# Modern Reports:

OR,

# SELECT CASES

Adjudged in the

# COURTS

OF

## King's Bench, Chancery, Common Pleas, and Exchequer, ſince the Reſtoration of

His MAJESTY

# King Charles II.

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The Third Edition,

Carefully reviſed; with the Addition of ſeveral Hundreds of References never before printed.

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*Collected by a careful Hand.*

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In the *SAVOY:*

Printed by Eliz. Nutt and R. Gosling, (Aſſigns of *Edward Sayer* Eſq;) for *D. Browne, R. Sare, J. Walthoe, B. Tooke, J. Wotton, B. Lintot, D. Midwinter, B. Cowſe, W. Mears,* and *F. Clay.* MDCCXX.

# THE PUBLISHER TO THE READER.

*THESE Reports (the first except the Lord Chief Justice* Vaughan's *Arguments that have been yet printed, of Cases adjudg'd since His Majesty's happy Restoration) though they are not Published under the Name of any eminent Person, as some other spurious Ones have been, to gain thereby a Reputation, which in themselves they could not Merit; yet have been collected by a Person of Ability and Judgment, and communicated to several*

*ſeveral of known Learning in the Law, who think them not Inferior to many Books of this Nature, which are admitted for Authorities. A great and well-ſpread Name may be requiſite to render a Book Authentick, and to defend it from that Common Cenſure, of which this Age is become ſo very Liberal. But its own Worth is that only which can make it Uſeful and Inſtructive.*

*THE Reader will find here ſeveral Caſes (as well ſuch as have been reſolved upon our Modern Acts of Parliament, as others relating to the Common Law) which are* primæ Impreſſionis, *and not to be found in any of the former Volumes of the Law; and the Pith and Subſtance of divers Arguments, as well as Reſolutions of the Reverend Judges, on many other weighty and difficult Points.*

*AND indeed, though in every Caſe, the main Thing which it behoves us to know, is, What the Judges take and define*

*define to be Law; yet the ſhort and conciſe Way of reporting it, which is affected in ſome of our Books, doth very ſcantily Anſwer the true and proper End of Reading them; which is not only to know what is Law, but upon what Grounds and Reaſons it is adjudged ſo to be; otherwiſe the Student is many Times at a Loſs, and left in the Dark; eſpecially where he finds other Reſolutions which ſeem to have a Tendency to the contrary Opinion.*

*IN this Reſpect, theſe Reports will appear to be more ſatisfactory and enlightning than many others: Several of the Caſes (eſpecially thoſe of the moſt important Conſideration) containing in a brief and ſummary Way what hath been offered by the Counſel* Pro *and* Con, *and the Debates of the Reverend Judges, as well as their ultimate Reſolutions; than which nothing can more contribute to the Advantage of the ſtudious Reader, and to the Settling and Guidance of his Judgment, not only in*

*the Point controverted, but likewiſe in other Matters of Law, where the Reaſon is the ſame.* Ubi eadem ratio, idem jus.

*AS to the Truth of theſe* Reports, *tho' the Modeſty of the Gentleman who collected them, hath prevailed above the Importunity of the Bookſeller, and he hath rather choſen to ſee his Book, than himſelf, gain the Publick Acceptation and Applauſe, whereby it hath loſt ſome ſeeming Advantage, which the prefixing of his Name would have undoubtedly given it; yet the Reader may reſt aſſured, That no little Care hath been taken to prevent any Miſtakes or Miſrepreſentations. The Judgments having been examined, and the Authorities here cited induſtriouſly compared with the Books out of which they were taken.*

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# REPORTS

Of divers

# Select Cases

In the Reign of

## *CHARLES* II.

### Term. Mich. 21 Car. II. 1669. in Banco Regis.

#### Mynn's *Case*.

( 1. )

ONE Mynn an Attorney entred a Judgment, by Colour of a Warrant of Attorney, of another Term than was expressed in the Warrant; the Court consulting with the Secondary about it, he said, That if the Warrant be to appear and enter Judgment as of this Term, or any Time after, the Attorney may enter Judgment at any Time during his Life; but in the Case in Question the Warrant of Attorney had not those Words, Or at any Time after: Wherefore the Secondary was ordered to consider the Charge of the Party grieved, in order to his Reparation. Which the Court said concluded him from bringing his Action on the Case.

Warrant to enter Judgment. See *Inst. Leg.* 264, 266. *Lilly's Reg.* 434.

( 2. )

The Secondary said, That in Trin. & Hill. Term they could not compel the Party in a Habeas Corpus to plead and go to Trial the same Term, but in Michaelmas and Easter Term they could.

Trials. See *Inst. Leg.* 28, 246. *Post*, 8. *pl.* 25.

( 3. ) Writ of inquiry. See *Inſt. Leg.* 203, 204. *Raym.* 77. 2 *Danv.* 464.

Mr. Solicitor moved for a new Writ of Inquiry into London, and to ſtay the filing of a former, becauſe of exceſſive Damages given; but it was denied.

( 4. ) *Venue* changed. *Poſt*, 63, 64.

An Affidavit for the changing of a Venue made before the Party was arreſted, and allowed. 2 *Salk.* 668. 1 *Sid.* 442.

( 5. ) No Bail in Battery. See 6 *Mod.* 230. 1 *Rol.* 335. *pl.* 14. *Inſt. Leg.* 20. 1 *Lev.* 39.

Moved in Battery for putting an Arm out of joint, that the Party might be held to Special Bail; but denied. Twiſd. Follow the Courſe of the Court.

( 6. ) Juſtices Order. Apprentices. 8 *Eliz. c.* 4. 1 *Saund.* 313, 314. 1 *Salk.* 67, 68. 2 *Salk.* 490, 491. *Poſt*, 287.

Mr. Saunders moved to quaſh an Order made by the Juſtices of Peace, for putting away an Apprentice from his Maſter, and ordering the Maſter to give him ſo much Money. Kelynge. The Statute of 5 Eliz. leaves this to their Diſcretion.

( 7. ) Franchiſe. *Poſt*, 118.

An Indictment was preferred in Cheſter for a Perjury committed in London: For which Kelynge threatned to have the Liberties of the County-Palatine ſeized, if they kept not within their Bounds.

---

( 8. )

## Goodwin *verſus* Harlow.

Inferior Courts. 1 *Roll.* 888.

ERror to reverſe a Judgment in Colcheſter, there being no Appearance by the Party, but Judgment upon three Defaults recorded. Revers'd.

Execution on a Judgment.

Twiſd. If there be a Judgment againſt three, you cannot take out Execution againſt one or two.

( 9. ) New Trial. 2 *Salk.* 648, 650.

Heir. *Poſt*, 253.

Upon a Motion for a new Trial, Twiſden ſaid, That in his Practice the Heir in an Action of Debt againſt him upon a Bond of his Anceſtor, pleaded Riens per diſcent: the Plaintiff knew the Defendant had levied a Fine, and at the Trial it was produced: But becauſe they had not a Deed to lead the Uſes, it was urged, That the Uſe was to the Conuſor, and his Heirs, and ſo the Heir in by Deſcent: Whereupon there was a Verdict againſt him; and it being a juſt and due Debt, they could never after get a new Trial.

Goſtwicke

## Goſtwicke & Maſon.

(10.)

DEBT for Rent upon a Leaſe for a Year, and ſo from Year to Year, quamdiu ambabus partibus placuerit; there was a Verdict for the Plaintiff for two Years Rent. Saunders moved in Arreſt of Judgment, that the Plaintiff alledges indeed that the Defendant entred and was poſſeſſed the firſt Year, but mentions no Entry as to the ſecond. Twiſd. The Jury have found the Rent to be due for both Years, and we will now intend that he was in Poſſeſſion all the time for which the Rent is found to be due.

S. C. 1 *Sid.* 423, *&c. ib.* 1 *Vent.* 41. *Vid. N. Lutw.* 66. 2 *Danv.* 508 *pl.* 6.

(11.) Schools.

A Prohibition was prayed to the Eccleſiaſtical Court at Cheſter to ſtay Proceedings upon a Libel againſt one William Bayles, for teaching School without Licence; but it was denied.

## Redman & Edolfe.

(12.)

TReſpaſs and Ejectment by Original in this Court. Saunders moved in Arreſt of Judgment, upon a Fault in the Original: for a bad Original is not help'd by Verdict. But upon Mr. Liveſay's certifying that there was no Original at all, the Plaintiff had Judgment, though in his Declaration he recited the Original.

S. C. 1 *Sid.* 423. 1 *Sand.* 317. 2 *Keb.* 544. 5 *Co.* 37.

(13.) Battery. See 6 *Mod.* 149, 172. 2 *Rol. R.* 545. 1 *Lev.* 281. 2 *Keb.* 545. 2 *Lev.* 102.

In an Action of Aſſault and Battery and Wounding; the Evidence to prove a Provocation, was, That the Plaintiff put his Hand upon his Sword and ſaid, If it were not Aſſize-time I would not take ſuch Language from you: The Queſtion was, if that were an Aſſault? The Court agreed that it was not: for he declared, That he would not aſſault him, the Judges being in Town; and the Intention as well as the Act makes an Aſſault. Therefore if one ſtrike another upon the Hand, or Arm, or Breaſt, in Diſcourſe, it's no Aſſault, there being no Intention to aſſault: But if one intending to aſſault, ſtrike at another and miſs him, this is an Aſſault: ſo if he hold up his Hand againſt another and ſay nothing, it is an Aſſault. In the principal Caſe the Plaintiff had Judgment.

2 *Rol.* 545. *pl.* 10. 6 *Mod.* 149. 1 *Lev.* 281, 282.

(14.) **Medlicott & Joyner.**

Evidence. See *post* 94, 114. 2 *Keb.* 31, 546. 3 *Keb.* 1, 2, 477. 5 *Mod.* 211, 386. 6 *Mod.* 225, 248. 10 *Co.* 92. *b.* 93.

EJectione firmæ. The Plaintiff at the Trial offer'd in Evidence a Copy of a Deed that was burnt by the Fire; the Copy was taken by one Mr. Gardner of the Temple, who said he did not examine it by the Original, but he writ it, and it always lay by him as a true Copy: And the Court agreed to have it read; the original Deed being proved to be burnt.

(15.) 1 *Co.* 124. *a.* 9 *Co.* 106. *a. b.* 10 *Co.* 98, 99. 1 *Cro.* 577. *pl.* 373.

Twisd. Feoffee upon Condition is disseised, and a Fine levied, and five Years pass; then the Condition is broken: The Feoffee may enter, for the Disseisor held the Estate subject to the Condition, and so did the Conuzee, for he cannot be in of a better Estate than the Conuzor himself was.

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(16.) **Dawe & Swayne.**

S. C. 1 *Lev.* 275. 1 *Sid.* 424. 2 *Keb.* 548. *Raym.* 176. Case *par Malice, &c.* See 1 *Vent.* 18, 19. 1 *Saund.* 228, 229. 1 *Lev.* 275, 292. 3 *Lev.* 211. 1 *Danv.* 196. *pl.* 14. 1 *Salk.* 14, 15. *Hob.* 267. 1 *Rol.* 103.

AN Action upon the Case was brought against one for suing the Plaintiff in placito debiti for 600 l. and falsly and maliciously affirming to the Bailiff of Westminster, that he did owe him 600 l. whereby the Bailiff insisted upon extraordinary Bail, to his Damage, &c. The Defendant traverses absque hoc that he did falsly and maliciously affirm to the Bailiff of Westminster that he did owe him so much. Winnington moved in Arrest of Judgment, that the Action would not lie; but the Plaintiff had Judgment. Kel. If there had been no Cause of Action, an Action upon the Case would not lie, because he has a Recompence by Law, but here was a Cause of Action. If one should arrest you in an Action of 2000 l. to the Intent that you should not find Bail, and keep you from Practice all this Term, and this is found to be falsly and maliciously, shall not you have an Action for this? This Twisden said he knew to have been Serjeant Rolle's Opinion. Morton. Foxley's Case is, That if a Man be outlaw'd in another County, where he is not known, an Action upon the Case will lie; so an Action lies against the Sheriff, if reasonable Bail be offered and refused.

Twisd.

Twiſd. If three Men bring an Action, and the Defendant put in Bail at the Suit of four, they cannot declare; but if he had put in Bail at the Suit of one, that one might declare againſt him. (17.) Bail.

Judgment was entred as of Trinity Term for the Queen-Mother, and a Writ of Enquiry of Damages was taken out returnable this Term, and ſhe died in the Vacation-time; Reſolved, that the firſt was but an interlocutory Judgment, and that the Action was abated by her Death. Twiſd. Some have queſtioned how you ſhall come to make the Death of the Party appear between the Verdict, and the Day in Bank; and I have known it offer'd by Affidavit, and by Suggeſtion upon the Roll, and by Motion. (18.) 1 *Leon.* 263. 2 *Keb.* 584. *Vid.* 1 *Vent.* 235. 1 *Sid.* 131. 1 *Salk.* 8. 6 *Mod.* 142. *poſt* 6. 1 *Keb.* 477. 2 *Keb.* 449, 477. 3 *Keb.* 160, 466. 4 *Co.* 39. *Hob.* 129.

## Troy, *an Attorney.* (19.)

AN Information of Extortion againſt Troy an Attorney; it was moved in Arreſt of Judgment, That Attorneys are not within any of the Statutes againſt Extortion, and therefore the Information concluded ill, the Concluſion being contra formam Statuti. Twiſd. The Statute of 3 Jac. cap. 7. is expreſs againſt Attornies. Kel. I think as thus adviſed, That Attornies are within all the Statutes of Extortion. It was afterwards moved in Arreſt of Judgment, becauſe the Information was inſufficient in the Law: For Sir Tho' Fanſhawe informed, that M. Troy being an Attorney of the Court of Common Pleas, did at Maidſtone cauſe one Collop to be impleaded for 9 s. 4 d. Debt, at the Suit of one Dudley Sellinger, &c. and this was ad grave damnum of Collop, &c. but it is not expreſſed in what Court he cauſed him to be impleaded; and that which the Defendant is charged with is not an Offence; for he ſaith that he did cauſe him to be impleaded, and received the Money the ſame Day, and perhaps he received the Money after he had cauſed him to be impleaded: Then it is not ſufficiently alledged that he did illicite receive ſo much; and Extortion ought to be particularly alledged. Nor is there any Statute, that an Attorney ſhall receive no more than his juſt Fees. The Proceſſion of an Attorney is at Common Law, and allowed by the Statute of Weſtm. 1. cap. 26. and the Sta- S. C. 1 *Sid.* 434. Extortion. See *Co. Lit.* 368. 2 *Inſt.* 209, 210. 3 *Inſt.* 149. 4 *Inſt.* 274. 1 *Jo.* 65. *Noy* 76. *Mo.* 468. 2 *Rol. Ab.* 32, 75, 266. 1 *Rol. Ab.* 16. 1 *Rol. R.* 313. *Ray* 315. *Hawk.* P. C. 171, 172. 2 *Inſt.* 209. *Co. Lit.* 268.

Statute of 3 Jac. does not extend to this Matter. Non conſtat in this Caſe, if what he received was for Fees or no: Beſides, the Suit for an Offence againſt that Statute muſt be brought by the Party, not by Sir Tho' Fanſhawe. Kel. If the Party grieved will not ſue for the Penalty of treble Damages given by that Statute; yet the King may proſecute to turn him out of the Roll. Twiſd. I doubt that: Nor is it clear, Whether an Information will lie at all upon that Statute or not? For the Statute does not ſpeak of an Information. Kel. Whenever a Statute makes a Thing criminal, an Information will lie upon the Statute, though not given by expreſs Words. Twiſd. It appears here, That this Money was not received of his Client; for he was againſt Collop. But he ought to ſhew in what Court the impleading was; for otherwiſe it might be before Mr. Major in his Chamber. To which the Court agreed. So the Information was quaſh'd.

10 *Co.* 75. *b.* See 1 *Salk.* 374.

(20.) Burnet & Holden.

THERE were theſe two Points in the Caſe. 1. If the Defendant die after the Day of Niſi prius, and before the Day in Bank, whether the Judgment ſhall be ſaid to be given in the Life of the Defendant? 2. Admit it ſhall, yet whether the Executor ſhall have the Advantage taken from him, of retaining to ſatisfie his own Debt? To the firſt it was ſaid, That the Act of Parliament only takes away a Writ of Error in ſuch Caſe, but there is no Day in Bank to plead. It was order'd to ſtand in the Paper.

S. C. 1 *Lev.* 277. *Raym.* 210. 2 *Keb.* 549, *&c.* *Vide ante* 5. 1 *Salk.* 8. 6 *Mod.* 142. 1 *Vent.* 235. *Ante* 5. *pl.* 7.

(21.) Corporation *of* Derby.

THE Corporation of the Town of Derby preſcribe to have Common ſans number in groſs. Saunders. I conceive it may be by Preſcription: What a Man may grant, may be preſcribed for; Co. Lit. 122. is expreſs. Kel. In a Foreſt the King may grant Common for Sheep, but you cannot preſcribe for it. And if you may preſcribe for Common ſans number in groſs, then you may drive all the Cattel in a Fair to the

S. C. 1 *Saund.* 343, 346. 2 *Keb.* 527, 550, 570. Common in groſs. *Vide* 1 *Lev.* 196. 2 *Lev.* 2. 1 *Sid.* 313. 2 *Keb.* 12. 1 *Vent.* 163, 383. *poſt* 75.

Com-

Common. Saunders. But the Preſcription is for their own Cattle only. Twiſd. If you preſcribe for Common ſans number appurtenant to Land, you can put in no more Cattle than what is proportionable to your Land; for the Land ſtints you in that Caſe to a reaſonable Number. But if you preſcribe for Common ſans number in groſs, what is it that ſets any Bounds in ſuch Caſe? There was a Caſe in Glyn's Time between Maſſelden and Stoneby, where Maſſelden preſcribed for Common ſans number, without ſaying Levant & Couchant, and that being after a Verdict, was held good; but if it had been upon a Demurrer, it would have been otherwiſe: Liveſay ſaid he was Agent for him in the Caſe. *Nelſ. Lutw.* 431. 2 *Show. Rep.* 30, 95. *Vide Poſt*, 63, 75. *Nelſ. Lutw.* 500, 501.

## Bucknall & Swinnock. ( 22. )

INdebitatus Aſſumpſit for Money received to the Plaintiff's Uſe; the Defendant pleads ſpecially, that poſt aſſumptionem prædict. there was an Agreement between the Plaintiff and Defendant, that the Defendant ſhould pay the Money to J. S. and he did pay it accordingly. The Plaintiff demurs. Jones. This Plea doth not only amount to the general Iſſue, but is repugnant in it ſelf. It was put off to be argued. 2 *Keb.* 540, 550, 553. *Poſt*, 69 *pl.* 20.

## Hall *verſus* Wombell. ( 23. )

Debt.

THE Queſtion was, Whether an Action of Debt would lie upon a Judgment given by the Commiſſioners of Excile, upon an Information before them? Adjourn'. See 1 *Raym.* 14. 1 *Jon.* 29. *Winch* 61, 62. *Godb.* 354. 1 *Roll. Ab.* 599. *M.* 6. *Cro. Eliz.* 186.

## Vaughan & Caſewell. ( 24. )

S.C. 2 *Saund.* 38. 2 *Keb.* 553, 563, 574, 603, 610.

A Writ of Error was brought to reverſe a Judgment given at the Grand Seſſions in Wales, in a Writ of Quod ei deforceat. Saunders. The Point in Law will be this; Whether a Tenant's Vouching a Vouchee out of the Line, be peremptory and final, or that a Reſpondeas Ouſter ſhall be awarded?

Mr. Jones. In an Aſſize the Tenant may vouch another named in the Writ, 9 H. 5. 14. and ſo in the Com. fo. 89. b. but a Voucher cannot be of one not named in the Writ, becauſe it is feſtinum remedium. In Wales they never allow foreign Vouchers, becauſe they cannot bring them in. If there be a Counterplea to a Voucher, and that be adjudged in another Term, it is always peremptory; otherwiſe, if it be determined the ſame Term.

8 *Co.* 50. a. 2 *Inſt.* 411.

2 *Inſt.* 242, 243, 367.

( 25. ) An Action of Trover and Converſion was brought againſt Huſband and Wife, and the Wife arreſted. Twiſd. The Wife muſt be diſcharged upon Common Bail: So it was done in the Lady Baltinglaſs's Caſe. And where it is ſaid in Croke, that the Wife in ſuch Caſe ſhall be diſcharged, it is to be underſtood, that ſhe ſhall be diſcharged upon Common Bail. So Liveſay ſaid the Courſe was.

2 *Cro.* 445. 1 *Lev* 216. 1 *Vent.* 49, 6 *Mod.* 301. 1 *Sid.* 21.

( 26. ) It was ſaid to be the Courſe of the Court, That if an Attorney be ſued Time enough to give him two Rules to plead within the Term, Judgment may be given, otherwiſe not.

*Ante* 1. *pl.* 2.

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## Ruſſell & Collins.

( 27. ) AN Aſſumpſit was brought upon two ſeveral Promiſes, and entire Damages were given. Moved by Mr. Sympſon in Arreſt of Judgment, that for one of the Promiſes an Action will not lie: It was a general Indebitatus pro opere facto; which was urged to be too general and uncertain. But per Cur. It is well enough, as pro mercimoniis venditis & pro ſervitio, without mentioning the Goods or the Service in particular. And the Plaintiff had Judgment.

*Aſſumpſit.* S. C. 2 *Keb.* 552.

2 *Cro.* 207. *Hob.* 5.

Dyer

## Dyer *verſus* Eaſt.

( 28. )
S. C. 2 *Keb.* 554.

AN Action upon the Caſe upon a Promiſe for Wares that the Wife took up for wearing Apparel; Pollexfen moved for a new Trial. Kelynge. The Husband muſt pay for the Wife's Apparel, unleſs ſhe does elope, and he give Notice not to truſt her: That is Scott and Manby's Caſe; which was a hard Judgment, but we will not impeach it. The Plaintiff had Judgment.

*Vide Poſt*, 124, 125, 143, *&c.*

## Beckett & Taylor.

( 29. )
S. C. 2 *Keb.* 546.

DEbt upon a Bond to ſubmit to an Award. Exception was taken to the Award, becauſe the Concurrence of a third Perſon was awarded, which makes it void: They award that one of the Parties ſhall diſcharge the other from his undertaking to pay a Debt to a third Perſon; and it was pretended, that the third Perſon being no Party to the Submiſſion, was not compellable to give a Diſcharge. But it was anſwered, that he is compellable; for in caſe the Debt be paid him, he is compellable in Equity to give a Releaſe to him that had undertaken to pay it. Roll. 1 Part, 248. and Giles and Southward's Caſe, Mich. 1653. Judgment niſi.

1 *Cro.* 541.

( 30. )
S. C. 2 *Keb.* 552.

Seventeen Serjeants being made the 14th of November, a Day or two after Serjeant Powys, the Junior of them all, coming to the King's Bench Bar, the Lord Chief Juſtice Kelynge told him, that he had ſomething to ſay to him, viz That the Rings which he and the reſt of the Serjeants had given, weighed but 18s. a-piece, whereas Forteſcue, in his Book De laudibus legum Angliæ ſays, That the Rings given to the Chief Juſtices, and to the Chief Baron, ought to weigh 20s. a-piece: And that he ſpake not this expecting a Recompence, but that it might not be drawn into a Precedent; and that the young Gentlemen there might take Notice of it.

( 31. )

## Clerke *verſus* Rowell & Phillips.

S.C. 1 *Saund.* 319. 1 *Vent.* 42. 2 *Keb.* 555. Evidence. Entry. *Vide ſupra.* & 1 *Vent.* 332. 2 *Danv.* 792. *pl.* 14.

A Trial at Bar in Ejectment for Lands ſettled by Sir Pexall Brockhurſt. The Court ſaid, a Trial againſt others ſhall not be given in Evidence in this Cauſe. And Twiſden ſaid, That an Entry to deliver a Declaration in Ejectment ſhould not work to avoid a Fine; but that it muſt be an expreſs Entry. Upon which laſt Matter the Plaintiff was nonſuit.

( 32. )

## Redman's *Caſe*.

S. C. 2 *Keb* 555. Privilege.

IT was moved, That one Redman an Attorney of the Court, who was going into Ireland, might put in Special Bail. Twiſden. A Clerk of the Court cannot put in Bail. You have filed a Bill againſt him, and ſo waved his putting in Bail. Kelynge. You may remember Wolly's Caſe; that we diſcharged him by reaſon of his Privilege, and took Common Bail. Twiſden. You cannot declare againſt him in Cuſtodia. But though we cannot take Bail, yet we may commit him, and then deliver him out by Mainpernancy. Jones. If he be in Court in propria perſona, you cannot proceed againſt his Bail. The Court agreed, that the Attorney ſhould not put in Bail.

( 33. )

## Grafton.

S. C. 2 *Keb.* 555. *Habeas Corpus.*

GRafton, one of the Company of Drapers, was brought by Habeas Corpus. In the Return, the Cauſe of his Impriſonment was alledged to be, for that being choſen of the Livery, he refuſed to ſerve. Per Cur. They might have fined him, and have brought an Action of Debt for the Sum; but they could not impriſon him. Kelynge. The Court of Aldermen may impriſon a Man that ſhall refuſe to accept the Office of Alderman, becauſe they are a Court of Record, or they may want Aldermen elſe. So he was releaſed.

1 *Sid.* 288.

It was moved for the Plaintiff, That a Perſon named in the ſimul cum being a material Witneſs, might be ſtruck out, and it was granted. Kel. ſaid, That if nothing was proved againſt him, he might be a Witneſs for the Defendant. (34.) *Poſt* 16. *pl.* 45.

## Clerke & Heath. (35.)

Ejectione firmæ. The Plaintiff claims by a Leaſe from Th. Prin, Clerk. Objected, That Prin had not taken the Oath according to the Act for Uniformity; whereupon he produced a Certificate of the Biſhop that had only a ſmall Bit of Wax upon it. Twiſd. If it were ſealed, though the Seal be broken off, yet it may be read, as we read Recoveries after the Seal broken off; and I have ſeen Adminiſtration given in Evidence after the Seal broken off, and ſo Wills and Deeds. Accordingly it was read. Obj. The Church is ipſo facto void by the Act of Uniformity, if the Incumbent had no Epiſcopal Ordination. So they ſhewed that Prin was ordained by a Biſhop. It was likewiſe proved, That he had declared his Aſſent and Conſent to the Common Prayer in due Time, before St. Bartholomew's Day. Then it was urged, That the Act does not confirm the Plaintiff's Leſſor in this Living; for that it is not a Living with Cure of Souls; for it has a Vicarage endowed. Twiſd. If it be a Living without Cure, the Act does not extend to it. M. Solicitor. The Preſentation does not mention Cure of Souls. (So they read a Preſentation of a Rector, and another of a Vicar, in neither of which any Mention was made of Cure of Souls: But the Vicar's was reſidendo.) If both be preſentative, the Cure ſhall be intended to be in the Vicar. Kelynge. Why may not both have the Cure? Sol. If the Vicar be endow'd, the Rector is diſcharged of Reſidence by Act of Parliament. Twiſd. Synodals and Procurations are Duties due to the Ordinary; which Vicars, when the Parſonages are impropriated, always pay: But I queſtion whether they that come into a Church by Preſentation to, and Inſtitution by the Biſhop, have not always the Cure of Souls? It is true, in Donatives, where the Miniſters do not come in by the Biſhop's Inſtitution, there is no Cure: But they that come in by Inſtitution of the Biſhop, have their Power delegated to them from him, and

S. C. 2 *Keb.* 556. 1 *Vent.* 14.

Seal broken. See 2 *Show.* 28. 2 *Lev.* 220. *Lat.* 226.

See *poſt* 12, 22, 90.

generally have Cure of Souls. Solic. There are ſeveral Rectories without Cure. Twiſd. When came Rectories in? Morton. After the Council of Lateran, and Vicars came in in the ſeventeenth Year of King John. Moreton. Before the Council of Lateran, the Biſhop did provide Teachers, and
2 Co. 44. received the Tithes himſelf; but ſince he hath appointed others to the Charge, and ſaith, Accipe curam tuam & meam. Kelynge and Twiſden. It is is ſaid ſo by my Lord Coke, but not done. Twiſden. Where-ever there is a Cure of Souls, the Church is viſitable, either by the Biſhop, if it belong to him; if to a Lay-man, he muſt make Delegates; if to the King, my Lord Keeper does it. And where a Man comes in by Preſentation, he is prima facie viſitable by the Biſhop. Kelynge. I take it, That whoever comes in under the Biſhop's Inſtitution, hath the Cure. Twiſden. Grendon's Caſe is expreſly, That the Biſhop hath the Cure of Souls of all the Diocels, and doth by Inſtitution transfer it to the Parſon: So that prima facie, he that is inſtituted hath the Cure. The Vicarage is derived out of the Parſonage; and if the Vicar come to Poverty, the Parſon is bound to maintain him. Twiſd. There is an Appropriation to a Corporation; the Corporation cannot have Cure of Souls, being a Body Politick; but when they appoint a Vicar, he coming under the Biſhop by
*Ante* 11. *poſt* 22, 90. Inſtitution, hath Cure of Souls: And a Donative, when it comes to be Preſentative, hath Cure of Souls. Kelynge agreed. Twiſd. We hold, That when the Rector comes in by Inſtitution, the Biſhop hath Power to viſit him for his Doctrine and his Life; for he hath the particular Cure, but the Biſhop the general; and that the Biſhop hath Power to deprive him.

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## Abbot & Moore.

(36.)

*Aſſumpſit.* Conſiderati. S. C. 2 *Keb.* 557. 610.

THE Plaintiff declares, That whereas one William Moore was indebted to him 210 l. and whereas the ſaid William Moore had an Annuity out of the Defendant's Lands, That the Defendant in Conſideration that the Plaintiff had agreed that the Defendant ſhould pay ſo much Money to the Plaintiff, the Defendant did promiſe to pay it. After a Verdict,

dict, it was objected in Arrest of Judgment, That here was not any Consideration; and the Court was of that Opinion. Then the Plaintiff would have discontinued, but the Court would not suffer that after a Verdict. Discontinuance. 1 *Saund.* 210, 211. 1 *Cro* 575. 1 *Rol.* 27. *pl.* 50. 29 *pl.* 60. & 21. *pl.* 5. *post* 41. See 1 *Lev.* 48. 1 *Sid.* 60. 2 *Danv.* 156. *J. Nel. Lutw.* 91.

Sir Edward Thurland moved to quash an Order made by the Justices of the Peace for one to serve as Constable in Homeby. Moreton. If a Leet neglect to chuse a Constable, upon Complaint to the Justices of Peace, they shall by the Statute appoint a Constable. Twisd. In this Case there are Affidavits, That there never was any Constable there. And I cannot tell whether or no the Justices of Peace can erect a Constablewick where never any was before: If he will not be sworn, let them indict him for not executing the Office, and let him traverse, That there never was any such Office there. Kelynge. Go and be sworn, or if the Justices of the Peace commit you, bring your Action of False Imprisonment. Twisd. If there be a Court-Leet that hath the Choice of a Petty Constable, the Justices of Peace cannot chuse there: And if it be in the Hundred, I doubt whether the Justices of the Peace can make more Constables then were before; High Constables were not ab origine, but came in with Justices of the Peace. 10 H. 4. Kel. and Morton, cont. Moreton. The Book of Villarum in the Exchequer sets out all the Wills, and there cannot be a Constablewick created at this Day. In this Case the Court ordered him to be sworn. Thurl. If they chuse a Parliament-Man's Servant Constable, they cannot swear him. Twisd. I do not think the Privilege extends to the Tenant of a Parliament-Man, but to his Servant. (37.) Constable. See 1 *Salk.* 175, 176, 381. 5 *Mod.* 96, 127. 6 *Mod.* 96. 2 *Saund.* 290. 2 *Show.* 75. *post* 78.

## Blissett & Wincott. (38.)

Two persons committed for being at a Conventicle, were brought up by Habeas Corpus. Twisd. To meet in Conventicles in such Numbers as may be affrighting to the People, and in such Numbers as the Constable cannot suppress, is a Breach of the Peace, and of a Person's Recognizance for the Good Behaviour. Note, This was after the late Act against Conventicles expired. Conventicles. S. C. 2 *Keb.* 558. See 2 *Show.* St. 16 *Car.* 2. *c.* 4.

Lee

## Lee & Edwards.

(39.) S. C. 1 *Lev.* 280. 1 *Vent.* 44. 1 *Sid.* 428. 2 *Keb.* 559, &c.

AN Action upon the Case was brought upon two Promises, 1. In Consideration the Plaintiff would bestow his Labour and Pains about the Defendant's Daughter, and would cure her, he did promise to pay so much for his Labour and Pains, and would also pay for the Medicaments. 2. That in Consideration he had cured her, he did promise to pay, &c. Raymond moved in Arrest of Judgment, That he did not aver that he had cured her, the Consideration of the first Promise being future, and both Promises found, and entire Damages given. Twisd. It is well enough; for now it lies upon the whole Record, whether he hath cured her or no? If it had rested upon the first Promise, it had been naught. And in the second Promise there is an Averment, that he had cured her. So that now after a Verdict it is help'd, and the Want of an Averment is holpen by a Verdict in many Cases. Judgment nisi, &c.

See 1 *Lev.* 298. *Hard.* 485. *Nelf. Lutw.* 510. *post* 285.

(40.) 3 *Co.* 72. *b.*

Twisd. If a Man be in Prison, and the Marshal die, and the Prisoner escape, there is no Remedy but to take him again.

(41.)

Twisd. Pleas in Abatement come too late after Imparlance.

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## Hall & Sebright.

(42.) S. C. 2 *Keb.* 591.

AN Action of Trespass, wherein the Plaintiff declared, That the Defendant on the 24th of January, did enter and take Possession of his House, and did keep him out of Possession to the Day of the exhibiting the Bill; the Defendant pleads, That ante prædict. tempus quo, &c. the Plaintiff did licence the Defendant to enjoy the House until such a Day. Saunders. The Plea is naught in Substance: For a Licence to enjoy from such a Time to such a Time, is a Lease; and ought to be pleaded as a Lease, and not as a Licence: It is a certain present Interest. Twisd. It is true 5 H. 7. fo. 1. is,

*Hob.* 35. *Moor.* 861.

That if one doth licence another to enjoy his House till such a Time, it is a Lease; but whether it may not be pleaded as a Licence, I have known it doubted. Judgment nisi, &c.

## Coppin *versus* Hernall.

( 43. )
S. C. 1 *Sid.* 428.
1 *Lev.* 285.
*Raym.* 187.
2 *Keb.* 562.
2 *Saund.* 129, to 133.
*Vide Post*, 274.
1 *Roll.* 261.

TWisden said upon a Motion in Arrest of Judgment, because an Award was not good, That the Umpirage could not be made, till the Arbitrators Time were out: And if any such Power be given to the Umpire, it is naught in its Constitution, for two Persons cannot have a several Jurisdiction at one and the same Time.

( 44. )
Panel.

The Law allows the Defendant a Copy of the Panel to provide himself for his Challenges.

## Fettyplace *versus* -------

( 45. )

Amendment.

5 *Co.* 45. a.

ACtion upon the Case upon a Promise, in Consideration that the Plaintiff would affeerere, instead of afferre, &c. It was moved in Arrest of Judgment, and Cro. 3 Part, 266. was cited; Bedel and Wingfield. Twisden. I remember districtionem for destructionem, cannot be help'd; so neither vaccaria instead of vicaria. So the Court gave Directions to see if it were right upon the Roll.

## Holloway.

( 46. )
Estopel.
S. C. 1 *Saund.* 316.
2 *Keb.* 564.
See *Moor.* 420.
*Aleyn* 52.
2 *Cro.* 375.
1 *Rol.* 872.

THE Condition of a Bond for Performance of Covenants in an Indenture, doth estop to say, There is no such Indenture; but doth not estop to say, There are no Covenants.

Kelynge.

( 47. )
*Ante* 11. *pl.* 33.

Kelynge. The Courſe of the Court is, that if a Man be brought in upon a Latitat for 20 l. or 30 l. we take the Bail for no more, but yet he ſtands Bail for all Actions at the ſame Party's Suit; otherwiſe, if a Stranger bring an Action againſt him. Twiſden. They cannot declare till he hath put in Bail; and when we take Bail, it is but for the Sum in the Latitat, perhaps 30 l. or 40 l. but when he is once in, he may be declared againſt for 200 l.

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## Smith *verſus* Wheeler.

( 48. )
S. C. *Poſt*, 38.
1 *Vent.* 128.
1 *Lev.* 279.
2 *Keb.* 564, 608, 644, 763, *&c.*

A Writ of Error was brought to reverſe a Judgment given in the Common Pleas upon a ſpecial Verdict in an Ejectione firmæ. The Jury found, that one Simon Mayne was poſſeſt of a Rectory for a long Term, and having conveyed the whole Term in Part of it to certain Perſons abſolutely, he conveyed his Term in the Reſidue, being two Parts, in this Manner; ſcilicet, in Truſt for himſelf during Life, and afterwards in Truſt for the Payment of the Rent reſerved upon the original Leaſe, and for ſeveral of his Friends, &c. Provided, that if he ſhould have any Iſſue of his Body at the Time of his Death, then the Truſts to ceaſe, and the Aſſignment to be in Truſt for ſuch Iſſue, &c. And there was another Proviſo, That if he were minded to change the Uſes, or otherwiſe to diſpoſe of the Premiſſes; that he ſhould have Power ſo to do by Writing, in the Preſence of two or more Witneſſes, or by his laſt Will and Teſtament. They further find, that he had Iſſue male at the Time of his Death, but made no Diſpoſition purſuant to his Power: And that in his Life-time he had committed Treaſon, and they find the Act of his Attainder. The Queſtion was, Whether the reſt of the Term, that remained unexpired at the Time of his Death, were forfeited to the King? The Points made were two. 1. Whether the Deed were fraudulent? 2. Whether the whole Term were not forfeited by Reaſon of the Truſt, or Power of Revocation? Pemberton argued, That the Deed was fraudulent, becauſe he took the Profits during his Life, and the Aſſignees knew not of the Deed of Truſt. The Court hath in theſe Caſes adjudged Fraud upon Circumſtances appearing upon Record, without any Verdict: The Caſe that comes neareſt to this is in Lane 42, &c. The King againſt the

Earl of Nottingham, and others. 2dly, He argued, that there was a Truſt by expreſs Words; and if there be a Truſt, then not only the Truſt, but the Eſtate, is veſted in the King, by the expreſs Words of the Statute of 33 H. 8. The King indeed can have no larger Eſtate in the Land, than the Perſon attainted had in the Truſt; and if this Conveyance were in Truſt for Simon Mayne, only during his Life, the King can have the Land no longer; but he conceived it was a Truſt for Simon Mayne, during the whole Term. A Truſt, he ſaid, was a Right to receive the Profits of the Land, and to diſpoſe of the Lands in Equity. Now if Simon Mayne had a Right to receive the Profits, and a preſent Power to diſpoſe of the Land, he took it to be a Truſt for him; and that conſequently by his Attainder it was forfeited to the King. Coleman contra: As for the Matter of Fraud; firſt, there is no Fraud found by the Jury, and for you to judge of Fraud upon Circumſtances, is againſt the Chancellor of Oxford's Caſe, Rep. 10. As for the Truſt, it muſt be agreed, that if there be any either Truſt or Condition by Conſtruction upon theſe Proviſoes in Simon Mayne in his Life, between Mich. 1646. and the Time of making the Act, the Truſt will be veſted in the King: But whether will it be veſted in the King as a Truſt, or as an Eſtate? For I am informed, that it hath been adjudged between the King and Holland, Style's Reports; That if an Alien purchaſe Copyhold-Lands, the King ſhall not have the Eſtate, but as a Truſt; and the particular Reaſon was, becauſe the King ſhall not be Tenant to the Lord of the Manor. Kelynge. The Act of Parliament takes the Eſtate out of the Truſtees, and puts it in the King. Coleman. But I ſay here is no Truſt forfeitable. By the Body of the Deed all is out of him. If a Man makes a Feoffment in Fee to the Uſe of his Will, becauſe he hath not put it out of him, there ariſes an Uſe, and a Truſt, for himſelf. But in our Caſe, he hath put the Uſes out of himſelf; for there are ſeveral Uſes declared. But there is a further Difference: If Simon Mayne had declared the Uſe to others abſolutely, and had reſerved Liberty to himſelf to have altered it by his Will, that might have altered the Caſe: But here the Proviſo is, That if at the Time of his Death he ſhall have a Son, &c. ſo that it is reduced to him upon a Condition and Contingency. As to the Power of Revocation, he cited the Duke of Norfolk's Caſe in Englefield's Caſe; which Twiſden ſaid came ſtrongly to this. Adjournatur. Vide infra pag. 38.

1 *Roll.* 194. *Aleyn* 14, 15.

1 *Lev.* 279, 280.

( 48. ) Pleading. An Information was exhibited against one for a Libel. Coleman. The Party has confessed the Matter in Court, and therefore cannot plead Not guilty. Twisden. You may plead Not guilty with a relicta verificatione.

## Horne & Ivy.

( 49. ) S. C. 1 *Vent.* 47. 1 *Sid.* 444, 472. 2 *Keb.* 564, 604. *Vide* 4 *Mod.* 176. 1 *Salk.* 31. 6 *Mod.* 13.

TRespass for taking away a Ship. The Defendant justifies under the Patent, whereby the Canary-Company is incorporated and granted, That none but such and such should trade thither, on Pain of forfeiting their Ships and Goods, *&c.* and says, that the Defendant did trade thither, &c. the Plaintiff demurs. Pollexfen. He ought to have shown the Deed whereby he was authorized by the Company to seize the Goods: 26 H. 6. 8. 14 Ed. 4. 8. Bro. Corp. 59. Tho' I agree, that for ordinary Imployments and Services, a Corporation may appoint a Servant without Deed, as a Cook, a Butler, &c. Plow. Com. 91. A Corporation cannot licence a Stranger to fell Trees without Deed: 12 H. 4. 17. Nor can they make a Disseisor without Deed, nor deliver a Letter of Attorney without Deed. 9 Ed. 4. 59. Bro. Corp. 24, 34. 14 H. 7. 1. 7 H. 7. 9. Roll. 514. Tit. Corporation, Dr. Bonham's Case. Again, the Plea is double; for the Defendant alledges two Causes of a Breach of their Charter, viz. their taking in Wines at the Canaries, and importing them here; which is double. Then there is a Clause, that gives the Forfeiture of Goods and Imprisonment, which cannot be by Patent: 8 Rep. 125. Waggoner's Case. Noy 123. in the Case of Monopolies. This Patent I take also to be contrary to some Acts of Parliament, viz. 2 Ed. 3. cap. 1. 2 Ed. 3. cap. 2. 2 Rich. 2. cap. 1. 11 Rich. 2. cap. 2. and these Statutes the King cannot dispense withal by a Non obstante. Twisd. For the first Point, I think they cannot seize without Deed, no more than they can enter for a Condition broken without Deed. Kelynge. We desire to be satisfied, whether this be a Monopoly, or not? It was ordered to be argued.

1 *Roll. Ab.* 514. K. 3 *Mod.* 126.

## Pryn *verſus* Smith. (50.)

SCire Facias in this Court, upon a Recognizance by way of Bail upon a Writ of Erroꝛ in the Exchequer-Chamber. The Defendant pleaded, That the Plaintiff did after Judgment ſue forth a Capias ad ſatisfaciend. out of this Court to the Sheriff of Middleſex, whereupon he was taken in Execution, and ſuffered to eſcape by the Plaintiff's own Conſent. Jones. We have demurred, becauſe they do not lay a Place where this Court was holden, noꝛ where the Plaintiff gave his Conſent.

## Redman & Pyne. (51.)

AN Action upon the Caſe was bꝛought foꝛ ſpeaking theſe Woꝛds of the Plaintiff, being a Watch-maker, viz. He is a Bungler, and knows not how to make a good Piece of Work: But there was no Colloquium laid of his Trade. Pemberton. The Jury have ſupply'd that, having found that he is a Watch-maker. And it is true, that Woꝛds ſhall be taken in mitiori ſenſu: but that is when they are doubtful? Caudry's Caſe. 1 Cro. 196. Twiſden. I remember a Shoe-maker bꝛought an Action againſt a Man, foꝛ ſaying that he was a Cobler: And though a Cobler be a Trade of it ſelf, yet held that the Action lay in Glyn's Time. Saunders. If he had ſaid, That he could not make a good Watch, it would have been known what he had meant: But the Woꝛds in our Caſe are indifferent, and perhaps had no Relation to his Trade. Oꝛdered to ſtay.

Words. See *Sid.* 424, 425. 1 *Lev.* 276. *Rav.* 184. 2 *Show.* 136, 293. *Nelſ. Lutw.* 334. *poſt* 23.

## Vere & Reyner. (52.)

AN Action upon the Caſe upon a Pꝛomiſe to carry duas carectatas, &c. Rotheram. It's uncertain whether carectata ſignifies a Hoꝛſe-Load, oꝛ a Cart-Load. Judgment niſi, &c.

(53.) Twiſd. I have known, if a Judgment be given, and there
*Poſt* 24. *pl.* 62. is an Agreement between the Parties not to take out Execution till next Term, and they do it before, that the Court has ſet all aſide.

(54. *Cinque-Ports.* One brought up by Habeas Corpus out of the Cinque-Ports, upon an Information for breaking Priſon, where he was in upon an Execution for Debt. Barrell moved againſt it. Twiſd. Suppoſe a Man be arreſted in the Cinque-Ports for a Matter ariſing there, and then another hath Cauſe to arreſt him here, is there not a Way to bring him up by Habeas Corpus, ? Barrell. It was never done, but there has been a Habeas Corpus thither ad faciend. & recipiend. Kel. If a Man be in Priſon in
2 *Cro.* 543. the Fleet, we bring him up by Habeas Corpus, in Caſe there be a Suit againſt him here. Twiſd. Where ſhall ſuch a Man be ſued, upon a Matter ariſing out of the Cinque-Ports? Barrell. If it be tranſitory, it muſt be ſued there; if local, elſewhere. Twiſd. Then you grant, if local, that there muſt be a Habeas Corpus. And ſo it was allowed in this Caſe.

(55.) Baſtard-Child. See 1 *Salk.* 121, 122, 124. 2 *Salk.* 477, 478. 2 *Salk.* 476, 480, 482, 486, 534. 5 *Mod.* 329. 5 *Mod.* 208, 209. 2 *Salk.* 472. Two Juſtices of the Peace made an Order, in Seſſion-time, againſt one Reignolds, as reputed Father, for the keeping of a Baſtard-Child: Reignolds appealed to the ſame Seſſions, where the Juſtices made an Order that one Burrell ſhould keep it. Jones moved to ſet aſide this Order, though an Order of Seſſions upon an Appeal from two Juſtices; becauſe he ſaid the firſt Order being made in Seſſion-time, that Seſſions could not be ſaid to be the next within the Stat. of 18 Eliz. and becauſe the Juſtices of the Seſſions, did not quaſh the Order made by two Juſtices. Kel. They ought to have done that. Twiſd. They may vacate the firſt Order, and refer it back to two Juſtices as res integra. The Order being read, one Clauſe of it was, That Burrell ſhould pay 12 d. a Week for keeping the Child, till it came to be twelve Years of Age: Which Twiſden ſaid was ill, for it ought to be ſo long as it continues chargeable to the Pariſh: The Parties were bound over to appear at the next Aſſizes in Eſſex.

Darby-

## Darbyſhire *verſus* Cannon.

(56.)
S. C. 2 *Kel.* 575.

SYmpſon moved, That the Defendant having ſubmitted to a Rule of Court for referring the Matter, and not performing the Award, an Attachment might be granted againſt him. Which was granted: But when the Party comes in upon the Attachment, he may alledge, That the Award is void; and if it appear to be ſo, he ſhall not be bound to perform it.

## Owen Hannings.

(57.)

IN a Trial at Bar upon a Scire facias to avoid a Patent of the Office of Searcher, Exception was taken to a Witneſs, That he was to be Deputy to the Party that would avoid the Patent. Twiſd. If a Man promiſe another, that if he recover his Land, the other ſhall have a Leaſe of it, he is no good Witneſs: So neither is this Man. But by the Opinion of the three other Judges he was allowed, becauſe the Suit here is between the King and the Patentee.

## Worthy & Liddall.

(58.)
S. C. 1 *Sid.* 433.

SAunders moved for a Prohibition to the Spiritual Court, in a Suit there, for calling the Plaintiff Whore. Twiſd. Opinions have been pro and con upon this Point. The Spiritual Court has a Juriſdiction in Caſes of Whoredom and Adultery; but if Suits there were allowed for ſuch railing Words, they would have Work enough from Billingſgate. Saunders relied upon this, That they were only Words of Heat. Kel. They are Judges of that. Saunders. In Mich. 11 Jac. Rot. 664. Cryer *verſus* Glover. in Com. B. The Suggeſtion was, That ſhe ſtruck him, and he ſaid, Thou art a Whore, and I was never ſtruck by a Whore's Hand before: There a Prohibition was granted, and I conceive the Reaſon was, becauſe there was a Provocation; ſo in our Caſe, it appears,

pears, that they were ſcolding. Accoꝛding 15 Jac. Rot. 325. Short *verſus* Cole, and 15 Car. 2. between Loveland and Gooſe. The Court refuſed to grant a Pꝛohibition.

(59.)

## Maddox.

2 *Keb.* 578. Donative. See *ante* 11, 12. & *poſt* 90. 1 *Sid.* 432.

WAllop moved foꝛ a Prohibition to the Spiritual Court foꝛ one Maddox, Incumbent of a Donative within the Diocels of Peterborough, who was cited into the Spiritual Court foꝛ marrying there without a Licence; and cited Farechild's Caſe, Yel. 60. But per Kelynge, Moreton & Rainsford, the Pꝛohibition was denied. Twiſden doubted; but ſaid, If they might puniſh him in the Eccleſiaſtical Court pro reformatione morum, at leaſt they could not depꝛive him.

*Poſt* 90.

(60.)

## *Doctor* Poordage.

S. C. 1 *Sid.* 431.

BArtue moved foꝛ a Writ of Pꝛivilege foꝛ him, he being a pꝛactiſing Phyſician in Town, and choſen Conſtable in a Pariſh. The Court ſaid, if the Office go by Houſes, he muſt make a Deputy. But upon Conſideration the Motion was refuſed; and a Difference made between an Attoꝛney oꝛ Barriſter at Law, and a Phyſician: The foꝛmer enjoy their Pꝛivilege, becauſe of their Attendance in publick Courts, and not upon the Account of any pꝛivate Buſineſs in their Chambers: And a Phyſician's Calling is a pꝛivate Calling: Wheꝛefoꝛe they would not introduce new Pꝛecedents.

(61.)

## Sir John Kirle *verſus* Oſgood.

S. C. 1 *Lev* 280. 1 *Vene.* 50. 1 *Sid.* 432. *Nelſ. Lutw.* 409. 2 *Keb.* 548, 579. 3 *Mod.* 139, 163.

AN Action foꝛ Woꝛds, viz. Sir *John Kirle* is a foreſworn Juſtice, and not fit to be a Juſtice of the Peace, to ſit upon the Bench; and ſo I will tell him to his Face. Moved in Arreſt of Judgment, becauſe to ſay a Man is foꝛſwoꝛn, is not actionable; foꝛ it may be underſtood of ſwearing in common

Diſcourſe. Jones. They are actionable, becauſe applied to his Office. Stukely's Caſe, 4 Rep. and Fleetwood's Caſe in Hob. Though a Man's Office is not named, yet if the Words do refer in themſelves, or are applied to it, they are actionable: So in our Caſe. Winnington. They are not actionable, for they admit of a Conſtruction in mitiori ſenſu: In Stukely's Caſe that has been cited; Corruption in his Office is neceſſarily implied, but not in this Caſe. Roll. 56. Kelynge. He calls him in Effect a corrupt Juſtice; and that ſupplies the Communication concerning his Office: Words muſt be conſtrued according to common Acceptation. Morton. I ſee little Difference between this and Sir John Iſam's Caſe. 1 Cro. 14. and Sir William Maſſam's Caſe. Rainsford accorded. He cited 1 Roll. 53. and 4 Rep. Stukely's Caſe. Twiſden was of the ſame Opinion: for the Words tend to diſgrace him in his Office. Judgment for the Plaintiff.

*Vide* 1 *Lev.* 52. *Style* 22, 210.

## Haſtings, *Attorney of the King's Bench.* ( 62. )

WInnington complained to the Court on the ſaid Haſtings's Behalf, that he being an Attorney of this Court, was not ſuffered to appear for his Client in the Court at Stepney. That Court, he ſaid, was erected by Letters Patents within theſe two Years; and the Attornies of this Court, being an ancient Court, ought not to be excluded. On the other Side it was urged, that they had a certain Number of Attornies appointed by their Charter, as there is at the Marſhal's Court. Kelynge. This is a new Court, and for my Part, I think our Attornies cannot be excluded. Haſtings may bring his Action. If a Patent erecting a new Court, may limit a certain Number of Attornies that ſhall practiſe there, it may as well limit a certain Number of Counſel. Coleman. They have ſo in the Marſhalſea, and in London. Kelynge. Their Courts in London are ancient, and their Cuſtoms confirmed by Acts of Parliament. The now Court of the Marſhalſea is indeed a new-created Court, (for the old Court of the Verge was another Thing) and as for their having a certain Number of Counſel or Attornies, the Queſtion is the ſame with this before us, Whether they can legally exclude others? I do not ſee how the King, by a new Patent, can ouſt any Man of his Privilege. Twiſden ſaid it was a new

Attornies Privilege. *Vide* 5 *Mod.* 310. 1 *Salk.* 1, 173. 1 *Lev.* 54. 6 *Mod.* 26, 106. *Poſt*, 118.

new Point, and that he had never heard it ſtir'd before. Afterwards being moved again, Kelynge ſaid, they ſhould have their Judgments quickly, if they ſtood upon it.

( 63. ) *Ante* 20. *pl.* 53.

Twiſden. I have known this ruled, If you ſay you will refer the Cauſe to ſuch a Man, that ex conſequente the Cauſe muſt ſtay, becauſe that Man is made Judge; and that the ſtaying of the Cauſe is implied in the Reference.

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( 64. )

## *Dominus Rex verſus* Vaws.

Preſentment.

MOved to quaſh a Preſentment for refuſing to be ſworn Conſtable of an Hundred, becauſe the Preſentment does not mention before whom the Seſſions were held, which was quaſh'd accordingly; and Twiſden ſaid, the Clerk of the Peace ought to be fined for returning ſuch a Preſentment.

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( 65. )

## Birrell & Shawe.

2 *Keb.* 517.

SCire facias againſt the Bail. The Defendant pleads, that before the Return of the Writ of Scire Facias, there was a Capias ad ſatisfaciend. againſt the Principal, by Vertue whereof he was taken, and paid the Money; but alledges no Place where the Payment was. Twiſden. You cannot make good this Fault.

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( 66. ) S. C. 1 *Sid.* 433. 2 *Danv.* 451. Maihem.

## * Dodwell & Ux' *verſus* Burford.

*Cro. Car.* 192. 11 *Co.* 5. *Cro. Jac.* 350. 1 *Roll. Rep.* 30.

THE Plaintiffs, in an Action of Battery, declared, that the Defendant ſtruck the Horſe whereon the Wife rode, ſo that the Horſe ran away with her, whereby ſhe was thrown down, and another Horſe ran over her, whereby ſhe loſt the Uſe of two of her Fingers. The Jury had given them 48 l. Damages, and they moved the Court upon View of the Maihem, to increaſe them; whereupon the Declaration was read: But the Court thought the Damages given by the Jury ſufficient.

## Smith *verſus* Bowin. (67.)

ACtion upon a Promiſe. The Plaintiff declares, That the Defendant, in Conſideration that the Plaintiff would ſuffer him to take away ſo much of the Plaintiff's Graſs, which the Defendant had cut down, promiſed to pay him ſo much for it, and alſo to pay him ſix Pounds which he owed him for a Debt. After a Verdict for the Plaintiff, Williams moved in Arreſt of Judgment, That the Plaintiff was an Infant, and he not being bound by the Agreement, that the Defendant ought not to be bound by it neither. Kelynge. If an Infant let you a Houſe, ſhall he not have an Action againſt you for the Rent? Twiſd. I have known an Action upon the Caſe brought by an Infant upon a Promiſe to pay ſo much Money, in Conſideration that he would permit the Defendant to enjoy ſuch a Houſe: It was long inſiſted upon, That this was not a good Conſideration, becauſe not reciprocal; for the Infant might avoid his Promiſe, if an Action were grounded upon it againſt him: But it was adjudged to be a good Conſideration, and that the Action was maintainable. And in the principal Caſe the Court gave Judgment for the Plaintiff, Niſi, &c.

*Quære* 2 *Dan.* 770. *pl.* 2. Infant. *Vid.* 1 *Rol. Ab.* 729. & *per totum. poſt* 137. 1 *Jon.* 157, 405, 406. *Cro. Car.* 502. *Co. Lit.* 308. *Godb.* 364. *Noy* 92, 130. 4 *Leon.* 4.

See 2 *Danv.* 266. *pl.* 3. That an Infant, Maſter of a Ship, is liable in the Admiralty.

## Bear *verſus* Bennett. (68.)

TWiſden. When a Man is arreſted, and has lain in Priſon three Terms, and is diſcharged upon Common Bail, whether ſhall the Plaintiff ever hold the Defendant to ſpecial Bail afterward for the ſame Cauſe, if he begins anew? Kel. If he may, then may a Man be kept in Priſon forever at that rate. At laſt it was agreed, That if he would pay the Defendant his Coſts for lying ſo long in Priſon, he ſhould have ſpecial Bail.

(69.)

Mr. Maſters moved for a Prohibition to the Spiritual Court to ſtay a Suit there againſt a Man, for having married his Wife's Siſter's Daughter, alledging the Marriage to be out of the Levitical Degrees. Cur. Take a Prohibition, and demur to it; for it is a Caſe of Moment.

See 2 *Lev.* 254. *Ray.* 464. 3 *Lev.* 364. 2 *Jon.* 118. 2 *Vent.* 9. *Vaug.* 206, 302, &c.

(70.) Dominus Rex *verſus* Turnith.

Indictment on 5 *Eliz.* See 1 *Salk.* 370, 373.

MOved to quaſh an Indictment upon 5 Eliz. cap. 2. for exerciſing a Trade in Cheſthunt in Hertfordſhire, not having been an Apprentice to it for ſeven Years; becauſe the Statute ſays, they ſhall proceed at the Quarter-Seſſions, and the Word Quarter is not in the Indictment. Twiſden. That Word ought to be in. And I believe the uſing of a Trade in a Country-Village, as this is, is not within the Statute. Moreton accorded. Rainsford. It will be very prejudicial to Corporations not to extend the Statute to Villages. Twiſden. I have heard all the Judges ſay, That they will never extend that Statute further then they needs muſt. Obj. Further, That there wanted theſe Words, ſc. Adtunc & ibidem onerati & jurati, for which all the three Judges, Kelynge being abſent, conceived it ought to be quaſh'd.

(71.) S.C. 2 *Danv.* 422. *London* Cuſtoms.

A Cauſe was removed out of London by Habeas Corpus, wherein the Plaintiff had declared againſt the Defendant as a Feme-ſole, Merchant; and Barrue moved for a Procedendo, becauſe (he ſaid) they could not declare againſt her here as a Feme ſole, for that ſhe had a Husband. Jones contra. The Husband may then be joined with her, for he is not beyond Sea. Twiſd. I think a Procedendo muſt be granted for the Cauſe alledged. It was reſolved in Langlin & Brewin's Caſe, in Cro. (though not reported by him) That if the Wife uſe the ſame Trade that her Husband does, ſhe is not within the Cuſtom. And they are to determine the Matter there, Whether this Caſe be within their Cuſtom? Perhaps a Victualler (as this Trade is) is not ſuch a Trade as their Cuſtom will warrant: And whether it will warrant it or not, is in their Judgment. A Procedendo was granted.

*Vide Lit. R.* 31, 32. *Hetl.* 9. 2 *Brownl.* 219. 1 *Cro.* 68, 69.

## Tomlin *verſus* Fuller.

( 72. )

A Special Action on the Caſe was brought for keeping a Paſſage ſtopt up, ſo that the Plaintiff could not come to cleanſe his Gutter. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That there ought to have been a Requeſt for the opening of it. Anſw. It is true, where the Nuſance is not by the Party himſelf, there muſt be Notice before the Action brought; but in this Caſe, the Wrong began in the Defendant's own Time. Twiſden. I know this hath been ruled: Where a Man made a Leaſe of a Houſe, with free Liberty of Ingreſs, &c. through Part of the Leſſor's Houſe, the Leſſor notwithſtanding might ſhut up his Doors, and was not bound to leave them open for his coming in at One or Two of the Clock at Night, but he muſt keep good Hours. And muſt the Defendant in this Caſe keep his Gate always open expecting him? Wherefore it ſeems he ought to have laid a Requeſt. Cur. It is aided by the Verdict. Twiſden. It is not good at the Common Law; and the Defendant might well have demurred for that Cauſe. Judgment pro Querente.

Requeſt, &c. *Vide* 1 *Lev.* 289. 2 *Salk.* 457, 585. 6 *Mod.* 200, 260. *Nelſ. Lutw.* 90, 66, 114, 115, 117, 135. 5 *Co.* 101. a. 1 *Cro.* 395, 396. 2 *Cro.* 652, 653.

## Butler & Play.

( 73. )

Upon a Motion for a new Trial in a Cauſe, where the Matter was upon proteſting a Bill of Exchange: Serjeant Maynard ſaid, The Proteſt muſt be on the Day that the Money becomes due. Twiſden. It hath been ruled, That if a Bill be denied to be paid, it muſt be proteſted in a reaſonable Time, and that is within a Fortnight; but the Debt is not loſt by not doing it on the Day. A new Trial was denied.

Bill of Exchange proteſted.

New Trial denied.

*Vide* 2 *Salk.* 644, 648, 653. 1 *Lev.* 9, 41, 97, 124.

( 74. ) Hughes & Underwood.

*Superſedeas. Vide Poſt*, 45, 106, 112, 285.

KElynge. The very Sealing of the Writ of Error is a Superſedeas to the Execution. Twiſden. There was once a Writ of Error to remove the Record of a Judgment between ſuch and ſuch; but ſome of the Parties Names were left out: And by my Brother Wylde's Advice, that Writ not removing the Record, they took out Execution. But the Court was of Opinion, That tho' the Record was not removed thereby (of which yet, they ſaid, he was not Judge, whether it was, or not) yet, that it ſo bound up the Cauſe, that they could not take out Execution. It is indeed good Cauſe to quaſh the Writ of Error, when it comes up; but Execution cannot be taken out.

*Yelv.* 6.

*Poſt*, 195.

Term.

# Term. Hill. 21 & 22 Car. II. 1669. in BR.

## Jefferſon & Dawſon.

( 75 )

S. C. 2 *Keb.* 587, *&c.* 1 *Sid.* 436. 2 *Saund.* 23, 27. 1 *Lev.* 283. 1 *Danv.* 776. 1 *Roll.* 436.

IN a Scire Facias upon a Recognizance in Chancery entered into by one Garraway, there was a Demurrer to Part, and Iſſue upon Part. And the Queſtion was, Whether this Court could give Judgment upon the Demurrer? Jones. The Judgment upon the Demurrer muſt be given in Chancery. The Court of Chancery cannot try an Iſſue, and therefore it is ſent hither to be tried; but with the Demurrer this Court has nothing to do. Indeed, the Books differ in caſe of an Iſſue ſent hither out of Chancery, Whether the Judgment ſhall be here or there? Keilway ſays, it ought to be given here. My Lord Coke, in his 4 Inſt. ſays, it muſt be given in Chancery. But none ever made it a Queſtion, Whether Judgment upon a Demurrer were to be given here or there? Vide Coke's Juriſdiction of Courts, Fol. 80. Saunders contra. When there is a Demurrer upon Part, and Iſſue upon Part, the Record being here, this Court ought to give Judgment; becauſe there can be but one Execution. Kelynge. If the Record come hither entirely, we cannot ſend it back again: I cannot find any Authority that the Record ſhall be removed from hence. He cited Keilway 94. 21 H. 7. Co. 2. 12. Coke's Entries, 678. 2 *Co.* 12. 24 Ed. 3. Fol. 65. there it is held, That Judgment ſhall be given here upon a Demurrer. Now if it muſt not be given here, there muſt be two Executions for the ſame Thing, or elſe they muſt loſe half, for they can have but one Elegit. At another Day the Judges gave their Opinions ſeverally, that Judgment ought to be given in this Court upon the whole Record; for that it is an entire Record, and the Execution one: And if Judgment were to be given there upon the Demurrer, there muſt be two Executions. And becauſe the Record ſhall not be remanded. Twiſden ſaid, the Record it ſelf was here; and that it had been ſo adjudged in King and Holland's Caſe, and in Dawkes and Barter's Caſe: Though

my Lord Chief Baron, being then at the Bar, urged strongly, That it was but the Tenor of the Record that was sent hither. And it is a Maxim in Law, That if a Record be here once, it never goes out again; for that here it is coram ipso Rege: So that if we do not give Judgment here, there will be a Failure of Justice, because we cannot send the Record back. The Jury that tries the Issue must assess the Damages upon the Demurrer. The Record must not be split in this Case. Accordingly Judgment was given here.

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## Willbraham & Snow.

(76.)
S. C. 1 *Lev.* 282.
1 *Vent.* 52.
1 *Sid.* 438.
2 *Saund.* 47, 345, 438.
1 *Danv.* 20. *pl.* 4. 5.
2 *Keb.* 588.

TRover and Conversion. Upon Issue Not guilty, the Jury find a Special Verdict, viz. That one Talbot recovered in an Action of Debt against one Wimb, and had a Fieri Facias directed to the Sheriff of Chester, whereupon he took the Goods into his Possession, and that being in his Possession, the Defendant took them away, and converted them, &c. and the sole Point was, Whether the Possession, which the Sheriff has of Goods by him levied upon an Execution, is sufficient to enable him to bring an Action of Trover? Winnington. I conceive the Action does not lie. An Action of Trover and Conversion is an Action in the Right, and two Things are to be proved in it, viz. a Property in the Plaintiff, and a Conversion in the Defendant. I confess, That in some Cases, though the Plaintiff have not the absolute Property of the Goods, yet as to the Defendant's being a Wrongdoer, he may have a sufficient Property to maintain the Action against him. But I hold, That in this Case the Property is not at all altered by the Seizure of the Goods upon a Fieri Facias, (for that he cited Dyer, 98, 99. and Yelvert. 44.) This Case is something like that of Commissioners of Bankrupts: They have Power to sell, and grant, and assign; but they cannot bring an Action: Their Assignees must bring all Actions. It is true, a Sheriff in this Case may bring an Action of Trespass, because he has Possession; but Trover is grounded upon the Right, and there must be a Property in the Plaintiff to support that; whereas the Sheriff takes the Goods by Vertue of a nude Authority: As when a Man deviseth, That his Executors shall sell his Land, they have but a nude Authority. Curia. The Sheriff may well

*Vide* 2 *Mod.* 245.
2 *Salk.* 655.
6 *Mod.* 212, 291.
*Moor.* 757.

have an Action of Trover in this Case. As for the Case in Yelv. 44. there the Sheriff seiz'd upon a Fieri facias, then his Office determined; then he sold the Goods, and the Defendant brought Trover. And it was holden, That the Property was in the Defendant, by Reason of the determining of the Sheriff's Office: And because a new Fieri facias must be taken out; for that a Venditioni exponas cannot issue to the new Sheriff. They compared this Case to that of a Carrier, who is accountable for the Goods that he receives, and may have Trover or Trespass at his Election. Twisden said, The Commissioners of Bankrupts might have an Action of Trover, if they did actually seize any Goods of the Bankrupts, as they might by Law. Rainsford said, Let the Property, after the Seizure of Goods upon an Execution, remain in the Defendant, or be transferred to the Plaintiff, since the Sheriff is answerable for them, and comes to the Possession of them by Law, it is reasonable that he should have an ample Remedy to recover Damages for the taking of them from him, as a Carrier has, that comes to the Possession of Goods by the Delivery of the Party. Morton said, If Goods are taken into the Custody of a Sheriff, and the Defendant afterward become Bankrupt, the Statute of Bankrupts shall not reach them; which proves the Property not to be in the Defendant. Twisd. I know it hath been urged several Times at the Assizes, That a Sheriff ought to have Trespass, and not Trover; and Counsel have pressed hard for a special Verdict. Morton. My Lord Chief Justice Brampston said, He would never deny a special Verdict while he lived, if Counsel did desire it.

*Moor.* 745.

*2 Cro.* 73.

*1 Rol.* 491.

## Gavell & Perked.

(77)

S. C. 1 *Sid.* 241. 2 *Keb.* 589.

Action for Words, viz. You are a Pimp and a Bawd, and fetch young Gentlewomen to young Gentlemen. Upon Issue Not guilty, there was a special Verdict found. Jones. The Declaration says further, whereby her Husband did conceive an evil Opinion of her, and refused to cohabit with her. But the Jury not having found any such special Damage, the Question is, Whether the Words in themselves are actionable, without any Relation had to the Damage alledged. I confess,

That

1 *Rol.* 44. *pl.* 9. 1 *Cro.* 229. That to call one Bawd is not actionable: For that is a Term of Reproach used in scolding, and does not imply any Act, whereof the Temporal Courts take Notice; for one may be said to be a Bawd to her self. But where one is said to be a Bawd in such Actions as these, it is actionable: 27 H. 8. 14. If one say, that another holds Bawdry, it is actionable: 1 Cro. 329. Thou keepest a Whore in thy House to pull out my Throat: These Words have been adjudged to be actionable: For that they express an Act done; and so are special, and not general railing Words. 1 *Cro.* 261. In Dimock's Case, 1 Cro. 393. Two Justices were of Opinion, That the Word Pimp was actionable of it self. But I do not relie upon that, or the Word Bawd; but taking the Words all together, they explain one another: The latter Words show the Meaning of the former, viz. That her Pimping and Bawdry consisted in bringing young Men and Women together, and what she brought them together for, is sufficiently expressed in the Words Pimp and Bawd, viz. That she brought them together to be naught. And that is such a Slander, as, if it be true, she may be indicted for it, and is punishable at the Common Law. The Court was of the same Opinion, and gave Judgment for the Plaintiff. Nisi, &c.

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(78.)

## Healy & Warde.

Jurisdiction. See *post* 63, 64. 1 *Lev.* 50, 69, 96, 153, 156, &c. 3 *Lev.* 243. 1 *Saund.* 74. 2 *Mod.* 30, 141, 197. 2 *Lev.* 87. 6 *Mod.* 224. 2 *Show.* Case. 430. 1 *Vent.* 28, 72.

Error of a Judgment in Hull. Weston. The Action is brought upon a Promise, cum inde requisitus foret: And does not say, cum inde requisitus foret infra Jurisdictionem. Twisd. Though the Agreement be general, cum inde requisitus foret, yet if he does request within the Jurisdiction, it is good enough; and so it has been ruled: And this Error was disallowed.

## Boſwill & Coats. (79.)

TWO ſeveral Legacies are given by Will to Alice Coats and John Coats; the Executors depoſite theſe Legacies in a third Perſon's Hand for them: And take a Bond of that third Perſon, conditioned, That if the Obligor, at the Requeſt of ſhall bring in *Alice* and *John Coats*, when they ſhall come to their Ages of twenty-one Years, to give ſuch a Releaſe to the Executors of *Francis Gibbs* as they ſhall require, then, &c. One of the Legatees comes of Age, and during the Minority of the other, the Bond is put in Suit; and this whole Matter is diſcloſed in the Pleading. And the Queſtion was, Whether the Defendant was obliged to bring him in, to give a Releaſe, that was of Age before the Action brought, or might ſtay till both were of Age, before he procured a Releaſe from either? The Court was of Opinion, That it muſt be taken reſpectively, and becauſe it appears, that the Legacies were ſeveral, that ſeveral Releaſes ought to be given, upon the Reaſon of Juſtice Wyndham's Caſe, 5th Rep. And Twiſden ſaid, if there were no more in it than this, ſc. When they ſhall come to their Ages of, &c, it were enough to have the Condition underſtood reſpectively: For they cannot come to their Ages at one and the ſame Time. And Judgment was given accordingly.

1 *Saund.* 184. 2 *Cro.* 295.

(80.) Twiſden. If an Executor plead ſeveral Judgments, you may reply to every one of them, obtent. per fraudem; or you may plead ſeparalia Judicia, &c. obtent. per fraudem; but in pleading ſeparalia Judicia obtent. per fraudem, if one be found to be a true Debt, you are gone.

2 *Saund.* 48, 49. 2 *Keb.* 591.

(81.) Kelynge and Twiſden. Notwithſtanding the Stat. of 23 H. 6. which obliges the Sheriff to take Bail, yet he can make no other Return of a Capias then either Cepi corpus, or Non eſt inventus: For at the Common Law he could return nothing elſe, and the Statute, though it compels him to take Bail, does not alter the Return: And ſo in a Caſe between Franklin and Andrews, it has been adjudged here.

2 *Saund.* 59. 2 *Keb.* 521, 607. *poſt* 57. *pl.* 1.

( 82 ) **Crofton.**

1 *Sid* 432. 2 *Keb.* 595.

OFfley moved for a Certiorari to the Juſtices of the Peace for Middleſex, to remove an Indictment againſt one Crofton, upon the late Statute made againſt Nonconformiſt Miniſters, coming within five Miles of a Corporation: The Indictment was traverſed. He urged, That by the Statute no Indictment will lie for ſuch Offence; For where an Act of Parliament enacts, That the Penalty ſhall be recovered by Bill, Plaint, or Information, (as the Statute upon which this Indictment is grounded, does) there an Indictment will not lie: 2 Cro. 643. Twiſd. If the Statute appoint, That the Penalty ſhall be recovered by Bill, Plaint, &c. and not otherwiſe, there (I confeſs) an Indictment will not lie; but without negative Words I conceive it will, though the Statute be introductive of a new Law, and create an Offence, which was none at the Common Law. For whenever a Thing is prohibited by a Statute, if it be a publick Concern, an Indictment lies upon it: And the giving other Remedies, as by Bill, Plaint, &c. in affirmative Words, ſhall not take away the general Way of Proceeding which the Law appoints for all Offences. Kelynge differed in Opinion, and thought, That where a Statute created a new Offence, and appointed other Remedies, there could be no Proceeding by way of Indictment. Afterward Offley moved it again, and cited 2 Cro. 643. 3 Cro. 544. Mag. Chart. 201 and 228. Upon the ſecond Motion, Kelynge came over to Twiſden's Opinion. But it was objected, That upon an Indictment the Poor of the Pariſh would loſe their Part of the Penalty: To which Twiſden ſaid, That he knew it to have been adjudged otherwiſe at Serjeants-Inn, and that where a Statute appoints the Penalty to be divided into three Parts, one to the Informer, another to the King, and the third to the Poor; that in ſuch Caſe, where there is no Informer, as upon an Indictment, there the King ſhall have two Parts, and the Poor a third.

7 *Co* 36. 11 *Co.* 88. 1 *Rol.* 106. *pl.* 16, 17.

10 *Co* 75. 2 *Inſt.* 163. 2 *Cro.* 577.

## *The* King *verſus* Baker.

( 83. )

Slander.

AN Indiãment in Hull for ſaying theſe Words, viz. That whenever a Burgeſs of *Hull* comes to put on his Gown, Satan enters into him. Levinz moved, That theſe Words would not bear an Indiãment. Kelynge. The Words are a Scandal to Government. Levinz. The Indiãment concludes, in malum exemplum inhabitantium, whereas it ſhould be, quamplurimorum ſubditorum Domini Regis in tali caſu delinquentium. And for this adjudged naught.

( 84. )

*Poſt*, 118. *pl.* 18.

Twiſden. If the Defendant in an Aãion of Debt for Rent plead Nil debet, he may give in Evidence a Suſpenſion of the Rent.

( 85. )

*Stat.* 2 *E.* 6. *cap.* 13. *Yelv.* 128, 129. 2 *Keb.* 596. 2 *Mod.* 77. 2 *Danv.* 585. *pl.* 5.

A Parſon libels in the Spiritual Court againſt ſeveral of his Pariſhioners for Tithe-Turf. They pray a Prohibition. Kelynge. Turf, Gravel and Chalk, are Part of the Freehold, and not tithable. They granted one Prohibition to all the Libels, but ordered the Plaintiffs to declare ſeverally.

## Maleverer *verſus* Redſhaw.

( 86. )

S. C. 1 *Vent.* 39. 2 *Saund.* 78, 79. 1 *Sid.* 456. 2 *Keb.* 536, 596, 625. Sheriffs Bond, void. *Vide* 2 *Saund.* 78. 2 *Danv.* 24, 25. *Hob.* 14.

DEbt upon a Bond of 40l. the Condition was, For appearing at a certain Day; and concluded, If the Party appeared, then the Condition to be void. The Defendant pleaded the Statute of 23 H. 6. Coleman The Bond is void by the expreſs Words of the Statute, being taken in other Form than the Statute preſcribes. Kelynge. If the Condition of a Bond be, That if the Obligor pay ſo much Money, then the Condition to be void, in that Caſe the Bond is abſolute. Twiſden. I have heard my Lord Hobart ſay upon this Occaſion, That becauſe the Statute would make ſure Work, and not leave it to Expoſition what Bonds ſhould be taken, therefore it was added, That Bonds taken in any other Form ſhould be void. For, ſaid he, the Statute is like a Tyrant, where he comes, he makes all void; but the Common Law is like a nurſing Father, makes void only that

Part where the Fault is, and preſerves the reſt. Kelynge. If the Condition had been, That the Party ſhould appear, and had gone no further, it would then have been well enough. Twiſden. Then why may not that which follows be rejected, as idle, and Surpluſage? Cur. adviſare vult.

*Vide* 2 *Danv.* 24, 25. 2 *Saund.* 78.

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( 87. ) Jones *verſus* Treſilian.

S. C. 1 *Lev.* 282. 1 *Sid.* 441. 2 *Kel.* 597. *Vide* 2 *Rol. Ab.* 548, 549. *Nelſ. Lutw.* 287, 470, 481.

AN Action of Treſpaſs of Aſſault and Battery. Defendant pleads, De ſon aſſault demeſne. The Plaintiff replies, That the Defendant would have forced his Houſe from him, whereby he did molliter inſultum facere upon the Defendant, in Defence of his Poſſeſſion. To this the Defendant demurred. Morton. Molliter inſultum facere is a Contradiction. Suppoſe you had ſaid, that molliter you ſtruck him down. Twiſden. You cannot juſtify the beating of a Man in Defence of your Poſſeſſion, but you may ſay, That you did molliter manus imponere, &c. Kelynge. You ought to have replied, That you did molliter manus imponere, quæ eſt eadem tranſgreſſio. Cur. Quer. nil capiat per billam, unleſs better Cauſe be ſhown this Term.

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( 88. ) Rich & Morris.

Arbitrament. 1 *Lev.* 292. 2 *Keb.* 623, 659.

IN an Action of Debt for not performing an Award. The Plaintiff declares, That inter alia Arbitrarium fuit, &c. Twiſden. That is naught.

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( 89. ) ------ & Criſp *verſus the Mayor of* Berwick.

1 *Lev.* 252.

AN Action of Covenant is brought againſt the Mayor, Burgeſſes, and Corporation of Berwick, upon an Indenture of Demiſe; wherein the Plaintiffs declare, That the Defendants did demiſe to them a Houſe in Berwick, with a Covenant, That the Plaintiffs ſhould enjoy the ſame without Interruption by them, or any other Perſon or Perſons whatſoever;

ſoever; and alledge, That a Stranger claiming a Title, did make an Entry upon them, and kept them out of Poſſeſſion. To this the Defendants plead a local Plea; to wit, That the ſaid Stranger did not enter upon the Plaintiffs, &c. upon which Iſſue is joined. Then do the Plaintiffs make a Suggeſtion, and pray a Venire Facias into the next County. Upon which there is a Trial. Jones conceived this to be a Miſtrial, and that the Venire ought to have been de vicineto of the Caſtle of York, where the Covenant is alledged to have been made: Firſt, This Fault is not aided by any of the Statutes of Jeofails; not by the laſt and greateſt of all: That aids where the Venire Facias is awarded from another Place than it ought to be, but not when awarded from another County; which is my Exception. That at the Common Law this Venire Facias is not well awarded, I rely upon Dowdale's Caſe, Rep. 6. If an Action be brought upon a Matter done out of the Kingdom, the Trial will be where the Action is laid. In our Caſe the Action is grounded upon an Indenture, ſuppoſed to be made within the County of York: But Iſſue is joined upon a Matter done out of the Kingdom; for ſo Berwick is. This Iſſue, I conceive, ought to be tried where the Action is laid. It is true, in the Caſe of Wales, the Law is otherwiſe; for I find, That Wales is Parcel of the Realm of England, though the King's Writs do not run there. But Berwick is Part of the Realm of Scotland, and was conquered by King Edward IV. and Acts of Parliament name Berwick. When Calais was in Poſſeſſion of the Kings of England, and a Matter ariſing within Calais came in Iſſue, was ever any Venire Facias awarded to Dover? Twiſden. There are two Precedents of ſuch Trials; one in 12 Eliz. Rot. 630. and in 2 Roll. 97. I have asked my Brother Withrington, who was a knowing Man, how it came to paſs, That Berwick was put into Acts of Parliament? He ſaid, he knew no other Reaſon, than that the Recorder of Berwick was at firſt in Parliament, and deſired it, and therefore it hath continued ever ſince. Mr. Weſton ſaid, That 3 Cro. 465. was an Authority. In this Caſe it happen'd, That during the Cur. adviſare vult, one of the Plaintiffs died; and the Queſtion was, What ſhould be done? Twiſden. There is a Caſe in Latch, wherein this Difference is taken, viz. If there be no Continuance entred, you may enter the Judgment as at the Day in Bank: But if Continuances are entred, then

1 *Saund.* 247. *Poſt*, 199.

6 *Co.* 46.

*Vide Vaugh.* 395, to 420. 2 *Saund.* 193. 2 *Mod.* 10. *Raym.* 206. 1 *Lev.* 291. *Poſt*, 68, & 64. *pl.* 10.

then you cannot go back, but muſt enter the Judgment to the Time of the Continuances. It was put off for Counſel to be heard in it.

## Smith & Wheeler, *pl.* 16.

( 90. )
S. C. *Ante* 16.
1 *Vent.* 128.
1 *Lev.* 279.
2 *Keb.* 564, 608, *&c.*
2 *Inſt.* 216.

