The Fifth and Last PART
OF
Modern Reports:
BEING A
CONTINUATION
Of Several
SPECIAL CASES
ARGUED and ADJUDGED
IN THE
COURT
OF
King's Bench,
At *WESTMINSTER*,

In the 6th, 7th, 8th, 9th, 10th, and 11th Years of the Reign of the late King *William*; and Judgments thereupon.

TOGETHER WITH
Special Pleadings to moſt of the ſaid *CASES*.

None of them ever Printed before.

Collected by the ſame Hand as the former PARTS.

——*Durum ex me diſce laborem,*
Fortunam ex aliis.

The Second Edition carefully reviſed, with the Addition of ſome Thouſands of Notes.

In the *SAVOY*:
Printed by Eliz. Nutt and R. Goſling, (Aſſigns of *Edward Sayer* Eſq;) for *Tho. Bever*, at the *Hand* and *Star* within *Temple-Bar*; and *Tho. Osborn*, in *Grey's-Inn*, near the Walks. MDCCXX.

THE PREFACE.

THE Reports *of Caſes adjudged in former Ages, which* Bracton *calls,* The Judgments of the Juſt, *are ſo very beneficial to the Publick, that it hath been the Care of ſeveral Kings to tranſmit them to Poſterity; and for that Purpoſe* Edw. 3. *and ſeveral of his Succeſſors, did, in their reſpective Reigns, appoint four diſcreet Men to Report the judicial Deciſions in the great Courts of Juſtice, that thoſe Judgments which were given there might be eſtabliſhed by Time and Uſage, and that parallel Caſes might receive uniform and certain Determinations.*

The Reporters thus appointed by the State, had a conſtant and fixed Salary from the Government, as a juſt Reward for their Labours, which have been long ſince publiſhed in ſeveral Volumes, called the Year-Books, *containing the Arguments of Counſel at the Bar, and the Reſolutions of Judges on the Bench, in a continued Courſe of Time from* 1 Edw. 3. *to* 12 Hen. 8. *for almoſt two hundred Years.*

After the firſt twelve Years of Hen. 8. *this Method was diſcontinued. It is true, there are ſome Caſes from that Time to* 27 Hen. 8. *which are bound up with the* Year-Books; *but Mr.* Fleetwood *tells us,* They are collected with ſo little Judgment, that he did not think them worthy to be placed in the Tables which he made of thoſe Books; *and therefore compoſed a Table of them by its ſelf.*

It is very remarkable, that there are no Memorials extant who theſe Reporters *were, not ſo much as the initial Letters of their Names, or of what Houſes they were; but it is probable by their Number, that each of them were choſen from the reſpective Inns of Court, and it is certain they were very induſtrious Men; we have my Lord* Coke's *Word for it, who extols their* Diligence, *and* metaphorically *tells us,* That if it had not

been for their Writings, the Judgments of ſo many Sages of the Law, had, with their Bodies, been worn away with the Worm of Oblivion. *And though this may be the Fate of their Books, yet the ſame great Judge hath recommended them to our Reading, aſſuring us,* That out of the old Fields, the new Corn muſt ſpring.

1599. Plowden. *The next, in Order of Time, was Mr.* Plowden, *a* Middle-Temple *Man, who collected two Volumes of Caſes from* 2 Edw. 6. *to* 22 Eliz. *for his private Uſe; but having lent his Manuſcript to ſome Lawyers, whoſe Clerks were ſo diligent, in thoſe Days, as to ſit up whole Nights to tranſcribe it, deſigning it for the Preſs, he therefore reſolved to publiſh it himſelf, and hath aſſured us,* That all the Pleadings are on ſpecial Verdicts, or Demurrers; that he had the Copies of the Records, and ſtudied the Caſes before they were argued; *and we have his Word for it,* That for Surety of Law, his Books paſſed all former *Reports.*

1601. Dyer. *About two Years afterwards, the* Nephews *and* Executors *of Sir* James Dyer, *another* Lawyer *of the* Middle-Temple, *publiſhed his* Reports, *being* aſſailed (*as they call it*) by Men of good Countenance for that Purpoſe; *and theſe were the only* Reports *which were Publiſhed in eighty Years after the* Year-Books: *But we have been told, that this Defect hath been amply recompenſed by the* Grandeur *and* Authority *of this ſingle Judge; and yet his Book is compos'd of very* ſhort Notes, *which my Lord* Coke *ſays,* is leſs Painful, but not leſs Profitable, than more elaborate Works.

1601. Keilway. *About the ſame Time Sir* John Coke, *the eldeſt Brother of the Judge of that Name, and who was afterwards a Judge himſelf, having gotten Mr.* Keilway's *Manuſcript of Law-Caſes, committed ſo many of them to the Preſs which he thought fit to publiſh, and told his Reader, That there he might find* Multa ſubtiliter diſputata, & ſummo cum judicio determinata, quæ alibi non leguntur; *which is very true, for there are many Caſes argued and adjudged in the Reign of* Hen. 7. *and his Son* Hen. 8. *which are not Printed in any of the former* Reports.

1601. 1 Rep. *In the ſame Year, the Lord Chief Juſtice* Coke *publiſhed the firſt Volume of his* Reports, *and having for twenty Years before,* obſerved the true Reaſons of ſuch Matters in Law, wherein he was of Counſel, and which were adjudged upon great and mature Deliberation; *he afterwards conſented to the Printing ten Volumes more, which were nineteen Years in publiſhing; and it is remarkable, that in all that Time there was no other* Report *printed; as if it became all the reſt of the*

Lawyers to be ſilent whilſt their Oracle was ſpeaking. But notwithſtanding the Character of this great Judge, his Works were cenſured even in his Life-time; for being removed from the Seat of Chief Juſtice of England, *in* Michaelmas-Term, Anno 14 Jac. *a Commiſſion was granted to Sir* Henry Mountague, *his immediate Succeſſor in that Place, and to others, to review and reform his* Reports; ſome Part whereof, *he tells us himſelf*, were writ in the Tempeſt of Buſineſs, and therefore he could not poliſh them as he deſired.

It is likewiſe to be obſerved, That there was not any Report *publiſhed in the Space of twenty-two Years after my Lord* Coke's *laſt Volume came forth*; though, *he tells us*, there was a flouriſhing Spring of Learning at that Time, and encouraged the Lawyers of that Age to follow his Example, to Regiſter in Books the Sayings and Doings which were in their Time worthy of Note and Obſervation: *But none would undertake it, unleſs it was Sir* Henry Hobart, *his immediate Succeſſor in the* Common Pleas, *who collected a Volume of* Caſes *adjudged in that Court, but did not think fit to publiſh them in his Life-time. However, it was ſet forth ſixteen Years after his Death by an unskilful Hand; but as my Lord Chancellor* Finch *obſerved, it was Beautiful even in Confuſion: And I may very well affirm, that after it was corrected by his Pen, it infinitely excels moſt other Books of that Kind, both in Purity of Language, and Soundneſs of Reaſon.*

Soon after the Martyrdom of King Charles the Firſt, *there came forth a flying Squadron of thin* Reports, *of which Mr.* March *led the* Van, *moſt of them very good; but the beſt of that Number are the* Caſes *which were adjudged in that Reign, collected by Juſtice* Croke, *and publiſhed by his Son-in-Law, Sir* Harbottle Grimſtone, *during the Uſurpation; in which Time, and within the Space of twelve Years, there were twenty-one* Reports *publiſhed in the Names of Judges, Serjeants at Law, Prothonotaries, and other Lawyers of leſs Characters; as may be ſeen in the* Margin; *inſomuch, as Mr.* Bulſtrode, *who was made Chief Juſtice of* North-Wales, *by* Cromwell, *and who was the firſt Lawyer after my Lord* Coke, *who publiſhed a* Report *in his Life-time, complained of thoſe flying* Reports, *which he compared to the Soldiers of* Cadmus, *daily ariſing, and juſtifying each other; and yet there were very fair Pretences made at that Time for the Publiſhing all theſe Volumes, ſome from the Manuſcripts of judicious Perſons, ſome from the Copies taken out of the Libraries of eminent Judges, or Serjeants at Law, where they had been a long Time hoarded for their private Uſe; but falling then into the Hands of Men of publick Spirits, and who were more communicative of Learning, they either out of a hearty Zeal to the Common Good were willing*

March, 1648.
Cr. Car. Brownl. } 1651.
Godbolt. 1652.
Gouldſ. 1653.
Poph. Hutt. Owen, Noy, } 1656.
Winch. Lane, Herley, 1 Bulſt. } 1657.
2 Cro. 2 Bulſt. Style, 1 Leon. } 1658.
2 Leon. Ley, Bridg. 3 Bulſt. } 1659.

ling, or by Importunities were prevailed on, to tranſmit them to the Preſs: And I remember a particular Reaſon was given, for Printing Juſtice Hutton's Reports, *which was,* That he being Cotemporary with my Lord *Hobart*, both thoſe Judges might, like *Cicero* and *Roſcius*, make one incomparable Man; *which (by the Way) was no very good Compliment to either.*

It is true, the Fertility of the Preſs was, even at that Time, accounted a Fault; but it was in a reforming Age, which made the Lawyers conſult the Scriptures, that they might, with Authority, reject all thoſe ſpurious Births without living Fathers; *which is the beſt Character Mr.* Style *gave them, and who had as little Reaſon as any Man to expreſs himſelf in that Manner. But he is the Perſon who tells us,* Theſe *Reports* ſpoke ſo plain, in the Language of *Aſhdod*, that a wiſe Man could never believe they ſprang from *Iſraelitiſh* Parents.

1661. { Yelver. Cro. El. Bendl. 1662. Latch. 1663. Moore. 1664. 1 And. 1665. 2 And.

Soon after the Reſtoration of Car. 2. *a Check was given to the Preſs by a Statute,* prohibiting all Law-Books to be printed, without the Licence of the Lord Chancellor or Keeper, the Chief Juſtices of each Court, the Chief Baron, or one or more of them, or of one by their Appointment: *Which Act, after ſeveral Continuances, expired in King* William's *Reign.*

1675. { Jones. 1 Roll. 4 Leon. 1676. 2 Roll. 1677. Vaugh. 1678. Palmer. 1682. 1 Mod. 1683. { 1 Sid. Lit. Rep.

But in Conformity to this Law, moſt of the Reports *which were printed, whilſt it was in Being, were licenſed by the Chancellor and Judges, only the firſt Part of the Lord* Anderſon's Reports, *and the 1ſt* Mod. *had not that Advantage; for an Advantage it muſt neceſſarily be in many Reſpects, for any Book to come forth with ſo great a Solemnity. Notwithſtanding, Serjeant* Maynard, *in his Argument of the ſpecial Verdict between* Hitchins *and* Baſſet, *in* B. R. 1684. *citing a Caſe taken by himſelf fifty Years before, told the Court,* It was of as good Authority as any which had been printed ſince; *which takes in every* Report *of my Lord* Coke's.

2 Sid. 1684. 3 Kebles 1685. Saund. 1686. Aleyn, 1688.

In the Reign of Jac. 2. *there were ſeven* Reports *publiſhed, ſome of them Inferior to none before: But I cannot help taking Notice, That ſome other* Reports, *at that Time, were licenſed in a very unuſual Manner a Year after the Books were printed, with the bare* Allowance *only of the Impreſſion, without certifying to the World (as is uſual in ſuch Caſes)* the great Judgment, Learning, and Wiſdom of the Author.

The PREFACE.

After the Revolution, and during the Reigns of King William, *and her late Majeſty, there have been thirteen* Reports *publiſhed, moſt of which (to expreſs my ſelf in my* * *Lord* Coke's *Words)* ſet open the Windows of the Law to let in the gladſome Light, whereby the Reaſon thereof may be clearly diſcerned. *And though* ſome of them, *as Juſtice* Shelley *merrily ſaid,* might be compared to *Banbury Cheeſes,* whoſe Superfluities being pared away, there would not be enough left to bait what my Lord *Hale* called the *Mouſe-Trap* of the Law: *Yet to ſpeak ſtill in the Language of a Judge,* I think the meaneſt of them may, † like the little Birds, add ſomething to the building the Eagle's Neſt.

Hardres, 1693
Jones, 1695.

* *Preface to* 6 Rep.

Vent. 2. Raym. } 1696

2 Mod. 1698.
3 Mod. 1700.
Levinz, 1702.
4 Mod. 1703.
2 Lutw. 1704.
Shower, 1708.

† *Preface to* 8 Rep.
5 Mod. 1711.

And thus I have given an Hiſtorical Account of our Reports, *which a Country Lawyer (who was afterwards advanced to the Seat of Juſtice) told the Bar,* were too Voluminous: For when he was a Student, he could carry a compleat Library of Books in a Wheelbarrow; but that they were ſo wonderfully encreaſed in a few Years, that they could not then be drawn in a Waggon.

What would he have ſaid, if he had look'd into the Codes, *the* Pandects, *the* Inſtitutes, *the* Novels, *and a vaſt Number more of Gloſſes and Explanations of the* Civil Law, *not only by the old Commentators, but by* Budæus, Duaren, Tiraquill, Hottoman, *and many more of the laſt Century? And if this grave Lawyer accounted eighty Volumes of the Common Law* Reports *to have been too great a Number, though they have been almoſt four hundred Years in publiſhing, certainly he would have been amazed at the* Theodoſian *and* Juſtinian Codes, *the* Capitularies, *the* Decrees *and* Decretals, *the* Orders *and* Conſtitutions of Biſhops, *the* Curſus Canonicus, *the* Clementines, Concordates, *and an infinite Number of Volumes of the* Canon Law, *too tedious to be repeated.*

I ſhall only add, let the Volumes of Law-Books be what they will, the Sufficiency of every Author muſt appear from his Works, and not from his Picture before the Title-Page, or from any other artificial Embelliſhment there, which was never attempted by the Publiſher of theſe Reports, *who was induced to commit them to the Printer, being aſſured long ſince, by a moſt learned Judge, that this Way of Reporting is the moſt perſpicuous Courſe of teaching the Law.*

The PREFACE.

It is a Satisfaction to him who is in Obſcurity, to ſee ſome of his Labours accepted by the Publick, who would likewiſe be very well pleaſed to ſee thoſe who cenſure them, attempt ſomething of this Nature themſelves; and therefore will conclude this Preface to his laſt Report, *as my Lord* Coke *did that of his firſt:*

Cum tua non edas, his utere, & annue, Lector,
Carpere vel noli noſtra, vel ede tua.

Note, *The fourth Part is Intitled* the Laſt, *by Miſtake.*

W. N.

A TABLE OF THE Names of the Caſes.

A,

ALinſon *verſus* Spence, *Page* 419
Atkinſon *verſus* Corniſh 395
Atkinſon *verſus* Oakley 398
Atwood *verſus* Duell 397

B.

Barley's *Caſe* 210
Barney's *Caſe* 323
Bath (*the Earl*) *verſus* Batterſea 9
Batterſea Inhabitants *verſus* Weſtham 396
Bennet *verſus* Talbot 307
Blackwell *verſus* Eales 286
Blanchly *verſus* Fry 315
Bonham Strangeways's *Caſe on a Reſcue* 217
Bonoyon *verſus* Palmer 71
Bowers *& Ux' verſus* Cook 136, 145
Bracey *verſus* Harris 308
Brace *verſus* Pennoyer 338
Breedon *verſus* Gill, *qui tam, &c.* 269
Britton *verſus* Cole 109, 112
Brewſter *verſus* Kidgill 368
Brockwell *verſus* Lock 97
Buſh *verſus* Allen 63
Byrt *verſus* Hallet 248

C.

Calverly *verſus* Leving, *Page* 405
Carter *verſue* Sheppard 398
Chamberlain *verſus* Harvey 186
Chamberlain *verſus* Hewſon 69
Cheſter (*Biſhop*) *his Caſe* 433
Chidingfold Inhabitants *verſus* Penſhurſt 321
Cholmondley *verſus* Broom 335
Churchy *verſus* Roſſe 144
Clark's *Caſe.* 319
Clement *verſus* Beard 448
Coot *verſus* Lynch 421
Cox *verſus* Copping 395
Cromwell *verſus* Grunſdale 281
Cudmore *verſus* Tripe 78

D.

Dalbury *and* Foiſton *Inhabitants* 330
Dalſton *verſus* Johnſon 89
Daſhwood's *Caſe* 68
Davis *verſus* Speed 143
Dubartin *verſus* Chancellor 399

E

Ellis *verſus* Ellis 368

F.

Fletcher *verſus* Ingram *Page* 124
Foiſton *and* Dalbury Inhabitants 330

G.

Gardner *verſus* Hobbs 76
Gerard (*Lord*) *his Caſe* 64
Green *verſus* Moor 11
Gregory's *Caſe* 368

H.

Hackſhaw *verſus* Clarke 319
Haines *verſus* Jefcott 168
Haines *verſus* Barley's *Caſe.* 210
Hallet *verſus* Birt 252
Harcourt *verſus* Weekes 77
Harris *verſus* Pitt 243
Harriſon *verſus* Cage 411
Hartop *verſus* Holt 228
Hawkins's *Caſe.* 389
Herbert *verſus* Waters 118
Herbert *verſus* Morgan 17
Huſſey *verſus* Jacob 170

I.

Jones *verſus* Bodinham 225, 310
Johnſon *verſus* Lee 231
Johnſon *verſus* Adams 77

K.

Keat *verſus* Barker 208
Kirk's *Caſe* 454

L.

Lane *verſus* Cotton 455
Leaves *verſus* Bernard 131
Lee *verſus* Barnes 144
Leigh *verſus* Brace 266
Lewis *verſus* Maſters 75
Lewſley *verſus* Budd 68
Lindſey *verſus* Clerk, *Mil'* 285
Littleton *verſus* Cole 181
London Civit' *verſus* Vanacre 438
Loveday *verſus* Winter 244, 378

M.

Machin *verſus* Malton 450
Maddiſon *verſus* Shore 352
Mandamus to get Adminiſtration 374
Maſters *verſus* Lewis 74, 92
Martin *verſus* Monk 211
Matthew *verſus* Thompſon 384

N.

Newnham *verſus* Lunn *Page* 225
Norris *verſus* Mawditt 311

O.

Odes *verſus* Clerke 413

P.

Parkhurſt *verſus* Foſter 427
Phyſicians College *verſus* Salmon 327
Playhouſe, &c. 142
Plummer *verſus* Lea 88
Pope *verſus* Saintleger 1, 4
Puliſton *verſus* Warburton 332
Pullen *verſus* Palmer 150

R.

Redſhaw *verſus* Heſter 119, 122
Redwood *verſus* Coward 323
Rex *verſus* Bethell 19
Blythe 404, 421
Broom 340
Burrel
Chandler 446
Cheſter, *Biſhop* 297
Cheſter *City* 10
Cheſterfield 322, 327
Chertſey 454
Clerke 151, 319
Clough 149
Cook, *&c.* 363
Comings 179
Cowper 206
Cranfeild 203
Crosby 15
Davis *& al'* 74
Fells 414
Gately 138
Greep 342
Grove 18
Hall 163
Harneſs 443
Harper 96
Haſwell 208
Hill 141
Holroy 341
Hornby 29, 46
Jarvois 335
Keat 287

Names of the Caſes.

Rex *verſus*
- Lammas — *Page* 12
- Lincoln, *Mayor* — 399
- Liſley — 204
- Melling — 349
- Morgan Rice — 325
- Owen — 314
- Paine — 163
- Peckham — 321
- Penſhurſt (*Inhabitants*) — *Ibid.*
- Pope — 519
- Rice — 325
- Sharp — 167
- Slatford — 316
- Snatt — 363
- Spence — 419
- Stainford — 393
- Stocker — 137
- Thorp & *al'* — 221
- Turner — 327
- Wadſworth — 13
- Weſtham — 396
- Weſton — 325
- Wilton, *Mayor* — 254
- Wood — 18
- Wootton Rivers — 149

Reynold *verſus* Osborn — 74
Riccards *verſus* Cornforth — 363
Ricelip *verſus* Henden — 416
Richards *verſus* Hill — 206
Roberts *verſus* Savile — 405
Roberts *verſus* Witherhead — 191
Robinſon *verſus* Groſcourt — 104
Roe *verſus* Kendall — 78
Row *verſus* Gatehouſe — 305

S.

Salisbury *verſus* Proctor — 324
Saunders *verſus* Owen — 386
Savidge *verſus* Roebury — 398
Savill *verſus* Roberts — 394, 405
Smallcomb *verſus* Buckingham — 376
Smith *verſus* Sharp — 133
Smith *verſus* Crompton — *Page* 87
South *verſus* Allen — 98, 101
Stanford *verſus* Chamberlaine — 205
Stanhope *verſus* Smith — 351
Stedman *verſus* Page — 141
Stephens *verſus* Squire — 205
Stokes *verſus* Oliver — 209
Strangeways's *Caſe* — 217
Sutton *verſus* Moody — 375
Swales *verſus* Lowther — 96
Swinſted *verſus* Lydall — 295

T.

Tayler *verſus* Baker — 136
Thwaite's *Caſe* — 212
Toddard *verſus* Middleton — 352
Trevillian *verſus* Andrews — 384
Trobridge Pariſhioners *verſus* Weſton — 325
Turner *verſus* Maine — 444

V.

Vintners Company *verſus* Clerke — 151, 156, 319
Vinkiſton *verſus* Ebden — 359
Uſher's *Caſe* — 452

W.

Waites *verſus* Briggs — 8
Walker *verſus* Walker — 13
Walton Pariſh *verſus* Cheſterfield — 322
Ward *verſus* Evans — 25
Walter *verſus* Slackoe — 16, 69
Warſop *verſus* Abell — 306
Wentworth *verſus* Strafford, *Earl*, — 105
Wilſon *verſus* Guttery — 95
Wilſon *verſus* Howard — 178
Winchurſt *verſus* Meſeley — 66
Winter *verſus* Loveday — 378
Woolfe *verſus* Daviſon — 195, 200
Woolvill *verſus* Young — 367

Y.

Young *verſus* Rudd — 86

A TABLE OF THE PLEADINGS.

Caſe.

Quantum meruit pro opera & ſervitio, and an *Inſimul computaſſet* for Wages *Page* 133

Debt.

The Statute of Gaming pleaded 1
Debt upon a Bond againſt an Heir upon the Bond of his Anceſtor 119
On the Statute for not appearing, and giving Evidence ar the Aſſizes, 352

Ejectment.

Narr' inde 260

Habeas Corpus.

Retorn thereof 151

Mandamus.

To reſtore a Man to be Burgeſs of a Corporation *Page* 254

Prohibition.

To the Commiſſioners of Appeal upon the Duty of Exciſe 269

Replevin and Avowry.

The Defendant juſtifies the taking, *&c.* becauſe the Plaintiff did refuſe the Office of Conſtable, being choſen at a Court-Leet 224

Treſpaſs.

Narr' inde 109, 248

Trover.

Narr' inde 356

DE

Term. Sancti Mich.

Anno 5 W. & M. Regis & Reginæ, Rot. 337.

Pope *verſus* St. Leiger.

S. C. 4 *Mod.* 409. 1 *Salk.* 344. *Lutw.* 484, 487.

On a Writ of Error on a Judgment in B. C. *the Record there,* ut ſequitur.

Mid. ſſ. JOHANNES St. Leiger nuper, &c. alias dict. &c. ſum. fuit ad reſpond. Rogero Pope Arm. de placito quod reddat ei centum & ſeptem libras & decem ſolidos quos ei debet & injuſte detinet, &c. Et unde idem Rogerus per A. B. Attorn. ſuum dicit quod cum præd. J. St. Leiger & R. Pope 8 die Julii An. Dom. 1691. apud Paroch. Sancti Martini in Campis in Com. Mid. Latrunculis luſer. ad ludum Anglice vocat. **Back-Gammon** Cumq; ad ludum illum præd. Rogerus adtunc & ibidem uno jactu jecit quatuor ſuper unam aleam, quatuor ſuper alteram aleam [Anglice **threw two Fours.**] Cumque ſuper inde præd. R. adtunc & ibidem tetigit & paulatim movit duos latrunculorum ſuorum illorum [Anglice **two of his Table-Men**] ſed non amovit illos a Statione ſua [Anglice **off from the Point they ſtood on**] cumque ſuper inde adtunc & ibidem pignore certat' fuit [Anglice **a Wager was laid**] inter præd. J. St. Leiger & præfat. R. modo ſequen' (videlicet) quod præd. R. ſolveret præfat. Joh. St. Leiger centum & quinquaginta nummos aureos [Anglice vocat **Guineas**] ſi præfat. R. tenebatur jure luſus illius amovere [Anglice **to play**] duos Latrunculos illos quos ita movit; quodq; præd. J. St. Leiger ſolveret præfat. Rogero centum nummos aureos ſi præd. R. non tenebatur jure luſus illius amovere [Anglice **to play**] duos Latrunculos illos quos ita movit; & præd. J. St. Leiger & R. adtunc & ibidem pro determinatione pignorationis

Count per le value de 100 *Guineas ſur un Wager concernant le Ludor de un caſt' ject per le Plaintiff al'.* Back-Gammon *de que fut un* Caſe ſtated.

Le Wager is determined *per le* Groom-Porter.

Le fait ſur que Action eſt founded.

norationis illus [Anglice of that Wager] poſuere ſe ſuper Judicium Atrienſis Angliæ [Anglice of the Groom-Porter of England] Cumq; præd. Johannes St. eiſdem die & Anno ſupradict. apud Paroch. præd. per ſcriptum ſuum ſigillo ſuo ſigillat. curiæque Dom. Regis & Dom. Reginæ nunc hic oſtenſ. cujus dat. eſt iiſdem die & Anno cognovit pignoration. præd. [Anglice the ſaid Wager] Et præd. J. St. per idem ſcriptum obligavit ſeipſum ſolvere præfat. R.P. vel ordini ſuo centum nummos aureos [Anglice vocat. Guineas] quando Atrienſis [Anglice ſo ſoon as the Groom-Porter] adjudicaret [Anglice ſhould give his Judgment] in caſu illo ſi accideret quod judicium illud foret contra præd. J. St. Leiger. Et in facto idem Rogerus dicit quod poſtea poſt confectionem ſcripti præd. & ante impetration. brevis originalis præd. Rogeri in Cur. hic ſcilicet 31 die Julii Ann. Dom. 1691. ſupradict. quidam Thomas Neale Armig. tempore confectionis ſcripti præd. & diu antea & abinde ad-

Le Judgment de Groom-Porter *pro Quer.*

huc exiſten. Atrienſis Angliæ [Anglice the Groom Porter of England] in caſu præd. adjudicavit contra præd. J. St. Leiger ſcilicet quod præd. Rogerus non tenebatur jure luſus illius amovere [Anglice to play] duos Latrunculos illos quos ita moviſſet niſi moviſſet illos a Statione ſua [Anglice off from the Point] quodque centum nummi aurei [Anglice vocat Guineas] tempore confectionis ſcripti præd. & diu antea fuer. & adhuc exiſt. valoris præd. centum & ſeptem librarum & decem ſolidorum ſcilicet apud Paroch. præd. in Com. præd. unde præd. J. St. Leiger adtunc & ibid. habuit notitiam præd. tamen Johannes St. Leiger licet ſæpius requiſit. præd. centum & ſeptem libras & decem ſolidos eidem Rogero non reddidit ſed ill' ei hucuſque reddere omnino contradixit & adhuc contradicit unde dicit quod deteriorat' eſt & damnum habet ad valentiam 40 *l.* & inde produc. ſectam.

