it is not ſufficient for him to ſay, that he is *in medicinis Doctor*,but he ought to ſhew that he was licenſed to practiſe by the Colledge of Phyſitiãs in London,or that he was a Graduate of one of the Univerſities. 116.pl.193.

Place.

A man pleads a conveyance made of Land, according to promiſe, and ſhewes not where it was made, he need not,for it ſhall be intended to be made upon the Land,ſo in caſe of performance of covenants. 22.pl.51.

The place of Reſcous ought to be ſhewne. 25.pl.57.

Pleadings & Pleader.

If a man in pleading derive an eſtate from any man,he ought to ſhew what eſtate he had,from whom he derives his eſtate,if it be materiall to the maintaining and ſupporting of the eſtate which he claimes, otherwiſe not. 1.pl.2.

In Treſpaſſe, if the Defendant juſtifies for part,and ſaith nothing to the reſidue,the plea is inſufficient for the whole.21.pl.47

Trover and converſion of two Garbes *Anglicè* Sheafes of Rye; the count is uncertaine, and naught, and the *Anglicè* doth not helpe it. 60.pl.94.

Where a man in pleading a bargain & ſale, ought to plead an inrolment,where not. 62.pl.97. & 69.108.

A man is not bound to plead the title of his adverſary, or a ſtranger, ſo exact as his owne title. 62.pl.97. & 69.pl.108.

In Treſpas of aſſault,battery and wounding, the Defendant may plead not guilty as to the wounding,and juſtifie the aſſault and battery without any repugnancy.98. 106

It is no good plea,to ſay that ſuch a one was bound in a Recognizãce,but he ought to ſay,*per ſcriptum obligatorium*; & to conclude that it was *ſecundum formam ſtatuti* will not help it, but in a Verdict it was agreed to be good. 76.pl.117.

Apothecary brought an action upon the caſe upon a promiſe for divers wares and medicines of ſuch a value, the defendant pleads in bar that he payed to the plaintiffe *tot et tantas denariorum ſummas* as the medicines were worth,and ſhewes no ſum in certain,and therefore naught. 77. pl.120.

A. and B. were bound to ſtand to and obſerve ſuch order and decree as the Kings Counſel of the Court of Requeſts ſhould make: A. brought an action againſt B. and pleaded that the Counſell of the King of the ſaid Court made ſuch order and decree, and that the defendant did not obſerve it; the defendant pleaded that the King and his Counſell did not make the decree, which is naught. 78.pl.126.

Where

Where a bad plea ſhall be made good by verdict. See Title *Verdict* 2.
If a man plead an affirmative plea, as that he hath ſaved the plaintiffe harmleſſe, & doth not ſhew how, it is naught; otherwiſe of a negative plea, as *non damnificatus, &c.* 121.pl.200.
What ſhall be ſaid to be an argumentative plea, what not. 207.pl.247.

Pleas of the Crowne.

Bayliffs endeavour to break open a houſe, to ſerve an execution upon the owner, who not deſiſting, upon his threats he ſhot and killed one of them, it is not murder, but man-ſlaughter. 3. pl.7.
Many notable reſolutions upon the Statutes of Wincheſter, and 27 Q. of Robberies. 10.pl.28.

Pledges.

Judgement reverſed for want of Pledges. 17. pl.40.
In a Replevin brought in an inferior Court and no pledges *de retorno habendo* taken by the Sheriffe according to the Statute of W.2.ca. 2. upon the plaint removed into the Kings Bench, that Court may find Pledges, and that any time before judgement. 46.pl.72.

Preſentments in Courts.

Preſentments taken in an Hundred Court were quaſhed, becauſe that it is not the Kings Court, and therefore *coram non judice.* 75.pl.115.

Priviledge.

If the Clerke of a Court be elected into any office which requires his perſonall & conſtant attendance, as Churchwarden, or the like, he ſhall have his priviledge, otherwiſe not, as for watching & warding and the like. 30 pl.65.
Ordered by the upper houſe of Parliament 16 *Caroli* that onely meniall ſervants, or ſuch as tend upon the perſon of a Knight or Burgeſſe ſhould be priviledged from arreſt. 92.pl.157.
Debt againſt a husband and his wife as executrix, who are ſued to the Exigent, and at the retorn of it, the husband (being an officer in the Exchequer) came into Court and damanded his priviledge, and whether as this caſe is he ſhall have it, or not; *quære.* 149.pl.219.