IN this Caſe Serjeant Maynard was about to argue, That the Reſidue of the Term was not forfeited to the King. Kelynge. Brother Maynard, you would do well to be adviſed, Whether or no, you, being of the King's Counſel, ought to argue in this Caſe againſt the King? Maynard anſwered, That the King's Counſel would have but little to do, if they ſhould be excluded in ſuch Caſes: And that Serjeant Crew argued Haviland's Caſe, in which there was the like Queſtion. Twiſden. In Stone and Newman's Caſe, I know the King's Counſel did argue againſt Eſtates coming to the Crown: But if my Lord thinks it not proper, my Brother Maynard may give his Argument to ſome Gentleman at the Bar to deliver for him. Afterwards, Term. Paſch. 22 Car. 2. 1670. the Caſe came to be argued again. Jones argued for the Plaintiff in the Writ of Error: 1. Whether this Settlement be fraudulent or no? That Fraud is not to be preſumed, he cited the Chancellor of Oxford's Caſe, Rep. 10. and 1 Cro. 549, 550. But for the ſecond Point, he held, That here is a Truſt forfeitable to the King. He quoted Sir John Duncomb's Caſe, 2 Cro. That the Truſt in this Caſe is forfeited, he proved from the Nature of a Truſt, which is an equitable Intereſt, or a Right of Perception of the Profits of an Eſtate: The Ceſtuy que Truſt hath jus habendi & jus diſponendi. And though he that hath a Truſt, hath in Law neither jus in re, nor jus ad rem, yet in Equity he hath both: In Equity, whatever I have a Right to diſpoſe of, I have a Right to take the Profits of. For if a Man makes a Conveyance to the Uſe of one and his Heirs, in Truſt, that he ſhall convey over, tho' it is not expreſt that he ſhall take the Profits, yet he ſhall take them. Now in the ſecond Proviſo there is a double Expreſſion, one that amounts to a Revocation, the other amounting to a Diſpoſition or Limitation. Now he that hath a Power of Diſpoſition, hath a Right that may be forfeited. And therefore the Duke of Norfolk's Caſe comes not to this, for we are not in the Power of

9 Co. 121. a. b.

Revoca-

Revocation: I decline that, but we are in a Power of Diſpoſition. Now this is good by way of Truſt: In Law indeed ſuch a Proviſo is naught, but in a Truſt the Intention of the Parties carries it. I obſerve in Forfeitures at the Common Law, where a Man hath only jus diſponendi, though he hath no Eſtate, yet he may forfeit it: Plo. Com. 260. A Man is poſſeſt of a Term in the Right of his Wife, though he hath no Eſtate himſelf, yet he may forfeit it: And the Reaſon is, becauſe he hath jus diſponendi. If a Man might by ſuch a Diſpoſition as this protect his Eſtate from being forfeited, little Land would come to the Crown upon Attainders. There are two Badges of Ownerſhip: The one is a Perception of the Profits, the other a Power of diſpoſing: Both which are in our Caſe: And a favourable Conſtruction ought not to be put upon a Deed for Encouragement of Traitors. Winnington contra. As for the firſt Point, the Fraud ought to be found: And this Leaſe was made long before the Attainder, or the Treaſon committed. For the ſecond Point, the Queſtion will be, What our Law calls a Truſt? Then I ſhall examine Whether there was ſuch a Thing in Mayne at the Time of his Deceaſe? A Truſt I find to be a Confidence repoſed in the Perſon, that another ſhall take the Profits, and that the Truſtee ſhall convey according to his Directions: This I gather from theſe Books, viz. Plowd. 352. Delamere's Caſe, 1 Rep. 121, 122. Co. Lit. 272. Now if theſe two Qualities, or either, ſhall fail in this Caſe, then Simon Mayne had no Truſt to forfeit: For that the Caſe will depend upon the true ſtating the Words of the Deed. For the firſt Proviſo, it doth not cohere with any of theſe Qualities: For by Virtue of that Proviſo he could not be ſaid to have any Right: He hath no jus diſponendi, but upon Contigencies. If he hath no Children, he hath no ſuch Power; nay, if he have Children, they muſt be living at his Death. Further, by theſe Proviſoes, if the Contingencies do happen, he hath but a Power to declare the Uſes; he hath no Intereſt in him at all: Litt. Sect. 463. It is one Thing to have a Power or Poſſibility of limiting an Intereſt, another to have an Intereſt veſted. 7 Rep. 11. and Moor's Rep. 366. about the Delivery of a Ring; where they hold, That if it had been to have been done with his own Hand, it had not been forfeited. The Caſe of Sir Edward Clere is different from ours: For if a Man make a Feoffment to the Uſe of his laſt Will, or to the Uſe of ſuch Perſons as ſhall be appointed by

his

his laſt Will; in this Caſe he remains a perfect Owner of the Land. But if a Man makes a Conveyance, reſerving a Power to make Leaſes, or to make an Eſtate to pay Debts, he hath here no Intereſt, but a naked Power. The Duke of Norfolk's Caſe is full in the Point: A Conveyance to the Uſe of himſelf for Life, the Remainder to his Son in Tail, with Power to revoke under Hand and Seal: Adjudged not forfeited: And yet he had a Power to declare his Mind, as in our Caſe. Pagett's Caſe, Moor 193, 194. Kelynge. If this Way be taken, a Man may commit Treaſon pretty cheaply. Twiſden. Whoever hath a Power of Revocation, hath a Power of Limitation. The Reaſon is, becauſe elſe the Feoffees would be ſeized to their own Uſe. Sir William Shelly's Caſe in Latch. Twiſden. There is no Difference betwixt the Duke of Norfolk's Caſe and this; only here it is under his Hand writing, and there under his proper Hand-writing.

7 Co. 13. a.

Afterward Term. Paſch. 23 Car. 2. 1671. the Court delivered their Opinions (Hale being then Chief Juſtice.) Morton. I conceive the Judgment in the Common-Pleas is well given: As for the firſt Point, Whether this Conveyance made by Sir Simon Mayne be fraudulent or not, the Counſel themſelves have declined it; and therefore I ſhall ſay nothing to it: For the ſecond, I conceive no larger Intereſt is forfeited than during the Life of the Father. If it be objected, That the Father had by this Proviſo jus diſponendi; I anſwer, It is true, he had a Power, if he had been minded ſo to do, but it was not his Mind and Will: Now animus hominis eſt ipſe homo; but he muſt not only be minded ſo to do, but he muſt declare his Pleaſure. Hobart ſaith, If a Man will create a Power to himſelf, and impoſe a Condition or Qualification for the Execution of it, it muſt be obſerved. Now here is a perſonal and individual Power, ſeated in the Heart of a Man. And it ſeems to me a ſtronger Caſe than that of the Duke of Norfolk, put in Engleſield's Caſe, where yet the Condition was not given to the King by the Statute of Hen. 8. There was a later Caſe adjudged in Latch, between Warner and Hynde: A Caſe that walked through all the Courts in Weſtminſter-Hall: There by Reaſon of the ipſo declarante, it could not be forfeited. Rainsford. I hold it is not forfeited. My Reaſon is, becauſe the Proviſo is at an End and determined; for when he died and no Will, there's an End of the

Proviſo. The altering of the old Truſt is to be done by Sir Simon Mayne, and it is inſeparable from his Perſon: Nothing can be more inſeparable than a Man's Will. Moore 193. Twiſd. I am of the ſame Opinion. Hale was of the ſame Opinion: That Nothing was forfeited but during Sir Simon's Life. The Proviſo, he ſaid, did not create a Truſt, but poteſtatem diſponendi, which is not a Truſt. He ſaid he did not underſtand the Difference between the Duke of Norfolk's Caſe and this. Accordingly the Judgment was affirm'd.

(91.) Diſcontinuance of Suits.

In a Cauſe wherein one Aſton was Attorney, Kelynge ſaid, That a Man may diſcontinue his Action here before an Action brought in the Common Pleas: But if he do begin there, and then they plead another Action depending here, and then they diſcontinue, I take it the Attorney ought to be committed for this Practice. Twiſden. When I was at the Bar, Error was brought, and Infancy aſſigned, when the Man was thirty Years old: And the Attorney was threatned to be turned out of the Roll.

1 *Sid.* 84, 306. 1 *Lev.* 227. 298. 2 *Lev.* 118, 194. 1 *Saund.* 23. 2 *Saund* 74. *Ante* 13. 2 *Danv.* 156. *Nelſ. Lut.* 91.

(92.) *Certiorari.*

Serjeant Newdigate moved for a Certiorari to remove an Indictment hither from Bedford, againſt ſeveral French-Men for Robbery. Kelynge. Will it remove the Recognizances there to appear? Twiſden. I never knew ſuch a Motion made by any but the King's Attorney or Solicitor. Rainsford. There is no Indictment yet before a Judge of Aſſiſe. Kelynge. You may have a Certiorari; but it muſt not be delivered till the Indictment be found; and then the Judge hath the Proſecutors there, and may bind them over hither, and ſo the Trial may be here.

1 *Vent.* 63.

(93.) View. See the Stat. 4 & 5 *Annæ, cap.* 16. *Sect.* 9.

Kel. A Jury was never ordered to a View before their Appearance, unleſs in an Aſſiſe. Twiſd. Neither ſhall you have it here but by Conſent.

(94.) **Nosworthy *versus* Wyldeman.**

2 *Keb.* 615. THE Plaintiff declares in an Indeb. Assumpsit, That the Defendant was indebted to him in 50 l. for so much Money received of the Plaintiff by one Thomas Buckner, by the Appointment and to the Use of the Defendant. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff could not have an Action for Money received
2 *Cro.* 690. by the Defendant to the Use of the Defendant. But because it might be Money lent, which the Defendant received to his own Use, though he was to make good the Value to the Plaintiff, the Court will presume after a Verdict, that it appeared
1 *Rol.* 111. *pl.* 4. so to the Jury at the Trial. For where a Declaration will bear two Constructions, and one will make it good, and the other bad, the Court after a Verdict will take it in the better Sense. And accordingly the Plaintiff had Judgment.

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(95.) **Williams *versus* Lee.**

Account. *post* 65. See Stat. *West.* 2. *c.* 11. 2 *Inst.* 380. 1 *Brownl.* 24, 25. 1 *Danv.* 231. AN Action of Account. It was prayed, That the Court would give further Day for giving the Account; the Matter being referred to Auditors. Twisden. The Auditors themselves must give further Day. Kelynge. The Auditors are Judges whether there be a voluntary Delay or not. If they find the Parties remiss and negligent, they must certifie to the Court, That they will not account.

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(96.) **Roberts & Mariott.**

S. C. 1 *Lev.* 300. 2 *Saund.* 73, 188. 2 *Keb.* 618. *post* 289. *&c. ibid.* See 1 *Lev.* 133. MOved to discontinue an Action of Debt upon a Bond. Kelynge. We will not favour Conditions. Ruled, That the other Side should shew Cause why they should not discontinue.

## Buckly *verſus* Turner.

( 97. )
S.C. 1 *Sid.* 446. 2 *Keb.* 618.
*Aſſumpſit.* Conſideration. *Vide Poſt*, 166, 169, 284.

ACtion upon the Caſe upon a Promiſe. The Caſe was, That Edward Turner, Brother to the Defendant, was indebted to the Plaintiff for a Quarter's Rent, and the Defendant, in Conſideration that the Plaintiff mitteret proſequi prædict. Edwardum Turner, (ſo the Words are in the Declaration) promiſed to pay the Money. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that here is not any Conſideration: For there is no Loſs to the Plaintiff in ſending to proſecute, &c. nor any Benefit, but a Diſadvantage to the Party that owed the Money: Beſides, there is an Uncertainty whether, or to whom he ſhould ſend. Twiſd. Mittere proſequi is well enough; for the Plaintiff muſt be at Charge in it. Kelynge. Certainly it ought to have been omitteret; and if it be ſo in the Office-Book, we will mend it. Twiſden. This being after a Verdict, if you mend it, they muſt have a new Trial; for then it becomes another Promiſe. Jones moved for Judgment, and ſaid, he found the Word mitto did ſignify to ſend, forbear, ceaſe, or let alone; as, Mitte me quæſo: I pray let me alone; in Terence. And in the Latin and Engliſh Dictionary it hath the Senſe of forbearing. Kelynge. I think the Conſideration not good, unleſs the Word mitto will admit of that Senſe. If it have a Propriety of Senſe to ſignify forbear, in reference to Things as well as Perſons, it will be well. Whereupon the Dictionary being brought, it was found to bear that Senſe. And Twiſden ſaid, If a Word will bear divers Senſes, the beſt ought to be taken after a Verdict. Per Cur. Let the Plaintiff take his Judgment.

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## Richards & Hodges.

( 98. )
S.C. 2 *Saund.* 83. 1 *Sid.* 444. 2 *Keb.* 612, 619.

DEbt upon a Bond. The Condition was to ſave a Pariſh harmleſs from the Charge of a Baſtard-child. The Defendant pleaded Non damnificatus. The Plaintiff replies, That the Pariſh laid out three Shillings for keeping the Child. The Defendant rejoins, That he tendred the Money; and the Plaintiff paid it de injuria ſua propria. Whereupon it

was demurred; the Queſtion being, Whether this Rejoinder were a Departure or no from the Bar? Saunders. It is a good Rejoinder; for in our Bar we ſay, That the Pariſh is not damnified; that is, not damnified within the Intent of the Condition. If I am to ſave a Man harmleſs, and he will voluntarily run himſelf into Trouble, the Condition of my Bond is not broken. And ſo our Rejoinder is purſuant to our Bar, and ſhows, That there is no ſuch Damnification as can charge us. Twiſden. The Rejoinder is a Departure; as in an Action of Covenant for Payment of Rent, if the Defen-
Co. Lit. 304. a. dant pleads Performance; and the Plaintiff reply, That the Rent is unpaid; for the Defendant to rejoin, that it was never demanded, is a Departure. You ſhould have pleaded thus, viz. That non fuit damnificat. till ſuch a Time; and that then you offered to take Care of the Child, and tendred, &c. Judgment for the Plaintiff, Niſi, &c.

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( 99. )
S. C. *Raym.* 166, 186. 1 *Vent.* 66. 2 *Keb.* 635. 1 *Lev.* 288. 23 *H.* 8. *c.* 5. *Vide* 1 *Salk.* 201.

## Smith, Lluellyn, *& al'*, *Commiſſioners of Sewers.*

THEY were brought into Court by Attachment, becauſe they proceeded to fine a Perſon after a Certiorari delivered. Twiſden. Sir Anthony Mildmay was a Commiſſioner of Sewers, and for not obeying a Certiorari, was indicted of a Præmunire, and was fain to get the King's Pardon. And I have known, That upon an unmannerly Receipt of a Prohibition, they have been bound to the Good Behaviour. Kelynge. When there are Informations exhibited againſt you, and you are fined a thouſand Pounds a Man, which is leſs than it was in King Edward III's Time, (for then a thouſand Pounds was a great deal more than it is now) you will find what it is to diſobey the King's Writ.

Afterwards they appeared again, and Coleman ſaid, The firſt Writ was only to remove Preſentments; the ſecond to remove Orders; and we have made two Returns, the one of Preſentments, the other of Orders: A general Writ might have had a general Return. Kelynge. Before you file the Return, let a Clauſe of the Statute of 13 Eliz. cap. 9. be read; which being done, he ſaid, That by the Statute of 23

Hen. 8. no Orders of the Commissioners of Sewers are binding without the Royal Assent: Now this Statute makes them binding without it, and enacts, That they shall not be revers'd but by other Commissioners. Yet it never was doubted, but that this Court might question the Legality of their Orders, notwithstanding. And you cannot oust the Jurisdiction of this Court, without particular Words in Acts of Parliament. There is no Jurisdiction that is uncontroulable by this Court. Sir Henry Hungate's Case was a famous Case, and we know what was done in it. Morton. Since the making this Statute of Eliz were those Cases in my Lord Coke's Reports adjudged, concerning Chester Mills. If Commissioners exceed their Jurisdiction, where are such Matters to be reformed, but in this Court? If any Court in England, of an inferior Jurisdiction, exceed their Bounds, we can grant a Prohibition. Twisden. I have known it ruled in 23 Car. 1. That the Statute of 13 Eliz. cap. 9. where it is said, there shall be no Supersedeas, &c. hath no Reference to this Case, but only to the Chancery. But this is a Certiorari, whereby the King doth command the Cause to be removed, & voluit, that it be determined here, and no where else. So the Court fined them for not obeying two Certioraries, but fining them that brought them 5 l. a-piece.

11 *Co.* 64, 65.
5 *Co.* 103.
*Cro. Eliz.* 885.
*Moor.* 642.
*Bridg.* 63, 64.
10 *Co.* 138.

(100.) Bankrupts.

Jones moved, That one who was Partner with his Brother, a Bankrupt, being arrested, might be ordered to put in Bail for the Bankrupt, as well as for himself. Twisden. If there are two Partners, and one breaks, you shall not charge the other with the Whole, because it is ex maleficio; but if there are two Partners, and one of them die, the Survivor shall be charged for the Whole. In this Case you have admitted him no Partner by Swearing him before the Commissioners of Bankrupts. So not granted.

*Vide Raym.* 6. 1 *Lev.* 17.

Rawlin's

(101.)

## Rawlin's *Caſe.*

Felony.
*Stat.* 21 *Jac.* 1. *cap.* 26. *ſect.* 2.
2 *Jones* 64.
*Hawk. P. C.* 113.
3 *Cro.* 531.
*Q. Cro. Car.* 256.

MOved by Serjeant Scroggs, That Rawlins having perſonated one Spicer, in acknowledging a Judgment, that therefore the Judgment might be ſet aſide. Twiſden. The Statute that makes it Felony, does not provide, That the Judgment ſhall be vacated. One Tymberly eſcaped with his Life very narrowly; for he had perſonated another in giving Bail; but the Bail was not filed. Then he moved, That the Defendant had paid the Fees of the Execution, which the Plaintiff ought to have done. So the Court granted an Attachment againſt the Bailiff.

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(102.)

## Taylor & Wells.

S.C. 2 *Saund.* 74.
1 *Keb.* 390.
1 *Sid.* 445.
*Vide* 1 *Vent.* 71,106,114.

TRover and Converſion, decem parium regularum & valorum, [Anglice of ten Pair of Curtains and Valons.] Obj. That it is not certain what is meant by a Pair, whether ſo many Two's, or ſo many Sets: And that in Web and Waſhburn's Caſe, 1652. four Pair of Hangings held not good. Twiſden. I remember that a Pair of Hangings has been held naught. Trover and Converſion, pro decem Ovibus & Agnis, not expreſſing how many Ewes and how many Lambs, ruled naught. Another Action of Trover de velis, not ſaying how many, held to be naught. It was urged, That ten Pair of Curtains and Valons is certain enough; for by Pair ſhall be underſtood two, and ſo there are twenty in all. If it be objected, That it does not appear how many of each; I anſwer, The Words, ten Pair, ſhall go to both. Beſides, it is after a Verdict, and therefore ought to be made good, if by any reaſonable Conſtruction it may. If it had been ten Sets, or ten Suits, then without Queſtion it had been well enough: Now, why may not a Pair be underſtood of Sets or Suits, or ſo many as will ſerve for a Bed, if it ſhall not be taken for a Couple? They quoted ſome Caſes, in which it had been adjudged, That in Trover and Converſion for ſeveral Things, though it did not appear how many of each Sort there were, yet it had been held good. Twiſden acknowledged, That there

*Vide* 3 *Keb.* 253.
2 *Show.* 315. *contra.*

had been such Resolutions, but said, he knew not what to think of such Cases, considering the Uncertainty of the Declarations. And the Word Pair in our Case, is as uncertain as may be, tho' a Pair of Gloves, a Pair of Cards, a Pair of Tongs is certain; for the Word applied to some Things, signifies more, to others less, and what shall it signifie here? But by three Judges against Twisden, the Plaintiff had Judgment.

## Fox & alii, Exec' of Pinsent, versus Tremain.

(103.) S. C. 2 Saund. 212. Ray 198. 1 Sid. 449. 2 Lev. 299. 2 Keb. 633. post 72, 296. 1 Vent. 102.

THE Plaintiffs being Executors, and some of them under Age, all appeared by Attorney: And thereupon it was prayed, That Judgment might be stayed; for, 1. An Infant cannot make a Warrant of Attorney. 2. An Infant appearing by Attorney, may be amerced pro falso clamore: And the Reason is, because it does not appear that he is under Age; but if he appear by Guardian or Prochein amy, he shall not be amerced. 3. The Infant may be much prejudiced. For these Reasons, and because they said, the Practice had gone accordingly, Judgment was stayed. The Cases cited pro and con were, 3 Cro. 424. 2 Cro. 441. 1 Roll. 288. and Hutton and Mascall's Case: A Scire facias brought by two Executors, reciting, That there was a third, but within Age: Resolved that all must join. Colt and Sherwood's Case: Resolved, That an Infant Executor cannot defend by Attorney. Twisden. Where there are several Executors, and one or more under Age, and the rest of full Age, all must join in an Action; and Administration durante minore ætate, cannot be granted, if any of them be of full Age. Vid. inf. 72, 296.

2 Saund. 212. 1 Lev. 181. 1 Keb. 750. post 172, 229, 297. 2 Roll. 207. B. 1. Yelv. 130.

## Haspurt & Wills.

(104.) S. C. 1 Vent. 71. 2 Danv. 428. See 1 Sid. 284. 2 Sid. 178. 6 Mod. 123. 1 Lev. 14, 15.

A Special Action brought upon the Custom of Wharfage and Cranage in the City of Norwich: The Declaration sets forth, That they have a common Wharf, and a Crane to it; and then they set forth a Custom, That all Goods brought down the River, and passing by, shall pay such a Duty. Obj. That the Custom is not good; for that it is Toll-

See *poſt* 231, 232. 3 *Lev.* 425, 400. 2 *Rol.* 522. 1 *Rol.* 547. *O.* 2.

Toll-thorough; which is malum Tolnetum. Twiſd. There is a Caſe in Hob. 175. of a bad Cuſtom of paying the Charges of a Funeral, though the Plaintiff were a Stranger, and not buried in the Pariſh. So here, if they had unladed at the Key, they ſhould have paid the whole Duty; nay, if they had unladed at any other Place in the City, there would have been ſome Reaſon for it: Or if the Declaration had ſet forth, that they had cleanſed the River. At Graveſend they claimed a Toll of Boats lying in the River of Thames; and it was adjudged in Parliament to be malum Tolnetum. To ſtay.

*Poſt* 104, 105.

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(105.) S. C. 1 *Sid.* 446. 1 *Vent.* 73. 2 *Saund* 94, 95. 2 *Keb.* 627. *Vide* 2 *Danv.* 772. *G.* Common Recovery by Infant. *Vide poſt* 246, 252. 1 *Sid.* 321. *Cro. El.* 323. 1 *Lev.* 142, 163.

## Heskett & Lee.

A Writ of Error was brought to reverſe a Judgment given in a Common Recovery in the County-Palatine of Lancaſter. Weſton. The Tenant in the Common Recovery is an Infant, and appears by his Guardian; but there is a Fault in the Admittance; for whereas he ought to have been admitted as Defendant, in this Form; ſcil. A. B. admittitur per C. D. Gardianum ſuum ad comparendum & defendendum: He is admitted in the Record ad ſequendum. The ſecond Error is in the Appearance: Which is entered in this Manner; ſc. qui admiſſus eſt ad ſequendum, &c. (following the Error of the Admittance) ut Gardianus ipſius Thomæ in propria perſona ſua venit & defendit, &c. ſo that he is admitted ad ſequendum, which is the Act of the Plaintiff; and as Guardian he defends; which is the Act of the Defendant: And further, it is ſaid, That the Guardian appears in propria perſona, which cannot be. Now I conceive that the Aſſignment of the Guardian, and the Appearance of the Guardian, is triable by the Record: And if the Infant ſhould bring a Action againſt his Guardian, he muſt declare that he was admitted to appear and defend his Right. Now whether will this Admittance ad ſequendum, warrant ſuch a Declaration? I conceive it will not, and that therefore the Recovery is erroneous. Winnington. I am for them that claim under the Recovery. And I conceive this whole Record is not only good in Subſtance, but according to the Form uſed in all Common Recoveries. If an Infant Tenant appear per Gardianum, either as Defendant or Vouchee, he ſhall be bound, as well as one of full Age. And

And if the Guardian faint-pleads or mispleads, the Infant hath an Action against him: 9 Ed. 4. 34, 35. Dyer 104. b. In our Case there is a Common Recovery, wherein the Tenant is an Infant, who ought to appear by his Guardian; Whether the Admittance of him here by his Guardian, be well entered or no, is the Question? The Word Sequi signifies only to follow the Cause; and the Defendant doth prosecute and act: A Venire, by Proviso, may be taken out at the Defendant's Suit: 35 H. 8. 7. So in a Replevin the Defendant is the Prosecutor; and the Tenant doth sue in Common Recovery, and is the only Person that doth prosecute an act; so that I think the Word is proper. It is true, one Book is cited, where prosequendum is void in an Ejectment: 2 Cro. 640, 641. Sympson's Case; but that Judgment is upon the Point of prochein amy. There is a Precedent for me in 6 Car. 1. which I believe, was the Precedent of this Case. And Sir Francis Englefield's Case, where the Infant came in as Vouchee, is the same with ours. As for the second Error assigned, viz. That the Guardian is said to come in propria Persona: In the Earl of Newport's Case, and in Englefield's Case, propria Persona is in the same Manner as here: Now the Law doth not regard so much the Manner of the Admittance, as that a good Guardian be admitted. Twisden. This is a Recovery suffered upon a Privy-Seal from the King, and upon a Marriage-Settlement, upon good Consideration; and therefore ought to be favoured. The Word Sequatur is as proper for the Defendant as for the Plaintiff. And for the second, the Words propria Persona are well enough, being applied to the Guardian, who does in proper Person appear for the Infant. For an Infant to suffer a Common Recovery, if it were res integra, it would hardly be admitted. But if an Infant will reverse a Common Recovery, he ought to do it whilst he is under Age; as it was adjudged here about two Years ago, according to my Lord Coke's Opinion. Weston. If you stand upon that, Whether an Infant, having suffered a Common Recovery, may reverse it after he is of full Age? I desire to be heard to it. Cur. advisare vult.

Cro. Eliz. 323. Godb. 161. 2 Cro. 641. 1 Rol. Abr. 731. G. 1 Jones 318. Hob. 196. Style 246. 1 Sid. 118, 252, 446.

Hob. 196. 1 Rol. 731. D. 1.

Co. Lit. 380. b.

(106.) S. C. 2 *Keb.* 628. *Vide Stat.* 2 E. 6. c. 13.

## Tildell & Walter.

A Vicar libelled in the Spiritual Court for Tithe-wood. Barrell prayed a Prohibition, ſuggeſting, That Time out of Mind they paid no ſmall Tithe to the Vicar; but that ſmall Tithes, by the Cuſtom of the Pariſh, were paid to the Parſon. Twiſden. If the Endowment of the Vicarage be loſt, ſmall Tithes muſt be paid according to Preſcription.

(107.) S. C. 1 *Sid.* 449. 1 *Vent.* 76. 1 *Rol.* 922. 2 *Keb.* 632.

## Jordan *verſus* Fawcett.

ERror of a Judgment in the Common Pleas. An Action was brought againſt an Executor, who pleaded ſeveral Judgments; but for the laſt Judgment that he pleads, he doth not expreſs where it was entered, nor when obtained. Coleman held it well enough upon a general Demurrer. Twiſden. It is not good, for by this Plea he is tied up to plead Nothing, but Nul tiel Record. He might, if the Judgment had been pleaded as it ought to have been, have pleaded perhaps obtent. per fraudem. And Judgment was given accordingly.

(108.) S. C. 1 *Sid.* 450. 1 *Vent.* 79. 2 *Keb.* 637. 2 *Chan. Rep.* 14, 15. *Poſt*, 114, 115.

## Love *verſus* Wyndham & Wyndham.

UPon an Iſſue out of Chancery, the Jury find a Special Verdict, viz. That one Gilbert Thirle was ſeized of the Lands in Queſtion for three Lives, and did demiſe the ſame to Nicholas Love the Father, for a Term of Years, if the Ceſtuy que Vies, or any of them, ſhould ſo long live; that he being ſo poſſeſſed, made his Will, and deviſed them in this Manner; viz. to his Wife for her Life, and after her Deceaſe to Nicholas his Son for his Life; and if Nicholas his Son ſhould die without Iſſue of his Body begotten, then he deviſeth them to Barnaby the Plaintiff. Then they find, that the Wife was Executrix, and that ſhe did agree to this Deviſe. And whether this be a good Limitation to Barnaby or not? is the Queſtion. Jones. I conceive it is a good Limitation to

Barnaby. I shall enquire whether a Termor having devised to one for Life, and after his Death to another for Life, may go any further: And secondly, admitting that he may go further, whether the Limitation in our Case, which is to begin after the Death of the second, without Issue of his Body, be good or no? For the first Point, he said, The Reason given in Plo. Com. 519. and in 8 Co. 94. why an executory Devise of a Term is good in Law, is, because the Law takes it as devised to the last Man first, and then afterwards to the first Man; without which Transposition it is not good; for if it should be a Devise to the first Man first, there would be nothing left for the last but a Possibility, which is not grantable over. Now then, if a Man may devise a Term after the Death of another, then he may devise it after the Death of two other. It is true, this cannot be in Grants; for they are founded upon Contracts, and there must be a Certainty in them, according to the Rector of Chedington's Case. Now if a Devise may be good after the Death of one or two, it is all one if it be limited after the Death of five or six. Now that a Contingency may be devised upon a Contingency, I take it, that the Authorities are clear: 14 Car. 1. Cotton and Herle: 1 Roll. 612. resolved by three Justices. And Hill. 9 Jac. Rot. 889. 2 Cr. 461. And for the Case of Child and Bayly, reported in 2 Cro. 459. and in Roll. 613. I conceive it is not against our Case; for they held the Devise to be void, not because it was a Contingency upon a Contingency, but in respect of the Remoteness of the Possibility, and because the Term was wholly devised to a Man and his Assigns. So that by the express Authority of the two first Cases, and by the Implication of this Case, I do think that a Devise to a Man after such a Manner is good, provided that it do not introduce a Perpetuity: So that where there is not the Inconvenience of a Perpetuity, though there are many Contingencies, they are no Impediment to the Devise. Therefore where a Devise is upon a Contingency that may happen upon the Expiration of one or more Mens Lives, and where it is upon a Contingency that may endure for ever, there is a great Difference. The Reason of the Rector of Chedington's Case was, because of the Uncertainty; for in Case of a Grant of a Term, there is a great Uncertainty; but ours is in Case of a Devise, which is not taken in the Law by way of Remainder: 12 Ass. 5. So that I conceive a Contingency may be limited

See 2 *Danv.* 523. *pl.* 6. 1 *Lev.* 25. 290. 1 *Sid.* 37. 3 *Lev.* 22, 23.

upon a Contingency, provided that it be not remote. The ſecond Point is, Whether this Deviſe (thus limited) be a good Deviſe? Now I conceive the Limitation is as good, as if it had been to his Wife for her Life, and after her Death to Nicholas for Life, and after his Death to Barnaby. I agree, That if theſe Words (if Nicholas die without Heirs of his Body) ſhall not be applied to the Time of his Death, it will be a void Deviſe. But the Meaning is, That if at the Time of his Death he ſhall have no Iſſue, then, &c. Now that they muſt have ſuch Conſtruction, I prove from the Words of the Will. The Limitation of the Remainder muſt be taken ſo as to quadrate with the particular Eſtate. As if there be a Conveyance to one for Life, and if he die without Iſſue, to another; this is a good Remainder upon Condition, and the Remainder ſhall reſt upon the Determination of the particular Eſtate, if the Tenant for Life have no Iſſue when he dieth; but if a Man convey to one, and the Heirs of his Body, and if he die without Iſſue, to another, there it muſt be underſtood of a Failer of Iſſue at any Time; becauſe the precedent Limitation goes further than his Life. But admitting there were no precedent Words to guide the Intention, and that common Parlance were againſt me, yet if there be but a Poſſibility of a good Conſtruction, it ſhall be ſo conſtrued: And they may very well be underſtood of his dying without Iſſue of his Body at the Time of his Death. In Goodyer and Clerk's Caſe in this Court, Trin. 12 Car. Rot. 1048. I confeſs it was adjudged, That it would be underſtood of a Failer of Iſſue at any Time; but in our Caſe, if you ſhall not underſtand it of a Failer of Iſſue at the Time of his Death, it cannot have any Conſtruction at all to take Effect. I think there are no expreſs Authorities againſt me: Thoſe that may ſeem to be ſo, I will put, and endeavour to give an Anſwer to them: As for Child and Baylie's Caſe, Reports differ upon the Reaſon of that Judgment: For Cro. ſays, It was held to be a void Deviſe, becauſe it was taken, if he die without Iſſue at any Time during the Term: But Serjeant Rolle goes upon another Reaſon: Roll. 613. there he ſays it is void, becauſe given abſolutely to the Son and his Aſſigns before. In Rolle's firſt Part, 611. Leventhorp and Aſhly's Caſe, the Remainder there

there is said to be void, because when he had devised the Term to A. and the Heirs Males of his Body, it shall go to the Executors of A. and the Remainder there was to begin upon his dying without Issue at any Time. The Case of Saunders and Cornish will not come to ours: For there were many Limitations for Life successively to Persons not in being, &c. In the Case cited 1st Report, 135. of an Estate for Life limited to one, and to every Heir successively an Estate for Life, the Limitation was naught, because it would make a perpetual Freehold; and no Body would know where the absolute Estate should vest. So he prayed Judgment for the Plaintiff. Coleman for the Defendant. I conceive this to be a void Limitation. Mr. Jones would make this a middle Case. I shall discharge him of the first Point, though he has taken Pains to argue it: And I shall rest upon this, That the Limitation of a Term after the Death of a Man, without Issue of his Body, is void. The Case is put as a middle Case to these two, viz. If a Man possessed of a Lease for Years, devise it to J. S. for Life, the Remainder to J. N. for Life, the Remainder to J. G. for Life; these Remainders are good. But if he do devise to J. S. and the Heirs of his Body, the Remainder over; this Remainder he admits to be void, because it depends upon so remote a Possibility as may never happen. Now I conceive it is the same Thing to limit it to one for Life, and if he die without Issue, then to another for Life, as to limit it to one and the Heirs of his Body, with a Remainder over. He would tie it up from the ordinary and legal Construction, to Issue at the Time of his Death. If it be to be understood of dying without Issue at any Time, then Child and Baylie's Case, and Cornish's Case, are full Authorities in the Point. Vide 2 Cro. 459. Rolle, 612, 614. There Lessee for Years deviseth to one for Life, and after to Wms. and his Assigns, and if he die without Issue then living, the Remainder to J. G. This they say is good in Case of a Fee-simple, but they will not allow it in Case of a Term for Years. Now Mr. Jones would by Construction bring the Words then living, into our Case. The legal Construction of the Words, dying without Issue, is, if there be a Failer of Issue at any Time

3 *Lev.* 22, 23. 432. 2 *Danv.* 715. *pl.* 7. & 523. *pl* 7.

to come. In Pell and Brown's Case, if the Words then living had not been in the Will, the Case had not been so adjudged. Kelynge. You go up Hill a little. Can Barnaby take so long, as there is any Issue in being of Nicholas? Jones. He cannot. Kelynge. Then Barnaby's Interest depends upon a Contingency, that may never happen. Jones. I grant, if Nicholas hath Issue at the Time of his Death, that Barnaby shall never take, but if he hath none, he shall. Kelynge. If I devise Lands to A. for Life, and if he die without Issue of his Body, to B. A. shall have an Estate-Tail. So in our Case, the Words and Limitation is the same, though, the Devisor having but a Lease for Years, there cannot be an Estate Tail of it: Yet he intended not that Barnaby should have any Estate as long as there were any Issue in being of Nicholas his Body. Twisden. It appears to me upon the Reason of the Cases that have been cited, That the Remainder to Barnaby must be void, because of the remote Possibility: But then there will be a Question, to whom the Remainder of the Term will go, if Nicholas die without Issue? Whether to the Executors of Nicholas, or to the Executors of Doctor Love? If A. Tenant of a Term, devise it to B. for Life, the Remainder to C. for Life, the Remainder to D. for Life; I have heard it questioned, whether these Remainders are good or not? But it hath been held, That if all the Remainder-men are living at the Time of the Devise, it is good: If all the Candles be light at once, good. But if you limit a Remainder to a Person not in being, as to the first begotten Son, &c. and the like; there would be no End if such Limitations were admitted, and therefore they are void. And some Judges are of the same Opinion to this Hour. If I devise a Term to A. for Life; after the Death of A. his Executors shall not have it, but it shall go to the Executors of the Devisor: But if it be devised to A. generally, without saying for Life, it shall go to his Executors after his Death. But a Devise for Life vests in him only during his Life, and you may make a Limitation over. Kelynge. I take it, That A. carries the whole Term, when devised to him for Life; because an Estate for Life is larger than the longest Term. Twisden.

1 *Sid.* 451. 2 *Danv.* 522. *pl.* 3. *post* 115.

1 *Rol.* 612. *pl.* 3.

7 *Co.* 23. *a.* 1 *Sid.* 37.

As

As a Term for Years doth admit of Remainders, so it doth of Reversions, if you will have it so; and when he deviseth to A. during his Life, A. shall have it for his Life; but the Reversion shall be to the Devisor's Executors. But if he devise it to A. for Life, and if he die without Issue of his Body, the Remainder to B. what shall become of the Reversion then? Kelynge. You start a new Point. Car. You shall have our Judgments this Term. Remainders and Reversions. *Post*, 115.

## Knowles *versus* Richardson.

(109.) Obstructing a Prospect. *Vide* 1 *Vent.* 237, 239. *Raym.* 87. 6 *Mod.* 116, 314. 1 *Sid.* 167. 2 *Salk.* 459. 1 *Lev.* 239, 248. 9 *Co.* 58. *Hob.* 131. *Hutt.* 136. *Poph.* 170.

Error of a Judgment in the Common Pleas in an Action upon the Case, for obstructing a Prospect. Sympson. The stopping of a Prospect is no Nusance, and consequently no Action on the Case will lie for it. Aldred's Case, Rep. 9. is express, That for obstructing a Prospect, being Matter of Delight only, and not of Necessity, an Action will not lie. Twisden. Why may not I build up a Wall, that another Man may not look into my Yard? Prospects may be stop'd, so you do not darken the Light. Judgment nisi, &c.

(110.) Perjury. 2 *Rol.* 257.

Twisden. A Man may be indicted for Perjury in a Court-Baron.

(111.) Trials.

Jones moved to have a Trial at Bar for Lands in Northumberland of 50*l.* per Annum. Kelynge. It is a great way off, and never any Jury came from thence in your Time. Twisden. But I have been of Counsel in Causes, wherein Trials have been granted at Bar for Lands there. We have lost Cornwal; no Juries from thence come to the Bar, and we shall lose Northumberland too. The other Side to shew Cause.

Kelynge.

(112.) Arreſt on *Sunday*. *Hetl.* 19. See the *Stat.* 29 *Car.* 2. *c.* 7. 1 *Salk.* 87. 6 *Mod.* 96.

Kelynge, upon a Motion of Mr. Holt's, ſaid, I have known many Attachments for arreſting a Man upon a Sunday; but ſtill the Affidavit contained, That he might have been taken on another Day. Twiſden. So for arreſting a Man as he was going to Church, to diſgrace him.

# Term. Trin. 22. Car. II. 1670. in B. R.

## Parker & Welby. (1.)

AN Action upon the Case against a Sheriff for making a false Return. The Plaintiff sets forth, that one Wright was indebted to him in 60 l. and did promise to pay him, and that thereupon a Writ was sued out against him directed to the Defendant, being Sheriff of Lincolnshire, who took him into his Custody, and after suffered him to go at large, whither he would, and at the Day of Return, he returned that he had his Body ready. Jones. They have demurred to the Declaration: Which I conceive to be a good Declaration. For take the Case, that there went a Latitat to the Sheriff, and the Sheriff took the Person upon it, and let him go at large; no Body will deny, but that an Action of Escape will lie against him: And when he makes such a false Return, as here, that he has the Body ready, why will not an Action lie for a false Return? And this is no new Case, but hath been adjudged; Moor. plac. 596. 3 Cro. 460. ibid. 624. It is at the Plaintiff's Election to follow the Sheriff with Amercements, or to bring his Action for the false Return. And when this Action has been brought formerly, they were forced to plead the Statute; none ever demurred generally. Twisden. I remember a Case in 21 Car. 1. Rot. 616. between Franklyn and Andrews, where an Action upon the Case was brought against a Sheriff for such a false Return: He pleaded the Statute, and they held in that Case, That the Sheriff could not return any Thing else but Cepi corpus. And old Hodson, that sate here, remembred the Case of Langton and Gardiner reported in 3 Cro. and said, The Court did amerce the Sheriff for a bad Return; but the Judgment was given in that Case for the Plaintiff, because there was a Traverse aliter vel alio modo, which could not be, unless a false Return had been confessed; and the Court ordered Judgment to be entred for

False Return. Stat. 23. H. 6. c. 10. *Vide post* 227. *pl.* 17. 244, 245. 1 *Lev.* 214. 2 *Lev.* 28, 144. 2 *Saund.* 155. *Inst. Leg.* 25, 27. *Post* 239. *Post* 244.

the Plaintiff for that Cauſe. In the Caſe of Franklyn, the Court held, That upon Iſſue Not guilty, the Statute might be given in Evidence: But upon a Demurrer you ought to plead the Statute; and the general Demurrer cannot be help'd in this Caſe, unleſs you will ſay that it is a general Law. Whelpdale's Caſe is, That the Statute muſt be pleaded, becauſe it is a particular Law: But it concerns Extortion in all Sheriffs; and the Statute of 13 Eliz. that concerns all Parſons, touching Non-reſidency, is held to be a general Law: And it is not to be ſtirr'd now; but if the Point were to be adjudged again, perhaps we might be of another Opinion. Kelynge. They have relied here upon the falſe Return, and the general Demurrer I take to be well enough. Morton and Rainsford accorded; wherefore Judgment was given againſt the Plaintiff.

4 *Co.* 120. *b.* 1 *Sid.* 24. *poſt* 205.

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## Lake *verſus* King.

(2.) S. C. 1 *Sid.* 414. 1 *Lev.* 240. 1 *Saund.* 131. *Hard.* 470. 1 *Danv.* 196. 2 *Keb.* 261, 462, 496, &c. See *Godb.* 405. 4 *Co.* 14. *b.* *Hob.* 252.

THE Plaintiff brought an Action upon the Caſe for publiſhing a Libel, in which he was defamed, &c. the Publication was in delivering ſeveral printed Papers, wherein the Plaintiff was ſlandered, to ſeveral Members of a Committee of the Houſe of Commons. Jones. It is true, if a Man make a Complaint in a legal Way, no Action lieth againſt him for taking that Courſe, if it be in a competent Court. But that that we ſay is not lawful in this Caſe, is his cauſing the Matter to be printed and publiſhed: Agreeable to this Caſe are the common Caſes of Letters: If a Man will write a ſcandalous Letter, and deliver it to the Party himſelf, this is no Slander. But if he acquaints a third Perſon with it, an Action will lie. So here, ſince he will publiſh this Matter by printing it, or if he had but written it, it might have been actionable: For the Members ought not to be prepoſſeſſed.

King

## King *verſus* Standiſh.

(3.)

S. C. 1 *Sid.* 463, 464. 1 *Lev.* 241, 242. *Hard.* 120. *Raym.* 227. 2 *Keb.* 402, 661. Chancery. *Præmunire.* *Vide* 3 *Keb.* 221, 354. *Cary* 4, 106.

AN Action upon the Statute of Præmunire for impeaching in the Chancery a Judgment given in the King's Bench. The Defendant demurred. Bigland for the Defendant. The Queſtion is, Whether the Court of Chancery be meant within the Statute of 27 Ed. 3. 3? This Queſtion has been controverted formerly, but has not been ſtirr'd within theſe 40 Years laſt paſt. It concerns the Chancery, as it is a Court of Equity. Now the Statute cannot be applied to the Chancery as ſuch; for it was not a Court of Equity at that Time; and if ſo, then muſt the Statute be apply'd to other Courts, where the Gravamen then was. Mr. Lambard, in his Juriſdiction of Courts, ſays of this Court, That the King did at firſt determine Cauſes in Equity in Perſon; and that about 20 *Ed.* 3. the King going beyond Sea, delegated this Power to the Chancellor. And then he ſays, Several Statutes were made to enlarge the Juriſdiction of this Court, as 17 *Rich.* 2. *cap.* 6, *&c.* But the Chancellor took not upon him ex Officio, to determine Matters in Equity, till Edward the fourth's Time. For till then it was done by the King in Perſon, or he delegated whom he pleaſed. So that the Gravamen of that Statute could not be in the Chancery. 2. It is not poſſible that the King can be diſinherited in his own Courts; and therefore the Statute muſt be underſtood of Courts, that ſtand in Oppoſition to the King's Courts, and only foreign Courts. But this Court is held by the King's Seal, and the Judgments in it are according to the King's Conſcience. 3. It is ſaid in the Statute, That the Offenders ſhall have a Day given them to appear before the King and his Council, or in his Chancery, *&c.* And it is ſtrange, that the Chancery ſhould give the Remedy, if that were one of the Courts wherein the Offence were incurred. My 4th Reaſon is from the Penalty: The Penalty is very rare and great; for they muſt be put out of the King's Protection, their Lands forfeited, and their Bodies impriſon'd at the King's Pleaſure. The Penalty is fitted well for thoſe that draw the King's Subjects out of the King's Juriſdiction: But ſo great a Penalty to be inflicted for ſuing in the King's Courts, is not ſo reaſonable. If a Man ſue in the Eccleſiaſtical Court for a Matter Temporal,

ſhall he incur a Præmunire? An Action upon the Caſe may lie, when a Man is miſtaken in the Court, in which he ought to ſue; but to make it a Præmunire ſeems not ſo reaſonable. The Uſurpations of the Biſhop of Rome were the Cauſe of the making of this Statute, and all other Statutes of Præmunire: 28 Ed. 3. cap. 1. 16 H. 6. cap. 5. The Complaint was all along of the Biſhop of Rome's Uſurpations; but not a Word of the Chancery. Sir John Davies, in his Caſe of Præmunire, tells us, That all the Statutes were made upon this Occaſion. Of all the Attainders of Præmunire, there never was one for ſuing in the Chancery. The great Objection is from theſe Words in the Statute, (or which do ſue in any other Court) Now, ſay they, this laſt Diſjunctive muſt be applied to this Court, and not to the Court or Courts mentioned before. But I anſwer, There were other Eccleſiaſtical Courts within this Realm, beſides that that was a ſtanding Court, and had a conſtant Dependance upon the Pope here; and they were aimed at by this Diſjunctive. Thoſe Courts derived their Juriſdiction from the Court of Rome, and not from the King. There is an Authority in the Point in 5 Ed. 4. 6. Now for Authorities, I confeſs there are great ones againſt me: 2 Cro. fol. 335. Heath and Ridley. Moor. 838. Courtney *verſus* Glanvil. My Lord Coke, in his Chapter of Præmunire. 22 Ed. 4. fol. 37. But the greateſt Authority againſt me, is the Caſe of Throgmorton and Finch, reported by my Lord Coke, in his Treatiſe of Pleas of the Crown, Chapter Præmunire. But the Practice has been contrary, not one Perſon attainted of a Præmunire for that Cauſe. In King James's Time the Matter was referred to the Counſel, who all agreed, That the Chancery was not meant within the Statute: Which Opinions are inrolled in Chancery. And the King, upon the Report of their Reaſons, ordered the Chancellor to proceed as he had done; and from that Time to this, I do not find that this Point ever came in queſtion. And ſo he prayed Judgment for the Defendant. Saunders. As to that Objection, That at the Time when this Statute was made, there were no Proceedings in Equity, I anſwer, That granting it to be true, yet there is the ſame Miſchief: The Proceedings in one Part of the Chancery are coram Dom. Rege in Cancellaria; but an Engliſh Bill is directed to the Lord Keeper, and decreed: So that there is a Difference in the Proceedings of the ſame Court. But admit that Courts of Equity

2 Cro. 343. 3 Inſt. 124. 1 Rol. Ab. 381. pl. 2.

3 Inſt. 124.

are the King's Courts, yet they are aliæ Curiæ, if they hold Plea of Matters out of their Jurisdiction. 16 Rich. 2. cap. 5. Roll. 1 part 381. There is a common Objection, That if there were no Relief in Chancery, a Man might be ruined; for the Common Law is rigorous, and adheres strictly to its Rules. I cannot answer this Objection better than it is answered to my Hand in Dr. & Stud. lib. 1. cap. 18. He cited 13 R. 2. num. 30. Sir Robert Cotton's Records. It is to be considered, What is understood by being impeached? Now the Words of another Act will explain that, viz. 4 H. 4. cap. 23. by that Act it appears, That it is to draw a Judgment in Question any other Way than by Writ of Error or Attaint. One would think this Statute so fully penned, that there were no Room for an Evasion. There was a temporary Statute which is at large in Rastall, 31 H. 6. cap. 2. in which there is this Clause, viz. That no Matter determinable at Common Law, shall be heard elsewhere. A fortiori, no Matter determined at Common Law shall be drawn in Question elsewhere. He cited 22 Ed. 4. 36. Sir Moyle Finch and Throgmorton, 2 Inst. 335. and Glanvill and Courtney's Case. He put them also in Mind of the Article against Cardinal Wolsey, in Coke's Jurisdiction of Courts, Tit. Chancery. So he prayed Judgment for the Plaintiff. Kelynge. It is fit that this Cause be adjourned into the Exchequer-Chamber, for the Opinions of all the Judges to be had in it. We know what Heats there were betwixt my Lord Coke and Ellesmere, which we ought to avoid.

*Post*, 94.

## Turner & Benny.

(4.)
S. C. 1 *Lev.* 293. 2 *Keb.* 666.

A Writ of Error was brought to reverse a Judgment in the Common Pleas, in an Action upon the Case, wherein the Plaintiff declared, That it was agreed between himself, and the Defendant, that the Plaintiff should surrender to the Use of the Defendant certain Copy-hold Lands; and that the Defendant should pay for those Lands a certain Sum of Money: And then he sets forth, That he did surrender the said Lands into the Hands of two Tenants of the Manor out of Court, secundum consuetudinem, &c. Exception. The Promise is to surrender generally, which must be understood

ſtood of a Surrender to the Lord, or to his Steward: And the Declaration ſets forth a Surrender to two Tenants; which is an imperfect Surrender: 1 Cro. 299. Kelynge. But in that Caſe there are not the Words ſecundum conſuetudinem, as in this Caſe. Jones. Hill. 22 Car. 1. Rot. 1735. betwixt Treburn and Purchas, two Points were adjudged: 1. That when there is an Agreement for a Surrender generally, then ſuch a particular Surrender is naught. 2. That the alledging of a Surrender ſecundum conſuetudinem is not ſufficient; but it ought to be laid, That there was ſuch a Cuſtom within the Manor, and then, that according to that Cuſtom he ſurrendred into, &c. accordingly is 3 Cro. 385. Coleman contra. We do ſay, That we were to ſurrender generally; and then we aver, That actually we did ſurrender ſecundum conſuetudinem; and if we had ſaid no more, it had been well enough. Then the adding, into the Hands of two Tenants, *&c.* I take it that it ſhall not hurt. Beſides, we need not to alledge a Performance, becauſe it is a mutual Promiſe; and he cited
*Hob.* 88, 106. Camphugh and Brathwait's Caſe: Hob. Twiſden. I remember the Caſe of Treborne; he was my Client. And the Rea-
*9 Co.* 76. a. b. ſon of the Judgment is in Combe's Caſe, Rep. 9. becauſe the Tenants are themſelves but Attornies. And they compared it to this Caſe: I am bound to levy a Fine; it may be done either in Court, or by Commiſſion, but I muſt go and know of the Perſon to whom I am bound, how he will have it, and he muſt direct me. In the principal Caſe the Judgment was affirm'd. Niſi, &c.

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## Turner & Davies.

(5:)
S. C. 2 *Keb.* 668.
2 *Saund.* 148.
*Vide* 6 *Mod.* 92.

AUdita Querela. The Point was this, viz. An Adminiſtrator recovers Damages in an Action of Trover and Converſion for Goods of the Inteſtate, taken out of the Poſſeſſion of the Adminiſtrator himſelf: Then his Adminiſtration is revoked, and the Queſtion is, Whether he ſhall have Execution of the Judgment, notwithſtanding the Revocation of his Adminiſtration? Saunders. I conceive he cannot, for the Adminiſtration being revoked, his Authority is gone. Doctor Drurie's Caſe, in the 8th Rep. is plain. And there is a Precedent in the new Book of Entries 89. Barrell. I conceive he

may take out Execution, for it is not in Right of his Administration: He lays the Converſion in his own Time: And he might in this Caſe have declared in his own Name; and he cited and urged the Reaſon of Pakman's Caſe, 6th Rep. and 1 Cro. Kelynge. He might bring the Action in his own Name, but the Goods ſhall be Aſſets. If Goods come to the Poſſeſſion of an Adminiſtrator, and his Adminiſtration be repealed, he ſhall be charged as Executor of his own Wrong: Now in this Caſe, the Adminiſtration being repealed, ſhall he ſue Execution, to ſubject himſelf to an Action when done? Twiſden. I think it hath been ruled, That he cannot take out Execution, becauſe his Title is taken away. Judgment per Cur. verſus Defendentem. *Cro. Car.* 208, 227. *Yel.* 83, 125. *Cart.* 138.

## Jordan & Martin. (6.)

EXception was taken to an Avowry for a Rent-charge, That the Avowant having diſtrained the Beaſts of a Stranger for his Rent, does not ſay that they were levant and couchant. Coleman. The Beaſts of a Stranger are not liable to a Diſtreſs, unleſs they be levant and couchant: Roll. Diſtreſs, 668, 672. Reignold's Caſe. Twiſd. Where there is a Cuſtom for the Lord to ſeize the beſt Beaſt for a Heriot, and the Lord does ſeize the beſt Beaſt upon the Tenancy, it muſt come on the other Side to ſhew that it was not the Tenant's Beaſt. Kel. The Cattle of a Stranger cannot be diſtrained, unleſs they were levant and couchant; but it muſt come on the other Side to ſhow that they were not ſo. So Judic. pro Defendente. *Levant & Couchant.* See *Nelſ. Lutw.* 500, 501. 2 *Show.* 328, 329. 1 *Saund.* 27, 222, 346. 2 *Saund.* 227, 289, 290, 325. *Co. Lit.* 47. *poſt* 74, 75. *Heriot. Nelſ. Lutw.* 203, 416, 425, 433 to 436. & *poſt* 216, 217. *Co. Lit.* 475.

## Wayman & Smith. (7.)

A Prohibition was prayed to the Court of Briſtol upon this Suggeſtion, viz. That the Cauſe of Action did not ariſe within the Juriſdiction of the Court. Winnington. There was a Caſe here between Smith and Bond: Hill. 17. Car. 2. Rot. 501. a Prohibition to Marlborough: The Suggeſtion grounded on Weſtm. 1. cap. 34. granted: And there needs not a Plea in the Spiritual Court, to the Juriſdiction: For that he cited, 1 *Sid.* 464. See 1 *Lev.* 50, 69, 96, 104, 137, 153, 208, 289. 2 *Mod.* 131. 1 *Saund.* 74. *ante* 32. 2 *Inſt.* 230.

F. N. B. 49. But he ſaid, he had an Affidavit, that the Cauſe
*Poſt* 81. of Action did ariſe out of their Juriſdiction. Twiſden. I doubt you muſt plead to the Juriſdiction of the Court. I remember a Caſe here, wherein it was held ſo: And that if they will not allow it, then you muſt have a Prohibition. Winnington. Fitzherbert is full. Ruled, That the other Side ſhall ſhew Cauſe why a Prohibition ſhould not go, and Things to ſtay.

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## Humlock & Blacklow.

(8.) S. C. 1 *Sid.* 464. Covenant. 2 *Saund.* 155, 166. 2 *Keb.* 674. 2 *Mod.* 33, 34. 2 *Show.* See 2 *Danv.* 15. *pl.* 8. Averment. See 2 *Mod.* 75, 76. 1 *Vent.* 41.

DEBT upon a Bond for Performance of Covenants in Articles of Agreement. The Plaintiff covenanted with the Defendant to aſſign over his Trade to him, and that he ſhould not endeavour to take away any of his Cuſtomers; and in conſideration of the Performance of theſe Covenants, the Defendant did covenant to pay the Plaintiff 60*l.* per Annum, during his Life. Saunders. The Words in conſideratione performationis, make it a Condition precedent: Which muſt be averred: 3 Leon. 219. And thoſe Covenants muſt be actually performed. Twiſden. How long muſt he ſtay then, till he can be entitled to his Annuity? As long as he lives; for this Covenant may be broken at any Time. That's an Expoſition that corrupts the Text. Judic. niſi, &c.

(9.) Venue and Privilege. 2 *Salk.* 668, 670. 2 *Vent.* 47. 2 *Show.* 176, 242.

It was moved by one Hunt, That the Venue might be changed in an Action of Indebitat. aſſumpſit, brought by Mr. Wingfield. Jones. I conceive it ought not to be changed, being in the Caſe of a Counſellor at Law, by Reaſon of his Attendance upon this Court. Twiſd. In Mr. Bacon's Caſe of Grays-Inn, they refuſed to change the Venue in the like Caſe. So not granted.

(10) Wales. *Poſt* 68. *pl.* 16.

An Indictment againſt one Morris in Denbighſhire, for Murther, was removed into the King's Bench by Certiorari, to prevent the Priſoner's being acquitted at the Grand-Seſſions; and the Court directed to have an Indictment found againſt him in the next Engliſh County, viz. at Shrewsbury. Vide infra.

Taylor

## Taylor & Rouſe, *Church-wardens of* Downham, *verſus* their Predeceſſors.

(11.)
S. C. 1 *Danv.* 223. 2 *Keb.* 225. 1 *Vent.* 88. Church-Wardens Account. *Bro.* Account, 71. *F.* Account, 20. 1 *Rol.* 118. *E. & L.* 121. 9. 1 *Danv.* 223, 224, 225, 233, 234. *Ante* 42.

THE Action was to make them account for a Bell. They plead, That they delivered it to a Bell-founder, to mend, and that it is yet in his Hands. The Plaintiff demurs; the Cauſe of his Demurrer was, That this was no good Plea in Bar of the Account, though it might be a good Plea before Auditors. 1 Roll. 121. Pemberton. I conceive it is a good Plea; for where-ever the Matter or Cauſe of the Account is taken off, the Plea is good in Bar. But he urged, That the Action was brought for taking away bona Eccleſiæ, and not bona Parochianorum, as it ought to have been. Court. The Property is not well laid. So ordered to mend all, and plead de novo.

# Term. Mich. 22 Car. II. 1670. in B. R.

(12.) AN Inquiſition was returned upon the Statute againſt pulling down Incloſures. They took Iſſue as to the Damages only. It was moved, That before the Trial for the Damages, there might be Judgment given to have them ſet up again, having been long down. Twiſden. When you have Judgment for the Damages, then one Diſtringas will ſerve for ſetting up the Incloſures and the Damages too. As in an Action, where Part goes by Default, and the other Part is traverſed, you ſhall not take out Execution, till that Part which is traverſed be tried.

1 *Cro.* 580.

2 *Rol.* 898.

(13.) Upon a Motion by Mr. Dolben for an Attachment, Twiſden ſaid, If a Man has a Suit depending in this Court, and be coming to Town to proſecute or defend it here, he cannot be ſued elſewhere. But if a Man come hither as a Witneſs, he is protected eundo & redeundo.

Attachment.

Arreſt.

## Wootton & Heal.

(14.) AN Action of Covenant was brought upon a Warranty in a Fine, a Term for Years being evicted. Saunders. I acknowledge, That an Action of Covenant does well lie in this Caſe: But the Plaintiff aſſigns his Breach in this, viz. That one Stowell habens legale jus & titulum, did enter upon him and evict him; which perhaps he did by Virtue of a Title derived from the Plaintiff himſelf: 2 Cro. 315. Kirby and Hanſaker. Jones contra. To ſuppoſe that Stowell claimed under the Plaintiff, is a foreign Intendment: And it might as well come on the Defendant's Side to ſhow it: And ſince that Caſe in 2 Cro. the Statute of 21 Jac. and the late Act, have much ſtrengthned Verdicts. Twiſden. The Statutes do not help

S. C. 2 *Saund.* 177.

1 *Sid.* 466.

*poſt* 290, 291.

See 2 *Mod.* 213.

3 *Mod.* 135.

2 *Lev.* 37, 194.

3 *Lev.* 325.

2 *Danv.* 50.

*Poſt* 101, 290.

2 *Cro.* 444.

when the Court cannot tell how to give Judgment. The Plaintiff ought to entitle himself to his Action, and it is not enough if the Jury entitle him. Jones. You have waived the Title here, and relied upon the Entry of the Issue only, which is non intravit, &c. Cur. advisare vult.

*Post*, 290. *pl.* 37.

## Lassels & Catterton.

(15.)

S. C. 1 *Sid.* 467. *Raym.* 190. 2 *Danv.* 36. *pl.* 13. 2 *Keb.* 685.

AN Action of Covenant for further Assurance, the Covenant being to make such Conveyance, &c. as Counsel should advise; they allege for Breach, That they tendred such a Conveyance as was advised by Counsel, viz. A Lease and Release, and set it forth with all the usual Covenants. Levinz moved in Arrest of Judgment; I conceive they have tendred no such Conveyance as we are bound to execute; for we are not obliged to seal any Conveyance with Covenants, nor with a Warranty. Besides, That which they have tendred, has a Warranty, not only against the Covenantor, but one Wilson: 2 Cro. 571. 1 Roll. 424. Again, our Covenant is, to convey all our Lands in Bomer; and the Conveyance tendred, is of all our Lands in the Lordship of Bomer. Twisd. For the last Exception, I think we shall intend them to be both one: And I know it hath been held, That if a Man be bound to make any such reasonable Assurance, as Counsel shall advise, usual Covenants may be put in; for the Covenant shall be so understood. But there must not be a Warranty in it: Though some have held, That there may be a Warranty against himself; but I question whether that will hold. But Weston, on the other Side, said, That the Objection as to the Warranty was fatal, and he would not make any Defence.

*Vide Owen* 65. 1 *Rol. Rep.* 71.

The

( 16. ) *The* King *verſus* Morris. *Vide ſup'.*

*Wales. Vide Ante* 37. *& 64. pl.* 10. *Vaugh.* 395, to 420. 2 *Mod* 10. 2 *Saund.* 193. *Raym.* 206. 1 *Lev.* 291.

MR. Attorney Finch ſhewed Cauſe, why a Certiorari ſhould not be granted to remove an Indictment of Murder out of Denbighſhire in Wales. Twiſden. In 2 Car. and 8 Car. it was held, That a Certiorari did lie in Wales. Morton. By 34 H. 8. the Juſtices of the Great Seſſions have Power to try all Murthers, as the Judges here have; and the Statute of 26 H. 8. for the Trial of Murthers in the next Engliſh County, was made before that of the 34 H. 8. Twiſden. I never yet heard, That the Statute of 34 H. 8. had repealed that of 26 Hen. 8. It is true, the Judges of the Grand Seſſions have Power, but the Statute that gives it them, does not exclude this Court. To be moved when the Chief Juſtice ſhould be in Court.

( 17. ) Franklyn's *Caſe.*

Conventicles. *Stat.* 17 *Car.* 2. *cap.* 2. *ſect.* 5. *Vide* 2 *Show.*

FRanklyn was brought into Court by Habeas Corpus, and the Return being read, it appeared, That he was committed as a Preacher at ſeditious Conventicles. Coleman prayed he might be diſcharged; he ſaid this Commitment muſt be upon the Oxford Act: For the laſt Act only orders a Conviction; and the Act for Uniformity, Commitment only after the Biſhop's Certificate. And the Oxford Act provides, That it ſhall be done by two Juſtices of the Peace, upon Oath made before them: And in this Return, but one Juſtice of Peace is named; for Sir William Palmer is mentioned as Deputy-Lieutenant, and you will not intend him to be a Juſtice of Peace. Nor does it appear that there was any Oath made before them. Twiſden. Upon the Statute of the 18th of the Queen, that appoints, That two Juſtices ſhall make Orders for the keeping of Baſtard-Children, whereof one to be of the *Quorum*: I have got many of them quaſh'd, becauſe it was not expreſs'd, That one of them was of the Quorum. Whereupon Franklyn was diſcharged.

Upon a Motion for Time to plead in a great Cauſe about Brandy, Twiſden ſaid, If it be in Bar, you cannot demand Oyer of the Letters Patents the next Term; but if it be in a Replication, you may; becauſe you mention the precedent Term in the Bar, but not in the Replication. ( 18. ) *Oyer.* *5 Co. 75.*

## Yard & Ford.

( 19. ) *S.C. 2 Saund. 172.*

MOved by Jones in Arreſt of Judgment; an Action upon the Caſe was brought for keeping a Market without Warrant, it being in Prejudice of the Plaintiff's Market. He moved, That the Action would not lie, becauſe the Defendant did not keep his Market on the ſame Day that the Plaintiff kept his; which he ſaid is implied in the Caſe in 2 Roll. 140. Saunders contra. Upon a Writ of Ad quod dampnum, they enquire of any Markets generally, though not held the ſame Day. In this Caſe, though the Defendant's Market be not held the ſame Day that ours is, yet it is a Damage to us in foreſtalling our Market. Twiſden. I have not obſerved that the Day makes any Difference. If I have a Fair or Market, and one will erect another to my Prejudice, an Action will lie; and ſo of a Ferry. It is true, for one to ſet up a School by mine, is damnum abſque injuria. Ordered to be moved again. *2 Roll. 140. G. 4.* *1 Roll. 117. pl. 11.*

## Cock & Honychurch.

( 20. ) Accord.

PAwlet moved in Treſpaſs, that the Defendant pleaded in Bar, that he had paid three Pounds, and made a Promiſe to pay ſo much more in Satisfaction; and ſaid it was a good Plea, and did amount to an Accord with Satisfaction; an Action being but a Contract, which this was. Twiſden. An Accord executed is pleadable in Bar, but Executory not. *Raym. 203. 1 Roll. 129. pl. 13. 4 Mod. 89. Ante 7. pl. 21. 1 Danv. 241. pl. 18. 9 Co. 79.*

( 21. ) Uſury. *Vide 1 Saund. 295. 1 Vent. 38. 1 Sid. 421. Raym. 197. 2 Mod 307. Stat. 37 H. 8. cap. 9.*

Twiſden. There are two Clauſes in the Statute of Uſury; if there be a corrupt Agreement at the Time of the lending of the Money, then the Bonds, and all the Aſſurances, are void; but if the Agreement be good, and afterward he receives more than he ought, then he forfeits the treble Value.

Bonne-

( 22. ) **Bonnefield.**

Noſme. HE was brought into Court upon a Capias Excom. and it was urged by Pawlet, That he might be delivered, for
1 *Cro.* 199. that his Name was Bonnefield, and the Capias Excom. was againſt one Bromfield. Twiſden. You cannot plead that here to a Capias Excom. You have no Day in Court, and we cannot bail upon this; but you may bring your Action of Falſe Impriſonment.

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( 23. ) **Caterall & Marſhall.**

ACtion upon the Caſe, wherein the Plaintiff declares, That in Conſideration that he would give the Defendant a Bond of ſufficient Penalty to ſave him harmleſs, he would, &c. and ſets forth, That he gave him a Bond with ſufficient Penalty; but does not expreſs what the Penalty
1 *Sid.* 270. was. This was moved in Arreſt of Judgment. Jones. After a Verdict it is good enough, as in the Caſe in Hob '69. Twiſden. If it had been upon a Demurrer, I ſhould not have doubted but that it had been naught. Rainsford and Morton. But the Jury have judged the Penalty to be reaſonable, and have found the Matter of Fact. Twiſden. The Jury are not Judges what is reaſonable, and what unreaſonable: But this is after a Verdict. And ſo the Judgment was affirm'd, the Cauſe coming into the King's Bench upon a Writ of Error.

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( 24. ) **Martin & Delboe.**

S.C. 1 *Lev.* 298.
1 *Vent.* 89.
2 *Saund.* 125.
2 *Keb.* 674, 696, 717.
1 *Sid.* 465.
*Vide* 2 *Mod.* 312.

AN Action upon the Caſe, ſetting forth, That the Defendant was a Merchant, and tranſmitted ſeveral Goods beyond Sea, and promiſed the Plaintiff, that if he would give him ſo much Money, he would pay him ſo much out of the Proceed of ſuch a Parcel of Goods as he was to receive from

beyond Sea. The Defendant pleaded the Statute of Limitations, and doth not say, Non assumpsit infra sex annos, but that the Cause of Action did not arise within six Years. The Plaintiff demurs, because the Cause is between Merchants, &c. Sympson. The Plea is good; Accounts within the Statute must be understood of those that remain in the Nature of Accounts: Now this is a Sum certain. Jones accorded. This is an Action upon the Case, and an Action upon the Case between Merchants is not within the Exception. And the Defendant has pleaded well in saying, That the Cause of Action did not arise within six Years: For the Cause of Action ariseth from the Time of the Ship's coming into Port; and the six Years are to be reckoned from that Time. Twisden. I never knew but that the Word Accounts in the Statute was taken only for Actions of Account. An insimul computassent brought for a Sum certain, upon an Account stated, though between Merchants, is not within the Exception. So Judgment was given for the Defendant.

*Post* 268, 269. 1 *Le.* 2. 287. 2 *Mod.* 311. *Post* 270. *Post* 89. 2 *Saund.* 127. *Post* 268, 269, 270. 2 *Mod.* 311.

## The King *versus* Leginham.

(25.) S. C. *Ray.* 193, 205.

An Information was exhibited against him for taking unreasonable Distresses of several of his Tenants. Jones moved in Arrest of Judgment, That an Information would not lie for such Cause. Marlbr. cap. 4. saith, That if the Lord take an unreasonable Distress, he shall be amerced, so that an Information will not lie. And my Lord Coke upon Magna Carta, says, the Party grieved may have his Action upon the Statute: But admit an Information would lie, yet it ought to have been more particular, and to have named the Tenants; it is not sufficient to say in general, that he took unreasonable Distresses of several of his Tenants. And the second Part of the Information, viz, That he is communis oppressor, is not sufficient: Rolle 79. Moor 451. Twisden. It hath so been adjudged, that to lay in an Information, that a Man is communis oppressor, is not good. And a Lord cannot be indicted for an excessive Distress, for it is a private Matter, and the Party ought to bring his Action. To stay. Vide post 288.

1 *Lev.* 299. 2 *Keb.* 687, 697. *post* 288. Distress. 2 *Inst.* 107. *Vide Faresl.* 52. 6 *Mod.* 178, 289, 311. 1 *Salk.* 382. 1 *Sid.* 62, 282.

Haman

(26.)

## Haman & Truant.

AN Action upon the Case brought upon a Bargain for Corn and Grals, &c. The Defendant pleads another Action depending for the same Thing. The Plaintiff replies, That the Bargains were several; absque hoc, that the other Action was brought for the same Cause. The Defendant demurs specially, for that he ought to have concluded to the Country. Pollexfen. When there is an Affirmative, they ought to make the next an Issue, or otherwise they will plead in infinitum. 3 Cro. 755. and accordingly Judgment was given for the Defendant.

*Co. Lit.* 126. *a.*
1 *Cro.* 164.
*Yel.* 38.
See 1 *Lev.* 133.
1 *Saund.* 102.
2 *Saund.* 73, 189, 190.
1 *Vent.* 101.
*Ray.* 199.

(27.)

## Fox, *& alii*, Executors of Mr. Pinsent.

*Vide supra* 47. *pl.* 102.

S. C. *Ante* 47. *post* 295.
2 *Lev.* 299.
2 *Saund.* 212.

INdebitat. Assumpsit: The Defendant pleads, That two of the Plaintiffs are Infants, and yet they all sue per Attornatum. The Question is, If there be two Executors, and one of them under Age, whether the Infant must sue per Guardianum, and the other per Attornatum, or whether it is not well enough, if both sue per Attornat.? Offley spake to it, and cited 2 Cro. 541. Pasch. 11 Car. 288. Powell's Case, Style 318. 2 Cro. 577. 1 Inst. 157. Dyer 338. Morton. I am of Opinion that he may sue by Attorney, as Executor: Though if he be Defendant, he must appear by Guardian. Rainsford. I think it is well enough; and I am led to think so by the Multitude of Authorities in the Point: And I think the Case stronger when Infants join in Actions with Persons of full Age. He sues here in auter droit; and I have not heard of any Authority against it. Twisden concurred with the rest, and so Judgment was given.

See 1 *Lev.* 181.
2 *Lev.* 38, 239, 240.
1 *Sid.* 449.
*Ray.* 198.
3 *Cro.* 541.

2 *Rol.* 207.

## Moreclack & Carleton.

( 28. )
S. C. *Raym.* 195.
2 *Saund.* 191.

Upon a Writ of Error out of the Court of Common Pleas, one Error assigned was, That upon a Relicta verificatione, a Misericordia was entred; whereas it ought to have been a Capiatur. Twisden. The Common Pleas ought to certify us what the Practice of their Court is. Monday, the Secondary, said, It was always a Capiatur. It is true in 9 Ed. 4. it is said, That he shall be amerced, because he hath spared the Jury their Pains; and 34 H. 8. is accordingly: But say they, in the Common Pleas, a Capiatur must be entred, because dedicit factum suum. So they said they would discourse with the Judges of the Common Pleas concerning it.

## *The* King *versus* Holmes.

( 29. )

Moved to quash an Indictment of Forcible Entry into a Messuage, Passage, or Way: For that a Passage, or Way, is no Land nor Tenement, but an Easement: And then it is not certain, whether it were a Passage over Land or Water: Yelv. 169. The Word Passagium is taken for a Passage over Water. Twisden. You need not labour about that of the Passage; we shall quash it as to that: But what say you to the Messuage? Jones. It is naught in the Whole; for it is but by way of Recital, with a quod cum, he was possessed, &c. Et sic possessionatus, &c. But that, Twisden said, was well enough. Jones. Then he saith, That he was possessed de quodam Termino; and doth not say annorum. Twisden. That is naught. And the Indictment was quash'd.

( 30. )
S. C. 2 *Keb.* 73.
*Vide* 2 *Saund. versus Fin.*

An Action was brought against the Hundred of Stoak, upon the Statute of Hue and Cry; and at the Trial, some Housekeepers appeared as Witnesses, that lived within the Hundred, who being examined, said they were poor, and paid no Taxes nor Parish-Duties: And the Question was, Whether they were good Witnesses, or not? Twisden. Alms-People

and Servants are good Witneſſes; but theſe are neither. Then he went down from the Bench to the Judges of the Common Pleas, to know their Opinions; and at his Return ſaid, That Judge Wylde was confident that they ought not to be ſworn; and that Judge Tyrrell doubted at firſt, but afterwards was of the ſame Opinion: Their Reaſon was, Becauſe when the Money recovered againſt the Hundred ſhould come to be levied, they might be worth Something.

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## Hoskins *verſus* Robins.

### *Hill.* 23 *Car.* 2. *Rot.* 233.

( 31. )

S. C. 1 *Vent.* 163. 2 *Saund.* 324. 2 *Lev.* 2. 2 *Keb.* 758, 842. *Vide* 1 *Vent.* 163. 383. 1 *Saund.* 227, 343. Common, &c. *Vide Cro. Jac.* 27, 44. *Poph.* 201. 1 *Lev.* 196. 2 *Mod.* 185. 3 *Mod.* 162. *Nelſ. Lutw.* 500, &c.

IN this Caſe theſe Points were ſpoke to in Arreſt of Judgment, viz. 1. Whether a Cuſtom to have a ſeveral Paſture excluding the Lord, were a good Cuſtom, or not? It was ſaid, That a Preſcription to have Common ſo, was void in Law; and if ſo, then a Preſcription to have ſole Paſture, which is to have the Graſs, by the Mouth of the Cattle, is no other than Common Appendant: Daniel's Caſe, 1 Cro. So that Common and Paſturage is one and the ſame Thing. They ſay that it is againſt the Nature of Common, for the very Word Common ſuppoſeth that the Lord may feed. I anſwer, If that were the Reaſon, then a Man could not by Law claim Common for half a Year, excluding the Lord; which may be done by Law. But the true Reaſon is, That if that were allowed, then the whole Profits of the Land might be claimed by Preſcription, and ſo the whole Land be preſcribed for. The Lord may grant to his Tenants to have Common, excluding himſelf; but ſuch a Common is not good by Preſcription. The ſecond Point was, Whether or no the Preſcription here not being for Beaſts Levant and Couchant, were good, or not? For that a Difference was made betwixt Common in Groſs, and Common Appendant, viz. That a Man may preſcribe for Common in Groſs, without thoſe Words; but not for Common Appendant. 2 Cro. 256. 1 Brownl. 35. Noy 145. 15 Edw. 4. fol. 28, 32. Roll. Tit. Common 398. Fitz. Tit. Preſcription, 51. A third Point was, Whether or no theſe Things

*Vide Ante*, 6, 7. *Nelſ. Lutw.* 500, 501. 1 *Sid.* 313. 1 *Lev.* 196. 2 *Lev.* 2. 2 *Show.* 328, 329. 1 *Danv.* 798. I. 802. O. *Ante* 6, 7, & 63.

are not help'd by a Verdict? As to that, it was alledged, That they are Defects in the Title, appearing on Record: And that a Verdict doth not help them. Saunders contra. In Case of a Common, such a Prescription is not good, because it is a Contradiction, but here we claim solam Pasturam. Now what may be good at this Day by Grant, may be claimed by Prescription. As to the Exception, that we ought to have prescribed for Cattle levant and couchant: It's true, if one doth claim Common for Cattle, levant and couchant is the Measure for the Common, unless it be for so many Cattle in Number: But here we claim the whole Herbage; which perhaps the Cattle levant and couchant will not eat up. Hale. Notwithstanding this Prescription for the sole Pasture, yet the Soil is the Lord's, and he has Mines, Trees, Bushes, &c. and he may dig for Turfs. And such a Grant, viz. of the sole Pasturage, would be good at this Day. 18 Ed. 3. Though a Grant by the Lord, That he will not improve, would be a void Grant at this Day. Twisden. My Lord Coke is express in the Point. A Man cannot prescribe for sole Common, but may prescribe for sole Pasture. And there is no Authority against him. And for levant and couchant; it was adjudged in Stoneby and Muckleby's Case, That after a Verdict it was help'd. And Judgment was given accordingly.

*Levant, &c.* *Ante* 6, 7, 63. 2 *Show.* 328, 329. *Nelf. Lutw.* 500, 501. 1 *Saund.* 27, 222, 346. 2 *Saund.* 227, 290, 325. 1 *Danv.* 798. *J.* 802. *O.* 3 *Mod.* 162. 2 *Mod.* 185.

1 *Saund.* 227.

## Anonymus. (32)

Court-Baron.

An Action of Trespass was brought for taking away a Cup, till he paid him twenty Shillings. The Defendant pleads, That ad quandam curiam he was amerced, and that for that the Cup was taken. Hale. We cannot tell what Court it is, whether it be a Court-Baron by Grant or Prescription; if it be by Grant, then it must be coram Seneschallo; if by Prescription, it may be coram Seneschallo, or coram Sectatoribus, or coram both. Then it does not appear, that the House where the Trespass was laid, was within the Manor: Then he doth not say infra Jur. Cur'. It was put upon the other Side to shew Cause.

(33.)

## Jacob Hall's Caſe.

See 5 *Mod.* 142.

ONE Jacob Hall a Rope-dancer, had erected a Stage in Lincoln-Inn-fields: But upon a Petition of the Inhabitants, there was an Inhibition from Whitehall: Now upon a Complaint to the Judges, that he had erected one at Charing-croſs, he was ſent for into Court: And the Chief Juſtice told him, That he underſtood it was a Nuſance to the Pariſh: And ſome of the Inhabitants being in Court ſaid, That it did occaſion Broils and Fightings, and drew ſo many Rogues to that Place, that they loſt Things out of their Shops every Afternoon. And Hale ſaid, That in 8 Car. 1. Noy came into Court, and prayed a Writ to prohibit a Bowling-Ally erected near St. Dunſtan's Church, and had it.

(34.)

## Sir Anthony Bateman's Caſe.

Conveyance voluntary. 2 *Lev.* 70, 146, 147. 2 *Show.* 46.

*Poſt* 119. *pl.* 21.

IN the Trial at Bar, the Son and Daughter of Sir Anthony Bateman were Defendants: The Action was an Ejectione Firmæ. The Defendants admitted the Point of Sir Anthony's Bankrupcy, but ſet up a Conveyance made by Sir Anthony to them for the Payment of 1500 l. apeice, being Money given to them by their Grandfather, Mr. Ruſſel, to whom Sir Anthony took out Adminiſtration. Hale. It is a voluntary Conveyance, unleſs you can prove that Sir Anthony had Goods in his Hands of Mr. Ruſſel's, at the Time of the executing it. So they proved that he had, and there was a Verdict for the Defendants.

## Legg & Richards. (35.)

Ejectment. Judgment againſt the Defendant, who dies, and his Executor brings a Writ of Error, and is nonſuited. It was moved that he ſhould pay Coſts. Twiſden. An Executor is not within the Statute for Payment of Coſts occaſione dilationis. Hale. I am of the ſame Opinion. Coſts. 1 *Vent.* 166.

## Harwood's Caſe. (26.)

S. C. *Poſt* 79. 2 *Lev.* 32. Marriage. Orphan. See 1 *Lev.* 162. 1 *Chan. R.* 26.

He was brought to the Bar by Habeas Corpus, being committed by the Court of Aldermen for marrying an Orphan without their Conſent. Sol. North. We conceive the Return inſufficient, and that it is an unreaſonable Cuſtom to impoſe a Penalty on a Man for marrying a City Orphan in any Place of England. Now we married her far from London, and knew not that ſhe was an Orphan. Then they have put a Fine of 40 l. upon him, whereas there is no Cauſe why he ſhould be denied Marriage with her, there being no Diſparagement. Twiſden. Mr. Waller of Beconsfield was impriſoned ſix Months for ſuch a Thing. So the Money was ordered to be brought into Court. Vide infra 79.

## Leginham & Porphery. (37.)

S. C. 1 *Sid.* 361. *Vide ib.* 348. 2 *Keb.* 344, 847.

Replevin and Avowry for not doing Suit. The Plaintiff ſets forth a Cuſtom, That if any Tenant live at a Diſtance, if he comes at Michaelmas and pay Eight-pence to the Lord, and a Peny to the Steward, he ſhall be excuſed for not attending; and then ſays, That he tendred Eight-pence, &c. and the Lord refuſed it, &c. Pollexfen. I know no Caſe where Payment will do, and Tender and Refuſal will not do. Hale. Have you averred, that there are ſufficient Copyholders that live near the Manor? Pollexfen. We have averred, That there

there are at least 120. Hale. Surely Tender and Refusal is all one with Payment. Twisden. An Award is made, that super receptionem, &c. a Man should give a Release; there Tender and Refusal is enough. Judgment for the Defendant.