Bar.

Et præd. Johannes per E. H. attorn. ſuum venit & defend. vim & injur. quando, &c. Et petet auditum ſcript. præd. & ei legitur in hæc verba. ſſ. I John St. Leiger of, &c. do own, That I have betted with Lieutenant Colonel Roger Pope an hundred Guineas againſt One-hundred and fifty, concerning a Diſpute ariſing on the Manner of playing a Caſt at Back-Gammon, which is ſtated and ſigned by us both, and Captain Francis Chantrell, and referred to the Deciſion of the Groom-Porter of England. And I do by theſe Preſents oblige my ſelf, on the Word and Honour of a Gentleman, to pay to the ſaid Roger Pope, or his Order, or whom he appoints to receive it, an hundred Guineas, ſo ſoon as the Groom-Porter gives his Judgment on the Caſe, if it ſo happen that the Judgment be againſt me: The Queſtion to the Groom-Porter is ſtated under the Letters A. B.

Oyer de fait.

and

and C. John St. Leiger is meant by A. and Roger Pope by B. Given under my hand and Seal, July 8. 1691.

Quibus lectis & auditis idem Johannes dicit quod ipſe de debito præd. virtute ſcripti præd. onerari non debet quia dicit quod in Statuto in Parliamento Dom. Caroli 2. nuper Regis Angliæ inchoat. apud Weſtm. in Com. Mid. 8 die Maii, Anno Regni dicti Dom. nuper Regis 13. & per diverſas prorogation. & adjornament. ibid. continuat. uſq; 16 diem Martii, Anno Regni ejuſdem nuper Regis 16. (inter alia) inactitatum fuit quod ſi aliqua perſona vel perſonæ ad aliquod tempus vel tempora poſt 29 diem Septemb. in Ann. Dom. 1664. luderet ſeu luderent ad & cum pictis chartis [Anglice Cards] aleis latrunculis pilis palmariis [Anglice Tennis] globulis [Anglice Bowls] clavis ligneis [Anglice Skettles] menſa lubrica [Anglice Shovelboard] vel ad alium luſum [Anglice Paſtime] Ludum vel Ludos quoſcunque (aliter quam) cum & pro pecuniis depoſit. [Anglice ready Money] vel pignoraret [Anglice ſhall bet] ex partibus [Anglice upon the Sides] vel ſuper manus eorum qui ludunt vel luderet ad inde & perderet aliquam ſummam vel ſummas monetæ vel aliam rem vel res ſic in Luſum poſit' [Anglice played for] exceden' ſummam Centum Librar. ad aliquod unum tempus vel congreſſum ſuper notam [Anglice upon Ticket] vel credentiam [Anglice Credit] vel aliter & non ſolveret ead. in manibus [Anglice ſhall not pay down the ſame] ad tempus quando ill' vel illi ſic perdent ead. perſona vel perſonæ quæ perdiderunt ſive perdiderint dict monet. vel aliam rem ſive res ſic in Luſum poſit. ſive ponend. [Anglice ſo played, or to be played for] ultra ſummam Centum Librar. in tali caſu non obligaretur ſeu compeller. vel compellend. erit ſolvere ſeu reſpondere [Anglice to make good] eadem ſed contract. por iiſdem & pro qualibet parte inde & omnia & ſingula judicia Statuta recogn. [Anglice Recognizances] Mortgagia [Anglice Mortgages,] Conveyanciæ, Aſſuranciæ, Obligationes [Anglice Bonds] Billæ, ſpecialitates, promiſſiones, conventiones, agreamenta, & alia acta facta & ſecuritates quæcunque quæ erint obtent. fact. dat. cogn. ſive intrat. [Anglice entred into] pro ſecuritat. ſive ſatisfaction. eorundem vel pro eiſdem vel aliqua parte inde erunt vacua & nullius effectus prout per eundem actum (inter alia) plenius apparet. Et idem Johannes in facto dicit quod poſt 29 diem Septemb. Ann. Dom. 1664. ſupradict. & ante confect. ſcripti prædict. ſcilicet præd. 8 die Julii, Ann. Dom. 1691. ſupradict. apud Parochiam præd. in Com. præd. ipſe idem Johannes & præd. Rogerus ludebant cum aleis ad quendam Ludum vocat [Back-Gammon] Quodque præd. nummi aurei vocat. [Guineas] in præd. ſcripto mentionat. adtunc & ibidem ad unum tempus & unum congreſſum [Anglice Meeting] fuer. pignorat. [Anglice Betted]

Plea *per Stat.* 16 *Car.* 2. *cap.* 7. *encounter* exceſſive Gaming.

Betted] per eund. Johannem cum præd. Rogero & perdit. in Luſu illo & non cum vel pro pecuniis depoſit' [Anglice ready Money] Quodq; præd. centum nummi aurei vocat. [Guineas] tempore pignorationis illius [Anglice at the Time of the ſaid Bet] necnon tempore adjudicationis in narratione Rogeri præd. per Thomam Neale in eadem narratione mentionat. fieri ſuppoſit. fuer. valoris ultra ſummam centum Librarum (videlicet) valoris centum & ſeptem librarum & decem ſolid. ſuperius petit. videlicet apud Paroch. præd. in Com. præd. Quodq; præd. centum nummi aurei tempore Luſus illius non fuer. pignorat. [Anglice Betted] in pecuniis depoſit. [Anglice ready Money] neque tempore adjudicationis præd. in narr. præd. fieri ſuppoſit. ſolut. ſed pro ſecuritat. ſolution. præd. centum nummor. aureor. per ipſum Johannem cum præd. Rogero ut præfertur pignorat. [Anglice Betted.] Idem Johannes poſtea ſcilicet præd. 8 die Julii, An. Dom. 1691. ſupradict. apud Paroch. præd. in Com. præd. ſcriptum præd. in narratione præd. mentionat. præd. Rogero dedit ſigillavit & ut factum ſuum deliberavit per quod ac vigore Statut' præd. in eo caſu inde edit. & proviſ. ſcriptum præd. fuit & eſt vacuum & nullius vigoris in Lege. Et hoc paratus eſt verificare unde petit judicium ſi ipſe de debito præd. virtute ſcripti præd. onerari debeat, &c.

C. Levinz.

To this the Plaintiff, Roger Pope demurs generally.

Fr. Pemberton.

This was adjudged for the Plaintiff in B. C.

St. Leiger *verſus* Pope. B. R.

S. C. 4 *Mod.* 409. 1 *Salk.* 344, 484, 487. *N. Lut.* 147.

On a Writ of Error on the Judgment given in the Common Pleas *for* Pope, *the now Defendant: It was argued,*

Debt for a Wager, the Statute of *Gaming* pleaded. *Vide poſt*, 131, 175. 3 *Lev.* 118. 2 *Vent.* 175.

BRoderick for the Plaintiff in Error: The Plaintiff in Debt demands 100 Guineas, valoris 107 *l.* 10 *s.* in B. C. The Defendant pleads, That when the Wager was laid, he and the Plaintiff were at a Play called Back-Gammon, and pleads the Statute of Gaming, and avers that this was for Money won at play at Tables, being for above the Sum of 100 *l.* and ſo was void by the Statute; to which the then Plaintiff demurs, and Judgment was given for him in the Common Pleas. And we bring Error:

1. I think Debt will not lie on this Wager, &c.

2. The Plaintiff ought not to declare of ſo many Guineas, Valoris, &c. Yelv. 80. 2 Cro. 88. 1 Leon. 41. Thoſe Caſes I agree: But here a Guinea is Engliſh Money, of which the Court takes Notice; and in ſuch Caſes it is never declared ad Valentiam. Latch, 84. A Guinea in Law is no more than 20 s. but in an Action on the Caſe, Damages ſhall be given for them according to the Value; but in Debt for them, the Plaintiff never declares for more than 20 s. and ſo you lately adjudged in this Court, in the Caſe between Harriſon and Byron: In which Caſe it was adjudged, 1. That the Court judicially takes Notice of a Guinea. 2. That the legal Value of it is but 20 s. though by Conſent it may paſs for more; ſo that this Judgment is erroneous.

How to declare for Guineas in Debt or Caſe. *Vide* 1 *Salk.* 9, 22, 25, 446. *Pal.* 407. 2 *Keb.* 463. *poſt*, 7. *Raſt. Ent.* 158. b.

1 Saund. 316. The Deed being entered of Record, is Parcel of the Plea; and if by that it appears that the Plaintiff hath not Cauſe of Action, he cannot have Judgment though the Defendant has miſ-behaved himſelf; and therefore our Admittance of the Value of the Guineas will not hurt us, and we need not to have mentioned this Variance from the Deed; and this was a Point not touched in the Common Pleas.

A Deed entered of Record, is Parcel of the Plea. *Vide* 1 *Saund.* 316, 317.

Then non conſtat in what Caſe (in Caſu illo,) for it's not mentioned before, and the Money is not to be paid by the Deed, before the Groom-Porter has given Judgment in that Caſe; and as to that, the Declaration is, That Pope ſtirred two of his Tablemen, Sed non amovit illos a Statione ſua, [Anglice from the Point they ſtood on:] And a Wager was laid, Whether the ſaid Pope was bound by the Law of the Play, to play thoſe Men which he ſo ſtirred? And they put it to the Determination of the Groom-Porter, Cumq; præd. J. St. Leiger (die anno & loco) per ſcriptum ſuum ſigillat. curiæq; Dom. Regis & Dom. Reginæ nunc hic oſtenſ. cujus, &c. cognovit pignorationem præd. [Anglice the ſaid Wager] Et præd. J. S. per idem ſcriptum obligavit ſeipſum ſolvere præfat' R. Pope vel ordini ſuo centum nummos Aureos [Angl. vocat. Guineas] quando Atrienſis [Angl. ſo ſoon as the Groom-Porter] adjudicaret [Angl. ſhould give his Judgment] in caſu illo ſi acciderit judicium illud fore contra præd, J. St. Leiger: In caſu illo: In what Caſe? For it is not mentioned before, and the Money is not to be paid by the Deed, before the Groom-Porter has given his Judgment in that Caſe.

Ante, 2.

Then our Plea is good; for we plead the Statute of Gaming, and that being at Back-Gammon, theſe Hundred Guineas were wagered on that Game; and ſo not being for ready Money, it is void by the Statute: Now we may aver by the Statute

Where a Man may aver againſt his own Deed. *Vide Lutw.* 734, 735. *N. Lutw.* 231, 232. 1 *Salk.* 162, 197, 227. 2 *Salk.* 676. 6 *Mod.* 306.

againſt our own Deed, 2 Cro. 253. Mo. 641. 2 Sid. 88. and the Demurrer hath confeſſed this. And though the Averment is not good, yet it appears by the Declaration to be within the Words and Intention of the Statute of Gaming, for the Money is above 100 l. and is loſt on Ticket; and it appears by the Declaration how it was loſt, That it was at Back-Gammon, and that the Money was won at Play at that Game, though the Judgment of the Groom-Porter was at another Time; and the Statute of Gaming would be of little Uſe, if it is not extended to By-Bets, but only to the Gaming it ſelf; and this Act has always been conſtrued liberally. And therefore where a Man loſt 80 l. at one Day, and then the Parties agreed to play at another Day, when 80 l. more was loſt; this was adjudged to be within the Statute, and to be but one Loſs; and that Statute was made to prevent great Miſchiefs. If any of theſe Points are for us, then I pray that Judgment may be reverſed.

Statute of *Gaming* conſtrued liberally.

Chief Juſtice, Do you make laying a Wager to be within the Statute of Gaming? It is true, they were at Play when the Wager was laid.

Eyre, Juſtice. Suppoſe that the Wager had been, that the Tables were made of Brazil, had this been within the Statute? Certainly no: No more ſhall this.

Whether a Wager be within the Statute of *Gaming*. *Vide poſt*, 13, 175.

Pemberton, Serjeant. It is plain, That this is not within the Statute of Gaming; for to make it ſo, it muſt be betted on the Hand of the Plaintiff or Defendant; but this Wager was laid on a collateral Matter on the Right of Play, which is not within the Act.

The Nature of Guineas, and how the Law takes Notice of them. 2 *Salk.* 446.

As to the Declaration, The Writing produced maintains it, for it is the very ſame with the Declaration. Then we lay it, that the 100 Guineas are valoris 107 l. 10 s. of which you muſt take Notice, for it is a Coin by it ſelf, and is not any noted Money or Coin of the Kingdom, as the 20 s. Pieces are, for there is no Proclamation to make them paſs; but a Guinea is in Nature of a Medal, and is more like a foreign Coin, and is much of that Nature. And there are ſeveral Declarations of ſo many Dollars, valoris ſo much, and yet you know the Value of a Dollar: This is like that, which you cannot take Notice of, becauſe it is not the currant Coin of the Kingdom.

Holt,

Holt, Chief Justice. Guineas were coined at the Mint for 20 s. only, and there was never any Proclamation to make them pass, though there was one to take the Twenty Shilling-Pieces. 'Tis true, by Consent they may pass for more than 20 s. but legally no more is to be demanded for them than 20 s. the Guinea was coined according to the Twenty Shilling-Piece; we call them Guineas by Agreement; but how can we take Notice of what Value they are? If the Plaintiff had declared of Twenty Shilling-Pieces, we must have judicially taken Notice of them: But do you think that it is not High Treason to counterfeit Guineas? Certainly it is: Though the Indictment shall not run for counterfeiting Guineas, but of so many Pieces of 20 s. Value. A Guinea is the currant Coin of the Kingdom, and we are to take Notice of it. The Guineas were coined after the Proportion of Carolus's (that is) Sixteen Penny-weight less, to the Value of 20 s. only: The Question is, If we can take Notice of the Allegation of the Value of Guineas, because there are other Sorts of them, as Five Pound Guineas?

Vide 2 *Salk.* 446. *Ante*, 5. 1 *Salk.* 9, 22, 25.

Where you declare on a Foreign Coin, you must declare in the Detinet only, and not in the Debet: So in an Action of Debt for Goods, as Corn, &c. though Debt lies on the Contract, yet it must be in the Detinet only, and the Value must be shewed; it's always so, unless the Debt be for English Money. Now these are called Guineas here, which if it were a Coin not known in our Law, we must take them to be as Goods.

How to declare on Foreign Coin. *Vide ante* 5. *& supra.*

Eyre, Justice. Then the Defendant confesseth the Value of them as the Plaintiff hath alledged.

Holt, Chief Justice. But it is centum nummos aureos, [Anglice Guineas] What is that? It is very uncertain indeed; if it had been centum pecias Auri, [vocat. Guineas], it had been well enough. Adjorn.

But in Trin. 7 W. 3 (the Chief Justice and Justice Eyre only present), the Judgment was reversed, chiefly for this Reason, because the Plaintiff had shewed the Case, Play, and Wager, and then the Deed by which the Parties bound themselves in pignoratione præd; and upon Oyer of the Deed it appears, that it was to stand to the Judgment of the Groom-Porter, upon the Case stated and signed by us both, which is not the same: And therefore the Writing comprehending the Case, and Averment taken, That the Case in this and in the Declaration

claration are all one, and although that the Inducement of the Caſe and this ſtated are all one, and therefore whether the Averment be before the Deed or after is not material; yet the Chief Juſtice was of another Opinion, becauſe the Declaration ſuppoſeth the Deed to be, to perform a Wager compriſed in the Deed, where it is to perform a Caſe extrinſical, and which is to be coupled by Averment.

S. C. 2 *Salk.* 565.

Waytes *verſus* Briggs.

This is an Action of Debt on Eſcape.

Vide Hob. 210. *Mo.* 888. 1 *Sid.* 216. 1 *Lev.* 137. 1 *Keb.* 761, 815. *Show.* 4. 6 *Mod.* 103. 1 *Salk.* 298.

IT is ſaid, That the Priſoner was brought before Mr. Juſtice Gregory, and by him committed. It has been objected, becauſe we do not conclude prout patet per Recordum.

Conclusion of the Plea *prout patet per Recordum*, where it is Matter of Form or not. See now the Stat. 4. & 5 *Annæ. cap.* 16. For Amendment of the Law.

Hall. I conceive this is good on a general Demurrer, and is within the Stat. 27 Eliz. of Demurrers, becauſe it is but Matter of Form, and is within the Rule laid down in Hob. 233. and within the Reaſon of it too; and on the Trial, the Commitment muſt have been given in Evidence. 1 Sid. 429. is in Point. Hancock & Prowd. 1 Saund, 336. Debt on Bond againſt Executor. Defendant pleads ſeveral Judgments in Bar, ultra quod, &c. Plaintiff replies, quod placitum præd. eſt minus ſufficiens to bar him, becauſe upon one of the Judgments (naming it) Satisfaction is acknowledged; and as to the others kept on Foot by Fraud, Et hoc paratus eſt verificare, without ſaying per Recordum. Et per Cur. It is good on a general Demurrer; otherwiſe upon a ſpecial Demurrer: And Judgment was for the Plaintiff.

Chief Juſtice. It ſeems but Matter of Form, and ſo it was adjudged twice in the Caſe of Hancock and Prowd in 1659. and between Clegat and Banbury, 2 Sid. 16.

1 *Lev.* 137. 1 *Keb.* 761. *&c.*

Eyre, Juſtice. The alledging of the Commitment, is but Inducement, and not the Point of the Action. I think the Caſe in 1 Sid. 216. Midleton and the Manucaptors of Silveſter is in Point, and this is but Matter of Evidence. Where the Record is the Subſtance of the Plea, there it muſt conclude prout patet per Recordum; but where it is but Inducement, it need not; for which there is a good Difference in Co. Lit. 303. a. where a Matter of Record is the Foundation or Ground of the Suit of the

the Plaintiff, or of the Substance of the Plea, there it ought to be certainly and truly alledged; aliter where it is but Conveyance; and so in this Case.

Difference in Pleading as to Matter of Inducement and Substance. 1 *Saund.* 9, 10, 268, 269. *Vide* 1 *Salk.* 520, 565, 630

Holt, Chief Justice. In Debt on a Judgment, it is said, quod cum recuperasset, &c. And though it is not said prout patet per Recordum, yet it is good, and so it has been held; for it was but Inducement, and yet it is agreed, That in such Case the Defendant may plead nul tiel Record.

The Escape is the Gist of the Action, and the Commitment is but the Inducement to it, tho' it can be no Escape without it; but the Record is not the Matter of the Action; (but the Escape was) for then the Plaintiff ought to have concluded prout patet per Recordum; but here the Omission of it is but Matter of Form, for it ought to have been given in Evidence on nil debet pleaded, which is the Plea for the Defendant in this Case, because the Gist of the Action is grounded on Matter of Fact, and not on the Record; for if it was, then the Plaintiff could not plead nil debet to it, but only nul tiel Record.

Eyre, Justice. The Defendant is not estopped to say, quod the Prisoner non fuit committed, though it is said on the Record, quod committitur: And per Chief Justice, The Record is only alledged to make it an Escape; and tho' the Record is proved, that does not make it an Escape only.

Northey. In last Hillary Term in B. C. in Debt on Escape, it was not said prout per Record. and the Court on the first Argument were of Opinion, That Judgment should be given against the Plaintiff; but afterwards considering that the Defendant's Plea had admitted the Commitment, Judgment was given for him.

Curia. That Case is no Authority for you.

Judgment for the Plaintiff, nisi, &c.

The Earl of Bath *versus* Batherſea.

Vide 1 *Salk.* 278, 281, 286. 2 *Salk.* 555, 691.

Depositions in one Cause, where they are Evidence in another, or not.

Sol. Gen. THE Depositions which were read against my Lord of Bath in the other Cause, are no Evidence in this, because that Trial is not between the same Parties; and Depositions are never Evidence but where they are mutual; and this Defendant does not claim under any one that was Party to the former Suit.

Cur. They may be read because the Defendant shelters himself under the other's Title, and the Title of the Land is not in Question, but to whom the Rent shall be paid. If the De-

Vide 1 *Chan. Cases*, 73, 175, 236. 2 *Chan. Cases*, 250. *Post*, 277.

Answer in *Chancery* read in Evidence. *Vide Chan. Cases*, 154.

fendant gives the Plaintiff's Answer in Chancery in Evidence, he may insist only to read such Part as he will, for it's like Examination of Witnesses; but then the other Side may insist to have the Whole read after.

Nota, There was a Verdict for the Plaintiff in this Cause after a Trial from nine a Clock in the Morning till nine the next Day: And the Judges sat up all Night long.

The King versus *the City of* Chester.

Vide Post 256, 275. *Mandamus.* 1 *Salk.* 433, 436, 7. *Mandamus* to restore nine Common-Councilmen. *Vide* 6 *Mod.* 18. *Show.* 258, 260, 281, 364.

THIS was a Mandamus to restore nine Persons to their Places of Common-Councilmen in Chester.

They return, That by Charter granted to them in 20 H. 7. amongst many other Things of which they take no Notice, they are impowered to choose forty Common-Councilmen yearly, and that ante adventum of this Writ, these nine Persons were chosen Common-Councilmen, and so continued for a Year; and that at the End of the Year, debite amoti fuere ab officio per electionem aliorum.

Sir Tho. Powys. This is no good Return, because it does not set forth any certain Time when these Persons were chosen or removed; and in Returns to Mandamus's, there ought to be the greatest Certainty, because it is the Ground of the Judgment of the Court, and are to conclude the Party, who has no Opportunity to plead to them, and therefore they must be positive too, that if they be false, the Party may have his Action. Now to say, That these nine Persons were ante unum annum integrum ante adventum brevis chosen and removed, is altogether uncertain; for it may be forty Years ago, and yet the Return is true; and if we bring an Action on this Return, we cannot know what certain Time they meant.

2. They say, That the Year being ended, debite ab officio amoti fuer. which is not good; 1 Sid. 209, 210. for it ought to be direct and positive: Non fuit debito modo admissus is an ill Return of a Mandamus; it ought to be Non fuit admissus. H. brought a Mandamus to be restored to the Place of Town-Clerk of Hereford, the Mayor returns, Nunquam fuit debito modo admissus; it is ill: He ought to have returned Non est admissus; for if the Return be false, the Party grieved may have his Action on the Case.

Curia. The Case of Amotion, or Putting out, differs from the Matter of Election. There is Difference between debite amotus fuit, and non fuit debite electus; for this Case, and all others of like Nature, admit that he was removed; but in case of Election the Mandamus is to admit him, and therefore in the Return it must be shewed non fuit electus positively, and must not say, non fuit debite electus, for that implies an Election; but it was not according to the Constitution of the Corporation, and therefore in such Case the Return ought to have shewed how he was elected. But in this Case all are agreed, That he was removed, and they say that it was duly done, and shew the Reason of it; but the Return ought to have shewed what Time they were elected.

Diversity between Amotion and Election as to the Return. *Vide* 2 *Salk.* 428, 433, 434, 435.

And here you ought to have brought several Mandamus's: for nine Persons cannot join in a Mandamus as here; perhaps you were chosen at nine several Times. You cannot all join in one Writ, for the Election of one is not the Election of another.

1 *Salk.* 433.

Eyre, Justice. They may alledge a Custom to choose a Common-Councilman, and to turn him out ad libitum, and that is Warren's Case; for he has no Freehold in his Place, as an Alderman hath; for a Common-Councilman is collateral to the Corporation.

Difference between a Common-Councilman and an Alderman. *Vide* 1 *Vent.* 19, & 302. 2 *Keb.* 488. 3 *Keb.* 714.

Holt, Chief Justice. The Return is too short; but we will not restore you on this Writ: Agree to take a Declaration, and try it next Term on the Merits.

This is an Innovation to join nine Men in one Writ of Mandamus: Can we grant a joint Restitution to them? It is a several Interest.

Tenants in Common cannot join in one Action, though they come in by one Feoffment; the Amotion of the one is not the Amotion of the other; and it may be for several Faults, one for Forfeiture, the others for other Reasons. I think the Writ ought to be quashed.

Eyre. And so do I.

Green *versus* Moore.

If Plea of Outlawry after Imparlance be good, without saying *puis darrein Continuance*.

THE Case was this. The Declaration was in Trinity Term; Defendant imparls till Michaelmas Term. In the Vacation the Plaintiff was outlawed, and then in Michaelmas

Vide 1 *Lutw.* 39. N. *Lutw.* 15. 2 *Lutw.* 1512, 1514.

mas Term the Defendant pleads the Outlawry in Bar, but does not say the Outlawry was puis darrein Continuance. Upon this the Plaintiff demurs.

An Executor may after Declaration and Imparlance confess Judgment, and then plead this in Bar, and need not to say puis darrein Continuance. Jones 299. Savil's Case. So here the Plea of Outlawry after Imparlance is good, without saying puis darrein Continuance, for it appears to be so here. So Mich. 3 W. & M. Rot. 395.

Econtra, Trin. 35 Car. 2. Rot. 1118. Surby and Gile. An Outlawry was pleaded after Imparlance, but because it was not said puis darrein Continuance, the Plea was disallowed. So Ewer and Moyle, in Yel. 141. It is no good Plea to say post darrein Continuance, such a Thing happen'd; but ought to be precise in the Day.

Chief Justice. The Plea is good enough.

Eyre, Justice. Since the Record does appear, why should it not be pleaded?

But per Cur. Let it go over till the next Term, because it being a just Action, you may in the mean Time reverse the Outlawry, and then may plead puis darrein Continuance.

S. C. 1 *Salk.* 149. N° 16.

The King *versus* Lammas.

Indictment for selling Low-Wines in a Cellar, &c.

NOrthey moved to quash an Indictment for selling Low Wines in a Cellar, without giving Notice to the Exciseman, against the Statute of 3 & 4 W. & M. because it is returned in English, and ought to be in Latin.