Prohibition.

A man libelled in the Eccleſiaſticall Court againſt one for theſe words, *thou art a drunkard, and uſeſt to be drunke thrice a week*, upon which a Prohibition was prayed and granted. 6. pl. 11. & 66. pl.103.
If the Eccleſiaſticall Court proceed upon a Canon which is contrary to the Common Law, Statute Law, or Cuſtome a Prohibition lyes. 22.pl.50.& 67.pl.74.
Two joynt Tenants of Tythes, the one ſues in the Eccleſiaſticall Court without the other; or a Feme Covert ſolely for defamation, this is no cauſe of Prohibition. 25. pl.26.& pa.47.pl.112. See pa.93.pl.112.
Upon a Petition to any Eccleſiaſticall Judge, without ſuit there, no Prohibition lyes. 45. pl.70.
A man is compellable in the Eccleſiaſticall Court to repaire a way which leades to the Church, but upon a Libel there to repair a high way a prohibition lyes. 45. 70
Tenant in Taile levyed a Fine to the uſe of himſelfe for life, the Remainder in fee to I S. and dyed, the Counſell of the Marches would ſettle the poſſeſſion upon the heire of the tenant in Taile, againſt the purchaſor, upon which a Prohibition was granted. 51.pl.79.
Libell for Tythes for barren Cattle, upon a ſuggeſtion that the party had no cattle but for plough and pale, probibition was grãted: the ſame Parſon libel'd for tyth of Conyes,

Conyes, upon which a Prohibition was alſo granted. 58.pl.87.

No Prohibition after ſentence in the Eccleſiaſticall Court. 73.pl.111. & 92.pl.156.

Many men recover Coſts in the Spirituall Court, one of them releaſes, the others ſue there for their coſts, this is no cauſe of prohibition. Baron and Feme recover coſts there for defaming the wife, the Baron releaſes, this will not barre the wife. 73.pl.112. See pa.25.pl.26. & pa. 47. pl.74.

Contract betwixt the Vicar and a Pariſhioner to pay ſo much for increaſe of Tyths, the Vicar dyes, his ſucceſſor ſues in the Eccleſiaſticall Court for them, upon which a Prohibition was granted, by reaſon of the reall contract which is a temporall thing. 87.pl.140.

Libell in the Eccleſiaſticall Court for theſe words, *She is a beaſtly queen, a drunken queane, a copper noſed queen, and ſhe was one cauſe wherefore* B. *left his wife, and hath miſ-ſpended* 500 l. *& ſhe keeps company with whores and rogues.* upon w^ch a Prohibition was granted. 89 pl.144.

Where the Eccleſiaſticall Court hath conuſance of the cauſe, though they proceed erroneouſly, a Prohibition will not lye. 92.pl.152. See pa.98.pl.169.*acc'*.

The Eccleſiaſticall Courts may hold plea of an excuſe for not going to Church, and no prohibition lyes. 93. pl.162.

Where there are ſeverall *Moduſes*, there ſeveral Prohibitions ſhal be granted; where one *Modus* onely, though divers parties, all ſhall have but one Prohibition. 94. pl.163.

If the Eccleſiaſticall Court proceed againſt a man without Citation, where they have juriſdiction, no Prohibition lyes, the remedy is by way of Appeale. 98. pl.169. See pa.92.pl.152.*acc'*.

Legatee may ſue an executor in the Spirituall Court, for to aſſent to a Legacy: & Aſſets or not Aſſets may be tryed by them, and no prohibition lyes, 96.pl.167

A woman Libelled againſt another for calling of her Jade, upon which a prohibition was granted: but for whore or baud no Prohibition lyes; *quære* whether or no for *Queane.* 99.pl.170.

If a man be ſued in the Court of Requeſts to account there, a Prohibition lyes. See Title *Sequeſtration.* 1. & 2.

A man exhibited a bill in the Court of Requeſts for moneys due upon an account, upon which a Prohibition was granted, for that it is no other then Debt upon an account: further they referred the merits of the cauſe to others, which is a good cauſe of prohibition. 102.pl.175.