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(38.) Waldron *versus*, &c.

Constable.

HAle. It is true, one Parish may contain three Wills. The Parish of A. may contain the Wills of A. B. and C. that is, when there are distinct Constables in every one of them. But if the Constable of A. doth run through the whole, then is the whole but one Will in Law. Or where there is a Tithing-Man, it may be a Will: But if the Constable run through the Tithing, then it is all one Will. I know where three or four thousand Pounds per Ann. hath been enjoyed by a Fine levied of Land in the Will of A. in which are five several Hamlets, in which are Tithings; but the Constable of A. runs through them all, and upon that it was held good for all. Here was a Case of the Constable of Blandford-Forum, wherein it was held, That if he had a concurrent Jurisdiction with all the rest of the Constables, the Fine would have passed the Lands in all. In some Places they have Tithing-Men and no Constables. Pollexfen. Lambard 14. is, That the Constable and the Tithing-Man are all one. Hale. That is in some Places. Præpositus is a proper Word for a Constable, and Decemarius for a Tithing-Man.

*Ante* 13.
1 *Salk.* 175, 176, 381.
2 *Saund.* 290.
2 *Show.* 75.
5 *Mod.* 96, 127.
6 *Mod.* 96.
*Pop.* 12.
*Savil.* 97, 98.
2 *Danv.* 148.

(39.) Apprentice.

An Indictment for retaining a Servant without a Testimonial from his last Master. Moved to quash it, because it wants the Words contra pacem. 2. Because they do not shew in what Trade it was. So quash'd.

1 *Cro.* 584.

(40.) Days.

Moved to quash another Indictment, because the Year of our Lord, in the Caption, was in Figures. Hale. The Year of the King is enough.

Moved for a Prohibition to the Spiritual Court, for that they ſue a Pariſh for not paying a Rate made by the Church-wardens only; whereas by the Law, the major Part of the Pariſh muſt join. Twiſden. Perhaps no more of the Pariſh will come together. Counſel. If that did appear, it might be ſomething. ( 41. ) *Poſt*, 194. *pl.* 25. 5 *Co.* 63.

Hale. A Writ of Error will lie in the Exchequer-Chamber of a Judgment in a Scire Facias, grounded upon a Judgment in one of the Actions mentioned in the 27 of Eliz. cap. 8. becauſe it is in Effect a Piece of one of the Actions therein mentioned. ( 42. ) Error. S. C. 1 *Vent.* 168. 2 *Keb.* 833.

## Harwood's *Caſe*.

( 43. ) S. C. *Ante*, 77. 2 *Lev.* 32. 130. 1 *Vent.* 180. Marriage. Orphan. *Vide* 1 *Lev.* 162. 1 *Chanc. Rep.* 26. 1 *Rol. Rep.* 316. 1 *Lev.* 162. 2 *Lev.* 32. *Ante*, 77. *Co. Lit.* 136.

HE was removed out of London by Habeas Corpus; the Return was, That he was fined and committed there for marrying a City-Orphan, without the Conſent of the Court of Aldermen. Exception 1. They do not ſay that the Party was a Citizen, or that the Marriage was within the City: And they are not bound to take Notice of a City-Orphan out of the City, for their Cuſtoms extend only to Citizens in the City. Exception 2. They have not ſhewed that we had reaſonable Time to ſhew Cauſe, why we ſhould not be fined. Twiſden. Theſe Objections are over-ruled in Mr. Waller's Caſe. Afterward, in the ſame Term, Weſton ſpake to it. There are two Matters upon which the Validity of this Return doth depend, viz. The Cuſtom, and the Offence within the Cuſtom. The Cuſtom is laid, that Time out of Mind the Court of Aldermen have had Power to ſet a reaſonable Fine upon ſuch as ſhould marry an Orphan without their Leave; and upon Refuſal to pay it, to impriſon him. I conceive this Cuſtom, as it is laid, to be unreaſonable: It ought to be locally circumſcribed, and confined to the City: 17 Ed. 4. 7. There was an Action brought upon the Statute of Labourers, for retaining one that was the Plaintiff's retained Servant: The Defendant pleaded in Abatement, That there was no Place laid where the Plaintiff's Retainer was; and this was held a good Plea; for that

that if it were in another County than where the Defendant retained him, it was impoſſible for the Defendant to take Notice of a Retainer in another County. No more can we take Notice who is a City-Orphan in the County of Kent. Then, they have returned a Cuſtom to impriſon generally; but it ſhould have been, That without reaſonable Cauſe ſhewn they might impriſon, and the Party have Liberty to ſhew Cauſe to the contrary. Then, I conceive they have returned the Faſt as defective as the Cuſtom: They ſay, That he married her without their Conſent; they ought to have ſaid, That he took her out of their Cuſtody: And your Lordſhips will not intend, That ſhe was in their Cuſtody, when ſhe was out of the City. Offley, of the ſame Side, and cited 21 Ed. 3. Fitz. Guard. 31. and Hob. in Moore and Huſſey's Caſe, 95. 3 Cro. 803. 3 Cro. 689. 1 Cro. 561. In all the Caſes it is returned, That they were Freemen of the City. Mr. Solicitor North, on the ſame Side, cited Day and Savage's Caſe. Mr. Attorney General, on the other Side, ſaid, That becauſe it was impoſſible to give Notice to all, therefore ex neceſſitate rei, they muſt take Notice at their Peril. Hale. The City has an Intereſt in the Orphan, where-ever the Orphan be. And for Notice, he may enquire; there is no Impoſſibility of his coming to the Knowledge, whether ſhe be an Orphan or no; therefore if he takes her, he takes her at his Peril. Twiſden. And for the Fine, ſuch a Fine was ſet in Langham's Caſe, and adjudged good. Let a Citizen of London live where he will, his Children ſhall be Orphans. Hale. Some Things are local in themſelves; ſome Things adherent to the Perſon, and follow the Perſon: Now this is an Intereſt which follows the Perſon, and is tranſmitted to his Children; and the Party muſt take Notice of it at his Peril.

*Vide* 2 *Danv.* 312. *B.* 3.

1 *Sid.* 250. 1 *Vent.* 180. *Hut.* 30. 1 *Lev.* 162.

## Cox & St. Albans.

( 44. )

A Prohibition was prayed for to the City of London, because the Defendant had offered a Plea to the Jurisdiction sworn, and it had been refused. Hale. In transitory Actions, if they will plead a Matter that ariseth out of the Jurisdiction, and swear it before Imparlance, and it be refused, a Prohibition shall go. There was a Case, in which it was adjudged: 1. That upon a bare Surmise, That the Matter ariseth out of the Jurisdiction, the Court will not grant a Prohibition. 2. It must be pleaded, and the Plea sworn, and it must come in before Imparlance. If all this were done, we would grant a Prohibition here. It was also agreed in that Case, That the Party should never be received to assign for Error that it was out of the Jurisdiction; but it must be pleaded. Twisden. So in this Court, when there is a Plea to the Jurisdiction, as that it is within a County-Palatine, they plead it before Imparlance, and swear their Plea.

Jurisdiction, pleaded. *Vide* 2 *Mod.* 272, 273. 1 *Sid.* 151. *Vaugh.* 405. 1 *Vent.* 333. *Raym.* 189. 2 *Inst.* 230. *Ibid.*

( 45. )

Twisden. There was a Venire Facias returnable coram nobis apud Westm. whereas it should have been ubicunque fuerimus, &c. yet because the Court was held here, it was held to be good. Hale. I remember it. When in an inferior Court the Venire Facias is ad prox. Cur', it is naught, because it is uncertain when the Court will be kept. But if it be at such a Day ad prox. Cur. it is good.

Return. *Venire* in Inferior Courts. 2 *Keb.* 718. 2 *Mod.* 59. *Raym.* 20. 2 *Danv.* 151. *pl.* 7.

## Anonymus.

( 46. )

S.C. 2 *Saund.* 393.

A Writ of Error of a Judgment in White-Chapel. After the Record was read, Hale said, the Acts of a Court ought to be in the Present Tense, as præceptum est, not præceptum fuit. But the Acts of the Party may be in the Preterperfect Tense; as venit & protulit hic in Cur. quandam querelam suam; and the Continuances are in the Preterperfect Tense, as venerunt, not veniunt. But upon another Exception the Court gave Time to move it again.

Inferior Court. 2 *Keb.* 846, 861. Continuances 2 *Danv.* 151. *pl.* 7.

(47.) S. C. 2 *Keb.* 859.

Moved for a Melius inquirendum to be granted to the Coroner of Kent, who had returned an Inquiſition concerning the Death of one that was killed within the Manor of Greenwich: He had returned, That he died of a Meagrim in his Head, when he was really killed with a Coach. Hale. A Melius inquirendum is generally upon an Office poſt mortem, and is directed to the Sheriff. Twiſden. But this cannot be to the Sheriff. In 22 Ed. 4. the Coroner muſt enquire only ſuper viſum corporis. And if you will have a new Inquiry, you muſt quaſh this. Indeed, a new Inquiry was granted in Miles Bartly's Caſe. 4 *Co.* 57. Thurland prayed, That the Court, being the ſupreme Coroner, would examine the Miſdemeanor of the Coroner. Hale. Make ſome Oath of his Miſdemeanor, becauſe he is a ſworn Officer. Without Oath we will not quaſh this Inquiſition. Newdigate ſaid, That in the Caſe of Miles Bartly the Inquiry was not filed; and that that was the Reaſon why a new one was granted. Hale. Let the Coroner attend, he muſt take the Evidence in writing; and he ſhould bring his Examination into Court.

## Daniel Appleford's *Caſe*.

(48.) S. C. 2 *Keb.* 799.

*Mandamus.* *Vide* 2 *Lev.* 14. 1 *Lev.* 23, 65. *Raym.* 56, 94, 101. 1 *Sid.* 94, 152, 346.

A Writ of Mandamus was directed to the Maſter and Fellows of New-College in Oxford, to reſtore one Daniel Appleford, a Fellow. They return, That the Biſhop of Wincheſter did erect the College; and among other Laws, by which the College was to be governed, they return this to be one, viz. That if a Scholar, or other Member of the ſaid College, ſhould commit any Crime, whereby Scandal might ariſe to the College; and that it appeared by his own Confeſſion, or full Evidence of the Fact, that then he ſhould be removed without any Remedy. And that Daniel Appleford, a Fellow, was guilty of enormous Crimes, and was convicted, and thereupon removed: And they pray Judgment, Whether this Court will proceed? Jones. By this Concluſion they rely chiefly upon the Juriſdiction of the Court. I will lay this for a Ground, That this Court hath Juriſdiction in extrajudicial Cauſes, as well as judicial: 11 Rep. Bagg's Caſe. And

Appleford hath no Remedy but this. I will not ſay, that he may not have an Action upon the Caſe, but by that he will not recover the Thing, but Damages. And for an Aſſize; if a Man be a Corporation ſole, or Head of a Corporation aggregate, and be turn'd out wrongfully, he may have an Aſſize: But for a Man that is but an inferior Member of a Corporation, no Aſſize lieth for him: Becauſe he is but a Part of the Body Politick, and doth not ſtand by himſelf, but muſt join with others; and as he cannot have an Aſſize, ſo he cannot have an Appeal: Dyer, 209. and 11 Rep. in Bagg's Caſe. 24 H. 8. 22. 25 H. 8. cap. 19. 4 Inſt. 340. by theſe Authorities, it appears that we are without Remedy by way of Appeal. It may be objected, That there can be no Appeal hither, becauſe it is a ſpiritual Corporation. Now I ſay, this is not a ſpiritual Corporation, as appears by the Foundation: And I am of Opinion, That if a Corporation be all of ſpiritual Perſons, yet unleſs there be a ſpiritual End, it is no ſpiritual Corporation, but a Lay One. But if it be a ſpiritual Corporation; yet Deprivation is a temporal Act: Dyer 209. Another Objection may be, That the Founder hath provided that there ſhall be no Appeal. I anſwer, The Founder cannot by his Foundation exclude legal Remedies againſt Wrong. A Cuſtom, which is the ſtrongeſt Foundation, doth not bind a Man up from his legal Remedy: Litt. Sect. 212. If a Man ſhould diſpoſe of his Eſtate by Will, and provide therein, That if any Difference ſhould ariſe concerning the Execution of the ſame, that it ſhall be determined by ſuch and ſuch, and no Suit commenced upon it at the Common Law, this would be a vain Appointment: He muſt not erect a Juriſdiction of his own, to ouſt the King's Courts of theirs. Coleman. I conceive this is ſuch a College, as no Mandamus ſhould go to it in any Caſe whatſoever: For it is but a private Society, and hath no Influence upon the publick. In Ryly's Records we find, That Mandamus's were only Letters to Colleges, &c. and there were no judicial Mandamus's till Bagg's Caſe; and I never knew them go, but when the Party had not only a Freehold, but one that was of publick Concern. Now a Fellowſhip of a College is for a private Deſign, only to ſtudy: And if you grant a Mandamus in this Caſe, whither will it go at laſt? Then the Foundation was to a ſpiritual Intent; and what is committed to the Eccleſiaſtical Power and Juriſdiction, this Court doth preſerve. Eccleſiaſtical Men hold in Eleemoſynam: Litt. Sect. 136. Linde- 1 *Sid.* 29.

wode de Religioſis domibus. When Colleges are founded under Rule and Order, it doth give the Biſhop Juriſdiction: So that this Court will not enquire into this Matter, no more than it will enquire into Cauſes of Deprivation, and Matters relating to the Inſtitution of Clergy-Men. It has been denied, that a Fellow of a College can bring an Aſſize. But as a Prebend hath two Capacities, ſole and aggregate; ſo a Fellow is a Member of a Corporation aggregate, and hath a ſole Capacity in reſpect of his Fellowſhip. For a Church-Warden who is admitted according to the Courſe of the Eccleſiaſtical Law, a Mandamus will not lie: Vide 6 H. 7. 10.
2 *Rol.* 234. Twiſden. In one Patrick's Caſe, we all held That a College was a temporal Corporation. Hale. There is a Reaſon given in Dyer why a Mandamus will not lie in the Caſe there, viz. becauſe it was prayed to be awarded to a temporal Corporation. Coleman. It doth appear by the Return, That the Founder hath appointed a Viſitor; now to him there may be an Appeal; and we have returned the Sentence of the Viſitor, and need not return the Cauſe of the Sentence. And for Books, I do oppoſe Rolle, tit. Prerogative, Huntly's Caſe, 209. to Specott's Caſe, and Ken's Caſe in the Rep. In our Caſe the Party has a Remedy elſewhere, and therefore he ſhall not come hither. If a Mandamus ſhall lie for a Maſterſhip, Fellowſhip or Scholarſhip, it will in Time come to lie for turning out of Commons; and what a Combuſtion will this raiſe then? The Niceties of Husband and Wife were ſaid by the Judges in Scott's Caſe, to be proper for the Spiritual Court, and not fit to be brought before the Judges. Hale. That a Mandamus lies, I will not poſitively deny; but whether is it fit for us to proceed after this Return? It muſt be taken for granted, that it is not a ſpiritual Corporation; if it were, you ought to appeal to the Viſitor, and then to the Delegates. It is a private Society, as an Inns of Court: And I confeſs, That Mandamus's do generally reſpect Matters of publick Concern. I never heard of a Mandamus for a Monk. If there be a Juriſdiction in the Viſitor, and he hath determined the Matter, how will you get over that Sentence? The Chancellor is Viſitor of all the King's Free-Chapels, and the 2 H. 5. doth make him ſo of all Colleges of the King's Foundation. Suppoſe a temporal Court, over which we have Juriſdiction, do give Judgment in Aſſize to recover an Office: So long as that Judgment ſtands in Force, do you think

think that we will grant a Mandamus to reſtore him againſt whom the Judgment is given? Twiſden. In all eleemoſynary Things there are Viſitors appointed either by Law, or by Creation of the Party. Hale. The Free-Chapels of Windſor and Wolverhampton are not of ſpiritual Juriſdiction. Hale. At this Rate we ſhould examine all Deprivations, Suſpenſions, Elections, &c. and by the 13th of the Queen the Laws of the Univerſity are confirmed. Hale. We ought not to grant a Mandamus where there is a Viſitor: But in this Caſe the Viſitor hath given Sentence.

## Mors & Sluce.

(49.)

S. C. 2 *Lev.* 69. *Ray.* 220. 1 *Vent.* 190, 238. 3 *Keb.* 72, 112, 135. 1 *Danv.* 12, 13. *pl.* 6. *Moll.* 209, 230, 239.

A Trial at Bar. An Action upon the Caſe was brought againſt a Maſter of a Ship, who had taken in Goods to tranſport them beyond Sea, for that he ſo negligently kept them, that they were ſtolen away whilſt the Ship lay in the River of Thames. Maynard inſiſted upon it, That the Maſter was not chargeable; Say they, he is chargeable whilſt he is here, but when he is gone out of the Realm, he is not chargeable, though the Goods be taken from him. Which Diſtinction, he ſaid, had no Foundation in Law. Hale. It will lie upon you that are for the Defendants, to ſhew a Difference betwixt a Carrier and a Maſter of a Ship. And it will lie upon you that are for the Plaintiff, to ſhew why the Maſter of a Ship ſhould be charged for a Robbery committed within the Realm, and not for a Piracy committed at Sea. It was urged for the Plaintiff, That a Hoy-Man and Ferry-Man are bound to anſwer, and why not the Maſter of a Ship? The Defendant proved, That there was no Careleſneſs nor negligent Default in him. Maynard. He is not chargeable, if there be no Negligence in him, becauſe he is but a Servant, the Owner takes the Freight. Hale. He is Exercitor navis, If we ſhould let looſe the Maſter, the Merchant would not be ſecure. And if we ſhould be too quick upon him, it might diſcourage all Maſters: So that the Conſequence of this Caſe is great. But the Jury gave a Verdict for the Defendant; the Court, for the Reaſons aforeſaid, inclining that way. 1 *Rol.* 2. *pl.* 2. 1 *Sid.* 36.

Porter

## Porter & Fry.

(50.)
S. C. 2 *Lev.* 21, 22. *Ray.* 136. 1 *Vent.* 199, 200. *Poſt* 300, 301, &c. 2 *Keb.* 756, 787, 814, 867. 2 *Chan. Rep.* 26. 2 *Show.* 316, 317. Deviſe on Condition, &c. See 2 *Danv.* 30. *J.* 2. 111 *pl.* 42. 112 *pl.* 43. 1 *Cro.* 583.

EJectione firmæ, A ſpecial Verdict. The Caſe was; A Man deviſeth to A. for Life, the Remainder to one and the Heirs of his Body, upon Condition, That if he marry without Conſent of ſuch and ſuch, or die without Heirs of the Body of his Mother, that then the Eſtate ſhall go to another and his Heirs. He marries without their Conſent, and he in the Remainder enters. Mr. Attorney Finch. The firſt Queſtion will be, Whether this Proviſo be a Condition or a Limitation? 2. Whether Notice be requiſite in this Caſe, or not? For the firſt, I take it to be a Limitation, and that it muſt ſo be expounded, and not as a Condition. Dyer: 10 Eliz. 317. Plowd. queres, 108. Moor. 312. 29 Elix. Com. Banc. 1 Leon. Plac. 383. 2 Leon. 581. Poph. 6, 7. 1 Roll. Condition 411. and the ſame Caſe is in Owen's Rep 112. In Caſe of a Deviſe, a Condition muſt be conſtrued as a Limitation: 3 Cro. 388. There ſeems to be an Authority againſt me in Mary Portington's Caſe, 10 Rep. in a Reaſon there given; but it is an accumulative Reaſon, and does not come to the Point adjudged. I ſhall inſiſt upon Wellock and Hamond's Caſe in Leon. it is reported likewiſe in Boraſton's Caſe, 3 Rep. and my Lord Coke ſays, That it doth reſolve a Quære in Dyer, 327. ſo that expreſs Words of Condition, may by Conſtruction in a Will, amount to no more than a Limitation. The ſecond Point is, Whether he ſhall be excuſed for Breach of this Condition, for want of Notice? Firſt, I ſhall conſider it in reſpect of the Perſon. Secondly, in reſpect of the Grounds of Notice in any Caſe. Firſt, in Reſpect of the Perſon: Now he may be conſidered in two Capacities, as an Infant, and as a Deviſee. Now his Infancy cannot excuſe him: For the Condition was annexed to the Deviſe expreſly; becauſe he was an Infant. Secondly, he is a Purchaſor. Now if an Infant purchaſe an Advowſon, and the Incumbent die, Lapſe ſhall incur, though he had Notice of the Death of the Incumbent: And there is the ſame Reaſon in this Caſe, where he is Deviſee. Thirdly, An Infant is bound by all Conditions in Deed, though not by Conditions in Law. Com. 57. Indeed 31 Aſſ. 17. is againſt it; but in Bro. Con-

1 *Leon.* 269. 3 *Co.* 19, 20. *Cro. J.* 510. 2 *Bulſt.* 123, 124. 2 *Ro. R.* 223, 427.

*Co. Lit.* 380. *b.*

Condition, Plac. 114. that Caſe is ſaid to be no Law, and Bro. agreeth with Plowd. 375. Secondly, Conſider him as Deviſee; and then there will be leſs Ground to excuſe the want of Notice. I take it to be a good Difference betwixt Lands deviſed to an Heir upon Condition, and Lands deviſed to a Stranger upon Condition. To the Heir Notice muſt be given, but not to a Stranger: For the Heir is in by Deſcent, and a Title by Law caſt upon him. And he may very well be ſuppoſed to take no Notice of a Deviſe, becauſe the Law takes no Notice of a Deviſe to him. Now a Stranger, as he muſt needs take Notice of the Eſtate given, ſo he may very well be obliged to take Notice of the Terms upon which it is given. 4 Rep. 82. As for the Grounds and Reaſons of the Law, When Notice in any Caſe is requiſite, and when not: Firſt, I take it for a Rule, That every Man is bound to take Notice, when none is bound to give him Notice: 1 H. 7. 5. 13 H. 7. 9. 5 Rep. Sir Henry Conſtable's Caſe. 3 Leon. Burleigh's Caſe, in the Exchequer. 1 Cro. 390. Roll. 856. Litt. Sect. 350. My ſecond Ground is, That where Perſons are equally privy and concerned, there needs no Notice. Mich. 1649. Leviſton's Caſe. 1 Leon. 31. 7 Rep. 117. Mallorie's Caſe. 14 H. 7. 21. The third Conſideration ariſeth from the Circumſtances, and ſtrict Formality of all Notice. You muſt not give Notice of a Will by Word of Mouth, but you muſt leave a Copy of it, compared: 8 Rep. Fraunce's Caſe. Now the Infant, in Remainder, is incapable of obſerving theſe Circumſtances; and they being both Strangers, are both to take Notice at their Peril. Now to anſwer Objections: One is, That the Condition is penal, and inflicts a forfeiture of an Eſtate, and that therefore Notice ought to be given. I ſay, this is rather a Declamation, than an Argument in Law. I will put a Caſe, where he that is ſubject to a Penalty, muſt give Notice to preſerve himſelf: Poph. 10. So that Penalty, or no Penalty, is not the Buſineſs; but Privity, or no Privity, guides the Caſe. And Fraunce's Caſe, 8 Rep. was ruled upon the Privity, not upon the Penalty. 2 Cro. 56. And a Caſe adjudged in this Court, betwixt Lee and Chamberlyne, ſeems againſt me; but they differ from ours: And the 1 Cro. a Caſe between Alford, and the Commonalty

Notice, &c. *Vide* 2 *Show.* 316, 317. 1 *Jon.* 389. 1 *Rol. Rep.* 469. *Winch.* 109, 117. *Palm.* 164, 165. *Cart.* 92, 170, &c. 2 *Danv.* 111. *pl.* 42, 43. 8 *Co.* 92. *Poſt*, 300, to 314. 1 *Vent.* 200, 202. *Palm.* 73. *Cro. Car.* 577. 2 *Rol. Rep.* 152. 1 *And.* 86, 87. 8 *Co.* 90. 1 *Rol. Rep.* 340. 2 *Brownl.* 277. 3 *Bulſt.* 327. *Cart.* 172. 1 *Cro.* 577.

*Vide 2 Danv.* 8, 9, 10. 10 *Co.* 36, 37, *&c.*

nalty of London, is an Authority for me. Mr. Solicitor North, pro Defendente. I will not speak much to that Point, whether it be a Condition, or a Limitation. I shall rely for that upon Mary Portington's Case: That express Words of Condition, cannot be construed to be a Limitation. Dyer 127. Now, if this be a Condition, then the Heir regularly ought to enter; which he cannot do in this Case, because a Remainder is here limited over. The Law does interpret Conditions according to the Nature and Circumstances of the Thing, and not strictly always according to the Letter. I do not observe, That in any Case the Law suffers a Man to incur a Forfeiture, where he hath not Notice, or is not in the Law supposed to have Notice. He cited 2 Cro. 144. Molineux and Molineux, and Fraunce's Case, 8 Rep. He said it was not the Intention of the Party, That the Devisee should be strip'd of his Estate, and be never the wiser. Saunders and Gerard's Case is for me, of which I have a private Report. He urged also the Case of Curtis and Wolverton, Dyer 354. and Penant's Case, 3 Rep. It is objected, That they that are to have the Benefit of the Estate, ought to take Notice: I answer, The same Objection might be made in Fraunce's Case. Another Reason given to excuse the not giving of Notice, is, That the Condition imports no more than Nature teacheth: But I answer, In case the Executor consent, it is no matter whether the Grand-mother consent or not. And for their Authorities, I shall rely upon 1 Cro. 391. and upon Fraunce's Case for answering them. So he prayed Judgment for the Defendant. Hale. All the Difference betwixt this Case and Fraunce's, is, That in that Case there is an Heir at Law, and not in this. Now the Chancery is so just, as to observe the Civil and Canon Law, as to personal Legacies, but not as to Land.

8 *Co.* 90, 91. 1 *Rol.* 340. 3 *Bulst.* 327. *Vide Cart.* 172.

3 *Co.* 64, 65. 2 *And.* 90. *Cro. Eliz.* 553, 572. *Moor.* 426, 456.

8 *Co.* 90. 1 *Rol.* 340. 2 *Brownl.* 277. 3 *Bulst.* 327. *Cart.* 172. *Post*, 300, 301, *&c.*

Anonymus.

## Anonymus. ( 51. )

AN Action upon the Case upon a Promise to pay Money three Months after, upon a Bill of Exchange. The Defendant pleads, Non assumpsit infra sex annos; urged, That as this Promise was laid, he ought to have pleaded, that the Cause of Action did not accrue within six Years. Sympson, Non assumpsit infra sex annos, relates to the Time of Payment, as well as to the Promise. Hale. That cannot be. Twisden. If I promise to do a Thing upon Request, and the Promise were made seven Years ago, and the Request yesterday, I cannot plead the Statute; but if the Request were six Years ago, it must be pleaded specially, viz. That causa actionis was above six Years since. Stat. Limitations. *Ante*, 71.

## Bradcat & Tower. ( 52. )

AN Action was brought upon a Charter-party. And Hale, in that Case, said, That upon a Penalty you need not make a Demand, as in Case of a Nomine Pœnæ; as if I bind my self to pay 20 l. on such a Day, and in Default thereof to pay 40 l. the 40 l. must be paid without any Demand. *Vide Hob.* 82, 208. 7 *Co.* 28. 1 *Saund.* 33. *Cro. Eliz.* 383. 2 *Danv.* 100. *pl.* 4.

( 53. )

Hale. If a Man cut and carry away Corn at the same Time, it is not Felony, because it is but one Act; but if he cut it, and lay it by, and carry it away afterwards, it is Felony. Tresspass.

( 54. )

Hale. If a Declaration be general, Quare clausum fregit, and doth not express what Close, there the Defendant may mention the Tresspass at another Day, and put the Plaintiff to a new Assignment. But if he say, Quare clausum vocat. Dale fregit, &c. There the Conclusion, Quæ est eadem transgressio, will not help. *Hob.* 16.

( 55. ) Fitz-gerard *verſus* Maskall.

Ejectment. *Vide Hard.* 59. *Cro. Car.* 179, 471, 573. 1 *Jon.* 454. 2 *Danv.* 755. 1 *Lev.* 58, 114, 213. 3 *Lev.* 96. 11 *Co.* 55. *Cro. Car.* 471, 573. 4 *Co.* 87.

ERror of a Judgment in the King's Bench in Ireland; the general Error aſſigned. Offered, 1. That the Ejectment was brought De quatuor molendinis, without expreſſing whether they were Wind-mills or Water-mills. Hale. That is well enough. The Precedents in the Regiſter are ſo. 2. That it was of ſo many Acres Jampnor. & bruer', not expreſſing how many of each. Cur'. That hath always been held good. It was then objected, That the Record was not removed: Upon which it was ordered to ſtay.

( 56. ) Donative.

Pemberton moved for a Prohibition to the Spiritual Court, for that they cited the Miniſter of Mary-bone, which is a Donative, to take a Faculty of Preaching from the Biſhop. Hale. If the Biſhop go about to viſit a Donative, this Court will grant a Prohibition. But if all the Pretence be, That it is a Chapel, and the Chaplain hired, and the Biſhop ſend to him, That he muſt not preach without Licence, it may be otherwiſe. Twiſden. Fitzherbert ſaith, If a Chaplain of the King's Free-Chapel keep a Concubine, the Biſhop ſhall not viſit, but the King. Hale. Indeed, whether there be all Ornaments requiſite for a Church, the Biſhop ſhall not enquire, nor ſhall he puniſh for not repairing. Originally Free-Chapels were Colleges, and ſome did belong to the King, and ſome to private Men. And in ſuch a Chapel, he that was in, was intitled as Incumbent, and not a Stipendiary. Ordered to hear Counſel.

*Vide Ante*, 11, 12, 22.

( 57. ) Demiſe. *Vide* 1 *Vent.* 207. *Hard.* 1. 2 *Keb.* 876. *Styl. Reg.* 587.

Moved by Stroud for a Prohibition to the Biſhop's Court of Exeter, becauſe they proceeded to the Probate of a Will, that contained Deviſes of Lands, as well as Bequeſts of perſonal Things. Hale. Their proving the Will ſignifies nothing as to the Land. Stroud urged Denton's Caſe, and ſome other Authorities. Hale. The Will is entire, and we are not adviſed to grant a Prohibition in ſuch Caſe.

( 58. ) Outlawry.

Hale. It is the Courſe of the Exchequer in caſe of an Outlawry, to prefer an Information, in the Nature of Trover and Converſion, againſt him that hath the Goods of the Party outlawed.

## Parſons & Perns.

(59.)
S. C. 2 *Lev.* 34.

TWO Women were Jointenants in Fee. One of them made a Charter of Feoffment, and delivered the Deed to the Feoffee, and ſaid to him, being within View of the Land, Go, enter, and take Poſſeſſion: But before any actual Entry by the Feoffee, the Feoffor and Feoffee entermarry. And the Queſtion was, Whether or no this Marriage, coming between the Delivery of the Deed and the Feoffee's Entry, had deſtroyed the Operation of the Livery within the View? Pollexfen. It hath not: For the Power and Authority that the Feoffee hath to enter, is coupled with an Intereſt, and not countermandable in Fact, and if ſo, not in Law. If I grant one of my Horſes in my Stable, nothing paſſeth till Election, and yet the Grant is not revocable: So till Attornment nothing paſſeth, and yet the Deed is not revocable. If the Woman in our Caſe, had married a Stranger, that would not have been a Revocation: Perk 29. I ſhall compare it to the Caſe of 1 Cro. 284. Burdet *verſus* — Now for the Intereſt gotten by the Husband by the Marriage: He hath no Eſtate in his own Right. If a Man be ſeized in the Right of his Wife, and the Wife be attainted of Felony, the Lord ſhall enter and ouſt the Husband; he gains Nothing but a bare Perception of Profits till Iſſue had: After Iſſue had, he had an Eſtate for Life. Where a Man that hath Title to enter, comes into Poſſeſſion, the Law doth execute the Eſtate to him: 7 H. 7. 4. 2 R. tit. Attornment. 28 Ed. 3. 11. Bro. tit. Feoffment, 57. Moor, fol. 85. 3 Cro. 370. Hale ſaid on the other Side, You will never get over the Caſe of 38 Ed. 3. My Lord Coke to that Caſe ſaith, That the Marriage without Attornment, is an Execution of the Grant: But that I do not believe; for the Attendance of the Tenant ſhall not be altered without his Conſent. The effectual Part of the Feoffment is, Go, enter, and take Poſſeſſion. Twiſden. Suppoſe there be two Women ſeized, one of one Acre, and another of another Acre, and they make an Exchange: And then one of them marries before Entry, ſhall that defeat the Exchange? Hale. That is the ſame Caſe. So Judgment was given accordingly.

1 *Vent.* 186. 2 *Keb.* 872, 882. *Livery deins le view.*

4 *Co.* 68.

*Co. Lit.* 351.

1 *Vent.* 186.

(60.)
S. C. 2 *Keb.* 881.

## Zouch & Clare.

THomas Tenant for Life, the Remainder to his firſt, ſecond, and third Son, the Remainder to William for Life, and then to his firſt, ſecond, and third Son: And the like Remainders to Paul, Francis, and Edward, with Remainders to the firſt, ſecond, and third Son of every one of them. William, Paul, Francis, and Edward, levy a Fine to Thomas, Paul having Iſſue two Sons at the Time. Then Thomas made a Feoffment. And it was urged by Mr. Leak, that the Remainders were hereby deſtroyed. Hale. Suppoſe A. be Tenant for Life, the Remainder to B. for Life, the Remainder to C. for Life, the Remainder to a Contingent, and A. and B. do join in a Fine, doth not C.'s Right of Entry preſerve the contingent Eſtates? If there had been in this Caſe no Son born, the contingent Remainders had been deſtroyed; but there being a Son born, it left in him a Right of Entry, which ſupports the Remainders: And if we ſhould queſtion that, we ſhould queſtion all; for that is the very Baſis of all Conveyances at this Day. And Judgment was given accordingly.

See *Chan.* Caſes.

# Term. Paſch. 24. Car. II. 1672. in B. R.

## Monke *verſus* Morris & Clayton.

(1.) S C. 2 *Show.* Bankrnpts. See Stat. 13 *El. c.* 7. *ſect.* 247. 1 *Cro.* 166, 176. and my Treatiſe of Bankrupts. 1 *Lev.* 13, 14. 3 *Lev.* 58, 70, 191. 2 *Sid.* 115. 2 *Jon.* 196. 1 *Vent.* 137, 360. *poſt* 215.

AN Action was brought by Monke againſt the Defendants, and Judgment was given for him. They brought a Writ of Error, and the Judgment was affirmed. Jones moved, That the Money might be brought into Court, the Plaintiff being become a Bankrupt. Winning'. This Caſe was adjudged in the Common Pleas, viz. a Man brought an Action of Debt upon a Bond, and had a Verdict, and before the Day in Bank, became a Bankrupt: It was moved, That that Debt was aſſigned over, and prayed to have the Money brought into Court, but the Court refuſed it. Colen an. We have the very Words for us in Effect: For now it is all one as if Judgment had been given for the Aſſignees of the Commiſſioners. Twiſden. How can we take Notice that he is a Bankrupt? Any Execution may be ſtopped at that Rate, by alledging, That there is a Commiſſion of Bankrupts out againſt the Plaintiff. If he be a Bankrupt, you muſt take out a ſpecial Scire facias, and try the Matter, whether he be a Bankrupt or not. Which Jones ſaid they would do, and the Court granted.

(2.) Admiral.

Twiſden. If a Mariner or Ship-Carpenter run away, he loſes his Wages due: Which Hale granted.

Henry

(3.) S. C. *Poſt* 114.

## Henry Lord Peterborough *verſus* John L. Mordant.

A Trial at Bar upon an Iſſue out of the Chancery, Whether Henry Lord Peterborough had only a n Eſtate for Life, or was ſeized in Fee-Tail? The Lord Peterborough's Counſel alledged That there was a Settlement made by his Father 9 Car. 1. whereby he had an Eſtate in Tail, which he never underſtood till within theſe three Years: But he had claimed hitherto under a Settlement made 16 Car. 1. And to prove a Settlement made 9 Car. 1. he produced a Witneſs, who ſaid, That he being to purchaſe an Eſtate from my Lord the Father, one Mr. Nicholls, who was then of Counſel to my Lord, gave him a Copy of ſuch a Deed, to ſhew what Title my Lord had. But being asked, Whether he did ſee the very Deed, and compare it with that Copy, he anſwered in the Negative: Whereupon the Court would not allow his Teſtimony to be a ſufficient Evidence of the Deed: And ſo the Verdict was for my Lord Mordant.

*Vide ante* 4. 5 *Mod.* 211, 386. 6 *Mod.* 225, 248.

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(4.) S. C. 1 *Lev.* 309 to 312. 2 *Saund.* 252 to 259. 3 *Keb.* 8.

## Cole & Forth.

A Trial at Bar directed out of Chancery upon this Iſſue, Whether Waſte or no Waſte? Hale. By Proteſtation I try this Cauſe, remembring the Statute of 4 Hen. 4. And the Statute was read, whereby it is Enacted, That no Judgment given in any of the King's Courts, ſhould be called in Queſtion, till it were reverſed by Writ of Error or Attaint. He ſaid this Cauſe had been tried in London, and in a Writ of Error in Parliament the Judgment affirmed; now they go into Chancery, and we muſt try the Cauſe over again, and the ſame Point. A Leaſe was made by Hilliard to Green in the Year 1651. afterwards he deviſeth the Reverſion to Cole; and Forth gets an Under-Leaſe from Green of the Premiſſes, being a Brew-houſe. Forth pulls it down, and builds the Ground into Tenements. Hale. The Queſtion is, Whether this be Waſte or no? And if it be Waſte at Law, it is ſo in Equity. To pull down a Houſe is Waſte, but

*Ante* 61.

2 *Saund.* 252.

but if the Tenant build it up again before an Action brought, he may plead that ſpecially. Twiſden. I think the Books are pro and con; Whether the building of a new Houſe be Waſte or not. Hale. If you pull down a Malt-mill, and build a Corn-mill, that is Waſte: Then the Counſel urged, That it could not be repaired without pulling it down. Twiſden. That ſhould have been pleaded ſpecially. Hale. I hope the Chancery will not repeal an Act of Parliament. Waſte in the Houſe is Waſte in the Curtilage; and Waſte in the Hall, is Waſte in the whole Houſe. So the Jury gave a Verdict for the Plaintiff, and gave him 120 l. Damages.

*Co. Lit.* 53. a. 1 *Rol.* 507. 2 *Rol.* 815. *pl.* 22.

Term.

# Term. Mich. 25 Car. II. 1673. in B R.

( 1. )
S. C. 2 *Danv.* 433. *pl.* 19. Cuſtom. *Vide Cro. Eliz.* 894. *Cro. Jac.* 357. 1 *Rol. Rep.* 193. *Styl.* 124. *Moor.* 603. 1 *Sid.* 355. 2 *And.* 251. 2 *Inſt.* 204.

AN Action of Debt was brought upon a Bond in an inferior Court; the Defendant Cognovit actionem, & petit quod inquiratur per patriam de debito. This pleading came in Queſtion in the King's Bench upon a Writ of Error; but was maintain'd by the Cuſtom of the Place, where, &c. Hale ſaid, It was a good Cuſtom; for perhaps the Defendant has paid all the Debt but 10 l. and this Courſe prevents a Suit in Chancery. And it were well if it were eſtabliſh'd by Act of Parliament at the Common Law. Wylde. That Cuſtom is at Briſtol.

## Randall *verſus* Jenkins.

*Intr.* 24 *Car.* 2. *Rot.* 311.

( 2. )
S. C. 2 *Lev.* 87. 2 *Danv.* 549. *pl.* 5. Gavelkind Lands. *Poſt*, 112. *pl.* 7. 2 *Rol. Abr.* 780. *pl.* 6. *Noy* 15. *Cro. Car.* 411. *Cro. Jac.* 498.

REplevin. The Defendant made Conuſance as Bailiff to William Jenkins, for a Rent-charge, granted out of Gavelkind Lands, to a Man and his Heirs. The Queſtion was, Whether this Rent ſhould go to the Heir at Common Law, or ſhould be partible amongſt all the Sons? Hardres. It ſhall go to the eldeſt Son, as Heir at Law: For I conceive it is by reaſon of a Cuſtom, Time out of Mind uſed, that Lands in Kent are partible amongſt the Males. Lamb. Perambulat. of Kent, 543. Now this being a Thing newly created, it wants Length of Time to make it deſcendible by Cuſtom. 9 H. 7. 24. A Feoffment in Fee is made of Gavelkind Lands, upon Condition: The Condition ſhall go to the Heirs at Common Law, and not according to the Deſcent of the Land. Co. Litt. 376. If a Warranty be annex'd to ſuch Lands, it ſhall deſcend only upon the eldeſt Son. Now this Rent-charge, being a Thing

contrary to Common Right, and de novo created, is not apportionable: Litt. Sect. 222, 224. It is not a Part of the Land; for if a Man levy a Fine of the Land, it will not extinguish his Rent, unless by Agreement betwixt the Parties: 4 Edw. 3. 32. Bro. Tit. Customs 58. If there be a Custom in a particular Place, concerning Dower, it will not extend to a Rent-charge: Fitz. Dower 58. Co. Litt. 12. Fitz. Avowry 207. 5 Edw. 4. 7. There is no Occasion in this Case to make the Rent discendible to all; for the Land remains partible amongst the Males, according to the Custom. And why a Rent should go so, to the Prejudice of the Heir, I know not. 14 H. 8. it is said, That a Rent is a different and distinct Thing from the Land. Then the Language of the Law speaks for general Heirs, who shall not be disinherited by Construction. The grand Objection is, Whether the Rent shall not follow the Nature of the Land? 27 H. 8. 4. Fitzherbert said, He knew four Authorities that it should: Fitz. Avowry, 150. As for his first Case, I say, that Rent amongst Parceners is of another Nature than this; for that is distrainable of Common Right. As for the second, I say the Rule of it holds only in Cases of Proceedings and Trials; which is not applicable to this Custom. His third Case is, That if two Coparceners make a Feoffment, rendring Rent, and one dies, the Rent shall not survive. (To this I find no Answer given.) Litt. Sect. 585. is further objected, where it is said, That if Land be deviseable by Custom, a Rent out of such Lands may be devised by the same Custom; but Authorities clash in this Point. He cited farther these Books, viz. Lamb. Peramb. of Kent; and 14 H. 8. 7, 8. 21 H. 6. 11. Noy, Randall and Robert's Case 51. Den. cont. I conceive this Rent shall descend to all the Brothers; for it is of the Quality of the Land, and Part of the Land; it is contained in the Bowels of the Land, and is of the same Nature with it: 22 Ass. 78. which I take to be a direct Authority, as well as an Instance. Co. Lit. 132. Ibid. 111. In some Boroughs a Man might have devised his Land by Custom, and in those Places he might have devised a Rent out of it. The Stat. De bonis conditionalibus brought in a new Estate of Inheritance by way of Intail: Now this Estate-Tail in Gavelkind Lands hath been taken to descend to all the Brothers; and the Reason is, because it is Part of the Fee-simple, though created de novo: So Ales follow the Nature of the Land. The Cases that have been cited, were

*Vide* 2 *Danv.* 548, 549. *Hard.* 325. 1 *Sid.* 135. *Raym.* 59, 76. 1 *Lev.* 80.

*Co. Lit.* 111. a. *Styl.* 49.

2 *Danv.* 515. E.

not the Opinion of the Court, but of them that argued. Lamb. 47. ſaith, That the Cuſtom extends to Advowſons, Commons, Rent-charges, as well as to Land. It is objected, That here muſt be a Preſcription: I anſwer, Gavelkind Law is the Law of Kent, and is never pleaded, but preſumed. 7 Edw. 3. 38. Co. Litt. 175. 2 Edw. 4. 18. and Co. Litt. 140. ſaith, The Cuſtoms of Kent are of common Right, and if ſo, then our Rent-charge will go of common Right to all the Brothers. Hale, Rainsford, and Wylde were of Opinion, That the Rent ought to deſcend to all the Brothers, according to the Deſcent of the Land; becauſe the Rent is Part of the Profits of the Land, and iſſues out of the Land: And they gave Judgment accordingly.

*Poſt*, 112. *pl.* 7.

( 3. ) Remainder. *Vide Poſt*, 121. *pl.* 72. 159. *pl.* *Co. Lit.* 22. *Stat.* 27 *H.* 8. *cap.* 10. Uſes. *Vide Poſt*, 159, 226, 237.

A Man covenanted to ſtand ſeized to the Uſe of the Heirs of his Body. Hale. The Heir and the Anceſtor are Correlatives, and as one Thing in the Eye of the Law; and that is the Reaſon why a Man ſhall not make his right Heir a Purchaſor, without putting the whole Fee-ſimple out of himſelf. If the Father's Eſtate turns to an Eſtate for Life, there will be no Queſtion. In the Caſe of Bennet and Mitford, there did reſult an Eſtate for Life, to knit the Limitation to the original Eſtate. Here, 1, We are in the Caſe of an Eſtate-Tail; and the Judges uſe to go far in making ſuch a Limitation good: Then, 2. We are in the Caſe of an Uſe, which is conſtrued as favourably as may be to comply with the Intention of the Party. This Caſe is not as if he ſhould have covenanted to ſtand ſeized to the Uſe of the Heirs of the Body of J. D. there the Covenantor would have had a Fee-ſimple in the mean Time: But the Caſe is all one as if the Limitation had been to himſelf, and the Heirs of his own Body: See the Earl of Bedford's Caſe. Twiſden. We muſt make it good, if we can. Cur. adviſare vult.

1 *Co.* 13. b.

## Auſtin & Lippencott.

(4) S. C. 3 *Keb.* 243.

A Special Verdict. Francis the Father was Tenant for Life, the Remainder in Fee to Francis the Son; and by the Deed, by which this Eſtate was thus ſettled, 100 l. a-year was appointed to be paid to Francis the Son during the Father's Life. The Son releaſeth to the Father all Arrears of Rent, Annuities, Titles and Demands by Virtue of that Indenture: And the Queſtion was, Whether this Releaſe paſſed the Inheritance as well as the Annuity? Pollexfen. I conceive this Releaſe ſhall not paſs any Eſtate in the Land: And my Reaſon is, becauſe there is no Mention of the Land, nor of any Eſtate therein. The principal Thing intended and expreſſed is the Annuity: Then the Releaſe concludes, to the Day of the Releaſe, which doth manifeſt, That he did not intend to releaſe any Thing that was not to come to him till after the Death of his Father. It is true, here is the Word Demand, but that will not do it: 3 Cro. 258. Then for the Word Titles: by Plowd. 494. and 8 Rep. 153. it is where a Man hath lawful Cauſe to have that that another doth poſſeſs; ſometimes it is taken in a larger Senſe, and then it doth include Right. Upon Conſtruction of this Releaſe I think it ought to be taken in the ſtricter Senſe, and the Intention of the Party muſt guide the Conſtruction. For where there are general Words in the Beginning, and particular Words afterwards, the particular do reſtrain the general: And ſo vice verſa for Enlargement: He cited Hen and Hanſon's Caſe, 15 Car. 2. in this Court: Where a Releaſe of all Demands would not releaſe a Rent-charge by the Opinion of three Judges againſt Twiſden, for that Reaſon; and becauſe Words in Deeds are to be taken according to common Acceptation: He cited 2 Roll. 409. In our Caſe, the general Words of all Suits and Titles are limited and reſtrained to the Annuity and Title of that, and ſhall not by a large Conſtruction be extended to any Thing elſe. Hale. How hath the Inheritance gone? Pollexfen. The Grandchild has that. Hale. I think a Releaſe of all Demands will not extinguiſh a Rent: But if it were all Demands out of Land, it were another Thing. It hath been held over and over again, that it does not extinguiſh and diſcharge a Covenant not broken. But what ſay you to this Releaſe of all Titles? For it appears

Releaſe. 8 *Co.* 154. *b.* 2 *Cro.* 486. *Co. Lit.* 291. *b.*

in expreſs Terms, That the Son did not only releaſe the Arrears of the Annuity, but the Thing it ſelf; and not only ſo, but all other Titles by Virtue of that Deed: Suppoſe the Caſe had been but thus; the Father is Tenant for Life, the Remainder to the Son for Life; the Son releaſeth to his Father all the Title that he has by Virtue of that Deed: Had not this paſſed the Son's Eſtate for Life? In the Caſes that you have cited, it is allowed that a Releaſe of all Titles, will paſs a Right to Land. He had a Title to the Annuity, and a Title to the Remainder: Now he releaſeth the Annuity, and all other Titles which he hath by that Deed, or otherwiſe howſoever: To hear Serjeant Maynard on the other Side.

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(5.)
3 *Keb.* 180.

## Wilſon & Robinſon.

A Man deviſeth all his Tenant-right Eſtate at Brickend, and all that my Father and I took of Rowland Hobbs, &c. Levinz. I conceive that theſe Words paſs only an Eſtate for Life; for it is not mentioned what Eſtate he hath: 1 Cro. 447, 449. a Deviſe of all the Reſt of his Goods, Chattels, Leaſes, Eſtates, Mortgages, Debts, ready Money, &c. and the Court held, That no Fee paſſed; and ſaid it was a Doubt, Whether any Eſtate would paſs in that Caſe, but what was for Years; being coupled only with perſonal Things? Trin. 1649. Rot. 153. Jerman and Johnſon: One deviſed all his Eſtate, paying his Debts and Legacies; now his perſonal Eſtate came but to 20 l. and his Debts were 100 l. there indeed all his real Eſtate paſſed becauſe of the Payment of his Debts. And in our Caſe, the following Particulars are but a Deſcription of the Land, and contain no Limitation of the Eſtate. If a Man deviſeth Black-Acre to one and the Heirs of his Body, and alſo deviſeth White-Acre to the ſame Perſon, he hath but an Eſtate for Life in White-Acre, though he hath a Fee-ſimple in the other: For the Word alſo is not ſo ſtrong as if it had been in the ſame Manner. Moor 152. Yel. 209. Weſton contra. I conceive an Eſtate of Inheritance doth paſs; for the Word Eſtate comprehendeth all his Intereſt. When a Man deviſeth all his Eſtate, he leaves Nothing

1 *Rol.* 834. *pl.* 14.

*Styl.* 211, 293.

2 *Cro.* 290.

in himſelf: In that Caſe of Jerman it was held, That all my Eſtate comprehends all my Title and Intereſt in the Land. If a Man deviſeth all his Inheritance, this carries the Fee-ſimple of his Land: And the Word all his Eſtate, is as comprehenſive as that. Hale and Wylde. By a Grant or Releaſe of totum ſtatum ſuum, the Fee-ſimple will paſs: If the Words had been all my Tenant-right Lands, it had been otherwiſe: But the Word Eſtate is more than ſo: If a Man deviſeth all his Copyhold Eſtate, will not all his whole Intereſt paſs? Adjornatur. *Hob.* 2.

## Norman & Foſter.

(6.)
S. C. 3 *Keb.* 246.
2 *Danv.* 50. *pl.* 14.

AN Action of Debt upon a Bond to perform Covenants in an Indenture of Leaſe, one Covenant is for quiet Enjoyment: And the Plaintiff aſſigns for Breach, that a Stranger entred, but does not ſay that he had Title. Hale. Habens Titulum at that Time, would have done your Buſineſs. My Lord Dyer's Caſe is, That another entred claiming an Intereſt: But that is not enough; for he may claim under the Leſſee himſelf. He mentioned the Caſes in Moor 861. and Hob. 34. Tiſdale and Eſſex. If the Covenant had been to ſave him harmleſs againſt all lawful and unlawful Titles, yet it muſt appear, That he that entred, did not claim under the Leſſee himſelf. Hale. If I covenant that I have a lawful Right to grant, and that you ſhall enjoy notwithſtanding any claiming under me; theſe are two ſeveral Covenants, and the firſt is general, and not qualified by the ſecond. And ſo ſaid Wylde: And that one Covenant went to the Title, and the other to the Poſſeſſion: Dyer 328. An Aſſumpſit to enjoy ſine interruptione alicujus, that is, Whether by Title or by Tort, a quiet Poſſeſſion being to be intended to be the chief Cauſe of the Contract. 3 Leon. 43. 2 Cro. 425, 315, 444. Adjournatur. *Ante* 66. *poſt* 290. 2 *Cro.* 319. 4 *Co.* 80. *b.* 1 *Rol. ab.* 430. *Vaugh.* 118, 119. 120. 2 *Lev.* 37, 194. 1 *Lev.* 301. 3 *Lev.* 325. 2 *Mod.* 213. 3 *Mod.* 135. 2 *Saund.* 177, 181. 1 *Saund.* 60.

Angell

(7.) Pardon. See 2 *Show.* 334. 2 *Mod.* 53. 1 *Lev.* 8. 26, 120, *&c.*

Angell convicted of Barretry, produced a Pardon, which was of all Treasons, Murders, Felonies, and all Penalties, Forfeitures, and Offences. The Court said the Words all Offences, will pardon all that is not capital.

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Blackburn & Graves.

(8.) S. C. 2 *Keb.* 263. *post* 120. 2 *Danv.* 185. *N.* 2, 3. See 4 *Co.* 21, 22, *b.* 23. 3 *Leon.* 70. 4 *Leon.* 38. 1 *And.* 192. 1 *Vent.* 261. 1 *Rol.* 505. Y. 1. Z. 2. 1 *Vent*, 261. 2 *Sid.* 61. 4 *Co.* 22. *b.*

A Copyholder surrenders to the Use of several Persons for Years successive, the Remainder in Fee to J. S. Wylde. An Admittance of a particular Tenant is an Admittance of all the Remainders to all Purposes, but only the Lord's Fine: And if the Custom be, That the Fine paid by the first Tenant shall go to all the Remainders, then the Admittance of the first Man is to all Intents and Purposes an Admittance of all that come after. In this Case the Possession of the Lessee for Years is the Possession of the Remainder-Man. In one Baker and Dereham's Case, there was a Surrender, to the Use of a Man and his Heirs, of Copyhold Land, that discended according to the Custom of Borough-English: The Surrenderee died before Admittance; and the Opinion of the Court was, That the Right would descend to the youngest, according to the Custom.

(9.) Tenants in common. *Co. Lit.* 198. *a.* 202. *a.*

Upon a Case moved, Hale said, That if a Tenant in Common bring a personal Action without his Fellow joining in the Suit, the Defendant ought to take Advantage of it in Abatement: But if he plead Not guilty, it shall be good; but then he shall recover Damages only for a Moiety. If a Tenant in Common seal a Lease of Ejectment, he shall recover but a Moiety.

(10.) *Certiorari.*

A Justice of the Peace committed a Brewer for not paying the Duty of Excise; the Brewer was brought into Court by Habeas Corpus. Sympson. It ought to appear that he

was a common Brewer. Hale. The Statute doth prohibit the bringing of a Certiorari, but not a Habeas Corpus. And want of Averment of the Matter of Fact, may be amended in a Return in Court; and if it be not true, at their Peril be it. So it was mended. *Stat. 12 Car. 2. cap. 23. sect. 36.*

(11.) Foreign Attachment.

Money owing upon a Judgment given in the King's Court cannot be attached.

See 3 *Cro.* 63. 1 *Rol.* 552.

Term.

# Term. Hill. 25 & 26 Car. II. 1673. in B. R.

## Baker & Bulſtrode.

( 12. )
S. C. 3 *Keb.* 273. *Raym.* 282. 2 *Lev.* 95. 1 *Vent.* 255. See 2 *Danv.* 39. *pl.* 33. 3 *Mod.* 191, 192. 2 *Cro.* 661. 5 *Co.* 23.

DEbt upon a Bond. The Condition was, To ſeal and execute a Releaſe to the Plaintiff. The Defendant demurs, becauſe the Plaintiff did not alledge in his Declaration, A Tender of a Releaſe. It was urged, That the Condition was not, to make, but only, to ſeal and execute, *&c.* But per Curiam, he is bound to do it without a Tender. And the Word Execute, or the Word Seal, comprehends the making. And Lamb's Caſe was cited.

## Warren & Prideaux.

*Intr. Trin.* 24 *Car.* 2. *Rot.* 1472.

( 13. )
S. C. 2 *Lev.* 96, 97. 3 *Lev.* 425. *Raym.* 232. See *Ante* 48. *Poſt*, 231, 232. 3 *Lev.* 400, 425. *Raym.* 52.

A Diſtreſs and Avowry, for Toll. The Preſcription was for Toll, in Conſideration of maintaining the Key, and keeping a Buſhel to meaſure Salt, viz. That in Conſideration thereof, he, and thoſe, &c. have had, Time out of Mind, &c. a Buſhel of Salt of every Ship that comes laden with Salt into Slipper-point: For the Avowant it was alledged, That the maintaining of the Key is for publick Good: Co. Magn. Cart. 222. Roll. 265. It is true, it is not alledged, That they did actually uſe the Weights and Meaſures. 1 Leon. 231. But it being alledged, That the Ship came within Slipper-point, it is enough to charge the Plaintiff with the Payment. As for the Diſtreſs taken, which is Part of the Ships lading, viz. Salt, it is objected, That it cannot be diſtrained, becauſe it is Part

of the Thing from which the Duty ariſeth: But I anſwer, That this is not like to a Diſtreſs upon Land, nor to be judged of according to the Rules allowed in Caſes of ſuch Diſtreſſes. There were cited on this Side 21 H. 7. 1. 3 Cro. 710. Smith and Shepheard; Dyer 352. Courtney contra. I conceive this Preſcription ought to have ſome Conſideration, and to be grounded on a meritorious Cauſe, to bind a Subject. The keeping of the Buſhel is no meritorious Cauſe, becauſe it is preſumed, That the Party hath the Uſe of it himſelf. Hale. The Preſcription is not for a Port but a Wharf. If any Man will preſcribe for a Toll upon the Sea, he muſt alledge a good Conſideration; becauſe by Magna Charta, and other Statutes, every one hath a Liberty to go and come upon the Sea without Impediment. Wylde. This Cuſtom or Preſcription is laid, to have a Buſhel of Salt of every Ship that comes within the Slipper-point: If a Ship be driven in by Streſs of Weather, and goes out again the firſt Opportunity that preſents, ſhall that Ship pay? Hale. If he had ſaid, That he had a Port, and was bound to maintain that Port, and that he, and all thoſe whoſe Eſtate he had, &c. that might have been a good Preſcription: But in this Caſe, there muſt be a ſpecial Inducement and Compenſation to the Subject by reaſon of thoſe Statutes, by which all Merchants, and others, have Liberty to come in and go out. They inclin'd, that the Preſcription was not good.

*Ante*, 48.

2 *Kol.* 205. E. 5.

## *Anonymus.

( 14. )
S. C. 3 *Keb.* 242.

A Trial at Bar concerning the River of Wall-fleet; the Queſtion was, Whether had not the Right of Fiſhing there, excluſive of all others. Hale. In caſe of a private River, the Lord's having the Soil is a good Evidence to prove, That he hath the Right of Fiſhing; and it puts the Proof upon them that claim liberam piſcariam. But in Caſe of a River that flows and re-flows, and is an Arm of the Sea, there, prima facie, it is common to all: And if any will appropriate a Privilege to himſelf, the Proof lieth on his Side; for in Caſe of an Action of Treſpaſs brought for Fiſhing there, it is, prima facie, a good Juſtification to ſay, That the Locus in quo is Brachium maris, in quo unuſquiſq; ſubjectus Dom. Regis

habet & habere debet liberam piſcariam. In the Severn there are particular Reſtraints, as Gurgites, &c. but the Soil doth belong to the Lords on either Side: And a ſpecial Sort of Fiſhing belongs to them likewiſe; but the common Sort of Fiſhing is common to all. The Soil of the River of Thames is in the King; and the Lord Mayor is Conſervator of the River, and it is common to all Fiſhermen: And therefore there is no ſuch Contradiction betwixt the Soil being in one, and yet the River common for all Fiſhers, &c.

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## Sedgewick & Goſton.

( 15. )
S. C. 3 *Keb.* 256.
Error in Parliament.
See *Poſt*, 112, 285.

HAle ſaid, That a Writ of Error in Parliament may be returned ad prox. Parliament. ſuch a Day; but if a particular Day be not mentioned, then it is naught: And altho' there be a particular Day expreſſed, yet if that Day be at two or three Terms diſtance, the Court will adjudge it to be for Delay; and it ſhall be no Superſedeas. And he ſaid he had looked into the Books upon the Point. In the Regiſter, he ſaid, there is a Scire facias ad prox. Parliament. but not a Writ of Error.

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# Term. Paſch. 26 Car. II. 1674. in B. R.

## Fountain & Coke. (1.)

A Trial at Bar. Hale. An Executor may be a Witneſs in a Cauſe concerning the Eſtate, if he have not the Surpluſage given him by the Will: And ſo I have known it adjudged.

If a Leſſee for Years be made Tenant to the Præcipe, for ſuffering a Common Recovery, that doth not extinguiſh his Term, becauſe it was in him for another Purpoſe: Which the whole Court agreed. 7 *Co.* 38. a. 2 *Cro.* 643.

## Jacob Aboab. (2.)

DEbt upon a Bond was brought againſt him by the Name of Jacob: And he pleaded, That he was called and known by the Name of Jaacob, and not Jacob: But it was over-ruled. S.C. 3 *Keb.* 284, 287. *Vide* 1 *Saund.* 135. *Co. Lit* 3. 2 *Rol. Abr.* 135, 329. *Cro. Eliz.* 50, 176. *Cro Jac.* 425.

## *Sir* John Thorowgood's *Caſe*. (3.)

IT was moved to quaſh an Indictment of Nuſance, becauſe it ran, In detrimentum omnium inhabitantium, &c. 2 Roll. 83. pl. 11. Wylde. I have known it ruled naught for that Cauſe. So quaſhed.

## Benſon *verſus* Hodſon.

( 4. )
S. C. 2 *Lev.* 28, 29, 30. 3 *Keb.* 274, 287, 292. Common Recovery, &c.

A Writ of Error of a Judgment, in the County Palatine of Lancaſter, in Replevin: The Defendant makes Conuſance as Bailiff to Anne Moſely: The Lands were the Lands of Rowland Moſely, and he covenanted to levy a Fine of them, to the Uſe of himſelf, and the Heirs males of his Body, the Remainder in Tail to ſeveral others, the Remainder to his own right Heirs: Provided, That if there ſhall be a Failure of Iſſue male of his Body, and Dame Elizabeth be dead, and Anne Moſely be married, or of the Age of twenty-one Years, then ſhe ſhall have 200 l. per Annum for ten Years: Then Rowland dies, leaving Iſſue Sir Edward Moſely: Sir Edward makes a Leaſe for one thouſand Years, then levies a Fine, and ſuffers a Recovery; then dies without Iſſue male: And the Contingents did all happen. The Queſtion is, Whether this Rent-charge of 200 l. per Ann. be barred by the Fine and Recovery, and ſhall not operate upon the Leaſe? Levinz. I conceive the Fine is not well pleaded; for nothing is ſaid of the King's Silver, and if that be not paid, it is void: Then they have pleaded a Common Recovery, but not the Execution of it by Entry. Now I conceive the Common Recovery doth deſtroy the Eſtate-Tail, but not the Rent. The Reaſon why a Common Recovery is a Bar, is becauſe of the intended
1 *Sid.* 102. Recompence. Now that is a fictitious Thing: 9 Rep. Beaumont's Caſe. 1 Cro. Stone and Newman, Cuppledick's Caſe. Now this Rent is a meer Poſſibility, and hath no Relation to the Eſtate of the Land. Then again, When the Recovery was ſuffered, the Rent was not in Being: Now a Recovery will never bar but where the Eſtate is dependent upon it, either in Reverſion or Remainder. For that Caſe of Moor. pl. 201. I conceive he is barred, becauſe the Reverſion is barred by the Fine. 3 Cro. 727, 792. White and Geriſhe's Caſe; the ſame Caſe 2 And. 190. Noy 9. Another Reaſon is, Becauſe the Rent remains in the ſame Plight, notwithſtanding the Fine. Another Reaſon is, It was a meer Poſſibility at the Time of the Fine and Recovery. Pell and Brown's Caſe is for me. In our Caſe is no Eſtate in eſſe to be barred. Then this Eſtate is granted out of the Eſtate of the Feoffees, as in Whitlock's Caſe, 8 Rep. 71. The Eſtates for Years, which there is a Power to make, ſhall be ſaid to

precede all the Limitations. There is no other Way for ſecuring younger Childrens Portions by the ſame Deed, but it may be done by another Deed, as in Goodyer and Clarke's Caſe. Mr. Finch, contra. I conceive the Rent is barred, upon the reaſon of Capell's Caſe. They ſay not. (1.) Becauſe it doth only charge the Remainder. (2.) The intended Recompence doth not go to it. (3.) This Leaſe for one thouſand Years doth precede the Fine. The Law will never divert the Operation of a Conveyance; but Ut res magis valeat: Bredon's Caſe. Then for the intended Recompence, that cannot be the Reaſon of barring a Remainder; for the Eſtate-Tail was barred before. 3 Leon. 157. But Moor. fol. 73. ſaith, It is the Favour the Law hath for Recoveries: And till the Reverſion takes Place in Poſſeſſion, the Rent cannot ariſe out of the Reverſion, nor ſo long as this Leaſe is in Being. Hale. You make two great Points; (1.) Whether the Rent be barred by the Common Recovery? (2.) Whether the Rent-charge ſhall ariſe out of the Leaſe for Years? This is plain: If Tenant in Tail grant a Rent-charge, and ſuffer a Common Recovery, the Rent-charge will not be avoided: So that if Tenant in Tail be, rendring a Rent, a Recovery will not bar that, though it doth a Reverſion; but the Reaſon of theſe Caſes is, becauſe the Eſtate of him that ſuffers the Recovery, is charged with the Rent. Therefore, if there be a Limitation of a Uſe upon Condition, and Ceſtui que uſe ſuffers a Recovery, that will not deſtroy the Condition, the Eſtate being charged with it; for the Recoveror can have the Eſtate only as he that ſuffered the Recovery had it: And therefore there is an Act of Parliament to enable Recoverors to diſtrain without Attornment. Therefore, ſo long as any one comes in by that Recovery, he comes in in Continuance of the Eſtate-Tail, and coming in ſo, he is liable to all the Charges of Tenant in Tail. Now what is the Reaſon why Tenant in Tail, ſuffering a Common Recovery, a Rent by him in Remainder ſhall be barr'd? The Reaſon is, becauſe the Recoveror comes in in the Continuance of that Eſtate that is not ſubject to the Rent, but is above all thoſe Charges; now no Recompence can come to ſuch a Rent. And therefore there is another Reaſon why a Common Recovery will bar: At Common Law upon an Eſtate-Tail, which was a Fee-ſimple conditional, a Remainder could not be limited over; becauſe but a Poſſibility: But now comes that Stat. De donis conditionalibus, and makes

1 Cro. 598.

it

it an Eſtate-Tail, and a Common Recovery is an inherent Privilege in the Eſtate, that was never taken away by that Statute De donis; the Law takes it as a Conveyance excepted out of the Statute, as if he were abſolutely ſeized in Fee, and this by Conſtruction of Law: It is true, there can be no Recompence to him that hath but a Poſſibility. But the Buſineſs of Recompence is not material, as to this Charge; and the Reaſon of White's Caſe, and other Caſes put, explain this. Now what Difference between this and Capel's Caſe? Say they, There the Charge doth ariſe ſubſequent, but here the Charge doth ariſe precedent: Why, I ſay, the Charge doth ariſe precedent to the Remainder, but ſubſequent to the Eſtate-Tail; for it is not to take Effect till the Eſtate-Tail be determined. It was doubted in the Queen's Time, Whether a Remainder for Years was barred? But it hath been otherwiſe practiſed ever ſince, and there is no Colour againſt it. Now you do agree, That the Remainder to the right Heirs of one living ſhall be barred, for the Eſtate is certain, though the Perſon be uncertain; ſo long as the Rent doth not come within the Compaſs and Limitation of the Eſtate-Tail, the Rent is extinct and killed, there is nothing to keep Life in it: But whether doth not the Leaſe for Years preſerve it? Heretofore it was a Queſtion among young Men, Whether if Tenant in Tail granted a Rent-charge for Life, then makes a Leaſe for three Lives: In this Caſe, though the Rent before would have died with Tenant in Tail, yet this Rent will continue now during the three Lives, which it will. And it hath been queſtioned, If he had made a Leaſe for Years, inſtead of the Leaſe for Lives, if that would have ſupported the Rent? Now in our Caſe, if the Leaſe for Years were chargeable, the Rent would ariſe out of that; but if this Rent ſhould continue, then moſt Mens Eſtates in England would be ſhaken. Wylde. The Leaſe for Years doth not preſerve the Rent, but the Common Recovery doth bar it: For Pell and Browne's Caſe; in that Caſe the Recovery could not bar the Poſſibility, for he was not Tenant in Tail that did ſuffer the Recovery, but he had only a Fee-ſimple determinable, and the contingent Remainder did not depend upon an Eſtate-Tail; nay, did not depend by Way of Remainder, but by Way of Contingency: It is true, Juſtice Dodridge did hold otherwiſe; but the reſt of the Judges gave Judgment againſt him upon very good Reaſon.

See 2 *Lev.* 30, 31.

I Twiſden.

Twiſden. I never heard that Caſe cited, but it was grumbled at. Hale. But to your Knowledge and mine, they always gave Judgment accordingly. A Man made a Gift in Tail, determinable upon his Non-payment of 1000 l. the Remainder over in Tail to B. with other Remainders: Tenant in Tail before the Day of Payment of the 1000 l. ſuffers a Common Recovery, and doth not pay the 1000 l. yet becauſe he was Tenant in Tail when he ſuffered the Recovery, by that he had barred all, and had an Eſtate in Fee by that Recovery. At a Day after Hale ſaid, The Rent was granted before the Leaſe for Years, and is not to take Effect till the Eſtate-Tail be ſpent, and a Common Recovery bars it: If there be Tenant in Tail, reſerving Rent, a Common Recovery will not bar it; ſo if a Condition be for Payment of Rent, it will not bar it: But if a Condition be for doing a collateral Thing, it is a Bar. And ſo if Tenant in Tail be with a Limitation ſo long as ſuch a Tree ſhall ſtand, a Common Recovery will bar that Limitation.

## Lampiere *verſus* Mereday.

(5.) S. C. 3 *Keb.* 291. See 1 *Danv.* 631, 632, *&c. Audita Querela.*

AN Audita Querela was brought before Judgment entred, which they could not do: 9 H. 5. 1. which the Court agreed: Whereupon Counſel ſaid, It was impoſſible for them to bring an Audita Querela before they were taken in Execution; for the Plaintiff will get Judgment ſigned, and take out Execution on a ſudden, and behind the Defendant's Back. Therefore the Court ordered the Poſtea to be brought in, for the Defendant to ſee if Execution were ſigned. And at a Day after Hale ſaid, If an Audita Querela was brought after the Day in Bank, though the Judgment was not entred up, yet the Court make them enter up the Judgment, as of that Day. So that they ſhall not plead Nul tiel Record. 1 *Rol.* 106. *pl.* 10.

(6.) Sheriffs Bonds. 1 *Sid.* 383. 1 *Saund.* 181, 318. 1 *Vent.* 237. 1 *Lev.* 254. See *Hard.* 464. 2 *Lev.* 103. 10 *Co.* 100. *Hob.* 14.

Wylde ſaid, A Sheriff's Bond for Eaſe and Favour was void at Common Law; and ſo it was declared in Sir John Lenthall's Caſe.

(7.) *Ante*, 97. *pl.* 2, & 7. Twiſden, upon opening of a Record by Mr. Den, ſaid, It was already adjudged in this Court, That a Rent iſſuing out of Gavelkind Land, is of the Nature of the Land, and ſhall deſcend as the Land doth.

(8.) 1 *Rol.* 442. An Action of Debt upon a Bond. Sympſon moved in Arreſt of Judgment. The Bond was dated in March, and the Condition was for Payment, Super viceſſimum octavum diem Martii prox. ſequentem. It was ſequentem which refers to the Day, which ſhall be underſtood of the ſame Month. If it had been ſequentis, then it had referred to March, and then it had been payable the next Year. But the Court was of Opinion, That it ſhould be underſtood the currant Month. Sympſon cited a Caſe, wherein he ſaid it had been ſo held. Read *verſus* Abington.

(9.) 3 *Keb.* 308. *Superſedeas. Ante* 28, 45. 106. *Poſt*, 285. Hale. Formerly, if Execution was gone before a Writ of Error delivered or ſhewed to the Party, it was not to be a Superſedeas. Wylde. He muſt not keep the Writ in his Pocket, and think that will ſerve. At another Day Hale ſaid, It ſhall not be a Superſedeas, unleſs ſhewed to the Party, and he muſt not forefiow his Time of having it allowed; for if it be not allowed by the Court within four Days, it is no Superſedeas. Hale. A Writ of Error taken out, if it be not ſhewn to the Clerk of the other Side, nor allowed by the Court, it is no Superſedeas to the Execution: And that if a Writ of Error be ſued, bearing Teſte before the Judgment be given, if the Judgment be given before the Return, it is good to remove it, (tho' at firſt he ſaid it was ſo in Reſpect of a Certiorari, but not of a Writ of Error.) And he ſaid, That Judgment, whenever it is entred, hath Relation to the Day in Bank, viz. the firſt Day of the Term: So that a Writ of Error returnable after, will remove the Record whenever the Judgment is entred.

(10.) 3 *Keb.* 301. See *Stat.* 22 *H.* 8. *c.* 5. Upon a Motion concerning the amending of Leather-lane. Hale. If you plead Not guilty, it goes to the Repair, or not Repair; but if you will diſcharge your ſelf, you muſt do it by Preſcription, or Ratione tenuræ, and ſay, That ſuch an one Ratione tenuræ, or ſuch Part of the Pariſh, hath always uſed, Time out of Mind, &c.

## Anonymus.

(11.)
Demiſe.

AN Action of Debt upon a Bond: The Condition, Whereas one Bardue did give by his Will ſo much, if he ſhould pay it ſuch a Day, &c. The Defendant pleads, Bene & verum eſt, he did give him ſo much by his Will and Teſtament; but he revoked that, and made another Laſt Will. The Court ſaid, he was eſtopped to plead ſo. Hale. It doth not appear when the Bond was made, and it ſhall be intended to be made after the Party's Death. Judgment pro Querente.

*Moor*, 420. 1 *Rol.* 872. *pl.* 8. *Ante* 15.

## Deering *verſus* Farrington.

(12.)

AN Action of Covenant, declaring upon a Deed by which the Defendant aſſignavit & tranſpoſuit all the Money that ſhould be allowed by any Order of a Foreign State to come to him in Lieu of his Share in a Ship. Tompſon moved, That an Action of Covenant would not lie, for it was neither an expreſs nor implied Covenant: 1 Leon. 179. Hale. You ſhould rather have applied your ſelf to this, viz. Whether it would not be a good Covenant againſt the Party? As, If a Man doth demiſe, that is an implied Covenant; but if there be a particular expreſs Covenant, that he ſhall quietly enjoy againſt all claiming under him, that reſtrains the general implied Covenant; but it is a good Covenant againſt the Party himſelf. If I will make a Leaſe for Years, reſerving Rent to a Stranger, an Action of Covenant will lie by the Party for to pay the Rent to the Stranger. Then it was ſaid, It was an Aſſignment for Maintenance. Hale. That ought to have been averred. Then it was further ſaid, That an Aſſignment tranſferring, when it cannot tranſfer, ſignifies Nothing. Hale. But it is a Covenant, and then it is all one as if he had covenanted that he ſhould have all the Money that he ſhould recover for his Loſs in ſuch a Ship. Twiſd. ſeemed to doubt. But Judgment.

3 *Keb.* 304.

4 *Co.* 80.

*Co. Lit.* 213. *a.*

(13.) S. C. *Ante* 94. *pl.* 3.

## Lord Mordant *verſus* Earl of Peterborough.

TRial at Bar, the Queſtion was, Whether the Earl of Peterborough was Tenant for Life only of the Manor of Mayden: The Defendant did not appear, the Plaintiff thereupon deſired to examine his Witneſſes, that ſo he might preſerve their Evidence. Twiſd. When they do not appear, what Good will that do you? For they will ſay, you ſet up a Man of Straw, and pull him down again. There was a former Deed of Entail, with a Power of Revocation in it, and after the Deed exhibited was made, whereby the Eſtate was otherwiſe ſettled, and there was a Jointure to the preſent Lady, and done by Perſons of great Learning in the Law: The Revocation was to be by Deed under my Lord's Hand and Seal in the Preſence of three Witneſſes: Now the Queſtion was, Whether this ſecond Deed was a Revocation in Law, and an Execution of that Power? And the Court told the Counſel, they ſhould find it ſpecially if they would; but they refuſed. Hale. In 16 Car. Snape and Sturt's Caſe, If there be a Power of Revocation, and a Leaſe for Years is made, it doth ſuſpend quoad the Term, but after it is good. Then it hath been queſtioned formerly, If there be ſuch a Power, and the Perſon makes a Leaſe and Releaſe, whether it was a Revocation? But ſhall we conceive the learned Counſel in this Caſe would have ventured upon an implicit Revocation, and not have made an expreſs Revocation? So that you muſt be nonſuit, or find it ſpecially. But the Iſſue being, If he were only Tenant for Life? he ſaid, he muſt go back to the Chancery to amend it; for by the Deed produced, he hath an Eſtate for Life, and the Reverſion in Fee.

2 *Rol.* 263. *pl.* 2. 1 *Cro.* 472.

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(14.)

## Burgis *verſus* Burgis. In Chancery.

*Vide ante* 50, 51. 2 Chan. Caſes, 14, 15.

A Man having a long Leaſe, ſettled it in Truſt upon himſelf for Life, the Remainder to his Wife for Life, the Remainder to the firſt Son of their two Bodies, the Remainder to the ſecond Son, and ſo to the tenth Son; and if they

ſhould have no Son or Sons, then the Remainder to ſuch Daughter and Daughters of their Bodies, &c. The Man and his Wife died, and left only a Daughter, who preferred her Bill againſt the Truſtees for the executing of this Remainder to her; The Queſtion is, Whether this Remainder be a good Remainder, or whether it be void? And the Lord Keeper Finch held it was a void Remainder, becauſe it doth depend upon ſo many, and ſuch remote Contingencies, for otherwiſe it would be a Perpetuity. And he ſaid, he would allow one Contingency to be good, viz. that to the firſt Son, though the firſt Son was not in eſſe at the Time of his Deceaſe. And he ſaid, he did deny my Lord's Coke's Opinion in Leon. Lovell's Caſe, which ſaith, That in Caſe of a Leaſe ſettled to one and the Heirs Males of his Body, when he dies the Eſtate is determined; for he ſaid it ſhall go to his Executors. And he ſaid there was the ſame Caſe with this in this Court, Backhurſt verſus Bellingham. And he ſaid, That the Common Law did complain, that this Court did encroach upon them, whereas they are beholden to this Court for their Rules in Equity; as formerly, when Eccleſiaſtical Perſons made Leaſes, a Miſnomer would avoid them; but Elſmere in his Time would notwithſtanding the Miſnomer make them good. And he cited a Caſe in Dyer, and Matthew Manning's Caſe, Leon. Lovell and Lampett's Caſe, and Child and Bailie's Caſe.

*Vide ante* 50 to 55. 1 *Sid.* 37, 450. 1 *Vent.* 79.

1 *Sid.* 37.

(15.

Another Caſe in Chancery. One mortgaged Lands, then confeſſed a Judgment, and died. The Mortgagee buys of the Heir the Equity of Redemption for 200 l. The Bill was preferred by the Creditor by Judgment againſt the Mortgagee and Heir, either to be let in by paying the Mortgage-Money, or elſe that the 200 l. received by the Heir, might be Aſſets; And the Court ſaid, That the Mortgagee's Eſtate ſhould not be ſtirred; but it was left by my Lord to be made a Caſe, Whether the two hundred Pounds ſhould be Aſſets in the Hands of the Heir.

Mortgage.

(16.)
S. C. 3 *Keb.* 305.

## Moſedell *the* Marſhal *of the* K. B.'s Caſe.

A Trial at Bar; an Action of Debt brought againſt Moſedell for the Eſcape of one Reynolds; the Plaintiff ſaid, He could prove that he was at London three long Vacations. Twiſd. It is hard to put three Eſcapes upon the Marſhal, for he may be provided only for one, and he cannot give in Evidence a Freſh Purſuit, but it muſt be pleaded. Hale. I always let them give in Evidence a Freſh Suit upon a Nil debet. And Wylde ſaid, it was generally done. So they gave Evidence of an Habeas corp. ad teſt', and that the Priſoner went down too long before-hand, and ſtayed too long after the Aſſizes were done at Wells in Somerſetſhire, and that he went back threeſcore Miles beyond Wells before he returned again for London. Hale. If an Habeas Corpus be granted to bring a Perſon into Court, and the Sheriff let him go into the Country, it is an Eſcape. And though he be not bound to bring him the direct Way, becauſe he may be reſcued, yet he ought not to carry him round about a great Way for the Accommodation of the Party; if he doth it is an Eſcape; but by this Evidence you let him go back threeſcore Miles, to which there can be no Anſwer. An Habeas Corpus returnable immediate is not fixt to an Hour, but to a convenient Time. They anſwered, that he went back to carry back ſome Writings. Counſel. Here is an Eſcape of one of the Parties, who dies before the Action brought, whereby the whole Charge is ſurvived to the other before the Action brought; and whether this ſhall purge the Eſcape is the Queſtion, or how far it ſhall purge it? Wylde. Before you brought your Action, the Debt is gone, as to the Eſcape. Hale. We are made the Engines of doing all the Miſchief if this ſhall go unpuniſhed, being by Colour of an Habeas Corpus. So the Jury brought in a Verdict for the Plaintiff, who declared in Debt for 6200 l.

3 *Co.* 45.
1 *Cro.* 14.

## Green *verſus* Proude.

(17.)