Chief Justice. I cannot tell that; no Writ of Error lies on it, the Remedy is by Appeal. You may as well take this Exception to an Order for keeping a Bastard-Child; tho' indeed all Convictions for Deer-stealing are in Latin.

Northey. Then the Conviction is not according to the Indictment and the Statute, because they do not find that he is a common Distiller, as the Words of the Statute are; for if another Person distils Wines, a Man may sell them in a private Cellar without offending the Statute.

Cur. They convict him of the Offence aforesaid, which must be as he was a Common Distiller.

The King *versus* Wadsworth.

Extortion, *Hawk. P. C.* 170, 171.

Counsel moved to quash an Indictment against a Miller for taking too great Toll, because it was not said Jurat' nor Onerat', nor the Jurors named.

It is against the Course of the Court to quash an Indictment against Extortion.

Cur. It is against the Course of the Court to quash an Indictment against Extortion or Oppression; we cannot do it. Demur to it.

Walker *versus* Walker.

Vide ante 5, 6, *&c.* 3 *Lev.* 118. 2 *Vent.* 175. 4 *Mod.* 409.

Counsel moved in Arrest of Judgment, because the Action was for Money won at Play on a Wager, by a general Indebitatus Assumpsit, which is not a good Promise in Law: For there is no Debt, and the Verdict being general and intire, Damages given cannot be good. There are Cases on both Sides, and the Point is now depending in a Cause in the Exchequer-Chamber.

3 *Lev.* 118.

Econtra. Though it is, yet in Egleston's and Lewen's Case, Hill. 33 & 34 Car. 2. in Sir Fr. Pemberton's Time, a Judgment in this Point was affirmed.

Vide 6 *Mod.* 128. 1 *Salk.* 22, 23.

A general *Indebitatus Assumpsit* lies not for Money won at Play. But it lies against him that holds the Wager.

Vide ante 5, 6, 7.

Holt, Chief Justice. It was so: But since we came hither we have held the Contrary, that it does not lie: It is meerly a Wager, and no Indebitatus Assumpsit lies for it; for to make that lie, there must be a Work done, or some meritorious Action for which Debt would lie; but it does not for this Wager, because this is due in a collateral Respect: It is true, the Cast of a Die alters the Property if the Money be staked down, because it is then a Gift on Condition Precedent, and an Indebitatus Assumpsit lies against him that holds the Wager, because it is a Promise in Law to deliver it if won. See 1 Cro. Sands's and Trevilian's Case. If a Man says to a Surgeon, Cure such a Man and I will pay you; a good Assumpsit lies upon that, because it is an original Contract, and there is a Labour done in the Way of his Profession. No Indebitatus Assumpsit lies on a Bill of Exchange, and a Judgment was stayed on that Point in my Lord Hale's Time, and the like in the Exchequer; and it is not material, whether he against whom the Bill is drawn has Effects

No *Indebitatus Assumpsit* lies on a Bill of Exchange. *Vide* 1 *Salk.* 125.

Vide Poſt, 48. in his Hands when he acceptrd the Bill, or not. It is not like a Liberate to pay Money on a Tally; when the Officer hath the Money, the Propriety of it is veſted out of the King, and is in the Party. I am ſure my Lord Chief Juſtice Polexfen was of Opinion, That that Judgment in Egleſton and Lewen's Caſe was not well affirmed. Let it ſtay; we will ſpeak with the Judges in the Exchequer-Chamber; after this Verdict, if it could be any ways made good, we would do it; but a Verdict cannot make that good which is bad in Law: Though on the Loſs of the Wager, the Defendant had promiſed the next Day to pay it, yet an Aſſumpſit would not lie on it, becauſe it wants Conſideration, it being but Executory. Adjourn'.

3 *Lev.* 118.
1 *Danv.* 28. *pl.* 12.
3 *Lev.* 118.
4 *Mod.* 409.

D E

DE

Term. Sancti Hill.

Anno 6 Will. & Mar. in Banco Regis.

The King *verſus* Crosby.

CROSBY was indicted for High Treaſon, and at a Trial at Bar, Aaron Smith was ready to give Evidence againſt the Priſoner; when he produced the Record of Smith's Conviction and Judgment to ſtand in the Pillory, and had ſtood in it, which his Counſel objected, made him infamous, and diſabled him to be a Witneſs. S. C. 2 *Salk.* 461, 689, 690. and *Ib.* 513, 514. 3 *Lev.* 426, 427.

Ward, Attorney General. This does not take away his Evidence; the Cauſe for which he was convicted, was only giving Inſtructions to Stephen Colledge to be uſed by him at his Trial; but there was no Publication of them, and it was not a Cauſe that deſerved the Pillory.

Holt, Chief Juſtice. The Cauſe is not material if the Court had a Juriſdiction; if he ſtood on the Pillory, and ſuffered an infamous Puniſhment, the Queſtion is, If he be a good Evidence?

Trevor, Solicitor General. 'Tis not the putting in the Pillory, but the Fact for which he was convicted, takes away his Evidence; as Perjury, and not a Libel only, as here.

Holt, Chief Juſtice. It is the infamous Puniſhment, and not the Cauſe. If one is convicted of Perjury, and ſtands in the Pillory for it, if he gets a Patent of Pardon, it does not reſtore him to his Liberam Legem. Here has been a general Pardon; the Pardon does not revive his old Credit, but it gives him A Man infamous, not to be a Witneſs. *Vide Poſt*, 75. After Pardon he may;

him a new one. If one attainted of Treaſon is pardoned, it makes him a good Witneſs, tho' before the Pardon he could not be ſo; but where a Man lies under a Civil Diſability, without any Conviction, the King cannot pardon that; but where there is a Conviction for a Criminal Offence, the King can, tho' not to reſtore him, but to give him Credit for the future. This is the ſame Diſability as is on a Judgment in Alienage or Attainder, and it is every Day's Practice to allow them to be Witneſſes after Pardon; the Diſability is as much a Conſequence on one as the other, and the general Pardon diſchargeth the Offence. I will not give any Opinion now as to the firſt Point, Whether he had been a good Evidence without a Pardon? But I take it, that the general Pardon makes him a good one, and has taken off the Diſability; for it not only takes away the Crime, but the Diſability too; and per Eyre Juſtice, he was allowed to give Evidence; but the Jury acquitted Crosby.

Walker *verſus* Slackoe.

Vide Poſt, 69. S. C.]

Amendment. *6 Mod.* 263, 310. *1 Salk.* 52, 49, *&c.*

THE Note from the Attorney to the Curſitor was thus: Inter A. in Treſpaſs, and five, naming them, Defendants. [*Note*, E. one of the Defendants is dead, make out a Writ of Error.] The Curſitor omits to ſay, that he is dead, and takes no Notice of him; but makes it out in the Name of four only.

Carthew. This is not like Blackmore's Caſe, for this is an Error in Judgment, which is not amendable; and there is no Caſe comes up to this.

Error in Judgment, if amendable.

Holt, Chief Juſtice. I will tell you one. In Debt on a Bond againſt an Heir where he was bound, the Curſitor made out a Writ, wherein he did not expreſs, that the Heir was bound, as perhaps thinking him bound without it; yet after Verdict it was amended and put in; which was an Error in his Judgment, and yet amendable, becauſe he had the Bond before him. This is 1 Cro. 147, 148. Forger *verſus* Sales. In this Caſe before us, the Notes were as large to the Curſitor as need to be.

Northey. 3 Cro. 644. Powel *verſus* Brazen-Noſe College. The Writ was, Præcipe quod reddat twenty Acres Hedington;

[in] being omitted, it was amended, it being only the Default of the Clerk; for he had writ it out of a Paper delivered to him to make the Writ, wherein this Word [in] was, which the Cursitor confessed upon Oath, though this was an Original: And our Case is the same with Blackamore's Case, 8 Rep. for the Cursitor is to draw the Writ, and the Attorney is only to state the Fact to him, and here was full Instruction to him as could be.

If the Instruction be right to the Cursitor, and he mistakes or omits, amendable. 1 *Salk.* 49.

At another Day.

Holt, Chief Justice. The Defendant here is not Party to the Writ of Error; for if the Defendant die before Non est erratum pleaded, you shall go on. Vide post, Pag. 69.

Defendant dies before *Non est erras.* pleaded.

Herbert *versus* Morgan.

THIS was a Formedon in Remainder. The Plaintiff intitles himself to maintain the Action, for that the Issue in Tail is dead without Issue; and saith not, that Tenant in Tail is dead without Issue.

Formedon in Remainder. Vide Lutw. 961, 962. *N. Lutw.* 305, 309. *Hob.* 282.

Levinz, Serjeant. This Formedon does not intitle the Plaintiff to maintain his Action; for it is not enough to say, that the Issue is dead without Issue, but also, that the Tenant in Tail is so; and that is the very Title of the Demandant, and it shall never be intended that he died without Issue; for the Estate was a Fee-Simple at Common Law, and now it is an Estate-Tail, it is supposed it will endure for ever, and the Plaintiff must always set forth as much as will entitle him to his Action, and the Intendment is strong against him here, because the Law supposeth the Estate-Tail will continue for ever; and if the Tenant in Tail is not dead without Issue, the Demandant can have no Title, tho' his Issue is dead without Issue, and therefore is not to be received; Fitz. N. B. 220. Reg. 242. 3 H. 4. 1. a. Br. Tit. Formedon 21. Rast. 364. a. And let me admit what I will, if the Plaintiff has no Title, he shall never recover; 8 Rep. Buckmer's Case is in Point.

Vide 8 Co. 86, 87, &c. 2 *Brownl.* 274, 275. 1 *Leon.* 213.

Holt, Chief Justice. It is a Formedon in Remainder, because it remains over on the Determination of the Estate-Tail: And must not you shew that the Tenant in Tail is dead without Issue, according to the Limitation; for without that you can have no Remainder? It is the very Point of the Action, and you must shew, that the first Donee is dead without Issue; and it

In *Formedon in Remainder* it is not enough to say, the Issue is dead without Issue; but must say, the Tenant in Tail died without Issue.

Vide 8 Co. 68, 88. *Hob.* 51, 282. 8 *Ed.* 3. 19. 38 *Ed.* 3. 26, *&c.*

it is not implied at all, that becauſe the Iſſue is dead without Iſſue, that therefore the Tenant in Tail is; for he may have other Sons beſides his eldeſt. Suppoſe it be a Condition Precedent, that when A. is dead without Iſſue, the Remainder ſhall be to B. in Fee, it will not be ſufficient to aver, that the Son of A. died without Iſſue; but alſo, that A. is dead without Iſſue: And this is in Nature of a Condition Precedent before the Remainder can come in Poſſeſſion.

The King *verſus* Wood.

Vide 1 *Salk.* 150, 379. 6 *Mod* 42, 61, 105, 301, 311. Where Indictment lies not for Deceit.

MOuntague moved to quaſh an Indictment, which ſet forth, That J. J. having ſeventeen Yards of Silk, W. Deceptivè told him, that a young Woman had Occaſion for it to make her Wedding-Clothes; on which, he ſold it to her under Colour of that falſe Pretence.

No Indictment lies for this Matter, for there was no Truſt; and if there was any, an Action lies for it: Then it is not averred, that the young Woman did not marry, or that ſhe had not Occaſion for it.

Cur. Let it be quaſhed.

The King *verſus* Grove.

Hawk. P.C. 244. 1 *Mod.* 288. 6 *Mod.* 261, 311. 1 *Sid.* 282. In Indictment of Barretry the Defendant muſt have a Note of the particular Charges.

CUR. In an Indictment for Barretry, the Defendant muſt have a Note of the Particulars, that he may know how they intend to charge him, otherwiſe they will not proceed to Trial.

Where a ſpecial Matter amounting to the general Iſſue is no Cauſe of Demurrer.

Note: Cur. If a ſpecial Matter is pleaded, which looks like the Colour of a Plea, but amounts to the general Iſſue, it is no Cauſe of Demurrer; as if in Debt you plead a Releaſe, though you might have given it in Evidence on Nil debet, yet it is no Cauſe of Demurrer; ſo in Debt for Rent, if you plead Entry and Expulſion, it is no Cauſe of Demurrer, though it may be given in Evidence on Nil debet.

* After Demurrer joined, the Defendant ſhall not wave his Demurrer, and plead the general Iſſue. *Vide* 6 *Mod.* 38. 2 *Salk.* 515.

Note. * After Demurrer joined, we cannot give Leave to the Defendant to wave his Demurrer, and plead the general Iſſue; and here the Demurrer is entered on the Roll. It is a Record of Court when it is brought into Court, and put into the Paper to be read as a Record.

DE

Termino Paſchæ.

Anno 7 W. III. in Banco Regis.

The King *verſus* Bethel.

BETHEL was convicted at the Old Baily for buying of Broad-Money, and was fined 1000 l. and being arreſted at the Suit of a private Perſon, ſome Time before his Proſecution for that Offence, or before any Knowledge of it, and two Perſons being Bail for him in the King's Bench, he moved for an Habeas Corpus; and being brought up by the Keeper of Newgate, it was moved in Behalf of his Bail, That he being now in Court, may (as he alſo deſired) ſurrender himſelf in Diſcharge of his Bail, and be committed to the Marſhalſea. S. C. 1 *Salk.* 348. *Quære* 1 *Salk.* 149. 1 *M* .. 118, 184. 2 *Jo.* 13. 3 *Keb.* 322. 1 *Sid.* 78. *Style* 147.

Curia. You cannot diſcharge the King's Priſoner without Leave of the Court; it was denied in Clayton's Caſe: We know very well the Meaning of turning him over to the King's Bench Priſon. King's Priſoner not to be charged without Leave of the Court.

Sir B. Shower. Then we hope we ſhall be diſcharged on theſe Exceptions to the Return.

It does not appear by that, that there was any Commitment of Bethel; it ſaith, he was committed virtute ordinis qui ſequitur, which was that being convicted and fined 1000 l. remaneat in cuſtodia Gaolæ de Newgate quouſque, &c. Now it ought to have ſaid, That he was in Executione before, and that then he was charged for this Fine; or that he was preſent in Court, and committed by the Court for the Fine, as it ought to be where the Commitment is by Commiſſioners of Oyer and Terminer. And we are at Liberty to take theſe Exceptions on a Return to an Habeas Corpus, as well as on a Writ of Error: Vaugh. Rep. Buſhel's Caſe. Commitment for a Fine. *Vide* 1 *Mod.* 119, 184. *Vaugh.* 135. 2 *Jo.* 13.

Northey.

Northey, ad idem. The Order is only the Judgment of the Court, which is, That he ſhould be taken; yet there muſt be Proceſs for that, as there is a Capias pro Fine here. The Judgment is no Commitment, but there muſt be Proceſs, ſo that here does appear no Cauſe of Detention of Bethel, becauſe it does not appear he was in Cuſtody before, or that being in Court he was committed by them for this Fine.

Ward, Attorney-General, contra.

Vide 1 *Sid.* 78, 143. 1 *Keb.* 146, 305, 514.

In Returns by an Officer, if there does appear a ſufficient Cauſe of Detainer, tho' not of his Caption, yet it will be ſufficient; for the Complaint is, That he is in Priſon for a Cauſe that is not lawful; and here the Keeper returns, That here is a Judgment againſt B. and a Fine, and that he is in Priſon for that Cauſe; which is a ſufficient Signification of the Cauſe, though it is not expreſly ſaid quod committitur.

Trevor, Solicitor-General. Tho' the Return is not ſo formal as it might have been, yet it is good in Subſtance, for the Order is a ſufficient Judgment of a Committitur; for the Remanent may as well go to his putting in Priſon, as his continuing there if he was there before, and amounts to a new Commitment of him for this Offence and Fine.

Lovel, Serjeant. This is only the Certificate and Return of the Gaoler, and not the Words of the Judgment of Record; it is not traverſable, but muſt be taken for Truth, which anſwers the Intent of the Habeas Corpus.

Cowper. 1. It appears, That Bethel was committed by ſufficient Authority, by Commiſſioners of Oyer and Terminer, which is in Court.

2. Here is a ſufficient Cauſe of Commitment, appears on Conviction and Fine of 1000 l. and this is no Return of the Judgment; which if it be ſo as here, it is erroneous; but they cannot take Advantage of it now, here is only returned the Cauſe of Detainer and Commitment to Priſon: In Buſhel's Caſe there was no ſufficient Cauſe of Commitment. Returns need not be ſo certain as other Things, it is ſufficient if the Words will imply as much as will make the Detainer lawful that is here by Remanent, which could not be unleſs he had been in Priſon before.

Shower, contra. It had been ſufficient if he had returned quod commiſſus fuit per Commiſſioners de Oyer & Terminer: But if he returns the Order, and that appears not to be ſufficient or not good, the Priſoner ſhall be diſcharged; for the Judgment is not a Commitment, and for ought appears a Stranger might have taken him up and carried him to Newgate. I agree, That this Return does not require ſo much Certainty as Returns to a Mandamus, yet a ſufficient Commitment and Cauſe of it muſt appear.

Chief Juſtice S. This is a Caſe of Conſequence, and the Return of it is primæ Impreſſionis, the firſt Precedent; the Commitment ought to be to the Sheriff, or generally quouſque he paid the Fine. 'Tis true, Juſtices of the Peace commit Felons to the Keeper of the Priſon; but where the Court commits, it is to the Sheriff who is their Officer, to whom the Court muſt award a Capias, and not to the Keeper. It's true, an Habeas Corpus lies to any Perſon as well as the Gaoler, but then here he ought to return ſpecially, that he was committed to the Sheriff for the Fine, and is now in the Gaol of Newgate under his Cuſtody. Commitment by the Court to the Sheriff. 1 *Sid.* 144. 1 *Keb.* 503.

Then as to the Remanent: Suppoſe he was wrongfully in Cuſtody before, no one but the proper Officer can take him. If a Judgment be given againſt a Man, any of the Courts of Weſtminſter-Hall may ſend a Tipſtaff to take him in View of the Court, but they could not do ſo if they heard he was at Charing-Croſs.

Then you cannot ſtop a lawful Deteiner on a wrongful Commitment, and you muſt ſatisfie us by the Return, that he was lawfully in Cuſtody. There ought not only a good Cauſe to appear, but alſo a good Commitment, both as to the Manner and Subſtance of it, for the Writ requires Cauſam Captionis & Detentionis, and here is only the Cauſe of Detention and not of the Caption; and where the Liberty of the Subject is concerned, we muſt be certified of the Cauſes. Adjorn'.

At another Day.

Holt, Chief Juſtice. It does not appear to us that Bethel was in Execution; for a Commitment to the Gaoler, is not any Commitment in Execution; but it muſt be to the Sheriff, for the Gaoler is but an Under-Officer; and it makes no Difference that this Commitment was in Court; for the Commitment there is in Lieu of Procels. We in this Court can- Commitment to the Sheriff, not to the Gaoler.

Vide 1 *Salk.* 348. 350. not commit to the Gaoler, but to the Sheriff; for though we have a Marſhal, and a Priſon of our own, yet we may commit to the Sheriff; and we have often committed to the Gate-Houſe, and the Sheriffs of London have often taken away a Priſoner from this Bar for a Fine. It is true, the Gaoler muſt take Notice of a Commitment to him, but it is no otherwiſe good than as he is a Servant to the Sheriff; his ſhort Notes are not a good Return to an Habeas Corpus. All the Men condemned at the Old Baily, are hanged by this ſhort Note Suſpenſ. per Coll. and yet that would never be a good Return to a Writ of Error: But here is the Matter, The Offender knowingly gets an Habeas Corpus to the Gaoler, who haſtily makes a Return to it, and ſo the Sheriff ſhall be made liable to the Servant's Fault or Negligence.

Cowper. Style 147. is a ſtronger Caſe than this. The Court was moved for an Habeas Corpus, for one that was taken in Execution by the Sheriff, and was afterwards ſet at Liberty, and after that was retaken on the ſame Execution by the Sheriff; the Court told them they were in the wrong Way, for they ought to bring Audita Querela.

1 *Sid.* 78, 143. 1 *Salk.* 348.

Chief Juſtice. When a Man comes in by Habeas Corpus, by the Favour of the Court he may be bailed to appear de die in diem, till the Caſe is determined, and then he may be remanded to the ſame Priſon; and ſo it was ruled in Ralph Horwood's Caſe, who married a City-Orphan. By the Petition of Right, we are to bail or diſcharge a Priſoner in three Days; but when we bail and afterwards remand him, it's no Eſcape; for the Entry is Remittitur, and that is a Commitment grounded on the old one.

Vide 1 *Salk.* 349, 353, 354.

Lovel. Sid. 78. Zach. Croſton's Caſe: There is nothing judicially before the Court till the Return be filed, and then the Entry is Committitur Mareſchallo, and within three Days enſuing they may remand; and then the Entry is Remittitur, or they may bail him.

Chief Juſtice. No Doubt of that, after the Return filed; but he may be remitted and brought up by Rule of Court, and in the mean Time he is in the Cuſtody of the Gaoler; and when we give Judgment on the Return, it has Relation to the firſt Day.

At another Day the Queſtion was, Whether pending the Debate about the Retorn to the Habeas Corpus, which was filed, the Party ſhould be bailed? For which Style 16. was quoted. Information to a Juſtice of Peace againſt Sir W. B. for cheating him at Play: Upon Refuſal to find Sureties, the Juſtice commits him to Priſon, and upon Habeas Corpus the Court took Bail for his Appearance. 1 *Sid.* 78, 143. 1 *Keb.* 146, 305, 514.

Upon this the Court thought fit to deliver their Opinion,

Eyre, Juſtice. I do agree, That the Retorn is not ſufficient, but I think there is enough returned for us to remand him. The Judgment is, That he ſhall be fined 1000 l. which is returned; therefore I do not know the Conſequence of this Bailing. I ground my Opinion on a Caſe in March's Rep. 52. Shield's Caſe. The Defendants were fined, and impriſoned quouſq; before the Counſel of the Marches of Wales, on Information of unlawful Practice and Combination in Marrying a Servant-Maid to P. a Gentleman's Son; and upon the Retorn the Priſoners were remanded, becauſe it appeared that their Fines were not paid without any other Reſpect had to the Matters of the Retorn; and if we let him at large, the King may loſe his Fine.

This ſeems to be a Caſe primæ Impreſſionis, and it might encourage others guilty of the ſame Fault. Then it might rid all the Gaols in England, if the Gaoler's Retorn ſhould be taken ſo ſtrictly; therefore I think he muſt be remanded.

Chief Juſtice. That this Retorn does contain ſomething not ſo regular, is plain; but however it does appear, he was committed by a Court that had Juriſdiction of the Matter.

The Law does take Notice of the Gaoler, as one that has the actual Cuſtody of the Gaol, and therefore it is criminal in him to ſuffer a voluntary Eſcape: So Juſtices of the Peace commit Priſoners to the Gaoler's Cuſtody, and yet at the Seſſions of Oyer and Terminer, the Court takes Notice of him as a Servant to the Sheriff; and the Cuſtody of the Gaoler is the Cuſtody of the Sheriff.

But now the Queſtion is, Whether we ſhall avoid the Commitment upon an Habeas Corpus; or whether you are not put to your Writ of Error? And truly I think we cannot avoid it on an Habeas Corpus. *Vide* 1 *Salk.* 341.

This Word [Remaneat] is an improper Word; it ſhould have been Committitur; but indeed they could not make him remain there, unleſs there had been a Commitment.

Beſides,

Committed, for that the Fine was not paid.

Beſides, Since it appears here that he was committed for the Fine, I think he muſt be remanded. Let him be remanded.

Memorandum. The later end of this Term died Sir *Giles Eyre*, one of the Judges in the Court of *King's Bench*, a Perſon of a quick Apprehenſion, and a good diſtinguiſhing Head; but moſt remarkable for his Experience in Matters relating to the Juſtices of Peace at their Seſſions, *&c.* he having practiſed the moſt Part of his Time in the Country.

The Term following, Sir *Tho. Rokeby*, one of the Juſtices in the *Common Pleas*, was advanced to the Court of *King's Bench* in his Room.

Memorandum. This Term Sir *Edward Ward*, the King's Attorney General, was called to be a Serjeant at Law, and was afterwards made Lord Chief Baron of the *Exchequer*,

And Sir *Tho. Trevor*, the King's Solicitor-General, was made Attorney-General in his Place.

And in the Vacation following, *John Hawles*, of *Lincoln's Inn*, Eſq; was made the King's Solicitor General, and was knighted by the King ſoon after his Return from *Flanders*.

DE

Term. Sanctæ Trin.

Anno 7 W. III. in Banco Regis.

Ward *verſus* Evans.

S. C. 1 *Salk.* 390, 391.

PEmberton, Serjeant. In Replevin, the Defendant makes Conuſance as Bailiff to C. H. and E. J. and ſets forth, That Sir Robert Carr, in 1638, was ſeiſed of the Locus in quo, &c. in Fee, and did by Indenture grant and demiſe to C. H. and E. J. and three others (now dead,) an Annuity of 100 l. per Annum, to be equally divided between them; (videlicet) 20 l. to each: Habend. the ſaid 100 l. to them and their Aſſigns for their Lives, (videlicet) 20 l. to each of them reſpectively, and to be iſſuing out of the Locus in quo, &c. And that he did farther grant, That if any one of the five died, the Annuity of 20 l. payable to ſuch, ſhould be paid equally to the other four, and ſo if two died; and if three died, that the two Survivors ſhould have 50 l. each, but that there ſhould be no Survivor of either of their Parts. And further, That if any Part of this were Arrear, that they might diſtrain; Virtute cujus the five were ſeiſed of the Annuity of 20 l. each, and being ſo ſeiſed, three of them died, and that their Parts ſurvived to the two living, and that the Annuity was in Arrear for ſeveral Years; the Arrears before the Death and ſince, amounting in the Whole to 2200 l. and for 40 l. the Defendant makes Conuſance. To this the Plaintiff pleads in Bar, on which Iſſue is join'd, which is found for the Avowant.

Replevin by Tenants in Common. *Vid.* 1 *Sid.* 157. 2 *Salk.* 423.

Replevin by Jointenants. *Vide Poſt* 71, 72, 73.

Now we move in Arreſt of Judgment, that this is no good Conuſance, becauſe the Defendants are Tenants in Common of this Annuity; and therefore one Conuſance cannot be made for both, but it ought to be ſeveral for each of them. The only

In Replevin, if a Joint-conuſance can be made by Tenants in Common.

Queſtion is, If a Joint-conuſance can be made for Tenants in Common?