Prohibition was prayed to the Court of Requeſts, for priority of ſuit, but denyed, the Bill being exhibited there before judgement. 105.pl.181.

If a Ship be taken at Sea, whether by Letters of Mart, or by Piracy, if it be ſold *infra corpus Comitatus*, and the party Libels againſt the vendee in the Admiralty, a Prohibition lyes. 110.pl.188.

Upon deciding of actions in an inferiour Court, a Prohibition lyes. 141.pl.214.

Property.

In Trover and Converſion for a Haulke, if he doth not ſay that it was reclaimed, the action will not lye, for that it doth not appeare he had a property in it; & to ſay that he was poſſeſſed of it *ut de bonis ſuis propriis* will not helpe it. 12. pl.32.

A man brought Treſpaſſe for fiſhing *in ſeperali piſcaria ſua*, and declares that the Defendant *piſces ipſius cepit*: and good, for that he had a qualified property in them, *ratione privilegii.* 48. pl.77.

If a Ship be taken by Letters of Mart, and is not brought *infra præſidia* of the King who granted them, the property is not altered. 110.pl.188.

Quilibet

Quilibet poteſt renunciare juri pro ſe introducto.

AN Orphan may waive the Court of Orphans, and ſue in Equity, for it is a priviledge which the Orphan hath, *& quilibet poteſt renunciare, &c.* 107.pl.185

Recitall.

WHere a falſe Recitall ſhall not avoyd a grant. 31.pl.66.

Grants of the King need not to recite leaſes not of Record, nor Copyholds. 206. pl.246.

Recognizance.

It is no good plea to ſay, that ſuch a one was bound in a Recognizance, and to conclude that it was *ſecundum formam ſtatuti*, but he ought to ſay, *per ſcriptum obligatorium.* 76.pl.117.

Records.

An Order of the Seſſions of peace, is a Record, and therefore the plea of *nul tiel Record* of Seſſions of peace, is a good plea. 121.pl.200.

Relation.

If a man be living at the day of *Niſi prius*, and dyes before the day in Bank, the writ ſhall not abate; ſo if a man be living the firſt day of Parliament, and dyes before the laſt, yet he may be attainted, for that they are but one day by relation. 65.pl.101.

Releaſes.

Releaſe to a bargainee before inrolment, is not good. 70.

If divers recover coſts joyntly in the Eccleſiaſticall Court, and after one of them releaſes, this is no barre to the others in a ſuit there for their coſts; ſo where a baron and feme recover coſts there in the right of the wife, and the baron releaſes, this ſhall not barre the wife. 73.pl.112. See Title *Prohibition.*

Two men are bound jointly and ſeverally to a third, who ſues the bond againſt both, and after appearance, enters a Retraxit againſt one, whether this ſhall amount to a Releaſe, ſo that it ſhall diſcharge the other or not; *quære.* 95. pl.165.

Remainder and Reverſion.

The King may grant an office in reverſion, but not a common perſon, nor a Biſhop without Cuſtome. 42,& 43.

Remover of Records.

A. and B. were indicted for a murder, B. flyes, A brings a Certiorari to remove the indictment into the Kings Bench, whether all the Record be removed, or but part; *quære.* 112.pl.190.

Writ of Error bearing Teſte before the plaint entered, is naught, and the Record is not removed by it; otherwiſe, where it beares Teſte before judgement. 140. pl.212.

Reparations.

The inhabitants of a Pariſh are bound by the Common Law to repaire the high wayes within the Pariſh, except preſcription bind any particular perſons to it. 26.pl.62.

A man is compellable in the Eccleſiaſticall Court to repaire a way which leads to the Church, but not a high way. 45.pl.70.

Repleader.

Where there is an inſufficient barre, and a good Replication, after a verdict, there ſhall be a repleader: contrary where no verdict. 78. 125.

Replevin.

Replevin lyes of a Shippe. 110.pl.188.

Requests.

A. is bound to B. to deliver to him two hundred weight of Hops, and B. to chuse them out of 24 bags, &c. whether B. is bound to request A. to shew the bags for him to make his election or not; *quære.* 74.pl.113.

Rescous.

For a Rescous upon meane processe, no action lyes against the Sheriffe, otherwise, in case of execution. 1.pl.1.