S. C. 1 *Vent.* 257. 3 *Keb.* 310. *Vide* 2 *Danv.* 539. Wills. *Vide* Stat. 32. *H.* 8. *c.* 1. *Plo.* 344. *Moor*, 341; 356, 177. *Cro. Jac.* 145. *Cro. El.* 100. 2 *Leon.* 35. 3 *Leon.* 79. 3 *Co.* 31. *All.* 2, 55. 1 *Rol. ab.* 618. X. 1. 1 *And.* 34. 1 *Sid.* 315, 362. 10 *Co.* 92. *b.* 98. *a.*

A Trial at Bar; the Queſtion, Whether a Will or no Will? The Plaintiff produced a Deed indented, made between two Parties, the Man and his Son: And the Father did agree to give the Son ſo much, and the Son did agree to pay ſuch and ſuch Debts and Sums of Money: And there were ſome particular Expreſſions reſembling the Form of a Will; as, that he was ſick of Body, and did give all his Goods and Chattels, &c. but the Writing was both ſealed and delivered as a Deed; and they gave Evidence, That he intended it for his laſt Will; which, the Court ſaid, was a good Proof of his Will. Then the Defendant ſetting up an Entail, the Plaintiff exhibited an Exemplification of a Recovery in the Marquels of Wincheſter's Court in Antient Demeſne: The other Side objected, That they did not prove it a true Copy. But becauſe it was antient, the Court ſaid they ſhould not be ſo ſtrict upon the Evidence of it; for the other Side ſaid, The Court-Rolls were burned in Baſing-Houſe in the Time of the Wars. Hale. I remember a Caſe, where one had gotten a Preſentation to the Parſonage of Goſnall in Lincolnſhire, and brought a Quare Impedit, and the Defendant pleaded an Appropriation; there was no Licence of Appropriation produced, but becauſe it was antient, the Court would intend it. Then they objected, That they ought to prove Seiſin in the Tenant to the Præcipe. Hale. It being an antient Recovery, we will not put them to prove that. He ſaid the Mayor of Briſtol had offered in Evidence an Exemplification of a Recovery under the Town-Seal, of Houſes in Briſtol, the Records being burned, and that Exemplification was allowed for Evidence. Hale. If Tenant in Tail accept a Fine come ceo, &c. this doth not alter his Eſtate: If Tenant for Life accept of a Fine Sur conuſance, &c. he doth forfeit his Eſtate, but it doth not alter the Eſtate for Life. Objection: The Recovery is of Land in Kingſcleare, whereas the Land claimed is in a particular Will called —— And the Wills are ſeveral, and there are diſtinct Courts in every Will. Hale. There are ſeveral Tithings of Dale, Sale, and Downe, there is a Tithing Man in every particular Place; but the Conſtable of Dale goes through all; theſe may go for ſeveral Wills, or one Will; There

*Salmon verſus Wilſon.*

2 *Co.* 55. *b.* 56. *a.* *CL.* 252.

*Ante* 78.

There may be a Manor that hath ſeveral little Manors within it, wherein are held ſeveral Courts for the Eaſe of the Tenants, but all but one Manor; and a Writ of Right cloſe is, Quod plenam rectam, &c. and runs to the Bailiff of the Manor, and may extend to the Precinct of the whole Manor: As the Manor of Barton hath ſeveral little Manors under it, yet all within the Manor. Hale. Where there is a Writ of Right cloſe in Antient Demeſne, it is not like a Demand to a Sheriff here, where he hath his Direction for ſo many Acres. Maynard. But then he muſt demand it in the particular Hill where it is. Hale. If a Præcipe quod reddat be of Land in a Pariſh where it muſt be in a Hill, there may be Exception to the Writ; but if he recovers, it is good, for now the Time is paſt: And ſo where it is infra manerium, if he recovers, it is good.

(18.) Browne *verſus* ----

Franchiſe. *Ante* 7.

AN Action brought in Canterbury Town: The Defendant removes it by Habeas Corpus: Then the Plaintiff declares here. It was moved that it might be tried in ſome other County, becauſe the Judges came there ſo ſeldom. Court. Let them ſhew Cauſe why they ſhould not conſent; and if they will plead Nil debet, the Plaintiff will be willing to let them give any Thing in Evidence. And Simpſon ſaid, It was the Opinion of all the Judges, That upon Nil debet pleaded, Entry and Suſpenſion may be given in Evidence, which the Court did not deny: So the Court ordered the other Side to ſhew Cauſe why they ſhould not conſent.

*Ante* 35. *pl.* 83. 1 *Sid.* 151.

(19.) Attorney. *Ante* 23, 24. 1 *Lev.* 54.

One Hillyard an Attorney ſued for his Fees in this Court, in the Court at Briſtol: But the Court ſaid, an Attorney ought not to wave this Court.

## Buſhell's *Caſe*.

(20.)

S. C. 2 *Jon.* 13. 3 *Keb* 322. and ſee *Buſhel's* Caſe reported in *Vaughan's* Reports, 135 to 158. *Vide poſt* 184, 185, 145, 147, 148.

A Motion was made by Sir William Jones for the Lord Mayor Starling, and the Recorder Howell: One Buſhell brought an Action againſt them for Falſe Impriſonment; and becauſe the Plea was long, he prayed he might have Time to plead. Hale. I ſpeak my Mind plainly, That an Action will not lie; for a Certiorari and an Habeas Corpus, whereby the Body and Proceedings are removed hither, are in the Nature of a Writ of Error; and in Caſe of an erroneous Judgment given by a Judge, which is reverſed by a Writ of Error, ſhall the Party have an Action of Falſe Impriſonment againſt the Judge? No, nor againſt the Officer neither: The Habeas Corpus and Writ of Error, though it doth make void the Judgment, it doth not make the Awarding of the Proceſs void to that Purpoſe; and the Matter was done in a Courſe of Juſtice: They will have but a cold Buſineſs of it. An Habeas Corpus and Certiorari is a Writ of Right, the higheſt Writ the Party can bring. So Day was given to ſhew Cauſe.

## Lord Tenham *verſus* Mullins.

(21.)

A Trial at Bar about a fraudulent Deed. Hale. There are three Things to be conſidered, Fraud, Conſideration, and Bona fide. Now the Bona fide is oppoſite to Fraud. I remember a Caſe in Twine's Caſe; If the Son be diſſolute, and the Father, with Advice of Friends, doth ſettle Things, ſo that he ſhall not ſpend all, though here be not a Conſideration of Money, yet it is no fraudulent Deed; and a Deed may be voluntary, and yet not fraudulent, otherwiſe moſt of the Settlements in England would be avoided; and ſo ſaid Twiſden.

Deed voluntary.

*Ante* 76. *pl.* 34.

Black-

(22.)

## Blackburne *verſus* Graves.

S. C. *Ante* 102.

3 *Keb.* 263.
2 *Danv.* 185. *N.* 2, 3.

TRover for 100 Loads of Wood; Not guilty pleaded; A ſpecial Verdict, that the Lands are Copyhold Lands, and ſurrendred to the Uſe of one for eleven Years, the Remainder for five Years to the Daughter, the Remainder to the right Heirs of the Tenant for eleven Years; the eleven Years expire, the Daughter is admitted, the five Years expire; and there being a Son and Daughter by one Venter, and a Son by another Venter, the Son of the firſt Venter dies before Admittance, and the Daughter of the firſt Venter, and her Huſband, bring Trover for cutting down of Trees; and the Queſtion was, If the Admittance of Tenant for Years was the Admittance of the Son in Remainder? Levinz. I conceive it is; and then the Son is ſeized, and the Daughter of the whole Blood is his Heir; and he cited 4 Rep. 23. 3 Cro. 503. Bunny's Caſe. Wylde. The Eſtate is bound by the Surrender. Hale. If a Man doth ſurrender to the Uſe of John Styles, till admitted there is no Eſtate in him, but remains in the Surrenderor; but he hath a Right to have an Admittance: If a Surrender be to J. S. and his Heirs, his Heir is in without Admittance if J. S. dies. About this hath indeed been Diverſity of Opinion, but the better Opinion hath been according to the Lord Coke's Opinion. I do not ſee any Inconvenience, why the Admiſſion of Tenant for Life or Years, ſhould not be the Admittance of all in Remainder; for Fines are to be paid, notwithſtanding, by the particular Remainders; and ſo the Books ſay it ſhall be no Prejudice to the Lord. Twiſd. I think it is ſtrong, That the Admiſſion of Leſſee for Years is the Admiſſion of him in Remainder; for, as in a Caſe of Poſſeſſio fratris the Eſtate is bound, ſo that the Siſter ſhall be Heir; ſo here, the Eſtate is bound, and goes to him in Remainder. Hale. I ſhall not prejudice the Lord; for if a Fine be aſſeſſed for the whole Eſtate, there is an End of the Buſineſs; but if a Fine be aſſeſſed only for a particular Eſtate, the Lord ought to have another. If a Surrender be to the Uſe of A. for Life, the Remainder to his eldeſt Son, &c. or to the Uſe of A. and his Heirs, and then A. dies,

See before 102.
4 *Co.* 22, 23. *Mo.* 125, 272:
3 *Leon.* 70.
4 *Leon.* 38.
1 *Vent.* 260, 261.
3 *Lev.* 308.

1 *Rol.* 502. *N.* 2.
2 *Danv.* 185.
1 *And.* 122.
1 *Vent.* 261, *&c. Supra.*

dies, the Eſtate is in the Son without Admittance, whether he takes by Purchaſe or Deſcent. And Judgment was given accordingly. *Dyer* 291.

## Draper *verſus* Bridwell. *Rot.* 320.

( 23. ) S. C. 3 *Keb.* 330. *Vide* 2 *Vent.* 261.

ALL the Court held, that an Action of Debt would lie upon a Judgment, after a Writ of Error brought.

( 24. ) Tithes. 1 *Rol.* 645. *pl.* 11, 12.

Twiſden. They in the Spiritual Court will give Sentence for Tithes for Rakings, tho' they be never ſo unvoluntarily left, which our Law will not allow of.

( 25. ) *Cinque-Ports.*

Wylde ſaid, That Actions perſonally tranſitory, tho' the Party doth live in Cheſter, yet they may be brought in the King's Courts.

( 26. ) Ley gager.

Hale. Shew a Precedent where a Man can wage his Law in an Action brought upon a Preſcription for a Duty; as in an Action of Debt for Toll by Preſcription, you cannot wage your Law.

## Pybus *verſus* Mitford. *Poſt*, 159.

( 27. ) S. C. *Poſt.* 159. *Raym.* 228. 1 *Vent.* 372. 3 *Keb.* 129, 239, 316, 338. See *Ante*, 98. *pl.* 3. *Poſt*, 160, 237. & *Stat.* 27 *H.* 8. *cap.* 10.

THE Chief Juſtice delivered his Opinion, Wylde, Rainsford and Twiſden, having firſt delivered theirs. Hale. I think Judgment ought to be given for the Defendant, whether the Son take by Deſcent or Purchaſe. I ſhall divide the Caſe: (1.) Whether the Son doth take by Deſcent? (2.) Admitting he doth not, Whether he can take by Purchaſe? We muſt make a great Difference between Conveyances of Eſtates by way of Uſe, and at Common Law: A Man cannot convey to himſelf an Eſtate by a Conveyance at Common Law, but by way of Uſe he may. But now in our Caſe here doth return by Operation of Law, an Eſtate to Michael for his Life,

which is conjoined with the Limitation to his Heirs. The Reaſon is, becauſe a Limitation to the Heirs of his Body, is in Effect to himſelf: This is perfectly according to the Intention of the Parties. Objection. The Uſe being never out of Michael, he hath the old Uſe, and ſo it muſt be a contingent Uſe to the Heirs of his Body. But, I ſay, we are not here to raiſe a new Eſtate in the Covenantor, but to qualify the Eſtate in Fee in himſelf; for the old Eſtate is to be made an Eſtate for Life, to ſerve the Limitation. Further Objection. It ſhall be the old Eſtate in Fee; as if a Man deviſeth his Lands to his Heirs, the Heir is in of the old Eſtate. But, I anſwer, If he qualify the Eſtate, the Son muſt take it ſo, as in Hutton, fol. . So in this Caſe is a new Qualification: Rol. 789. 15 Jac. If a Man makes a Feoffment to the Uſe of the Heirs of the Body of the Feoffor, the Feoffor hath an Eſtate-Tail in him; Pannell *verſus* Fenne, Moor. 349. Engleſield and Engleſield. (2.) I conceive, if it were not poſſible to take by Deſcent, this would be a Contingent Uſe to the Heirs of the Body. Objection. It is limited to the Heir, when no Heir in Being: Why, I ſay, it would have come to the Heir at Common Law, if no expreſs Limitation had been; and it cannot be intended, That he did mean an Heir at Common Law, becauſe he did ſpecially limit it. Fitz. Tit. Entail, 23.

(28.) An Aſſize for the Serjeant at Mace's Place, in the Houſe of Commons. The Plaintiff had his Patent read: The Court asked, If they could prove Seiſin? They anſwered, That they had recovered in an Action upon the Caſe, for the mean Profits, and had Execution. Per Cur'. For ought we know, That will amount to a Seiſin. Twiſden. Upon your Grant, ſince you could not get Seiſin, you ſhould have gone into Chancery, and they would have compelled him to give you Seiſin. Hale. A Man may bring an Action upon the Caſe for the Profits of an Office, though he never had Seiſin: So the Record was read of his Recovery in an Action upon the Caſe for the Profits. Hale. This is but a Seiſin in Law, not a Seiſin in Fact. The Counſel for the Plaintiff much urged, That the Recovery and Execution had of the Profits, was a ſufficient Seiſin to intitle them to an Aſſize. It was objected,

4 Co. 9. b. 1 Rol. 303. pl. 2.

That the Plaintiff was never inveſted into the Office. Hale ſaid, That an Inveſtiture did not make an Officer when he is created by Patent, as this is; but he is an Officer preſently. But if he were created an Herald at Arms (as in Segar's Caſe) he muſt be inveſted before he can be an Officer; a Perſon is an Officer before he is ſworn. Hale. You are the Perſon of the Profits, and they have recover'd them: Is not this a Seiſin againſt you? They ſhall find it ſpecially. But they choſe rather to be nonſuit, becauſe of the Delay by a ſpecial Verdict. And the Court told them, They could not withdraw a Juror in an Aſſize, for then the Aſſize would be depending. The Roll of the Action ſur le caſe fuit 19 Car. 2. Mich. Rot. 557. 1 *Leon.* 248.

# Term. Trin. 15 Car. II. 1663.

## *Judge* Hide's *Argument in the Exchequer-Chamber.*

## Manby *verſus* Scott.

( 1. )

S. C. 1 *Sid.* 109, 425. 1 *Vent.* 24, 42. 2 *Vent.* 155. 1 *Lev.* 4,5,6. 1 *Keb.* 69, 80, 87, 206, *&c.*

After Elopement the Husband is not liable to pay for Goods, *&c.* ſold and deliver'd to the Wife.

See *Aleyn* 61. *Noy* 79, 126. *Lat.* 126. *Mar.* 60,82. *Styl.* 18. *Yelv.* 166. *Palm.* 343. *Cro. Car.* 254, 355, 494. *Cro. Jac.* 661. 1 *Leon.* 312. 1 *Rol. Ab.* 6. *pl.* 6. 1 *Salk.* 113, to 116, 118. 6 *Mod.* 239. 2 *Show.* 283.

A Feme Covert departs from her Husband againſt his Will, and continues abſent from him divers Years; afterwards the Wife deſires to cohabit with her Husband again, but the Husband refuſeth to admit her; and from that Time the Wife lives ſeparate from him; during this Separation, the Husband forbids a Tradeſman of London to truſt his Wife with any Goods or Wares; yet for divers Years before and afterwards allows his Wife no Maintenance: The Tradeſman, contrary to the Prohibition of the Husband, ſells and delivers divers Wares to the Wife upon Credit, at a reaſonable Price; and the Wares ſo ſold and delivered to the Wife are neceſſary for her, and ſuitable to the Degree of her Husband: The Wares are not paid for; wherefore the Tradeſman brings an Action upon the Caſe againſt the Husband, and declares, That the Husband was indebted to him in 40 l. for divers Wares and Merchandizes formerly to the Husband ſold and delivered; and that the Husband, in Conſideration thereof, did promiſe to pay him the ſaid 40 l. That the Husband hath not paid the ſame unto him, although thereunto required; and for that Money the Action is brought againſt the Husband. And, Whether this Action will lie againſt the Husband for the Wares thus ſold and delivered to the Wife, againſt the Will, and contrary to the Prohibition of the Husband, or not, is the Queſtion? This Caſe is the meaneſt that ever received Reſolution in this Place; but as the ſame is now handled, it is of great Conſequence to all the King's People of this Realm, as any Caſe can be; it concerns every individual Perſon of both Sexes, that is, or hereafter ſhall

be married within this Kingdom, in the first and nearest Relation, that is, betwixt Man and Wife. The holy State of Matrimony was ordained by Almighty God in Paradise, before the Fall of Man, signifying unto us, That mystical Union which is between Christ and his Church; and so it is the first Relation: And when two Persons are joined in that Holy State, they twain become one Flesh; and so it is the nearest Relation. This Case toucheth the Man in Point of his Power and Dominion over his Wife, and it concerns the Woman in Point of her Substance and Livelihood. I will deliver my Opinion plainly and freely, according as I conceive the Law to be, without favouring the one, or courting the other Sex. I hold, That Judgment ought to be given for the Defendant. The Case hath been so fully argued, and all the Authorities so particularly vouched by my Brothers, who have already delivered their Opinions, that nothing is left for me to say, which hath not been spoken by them in better Terms than I can express my self. It will be a Trouble to your Lordships for me to repeat their Arguments, and yet without doing so, it will be impossible for me to speak any Thing to the Purpose. It shall be my Endeavour therefore, rather to answer the Reasons and Objections given and made by my two Brothers, who have so copiously argued for the Woman's Power, than to argue the Case on the same Grounds which have been already delivered.

It is agreed by all my Brothers who have argued, as I conceive, That a Feme Covert generally cannot bind or charge her Husband by any Contract made by her, without the Authority or Assent of her Husband precedent or subsequent, either express or implied. But the Question in this Case is, If the Contract of a Feme Covert for Wares for her necessary Apparel, made without the Consent, and contrary to the Prohibition of her Husband, shall bind her Husband?

First, I hold, That the Husband shall not be charged by such a Contract, although he do not allow any Maintenance to his Wife.

Secondly, Admit the Husband were chargeable generally by such a Contract; yet I conceive that this Action doth not lie for the Plaintiff, as this Declaration is, and as this Verdict is found against the Defendant in this particular Case.

For

For the first, Every Gift, Contract, or Bargain, is, or contains an Agreement, for the Contractor or Bargainor will that the Donee or Bargainee shall have the Things contracted for; and the other is content to take them, and so in every Contract there is a mutual Assent of their Minds, which mutual Assent is an Agreement: Plow. Com. Fogassa's Case. Afterwards in the same Case fol. 17. it is said, Agreement is a Word compounded of two Words, viz. Aggregatio and Mentium; so that aggreamentum is aggregatio mentium; or thus, aggreamentum is no other but a Union or Conjunction of two Minds in any Matter or Thing, done, or to be done, according to that of Sir Edward Coke, Com. fol. 47. Contractus est quasi actus contra actum: But a Feme Covert cannot give a mutual Assent of her Mind, nor do any Act without her Husband; for her Will and Mind (as also her self) is under and subject unto the Will or Mind of her Husband; and consequently she cannot make any Bargain or Contract (of her self) to bind her Husband. The second Ground of the Law of England, is the Law of God: Dr. & Stud. cap. 6. fol. 10. In the Beginning when God created Woman an Help-meet for Man, he said, They twain shall be one Flesh; and thereupon our Law says, That Husband and Wife are but one Person in the Law: Presently after the Fall, the Judgment of God upon Woman was, Thy Desire shall be to thy Husband, for thy Will shall be subject to thy Husband, and he shall rule over thee. 3 *Gen.* 16. Hereupon our Law put the Wife sub potestate viri, and says, Quod ipsa potestatem sui non habeat, sed vir suus, and is disabled to make any Grant, Contract, or Bargain, without the Allowance or Consent of her Husband: Bract. lib. 3. cap. 32. fol. 15. The Books and Authorities of our Law which prove this Point, have been all particularly vouched already, and I will not repeat them again, nor do I know any one particular Point to the contrary. The Words of the Book are observable, namely, If a Feme Covert make a Contract, or buy any Thing in the Market, or elsewhere, without the Allowance or Consent of her Husband, although it come to the Use of the Husband, yet the Contract is void, and shall not charge the Husband; but if a Man command or licence his Wife to buy Things necessary, or agree that she shall buy, he shall be bound by this Command or Licence: Old Nat. Brev. 62. 21 H. 7. 70. Fitz. Nat. Brev. 120. Which proves, that it is not the Buying or Contract of the Wife, which binds or charges the Husband (for that is void in it self) but

1 *Rol.* 351. *pl.* 45, 46.

the Command or Licence of the Husband, which makes it the Contract or Bargain of the Husband.

As to my Brother Twisden's saying, That all those Books are where the Wife deals or trades as a Factor to her Husband, and all grounded upon that Reason, the Words themselves prove the contrary; for the Difference taken by all these Books is, between the Buying and Contract of the Wife, without the Knowledge or Consent of her Husband; and a Buying or Contract had by the Wife, with Allowance or Command of the Husband. In the first Case, the Buying or Contract is void, in the other the Allowance or Command makes it good, as the Contract or Bargain of the Husband: Besides, weigh the Inconveniencies which would follow, if the Law were otherwise. Judges, in their Judgments, ought to have a great Regard to the Generality of the Cases of the King's Subjects, and to the Inconveniencies which may ensue thereon by the one Way or the other. 1 Rep. 52. Altenwood's Case.

Judges in giving their Resolutions in Cases depending before them, are to judge of Inconveniencies as Things illegal, and an Argument ab inconvenienti is very strong, to prove that it is against Law: Plo. Com. 279, 379. Then examine the Inconveniencies which must ensue, if the Law were according to my Brother Twisden and Tyrrell's Opinions: If the Contract or Bargain of the Wife, made without the Allowance or Consent of the Husband, shall bind him upon Pretence of necessary Apparel, it will be in the Power of the Wife (who by the Law of God, and of the Land, is put under the Power of the Husband, and is bound to live in Subjection unto him) to rule over her Husband, and undo him, maugre his Head, and it shall not be in the Power of the Husband to prevent it. The Wife shall be her own Carver, and judge of the Fitness of her Apparel, of the Time when it is necessary for her to have new Cloaths, and as often as she pleaseth, without asking the Advice or Allowance of her Husband: And is such Power suitable to the Judgment of Almighty God, inflicted upon Woman, for being first in the Transgression? Thy Desire shall be to thy Husband, and he shall rule over thee. Will Wives depend on the Kindness and Favours of their Husbands, or be observant towards them as they ought to be, if such a Power be put into their Hands?

Secondly,

Secondly, Admit that in Truth the Wife wants neceſſary Apparel, Woolen and Linen, and thereupon ſhe goes into Pater-noſter-Row, to a Mercer, and takes up Stuff, and makes a Contract for neceſſary Cloaths, thence goes up into Cheapſide, and takes up Linen there in like Manner, and alſo goes into a third Street, and fits her ſelf with Ribbonds, and other Neceſſaries ſuitable to her Occaſions, and her Husband's Degree. This done, ſhe goes away, diſpoſeth of the Commodities to furniſh her ſelf with Money to go abroad to Hide-Park, to ſcore at Gleeke, or the like. Next Morning this good Woman goes abroad into ſome other Part of London, makes her Neceſſity and want of Apparel known, and takes more Wares upon Truſt, as ſhe had done the Day before; after the ſame Manner ſhe goes to a third and fourth Place, and makes new Contracts for freſh Wares, none of theſe Tradeſmen knowing or imagining ſhe was formerly furniſhed by the other, and each of them ſeeing and believing her to have great need of the Commodities ſold her; ſhall not the Husband be chargeable and liable to pay every one of theſe, if the Contract of the Wife doth bind him? Certainly, every one of theſe hath as juſt Cauſe to ſue the Husband as the other, and he is as liable to the Action of the laſt, as the firſt or ſecond, if the Wife's Contract ſhall bind him; and where this will end no Man can divine or foreſee.

As for my Brother Tyrrell's ſaying, We may alter the Law becauſe an Inconvenience may follow thereon, that is true: But we ought to foreſee and provide againſt ſuch Inconveniencies as may ariſe, before we adjudge or declare the Law in a particular Caſe in queſtion, Whether the Law be ſo or not? And that is the Caſe here: It is objected, That the Husband is bound of Common Right, to provide for, and maintain his Wife; and the Law having diſabled the Wife to bind her ſelf by her Contract, therefore the Burden ſhall reſt upon the Husband, who by Law is bound to maintain her, and he ſhall do it nolens volens; generally the Antecedent is moſt true; for ſhe is Bone of his Bone, Fleſh of his Fleſh, and no Man did ever hate his own Fleſh, ſo far as not to preſerve it.

But apply this general Propoſition to our particular Caſe, and then ſee what Logick there is in the Argument. I am bound to maintain and provide for my Wife: Therefore my Wife departing from me againſt my Will, ſhall be her own

Carver, and take up what Apparel she pleaseth upon Trust, without my Privity or Allowance, and I shall be bound to pay for it; this is our Case, for there is not a Word throughout the whole Verdict, that the Wife did want necessary Apparel, that she ever acquainted her Husband with any such Matter, that she ever desired the Husband to supply her with Money to buy it, or otherwise to provide for her, or that the Husband did deny, refuse, or neglect to do it. Besides, although it be true, That the Husband is bound to maintain his Wife, yet that is with this Limitation, viz. so long as she keeps the Station wherein the Law hath placed her, so long as she continues a Help-meet unto him; for if a Woman of her own Head, without the Allowance or Judgment of the Church, which hath united them in the holy State of Matrimony (which only can separate that, or dissolve this Union) depart from her Husband against his Will, (be the Pretence what it will) she doth thereby put her self out of the Husband's Protection; so that during this unlawful Separation, she is no Part of her Husband's Care, Charge, or Family. The King is the Head of the Commonwealth: His Office is, and he is bound of Right, to protect and preserve his Subjects in their Persons, Goods and Estates. And on that Ground; every loyal Subject is said to be within the King's Protection. Plo 315. Case of Mynes, 1. N. Br. 232.

But a Man may put himself out of the King's Protection by his Offence; as, by forsaking his Allegiance to the King, and owning or setting up any foreign Jurisdiction, and then every Man may do unto him as to the King's Enemy, and he shall have no Remedy or Recovery by the King's Laws or Writs. 27 E. 3. Case the first. The Husband is Head of the Wife, as fully as the King is Head of the Commonwealth; and the Wife by the Law is put sub potestate viri, and under his Protection, although he hath not potestatem vitæ & necis over her, as the King hath over his Subjects. When the Wife departs from her Husband against his Will, she forsakes and deserts his Government, she erects and sets up a new Jurisdiction, and assumes to govern her self, besides at least, if not against, the Law of God and of the Land; and therefore it is but just that the Law for this Offence, should put her in the same Plight in the petit Commonwealth of the Household, that it puts the Subject for the like Offence in the great Commonwealth of the Realm; and this according to

the Civil Law, namely, Si uxor propria (ſine culpa mariti) ſit extra conſortium viri, non tenetur maritus extunc ei extra conſortium ſuum exiſtenti aliqualiter ſubminiſtrare; videtur enim virum alendi obligatione fore exemptum, quoniam culpa ſua extra viri conſortium eſt. For, Nuptiæ ſunt conjunctio maris & fœminæ & conſortium ejus divini & humani juris communicatio. *Digeſt. de ritu Nuptiarum.* Fleta ſpeaking of Appeals, hath this Expreſſion, Fœmina de morte viri ſui inter brachia ſua interfecti, & non aliter potuit appellare, *l.* 1. *Ca.* 33. Bracton is much to the ſame Purpoſe, *li.* 3. *Chap.* 24. *fo.* 148. Non niſi in duobus caſibus fœmina appellum habeat, ſc. non niſi de violentia corpori ſuo illata, ſicut de raptu & de morte viri ſui interfecti inter brachia ſua; and the Words of the Writ of Appeal are ſuitable thereunto, ſc. Venit idem A. B. & nequiter & in felonia, &c. occidit ipſum virum ſuum inter brachia ſua, &c. By the Words inter brachia ſua, in thoſe antient Authors, is underſtood the Wife, which the dead Perſon lawfully had in Poſſeſſion at the Time of his Death: For ſhe ought to be his Wife of Right, and alſo in Poſſeſſion, Com' S. Ma. Char. fo. 68. The Words of the Writ are obſervable. ſc. occidit virum ſuum inter brachia ſua, and prove that the Woman ought to be inter brachia viri ſui, or otherwiſe ſhe hath not the Privilege of a Wife.

By an Argument a pari, as the Wife ſhall not have Remedy againſt the Murtherer of her Husband after his Death, if he were not inter brachia ſua, at the Time of his Death, pari ratione ſhe ſhall not have Support or Maintenance from her Husband in his Life, when ſhe put her ſelf extra brachia ſua, againſt his Will.

But 'tis objected by my Brother Tyrrell; It appears not in whoſe Default this Departure was, whether in his or her Default? Thereto I anſwer, That the Law doth not allow a Wife to depart from her Husband in any Caſe, or for any Cauſe whatſoever, of her own Head. An expreſs Command is laid upon her by the Law of God to the contrary, Cor. 7. 10. To the Married I command, yet not I, but the Lord; let not the Wife depart from her Husband.

The Proviſion which our Law hath made for the Safeguard of the Perſon of a Woman, in Caſe of Cruelty by her Husband, and for her Maintenance in Caſe the Husband refuſes to allow it, proves, That it is not lawful for the Wife to depart from her Husband of her own Head, upon any Pretence whatſoever.

If

If the Wife be in Fear, or in Doubt of her Husband, that he will beat or kill her, she shall have a Supplicavit out of the Chancery against her Husband, and cause him to find Sureties that he will not beat, nor intreat her otherwise than in civil Manner, and for to order and rule her, &c. F. N. Br. fo. 179. The Words of the Writ are, Quod ipsum B. coram te corporaliter venire fac', & ipsum B. ad sufficien' manucaption' inveniend', &c. quod ipse præfat' B. bene & honeste tractabit gubernabit ac dampnum & malum aliquod eidem A. de corpore suo alit' quam ad virum suum ex causa regiminis & castigationis uxoris suæ licite & rationabilit' pertinet, non faciet nec fieri procurabit. And if the Husband refuse to give or allow necessary and fitting Maintenance unto his Wife, the Law hath provided a Remedy for her, by Complaint to the Ordinary in the Ecclesiastical Court.

Next, it is alledged by my Brother Tyrrell, That the Wife in our Case did return, and desire to cohabit with her Husband again, which he refused, and so she is remitted to her former Condition. Admit that be true, yet her Return hath not put her in a better Condition than she was in before her Departure, in which Case she could not be her own Carver, and have charged her Husband (according to her Pleasure) with Apparel, but was to be clothed in such sort as her Husband thought fit. Besides, in our Case the Wife departed from her Husband, and lived from him divers Years after (before the Mares said, or the Action brought) then she desired to cohabit with him, which he refused to admit; and from that Time she lived from him. This is all that appears in our Case: And is this Offence so easily purg'd, with a bare Desire to cohabit, without any other Submission and Satisfaction given of the better Carriage in futuro? The Law of God says, Wives be in Subjection to your Husbands as unto the Lord: For the Husband is the Head of the Wife, as Christ is Head of the Church, 1 *Pet.* 3, 4. *Ephes.* 5. 22. The Church declares, That one of the principal Ends for which Marriage was ordained, is for the mutual Society, Help, and Comfort, which the one ought to have of the other, in Prosperity and Adversity. It is also there said, the Woman of her self in contracting of Marriage, makes a solemn Vow in facie Ecclesiæ, to live together with her Husband, in the holy State of Matrimony, to obey him, and serve him, to love him, and keep him in Sickness and in Health, till Death them do part.

The Wife, in our Case, by departing from her Husband against his Will, breaks all those Commands, and her own Vow; she makes a voluntary Separation, and temporary Divorce between her self and her Husband; she deprives him of that mutual Society, Help, and Comfort (which she owes to him) for divers Years: And are all these Offences wash'd away with a bare Desire, without Submission or Contrition? No certainly, Confession and Promise of future Obedience, ought to precede her Remitter, or Restitution to the Privileges of a Wife. The prodigal Son in the Gospel said, I will arise and go to my Father, and say, I have sinned, before the indulgent Father did receive or cloath him. And this is according to the Rule in the Civil Law, Si uxor quæ (culpa sua) recesserat, pœnitentia ducta ad virum rediens nolit admitti eam, extunc culpa purgatur, in virum transfundit' renebiturque ipsi seorsum habitanti alimenta præstare. So that the Wife ought to be a Penitentiary before the Husband is bound to receive her, or give her any Maintenance. And no such Thing appears, or is found in the Verdict in our Case.

It's said by my Brother Twisden: Although the Wife departs from her Husband, yet she continues his Wife, and she ought not to starve. If a Woman be of so haughty a Stomach, that she will chuse to starve, rather than submit, and be reconciled to her Husband, let her take her own Choice. The Law is in no Default, which doth not provide for such a Wife. If a Man be taken in Execution, and lie in Prison for Debt, neither the Plaintiff, at whose Suit he is arrested, nor the Sheriff who took him, is bound to find him Meat, Drink, or Cloths; but he must live on his own, or on the Charity of others; and if no Man will relieve him, let him die in the Name of God, says the Law; Plow. 68. Dive and Manningham: So say I; if
Co. Lit. 295. a Woman who can have no Goods of her own to live on, will depart from her Husband against his Will, and will not submit her self unto him, let her live on Charity, or starve in the Name of God; for in such Case the Law says, her evil Demeanour brought it upon her, and her Death ought to be imputed to her own Wilfulness. As to my Brother Tyrrell's Objection, it were strange if our Law, which gives Relief in all Cases, should send a Woman unto another Law or Court to seek Remedy to have Maintenance. I answer. It's not sending the Wife to another Law, but leaving the Case to its proper Jurisdiction; the Case being of Ecclesiastical Conusance. Is it

any Strangeneſs or Diſparagement to the Common Pleas, to ſend a Cut-purſe, or other Felon taken in the Court, to the King's Bench to be indicted? Or to the King's Bench, to ſend a Woman to the Common Pleas to recover her Dower? Why is it more ſtrange for the Common Law to ſend a Woman to the Ordinary to determine Differences betwixt her and her Husband touching Matters of Matrimony, than for our Courts at Common Law to write unto the Ordinary to certifie Loyalty of Marriage, Baſtardy, or the like, where Iſſue is joined on theſe Points in the King's Courts? For although the Proceeding and Proceſs in the Eccleſiaſtical Courts be in the Names of the Biſhops, yet theſe Courts are the King's Courts, and the Law by which they proceed is the King's Law: 5 Rep. 39. Caudrie's Caſe. But the Reaſon in both Caſes is, quia hujuſmodi cauſæ cognitio ad forum ſpectat Eccleſiaſticum. 30 *H. 6. b. Old Book of Entries* 288. according to that of *Bracton, lib.* 3. *fo.* 107. *Staundf.* 57. Sunt caſus ſpirituales in quibus judex ſecularis non habet cognitionem neque executionem, quia non habet coercionem: In his enim caſibus ſpectat cognitio ad judices eccleſiaſticos qui regunt & defendunt ſacerdotium. Hereunto agrees Cawdrie's Caſe, 5 Rep. 9. As in temporal Cauſes, the King by the Mouth of his Judges in his Courts of Juſtice, determines them by the temporal Law; ſo in Cauſes Eccleſiaſtical and Spiritual (the Conuſance whereof belongs not to the Common Law) they are decided and determined by the Eccleſiaſtical Judges, according to the King's Eccleſiaſtical Laws; and that Cauſes of Matrimony, and the Differences between Husband and Wife touching Alimony, or Maintenance for the Wife (which are dependant upon, or incident unto Matrimony) are all of Eccleſiaſtical, and not of ſecular Conuſance, is evident by the Books and Authorities of our Laws, De cauſa teſtamentaria ſicut nec de cauſa matrimoniali, curia regia ſe non intromittat ſed in foro eccleſiaſtico debet placitum terminari. *Bracton, lib.* 2. *cap.* 20. *fo.* 7. All Cauſes teſtamentary, and Cauſes of Matrimony, by the Laws and Cuſtoms of the Realm, do belong to the ſpiritual Juriſdiction. 24 H. 8. cap. 2.

The Words of the Writ of Prohibition granted in ſuch Caſes are, Placita de catallis, & debitis quæ ſunt de teſtamento vel matrimonio, ſpectant ad forum eccleſiaſticum. In a Suit commenced by a Woman againſt her Husband before the Commiſſioners for Eccleſiaſtical Cauſes for Alimony, a Prohibition

on was prayed and granted, because it is a Suit properly to be brought and prosecuted before the Ordinary. In which, if the Party find himself grieved, he may have Relief by Appeal unto the superior Court, and that he cannot have upon a Sentence given in the High Commission-Court. 1 Cro. 220. Drake's Case.

But 'tis objected by my Brothers Tyrrell and Twisden, That the Remedy in the Ecclesiastical Court is not sufficient: For if the Husband will not obey the Sentence of the Ordinary, it is but Excommunication for his Contumacy, and that will neither feed nor cloath the Wife. Are the Censures of the holy Mother the Church, grown of so little Account with us, or the Separation, a communione fidelium, become so contemptible, as to be slighted, with but Excommunication? Hath our Law provided any Remedy so penal, or can it give any Judgment so fearful as this? With us the Rule is, committitur Marescal' or Prison' de Fleet. There the Sentence is, traditur Satanæ, which Judgment is more penal. Take him Gaoler till he pay the Debt, or take him Devil till he obey the Church. And yet their Judgment is warranted by the Rule of St. Paul, Whom I have delivered unto Satan, 1 *Cor.* 5. 5. whereupon the Comment says, Anathema ab ipso Christi corpore (quod est Ecclesia) recidit. *Causa* 3. *quest.* 4 *Cam' Egell* trudam; and also, Nullus cum excommunicatis in oratione aut cibo aut potu, aut esculo communicet, nec ave eis dicat. *Causa*, 2. *quest.* 3 *Can. excommunicat'. Bracton, lib.* 5. *cap.* 23. *fo.* 42. As much is said by our Law, and it is to the same Effect, Excommunicato interdicitur omnis actus legitimus, ita quod agere non potest, nec aliquem convenire cum ipso, nec orare, nec loqui, nec palam, nec abscondite vesci licet.

*Vide Bro. Excommengement.*

The second Ground of the Law of Excommunication, is the Law of England; and it is a Ground in the Law of England, That he which is accursed shall not maintain any Action, Doctor & Stu. 11. Where a Man is excommunicated by the Law of the Church, if he sue any Action, real or personal, the Tenant or Defendant may plead, That he is excommunicated, and demand Judgment, if he shall be answered. Lit. 201. The Sentence is set forth at large in the old Statute Book of Magna Charta, and is intituled, Sententia lata super chartas, namely, Authoritate Dei patris omnipotentis & filii & spiritus sancti excommunicamus, anathematizamns, & a liminibus sanctæ matris ecclesiæ sequestramus omnes illos, &c. 12 H. 3.

fo. 146. He which by the Renunciation is rightfully cut off from the Unity of the Church, and excommunicate, ought to be taken by the whole Multitude as a Heathen and a Publican, until he be openly reconciled by Penance. Act. 33. confirm' per 13 Eliz. cap. And this is ground edon the Rule of our bleſſed Saviour, Dic Eccleſiæ; and if he neglect to hear the Church, let him be as an Heathen and Publican. Matt. 18. 17. Shall a Man be accurſed, barred of the Company or Society of Chriſtians, cut off from the Body of Chriſt, accounted as a Heathen and Publican, for not allowing Maintenance to his Wife, when the Church enjoins him ſo to do; and ſhall not this be accounted a ſufficient Remedy for the Wife? I fear it is the Want of Religion, and due Credence to the Cenſures of the Church, which occaſions this Objection, rather than real Want of ſufficient Remedy in Law for her Relief.

The laſt Matter to be anſwered, is rather the Opinion of my Brothers Twiſden and Tyrrell in their Arguments, than an Objection in this Caſe; namely, If an Action upon the Caſe doth not lie againſt the Husband upon the Contract of the Wife for neceſſary Apparel, yet an Action of Trover and Converſion doth lie againſt him for the Stuff; and ſo one way or other the Husband muſt pay the Reckoning. If the Law ſhould be ſo, it were a Converſion with a Witneſs; for then the Husband ſhould ſeem to be ſub poteſtate fœminæ: He might glory in the Words of St. Paul, I would have you know, That the Head of the Woman is the Man. But if the Wife ſhall ſet his Cap, or lay his Headſhip in the Gaol, it ſhall not be in the Power of the Husband to prevent or avoid it.

One Kind of Divorce between Husband and Wife is, when Action of Treſpaſs is brought againſt them, and the Husband only appears, and Proceſs iſſue out againſt the Wife, until ſhe be waived and outlawed, ſhe can never purchaſe her Pardon, or reverſe the Outlawry, unleſs the Husband will appear; ſo that if the Husband pleaſe he is divorced. 14 H. 6. 14. a. If the Wife be outlawed by erroneous Proceſs, and the Husband will not bring a Writ of Error, he may by this Way be rid of a Shrew, and that doth countervail a Divorce. 18 E. 4. 4. a. *Vide* 1 *Lev.* 51. 1 *Keb.* 194 & 637.

By theſe Books it appears, That the Law puts a Power in the Husband to be rid of his Wife, and provides a Remedy to tame a Shrew; but I never heard before, That the Law hath left it in the Power of the Wife to do ſo by her Husband; and

I do

I do not remember that my Brothers did vouch any Authority, or give any Reason for Maintenance of their Opinions; and therefore I may with Freedom deny the Law to be as they have said: Besides, the Nature of an Action of Trover proves that it lies not in this Case. The Count is, That the Plaintiff was possessed of such Goods, (and names them) as of his own proper Goods, and casually lost them; that the Goods came to the Defendant's Hands by finding, yet he knowing them to belong to the Plaintiff, refuseth to deliver them to him, but hath converted them to his own Use; so that an Action is grounded upon a Wrong supposed to be done by the Defendant, in converting the Goods of the Plaintiff knowingly to his own Use, against the Will of the Plaintiff: And that is the Reason why the Plaintiff in that Action, must make a Demand of the Goods, and an actual Conversion by the Defendant, or else he fails in the Action.

In an Action of the Case, for that the Defendant did find the Goods of the Plaintiff, and delivered them to Persons unknown, Non deliberavit modo & forma is no Plea, without saying Not guilty, where the Thing rests in Feasance: And if the Action be, That the Plaintiff was possessed, ut de bonis propriis, and the Defendant did find and convert them to his own Use, it is no Plea, That the Plaintiff was not possessed, ut de bonis propriis, but he must plead Not guilty to the Misdemeanor, and give the other Matter in Evidence. 33 H. 8. & Mar. Bro. Action sur le Case.

In Trover the Plaintiff declares, That he was possessed of such Goods, and casually lost them, and the Defendant found them, and converted them to his own Use; the Defendant did plead, That the Plaintiff did gage the Goods unto him for 10 l. and that he detained the Goods for 10 l. this is no Plea; but he ought to plead Not guilty, and give this Matter in Evidence; for the Action doth suppose a Wrong, which the Defendant ought to answer. 4 E. 6. Action sur le Case 113. What Wrong is done to the Plaintiff in our Case, when he himself sells and delivers the Goods? It is not like the Case where two Men, by mutual Consent, wrestle or play at Football together: Will an Action of Assault and Battery lie for the one against the other, when the Act is done by their mutual Agreement before Hand? Put the Case of Sale made to a Man upon Credit, and the Vendee promised to pay for the Goods at Michaelmas, but fails to pay the Money accordingly,

*Co. Lit.* 283. *a.*

cordingly, shall the Salesman have Trover against the Vendee, because he pays not the Money at the Day? And will the Sale to this Feme Covert, alter the Case, or the Law, as to the Action? It is true, That for a Conversion by the Woman before Coverture, or by the Wife during the Coverture, an Action of Trover lies against the Husband and Wife; but this is for a Conversion by Wrong, when she takes the Goods, and converts them against the Will of the Owner: 1 Cro. 10, 254. Remis and Humfrey's Case: As in Case where a Man comes to buy Goods, and offers 10l. for them, and the Owner agrees to accept the Money, whereupon the Buyer takes the Goods away without Payment or Delivery by the Owner; there an Action of Trespass or Trover lies, notwithstanding the Bargain: 21 H. 7. 6. Otherwise, it is if they agree upon a Price, and the Vendor takes the Vendee's Word for Payment, and delivers the Goods unto him; there the Vendor is put to his Action for the Money upon the Contract, and shall not bring Trover for the Goods. 14 H. 8. 22.

If an Infant gives or sells Goods, and delivers them with his own Hand, he shall have no Action of Trespass against the Donee or Vendee, by reason of the Delivery: 21 H. 7. 39. 26 H. 8. 2. But if an Infant give or sell Goods, and the Vendee or Donee takes them by Force of the Gift or Sale, the Infant may have an Action of Trespass against him. So in our Case: If a Feme Covert takes Wares of a Shop-keeper against his Will, upon Pretence of buying them, an Action lies against the Husband; but if the Owner sell the Goods to the Wife upon Trust, and delivers the Goods unto her, he shall not have an Action of Trespass against the Husband, by reason of this Delivery. If a Man take my Wife and cloath her, this amounts unto a Gift of the Apparel unto her: 11 H. 4. 83. And I may take my Wife with the Apparel, and no Action lies against me: By the same Reason, when a Man delivers Stuff, or other Wares to my Wife, knowing her to be a Feme Covert, to make Apparel, without my Privity or Allowance, this shall be construed to be a Gift of the Stuff unto her, and I shall not be charged in any Action for it: Besides, consider the Inconveniencies which will follow, if an Action of Trover should be against the Husband; for then the Husband shall be barred of all those Helps which my Brothers, (who maintain that Opinion) have allowed unto him, and have made Reasons, for which an Action of the Case should lie

Infants. *Hob.* 77. 2 *Rol. Rep.* 408. *Latch* 10. 3 *Mod.* 310. *Ante*, 25.

1 *Cro.* 344. *Finch* 22.

againſt him on the Contract; namely, the Jurors are to examine and ſet the Price or Value, and the Neceſſity and Fitneſs of Things, with relation to the Degree of the Husband, whereby Care is taken, that the Husband have no Wrong; for in an Action of Trover, the Jury cannot examine any of thoſe Matters; but are to enquire only of the Property of the Plaintiff, and the Converſion by the Defendant, and to give Damages according to the Value of the Goods: And ſo it ſhall be in the Power of the Wife to take up what ſhe pleaſeth, and to have what ſhe liſts, without Reference unto the Degree, or Reſpect to the Eſtate of her Husband, and he ſhall be charged with it Nolens volens.

It is objected, That the Jury is to judge what is fit for the Wife's Degree, that they are truſted with the Reaſonableneſs of the Price, and are to examine the Value; and alſo the Neceſſity of the Things or Apparel. Alas, poor Man! What a Judicature is ſet up here to decide the private Difference between Husband and Wife? The Wife will have a Velvet Gown, and a Sattin Petticoat, and the Husband thinks Mohair, or Farendon for a Gown, and watered Tabby for a Petticoat, is as faſhionable, and fitter for his Quality: The Husband ſays, That a plain Lawn Gorget of 10s. pleaſeth him, and ſuits beſt with his Condition; the Wife will have a Flanders Lace, or Point-Handkerchief of 40l. and takes it up at the Exchange. A Jury of Mercers, Silkmen, Sempſters, and Exchange-men, are very excellent, and very indifferent Judges to decide this Controverſy: It is not for their Avail and Support to be againſt the Wife, that they may put off their braided Wares to the Wife upon Truſt, at their own Price, and then ſue the Husband for the Money. Are not a Jury of Drapers and Milliners bound to favour the Mercer or Exchange-men to Day, that they may do the like for them to Morrow?

And beſides, What Matter of Fact (and of that only the Law hath made Jurors the Judges) is there in the Fitneſs of the Commodities, with Reference to the Degree of the Huſband? And, Whether this or that Thing be the moſt neceſſary for the Wife? The Matter of Fact is, to find, That the Wife wanted neceſſary Apparel, and that ſhe bought ſuch and ſuch Wares of the Plaintiff, at ſuch a Price, to cloath herſelf, and leaves the Fitneſs of the one, and the Reaſonableneſs of the other, to the Court; for that is Matter of Law, whereof the Jurors have no Conuſance. Leſſee for Life of a Houſe, puts his

Goods therein, makes his Executors, and dies; whosoever hath the House after his Death, yet his Executors shall have free Entry, Egress and Regress to carry their Testator's Goods out of the House by reasonable Time: Lit. 69. And this reasonable Time shall be adjudged by the Discretion of the Justices before whom the Cause depends, upon the true State of the Matter, and not by the Jury: Co. super Littleton 56. b. So it is in case of Fines for Admittance, Customs and Services, if the Question be, Whether the same be reasonable, or not? For Reasonableness belongs to the Knowledge of the Law: 4 Rep. 27. Hubart's Case. Lessee for Life makes a Lease for Years, and dies within the Term; in an Action of Trespass brought by the first Lessor against the Lessee for Years, he ought by his Plea to set forth what Day his Lessor died, and at what Place, where the Land lies, and at what Day he did leave the Possession; and so leave it to the Discretion of the Court, Whether he did quit the Possession in reasonable Time, or not? 22 E. 4. 18. Soinor's Case. The Fitness or Necessity of Apparel, and the Reasonableness of the Price, shall be judged by the Court, upon the Circumstance of the Matter, as the same appears by the Pleadings, or is found by the Jury; but the Jurors are not Judges thereof. Again, there is a twofold Necessity, Necessitas simplex, vel absoluta, and Necessitas qualificata, vel convenientiæ; of a simple and absolute Necessity in the Case of Apparel or Food for a Feme Covert, the Law of the Land takes Notice, and provides Remedy for the Wife, if the Husband refuse or neglect to do it. But if it be only Necessitas convenientiæ, whether this or that Apparel, this or that Meat or Drink be most necessary, or convenient for any Wife, the Law makes no Person Judge thereof, but the Husband himself; and in those Cases no Man is to put his Hand between the Bone and the Flesh. 11 Co. 44.

I will conclude the general Question, or first Point, with the Judgment of Sir Thomas Smith, in his Book of the Commonwealth of *England*, lib. 1. cap. 11. fol. 23. The naturalest, and first Conjunction of two towards the making a further Society of Continuance, is of the Husband and Wife, each having Care of the Family, the Man to get, to travel Abroad, to defend; the Wife to save, to stay at Home, and distribute that which is gotten for the Nurture of the Children and Family, is the first and most natural but primate Apparence of one of the best Kind of Commonwealths, where not one always, but sometime, and in some Things, another bears

Rule; which to maintain, God hath given the Man greater Wit, better Strength, better Courage to compel the Woman to obey, by Reaſon or Force; and to the Woman Beauty, fair Countenance, and ſweet Words to make the Man obey her again for Love. Thus each obeyeth and commandeth the other, and they two together rule the Houſe, ſo long as they remain together in one. I wiſh, with all my Heart, That the Women of this Age would learn thus to obey, and thus to command their Husbands: So will they want for nothing that is fit, and theſe kind of Fleſh-flies ſhall not ſuck up or devour their Husbands Eſtates by illegal Tricks.

I am come now to this particular Caſe, as it ſtands before us on this Record. Admit that the Husband were chargeable by Law by the Contract of his Wife, yet Judgment ought to be given againſt the Plaintiff, upon this Declaration, as this Verdict is found.

Firſt, The Declaration is, That the Defendant was indebted to the Plaintiff in 90 l. for Wares and Merchandizes, by the Plaintiff to him before that Time ſold and delivered; and the Verdict finds, That the Wares were not ſold and delivered to the Defendant, but the ſame were ſold to his Wife without his Privity or Conſent. So it appears, That the Plaintiff hath miſtaken his Action upon the Caſe, for Wares ſold unto him, and ought to have declared ſpecially, according to the Truth of his Caſe, for Wares ſold to his Wife for neceſſary Apparel. In an Action of Battery againſt the Husband and Wife, the Plaintiff counted that they both did aſſault and beat him. Upon Not guilty pleaded, the Jury found, That the Wife alone did make the Aſſault, and not the Husband: Yelv. 106. Darcy and Denier's Caſe. And the Verdict was againſt the Plaintiff, becauſe now the Plaintiff's Action appeared to be falſe; for the Husband ought not to be joined, but for Conformity; and there is a ſpecial Action for the Plaintiff in that Caſe: So this Verdict is againſt the Caſe, becauſe it appears, That the Action brought by him is falſe, and that he ought to have brought another Action upon the ſpecial Matter of his Caſe, if any ſuch Law lie for him.

Secondly, The Jury find, That the Defendant's Wife departed from him againſt his Will, and lived from him; and that the Defendant, before the Wares were ſold to his Wife, did forbid the Plaintiff to truſt his Wife with any Wares. And that the Plaintiff, contrary to his Prohibition, did ſell

and deliver those Wares to the Wife upon Credit; and I conceive, That this Prohibition doth so far bar, or bind the Plaintiff, that he shall never have any Action against the Defendant for Wares sold and delivered to his Wife, after he was prohibited by the Husband. It is agreed by all, That a Feme Covert cannot generally make any Contract, which shall charge or discharge her Husband, without the Authority or Consent of the Husband, precedent or subsequent: So that the Authority or Consent of the Husband is the Foundation or Ground which makes the Contract good against him: But when the Husband forbids a particular Person to trust his Wife, this Prohibition is an absolute Revocation or Countermand, as to the Person, of the general Authority which the Wife had before, and puts him in the same Plight, as if the Wife had never any Authority given her.

It is said by my Brothers Twisden and Tyrrell, That the Prohibition of the Husband is void; for (says Tyrrell) the Husband is bound to maintain his Wife, notwithstanding her Departure from him, and therefore he cannot prohibit others to do it.

And Twisden says, It is a Right vested in her by the Law, and therefore the Prohibition of the Husband shall not divest, or take it away from her.

I have already answered and disproved these Reasons, on which they ground their Opinions, and will not repeat them here again: But admit that the Husband were by Law bound to maintain his Wife, notwithstanding her Departure from him against his Will; and that the Law doth give her, or vest a Right in the Wife to bind or charge the Husband by her Contract for necessary Apparel; will this be a good Consequence thereupon, Therefore the Husband cannot forbid this or that particular Person to trust his Wife?

A Man makes a Feoffment in Fee, upon Condition that the Feoffee shall not alien, this Condition is void: Litt. Sect. 360. Were it not a strange Conclusion to say thereupon, If a Man makes a Feoffment in Fee, upon Condition that the Feoffee shall not alien to J. S. that this Condition is likewise void?

The Reason given by Littleton, Why the Condition is void in the former, and not in the latter Part of this second

Case,

Case, is applicable to our Case; namely, The Condition in the first Case ousts the Feoffee of all the Power which the Law gives unto him, which should be against Reason, and therefore the same is void; but in the latter Case the Condition doth not take away all the Power of aliening from the Feoffee; and therefore it is good: So in our Case, if the Prohibition were so general, That the Wife were thereby disabled altogether to cloath herself, peradventure it might be reasonable to say, That the Prohibition was void; but it being a Restriction only to one particular Person, there is no Colour to say, That it is not good.

It is true, (as my Brother Tyrrell says) that I cannot discharge others to deal with my Wife, although I may forbid my Wife to deal with them; but it follows not thereupon, but that my Prohibition to a particular Person doth make his dealing with, or trusting my Wife, to be at his own Peril, so that he shall not charge me thereby in an Action; as in case of a Servant, who buys Provision for my Houshold by my Allowance: If I forbid a Butcher, or other Victualler, to sell to my Servant without ready Money, and he delivers Meat to my Servant afterwards upon Trust, it is at his Peril; he shall have no Action against me for it.

It appears not by this Declaration or Verdict, That the Defendant's Wife did want Apparel, That she ever desired her Husband to supply her therewith, That he refused to allow her what was fit, That the Wares sold to her by the Plaintiff were for necessary Apparel, or of what Nature or Price the Wares were; so that the Court may judge of the Necessity or Fitness thereof: But only, That the Plaintiff did sell and deliver upon Credit divers of the Wares mentioned in the Declaration, unto the Wife (whereas none are mentioned therein) for 43 l. that this was a reasonable Price for these Wares, and the same Wares were necessary for her, and suitable to the Degree of her Husband; and for these Reasons the Defendant ought to have Judgment in this particular Case against the Plaintiff, be the Law what it will in General.

I will conclude all, as the seven Princes of Persia (who knew Law and Judgments) did, in the Case of Queen Vasthi, Esther Cap. 1. ver. 16, &c. This Deed that this Woman

hath done, in departing from her Husband againſt his Will, and taking of Cloaths upon Truſt, contrary to his Prohibition, ſhall come abroad to all Women; and if it ſhall be repeated that her Husband (by the Opinion of the Judges) muſt pay for the Wares which ſhe ſo took up, whilſt ſhe lived from him, then ſhall their Husbands be deſpiſed in their Eyes. But when it ſhall be known throughout the Realm, That the Law doth not charge the Husband in this Caſe, all the Wives ſhall give to their Huſbands Honour, both great and ſmall.

**Judgment for the Defendant,** Tyrrell, Twiſden **and** Mallett **diſſenting.**

# Term. Trin. 29 Car. II. 1677. in B. R.

## *The Earl of* Shaftsbury's *Caſe.*

( 1. )
S. C. 3 *Keb.* 792.
See 2 *Show.* 336, 337.
*Habeas Corpus.*

HE was brought to the Bar upon the Return of an Habeas Corpus, directed to the Conſtable of the Tower of London. The Effect of the Return was, That Anthony, Earl of Shaftsbury, in the Writ mentioned, was committed to the Tower of London, 16 Feb. 1676. by Virtue of an Order of the Lords Spiritual and Temporal in Parliament aſſembled; The Tenor of which Order followeth in theſe Words: Ordered by the Lords Spiritual and Temporal in Parliament aſſembled, That the Conſtable of His Majeſty's *Tower* of *London*, his Deputy or Deputies, ſhall receive the Bodies of *James* Earl of *Salisbury*, *Anthony* Earl of *Shaftsbury*, and *Philip* Lord *Wharton*, Members of this Houſe, and keep them in ſafe Cuſtody within the ſaid *Tower*, during His Majeſty's Pleaſure, and the Pleaſure of this Houſe, for their high Contempt committed againſt this Houſe: And this ſhall be a ſufficient Warrant on that Behalf.

To the Conſtable, *&c.* *John Browne, Cler' Parl'.*

The Earl of Shaftsbury's Counſel prayed, That the Return might be filed, and it was ſo; and Friday following appointed for the debating of the Sufficiency of the Return; and in the mean Time, Directions were given to his Counſel, to attend the Judges, and the Attorney-General, with their Exceptions to the Return; and my Lord was remanded till that Day: And it was ſaid, That though the Return was filed, the Court could remand or commit him to the Marſhal at their Election.

And on Friday the Earl was brought into Court again, and his Counſel argued the Inſufficiency of the Return. Williams ſaid, That this Cauſe was of great Conſequence, in regard the King was touched in his Prerogative, the

Subject in his Liberty, and this Court in its Jurisdiction.

The Cause of his Commitment (which is returned) is not sufficient, for the general Allegation, of high Contempts, is too uncertain; for the Court cannot judge of the Contempt, if it doth not appear in what Act it is. Secondly, It is not shewed where the Contempt was committed, and in Favour of Liberty it shall be intended they were committed out of the House of Peers. Thirdly, The Time is uncertain, so that peradventure it was before the last Act of general Pardon. 1 Roll. 192, 193. and 219. Russell's Case. Fourthly, It doth not appear whether this Commitment were on a Conviction, or an Accusation only; it cannot be denied, but that the Return of such Commitment by any other Court, would be too general and uncertain. Moore, 839. Astwick was bailed on a Return, Quod commissus fuit per mandatum *Ni. Bacon*, Mil. Domini Custodis magni sigilli *Angliæ*, virtute cujusdam contempt. in curia Cancellariæ fact.; and in that Book it appears, That divers other Persons were bailed on such general Returns; and the Cases have been lately affirmed in Bushell's Case reported by the Lord Chief Justice Vaughan, where it is expressly said, That on such Commitment and Returns, being too general and uncertain, the Court cannot believe in an implicite Manner, that in Truth the Commitment was for Causes particular and sufficient: Vaughan's Rep. 14. accord. 2 Inst. 52, 53, 55, and 1 Roll. 218. And the Commitment of the Jurors was for acquitting Pen and Mead, contra plenam & manifestam evidentiam; and it was resolved to be too general, for the Evidence ought to appear as certain to the Judge of the Return, as it appeared before the Judge authorized to commit: Russell's Case, 137. Now this Commitment (being by the House of Peers) will make no Difference: For in all Cases where a Matter comes in Judgment before this Court, let the Question be of what Nature it will, the Court is obliged to declare the Law, and that without Distinction, whether the Question began in Parliament or no. In the Case of Sir George Binion in C. B. there was a long Debate, Whether an Original might be filed against a Member of Parliament, during the Time of Privilege? And it was urged, That it being during the Sessions of Parliament, the Determination of the Question did belong to the Parliament. But it was resolved, an Original might be filed; and Bridgman

*Vide ante* 119. *post* 147, 184, 185.

*Vide Bro.* Parliament. 2 *Show.* 337.

1 *Lev.* 111. 1 *Show.* 99. 1 *Pryn.* Parl. Wrias, 814, 815.

then being Chief Juſtice, ſaid, That the Court was obliged to declare the Law in all Caſes that come in Judgment before them. Hill. 24. E. 4. Rot. 4. 7. and 10. in Scacc. in Debt by Rivers *verſus* Couſin. The Defendant pleads, he was a Servant to a Member of Parliament, and ideo capi ſeu arreſt. non debet; and the Plaintiff prays Judgment; and quia videtur Baronibus quod tale habetur privilegium quod magnates, &c. & eorum familiares capi ſeu arreſtari non debent; ſed nullum habetur privilegium quod non debent implacitari: Ideo reſpondeat ouſter. So in Treymiard's Caſe, a Queſtion of Privilege was determined in this Court: Dyer 60. In the 14 E. 3. in the Caſe of Sir John and Sir Geoffrey Staunton, (which was cited in the Caſe of the Earl of Clarendon, and is entred in the Lords Journals) an Action of Waſte depended between them in the Common Pleas, and the Court was divided, and the Record was certified into the Houſe of Parliament, and they gave Direction that the Judgment ſhould be entred for the Plaintiff. Afterwards, in a Writ of Error brought in this Court, that Judgment was reverſed notwithſtanding the Objection, That it was given by Order of the Houſe of Lords; for the Court was obliged to proceed according to the Law in a Matter which was before them in Point of Judgment.

The Conſtruction of all Acts of Parliament is given to the Courts at Weſtminſter. And accordingly they have adjudged of the Validity of Acts of Parliament. They have ſearched the Rolls of Parliament: Hob. 109. Lord Hudſon's Caſe. They have determined whether the Journals be a Record: Hob. 110. When a Point comes before them in Judgment, they are not foreclosed by any Act of the Lords. If it appears, That an Act of Parliament was made by the King and Lords, without the Commons, that is Felo de ſe, and the Courts of Weſtminſter do adjudge it void. 4 H. 7. 18. Hob. 111. And accordingly they ought to do. If this Return contains in it that which is fatal to it ſelf, it muſt ſtand or fall thereby. It hath been a Queſtion often reſolved in this Court, When a Writ of Error in Parliament ſhall be a Superſedeas? And this Court hath determined what ſhall be ſaid to be a Seſſion of Parliament. 1 Roll. 29. And if the Law were otherwiſe, there would be a Failure of Juſtice. If the Parliament were diſſolved, there can be no Queſtion, but the Priſoner ſhould be diſcharged on a Habeas Corpus; and yet then the Court muſt examine the Cauſe of his Commitment: And by Conſequence a

8 *Co.* 20. *b.*

Matter

Matter Parliamentary. And the Court may now have Cognisance of the Matter as clearly as when the Parliament is dissolved. The Party would be without Remedy for his Liberty, if he could not find it here; for it is not sufficient for him to procure the Lords to determine their Pleasure for his Imprisonment; for before his Enlargement he must obtain the Pleasure of the King to be determined, and that ought to be in this Court, and therefore the Prisoner ought first to resort hither.

Let us suppose (for it doth not appear on the Return, and the Court ought not to enquire of any Matter out of it) that a supposed Contempt was a Thing done out of the House, it would be hard for this Court to remand him. Suppose he were committed to a Foreign Prison during the Pleasure of the Lords, no doubt that would have been an illegal Commitment against Magna Charta, and the Petition of Right. There the Commitment had been expressly illegal; and it may be this Commitment is no less: For if it had been expressly shewn, and he be remanded, he is committed by this Court, who are to answer for his Imprisonment.

But secondly, The Duration of the Imprisonment, during the Pleasure of the King and of the House, is illegal and uncertain; for since it ought to determine in two Courts, it can have no certain Period. A Commitment until he shall be discharged by the Courts of King's Bench and Common Pleas, is illegal; for the Prisoner cannot apply himself in such Manner as to obtain a Discharge. If a Man be committed till further Order, he is bailable presently; for that imports till he shall be delivered by due Course of Law; and if this Commitment have not that Sense, it is illegal; for the Pleasure of the King is that which shall be determined according to Law in his Courts; as where the Statute of Westm' 1. cap. 15. declares, That he is repleviable, who is taken by Command of the King, it ought to extend to an extrajudicial Command, not in his Courts of Justice, to which all Matters of Judicature are delegated and distributed. 2 Inst. 186, 187.

Wallop to the same Purpose; he cited Bushell's Case, Vaughan's Rep. 137. that the general Return for high Contempts was not sufficient; and the Court that made the Commitment in this Case, makes no Difference; for otherwise one may be

*Vaugh.* 137. 2 *Jon.* 13. 3 *Keb.* 322. *Ante* 119.

imprisoned by the House of Peers unjustly for a Matter relievable here, and yet shall be out of all Relief by such a Return; for upon a Supposition, That this Court ought not to meddle where the Person is committed by the Peers, then any Person, at any Time, and for any Cause, is to be subject to perpetual Imprisonment at the Pleasure of the Lords. But the Law is otherwise; for the House of Lords is the supream Court, yet their Jurisdiction is limited by the Common and Statute Law; and their Excesses are examinable in this Court; for there is great Difference between the Errors and Excesses of a Court, between an erroneous Proceeding, and a Proceeding without Jurisdiction, which is void, and a meer Nullity; 4 H. 7. 18. In the Parliament, the King would have one attaint of Treason, and lose his Land, and the Lords assented, but Nothing was said of the Commons; wherefore all the Justices held that it was no Act, and he was restored to his Land; and without doubt in the same Case, if the Party had been imprisoned, the Justices must have made the like Resolution, that he ought to have been discharged.

It is a Solecism, That a Man shall be imprisoned by a limited Jurisdiction; and it shall not be examinable whether the Cause were within their Jurisdiction or no? If the Lords without the Commons, should grant a Tax, and one that refused to pay it should be imprisoned; the Tax is void; but by a general Commitment the Party shall be remediless: So if the Lords shall award a Capias for Treason or Felony: By these Instances it appears, That their Jurisdiction was restrained by the Common Law; and it is likewise restrained by divers Acts of Parliament, 1 H. 4. cap. 14. No Appeals shall be made, or any way pursued in Parliament. And when a Statute is made, a Power is implicitely given to this Court by the fundamental Constitution, which makes the Judges Expositors of Acts of Parliament. And peradventure if all this Case appeared upon the Return, this might be a Case in which they were restrained by the Statute 4 H. 8. cap. 8. That all Suits, Accusements, Condemnations, Punishments, Corrections, &c. at any Time from henceforth to be put or had upon any Member for any Bill, speaking or reasoning of any Matters concerning the Parliament to be communed or treated of, shall be utterly void and of none Effect.

Now

Now it doth not appear but this is a Correction or Punishment imposed upon the Earl contrary to the Statute; there is no Question made now of the Power of the Lords; but it is only urged, That it is necessary for them to declare by Virtue of what Power they proceed; otherwise the Liberty of every Englishman shall be subject to the Lords, whereof they may deprive any of them against an Act of Parliament; but no Usage can justifie such a Proceeding. Ellismere's Case of the Postnati. 19. The Duke of Suffolk was impeached by the Commons of High Treason and Misdemeanors; the Lords were in doubt whether they would proceed on such general Impeachment to imprison the Duke; and the Advice of the Judges being demanded, and their Resolutions given in the Negative, the Lords were satisfied: This Case is mentioned with Design to shew the Respect given to the Judges, and that the Judges have determined the highest Matters in Parliament.

At a Conference between the Lords and Commons 3 Aprilis Car. 1. concerning the Rights and Privileges of the Subject, it was declared and agreed, That no Freeman ought to be restrained or committed by Command of the King, or Privy-Council, or any other (in which the House of Lords are included) unless some Cause of the Commitment, Restraint, or Detainer be set forth for which by Law he ought to be committed, &c. Now if the King (who is the Head of the Parliament) or his Privy Council, (which is the Court of State) ought therefore to proceed in a legal Manner; this solemn Resolution ought to end all Debates of this Matter. It is true, 1 Roll. 129. in Russell's Case. Coke is of Opinion, That the Privy Council may commit without shewing Cause; but in his more mature Age, he was of another Opinion: And accordingly the Law is declared in the Petition of Right; and no Inconvenience will ensue to the Lords by making their Warrants more certain.

1 *Leon.* 71. 2 *Leon.* 175.

Smith argued to the same Purpose, and said, That a Judge cannot make a Judgment, unless the Fact appears to him on a Habeas Corpus: The Judge can only take Notice of the Fact returned. It is lawful for any Subject that finds himself agrieved by any Sentence or Judgment, to petition the King in an humble Manner for Redress; and where the Subject is restrained of his Liberty, the proper Place for him to apply himself to, is this Court; which hath the supreme Power, as

to

to this Purpoſe, over all other Courts; and an Habeas Corpus iſſuing here, the King ought to have an Account of his Subjects: Roll. Tit. Habeas Corp. 69. Wetherlie's Caſe. And alſo the Commitment was by the Lords; yet if it be illegal, this Court is obliged to diſcharge the Priſoner, as well as if he had been illegally impriſoned by any other Court. The Houſe of Peers is an High Court, but the King's Bench hath ever been entruſted with the Liberty of the Subject, and if it were otherwiſe (in Caſe of Impriſonment by the Peers) the Power of the King were leſs abſolute, than that of the Lords.

It doth not appear but that this Commitment was for Breach of Privilege; but nevertheleſs if it were ſo, this Court may give Relief, as appears in Sir John Benion's Caſe before cited; for the Court which hath the Power to judge what is Privilege, hath alſo Power to judge what is Contempt againſt Privilege. If the Judges may judge of an Act of Parliament, a fortiori they may judge of an Order of the Lords. 12 E. 1. Butler's Caſe, where he in Reverſion brought an Action of Waſte, and died before Judgment, and his Heir brought an Action for the ſame Waſte; and the King and the Lords determined that it did lie, and commanded the Judges to give Judgment accordingly for the Time to come; this is publiſhed as a Statute by Poulton, but in Ryley 93. it appears, That it is only an Order of the King and the Lords, and that was the Cauſe that the Judges conceived that they were not bound by it; but 39 E. 3. 13. and ever ſince, have adjudged the contrary.

If it be admitted, That for Breach of Privilege the Lords may commit, yet it ought to appear on the Commitment, that that was the Cauſe; for otherwiſe it may be called a Breach of Privilege, which is only a refuſing to anſwer to an Action, whereof the Houſe of Lords is reſtrained to hold Plea by the Statute 1 H. 4. And for a Contempt committed out of the Houſe they cannot commit; for the Word Appeal in the Statute extends to all Miſdemeanors, as it was reſolved by all the Judges in the Earl of Clarendon's Caſe, 4 Julii 1663.

If the Impriſonment be not lawful, the Court ought not to remand to his wrongful Impriſonment, for that would be an Act of Injuſtice, to impriſon him de novo. Vaugh. 156.

It doth not appear whether the Contempt was a voluntary Act, or an Omiſſion, or an Inadvertency, and he hath now ſuffered five Months Impriſonment. Falſe Impriſonment is not only where the Commitment is unjuſt, but where the Detainer is too long. 2 Inſt. 53.

In this Caſe, if this Court cannot give Remedy, peradventure the Impriſonment ſhall be perpetual; for the King (as the Law is now taken) may adjourn the Parliament for ten or twenty Years.

But all this is upon Suppoſition, That the Seſſion hath Continuance; but I conceive that by the King's giving his Royal Aſſent to ſeveral Laws which have been enacted, the Seſſion is determined; and then the Order for the Impriſonment is alſo determined.

Brook, tit. Parliament 36. Every Seſſion in which the King ſigns Bills, is a Day of it ſelf, and a Seſſion of it ſelf. 1 Car. 1. cap. 7. A ſpecial Act is made, That the giving of the Royal Aſſent to ſeveral Bills, ſhall not determine the Seſſion; 'tis true, 'tis there ſaid to be made for avoiding all Doubts. In the Statute 16 Car. 1. cap. 1. there is a Proviſo to the ſame Purpoſe. And alſo 12 Car. 2. cap. 1. 11 R. 2. H. 12. By the Opinion of Coke, 4 Inſt. 27. the Royal Aſſent doth not determine a Seſſion; but the Authorities on which he relies do not warrant his Opinion. For 1. In the Parliament-Roll, 1 H. 6. 7. it appears, That the Royal Aſſent was given to the Act for the Reverſal of the Attainder of the Members of Parliament the ſame Day that it was given to the other Bills; and in the ſame Year, the ſame Parliament aſſembled again; and then it is probable the Members who had been attainted, were preſent, and not before. 8 R. 2. n. 13. is only a Judgment in Caſe of Treaſon, by Virtue of a Power reſerved to them on the Statute 25 E. 3. Roll. Parliament. 7. H. 4. n. 29. and is not an Act of Parliament. 14 E. 3. n. 7. 8, 9. the Aid is firſt entred on the Roll, but upon Condition that the King will grant their other Petitions. The Inference my Lord Coke makes, That the Act for the Attainder of Queen Katherine, 33 H. 8. was paſſed before the Determination of the Seſſion, is an Error; for though ſhe was executed during the Seſſion, yet it was on a Judgment given againſt the Queen by the Commiſſioners of Oyer and Terminer, and the ſubſequent Act was only an Act of Confirmation; but Coke ought to be excuſed, for all his Notes and Papers were

were taken from him; ſo that this Book did not receive his laſt Hand: But it is obſervable, that he was one of the Members of Parliament, 1 Car. 1. when the ſpecial Act was paſſed. And afterwards the Parliament did proceed in that Seſſion only, where there was a precedent Agreement betwixt the King and the Houſes. And ſo concluded, That the Order is determined with the Seſſion, and the Earl of Shaftsbury ought to be diſcharged.

argued to the ſame Effect, and ſaid, That the Warrant is not ſufficient; for it doth not appear that it was made by the Juriſdiction that is exerciſed in the Houſe of Peers; for that is coram Rege in Parliamento: So that the King and the Commons are preſent in Suppoſition of Law: And the Writ of Error in Parliament is, Inſpecto Recordo, nos de conſilio, adviſamento Dominorum Spiritual. & Temporalium & Commun. in Parliament', præd. exiſten', &c. It would not be difficult to prove, That antiently the Commons did aſſiſt there: And now it ſhall be intended that they were preſent; for there can be no Averment againſt the Record. The Lords do ſeveral Acts as a diſtinct Houſe; as the debating of Bills, enquiring of Franchiſes and Privileges, &c. And the Warrant in this Caſe (being by the Lords Spiritual and Temporal) cannot be intended otherwiſe, but it was done by them in their diſtinct Capacity: And the Commitment being during the Pleaſure of the King and of the Houſe of Peers, it is manifeſt that the King is Principal, and his Pleaſure ought to be determined in this Court.

If the Lords ſhould commit a great Miniſter of State whoſe Advice is neceſſary for the King and his Realm, it cannot be imagined that the King ſhould be without Remedy for his Subject, but that he may have him diſcharged by his Writ out of this Court.

This preſent Receſs is not an ordinary Adjournment: For it is entred in the Journal, That the Parliament ſhall not be aſſembled at the Day of Adjournment, but adjourned or prorogued till another Day, if the King do not ſignifie his Pleaſure by Proclamation.

Some other Exceptions were taken to the Return.

Firſt, That no Commitment is returned, but only a Warrant to the Conſtable of the Tower to receive him.

Secondly, The Return does not answer the Mandate of the Writ; for it is to have the Body of Anthony Earl of Shaftesbury; and the Return is of the Warrant for the Imprisonment of Anthony Ashly Cooper, Earl of Shaftsbury.

Maynard to maintain the Return. The House of Lords is the supream Court of the Realm: It is true, this Court is superior to all Courts of ordinary Jurisdiction. If this Commitment had been by any inferior Court, it could not have been maintained: But the Commitment is by a Court that is not under the Controul of this Court, and that Court is in Law sitting at this Time; and so the expressing of the Contempt particularly is Matter which continues in the Deliberation of the Court: It is true, this Court ought to determine what the Law is in every Case that comes before them; and in this Case the Question is only, Whether this Court can judge of a Contempt committed in Parliament, during the same Session of Parliament, and discharge one committed for such Contempt? When a Question arises in an Action depending in this Court, the Court may determine it: But now the Question is, Whether the Lords have Capacity to determine their own Privileges? And, Whether this Court can controul their Determination, and discharge (during the Session) a Peer committed for Contempt? The Judges have often demanded what the Law is, and how a Statute should be expounded, of the Lords in Parliament, as in the Statute of Amendments: 40 Ed. 3. 84. 6. 8 Co. 157, 158. A fortiori, The Court ought to demand their Opinion when a Doubt arises, on an Order made by the House of Lords now sitting.

As to the Duration of the Imprisonment, doubtless the Pleasure of the King is to be determined in the same Court where Judgment was given. As also to the Determination of the Session, the Opinion of Coke is good Law, and the Addition of Proviso's, in many Acts of Parliament, is only in majorem cautelam.

Jones Attorney General, to the same Effect. As to the Uncertainty of the Commitment, it is to be considered, That this Case differs from all other Cases in two Circumstances: First, The Person that is a Member of the House, by which

he is committed. I take it upon me to say, That the Case would be different if the Person committed were not a Peer.

Secondly, The Court which doth commit; which is a superior Court to this Court: And therefore, if the Contempt had been particularly shewn, of what Judgment soever this Court would have been as to that Contempt, yet they could not have discharged the Earl, and thereby take upon them a Jurisdiction over the House of Peers. The Judges in no Age have taken upon them the Judgment of what is Lex & consuetudo Parliamenti; but here the Attempt is to engage the Judges to give their Opinion, in a Matter whereof they might have refused to have given it, if it had been demanded in Parliament. This is true, if an Action be brought where Privilege is pleaded, the Court ought to judge of it as an Incident to the Suit, whereof the Court was possessed; but that will be no Warrant for this Court to assume a Judgment of an original Matter arising in Parliament. And that which is said of the Judges Power to expound Statutes, cannot be denied; but it is not applicable to this Case.

By the same Reason that this Commitment is questioned, every Commitment of the House of Commons may be likewise questioned in this Court.

It is objected, That there will be a Failure of Justice, if the Court should not discharge the Earl; but the contrary is true, for if he be discharged, there would be a manifest Failure of Justice; for Offences of Parliament cannot be punished any where but in Parliament; and therefore the Earl would be delivered from all Manner of Punishment for his Offence, if he be discharged, (for the Court cannot take Bail, but where they have a Jurisdiction of the Matter) and so delivered out of the Hands of the Lords, who only have Power to punish him.

It is objected, That the Contempt is not said to be committed in the House of Peers; but it may well be intended to be committed there; for it appears he is a Member of that House, and that the Contempt was against the House. And besides, there are Contempts whereof they have Cognizance, though they are committed out of the House.

It is objected, That it is possible this Contempt was committed before the general Pardon; but surely such Injustice should not be supposed in the supream Court; and it may well be supposed to be committed during the Session, in which the

Com-

Commitment to Prison was. It would be a great Difficulty for the Lords to make their Commitments so exact and particular, when they are imployed in the various Affairs of the Realm: And it hath been adjudged on a Return out of the Chancery, of a Commitment for a Contempt against a Decree, that it was good, and the Decree was not shewn.

The Limitation of the Imprisonment is well; for if the King, or the House, determine their Pleasure, he shall be discharged: For then it is not the Pleasure of both that he should be detained; and the Addition of these Words (during the Pleasure) is no more then was before imply'd by the Law: For if these Words had been omitted, yet the King might have pardoned the Contempt, if he would have expressed his Pleasure under the Broad Seal. If Judgment be given in this Court, That one should be imprisoned during the King's Pleasure, his Pleasure ought to be determined by Pardon, and not by any Act of this Court. So that the King would have no Prejudice by the Imprisonment of a great Minister, because he could discharge him by a Pardon; the double Limitation is for the Benefit of the Prisoner, who ought not to complain of the Duration of the Imprisonment, since he hath neglected to make Application for his Discharge in the ordinary Way.

I confess, by the Determination of the Session, the Orders made the same Session are discharged; but I shall not affirm, Whether this present Order be discharged or no, because it is a Judgment: But this is not the present Case; for the Session continues notwithstanding the Royal Assent given to several Bills, according to the Opinion of Coke, and of all the Judges: Hutton 61, 62. Every Proviso in an Act of Parliament, is not a Determination what the Law was before; for they are often added for the Satisfaction of those that are ignorant of the Law.

Winington Solicitor General, to the same Purpose. In the great Case of Mr. Selden, 1 Car. 1. the Warrant was for notable Contempts committed against us and our Government, and stirring up Sedition; and though that be almost as general as in our Case, yet no Objection was made in that Cause in any of the Arguments: Rushworth's Collections 18, 19. in the Appendix. But I agree, That this Return could not have been maintained, if it were of an inferior Court; but during the Session, this Court can take no Cognizance of the Matter:

And the Inconvenience would be great, if the Law were otherwise taken, for this Court might adjudge one Way, and the House of Peers another Way; which doubtless would not be for the Advantage or Liberty of the Subject; for the avoiding of this Mischief, it was agreed by this whole Court, in the Case of Barnadiston and Soames, That the Action for the double Return could not be brought in this Court, before the Parliament had determined the Right of the Election, lest there should be a Difference between the Judgments of the two Courts.

When a Judgment of the Lords comes into this Court, (tho' it be of the Reversal of a Judgment of this Court) this Court is obliged to execute it; but the Judgment was never examined or corrected here. In the Case of my Lord Hollis it was resolv'd, That this Court hath no Jurisdiction of a Misdemeanor committed in the Parliament; when the Parliament is determined, the Judges are Expositors of the Acts, and are intrusted with the Lives, Liberties, and Fortunes of the Subjects: And (if the Session were determined) the Earl might apply himself to this Court; for the Subject shall not be without Place, where he may resort for the Recovery of his Liberty; but this Session is not determined. For the most Part the Royal Assent is given the last Day of Parliament; as saith Plow. Partridge's Case. Yet the giving of the Royal Assent doth not make it the last Day of the Parliament, without a subsequent Dissolution or Prorogation. And the Court judicially takes Notice of Prorogations or Adjournments of Parliament: Cro. Jac. 111. Ford *versus* Hunter. And by Consequence, by the last Adjournment, no Order is discontinued, but remains as if the Parliament were actually assembled: Cro. Jac. 242. Sir Charles Heydon's Case: So that the Earl ought to apply himself to the Lords, who are his proper Judges.