2 *Salk.* 423. 1 *Lev.* 109. There has been a Difference taken between Avowries, which though it ought to be ſeveral, yet a Conuſance in the ſame Caſe ought to be joint: But I ſhall take no Notice of that; but this is a Gift in Common to the five, to be equally divided between them, (viz.) 20 l. to each, Habend. to them and their Aſſigns reſpectively, (viz.) 20 l. to each for their Lives; ſo that here is a ſeveral Annuity to each of them: And when all but two are dead, then 50 l. ſhall be to each of them; ſo that the Grantor intended a ſeveral Annuity to them, and not a joint one, and that the Diſtreſs ſhould be by them reſpectively. And they ſay in the Conuſance, that they were ſeized of the Annuity ſeverally, yet now they would be Jointenants of it, and not Tenants in Common, as on the Face of the Deed they appear to be by their own ſhewing, and are ſo concluded to be by their own Conuſance.

It is objected, That this is no more than what the Law would import from the Words of the Deed; that the 100 l. is jointly granted, and that it ſhould ſurvive without any Appointment of the Grantor.

Equally to be divided. *Vide* 1 *Salk.* 226, 390, 391, 392. *Poſt* 29. I will not rely on the Words [equally to be divided,] which without more would not have made a ſeveral Grant; but in the Expoſition of Deeds, it is not unuſual to conſider the Habend. and the other Clauſes after the Grant, to explain the general Intent of the whole Deed: Lit. Sect. 283. And Coke in his Comment on it ſaith, That the Habendum will alter it: Dyer 361. Fitzherbert Tit. Charge, 9. Hob. 171. 3 Cro. 25. In all which Caſes the whole Deed is to be taken together to explain the general Words of the Premiſſes. Now here he grants 100 l. to be equally divided; but he does not reſt there, but that each ſhall have 20 l. which muſt ſignify ſomething, and muſt not be rejected: And ſo it is called a ſeveral Annuity throughout the Deed, and not a joint one; and that three are dead, and the Survivors ſhall have 50 l. each for their Lives, but that that ſhall not ſurvive; and though it ſhould be ſo, yet if the Grant were good to the reſt of the Tenants in Common, the Conuſance is bad; becauſe it is as well for the twenty Pounds before their Deaths, as for what has been Arrear ſince, when they have ſhewed that they were ſeverally ſeized of the twenty Pounds for their Lives.

Other Clauſes after the *Habendum* and Grant explanatory of the whole Deed. 1 *Salk.* 294-5.

But they object, That the Words [equally to be divided] do not make a Tenancy in Common in a Deed as it will in a Will: But I do not reſt on that only, for the Deed goes further, and gives 20 l. to each of them.

Then they ſay, Though the Conuſance is not good for the Whole, yet it is for Part; and if any one of the Plaintiffs have Title for any Part, he ſhall have a Return.

But if this Conuſance is not good for any Part, it is void for the Whole; for they are Tenants in Common from the Beginning: 5 Rep. Knight's Caſe is relied on by them, which was one Reſervation, and not ſeveral, which Caſe I agree; but it is not like ours, for the Reſervation was entire when the Rent was once reſerved; and what followed was only to ſhew the Rates of the Lands: But here the Grant is of 100 l. equally to be divided, (viz.) 20 l. to each; and ſo is the Habendum, which was not in Knight's Caſe, which was a Demiſe of divers Houſes in London, for Years, rendering the yearly Rent of 5 l. 10 s. 11 d. (viz.) For one Houſe 3 l. 11 s. for another Houſe 20 s. Now the Reſervation was compleat, eo Inſtanti: 4 Leon. 187, 188. has been cited too. Hill ſeized of a Cloſe called Broom-Acre, and of two other Cloſes in Fee; he and his Wife Agatha, and Robert their Son, let Broom-Acre, and the ſaid two Cloſes, to Hutchin for ninety Years, if he ſo long live; reddendo annuatim præd. Hill & Uxori ejus pro Broom-Acre, 3 s. 4 d. & pro una Clauſura 1 s. & pro altera 20 s. ad quatuor Anni terminos, and a Re-entry for Non payment. Hill and his Wife died, their Son ſold the Reverſion of Broom-Acre, rendering Rent to Smith: The Rent of Broom-Acre is behind; Smith enters and leaſeth it to Reynolds, who being ejected, brings Ejectione firmæ, and Judgment was given for him; for that they are ſeveral Reſervations, and ſeveral Conditions, and the Rent is originally ſeveral. There is no Doubt, when two Cloſes are demiſed, two ſeveral Rents may be reſerved. So is the Caſe in Dyer 308, 309. 2 Rol. 90. has been cited too, which is only for the Words [equally to be divided;] ſo 2 Cro. 254. No doubt Tenants in Common may join in Avowry for Damage-feaſant; and ſo in Treſpaſs.

5 *Co.* 54, 55. *Moore* 199, 200, 201, 202. 3 *Leon.* 124, 125, 126, 127. 1 *And.* 173, 174, 175, *&c.*

Vide 1 *Lev.* 109. *Ray.* 80. 1 *Sid.* 157. 1 *Keb.* 565, 572.

Tenants in Common may join in Avowry for Damage-feaſant; ſo in Treſpaſs.

Chief Juſtice. Suppoſe the Words had been [equally to be divided,] (viz.) 20 l. to one, &c. and there had been no Habendum, Would they not have been Tenants in Common? Certainly they had: Then where is the Difference? Here the 100 l. Annuity is granted to five equally, &c. The Habendum is one 20 l. to one, and ſo on; and there is to be a Survivor, but that is by a new Grant; and there is to be no Survivor between the laſt two. As to the Caſe of Stukely and Butler, in Hob. 171, 172. where he puts a Difference where the Rents are reſerved ſeverally at the firſt, and where they are entire at the firſt; but that Caſe is not yet determined, my Lord Hobart only recites

recites his own Opinion there. Look in Moore 880. the Court was divided there as to the Word [Videlicet] Leſſor grants all Trees, Woods, Underwoods, growing in the Manor of, &c. (Videlicet) within the Grounds called A. B. and C. If the Videlicet were void or not? was the Queſtion.

Carthew ad idem. The Intent of the Grantor was, That there ſhould be ſeveral Rents to the five Grantees, and the Court will expound it accordingly. The Intent appears by the Grant in the Premiſſes, the Habendum, and the Clauſe of Diſtreſs; in all which the Words ſeverally and reſpectively are always uſed, which makes it the ſame as if they were applied to each Perſon and Grant diſtinctly; and this is proved by the Pleading of ſuch Words in many Caſes, of which I will cite two or three: 2 Saund. 115, 116. 11 H. 6. 11 b. Raſt. 622. b. 625. a. Coryton and Hartly joined in Action againſt L. for grinding at their Mills; the Declaration was demurred to, becauſe it appeared their Intereſts were ſeveral. Per Cur. Though their Intereſts be ſeveral, yet the not grinding at any of their joint Mills, is an entire Damage to both of them.

Grants ſeveral and not joint. 2 *Lev.* 27. 1 *Vent.* 167, 168. 1 *Rol. Abr.* 561. 2 *Keb.* 601, 803, 838, *&c.*

And if theſe Words ſhall be taken ſo in Pleading, to divide that which otherwiſe would be joint, much more they ſhall in Grants; and if the Grantor had intended this for a joint Grant, the ſubſequent Clauſe of giving it by Survivor would be uſeleſs and void; and if it is an entire and joint Grant, then it muſt ſurvive in the Caſe of the laſt two, notwithſtanding the Clauſe that it ſhall not; which is contrary to his expreſs Meaning and Intent. There are ſome Caſes that come up to this: Yel. 23, 24. 3 Cro. 637, 651. Dyer 308, 309. 3 Cro. 340, 341. 17 Aſſ. Pl. 10. 1 Cro. 154. Bere againſt Woodley. Jones 207. is a ſtrong Caſe for us; but they all over-rule this: For in thoſe Caſes, either in the Premiſſes, Habendum, or Diſtreſs, there is ſome Word abſolutely joint; but here throughout the Deed the Words are ſeveral. As of Knight's Caſe, which was objected, there the Land was firſt charged with an entire Rent, and then the [Viz.] comes too late; but if the Words had been ſeveral at the firſt, the Reſervation had been ſo too, and ſo it little differs from Winter's Caſe, 14 Eliz. Dyer 308. and will not effect ours which does not come under a Videlicet; and the Caſe of 2 Rol. 90. is not to the Purpoſe.

Darnell, contra. This is a Joint-tenancy on the whole Deed. They have not anſwered the material Part of the Caſes cited by us: 2 Rol. 90. Bird againſt Weekes. The Diffe-

rence appears to be taken by the Court, and there diſtinct Payments were appointed as here, and that was a ſtronger Caſe; for it was on a Will, and this is on a Deed. The Grant is joint of one Rent of 100 l. per Annum, and the Clauſe of Diſtreſs is, That if the 100 l. be behind, and not if the ſeveral Rents of 20 l. is Arrear; ſo that this is alſo joint, which ſhews his Intent.

Chief Juſtice. I don't know why a [videlicet] ſhall not make a Separation, as well as an Habendum; and this is alſo ſeparate in the Habendum, for it is to each of them and their Aſſigns reſpectively, for the Lives of them and either of them reſpectively. If you conſtrue it to be a ſeveral Grant, all the Parts of the Deed are ſatisfied, but not if it be taken joint; for then a Payment to one would be a Payment to all, when the Deed limits 20 l. to each of them. And how can it be conſtrued according to the Intent, when each of them would not have a Remedy for his 20 l. without Partition?

(Viz.) The Operation of it. *Vide Hob.* 172, 276. *Moore* 880. 1 *Salk.* 294, 295. 1 *Saund.* 118, 169, 170, 286, 287. 2 *Saund.* 290, 291.

Then the Diſtreſs is alſo ſeveral. The whole Annuity is 100 l. in Groſs, but it is diſtributed into 20 l. each; and as to the Survivor on the Death of the three firſt, that amounts to a new Grant, and it ſhall not ſurvive as to the two laſt: Now if it be a ſeveral Rent, the Arrears ſhall not ſurvive, but go to their Executors; the Words of the Deed cannot be ſatisfied unleſs it be made a ſeveral Grant. Equally to be divided does not make it ſeveral, but all the Clauſes are ſeveral of themſelves. You muſt agree, that if it had been ſaid, Habendum 20 l. to one, and ſo to the reſt, that had been ſeveral, and that is the ſame in Effect, though it ſays (Habendum) the 100 l. to them to be equally divided; (viz) 20 l. to one, which is the ſame as if it had been the fifth Part to one, and ſo to the reſt; in which Caſe, one could not have avowed for 20 l. (as here he muſt) but for the fifth Part.

Equally to be divided. *Vide ante* 26. 1 *Salk.* 226, 390, 391, 392.

Let me have a Copy of the Deed, for it is ſet forth in hæc verba; for if on Oyer of the Deed you have avowed otherwiſe than you ought, they may take Advantage of it though after Verdict, as they may of any Thing that makes the Avowry abateable, for we muſt judge on the whole Record. Adjourn.

After *Oyer*, if it appear the Avowry is abateable, tho' after a Verdict, Advantage may be taken of it.

The King *and* Hornby's *Caſe.*

A Petition to the Treaſurer and Barons of the Exchequer, exhibited by Joſeph Hornby, Ter. Hill. 1 Gulielmi & Mariæ, for the Allowance of Letters Patents granted by King Charles II. *Vide Shower's M. S. Rep.*

for Payment of an Annuity out of the Excise, &c. The Attorney-General demurs generally. The Court gave Judgment for the Petitioner Hornby; whereupon the Attorney-General brought a Writ of Error.

Argued in the Exchequer-Chamber, where the Judgment was reversed.

Record. Petition. & Morac. superinde & Judicium, & Brevis de Error'.

The Arguments of the Lord Chief Justice Treby for the Reversal, and the Lord Chief Justice Holt for the Affirmance.

Termino Sancti Hillarii Anno 1° Gulielimi & Mariæ, Regis & Reginæ.

Lond. Mid. MEmorandum, *Quod Josephus Hornby de Lond. Gen. venit coram Baronibus de Scaccario vicesimo primo die Octobr. hoc Termino in propria Persona sua & exhibuit Curiæ hic quasdam Literas Patentes Dom. Caroli Secundi nuper Regis Angliæ,* &c. *sub Magno Sigillo Angliæ confect. geren. dat. tricesimo Die Aprilis Anno Regni dict. Dom. Caroli nuper Regis Angliæ vicesimo nono eid. Josepho Hornby, Hæred. & Assignat. suis confect. de annuali redditu sive summa Mille trecent. quinquagint. & duar. Libr. Septemdecim. Solid & decem Denar. annuatim solvend. recipiend. & percipiend.* [*Anglice* taken] *per præd. Josephum Hornby Hæred. & Assign. suos in perpetuum de redditibus reventionibus proficuis & perquisit. & emolument. & solutionibus reservat. surgen. crescen. & provenien. eid. nuper Dom. Regi Carolo Secundo Hæred. & Successoribus suis de pro ex sive ratione debiti Exciſæ* [*Anglice* Duty of Excise] *super potum Lupulat' & Illupulat' & alios Liquores infra Regn. Angliæ, Domin. Walliæ, & Vill. Berwici super Twedam, virtute Actus Parliamenti fact. Anno Regni ejusdem nuper Regis Caroli secundi duodecimo, Intitul.* An Act for taking away the Court of Wards and Liveries and Tenures *in Capite*, and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in Lieu thereof; *Dat. & concess. solvend. Quarteriatim (viz.) ad Festum Annunciationis beatæ Mariæ Virginis Nativitatis Sancti Johannis Baptist', Sancti Mich. Arch. & Nativitatis Dom. per æquas & æquales portiones sub fiducia in iisdem Literis patentibus expressâ. Et præd. Josephus Hornby petit Literas patent. de recordo hic irrotulari. Quas quidem Literas patent. Barones hic receperunt & illas legi & sub serie verborum in iisdem Literis patent. content. irrotulari præceperunt. Et tenor' earund. Literarum patent' sequitur in hæc verba. (Scilicet:)*

Charles the Second, by the Grace of God of England, Scotland, France and Ireland, King, Defender of the Faith, &c. To all to whom theſe Preſents ſhall come, Greeting. Whereas, ſince the Time of Our happy Reſtoration, We have been involved in great and foreign Wars, as well for the Safety of Our Government, as for the Vindication of the Rights and Privileges of Our Subjects; in the Proſecution whereof, We have been conſtrained for ſome Years paſt, contrary to Our inclination, to poſtpone the Payment of the Monies due from Us to ſeveral Goldſmiths and others, upon Tallies ſtruck, and Orders regiſtred on, and payable out of ſeveral Branches of Our Revenue, and otherwiſe. And although the preſent Poſture of Our Affairs cannot reaſonably ſpare ſo great a Sum as muſt be applied to the Satisfaction of thoſe Debts, yet conſidering the great Difficulties which very many of Our loving Subjects, who put their Monies into the Hands of thoſe Goldſmiths and others, from whom We received it, do at preſent lie under, almoſt to their utter Ruin for want of their ſaid Monies; We have rather choſe, out of Our Princely Care and Compaſſion towards Our People, to ſuffer in our own Affairs, than that Our loving Subjects ſhould want ſo ſeaſonable Relief; And having ſeriouſly conſidered of the Way and Means to effect this our preſent Purpoſe, we could not find any more Effectual and leſs Prejudicial to Us in the preſent Poſture of our Revenue, than by granting to each of them the ſaid Goldſmiths and others, to whom We are indebted as aforeſaid reſpectively, and to his and their Heirs and Aſſigns, an Annual Sum or Payment, anſwerable in Value Yearly to the Intereſt of their reſpective Debts, at the Rate of Six Pounds per Cent. per Annum, for all ſuch Monies that are due unto them. The Conſideration whereof induced Us to command Our High Treaſurer of England, to cauſe all the Accompts of the ſaid Goldſmiths to be ſtated and made up by Richard Aldworth Eſq; one of Our Auditors, to the Firſt Day of January, 1676. which having been accordingly caſt up and ſettled, it appears thereby that there is due and owing by Us unto Our Truſty and well-beloved Subject, Joſeph Hornby of London, Goldſmith, the Sum of Twenty-two thouſand five hundred forty-eight Pounds five Shillings and ſix Pence. In Satisfaction whereof, according to Our Intent in theſe Preſents expreſſed, we have reſolved to grant unto him the Sum of One thouſand three hundred fifty-three Pounds ſeventeen Shillings and ten Pence per Annum, out of that Part of Our Revenue of Exciſe which was granted to Us, Our Heirs and Succeſſors for ever, by an Act of Parliament made in the Twelfth Year of Our Reign, Intituled, An Act for taking away the Court of Wards and Liveries, and Tenures

in

in Capite, and by Knights Service and Purveyance, and for ſetting a Revenue upon His Majeſty in Lieu thereof. Know ye therefore, That We, for the Conſideration aforeſaid, and in Satisfaction or Lieu of the ſaid Debt, or Sum of Twenty-two thouſand five hundred forty-eight Pounds five Shillings and ſix Pence, by Us owing to the ſaid Joſeph Hornby, and of Our eſpecial Grace, certain Knowledge, and meer Motion, have given and granted, and by theſe Preſents, for Us, Our Heirs and Succeſſors, do give and grant unto the ſaid Joſeph Hornby, his Heirs and Aſſigns, one annual or yearly Rent or Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, of lawful Money of England, to be yearly had, received and taken by the ſaid Joſeph Hornby, his Heirs and Aſſigns for ever, out of the Rents, Revenues, Profits and Perquiſites, Emoluments and Payments reſerved, ariſing, accruing or coming, or that hereafter ſhall or may be reſerved, ariſe, accrue or become due or payable to us, our Heirs and Succeſſors, out of, for or by reaſon of the Duty of Exciſe upon Beer, Ale and other Liquors, within our Kingdom of England, Dominion of Wales, and Town of Berwick upon Tweed, by Virtue of the ſaid Act of Parliament, the ſaid Sum of One thouſand three hundred fifty two-Pounds ſeventeen Shillings and ten Pence per Annum, to be paid quarterly at the four moſt uſual Feaſts in the Year, that is to ſay, at the Feaſt of the Annunciation of the Bleſſed Virgin Mary, the Nativity of St. John the Baptiſt, St. Michael the Archangel, and the Birth of our Lord God, commonly called Chriſtmas, by even and equal Portions, in Truſt for ſuch of the Creditors of the ſaid Joſeph Hornby, as within one Year next enſuing the Date hereof ſhall, upon Notice of theſe Preſents, deliver up their Securities, and accept of Aſſignments of proportionable Parts of the ſaid yearly Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, for Satisfaction of their reſpective Debts, according to the true Intent and Meaning of the Covenant in that Behalf herein after contained, for ſo much as their Proportionable Parts ſhall amount unto, and in the mean time ſhall not ſue or proſecute the ſaid Joſeph Hornby, his Heirs, Executors or Adminiſtrators for ſuch their Debts, and the Reſidue and Overplus of the ſaid yearly Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, to remain and be to and for the proper Uſe and Benefit of the ſaid Joſeph Hornby, his Heirs and Aſſigns, without any Truſt or Account whatſoever, the firſt Payment of the ſaid Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, to commence from the Feaſt of the Birth of our Lord God One thouſand ſix hundred ſeventy and ſix:

ſix: And We do hereby, for Us, Our Heirs and Succeſſors, authorize, direct and appoint Our High Treaſurer, Chancellor, Under-Treaſurer, Chamberlain and Barons of Our Exchequer, and the High Treaſurer and Commiſſioners of the Treaſury, Chancellor, Under Treaſurer, Chamberlain and Barons of the Exchequer, of Us, Our Heirs and Succeſſors that hereafter ſhall be, and all other Officers and Miniſters of the ſaid Court, and of the Receipt thereof, now being, or that hereafter ſhall be, that they and every of them, in their reſpective Places, do from Time to Time, upon Requeſt of the ſaid Joſeph Hornby, his Heirs or Aſſigns, reſpectively perform all Acts neceſſary for the conſtant and due Payment of the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, to the ſaid Joſeph Hornby, his Heirs or Aſſigns, as the ſame ſhall grow due and become payable, and of every ſuch Part and Parts as the ſaid Joſeph Hornby, his Heirs or Aſſigns ſhall grant or aſſign to any Perſon or Perſons, from Time to Time, according to the Truſt and Agreement in that Behalf herein contained; and as Occaſion ſhall be, levy or ſtrike, or cauſe to be levied or ſtricken in the Receipt of the Exchequer, of Us, our Heirs and Succeſſors from Time to Time, Tallies of *Pro* or Aſſignment, or other Tallies, as the Caſe may require, and as ſhall be deſired, upon the Commiſſioners, Treaſurers, Receivers, Collectors or Farmers of the ſaid Duty and Revenue for the Time being; or upon ſuch other Perſon or Perſons as ought to be charged or chargeable therewith, or accountable to Us, our Heirs and Succeſſors for the ſame, who are hereby required and directed from Time to Time to make due Payment thereof accordingly; ſo that the ſaid Joſeph Hornby, his Heirs and Aſſigns reſpectively, of all or any Part or Parts thereof, may certainly and duly, and on every of the ſaid quarterly Feaſt-Days aforementioned, for ever hereafter have and receive the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, hereby granted out of Our ſaid Revenue, without any further or other Warrant to be ſued for, had or obtained from Us, Our Heirs and Succeſſors in that Behalf, and without any Account, Impreſt, or other Charge to be ſet upon the ſaid Joſeph Hornby, his Heirs or Aſſigns, or any of them, for the ſame: And if it ſhall happen at any Time hereafter, that the Rents, Iſſues or Profits of our ſaid Revenue ſhall be paid into the Receipt of Our Exchequer, or elſewhere, to the Uſe of Us, Our Heirs or Succeſſors, before the levying of ſuch Tallies, or before Payment be made to the ſaid Joſeph Hornby, his Heirs or Aſſigns reſpectively, of the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and

ten Pence, or any Part thereof, according to the true Intent of theſe our Letters Patents; then, and in ſuch Caſe, our expreſs Will and Pleaſure is, and we do hereby of our further eſpecial Grace, certain Knowledge, and meer Motion, for Us, our Heirs and Succeſſors, authorize and require the High Treaſurer and Commiſſioners of the Treaſury, Chancellor or Under-Treaſurer, Chamberlain and Barons of the Exchequer, of Us, our Heirs and Succeſſors for the Time being, and all other Officers and Miniſters of the Exchequer, and of the Receipt thereof, that they or ſuch of them to whom it appertains, do from Time to Time, as often as Need ſhall be, well and truly pay, or cauſe to be paid, unto the ſaid Joſeph Hornby, his Heirs and Aſſigns reſpectively, out of ſuch Monies as ſhall be ſo paid into our Exchequer, or elſewhere, to the Uſe of Us, our Heirs and Succeſſors, all ſuch, or ſo much of the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, as ſhall from Time to Time be in Arrear, or unpaid, after the Feaſt-Days or Times of Payment aforeſaid, or any of them, without any further or other Warrant to be ſued for, had or obtained in that Behalf, and without any Account, Impreſt, or other Charge to be ſet upon him the ſaid Joſeph Hornby, his Heirs or Aſſigns, for the ſame, or any Part thereof: And theſe our Letters Patents, or the Exemplification, Entry or Inrollment thereof, ſhall be unto the High Treaſurer, Commiſſioners of the Treaſury, Chancellor and Under-Treaſurer, Chamberlain and Barons of the Exchequer, of Us, our Heirs and Succeſſors, and all other Officers and Miniſters of the ſaid Exchequer, and to the Commiſſioners, Treaſurer, Receivers, Collectors, Farmers, and all other Officers and Miniſters of our ſaid Revenue of Exciſe, a good and ſufficient Warrant and Diſcharge for all and whatſoever they or any of them reſpectively ſhall do, or cauſe to be done, in or about the Premiſſes, purſuant to our Will and Pleaſure herein before declared. And our further Will and Pleaſure is, and we do hereby of our eſpecial Grace, certain Knowledge, and meer Motion, grant, direct and appoint, That all ſuch Tallies of *Pro* or Aſſignment, or other Tallies as ſhall be hereafter levied or ſtruck upon our ſaid Revenue of Exciſe, at the Inſtance and Deſire of the ſaid Joſeph Hornby, his Heirs or Aſſigns reſpectively, for or towards the Satisfaction or ſecuring the Payment of the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, or any Part thereof, ſhall be well and truly paid and ſatisfied out of the ſaid Revenue quarterly, and every Quarter as aforeſaid; and ſhall be preferrable and preferred before any other quarterly Payments out of the ſame, by Vertue or Colour of any Warrant, Order or Direction whatſo-

ever of any After-date, excepting only ſuch yearly Sums as are neceſſarily payable for the Management of our ſaid Revenue, and except the yearly Sums amounting to twelve thouſand two hundred and nine Pounds fifteen Shillings and four Pence halfpenny, or thereabouts, payable thereout unto our deareſt Conſort the Queen, as Parcel of her Jointure; and the yearly Sum of twenty-four thouſand Pounds, payable to our moſt dear Brother James Duke of York; which ſaid ſeveral Sums, we will and do hereby direct, ſhall be paid and ſatisfied unto our ſaid deareſt Conſort, and to our ſaid moſt dear Brother, out of the ſaid Revenue, duly, conſtantly, and in the firſt Place before any of the ſaid Payments, or any other Payments whatſoever to be made out of the ſame. And our Will and Pleaſure is, and the ſaid Joſeph Hornby, for himſelf, his Heirs, Executors, and Adminiſtrators, doth covenant, grant and agree, to and with Us, our Heirs and Succeſſors, that he the ſaid Joſeph Hornby, his Heirs and Aſſigns, ſhall and will, at any Time or Times within one Year next enſuing the Date hereof, grant and aſſign proportionable Part and Parts of the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, unto ſuch of his Creditors, or others, by their Appointment, as will be content to deliver up their Securities, and take ſuch Aſſignments in Satisfaction of their Debts, according to the Truſts herein before expreſſed: And that he the ſaid Joſeph Hornby, his Heirs or Aſſigns, ſhall not nor will, during the ſaid Space of one Year, make any Grant or Aſſignment of all, or any Part of the ſaid yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, unto any Perſon or Perſons but ſuch as are Creditors of the ſaid Joſeph Hornby, or others, by their Appointment as aforeſaid: And that if any Difference ſhall at any Time or Times, within the Space of one Year and an half now next coming, ariſe between the the ſaid Joſeph Hornby, his Heirs, Executors, Adminiſtrators or Aſſigns, or any of them, and the ſaid Creditors, or any of them, touching the aſſigning or diſpoſing of all or any Part or Parts of the ſaid Annuity or yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence; that then the ſaid Joſeph Hornby, his Heirs, Executors, Adminiſtrators and Aſſigns, ſhall and will from Time to Time ſubmit themſelves, and all Matters and Things relating thereunto, to the Control of the Lord High Treaſurer, or the Commiſſioners of the Treaſury for the Time being, and ſhall and will obſerve and fulfil all ſuch Orders and Directions as the Lord High Treaſurer, or the Commiſſioners of the Treaſury, ſhall from Time to Time make or give concerning the ſame. Provided always, and our further Will and Pleaſure, Intent and Meaning