Restitution.

Clerke of a Parish is put out by the Parson without cause, no writ of Restitution lies. 101.pl.174.

Barrister of one of the Temples was expelled the house, whereupon he prayed his writ of restitution, and denyed, because that there is no body in the Innes of Court to direct unto, they being no body corporate. 177.pl.235.

Retorne of a Sheriffe.

Sheriffe in retorne of a Rescous, saith, that he was *in custodia ballivi itinerantis*, and that Rescous was made to him, the retorne is naught, because the Law takes no notice of the Baylie itinerant. 92. pl.153.

Revocation.

The King presents, and before institution presents another, whether this be a revocation of the former presentation, or not; *quære.* 86.

Scire Facias.

Upon a judgement in the Kings Bench there ought to be two *Scire Faciases*, one against the principall, the other against the Bayle, but one only suffices in the Common Pleas, and two *Nihils* returned, amount to a *Scire feci.* 3.pl.4.

A man acknowledgeth a Statute, and after grants a Rent, the Statute is satisfied, the grantee of the Rent may distraine, without suing a *Scire Facias.* 124.pl.203. 159.pl.230. & 207.pl.247.

Sequestration.

No Sequestration ought to be granted by a Court of Equity untill all the processe of contempt are run out: and the sequestring of things collaterall is illegall. 81.pl.130.

For sequestring of collaterall things, a prohibition was granted to the Court of Requests. 99.pl.171.

Sewers.

Divers Exceptions taken to the proceedings of the Commissioners of Sewers, upon Certificates of them. 123.pl.202 & 191. pl.241.

Resolved upon question, and debate, that a Certiorari doth lye to remove the proceedings of the Commissioners of Sewers. 192.pl.241.

Supersedeas.

Writ of Error brought here to reverse a judgement given in Ireland, is a *Supersedeas* to the execution. 10.pl.27.

A writ of Error is no *Supersedeas* of it self without notice. 54.pl.81.

Writ of Error is a *Supersedeas* to the writ of enquiry of Damages. 88.pl.142.

Tenant at Will.

Whether a bargainee before inrolment or entry, shall be a Tenant at will, or not; *qu.* 62.pl.97.&.69.108.

Tender.

The defendant upon an award was to pay to the plaintif 8.l. or 3.l. and costs of suit expended in an action of trespas betwixt the plaintif and defendant, as should appear

pear by a note under ... of the plaintif, &c. the plaintif ... to cause his Attorney to tender the no... to the defendant, but the defendant ought to seeke the Attorney, and request it of him. 108.pl.186.& 156.pl.225.

Traverse.

A man pleaded the discent of a Copyhold in fee, the defendant to take away the descent, pleads that the ancestor surrendred to the use of another, *absque hoc* that the Copyholder died seised, the traverse is naught. 2 ...pl.48.

A man was bound to pay money at such a place, in debt brought against him, he pleaded that he payed the money at the place, this is not traversable. 77.pl.122.

Trespas.

An action of trespas lyes upon the Statute of 2 E.6. against any man that takes the Tythes. 21.pl.49.

Trespas for fishing *in seperali piscaria* of the plaintiffe. 48.pl.77.

Trover & conversion.

Trover and conversion lyes of a Ship. 110. pl.188.

Tythes.

A Vicar cannot have Tythes, but by dotation, composition, or prescription, for all the Tythes *de jure* appertain to the Parson. 11.pl.29.

Fishes in a River are not tythable but by Custome. 17.pl.41.

An action lyes upon the Statute of 2 E. 6. against any man that takes the Tythes. 21.pl.49.

Custome *in non decimando* by a Hundred is good, not by a Parish or Towne. 25. pl.59.

A man shall not pay Tythes for Cattle wch are for plough and pale onely; nor for Conyes, except by Custome, and if the Tenant doth not plough and manure his land, yet the Parson may sue him for Tythes. 56.pl.87.

A man shall not pay Tythes of rootes of a Coppice rooted up, nor of Quarries of Stone, nor for brick and clay. 58.pl.89. & 64.pl.100.