It ought to be observed, That these Attempts are primæ Impressionis; and though Imprisonments for Contempts have been frequent by the one or the other House, till now no Person ever sought Enlargement here.

The Court was obliged in Justice to grant the Habeas Corpus; but when the whole Matter being disclosed, it appears upon the Return, That the Case belongs ad aliud examen, they ought to remand the Party.

As to the Limitation of the Imprisonment, the King may determine his Pleasure by Pardon under the Great Seal, or

Warrant for his Diſcharge under the Privy Seal, as in the Caſe of Reniger and Fogaſſa, Plow. 20.

As to the Exception, That no Commitment is returned, the Conſtable can only ſhew what concerns himſelf, which is the Warrant to him directed; and the Writ doth not require him to return any Thing elſe.

As to the Exception, That he is otherwiſe named in the Commitment than in the Writ, the Writ requires the Body of Anthony Earl of Shaftsbury, quocunque nomine cenſeatur in the Commitment.

The Court delivered their Opinion: And firſt, Sir Thomas Jones Juſtice ſaid, Such a Return made by an ordinary Court of Juſtice, would have been ill and uncertain; but the Caſe is different when it comes from this High Court, to which ſo great Reſpect hath been paid by our Predeceſſors, that they deferred the Determination of Doubts conceived in an Act of Parliament, until they had received the Advice of the Lords in Parliament. But now inſtead thereof, it is demanded of us to controul the Judgment of all the Peers given on a Member of their own Houſe, and during the Continuance of the Seſſion. The Caſes where the Courts of Weſtminſter have taken Cognizance of Privilege, differ from this Caſe; for in thoſe it was only an Incident to a Caſe before them, which was of their Cognizance; but the direct Point of the Matter now is the Judgment of the Lords.

The Courſe of all Courts ought to be conſidered; for that is the Law of the Court: Lane's Caſe, 2 Rep. And it hath not been affirmed, That the Uſage of the Houſe of Lords hath been to expreſs the Matter more punctually on Commitments for Contempts; and therefore I ſhall take it to be according to the Courſe of Parliament: 4 Inſt. 50. It is ſaid, That the Judges are Aſſiſtants to the Lords to inform them of the Common Law; but they ought not to judge of any Law, Cuſtom or Uſage of Parliament.

The Objection as to the Continuance of the Impriſonment, hath received a plain Anſwer; for it ſhall be determined by the Pleaſure of the King, or of the Lords; and if it were otherwiſe, yet the King could pardon the Contempt under the Great Seal, or diſcharge the Impriſonment under the Privy Seal. I ſhall not ſay what would be the Conſequence (as to this Impriſonment) if the Seſſion were determined, for that

that is not the preſent Caſe; but as the Caſe is, this Court can neither bail nor diſcharge the Earl.

Wylde Juſtice. The Return no doubt is illegal; but the Queſtion is on a Point of Juriſdiction, Whether it may be examined here? This Court cannot intermeddle with the Tranſactions of the High Court of Peers in Parliament during the Seſſion, which is not determined; and therefore the Certainty or Uncertainty of the Return is not material, for it is not examinable here; but if the Seſſion had been determined, I ſhould be of Opinion that he ought to be diſcharged.

See 2 *Show.* 335, to 338.

Rainsford Chief Juſtice. This Court hath no Juriſdiction of the Cauſe, and therefore the Form of the Return is not conſiderable; we ought not to extend our Juriſdiction beyond its due Limits, and the Actions of our Predeceſſors will not warrant us in ſuch Attempts: The Conſequence would be very miſchievous, if this Court ſhould deliver the Members of the Houſes of Peers and Commons who are committed; for thereby the Buſineſs of Parliament may be retarded; for perhaps the Commitment was for evil Behaviour, or undecent Reflections on the Members, to the Diſturbance of the Affairs of Parliament.

The Commitment, in this Caſe, is not for ſafe Cuſtody, but he is in Execution on the Judgment given by the Lords for the Contempt; and therefore if he be bailed, he will be delivered out of Execution; becauſe for a Contempt in facie Curiæ, there is no other Judgment or Execution. This Court hath no Juriſdiction of the Matter, and therefore he ought to be remanded: And I deliver no Opinion, if it would be otherwiſe in Caſe of Prorogation.

Twiſden Juſtice, was abſent; but he deſired Juſtice Jones to declare, that his Opinion was, That the Party ought to be remanded.

And ſo he was remanded by the Court.

# Term. Trin. 26 Car. II. 1674. in B. R.

## Pybus *verſus* Mitford. *Ante* 121.

(2.)
S. C. 1 *Vent.* 372. 2 *Lev.* 75. *Raym.* 228. 3 *Keb.* 129, 239, 316, 338. & *Ante*, 121. 2 *Danv.* 556. 2. Covenant to Uſes. *Vide Poſt*, 226, 237. 2 *Mod.* 207, 209, 211. *Hob.* 30. *Co. Lit.* 22. b. *Ante*, 98.

This Caſe having been ſeveral Times argued at the Bar, received Judgment this Term. The Caſe was, Michael Mitford was ſeized of the Lands in queſtion in Fee, and had Iſſue by his ſecond Wife Ralph Mitford; and 23 Jan. 21 Jac. by Indenture made between the ſaid Michael of the one Part, and Sir Ralph Dalivell, and others, of the other Part, he covenanted to ſtand immediately ſeized, after the Date of the ſaid Indenture (amongſt others) of the Lands in queſtion, by theſe Words, viz. To the Uſe of the Heirs males of the ſaid *Michael Mitford*, begotten, or to be begotten, on the Body of *Jane* his Wife, the Reverſion to his own right Heirs: After which Michael died, leaving Iſſue Robert his Son and Heir by a firſt Venter, and the ſaid Ralph by Jane his ſecond Wife; after the Death of Michael, Robert entred, and from Robert, by divers Meſne Conveyances, a Title was deduced to the Heir of the Plaintiff; Ralph had Iſſue Robert the Defendant. And in this ſpecial Verdict, the Queſtion was, If any Uſe did ariſe to Ralph by this Indenture 23 Jan. 21 Jac.? Hale, Rainsford, and Wylde, (againſt the Opinion of Twiſden) Michael Mitford took an Eſtate for Life by Implication and Conſequence, and ſo had an Eſtate-Tail. Hale ſaid, (1.) It were clear if an Eſtate for Life had been limited to Michael, and to the Heirs males of the Body of Michael, to be begotten on the Body of his ſecond Wife; that had been an Eſtate-Tail, (2.) Which way ſoever it be, the Eſtate is lodged in Michael during his Life. (3.) There is a great Difference between Eſtates to be conveyed by the Rules of the Common Law, and Eſtates conveyed by way of Uſe: For he may mould the Uſe in himſelf in what Eſtate he will. Theſe Things being premiſed, he ſaid, This Eſtate being turned by Operation of Law

*Poſt*, 327. *Co. Lit.* 22. a. Law into an Eſtate in Michael, is as ſtrong as if he had limited an Eſtate in himſelf for Life. (2.) A Limitation to the Heirs of his Body, is in Effect a Limitation to the Uſe of himſelf; for his Heirs are included in himſelf. (3.) It is perfectly according to the Intention of the Party, which was, That his eldeſt Son ſhould not take, but that the Iſſue of the ſecond Wife ſhould take.

1 Object. *Poſt*, 327. His Intent appears to be, That it ſhould take Effect as a future Uſe.

Reſponſ. 1 *Vent.* 379. *Ante*, 121, 122. *Poſt*, 237, 238. When a Man limits a Uſe to commence in futuro, and there is ſuch a deſcendible Quality left in him, that his Heirs may take in the mean Time, there it ſhall operate ſolely by way of future Uſe: As if a Man covenant to ſtand ſeized to the Uſe of J. S. after the Expiration of forty Years, or after the Death of J. D. there no preſent Alteration of the Eſtate is made, but it is only a future Uſe, becauſe the Father, or the Anceſtor, had ſuch an Intereſt left in him which might deſcend to his Heir, viz during the Years, or during the Life of J. D. But when no Eſtate may, by Reaſon of the Limitation, deſcend to the Heir until the Contingency happen, there the Eſtate of the Covenantor is moulded to an Eſtate for Life.

2 Object. This would be to create an Eſtate by Implication.

Reſponſ. We are not here to create an Eſtate, but only to qualify an Eſtate which was in the Anceſtor before.

3 Object. That the old Fee-ſimple ſhould be left in him.

Reſponſ. Yet the Covenantor had qualified this Eſtate, and converted it into an Eſtate-Tail, viz. Part of the old Eſtate.

4 Object. That the Intention of the Parties appears, That it ſhould operate by way of future Uſe; for that of other Lands he covenanted to ſtand ſeized to the Uſe of himſelf, and his Heirs of his Body.

Reſponſ. It is not the Intention of the Party that ſhall controul the Operation of Law; and to the Caſe 1 Inſt. 22. though it be objected, That it was not neceſſary at the Law to raiſe an Eſtate for Life by Implication, yet my Lord Coke hath taken Notice what he had ſaid in the Caſe of Parnell and Fenn, Roll. Rep. 240. If a Man make a Feoffment to the Uſe of the Heirs of

his Body, that is, an Eſtate for Life in the Feoffor: And in Englefield's Caſe, as it is reported in Moore 303. it is agreed, That if a Man covenant to ſtand ſeized to an Ule to commence after his Death, that the Covenantor thereby is become ſeized for Life.

As to the ſecond Point, Twiſden, Rainsford and Wylde, held, That no future Uſe would ariſe to Ralph, becauſe he is not Heir at Common Law; and none can purchaſe by the Name of Heir, unleſs he be Heir at Common Law: But Hale was againſt them in this Point, and he held, That if Ralph could not take by Deſcent, yet he might well take by Purchaſe; (1.) Becauſe before the Stat. De Donis, a Limitation might be made to this Heir, and ſo he was a ſpecial Heir at Common Law. (2.) It is apparent that he had taken Notice that he had an Heir at the Common Law: Lit. Sect. 35. 1 Inſt. 22. So his Intent is evident, That the Heir at Common Law ſhould not take. But on the firſt Point Judgment was given for the Defendant.

1 *Co.* 103. b. *Co. Lit.* 24. *Hob.* 31. *Poſt*, 238.

1 *Vent.* 381, 382.

# Term. Mich. 25 Car. II. in Com. Ban.

*Note*, From hence to *Page* 271. the Caſes were adjudg'd *in Communi Banco.*

## Anonymus. (1:)

*Aſſumpſit.*

IF a Man be liable to pay a yearly Sum, as Treaſurer to a Church, or the like, to a Sub-treaſurer, or any other, and dies, the Money being in arrear, an Action of Aſſumpſit cannot be maintained againſt his Executors for theſe Arrears. For although, according to the Reſolution in Slade's Caſe, 4 Rep. (which Vaughan Chief Juſtice, ſaid, was a ſtrange Reſolution) an Aſſumpſit, or an Action of Debt, is maintainable upon a Contract, at the Party's Election; yet where there is no Contract, nor any perſonal Privity, as in this Caſe there is not, an Aſſumpſit will not lie. And in an Action of Debt for theſe Arrears, the Plaintiff muſt aver, That there is ſo much Money in the Treaſury, as he demands; and in this Caſe of an Action againſt Executors, that there was ſo much at the Time of the Teſtator's Death, &c. For the Money is due from him as Treaſurer, and not to be paid out of his own Eſtate. As in an Action againſt the King's Receiver, the Plaintiff muſt ſet forth, That he has ſo much Money of the King's in his Coffers.

4 *Co.* 92. b. *Yelv.* 20. *Moor.* 433, 667.

1 *Cro.* 450.

## Magdalen *College's Caſe.* (2.)

Connzance. *Hard.* 509, 510. *Vide prox. Pag.*

INdebitat. Aſſumpſit againſt the Preſident and Scholars of Magdalen College in Oxford, for threeſcore Pounds, due for Butter and Cheeſe ſold to the College. The Chancellor of the Univerſity demanded Conuzance, by Vertue of Charters of Privileges granted to the Univerſity by the King's Progenitors, and confirm'd by Act of Parliament; whereby, amongſt other Things, Power is given them to hold Plea in perſonal Actions, wherein Scholars, or other privileged Perſons, are

See *Hard.* 189, 506, 509, *&c.* 2 *Vent.* 362. 1 *Chan.* Cases, 237. *Lit. Rep.* 40, 304. *N. Benl.* 88. 2 *Danv.* 161, *&* 166. *pl.* 7. *Cro. Car.* 73. *Hetl.* 25.

concerned; and concludes with an expreſs Demand of Conuzance in this particular Cauſe. Baldwin. Their Privilege extends not to this Caſe; for a Corporation is Defendant; and their Charters mention privileged Perſons only. Their Charters are in Derogation of the Common Law, and muſt be taken ſtrictly. They make this Demand upon Charters confirm'd by Act of Parliament: And they have a Charter granted by King Henry 8. which is confirm'd by an Act in the Queen's Time; but the Charter of 11 Car. 1. (which is the only Charter that mentions Corporations) is not confirm'd by any Act of Parliament, and conſequently is not material, as to this Demand. For a Demand of Conuzance is ſtricti Juris. But admitting it material, the King's Patent cannot deprive us of the Benefit of the Common Law: And in the Vice-Chancellor's Court they proceed by the Civil Law. If you allow this Demand, there will be a Failure of Juſtice; for the Defendants, being a Corporation, cannot be arreſted, they can make no Stipulation, the Vice-Chancellor's Court cannot iſſue Diſtringas's againſt their Lands, nor can they be excommunicated. Precedents we find of Corporations ſuing there as Plaintiffs, (in which caſe the aforementioned Inconvenience does not enſue) but none of Actions brought againſt Corporations.

Maynard contra. Servants to Colleges and Officers of Corporations have been allowed the Privilege of the Univerſity; which they could not have in their own Right: And if in their Maſter's Right, a fortiori their Maſters ſhall enjoy it. The Word Perſona in the Demand, will include a Corporation well enough.

Vaughan Chief Juſtice. Perhaps the Words atque confirmat', &c. in the Demand of Conuzance, are not material; for the Privileges of the Univerſity are grounded on their Patents, which are good in Law, whether confirm'd by Parliament, or not. The Word Perſona does include Corporations: 2 Inſt. 256. per Coke, upon the Statute of 31 Eliz. cap. 7. Of Cottages and Inmates. A Demand of Conuzance is not in Derogation of the Common Law: For the King may by Law grant Tenere placita; though it may fall out to be in Derogation of Weſtminſter-Hall. Nor will there be a Failure of Juſtice: For when a Corporation is Defendant, they make them give Bond, and put in Stipulators, that they will ſatisfy the Judgment; and if they do not perform the Condition of their

*Hard.* 509, 510. *&c. ſupra.*

Bond, they commit the Bail. They have enjoyed these Privileges some Hundreds of Years ago. The rest of the Judges agreed, That the University ought to have Conuzance. But Atkins objected against the Form of the Demand; that the Words Persona privilegiata cannot comprehend a Corporation in a Demand of Conuzance, howsoever the Sense may carry it in an Act of Parliament. Ellis and Wyndham. If neither Scholars, nor privileged Persons had been mentioned, but an express Demand made of Conuzance in this particular Cause, it had then been sufficient; and then a Fault, if it be one, in Surplusage, and a Matter that comes in by way of Preface, shall not hurt. Atkins. It is not a Preface, they lay it as the Foundation and Ground of their Claim. The Demand was allowed as to Matter and Form.

*Vide* 8 H. 6. 19, 20. b. 1 *Rol. Abr.* 492. I. 3. *Hard.* 505, 508, &c.

## Rogers & Danvers. ( 3. )

DEbt against S. Danvers, and D. Danvers, Executors of G. Danvers, upon a Bond of 100 l. entred into by the Testator. The Defendants pleaded, That G. Danvers, the Testator, had acknowledged a Recognizance in the Nature of a Statute-Staple, of 1200 l. to J. S. and that they have no Assets, ultra, &c. The Plaintiff replied, That D. Danvers, one of the Defendants, was bound together with the Testator in that Statute, to which the Defendants demur.

Baldwin pro Defendente. If this Plea were not good, we might be doubly charged. It is true, one of us acknowledged the Statute likewise; but in this Action we are sued as Executors. And this Statute of 1200 l. was joint and several; so that the Conuzee may at his Election, either sue the surviving Conuzor, or the Executors of him that is dead: So that the Testator's Goods that are in our Hands, are liable to this Statute. It runs, Concesserunt se & utrumque eorum: If it were joint, the Charge would survive; and then it were against us. It is common for Executors, upon pleinment administer pleaded, to give in Evidence Payment of Bonds, in which themselves were bound with the Testator: And sometimes such

Assets. 1 *Lev.* 132, 201, 261. 1 *Sid.* 404. *Raym.* 153. 2 *Lev.* 40. 3 *Lev.* 311. 2 *Mod.* 36. *Vaugh.* 104. 4 *Mod.* 63, 64, 296. *Cart.* 221. 1 *Lutw.* 241.

1 *Lev.* 191, 227, 298. 2 *Lev.* 118, 124.

such Persons are made Executors for their Security. The Opinion of the Court was against the Plaintiff; whereupon he prayed Leave to discontinue, and had it.

( 4. )

## Amie & Andrews.

Consideration. *In Assumpsit.* See 1 *Salk.* 25, 28, 29. *Farefly* 13. 2 *Saund.* 136. *Post*, 169, 284. *Ante*, 43.

Assumpsit. The Plaintiff declares, That whereas the Father of the Defendant was indebted to him in 20 l. for Malt sold, and promised to pay it; That the Defendant, in Consideration that the Plaintiff would bring two Witnesses, before a Justice of Peace, who upon their Oaths should depose, That the Defendant's Father was indebted to the Plaintiff, and promised Payment, assumed and promised to pay the Money: Then avers, That he did bring two Witnesses, &c. who did swear, &c. The Defendant pleaded non Assumpsit; which being found against him, he moved by Serjeant Baldwin, in Arrest of Judgment, that the Consideration was not lawful; because a Justice of Peace not having Power to administer an Oath in this Case, it is an extrajudicial Oath, and consequently unlawful. And Vaughan was of Opinion, That every Oath not legally administred and taken, is within the Statute against prophane Swearing. And he said it would be of dangerous Consequence to countenance these extrajudicial Oaths, for that it would tend to the overthrowing of legal Proofs. Wyndham and Atkins thought it was not a prophane Oath, nor within the Statute of King James; because it tended to the determining of a Controversy. And accordingly the Plaintiff had Judgment.

## Horton & Wilſon.

(5.)
Fees.
See 1 *Salk.* 330 to 334. 2 *Danv.* 434. E. 2 *Keb.* 615. 3 *Keb.* 303, 441, 516.

A Prohibition was prayed to ſtay a Suit in the Spiritual Court, commenced by a Proctor for his Fees. Vaughan and Wyndham. No Court can better judge of the Fees that have been due and uſual there than themſelves. Moſt of their Fees are appointed by Conſtitutions Provincial, and they prove them by them. A Proctor lately libell'd in the Spiritual Court for his Fees, and amongſt other Things demanded a Groat for every Inſtrument that had been read in the Cauſe: The Client pretended that he ought to have but 4d. for all. They gave Sentence for the Defendant; the Plaintiff appealed, and then a Prohibition was prayed in the Court of King's Bench. The Opinion of the Court was, That the Libel for his Fees was moſt proper for the Spiritual Court: But that becauſe the Plaintiff there demanded a cuſtomary Fee, that it ought to be determin'd by Law, Whether ſuch a Fee were cuſtomary, or no? And accordingly they granted a Prohibition in that Caſe. It is like the Caſe of a Modus for Tithes: For whatever ariſeth out of the Cuſtom of the Kingdom, is properly determinable at Common Law. But in this Caſe they were of Opinion, That the Spiritual Court ought not to be prohibited; and therefore granted a Prohibition, quoad ſome other Particulars in the Libel, which were of temporal Cognizance, but not as to the Suit for Fees. Wyndham ſaid, If there had been an actual Contract upon the Retainer, the Plaintiff ought to have ſued at Law. Atkins thought a Prohibition ought to go for the Whole. Fees, he ſaid, had no Relation to the Juriſdiction of the Spiritual Court, nor to the Cauſe in which the Proctor was retain'd. No Suit ought to be ſuffer'd in the Spiritual Court, when the Plaintiff has a Remedy at Law; as here he might in an Action upon the Caſe; for the Retainer is an implied Contract. A Difference about the Grant of the Office of Regiſter in a Biſhop's Court, ſhall be tried at Common Law, though the Subjectum circa quod be Spiritual: 2 Roll. 285. Placito 45. and 2 Roll. 283. Wadworth and Andrewes. Shall a Six-Clerk prefer a Bill in Equity for his Fees? But a Prohibition was granted, Quoad, &c.

( 6. ) Glever *verſus* Hynde, *& alios.*

Incumbent. See *Stat* 1 *P. & M. Stat.* 2. *c.* 3.

GLever brought an Action of Treſpaſs of Aſſault and Battery againſt Elizabeth Hynde, and ſix others; for that they at York-Caſtle, in the County of York, him the ſaid Plaintiff with Force and Arms did aſſault, beat, and evil-entreat, to his Damage of 100 l. The Defendants plead to the Vi & Armis, Not guilty; to the Aſſault, Beating, and Evil-entreating, they ſay, That at ſuch a Place in the County of Lancaſter, one Jackſon, a Curate, was performing the Rites, and funeral Obſequies, according to the Uſage of the Church of England, over the Body of there lying dead, and ready to be buried; and that then and there the Plaintiff did maliciouſly diſturb him; that they, the Defendants, required him to deſiſt, and becauſe he would not, that they to remove him, and for the preventing of further Diſturbance, Molliter ei manus impoſuerunt, &c. quæ eſt eadem tranſgreſſio, abſque hoc that they were guilty of any Aſſault, &c. within the County of York, or any where elſe, extra Comitatum Lancaſtriæ. The Plaintiff demurs. Turner pro Querente. The Defendants do not ſhew that they had any Authority to lay Hands on the Plaintiff; as that they were Conſtables, Church-wardens, or any Officers; nor do they juſtify by the Authority of any that were. If they had pleaded, That they laid Hands on him to carry him before a Juſtice of Peace, perhaps it might have alter'd the Caſe. The Plaintiff here, if he be Faulty, is liable to Eccleſiaſtical Cenſure; and the Statute of 1 Ph. & Ma. cap. 3. provides a Remedy in ſuch Caſes. Jones contra. If the Statute of Ph. & Ma. did extend to this Caſe, yet it does not reſtrain other Ways that the Law allows to puniſh the Plaintiff, or keep him quiet. Our Saviour himſelf has given us a Precedent; he whip'd Buyers and Sellers out of the Temple; which Act of Buying and Selling was not ſo great an Impiety, as to diſturb the Worſhip of God in the very Act and Exerciſe of it.

*Stat.* 1 *P. & M. Stat.* 2. *c.* 3.

Per Cur'. The Stat. of 1 P. & M. concerns Preachers only: But there is another Act made 1 Eliz. that extends to all Men in Orders, that perform any Part of Publick Service. But neither of theſe Statutes take away the Common Law. And at the Common Law, any Perſon there preſent might have removed

1 *Eliz. c.* 2. *ſect.* 9.

moved the Plaintiff: For they were all concern'd in the Service of God, that was then performing; so that the Plaintiff in disturbing it, was a Nusance to them all; and might be removed by the same Rule of Law that allows a Man to abate a Nusance. Whereupon Judgment was given for the Defendant, Nisi causa, &c.

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## Anonymus. (7.)

ACtion sur le Case: The Plaintiff declares, That whereas the Testator of the Defendant was indebted to the Plaintiff at the Time of his Death in the Sum of 12 l. 10 s. That the Defendant in Consideration of Forbearance, promised to pay him 5 l. at such a Time, and 5 l. more at such a Time after, and the other 50 Shillings when he should have received Money; then avers, That he did forbear, &c. and saith, That the Defendant paid the two five Pounds; but for the 50 Shillings Residue, that he hath received Money, but hath not paid it. The Defendant pleaded non Assumpsit, which was found against him. Wilmot moved in Arrest of Judgment, That the Plaintiff doth not set forth how much Money the Defendant had received, who perhaps had not received so much as 50 Shillings; he said, Though the Promise was general, yet the Breach ought to be laid so, as to be adequate to the Consideration. And secondly, That the Plaintiff ought to have set forth of whom the Defendant received the Money, and when and where, because the Receit was traversable. The Court agreed, That there was good Cause to demur to the Declaration: But after a Verdict they would intend, That the Defendant had received 50 Shillings; because else the Jury would not have given so much in Damages: And for the other Exception, they held, That the Defendant having taken the general Issue, had waived the Benefit thereof.

*Assumpsit.* Consideration. *Vide ante* 43, 166. *post* 284.

(8.)
S. C. 2 *Mod.* 49.

## Alford & Tatnell.

*Audita Querela.*
*Vide ante* 111. *poſt* 224.

GRegory and Melchiſedce Alford were bound jointly and ſeverally to Tatnell in a Bond of 700 l. the Obligee brought ſeveral Actions, and obtained two ſeveral Judgments in this Court againſt the Oligors; and ſued both to an Outlawry. And in Mich. Term. 18. Car. 2. both were returned outlawed. In Hill. Term. following, Gregory Alford was taken upon a Cap. utlagatum by Browne, Sheriff of Dorſetſhire; who voluntarily ſuffered him to eſcape. Tatnell brought an Action of Debt upon this Eſcape againſt Browne, and recover'd and receiv'd Satisfaction: Notwithſtanding which he proceeded to take Milchiſedec Alford, who brought an Audita querela, and ſet forth all this Matter in his Declaration; but upon a Demurrer, the Opinion of the Court was againſt the Plaintiff for a Fault in the Declaration, viz. Becauſe the Satisfaction made to the Plaintiff by the Sheriff, was not ſpecially pleaded, viz. Time and Place alledged where it was made; for it is iſſuable, and for ought appears by the Declaration, it was made after the Writ of Audita querela purchaſed, and before the Declaration. The Court ſaid, If Tatnell had only brought an Action on the Caſe againſt the Sheriff, and recovered Damages for the Eſcape, tho' he had had the Damages paid, that would not have been ſufficient Ground for the Plaintiff here to bring an Audita querela; but in this Caſe he recovered his original Debt in an Action of Debt grounded upon the Eſcape, which is a ſufficient Ground of Action, if he had declared well. They gave Day to ſhew Cauſe, why the Declaration ſhould not be amended, paying Coſts.

(9.)

## Anonymus.

Courts.
Impriſonment.
*Vide poſt* 272.
2 *Saund.* 182.

AN Action of Falſe Impriſonment. The Defendants juſtifie by Virtue of a Warrant out of a Court within the County-Palatine of Durham; to which the Plaintiff demur'd. The material Part of the Plea was, That there was antiqua Curia tent. coram Vicecomite Comitatus, &c. vocat. the County-

County-Court, which was accuſtomed to be held de 15 diebus in 15 dies; and that there was a Cuſtom, That upon a Writ of queſtus eſt nobis, iſſuing out of the County-Palatine of Durham, and delivered to the Sheriff, &c. That upon the Plaintiff's affirming quandam querelam againſt ſuch Perſon or Perſons, againſt whom the queſtus eſt nobis iſſued, the Sheriff uſed to make out a Writ in the Nature of a Cap. ad ſatisfac. againſt him or them, &c. that ſuch a Writ of queſtus eſt nobis iſſued ex Cur' Cancellar. Dunelm. which was delivered to the Sheriff, who thereupon made a Precept to his Bailiffs to take the Plaintiff, who thereupon was arreſted, which is the ſame Impriſonment.

Serjeant Jones for the Plaintiff, took Exceptions to this Plea; as, 1. The Court is ill pleaded to be held coram Vicecomite; for in a County-Court the Suitors are Judges: Cr. Jac. 582. And though this Court holdeth Plea upon a queſtus eſt nobis, which is the King's Writ; yet that doth not alter the Nature of the Court, nor its Juriſdiction. Jentleman's Caſe, 6 Rep. 11. 2. The Cuſtom of holding this Court de quindecim diebus in quindecim dies, is void; being not only againſt Magna Cart. 35. but againſt the 2 and 3 Edw. 6. cap. 25. which enacts, That no County-Court, &c. ſhall be longer deferred than one Month from Court to Court, &c. any Uſage, Cuſtom, Statute, or Law to the contrary notwithſtanding. 3. He took theſe Exceptions to the Cuſtom. 1. It is abſurd, That if upon a Queſtus eſt nobis, the Party affirm quandam querelam, that then, &c. for a queſtus eſt nobis is an Action upon the Caſe, and this quædam querela may be in any other Action, though never ſo remote: The Plaint ought to be in Purſuance of the Writ, and ſo to have been pleaded. 2. As this Cuſtom is laid, it does not appear, That the Plaint ought to ariſe within the Juriſdiction of the Court. 3. It is againſt the Law, that in any inferior Court a Capias ſhould be awarded before Summons. 1 Roll. 563. Seaburn and Savaker. 2 Roll. 277. placit. 2. Paſch. 16 Jac. Bankes and Pembleton. The 4th Exception to the Declaration was, That it does not appear, Whether this Writ were purchaſed out of the Chancery of the City of Durham, or of that of the County: The Words ex Cur. Cancellar. Dunelm. are applicable to either. 5. Here is not an Averment, That the Cauſe of Action did ariſe within the County-Palatine: It is ſaid indeed, That he was indebted, and did aſſume within the County; but it is the Contract and Cauſe of the Debt that entitles the Court

there to the Action. 6. He ſays, That he did levare quandam querelam; but does not ſay that it was ſuper brevi de queſtus eſt nobis: Nor that it was in placito prædict'; nor makes any Application at all of the Plaint to the Writ: And then the Plaint not appearing to be warranted by the Writ, and being for above 40 Shillings, the Proceedings are coram non judice. 7. The Sheriff's Warrant is to arreſt , ſi inventus fuerit in balliva tua: And it does not appear, That the Bailiff hath any Bailiwick. If the County were divided into ſeveral Diviſions, and each Bailiff allotted to a ſeveral Diviſion, this ought to have been ſhown; and that the Place where this Arreſt was made, was within this Bailiff's proper Diviſion. 8. Of the Defendant's own Shewing, the Court was not held according to the Cuſtom alledged, viz. de quindecim diebus in 15 dies: For the laſt Court is ſaid to have been held the 12th of March, and the next after that on the 26th. Turner for the Defendant argued, That the Impriſonment was lawful. To the firſt Exception he ſaid, That the Court mention'd in the Bar is not a County-Court, nor ſo pleaded: It is pleaded as it is, Cur. vocat. Cur. Comitat'; and there were never any Suitors known there to be Judges. It is not to be examined according to the Rules of County-Courts, properly ſo called: For we plead it to be according to the Cuſtom of the County-Palatine of Durham, which is an exempt Juriſdiction. As for the Exception to its being held de 15 diebus in 15 dies; the Anſwer to the firſt Exception anſwers this alſo. The Judges of Aſſize in Writs of Falſe Judgment have allowed this Cuſtom, and affirm'd Judgments given in this Court: Of which we have many Precedents. For the third Exception, concerning the Validity of the Cuſtom; to the firſt Exception againſt it, he anſwered, That a Bar is good enough, if it be to a common Intent, and the common Intent is, That the quædam querela muſt be purſuant to the queſtus eſt nobis: And in this Caſe it was ſo; the queſtus eſt nobis, and the Precept upon which the Plaintiff was arreſted, are both in an Action of the Caſe upon a Promiſe. And to the ſecond, That the Cauſe of Action is ſhewn to ariſe within the Juriſdiction; for the Promiſe, which is the Ground of this Action, is ſaid to have been made infra Comitat. Palatin. To the third Exception, That in inferior Courts it is illegal to award a Capias before Summons; but this
1 *Saund.* 74. Court is in a County-Palatine; and ſuch Courts are like to the Courts at Weſtminſter, and have the ſame Authority: Rowlandſon

landſon and Sympſon, 1 Roll. 801. placito 11. And the Cuſtoms of thoſe Courts are good Warrants for their Proceedings, as the Cuſtom of the King's Bench is for their iſſuing Latitats. To the fourth he ſaid, It was a foreign Intendment, to ſuppoſe a Court of Chancery in the City of Durham; a Court of Equity cannot be by Grant, and there is no Preſcription in the City of Durham, to hold Plea in Equity. To the fifth he ſaid, The Promiſe was laid to have made within the Juriſdiction. To the ſixth, ut ſupra. To the ſeventh, That this Precept was according to the Form of all their Precepts in like Caſes. To the eighth, That taking both Days inclusively, there are 15 Days. But admitting that there were ſome Defect in the Proceedings, yet ſince that Court can iſſue ſuch a Writ as this is, it is ſufficient to excuſe the Officer: 10 Rep. The Caſe of the Marſhalſea.

Cur'. This is not a County-Court, but a Court vocat. Cur' Com', and it is within a County-Palatine; and for both thoſe Reaſons not in the ſame Degree with other County-Courts. And though it were a County-Court, it might by Preſcription be held before the Sheriff, as a Court-Baron may by a ſpecial Preſcription be held coram Seneſchallo, and ſo it hath been adjudged: In the Caſe of Armyn and Appletoft, Cr. Jac. 512. There is no ſuch ſpecial Preſcription as there ought to be, but a general Preſcription for a Court-Baron, and every Court-Baron muſt be preſcribed for. The County-Palatine of Durham is not of late ſtanding, like that of Lancaſter, but is immemorial: And a Cuſtom there is of great Authority. As to the Objection againſt quandam querelam; why it may not be as allowable for a Man there to bring a queſtus eſt nobis, and declare in what Plaint he will, as it is here to arreſt a Man and declare againſt him in any Action? But admitting the Proceedings irregular, yet ſince the Court can iſſue a Capias, that excuſes the Officer in this Action: And Judgment was given for the Defendant, Niſi cauſa, &c. 2 *Saund.* 74.

Term.

# Term. Paſch. 26 Car. II. in Com. Ban.

(10.) Brooking *verſus* Jennings, *& alios.*

Executor, *durante minor.*

THE Plaintiff declared as Executor againſt the Defendants, as Executors alſo; they pleaded ſeverally Plene adminiſtravit. Upon one of the Iſſues a ſpecial Verdict was found, viz. That the ſaid Defendant being Executor durante min. ætate of an Infant, had paid ſuch and ſuch Debts and Legacies, and had delivered over totum reſiduum ſtatus perſonalis of the Teſtator, to the Infant Executor, when he came of Age. Juſtice Atkyns. This ſpecial Verdict does not maintain the Defendant's Plea of Fully adminiſtred: For that cannot be pleaded, unleſs all Debts, &c. are diſcharged, as far as the Aſſets will reach: which is not done here; for reſiduum ſtatus perſonalis is delivered over, &c. and that reſiduum is liable to the Payment of this Debt, which is yet undiſcharged. But Vaughan, Wyndham and Ellis held, That however an Executor diſchargeth himſelf of the Eſtate that was the Teſtator's, he may plead Fully adminiſtred: And that it is his ſafeſt Plea.

It was found by the ſame Verdict, That the Teſtator left a perſonal Eſtate, to the Value of 2000 l. That there were owing by him 500 l. in Debts upon Specialties, 500 l. more upon ſimple Contracts; and that he had diſpoſed of 400 l. in Legacies: And that this Defendant was Executor durante minor. of the Teſtator's Son; that he had paid 1400 l. in Diſcharge of the Debts and Legacies aforeſaid; and had accounted with the Infant Executor, when he came of Age, and that upon the Payment of 91 l. to him, the Infant Executor releaſed to him all Actions, &c. and whether upon this whole Matter, this Defendant ſhould be ſaid to have adminiſtred, was the Queſtion?

Vaughan. When an Infant Executor comes of Age, the Power of an Executor durante minore ætate ceaſeth; and the new

new Executor is then liable to all Actions: If the former Executor wasted, the new one hath his Remedy against him; but he is not liable to other Mens Suits. Nor is there any Inconvenience in this; for still here is a Person liable to all Actions: It is objected, That possibly the new Executor is not of Ability to satisfie: I answer; If in some particular Case it fall out to be so, that is by Accident: And to argue from the Possibility of such an Accident, is to suppose the Law fitted to answer all Emergencies. Atkyns accorded. 3 *Cro.* 43.

Vaughan. It is said, That here are 1500 l. liable to pay this Debt: For to pay Debts upon simple Contracts or Legacies before it, is a Devastavit; especially the Defendant having Notice of this Debt (which was also found.) That is a Mistake, upon which some Books run: But it is certainly no Law. Debts upon simple Contracts may be paid before Bonds, unless the Executors have timely Notice given them of those Bonds; and that Notice must be by Action. Atkyns and Ellis agreed with Vaughan. Wyndham dubitabat. The Case was put off to be argued next Trinity Term: But in the mean Time the Plaintiff discontinued.

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## Scudamore & Crossing. *Exch. Chamber.*

(11.)

S. C. 1 *Vent.* 137. 2 *Keb.* 754. Covenant to Uses. See Stat. 27. *H.* 8. *c.* 10. *& Pybus & Mitford. ante* 91, 121, 159. 2 *Lev.* 75. 2 *Mod.* 207. 1 *Vent.* 372.

Ejectione firmæ. A special Verdict: It was found, That a Man by Deed did give and grant, bargain and sell, alien, enfeoff and confirm to his Daughter certain Lands: But no Consideration of Money is mention'd, nor is the Deed enroll'd; there is likewise no Consideration of natural Affection expressed (other than what's implied in naming the Grantee his Daughter) there is no Livery endorsed, nor any found to have been made; nor was the Daughter in Possession at the Time of the Deed made. The Question was, Whether this were a void Deed, or had any Operation at all in the Law, and what was wrought by it? In the King's Bench it was adjudged by the whole Court to be a good Deed, and that it carried the Estate to the Daughter by way of Covenant to stand seized. Upon a Writ of Error before the Justices of the Common Pleas, and the Barons of the Exchequer, the Case was argued at Serjeants-Inn, by Sir William Jones against the Deed, and

and by Sir Francis Winnington in Maintenance of it.

Jones. Before the Statute of Uſes, a Man might either have retained the Poſſeſſion, and have departed with the Uſe, or he might have departed with the Poſſeſſion, and have retained the Uſe; or he might have departed with them both together. The Statute unites the Poſſeſſion to the Uſe; but leaves Men at Liberty to convey their Eſtates by putting the Poſſeſſion out of themſelves, and limiting an Uſe; or by raiſing an Uſe, and let the Poſſeſſion follow that. Now how ſhall it be known when an Eſtate muſt paſs one of theſe Ways, and when the other? That muſt appear by the Intention of the Party expreſſed in the Deed. Some Conveyances contain Words that look both Ways; ſome one Way and ſome another. If the Words look both Ways, then has he, to whom the Eſtate is intended to be conveyed, Election to take it whether Way he likes beſt: Sir Rowland Heyward's Caſe, 2 Rep. Adams and Steer, 2 Cr. 210. ſo in Mich. 9 Jacob. a Man in Conſideration of Money did grant, enfeoff, bargain, and ſell; and in the Deed there was a Letter of Attorney to make Livery; reſolved to be a good Conveyance by way of Bargain and Sale, if the Deed were enrolled: Roll's ſecond Part, 787. Where the Words are only proper to paſs an Eſtate by way of Uſe, there you ſhall never take an Eſtate at Common Law: Cr. Jac. 210. in Adams and Steer's Caſe: Denton and Fettyplace's Caſe, 30 Eliz. is there cited, That by the Words of Bargain and Sale without Attornment, a Reverſion paſſeth not. Vide ibid. 50. Dr. Atkyn's Caſe: The King bargains and ſells, &c. no Uſe can riſe, becauſe the King cannot ſtand ſeized to an Uſe, Moor 113. On the other Side, where the Words are proper to paſs the Eſtate at Common Law, there nothing ſhall paſs by Way of Uſe: Dyer 302. b. a Quære is there made, whether or no, if a Man, in Conſideration of mutual Affection, &c. releaſe to his Brother, who is not in Poſſeſſion; whether an Uſe hereby ariſeth to the Releſſee? But this Quære is reſolved in a manuſcript Report that I have of that Caſe: viz. That no Uſe does ariſe. He cited Ward and Lambert's Caſe: Cr. Eliz. 394. and Osburn and Churchman's Caſe, Cr Jac. 127. which is the Caſe in Queſtion. In Roll's ſecond Part, fol. a Man in Conſideration of Marriage did give and grant unto his Wife after his Deceaſe, to her and the Heirs of her Body, &c. and it was reſolved That Nothing paſſed. This Caſe is much ſtronger than ours: For there is but one Way to make this good, viz. by raiſing an Uſe:

2 *Rol.* 786, 787. *pl.* 25.

Uſe: For as a Conveyance at Common Law, it cannot be good, becauſe a Freehold cannot be granted to commence in futuro; and yet rather than recede from the Words of the Party, the Deed was adjudged to be void. He cited Foſter and Foſter's Caſe, Trin. 1659. which himſelf had argued. In the Deed here in queſtion there are Words proper to paſs an Eſtate in Poſſeſſion; Give and grant. There is likewiſe a Clauſe of Warranty; of which the Grantee ſhould loſe the Benefit in a great Meaſure, if he were in the Poſt; for then he ſhall not vouch: And there are Opinions that he cannot rebut; as in Spirt and Bence's Caſe. There is alſo a Covenant, That after the Sealing and Delivery, and due Execution of, &c. the Party ſhall quietly enjoy, &c. Now, what Execution can be meant, but by Livery and Seiſin? Foxe's Caſe, 8 Rep. has been objected; in which it is reſolved, That the Reverſion in that Caſe ſhould paſs by way of Bargain and Sale, tho' the Words of the Grant were, demiſe, ſet, and to Farm let; all Words proper to a Common Law Conveyance: I anſwer, The Conſideration of Money there expreſſed, is ſo ſtrong a Conſideration, as to carry it that Way; but the Conſideration of natural Affection is not ſo ſtrong; and ſo the Caſes are not alike. The Conſideration of Money has been held ſo ſtrong, as to carry an Eſtate of Fee-ſimple in an Uſe, without Words of Inheritance.

1 *Sid.* 82. *Raym.* 43, 44. 1 *Keb.* 160, 277.

Winnington contra. He inſiſted upon the Intention of the Party, the Conſideration of Blood and natural Affection, and the Neceſſity of making this Deed good by way of Covenant to ſtand ſeized, becauſe it could not take Effect any other way. The Clauſe of Warranty and Covenant for quiet Enjoyment, he ſaid, were but Forms of Conveyances, and Words of Clerks; but the effectual Words are thoſe that contain the Inducement of the Party to make the Conveyance, and the Words that paſs the Eſtate: He cited Plow. Queries, placito 305. 2 Roll. 787. Placito 25. 1 Inſt. 49. Poph. 49. In Foſter's Caſe, which had been cited againſt him, he ſaid, the Deed was as unformal to paſs the Eſtate one way as another. In Osburn and Churchman's Caſe, he ſaid, this Point was ſtarted; but that the Reſolution was not upon this Point: It came in queſtion neither upon a ſpecial Verdict, nor a Demurrer. Tibs and Purplewell's Caſe, 40 & 41 Eliz. 2 Roll. 786, 787. anſwers all Objections againſt our Caſe, and is in Form and Subſtance the ſame with it. He cited one Saunders and Savin's Caſe, adjudged in the

late Times in the Common Pleas, viz. That where a Man ſeiz'd in Fee of a Rent-charge, granted it to a Kinſman for Life; and the Grantor died before Attornment, it was reſolved, That upon the Sealing and Delivery of the Deed an Uſe aroſe. Wherefore he prayed, That the Judgment might be affirm'd.

Turner Chief Baron of the Exchequer, Turner and Littleton Barons, and Atkins, Wyndham and Ellis Juſtices of the Court of Common Pleas, were for affirming the Judgment. Vaughan Chief Juſtice of the Common Pleas, and Thurland puiſne Baron contra.

1 *Sid.* 26. 1 *Vent.* 140. 1 *Keb.* 162, 275. The ſix Judges argued, 1. That in a Covenant to ſtand ſeized, thoſe Words of covenanting to ſtand ſeized to the Uſe of, *&c.* are not abſolutely neceſſary, and that it is ſufficient if there are Words that are tantamount. 2. That no Conveyance admits of ſuch Variety of Words, as does this of a Covenant to ſtand ſeized. 3. That Judges have always endeavoured to ſupport Deeds, ut res magis valeat, &c. 4. That the Grantor in this Caſe by putting in Plenty of Words, ſhews, That he did not intend to tie himſelf up to any Sort of Conveyance. 5. That if the Words Give and grant had been alone in the Deed, there would have been no Queſtion; and that if *Raym.* 48. ſo, then utile per inutile non vitiatur. 6. That every Man's Deed muſt be taken moſt ſtrongly againſt himſelf. 7. That the Words Give and grant enure ſometimes as a Grant, ſometimes as a Covenant, ſometimes as a Releaſe; and muſt be taken in that Senſe which will beſt ſupport the Intent of the Party. 8. That the very Point of this Caſe has received two full Determinations upon Debate; and that it were a Thing of ill Conſequence to admit of ſo great an Uncertainty in the Law, as now to alter it. 9. That there is here a clear Intent that the Daughter ſhould have this Eſtate, a Deed, a good Conſideration to raiſe an Uſe, and Words that are tantamount to a Covenant to ſtand ſeized. Wherefore the Judgment was affirm'd.

Thurland ſaid, The Intention of the Party was not a ſure Rule to conſtrue Deeds by: That if Lands were given in connubio ſoluto ab omni ſervitio, the Intent of the Giver is, To make a Gift in Frank-marriage; but the Common Law, that delights in Certainty, will not underſtand his Words ſo, becauſe he does not ſay, in libero maritagio: In our Caſe, the

firſt Intent of the Father was to ſettle the Land upon his Daughter: His ſecond Intent was to do it by ſuch or ſuch a Conveyance: What Conveyance he meant to do it by, we muſt know by his Words; the Words Give and grant do generally and naturally work upon ſomething in eſſe: Strained Conſtructions are not favoured in the Law: Nor ought Heirs to be diſinherited by forced and ſtrained Conſtructions. If this Deed ſhall work as a Covenant to ſtand ſeized, it will be in vain to ſtudy Forms of Conveyances; it is but throwing in Words enough, and if the Lands paſs not one Way, they will another. He cited Cro. 279. Blitheman and Blitheman's Caſe. And 34 & 35 Eliz. Dyer 55. he ſaid Pitfield and Pierce's Caſe in March, was later than that of Tibs and Purplewell, and of better Authority.

Vaughan accordant. It is not clear that the Words Give and grant are ſufficient to raiſe an Uſe; but ſuppoſing that they are by a forced Expoſition, when nothing appears to the contrary; will it thence follow, That they may be taken in a Senſe directly contrary to their proper and genuine Senſe, in ſuch a Place as this, where all the other Parts of the Deed are wholly inconſiſtent with, and will not by any Poſſibility admit of ſuch a Conſtruction? He mentioned ſeveral Clauſes in the Deed, which he ſaid were proper only to a Conveyance at Common Law. He appealed to the Law before the Statute of Uſes; and ſaid, That where an Uſe would not riſe by the Common Law, there the Statute executes no Poſſeſſion; and that by ſuch a Deed as this no Uſe would have riſen at the Common Law: But the Judgment was affirmed. 1 *Sid.* 26. 2 *Rol.* 789.

## Gabriel Miles's *Caſe.* (12.)

HE and his Wife recovered in an Action of Debt againſt one Cogan two hundred Pounds, and ſeventy Pounds Damages: The Wife dies, and the Husband prays to have Execution upon this Judgment. The Court, upon the firſt Motion inclin'd, That it ſhould not ſurvive to the Husband; but that Adminiſtration ought to be committed of it, as a Thing in Action: But this Term they agreed, That the Husband might take out Execution; and that by the Judgment Baron and Feme.

it became his own Debt, due to him in his own Right. And
1 *Cro.* 464. accordingly he took out a Scire Facias: Beaumond and Long's Caſe, Cro. Car. 608. was cited.

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## Anonymus.

( 13. )

Leaſes. THE Plaintiff in an Ejectione firmæ declared upon a Leaſe made the tenth Day of October, Habend. from the 20th of November, for five Years. And the Queſtion upon a ſpecial Verdict was, Whether this were a good or a void Leaſe? Serjeant Jones. There are many Caſes in which the Law rejects the Limitation of the Commencement of a Leaſe, if it be impoſſible; as from the 31ſt of September, or the like: Now this being altogether uncertain, and ſince there is nothing to determine your Judgments what November he meant, whether laſt-paſt, or next-enſuing, it amounts to an impoſſible Limitation. Roll. Tit. Eſtate, placito 7.
6 *Co.* 36. a. 849. Ibid. placito 10. betwixt Elmes and Leaves. Baldwin contra. The Law will reject an impoſſible Limitation, but not an uncertain Limitation. Vaughan and Atkins. The Law rejects an impoſſible Limitation, becauſe it cannot be any Part of the Parties Agreement: But an uncertain Limitation vitiates the Leaſe, becauſe it was Part of the Agreement; but we cannot determine it, not knowing how the Contract was. There are many Examples of Leaſes being void for Uncertainty of Commencements; which could not have been adjudged void, if the Limitation in this Caſe were good. Wyndham and Ellis contra; and that it ſhould begin from the Time of the Delivery. It was moved afterward, and Ellis being abſent, it was ruled by Vaughan and Atkins againſt Wyndham's Opinion, and Judgment was arreſted.

## Fowle & Doble's *Caſe*. ( 14. )

Non tenure. *Formedon* in Remainder. *Nelſ. Lutw.* 258, 305, 306. 2 *Danv.* 570.

FOrmedon in the Remainder. The Caſe was thus: There were three Siſters, the eldeſt was Tenant in Tail of a fourth Part of 140 Acres, &c. in three Vills, A. B. and C. the Remainder in Fee-ſimple to the other two: The Tenant in Tail takes Husband Dr. Doble the Defendant. The Husband and Wife levy a Fine Sur Conuſance de droit, to the Uſe of them two, and the Heirs of the Body of his Wife, the Remainder in Fee to the right Heirs of the Husband: And this Fine was with Warranty againſt them and the Heirs of the Wife. The Wife dies without Iſſue, living the Husband, againſt whom Lucy and Ruth, the other two Siſters, to whom the Remainder in Fee was limited, bring a Formedon in the Remainder. The Defendant, as to Part of the Lands in Demand, viz 100 Acres, pleaded Non-tenure, and that ſuch a one was Tenant. To that Plea the Plaintiff demurred. As to the reſt of the Lands, he pleaded this Fine with Warranty. The Plaintiffs made a frivolous Replication, to which the Defendant demurred. The Plaintiffs Counſel excepted to the Defendant's Plea of Non-tenure: 1. That he does not expreſs in which of the Vills the 100 Acres lie: 5 Ed. 3. 140. In the old Print, 184. and 33 H. 6. 51. Sir John Stanley's Caſe. But this was over-ruled; for the Formedon being of ſo many ſeveral Acres, he is not obliged to ſhew where thoſe lie, that he pleads Non-tenure of: He tells the Plaintiff who is the Tenant, which is enough for him. 2. Becauſe he that pleads Non-tenure in Abatement, ought to ſet forth who was Tenant die impetrationis brevis orig'. &c. But this was over-ruled alſo; for he ſays, That himſelf was not Tenant die impetrationis brevis origin. but that ſuch another eodem die was Tenant; which is certain enough. When the Tenant pleads Non-tenure to the whole, he needs not ſet forth who is Tenant; otherwiſe when he pleads Non-tenure of Part: 11 H. 4. 15. 33 H. 6. 51. At the Common Law, if the Tenant had pleaded Non-tenure as to Part, it would have abated all the Writ: 36 H 6. 6. But by the Statute of the 25 Ed. 3. cap. 16. it was enacted, That by the Exception of Non-tenure of Parcel, no Writ ſhould be abated, but only for that Parcel, whereof the Non-tenure was alledged. A third Exception was taken to the Pleading of the Fine, *Nelſ. Lutw.* 306. 3 *Lev.* 330.

Fine, viz. becauſe he pleaded a Fine levied of a fourth Part, without ſaying, In how many Parts to be divided. This was alſo over-ruled, and 1 Leon. 114. was cited; where a Difference is taken betwixt a Writ and a Fine: And in a Fine it is ſaid to be good, that being but a common Aſſurance, aliter in a Writ: 19 Ed. 3. Fitz. Br. 244. This Exception ſeems level'd againſt the Plaintiffs own Writ, in which he demands a fourth Part, without ſaying, In how many Parts to be divided. The Matter in Law was, Whether or no this Warranty, being againſt the Husband and Wife, and the Heirs of the Wife, were a Bar to the Plaintiffs, or ſurvived to the Husband? And it was reſolved to be a Bar; for this Warranty as to the Husband, was deſtroyed as ſoon as it was created: The ſame Breath that created it put an End to it: For the Husband warranted during his own Life only, and took back as large
1 *Cro.* 370. an Eſtate as he warranted; which deſtroys his Warranty: And this is Littleton's Text. If a Man make a Feoffment in Fee with Warranty, and take back an Eſtate in Fee, the Warranty is gone. But the Deſtruction of the Husband's Warranty does not affect the Wife's: 20 H. 7. 1. and Sym's Caſe; upon which Ellis ſaid, he much relied. Herbert's Caſe, 3 Rep. can give no Rule here; for that here the Husband is ſeiz'd only in Right of the Wife.

Vaughan ſaid, That if the Fine in this Caſe had been levied to a Stranger for Life, or in Fee, who had been impleaded by another Stranger; that in that Caſe the Tenant ought to have vouched the ſurviving Husband, as well as the Heir of the Wife, or elſe he would have loſt his Warranty. 2. He ſaid, if the Fine had been levied to the Uſe of a Stranger, who had been impleaded by the Heirs of the Wife, he queſtioned,
8 *Co.* 51, 52, *&c.* *Cro. Jac.* 217, 218. Whether or no the Tenant could have rebutted them for any more than a Moiety? And he queſtioned the Reſolution of Sym's Caſe, 8 Rep. There is a Caſe cited in Sym's Caſe out of the 45 Ed. 3. 23. which is expreſly againſt the Reſolution of the Caſe: It is ſaid in the Reports, That no Judgment was given in that Caſe, which is falſe; and that the Caſe is not
*Bro. Garranty* 14. well abridged by Brook, which is alſo falſe. If in caſe of a Voucher, a Man loſeth his Warranty, that does not vouch all that are bound; why ſhould not one that is rebutted have the
8 *Co.* 51. like Advantage? There is a Reſolution quoted in Sym's Caſe
*Co. Lit.* 373. b. out of 5 Ed. 2. Fitz. Tit. Garranty 78. upon which the Judgment is ſaid to be founded, being, as is there ſaid, a Caſe in Point; but he conceived not: For Harvey, that gave the Rule,

ſaid, Le tenant poit barrer vous touts, ergo un ſole: In the Caſe there were ſeveral Co-heirs, and if all were Demandants, all might have been barred; and if one be Demandant, there is no Queſtion but ſhe may be rebutted for her Part. But Sym's Caſe is quite otherwiſe: For there one Perſon is Co-heir to the Guarranty, that is not Heir to any Part of the Land. In 6 Ed. 3. 50. there is a Caſe reſolved upon the Ground and Reaſon of the 45 Ed. 3. For theſe Reaſons he ſaid, he could not rely upon Sym's Caſe. He agreed with the reſt to the Reaſon, Why the Warranty is deſtroyed? viz. Becauſe the Husband takes back as great an Eſtate as he warranted: For then no Uſe can be made of the Warranty. If a Man that has Land, and another warrant this Land to one, and his Heirs, and one of them die without Heirs, the Survivor may be vouched without Queſtion. The Husband never was obliged by this Warranty; but as to him it was meerly nominal: For from the very Creation of it, it was impoſſible that it ſhould be effectual to any Purpoſe: He cited Hob. 124. in Rolls and Osborn's Caſe. The whole Court agreeing in this Opinion, Judgment was given for the Tenant. 8 Co. 51. b.

Term.

# Term. Trin. 26 Car. II. in Com. Ban.

( 15. ) Hamond *verſus* Howell, *&c.*

*Vide* 2 *Mod.* 218. *Ante*, 119. *pl.* 20. 2 *Jon.* 13. *Vaugh.* 135, *&c.*

THE Plaintiff brought an Action of Falſe Impriſonment againſt the Mayor of London, and the Recorder, and the whole Court at the Old Baily, and the Sheriffs and Gaoler, for committing him to Priſon at a Seſſions there held. The Caſe was thus, Some Quakers were indicted for a Riot, and the Court directed the Jury, if they believed the Evidence, to find the Priſoners guilty; for that the Fact ſworn againſt them was in Law a Riot: Which becauſe they refuſed to do, and gave their Verdict againſt the Direction of the Court in Matter of Law, they committed them. They were afterwards diſcharged upon a Habeas Corpus. And one of them brings this Action for the wrongful Commitment. Serjeant Maynard moved for the Defendants, That they might have longer Time to plead: For a Rule had been made, That the Defendants ſhould plead the firſt Day of this Term. The Court declared their Opinions againſt the Action, viz. That no Action will lie againſt a Judge for a wrongful Commitment, any more than for an erroneous Judgment. Monday the Secondary, told the Court, That giving the Defendants Time to plead countenanced the Action, but granting Imparlances did not. So they had a ſpecial Imparlance till Michaelmas-Term next. Atkins. It was never imagined, That Juſtices of Oyer and Terminer, and Goal-delivery, would be queſtioned in private Actions, for what they ſhould do in Execution of their Office; if the Law had been taken ſo, the Statute of 7 Jac. cap. 5. For pleading the general Iſſue, would have included them as well as inferior Officers.

*Aleyn* 12. 1 *Sid.* 273, 338. 4 *Inſt.* 314.

*Ante*, 119, 185.

## Birch & Lake. (16.)

A Prohibition was granted to the Spiritual Court upon this Suggeſtion, that Sir Edward Lake Vicar-general, had cited the Plaintiff ex officio to appear and anſwer to divers Articles. The Court ſaid, that the Citation ex officio was in Uſe, when the Oath ex officio was on Foot: But that is ouſted by the 17th of Eliz. If Citations ex officio were allowed, they might cite whole Counties without Preſentment; which would become a Trick to get Money. And the Party grieved can have no Action againſt the Vicar-general, being a Judge, and having Juriſdiction of the Cauſe, though he miſtake his Power. Per quod, &c. Prohibition. *Ante*, 119, 184.

## Anonymus. (17.)

S. C. 2 *Jon.* 169.

Baron and Feme Adminiſtrators in the Right of the Feme, bring an Action of Debt againſt Baron and Feme, Adminiſtrators likewiſe in the Right of the Feme, de bonis non, &c. of J. S. The Action is for Rent incurred in the Defendants own Time, and is brought in the * Debet & detinet. The Defendants plead, Fully adminiſtred; to which the Plaintiffs demurred. Serj. Hardes for the Plaintiff ſaid, The Action was well brought in the Debet & detinet, for that nothing is Aſſets, but the Profits over and above the Value of the Rent: He cited Hargrave's Caſe, 5 Rep. 31. 1 Roll. 603. 3 Cro. 238. Rich and Frank. ibid. 411. ibid. 549. 2 Brook 202. 1 Bulſtr. 22. Moor 566. Poph. 120. Though if an Executor be Plaintiff in an Action for Rent incurred after the Teſtator's Death, he muſt ſue in the Detinet only, becauſe whatever he recovers is Aſſets: But though an Executor be Plaintiff, yet, if the Leaſe were made by himſelf, he muſt ſue in the Debet & detinet. Then the Plea of Fully adminiſtred, is not a good Plea: For he is charged for his own Occupation. If this Plea were admitted, he might give in Evidence Payment of Debts, &c. for as much as the Term is worth, and take the Profits to his own Uſe, and the Leſſor be ſtript of his Rent: In Style's Reports, 49. in one Joſſelyn's Caſe, this Plea was ruled to be ill. And of that Opinion the Court

Adminiſtrators.

* See 1 *Cro.* 125. *Pop.* 120. 5 *Co.* 31. b. 1 *Vent.* 171. 1 *Sid.* 266. 2 *Vent.* 209. 3 *Mod.* 327. 1 *Lev.* 128.

1 *Cro.* 685.

*Vide* 2 *Danv.* 504.

was; and ſaid, That Executors could not waive a Term,
2. *Cro.* 549. (though if they could, they ought to plead it ſpecially) for it is naturally in them, and prima facie is intended to be of more Value than the Rent: If it ſhould fall out to be otherwiſe, the Executors ſhall not be liable de bonis propriis, but muſt aid themſelves by ſpecial Pleading. For the Plea, they ſaid there was Nothing in it: And gave Judgment for the Plaintiff.

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(18.)

## Buckly & Howard.

Statute Merchant.

DEBT upon two Bonds, the one of 20 l. the other of 40 l. againſt an Adminiſtratrix: The Defendant pleaded, That the Inteſtate was indebted to the Plaintiff in 250 l. upon a Statute Merchant: Which Statute is yet in Force, not cancell'd nor annull'd: And that ſhe has not above 40 Shillings in Aſſets, beſides what will ſatisfie this Statute. The Plaintiff replies, That the Statute is burnt with Fire. The Defendant demurs. And by the Opinions of Wyndham, Atkyns, and Ellis, Juſtices, the Plaintiff had Judgment. For the Defendant, by his Demurrer, had confeſſed the Burning of the Statute: Which being admitted and agreed upon, it is certain that it can never riſe up againſt the Defendant: For the Stat. of the 23 Hen. 8. cap. 6. concerning Recognizances in the Nature of a Statute-Staple, refers to the Statute-Staple, viz. That like Execution ſhall be had and made, and under ſuch Manner and Form as is therein provided: The Statute-Staple refers to the Statute-Merchant; and that to the Statute of Acton Burnel, 13 Ed. 1. which provides, That if it be found by the Roll, and by the Bill, that the Debt was acknowledged, and that the Day of Payment is expired, that then, &c. But if the Statute be burnt, it cannot appear that the Day of Payment is expired; and conſequently there can be no Execution. If the Recogniſee will take his Action upon it, he muſt ſay, hic in Cur. prolat. 15 H. 7. 16. Vaughan differ'd in Opinion: He ſaid, 1. That it is a Rule in Law, That Matter of Record ſhall not be avoided by Matter in pais; which Rule is manifeſtly thwarted by this Reſolution. He ſaid, It was a Matter of Record to both Parties; and the Plaintiff could not avoid it by ſuch a Plea, any more than the Defendant could avoid it by any other Matter of Fact. He cited

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a Caſe, where the Obligee voluntarily gave up his Bond to the Obligor, and took it from him again by Force, and put it in Suit: The Defendant pleaded this ſpecial Matter, and the Court would not allow it: But ſaid, he might bring his Action of Treſpaſs. 2. Suppoſe the Defendant had taken Iſſue upon the Statute's being burnt, and it had been found to have been burnt, and yet had been found afterwards; the Defendant could not have any Benefit of this Verdict. He ſaid it was a proper Caſe for Equity. *Co. Lit.* 226. *Poſt*, 216.

## Slater & Carew. ( 19. )

Debt upon a Bond. The Condition was, That if the Obligor, his Heirs, Executors, &c. do yearly, and every Year, pay or cauſe to be paid to Thomas and Dorothy his Wife, during their two Lives, that then, &c. The Huſband dies, and the Queſtion was, Whether or no the Payment ſhould continue to the Wife? Serjeant Baldwin argued, That the Money is payable during their Lives, and the longer Liver of them: He cited Brudnel's Caſe, 5 Rep. and 1 Inſt. 219. b. That whenever an Intereſt is ſecured for Lives, it is for the Lives of them, and the longer Liver of them: And Hill's Caſe, adjudged Paſch. 4 Jac. Rot. 112. in Warburton's Reports. Seyſe contra. The Intereſt of this Bond is in the Obligee; the Huſband and Wife are Strangers, and therefore the Payment ceaſeth upon the Death of either of them: And of that Opinion was the whole Court; and grounded themſelves upon that Diſtinction in Brudnel's Caſe, betwixt where the Ceſtuy que vies have an Intereſt, and the Caſes of collateral Limitations. They ſaid alſo, That in ſome Caſes an Intereſt would not ſurvive; as if an Office were granted to two, and one of them died, unleſs there were Words of Survivorſhip in the Grant. So the Plaintiff was barred. 5 *Co.* 9. 1 *Leon.* 74, 103. 1 *And.* 151, 161. 11 *Co.* 3. b. *Owen* 52. 1 *Rol. Ab.* 832. *Raym.* 126. *Palm.* 74, 108. 1 *Vent.* 163. 2 *Vent.* 74, 108. 5 *Co.* 9. 1 *Leon.* 74. 1 *Brownl.* 46. 2 *Brownl.* 43.

# Term. Mich. 26 Car. II. in Com. Ban.

( 20. ) Farrer & Brooks, *Adminiſtrators of* Jo. Brooks.

*Vide* 2 *Vent.* 218. Execution. *Stat.* 29 *Car.* 2. *cap.* 3. *ſect.* 19.

THE Plaintiff had Judgment in Debt againſt John Brooks, the Inteſtate; and took out a Fieri Facias, bearing Teſte the laſt Day of Trinity-Term, De bonis & catallis of John Brooks: Before the Execution of which Writ John Brooks dies, and Elizabeth Brooks adminiſters: The Sheriff's Bailiff executes the Writ upon the Inteſtate's Goods in her Hands. Upon this Serjeant Baldwin moved the Court for Reſtitution; for that a Fieri Facias is a Commiſſion, and muſt be ſtrictly purſued. Now the Words of the Writ are, De bonis of John Brooks; and by his Death they ceaſe to be his Goods. The Plaintiff will be at no Prejudice; the Goods will ſtill remain liable to the Judgment; only let the Execution be renewed by Scire Facias, to which the Adminiſtratreſs may plead ſomewhat. Wyndham. The Property of the Goods is ſo bound by the Teſte of the Writ, as that a Sale made of them Bona fide ſhall be avoided; which is a ſtronger Caſe. And ſince the Inteſtate himſelf could not have any Plea, why ſhould we take Care that the Adminiſtrator ſhould have Time to plead? And of that Opinion was all the Court, after they had adviſed with the Judges of the King's Bench; who informed them that their Practice was accordingly. But Vaughan ſaid, That in his Opinion it was clearly againſt the Rules of the Law. But they ſaid there were Caſes to this Purpoſe in Cro. Car. Roll. Moore, &c.

## Liefe & Saltingſtone's *Caſe*. ( 21. )

EJect. firmæ. The Caſe upon a ſpecial Verdict was thus, viz. Sir Rich. Saltingſtone being ſeized in Fee of Rees-Farm, on the 17th Day of February, in the 19th Year of the King, made his Will in Writing, in which there were theſe Words, viz. For *Rees-Farm*, in ſuch a Place, I will and bequeath it to my Wife, during her natural Life; and by her to be diſpoſed of to ſuch of my Children as ſhe ſhall think fit. Sir Richard died; his Wife entred and ſealed ſuch a Writing as this, viz. Omnibus Chriſti fidelibus, &c. Noveritis, That whereas my Huſband, Sir *Richard Saltingſtone*, &c. reciting that Clauſe in the Will: I do diſpoſe the ſame in Manner following; that is to ſay, I diſpoſe it, after my Deceaſe, to my Son *Philip*, and his Heirs for ever. The Wife died, and Philip entred and died, and left the Leſſor of the Plaintiff his Son and Heir. The Queſtion was, What Eſtate Philip took? Or, What Eſtate the Teſtator intended ſhould paſs out of him? This Caſe was argued in Eaſter-Term laſt paſt, by Serjeant Scroggs for the Plaintiff, and by Serjeant Waller for the Defendant; and in Trinity-Term by Serjeant Baldwin for the Plaintiff, and Serjeant Newdigate for the Defendant. They for the Plaintiff inſiſted upon the Word diſpoſe; that when a Man deviſeth his Land to be diſpoſed by a Stranger, it has been always held to be a Bequeathing of a Fee-ſimple, or at leaſt a Power to diſpoſe of the Fee-ſimple: 19 H. 8. 10. Moor. 5 Eliz. 57. per Dyer, Weſton and Welſhe; but they chiefly relied on Daniel and Uply's Caſe in Latch.

The Defendant's Counſel urged, That the Heir at Law ought not to be diſinherited without very expreſs Words. That if the Deviſor himſelf had ſaid in his Will, I diſpoſe *Rees-Farm* to *Philip*: That Philip would have had no more than an Eſtate for Life; and what Reaſon is there, That the Diſpoſal being limited to another, ſhould carry a larger Intereſt, than if it had been executed by the Teſtator himſelf? This Term it was argued at the Bench, and by the Judgments of Ellis, Wyndham and Atkyns Juſtices, the Plaintiff had Judgment: They agreed, That the Wife took by the Will an Eſtate for her own Life, with a Power to diſpoſe of the Fee. She cannot take a larger Eſtate to her ſelf by Implication, than an Eſtate for Life; becauſe an Eſtate for Life is given to her by expreſs Limita-

3 *Cro.* 16, 160.
3 *Leon.* 71.

Limitation: 1 Bulſt. 219, 220. Whiting and Wilkins's Caſe. For Caſes reſembling the Caſe in queſtion were cited, 7 Ed. 6. Brook. Tit. Deviſe 39. 1 Leon. 159. and Daniel and Uply's Caſe, and Clayton's Caſe in Latch. It is objected, That in Daniel and Uply's Caſe, there are theſe Words, at her Will and Pleaſure; to which they anſwered, That if ſhe have a Power to diſpoſe according to her Diſcretion, and as ſhe her ſelf pleaſeth; and then Expreſſio eorum quæ tacite inſunt, nihil operatur. If I deviſe that J. S. ſhall ſell my Land, he ſhall ſell the Inheritance: Keilway 43, 44. 19 H 8. fol. 9. Where the Deviſor gives to another a Power to diſpoſe, he gives to that Perſon the ſame Power that himſelf had. Vaughan Chief Juſtice, differed in Opinion; he ſaid, It is plain that the Word diſpoſe does not ſignify to give; for if ſo, then it is evident that the Leſſor of the Plaintiff cannot have any Title: For if the Wife were to give, then were the Eſtate to paſs out of her, which could not be by ſuch an Appointment as ſhe makes here, but muſt be by a legal Conveyance. Be-
3 *Leon.* 71. ſides, ſhe cannot give what ſhe has not, and ſhe has but an Eſtate for Life. If then it does not ſignify to Give, what does it ſignify? Let us a little turn the Words, and a plain certain Signification will appear: I will and bequeath *Rees-Farm* to ſuch of my Children as my Wife ſhall think fit, at her Diſpoſal: At this Rate the Wife does but nominate what Perſon ſhall take by the Will. This is a plain Caſe, and free from Uncertainty and Ambiguity, which elſe the Word diſpoſe will be liable to. But Judgment was given, ut ſupra.

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( 22. ) Howell *verſus* King.

Way. TRespaſs, for driving Cattle over the Plaintiff's Ground. The Caſe was, A. has a Way over B's Ground to Black-Acre, and drives his Beaſts over B's Ground to Black-Acre, and then to another Place lying beyond Black-Acre. And whether this was lawful or no, was the Queſtion upon a Demurrer. It was urged, That when his Beaſts were at Black-Acre, he might drive them whether he would: Roll. 391. Nu 40. 11 H. 4. 82. Brook, Tit. Chimin. On the other Side it was ſaid, That by this Means the Defendant might purchaſe a Hundred

for a thouſand Acres adjoining to Black-Acre, to which he preſcribes to have a Way: By which Means the Plaintiff would loſe the Benefit of his Land: And that a Preſcription preſuppoſed a Grant, and ought to be continued according to the Intent of its original Creation. The whole Court agreed to this. And Judgment was given for the Plaintiff. 1 *Rol.* 391. *pl.* 3.

## Warren *qui tam*, &c. *verſus* Sayre. (23)

THE Court agreed in this Caſe, That an Information for not coming to Church may be brought upon the Stat. of 23 Eliz. only, reciting the Clauſe in it that has Reference to Stat. 1. of the Queen; and that this is the beſt and ſureſt Way of declaring. Information. See 2 *Show.* Caſe 237, 342.

Term

( 24. )

## Williamſon & Hancock.

S. C. 2 *Mod.* 14, 3 *Keb.* 408.

*Hill.* 24 & 25 *Car.* 2. *Rot.* 679.

Stat. 27 *H.* 8. *c.* 10. & 32 *H.* 8. *c.* 34.

TEnant for Life, the Remainder in Tail. Tenant for Life levies a Fine to J. S. and his Heirs, to the Uſe of himſelf for Years, and after to the Uſe of Hannah and Suſan Prinne and their Heirs, if ſuch a Sum of Money were unpaid by the Conuſor; and if the Money were paid, then to the Uſe of the Conuſor and his Heirs. And this Fine was with general Warranty. The Tenant for Life died, the Money unpaid, and the Warranty deſcended upon the Remainder-Man in Tail. And the Queſtion was, Whether the Remainder-Man were bound by this Warranty or not? Serjeant Maynard argued, that becauſe the Eſtate of the Land is transferred in the Poſt, before the Warranty attaches in the Remainder-Man, that therefore it ſhould be no Bar. He agreed, that a Man that comes in by the Limitation of an Uſe ſhall be an Aſſignee within the Statute of 32 H. 8. cap. 34. by an equitable Conſtruction of the Statute, becauſe he comes in by the Limitation of the Party, and not purely by Act in Law: But this Caſe of ours is upon a collateral Warranty, which is a poſitive Law, and a Thing ſo remote from ſolid Reaſon and Equity, that it is not to be ſtretch'd beyond the Warrime. That the Cuſtuy que uſe in this Caſe ſhall not vouch, is confeſſed on all Hands; and there is the ſame Reaſon why he ſhould not rebut. He ſaid the Reſolution mentioned in Lincoln College's Caſe, was not in the Caſe, nor could be: The Warranty there was a particular Warranty, contra tunc Abbatem Weſtmonaſterienſem & ſucceſſores ſuos; which Abbey was diſſolved long before that Caſe came in queſtion. He ſaid Juſtice Jones upon the arguing of Spirt and Bence's Caſe, reported in Cr. Car. ſaid, that he had been preſent at the Judgment in Lincoln College's Caſe,

*Co. Lit.* 215. b.

3 *Co.* 62. b.

Caſe; and that there was no ſuch Reſolution as is there reported. Serjeant Baldwin argued on the other Side; That at the Common Law many Perſons might rebut, that could not take Advantage of a Warranty by way of Voucher; as the Lord by Eſcheat, the Lord of a Villain, a Stranger, Tenant in Poſſeſſion: 35 Aſſ. Placito 9. 11 Aſſ. Placito 3. 45 Ed. 3. 18. Placito 11. 42 Ed. 3. 19. b. A fortiori, he ſaid, he that is in by the Limitation of an Uſe, being in by the Act of the Party (though the Law co-operate with it, to perfect the Aſſurance) ſhall rebut. 3 Co. 92, 63.

The Court was of Opinion, That the Ceſtuy que uſe might rebut; that though Voucher lies in Privity, an Abater or Intruder might rebut: F. N. B. 135. 1 Inſt. 385. As to Serjeant Maynard's Objection, That he is in the Poſt; they ſaid they had adjudged lately in Fowle and Doble's Caſe, That a Ceſtuy que uſe might rebut. So it was held in Spirt and Bence's Caſe, Cro. Car. and in Jones 199. Kendal and Foxe's Caſe. That Report in Lincoln College's Caſe, Whether there were any Reſolution in the Caſe or no, is founded upon ſo good Reaſon, that Conveyances ſince have gone according to it. Atkyns ſaid, There was a difficult Clauſe in the Statute of Uſes, *viz.* That all and ſingular Perſon and Perſons, *&c.* which at any Time on this Side the firſt Day of *May*, *&c.* 1536, *&c.* ſhall have, *&c.* By this Clauſe, they that came in by the Limitation of an Uſe before that Day, were to have the like Advantages by Voucher or Rebutter, as if they had been within the Degrees. If the Parliament thought it reaſonable, why was it limited to that Time? Certainly, the Makers of that Law intended to deſtroy Uſes utterly, and that there ſhould not be for the future any Conveyances to Uſes. But they ſuppoſed that it would be ſome ſmall Time before all People would take Notice of the Statute, and make their Conveyances accordingly; and that might be the Reaſon of this Clauſe. But ſince, contrary to their Expectations, Uſes are continued, he could eaſily be ſatisfied: He ſaid, That Ceſtuy que uſe ſhould rebut. Wyndham was of Opinion, That Ceſtuy que uſe might vouch: He ſaid, There was no Authority againſt it, but only Opinions obiter. They all agreed for the Defendant, and Judgment was given accordingly. *Ante*, 181. *Moor.* 859. *Hob.* 27. 1 *Cro.* 370, 371.

( 25. )

## Rogers *verſus* Davenant *Parſon of* White-Chapel.

Taxes.
*See* 1 *Vent.* 367.
*Ante*, 79. *pl.* 41.
*Poſt*, 236. *pl.* 2.
5 *Co.* 63. a.

NOrth Chief Juſtice. The Spiritual Court may compel Pariſhioners to repair their Pariſh-Church, if it be out of Repair, and may excommunicate every one of them, till it be repaired: And thoſe that are willing to contribute muſt be abſolved, till the greater Part of them agree to aſſeſs a Tax; but the Court cannot aſſeſs them towards it; it is like to a Bridge, or a High-way: A Diſtringas ſhall iſſue againſt the Inhabitants, to make them repair it; but neither the King's Court, nor the Juſtices of Peace, can impoſe a Tax for it. Wyndham, Atkyns and Ellis accorded, The Church-wardens cannot, none but a Parliament can impoſe a Tax; but the greater Part of the Pariſh can make a By-Law: And to this Purpoſe they are a Corporation. But if a Tax be illegally impoſed, as by a Commiſſion from the Biſhop to the Parſon, and ſome of the Pariſhioners, to aſſeſs a Tax; yet if it be aſſented to, and confirmed by the major Part of the Pariſhioners, they in the Spiritual Court may proceed to excommunicate thoſe that refuſe to pay it.

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( 26. )

## Compton *& Ux'.* *verſus* Ireland.

*Mich.* 26 *Car.* 2. *Rot.* 691.

Eſcape.

SCire Facias by the Plaintiffs as Executors, to have Execution of a Judgment obtained by their Teſtator; unde Executio adhuc reſtat faciend'. The Defendant confeſſeth the Judgment; but ſays, That a Capias ad ſatisfaciendum iſſued againſt him; upon which he was taken, and was in the Cuſtody of the Warden of the Fleet; and that he paid the Sum mentioned in the Condemnation, to the Warden of the Fleet, who ſuffered him to go at large. The Plaintiff demurred. This the Court held to be no Plea; but that it was a voluntary Eſcape in the Warden, and Judgment was given for the Plaintiff.

1 *Rol.* 902. *pl.* 8.
1 *Cro.* 328.
*Pract. Reg.* 158.

## Haley's Caſe.

( 27. )

PER Cur'. If a Habeas Corpus be directed to an inferior Court, returnable two Days after the End of the Term, yet the inferior Court cannot proceed contrary to the Writ of Habeas Corpus. North cited the Caſe of Staples, Steward of Windſor; who hardly eſcaped a Commitment, becauſe he had proceeded after a Habeas Corpus delivered to him (though the Value were under five Pounds) and would not make a Return of it. *Certiorari.* *Ante*, 28.

## The King *verſus* Sir Francis Clerke.

( 28. )
S. C. 2 *Mod.* 1. 3. *Keb.* 412.

*Ent. Hill.* 24 & 25 *Car.* 2. *Rot.* 594.

THE Caſe upon a ſpecial Verdict was thus, viz. The King being ſeized in Fee of the Manor of Leyborn in Kent, to which the Advowſon of the Church of Leyborn is Appendant (which Manor came to him by the Diſſolution of Monaſteries, having been Part of the Poſſeſſions of the Abbot of Gray-Church) granted the Manor to the Archbiſhop of Canterbury and his Succeſſors, ſaving the Advowſon; Afterward the King preſents to the Church, being void, J. S. The Archbiſhop of Canterbury grants the Manor, and the Advowſon, to the King, his Heirs and Succeſſors; which Grant is confirmed by the Dean and Chapter: The King grants the Manor with the Appurtenances, and this Advowſon (naming it in particular) which lately did belong to the Archbiſhop of Canterbury, and to the Abbot of Gray-Church: Together with all Privileges, Profits, Commodities, &c. in as ample manner, as they came to the King's Hand by the Grant of the Archbiſhop, or by Colour or Pretence of any Grant from the Archbiſhop, or Confirmation of the Dean and Chapter, or by Surrender of the late Abbot of Gray-Church, or as amply as they are now, or at any Time were in our Hands, to Sir Edw. North and his Heirs, &c. The Queſtion was, Whether or no, by this Patents.

Grant, the Advowson passed? Serjeant Newdigate. The King is not apprised of his Title, and therefore the Grant void: 1 Rep. 52. a. For he thought this Advowson came to him by Grant from the Archbishop. He cited Moor 318. Inglefield's Case. If the King be deceived in Deed or in Law, his Grant is void: Brook, Patents 104. 1 Rep. 51, 52. 1 Rep. 46, 49, 10 Rep. Arthur Legat's Case. Hob. 228, 229, 230, &c. ibid 223, 243. Dyer 124. 1 Rep. 50. Hob. 170. Moor. 888. 1 Rep. 49. 2 Rep. 33. 11 Rep. 90. 9 H. 6. 28. b. 2 Roll. 186. Hob. 323. Coke's Entries 384. Serjeant Hardes contra. He laid down four Grounds or Rules whereby to construe the King's Letters Patents: 1. Where a particular Certainty precedes, it shall not be destroyed by an Uncertainty, or a Mistake coming after; 1 Cr. 34. & Yel. 42. 1 Cr. 48. 3 Leon. 162. 1 And. 148. 29 Ed. 3. 71. b. 10 H. 4. 2. Godb. 423. Markham's Case, cited in Arthur Legat's Case, 10 Rep. 2. There is a Difference when the King mistakes his Title to the Prejudice of his Tenure or Profit, and when he is mistaken only in some Description of his Grant, which is but supplemental, and not material nor issuable: 21 Ed. 4. 49 33 H. 7. 6. 36 H. 8. 1. & 38 H. 6. 37. 9 Ed. 4. 11, 12. Lane's Reports 111. 2 Co. 54. 1 Bulstr. 4. 3. Distinct Words of Relation in the King's Grant, are good to pass away any Thing: Dyer 350, 351. 9 Rep. 24. &c. Whistler's Case, 10 Co. 4. When the King's Grants are upon a valuable Consideration, they shall be construed favourably for the Patentee, for the Honour of the King: 18 Ed. 1. de Quo warranto. 2 Inst. 446, 447. 6 Rep. Sir John Molyn's Case, 10 Co. 65. a. Then he applied all these Rules to be the Case in question, and prayed Judgment. Afterward Serjeant Maynard argued against the passing of the Advowson. He said those two Descriptions of the Advowson, viz. Belonging lately to the Archbishop of Canterbury, and formerly to the Abbey of Gray-Church, are coupled together with a Conjunctive (et) so that both must be true. So here is a Falsity in the first and material Part of the Grant, viz. the Description of the Thing granted: Though the Advowson of Leyborn be named, yet it is so named, as to be capable of a Generality: For there may be more Advowsons than one belonging to that Manor. This Falsity goes to the Title of the Church. No subsequent Words will aid this Misrecital; for the Description of the Thing granted ends there. The following Words, viz. adeo plene, &c. and whatever comes after, do but set out how fully and amply he should enjoy

enjoy the Thing granted: And being no Part of its Deſcription, cannot enlarge it or make it more certain: 8 H. 4. 2. Serj. Turner contra, cited theſe Books, viz. Bacon's Elements 96. 1 Leon. 120. Veritas nominis tollit errorem demonſtrationis. 29 Ed. 3. 7, 8. 1 And. 148. Plowd. Comm. 192. 2 Co. Doddington's Caſe. 10 Co. 113. 19 Ed. 3. Fitzherb Grants 58. 10 H. 4. 2. Sir John L'Eſtrange's Caſe. Markham's Caſe 10 Co. in Arthur Legate's Caſe. Cr. Car. 548. Ann. Needler's Caſe, in Hob. 9 H. 6. 12. Brook Annuity 3. Baker and Bacon's Caſe, Cr. Jac. 48 & Bozoun's Caſe. 4 Rep. 6 Co. 7. Cr. Jac. 34. 1 Leon. 119, 120. 2 Roll. Prerog. le Roy 200. 8 Co. 167. 21 Ed. 4 46. 8 Co. 56. Roll. tit. Prerog. 201. 10 Co. 64. 9 Co. the Earl of Salop's Caſe. 1 Inſt. 121. b. Moor 421. 2 Roll. 125. This Term the Court gave their Judgment, That the Advowſon did well paſs. In this Grant there are as large Words, and the ſame Words that are in Whiſtler's Caſe, 10 Rep. and the King is not here deceived, neither in the Value nor in his Title. And Judgment was given accordingly.