ing is, and is hereby declared to be, That all Aſſignments to be made as well before as after the ſaid Space of one Year, of any Part or Parts of the ſaid yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence hereby granted, ſhall, within the Space of thirty Days next after the Execution thereof, be enrolled before the Auditor of the Receipt of the Exchequer, or the Clerk of the Pells for the Time being, to the End it may appear what Aſſignments have been granted, and Payments may be made thereupon according to the Intent of theſe Preſents, and that every Aſſignment not ſo enrolled, ſhall be of none Effect. Provided alſo, That when We, our Heirs or Succeſſors, ſhall at entire Payments have actually paid the full Sum of twenty-two thouſand five hundred forty-eight Pounds five Shillings and ſix Pence, of lawful Money of England, to the ſaid Joſeph Hornby, his Heirs and Aſſigns, and to ſuch Perſon or Perſons to whom ſuch Aſſignment or Aſſignments ſhall be made as aforeſaid, reſpectively, in Proportion amongſt them, after the Rate of one hundred Pounds Principal Money, for each and every ſix Pounds per Ann. which they, every, or any of them reſpectively ſhall, or ought to have and enjoy of the ſaid yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, hereby granted by Vertue of theſe Preſents, or ſuch Aſſignment or Aſſignments as ſhall be made and inrolled as aforeſaid, and ſo after thoſe Proportions and Rates for greater or leſſer Sums, as the reſpective Caſes ſhall happen, and alſo the Arrears of the ſaid yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, if any be: That then theſe Preſents, and the Grant of the ſaid yearly Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, ſhall ceaſe and be void, any Thing herein before contained to the contrary notwithſtanding. And we do hereby of our further eſpecial Grace, certain Knowledge, and meer Motion, for Us, our Heirs and Succeſſors, grant unto the ſaid Joſeph Hornby, his Heirs and Aſſigns; and our expreſs Pleaſure is, That theſe our Letters Patents, and every Clauſe, Article, and Sentence therein contained, whereupon any Ambiguity or Doubt ſhall or may ariſe, that the ſame ſhall be all Times expounded and taken moſt favourably and beneficially for the Advantage of the ſaid Joſeph Hornby, his Heirs and Aſſigns; and that theſe our Letters Patents ſhall be good and effectual in Law, and ſhall be available to the ſaid Joſeph Hornby, his Heirs and Aſſigns reſpectively, for his and their receiving and enjoying the ſaid yearly Rent or Sum of one thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, with all the Arrearages thereof in Manner aforeſaid, notwithſtanding the not reciting, or not mentioning,

tioning, or not truly and certainly reciting or mentioning of any Act or Acts of Parliament, whereby the ſaid Revenue was given and granted unto Us, our Heirs and Succeſſors, or by what Title we have received or enjoyed the ſame: And notwithſtanding the not reciting, or not mentioning in this our Grant, any Leaſe or Leaſes, Grant or Grants, Charge or Charges, made of or upon, or out of the ſaid Revenue, or any Part thereof alone on the ſaid Revenue, or on the ſame, and any other Part or Parts of our Revenue of Exciſe, or generally on our Revenue, or the Date or Contents of ſuch Leaſes or Grants, or of the Perſons to whom the ſame are made: And notwithſtanding that no Mention be herein of the direct and certain yearly and other Rents and Profits of the Premiſſes, or of the certain, true or direct Nature of ſuch Rents and Profits, or how or in what Manner they ariſe, become due, or payable unto Us, our Heirs and Succeſſors: And notwithſtanding the not mentioning how, and in what Manner the ſaid Debt due from Us to the ſaid Joſeph Hornby ariſeth particularly, or any Miſtake in the Stating, or in the Quantity or Sum of the aforementioned Debt due, or herein mentioned to be due by Us to the ſaid Joſeph Hornby: And notwithſtanding the Statute of Henry the Fourth, late King of England, publiſhed in the firſt Year of his Reign: And notwithſtanding the Statute of Henry the Sixth, late King of England, made and publiſhed in the eighteenth Year of his Reign: And notwithſtanding the Statute of Henry the Eighth, late King of England, made and publiſhed in the twenty-ſixth Year of his Reign: And notwithſtanding the Statutes or Acts of this preſent Parliament, made and publiſhed in the twelfth Year of Our Reign, whereby the ſaid Revenue was, or was mentioned or intended to be granted, ſettled, and confirmed unto Us, Our Heirs and Succeſſors, or any Article, Clauſe, Sentence, or Reſtraint therein contained: And notwithſtanding any Defect in this our Grant, or any Act, Statute, Ordinance, Proclamation, Proviſion or Reſtraint whatſoever made or provided, or any other Act, Matter, or Thing whatſoever to the contrary hereof, in any wiſe notwithſtanding. And laſtly, Our Will and Pleaſure is, and We do hereby of Our more abundant Grace, certain Knowledge, and meer Motion, for Us, and Our Heirs and Succeſſors, covenant and grant to and with the ſaid Joſeph Hornby, his Heirs and Aſſigns, that due Payment ſhall be made of the ſaid yearly Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings, and ten Pence, hereby granted, and all other Things hereby directed to be done on Our Part, ſhall be from Time to Time done and performed, according to the true Intent and Meaning of theſe Preſents: And that if at any Time hereafter, any Defect or Que-

ſtion ſhall be found or made of or in the Validity of this Our preſent Grant, That then upon the humble Petition of the ſaid Joſeph Hornby, his Heirs and Aſſigns, We, Our Heirs and Succeſſors, will be graciouſly pleaſed to make ſuch further Grant, Aſſurance and Confirmation of the ſaid yearly Rent or Sum of One thouſand three hundred fifty-two Pounds ſeventeen Shillings and ten Pence, to the ſaid Joſeph Hornby, his Heirs or Aſſigns, as by Our Attorney General ſhall be approved of and adviſed, and by the Counſel learned in the Law, of the ſaid Joſeph Hornby, his Heirs or Aſſigns, ſhall be adviſed and deſired, and with ſuch beneficial Clauſes therein to be contained as ſhall be thought expedient and moſt conducing to the Performance of Our Will and Pleaſure herein before declared. In Witneſs whereof, *&c.*

Quibus quidem Literis Patentibus lectis præd. Joſephus Hornby *dicit, quod Vigore Præmiſſorum ipſe idem* Joſephus Hornby *ſeſit. fuit de & in præd. annuali Redditu ſive Summa Mille trecent. quinquagin. & duarum Libr. ſeptendecim Solid. & decem Denar. ut de Feodo & Jur. & ſic inde ſeſit. exiſten. ipſe idem* Joſephus Hornby *poſtea, ſcilicet quinto Die* Auguſti *Anno Regni Domini (nuper Regis)* Caroli *Secundi triceſimo tertio apud* Weſtm. *præd. per quoddam Scriptum ſuum Sigillo ſuo ſigillat. & in Cur. hic de Record. Debit. modo & Debit. Juris Forma Irrotulat. cujus dat. eſt eiſdem Die & Anno ult. mentionat. pro Conſideration. in eodem Script. mentionat. relaxavit præfat. Domino* Carolo *Secundo, Hæredibus & Succeſſoribus ſuis annual. Sum. Sexcent. Libr. Parcel. præd. annual. Sum. Mille trecent. quinquagint. duar. Libr. ſeptendecim Solid. & decem Denar. præfat.* Joſepho *ut præfert. Conceſs. prout per Record. Cur. il. liquet & apparet, & ipſe idem* Joſephus Hornby *continuavit, & adhuc ſeit. exiſt. ut de Feodo & Jure de & in annuali Redditu ſive Summa Septingent. quinquagint. duar. Libr. ſeptendecim Solid. & decem Denar. reſid. præd. annualis Redditus ſive Summæ Mille trecent. quinquagint. duar. Libr. ſeptendecim Solid. & decem Denar. in Literis Patentibus præd. mentionat. & per eaſdem eid.* Joſepho *ut præfert. Conceſs. & eundem annualem Redditum ſive Summam Septingent. quinquagint. & duar. Libr. ſeptendecim Solid. & decem Denar. reſid. præd. annualis Redditus ſive Summæ Mille trecent. quinquagint. duar. Libr. ſeptendecim Solid. & decem Denar. de Jure habere & recipere debuit & debet Vigore Literarum Patentium præd.*

Et præfat. Joſephus *ulterius dicit, quod ipſe recepit & ſatisfactus fuit, & exiſtit de & pro omnibus Arrearagiis præd. annualis Summæ Septingent. quinquagint. & duar. Libr. ſeptendecim Solid. & decem Denar. debit. & ſolubil. ad Feſtum & pro Feſto Annunciationis beatæ* Mariæ *Virginis, Anno Regni Domini (nuper Regis)* Caroli *Secundi triceſimo quinto, & quod Summa Quinque mille octogint. & duar. Libr. quatuor Denar. & unius Oboli, pro Arrearagiis ejuſdem annualis Summæ Septingent. quinquagint. &*

duar. Libr. ſeptendecim Solid. & decem Denar. poſt præd. Feſtum Annunciationis beatæ Mariæ *Virginis, Anno triceſimo quinto ſupradict. debit. & ſolubil. ad Feſtum & pro Feſto Natalis Domini, communiter vocat.* Chriſtmas *ult. præterit. Anno primo Regnorum dictorum Domini Regis & Dominæ Reginæ nunc modo debit. & inſolubil. exiſtit præfat.* Joſepho Hornby, *ſcilicet Sum. Cent. octogint. & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ, Anno Regni dicti (nuper Regis)* Caroli *Secundi triceſimo quinto, & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solidorum quinque Denariorum & unius Oboli. pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno triceſimo quinto ſupradict. & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solid. quinque Denariorum & unius Oboli, pro alio Quarterio Anni finit. ad Feſtum Natalis Domini Anno triceſimo quinto ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar & unius Oboli, pro uno Quarterio Anni finit. ad Feſtum Annunciationis beatæ* Mariæ *Virginis Anno Regni dicti (nuper Regis)* Caroli *Secundi triceſimo ſexto, & ſimil. Sum. Cent. octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno triceſimo ſexto ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno triceſimo ſexto ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Natalis Domini Anno triceſimo ſexto ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Annunciationis beatæ* Mariæ *Virginis Anno primo (nuper Regis)* Jacobi *Secundi, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno primo ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno primo ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Domini Anno primo ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Annunciationis beatæ* Mariæ *Virginis Anno ſecundo Regni ejuſdem nuper* Jacobi *Secundi Regis, & ſimil. Sum. Cent. octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno ſecundo ſupradict. & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno ſecundo ſupradict. & ſimil. Sum. Centum*

tum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro alio Quarterio Anni finit. ad Feſtum Natalis Domini Anno ſecundo ſupradicto, & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Annunciationis beatæ Mariæ *Virginis Anno tertio Regni ejuſdem (nuper Regis)* Jacobi *Secundi, & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno tertio ſupradict. & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno tertio ſupradicto, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Natalis Domini Anno tertio ſupradicto, & ſimil. Sum. Centum octoginta & octo Libr. quatuor. Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Annunciationis beatæ* Mariæ *Virginis Anno quarto Regni præd. (nuper Regis)* Jacobi *Secundi, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno quarto ſupradicto, & ſimil. Sum. Centum octoginto & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno quarto ſupradicto, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Natalis Domini Anno Domini Milleſimo ſexcenteſimo octogeſimo octavo, & ſimil. Sum. Centum octoginta & octo Librarum quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Annunciationis beatæ* Mariæ *Virginis Anno Regnorum præd.* Gulielmi & Mariæ *(nunc Regis & Reginæ) primo, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Nativitatis Sancti* Johannis *Baptiſtæ Anno primo ſupradicto, & ſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Sancti* Michaelis *Archangeli Anno primo ſupradicto, necnon alia Conſimil. Sum. Centum octoginta & octo Libr. quatuor Solid. quinque Denar. & unius Oboli, pro uno alio Quarterio Anni finit. ad Feſtum Natalis Domini nunc ult. præterit. & Anno primo ſupradicto, attingen. in toto ut ſupra: Et petit idem* Joſephus Hornby, *quod præd. Breve Paten. in Forma præd. Fact. juxta Tenor. & Effect. earundem præfat.* Joſepho Hornby *allocentur, & quod præd. ſept. aliæ quarteriales Summæ Centum octoginta & octo Librarum quatuor Solid. quinque Denar. & unius Oboli, a Feſto Annunciationis beatæ* Mariæ *Virginis Anno Regni dicti (nuper Regis)* Caroli *Secundi triceſimo quinto uſque ad Feſtum & pro Feſto Natalis Domini nunc ult. præterit. attingen. ut ſupra, ad Quinque mille octoginta & duas Libr. quatuor Denar. & unum Obolum, ſicut præfertur Debit. & Arctro, & inſolut. exiſten. præfat.*

præfat. Joſepho Hornby *ſolventur, quodque etiam præd. annual. reddit. ſive ſum. ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. reſid. præd. annual. reddit. ſive ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. in literis patentibus præd. mentionat. a præd. feſto Natalis Domini ult. præterit. præfat.* Joſepho Hornby, *hæred. & aſſign. ſuis, ad præd. ſeparalia feſta in dictis literis patentibus ſpecificat. in poſterum per æquas & æquales portiones ſecundum formam & effectum literarum patentium præd. ſolvetur, quodque talis toties quoties caſus requireret, levand. ad recept. hujus Scaccar. pro dicto annuali redditu ſive ſumma ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. reſid. præd. ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. quando & quoties idem reſid. reddit. ſive ſum. ſeu aliqua pars vel parcel. inde deveniret, debit. levarentur ſecundum formam, effectum & directionem earundem literarum patentium, & ſecundum curſum recept. hujus Scaccarii, & quod omnes poteſtat. remed. & res quæcunque in & per dict. liter. patent. conceſſ. & mentionat. tangen. ſolution. denar. ſum. in dictis literis patent. mentionat. & pro beneficio præfat.* Joſephi Hornby, *hæred. & aſſign. ſuorum exequerentur & capiant effectum ſecundum formam & effectum liter. patent. præd. cum hoc quod idem* Joſephus Hornby *verificare vult, quod ad præd. feſtum Natalis Domini ult. præterit. ſufficien. fuer. & ad hoc ſufficien. exiſtunt de reddit. revencon. proficuis, perquiſition* [*Anglice* Perquiſites] *emolumen. & ſolution. renovan. provenien. recept. & ſolut. de & pro debito de le exciſe præd. virtute actus parliamenti præd. ad ſolvend. & ſatisfaciend. præfat.* Joſepho Hornby, *præd. ſummam ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. ſicut præfertur ei debit. & aretro exiſten. ultra & præter omnes annual. ſum. neceſſar. & ſolubil. uſque tempus illud pro gubernation.* [*Anglice* Management] *dict revencon. & ultra & præter præd. ſum. duodecim mille ducent. & novem libr. quindecim ſolid. quatuor denar. & unius oboli, aut eo circiter, ſolubil. exinde* Catherinæ *Reginæ, tunc conſort. nunc reginæ dotal. dicti Domini (nuper Regis)* Càroli *ſecundi, ut parcel. junctuæ ſuæ, in literis patentibus præd. mentionat. & ultra & præter præd. ſum. viginti & quatuor mille libr. ſolubil. præd.* Jacobo, *tunc Duci* Eborac. *Fratri Domini (nuper Regis)* Caroli *ſecundi, in literis patent. præd. conceſſ. cum hoc etiam quod præd.* Joſephus Hornby *verificare vult, quod nec præd. dominus* Carolus *ſecundus, nuper Rex* Angliæ, *&c. nec præd. Dominus* Jacobus *ſecundus, nuper Rex* Angliæ, *nec præd. Dom.* Willielmus *&* Maria, *modo Rex & Regina* Angliæ, *aut eorum aliqui vel aliquis hucuſque non ſolverit ſeu ſolvit præfat.* Joſepho Hornby *aut aſſignat. ſuis præd. ſum. viginti duar. mille quingent. quadraginta & octo libr. quinque ſolid. & ſex denar. in dictis literis patent. mentionat. ſeu aliquam inde partem ſeu parcel. ultra ſeu præter ſum. decem mille libr. exiſten. conſid. in dict. ſcript. relaxat. per præfat.* Joſephum

Hornby *præfat.* Carolo *Secundo, nuper Regi* Angliæ, *&c. ut præfertur fact. & pro qua ſum. ipſe idem* Joſephus Hornby *relaxavit eidem Domino nuper regi præd. annual. ſum. ſexcent. libr. parcel. præd. annual. ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. ſuperius mentionat.*

To this the Attorney-General demurs generally, and the ſaid Joſeph Hornby the Petitioner joined in Demurrer.

And the Court gave Judgment for the Petitioner Joſeph Hornby; whereupon the Attorney-General brought a Writ of Error in the Exchequer-Chamber. Note, The Judgment is recited in the Writ of Error; which is as follows:

DO M. Rex & Dom. Regina nunc Gulielmus & Maria mandaverunt Theſaur. & Baronibus de Scaccar. ſuo breve ſuum clauſum in hæc verba ſcilicet Gulielmus & Maria Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ, Rex & Regina, Fidei Defenſores, &c. Theſaurario & Baronibus ſuis de Scaccar. ſuo ſalutem Quia in Record. & Proceſſ. ac etiam in redditione judicii loquelæ cujuſdam petionis cujuſdam Joſephi Hornby, quæ fuit in curia noſtra coram vobis præfat. Baronibus noſtris de Scaccar. noſtro præd. termino Sancti Hillarii Anno Regni noſtri primo exhibit. de allocatione quarundam literarum patent. dom. nuper Regis Caroli ſecundi præd. Joſepho Hornby & hæredibus ſuis confect. & ſolution. cujuſdam annual. reddit per eaſd. literas patent. per eundem nuper Regem eidem Joſepho Hornby, & hæredibus ſuis conceſſ. ſolvend. & percipiend. de revention. proficuis & ſolution. ſurgen. & provenien. nobis, hæred. & ſucceſſ. de pro & ratione debit. Exciſæ, ſup. potum lupulat. & illupulat. & alios liquores necnon arrearag. ejuſdem annual. reddit. pro ſeparal. quarter. Anni finit. ad feſtum Nativitat. Domini anno primo ſupradict. error intervenit manifeſtus ad grave damnum noſtrum. Ac cum in ſtatuto in Parliamento Dom. Edward. nuper Regis Angliæ tertii, progenitoris noſtri apud Weſtm. Anno Regni ſui triceſimo primo tent. edit. inter cæterum concordat. fuit & ſtabilit. quod in omnibus caſibus regem aut alias perſonas tangen. ubi quis queritur de errore facto in Scaccar. Cancellar. Theſaur. venire fac. coram eis in aliquam cameram conſilii juxta Scac. record. & proceſſ. hujuſmodi extra dict. Scaccar. & aſſumptis ſibi juſticiariis & aliis peritis talibus qualem ſibi videbit. fore aſſumen. vocari fac. coram eis Baron. de Scaccar. præd. ad audiend. information. ſuas & cauſas judiciotum ſuorum & ſuper hoc negotium hujuſmodi debite fac. examinari. Et ſi quis error invent. fuit illum corrigi & rotulos emendari ac poſtea eos in dict. Scaccar. ad executionem inde

faciend. remitt. fac. ſicut pertinet prout in eod. ſtatuto plenius continetur. Nos igitur volentes errorem ſi quis fuerit juxta formam ſtat. præd. corrigi & celerem juſtitiam fieri in hac parte vobis mandamus quod ſi judicium inde redditum ſit tunc record. & proceſſ. præd. cum omnibus ea tangen. coram Dom. Commiſſionariis ad cuſtod. ſigillum magnum Angliæ & vobis vos præfat. Theſaur. in cameram conſilii juxta Scaccarium præd. [vocat. le Council-Chamber] die Martis videlicet none die inſtantis menſis Februarii venire fac. Ut quod Dom. Commiſſionarii & vos præfat. Theſaur. viſis & examinat. record. & proceſſ. præd. auditiſq; informationibus veſtris vos præfat. Barones ulterius in hac parte de conſilio juſticium & aliorum peritor. hujuſmodi fieri fac. quod de jure & ſecundum formam ſtat. præd. fuerit faciend. T. nobis ipſis apud Weſtm. primo die Februarii, Anno Regni W. 3. Fiſh. Alloc. R. Atkins.

Record. & proceſſ. de quibus in brevi de errore prædict. fit mentio ſequitur, &c.

Et ſuper hoc Georgius Treby miles Attorn' dictor. Dom. Regis & Dom. Reginæ, nunc general. qui pro eiſdem Dom. Rege & Dom. Regina in hac parte ſequitur, præſen. hic in curia in propria perſona ſua pro eiſdem Dom. Rege & Dom. Regina dicit quod in record. & in proceſſ. præd. necnon in redditione judicii præd. de & ſuper præd. Morac. in Lege manifeſte eſt errat'. In hoc videlicet quod præd. Literæ Patent. ſuperius recitat. & materia in eiſdem content. & ſpecificat. ac præd. materia per dict. Joſephum Hornby, in forma præd. allegat. minus ſufficien. in lege exiſtunt ad ipſos Dom. Regem & Dom. Reginam nunc de aut cum ſolution. denar. prædict. de arrearag. pro præd. ſeparalibus quarteriis Anni aut cum præd. ſolution. præd. annual. reddit. ſive ſum. præfat. Joſepho Hornby in forma præd. onerand'. Eo tamen non obſtante adjudicat. exiſtit. per Barones præd. quod præd. literæ patent. præfat. Dom. nuper Regis Caroli Secundi præfat. Joſepho Hornby, ut præfertur conceſſ. & ſuperius recitat. & irrotulat. juxta tenorem & effectum earundem ipſi præfat. Joſepho Hornby allocar. Et quod præd. ſumma quinq; mille octogint. & duarum librarum quatuor denar. & un. obol. pro. arrearagiis dict. annual. reddit. ſive ſum. ſeptingent. quinquagint. duarum librarum ſeptendecim ſolid. & decem denar. reſid. præd. annual. reddit. ſive ſum. mille treſcentar. quinquagint. duar. librar. decem ſolidor. & decem denar. in literis patent. præd. mentionat. a præd. Feſto Annunciationis beatæ Mariæ præd. Virginis Anno Regni dict. Dom. nuper Regis Caroli Secundi triceſimo quarto uſque ad Feſtum & pro Feſto Natalis Dom. Anno primo Regni Dom. Gulielmi & Dom. Mariæ nunc Regis & Reginæ ſupradict. ſic ut præfertur aretr. & inſolut. exiſten. ipſi præfat. Joſepho Hornby ad recept. hujus Scaccar. per man. Commiſſionar. Theſaur. & Camerar. ejuſdem

ejuſdem recept. qui modo ſunt & per man. Commiſſionar. Theſaur. & Camerar. ejuſdem recept. pro & tempore exiſten. de theſauro provenien. accreſcen. ex illa parte revention. de le Exciſe in Literis Patent. præd. mentionat. fore conceſſ. dicto nuper Regi Carolo Secundo, hæred. & ſucceſſ. ſuis imperpetuum per actum Parliament. fact. Anno Regni ejuſdem nuper Regis duodecimo in man. eorund. Commiſſionar. Theſ. & Camerar. jam exiſt. & in manus Commiſſionar. Theſ. Theſaur. & Camerar. impoſterum exiſten. ſolvetur poſt & ultra annual. ſum. neceſſar. ſolubil. pro gubernation. [Anglice Management] dict. revention. de le Exciſe, & poſt & ultra annual. ſum. attingen. ad duodecim mille ducent. & novem libras quindecim ſolid. & unum obol. ſeu eo circiter in Literis Patent. prædict. mentionat. fore ſolubil. exinde annuatim Catherinæ nuper Reginæ Conſort. dicti nuper Regis Caroli Secundi & modo Dom. Reginæ dotiſſæ Angliæ & parcel. juncturæ ſuæ, & poſt & ultra præd. ſummam vigint. & quatuor mille librarum in Literis Patent. præd. mentionat. fore ſolubil. Jacobo tunc Duci Ebor. fratri dict. Dom. nuper Regis Caroli Secundi & quod præd. annual. reddit. ſive ſumma ſeptingent. quinquagint. & duarum librarum ſeptendecim ſolid. & decem denar. reſid. præd. annual. reddit. ſeu ſum mille treſcentar. quinquagint. & duarum librarum ſeptendecim ſolid. & decem denar. in præd. Literis Patent mentionat. eidem Joſepho Hornby ſic ut præfertur conceſſ a præd. feſto Natalis Dom. Anno Regni dict. Dom. Gulielmi & Dom. Mariæ nunc Regis & Reginæ Angliæ, &c. primo ſupradict. ipſi eidem Joſepho Hornby, hæred. & aſſig. ſuis ad recept. hujus Scaccar. per manus Commiſſionar. Theſ. Theſaur. & Camerar. ejuſdem recept. pro tempore exiſten. de Theſauro de tempore in tempus provenien. accreſcen. & emergen. de præd. hæreditar. revention. de le Exciſe in man. ſuis de tempore in tempus exiſten. poſt & ultra annual. ſummam neceſſar. ſolubil. pro gubernation. [Anglice Management] dict. revention. de le Exciſe, & poſt & ultra annual. ſummam attingen. ad duodecim mille ducent. & novem libras quindecim ſolid. quatuor denar. & unum obol. aut eo circiter in dictis Literis Patent. mentionat. fore ſolubil. exinde annuat. præfat. Catherinæ modo Reginæ dotiſſæ Angliæ ut parcel. junctur. ſuæ & poſt & ultra annual. ſummam viginti quatuor mille librarum in eiſdem Literis Patent. mentionat. fore annuat. nuper ſolubil. præfato Jacobo Duci Ebor. & modo annuat. ſolubil. Dom. Regi & Dom. Reginæ nunc ad præd. ſeperal. feſta Annunciationis beatæ Mariæ Virginis Nativitatis Sancti Johannis Baptiſtæ, Sancti Michaelis Archang. & Nativitat. Dom. Dei noſtri communiter [vocat Chriſtmas] per æquas & æquales portiones annuatim ſolvetur. Et quod tall. toties quoties caſus requiret levand. ad dict. recept. ſcaccar. pro præd. annual. redditu ſive ſum. ſeptingent.

quinquaginta & duaram librarum ſeptendecim ſolid. & decem denar. reſid. præd. annualis redditus mille trecentarum quinquagint. duarum librarum ſeptemdecim ſolid. & decem denar. idem reſid. redditus ſeu aliqua inde parcel. deveniret debit. ſecundum formam & effectum Literarum patent. præd. ſuper Commiſſionarium Theſaurarium, Receptor' Collector' ſive firmarium dict. Hæreditariarum Revention. de le Exciſe per Officiar. recept. hujus Scaccar. pro tempore exiſten. ad quos Levac. Tallior. in ead. recept. pertinet ſeu pertinebit de tempore in tempus ad requiſition. ejuſdem Joſephi Hornby, Hæred. & Aſſign. ſuorum leventur ſecundum formam, effectum & directionem Literar. patent. prædict. & ſecundum curſum dict. recept, Scaccar. ſalvo ſemper jure Regis & Reginæ nunc ſi, &c. Ideo in eo manifeſte eſt erratum; Errat' eſt etiam in hoc quod per Record. præd. apparet quod judicium præd. in forma præd. reddit. reddit. exiſtit pro præfat. Joſepho Hornby verſus eoſdem Dom. Regem & Dom. Reginam ubi per Legem terræ hujus Regni Angliæ judicium ill. reddi debuiſſet pro eiſdem Dom. Rege & Dom. Regina nunc verſus præfat. Joſephum Hornby. Ideo in eo manifeſte eſt erratum, & ſic idem Attornat. General. pro eod. Dom. Rege & Dom. Regina dicit quod in Record. & proceſſ. præd. ac in recordo judicii præd. manifeſte eſt errat. & ſuper inde idem Attornat. dictor. Dom. Regis & Dom. Reginæ pro eiſdem Dom. Rege & Dom. Regina petit quod judicium illud ob errores præd. & alios in Record. & Proceſſ. exiſten. revocetur adnulletur & penitus pro nullo habeatur. Ac etiam breve dictor. Dom. Regis & Reginæ ad præmuniend. præfat. Joſephum Hornby. eſſend. coram præfat. Dom. Cuſtod. Magni Sigill' Angl. & Domino Theſaurario ad certum diem auditur. Record. ac Proceſſ. præd. errores. & ulterius ad faciend. & recipiend. quod fuit juſtum in Præmiſſis, &c. Et ei conceditur, &c.