It is a rule that where a Parishioner doth any thing, wch he is not compellable by the Law to doe, which comes to the benefit of the Parson, there if he demands Tythes of the thing, in lieu of which that thing is done, a Prohibition lyes: And also it is a rule, that Custome may make that tythable, which of it selfe is not tythable. 65.

Custome to pay Tythes in kind for Sheep, if they continue in the parish al the year, but if they be sold before shear time, but a half peny for every one so sold, naughty custome: custome in the same Parish to pay no Tythes for loppings, or wood for fire, or hedging, is a good Custome. 79.pl.128.

Modus decimandi goes onely to the realty, the Tythes, and not to the personalty, the Offerings. 81.pl.131.

Incumbent presented by Simony, cannot sue his Parishioners for tythes. 84.pl. 139.

Hille which hath a Chappell of ease, hath a custome, that they ought to find a rope to the third Bell, and repaire part of the wall of the Mother Church, in consideration of which, they have been free from payment of Tythes to the Mother church, whether this be a good custome, or not? *quære.* 91.pl.151.

Variance.

IN Trespas for assault, battery & wounding the plaintif, the plaintif declares & saith, that *quendam equum* upon which the plaintif rid *percussit ita quod cecidit, &c.* this is no variance, for that the al-

leadging of the ſtriking of the horſe, was onely an inducement to the battery of himſelf. 98. pl. 107.

Venire Facias.

A man brought Debt upon a Bond conditioned to pay ſo much in a houſe of the plaintifs in Lincoln, the defendant pleaded payment at Lincoln aforeſaid, upon wch they were at iſſue, & the *Venire Fac'* was *de vicinet' Civitatis Lincolne*, and found for the plaintif, and it was moved, that this was a miſ-triall, for that the *Venire* ought to have beene of the body of the County of Lincoln, and not of the City, but reſolved to be good. 124. 204

Verdict.

Where the Jury find the ſubſtance, though they vary in the circumſtance, yet it is good. 9. pl. 25.

Where a bad plea ſhall be made good by a Verdict. 82. pl. 134.

In an *Ejectione Firme*, the Jury find the defendant guilty *in tanto unius meſſuagii in occupatione, &c. quantum ſtat ſuper ripam* and not guilty for the reſidue, the verdict is naught for the incertainty. 97. pl. 168. See pa. 100. pl. 172.

Void & Voidable.

The Statute of 31 Q. ca. 6. enacts that if a man be preſented, inſtituted & inducted upon a Simoniacall contract, that the Church ſhall be utterly void, &c. in this caſe it is void, without deprivation or ſentence declaratory. 84. pl. 139.

Wager of Law.

A Man cannot wage his Law againſt matter of Record. 14

A man may wage his Law againſt a Recovery in a Court Baron, becauſe it is no Record. 15. pl. 35.

[illegible] Wales.

[illegible] manner the Counſell of the Marches of Wales proceed, and of what they may hold plea. 7. pl 14. 51. 79. 52. pl. 80. & 63. pl. 98.

Warrant of Attorney.

Though the Attorny be dead, yet the warrant of Attorny may be filed. 103. 177.

Where a warrant of Attorny may be filed after Error brought, where not. 93. pl. 160. 121. pl. 201. & 129. pl. 209. warrant of Attorny may be amended after Error brought. *ubi ſupra.*

Wils and Teſtaments.

A Will without a Seal is good to paſſe land. 206. pl. 245.

Witneſſes.

In Debt upon the Statute of 5 Q. ca. 9. it was reſolved, that it ſufficeth to leave a note of the proceſſe at the houſe of the witneſſe; and though there be not a reaſonable ſum delivered to him for coſts & charges, according to the diſtance of place, as the Statute ſaith, yet if he accept it, he is bound: he that will maintaine an action upon this Statute, ought to averre that he was damnified. 18. 43.

A Lawyer of Counſell may be examined upon oath as a witneſſe to the matter of agreement, not to the validity of the aſſurance, or to the matter of Counſell. And in examining of a witnes, Counſell cānot queſtion al the life of the witneſſe, as whether he be a whoremaſter, &c. but if he hath done any notorious fact, which gives juſt exception againſt him, this may betaken. 83. pl. 136.

Writ, & Abatement of it.

If a man be living at the day of *Niſi prius*, and dye before the day in bank, the writ ſhall not abate. 65. pl. 101.

FINIS.