## Furnis & Waterhouſe. ( 29. )

IT was moved for a Superſedeas to ſtay Proceedings upon a Grand Cape in Dower, quia erronice emanavit: becauſe the Return of the Summons was not according to the Stat. of 31 Eliz. cap. 3. the Stat. is, after Summons. 2. The Land lieth in a Hill called Heriock: And the Return is of a Proclamation of Summons at the Pariſh-Church of Halifax: And it does not appear that the Land lies within that Pariſh. 3. The Return is, proclamari feci ſecundum formam Statuti: And it is not returned to have been made upon the Land: Hob. 133. Allen and Walter. Theſe were all held erroneous; and the Grand Cape was ſuperſeded. Dower. *Grand Cape, &c.* See 6 *Mod.* 4. *Poſt*, 248. 1 *Lev.* 105. 1 *Salk.* 216. 217.

Term.

# Term. Paſch. 26 Car. II. in Com. Ban.

S. C. 2 *Mod.* 23. (30.) Naylor *verſus* Sharply *and other Coroners of the County-Palatine of* Lancaſter.

A Man brings an Action of Debt againſt B. Sheriff of the County-Palatine of Lancaſter, and ſues him to an Outlawry upon mean Proceſs, and has a Capias directed to the Chancery of the County-Palatine, who makes a Precept to the Coroners of the County, being ſix in all, to take his Body, and have him before the King's Juſtices of the Court of Common Pleas at Weſtminſter ſuch a Day. One of the Coroners being in Sight of the Defendant, and having a fair Opportunity to arreſt him, doth it not: But they all return Non eſt inventus, though he were eaſie to be found, and might have been taken every Day. Hereupon the Plaintiff brings an Action againſt the Coroners and lays his Act on in Middleſex; and has a Verdict for 100 l. Serj. Baldwin moved in Arreſt of Judgment: That the Action ought to have been brought in Lancaſter: He agreed to the Caſes put in Bulwer's Caſe 7 Rep. where the Cauſe of Action ariſes equally in two Counties; but here all that the Coroners do, ſubſiſts and determines in the County-Palatine of Lancaſter; for they make a Return to the Chancery of the County-Palatine only, and it is he that makes the Return to the Court. He inſiſted upon Dyer 38, 39, 40. Huſſe and Gibbs. 2. He ſaid this Action is grounded upon two Wrongs, one the not arreſting him when he was in Sight; the other for returning Non eſt inventus, when he might eaſily have been taken: Now for the Wrong of one, all are charged, and entire Damages given. He ſaid two Sheriffs make but one Officer, but the Caſe of Coroners is different: Each of them is reſponſible for himſelf only, and not for his Companion. Serjeant Turner and Pemberton contra.

*Hob.* 209. 2 *Cro.* 533.

tra. They ſaid the Action was well brought in Middleſex, becauſe the Plaintiff's Damage aroſe here, viz. by not having the Body here at the Day. They cited Bulwer's Caſe, and Dyer 159. b. The Chancery returns to the Court the ſame Anſwer that the Coroners return to him, ſo that their falſe Return is the cauſe of Prejudice that accrues to the Plaintiff here. The Ground of this Action is the Return of Non eſt inventus, which is the Act of them all: That one of them ſaw him, and might have arreſted him, and that the Defendant was daily to be found, &c. are but mentioned as Arguments to prove the falſe Return. And they conceived an Action would not lie againſt one Coroner, no more than againſt one Sheriff in London, York, Norwich, *&c.* But to the firſt Exception taken by Baldwin, they ſaid, Admitting the Action laid in another County than where it ought, yet after Verdict it is aided by the Statute of 16 & 17 Car. 2. If the *Venire* come from any Place of the County where the Action is laid: It is not ſaid, In any Place of the County where the Cauſe of Action ariſeth: Now this Action is laid in Middleſex, and ſo the Trial by a Middleſex Jury good, let the Cauſe of Action ariſe where it will. Per Cur'. That Statute doth not help your Caſe; for it is to be intended when the Action is laid in the proper County, where it ought to be laid, which the Word proper County implies. But they inclined to give Judgment for the Plaintiff upon the Reaſons given by Turner and Pemberton. Adjournatur.

*Stat.* 16 & 17 *Car.* 2. *c.* 8. *ſect.* 1. *Ante* 37.

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## Bird & Kirke.

( 31. )

S. C. 2 *Mod.* 32. *Kren, &c.* 2 *Danv.* 199. *pl.* 8. 205. *pl.* 5. Copyhold. See 1 *Sid.* 360. 1 *Saund.* 149.

IT was reſolved in this Caſe by the whole Court, 1. That if there be Tenant for Life, the Remainder for Life, of a Copyhold, and the Remainder-man for Life enter upon the Tenant for Life in Poſſeſſion, and make a Surrender, that nothing at all paſſeth hereby; for by his Entry he is a Diſſeiſor; and has no cuſtomary Eſtate in him, whereof to make a Surrender. 2. That when Tenant for Life of a Copyhold ſuffers a Recovery as Tenant in Fee, that this is no Forfeiture

feiture of his Estate; for the Freehold not being concern'd, and it being in a Court-Baron, where there is no Estoppel, and the Lord that is to take Advantage of it, if it be a Forfeiture, being Party to it, it is not to be resembled to the Forfeiture of a Fee-Tenant: That Customary Estates have not such accidental Qualities as Estates at Common Law have, unless by special Custom. 3. That if it were a Forfeiture, of this, and all other Forfeitures committed by Copyholders, the Lord only, and not any of those in Remainder, ought to take Advantage. And they gave Judgment accordingly. North Chief Justice said, That where it is said in King and Loder's Case in Cro. Car. That when Tenant for Life of a Copyhold surrenders, &c. that no Use is left in him, but whosoever is afterward admitted, comes in under the Lord: That that is to be understood of Copyholds in such Manors, where the Custom warrants only Customary Estates for Life; and is not applicable to Copyholds granted for Life, with a Remainder in Fee. Note.

4 *Co.* 32.
9 *Co.* 107.
*Cro. Car.* 205, 304.
1 *Jon.* 229.
2 *Rol. Abr.* 462.
See 2 *Danv.* 188.

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( 32. ) Anonymus.

Incumbent.

A Writ of Annuity was brought upon a Prescription against the Rector of the Parish-Church of St. Peter in, &c. The Defendant pleads, That the Church is overflown with the Sea, &c. The Plaintiff demurs. Serjeant Nudigate pro Querente. The Declaration is good, for a Writ of Annuity lies upon a Prescription against a Parson, but not against an Heir: F. N. B. 152. Rastall 32. The Plea of the Church being drowned, is not good: At best it is no more than if he had said, That Part of the Glebe was drowned: It is not the Building of the Church, nor the consecrated Ground, in respect whereof the Parson is charged; but the Profits of the Tithes and the Glebe. Though the Church be down, one may be presented to the Rectory: 21 H. 7. 1. 10 H. 7 13. 16 H. 7. 9. and Lutterel's Case, 4 Rep. Wilmote contra. The Parson is charged as Parson of the Church of St. Peter; we plead in Effect, That there is no such Church,

Church.

and he confeſſeth it: 21 Ed. 4. 83. Br. Annuity 39. 21 Ed. 4. 20. 11 H. 4. 49. We plead, That the Church is ſubmerſa, obruta, &c. which is as much a Diſſolution of the Rectory, as the Death of all the Monks is a Diſſolution of an Abbathy. It may be objected, That the Defendant has admitted himſelf Rector by pleading to it: But I anſwer, 1. An Eſtoppel is not taken Notice of, unleſs relied on in Pleading. 2. The Plaintiff by his Demurrer has confeſſed the Fact of our Plea. By which Means the Matter is ſet at large, though we were eſtopped. The Court was clearly of Opinion for the Plaintiff. The Church is the Cure of Souls, and the Right of Tithes. If the material Fabrick of the Pariſh-Church be down, another may be built, and ought to be. Judicium pro Quer', niſi, &c. Church.

# Term. Trin. 27 Car. II. in Com. Ban.

## Vaughton *verſus* Atwood, *& alios.*

( 33. )
S. C. 2 *Mod.* 56.
2 *Danv.* 431. *pl.* 14.
Victuals.
See *Cro. Jac.* 555.
*Palm.* 211.
*Raym.* 232.
*Ante*, 37, 85.
1 *Lev.* 96, 97.

TRespaſs for taking away ſome Fleſh-meat from the Plaintiff, being a Butcher. The Defendant juſtifies by Virtue of a Cuſtom of the Manor of, &c. That the Homage uſed to chuſe every Year two Surveyors, to take Care that no unwholſome Victuals were ſold within the Precinct of that Manor; and that they were ſworn to execute their Office truly for the ſpace of a Year; and that they had Power to deſtroy whatever corrupt Victuals they found expoſed to Sale: And that the Defendants, being choſen Surveyors, and ſworn to execute the Office truly, examining the Plaintiff's Meat (who was alſo a Butcher) found a Side of Beef corrupt and unwholſome, and that therefore they took it away and burnt it, Prout eis bene licuit, &c. The Plaintiff demurs.

North. This is a Caſe of great Conſequence, and ſeems doubtful. It were hard to diſallow the Cuſtom, becauſe the Deſign of it ſeems to be for the Preſervation of Mens Health. And to allow it, were to give Men too great a Power of ſeizing and deſtroying other Men's Goods. There is an Aletaſter appointed at Leets, but all his Office is, to make Preſentment at the Leet, if he finds it not according to the Aſſize. Wyndham, Atkins and Ellis. It is a good reaſonable Cuſtom: It is to prevent Evil, and Laws for Prevention are better than Laws for Puniſhment. As for the great Power that it ſeems to allow to theſe Surveyors, it is at their own Peril if they deſtroy any Victuals that are not really corrupt; for in an Action, if they juſtify by Virtue of the Cuſtom, the Plaintiff may take Iſſue, That the Victuals were not corrupt. But here the Plaintiff has confeſſed it by the Demurrer. Atkyns ſaid, If the Surveyors were not reſponſible, the Homage that put them in, muſt anſwer for them, according to the Rule of Reſpondeat ſuperior. Judgment was given for the ~~Plaintiff~~ Defendant, unleſs, &c.

## Thredneedle & Lynham's *Case*.

( 34. )
S. C. 2 *Mod.* 57.

UPon a ſpecial Verdict, the Caſe was thus. The Jury found, That the Lands in the Declaration are, and time out of Mind had been, Parcel of the Demeſnes of the Manor of Burniel, in the County of Cornwall; which Manor conſiſts of Demeſnes, viz. Copyhold Tenements demiſable for one, two, or three Lives, and Services of divers Freehold Tenants: That within the Manor of Burniel, there is another Manor called Trecaer, conſiſting likewiſe of Copyholds and Freeholds; and that the Biſhop of Exeter held both theſe Manors in the Right of his Biſhoprick. Then they find the Statute of 1 Eliz. in hæc verba. They find that the old accuſtomed yearly Rent, which uſed to be reſerved upon a Demiſe of theſe two Manors, was 67 l. 1 s. and 5 d. Then they find that Joſeph Hall, Biſhop of Exeter, demiſed theſe two Manors to one Prowſe for 99 Years, determinable upon three Lives, reſerving the old and accuſtomed Rent of 67 l. 1 s. and 5 d. that Prowſe, living the Ceſtuy que vies, aſſigned over to James Prowſe the Demeſnes of the Manor of Trecaer, for ; that afterwards he aſſigned over all his Intereſt in both Manors to Mr. Noſworthy, excepting the Demeſnes of Trecaer, then in the Poſſeſſion of James Prowſe: That Mr. Noſworthy, when two of the Lives were expired, for a Sum of Money by him paid to the Biſhop of Exeter, ſurrendred into his Hands both the ſaid Manors, excepting what was in the Poſſeſſion of James Prowſe; and that the Biſhop (Joſeph Hall's Succeſſor) redemiſed unto him the ſaid Manors, excepting the Demeſnes of Trecaer, and excepting one Meſſuage in the Occupation of Robert ; and excepting one Farm, parcel of the Manor of Burniel, for three Lives, reſerving 67 l. 1 s. and 5 d. with a Nomine Pœnæ: And whether this ſecond Leaſe was a good Leaſe, and the 67 l. 1 s. and 5 d. the old and accuſtomed Rent, within the Intention of the Stat. of 1 Eliz. was the Queſtion. After ſeveral Arguments at the Bar, it was argued at the Bench in Michaelmas-Term, Anno 26 Car. 2. And the Court was divided, viz. Vaughan and Ellis, againſt the Leaſe; Atkyns and Wyndham for it. This Term North, Chief Juſtice, delivered his Opinion, in which he agreed with Atkyns and Wyndham; ſo that

See *Stat.* 1 *Eliz. c.* 19. *ſect.* 26.

*Co. Lit.* 44. 5 *Co.* 5. 1 *Cro.* 95.

Judgment was given in Maintenance of the Leaſe; and the Judgment was affirmed in the King's Bench upon a Writ of Erroꝛ.

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## *The Chapter of the Collegiate Church of* Southwell *verſus the Biſhop of* Lincoln, *and* J. S. *Incumbent*, &c.

( 35. )
S. C. 2 *Mod.* 56.

Dean, &c. See *Stat.* 13 *Eliz. c. Poſt*, 230, 248, 253.

IN a Quare impedit the Incumbent's Title was under a Gꝛant made by the Plaintiffs, who were ſeiꝛed of the Advowſon ut de uno groſſo, in the Right of their Church, of the next Avoidance, one Eſco being then Incumbent of their Preſentation, to Edward King, from whom by mean Aſſignments it came to Elizabeth Bley, who after the Death of Eſco preſented the Defendant.

Upon a Demurrer theſe Points came in Queſtion: 1. Whether the Gꝛantoꝛs were within the Statute of the 13th of Eliz. oꝛ not? Whether a Gꝛant of a next Avoidance be reſtrained by the Statute? If the Gꝛant be void, Whether it be void ab initio, oꝛ when it becomes ſo? And, 4. Whether the Statute of the 13th of Eliz. ſhall be taken to be a general Law? Foꝛ it is not pleaded. Serjeant Jones, foꝛ the firſt Point, argued, That the Gꝛantoꝛs are within the Statute; the Woꝛds are Deans and Chapters, which he ſaid might well be taken ſeveꝛally; foꝛ of this Chapter there is no Dean. If they were to be taken jointly, then a Dean were not within this Law, in reſpect of thoſe Poſſeſſions, which he holds in the Right of his Deanry: But the ſubſequent general Woꝛds do certainly include them; and would extend even to Biſhops, but that they are ſupeꝛioꝛ to all that are expꝛeſſed by Name. Foꝛ the ſecond, He ſaid the Statute reſtrains all Gifts, Gꝛants, &c. other than ſuch upon which the old Rent, &c. He cited Cro. Eliz. 440. 5 Co. the Caſe of Eccleſiaſtical Perſons. 10 Co. the Earl of Salisbury's Caſe. Foꝛ the third Point, he held it void ab initio; it muſt be ſo, oꝛ good foꝛ ever: Foꝛ here is no Dean, after whoſe Death it may become void; as

in Hunt and Singleton's Case; the Chapter in our Case never dies. For the fourth Point, he argued, That it is a general Law, because it concerns all the Clergy: Holland's Case, 4 Rep. and Dumpor's Case, Ibid. 120 b. Willmote contra. North, Chief Justice, Atkyns, Wyndham and Ellis Justices, all agreed upon the three Points as Serjeant Jones had argued. Atkyns doubted whether the 13th of Eliz. were a general Law, or not; but was over-ruled. They all agreed, That the Action should have been brought against the Patron, as well as against the Ordinary, and the Incumbent; but that being only a Plea in Abatement, That the Defendant has waived the Benefit thereof by pleading in Bar. And Judgment was given for the Plaintiff, Nisi causa. &c. Hunt and Singleton's Case being mentioned, Atkyns said, he thought it a hard Case; considering, That the Dean and the Chapter were all Persons capable, that a Grant should hold in Force as long as the Dean lived, and determine then. He thought, they being a Corporation aggregate of Persons, who were all capable, that there was no Difference betwixt that Case and this. Ellis said, That in Floyd and Gregorie's Case, reported in Jones, it was made a Point; and that Jones in his Argument, denied the Case of Hunt and Singleton: He said, That himself, and Sir Rowland Wainscott reported it, and that nothing was said of that Point; but that my Lord Coke followed the Report of Serjeant Bridgeman, who was three or four Years their puisne, and that he mistook the Case.

*Ante*, 38.

6 *Co.* 25.

## Milword & Ingram.

(36.)
S. C. 2 *Mod.* 43.

*Assumpsit.*

THE Plaintiff declares in an Action of the Case upon a Quantum meruit for forty Shillings, and upon an Indebitat. Assumpsit for forty Shillings likewise. The Defendant acknowledged the Promises; but further says, That the Plaintiff and he accounted together for divers Sums of Money; and that upon the foot of the Account, the Defendant was found to be indebted to the Plaintiff in three Shillings, and that the Plaintiff, in Consideration that the Defendant promised to pay him those three Shillings, discharged him of all Demands. The Plaintiff demurred. The Court gave Judgment against the

*Poſt*, 262. the Demurrer: 1. They held, That if two Men, being mutually indebted to each other, do account together, and the one is found in Arrear ſo much, and there be an expreſs Agreement to pay the Sum found to be in arrear, and each to ſtand diſcharged of all other Demands; that this is a good Diſcharge in Law, and the Parties cannot reſort to the original Contracts. But North, Chief Juſtice, ſaid, If there were but one Debt betwixt them, entring into an Account for that would not determine the Contract. 2. They held alſo, That
*Poſt*, 210. any Promiſe might well be diſcharged by Parol, but not after it is broken, for then it is a Debt.

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## Jones & Wait.

(37.)
S. C. 2 *Mod.* 47, 48. *Lever* verſus *Hoſier*. Common Recovery. See *Poſt*, 250.

Shrewsbury and Cotton are Towns adjoining, Sir Samuel Jones is Tenant in Tail of Lands in both Towns: Shrewsbury and Cotton are both within the Liberties of the Town of Shrewsbury. Sir Samuel Jones ſuffers a Common Recovery of all his Lands in both Mills; but the Præcipe was of two Meſſuages and Cloſes thereunto belonging (theſe were in Shrewsbury) and of, &c. (mentioning thoſe in Cotton) lying and being in the Mill of Shrewsbury, and the Liberties thereof. And whether by this Recovery the Lands lying in Cotton, which is a diſtinct Mill of it ſelf, not named in the Recovery, paſs or not, was the Queſtion. Serjeant Jones argued againſt the Recovery. He cited Cro. Jac. 575. in Monk and Butler's Caſe, and Cro. Car. 269, 270, and 276. He ſaid the Writ of Covenant, upon which a Fine is levied, is a perſonal Action; but a Common Recovery is a real Action, and the Land it ſelf demanded in the Præcipe. There is no Precedent, he ſaid, of ſuch a Recovery. He cited a Caſe,
*Poſt*, 251. Hill. 22 & 23 Car. 2. Rot. 223. Hutton 106. and March's Reports, one Johnſon and Baker's Caſe, which, he ſaid, was the Caſe in Point, and reſolved for him. But the Court were all of Opinion, That the Lands in Cotton paſſed. And gave Judgment accordingly. Ellis ſaid, If the Recovery were erroneous, at leaſt, they ought to allow of it till it were reverſed.

## Lepping & Kedgewin. (38.)

AN Action in the Nature of a Conſpiracy was brought by the Plaintiff againſt the Defendant; in which the Declaration was inſufficient. The Defendant pleaded an ill Plea; but Judgment was given againſt the Plaintiff upon the Inſufficiency of the Declaration. Which ought to have been entred, Quod Defendens eat inde ſine die; but by Miſtake, or out of Deſign, it was entred, Quia placitum prædictum, in forma prædicta ſuperius placitat. materiaque in eodem contenta, bonum & ſufficiens in lege exiſtit, &c. ideo conſideratum eſt per Cur', quod Quer' nil capiat per billam. The Plaintiff brings a new Action, and declares aright. The Defendant pleads the Judgment in the former Action, and recites the Record verbatim as it was. To which the Plaintiff demurred. And Judgment was given for the Plaintiff, Niſi cauſa, &c. North, Chief Juſtice. There is no Queſtion, but that if a Man miſtakes his Declaration, and the Defendant demurs, the Plaintiff may ſet it right in a ſecond Action. But here it is objected, That the Judgment is given upon the Defendant's Plea. Suppoſe a Declaration be faulty, and the Defendant take no Advantage of it, but pleads a Plea in Bar; and the Plaintiff takes Iſſue, and the Right of the Matter is found for the Defendant; I hold, That in this Caſe the Plaintiff ſhall never bring his Action about again: For he is eſtopped by the Verdict. Or ſuppoſe ſuch a Plaintiff demur to the Plea in Bar; there, by his Demurrer, he confeſſeth the Fact, if well pleaded; and this eſtops him as much as a Verdict would. But if the Plea were not good, then there is no Eſtoppel. And we muſt take Notice of the Defendant's Plea; for upon the Matter, as that falls out to be good, or otherwiſe, the ſecond Action will be maintainable, or not. The other Judges agreed with him in omnibus.

Eſtoppel. 8 Co. 62. 1 Cro. 545.

Atkinſon

( 39. ) Atkinſon & Rawſon.

Executor. THE Plaintiff declares againſt the Defendant as Executor. The Defendant pleads, That the Teſtator made his Will, and that he the Defendant, Suſcepto ſuper ſe onere Teſtamenti prædict', &c. did pay divers Sums of Money due upon Specialties, and that there was a Debt owing by the Teſtator to the Defendant's Wife; and that he retained ſo much of the Teſtator's Goods, as to ſatisfy that Debt, and that he had no other Aſſets: The Plaintiff demurred, becauſe for ought appears, the Defendant is an Executor de ſon tort; and then he cannot retain for his own Debt. The Plaintiff's naming him in his Declaration, Executor of the Teſtament of, &c. will not make for him; for that he does of Neceſſity: He cannot declare againſt him any other Way; and of that Opinion was all the Court, viz. That he ought to entitle himſelf to the Executorſhip, that it may appear to the Court, that he is ſuch a Perſon as may retain. And accordingly Judgment was given for the Plaintiff.

5 Co: 30. Yelv. 137.

# Term. Hill. 27 & 28 Car. II. in C. B.

## Smith's *Caſe*.

( 40. )

S. C. 2 *Mod.* 204. 3 *Keb.* 601. Coſinage. *Stat.* 21 *H.* 8. *cap.* 5. *ſect.* 3.

A Man dies, leaving Iſſue by two ſeveral Venters, viz. by the firſt three Sons, and by the ſecond two Daughters. One of the Sons dies inteſtate; the elder of the two ſurviving Brothers takes out Adminiſtration; and Sir Lionel Jenkins, Judge of the Prerogative Court, would compel the Adminiſtrator to make Diſtribution to the Siſters of the Half-blood. He prayed a Prohibition, but it was denied, upon Advice by all the Judges: For that the Siſter of the Half-blood, being a Kin to the Inteſtate, and not in remotiori gradu than the Brother of the Whole-blood, muſt be accounted in equal Degree.

## Anonymus.

( 41. )

Attorney. See 1 *Salk.* 13, 14, 15, & 21. 2 *Mod.* 306. 5 *Mod.* 349, 405. 6 *Mod.* 30, 90, 137, 185, 169, 261.

AN Action was brought againſt four Men, viz. two Attornies and two Solicitors, for being Attornies and Solicitors in a Cauſe againſt the Plaintiff in an inferior Court, falſo & malitioſe, knowing that there was no Cauſe of Action againſt him: And alſo, for that they ſued the Plaintiff in another Court, knowing that he was an Attorney of the Common Pleas, and privileged there. Per tot. Cur', There is no Cauſe of Action. For put the Caſe as ſtrong as you will: Suppoſe a Man be retained as an Attorney to ſue for a Debt, which he knows to be releaſed, and that himſelf were a Witneſs to the Releaſe; yet the Court held, That the Action would not lie; for that what he does, is only as Servant to another, and in the Way of his Calling and Profeſſion. And for ſuing an Attorney in an inferior Court; that (they ſaid) was no

Cauſe of Action: For who knows, Whether he will inſiſt upon his Privilege, or not? And if he does, he may plead it, and have it allow'd.

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(42.) Fits & al', *verſus* Freeſtone.

1 *Sid.* 236. *Aſſumpſit.* *Ante*, 206. *pl.* 36.

IN an Action grounded upon * a Promiſe in Law, Payment before the Action brought is allowed to be given in Evidence upon Non aſſumpſit. But where the Action is grounded upon a ſpecial Promiſe, there Payment, or any other legal Diſcharge, muſt be pleaded.

* See 6 *Mod.* 131. *per Holt*, There is no ſuch Thing as a Promiſe in Law.

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(43.) Bringloe *verſus* Morrice.

Licence.

IN Treſpaſs for immoderately riding the Plaintiff's Mare: The Defendant pleaded, That the Plaintiff lent to him the ſaid Mare, & licentiam dedit eidem æquitare, upon the ſaid Mare; and that by Virtue of this Licence, the Defendant and his Servant alternatim, had rid upon the Mare. The Plaintiff demurs. Serjeant Skipwith pro Quer'. The Licence is perſonal and incommunicable; as 12 H. 7. 25. 13 H. 7. 13. the Dutcheſs of Norfolk's Caſe, 18 Ed. 4. 14. Serjeant Nudigate contra. This Licence is given by the Party, and not created by Law, wherefore no Treſpaſs lieth: 8 Rep. 146, 147. per Cur', The Licence is annexed to the Perſon, and cannot be communicated to another: For this Riding is Matter of Pleaſure. North took a Difference, where a certain Time is limited for the Loan of the Horſe, and where not. In the firſt Caſe, The Party to whom the Horſe is lent, hath an Intereſt in the Horſe during that Time, and in that Caſe his Servant may ride; but in the other Caſe not. A Difference was taken betwixt hiring a Horſe to go to York, and borrowing a Horſe: In the firſt Place, The Party may ſet his Servant up; in the ſecond not.

# Term. Paſch. 28 Car. II. in Com. Ban.

## Anonymus.

( 44. )

S.C. 2 *Mod.* 172, 173. 2 *Danv.* 512. Baron and Feme. See *Cro. Eliz.* 27. *F. Deviſe* 28. *Cro.Car.* 219, 220, 376, 597. *Moor.* 339, 340. 2 *And.* 92. 1 *Rol. Abr.* 912. *N.* 3, 4, 5. *Hob.* 17. *Nelſ. Lutw.* 10.

A Man upon Marriage covenants with his Wife's Relations, to let her make a Will of ſuch and ſuch Goods: She made a Will accordingly by her Husband's Conſent, and died. After her Death, her Will being brought to the Prerogative-Court to be proved, a Prohibition was prayed by the Husband, upon this Suggeſtion, That the Teſtatrix was fœmina viro cooperta, and ſo diſabled by the Law to make a Will. Per Cur'. Let a Prohibition go, Niſi cauſa, &c. North. When a Queſtion ariſeth concerning the Juriſdiction of the Spiritual Court, as, Whether they ought to have the Probate of ſuch a Will? Whether ſuch a Diſpoſition of a perſonal Eſtate be a Will, or not? Whether ſuch a Will ought to be proved before a Peculiar, or before the Ordinary? Whether by the Archbiſhop of one Province, or another, or both? And, What ſhall be Bona notabilia? In theſe, and the like Caſes, the Common Law retains the Juriſdiction of determining: There is no Queſtion, but that here is a good Surmiſe for a Prohibition; to wit, That the Woman was a Perſon diſabled by the Law to make a Will: The Husband may by Covenant depart with his Right, and ſuffer his Wife to make a Will; but whether he hath done ſo here, or not, ſhall be determined by the Law; we will not leave it to their Deciſion: It is too great an Invaſion upon the Right of the Husband. In this Caſe the Spiritual Court has no Juriſdiction at all; they have the Probate of Wills, but a Feme Covert cannot make a Will. If ſhe diſpoſeth of any Thing by her Husband's Conſent, the Property of what ſhe ſo diſpoſeth, paſſeth from him to her Legatee, and it is the Gift of the Husband. If the Goods were given into another's Hands in Truſt for the Wife; ſtill her Will is but a Declaration of the Truſt, and not a Will, properly ſo called. But of Things in Action, and Things that a Feme Covert hath as Executrix, ſhe may make a Will by her Huſband's

3 *Cro.* 27. 1 *Cro.* 220.

See 2 *Danv.* 512, 513.

band's Conſent: And ſuch a Will, being properly a Will in Law, ought to be proved in the Spiritual Court. In the Caſe in queſtion a Prohibition was granted.

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( 45. ) —— *againſt the* Hamburgh *Company.*

*London.* Foreign Attachment.

THE Plaintiff brought an Action of Debt in London againſt the Hamburgh Company, who not appearing upon Summons, and a Nihil being returned againſt them, an Attachment was granted, to attach Debts owing to the Company, in the Hands of fourteen ſeveral Perſons: By Certiorari the Cauſe was removed into this Court; and, Whether a Procedendo ſhould be granted, or not? Was the Queſtion.

Serjeant Goodfellow, Baldwin and Barrell argued, That a Debt owing to a Corporation is not attachable. Serjeant Maynard and Scroggs contra. Cur'. We are not Judges of the Cuſtoms of London; nor do we take upon us to determine, Whether a Debt owing to a Corporation, be within the Cuſtom of foreign Attachment, or not. This we judge and agree in, That it is not unreaſonable that a Corporation's Debts ſhould be attached. If we had judged the Cuſtom unreaſonable, we could and would have retained the Cauſe: For we can over-rule a Cuſtom, though it be one of the Cuſtoms of London, that are confirmed by Act of Parliament, if it be againſt natural Reaſon. But becauſe in this Cuſtom we find no ſuch Thing, we will return the Cauſe. Let them proceed according to the Cuſtom, at their Peril. If there be no ſuch Cuſtom, they that are aggrieved may take their Remedy at Law. We do not dread the Conſequences of it. It does but tend to the Advancement of Juſtice: And accordingly a Procedendo was granted per North Chief Juſtice, Wyndham and Ellis. Atkyns aberat.

Anonymus.

## Anonymus. ( 46. )

PEr Cur'. If a Man is indebted upon the Statute of Recuſancy, Conformity is a good Plea; but not, if an Action of Debt be brought. Recuſancy, &c. See 2 *Show. Rep.* 331, 332.

## Parten & Baſeden's *Caſe*. ( 47. )

PArten brought an Action of Debt in this Court againſt the Teſtator of Baſeden, the now Defendant; and had Judgment. After whoſe Death there was a Devaſtavit returned againſt the Defendant Baſeden, his Executor: He appeared to it, and pleaded, and a ſpecial Verdict was found, to this Effect, viz. That the Defendant Baſeden was made Executor by his Will, and dwelt in the ſame Houſe, in which the Teſtator lived and died; and that before Probate of the Will he poſſeſs'd himſelf of the Goods of the Teſtator, prized them, inventoried them, and ſold Part of them, and paid a Debt, and converted the Value of the Reſidue to his own Uſe; that afterwards, before the Ordinary he refuſed, and that upon his Refuſal Adminiſtration was committed to the Widow of the Deceaſed. And the Queſtion was, Whether or no the Defendant ſhould be charged to the Value of the whole perſonal Eſtate, or only for as much as he converted. Executors. *Vide* 5 *Mod.* 136, 137.

Serjeant Barrell argued, That he ought to be charged for the Whole, becauſe, 1. He is made Executor by the Will; and he is thereby compleat Executor before Probate, to all Intents but bringing of Actions. 2. He has Poſſeſſion of the Goods, and is chargeable in reſpect of that. 3. He cauſed ſome to be ſold, and paid a Debt; which is a ſufficient Adminiſtration. There is found to diſcharge him, 1. His Refuſal before the Ordinary. But that being after he had ſo far intermeddled, avails nothing: Henſloe's Caſe, 9 Co. 37. An Executor de ſon tort, he confeſſed, ſhould not be charged for more than he converted; and ſhall diſcharge himſelf by delivering over the reſt to the rightful Executor. But the Caſe is different

rent of a rightful Executor, that has taken upon him the Burthen of the Will. The ſecond Thing found to diſcharge him, is the granting of Adminiſtration to another; but that is void, becauſe he is a rightful Executor that has adminiſtred: In which Caſe the Ordinary has no Power to grant Adminiſtration: Hob. 46. Keble and Osbaſton's Caſe. The third Thing found to diſcharge him, is the Delivery of the Goods over to the Adminiſtrator; but that will not avail him, for himſelf became reſponſible by his having Poſſeſſion, and he cannot diſcharge himſelf by delivering the Goods over to a Stranger, that has nothing to do with them. If it be objected, That by this Means two Perſons will be chargeable in reſpect of the ſame Goods: I anſwer, That Payment by either diſcharges both: Cro. Car. Whitmore and Porter's Caſe.

*Plow.* 276.

The Court was of Opinion, That the committing of Adminiſtration in this Caſe is a meer void Act. A great Inconvenience would enſue, if Men were allowed to adminiſter as far as they would themſelves, and then to ſet up a beggarly Adminiſtrator; they would pay themſelves their own Debts, and deliver the Reſidue of the Eſtate to one that's worth Nothing, and cheat the reſt of the Creditors. If an Adminiſtrator bring an Action, it is a good Plea to ſay, That the Executor made by the Will has adminiſtred. Accordingly Judgment was given for the Plaintiff.

See 2 *Lev.* 55, 90, 182. 1 *Lev.* 157, 186, 305. 1 *Sid.* 280, 293, 372. 2 *Saund.* 148. 1 *Rol.* 919. 2. *Ante*, 62.

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( 48. ) Major & Stubbing, *verſus* Birde & Harriſon.

Abatement.

Reſolved, That a Plea may be a good Plea in Abatement, though it contain Matter that goes in Bar; they relied upon the Caſe in 10 H. 7. fol. 11. which they ſaid was a Caſe in Point, and Salkell and Skelton's Caſe, 2 Roll. Rep. And Judgment was given accordingly.

See 2 *Mod.* 63, 64. 1 *Show.* 4. 1 *Lev.* 312. 6 *Mod.* 102. 5 *Mod.* 131, 146. *Moor.* 692.

# Term. Trin. 28 Car. II. in Com. Ban.

( 1. )

Bankrupts. *Ante*, 93.

PEr North, Chief Juſtice. If there are Accounts between two Merchants, and one of them becomes Bankrupt, the Courſe is not to make the other, who perhaps upon ſtating the Accounts, is found indebted to the Bankrupt, to pay the Whole that originally was intruſted to him, and to put him for the Recovery of what the Bankrupt owes him, into the ſame Condition with the reſt of the Creditors; but to make him pay that only which appears due to the Bankrupt on the Foot of the Account; otherwiſe it will be for Accounts betwixt them after the Time of the other's becoming Bankrupt, if any ſuch were.

## Wing & Jackſon.

( 2. )

County Court.

TReſpaſs, Quare vi & armis the Defendant inſultum fecit upon the Plaintiff, was brought in the County-Court; and Judgment there given for the Plaintiff. But it was reverſed here upon a Writ of Falſe Judgment, becauſe the County-Court, not being a Court of Record, cannot fine the Defendant, as he ought to be, if the Cauſe go againſt him, becauſe of the Vi & Armis in the Declaration; but an Action of Treſpaſs without thoſe Words will lie in the County-Court well enough.

Anonymus.

## Anonymus.

( 3. )
S.C. 2 *Danv.* 592. *pl.* 9. 604. *pl.* 3. Tithes. *Stat.* 2 *Ed.* 6. *c.* 13. *Vide Poph.* 197. *Yelv.* 86. *Cro. Jac.* 116. *Winch.* 2, 44. 1 *Vent.* 61. 3 *Bulſt.* 220, 240, *&c.* *Poſt*, 229, 259, *&c.*

A Vicar libell'd in the Spiritual Court for Tithes of young Cattle, and ſurmiſed, That the Defendant was ſeized of Lands in Middleſex, of which Pariſh he was Vicar, and that the Defendant had Common in a great Waſte, called Sedgemore-Common, as belonging to his Land in Middleſex; and put his Cattle into the ſaid Common. The Defendant prayed a Prohibition, for that the Land where the Cattle went was not within the Pariſh of Middleſex. The ſame Plaintiff libelled againſt the ſame Defendant for Tithes of Willow-Faggots; who ſuggeſts, to have a Prohibition, the Payment of 2 d. a Year to the Rector, for all Tithes of Willow. The ſame Plaintiff libelled alſo for Tithes of Sheep. The Defendant, to have a Prohibition, ſuggeſts, That he took them in to feed, after the Corn was reaped, Pro melioratione agriculturæ infra terras arabiles & non aliter.

2 *Danv.* 616. *P.* 3. 2 *Inſt.* 651. *Vide Savil.* 60.

As for the firſt of theſe, no Prohibition was granted, becauſe of that Clauſe in 2 Ed. 6. whereby it is enacted, That Tithes of Cattle feeding in a Waſte or Common, where the Pariſh is not certainly known, ſhall be paid to the Parſon, *&c.* of the Pariſh where the Owner of the Cattle lives.

For the ſecond, they held, That a Modus to the Rector is a good Diſcharge againſt the Vicar.

For the third, they held, That the Parſon ought not to have Tithe of the Corn and Sheep too, which make the Ground more profitable, and to yield more. Per quod, &c.

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## Ingram *verſus* Tothill, & Ren.

( 4. )
S.C. 2 *Mod.* 93, 281. 3 *Keb* 785. Heriot. *Vide Ante*, 63. *& Poſt*, 217. 3 *Mod.* 230. 4 *Mod.* 321. 6 *Mod.* 64. See *Co. Lit.* 471.

Replevin. Trevill leaſed to Ingram for ninety-nine Years, if Joan Ingram his Wife, Anthony and John Ingram his Sons, ſhould ſo long live, rendring an Heriot, or 40 s. to the Leſſor and his Aſſigns, at the Election of the Leſſor, his Heirs and Aſſigns, after their ſeveral Deaths ſucceſſive, as they are named in the Indenture. Trevill deviſeth the Reverſion. John dies, and then Joan dies; and the Queſtion was, Whether

ther or no a Heriot were due to the Deviſee upon the Death of Joan. The Court agreed that the Avowry was faulty, becauſe it does not appear thereby, whether Anthony Ingram was alive or not at the Time of the Diſtreſs taken; for if he were dead, the Leaſe would be determined. North. Though Anthony were alive, the Deviſee of Trevill could not diſtrain for the Heriot, for that the Reſervation is to him and his Aſſigns, and although the Election to have the Heriot or 40 Shillings be given to the Leſſor, his Heirs or Aſſigns, yet that will not help the Fault in the Reſervation. Ellis. There is another Fault, in the Pleading; for it is pleaded that Trevill made his Will in Writing; but it is not ſaid, that he died ſo ſeized; for if the Eſtate of the Deviſor were turned to a Right at the Time of his Death, the Will could not operate upon it. Alſo it is ſaid, that the Avowant made his Election, and that the Plaintiff habuit notitiam of his Election, but it is not ſaid by whom Notice was given: For theſe Cauſes Judgment was given for the Plaintiff. It was urged likewiſe againſt the Avowant, that no Heriot could be due in this Caſe, becauſe Joan did not die firſt, but the Courſe of Succeſſion is interrupted; and that a Heriot not being due of common Right, the Words of Reſervation ought to be purſued: but as to this the Court delivered no Opinion.

See *Cro. Car.* 313, 314. *Cro. El.* 521, 589, 590. 1 *Show.* 81. 1 *Jon.* 300. 1 *Sid.* 437. 1 *Vent.* 91. 2 *Saund.* 164, *&c.* 1 *Lev.* 295. 1 *Salk.* 356. *Nelſ. Luew.* 203, 416. 433, *&c.* *Co. Lit.* 47. 147. 1 *Leon.* 2. *Co. Lit.* 148. 3 *Co.* 2. 3 *Cro.* 53. *Plo.* 193. 431. 2 *Danv.* 543. 1.

## Ognell *verſus the Lord* Arlington, *Guardian of Sir* John Jacob. ( 5. )

UPon a Trial at Bar the Court delivered for Law to the Jury, That if there be Tenant by Elegit of certain Lands, and a Fine be levied of thoſe Lands, and five Years with Non-claim paſs, that the Intereſt of the Tenant by Elegit is bound, according to Saffyn's Caſe 5 Rep. otherwiſe, if the Land had not been actually extended. Alſo, That if an Inquiſition upon an Elegit be found, the Party before Entry has the Poſſeſſion, and a Fine with Non-claim ſhall bar his Right; for before actual Entry he may have Ejectione firmæ or Treſpaſs; and ſo not like to an Intereſſe termini. *Elegit.* 5 *Co.* 124. *a.*

( 6. )
1 *Sid.* 146.
1 *Keb.* 523 562.
Annuity.
*Co. Lit.* 146. a.
2 *Inſt.* 491.
2 *Cro.* 666.

## Barry & Trebeſwycke.

IF a Parſon have a Penſion by Preſcription, he may either bring an Action at the Common Law, or commence a Suit in the Spiritual Court; but if he brings a Writ of Annuity at the Common Law, he can never after ſue in the Spiritual Court, for that his Election is determined.

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( 7. )
S. C. 2 *Mod.* 70.
Common Recovery.

## Wakeman & Blackwell.

IN a Quare Impedit the Defendant pleaded a Recovery in this manner, viz. That John Wakeman Grandfather to the Plaintiff was ſeized in Fee of the Manor, to which, &c. and that a Præcipe was brought againſt one Prinne and Philpotts, adtunc tenentes liberi tenementi, &c. who appeared and vouched John Wakeman, &c. and that this Recovery was to the Uſe of J. S. under whom the Defendant claims.

Strode, pro Defendente: It is not neceſſary that the Tenant in a Common Recovery have a Freehold, at the Time of the Purchaſe of the Writ: If he have at the Time of the Return, it ſufficeth. 7 Ed. 3. 42. 7 Ed. 3. 70. Aſſ. of Nov. diſſ. 43 Ed. 3. 21. In theſe Authorities the Perſon againſt whom the Præcipe is brought, comes in by Right, after the Purchaſe, and before the Return of the Writ. But in 26 Ed. 3. 68. there is an Example, where the Tenant to the Præcipe comes in by Tort; but there is this Difference: If he comes to the Land by his own Act, be it by Right or by Wrong, there he makes the Writ good: Otherwiſe if he come to it by Act of Law. 8 Ed. 3. 22. a. Formedon. 25 H. 6. 4. The Reaſon why you ſhall not abate the Plaintiff's Writ by your own Act, is becauſe you cannot give him a better.

*Hob.* 262

The Demandant here is eſtopped to ſay, that there was not a Tenant to the Præcipe in this Recovery; for the Writ is but abatable, if brought againſt one that is not Tenant: And as long as it ſtands not abated, but is pleaded to, &c it ſhall conclude all that are Parties and Privies, and all claiming under them: 34 Ed. 3. F. tit. droit. 39. Here is in our Caſe an

Eſtoppel, with a Recompence: Wakeman the Grandfather, who was the firſt Vouchee in this Recovery, might have counterpleaded the Lien, and extoyted the Warranty; but having vouched over, he is paſt that Advantage, and is concluded, being made a Party by Voucher.

This being a Common Recovery, the Court will do all they can to make it good. A Fine is levied by Dedimus poteſtatem by Baron and Feme. The Commiſſioners did not return the Examination of the Wife; and that is the diſcriminating Difference, upon which depends, Whether the Wife ſhall be bound by the Fine, or not? 15 Ed. 4. 28 a. Lit. Sect. 670. 6 Ed. 3. 22. a. The Court muſt needs in this Caſe intend, that Prinne and Philpots came in by Conveyance, becauſe Wakeman came in upon the Voucher, which he would not have done, if there had not been a Lien. He cited Cro. Jac. 454. Lincoln College's Caſe, 3 Rep. 48. and Hob. 262. Duncomb and Wingfield's Caſe. To which Pemberton anſwered, That tunc tenens is a ſufficient Averment in the pleading of a Recovery, which is favoured in Law; but is not good alone, when in the ſame Sentence a Matter is ſet forth, that is inconſiſtent with it, and plainly contradictory, as in this Caſe: And of that Opinion was the Court. The Caſe in Hob they ſaid was upon a ſpecial Verdict; where many Things may be intended, which ſhall not be ſo in Pleading: And in Lincoln College's Caſe the Writ is ſaid to be brought againſt one Edward Chamberlain in one Part of the Record, and the Mother is ſaid to be Tenant in another Part of the Record, and by the other Party; but here in the ſame Sentence uno flatu, there is a flat Contradiction.

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## Burrow & Haggett.

(8.)
S. C. 2 *Mod.* 94.

Formedon. See *Nelſ. Lutw.* 304, 308.

Formedon in the Deſcender. The Defendant pleaded in Abatement of the Count, and took theſe Exceptions: 1. That the Demandant declares, That the Right deſcended to him after the Death of Leonard, as Mother and Heir to Leon. and Son and Heir of the Donee; but does not alledge that Leonard died without Iſſue: 8 Rep. 88. Buckmere's Caſe. In ancient Regiſters the Clauſe is, eo quod the Iſſue died without Iſſue: Co. Ent. 254. b. &c. Raſt. Entr. 365. C. Yelv.

227. Glaſſe and Gyll's Caſe, 9 Ed. 4. 36. A Man that entitles himſelf as Heir, muſt ſhew how he is Heir. Seyſe, contra. The Precedents are on our Side; and the Difference betwixt a Formedon in the Deſcender, and a Formedon in the Remainder or Reverter. In the former they do not mention the Dying without Iſſue of him after whoſe Death they claim: For the Count there is in effect only to ſet out their Pedigree; but in a Formedon in the Remainder or Reverter, it is otherwiſe: 39 Ed. 3. 27. Old Book of Entries 339. Tit. Formedon, Bar: Placito 3. Co. Lit. Mandevil's Caſe, 26 b. 7 H. 7. fol. 7. b. There our Caſe is put in expreſs Terms; the Exception taken to the Count there by Keble, is the ſame that is taken to ours here; and there it is over-ruled. North. I have looked into Precedents, and find the Count in this Caſe according to them. It is a plain and reaſonable Difference betwixt a Formedon in the Diſcender, and a Formedon in the Remainder or Reverter: Nor could the Demandant be Brother and Heir to Leonard, if Leonard had left Children, &c. Another Exception was, That the Demandant does not ſet forth, that he was Son and Heir of John, begotten on the Body of Jane his Wife; for it was a Gift in ſpecial Tail. But this was over-ruled; for in the Writ that is ſet forth, and in the Declaration, after the Words filio & hæredi prædict. Johannis, came an (&c.) which (&c.) let the Words of the Writ into the Count; and ſo it was held good. The Prothonotary ſaid, That the Forms of Counts were accordingly. And Judgment was given to anſwer over, Niſi cauſa, &c.

*Hob.* 51.

3 *Cro.* 341, 348.

1 *Sid.* 187.

Term.

# Term. Mich. 28 Car. II. in Com. Ban.

## Blythe *verſus* Hill.

( 9. )

S. C. 2 *Mod.* 136, 139. 2 *Keb.* 804. *Poſt*, 225. 2 *Danv.* 115. *pl.* 1. Accord.

DEbt upon an Obligation for the Payment of Money at a Day certain. The Defendant pleaded, That the Plaintiff, being deſirous to have the Money paid before the Day, took another Bond for the ſame Sum payable ſooner; and that this was in full Satisfaction of the former Bond: Upon this Plea the Plaintiff took Iſſue, and it was found againſt him. And Serjeant Maynard moved, That notwithſtanding this Verdict, Judgment ought to be given for the Plaintiff; for that the Defendant by his Plea has confeſſed the Action: And to ſay, That another Bond was given in Satisfaction, is nothing to the Purpoſe: Hob. 68. So that upon the whole it appears, that the Plaintiff has the Right, and he ought to have Judgment: 2 Cro. 139. 8 Co. 93. a. And Day was given to ſhew Cauſe why the Plaintiff ſhould not have Judgment. Vide infra hoc eodem Termino. Poſt. 225.

## Savill *againſt the Hundred of* ------.

( 10. )

Freſh Suit. 1 *Cro.* 267.

THE Plaintiff in an Action upon the Statute of Winton, had a Verdict; and it was moved in Arreſt of Judgment, that the felonious taking is not ſaid to be in the Highway: 2 Cro. 469, 675. North. An Action lies upon the Statute of Winton, though the Robbery be not committed in the Highway; to which the Court agreed: And the Prothonotaries ſaid, That the Entries were frequently ſo. Per quod, &c.

( 11. )
S.C. 2 *Mod.* 217.
Sheriffs.

## Calthrop & Philippo.

ONE J. S. had recovered a Debt againſt Calthrop, and procured a Writ of Execution to Philippo the then Sheriff of D. but before that Writ was executed, Calthrop procured a Superſedeas to the ſame Philippo; who when his Year was out, delivered over all the Writs to the new Sheriff, ſave this Superſedeas; which not being delivered, J. S. procures a new Writ of Execution to the new Sheriff: Upon which the Goods of Calthrop being taken, he brings his Action againſt Philippo, for not delivering over the Superſedeas. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Action would not lie, for that the Sheriff is not bound to deliver over a Superſedeas. 1. Becauſe it is not a Writ that has a Return. 2. Becauſe it is only the Sheriff's Warrant for not obeying the Writ of Execution. The Prothonotaries ſaid, That the Courſe was to take out a new Writ to the new Sheriff. Serjeant Strode argued, That the Superſedeas ought to be delivered over; becauſe the King's Writ to the old Sheriff is, Quod Com. prædict. cum pertinentiis, una cum rotulis, brevibus, memorandis & omnibus officium illud tangentibus, quæ in cuſtodia ſua exiſtunt, liberet, &c. Reg. 295. and 3 Co. 72. Weſtby's Caſe. Beſides, the Superſedeas is for the Defendant's Benefit; and there is no Reaſon why the Capias ſhould be delivered over, which is for the Plaintiff's Benefit, and not the Superſedeas, which is for the Defendant's. And he ſaid an Action will lie for not delivering over ſome Writs to the new Sheriff, though thoſe Writs are not returnable; as a Writ of Eſtrepement. The Court inclined to his Opinion; but it was adjourned to a further Day, on which Day it was moved.

( 12. )
S. C. 2 *Mod.* 138.

## Baſcawin & Herle *verſus* Cooke.

THo. Cook granted a Rent-charge of 200 l. per annum to Baſcawin and Herle for the Life of Mary Cook, Habend' to them, their Heirs and Aſſigns, ad opus & uſum of Mary; and in the Indenture covenanted to pay the Rent ad opus & uſum of Mary. Baſcawin and Herle upon this bring an Action of Covenant, and aſſign the Breach in not paying the Rent to themſelves, ad opus & uſum of Mary. The Defendant demurs: 1. Becauſe the Words in which the Breach is aſſign'd, contain a Negative pregnant. Baldwin for the Plaintiff; we aſſign the Breach in the Words of the Covenant. Cur' accord. 2. Becauſe the Plaintiff does not ſay that the Money was not paid to Mary; for if it were ſo, it would ſatisfie the Covenant. 3. This Rent-charge is executed to Mary by the Stat of Uſes, and ſhe ought to have diſtrained for it: For ſhe having a Remedy, the Plaintiffs, out of whom the Rent is transferred by the Statute, cannot bring this Action: Hereupon two Queſtions were made, 1. Whether this Remedy by Action of Covenant be transferred to Mary by the Stat. of Uſes or not? And 2dly, If not, whether the Covenant were diſcharged or not? North and Wyndham: When the Statute transfers an Eſtate, it tranſfers together with it ſuch Remedies only, as by Law are incident to that Eſtate, and not collateral ones. Atkyns accordant. There is a Clauſe in the Statute of 27 H. 8. c. 10. which gives the Ceſtuy que uſe of a Rent all ſuch Remedies, as he would have had, if the Rent had been actually and really granted to him: But that has Place only where one is ſeized of Lands, in Truſt that another ſhall have a Rent out of them; not where a Rent is granted to one to the Uſe of another. They agreed alſo that the Covenant was not diſcharged. And gave Judgment for the Plaintiff, Niſi, &c.

*Quære Stat.* 27. *H.* 8. c. 10.

9 *Co.* 61.

Higden

( 13. )

## Higden *verſus* Whitechurch, *Executor of* Dethicke.

Outlawry.

AUdita Querela. The Plaintiff declares, that himſelf and one Prettyman became bound to the Teſtator for the Payment of a certain Sum: That in an Action brought againſt him he was outlawed: That Dethick afterward brought another Action upon the ſame Bond againſt Prettyman, and had Judgment: That Prettyman was taken by a Cap. ad ſatisfaciend', and impriſoned, and paid the Debt, and was releaſed by Dethick's Conſent: Upon this Matter the Plaintiff here prays to be relieved againſt this Judgment and Outlawry. The Defendant proteſtando that the Debt was not ſatisfied, pleads the Outlawry in Diſability. The Plaintiff demurs. Baldw. for the Plaintiff. Non datur exceptio ejus rei, cujus petitur diſſolutio. He reſembled this to the Caſes of bringing a Writ of Error or Attaint, in neither of which Outlawry is pleadable. 3 Cr. 225. 7 H. 4. 39. 7 H 6. 44. Seyſe contra. Outlawry is a good Plea in Audita querela. 2 Cro. 425. 8 Co. 141. This Caſe is not within the Maxim that has been cited; a Writ of Error and Attaint is within it: For in both them the Judgment it ſelf is to be reverſed. But in an Audita querela you admit the Judgmeut to be good: Only upon ſome equitable Matter ariſing ſince, you pray that no Execution may be upon it: Vide 6 Ed. 4. 6. b. and Jaſon and Kite's Caſe, Mich. 12 Car. 2. Rot. 385. Adj. Paſch. 13. Cur' accord'. If the Judgment had been erroneous, and a Writ of Error had been brought, the Outlawry, which was but a ſuperſtructure, would fall by Conſequence; but an Audita querela meddles not with the Judgment: The Plaintiff here has no Remedy, but to ſue out his Charter of Pardon.

*Co. Lit.* 384. *Fenk.* 37.

*Co. Lit.* 128. a.

1 *Sid.* 43.

*Ante* 111, 170.

Blythe

## Blythe & Hill, *supra* 221. *pl.* 9.

(14.) S C. 2 *Mod.* 136. *Ante*, 221. Action.

THE Case being moved again, appeared to be thus, viz. The Plaintiff brought an Action of Debt upon a Bond against the Defendant as Heir to the Obligor. The Defendant pleaded, that the Obligor, his Ancestor, died Intestate, and that one J. S. had taken out Letters of Administration, and had given the Plaintiff another Bond in full Satisfaction of the former. Upon this, Issue being joined, it was found for the Defendant. It was said for him, that one Bond might be taken in Satisfaction of another; and 1 Inst. 212. b. 30 Ed. 1. 23. Dyer 29. were cited. North Chief Justice: If the second Bond had been given by the Obligor himself, it would not have discharged the former: But here, being given by the Administrator, so that the Plaintiff's Security is bettered, and the Administrator chargeable de bonis propriis, I conceive it may be a sufficient Discharge of the first Bond, Wyndham accord', Else the Administrator and Heir might both be charged. Scroggs accord. Atkyns. There are many Authorities in the Point; and all directly, that one Bond cannot be given in Satisfaction of another. So is Cr. Eliz. 623, 697, 716, 727. and many others. But yet I hold that Judgment ought to be given for the Defendant; for though it be an impertinent Issue, yet being found for him, he ought by the Statute of 23 H. 8. to have Judgment. If no Issue at all had been joined, it would have been otherwise: 2 Cro. 44, 575. Serjeant Maynard cites 9 H. 6. but that Case was before the Statute: So I ground my Judgment upon that Point. North. I took it, that unapt Issues are aided by the Statute, but not immaterial ones; and so said Scroggs. Judic' pro Defendente Nisi, &c.

*Hob.* 68, 69.

*Hob.* 69.

## Southcot & Stowell.

*Intrat' Hill.* 25 & 26 *Car.* 2. *Rot.* 1303.

( 15. )

S. C. 2 *Mod.* 207. *Poſt*, 237. 2. *Danv.* 556. *pl.* 2.

Remainder. See Stat. 27 *H.* 8. *c.* 10. *Ante*, 159, 160, 175.

Covenant for Non-payment of Money. The Caſe was thus; viz. Thomas Southcote had Iſſue two Sons; Sir Popham and William; and in Conſideration of the Marriage of his Son Sir Popham, covenanted to ſtand ſeized to the Uſe of Sir Popham and the Heirs Males of his Body; and for default of ſuch iſſue, to the Uſe of the Heirs Males of his own Body, the Remainder to his own right Heirs. Sir Popham dies, leaving iſſue Edward his Son, and four Daughters: Then Thomas the Father died; and then Edward died without iſſue, and the Queſtion was, Whether Sir Popham's Daughters or William had the better Title? Two Points were made, 1. Whether the Limitation of the Remainder to the Heirs Males of the Body of the Covenantor, were good in its Creation or not? 2. Admitting it to be good originally, whether it could take Effect after the Death of Edward; he leaving Siſters, which are general Heirs to the Covenantor? North, Wyndham and Atkyns, upon Admiſſion of the firſt Point, were of Opinion for William; and that he ſhould have an Eſtate, not by Purchaſe, but by Deſcent from Edward: For after the Death of the Father, both the Eſtates in Tail were veſted in him: And he was capable of the Remainder by Purchaſe: And being once well veſted in a Purchaſer, the Eſtate ſhall afterwards run in courſe of Deſcent: Scroggs doubted. But they all doubted of the firſt Point, and would adviſe. V. infr' Paſch. 29 Car. 2. Poſt, 237.

S. C. 2 *Mod.* 182. Enqueſt. See 6. *Co.* 53. *Co. Lit.* 156. a.

It was ſaid by the Juſtices in the Counteſs of Northumberland's Caſe, That if a Knight be but returned on a Jury, when a Nobleman is concerned, it is not material whether he appear and give his Verdict or no. Alſo, that if there be no other Knights in the County, a Serjeant at Law that is a Knight, may be returned, and his Privilege ſhall not excuſe him.

Gayle

## Gayle & Betts. ( 16. )

Offices.

DEbt upon a Bond. The Defendant demands Oyer of the Bond and Condition; which was to pay 40 l. per Ann. quarterly, ſo long as the Defendant ſhould continue Regiſter to the Archdeacon of Colcheſter; and ſays, That the Office was granted to A. B. and C. for their Lives: And that he enjoyed the Office ſo long as they lived, and no longer; and that ſo long he paid the ſaid 40 l. quarterly. The Plaintiff replies, That the Defendant did enjoy the Office longer, and had not paid the Money. The Defendant demurs, ſuppoſing the Replication was double. Per Cur'. The Replication is not double; for the Defendant cannot take Iſſue upon the Nonpayment of the Money; that would be a Departure from his Plea in Bar: So if upon a Plea of Nullum fecit arbitrium, the Plaintiff in his Replication ſet forth an Award and a Breach, the Defendant cannot take Iſſue upon the Breach, for that would be an implicit Confeſſion of what he had denied before. North. If the Defendant plead, That he did not exerciſe the Office beyond ſuch a Time, till which Time he paid the Money, the Plaintiff may take Iſſue either upon the Payment till that Time, or rely upon the Continuance; but if he do the latter, he muſt ſhew a Breach; for the Continuance is in it ſelf no Breach.

*Hob.* 198. *Poſt*, 289. 1 *Saund.* 103.

## Ellis & Yarborough. ( 17. )

S. C. 2 *Mod.* 177.

Eſcape. See *Ante*, 57. *Poſt*, 239, 240, 244. *Stat.* 23 *H.* 6. *c.* 10.

ACtion upon the Caſe againſt a Sheriff for an Eſcape. The Plaintiff declares, That one G. was indebted to him in 200 l. and that the Defendant took him upon a Latitat at the Plaintiff's Suit, and afterward ſuffered him to eſcape. The Defendant pleads the Statute of 23 H. 6. cap. 10. and that he let G. out upon Bail, according to the ſaid Statute, and that he had taken reaſonable Sureties, A. and B. Perſons having ſufficient within the County. The Plaintiff replies and traverſes, abſque hoc that the Defendant took Bail of Perſons having ſufficient within the County: The Defendant demurs. Skipwith. The Sheriff is compellable to take Bail.

If he take insufficient Bail, the Course is for the Court to amerce the Sheriff, and not for the Party to have an Action upon the Case: Cro. Eliz. 852. Bowles and Lassel's Case, and Noy 39. if the Sheriff takes no Bail, an Action lies against him: And all Actions brought upon this Statute are founded upon this Suggestion: 3 Cro. 460. Moor. 428. 2 Cro. 280. But if he take insufficient Bail, it is at his own Peril, and no Action lies: The Sheriff is Judge of the Bail, and the Sum is at his Discretion: Cro. Jac. 286. Villers and Hastings: And so are the Number of the Persons, he may take one, two, or three, as he pleaseth. He cited Cro. Eliz. 898. Clifton and Web's Case. Besides the Traverse is pregnant, for it implies, That the Persons have sufficient out of the County; and the Sheriff is not bound to take Bail only of Persons having sufficient within the County.

1 *Sid.* 96. 10 *Co.* 101. a.

Serjeant Barrell contra.

The Court not agreeing in their Opinions upon the Matter of Law, it was put off to the next Term to be argued.

Baldwin, for the Defendant, cited 3 Cro. 624, 152. 2 Cro. 286. Noy 39. Roll. Tit. Escape, 807. Moor. 428. That the Sheriff is compellable to let him to Bail, and is Judge of the Sufficiency of the Sureties. The Statute was made for the Prisoner's Benefit; for the Mischief before was, That the Sheriff not being compellable to bail him, would extort Money from him to be bailed: And the Word sufficient is added in Favour of the Sheriff; and so are the Words, within the County. The Sheriff is not compellable to assign the Bail-bond; and then, if the Plaintiff cannot have the Security given by the Defendant for his Appearance, it is all one to him, whether it be good or no.

Strode contra. Why must the Sheriff always aver, That he has taken sufficient Sureties, if their Sufficiency be not material? Why is an Action allowed to lie, if the Sheriff take no Sureties at all, since according to my Brother's Opinion, the Party has no Interest in them? If the Law be as they argue, the Statute has left the Plaintiff in a worse Condition than he was at the Common Law: For it has deprived him of the Remedy he had before; and the Amercements belong not to him, but to the King.

1 *Saund.* 60.

Cur'. The Sufficiency of the Bail is not material; it is only for the Sheriff's own Security. If he take no Bail at all, an Action lies against him, for then he does not act by Colour of this Law. Atkyns. The Statute is not advantagious to

the Plaintiff at all, unleſs the Sheriff let go the Priſoner without taking Bail; and then he muſt render treble Damages. And by the Opinion of the whole Court Judgment was given for the Defendant.

## Moor *verſus* Field. (18.)

A Cuſtom was alledged, That all Perſons in a Pariſh that had Sheep upon the Ground on Candlemas day, ſhould be diſcharged of Tithes of all Sheep that ſhould be upon the Ground after in that Year, upon Payment of full Tithes for all the Sheep that were there upon that Day; and this was adjudged an unreaſonable Cuſtom. Serjeant Turner argued for it, and cited 2 Roll. Abr. 647, 648. Tithes of Sheep. *Ante*, 216.

Term.

# Term. Hill. 28 & 29 Car. II. in C. B.

(19.) S. C. 2 *Mod.* 183. Preſentation. *Poſt*, 253, 254.

## Strode *verſus* l'Eveſque *of* Bath *and* Wells, *and* *Sir* George Horner *and* Maſters.

QUare Impedit, the Plaintiff intitles himſelf, by Virtue of a Grant of the next Avoidance made by Sir George Horner, and counts, That Sir George was ſeized in Fee of the Manor of Dowling; to which the Advowſon was appendant, and preſented J. S. who was admitted, inſtituted, &c. And that then he granted the next Avoidance to the Plaintiff, and that J. S. died, and it belongs to him to preſent.

Serjeant Barton. The Plaintiff has failed in his Count, he ſays, That Sir George was ſeized and preſented; but he does not ſay, That he preſented tempore pacis: F. N. B. 33. Hob. 102. 6 Co. 30. 1 Inſt. 249. F. N. B. 31. 5 Co. 72. Vaugh. 53.

Strode. When the Plaintiff makes his Title by a Preſentation, he ought to ſay, That it was tempore pacis; but Sir George's Title is by reaſon of his being ſeized of the Manor of Dowling, to which the Advowſon is appendant. So that the Difference, as to that, will be betwixt an Advowſon in groſs, and an Advowſon appendant.

Cur'. When a Man ſhews a precedent Right, and then alledges a Preſentation, in purſuance of that Right, as in this Caſe the Plaintiff does in Sir George Horner, there it needs not be alledged to have been tempore pacis; but where no Title is alledged, ſo that the Preſentation only makes the Title, there it muſt be pleaded tempore pacis.

## Davies & Cutt. (20.)

Baron and Feme. *Vide* Stat. 21. *H.* 8. *c.* 5. §. 3. 4 *Co.* 51.

DAvies as Adminiſtrator to Eliz. B. a Feme Covert, brings an Action of Debt upon a Bond againſt Cutt. The Defendant pleads, That Adminiſtration of the Wife's Goods ought de Jure to be committed to the Husband, who was then alive: Upon this there was a Demurrer, and it was reſolved for the Plaintiff; for he is rightful Adminiſtrator till his Letters of Adminiſtration are repealed. See Stat. 29 Car. 2. c. 3. §. 25.

## James & Johnſon. (21.)

S. C. 2 *Mod.* 143. And cited 3 *Lev.* 425. Toll.

TReſpaſs for taking and driving away ſome Beaſts of the Plaintiff, the Defendant juſtifies for that he and all they whoſe Eſtate he has in ſuch a Manor (the Manor of Blythe) have had a Toll for all Beaſts driven over the ſaid Manor, viz. a half-penny a Beaſt, if under twenty; and if above, then Four-pence a ſcore. Iſſue being joined upon this Juſtification, a ſpecial Verdict was found, viz. That the Manor aforeſaid was Parcel of the Poſſeſſions of the Priory of Blythe, that the Prior had by Preſcription ſuch a Toll, as Appurtenant to the ſaid Manor: That by the Diſſolution it came to the Crown, and ſo to Sir Gervaſe Clifton, and at laſt to one Bingley; in whoſe Right, as Servant to him, the Defendant juſtifies; but then they conclude, that if the Defendant may entitle himſelf to it by a que eſtate, they find for the Defendant; if not, then for the Plaintiff.

*Que eſtate.* See 1 *Lev.* 190. 2 *Lev.* 19. *Ray.* 389. *Nelſ. Lutw.* 29. See *ante*, 48. 105. *Ray.* 52.

Serjeant Baldw. for the Plaintiff. It does not appear, whether the Toll which the Defendant claims, be a Toll-thorough, or a Toll-traverſe, or what ſort of Toll it is. A Toll-thorough is againſt Common Right, becauſe it is to be taken in the King's Highway. And no Preſcription can be for it, unleſs he that claims it, ſhew that the Subject has ſome Advantage by it. And when a Man claims a Toll-traverſe, he muſt lay it to be for a Way over his own Freehold, Keil. 148. Statham, Toll 2. Pl. 236. Moor 574. Cr. Eliz. 710. Keil. 152. A Toll ſuppoſeth a Grant from the Crown,

Crown, and therefore when the Manor of Blythe came to the Crown, the Toll was disjoined from the Manor, and became in Gross. Nor can a Toll be appendant to a Manor, nor claimed by a que estate.

Serjeant Maynard. The Jury have found exactly whatever the Defendant has disclosed in his Plea, and have made a special Conclusion upon a Point of pleading. Toll may be appurtenant to a Manor, as well as any other Profit a prendre. Nor does it become in gross by the Manor coming to the Crown. The Difference is, as to that, betwixt Things, that had a Being in the Crown, before they were granted out to Subjects, and Things which had not, 9. Rep. The Case of the Abbot of Strata Marcella. There is no such legal Difference between a Toll-thorough and a Toll-traverse, as has been offered: The Words are used promiscuously in our Books. A Toll-thorough may be by Prescription, without any reasonable Cause alledged of its Commencement: For having been paid Time out of Mind, the true Cause of its Beginning, in the Intendment of the Law, cannot be known. And for the que estate, indeed a Thing that lies in Grant, cannot be claimed by a que estate, directly by it self, but it may be claimed as appurtenant to a Manor, by a que estate in the Manor, &c. Cur. accord. and gave Judgment for the Defendant. Atkyns. When Toll is claimed generally, it shall be intended Toll-thorough, and so is the Case in Cr. Eliz. 710. Smith and Shepheard.

9 *Co.* 25. *Ante*, 48.

10 *Co.* 59. *Co. Lit.* 121. *a.*

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(22.) S. C. 2 *Mod.* 150, 151. *&c.*

## Lord Townsend *versus* Hughes.

AN Action upon the Stat. de Scandalis Magnatum, for these Words, viz. My Lord *Townsend* is an unworthy Person, and does Things against Law and Reason. Upon Issue Not Guilty, there was a Verdict for the Plaintiff, and four thousand pounds Damages given. The Defendant moved for a new Trial, because of the Excessiveness of the Damages: And a Precedent was cited of a new Trial granted upon that Ground and no other. And Atkyns was for Granting a new Trial. North, Wyndham and Scroggs contr. for that the Jury are the sole Judges of the Damages.

See 1 *Lev.* 277. 1 *Vent.* 59. 1 *Sid.* 434.

At

At another Day it was moved in Arreſt of Judgment, That the Words are not actionable: And of that Opinion was Atkyns. But North, Wyndham and Scroggs contr. And ſo the Plaintiff had Judgment.

Atkyns. The occaſion of the making of the Stat. of 5 Rich. 2. appears in Sir Robert Cotton's Abr. of the Records of the Tower, Fol. 173. Num. 9, 10. he ſays there, That upon the opening of that Parliament, the Biſhop of St. Davids in a Speech to both Houſes declared the Cauſes of its being ſummoned, and that amongſt the reſt one of them was to have ſome Reſtraint laid upon Slanderers and Sowers of Diſcord: Which ſort of Men were then taken notice of to be very frequent. Ex malis moribus bonæ Leges.

The Preamble of the Act mentions falſe News and horrible Lyes, *&c.* of Things, which by the ſaid Prelates, *&c.* were never ſaid, done nor thought. So that it ſeems deſigned againſt telling Stories by way of News concerning them. The Stat. does not make or declare any new Offence. Nor does it inflict any new Puniſhment. All that ſeems to be new is this, 1. The Offence receives an Aggravation, becauſe it is now an Offence againſt a poſitive Law, and conſequently deſerves a greater Puniſhment; as it is held in our Books, That if the King prohibit by his Proclamation, a Thing prohibited by Law, that the Offence receives an Aggravation by being againſt the King's Proclamation, 2. Though there be no expreſs Action given to the Party grieved, yet by Operation of Law the Action accrews. For when-ever a Statute prohibits any Thing, he that finds himſelf grieved, may have an Action upon the Statute. 10 Rep. 75. 12 Rep. 100. There this very Caſe upon this Statute was agreed on by the Judges. So that that is the ſecond new Thing, viz. a further Remedy, An Action upon the Stat. 3. Since the Stat. the Party may have an Action in the tam quam, which he could not have before. Now every Lye or Falſity is not within the Stat. It muſt be horrible, as well as falſe. We find upon another Occaſion ſuch a like Diſtinction; It was held in the 12 Rep. 83. That the High-Commiſſion Court could not puniſh Adultery; becauſe they had Juriſdiction to puniſh enormous Offenders only. So that great and horrible are Words of Diſtinction.

Again, it extends not to ſmall Matters, becauſe of the ill Conſequences mentioned; Debates and Diſcord betwixt the

ſaid Lords, *&c.* great Peril to the Realm, and quick Subverſion and Deſtruction of the ſame. Every Word impoꝛts an Aggravation. The Stat. does not extend to Woꝛds that do not agree with this Deſcription, and that cannot by any reaſonable Pꝛobability have ſuch dire Effects. The Caſes upon this Statute are but few and late, in reſpect of the Antiquity of the Act. It was made Anno 1379. foꝛ a long Time after we hear no Tidings of an Action grounded upon it. And by reading it one would imagine, that the Makers of it never intended that any ſhould be. But the Action ariſes by Operation of Law; not from the Woꝛds of the Act, noꝛ their Intention that made it. The firſt Caſe that we find of an Action bꝛought upon it, is in 13. H. 7. which is 120 Years after the Law was made: So that we have no contemporanea expoſitio, which we often affect. That Caſe in Keil. 26. the next in 4 H. 8. where the Duke of Buckingham recovered 40. l. againſt one Lucas, foꝛ ſaying that the Duke had no more Conſcience than a Dog; and ſo he got Money, he cared not how he came by it. He cited other Caſes, and ſaid he obſerved, That where the Woꝛds were general, the Judges did not oꝛdinarily admit them to be actionable; otherwiſe, when they charged a Peer with any particular Miſcarriage. Serjeant Maynard obſerved well, That the Nobility and great Men are equally concerned on the Defendant's Part: Foꝛ Actions upon this Statute lie againſt them, as well as againſt the meaneſt Subject. Acts of Parliament have been tender of racking the King's Subjects foꝛ Woꝛds. And the Scripture diſcountenances Mens being made Tranſgreſſoꝛs foꝛ a Woꝛd. I obſerve that there is not one Caſe to be met with, in which upon a Motion in Arreſt of Judgment, in ſuch an Action as this, the Defendant has pꝛevailed. The Court hath ſometimes been divided: The Matter compounded: The Action has abated by Death, &c. but a poſitive Rule that Judgment ſhould be arreſted we find not. So that it is Time to make a Pꝛecedent, and fix ſome Rules accoꝛding to which Men may demean themſelves in Converſe with great Perſons. Miſera eſt ſervitus, ubi jus eſt vagum. Since we have obtained no Rules from our Pꝛedeceſſoꝛs in Actions upon this Statute, we had beſt go by the ſame Rules that they did in other Actions foꝛ Woꝛds. In them, when they grew frequent, ſome Bounds and Limits were ſet, by which they endeavoured to make theſe Laws certain. The Actions now encreaſe. The

*Moor.* 244.

Stream

Stream ſeems to be running that Way. I think it is our Part to obviate the Miſchief. So he was of Opinion, That the Judgment ought to be arreſted: But the Court gave Judgment for the Plaintiff.

North. There are three Sorts of Hab. Corp. in this Court, 1. Hab. Corp. ad reſpondendum, and that is, when a Man hath a Cauſe of Suit againſt one that is in Priſon, he may bring him up hither by Hab. Corp. and charge him with a Declaration at his own Suit. 2. There is a Hab. Corp. ad faciendum & recipiendum, and that Defendants may have, that are ſued in Courts below, to remove their Cauſes before us. Both theſe Hab. Corp. are with relation to the Suits properly belonging to the Court of Common Pleas. So if an inferior Court will proceed againſt the Law, in a Thing of which we have Conuzance, and commit a Man; we may diſcharge him upon a Hab. Corp. this is ſtill with relation to the Common Pleas. A third Sort of Hab. Corp. is for privileged Perſons. But a Hab. Corp ad ſubjiciendum is not warranted by any Precedents that I have ſeen. (23.) S. C. 2 *Mod.* 198. *Hab. Corp.* *Pract. Reg.* 282.

# Term. Paſch. 29 Car. II. in Com. Ban.

## Hall & Booth.

( 1. )

Bail.

NOrth. In Actions of Debt, &c. the firſt Proceſs is a Summons, if the Defendant appears not upon that, a Capias goes, and then we hold him to Bail. The Reaſon of Bail is upon a Suppoſition of Law, that the Defendant flies the Judgment of the Law. And this Suppoſition is grounded upon his not appearing at the firſt. For if he appear upon the Summons, no Bail is required. And this is the Reaſon, why it is held againſt the Law for any inferior Court, to iſſue out a Capias for the firſt Proceſs. For the Liberty of a Man is highly valued in the Law, and no Man ought to be abridged of it, without ſome Default in him.

( 2. )

Taxes.

*Vide* 3 *Keb.* 729, 802, 819 829. 1 *Jo.* 89. 2 *Mod.* 222. 2 *Lev.* 186. *Ante*, 194. 1 *Vent.* 367. 2 *Inſt.* 489.

A Church is in decay, the Biſhop's Court muſt proceed againſt the whole Pariſh to have it repair'd: They cannot rate any particular Perſon towards the Repair of it. But the Churchwardens muſt ſummon the Pariſh; and that needs not be from Houſe to Houſe, but a general publick Summons at the Church is ſufficient; and the major Part of them that appear may bind the Pariſh. If the Church and Chancel be out of Repair, the Pariſhioners are only chargeable to be contributary towards the Repairs of the Navis Eccleſiæ. If a Libel be againſt the Pariſh for not repairing the Church, though the Word Eccleſia may include the Chancel, yet we will not grant a Prohibition. If a Tax be ſet by the major Part of the Pariſh, pro reparatione Eccleſiæ, it is well enough: And afterward any Part of the Money raiſed be laid out upon the Chancel, the Pariſh ought not to allow it upon the Churchwardens Accounts. But if a Tax be impoſed expreſly for the Repair of the Body of the Church, and of the Chancel, we will not ſuffer them to proceed. Or if a Libel be againſt a Pariſh for not repairing the Navis Eccleſiæ, and the Chancel, we will prohibit them.

them. If a Church be down, and the Parish increased, so that of Necessity they must have a larger Church, the major Part of the Parish may raise a Tax for the inlarging it, as well as the repairing it: Per Cur'. It was insisted on at the Bar, That to a Tax for the increasing of a Church, the Consent of every Parishioner must be had. But the Court was of another Opinion.

## Southcote & Stowell, *super Mich.* 28 *Car.* 2.

(3.)
S. C. *Ante*, 226.
2 *Mod.* 207.
2 *Danv.* 556. *pl.* 2. Remainder.
See *Stat.* 27 *H.* 8. *c.* 10.
*Ante*, 120, 121, 160.
*Co. Lit.* 22.
2 *Rep.* 91. *Vide Pybus & Mitford.*
*Ante*, 121, 159, *&c. ib.*

BAldwin, for the Plaintiff. Thomas the Covenantor may be said to take an Estate for Life by Implication, and then it will be all one as if an express Estate for Life had been limited to him, with a Remainder to his Heirs males, which would be a Fee-tail executed in himself; and if so, then William has a good Title: 1 And. 265. the Lord Page's Case, 1 Rep. 154. in the Rector of Chedington's Case, Fenwyke and Mittford's Case, Moor. 284. 1 And. 256. and Cro. Eliz. 321. Hodgekinson and Wood's Case, 1 Cro. 23. Lane and Pannell's Case, 1 Roll.

But if this will not hold, then William may take an Estate by way of future springing Use: For this he quoted 2 Roll. Uses. p. 794. Mills and Parsons, Num. 7.

If neither of these Ways will serve, yet the Remainder to the Heirs males of Thomas may vest in Edward, (for Sir Popham died in the Covenantor's Life-time) and William may take by Descent, as special Heir per formam doni, though he be not Heir of the Body of Edward, in whom the Remainder first vests.

Stroud contra. The Limitation of a Remainder in Tail to the Heirs males of the Covenantor, is bad in its original Creation. For no Man can make himself, or his own Heirs, Purchasers, without departing with the whole Fee-simple: Dyer 309. b. 42 Ass. 2. 1 H. 5. 8. per Skrene. 24 Ed. 3. 28. Bro. Estates 23. 1 H. 8. 65. per Hull. 42 Ed. 3. 5. Bro. Estates 66. Dyer 69. b. 2 H. 5. 4. b. 1 H. 5. 8. 14 H. 4. 32. a. Coke 2 Inst. 333. 1 Inst. 22. b. 32 H. 8. Bro. Livery 61. But all these Cases are of Estates passed by Conveyance at Common Law, and not by way of Use. But Uses are directed by

by the Rules of the Common Law, and as to the veſting of them, differ not from Eſtates conveyed in Poſſeſſion: 1 Rep. 138. Chudleigh's Caſe. No favourable Conſtruction ought to be made for Uſes againſt a Rule of Law. The Statute of H. 8. ſeems intended to extirpate all private Uſes, and was in Reſtitution of the Common Law. He cited the Earl of Bedford's Caſe, 1 Rep. 130. a. Poph. 3, & 4. and Moor. 718. and Fenwyke and Mittford's Caſe, 1 Inſt. 22. b. If Thomas took any Eſtate by this Settlement, he took a Fee-ſimple. For no Eſtate being limited to him, if he took any, the Law veſted it in him. Now the Act of Law will not ſettle in him an Eſtate-tail, which is a fettered Eſtate, but a Fee-ſimple, if any Thing. And the rather, becauſe the Reaſon of it muſt be upon a Suppoſition, that the old Uſe continues ſtill in him, being never well limited out of him. Then he argued, That admitting the Limitation to be good, yet ſince it veſted in Edward as a Purchaſor, it is ſpent by his dying without Iſſue.