Super quo idem Jeſeph' Hornby dicit quod nec in Record. & Proceſſ. præd. neq: in redditione Judicii præd. de & ſuper præd. Morac. in Lege in ullo eſt erratum. Et petit quod curia dict. Dom. Regis. & Dom. Reginæ nunc hic procedat tam ad examinationem Record. & Proceſſ. præd quam Materiæ præd. ſuperius pro erroribus aſſignat. ſed quia Curia vult adviſari in Præmiſſis antequam, &c. Ideo dies dat. eſt partibus præd. in ſtatu quo ſicut nunc a die Paſch. uſq; in unum Menſem proximum Anno quarto Regni Dom. Gulielmi & Dom. Mariæ nunc Regis & Reginæ de judicio ſuo inde audiend. eo quod Curia dict. Dom. Regis & Dom. Reginæ nunc inde nondum, &c. Ad quem diem veher. partes præd. & ob cauſam præd. habend. diem ulterior. in ſtatu quo nunc uſq; in Octab. Sanct. Trin. ad Judicium ſuum inde audiend. eo quod Curia hic inde nondum, &c.

The Argument of the Lord Chief Juſtice Treby.

THere are two Points in this Caſe:

1. Whether theſe Letters Patents are valid in Law, and ſufficient to bind the King?

2. Whether that the Remedy that theſe Petitioners have taken be proper?

As to the firſt, I am of Opinion, that the Letters Patents are valid and ſufficient to bind the King.

It is objected, That the Word [Succeſſors] in the Statute by which this Revenue is given, intends that it ſhall be fixed in the Crown, and unalienable. To this I anſwer, That there are ſeveral other Statutes by which Lands and other Revenues were given to the King by the ſame Words that are in this Statute; and yet the Kings of England had always Power to alien them, as appears by Berkley's Caſe in Plowd. and by the Statute of Monaſteries, Vaugh. 62. 2 Rol. Abr. 198. &c, So King Charles II. having an Eſtate of Inheritance in this Branch of his Revenue, had the ſame Power to alien this as he had to alien any other Part of it.

Vide Plow. 234. *to* 248.

It has been ſtrongly objected, That if the King ſhould have a Power to alien all his Lands and Revenues, it might be of pernicious Conſequence to his Subjects, and that then our Exchequer in England would be like the Spaniſh Exchequer, of which it's ſaid, that it receives Taxes and Revenues from the general, only to pay them out to ſome particular Perſons.

To this I anſwer, That this might be ſome Reaſon to induce the making an Act of Parliament to reſtrain the King's Power of Alienation; but ſince here the Parliament has thought fit to give the King ſuch a Power, we ought to acquieſce and ſubmit to it.

If the Barons can award the King's Treaſure out of the *Exchequer.*

But that which I ſhall chiefly proceed on, is the Judgment, which I think to be very extraordinary, and ſuch as the Barons could not give; for I do not think that they can award the King's Treaſure out of the Exchequer. Then I take this Judgment to be very erroneous and deficient in ſeveral Particulars:

1. It

1. It leaves out the Treaſurer, who is the Chief Officer concerned in diſpoſing the King's Money.

2. The Chamberlain of the Exchequer ought to have been mentioned as well as the Treaſurer; and ſo is the Judgment in Nevile and Worth's Caſes, in Plowd. and alſo in Cotton's Records. *Plow.* 378, 381, 457, 458.

3. This Judgment appoints Tallies to be ſtruck from Time to Time, and orders the Method of Payment of the ſeveral Sums of Money, which I take it the Barons cannot do; for they ſeem to undertake to do what is proper Work for an Act of Parliament, which only can appoint the Treaſurer to make Payments in ſuch an Order. 9 H. 4. 28.

In the next Place, I take it that this Judgment cannot be amended, becauſe theſe are Faults in Subſtance, and the Law is very nice and curious in Judgments; ſo if a Miſericordia be entered for a Capiatur, the Judgment is erroneous; ſo is it if it be Conceſſum eſt, inſtead of Conſideratum eſt, &c. Latch 177. ſo is Poph. Caſu ultimo. *Pop.* 203, 211. *Noy.* 89. *Lat.* 176, 177, 188. *Vide* 8 *Rol. Ab.* 771, 774. 1 *Rol. R* 278. *Yelv.* 130. 2 *Cro.* 386, 632. *Hob.* 194. 3 *Cro.* 442.

Now I come to the Remedy, which I take to be the great and difficult Point of the Caſe.

And I am of Opinion, That no Judgment can be given upon this Petition to the Barons; for I do not think that the Court of Exchequer has any Power to diſpoſe of the King's Treaſure, and therefore I cannot ſee how this Judgment can have any Effect: Indeed it's ſaid, that the Petitioner will have a Writ to the Officers of the Treaſury, or to the Treaſurer himſelf; and if they do not obey this Liberate, that then they will enforce to it by Action, But this they cannot do, for I hold that the Treaſurer may chooſe, upon a bare Warrant, to pay in what Order he thinks fit.

Then they have ſhewn no Precedent that ever any ſuch Action was brought; though indeed my Lord Coke, in his 4th Inſt. 116. ſeems to hint at it, and ſo does Plow. Com. 186. and 2 H. 7. 8, 9, 10. But there the Liberate always went to the ſubordinate Officer, but never to the Treaſurer himſelf. By the Treaſurer, I mean the Treaſurer of the Exchequer, and not the Lord High Treaſurer of England; for that great Officer has long been diſcontinued, and when he was in being, the greateſt Uſe of him was when he had the Honour to have been your Lordſhip's Colleague in this Place.

So

So that I take it, That the Treaſurer may, if he pleaſeth, pay theſe Annuities to the Petitioners; But whether he will do it or no, is left to his Conſcience and Diſcretion; but he cannot be compelled to it but by Authority of Parliament.

Then this Remedy is not warranted by the Courſe of the Exchequer; if there were any ſuch Uſage there, I agree it would be the Law of the Land, and ſo is Rawlins's Caſe, 4 Rep. and Plow. 32. but there has been no ſuch Uſage there; and in this Point I concur with my Brother Lechmere, who perhaps has the greateſt Experience in the Court of Exchequer of any Judge that ever ſate there; for I think I lately heard him ſay, it was ſixty Years ſince he practiſed there.

Vide ante 13, 14.

I have Reaſon to think whatever Mr. Plowden ſays, that theſe Liberate's were granted upon Petitions to the King himſelf, and not to the Barons; you may ſee Abundance of them in Ryley's Placita Parliamentaria. It appears indeed in Brooke, tit. Talley de Exchequer T. ver' Eb. 136. that upon Delivery of this Writ to the Officer and Aſſets in the Exchequer, an Action lay againſt the Officer for Non-Payment; but that ever it could be brought againſt the Treaſurer or Chamberlain, was never heard of.

But ſay they, there is a Clauſe in the Patent which empowers the Treaſurer, &c. to make Payments, &c. and this they call a Perpetual Warrant.

But this makes againſt the Petitioners: For if it is ſo, why do they prefer a Petition to the Barons of the Exchequer? If they can have their Debt without a Petition barely upon this Patent, where there is a Grant, a Command, and Warrant to the Treaſurer and Officers to pay the Money, (which, ſay they, amounts to a Liberate) then it's a vain Thing to ſue in the Exchequer for a Judgment: For it cannot be preſumed, that a Liberate under the Seal of the Exchequer, Teſte Chief Baron, ſhould be of more Force than a Liberate under the Seal of England Teſte meipſo. Reg. 191.

To clear this Point, it's neceſſary to enquire into the Power of the Court of the Exchequer.

The Power of the Court of *Exchequer* over the King's Treaſury.

I do agree that they are ſupreme Auditors, and have Authority over the King's Treaſure; but it is in tranſitu, as upon the Sheriffs Accounts, or any other of the King's Officers concerning the bringing in of the King's Revenues into the Exchequer; but when the Money is there, it is in its Center, and the Barons have nothing to do with it; they are only Conduits, but not Poduas. 2 Inſt. 181. 4 Inſt, 115. and it would be of dangerous Conſequence for ſo many to have to do with

the Treaſury, leſt (as Vernon ſays in his Book) there be too many Leaks in the Ciſtern.

I confeſs, the Court of Exchequer does uſe to enrol Charters in the Exchequer, and that is the Foundation of the Accounts, &c. and ſo is Plo. But whether the Barons of the Exchequer have a Power to control and command the Treaſurer, is a great and arduous Point; it is in effect, Whether the Barons ſhall have the Power to turn out the Treaſurer when they pleaſe; and whether the Petitions that were formerly preferred to the King, ſhall be now exhibited to the Barons of the Exchequer? Which Matters I muſt own I cannot be brought to imagine, though I would think as favourably as poſſible in this Caſe; for I give this Opinion, not becauſe I would, but becauſe I muſt.

But I take this Power in the Barons, to be againſt the Nature and Inſtitution of the Court of Exchequer; for they are originally empowered by the King to get in his Revenue, and it is for the Sake of the Revenue that they have any Thing elſe to do; and all they do, is to convey the King's Treaſure to its proper Place, but they cannot diſpoſe of it; for there is no Correſpondence between the Barons and the Officers of the Treaſury.

Upon Reverſal of Attainders, we know there is no Reſtitution of the Money paid to the King; and the Reaſon is, becauſe the Barons cannot in ſuch Caſe control the Treaſury. I remember ſeveral Years ſince, there was a Solicitor who brought the Rolls of a forfeited Eſtate in Diſpute into Court; and they ordered the Money to be put into the Hands of the Remembrancer; for they ſaid, If it was once paid into the Treaſury, there was no getting it out again.

On Reverſal of Attainders, no Reſtitution of Money paid to the King.

The Caſe in ſhort is no more than this:

Suppoſe the King be indebted to the Petitioners, and alſo to the Army, the Fleets, &c. Now who ſhall direct the Payment of theſe Debts, the Barons, or the Treaſurer, who is the beſt Judge of the State of the Kingdom, and of its Neceſſities? So that ſuppoſe there was only 4000 l. in the Exchequer, and we were threatned with a foreign Invaſion, How ſhall this Money be diſpoſed? Says the Treaſurer, To raiſe Men to pay the Army and our Fleets, that by their Aſſiſtance we may prevent the Enemy from coming amongſt us. No, ſay the Barons, we muſt pay the Bankers with this Money, though at the ſame Time we open the Gates and let in Hannibal to our utter Ruin and Deſtruction. My Lord Coke in his 4th Inſtit. treating of the Court of the Exchequer, takes Notice of the Oaths taken

The Treaſurer of the *Exchequer*, his Oath.

by the Treaſurer, and alſo by the Barons. In the Treaſurer's Oath it is mentioned, That he is to keep and diſpenſe the King's Treaſure ſafely; but in the Barons Oath, there is not a Word of this Matter taken Notice of: Which to me is an Argument, that the Treaſurer is Judge in Point of iſſuing Money, whether it be due and payable, or not; and to whom, in what Manner, and when it ſhall be paid, &c. And this I take to be the true Reaſon, why no Action can be brought againſt the Treaſurer, becauſe he acts as a Judge, and not as a Miniſter of the Court, for he is not Attendant to it as Sheriffs, Bailiffs, &c. are; ſo I take it, may be paid, is enough for the Barons to ſay; but muſt be paid, is only for the Treaſurer to ſay. Cro. Eliz. 545. Doddington's Caſe.

The Nature of his Office. *Vide Moore* 475. 11 *Co.* 90, 92.

Then it is Treaſon to counterfeit the Great or Privy Seal, becauſe they only have to do with the King's Revenue; but it was never thought Treaſon to counterfeit the Exchequer Seal, which has nothing to do with it. Plo. Com. 223.

In the Conteſts heretofore between the King and People, what was meant when they complained that the King's Treaſure was miſpent and miſemployed; not that it was paid away without Letters Patents, or taken away without the King's Grant; but it was this, They blamed the Treaſurer, becauſe he paid away the King's Treaſure to Perſons unworthy, to Minions and Favourites, though they had Grants from the Crown by Letters Patents: But yet it was left to the Treaſurer's Diſcretion to have paid them or not; which he ſhould not have done, when perhaps the Publick Good required it.

Now I come to the Authorities in our Books.

I ſhall begin with 2 Ed. 3. 25. & 38 Aſſ. pl. 20. wherein it is ſaid by the Chief Baron, That we ſhall take Conuſance of all Matters that may turn to the King's Advantage, but not a Word concerning the Diſpoſal of the Treaſury. Vid. 19 H. 6. 62, 63. and 2 Roll. Rep. 301. are expreſs.

So in Stradling and Morgan's Caſe, Plo. 207. it is ſaid, That no Pleas ſhall be held in the Exchequer, but for the Advantage of Recovery of the King's Debts, and bringing in his Revenues; ſo that the Common Pleas in the Exchequer, are only founded on getting in of the King's Revenue. I chooſe to cite Mr. Plowden, becauſe his Book is ſo mightily relied on by the other Side, I mean the Caſe of Nevil and Wroth.

I believe it was the Authority of thoſe Caſes that raiſed all this Duſt, but I ſhall anſwer them by and by; and at preſent ſhall only obſerve, That there is not one Law-Book that

gives these Cases the Credit to mention them, I mean as to this Point of Proceeding by Petition to the Barons, &c. So in the Earl of Devonshire's Case, 11 Rep. 92. there is no Notice taken of Nevil's or Wroth's Case, though there was Opportunity enough to have mentioned them, if they thought they had been of any Weight and Authority. So 2 Rol. Abr. 260, and 180, and 183. the Resolution in the Earl of Devonshire's Case is cited, but not a Word of Nevil's or Wroth's.

Vide Moore 476. 2 *Inst.* 555. *Lit. R.* 91. 2 *Ro. R.* 183.

In the next Place, I shall mention some Treatises concerning the Court of Exchequer.

1. There is Gervasius Tilburiensis de Rebus in Scaccario gestis; who sets forth the Jurisdiction of the Court of Exchequer, but mentions nothing of this Power in the Barons to control the Treasury; the Capitalis Justitiarius Angliæ had indeed a Control over the Treasurer himself, as appears from Spelm. Gloss. 71, 331. So when Hugo de Burgo, who was the last Great Justiciary, was in Disgrace, he was charged to render an Account of the Misspending of the King's Revenue; which shews that he had a Power over the Treasurer: But ever since this great Office has been discontinued, the Treasurer has acted according to his own Discretion.

The next Book that I shall quote, is called the Diversity of Courts; it is mentioned in my Lord Coke's Preface to the 10th Reports: But there is nothing of this Power in the Barons mentioned there, neither is it taken Notice of in the Mirror of Justices, cap. 1. Sect. 14. 4 Inst. 110. Fleta, lib. 2. c. 25. Britt. 2. 6. Crompt. Jurisdiction of Courts, 105. which Book was printed fifteen Years after Mr. Plowden's; nor in 2 Inst. 551. nor in 4 Inst. where the full Authority of this Court is fully set forth. And I can but also observe, That Mr. Prinn, in a Book which he printed on Purpose to animadvert on my Lord Coke, 4 Inst. does not take Notice of any such Power. I shall beg Leave also to mention Vernon's Consideration on the Court of Exchequer, and Mr. Cambden, and Sir Tho. Smith, who were great and learned Men, though their Books, I confess, are not of Authority: But if there had been any such Power in the Barons of the Exchequer, it is probable they would have taken Notice of it.

Next, there are Savil's Reports, Lane's, and my Brother Hardress's Reports, which treat chiefly of the Court of Exchequer; but yet they give not the least Countenance to any such Power: So in 1 Rol. Abr. 538, 539. in Lane's Case, 2 Rep. 2 Rol. Rep. 294. there is not one Syllable of it.

I shall

I ſhall conclude this Point with this Obſervation: That ſince there were two great Powers in the Barons, (as is pretended) one of bringing in Money into the Exchequer, and the other of paying it out, that yet theſe Books ſhould be all ſilent as to the greateſt Power of paying it out, is very ſtrange and unaccountable: Which indeed does induce me to believe, that there is no ſuch Power in the Barons, and that thoſe Petitioners have mentioned in their Petition the only Way of having their Annuities; that is, as their former Payments were made (viz.) by Warrant from the Lord Treaſurer.

Now I come to the Objections.

1. They quote Ryley's pla. Parl. pla. 251, 253, 257, 262, 337, 526, 529, &c. but if I can apprehend them, thoſe Words make againſt the Petitioners.

Then Margery Parker's Caſe, 9 H. 6. 12, 13. was mightily inſiſted on, and indeed at firſt I thought there was ſomething in it; but upon a ſtrict Peruſal, I find it is conſiſtent enough with my Opinion: Indeed Babington mentioned there a Remedy by Petition to the Barons, but this was only a Word ſlipp'd out; but the Court gave no Regard to it, and were of Opinion againſt it, that there was no ſuch Remedy. And it is obſervable, that Brook in his Abridgment takes no Notice of Babington's Opinion, though he does of all the reſt of the Caſe.

The next Thing objected is, That the Barons do every Term ſend a Liberate to the Officers of the Treaſury under the Exchequer-Seal to pay Money for Paper, Pens, and other Neceſſaries for the Court of the Exchequer; the Charge of which, I am told, comes to 2 or 300 l. per Ann.

To this I anſwer, That firſt this Writ goes without any Judgment at all; ſo that according to this, the Petitioners needed not to have had any Judgment; but the true Reaſon of iſſuing forth this Writ is grounded on this. In the Treaſurer's Commiſſion there is this Clauſe, That he ſhall pay out ſuch Sums of Money as are required, pro neceſſariis Scaccarii: But of this Writ they take no further Notice than as a Certificate, when they make up their Accounts.

Now for the Precedents.

The Court of Exchequer is guided by Multitudes of Precedents, 2 Rep. Lane's Caſe, Mo. 565. but here they have not one Precedent for ſuch a Power over the King's Revenue, to which the Law has ſo great a Regard; for there is nothing in the Law ſo fenced, ſo guarded, and ſo ſecured, as the King's Inheritance; where

Plow. 230, 320. 2 *Rol.* 524. *Cro. Car.* 513, 528.

where that is concerned, there must be Petition de droit, an Inquisition found, besides Searches, &c. so careful is the Law of the King's Inheritance and Revenue.

But now here the King must lose his Freehold without Trial, which his Subjects shall not do, as appears by Magna Charta.

In the next Place, I shall answer the Cases, which indeed give Life to the present Case, and are the Foundation of it. First, as to Nevill's Case, I observe the Petitioner's Counsel do not agree in their Title to it; some say, it was grounded on a Petition of Right; others, that it was a Monstrans de droit; and others, that it was a Complaint against the Officers of the Treasury. But true it is, Mr. Plowden is precise and express in the Point, though it seems to me to be but his own private Opinion: And I must take the Boldness to say, that he is mistaken, as will appear from these Books, 13 H. 7. Pl. 15. 4 Ed. 4. 23. b. 1 Leo. 190. 1 And. 253. Savile 125. all which Cases happened but twelve Years after Nevill's, and yet are contrary to it. By the same Books and the same Reasons it appears, that Wroth's Case ought to have no more Weight than Nevill's, &c.

Therefore I conclude, That this Judgment given by the Barons of the Exchequer is an erroneous Judgment, and ought to be reversed.

Vide infra, The Argument of the Lord Chief Justice Holt, contra.

The Argument of the Lord Chief Justice Holt.

Holt, Ch. J. IN this Case, here have been two Points made:

1. Whether this Grant be good?

2. Whether here be a proper Course taken by the Patentees?

There has indeed been a third Point started by my Brother that argued last, and that does respect the entring of the Judgment.

As to the first Question, I hold the Grant to be good, and all that have argued here, have concurred in the same Opinion. I do confess this is the great Point of the Case; but so much has been said to it, that little more can be added: But I must say something to it, though I cannot but repeat.

I hold that King Charles II. might charge this Branch of his Revenue, and my Reason for my Opinion is but short.

Whether, and in what Caſes, the King may alien his Revenue.

It is, becauſe the King was ſeiſed of an Eſtate in Fee of this Revenue; for to ſuch an Eſtate a Power of Alienation is incident. Lit. Sect. 360. And I take it to be the Intent and the expreſs Words of the Act, That the King ſhould have a Right and Liberty of alienating and charging this Eſtate.

It is no Objection, That this Revenue was given to the King under a Truſt; for notwithſtanding that, he might alien it: So ſeveral Kings of England have founded Corporations of charitable Uſes, and yet theſe Perſons incorporated might, notwithſtanding ſuch Truſt, alien their Eſtates; ſo may Dean and Chapter theirs; ſo may a Biſhop with the Conſent of Dean and Chapter; ſo a Parſon, with the Conſent of the Patron and Ordinary, might have alienedthe Land of which he was ſeiſed in the Right of his Church: But the King has no Body required to conſent to his Alienations. To ſay, that he may alien by the Conſent of the Eſtates of the Realm, is as much as to ſay, he cannot alien without an Act of Parliament, which he may clearly do.

That the Law will not permit the King to do Wrong to the Subject; (*& a fortiori* to the whole Kingdom,) *Vide. Co. Lit.* 19. *b.* 2 *Inſt.* 681. 1 *Co.* 44. *b.* 7 *Co.* 12. *b.* 11 *Co.* 72. 1 *Rol. R.* 167. *Noy* 182. *Mo.* 416. *Godb.* 317. *Dav.* 75. *Cro. Argum.* 60. *Plo.* 246. 487. *b.* 13 *E.* 4. 8. 1 *H.* 7. 10.

And indeed this Revenue comes to the King by Purchaſe; for he gave a Recompence for it, (viz.) Part of his ſtanding Revenues, it being the Profits that did ariſe from his Wards and Liveries.

But it is objected, That this Power in the King of alienating his Revenues may be a Prejudice to his People, to whom he muſt recur continually for Supplies. I anſwer, That the Law has not ſuch diſhonourable Thoughts of the King, as to imagine he will do any Thing amiſs to his People in thoſe Things in which he hath Power ſo to do.

But that which I inſiſt on is, that it is abſurd in its Nature to reſtrain the King from a Power of aliening his Revenues of which he is ſeiſed in Fee. It is againſt the Nature of the being of a King, that he ſhould have leſs Power than his People; for before he was King, he had Power to alien. Now when the Crown deſcended upon him, he is ſeiſed in Jure Coronæ, and ſhall he then have leſs Power over thoſe very Lands than he had before the Deſcent of the Crown? Shall he now be diſabled to alien by being a King? This would be againſt a common Principle of Law, That the Deſcent of the Crown takes away all Diſability. Plo. 105. Dyer.

Then it is repugnant to the Conſtitution of the Government. Suppoſe a King ſhould be under a preſent Danger of being invaded, if the King could not raiſe Money by alienating his Revenue, the Nation might periſh; for he cannot otherwiſe raiſe Money than by an Act of Parliament, for which there might not

be

be Time: And therefore heretofore the Kings of England have borrowed ſeveral Sums of Money by mortgaging their Lands, Cotton's Poſt. 175.

And there ought to be a Power in all Governments to reward Perſons that deſerve well, for Rewards and Puniſhments are the Supporters of all Governments; and it has been the conſtant Uſage of the Kings of England to reward Perſons deſerving of the Government out of the Crown-Revenues, by Penſions, and giving Eſtates to ſupport the Titles of Earl and other Dignities. Seld. Tit. of Honour 838. 7 Rep. 12. Calvin's Caſe. And this has been allowed of by Act of Parliament, as appeareth by 34 H. 8. c. 20.

But ſome perhaps will ſay, I have been talking little to the Purpoſe; for that they do not deny that the King might alien his own Demeſns, or any Lands that come to him by Deſcent or Purchaſe: But, ſay they, this Revenue was ſettled by Act of Parliament on the Crown, and therefore it cannot be alienated. But I do not find any ſuch Diſtinction in our Law-Books, nor any Authority from Common or Statute Law, that reſtrains the Kings of England from alienating any Sort of their Revenues.

As for the Lands in ancient Demeſn, they ſeemed moſt appropriated for the King's Uſe of any of his Revenues; for they had ſeveral Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Suſtenance and Husbandry, not to be impanelled on any Inqueſt; and yet notwithſtanding all this thoſe Lands were always alienable; and if theſe Lands are alienable, what Eſtates in the Crown are not alienable? And our Books do take Notice that theſe Eſtates are alienable, and ſo is Fitz. N. B. 13. c. 166 f. & 226. Staundford Prer. 38.

Ancient Demeſn Lands alienable, becauſe poſſeſſed by the King in his perſonal Capacity.