*Co. Lit.* 26. b. But North, Wyndham and Atkyns were of Opinion, That if an Eſtate limited to a Man, and the Heirs of the Body of his Father, veſt in him, be it either by Deſcent or Purchaſe, that if he die without Iſſue, it ſhall go to his Brother, &c. So that in this Caſe, if the Remainder to the Heirs males of Thomas, ever veſted in Edward, it comes to William, as Heir male of the Body of Thomas, and he is a ſpecial Heir to take by Deſcent.

2. They agreed, That at the Common Law a Man could not make his right Heir a Purchaſor, without parting with the whole Fee; but that by way of Uſe he might: Creſwold's Caſe in Dyer is of an Eſtate executed. They agreed the Limitation of the Remainder in this Caſe to be good, and that it veſted in Edward, as a Purchaſor.

*Ante*, 161. 1 *Vent.* 381.

North. It cannot take Effect as a ſpringing Uſe; becauſe where the Limitation is of a Remainder, the Law will never conſtrue it ſo, as to ſupport it any other Way. This (he ſaid) he had known reſolved in one Cutler's Caſe in the King's Bench.

Scroggs agreed to the Judgment; but ſaid, He went contrary to the Books in ſo doing; which go upon nice and ſubtile Differences, little leſs than Metaphyſical.

## Juſtice *verſus* Whyte. (3.)

IN an Action of Debt againſt the Defendant, as Executor to John Whyte, the Defendant pleaded, That John did make a Will, but made not him Executor, and that the ſaid John had bona notabilia in divers Dioceſſes, and that the Archbiſhop of Canterbury committed Adminiſtration to the Defendant, and concluded in Bar; to which there was a Demurrer. Executors.

Serjeant Turner. 1. This is a Plea in Abatement only, and the Defendant has concluded in Bar, Cr. Eliz. 202. Iſham and Hitchcot. 2. The Defendant does not traverſe, abſque hoc that he ever adminiſtred as Executor, 20 H. 6. 1. b. per Forteſcue. 3. The Defendant does not ſhew when Adminiſtration was committed to him: For if it were committed hanging the Writ, it will not abate it, 21 H. 6. 8. 5 H. 5. 10, 11. Br. tit. Executors 7. 4. Hob. 49. 4. The Defendant does not lay it expreſly that John Whyte died Inteſtate: But only ſays, that he made a Will, but did not appoint him, the Defendant, to be his Executor by that Will, and that Adminiſtration was granted to him. Now altho' the Defendant was not made Executor by the Will, yet he might have been made ſo, by a Codicil annexed to the Will, Roll. Rep. 2 Part 285. 5. He ſays not in what Province the bona notabilia were: and perhaps they were in the Province of York. The Court gave Judgment for the Plaintiff, niſi cauſa, &c. chiefly for the firſt and fourth Reaſons. 11. *Co* 52.

## Page & Tulſe. (4.)

MIdd', ſc. Henricus Tulſe nuper de Lond' Miles, & Robertus Jeffries nuper de Lond' Miles, nuper vicecom' Com' prædict' attachiati fuer ad reſpondendum Thomæ Page de placito tranſgreſſ. ſuper caſum, &c. & unde idem Tho. per Bale Attornatum ſuum queritur, quare cum quidem Sam. Wadham, S. C. 2 *Mod.* 83. Sheriff's Return. Action on the Caſe. *Ante*, 57, 227. *pl.* 17.

ham, alias Waddam, Term. Sanct. Trin. Ann Regni Dom. Regis nunc viceſimo ſexto, & antea indebitatus fuiſſet eidem Tho. Page in 34 libris monetæ Angliæ, idemque Tho. pro obtentione earund' eodem Term. Sanct' Trin. anno viceſimo ſexto ſupradict' debito modo proſecutus fuiſſet extra Cur' Domini Regis nunc coram ipſo Rege (eadem curia apud Weſtmonaſt' in prædict' Com. Midd' tunc exiſtente) quoddam præceptum ipſius Domini Regis verſus prædict' Samuelem vicecom' Midd' direct. per quod eid. tunc vicecomiti præcept' fuit, quod caperet præfatum Samuelem, ſi, &c. & eum ſalvo, &c. ita quod haberet corpus ejus cor' dict. Dom. Rege apud Weſtmonaſt. die Veneris prox. poſt. tres ſeptimanas Sancti Mich. prox' ſequent' ad reſpondendum eidem Tho. de placito tranſgr' ac etiam billæ ipſius Tho. verſus prædict' Sam. pro triginta quatuor libris ſuper aſſumptionem ſecund' conſuetud' Cur' dict' Dom' Regis cor' ipſo Rege exhibend' & quod idem vicecomes haberet ibi tunc præceptum illud, &c. quod quidem præceptum idem Thomas poſtea & ante return' ejuſd', ſcil. quarto die Jul. anno viceſimo ſexto ſupradict' apud Weſtmonaſt' in Com. prædict' præfat' Henric' & Roberto tunc Vicecom', prædict' Com' Midd' deliberavit, ea intentione quod prædict' Samuel virtute præcepti illius caperetur & arreſtaretur, & ad præd. diem return' ejuſdem in dict' cur' dict' Dom' Regis coram ipſo Rege ſecundum conſuetudinem ejuſdem cur' cuſtodiæ Mariſchalli Mariſchalciæ Dom' Regis cor' ipſo Rege committeretur, ad intentionem quod idem Tho. verſus præfat' Samuel. cuſtodiæ ejuſdem Mariſchalli Mariſchalciæ ſic commiſſum, & in cuſtod' ſua exiſtent' ſecund' conſuetudinem dict' Cur' dict' Dom' Regis coram ipſo Rege per bill' ipſius Tho. verſus præd' Samuel. in eadem Cur' exhibend' in placito tranſgreſſionis ſuper caſum ſuper aſſumptionem ipſius Sam. pro præd. 34 libris eid. Tho. ſolvend' & pro recuperatione earund' narraret & implacitaret, & quod præd' Sam. antequam ipſe ab hujuſmodi cuſtod' prædict' Mariſchall' Mariſcalciæ deliberaretur aut ad largum ire dimitteretur, imponeret in eadem Cur' in præd' placito tranſgreſſionis ſuper caſum ſufficientes manucaptores eid. Tho. inde reſponſur' ſecund' conſuetudinem Cur' illius, virtute cujus quidem præcepti prædictus Henricus & Robertus poſtea & ante return' ejuſdem. ſcil. 14 die Julii ann. 26 ſupradict' tunc vicecom' Com' præd' ut præfertur, exiſtentes præfat' Samuel. apud Weſtmonaſter' prædict' in Com' prædict' ceperunt & arreſtaverunt, & ipſum Samuel. in cuſtodia ſua ex cauſa prædict' habuerunt & deti-

nuerunt, prædicti tamen Henricus & Robertus, officii ſui Vicecom' debitum in vera & juſta executione præcepti iſtius, iis, ut præfertur, direct' & deliberat', minime curantes, ſed machinantes ipſum Thomam minus rite prægravare, & in proſecutione ſectæ ſuæ prædictæ penitus fruſtrare, & de aſſecutione & obtentione prædict' 34 librarum omnino impedire, prædict. Samuelem in Cuſtodia ſua in forma prædict' detent' exiſtent' (eodem Thoma de prædict' 34 libris ſeu aliquo denario inde minime ſatisfacto) ſine licentia & contra voluntatem ipſius Thomæ viceſimo ſecundo die Septembris Ann. 26 ſupradicto, apud Weſtm' præd' extra cuſtodiam ipſorum Henrici & Roberti tunc Vicecom' Com' prædict' exiſtent' ad largum quo voluit libere & voluntarie ire & evadere permiſerunt, & nihilominus ad præd. diem returni præcepti præd' ipſi prædict' Henricus & Robertus Vicecom' præd' com' Midd', ut præfertur, exiſtentes, in prædict' Cur' dicti Dom. Regis, coram ipſo Rege apud Weſtmonaſter' prædict' in ipſius Tho. grave damnum & præjudicium falſo & fraudulenter returnaverunt præceptum prædict. in forma ſequente, viz. quod ipſi virtute cujuſdam brevis ſibi direct. cepiſſent corpus prædict. Samuelis, cujus quidem corpus ad diem & locum in eodem præcept' content' cor' dict' Domino Rege para' habuerunt prout per idem præcept, ſibi præcipiebatur, ubi revera prædict. Henricus & Robertus corpus prædicti Samuelis, ad locum in præcept' prædict. content' non para' habuerunt, juxta exigentiam præcept' prædict. & return' ſuum prædict. ſed prædictus Samuel poſt evaſionem ſuam prædict. ſeipſum ad loca eidem Thomæ penitus incognita elongavit & retraxit, quorum prætext' idem Tho. non ſolum in proſecutione ſectæ ſuæ prædictæ manifeſto retardatus exiſtit, verumetiam de obtentione prædicta' 34 librarum ei, ut præfertur, debit', omnino impeditus & defraudatus exiſtit, ad dampnum ipſius Tho. 43 librarum & inde producit ſectam.

Et prædicti Henricus & Robertus per Joh. Tiſler Attornatum ſuum veniunt & defendunt vim & injuriam quando, &c. & dicunt quod prædictus Thomas actionem ſuam prædictam inde verſus eos habere ſeu manutenere non debet quia dicunt quod cum per quendam Actum in Parliamento Domini Henrici nuper Regis Angliæ, &c. ſexti poſt conqueſtum, apud Weſtmonaſter' in Com Midd. 24 die Februarii anno Regni ſui 23 tent' editum, inter alia inactitatum exiſtit authoritate ejuſdem Parliamenti quod Vicecomes, Sub-vicecomes,

Clericus Vicecom̃ Seneſchallus ſive Ballivus Francheſiæ vel Ballivus ſive Coronator non caperet aliquid colore Officii per ipſum nec per aliquam perſonam ad ejus uſum de aliqua perſona pro confectione alicujus returñ ſive panell. & pro copia ejuſd. panell. præterquam 4 denarios, & quod prædict. Vicecomes & omnes alii Officiar̃ & Miniſtri prædicti emitterent extra priſonam, Angl. ſhould let out of Priſon, omnimodas perſonas per ipſos vel eorum aliquos arreſtat. ſeu exiſtent. in eorum Cuſtodia vigore alicujus brevis billæ ſive warrant. in aliqua actione perſonali vel cauſa indictamenti pro tranſgreſſione, ſuper rationabili ſecuritate ſufficientium perſonarum habentium ſufficiens infra Com̃ ubi tales perſonæ ſint ad ballium ſive manucaptionem tradit. ad cuſtodiend. dies ſuos in talibus locis, prout prædict. brevia, billæ ſive warranta requirerent, tali perſona ſive perſonis quæ fuit vel forent in eorum cuſtodia per condemnation. execution. cap. utlagatum ſive excommunicat. & pro ſecuritate pacis, & omnibus talibus perſonis quæ forent commiſſ. ad cuſtod. per ſpeciale mandatum aliquorum Juſticiariorum, & vagrantibus recuſantibus ad ſerviendum ſecundum formam Statuti de laboratoribus tantummodo exceptis, prout per actum prædictum plenius apparet, & iidem Henricus & Robertus ulterius dicunt quod ipſi decimo quarto die Julii anno Regni dicti Dom̃ Regis nunc, &c. viceſimo ſexto ſupradict. in dicta narratione ſuperius ſpecificat. iiſdem Henr. & Roberto tunc Vicecom' Com' præd, exiſtentibus, apud Parochiam S. Clementis Dacorum in Com̃ præd, ceperunt & arreſtaverunt prædictum Samuelem Wadham virtute præcepti prædicti in narratione prædict. ſuperius ſpecificat. ac ipſum ad priſonam dicti Dom. Regis ſub cuſtodia Vicecom. Com præd. tunc exiſten. tunc & ibidem commiſerunt, prædictoque Samuele ſub cuſtodia prædict. Henr. & Roberti exiſtent. pro eadem cauſa & pro nulla alia cauſa, prædict. Sam. Wadham poſtea & ante return. præcepti illius, ſcil. prædicto decimo quarto die Julii anno viceſimo ſexto ſupradicto apud paroch. prædict' in Com' prædict' invenit & obtulit prædict' Henrico & Roberto adtunc Vicecom' Com' prædict' exiſtentibus rationabilem ſecuritatem ſufficientium perſonarum habentium ſufficiens infra Com. prædict' Middleſex ad ſervandum diem ſuum prædict. in præcepto prædict' ſuperius ſpecificat. ad repſond. præfato Tho. de placito tranſgreſſionis ac etiam billæ ipſius Tho. verſus præfatum Samuelem pro triginta quatuor libris ſuper aſſumptionem ſecundum conſuetudinem Cur̃ ipſius Dom. Regis coram ipſo Rege exhibend' ſecundum exigentiam præcepti illius, viz. Willielmum King de paroch.

roch. Sancti Martini in campis in Com' Middleſex Generoſ. & Tho. Williams de eadem paroch. in Com̃ prædict. Taylor, qui quidem Willielmus King & Tho. Williams eundem Samuelem adtunc manucapere obtulerunt quod ipſe idem Sam. Wadham compareret coram dicto Dom. Rege apud Weſtmon. die veneris prox. poſt tres ſeptimanas Sancti Mich. prox' ſequent. ad reſpondend. præfat. Tho. Page de placito tranſgreſſionis & billæ prædict. in narratione prædict. ſuperius ſpecificat. ſecundum formam & effectum actus prædicti; & iidem Henr. & Robertus ulterius dicunt, quod poſtea & ante returnum præcepti prædicti ſcil. prædicto decimo quarto die Julii ann. viceſimo ſexto ſupradicto iiſd' Henr̃ & Roberto tunc Vicecom̃ Com̃ præd. exiſten. apud paroch. Sancti Clementis Danor̃ præd vigore Statut. præd. cep. de præfat' Samuele rationabilem ſecuritatem prædict', viz. Willielmum King & Tho. Williams qui quidem Willielmus King & Tho. Williams iiſdem die & anno apud paroch. prædict' Sancti Clementis Danor̃ in Com̃ prædict. per quoddam Scriptum ſuum obligatorium ſub ſigill. prædictor̃ Willielmi King & Tho. Williams, cujus dat. eſt decimo quarto die Jul. ann. viceſimo ſexto ſupradict. conceſſiſſent & quilibet eorum conceſſit ſe teneri præfato Henric. & Robert. ut Vicecom̃ Com̃ præd. in ſumma 70 libr̃ bonæ & legalis monetæ Angliæ cum conditione eidem Script. Obligator̃ ſubſcript̃ quod prædict. Samuel compareret coram dicto Dom̃ Rege apud Weſtmonaſt. prædict. die veneris prox' poſt tres ſeptimanas Sancti Michaelis prox' ſequent. ad reſpondend' præfato Tho. Page de placit' tranſgreſſionis & billæ prædict' ſecundum exigentiam præcepti prædicti & ſuperinde adtunc & ibid' emiſerunt præfat' Sam̃ exrra priſonam prædict. ſecundum formam Statuti prædict' ut eis bene licuit, quæ eſt eadem ad largum ire permiſſio prædict' unde præd' Tho. Page ſuperius verſus eos queritur & ulterius iidem Henr. & Robert. dicunt quod ipſi poſtea ſcil. ad diem returni ejuſdem præcepti coram dicto Dom. Rege apud Weſtmonaſt' prædict. iiſdem Henr̃. & Robert. tum Vicecom̃ Com̃ præd. exiſtent. returnaverunt præceptum prædictum quod ipſi virtute præcepti prædicti cepiſſent præfatum Samuelem cujus corpus coram dicto Dom̃ Rege ad diem & locum in eodem præcept. content. parat. habuerunt, prout per idem præcept. præcipiebatur, & hoc parati ſunt verificare, unde petunt judicium & damna ſua occaſione prædict. ſibi adjudicand'.

Et prædict' Tho. Page dicit quod ipſe per aliqua per prædict. Henric. & Robert. ſuperius placitando allegat. ab actione ſua prædict. verſus præd. Henr. & Robert. habend. præcludi non debet,

quia proteſtando quod prædict. Henr. & Robert. non ceperunt ſecuritatem ſufficientium perſonarum pro comparentia prædict. Samuelis ad diem & locum in præcepto præd. ſuperius ſpecificat. prout præd. Henr. & Robert. ſuperius placitando allegaverunt, pro placito idem Thom. dicit quod iidem Henr. & Robert. corpus præfati Samuelis ad diem & locum in præcept. præd. content. coꝛ dicto Dom. Rege non parat. habuerunt juxta exigentiam præcepti prædict. & returnum ſuum prædict. & hoc paratus eſt verificare, unde petit judicium & damna ſua occaſione præmiſſorum ſibi adjudicari.

The Defendants demur to this Replication, and the Plaintiff joins in Demurrer.

Serjeant Strode pro Defendente. Before the Statute of Weſtm. 2 cap 10. no Man could make an Attorney without the King's Writ de Attornato faciendo: And there was no other Return at the Common Law than Cepi corpus, or Non eſt inventus. Vide 32 H. 6. 28. The Statute of 32 H. 6. doth not alter the Return. The Deſign of that Statute is only to provide for the Defendants Eaſe, and againſt the Extortion of Sheriffs and their Officers: So that the Sheriff being obliged to return a cepi, and yet to let the Defendant to Bail, there can be no Reaſon why he ſhould be charged for not having the Body at the Day. He cited Langton and Gardner's Caſe Cr. Eliz. 460. Barton and Aldworth Cr. Eliz. 624 in Bowles and Laſſel's Caſe, ibid ,852. The Sheriff took Bail according to this Statute, and returned a Languidus in priſona, though the Defendant was at large: Reſolved that no Action lay againſt the Sheriff. Trin. 13 Jac. Roll. Abr. 1. Part 92. no Action lies againſt the Sheriff for not having the Body at the Day, becauſe he is compellable by the Statute to let him to Bail: And ſo he ſaid it was reſolved in a Caſe between Francklyn and Andrews Br. 24 Car. 1. but adjudged for the Plaintiff upon the Inſufficiency of the Pleading.

*Vide ante* 57, 227. *pl.* 17.

Serjeant Conyers for the Plaintiff. I agree that an Action of Eſcape will not lie againſt the Sheriff, becauſe he is compellable to let him to Bail: But this is an Action at the Common Law for a Falſe Return; which if it ſhould not be maintainable, the Deſign of the Statute would be defrauded: For the Plaintiff cannot control the Sheriff in his taking Bail, but he may take what Perſons and what Bail he pleaſeth: And if he ſhould not be chargeable in an Action for not having the Body ready, the Plaintiff could never have the Effect of his Suit:

And although the Sheriff be chargeable, he will be at no Pre- *Vide ante* 54, judice; for he may repair his Loſs by the Bail-bond: And it is 55. his own Fault if he takes not Security ſufficient to anſwer the Debt. The laſt Clauſe in the Statute is, That if any Sheriff return a *Cepi corpus* or *Reddidit ſe*, he ſhall be chargeable to have the Body at the Day of the Return, as he was before, *&c.* that (if) implies a Liberty in the Sheriff not to return a Cepi corpus or Reddidit ſe. But notwithſtanding, by the Opinion of North Chief Juſtice, Wyndham and Atkyns Juſtices, the Plaintiff was barred. Bowles and Laſſel's Caſe, they ſaid, was a ſtrong Caſe to govern the Point; and the Return of paratum habeo, is in Effect no more than that he had the Body ready to bring into Court, when the Court ſhould command him; and it is the common Practice only to amerce the Sheriff till he does bring the Body: And therefore no Action lies againſt him; for it is not reaſonable that he ſhould be twice puniſhed for one Offence, and that againſt the Court only. Scroggs delivered no Opinion: But Judgment was given, ut ſup.

## Cockram & Welby.

(5.)
S. C. 2 *Mod.* 212.

Executor See Stat. 21 *Jac.* 1. *c.* 16.

ACtion upon the Caſe againſt a Sheriff, for that he levied ſuch a Sum of Money upon a Fieri facias at the Suit of the Plaintiff, and did not bring the Money into Court at the Day of the Return of the Writ, Per quod deterioratus eſt & damnum habet, &c. the Defendant pleads the Statute of 21 Jac. of Limitations. To which the Plaintiff demurs.

Serjeant Barrrel. This Action is within the Statute. It ariſeth ex quaſi contractu: Hob. 206. Speak and Richard's Caſe. It is not grounded on a Record, for then nullum tale Recordum would be a good Plea; which it is not: It lies againſt the Executors of a Sheriff, which it would not do, if it aroſe ex maleficio.

Pemberton. This Action is not brought upon the Contract; if we had brought an Indebitatus Aſſumpſit, which perhaps would lie, then indeed we had grounded our ſelves upon the Contract, and there had been more Colour to bring us within the Statute; but we have brought an Action upon the Caſe for not having our Money here at the Day, per quod, &c.

North.

North. An Indebitatus aſſumpſit would lie in this Caſe againſt the Sheriff or his Executor; and then the Statute would be pleadable. I have known it reſolved, that the Statute of Limitations is not a good Plea againſt an Attorney, that brings an Action for his Fees, becauſe they depend upon a Record here, and are certain.

Next Trinity-Term, the matter being moved again, the Court gave Judgment for the Plaintiff, Niſi cauſa, &c. If the Fieri facias had been returned, then the Action would have been grounded upon the Record, and it is the Sheriff's Fault that the Writ is not returned: But however the Judgment in this Court is the Foundation of the Action. Debt upon the Stat. of 2 Edw. 6. for not ſetting out Tithes, is not within the Stat. for oritur ex maleficio: So the Ground of this Action is maleficium, and the Judgment here given; in both which reſpects it is not within the Statute of Limitations.

1 *Cro.* 540, 513, 533. 1 *Saund.* 38. *Styl.* 214.

(6)

## Barrow & Parrot.

Infant levies a Fine, &c. *Vide ante* 48, 49. *poſt.* 252. 2 *Salk.* 567. *&c. ib.*

Parrot had married one Judith Barrow an Heireſs. Sir Herbert Parrot, his Father, and an ignorant Carpenter, by Vertue of a Dedimus poteſtatem to them directed took the Conuſance of a Fine of the ſaid Judith, being under Age, and by Indenture the Uſe was limited to Mr. Parrot, and his Wife for their two Lives, the Remainder to the Heirs of the Survivor; about two Years after the Wife died without Iſſue; and Barrow as Heir to her prayed the Relief of the Court; Upon Examination it appear'd, that Sir Herbert did examine the Woman whether ſhe were willing to levy the Fine? and asked the Husband and her, whether ſhe were of Age or not? Both anſwered that ſhe was. She afterwards, being privately examin'd touching her Conſent, anſwered as before, and that ſhe had no Conſtraint upon her by her Husband, but ſhe was not there queſtion'd concerning her Age. Sir Herbert Parrot was not examined in Court upon Oath, becauſe he was accuſed; and North ſaid, this Court could no more adminiſter an Oath ex officio, than the Spiritual Court could. North and Wyndham, There is a great Truſt repoſed in the Commiſſioners,

and they are to inform themſelves of the Party's Age; and a voluntary Ignorance will not excuſe them. But Atkyns oppoſed his being fined: He cited Hungar's Caſe, Mich. 12 Jac. Cam. Stell. 12 Coke, 122, 123. where a Fine by Dedimus was taken of an Infant, and becauſe it was not apparent to the Commiſſioners, that the Infant was within Age, they were in that Court acquitted. But North, Wyndham and Scroggs agreed, that the Son ſhould be fined; for that he could not poſſibly be preſumed to be ignorant of his Wife's Age. Atkyns contra. But they all agreed that there was no Way to ſet the Fine aſide.

## Searle & Long.

(7.)
S. C. 2 *Mod.* 264.

Judgment on *Grand Cape.*
See 6 *Mod.* 4,5. *ante* 197.
1 *Vent.* 60.
2 *Saund.* 35.
1 *Lev.* 105.
1 *Salk.* 216, 217. 2 *Show.* Caſe 274.
3 *Inſt.* 125.
2 *Inſt.* 80.
1 *Cro.* 511, 517.
1 *Jon.* 412, 413.
1 *Bulſt.* 160, 161.

QUare Impedit againſt two; one of the Defendants appears; the other caſts an Eſſoin: Wherefore he that appeared had idem dies; then he that was eſſoin'd appears, and the other caſts an Eſſoin. Afterward an Attachment iſſued for their not appearing at the Day; and ſo Proceſs continued to the Great Diſtreſs: which being return'd, and no Appearance, Judgment final was ordered to be entred according to the Statute of Marlbr. cap. 12.

It was moved to have this Rule diſcharged, becauſe the Party was not ſummoned, neither upon the Attachment nor the Great Diſtreſs, and the Sureties returned upon the Proceſs were John Doe and Richard Roe: an Affidavit was produced of Non-Summons, and that the Defendant had not put in any Sureties, nor knew any ſuch Perſons as John Doe and Richard Roe.

1 Freeman 200 —

It was objected on the other Side, That they had Notice of the Suit; for they appeared to the Summons; and it appeared that they were guilty of a voluntary Delay, in that they forched in Eſſoin: And the Stat of Marlbr. is peremptory; wherefore they prayed Judgment.

Serjeant Maynard for the Defendants. If Judgment be entred againſt us, we have no Remedy, but by a Writ of Deceit. Now in a Writ of Deceit the Sumners and Veyors are to be examin'd in Court: And this is the Trial in that Action: But feigned Perſons cannot be examined. It is a great Abuſe in the Officers to return ſuch feigned Names. The firſt Cauſe thereof was the Ignorance of Sheriffs, who being to make a Return, looked into ſome Book of Precedents for a Form; and finding the Names of John Doe and Richard Roe put down for Examples, made their Return accordingly, and took no Care for true Sumners and true Manucaptors. For Non-appearance at the Return of the Great Diſtreſs in a Plea of Quare Impedit, final

final Judgment is to be given, and our Right bound for ever, which ought not to be ſuffered, unleſs after Proceſs legally ſerved, according to the Intention of the Statute. In a Caſe Mich. 23. of the preſent King, Judgment was entred in this Court in a Plea of Quare Impedit, upon Non-appearance to the Great Diſtreſs; but there the Party was ſummoned, and true Summoners returned; upon Non-appearance an Attachment iſſued, and real Sumners return'd upon that: But upon the Diſtreſs it was return'd, That the Defendants diſtricti fuerunt per bona & catalla, & manucapti per Joh. Doe & Rich. Roe: And for that Cauſe the Judgment was vacated. Cur'. The Deſign of the Statute of Marlebridge was to have Proceſs duly executed, which if it were executed as the Law requires, the Tenant could not poſſibly but have Notice of it. For if he do not appear upon the Summons, an Attachment goes out; that is a Command to the Sheriff to ſeize his Body, and make him give Sureties for his Appearance: If yet he will not appear, then the Great Diſtreſs is awarded; that is, the Sheriff is commanded to ſeize the Thing in Queſtion: If he come not in for all this, then Judgment final is to be given. Now the Iſſue of this Proceſs being ſo fatal, that the Right of the Party is concluded by it, we ought not to ſuffer this Proceſs to be changed into a Thing of Courſe. It is true, the Defendant here had Notice of the Suit; but he had not ſuch Notice as the Law does allow him. And for his Fourching in Eſſoin, the Law allows it him. Accordingly the Judgment was ſet aſide.

2 *Show.* 274. 6 *Mod.* 4, 5. 1 *Lev.* 105. 2 *Saund.* 45, *&c. Ante.*

## Anonymus. ( 8. )

FAlſe Judgment out of a County-Court; the Record was vitious throughout, and the Judgment reverſed; and ordered, That the Suitors ſhould be amerced a Mark: But the Record was ſo imperfectly drawn up, that it did not appear before whom the Court was held; and the County-Clerk was fined five Pounds for it.

Baron and Feme. 8 *Co.* 40. 2 *Inſt.* 55.

Ceſſavit per biennium: The Defendant pleads Non-tenure. He commenceth his Plea, Quod petenti reddere non debet: But concludes in Abatement. ( 9. ) *Ceſſavit.*

Serjeant Barrell. He cannot plead this Plea, for he has imparled. Cur'. Non-tenure is a Plea in Bar: The Conclusion indeed is not good, but he shall amend it.

Barrell. Non-tenure is a Plea in Abatement. The Difference is betwixt Non-tenure, that goes to the Tenure, (as when the Tenant denies that he holds of the Demandant, but says, That he holds of some other Person; which is a Plea in Bar) and Non-tenure that goes to the Tenancy of the Land: As here he pleads, That he is not Tenant of the Land: And that goes in Abatement only. The Defendant was ordered to amend his Plea.

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## Addison *versus Sir* John Otway.

( 9. )
S. C. 2 *Mod.* 233. Common Recovery. *Vide Ante*, 206. *pl.* 37.

TEnant in Tail of Land in the Parishes of Rippon and Kirby-Marleſtone, in the Towns of A. B. and C. Tenant in Tail makes a Deed of Bargain and Sale to J. S. to the Intent to make J. S. Tenant to the Præcipe, in order to the ſuffering of a Common Recovery of ſo many Acres in the Pariſhes of Rippon and Kirby-Marleſtone. Now in thoſe Pariſhes there are two Towns called Rippon and Kirby-Marleſtone; and the Recovery is ſuffered of Lands in Rippon and Kirby-Marleſtone generally: All this was found by ſpecial Verdict. And further, that the Intention of the Parties was, That the Lands in Queſtion ſhould paſs by the ſaid Recovery, and that the Lands in Queſtion are in the Pariſhes of Rippon and Kirby-Marleſtone, but not within the Townſhips; and that the Bargainor had no Lands at all within the ſaid Townſhips. The Queſtion was, Whether the Lands in queſtion ſhould paſs by this Recovery, or not?

*Aleyn* 88.

Shaftoe. They will paſs. The Law makes many ſtrained Conſtructions to ſupport Common Recoveries, and abates of the Exactneſs that is required in adverſary Suits: 2 Roll. 67. 5 Rep. Dormer's Caſe, Eare and Snow, Plow. Com. Sir Moyle Finche's Caſe, 6 Rep. Cro. Jac. 643. Ferrers and Curſon. In Stork and Foxe's Caſe, Cro. Jac. 120, 121. where two Mills, Walton and Street, were in the Pariſh of Street; and a Man having Lands in both, levied a Fine of his Lands in Street, his Lands in Walton would not paſs: But there the Conuſor had Lands in the Town of Street to ſatisfy the Grant. But in

our Case it is otherwise. He cited also Roll. Abr. Grants 54. Hutton 105. Baker and Johnson. The Deed of Bargain and Sale, and the Recovery, make up in our Case but one Assurance, and Construction is to be made of both together; as in Cromwell's Case, 2 Rep. The Intention of the Party's Rules, Fines and Recoveries, and the Intention of the Party's, in our Case, appears in the Deed, and is found by the Verdict: 2 Roll. Abr. 19. Winch. 122. per Hob. Cro. Car. 308. Sir George Symond's Case. Betwixt which last Case and ours all the Difference is, That that Case is of a Fine, and ours of a Common Recovery: Betwixt which Conveyances, as to our Purpose, there is no Difference at all. He cited Jones and Wait's Case, Trin. 27 Car. 2. in this Court, and a Case 16 Reg. nunc, in B. R. when Hide was Chief Justice, betwixt Thynne and Thynne. *Ante*, 206. *Ibid.*

North. The Law has always stuck at new Niceties, that have been started in Cases of Fines and Common Recoveries, and has gotten over almost all of them. I have not yet seen a Case that warrants the Case at Bar in all Points. Nor do I remember an Authority expressly against it; and it seems to be within the Reason of many former Resolutions. But we must be cautious how we make a further Step.

Wyndham. I think the Lands in question will pass well enough; and that the Deed of Bargain and Sale, which leads the Uses of the Recovery, does sufficiently explain the Meaning of the Words Rippon and Kirby-Marlestone, in the Recovery. I do not so much regard the Jury's having found what the Party's Intention was, as I do the Deed it self, in which he expresses his own Intention himself: And upon that I ground my Opinion. 8 *Co.* 155. a.

Atkyns agreed with Wyndham. Indeed, when a Place is named in legal Proceedings, we do Prima facie intend it of a Hill, if nothing appears to the contrary; Stabitur præsumptioni, donec probetur in contrarium. In this Case the Evidence of the Thing it self is to the contrary. The Reason why Prima facie we intend it of a Hill, is, because as to civil Purposes the Kingdom is divided into Hills. We do not intend it of a Parish, because the Division of the *Co. Lit.* 225. b. 11 *Co.* 25. b.

Kingdom into Parishes is an Ecclesiastical Distribution to Spiritual Purposes. But the Law in many Cases takes Notice of Parishes in civil Affairs, and Custom having by Degrees introduced it, we may allow of it in a Recovery as well as in a Fine.

2 *Co.* 58. a. *Hob.* 224. *Ante*, 49, 246.

Scroggs accordant. If an Infant levy a Fine, when he becomes of full Age, he shall be bound by the Deed that leads the Uses of the Fine, as well as by the Fine it self, because the Law looks upon both as one Assurance. So the Court was of Opinion, That the Lands did pass.

It was then suggested, That Judgment ought not to be given notwithstanding; for that the Plaintiff was dead. But they said they would not stay Judgment for that, as this Case was. For between the Lessor of the Plaintiff and the Defendant there was another Cause depending, and tried at the same Assizes, when this Issue was tried; and by Agreement between the Parties the Verdict in that Cause was not drawn up, but agreed that it should ensue the Determination of this Verdict, and the Title to go accordingly. Now the Submission to this Rule was an implicit Agreement not to take Advantage of such Occurrences as the Death of the Plaintiff in an Ejectione firmæ, whom we know to be no wise concerned in Point of Interest, and many Times but an imaginary Person. It was said also to have Judgment, That there liv'd in the County where the Lands in question are, a Man of the same Name with him that was made Plaintiff. This the Court said was sufficient, and that were there any of that Name in rerum natura, they would intend that he was the Plaintiff.

Per Cur'. We take Notice judicially, That the Lessor of the Plaintiff is the Person interested, and therefore we punish the Plaintiff if he release the Action, or release the Damages. Accordingly Judgment was given.

2 Anony-

## Anonymus. (10.)

DEbt upon an Obligation was brought against the Heir of the Obligor; hanging which Action, another Action was brought against the same Heir, upon another Obligation of his Ancestor. Judgment is given for the Plaintiffs in both Actions; but the Plaintiff, in the second Action, obtains Judgment first. And which should be first satisfied? Was the Question. Heir. *Vide Ante*, 2.

Barrell. He shall be first satisfied that brought the first Action. North. It is very clear, That he for whom the first Judgment was given, shall be first satisfied. For the Land is not bound, till Judgment be given. But if the Heir, after the first Action brought, had alienedthe Land, which he had by Descent; and the Plaintiff in the second Action, commenced after such Alienation, had obtained Judgment, and afterward the Plaintiff in the first Action had Judgment likewise, in that Case the Plaintiff in the first Action should be satisfied, and he in the second Action not at all.

What if the Sheriff return in such a Case, That the Defendant has Lands by Descent, which indeed are of his own Purchase? North. If the Sheriff's Return cannot be traversed, at least the Party shall be relieved in an Ejectione firmæ.

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## *Dominus Rex versus* Thorneborough & Studly. (11.)

THE King brought a Quare Impedit against the Bishop of and Thorneborough and Studly, and declares, That Queen Elizabeth was seized in Fee of the Advowson of Redriff, in the County of Surrey, and presented J. S. That the Queen died, and the Advowson descended to King James, who died seized, &c. and brings down the Advowson by Descent, to the King that now is. Thorneborough the Patron pleads a Plea in Bar, upon which the King demurs. Incumbent. *Vide Post*, 276, 277, &c. *Ante*, 204, 230, 248.

murs. Studly the Incumbent pleads, confeſſing Queen Elizabeth's Seiſin in Fee in Right of her Crown, but ſays, That ſhe in the ſecond Year of her Reign, granted the Advowſon to one Bosbill, who granted to Ludwell, who granted to Danſon, who granted to Hurleſtone, who granted to Thorneborough, who preſented the Defendant Studly, and traverſeth abſque hoc that Queen Elizabeth died ſeized.

The Defendant's Counſel produced the Letters Patents of ſecundo Reginæ to Bosbill and his Heirs.

The King's Counſel give in Evidence a Preſentation made by Queen Elizabeth by Uſurpation Anno 34 Regni ſui, of one Rider, by which Preſentation the Advowſon was veſted again in the Crown. The Preſentation was read in Court, wherein the Queen recited, That the Church was void, and that it appertained to her to preſent.

2 *Rol.* 370. North, Chief Juſtice. Is not the Queen deceived in this Preſentation? For ſhe recites, That it belongs to her to preſent, which is not true. If the Queen had intended to make an Uſurpation, and her Clerk had been inſtituted, ſhe had gained the Fee-ſimple; but here ſhe recites, That ſhe had Right.

6 *Co.* 29. b. Maynard. When the King recites a particular Title, and has no ſuch Title, his Preſentation is void; but not when his Recital is general, as it is here. And this Difference was agreed to in the King's Bench, in the Caſe of one Eraſmus Dryden.

The Defendant's Counſel ſhewed a Judgment in a Quare Impedit againſt the ſame Rider, at the Suit of one Wingate, in Queen Elizabeth's Time; whereupon the Plaintiff had a Writ to the Biſhop, and Rider was ouſted. Wingate claimed under the Letters Patents of the ſecond of the Queen, viz. by a Grant of one Adie to himſelf; to which Adie one Ludwell granted it, Anno 33 Eliz.

Baldwin. It appears by the Record of this Judgment, that a Writ to the Biſhop was awarded; but no final Judgment is given, which ought to be after the three Points of the Writ inquired.

North. What is it that you will call the final Judgment? There are two Judgments in a Quare Impedit; one, That the Plaintiff ſhall have a Writ to the Biſhop, and that is the final Judgment, that goes to the Right betwixt the Parties; and the Judgment at the Common Law. There is another

Judgment to be given for the Damages since the Statute of Weſt. 2. cap. 5. after the Points of the Writ are inquired of. 5 Co. 50. a. Which Judgment is not to be given but at the Inſtance of the Party.

Pemberton. This Wingate that recovered, was a Stranger, and had no Title to have a Quare Impedit. Now I take this Difference, Where the King has a good Title, no Recovery againſt his Clerk ſhall affect the King's Title; he ſhall not be prejudiced by a Recovery, to which he is no Party. If the King have a defeaſible Title, as in our Caſe by Uſurpation, there, if the rightful Patron recover againſt the King's Incumbent, the King's Title ſhall be bound, though he be not a Party; for his Title having no other Foundation than a Preſentation, when that is once avoided, the King's Title falls together with it. But though the King's Title be only by Uſurpation, yet a Recovery againſt his Clerk by a Stranger, that has nothing to do with it, ſhall not prejudice the King: Covin may be betwixt them, and the King be tried. Now Wingate had no Right; for he claimed by Grant from one Adie, to whom Ludwell granted, Ann. 33 Eliz. But we can prove this Grant by Ludwell to have been void; for in the 29th of the Queen he made a prior Grant to one Danſon, of which Grant we here produce the Inrolment. This Grant to Danſon was an effectual Grant, for Anno 11 Jac. a Preſentation was made by J. R. and Tho. Danſon, which proves, That this Grant took Effect; and the Defendant himſelf deduceth the Title of his own Patron under that Grant.

Barrell. Wingate is not to be accounted a Stranger; for he makes Title by the Letters Patents of 2 Eliz. ſo that he encounters the Queen with her own Grant: And his Title under that Grant was allowed by the Court, who gave Judgment accordingly. There was no faint Pleader in the Caſe, as appears by the Record that has been read. And Covin ſhall not be preſumed, if it be not alledged. We deduce our Title under the Grant made to Danſon, 29 Eliz. in our Plea; but that is only by Way of Inducement to our Traverſe.

Per Cur'. By that Judgment temp. Reg Eliz. the Queen's Title was avoided. We muſt not preſume that Wingate had a Title. Ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta. That Quare Impedit was brought when the Matter

Matter was freſh. Without doubt Danſon would have aſſerted his Title againſt Wingate, if he had had any. The Defendant did not do prudently in conveying a Title to his Patron, under the Grant made to Danſon: But Iſſue being taken upon the Queen's dying ſeized, he ſhall not be concluded to give in Evidence any other Title to maintain the Iſſue. Upon which Evidence the Jury found for the Defendant, That Queen Elizabeth did not die ſeized.

*Vide Poſt*, 276, *&c.* North ſaid, He was clearly of Opinion, That the King's Title by Uſurpation ſhould be avoided by a Recovery againſt his Clerk, though the Recoverer were a meer Stranger.

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( 12. ) *The Company of* Stationers *againſt* Seymour.

Printing. See 2 *Show. Stat.* THE Company brought an Action of Debt againſt Seymour, for Printing Gadbury's Almanacks without their Leave. Upon a ſpecial Verdict found, the Queſtion was, Whether the Letters Patents, whereby the Company of Stationers had granted to them the ſole Printing of Almanacks, were good or not? The Jury found the Statute of 13 & 14 Car. 2. concerning Printing. They found a Patent made by King James, of the ſame Privilege to the Company, in which a former Patent of Queen Elizabeth's was recited; and they found the Letters Patents of the King that now is. Then they found, That the Defendant had printed an Almanack, which they found in verbis & figuris: And that the ſaid Almanack had all the eſſential Parts of the Almanack that is printed before The Book of Common Prayer; but that it has ſome other Additions, ſuch as are uſual in Common Almanacks, &c.

Pemberton. The King may by Law grant the ſole Printing of Almanacks. The Art of Printing is altogether of another Conſideration in the Eye of the Law, than other Trades and Myſteries are; the Preſs is a late Invention. But the Exorbitancies and Licentiouſneſs thereof has ever ſince it was firſt found out been under the Care and Reſtraint of the Magiſtrate. For great Miſchiefs and Diſorder would enſue

to the Common-wealth, if it were under no Regulation: And it has therefore always been thought fit to be under the Inspection and Controul of the Government. And the Stat. 14 Car. 2. recites that it is a Matter of publick Care. In England it has from Time to Time been under the King's own Regulation, so that no Book could lawfully be printed without an Imprimatur granted by some that derive Authority from him to licence Books. But the Question here is not, Whether the King may by Law grant the sole Printing of all Books; but of any, and of what sort of Books? The sole Printing of Law-Books is not now in Question; that seemed to be a Point of some Difficulty, because of the large Extent of such a Patent, and the Uncertainty of determining what should be accounted a Law-Book, and what not. And yet such a Patent has been allowed to be good by a Judgment in the House of Peers. When Sir Orlando Bridgeman was Chief Justice in this Court, there was a Question raised concerning the Validity of a Grant of the sole Printing of any particular Book, with a Prohibition to all others to print the same, how far it should stand good against them that claim a Property in the Copy paramount to the King's Grant? And Opinions were divided upon the Point. But the Defendant in our Case makes no Title to the Copy; only he pretends a Nullity in our Patent. The Book which this Defendant has printed, has no certain Author: And then, according to the Rule of our Law, the King has the Property; and by Consequence may grant his Property to the Company.

Cur. There is no Difference in any material Part betwixt this Almanack and that that is put in the Rubrick of the Common-Prayer. Now the Almanack that is before the Common-Prayer, proceeds from a publick Constitution; it was first settled by the Nicene Council, is established by the Canons of the Church, and is under the Government of the Archbishop of Canterbury. So that Almanacks may be accounted Prerogative Copies. Those particular Almanacks that are made yearly, are but Applications of the general Rules there laid down for the moveable Feasts for ever, to every particular Year. And without doubt, this may be granted by the King. This is a stronger Case than that of Law-Books, which has been mentioned. The Lords in the Resolution of that Case relied upon this, That

Printing was a new Invention, and therefore every Man could not by the Common Law have a Liberty of Printing Law-Books. And since Printing has been invented, and is become a Common Trade, so much of it as has been kept inclosed, never was made common: But Matters of State, and Things that concern the Government, were never left to any Man's Liberty to print that would. And particularly the sole Printing of Law-Books has been formerly granted in other Reigns. Though Printing be a new Invention, yet the Use and Benefit of it is only for Men to publish their Works with more ease than they could before: Men had some other Way to publish their Thoughts before Printing came in; and forasmuch as Printing has always been under the Care of the Government since it was first set on Foot, we may well presume that the former Way was so too. Queen Elizabeth, King James, and King Charles the First granted such Patents as these, and the Law has a great respect to Common Usage. We ought to be guided in our Opinions by the Judgment of the House of Peers; which is express in the Point: The ultimate Resort of Law and Justice being to them. There is no particular Author of an Almanack: And then by the Rule of our Law, the King has the Property in the Copy. Those Additions of Prognostications and other Things that are common in Almanacks, do not alter the Case; no more than if a Man should claim a Property in another Man's Copy, by Reason of some inconsiderable Additions of his own. Accordingly Judgment was given for the Plaintiffs, nisi causa, &c.

(13.)

S. C. 2 *Mod.* 254.

Tithes.

## Anonymus.

ACtion of Trespass for taking away four Loads of Wheat, four Loads of Rye, four Loads of Barly, four Loads of Beans, and four Loads of Pease: The Defendant as to part pleaded, Not guilty; and as to the other part justified; for that the Plaintiff is Rector of the Rectory Impropriate of Bradwardyne in the County of Hereford, and so bound to repair the Chancel; and that the Chancel being out of Repair, the Bishop of Hereford, after Monition to

*Vide ante*, 216, 229. 2 *Mod.* 77. 1 *Vent.* 5. *Hard.* 188.

the Plaintiff to repair the same, had granted a Sequestration of the Tithes, &c. of the Rectory, and that the Defendants, being Church-wardens, had taken them into their Hands, and so justified by Vertue of the Sequestration. To which the Plaintiff demurred.

Serjeant Barrel. I do not deny but that the Rector of a Rectory Impropriate may perhaps be bound of common Right to repair the Chancel. But since the Stat. of 31 H. 8. and 32 H. 8. c. 7. has converted the Tithes of such Rectories into a Lay-Fee, it has consequently exempted them from the Jurisdiction of the Ordinary. A Doubt was conceived upon the Stat. of 31 H. 8. whereby Pensions, Proxies and Synodals are saved, what Remedy lay for the Recovery of them? And it was therefore provided by the Stat. 32 H. 8. that the Church should be sequestred. The Possessions of Ecclesiastical Persons were subjected to the Jurisdiction of the Ordinary, and might be sequestred in many Cases by Process out of the Bishops Courts: But whenever the Possessions of Laymen were charged with any Ecclesiastical Payment or Spiritual Charge, the Ordinary could not take the Land into his Hands, nor meddle with the Possession thereof in any sort; but the constant Usage was to compel the Persons by Ecclesiastical Censures. Anno 1570. there was Application made to the Queen to provide a Remedy for the Reparation of the Chancels of such Churches, whereof the Parsonages were Impropriated. Moreover, he said, a Sequestration does not bind the Interest, nor put the Rector out of Possession; the not submitting to it is only Matter of Contempt; and it can no more be pleaded in Bar to an Action of Trespass, than a Sequestration out of Chancery.

See 2 *Danv.* 620, 621.

Atkyns. I hope not to see it drawn in Question, Whether a Sequestration out of Chancery may be pleaded in Bar to an Action of Trespass at the Common Law, or no? But if it were pleaded, I think we need not scruple to allow such a Plea, by Reason the Court of Chancery at Westminister prescribes to grant such a Process. Which is a Court of such Antiquity, that we ought to take Notice of their Customs.

Serjeant Baldwin contr. He cited, F. N. B. Fol. 50. M. Reg. Orig. 44. b. ibid. 48. a. the Stat. of Circumspecte agatis, 31 Edw. 1. Joh. Diathan in his Commentary upon the legatine Constitutions of Othobone, Tit. Ne Prælati fructus Ecclesiarum

vacantium perciperent. Lindew. 136. de ædificand. Eccleſiis. The Reparation of the Chancel is onus reale, impoſitum rebus, non perſonis. 5th Rep. Caudrie's Caſe 9. he cited the Stat. of 25 H. 8. cap. 19. Sir John Davie's Reports 70. Vaughan, 327. Reg. Jud. 22, 26. 13 H. 4. 17. 21 H. 6. 16. b. 28 H. 8. cap. 9.

It is objected, That theſe Tithes are become a Lay-fee. To which I anſwer, That by the Stat. of 32 H. 8. there is a Remedy given for them in the Spiritual Court. It is enacted indeed, That Fines and Recoveries may be ſuffered of them, as of Lands and Tenements, but they are not made Lay-fees to other Purpoſes. No Statute exempts them from the Juriſdiction of the Ordinary, nor diſcharges the onus reale. The Saving in the Stat. of 31 H. 8. preſerves the Power of Sequeſtration, as well as other particulars there inſtanced. For all Rights of any Perſon or Perſons, there Heirs and Succeſſors is ſaved, *&c.* the Saving is large. The Pariſhioners have a Right in the Chancel, and to have it kept in Repair; for the Communion-Table is to ſtand there, though they have not Jus ſepulturæ there. The Practice is with us. And this is the firſt inſtance of Diſobedience to ſuch a Sequeſtration. Beſides, there are many Impropriations in the Hands of Deans and Chapters, and Bodies politick, which cannot be excommunicated: What Proceſs will you grant againſt them but Sequeſtration? I do not mean Appropriations; to wit, ſuch Rectories as were appropriated to them before the Diſſolution of Monaſteries, and have continued ſo to this Day: For there is no Queſtion but the Ordinary may ſequeſter them; but I mean ſuch Impropriations as they have purchaſed of the King and his Patentees ſince the Diſſolution.

2 *Danv.* 617. *pl.* 5, 6.

*Co. Lit.* 159. b.

North. The Biſhop is in the Nature of an Eccleſiaſtical Sheriff. If an Action of Debt were brought againſt a Clerk, and the Sheriff had returned upon a Fieri facias, that the Defendant was Clericus beneficiatus non habens Laicum feodum; there iſſued a Fieri facias to the Biſhop, upon which he uſed to ſequeſter (as they call it) the Eccleſiaſtical Poſſeſſions of the Defendant, but that is not properly a Sequeſtration; for the Ordinary muſt not return Sequeſtrari feci: He muſt return Fieri feci or Nulla bona, in like manner as a Sheriff of a County muſt do: This I have known in Experience, that a Biſhop has been ordered in ſuch a Caſe to amend his

his Return. The Reaſon of this Proceſs was, becauſe the Poſſeſſions of Eccleſiaſtical Perſons were ſo diſtinct from Temporal Poſſeſſions, that they could not be ſubject to the Ordinary Proceſs of the Temporal Law, no more than Poſſeſſions of Laymen could be ſubject to their Juriſdiction. And therefore Rectories impropriate being now incorporated into the Common Law, and converted into Lay fees, it ſhould ſeem to me, that they are thereby exempted from the Juriſdiction of the Ordinary. And this I take to be within the Reaſon of Jeffrie's Caſe in the 5th Rep. where Temporal Perſons, that are liable to contribute towards the Repairs of the Church, out of their temporal Poſſeſſions, are ſaid to be compellable thereunto by Eccleſiaſtical Cenſures. It has been ſaid, that the Pariſhioners have a Right in the Chancel: But I queſtion that: It is called Cancellum, a cancellis: Becauſe the Pariſhioners are barred from thence. It is the Right of the Parſon. Wyndham thought, that by the Saving in the Stat. of 31 H. 8. the Juriſdiction of the Ordinary was preſerved. Atkyns. The Parſon was chargeable with the Reparation of the Chancel, in reſpect of the Profits which he received. They were the proper Debtors, Now I think it may be held that the Impropriation affects only the Surpluſage of the Profits over and above all Charges and Duties iſſuing out of the Parſonage, and wherewith it was originally charged. The Reparation of the Chancel is a Right ariſing from the firſt Donation; which ſhall not be taken away but by expreſs Words. Scroggs accordant.

North. The Defendant's Plea is naught; for the Cauſe of their Juſtification is, that what they did was in executing a Sequeſtration, whereby they were authorized to take into their Hands the Profits of the Rectory, for the Reparation of the Chancel. Now they ought to aver, that they did not take into their Hands more than was ſufficient for the Reparation thereof.

North. If the Law come to be taken as my Brothers are of Opinion, it will make a great Step to the giving Ordinaries Power to encreaſe Vicarages. For the Pariſhioners have a Right to a Maintenance for one to preach to them. Adjournatur.

Edwards

( 14. )
S. C. 2 *Mod.* 259.
Accord.
*Vide ante*, 206. *pl.* 36.
2 *Leon.* 214.
2 *Rol.* 408.
2 *Cro.* 620.

## Edwards & Weeks.

ACtion upon the Caſe. The Plaintiff declares, that the Defendant in Conſideration that the Plaintiff would deliver unto him ſuch a Horſe, promiſed to deliver to the Plaintiff in Lieu thereof another Horſe, or five Pounds upon Requeſt; and avers, that the Plaintiff had delivered to the Defendant the ſaid Horſe, and had requeſted him, &c.

The Defendant pleads that the Plaintiff, before the Action brought, diſcharged him of that Promiſe, but ſays not how: To which the Plaintiff demurred.

Strode. If he had pleaded a Diſcharge before the Requeſt made, the Plea had been good, without ſhewing how he diſcharged him: But after the Requeſt once made, a verbal Diſcharge is not ſufficient. Cr. Car. Langden and Stokes 384. and 22 Ed. 4. 40. b.

Cur' acc'. Et judicium pro querente, Niſi cauſa, &c.

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( 15. )
S. C. 2 *Mod.* 249.
~~249~~
Conveyance to Uſes.

## Barker & Keate.

EJectione firmæ of Ladd in Caſtle-acre in Com Norf. The Defendant pleaded Not guilty; and the Iſſue was found as to Part: And for the Reſidue there was a ſpecial Verdict, viz. That Edm. Hudſon was ſeized to him and the Heirs males of his Body, the Remainder to William Hudſon his Brother, and the Heirs males of his Body. That Edm. Hudſon by Indenture betwixt himſelf and Thom. Peeps demiſed to Thom. Peeps from the Feaſt of St. Michael then laſt paſt for ſix Months, rendring a Pepper-corn Rent: And that afterwards by another Indenture between himſelf on the one Part, and Thom. Peeps and Edw. Bromley on the other Part, reciting the ſaid Leaſe, he bargained and ſold the Reverſion to Tho. Peeps his Heirs and Aſſigns, to the Intent to make him Tenant to the Præcipe in order to the ſuffering of a Common Recovery, in which Edm Bromley was to be the Recoveror, and himſelf the ſaid Edw. Hudſon the Vouchee, and that this Recovery was to be to the Uſe of Edm Hudſon and his Heirs, &c. And the Jury made a ſpecial Concluſion, viz. That if the Court ſhould adjudge that in

in this Recovery there were a good Tenant to the Præcipe, then they found for the Plaintiff; otherwise, for the Defendant.

Serjeant Waller argued, That there was no good Tenant to the Præcipe: For that Tho. Peeps never was in Poſſeſſion by Vertue of the Leaſe for ſix Months. No Entry is found, nor no Conſideration to raiſe an Uſe. All the Conſideration mentioned is the Reſervation of a Pepper-corn; which is not ſufficient; for it is to be paid out of the Profits of the Land. He compared it to Colyer's Caſe 6 Rep. where a Sum in groſs appointed to be paid by the Deviſee, gave him an Eſtate in Fee-ſimple: But a Sum to be paid out of the Profits of the Land, not. He cited the Lord Pagett's Caſe, Moor, 343. Dyer, 10. placito 31. Beſides, the Conſideration in our Caſe is a Thing of no Value, being but a ſingle Pepper-corn. If an Infant make a Leaſe for Years, rendring Rent, the Leaſe is but voidable; but if an Infant make a Leaſe for Years, rendring a Roſe, or a Pepper-corn, or any ſuch like Trifle, the Leaſe is void. He cited Fitzherb. Tit. Entry congeable 26. *Hob.* 151. 1 *Co.* 154.

North. When a Tenant for Life or Years aſſigns his Eſtate, there needs no Conſideration; in ſuch Caſe the Tenure and Attendance, and the being ſubject to the ancient Forfeiture, and the Payment of Rent, if there were any, is ſufficient to veſt the Uſe in the Aſſignee: But otherwiſe in Caſe of a Fee-ſimple. When a Man is ſeized in Fee, and makes a Leaſe for Years, unleſs he give Poſſeſſion, and that the Leſſee enter, he muſt raiſe an Uſe. But in our Caſe the Reſervation ſeems not ſufficient to raiſe an Uſe, for an Uſe muſt be raiſed, and the Land united to it, before a Rent can reſult out of it. 2 *Rol.* 781. *pl.* 7.

Wyndham. It being in the Caſe of a Common Recovery, we muſt ſupport it, if it be poſſible. In Sutton's Hoſpital's Caſe, 10 Rep. 34 a. it is ſaid that the Reſervation of 12 d. Rent was a ſufficient Conſideration to veſt an Uſe in the Hoſpital: And a Rent of 12 d. is as inconſiderable a Matter in Conſideration of a great Eſtate, as a Pepper-corn in our Caſe. The Caſe in Dyer, that has been cited, is made a Quære in the Book. I think the Reſervation of a Rent would have changed an Uſe at the Common Law, and will raiſe an Uſe at this Day; If a Feoffee to an Uſe had made a Feoffment in Fee rendring Rent, the Feoffment (I conceive) would have been to the Uſe of the ſecond Feoffee, and the firſt Uſe deſtroyed. The other two Juſtices delivered no Opinion.

At

At another Day, the Cauſe being moved again, North ſaid, he had looked upon the Precedent quoted out of Sutton's Hoſpital's Caſe; and that there the Reſervation of a Rent was mentioned in the Deed as a Conſideration to raiſe an Uſe, which, he ſaid, would perchance make a Difference betwixt that Caſe and this. But the Court would adviſe further.

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( 16. )
S. C. 2 *Mod.* 200.

## Baſſett & Baſſett.

Condition. See 2 *Danvers*, 78, 79, and 84. *pl.* 11. 3 *Mod.* 234. *Cro. El.* 398, 864. 539. *Moor.* 357. *&c. poſt.*

AN Action of Debt upon an Obligation of 600 l. Penalty; the Condition was, That if the above-bounden *John Baſſett*, his Heirs or Aſſigns, ſhall within ſix Months after the Death of *Mary Baſſett* his Mother, ſettle upon and aſſure unto *Hopton Baſſett*, as the Counſel of the ſaid *Hopton Baſſett*, learned in the Law, ſhall adviſe, at the Coſts and Charges of the ſaid *Hopton Baſſett*, an Annuity or Rent-Charge of twenty Pounds *per annum* payable half-yearly by equal Portions, from the Death of the ſaid *Mary*, during *Hopton Baſſet*'s Life, if he the ſaid *Hopton Baſſett* require the ſame, at the Dwelling-Houſe of the ſaid *John Baſſett*; or, if he ſhall not grant the ſame, if then the ſaid *John Baſſett* ſhall pay unto *Hopton Baſſett*, within the Time aforementioned, 300 l. then the Obligation to be void. The Defendant pleaded, that the Plaintiff (to wit, the ſaid Hopton Baſſett) had not tendred any Grant of an Annuity, within the Time of ſix Months after the Death of his Mother, according to, &c. the Plaintiff replied, and the Defendant rejoined; But the Counſel on both ſides and the Court agreed, that the whole Queſtion aroſe upon the Plea in Bar.

Strode for the Defendant. The Plaintiff ought to have tendred us a Grant of Annuity, to be ſealed within ſix Months, &c. and having neglected that, he has diſpenſed with the whole Condition. For 1. This is not a diſjunctive Condition, but the Payment of 300 l. is as a Penalty impoſed upon him, if he refuſe to make ſuch a Grant. And if he ſhall not, *&c.* inſtead of the Word not, put the Words refuſe to, *&c.* and the Caſe will be out of doubt. Beſides, the Annuity to be granted, is but 20 l. per annum for a Life, and 300 l. in Money is

more than the Value of it; so that it cannot be intended a Sum to be paid in Lieu or Recompence of it; but must be taken for a Penalty,

But suppose it to be a disjunctive * Condition, then we ought to have an Election whether we would do; but as this Case is, the Plaintiff by his Negligence has deprived us of our Election. For Authorities he cited Gerningham & Ewer's Case, Cr. Eliz. 396. & 539. 4 H. 7. fol. 4. 5 Co. 21. b. Laughter's Case. & Warner & Whyte's Case, resolved the Day before in the King's Bench. There is a Rule laid down in Morecomb's Case, in Moor's Reports, 645. which makes against me: But the Resolution of that Case is Law; and there needed no such Rule. That Case goes upon the reason of Lamb's Case, 5 Rep. when a Man is obliged to pay such a Sum as J. S. shall assess, J. S. being a meer Stranger, the Obligor takes upon him, that J. S. shall assess a Sum in certain; and he must procure him to do it, or he forfeits his Obligation. But in our Case nothing is to be done but by the Obligee himself.

* See 2 *Mod.* 304.

1 *Rol.* 447. *Poph.* 98. 2 *Danv.* 78, *pl.* 1. 79. *pl.* 6. See *Cro. El.* 396, 539, 718. 2 *Mod.* 201, 304. 3 *Lev.* 177.

Pemberton contra. He argued that the Obligor's Election is not taken away; for though no Deed were tendred him, he might have got one made, and the Tender of that would have discharged the Condition of his Bond. Indeed this will put him to Charge, but he may have an Action of Debt for what he lays out. He cited the Cases cited by Walmesley in Moor 645. betwixt Milles & Wood: 41 El. & Gower's Case 38 & 39 El. &c.

1 *Rol.* 447.

North. The Case of Warner & White, adjudged yesterday in the Court of Kings Bench, is according to Law; the Condition there was, that J. S. should pay such a Sum upon the 25th of December, or should appear in Hillary Term after, in the Court of Kings Bench. J. S. died after the 25th Day of Dec', and before Hill. Term; and had paid nothing upon the 25th of December. In that Case the Condition was not broken by the Non-payment, and the other Part is become impossible by the Act of God. But I think, that if the first part of a Condition be rendred impossible by the Act of God, that the Obligor is bound to perform the other Part: But in the Case at the Bar the Obligor's Election is taken away by the Act of the Obligee himself. And I see no Difference betwixt this Case and that of Gerningham & Ewer, in Cr. Eliz. If the Condition of an Obligation be single, to make such Assurance as shall be advised by the Counsel of the Obligee; there Consilium non dedit advisamentum, is a goood Plea; and the Obligor is not bound to

5 *Co.* 22. *a.*

make an Aſſurance of his own Head; no more ſhall he be bound to do it when the Condition is in the Diſjunctive, to ſave his Bond. In both Caſes the Condition refers to the Manner of the Aſſurance; and it muſt be made in ſuch Manner as the Words of the Condition import. So he ſaid he was of Opinion againſt the Plaintiff.

Wyndham. Where the Condition of an Obligation is in the Diſjunctive, the Obligor muſt have his Election. But in this Caſe there is no ſuch Thing as a Diſjunctive, till ſuch Time as there be a Requeſt made to ſeal a Deed of Annuity; and then the Obligor will have an Election, either to execute the Aſſurance, or to pay the 300 l. but no ſuch Requeſt being made, it ſhould ſeem that the Obligor muſt pay the 300 l. at his Peril.

Atkyns agreed with the Chief Juſtice, and ſo did Scroggs: Wherefore Judgment was ordered to be entred againſt the Plaintiff. Niſi cauſa, &c. within a Week.

(17.) Deed to be produced.

Quare impedit. The Plaintiff declared upon a Grant of the Advowſon to his Anceſtor; and in his Declaration ſays, hic in Cur' prolat', but indeed had not the Deed to ſhew. Serjeant Baldwin brought an Affidavit into Court, that the Defendant had gotten the Deed into his hands, and prayed that the Plaintiff may take Advantage of a Copy thereof, which appear'd in an Inquiſition found temp. Edw. 6.

Cur'. When an Action of Debt is brought upon a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants perform'd, without the Deed, becauſe the Plaintiff has the original Deed, and perhaps the Defendant took not a Counterpart of it; we uſe to grant Imparlances till the Plaintiff bring in the Deed. And upon Evidence, if it be proved that the other Party has the Deed, we admit Copies to be given in Evidence. But where the Law requires that the Deed be procured; you have your Remedy for the Deed at Law. We cannot alter the Law, nor ought to grant an Imparlance.

1 *Saund.* 9.

2

*Note,*

Stead & Perryer.

(19.)
S. C. 2 *Mod.* 313.
2 *Lev.* 243.
2 *Jon.* 135.
*Raym.* 408.
1 *Vent.* 341.
2 *Danv.* 534.
10. Deviſe.
See *Plow* 345.
*Mo.* 353, 476.
*Cro. El.* 422.
2 *Jon.* 135.

EJectione firmæ. A Man has a Son called Robert. Robert has likewiſe a Son called Robert. The Grandfather deviſeth the Land in queſtion to his Son Robert, and his Heirs. Robert the Deviſee dies in the Deviſor's Life-Time. Afterwards the Deviſor makes a new Publication of the ſame Will; and declares it to be his Intention, that Robert the Grandchild ſhould take the Land in queſtion per eandem voluntatem, inſtead of his Father, and dyed. And all this was found by ſpecial Verdict upon a Trial betwixt Robert the Grandchild and a Daughter of the elder Brother of Robert the firſt Deviſee.

Pemberton. The Land doth not paſs by this Will; the Deviſe to Robert became void by his Death, and cannot be made good by a Republication. A Publication cannot alter the Words of a Will ſo as to put a new Senſe upon them. Land muſt paſs by Will in writing. Robert the Grandſon, is not within this Will in writing. The Grandfather's Intention is not conſiderable in the Caſe.

Skipwith contra. I agree the Caſe between Brett & Rygden in the Commentaries, to be Law: But there are two great Diverſities between this Caſe and that. 1. There was no new Publication. 2. In this Caſe Robert the Father, and Robert the Son are cognonimous. He cited Dyer 142, 143. Trevilian's Caſe. Fuller & Fuller. Cr. Eliz. 422. and Moor 353. Cr. Eliz. 493.

North & Atkyns. Without queſtion Robert the Grandchild ſhall take by this Will. If he never had had a Son called Robert, or if Robert the Son had been dead at the Time of making the Will, the Grandchild would then without Diſpute have taken by theſe Words. Now a new Publication is equivalent to a new Writing. The Grandchild is not directly within the Words of the Will; but they are applicable to him. He is a Son, though he be not begotten by the Body of the Deviſor himſelf. He is Son with a Diſtinction. Our Saviour is called the Son of David, though there were 28 Generations betwixt David and him. And a Republication may impoſe another Senſe upon theſe Words, different from what they had, when they were firſt written; as, if a Man deviſe all his

Lands in Dale, and have but two Acres in Dale; the Words now extend to more then those two Acres: And if he purchase more, and dye without any new Publication, the new purchased Land will not pass. But if there were a new Publication after the Purchase, they would pass well enough. If a Man has issue two Sons called Thomas: and he makes a Devise to his Son Thomas, this may be ascertained by an Averment. Now suppose that Thomas the Devisee dye, living the Father, and afterwards the Father publisheth his Will anew, and says that he did intend that his Son Thomas now dead, should have had his Land; but now his Will and Intent is, that Thomas his younger Son now living shall take his Land by the same Will. In this Case, to be sure the second Son Thomas shall take by the Devise. Here the Import of the Words is clearly altered by the Republication.

3 *Cro.* 493.

5 *Co.* 68. *b.* 2 *Danv.* 523. *pl.* 2, 3. 538. *pl.* 2, 3.

Atkyns, The Words of this Will would not of themselves be sufficient to carry the Land to the Grandchild, nor would the Intention of the Devisor do it without them: But both together do the Business. Quæ non prosunt singula, juncta juvant.

Wyndham and Scroggs differed in Opinion, and the Cause was adjourned to be argued the next Term.

( 20. )

*Panper.*

North. A Man admitted in forma pauperis is not to have a new Trial granted him: For he has had the Benefit of the King's Justice once, and must acquiesce in it. We do not suffer them to remove Causes out of inferior Courts. They must satisfie themselves with the Jurisdiction within which their Action properly lieth.

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( 21. )

S. C. 2 *Mod.* 311.

## Farrington & Lee.

Account.

*Stat.* 21 *Jac.* 1 *c.* 16.

Assumpsit. The Plaintiff declares upon 2 Indebitatus assumpsits, and a third Assumpsit upon an Insimul computasset. The Defendant pleaded Non assumpsit infra sex annos: The Plaintiff replied, that himself is a Merchant, and the Defendant his Factor; and recites a Clause in the Statute, in which Actions of Account between Merchants and Merchants, and Merchants and their Factors, concerning

their Trade and Merchandize, are excepted; and avers that this Money became due to the Plaintiff upon an Account betwixt him and the Defendant concerning Merchandise, &c. The Defendant makes an impertinent Rejoynder, to which the Plaintiff demurs. Q. 1 *Saund.* 36. 37. 2 *Saund.* 66, 120, 125, 126.

Nudigate pro Querente. This Statute is in the Nature of a penal Law; because it restrains the Liberty which the Plaintiff has by the Common Law, to bring his Action when he will; and must therefore be construed beneficially for the Plaintiff: Plwo. 54. Cr. Car. 394. Finche and Lamb's Case, to this Purpose. Also this Exception of Accounts between Merchants and their Factors, must be liberally expounded for their Benefit; because the Law-makers, in making such an Exception, had an Eye to the Encouragement of Trade and Commerce. The Words of the Exception are (other than such Accounts as concern the Trade of Merchandise, &c.) Now this Action of ours is not indeed an Action of Account; but it is an Action grounded upon an Account. And the Plaintiff being at liberty to bring either the one or the other upon the same Cause of Action, and one of the Actions being excepted expressly out of the Limitation of the Statute, the other by Equity is excepted also. He cited Hill. 17 Car. 1 in Marche's Reports, 151. and Jones 401. Sandys and Bloodwell: Mich. 13 Car. 1. and prayed Judgment for the Plaintiff. *Vide ante*, 70, 71. 2 *Saund.* 125.

Serjeant Baldwin contra. He said it did not appear in the Declaration, that this Action was betwixt a Merchant and his Factor; so that then the Plea in Bar is prima facie good. And when he comes and sets it forth in his Replication, he is too late in it: And the Replication is not pursuant to his Declaration.

But all the Court was against him in this. Then he said the Statute excepted Actions of Account only; and not Actions upon an Indeb. assumpsit.

Cur'. Whereas it has been said by Serjeant Nudigate, that the Plaintiff here has an Election to bring an Action of Account, or an Indebitat. assumpsit, that is false: For till the Account be stated betwixt them, an Action of Account lies, and not an Action upon the Case. When the Account is once stated, then an Action upon the Case lies, and not an Action of

of Account. Et per North, If upon an Indebitat. aſſumpſit, Matters are offered in Evidence, that lie in Account, I do not allow them to be given in Evidence.

2 *Saund.* 127. *Ante*, 71. North, Wyndham and Scroggs: The Exception of the Statute goes only to Actions of Account, and not to other Actions. And we take a Diverſity betwixt an Account current, and an Account ſtated. After the Account ſtated, the Certainty of the *Tothil.* 64. Debt appears, and all the Intricacy of Account is out of doors: And the Action muſt be brought within ſix Years after the *March.* 105. Account ſtated. But by North, If after an Account ſtated, upon the Balance of it a Sum appear due to either of the Parties, which Sum is not paid, but is afterwards thrown into a new Account between the ſame Parties, it is now ſlip'd out of the Statute again.

*Ante*, 70, 71. Scroggs. The Statute makes a Difference betwixt Actions upon Account, and Actions upon the Caſe. The Words would elſe have been, All Actions of Account, and upon the Caſe, other than ſuch Actions as concern the Trade of Merchandiſe. But it is otherwiſe penned; other than ſuch Accounts as concern, &c. and as this Caſe is, there is no Account betwixt the Parties; the Account is determined, and the Plaintiff put to his Action upon an Inſimul computaſſet: which is not within the Benefit of the Exception.

Atkyns. I think the Makers of this Statute had a greater Regard to the Perſons of Merchants, than the Cauſes of Action between them. And the Reaſon was, becauſe they are often out of the Realm, and cannot always proſecute their Actions in due time. The Statute makes no Difference betwixt an Account current, and an Account ſtated. I think alſo that no other ſort of Tradeſmen, but Merchants, are within the Benefit of this Exception: And that it does not extend to Shop-keepers, they not being within the ſame Miſchief. Adjournatur.

*Note*, The preceding Cases, from pag. 163, were in C. B. But from hence to pag. 300, were in *B. R.*

( 22. )

## Horn *verſus* Chandler, in *B. R.*

Damages. *Vide* 2 *Saund.* 169, 170. *Cro. Jac.* 619. 1 *Lev.* 299. *Yelv.* 94. *Aleyn.* 23. *Hob.* 214.

COvenant upon an Indenture of an Apprentice, wherein the Defendant bound himſelf to ſerve the Plaintiff for ſeven Years. The Plaintiff ſets forth the Cuſtom of London. That any Perſon above 14, and under 21, unmarried, may bind himſelf Apprentice, &c. according to the Cuſtom, and that the Maſter thereupon ſhall have tale remedium againſt him, as if he were 21, and alledges, that the Defendant did go away from his Service, per quod he loſt his Service for the ſaid Term, which Term is not yet expired. The Defendant pleads a frivolous Plea, to which the Plaintiff demurs. Offley. Though ſuch a Covenant ſhall not bind an Infant neither by Common Law, nor 5 Eliz. 1. Cr. 170. yet by this Cuſtom it ſhall. In Paſch. 21 Jac. B. R. Cole verſus Holme, there was ſuch an Action againſt an Apprentice, the Defendant pleaded Nonage; the Plaintiff replyed the Cuſtom of London, and that the Indenture of Apprenticeſhip was inrolled, as it ought to be, &c. and this was certified by the Recorder, Serjeant Finch, to be the Cuſtom: And thereupon Judgment was againſt the Defendant: It is a Manuſcript.

Jones. The Cuſtom ought to have been alledged, that he ſhould have an Action of Covenant againſt him, which is not done here; and Cuſtoms ſhall be taken ſtrictly, not by Implication. Moreover the Plaintiff declares for a Loſs not yet ſuſtained, the Term not being ended.

Cur. The Cuſtom is ſufficiently alledged to give and make good an Action of Covenant. Tale remedium implies it. Thoſe Words are applicable to all Things relating to this Matter, viz. That the Maſter may correct him, may go to a Juſtice of Peace; and alſo may have an Action of Covenant againſt him, as againſt a Man of full Age. And though by Common Law or the Statute, his Covenant ſhall not bind him, yet by the Cuſtom it ſhall. But Twiſden deſired to ſee Offley's Report. As to the declaring for the Loſs of the Term, Part whereof is unexpired, though it has been adjudged to be naught after a Verdict; yet in this Caſe, which is upon Demurrer, it may be helped; For the Plaintiff may take Damages

*V. Hutt.* 63, 64. *Winch.* 63, 64. 2 *Saund.* 169. 2 *Danv.* 460. *pl.* 12.

mages for the Departure only, not the Loss of Service during the Term; and then it will be well enough. Judgment nisi, &c.

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( 23 )
S. C. 1 *Vent.* 98.
1 *Lev.* 297.
1 *Danv.* 118. pl. 49. Words.
See *Sid.* 327. *Cro. El.* 342. *Moor.* 409. *Godb.* 441.

## Jones *versus* Powel

WOrds spoken of an Attorney, Thou canst not read a Declaration, per quod, &c. Cur. The Words are actionable, though there had been no special Damages; for they speak him to be ignorant in his Profession, and we shall not intend that he had a Distemper in his eyes, &c. Judic. pro querente.

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( 24. )
S. C. 1 *Saund.* 182.
2 *Keb.* 711.

*Vide ante*, 170. &c.

## Furlong *versus* Bray.

THE Defendant, in an Action of False Imprisonment, justified the taking and imprisoning the Plaintiff, by Vertue of an Order of Chancery, that he should be committed to the Fleet; and the Plea judged naught, because an Order is not sufficient. It ought to have been an Attachment, he should have pleaded, Quoddam breve de attachiamento, &c.

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( 25. )
S. C. 2 *Saund.* 197.
2 *Keb.* 712.
1 *Danv.* 651.

## Osborne *versus* Walleeden.

REplevin. The Defendant avows in Right of his Wife, for a Rent-charge, devised to her for Life, by her former Husband. But in the Will there was this Clause, viz. If she shall marry, &c. he (the Executor) shall pay her 100 l. and the Rent shall cease, and return to the Executor. She doth marry, and the Executor does not pay the 100 l. The Question was, Whether the Rent should cease before the 100 l. be paid?

Jones for the Plaintiff: The Rent ceaseth immediately upon her Marriage, and he shall have Remedy for the 100 l. in the Spiritual Court. If the Words had been, He shall pay her 100 l. and from that Time the Rent shall cease, it had been otherwise; if she had died presently after the Marriage, her Executor should have had the 100 l.

Brewer and Saunders for the Defendant: She had not a present Interest in the 100 l. In this very Case, the Common Pleas delivered their Opinion, That this 100 l. ought to be paid before the Rent should cease. But for Imperfection in the pleading, we could not have Judgment there. *2 Saund. 111.*

And by 1 Roll. Ab. She has no present Interest in the 100 l. nor can her Executors have any, and the Rent shall not cease till the Payment of it. For first, It is devised to her for Life, not during her Widowhood. Secondly, The Rent issues out of the Inheritance, and by the Construction of the Will it shall go to the Executor, for by cease in the Will is meant cease as to the Wife; and the Executor is in Nature of Purchasor, and ought to pay the Money before he has the Rent; and he ought to pay it out of his own Estate, if he will have the Rent. For otherwise, if it be look'd upon as a Legacy, if he have no Assets, she shall be immediately stript of her Rent, and have nothing. *1 Rol. Ab. 311. N. 2. 347. pl. 2. Cro. J. 442.*

Twisden. I think the Devisor's Meaning was to give her a present Interest in the 100 l. and if so, the Rent must cease presently upon the Marriage. But since it is to be issuing out of the Inheritance, it is doubtful. And since my Brothers are both of Opinion for the Avowant, let him have Judgment.

Then it was objected, That the Avowry was ill; For it ought to have been in the Wife's Name as well as the Husband's; and alledged, that Roll. 1 Part 318. N. Num. 2. makes a Quære, and seems to be of Opinion that Wise *versus* Bellent (which is to the contrary) is not Law. V. 2 Cr. 442. 3. *Vide 1 Danv. 651. 1 Rol. Abr. &c. Supra.*

Twisd. That was his Opinion, it may be, when he was a Student. You have in that Work of his a Common Place, which you stand too much upon. I value him where he reports Judgments and Resolutions. But otherwise it is nothing but a Collection of Year-Books, and little Things noted when he made his Common Place Books. His private Opinion must not warrant or controul us here. It has been adjudged, That the Husband alone may avow in Right of his Wife.

( 26. )
S. C. 1 *Lev.* 302.
1 *Sid.* 456.
*Raym.* 205.
2 *Keb.* 714.
See 2 *Mod.* 169.
2 *Jon.* 167.
1 *Saund.* 129. 133.
*Lutw.* 541.
1 *Salk.* 70.
72. *Ante*, 15.

## Delaval *verſus* Maſchall.

DEbt upon a Bond; the Condition whereof was, That if J. S. and J. D. Arbitrators did make an Award on or before the 19th of February; and if the Defendant ſhould perform it, then the Obligation ſhould be void; and then follow theſe Words, And if they do not make an Award before the 19th of *February*, then I impower them to chooſe an Umpire, and by theſe Preſents bind my ſelf to perform his Award. The Defendant pleads, That they did not make an Award. The Plaintiff replies, and ſets forth an Award made upon the ſaid 19th of February, by an Umpire choſen by the Arbitrators, and alledges a Breach thereof. The Defendant demurs.

*Ante*, 15.

Saunders for the Defendant. Here is no Breach of the Condition of the Bond. For that, which relates to the Performing the Umpire's Award, it following thoſe Words, Then the Obligation ſhall be void, is no Part of the Condition; and if any Action is to be brought upon that Part, it ought to be Covenant. 2. The Award made by the Umpire is void, becauſe made the 19th of February, which was within the Time limited to the Arbitrators for their Power, and the Umpire could not make an Award within that Time, becauſe their Power was not then determined, as was lately adjudged in Copping verſus Hornar.

1 *Sid.* 314.

Jones for the Plaintiff: The Condition is good as to this Part, it is all but one Condition. A Man may make ſeveral Defeaſances or Conditions to defeat the ſame Obligation, Brook, Condition 66. There is a Continuance of this Condition, It is ſaid, I bind my ſelf by theſe Preſents, which refers to the Lien before in the Obligation.

See *ante*, 15. *&c. ib.*
2 *Saund.* 130, 131.

I agree with Copping verſus Hornar and Bernard verſus King, That where an Umpire is at firſt certainly named and appointed, he cannot exerciſe his Authority within the Time appointed to the Arbitrators, becauſe the ſame Authority cannot be given to, and continue both in the Arbitrators and Umpire at the ſame Time. But when the Umpire is named and choſen by the Arbitrators, as in our Caſe, he may make his Award within the Time allowed to the Arbitrators; becauſe

cauſe there the Arbitrators by their own Action, viz the Election of the Umpire, determine their Authority: And the Authority veſts and remains in the Umpire only, and ſo it was admitted in Bernard *verſus* King.

Twiſden, aſſentientibus Rainsford & Morton This is a good Part of the Condition. There was a Condition, That if the Obligor ſhould, *&c.* then the Bond ſhould be void; and further, that the Obligor ſhould releaſe: And it was adjudged here, That the laſt was a Part of the Condition. I was at the Bar when the Caſe betwixt Bernard and King was ſpoken to, and I know Rolle did hold and deliver then, That if it had been alledged, that the Arbitrators had wholly denied and deſerted their Power, it had let in the Umpire, ſo as that he might account within the Time allowed to the Arbitrators; and he ſtood upon this then, that it was implicitely alledged, viz. poſtquam denegaſſent, &c. But this was a hard Opinion of his, and he himſelf reports his own Judgment otherwiſe, 1 Ro. 262. it may be he altered his Opinion: We inclin'd that the Award in the Caſe at the Bar is naught. For the Authority of the Arbitrators was not determined till after the 19th of February. For Juſtice Croke goes ſo far, 1 Cr. 263. as to agree, That Arbitrators may nominate an Umpire within the Time for their making their Award. So that the chuſing the Umpire doth not extinguiſh their Authority, and therefore the Umpire could not make an Award upon this 19th of February. It is true the Arbitrators might chuſe him upon that Day, or before. But, yet ſtill they might have made an Award, and therefore he could not. Adjournatur.

2 *Saund.* 132.

*Vide* 1 *Salk.* 70, 72. *Sed* Note the Difference in *Nelſon's Lutw.* 167. *&c. ib.*

(27.) S. C. 2 *Jon.* 8.

# Rex *verſus* Epiſcopum Worceſt', Jervaſon & Hinkley in Banco Regis.

*Vaugh.* 53. See before 253, 254. *&c.*

*See the Caſe put at large in* Vaughan's *Reports.*

The Arguments of Juſtice *Wylde*, *Archer* and *Tyrrel*, were as follow. The Chief Juſtice's Argument is here omitted, becauſe publiſhed at large in his own Reports.