Then what Reaſon can be given why ſome Eſtates ſhould be alienated, and others not? Why may not the King as well alien theſe Eſtates as he may the Flowers of his Crown, as appears in the Abbot of Strata Marcella's Caſe? For he may grant a County Palatine, which has Jura Regalia; ſo he has granted a Power to pardon Treaſon or Felony, &c. Indeed theſe Prerogatives are reaſſumed to the Crown by the Statute H. 8. but the Grants were not void.

Then if an Eſtate be ſettled on a Subject by Act of Parliament, it will not be denied but that he may alien ſuch Eſtate; and why ſhall not the King have the ſame Privilege? It appears in Fact, that he has always done it; ſo all the Lands that belonged to the Abbies and Monaſteries were alienated by the King,

King, and yet they were given to him by Act of Parliament, and by general Words, as it is here: So the Customs have been always granted and charged by the King, and yet they were granted to him by Act of Parliament. The Authorities in our Books are full to this Purpose, as 21 Ed. 3. 47. 29 Ed. 3. Pl. 1, 2, 4 Inst. 45. Davis 7, 14. Knighton 1684.

But it is objected, That this Revenue was given in Lieu of Inheritances that were unalienable, (viz.) the Wards, Liveries, Purveyances, &c.

Tho' how the Nature of these Inheritances can affect Inheritances of another Nature I cannot see; but even these Inheritances were always in Effect alienable, for they might have been released. The King's Grant to be free of Pisage, Sir Thomas Waller's Case; and so were Services in Capite, and Purveyances, &c.

Some Opinions have been urged, which say that the Crown-Revenues could not be alienated, as Fleta and Bracton; but these Books are only Ornaments to the Law; they are not look'd on as authentick, especially where the Practice has been always to the contrary: But Britt. 87. is otherwise, and so is Selden 549, and 552. And Bracton himself in his second Book, c. 57. seems to be of another Opinion, where he saith, That even Res sacræ are alienable by the Common Law, tho' perhaps by the Canon Law they are not to be alienated. So the Statute of Bigamis, c. 7. also admits that the King may grant away his Revenues; Forescue in his Book de Laudibus Legum Angliæ, that the Government is not only Regal, but legal and political, and then discourses of the Particulars wherein the Regal Power is restrained: And if our Constitution had been so that the King could not alien his Lands or Revenues, it cannot be imagined but that he would have mentioned a Thing so remarkable, especially in a Time when there were so many Grants made by the Crown, tho' indeed at that Time there were many Acts of Resumption made, as there were before and after, as in 6 H. 4. 14. and in the Time of King Henry the Eighth, &c. which are a great Demonstration that those Grants could not be revoked or avoided but by Act of Parliament.

Fee-Farm Rents granted by Act of Parliament, and why.

It is objected, that the Fee-Farm Rents in the Time of King Charles the Second were granted by Act of Parliament; but they might have been granted without that Act; it was only made to encourage Purchasers, to make good the Letters Patents beyond all Scruple, and to give Power to sue for the Arrears of Rent, and to distrain, &c.

Then it's objected, That if this Grant of the Revenue should be alienable to the Subjects, that then the King's Officers of Excise would be the Subjects Officers.

But that does not follow, they are only a Means to convey to their Fellow-Subjects their Right, and that which is granted to them by the King's Letters Patents. So the Justices in Eyre, and of Oyer and Terminer, &c. are the King's Justices; and yet they convey Justice to the People. 4 Inst. 162.

As for these Letters Patents themselves, it's plain by the whole Tenour of the Patents, that the King was not deceived in his Grant; and the Consideration being executed, though it be false, yet that will not avoid the Grant. Plo. 554.

So that I conclude this Point, that these Letters Parents which charge this Branch of the Revenue, are good and firm in Law.

I come now to the second Point, and that is, concerning the Remedy taken by the Patentees.

And I hold they have taken a very proper and legal Remedy. We are all agreed that they have a Right; and if so, then they must have some Remedy to come at it too.

The Remedies at Common Law to recover against the King, were by Petition, or Monstrans de droit. Remedies to recover against the King.

Indeed there is a new Remedy now given by Stat. 2 Ed. 6. c. 8. and that is by way of Traverse to the King's Title. 4 Rep. 54. 2 Inst. 688.

But first, a Petition of Right is not necessary in this Case: Not but that a Man may proceed in this Way, and admit himself out of Possession if he pleaseth. But it's not necessary, for two Reasons; Petition of Right, the Nature of it.

1. Because a Petition of Right is grounded always upon a naked Matter of Fact suggested, and not of Record; and upon such a Suggestion, there is a Commission issues out of Chancery. Cok. Entr. 462. 9 H. 4. 4.

But here the Title is derived by Letters Patents which are of Record; so that here is no Matter of Fact to be enquired of.

2. The Patentees do not endeavour to destroy the King's Title: But Petitions of Right do so, and are generally inconsistent with the King's Title.

Then this Annuity is not turned to a Right, as if there had been an Attainder, &c. therefore why should there be a Petition of Right?

I take this Remedy to be by a Monstrans de droit; and this Remedy is to be sued at Common Law, when the Party's *Monstrans de droit*, where lies

Title appeared of Record. Kell. 178. Monſtrans de droit, or Ouſter le maine, (which is all one in Effect) always lies where the Title or Right of the King appears, as well by Matter of Record as the King's Title; and this appears fully. Sadler's Caſe, 4 Rep. and Hob. 334.

Alſo it's plain, That a Monſtrans de droit lies in the Exchequer: I think there is no Doubt of that.

It is objected, That the Petition ſhould be firſt ſued to the King: But by the Records in Ryly's Placita, Parl. 351, 257. Staundf. 72. it appears, that theſe Petitions of Right have been ſued to the Court of King's Bench. But indeed this Petition differs from thoſe; for this being only the Way of Complaint, there needs no Indorſement as in the other Caſes.

The next Objection is, That in this Precedent there was a Liberate.

1. This Writ is in its Nature a Writ of Allowance. Reg. 192. but this Writ does not give any Manner of Jurisdiction; for the Court may hold Plea, and proceed without it.

2. But the next Anſwer that I give to this, and which may be ſatisfactory to any Body, is the Statute of 5 R. 2. c. 9. which directs the Barons of the Exchequer to anſwer every Demand, without any Writ or Letter from the King; ſo is 4 Inſt. 110. So that I take it to be very plain, that the Barons might proceed here without any Writ at all.

Power of the Barons of the *Exchequer* to anſwer Demands.

But it is objected, That the Writ ſhould have been directed to the Treaſurer, &c.

Of the Treaſurer.

But this needs not be; for the Treaſurer hath nothing to do with Civil Pleas. Reg. 137.

Indeed, Fitz. N. B. 129. doth mention the Treaſurer: But that is a common Error, and the Writs need not be ſo directed.

It's true, as my Lord Coke obſerves, That the Legitimation of any Caſe may be ſuſpected that has no Caſe of Kin to it; and I agree to that Rule: But I think I have found out ſome Kindred to this preſent Caſe, and that is the Caſe in Coke's Entries, 93. tit. Claim of Liberties; for there the Barons did allow certain Liberties, and alſo the Payment of a Rent-Charge granted by the King to my Lord Hunſdon. So the Caſe of Margery Parker in 9 H. 6. 13. is a conſiderable Authority to this Point; ſhe had an Annuity out of the Magna Cuſtuma of London, granted by the Queen out of a Sum aſſigned for her Dower to receive of the Cuſtomers. The Queen ſhall not have Action againſt the Cuſtomers, but muſt ſue to the Barons of the Exchequer; and

and Margery Parker may ſue for it in the Exchequer, in the ſame Manner as the Queen might for her Portion. Then there is my Lady Braughton's Caſe, which happen'd in 25 Car. II. my Lady Braughton forfeited the Keeper's Place of the New-Priſon to the King, who thereupon made a Seiſure; upon this the Dean and Chapter of Weſtminſter came into the Court of Exchequer and claimed the Inheritance, and the King's Hands were amoved. Indeed this Matter was firſt ſtirr'd in the King's-Bench, for they gave Judgment to ſeize the Priſon. Now if the Court of King's Bench might hold Plea there of a Monſtrans de droit becauſe the Seizure was there; Why may they not as well proceed in the Exchequer by Monſtrans de droit, becauſe the Money is there?

'Tis true, Money comes into and iſſues out of the Exchequer without the Barons: But with Submiſſion, the Right of bringing in, and iſſuing out of the Money, belongs to the Barons and if you make the Barons only Judges of the Right of coming in of the King's Money, you make them Judges but of half their Buſineſs which belongs to that Court; for the Barons have the Judicial Power over the whole Court of Exchequer. And to ſay that the Treaſurer and his Officers have no Correſpondence with the Barons, is not true; for all the Books take Notice of them, as Perſons that all belong to the Exchequer.

Some have objected, That this Court ought regularly to hold Pleas only where the King is Party; and that this Court uſed to be prohibited to proceed in any Pleas that do not concern the King. 2 Inſt. 551. there you may ſee what Pleas they may hold.

But here the Plea does concern the King; for here is the King's Grant, and the Suit is to the King: And this Determination of the Barons in this Caſe is not thus any Judgment of their own; but the King himſelf, by Reaſon of ſuch his Letters Patents, hath obliged himſelf to make ſuch Payments. As in the Caſe of an Obligation where Debt is brought upon it, and a Recovery is had; 'tis not ſo much the Judgment of the Court as binds the Property, as the Obligor himſelf, who by his Bond has ſubjected his Property to be determined by the Judgment.

Now as to the Authorities which ſeem directly to govern this Point, and the Objections againſt them.

1. There is Sir Tho. Wroth's Caſe in Plowden, which I rely upon as a clear and full Authority in this Caſe, notwithſtanding all the Objections that have been made againſt it.

King

King Hen. VIII. had appointed Sir Tho. Wroth to be Gentleman-Uſher of the Privy-Chamber to Prince Edward, and that he granted to the ſaid Sir Thomas for the Exerciſe of the ſame Office an Annuity of 20 l. to be had and Yearly taken to the ſaid Sir Tho. from Lady-day then laſt paſt during his Natural Life, by the Hands of the Treaſurer of his Court of Augmentations of the Revenues of the Crown for the Time being, of ſuch his Treaſure of the ſame Revenues, as ſhould remain in the Hands of the Treaſurer at two Times in the Year, &c.

Court of *Augmentations.*

The chief Objection againſt this Caſe is, That there the Grant was under the Seal of the Court of Augmentations, which was incorporated with the Court of Exchequer; but that I deny, for that Court was never legally united to the Court of Exchequer, as was adjudged in Dyer, 216. So that the Objection, That Sir Tho. Wroth's Grant was under the Seal of the Augmentation-Court, and under the Survey of it, is gone.

Then it does not appear to me, that ever the Court of Augmentations had any Power expreſly given them to relieve the Grantees of ſuch Rents. I have looked over the Act of Parliament, by which that Court is conſtituted, but I cannot find any ſuch Power: But I think, the Court of Augmentations did proceed in ſuch Manner, that it might be alſo reputed a Court of Exchequer; and the Court of Augmentations is by expreſs Words made a Court for the new Revenues that ſhould come to the Crown, which are exempted from the Juriſdiction of the other Court; But that which I infer from hence is, That if this new Court of Exchequer did in ſome Caſes relieve Grantees of Rents, &c. certainly the old Court of Exchequer ſhall have the ſame Privilege.

There are other Courts which have alſo proceeded in the ſame Manner; as the Court of Wards did uſually hold Plea of theſe Matters. 2 Croke 78. Queen Elizabeth granted to Allen under her Great Seal, an Annuity of 40 l. per Ann. to be paid by her Receiver of the Court of Wards. This being payable by the Receiver, is in the Nature of a Rent-Charge. So the Court of Surveyors, erected by 33 H. 8. did proceed in the ſame Manner, and relieve Grantees of Rent-Charges, &c.

As to Nevil's Caſe alſo in Plowden, I take it likewiſe to be a full Authority in Point. An Yearly Rent-Charge of 3 l. 10 s. was granted to Sir H. Nevil, and another for the Exerciſe of the Office of Keeper of a Park, out of a Manor for their Lives; one is attainted, the Manor comes to the Poſſeſſion of the King; the King ſhall neither have the Office nor the Rent: And the Arrears of the ſaid Annuity were paid to Sir. H. Nevil at the Receipt

Receipt of the Exchequer by the Hands of the Treaſurer and the Chamberlain.

Firſt, I grant that thoſe Lands were alſo under the Survey of the Court of Augmentations; but that I conceive makes nothing againſt me for the Reaſons before-mentioned.

There are ſeveral other Records which have been already quoted, but I ſhall not trouble you with the Repetition of them. I ſhall only mention ſome few which I think have been omitted, as Trin primo Mar. Rot. 126. 2 El. Rot. 145. Mich. 13. Q. Rot. 347. Hill. 13 El. Rot. 143. P. 1 Q Rot. 108. In all theſe Records it alſo appears, that Money iſſued out of the Exchequer, by Order of the Court of Exchequer; and it is highly reaſonable that they ſhould have ſuch a Power.

Money iſſuing out of the *Exchequer* by Order of the *Exchequer*.

Suppoſe the King purchaſeth Land that is charged with a Rent, the King muſt take the Land together with its Burden; but in ſuch Caſe it would be too hard to drive the Grantee of the Rent to his Petition of Right to the King: No, certainly he may come to the Court of Exchequer by way of Petition to the Barons, who may give him Relief.

It has been objected, That Money which once comes into the Exchequer can never be taken out; Reg. 193. But if this is true in a general Senſe, that none of the King's Revenues that are brought into the Exchequer can be paid out, this would deſtroy all Annuities, Rent-Charges, and other Payments which the Crown is obliged to make.

It is true, if a Man be outlawed in the King's Bench, and the Party's Goods are ſeiſed into the King's Hands, and then the Outlawry is reverſed, there can be no Reſtitution. The Reaſon of this is, for that the Court of King's Bench cannot ſend a Writ to the Treaſurer; and the Court of Exchequer have no Record before them to iſſue out a Warrant for a Reſtitution. So if an Attainder be reverſed, the mean Profits taken into the Exchequer cannot be reſtored for the ſame Reaſon; and alſo for that the King cannot be made a Diſſeiſor, and the Statute gives a Remedy only as to Parliament.

Reſtitution of outlawed Goods, and on Attainder.

There remains after all a great Objection, had it any Weight, and that is, Cui bono? If the Patentees ſhould have Judgment for them, what will it ſignify if they cannot come at any Money?

As to this, I do think, that as ſoon as the Writs are delivered to the Officers of the Exchequer, I mean the Treaſurer and Chamberlain, the Property is altered, and the Officers become Debtors to the Parties, as appears by 2 H. 7. So as ſoon as a Fieri facias is delivered to the Sheriff, and upon it

Goods are levied, the Property of the Goods is altered, and the Sheriff becomes a Debtor to the Plaintiff: So an Action of Debt will lie upon a Liberate, and so it has been adjudged.

Action of Debt on a *Liberate*, and why. *Vide ante* 13, 14, 48.

I shall only observe one Thing more, and so conclude, and that is in Answer to my Brother who argued last; for he struck very hard at the Judgment given by the Barons. He thought that it was very erroneous, and therefore void; but with Submission, I take this Judgment to be as well as it can be: And whereas it is said in the Judgment, That the Money shall be paid by Commissioners and Chamberlain of the Treasury, it must be understood of the Receipt of the Treasury, and not of the Lord High Treasurer; which Office is long since expired.

As for the levying of the Tallies mentioned in the Judgment, it does not hurt, it is at most but Surplusage; but that which I insist on is, That though this Judgment, in Respect of Form, or any material Point of it, should be erroneous, yet if your Lordship should be of Opinion in the two first Points with me, you will then give a new Judgment, such as the Court of Exchequer ought to have given, for that is the Law of this Place, as appears by 31 Ed. 3. And this last Point was so ruled upon a Debate in the House of Lords, and was the Case of the King *and* Sainthell, 30 Car. 2.

So that upon the Whole I am of Opinion, That the Judgment given by the Barons ought to be affirmed.

But afterwards the Lord Keeper was of Opinion to reverse the Judgment, and accordingly it was reversed. The Ground upon which he gave his Opinion was, That the Patentees had not taken a proper Remedy by Petition to the Barons, who have no Power or Control over the King's Treasury, &c. and that their only Remedy was by Petition to the King himself. He insisted much upon the same Reasons and Grounds which my Lord Chief Justice Treby went on.

Petition to the King, and not to the Barons.

DE

Term. Sancti Mich.

Anno 7 Will. III.

Buſh *verſus* Allen.

Vide S. C. 1 *Salk.* 228. *South* verſus *Allen.* *Vide Poſt*, 98, 101. Deviſe of Rents and Profits to be paid by Executors.

THE Point is this: A Man deviſeth to Jane Shore the Wife of J. S. the Iſſues and Profits of certain Lands to be paid by his Executors: Whether this be a Deviſe of the Land to her for Life, is the Queſtion; or whether the Executors ſhall receive the Profits to the Uſe of the Deviſee?

Chief Juſtice. To be paid by the Executors to her, ſhews the Teſtator's Intent, that the Husband ſhould have nothing to do with it. Why ſhould not this be a Deviſe to the Executors for her Life, upon Truſt to pay the Profits to her? And this is fully to perform the Will; the Intent of which was to exclude the Husband wholly. Adjourn'.

At another Day.

Chief Juſtice. The Queſtion is, If this be a Deviſe of the Lands to his Wife for her Life, and that the other Words ſhall be void; or whether it ſhall be to the Executors for her Life? It ſeems to me to be a Deviſe to her; for a Deviſe of the Rents and Profits is a Deviſe of the Land it ſelf; and if this ſhall not be conſtrued a Deviſe to her, then the laſt Words contradict the former; and then you will make a Deviſe by Implication to the Executors againſt an expreſſive Deviſe before.

Deviſe of Rents and Profits is of the Land. *Vide Yelv.* 73. 1 *Cro.* 368. 3 *Cro.* 674, 734.

Rokeby, Juſtice. But then the Husband ſhall intermeddle where the Deviſor intended to exclude him. Moore 753. Griffith *verſus* Smith is the Caſe that I rely upon. A Man poſſeſs'd of

a Term for Years of Lands, devised the Profits thereof for so many Years as he should live, and after he devised the Profits thereof to twenty of his poor Kindred; and that after the Death of his Wife the Lands should be let by the Advice of his Overseers, and the Rent distributed to his said poor Kindred, and made his Wife Executrix. Resolved by all the Judges in the Exchequer-Chamber, That although a Devise of the Profits is a Devise of the Land it self, if there be no other Circumstance in the Case, yet because the Devisor hath declared, that the poor Kindred should not have the Property of the Term, and he appoints a Lease to be made for Rent, the Executor hath the Term upon the Consideration to make the Lease and Distribution, and the poor Kindred had only a Trust, and no Interest.

Vide 1 *Salk.* 228. *contr.* which seems a Mistake.

Chief Justice. In that Case it remained in the Executor, and not in the Devisees.

Eyre, Justice. I think the subsequent Words make it a Devise to the Executors in Trust for the Wife.

Judgment pro Defendant, Chief Justice dissentiente.

S. C. 3 *Lev.* 401. 1 *Salk.* 54, 253. Dower of a *Caput Baroniæ.* *Vide Co. Lit.* 30. b. 31. b. *Glanv. lib.* 6. *cap.* 1. *Bract. lib.* 2. *fol.* 92, 93, 96. *Brit. cap.* 101, 103. *Fleta. lib.* 5. *cap.* 22, 23.

Lord Gerard's *Case.* B. R. *on Error.*

LADY Gerard brought a Writ of Dower, and demands the third Part of a Capital Messuage called Bromley-Hall. Defendant pleads, That Time out of Memory it had been called as well by the Name of Gerard's Bromley as Bromley-Hall, of which Sir Thomas Gerard Knight was, 1 Jac. 1. seised in Fee; and was by the said King James created Lord Gerard of Gerard's Bromley, he being Resident and Commorant with his Family in the said Capital Messuage; and the said Messuage then became Caput Baroniæ suæ, and derives the Title of the Messuage and Barony to himself by divers Descents, and demands Judgment if she shall be endowed of it, and avers, that he had assigned to her a third Part of his other Lands, &c.

The Demandant demurs generally, and the Court of Common Pleas gave Judgment for the Demandant.

And now a Writ of Error is brought in B. R.

Counsel for the Plaintiff in Error:
With Submission this is an erroneous Judgment.

The Reaſon of the Judgment in the Common Pleas was, that now there is no ſuch Thing as Caput Baroniæ; but I hope to prove there are at this Day many Capita Baroniæ, and that they are exempted from Dower: And this appears in the firſt Inſtitutes, 31. b. Bract. Lib. 2. 93. Fitz. Tit. Dower, 80. 4 H. 3. Rot. 7. Britt. 247. Mr. Dugdale's Summons to Parliament. Of the Capital Meſſuage the Wife ſhall be endowed, ſi non ſit Caput Comitatus ſive Baroniæ; and that this Privilege is Perſonal, appears in 1 Inſt. 16. 2 Inſt. 9. Selden Tit. of Honour, 552, 557. The ancient Way of Creation of Barons is altered: The King ſeldom creates a Baron, and gives Manors, &c. ad ſuſtentandum Nomen & Onus, (viz.) to give him Lands to hold of him in Chief, but grants an Annuity.

Vide Co. Lit. 9. b. 16. b. 31. b. 4 *H.* 4. *Fitz. Dower* 123, 180. 9 *H.* 7. 1. *Bro. Dower* 102. 2 *Cro.* 18.

The ancient Way of creating Barons altered.

It is objected, That where a Woman is once intitled to Dower, the King cannot deprive her of it, yet he may do it obliquely by this Means of making a Barony; ſo the King cannot exempt a Man from Arreſts, or being on Juries; yet he may create a Man a Nobleman, and then he ſhall be exempted from all Arreſts, and from ſerving on Juries.

Another Objection is, That ſhe ſhall have an Equivalent: But indeed that I take to be abſurd; for either ſhe has a Right or not; if ſhe has a Right, then there needs no Equivalent.

As for the Recompence ſhe has in Lieu of this Dower, ſhe has the Honour of being a Counteſs; and there are many Women in England would be contented to loſe a great Part of their Dower to be made Counteſſes.

Then I take this Judgment to be ill, becauſe of the double Amerciament that is laid on my Lord Gerard; and for this I rely on the Reſolution in 5 Rep. 58. Specot's Caſe, That one ſhall not be twice amerced in one Action againſt one and the ſame Tenant, where the Defendant pleads ſeveral Iſſues, and are found againſt him.

And prayed that Judgment may be reverſed.

Wright, Serjeant, econtra.

By theſe Pleadings, it is not ſhewed how this Houſe was made Caput Baroniæ, ſo that your Lordſhip may judge it to be ſo.

It is ſhewed, that Sir Thomas Gerard was made a Baron, but it is not ſaid there was any Barony made; and that there may be a Baron without a Barony, appears in Magna Chart. cap. 2. 2 Inſt. 9. where it is ſaid, the Heir of a Baron ſhall pay no Relief, unleſs he had a Barony. The Legal Conſtitution of a Barony is, when the King doth create certain Lands to be a

Legal Conſtitution of a Barony.

Barony, and they were generally Caſtles fit for the Defence of the Realm.

It is very ſtrange, that becauſe Sir Tho. Gerard was made a Baron, that therefore his Houſe muſt be a Barony, and that his Wife muſt be deprived of her third Part of it, to which ſhe had once a good Title: Coke ſaith, in Chapter of Dower, the Wife ſhall be endowed of all Meſſuages, and this is one.

As for the Indecency that the Wife might convert her third Part to an Inn, or introduce Inmates, &c. the ſame may be ſaid of a Commoner, but was never any Objection.

As for the Authority of my Lord Coke in his 1 Inſt. it is not his own Opinion, but only cited as the Opinion of thoſe ancient Authors. It is ſaid in the Comment on Magna Charta, That the Wife ſhall have her Quarantain in the Chief Seat of her Husband, niſi ſit Caſtrum, or Caput Baroniæ; ſo that they are the ſame, for their Chief Seats were frequently Caſtles, and in ſuch Caſe ſhe ſhould not have been endowed; but where ſhe ſhall have her Quarantain, there ſhe ſhall be endowed: That is a Rule. As for the double Amerciament, it is true, a Man ſhall not be twice amerced for the ſame Thing; but here the Demand is of two ſeveral Things. 1. Of the Hundred and Rents upon which Judgment was preſently given. 2. For the Houſe; and upon this my Lord Gerard has ſpecially pleaded, and we have Judgment on the Demurrer to that ſpecial Plea. I pray Judgment may be affirmed.

Baronies, what? *Vide Lib. Feud. lib. 2. Tit. 39. Seld. Tit. Honor.* 880, 883. *Doddr. of Hon. &c.*

Holt, Chief Juſtice. What is the Barony? It is not becauſe it is the Chief Houſe. Baronies were anciently out of Places. A Barony is when the King gives Lands or Rents to the Perſon he deſigns to make a Baron, and thoſe he is to hold per Baroniam; and in ſuch Caſe ſomething might be ſaid to exclude a Woman from Dower; for there were Caſtles alſo generally granted to do Service to the King: But indeed ſince the Time of R. 2. that Barons have been created by Patents, there have been few Baronies made.

Then how can this Houſe be made a Barony, that was always in the Family of the Gerards; and here it was no Caſtle neither?

Rokeby, Juſtice. When a Barony was anciently granted, there was a Caſtle with a Territory alſo granted. Suppoſe there be a Barony of Stafford, and all the Houſes in the Town of Stafford belonged before to the new Baron, which Houſe ſhall be called Caput Baroniæ?

Chief Juſtice. As for the double Amerciament, there may be ſeveral Amerciaments for ſeveral Offences; the Reaſon of the Amerciament is the Delay, and if the Defendant comes in at the firſt Day, it muſt be entered of Record, or it ſignifies nothing. Suppoſe there be an Action brought on two Deeds, and non eſt Factum is pleaded to one, and a Special Plea to the other, and Judgment is given for the Plaintiff in both Caſes; why certainly, here ſhall be ſeveral Fines, if they enter ſeveral Judgments: It is true, if they enter but one Judgment, there ſhall be but one Capiatur. So it is of Actions of Aſſault and Battery againſt two, and the one juſtifies, and the other confeſſeth the Action. Amerciament.

Judgment was affirmed.

Winchurſt *verſus* Maſely.

MR. Carthew moved for Leave to quaſh his own Writ of Error to reverſe a Fine, becauſe one of the Parties to the Fine is omitted in the Writ of Error. One of the Parties to the Fine omitted in the Writ of Error to reverſe it.