Traverſe.

Juſtice Wylde. I think the King cannot take the Traverſe in this Caſe, and this will appear by looking upon the old Books, which were not well conſidered by thoſe who did reply. 13 H. 7. 13, 14. Pl. 18. It is ſaid the King may chuſe, either to maintain his own Title, or traverſe the Title of the Party, who ſues him by Petition. So 13 E. 4. 8. pl. 1. It is ſaid when one traverſes an Office, the King may either maintain the Office, or traverſe the Title ſhewn for the Party, becauſe no Man ſhall recover Lands againſt the King without having a Title. But there it is reſolved, That if the King join Iſſue upon his own Title, he cannot change Iſſue, and traverſe the Title ſhewed for the Party; Now here is the Allegation of the King, that the Advowſon was in groſs, and the Defendants denying it, is in Nature of joining an Iſſue, which cannot be receded from. But the Reaſon why in that Caſe the King might wave the Traverſe tendered to his Title, and traverſe the Title ſhewn for the Party, is, becauſe the Office puts the King in actual Poſſeſſion; for where the King is in by Record, or Poſſeſſion (for Poſſeſſion is enough) the Party muſt make a Title, if he will recover againſt the King. Keil. 192. pl. 3. Savage's Caſe. It was found by Inquiſition, that whereas the Turn Time out of Mind uſed to be held at Worceſter, he being Sheriff for Life, held it at Pedyl and Streight, Contra formam Statuti de magna Charta: Upon a Scire fac. upon an Information hereupon, for forfeiting the Office, he pleads, That Time out of Mind, &c. it uſed to be held

at Pedyl, &c. absq; hoc that it used to be held at Worcester: Resolved, that the King might maintain the Inquisition, that it used to be held at Worcester, absque hoc that it used to be held at Pedyl, &c. and the Reason is, because the King was intituled to the Forfeiture by a Record. The Difference is, where the King is Actor, as here he is, being out of Possession, he must make a Title, and prove it. But where the Party is Actor he cannot fix upon his own Title, and force the King to make good his own Title: 34 H. 8. Br. Prerog. 116, Whorewood's Case is full in Point. In an Information tam quam, if the Defendant traverse, the King cannot wave the Issue so tendered. One Reason indeed given is, because the King is not sole Party. But the chief Reason is, Because the King is not intitled by Matter of Record: For saith the Book, There is no Office found before the Information. But upon a Traverse of an office, & hujusmodi, saith the Book, the King may do it, because he is intitled by Matter of Record; therefore in our Case the King shall not wave the Issue tendered, &c. and fly upon the Matter of the Defendant's Title.

Archer accordant. It must be admitted, that in this Case the King must make a Title, because by presenting of Tim. White and also of Hinkley the Defendant, the which was nine Years since, he is put to his Quare Impedit, and is out of Possession, I do not say of the Inheritance, though that hath been a Question in the old Books, V. 2 Cr. 53. But it has been adjudged, That the Inheritance cannot be gained or devested out of the King by any Usurpations, 2 Cr. 123. 3 Cr. 241. and 519. and Green's, 6 Co. 30. a. But that he may grant away the Inheritance of the Advowsons still, &c. But it is as clear, and agreed by all those Books, and Boswel's Case, 6. Co. 49. 50. that in such Case, he must bring a Quare Impedit to recover the Presentation, for he is put out of Possession of that. For as my Lord Hob. 322. observes it is one of the Things, whereupon Usurpation works more violently than upon other Possessions.

Now he that is thus out of Possession, and put to his Quare Impedit, must always make a Title to himself in the Declaration, Hob. 102. and this the Defendant cannot counterplead, but by conveying a Title to himself, and so avoiding the Plaintiff's alledged Title, by Traverse, or confessing and avoiding, Hob. 163. Now here the Defendant hath done what he could do; he hath traversed the King's Title, why then

shall

ſhall the King depart from his own Title, and fly upon the defective Title of the Defendant? No. Actori incumbit onus; he muſt recover by his own Strength, not by the Defendant's Weakneſs. The Defendant, by traverſing the King's Title, has cloſed up the King, ſo as that he ought to take Iſſue, and maintain his own Title. V. 2 Cr. 651. I ſay therefore, That the King's declining his own Title, and falling upon the other's, is a Departure, which is Matter of Subſtance, and it would make pleading infinite, therefore the Demurrer in this Caſe is good; 1 Cr. 105. is in Point; and ſo is Hobart's Opinion in Digby *verſus* Fitzherbert, 103, 104. and though the Judges are two and two in that Caſe, as it is there reported, yet the whole Court agreed it afterwards.

So that were this a common Perſon's Caſe, I ſuppoſe it would be agreed on all Hands. But it is inſiſted, that this is one of the King's Prerogatives, that when his Title is traverſed by the Party, he may either maintain his own Title againſt the Traverſe of the Party, or traverſe the Affirmative of the Party, Paſch. pr. C. 242. a. &c.

Anſwer. It is true, this is there reckoned up among many other Prerogatives of the King. But, firſt, with Reverence, ſeveral of them are judged no Law; as that if the King have Title by Lapſe, and he ſuffer another to preſent an Incumbent, who dies, the King ſhall yet preſent, is counterjudged, 3 Cr. 44. and both that and the next following Point too, 7 Co. 28. a Secondly, In the ſame Caſe, Fol. 236. there is a good Rule given, which we may make Uſe of in our Caſe, viz. the Common Law doth ſo admeaſure the King's Title and Prerogatives, as that they ſhall not take away, nor prejudice any Man's Inheritance. V. 19 E. 14. 9. 11 H. 4. 37. 13 E. 4 8. 28 H. 6. 2. 9 H. 4. 6. F. N. B. 152. Now my Brother Wylde hath given the true Anſwer, that when the King's Title appears to the Court upon Record, that Record ſo intitles the King, that by his Prerogative he may either defend his own, or fall upon the other's Title. For in all Caſes where the King either by Traverſe, as 24 E. 3. 30. pl. 27. Keil. 172. 192. or otherwiſe, as by ſpecial Demurrer, E. 3. Fitz. monſt. de Faits 172. falls upon a Defendant's Title, it muſt be underſtood, that the King is intitled by Record, and ſometimes it is remembred, and mentioned in the Caſe, Fitz. 34. That the King is in as by Office, &c. But Br. Preg. 116. the King's Attorney doth confeſs the Law to be

be ſo expreſly, that the King has not this Prerogative, but where he is entitled by Matter of Record.

Before 21 Jac. cap. 2. when the King's Title was found by any Inquiſition, or Preſentment, by Virtue of Commiſſions to find out Concealments, defective Titles, &c. he exerciſed this Prerogative of falling upon, and traverſing the Parties Titles, and much to the Prejudice of the Subjects, whoſe Titles are often ſo ancient and obſcure, as they could not well be made out. Now that Statute was made to cure this Defect, and took away the Severity of that Prerogative; ordaining, That the King ſhould not ſue or impeach any Perſon for his Lands, &c. unleſs the King's Titles had been duly in Charge to that King or Queen Eliz. or had ſtood inſuper of Record within 30 Years before the beginning of that Parliament, &c. Hob. 118, 9. The King takes Iſſue upon the Defendant's Traverſe of his Title; and could the King do otherwiſe, the Miſchief would be very great, as my Brother obſerved, both to the Patron and Incumbent. The Law takes Notice of this, and had a Jealouſie, that falſe Titles would be ſet on foot for the King: And therefore 25 Edw. 3. St. 3. cap. 7. and 13 R. 2. cap. 1. and 4 H. 4. cap. 22. enables the Ordinary and Incumbent to counterplead the King's Title, and to defend, ſue, and recover againſt it. But a fortiori at Common Law the Patron, who by his Endowment had this Inheritance, might controvert and traverſe the King's Title; and it is unreaſonable and miſchievous, that the Crown's Poſſeſſions by Lapſe, or, it may be, the meer ſuggeſting a Title for the King, ſhould put the Patron to ſhew, and maintain his Title, when perhaps his Title is very long, conſiſting of twenty meſne Conveyances, and the King may traverſe any one of them: Keilway 192. b. Pl. 3. I conclude, I think the King ought to have taken Iſſue, and he not doing it, the Demurrer is good, and that the Defendant ought to have Judgment.

Tyrrell contra. I am not ſatisfied but here is a Diſcontinuance. For the Defendant pleads the Appendancy of the Church only, not the Chapel. It is true, he traverſeth, that the Queen was not ſeized of both.

I deny what is affirmed, that the King by his Preſentation of Timothy White, and the preſent Incumbent, is out of Poſſeſſion. By the Judgment of Reverſal, 2 Cr. 123, 4. the Law at this Day is, that he cannot be put out of Poſſeſſion of an Advowſon

vowſon by 20 Uſurpations. A Quare Impedit is an Action of Poſſeſſion; and if he were out of Poſſeſſion, how could he bring it? As to this Traverſe, it is a common Erudition, that a Party ſhall not depart, and that there ſhall not be a Traverſe upon a Traverſe. But the King is excepted: 5 Co. 104. Pl. C. 243. a. Br. Petition 22. Prerogatives 56, 60, 69, & 116. It is agreed, where the King is in Poſſeſſion, and where he is intitled by Matter of Record, he may take a Traverſe upon a Traverſe. And there is no Book ſays, that where he is in by Matter of Fact, he cannot do it. Indeed there is ſome kind of Pregnancy at leaſt in the laſt of thoſe Authorities. But I will cite two Caſes, on which I will rely: viz 19 E. 3. Fitz. monſtr. de faits, 172. which is our Caſe. The King in a Quare Impedit makes Title by Reaſon of a Wardſhip, whereby he had the Cuſtody of the Manor, to which the Advowſon belonged, and that the Father dyed ſeiſed thereof, &c. and there is not a Word that his Title was by Matter of Record. The Defendant pleads, That the Father of a Ward made a Feoffment of the Manor to him for Life, and afterwards releaſed all his Right, &c. ſo that the Father had nothing therein at the Time of his Death; and that after his Death, he the Defendant enfeoffed two Men, &c. and took back an Eſtate to him for 10 Years, which Term yet continues, and ſo it belongs to him to preſent. But he did not ſhew the Releaſe, but demurred in Judgment upon this, that he ought not to ſhew the Releaſe; and the King departs from his Count and inſiſts upon that which the Defendant had confeſſed, that he had made a Feoffment, which he having not ſhewn by the Releaſe, as he ought to make himſelf more than Tenant for Life, was a Forfeiture, and therefore the Heir had cauſe to enter, and the King in his Right; and thereupon prays Judgment; and has a Writ to the Biſhop. Cook 86. 7. 1 Inſt. 304. b. The other Caſe is 24 Ed. 3. 30. Pl. 27, which is our very Caſe. The King brings a Quare Impedit for a Church appendant to a Manor, as a Guardian; the Defendant makes a Title, and traverſeth the Title alledged by the King in his Count, viz the Appendancy; the King replies and traverſes the Defendant's Title. For this Cauſe the Defendant demurs, and Judgment was for the King. In this Caſe it doth not appear in the Pleading, that the King was in by Matter of Record, and ſo it is our very Caſe. For the King may be in by Poſſeſſion by Vertue of a Wardſhip, without Matter of Record by Entry, &c. Staundf. Prerog. 54. I rely upon

See 1 *Lev.* 192, 193. 2 *Lev.* 112. 175. 1 *Saund.* 21, 22, 23.

on these two Cases. But 7 H. 8. Keilw. 175. is somewhat to the Purpose: Per Fitz. In a Ravishment of Ward by the King, if the Defendant make a Title, and traverse the King's Title, the King's Attorney may maintain the King's Title, and traverse the Defendant's Title. I think there is no Difference between the King's being in Possession by Matter of Record, and by Matter of Fact.

Again, If Matter of Record be necessary, here is enough, viz. The Queen's Presentation under the Great Seal of England. And here is a Descent, which is and must be Jure Coronæ. It is unreasonable, that a Subject should turn the King out of Possession by him that hath no Title. This is a Prerogative Case. As to the Statutes objected by my Brother Archer, they concern not this Case. The first enables the Patron to counterplead; but here the Patron pleads.

The rest concern the King's presenting En auter droit; but here it is in his own Right. I think the King in our Case may fly upon the Defendant's Title, and there is no Inconvenience in it. For the King's Title is not a bare Suggestion. For it is confessed by the Defendant, That the Queen did present; but he alledges it was by Lapse.

For another Reason, I think Judgment ought to be for the King, viz. because the Defendant has committed the first Fault. For his Bar is naught, in that he has traversed the Queen's Seisin in Gross; whereas he ought to have traversed the Queen's Presentment modo & forma. For where the Title is by a Seisin in Gross, it is repugnant to admit the Presentment, and deny the Seisin in Gross; because the Presentment makes it a Seisin in Gross: 10 H. 7. 27. Pl. 7. in Point; and so is my Lord Buckhurst's Case in 1 Leon. 154. The Traverse here is a Matter of Substance. But if it be but Form, it is all one: For the King is not within the Statute of 27 Eliz. cap. 5. So he concluded, That Judgment ought to be given for the King. *Vaugh.* 56, 57. *Yelv.* 211. 2 *Mod.* 185.

( 28. ) *Doctor* Lee's *Caſe.*

Privilege. A Motion was made by Raymond for a Writ of Privilege, to be diſcharged from the Office of Expenditor, to which he was elected and appointed by the Commiſſioners of Sewers, in ſome Part of Kent, in reſpect of ſome Lands he had within the Level. He inſiſted, That the Doctor was an Eccleſiaſtical Perſon, Archdeacon of Rocheſter, where his conſtant Attendance is required. Adding, That the Office to which he was appointed, was but a mean Office, being in the Nature of that of a Bailiff, to receive and pay ſome ſmall Sums of Money; and that the Lands, in reſpect whereof he is elected, were let to a Tenant: Vide 1 Cro. 585. Abdy's Caſe.

It was objected againſt this, That this Archdeacon's Predeceſſors did execute this Office: And the Court ordered, That Notice ſhould be given, and Cauſe ſhewn why the Doctor ſhould not do the like.

Afterward Rainesford and Morton only being in Court, it was ruled he ſhould be privileged. Becauſe he is a Clergyman, F. B. 175. r. But I think for another Reaſon, viz. Becauſe the Land is in Leaſe, and the Tenant, if any, ought to do the Office.

Take the Writ.

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( 29. ) Lucy Lutterell, Widow, *verſus* George Reynell, *Eſq*; George Turbervile, *Eſq*; John Cory & Anne Cory.

Treſpaſs. See *Hob.* 144. 1 *Cro.* 239. THE Plaintiff as Adminiſtratrix to Jane Lutterell, durante minori ætate of Alexander Lutterell, the Plaintiff's ſecond Son, declared againſt the Defendants, in an Action of Treſpaſs, for that they ſimul cum *John Chappell*, &c. did take away 4000 l. of the Moneys numbred of the ſaid Jane, upon the 20th Day of October. 1680. And ſo for ſeven Days following the like Sums, ad damnum of 32000 l.

Upon a full hearing of Witneſſes on both Sides, the Jury found two of the Defendants guilty, and gave 6000 l. Damages; and the others Not guilty.

A new Trial was afterwards moved for, and denied.

*Vide Ante*, 2: 2 *Salk.* 644, 648, 650.

At the Trial Mr. Attorney General excepted againſt the Evidence, That if it were true, it deſtroyed the Plaintiff's Action, inaſmuch as it amounted to prove the Defendants guilty of Felony; and that the Law will not ſuffer a Man to ſmooth a Felony, and bring Treſpaſs for that which is a kind of Robbery. Indeed, ſaid he, if they had been acquitted or found guilty of the Felony, the Action would lie; and therefore it may be maintained againſt Mrs. Cory, who was, as likewiſe was William Maynard, acquitted upon an Indictment of Felony for this Matter, but not againſt the reſt. But my Lord Chief Baron declared, and it was agreed, That it ſhould not lie in the Mouth of the Party, to ſay that himſelf was a Thief, and therefore not guilty of the Treſpaſs. But, perhaps, if it had appeared upon the Declaration, the Defendant ought to have been diſcharged of the Treſpaſs.

Quære, What the Law would be, if it appeared upon the pleading, or were found by ſpecial Verdict?

My Lord Chief Baron did alſo declare, and it was agreed, That whereas William Maynard, one of the Witneſſes for the Plaintiff, was guilty, as appeared by his own Evidence, together with the Defendants, but was left out of the Declaration, that he might be a Witneſs for the Plaintiff, that he was a good and legal Witneſs; but his Credit was leſſened by it, for that he ſwore in his own Diſcharge; for that when theſe Defendants ſhould be convicted, and have ſatisfied the Condemnation, he might plead the ſame in Bar of an Action brought againſt himſelf. But thoſe in the ſimul cum were no Witneſſes.

Several Witneſſes were received and allowed, to prove, That William Maynard did at ſeveral Times diſcourſe and declare the ſame Things, and to the like Purpoſe, that he teſtified now. And my Lord Chief Baron ſaid, Though a Hearſay was not to be allowed as a direct Evidence, yet it might be made uſe of to this Purpoſe, (viz.) To prove that William Maynard was conſtant to himſelf, whereby his Teſtimony was corroborated.

One Thorne, formerly Mr. Reynell's Servant, being ſubpena'd by the Plaintiff to give Evidence at this Trial, did not appear. But it being ſworn by the Exeter Waggoner,

That Thorne came so far on his Journey hitherward, as Blandford, and there fell so sick, that he was not able to travel any further, his Depositions in Chancery in a Suit there between these Parties, about this Matter, were admitted to be read.

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( 30. ) Smith *versus* Smith.

Consideration in *Assumpsit*. See 1 *Salk.* 25, 28, 29. *Fares.* 13. 2 *Saund.* 136. *Ante*, 43, 166.

Assumpsit: The Plaintiff declared, Whereas himself, and the Defendant were Executors of the Last Will and Testament of J. S. and whereas the Defendant had received so much of the Money, which was the Testator's, a Moiety whereof belonged to the Plaintiff; and whereas the Plaintiff Pro recuperatione inde sectasset the Defendant, that he the said Defendant, in Consideration that the Plaintiff Abstineret a Secta præd. prosequenda & monstraret quoddam computum, did promise him 100 l. and avers, That he did forbear, &c. Et quod ostentavit quoddam computum prædictum.

After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, by Jones for the Defendant, as followeth: Tho' I do not see how that which one Executor claims against another, is recoverable at all, unless in Equity; yet I shall insist only on this, That here is no good Consideration alledged; for it is only alledged in general, That the Plaintiff sectasset. It is not said so much as that it was legali modo, in a legal Way, whereas it ought to be set forth in what Court it was, &c. That so the Court might know, whether it were in a Court which had Jurisdiction therein or no; and so are all the Precedents in Actions concerning Forbearance to sue. In Point of Evidence the first Thing to be shewn in such a Case as this, is, that there was a Suit, &c.

Saunders for the Plaintiff. That being the prime Thing necessary to be proved, since the Verdict is found for us, must be intended to have been proved. But however, if this Consideration be idle and void, yet the other maintains the Action: And so the Court agreed, viz. That one was enough. It was agreed, That if the Plaintiff averred only that he had shewed Quoddam computum, that unless the Consideration had been to shew any Account, it had been naught; for quoddam is aliud. Dyer 70. Num. 38, 39. 1 H. 7. 9. But it being Quoddam

computum præd', it was well enough. Computum prædictum refers it to the particular Account discourſed of between them.

It was agreed, That it had been beſt to have ſaid Monſtravit in the Averment, that it might agree with the Allegation of the Conſideration. But yet the Word oſtentavit, though moſt commonly by a Metonimy, it ſignifies to boaſt, yet ſignifieth alſo to ſhew, or to ſhew often, as appears by all the Dictionaries; and therefore it is well enough. Take Judgment. *Ante*, 43.

## *Sir* Francis Duncombe's *Caſe.* (31.)

IT was held, If a Writ of Error abate in Parliament, or the like, and another Writ of Error be brought in the ſame Court, it is no Superſedeas. But if the firſt Writ of Error be in Cam. Scacc', &c. and then a Writ be brought in Parliament, &c. it is a Superſedeas by the Opinion of all the Judges, againſt my Lord Coke. Vide Heydon *verſus* Godſalve, 2 Cro. 342. *Superſedeas.* *Ante*, 28, 106, 112, 285. 2 *Rol.* 492.

## Browne *verſus* London. (32.)

INdebitatus Aſſumpſit for fifty three Pounds due to the Plaintiff upon a Bill of Exchange drawn upon the Defendant, and accepted by him, according to the Cuſtom of the Merchants, &c. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That though an Action upon the Caſe does well lie in ſuch Caſe, upon the Cuſtom of Merchants, yet an Indebitatus Aſſumpſit may not be brought thereupon. Bill of Exchange. 2 *Show.* 5 *Mod.* 13, 367. 1 *Salk.* 125. 6 *Mod.* 129.

Winnington. I think it doth well lie. Debt lies againſt a Sheriff upon levying and receiving of Money upon an Execution: Hob. 206. Now this is upon a Bill of Exchange accepted, and alſo upon the Defendant's having Effects of the Drawer in his hands, having read the Value; for ſo it muſt be intended, becauſe otherwiſe this general Verdict could not be found. *Vide Ante*, 14, *&c. Ib.*

Raineſ-

Rainesford. This is the very same with Milton's Case, lately in Scacc', where it was adjudged, That an Indebitatus Assumpsit would not lie. In this Case he added, That the Verdict would not help it; for though my Lord Chief Baron said it were well, if the Law were otherwise; yet he and we all agreed, That a Bill of Exchange accepted, &c. was indeed a good Ground for a Special Action upon the Case; but that it did not make a Debt: First, Because the Acceptance is but conditional on both Sides. If the Money be not received, it returns back upon the Drawer of the Bill. He remains liable still, and this is but collateral. Secondly, Because the Word Onerabilis doth not imply Debt. Thirdly, Because the Case is primæ Impressionis: There was no Precedent for it. Then Offley, who was of Counsel pro Defendente in the Case at Bar said, That he was of Counsel for the Plaintiff in the Exchequer-Case, and that therein Direction was given to search Precedents; and that they did search in this Court, and in Guildhall, and that there was a Certificate from the Attornies and Prothonotaries there, that there was no Precedent of such an Action. Adjournatur.

*Vide* 5 Co. 92, 93. Twisden. I remember an Action upon the Case was brought, for that the Defendant had taken away his Goods, and hidden them in such secret Places, that the Plaintiff could not come at them to take them in Execution; and adjudged it would not lie.

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( 33. ) Watkins *versus* Edwards.

Infant Apprentice. ACtion of Covenant brought by an Infant per Guardian' suum, for that the Plaintiff being bound Apprentice to the Defendant by Indenture, &c. the Defendant did not keep, maintain, educate, and teach him in his Trade of a Draper, as he ought; but turned him away. The Defendant pleads, That he was a Citizen and Freeman of Bristol; and that at the General Sessions of the Peace there held, there was an Order, That he should be discharged of the Plaintiff, for his disorderly Living, and beating his Master and Mistress, and that this Order was inrolled by the Clerk of the

Peace, as it ought to be, &c. To which the Plaintiff demurred.

It was said for the Plaintiff, That the Statute of 5 Eliz. cap. 4. doth not give the Justices, &c. any Power to discharge a Master of his Apprentice, in case the Fault be in the Apprentice, but only to minister due Correction and Punishment to him. See 1 *Salk.* 67, 68. 2 *Salk.* 490, 491. 1 *Saund.* 313, 314, 316. & *Ante*, 2.

Per Cur'. That hath been over-ruled here. The Justices, &c. have the same Power of discharging upon Complaint of the Master, as upon Complaint of the Apprentice. Else that Master would be in a most ill Case that were troubled with a bad Apprentice; for he could by no Means get rid of him. Secondly, It was urged on the Plaintiff's Behalf, that he had not, for ought that appears, any Notice or Summons to come and make his Defence. 11 Co. 99. Bagg's Case: And this very Statute speaks of the Appearance of the Party, and the hearing the Matter before the Justices, &c. 1 *Saund.* 314, 315.

Saunders pro Defendente. In this Case the Justices are Judges; and it being pleaded, That such a Judgment was given, that is enough, and it shall be intended all was regular.

Twisden and Rainesford. That which we doubt is, Whether the Defendant ought not to have gone to one Justice, &c. first, as the Statute directs, that he might take Order and Direction in it; and then, if he could not compound and agree it, he might have applied himself to the Sessions. For the Statute intended there should be, if possible, a Composure in private; and the Power of the Sessions is conditional, viz. if the one Justice cannot end it. In Case of a Bastard-Child they cannot go to the Sessions per Saltum; and we doubt they cannot in this Case. It is a new Case. And then the Matter will be, Whether this ought to be set down in the pleading? Adjournatur. 1 *Saund.* 316. 1 *Cro.* 530, 470.

Rex

( 34 ) Rex *verſus* Ledginham.

*Ante*, 71. *Raym.* 193, 205. 1 *Vent.* 97, 104. 1 *Lev.* 299. 2 *Keb.* 687, 697. 2 *Danv.* 651. *R.* 1. Diſtreſſes.

INformation ſetting forth, That he was Lord of the Manor of Ottery St. Mary in the County of Devonſhire, wherein there were many Copyholders and Freeholders, and that he was a Man of an unquiet Mind, and did make unreaſonable Diſtreſſes upon ſeveral of his Tenants, and ſo was communis oppreſſor & perturbator pacis. It was proved at the Trial, that he had diſtrained four Oxen for three Pence, and ſix Cows for eight Pence, being Amercements for not doing Suits of Court, and that he was Communis oppreſſor & perturbator pacis. The Defendant was found guilty.

It was moved in Arreſt of Judgment, That the Information is ill laid: Firſt, It is ſaid he diſquieted his Tenants, and vexed them with unreaſonable Diſtreſſes. It is true, that is a Fault, but not puniſhable in this Way. For by the Statute of Marlebridge, cap. 4. 2 Inſt. 106, 7. he ſhall be puniſhed by grievous Amercements; and where the Statute takes care for due Puniſhment, that Method muſt be obſerved. Secondly, As to the Matter it ſelf, they do not ſet forth how much he did take, nor from whom; ſo that the Court cannot judge whether it is unreaſonable or no, nor could we take Iſſue upon them. Thirdly, As to the Communis oppreſſor & perturbator pacis, they are ſo general, that no Indictment will lie upon them: 2 Rol. 79. Jones 302. Cornwall's Caſe, which indeed goeth to both the laſt Points.

*2 Rol. 79.* Twiſden, Communis oppreſſor, &c. is not good, ſuch general Words will never make good an Indictment, ſave only in that known Caſe of a Barretor; for Communis Barrectator is a Term which the Law takes Notice of, and underſtands: It is as much, as I have heard Judges ſay, as a common Knave, which contains all Knavery. For the other Point, *Ante*, 71. an Information will not lie for taking outragious Diſtreſſes. It is a private Thing, for the which the Statute gives a Remedy, (viz.) by an Action upon the Statute tam quam.

Per Cur'. It is naught. Adjourn'.

(35.)

## Roberts *verſus* Marriot.

S. C. 1 *Lev.* 300. 2 *Saund.* 73. 2 *Keb.* 614, 618, 702. See 1 *Saund.* 181.

AN Action of Debt brought upon a Bond to ſubmit to an Award. The Defendant pleads, Nullum fecerunt arbitrium. The Plaintiff replies, and ſets forth an Award made by two Prebends of Weſtminſter, and that it was delivered to the Party, according to the Condition of the Bond, &c. The Defendant rejoins, That it was not delivered, &c. Et hoc paratus eſt verificare. The Plaintiff demurs. Serjeant Baldwynne and Winington pro defend. Jones pro querente. Cur. The Defendant having firſt pleaded, Nullum fecer' arb. and then in his Rejoinder, that it was not delivered (which is a Confeſſion that there was an Award made) has committed a Departure; and ſo it has been judged. If he had pleaded Nullum fec' arbitrium, &c. abſque hoc that it was tendered, &c. it had been naught: And it is as bad now. Alſo when the Plaintiff replies, that the Award was delivered, and the Defendant ſaith, It was not, he ſhould have concluded to the Country, and not as he doth, hoc paratus eſt verificare; for otherwiſe the Party might go in infinitum; and there would be no end of Pleading. Note, there was an Exception taken to the Award (viz.) that it was awarded that there ſhould be a Releaſe of all Specialties among other Things; whereas Specialties were not ſubmitted.

*Ante*, 227.

*Ante*, 72.

1 *Saund.* 102.

Cur. Then the Award is void as to that only. But indeed, if the Breach had been aſſigned in not releaſing the Specialties, it had been againſt the Plaintiff. But now take Judgment.

8 *Co.* 133.

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## Wood *verſus* Davies.

(36.)

TRov. & conv. de tribus ſtruibus fœni, Anglice, Ricks of Hay. Moved in Arreſt of Judgment, that it was too uncertain. For no Man could tell how much was meant by ſtrues. It was urged it ſhould have been ſo many Cart-loads, or the like. For Loads was adjudged uncertain in Glyn's

Trover. *Ante*, 46.

time here. But Rainsford and Moreton, who only were in Court, judged it well enough.

S. C. *Ante*, 66.
2 *Saund.* 177.
1 *Sid.* 466.
2 *Danv.* 50. *pl.* 14.

## John Wooton *verſus* Penelope Hele. *Vide* Mich. 21. Rot. 210.

COvenant upon a Fine. The Plaintiff declares, That whereas quidem finis ſe levavit in curia nuper pretenſ. Cuſtodum libertatis Angliæ authoritate Parliamenti de Banco apud Weſtmonaſt', &c. a die Sancti Michaelis in unum menſem anno Domini, 1649. Coram Olivero St. John, Johanne Puliſon, Petro Warburton, & Leonard' Atkins, Juſtic, &c. inter præd. Johannem Wootton, &c, quer' & præd' Johannem Hele, & Penelopen Hele per nomina Johannis Hele Armigeri, & Penelopes uxoris ejus deforc inter alia de uno Meſſuagio, &c. Per quem finem præd' Johannes Hele & Penelope conceſſerunt præd. tenementa præd. John. W. habendum & tenendum, &c. pro termino 99 annorum proximorum poſt deceſſum Gulielmi Wootton, &c. ſi Johannes Wootton modo querens & Gracia Wootton tamdiu vixerint, aut eorum alter tamdiu vixerit, & præd' J. H. & Penelope & hæred. ipſius Johannis Warranc præd. Jo. W. præd' tenementa, &c. Contra omnes homines pro toto termino præd. prout per Recordum finis præd. &c. plenius apparet. Virtute cujus quidem finis præd. J. W. fuit poſſeſſionat de intereſſe præd. termini, &c. & ſic inde poſſeſſionat exiſtens præd. Gulielm W. &c. poſtea ſcil. ſexto die, &c. obierunt, poſt quorum mortem præd. J. W. in tenementa præd. &c intravit & fuit inde poſſeſſionat, &c. & ſic inde poſſeſſionat exiſtens præd. J. H. poſtea, ſcil. &c. obiit & præd. Penelope ipſum ſupervixit & idem Johannes W. in facto dicit quod quidem Hugo Stowel Armiger, poſt commenſationem termini præd. & durante termino illo & ante diem Impetrationis hujus Billæ, ſcil. &c. habens legale jus & titulum ad tenementa præd. &c. in & ſuper poſſeſſionem termini præd. ipſius J. W. in eiſdem intravit ipſumq; J. W. contra voluntatem ipſius J. W. per debitum Legis proceſſum a poſſeſſione & occupatione tenementorum præd. ejecit, expulit, & amovit, ipſumq; J. W. ſic inde expulſ. a poſſeſſione ſua inde cuſtodivit & extratenuit

& adhuc extratenet. Contra formam & effectum finis & warrant' præd. & ſic idem præd. J. W. dicit quod præd. Penel' poſt mortem præd. J. W. licet ſæpius requiſit', &c. Conventionem ſuam præd. Warrant' præd. non tenuit ſed infregit, ſed J. H. eidem J. W. tenere omnino recuſavit & adhuc recuſat ad dam', &c. 600 l. The Defendant pleads, Repreſentando quod eadem Penelope conventionem ſuam Warrant' præd. a tempore levationis finis præd. ex parte ſua cuſtodiend. hucuſq; bene & fideliter cuſtodivit, repreſentandoq; quod præd. Hugo Stowel præd. tempore intrationis ipſius Hugonis in tenementa præd. non habuit aliquod Legale Jus aut titulum ad eadem tenementa, &c. pro placito eadem Penel' dicit, quod præd. H. Stow. ipſum Johannem a poſſeſſione & occupatione tenementor. non ejecit, expulit & amovit, prout præd. Johannes ſuperius verſus eam narravit, & hoc parat' eſt verificare. Upon this Iſſue was taken, and a Verdict for the Plaintiff was found, and 300 l. Damages. And upon a Motion in Arreſt of Judgment, the Cauſe was ſpoken to three or four Times.

Jones pro Defendent'. 1. It is conſiderable, whether an Action will lie againſt a Feme upon a Covenant in a Fine levied by her, when Covert-Baron. It would be inconvenient that Land ſhould be unalienable, and therefore the Law enables a Feme Covert to levy a Fine. Which Fine ſhall work by Eſtoppel, and paſs againſt her a good Intereſt. But to make her liable to a perſonal Action thereupon, to anſwer Damages, &c. it were hard, and it is Caſus primæ impreſſionis. For the Plaintiff it was ſaid, There is little queſtion but an Action of Covenant will well lie upon this Warranty. The Law enables a Feme Covert to corroborate the Eſtate ſhe paſſes, and to do all things incident. If ſhe levy a Fine of her Inheritance, ſhe may be vouched, or a Warrantia Chartæ, &c. thereupon he had againſt her, and ſo is Roll *verſus* Osborn Hob. 20. and if ſhe can thus bind her Land, a fortiori ſhe may ſubject her ſelf to a Covenant, as in the Caſe at the Bar. If a Husband and Wife make a Leaſe for Years, and ſhe accept the Rent after his Death, ſhe ſhall be liable to a Covenant.

*Vide ante*, 66, 67. 2 *Mod.* 213. 3 *Mod.* 135. 2 *Lev.* 37, 194. 3 *Lev.* 325. 2 *Vent.* 61, 62. 1 *Lev.* 301. *Vaug.* 118, 119, 120, 121. 1 *Vent.* 184. *Raym.* 371. 2 *Danv.* 50. pl. 14, 15.

This Point was agreed by the Counſel on both ſides, that a Covenant in this Caſe would lie againſt her, and ſo this Court agreed.

Twyſd. added, That there was no queſtion but a Covenant would lie upon a Fine. For (ſaith he) ſealing is not always

See *Cro. Jac.* 240, 399, 521. 1 *Bulſt.* 21. 3 *Bulſt.* 163. *Poph.* 136. *Godb.* 276. 1 *Rol. R.* 352. 2 *Rol. R.* 63.

neceſſary to found an Action of Covenant. Thus Covenant lies againſt the King's Leſſee by Patent, upon his Covenant in the Patent, though we know there is no ſealing by the ſaid Leſſee.

Secondly, it was urged on the Defendant's behalf, That the Breach of Covenant is not well aſſigned, for it is not ſhewed what Title Stowel had. It is not only participially expreſſed, Habens Legale, &c. but what is ſaid, is altogether general and uncertain: Jus & Legalem titulum ad tenementa præd. So that the Breach aſſigned is in effect no more but that Stowel entred, and ſo the Covenant was broken. If a Man plead Indemn. Conſervat, he muſt ſhew how. Gyll *verſus* Gloſs. Yelverton 227, 8. 2 Cr. 312. Debt for Rent on a Parol-Leaſe, the Defendant pleads, That the Plaintiff nil habuit in tenementis prædictis, unde dimiſſionem prædictam facere potuit. The Plaintiff replies, Quod habuit, &c. in general, without ſhewing in ſpecial what Eſtate he had, that ſo it might appear to the Court, that he had ſufficient in the Lands whereout to make the Leaſe; and therefore the Replication was adjudged naught, It is true, it was adjudged, That after the Verdict, it was helped by the Stat. of Jeofails. But that I conceive was, becauſe the Iſſue, though not very formal, yet was upon the main Point, viz. Whether the Leſſor had an Eſtate in the Tenements or no? For the true Reaſon why a Verdict doth help in ſuch a Caſe, is, becauſe it is ſuppoſed that the Matter left out, was given in Evidence, and that the Judges did direct accordingly; or elſe the Verdict could not have been found. So in our Caſe, if the Iſſue had been, Whether Stowel had Right, &c. it might have been ſuppoſed and intended by his ſpecial Title and Eſtate made out and proved by Trial. But here the Iſſue going off on a collateral Point, it cannot be intended, that any ſuch matter was given in Evidence.

2 *Co.* 4. *a.* 2 *Saund.* 180.

Jones and Pollexfen for the Plaintiff. This Objection is againſt all the Precedents, by which it appears, that alledging generally as we do, habens Legale Jus & Titulum, is good. It is ſufficient for a Man to alledge, that the Covenantor had no Power to demiſe, or was not ſeized, &c. without ſhewing any Cauſe why, or that any other Perſon was ſeized, &c. 9 Co. 61. 2 Cr. 304, 369, 370. It is to be inquired upon Evidence, Whether the Party had a good Title or no, and ſo the Court agreed.

*Co. Ent.* 117. *a.*

Thirdly,

Thirdly, Saunders for the Defendant said, Though the Plaintiff was very wary, bringing in the Right of Stowel with a Participle only, so that we could not take Issue upon it; we could only protest: Yet I agreed, that having taken Issue upon one Point, we must admit, and do admit the rest of the Matter in the Declaration. But that is only as it is alledged. Now here therefore we must admit, that Stowell had Right and Title, &c. But we do not admit that he had a Title precedent to this Fine, or had Right otherwise than from and under the Plaintiff himself; for that is not alledged. And it shall never be intended, no not after Verdict, that Stowell had good and Eigne Right and Title, before the Lease granted by the Fine, but the contrary shall be intended. And for that I rely upon Kirby *versus* Hanfaker, 2 Cr. 315. By all the Judges of C. B. and Scacc in Cam Scacc in Point. May that is a stronger Case than ours is. For there the Issue which was found for the Plaintiff, was, that the Recovery by Essex, who answers to Stowel in our Case, was not by Covin, but by lawful Title. And yet, because it was alledged, that he had a good and Eigne Title, it was held to be ill, and not helped, and the Judgment was reversed. The saying that Stowell ejected him, &c. Contra formam & effectum Finis & Warrant præd. or if it had been Contra formam & effectum Conventionis præd. is absurd, and helps nothing. For Stowell could not do so, because he is not Party to the Fine. *Ante*, 102.

Jones for the Plaintiff. It can never be intended that Stowell entred, &c. by a Title under us, because it is alledg'd to be Contra formam & effectum Finis & Warrant' præd. & Contra voluntatem ipsius J. W. & eum a possessione sua Custodivit, &c. Had it been by Lease under us, the Defendant should have pleaded it. I doubt whether the Defendant could have demurred. But certainly, now the Jury have found all this, it can never be intended as they would have it: As to the Case, that has been cited, between Kirby and Hanfaker; I say it is not alledged so clearly there, as here: It is not said there, that the Lessee was possessed, and that the Recoveror entred into, and upon his Possessions; and ejected him. 2. These words Contra formam, &c. are not in that Case. 3. In that Case the Court of King's Bench was of Opinion, That the Verdict had made it good. 4. The Roll of that Case is not to be found, here is a Man will

will make Oath that he hath ſearched four Years before and after the Time when the Caſe is ſuppoſed to have been, and cannot find it.

Rainsford and Moreton were at firſt of Opinion, That the Verdict had helped it. For ſaith Rainsford, If Stowell had Title under the Plaintiff, it could not have been found, that there was a Breach of Covenant. But afterwards they ſaid, that Kirby and Hanſaker's Caſe came ſo cloſe to it, that it was not to be avoided, and they were unwilling to make new Precedents.

Twyſden. That Book is ſo expreſs'd, that it is not an ordinary Authority, it is not to be waved. But I was of the ſame Opinion, before that Book was cited. For here it is poſſible Stowell might have a Leaſe from Wootton ſince the Fine. Now the Warranty doth not extend to Puiſne Titles. The Defendant ſhould have ſaid that Stowell had Priorem Titulum, &c. When a good Title is not ſet forth in the Declaration to entitle the Plaintiff to his Action, it ſhall never be helped. There was an Action upon the Stat. of Monopolies, for that the Defendant entred, I ſuppoſe, by Pretext of ſome Monopoly-Commiſſion, &c. & detenuit certain Goods. But it was not ſaid, they were his, the Plaintiff's, and though we had a Verdict, yet we could never have Judgment. In 3 Car. there was an Action brought upon a Promiſe to give ſo much with a Child, quantum daret to any other Child; and it was alledged, that dedit ſo much, and becauſe that it might be before the Time of the Promiſe, it was held naught after Verdict.

It may be the Roll of Kirby *verſus* Hanſaker is not to be found, no more than the Roll of Middleton *verſus* Cleſman, reported, Yelv. 65. But certainly Juſtice Croke and Yelverton were Men of that Integrity, they would never have reported ſuch Caſes, unleſs there had been ſuch. There are many Loſſes, Miſcarriages and Miſtakes of this Kind. Pray, where will you find the Roll of the Decree for Titles in London? Yet I have heard the Judges ſay, They verily believe it is upon a wrong Roll.

Nil Capiat per Bill.

## Rex *verſus* Neville. (38.)

INdictment for erecting a Cottage for Habitation contra Stat. quaſhed, becauſe it was not ſaid, That any inhabited it. For elſe it is no Offence. Per Rainsford & Moreton, qui ſoli aderant. Cottages. 31. *El. c.* 7. *Styl.* 33.

## Jemy *verſus* Norrice, (39.)

S. C. 1 *Lev.* 303. &c.

A Writ of Error was brought of a Judgment given in the Common Pleas, in an Action upon a quantum meruit, for Wares ſold. Firſt, One of them is unum par Chirothecarum; But it is not ſaid of what ſort. Twiſden. It is good enough however, ſo it has been held de Coriis, without ſaying Bovinis, &c. de Libris, without ſaying what Books they were. Secondly, Another is parcella fili: which, it was ſaid, was uncertain; unleſs it had been made certain by an Anglice. For though it was agreed it had been good in an Indeb. Aſſumpſit, yet in this Caſe there muſt be a Certainty of the Debt. Such a general Word cannot be good, no more than in a Trover. Twiſden. If an Indeb. aſſumpſit ſhould be brought for 20 l. for Wares ſold, and no Evidence ſhould be given of an Agreement for the certain Price, I ſhould direct it to be found eſpecially. But parcella fili ſeems to be as uncertain, as Pairs of Hangings, Cur. It is doubtful. But however, affirmetur niſi, &c. 2 *Saund.* 374

Foxwiſt

( 40. )

S. C. *Ante*, 47, 72. 1 *Sid.* 449. 2 *Lev.* 299, 2 *Saund.* 212. 2 *Keb.* 633.

## Foxwith *& al. verſus* Tremayneaut, *Trin.* 21. *Rot.* 1512.

FOR the Plaintiff. The two Parties, who are Infants, may well ſue by Attorney, as they do. The Authorities are clear, 2 Cr. 441. 1 Ro. 288. Weld *verſus* Rumney in 1650. Style 318. We beg Leave to mention eſpecially what you Mr. Juſtice Twyſden ſaid there; though indeed we do not know, nor can be very confident that it is reported right. Twyſden. I do proteſt not one Word of it true they went about. But 3 Cr. 541. and eſpecially 378. is expreſs in our Point. *V.* 5 *Co.* 29. 6 *Co.* 67. *b.* In Rot. 288. num. 2. Indeed there is a Quære made, becauſe an Infant might by this means be amerced. But that reaſon is a Miſtake, for an Infant ſhall not be amerced. Dyer 388. 1 Inſt. 127. a. 1 Ro. 214.

Moreton. I take the Law to be, that where an Infant ſues with others in auter droit, as here, he ſhall ſue by Attorney; for all of them together repreſent the Teſtator. I ground my ſelf upon the Authorities, which have been cited, and Yelv 130. Alſo it is for the Infant's Advantage to ſue by Attorney. But if he be a Defendant he may appear by Guardian, Popham 112.

I think the Parties may all joyn in this Suit, though perhaps in Hatton *verſus* Maskall they could not: For in that Caſe it appeared that the Wife only, who was Plaintiff, was the Executrix. So he concluded, that Judgment ought to be given for the Plaintiffs. 1 *Lev.* 181. 1 *Keb.* 750. *Ante*, 47.

Rainesford accordant. This Caſe is ſtronger than where a ſingle Perſon is made Executor or Adminiſtrator. For though Ro. 388. num. 2. makes a Quære of that, yet Num. 3. which is our Caſe, he agrees clearly with the Counteſs of Rutland's Caſe, in 3 Cr. 377. 8. That the Infant as well as the other Executors ſhal ſue by Attorney. The Reaſons objected on the contrary are, That an Infant cannot make an Attorney, and that he may be prejudiced hereby. I anſwer, That the Executors of full Age have Influence upon the Infants, and they are entruſted to order and manage the whole Buſineſs. *V.* 1 *Leon.* 74. And therefore Adminiſtration durante minore ſhall not be granted, ſo in this Caſe, he ſhall have Privilege

to ſue by Attorney, becauſe he is accompanied with thoſe which are of full Age. I conclude, I have not heard of any Authority againſt my Opinion; and how we can go over all the Authorities cited for it, I do not know.

Twiſden contra. This is an Action upon the Caſe, for that the Defendant was indebted for Damages clear, received to the Teſtator's Uſe. And indeed, I do not ſee otherwiſe how it would lie. Two Queſtions have been made: Firſt, Whether all the Executors may, or muſt join? I confeſs I have heard nothing againſt this, viz. but that they may join. But I cannot ſo eaſily as my Brothers ſlubber over all the Authorities cited, (viz.) Hatton *verſus* Maskall, which, I confeſs, is a full Authority for this, that they need not join. The Caſe was thus; The Teſtator recovers a Judgment, and dies, making his Will thus. Alſo, I deviſe the Reſidue of my Eſtate to my two Daughters, and my Wife, whom I make my Executrix. I confeſs I cannot tell why, but the Spiritual Court did judge them all, both the two Daughters, as well as the Wife, to be Executrixes; and therefore, we the Judges muſt take them to be ſo. The Wife alone proves the Will with a reſervata poteſtate to the Daughters, when they ſhould come in. But this makes nothing at all in this Caſe; I think this is according to their uſual Form. The Wife alone ſues a Scire Facias upon this Judgment, and therein ſets forth this whole Matter, viz. That there were two other Executrixes which were under ſeventeen, &c. It was adjudged for the Plaintiff, and affirmed in a Writ of Error in Cam. Scacc', that the Scire facias was well brought by her alone. But firſt, I cannot ſee how a Writ of Error ſhould lie in that Caſe in Cam. Scacc'; for it is not a Cauſe within 27 Eliz. 2. What Reaſon is there for Judgment? A Reaſon may be given, That before an Executor comes to ſeventeen, he is no Executor. But I ſay he is quoad eſſe, though not quoad Executionem. A Wife Adminiſtratrix under ſeventeen ſhall join with her Husband in an Action; and why ſhall not the Infants as well in our Caſe? Yelv. 130. is expreſs, That the Infant muſt join, and be named. It is clear, That no Adminiſtration durante minore ætate can be committed in this Caſe. For all the Executors make but one Perſon, and therefore why may not all join? 2. Admitting they may join, Whether the Infants may ſue by Attorney? I hold, That in no Caſe an Infant ſhall ſue or be ſued either in his own, or auter droit, by Attorney.

*Yelv.* 130.

2 *Saund.* 212.
1 *Lev.* 181.
1 *Keb.* 750.
*Ante*, 47.

*Ante*, 79.
*Hob.* 72.

There are but four Ways by which any Man can ſue, In propria perſona, per Attornatum, per Guardianum, and per Prochein amy. An Infant cannot ſue in propria Perſona: That was adjudged in Dawkes *verſus* Peyton. It was an excellent Caſe, and there were many notable Points in it. Firſt, It was reſolved, That a Writ of Error might be brought in this Court, upon an Error in Fact in the Petty Bag. 2. That the Entry being general (venit ſuch a one) it ſhall be intended to be in propria Perſona. 3. That it was Error for the Infant, in that Caſe, to appear otherwiſe than by a Guardian. 4. That the Error was not helped by the Statute of Jeofails. In a Caſe between Colt and Sherwood, Mich. 1649. an Infant Adminiſtrator ſued and appeared per Guardianum; and it appeared upon the Record, that he was above ſeventeen Years of Age. I was of Counſel in it, and we inſiſted it was Error, but it was adjudged, That he appeared as he ought to appear; and that he ought not to appear by Attorney. And the Reaſons given were; Firſt, Becauſe an Infant cannot make an Attorney by reaſon of his Inability. Secondly, Becauſe by this Means an Infant might be amerced pro falſo Clamore. For when he appears by Attorney, non conſtat, unleſs it happen to be eſpecially ſet forth, That he is an Infant, and ſo he is amerced at all Adventures; and to relieve himſelf againſt this he has no Remedy, but by a Writ of Error. For Error in Fact cannot be aſſigned ore tenus. And it were well worth the Coſt to bring a Writ of Error to take off an Amercement.

1 *Rol.* 747. *Ante*, 340, 400. *Poſt*, 747.

But it is ſaid, That the Infants may appear by Attorney in this Caſe, becauſe they are coupled and joined in Company with thoſe of full Age. I think that makes no Difference, for that Reaſon would make ſuch Appearance good, in caſe that they were all Defendants. But it is agreed, That if an Infant be Defendant with others who are of full Age, he cannot appear by Attorney. The Reaſon is the ſame in both Caſes. If an Infant and two Men of full Age join in a Feoffment, and make a Letter of Attorney, &c. this is not good, nor can in any Sort take away the Imbecility which the Law makes in an Infant.

2 *Saund.* 212.

I conclude, I think the Plaintiffs ought to join; but the Infants ought to appear by Guardian. But ſince my two Brothers are of another Mind, as to the laſt Point, there muſt be Judgment, that the Defendant reſpondeat ouſter.

Note,

Note, Coleman argued for the Defendant; his Argument, which ought to have been inserted above, was to this Effect: First, These five cannot join; had there been but one Executor, and he under seventeen Years, the Administrator durant. minor', &c. ought to have brought the Action: 5 Co. 29. a. But since there are several Executors, and some of them of full Age, there can be no Administration durant. minor'. Those of full Age must administer for themselves, and the Infants too. But the Course is, That Executors of full Age prove the Will, and the other, that is under Age, shall not come in till his Age of seventeen Years. But now the Question is, How this Action should have been brought? I say, according to the Precedent of Harton *versus* Maskall, which was in Cam. Scacc'. Mich. 15 Car. 2. Rot. 703. wherein the Executor, who was of full Age, brought the Scire facias, but set forth, That there were other two Executors who were under Age, and therefore they which were of full Age pray Judgment. It was resolved, the Scire Facias was well brought, and they agreed, That the Case in Yelv. 130. was good Law; because in that Case it was not set forth specially in the Declaration, that there was another Executor under Age. So that they resolved, That the Executor of full Age could not bring the Action, without naming the others. 2. However the Infants ought to sue by Guardian, and where Rolle, and other Books say, That where some are of Age, and some under, they may all sue by Attorney: It is to be understood of such as are indeed under twenty-one, but above seventeen. Respondeas ouster.

1 *Lev.* 181. 1 *Keb.* 750. *Ante*, 47, 297.

After this the Suit was compounded.

# Term. Paſch. 22 Car. II. Regis.

(1.) S. C. *Ante*, 86. *Raym.* 236. 2 *Keb.* 756, 787, 814. 2 *Chan. Rep.* 26.

## *The great CASE* in Cancellaria, *between* Charles Fry *and* Anne *his Wife, againſt* George Porter.

Reſolved,

*That there is no Relief in Equity againſt the Forfeiture of Land limited over by Deviſe in marrying without Conſent*, &c. *Many Particulars concerning Equity.*

See before 86, 87.

THE Caſe was: Montjoy Earl of Newport was ſeized of an Houſe called Newport-houſe, *&c.* in the County of Middleſex, and had three Sons, who were then living; and two Daughters, Iſabel married to the Earl of Banbury, with her Father's Conſent, (who had Iſſue A. the Plaintiff) and Anne married to M. Porter, without her Father's Conſent (who had Iſſue D.) both theſe Daughters died. The Earl of Newport made his Will in this Manner: I give and bequeath to my dear Wife, the Lady *Anne* Counteſs of *Newport*, all that my Houſe, called *Newport-houſe*, and all other my Lands, *&c.* in the County of *Middleſex*, for her Life. And after her Death, I give and bequeath the Premiſſes to my Grandchild *Anne Knollis*, viz. the Plaintiff, and to the Heirs of her Body. Provided always, and upon Condition, That ſhe marry with the Conſent of my ſaid Wife, and the Earl of *Warwick*, and the Earl of *Mancheſter*, or of the major Part of them. And in caſe ſhe marry without ſuch Conſent, or happen to die without Iſſue, Then I give and bequeath it to *George Porter*, viz. the Defendant. The Earl died. Anne the Plaintiff married Charles the Plaintiff, ſhe being then about fourteen or fifteen Years old, without the Conſent of either of the Truſtees. And thereupon now a Bill was preferred to be relieved againſt this Condition and Forfeiture, becauſe ſhe had

Fourteen Years Old.

no Notice of this Condition and Limitation made to her, &c. To this the Defendant had demurred, but that was overruled. Afterwards there were ſeveral Depoſitions, &c. made and teſtified on each Side, the Effect of which was this. On the Plaintiffs Part it was proved by ſeveral, That it was always the Earl's Intention, that the Plaintiff ſhould have this Eſtate, and that they never heard of this Purpoſe, to put any Condition upon her; and believed that he did not intend to give away the Inheritance from her. But that this Clauſe in the Will was only in terrorem, and cautionary, to make her the more obſequious to her Grandmother. The two Earls ſwore, That they had no Notice of this Clauſe in the Will; but if they had, they think it poſſible ſuch Reaſons might have been offered, as might have induced them to give their Conſents to the Marriage; and that now they do conſent to, and approve of the ſame. Some Proof was made, That the Counteſs of Newport had ſome Deſign that the Plaintiff ſhould not have this Eſtate, but that the Defendant ſhould have it. But at laſt even ſhe, (viz. the Counteſs) was reconciled, and did declare, That ſhe forgave the Plaintiff's Marriage, and that ſhe ſhewed great Affection to a Child which the Plaintiff had; and directed, That when ſhe was dead, the Plaintiff, and her Child, ſhould be let into the Poſſeſſion of the Premiſſes, and ſhould enjoy them, &c. It was proved alſo, That when there had been a Treaty concerning the Marriage between my Lord Morpeth and the Plaintiff, and the Plaintiff would not marry him, her Grandmother ſaid, She ſhould marry whom ſhe would, ſhe would take no further Care about her: (The Counteſs was dead at the Time of this Suit.) It was proved, That Mr. Fry was of a good Family, and that the Defendant had 5000 l. appointed and provided for him by his Grandfather, by the ſame Will.

On the Defendant's Part, it was ſworn by the ſaid late Counteſs of Newport, viz. In an Anſwer made formerly to a Bill brought againſt her by the now Defendant for preſerving of Teſtimony, (which was ordered to be read) That the Marriage was private, and without her Conſent and Approbation, and that ſhe did not conceive it to be a fit and proportionable Marriage, he being a younger Brother, and having no Eſtate. Marriage private. No Eſtate.

The like was ſworn by the Earl of Portland, the ſaid Counteſs's then Husband, and that it appeared ſhe leap'd over a Wall (by Means of a Wheel-barrow ſet up againſt it) to go Leap'd over a Wall.

to

to be married; and that as ſoon as the Truſtees did know of the Marriage, they did diſavow and diſlike it, and ſo declared themſelves ſeveral Times, and ſaid, That had they had any Hint of it, they would have prevented it.

Others ſwore that the Earl of Portland declared, upon the Day of her going away, That he never conſented thereto; and that the Counteſs deſired then, That he would not do any Thing like it; and that the Earl of Warwick ſaid, He would have loſt one of his Arms rather than have conſented to the ſaid Marriage.

On hearing of this Cauſe before the Maſter of the Rolls, viz. Sir Harbottle Grimſtone, Baronet, the Plaintiff obtained a decretal Order, (viz.) That Anne the Plaintiff, and her Heirs ſhould hold the Premiſſes quietly againſt the Defendant and his Heirs, and that there ſhould be an Injunction perpetual againſt the Defendant, and all claiming under him.

And now there was an Appeal thereupon, and rehearing before Sir Orlando Bridgman, Kt. then Lord Keeper, aſſiſted by the two Lord Chief Juſtices, and the Chief Baron, before whom it was argued thus:

Serjeant Maynard. The Plaintiff ought not to have Relief in this Caſe. The Plaintiff's Mother had a ſufficient Proviſion by the Earl of Newport's Care. And therefore there is leſs Reaſon that this Eſtate ſhould be added to the Daughter. The noble Lords, the Truſtees, when the Thing was freſh, did diſapprove the Marriage; however they may conſent thereunto now. The Deviſe was to the Plaintiff, but in Tail, and afterwards to the Defendant. We diſparage not Mr. Fry in Blood, nor Family; but People do not marry for that only, but for Recompence, and like Fortune. There was a publick Fame or Report (it is to be preſumed) of this Will in the Houſe; and were there not, yet it was againſt her Duty, and againſt Nature, that ſhe ſhould decline asking her Grandmother's Conſent; and Mr. Fry, in Honour and Conſcience, ought to have asked it: And therefore this Practice ought not to receive the leaſt Encouragement in Equity. It is true, when there was a Demurrer, it was over-ruled, becauſe the Bill prayed to be relieved againſt a Forfeiture, for which there might be good Cauſe in Equity. But now it does not appear there is any in the Caſe. The

Eſtate is now in the Defendant, and that not by any Act of his own, but by the Deviſor and the Plaintiff; this is a Limitation, not a Condition. For my Lord Newport had Sons; it is ſomewhat of the ſame Effect with a Condition, though it is not ſo. We have a Title by the Will of the dead, and the Act of the other Party, without Fraud, or other Act of us, and therefore it ought not to be defeated.

I take a Difference between a Deviſe of Land and Money. For Land is not originally deviſeable, though Money is. By the Civil Law, and amongſt Civil Lawyers, it has been made a Queſtion, Whether there ſhall be Relief againſt ſuch a Limitation in a Deviſe? But be that how it will, Chattels are ſmall Things, but a Freehold ſettled ought not to be deveſted thus. No Man can make a Limitation in his Will better and ſtronger to diſappoint his Deviſe, conditionally, than this is made. If my Lord Newport had been alive, would he have liked ſuch a Practice upon his Grand-daughters as Want of Notice? In Organ's Caſe, and Sir Julius Cæſar's Caſe, there was a Grant to an Infant, on Condition to pay 10s. and no Notice given thereof before it was payable; yet becauſe no Body was bound to give Notice, it was adjudged againſt the Infant. Note this Diſtinction.

Sir Heneage Finch, Solicitor General. The Witneſſes who ſwear that the Earl ſaid, He would give the Eſtate to her, prove nothing to the Purpoſe. For he did ſo, but upon a Condition, That they did not hear. The After-conſent of the Earl, or the Counteſs, ought not to make it good; which Conſent at laſt perhaps was extorted by Importunity or Compaſſion; for at firſt they diſapproved the Marriage. Marrying without Conſent, and dying without Iſſue, are coupled in the ſame Line, and the Eſtate ſhall as effectually paſs over to the Defendant upon the one Limitation as the other.

For ſuch Conſent is Matter ex poſt facto, and ſuſpiciouſly to be ſcan'd: For we ought in this Caſe by Law to proceed ſtrictly, and not derogate from my Lord Newport's Intent, which plainly appears by the Letter of his Will, That his Grandchild ſhould ask Conſent of ſuch, he had thereby appointed to conſent before her Marriage were ſolemnized, the actual Solemnization of which was an Act ſo permanent, that it would admit of no Alteration or Diſſolution: An Act of ſuch Force and Efficacy, tending clearly and immediately to the Ruin of their Right and Title to the Eſtate in queſtion, and rendring

rendring it wholly uncapable of Reviver by any other Means than what the Common and Civil Laws of this Realm do permit. The Poſt-conſent therefore will not avail the Plaintiffs in this Court. Otherwiſe the Defendant claiming by this Limitation, ſhould have indeed Advantage, but ſuch as is inconſiderable, being liable to Alteration by the Pleaſure of this Court. And for a ſtrict Obſervation of the Teſtator's Words, the ſame ought to be in Equity as well as at Law. What great Reſpect the old Heathens paid to the Wills of deceaſed Perſons may appear in theſe following Verſes:

Sed legum ſervanda fides, ſuprema voluntas,
Quod mandat, fierique jubet, parere neceſſe eſt.

The Counteſs ſaying, likely in Paſſion, That ſhe might marry whom ſhe would, *&c.* did not amount to a dormant Warrant to her to marry without Conſent. I am upon Conjecture ſtill, That the Plaintiff will inſiſt upon theſe Particulars, for it looks as if they would, becauſe they read them. Doubtleſs the primary Intention of the Clauſe was in terrorem. But the ſecondary was, That if ſhe offended, ſhe ſhould undergo the Penalty. His Intention is to be gathered out of the Words only, and whatever they ſay the Earl intended, does not preſs the Queſtion. Our Freehold is ſettled in us by Vertue of an Act of Parliament. I lay it down for a Foundation, That a Father may ſettle his Eſtate, ſo as that the Iſſue ſhall be deprived of it for Diſobedience, and not be relievable in Equity. And now it is not poſſible, that any Counſel could adviſe a Man to do it ſtronger than it is done in this Caſe: And ſhall a Child break theſe Bonds, and look Diſobedience in the Face here? If it had been only provided, that ſhe ſhould marry with the Conſent, &c. and no further, it might have been ſomewhat; but ſince he goes on, and makes a Limitation over, &c. he becomes his own Chancellor; and upon this Difference are all the Precedents, and even theſe of deviſing Portions, (viz.) deviſing them over or not, as I have underſtood. Infancy can be no Excuſe in caſe of the Breach of a Condition of an Eſtate, in which the Infant is a Purchaſor. So that nothing reſts now in this Caſe but the Point of Notice. And why ſhould not the Infant be bound to take Notice in this Caſe, as he is to take Notice in Caſe of a Remainder, wherein he is a Purchaſor? But if Notice

*Vide* 1 *Cro.* 476. *Poſt*, 694, 699.

A Deviſe over.

be necessary, it is not to be tried here now. If we had brought an Ejectment, and (supposing Notice had been necessary) we had failed in the Proof thereof, should we have been bar'd for ever as by this perpetual Injunction we should be? And shall it be done now without Proof? If we are not bound to prove Notice at Law, much less are we bound to prove it here. This Case is Epidemical, and concerns all the Parents of England that have or shall have Children, that the Obligations which they lay upon their Children may not be cancelled wholly, and this Court (under colour of Equity) protect them in it, and be a City of Refuge for Relief of such, the Foulness of whose Actions deny them a Sanctuary.

Pecke. If Infancy would excuse, such a Clause would signifie nothing. For most Persons, especially of that Sex, marry before full Age. The Lords give no Reason why they changed their Opinions.

Serjeant Fountain. Yelverton's Case in 36 Eliz. is a Precedent in the Point for us, and Shipdam's Case is much like it. This being of a Devise of Land, and that of Money; which if it were paid, the Land was to go over. The grand Objection is, That here is an Estate vested by a Settlement, which is not to be avoided or defeated. But I doubt whether a Man can lay such a Restraint, that there shall not be Relief in any Case of Emergency and Contingency. It is a Part of the fundamental Justice of the Nation, that Men should not make Limitations wholly unalterable; as by the Common Law Men cannot make a Fee unalienable. You give Relief every Day where there are express Clauses, that there shall be no Relief in Law or Equity; where a Thing is appointed to be, &c. without Relief in Law or Equity, you relieve against them, and look upon them to be void. In our Case, suppose she had married a great Lord, or suppose a Person had brought Notice of the Trustees Consent, Would you not have given Relief? But secondly, I deny the Assumption. This Case is not so. I agree it had been well done if they had ask'd my Lady Newport's Consent. But is there a Word in the Will, that if the Plaintiff did not, he should have no Relief in Equity? The Estate was devised to my Lady Newport during her Life (so that the Plaintiff could not be in Possession) and she might have lived till the Plaintiff was 21 Years old. Could not my Lady Newport have said, Have a Care how you marry,

Part 7 12. 3. *V.* in *Leo.* 37.

for you forfeit the Eſtate, if you marry without the Conſent of two of us three? All Ingredients and Circumſtances muſt be taken in a Matter of Equity. Is it an Argument to ſay, He has no Eſtate, therefore take away his Wife's Eſtate, then there will be nothing to maintain her?

It is agreed, That if the Approbation had been precedent, it had been well. Now ſhe had no Notice before the Marriage, that it was neceſſary, and when ſhe had that Notice, ſhe got the Approbation, and that though ſubſequent, is good enough, becauſe it was ask'd (and gotten) as ſoon as ſhe had Notice, that ſhe ought to have it. The Will is hereby ſufficiently obſerved, for the Intent of the Will was, That ſhe ſhould have ſuch a Huſband as thoſe Perſons ſhould approve, and this Marriage is ſo approved. I rely upon this Matter, but eſpecially upon the Word of Notice.

Serjeant Ellis. There was a Caſe of a Proviſo not to marry, but with the Conſent of certain Perſons firſt had in writing. Conſent was had, but not in writing, and yet you rul'd it good. Had this been a Condition in Law (as 'tis in Fact) the Law would have helped her. If the Eſtate had been in her, there might have been ſome Reaſon that ſhe ſhould have taken Notice how it came to her; and of the Limitation, &c. Had the Earl been alive and conſented to the Marriage, after it was ſolemnized, he would have continued his Affection, and the Plaintiffs have had the Eſtate ſtill. Why now, the Conſent of the Lords and Counteſs, is as much as his Conſent: He had transferred his Conſent to them. This is a Ratihabitio, you cannot have a Caſe of more Circumſtances of Equity: 1. An Infant. 2. No Notice 3. Conſent after. 4. Their Declaration that they thought my Lord meant it *in terrorem, &c.* What if two of the Truſtees had died, ſhould ſhe never have married? Surely you would have relieved her.

Serjeant Baldwin. Here is as full a Conſent to the Marriage, as could well be in this Caſe. For ſince the Plaintiff had no Notice of the neceſſity of the Earls Conſent before the Marriage, it had been the ſtrangeſt and unexpecteſt Thing in the World, that ſhe ſhould have gone about to have ask'd it. The Heir ſhould not have taken Notice of ſuch a Forfeiture; and why ſhould a Man that is named by way of Remainder? In Caſe of a perſonal Legacy, this were a void Proviſo by the Civil Law. For I have informed my ſelf of it.

It

It is a Maxim with them, Matrimonium eſſe Liberum. This amounts to as much as the Condition, that the Perſon ſhould not marry at all. For when it is in the Truſtees Power they may propoſe the unagreeableſt Perſon in the World; it is a moſt unreaſonable Power, and not to be favoured. Sir Thomas Grimes ſettled his Land ſo, that his Son ſhould pay Portions; and if he did not, he demiſed the Lands over; and it it was adjudged relieveable.

If I limit, That my Daughter ſhall marry with the Conſent of two, &c. if each of them have a Deſign for a different Friend, if you will not relieve, ſhe can never marry.

Is it not more probable, That if the Earl had lived he would rather have given her a Maintenance, than have concluded her under perpetual Misfortune and Diſheriſon?

Kelynge, Chief Juſtice. I do not ſee how an Averment or Proof can be received to make out a Man's Intention againſt the Words of the Will. In Vernon's Caſe, though it were a Caſe of as much Equity as could be, it was denied to be received; and ſo in my Lord Cheney's Caſe. Here was a Caſe of Sir Thomas Hatton ſomewhat like this Caſe, wherein no Relief could be had. 4 *Co.* 4. 2. 5 *Co.* 68. *Plow.* 345.

Vaughan Chief Juſtice. I wonder to hear of citing of Precedents in Matter of Equity. For if there be Equity in a Caſe, that Equity is an univerſal Truth, and there can be no Precedent in it. So that in any Precedent that can be produced, if it be the ſame with this Caſe, the Reaſon and Equity is the ſame in it ſelf. And if the Precedent be not the ſame Caſe with this, it is not to be cited, being not to that Purpoſe. 1 *Inſt.* 216.

Bridgman, Lord Keeper. Certainly Precedents are very neceſſary and uſeful to us, for in them we may find the Reaſons of the Equity to guide us; and beſides, the Authority of thoſe who made them is much to be regarded. We ſhall ſuppoſe they did it upon great Conſideration, and weighing of the Matter, and it would be very ſtrange, and very ill, if we ſhould diſturb and ſet aſide what has been the Courſe for a long Series of Time and Ages.

Thereupon it was ordered, That they ſhould be attended with Precedents, and then they ſaid they would give their Opinions.

Three Weeks after they came into Chancery again, and delivered their Opinions Seriatim, in this Manner, viz.

Hale, Chief Baron. The general Question is, Whether this Decree shall pass? I shall divide what I have to say into these three Questions or Particulars. First, I shall consider, Whether this be a good Condition or Limitation, or conditional Limitation? For so I had rather call it; it being a Condition to determine the Estate of the Plaintiff, and a Limitation to let in the Defendant. I think it is good both in Law and Equity; and my Reasons are, first, Because it is a collateral Condition to the Land, and not against the Nature of the Estate, and she is not thereby bound from Marriage.

Secondly, It obliged her to no more than her Duty; she had no Mother, and in case of Marriage she ought to make Application to her Grandmother, who was in loco Parentis; and since the Estate moved from the Grandfather, she was Mistress of the Disposition and Manner of it. It is true, by the Civil Ecclesiastical Law, regularly such a Condition were void. And therefore, if the Question were of a Legacy, there might be a great deal of Reason to question the Validity of it, because in those Courts wherein Legacies are properly handled, it would have been void. But this is a Case of Land (Devise) Indeed it is agreed, That this is a good Condition, and not to be avoided in it self.

Thirdly, This being a good Condition and Limitation over; the Question is, Whether there be Relief against it in Equity, admitting it were a wilful Breach? I think there ought not to be any. I differ from the Reasons pressed at the Bar; as First, That it was a Devise by Will, by Virtue of the Statute, &c. but that doth not stick with me. For if there may not be a Relief against a Breach of a Condition in a Will, there would be a great Shatter and Confusion in Mens Estates, and some of those settled by great Advice, and there have been Precedents of Relief in such Cases: 2 Car. Fitz *versus* Seymour, and 10 Car. Salmon *versus* Bernard. Secondly, It has been urged, there could be no Relief, because there is a Limitation over. But that I shall not go upon neither. There have been many Reliefs in such Cases: I will decline the Latitude of the Objection, for that would go a great deal further than we are aware. But yet I think there ought to be no Relief in this Case: It is not like the Case of Payment

of Money, becauſe there the Party may be anſwered his Debt with Damages at another Day; and ſo may be fully ſatisfied of all that is intended him. But here my firſt Reaſon is, That it is a Condition to contain the Party in that due Obedience, which Law and Nature require.

(2.) It is a voluntary Settlement to the Grand-daughter in Tail, and the Remainder over is ſo too; and both theſe Parties are in æquali gradu to the Deviſor; and therefore they being both in a Parity, it would be hard to take the Eſtate from him, to whom, and in whoſe Scale the Law hath thrown the Advantage.

(3.) It appears by the Body of the Will, That the Earl did as really intend it ſhould go over, if ſhe married without Conſent, as if ſhe died without Iſſue; for they are both in the ſame Clauſe. There may be as much Reaſon to turn it into a Fee-ſimple, in Caſe ſhe had died without Iſſue, as in this Caſe; for ſo I doubt the penning of this decretal Order does.

And (4.) I reſt upon this, It is a Caſe without a Precedent. I remember after that Lanyett's Caſe had been adjudged, that 6 Car. there was a Caſe, I ſuppoſe Saunders *verſus* Corniſh, of a Limitation in Tail, and a Deviſe over; and it was adjudged void: And the Judges ſaid, So far it is gone, and we will go no further, becauſe we do not know where it will reſt. I know there is no intrinſical Difference in Caſes by Precedents; but there is a great Difference in a Caſe, wherein a Man is to make, and where a Man ſees (and is to follow) a Precedent: In the one Caſe a Man is more ſtrictly bound up, but in the other he may take a greater Liberty and Latitude. For if a Man be in Doubt, in æquilibrio, concerning a Caſe, Whether it be equitable or no? In Prudence he will determine according as the Precedents have been, eſpecially if they have been made by Men of good Authority for Learning, &c. and have been continued and purſued. Here muſt be ſome Boundary, or we ſhall go we know not whither. It were hard a Court of Equity ſhould do that that is not fit to be done in any Court below a Parliament. The Precedents do not come home to the Caſe. Moſt of them are in Caſe of Money Legacies; and in ſome of thoſe Caſes we may give Allowance, in reſpect of the Law of another forum, to which they belong. But this is in Caſe of Land only: Vide Swynborne 4. Co. 12. Indeed he is no Authority; but there is a very good Exemplification of this Matter.

3 *Co.* 230. It was of a Leaſe for Years, and ſo was adjudged void.

(5.) I

(5.) I ſhall conſider the Allays and Circumſtances which are obſerved, and offered to qualify this Caſe, and induce Relief.

(1.) It is ſaid, That this Clauſe was only in terrorem, and ſome Witneſſes have been examined to prove it: But I am not ſatisfied how collateral Averments can be admitted in this Caſe; for then, How can there be any Certainty? A Will will be any Thing, every Thing, Nothing. The Statute appointed the Will ſhould be in Writing to make a Certainty, and ſhall we admit collateral Averments and Proofs, and make it utterly uncertain? 2 Cro. 145.

(2.) It is ſaid in this Caſe, The Effect of the Proviſo has been obtained, for the Truſtees have now declared their Conſent.

I muſt ſay it is not full, for they do not ſay they would have conſented; but that poſſibly ſuch Reaſons might have been offered as they ſhould have done it; and poſſibly, I ſay not. They, like good Men, have only declined the ſhewing an ineffectual contradicting of a Thing which is done, and cannot now be recalled, undone, or altered. Beſides, if there had been but a circumſtantial Variation, the Conſent afterwards might have been ſomewhat; but here it is in the very Subſtance. In the Caſe before cited at the Bar by Mr. Serjeant Ellis, where the Conſent was to be had in Writing, and it was had only by Parol, there was great Equity that it ſhould be relieved, becauſe it was only a provident Circumſtance, and Wiſdom of the Deviſor, viz. for the more firm obliging the Party to ask Conſent, which the Deviſor conſidered might be pretended to be had by ſlight Words, in ordinary and not ſolemn Communication, or elſe in Paſſion and Heat, (as in this Caſe, when the Plaintiff would not conſent to the approved Marriage with the Lord Morpeth, the Counteſs ſaid, She might marry where ſhe would: Which Words imported a neglect of Care for the future over the Plaintiff, becauſe ſhe would not be ruled by the Counteſs in accepting the Tender of ſo commendable a Marriage;) as alſo for the Benefit of the Deviſee (in the Caſe aforeſaid.) That in caſe the Deviſee did marry with the Conſent of the Truſtee, he might not after (through Prejudice, &c.) avoid it by denial of ſuch Conſent, and ſo defeat or perplex the Deviſee for want of Proof of ſuch his Conſent.

(3.) It is ſaid the Party is an Infant. Why, an Infant is bound by a Condition in Fact, by Law: It is true, we are now in Equity; but in Equity, ſince this refers to an Act

which

which ſhe, though an Infant, is capable of doing, viz. to marry; it were unreaſonable that ſhe ſhould be able to do the Act, and not be obliged by Equity to obſerve the Conditions and Terms which concern and relate to that Act. So that it is all one, as if ſhe had been of full Age. The Statute of Merton cap. 5. provides, That Uſury ſhall not run againſt Infants, and yet the ſame Statute cap 6. appoints, That if an Infant marry without the Licence of his Lord, *&c.* he ſhall forfeit double the Value of his Marriage: and it is reaſonable, becauſe Marriage is an Act which he may do by Law while he is under Age.

(4) As to the Point of Notice: (1) Whether Notice be requiſite or no, in Point of Law, I will not determine. But I muſt needs ſay, that it muſt be referred to Law. But, (2) If it be not requiſite in Law, how far a Court of Equity might relieve for want of it, I will not now take upon me to determine. I will not trench upon Matters Gratis, of whith I know not what will be the Conſequence. But I conceive in this Caſe, the Fact is not yet ſettled, whether there were (Notice) or not; and it were a hard Matter, That becauſe no Notice is here proved, it ſhould be taken for granted there was none. For here are ſeveral Circumſtances that ſeem to ſhew there might be Notice: And a publick Voice in the Houſe, or an accidental Intimation, &c. may poſſibly be ſufficient Notice. I ſhall therefore leave it as a fit Thing to be tried, and till that, the Caſe in my underſtanding is not ripe. And therefore I will add no more. I think this Decree ought to be altered, if not ſet aſide. But as this Caſe is, there ought to be no Relief. Notice. *Vide ante*, 86, 87. *&c.* 300, 301. *&c. poſt*, 311.

Vaughan Chief Juſtice. I ſhall conclude as my Lord Chief Baron did, That as this Caſe is, there ought to be no Relief. I will ſingle out this Caſe from ſeveral Things not material to it, as my Lord Chief Baron did, &c. I think, if Land be deviſed on Condition to pay Legacies, and that the Deviſee has paid almoſt all, and fails in one, or ſo, there may be good Cauſe of Relief, becauſe he has paid much, and is ſomewhat in the Nature of a Purchaſor. This is not like a Legacy, this is upon the Statute, where it is ſaid a Man may deviſe at his

his Will and Pleaſure, i. e. abſolutely, upon Condition, upon Limitation, or any Way that the Law warrants. Suppoſe there had been a ſpecial Act of Parliament diſpoſing as the Earl has done, in this Caſe could there be any colour in Equity, to alter or vary this Law? And here 'tis equally as concluding as that, ſince the Statute gives a Man Power to diſpoſe as expreſly, and otherwiſe Equity would alter and diſpoſe of all Property, and all Things that came in Queſtion. But let Notice or Conſent, &c. be requiſite, or not, 'tis triable at Law. But I ſtand upon this, that there ought to be no Relief in Equity. It was inſiſted, that her Grandmother gave a kind of Conſent: But I take that for nothing; For though the Grandmother would not have offered or propoſed a Marriage, yet ſhe ought not to marry without her Conſent. Nor is the Lords Poſt-Conſent any Thing, for Conſent cannot be had for Things which cannot be otherwiſe, as a Man cannot be ſaid to conſent to his Stature, or the colour of his Hair, &c. A Man may know of what Opinion he is, or was; but 'tis impoſſible for a Man to know of what Opinion he would have been in the circumſtances of an Action, which he never tried. I conclude, the Plaintiffs ought not to have Relief in Equity. But if any Matter in Law will help them, they are not excluded from it.

Kelynge Chief Juſtice. I think there ought to be no Relief in this Caſe; I have conſidered it as well as I can, and I think nothing is more fit to be obſerved than chief Cuſtomary Rules for Children, they are very good Reſtraints for Children, and ought to be made good here, to encourage Obedience and diſcourage thoſe who would make a Prey of them; and if there were not Hope for Men, to haſten their Fortunes by this means, there would be few Adventures of this Nature; I have look'd upon the Precedents, &c. and I find they come not to this Caſe, except only one and that is but ſeven Years old, and the other are for Money, for which there is Reaſon, becauſe the Party may be ſubſtantially relieved and ſatisfied otherways. If there had been no Limitation over, there may be ſome Reaſon why it may be intended, that it is only in terrorem.

I do not think all Caſes upon Wills are irremediable here (becauſe of the Statute.) If the Breach of the Condition be in a Circumſtance only, as in the Caſe where the Conſent was given, but not in writing, as it ought, it may be relieved; for that was a Caution to the Conſentor, that he ſhould not give

give Conſent before Strangers, and truſt to the ſwearing of a Parol-conſent. I never yet ſaw any Deviſe obliging to have any ſuch Conſent after the Party's Age of 21 Years, ſo that there is no great Hardſhip in it. And if there ſhould be any ill Deſign in thoſe who have the Truſt and Power to conſent in with-holding their Conſent, it might be relieved here. I think none would make a Decree, that if ſhe died without Iſſue, the Defendant ſhould have it, and this is the ſame: But Equity can never go againſt the ſubſtantial Part of a Conveyance or Will, but that muſt be governed by the Party's Agreement or Appointment. Equity ought to ariſe upon ſome collateral or accidental Emergent. 'Tis not in Terrorem indeed without a Penalty. There can be no collateral Averment. Being an Infant is nothing: For this is only a Proviſion while ſhe is an Infant. Beſides, the Caſe of the Forfeiture of the double Value is a very good Inſtance for the Notice. If ſhe had Notice of this Will, yet they that came to ſteal her knew it not: for they did not come to take a ſhorn Sheep, and therefore no Relief is deſerved by the Plaintiff. In Honeſty and Conſcience thoſe Bonds ought to be kept ſtrict. I confeſs, I would not have the Plaintiff tempted to a further Suit, but indeed in ſaying that I go further then I need.

Bridgeman, Lord Keeper. If I were of another Opinion, yet I would be bound by my Lords; for I did not ſend for them, not to be bound by them, But I was of their Opinion from the Beginning. And I am glad now that we are delivered from a common Error, and that men may make ſuch Proviſions as may bind their Children. But to juſtifie the Decree a little: (1) Here is 5000 l. appointed to George Porter; ſo that the ample Proviſion was made for him, and it may the rather be intended that this Eſtate was wholly deſigned for the Plaintiff. (2) Here was a Poſt-conſent, and thoſe perſons were in loco parentum. Now if the Earl had, as poſſibly he might have, thus pardoned and been reconciled to the Marriage, he would probably have given the Plaintiff the Eſtate, and that is a Reaſon to induce us to the ſame. For I think it clear, that an Eſtate by Act of Parliament is liable to the ſame Relief, Regulation, &c. as any other Eſtate. An Eſtate-Tail, though that be by Statute, yet is liable to be cut off, &c. If there had been a Time limited, then there had been more Reaſon to bind her up to have Conſent.

Notice, Where not requiſite. See *ante* 86, 87, 300. *&c.* 1 *Lev.* 48. 2 *Lev.* 21, 106, 153. 2 *Jon.* 179. *Cart.* 170. *Nelſ. Lutw.* 66, 135, 114, 159, 249, 250.

But there ought to be a Reſtraint put in theſe Caſes: That of the double Forfeiture was truly and well obſerved: Where no body is bound to give Notice, it is to be taken by the Party; but beſides, ſhe is not Heir; for that might have made a great Difference. This I thought not to ſay. Upon the whole I am of Opinion with my Lords, and I am glad I have their Aſſiſtance.

Let the Bill be diſmiſſed.

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