Chief Juſtice. We cannot do it. How can we take Notice of any Thing but what is on Record? We cannot quaſh it on a Foreign Suggeſtion.

There was a Caſe in Pemberton's Time, where a Fine was levied by three, and two of them brought Error to reverſe it; perhaps the other had nothing in the Land, and it was reverſed. *Vide* 1 *Salk.* 49, 88.

But this is to be conſidered, That if a Man be intitled to be Tenant by the Courteſy, and he joins in a Fine with his Wife of thoſe Lands; whether his Title to be Tenant by the Courteſy, is not extinguiſhed if the Fine be reverſed after her Death. Indeed, if the Fine is reverſed in her Life-time, he may have a new Title: If the Husband makes a Feoffment on Condition of his Wife's Land and ſhe dies, and then the Condition is broken: Shall he be Tenant by the Courteſy?

Then you can't have any Coſts if the Party enters a Non Pros'; for the Statute gives Coſts on a Writ of Error only when it is in dilatione Executionis. Coſts on a Writ of Error.

We cannot let you quaſh it: But let them ſhew Cauſe why you ſhould not diſcontinue. Writs of Error are rarely diſcontinued, but ſometimes they may be. 1 *Salk.* 194, 195.

Daſhwood's

Debt on Judgment in *B. R.* Error pending in the *Exchequer-Chamber* pleaded. 1 *Sid.* 236, 253. *Pal.* 187, 303. *Ray.* 100. 1 *Lev.* 153. 1 *Mod.* 121. 2 *Mod.* 194. Contribution to Scavengers Rates. *Vide* 2 *Saund.* 423. 2 *Inſt.* 653, 702. 2 *Rol.* 289. *Cro. Eliz.* 659, 843. 1 *Bulſt.* 20. 2 *Rol. Rep.* 262. 5 *Co.* 67. 1 *Mod.* 73. 3 *Leon.* 208. 1 *Sid.* 218. *Poſt* 393.

Daſhwood's *Caſe.*

CUR. In Debt on a Judgment here, (in B. R.) Error pleaded pending in the Exchequer Chamber, is good in Abatement; but if the Defendant concludes, non debet reſpondere quouſque, it is not good, for we have no Re-ſummons.

Lewſly *verſus* Budd.

Chief Juſtice. This Caſe ſtands for the Reſolution of the Court.

It is on two Orders grounded on 2 Wil. & Mar. For Scavengers Rates for Cleanſing the Streets of *Newington.* One Order ſaith, That all the Inhabitants ſhall contribute to it; the other ſaith, That only thoſe that live on the Pavement ſhall contribute: And the Queſtion is, which of them is good?

We are of Opinion, that all the Inhabitants ſhall contribute.

For though it may be thought hard, that they ſhall pay any Thing towards the Pavement who do not live on it; yet the Words of the Statute are ſo ſtrong, that it lays the Charge on all the Inhabitants without Diſtinction; and where the Statute doth not diſtinguiſh, we have no Power to do it. Now in Newington, there is a Street that is paved, and a great Part of the Town that is not; and there are ſeveral of the Pariſh that live out of the Town, and yet they are all bound to contribute.

Beſides, they that live on the Pavement are bound to pave their own Doors, then they are not exempted from repairing the High-Ways; and therefore it is as reaſonable they ſhould repair the Pavement of which they have the Benefit; and an indefinite Propoſition is equal to a general One.

Then the Statute appoints, That they who do not live on the Pavement, as well as they who do, ſhall ſettle the Rates; and therefore it is reaſonable that they ſhould contribute to their own Rates.

Then the Penalty of the Scavenger is given to the Overſeers generally. How this would be on the Statute 13 and 14 Car. 2. we cannot tell: But on this Statute, all the Inhabitants ought to contribute towards the cleanſing of the Pavement; and therefore one of the Orders is good, and the other is bad, and ought to be quaſh'd.

Walker *verſus* Slackoe. (*Vide ſupra, p.* 16.)

IN a Writ of Error, all the Parties to the firſt Judgment did not join.

Chief Juſtice. The Queſtion is, If this Writ of Error be amendable? It appears here that the Writ of Error is not good, for all the Parties to the firſt Judgment ought to join in Error, and it appears they have not done ſo here; for it not being ſaid, he that is omitted is dead, the Writ of Error is ill: But ſuppoſing that this is only a Miſtake of the Curſitor, the Queſtion is, If it be amendable? And we are of Opinion that it is not, becauſe this is a Writ to reverſe a Judgment; and the Statutes were only made to amend Writs for the Support of the Judgment. So is 8 H. 6. c. 12.

But if this Fault were amendable, yet we think it muſt not be at the Motion of the Defendant; for no Man can pray to amend another's Plea or Writ; he may take Advantage of it, but cannot pray to have it amended: For every Man may ſue or plead as he thinks fit, but this would force him to ſue in another Manner, and it is not within any of the Statutes.

The ſecond Point is grounded on the Reaſon in Blackamore's Caſe, 8 Rep. 158. b. they have Power of Amendment in Affirmance of Judgments. And in no Caſe whatever did the Court amend to ſet aſide a Judgment, but only to ſupport it; and that was the Deſign of all the Statutes.

Writ of Error where the Parties to the firſt Judgment did not join, not amendable. *Vide* 1 *Sid.* 104, 138, 139, and 193. 1 *Lev.* 99. 3 *Co.* 2. 1 *Mod.* 153. Amendment. 6 *Mod.* 276, 285, 286.

Cur. Let the Writ of Error be quaſh'd.

Chamberlaine *verſus* Hewſon.

S. C. 1 *Salk.* 115.

THE Caſe here was this: Mrs. Hewſon, the Wife of Colonel Hewſon, ſues the Plaintiff Mrs. Chamberlaine in the Spiritual Court for Adultery with her Husband, and had Sentence there, and recovered Coſts againſt her 80 l. Then Mrs. Chamberlaine procures a Releaſe of Colonel Hewſon under Hand and Seal; notwithſtanding which, the Wife proſecuted her in the Court-Chriſtian for the Coſts. Upon which it was moved here for a Prohibition, ſuggeſting that the Eccleſiaſtical Court had no Conuſance of this Deed of Releaſe.

The Husband's Releaſe to bar the Wife of her Coſts in the *Spiritual Court*. *Quære* 2 *Lev.* 161. 1 *Sid.* 346. 1 *Salk.* 115, to 119, 207.

Wright, Serjeant, argued, That no Prohibition ought to go to the Spiritual Court, for that they had Conuſance of all this Matter, and that it was a Rule in Law, Ubi cognitio Principalis, ibi cognitio Acceſſarii; ſo that it is not material, whether the Releaſe be good or not: But the Point is, Whether this Court will think fit to meddle with it, ſince the Original Cauſe is cognoſcible by the Spiritual Court? There is a Caſe in Roll. Abr. 300. Tit. Prohibition, where a Releaſe was likewiſe pleaded in the Spiritual Court as it is here, and a Prohibition was denied; and if in ſuch Caſes the Husband's Releaſe ſhould be good to bar the Wife of her Coſts, all Suits of this Nature would be eluded; for it is the Coſts that are reckoned the moſt grievous Puniſhment in this Court: There are but two Sorts of Puniſhment there, Penance and Coſts; and the Penance too may be diſpenſed with for Money.

2 *Salk.* 551, 552.

Sir B. Shower, econtra. We hope that a Prohibition ſhall go, ſince the Eccleſiaſtical Court has refuſed to allow this Releaſe, which with Submiſſion they ought not to do; for the Coſts, as ſoon as they are paid to the Wife, belong to the Husband; and therefore he may releaſe them before they are paid.

So the Rule put by Mr. Serjeant, is fallacious; for in many Caſes they cannot proceed in the Spiritual Court, though the Original Cauſe be within their Juriſdiction. So is Yel. 39. Goodwin's Caſe; Executor enters into a Bond to pay a Legacy, he is ſued in the Spiritual Court as for a Legacy, Executor pleads Payment according to the Bond, they would not allow the Plea; a Prohibition was granted; for the Executor by giving Bond for Payment of the Legacy had extinct the Legacy, and made it meerly a Debt at Common Law. 3 Cro. 309. A Feme divorced Cauſa Adulterii of the Husband, ſues in the Spiritual Court for a Legacy: Defendant pleads the Releaſe of the Huſband made after the Divorce, which was diſallowed in the Spiritual Court; a Prohibition was granted; for this Releaſe was good, for they remained Man and Wife notwithſtanding the Divorce. 2 Rol. Abr. 301, 292. therefore we pray that the Prohibition may ſtand.

Prohibition to the *Spiritual Court*, in what Caſes.

Chief Juſtice. After that Rate they ſhall try the Validity of Letters Patents, and of Feoffments, &c. if they have Conuſance of the Original. Indeed, if they make an ill Conſtruction of the Law, we'll prohibit them; ſo if they would not allow a Releaſe unleſs proved by two Witneſſes, we would prohibit them;

them; as in the Case of Shotter and Friend The Spiritual Court are confined within their Compass, and if they go beyond their Line, we will fetch them back by a Prohibition; for under that Notion of Ubi cognitio Principalis, ibi cognitio Accessarii, they may do as they please, and so subvert and destroy the Common Law. Indeed, if the Suggestion had been that they refused to receive this Plea, it might be something.

Rokeby, Justice. Sir Bartholomew Shower, your Client does not deserve any Favour; but she must have Justice. *Vide 2 Lev. 161. 1 Sid. 346. 1 Salk. 115, &c.*

At another Day, this Matter being again stirred:

Chief Justice. If a Feme Covert sues sole in the Ecclesiastical Court for Defamation, as she may, if she cohabits with her Husband, he may release the Costs; but if they are divorced a Mensa & Thoro there in such Case, or of Incontinency, &c. he cannot release the Costs; and the Reason is, if they are divorced a Mensa & Thoro, the Husband allows his Wife Alimony, and the Costs of the Suit are out of the Alimony; and therefore he cannot discharge one more than the other. 2 Roll. 301. Motam's Case is the very same, and the same is in Bulstr. Baron and Feme divorced Causa Adulterii a Mensa & Thoro; the Feme sues in the Ecclesiastical Court sole against one for Slander. Sentence is for her, the Husband releaseth all Actions, and this very Suit, &c. The Defendant pleads this Release in the Ecclesiastical Court, which was disallowed, yet no Prohibition was granted; in Case of a Legacy aliter, yet if the Suit be there for a Legacy devised to the Wife, which is originally due to the Baron and Feme, and is not a Part of the Alimony, he may release the Suit and also the Costs, because he may discharge the Principal.

Feme Covert sues for Defamation, the Husband may release the Costs, except in Case of Divorce.

Of Suit for a Legacy.

My Opinion is, That there should be a Prohibition in this Case. But here you say Alimony is sentenced to Hewson's Wife; prove that, and then it is in our Discretion not to grant a Prohibition: As if it is suggested, that the Party is cited out of the Dioces, we prohibit them; but on Proof that it is upon Request to the Archbishop, as is the Exception in Stat. 23 H. 8. we can stop the Prohibition.

Bonoyon *versus* Palmer.

One Joint-tenant distrains alone for Rent, how to avow. *Vide ante* 25, *&c. Post*, 73, 141.

Carthew. This is on Replevin, in which the Defendant avows in his own Right; and it appears, that B. assigned a Rent to thirteen, four of which are dead, and the Defendant is

Of a Joint-conuſance by Tenants in Common. *Vide ante* 25, 26, &c.

is one of the nine Survivors, and avows the taking the Diſtreſs in his own Right, becauſe the Rent is Arrear, which he cannot do; but it ought to be in his own Right, and as Bailiff to the reſt, and they ought not to have ſevered.

Northey. This is but Form. If we had avowed for a ninth Part, it had been ill in Subſtance, becauſe there is no ſuch Thing as a ninth Part; but on this ſpecial Matter ſhewn in the Avowry, it is but Form, and one Joint-tenant by Law may take the whole Profits of all the reſt, and his Diſcharge of it is good. Co. 2. 68. 2 Cro. 282. Bowles *verſus* Poor. Payment of Rent to one Joint-tenant, is good. Rent-Charge granted to a Feme-ſole, which is Arrear, and ſhe marries; the Avowry ſuppoſeth 20l. to be in Arrear, not paid to Baron and Feme, was held good.

Carthew. One Joint-tenant cannot diſtrain for all the Rent alone, for they muſt all join in Avowry, and ſo muſt Tenants in Common even for Damage-feaſant.

Rokeby, Juſtice. It ſeems to be but Form, for one Joint-tenant may take all the Profits.

Chief Juſtice. If all ought to join, then it is not Form, but Subſtance; for it ſhews, that the Rent is not taken in the ſame Right, it was Arrear; but the Queſtion is, If they needs muſt join? All the Entries are, That they do join not as Bailiff to the reſt, but as Joint-tenant, and he avows the taking of the Rent as in Lands liable to the Diſtreſs of him and the reſt; if he had ſaid, To his Diſtreſs only, it had been bad; becauſe the Rent is not due to him only, but to him and the reſt: But he need not avow as Bailiff to them, for he needs no Authority from the reſt to diſtrain, but he may do it by Law; and ſo the Defendant has avowed here as in Lands liable to the Diſtreſs of himſelf and the reſt.

Carthew. Then it is not ſaid through the whole Record, that they were ſeiſed in Fee; but it is only generally, that they were ſeiſed.

Chief Juſtice. They ſhould have ſaid ſo: for tho' by Intendment, ſeiſed may be taken to be in Fee, yet they ought to ſhew it: But however, this here is well enough; for you ſay, the Rent

was granted to them and their Heirs, and that they were ſeiſed of it, which muſt be underſtood in Fee.

One Joint-tenant may diſtrain for the whole in Point of Intereſt, and not have any Authority from the reſt as Bailiff; for then he is to render an Account.

Carthew. Then they ſay, the Locus in quo is Parcel of the Tenements hereafter mentioned, which he ſhews to be in ſeveral Pariſhes, and does not ſhew in which Pariſh the Locus is.

Chief Juſtice. That is not ſo well as it ought to be.

At another Day.

Carthew. As to Wiſe and Bellant's Caſe, 2 Cro. Eliz. 442. which was in Replevin, the Defendant avows, becauſe his Anceſtor was ſeiſed in Fee, and let the Land in qua, &c. for Years rendring Rent; and for Rent due to him and his Wife, he avows the Taking. Verdict for the Avowant. Exception was taken in Arreſt of Judgment, becauſe the Baron ſole avows, and did not join the Wife with him; whereas it appears, the Rent was due to him and his Wife, and he ought not to avow in his own Name only; but becauſe he ſhewed the Truth of the Matter as it is, and did aver the Life of the Wife, and ſo the Diſtreſs well taken by him, the Avowry was adjudged good enough: That was, becauſe the Rent belonged to him; but if it had not been in the Caſe of Joint-tenants, it had not been good.

Chief Juſtice. Suppoſe one Joint-tenant ſhould bring Debt for Rent, and it appeared that the other was alive, it ſhould be bad. He may diſtrain alone, but then he muſt avow in his own Right, and as Bailiff to the other; and then the Return muſt be adjudged to him in his own Right, and as Bailiff to the other, in which Caſe he is accountable to the other: But if we give Judgment for him in this Avowry, we muſt adjudge the Return of the whole to him in his own Right; and tho' Payment to one Joint-tenant is ſo to the other, yet we muſt not give Judgment for him alone, to have it all in his own Right.

One Joint-tenant diſtrains alone for Rent, how to avow. *Ante* 25, 71.

I think the Avowry ought to abate; but this being upon a Demurrer, the Queſtion is, If we ſhall give Judgment that the whole Avowry ſhall abate, and to begin de Novo; or only that it ſhall abate, and there be a Repleader?

Poſt, 77, 78.

Per Cur. The Avowry is naught.

Reynolds *verſus* Osborn.

Stat. 22 & 23 *Car.* 2. No more Coſts than Damage. *Vide* 2 *Lev.* 124, 125.

COunſel moved for Coſts on a Verdict in Treſpaſs, for breaking his Cloſe, and breaking his Soil, and 1 s. Damage given; for he ſaid it was not within the Statute of 22 & 23 Car. 2. c. 9. which does not extend to voluntary, but involuntary Treſpaſſes only; as walking over the Ground.

Econtra. There have been Attempts to turn Treſpaſs into Caſe, to get Coſts; but no Coſts ſhall be given in this Caſe more than Damage, unleſs the Judge who tries it, certifies that the Title was in Debate. I agree, that if the Defendant takes away any Thing, he ſhall pay Coſts; but here was only a little Digging; if he had carried away the Soil, then indeed the Plaintiff ſhould have Coſts.

Rokeby, Juſtice. I remember a Caſe in B. C. where it was ſaid Quod ſolum ſubvertit cum aratro, and Coſts were allowed; And what Difference is there in that from this?

Chief Juſtice. Ploughing a Man's Soil is quite another Thing; the Statute extends to Treſpaſs on the Freehold, and not to any Treſpaſs on Goods and Chattels: 'Twill be an hard Matter for you to get Coſts here. In the Caſe of per quod Servitium amiſit, the Coſts are not there given for the Battery, but for the Degree of it, (viz.) the Loſs of the Service.

Adjorn.

The King *verſus* Davis *and* Carter.

S. C. 3 *Salk.* 461. 3 *Lev.* 426, 427. *Vide* 2 *Salk.* 514, 689.

DAVIS and Carter being convicted for forging a Bill under the Seal of the Bank of England, and having ſtood in the Pillory for it, were now brought up to the King's Bench, and prayed, That they might be turned over to the Marſhalſea, becauſe the Sheriff of London oppreſſed them in Newgate; where they were detained till they paid the Fine, &c. and their own Affidavits were offered to prove the Oppreſſion.

Chief Juſtice. See Co. Lit. 6 b. and Hale's Pleas of the Crown. If a Man has had an infamous Judgment, and has ſtood on the Pillory for an Offence, which is contrary to the

Faith, Credit, and Truſt of Mankind, as Forgery is, he cannot be a Witneſs in any Cauſe. Hale ſaith, If he has ſtood on the Pillory, he cannot be a Witneſs; but that is to be underſtood for an infamous Judgment: But if a Man be convicted for a Libel, and has ſtood in the Pillory for it, yet perhaps he may be a Witneſs.

One that has had Infamous Judgment, cannot be a Witneſs. *Ante* 15. 2 *Salk.* 461, 513, 514, 689, 690. 3 *Lev.* 426, 427.

Shower. Canning who was convicted for a Libel and ſtood on the Pillory, was allowed to be a Witneſs before the Delegates, my Lord Chief Juſtice Treby, and other Judges being there; and ſo Aaron Smith was an Evidence in Crosby's Caſe.

Chief Juſtice. Aaron Smith was pardoned, and we gave no Opinion to this Point: But for my Part, I don't underſtand the Nature of his Offence; it was only for giving Stephen College Notes how to defend himſelf on his Trial.

In the principal Caſe, the Affidavits were not read: But the laſt Day of the Term, the Court ordered the Sheriffs to return Money which they had taken from them; and remanded them to Newgate.

Lewiſſe *verſus* Maſters.

Poſt, 92, 93. Creditor attacheth Money in the Garniſhee's Hand, before Letters of Adminiſtration taken out. Cuſtoms of *London*. *Poſt*, 93, 160, 440.

J. S. dies Inteſtate in London, and Godſprit his Creditor attaches Money in the Garniſhee's Hand, and it is condemned before any Adminiſtration actually granted, it being at that Time conteſted before the Archbiſhop.

Sir B. Shower. I take this Manner of Proceeding to be good by the Cuſtom of London. It is true, their Cuſtoms are different from the Laws of the Land, and yet are good, for they are confirmed by Acts of Parliament; ſo General Indebitatus Aſſumpſits are good by the Cuſtom of London, &c.

Chief Juſtice. 'Tis one Thing if a Cuſtom be different from the Law, and another Thing if it be repugnant to it and unreaſonable. I confeſs, the Cuſtom of Garniſhment is reaſonable, for there are two Debts diſcharged by it: For if A. be indebted to B. and C. be indebted to A. now C. ſtanding againſt B. in Lieu of A. by the Payment of that Debt by C. to B. both the Debts to A. and B. are diſcharged and ſatisfied. Now in this Caſe, A. hath at the ſame Time a Remedy to recover againſt C. which by the Cuſtom is transferred to B. but in our Caſe, the Creditor Godſprit would have Remedy againſt Maſters the Garniſhee,

The Cuſtom of Garniſhment.

niſhee, when the Archbiſhop had none, and would diſcharge the Garniſhee againſt the Archbiſhop, who had never any Claim againſt him, which certainly is abſurd, and wholly differs from the other Caſe; for there A. had a Charge againſt C. and by his Payment to B. C. is diſcharged from A. But there can be no Cuſtom to ſupport this Caſe; for Cuſtoms that overthrow the Principles of Law, and which are unreaſonable, are to be rejected.

Dec. Here the Ordinary had the Goods in his Hands, and had intermeddled; And why ſhould he not be charged? The Cuſtoms of London are in many Caſes different from the Common Law; ſo an Executor is chargeable there, upon an Action of Debt grounded on Simple Contract; and the Judgment in ſuch an Action has been allowed to be a good Bar here.

Chief Juſtice. So it is, as was adjudged here in the Caſe of Palmer and Lawſon twelve Years ago.

But here was a Trick too, to put in a Caveat to the granting of Adminiſtration till the Plaint was finiſhed.

Rokeby. Can you charge any one by this Cuſtom that is not a Debtor? And here the Archbiſhop is no Debtor.

Chief Juſtice. At another Day.

We think in this Caſe, that the Debt was not well attached; for the Ordinary had no Way to recover the Debt, nor had any Thing to do with it.

Let the Plaintiff have Judgment.

Gardner *verſus* Hobbs.

THIS is an Action of Treſpaſs, and the Defendant juſtifies by Vertue of the Stat. 43 Eliz. for the Poors Rates, &c. The Plaintiff was nonſuited, but no Damages were found; therefore Counſel moved for a Writ of Error.

Nonſuit in Replevin; the Jury ſhall find Damage for the Avowant. See the following Caſe, and *Poſt*, 118, 119.

Chief Juſtice. I remember a Caſe, where, upon an Action of Detinue, and upon Iſſue Non Detinet, the Jury did not enquire of the Value, and afterwards we granted a Writ of Enquiry. It is every Day's Practice, That if the Plaintiff in Replevin be nonſuit, the Jury ſhall find Damages and Coſts for the Avowant.

Harcourt

Harcourt *and* Weekes.

WHICH was a Caſe of the ſame Nature with the former.

Holt, Chief Juſtice. We are of Opinion, That the Omiſſion of the Jury to enquire of the Damages on a Nonſuit in Replevin, may be ſupplied by a Writ of Enquiry of Damages; it is true, the Jury might have been charged with the Damages, but ſince they were not, there may be a Writ of Enquiry awarded. 1 Cro. 143. Darroſe *and* Newburt. In Aſſumpſit, the Parties being at Iſſue, a Demurrer was joined upon the Evidence, and ſo the Jury was diſcharged; and after, Judgment was given for the Plaintiff, and a Writ of Enquiry awarded, and Damages found, and Judgment thereupon; and Damages might have been enquired of by the ſame Jury conditionally, but it may be as well enquired of by a Writ of Enquiry, when the Demurrer is determined: And that comes home to this. 1 Rol. Rep. 272. Brampſton's Caſe is the ſame with ours; ſo that it is no new Caſe.

Indeed, in the Caſe of Burton and Robinſon in 1 Sid. 246. where in Detinue the Jury did omit to aſſert the Value of the Goods; the Court did doubt that a Writ could not be awarded, for that it would be againſt the whole Tenor and Reaſon of Cheney's Caſe.

But notwithſtanding, I remember a Caſe about fourteen Years ago, where a Writ was awarded in ſuch Caſe; ſo that I think a Writ of Enquiry ought to be awarded in this Caſe.

Vide 2 *Salk.* 205, 206. And *Poſt*, 118.

Omiſſion of the Jury to enquire of Damages, ſupplied by a Writ of Enquiry.

1 *Roll. Rep.* 272, 284. 2 *Roll.* 212. 1 *Cro.* 143, 357, 446. *Hard.* 166. 1 *Sid.* 380. 1 *Vent.* 40. *Raym.* 170. 1 *Lev.* 255. 1 *Salk.* 205, 206. *Raym.* 124.

10 *Co.* 119.

Johnſon *verſus* Adams, *and others.*

IN Replevin, for taking live Cattle, and ſeveral Stacks of Hay, &c.

Defendants plead, Bene cognoſcunt captionem Averiorum & Catallorum in Loco præd. quia dicunt quod Averia præd. &c. But ſay nothing as to the Chattels; but they conclude, and pray Judgment Averiorum & Catallorum.

Curia. It is ill: For though they make Cogniſance of the Whole, yet they do not anſwer the Whole; ſo that they are ſhort in their Juſtification. If the Diſtreſs be intire, if it is wrong in Part, it is bad for the Whole.

Cogniſance of all, and Juſtification for Part.

Ante 73. The Matter is, what Judgment we ſhall give; whether to abate the Avowry, or that the Plaintiff ſhall recover and have Judgment final? Certainly it is ill, to acknowledge the taking of all, and to juſtifie but for Part.

We will conſider what Judgment to give.

Cudmore *verſus* Tripe.

WRIT of Error on a Judgment given in the Provoſt-Court at Exeter, where the Plaintiff declared in an Indebitatus Aſſumpſit, and alſo in a Quantum meruit: But in the Quantum meruit, doth not ſay, That the Cauſe of Action was infra Juriſdictionem Curiæ.

Infra Juriſdiction.

Carthew. If it had been omitted in the firſt Promiſe, I confeſs it had been ill; but I conceive, the infra Juriſdictionem in the Indebitatus Aſſumpſit goes to all.

Chief Juſtice. Indeed there wants the adtunc & ibidem.

Let Judgment be reverſed.

S. C. 1 *Salk.* 347.

Roe, Kendale, *and others.*

Power of Secretary of State to commit. 1 *And.* 297. 2 *Leon.* 275.

THEY being brought up by Habeas Corpus, it appeared by the Return, that they had been committed by Sir William Trumball, one of the Secretaries of State, for aſſiſting Sir James Montgomery, (who was in Cuſtody for High Treaſon) in his Eſcape.

Sir B. Shower moved, That they might be diſcharged, their Commitment not being legal. Firſt, Becauſe a Secretary of State is no Juſtice of Peace; and as a Secretary of State, he cannot take a Recogniſance to proſecute; and therefore it is ſtrange he ſhould have Power to commit.

'Tis true, ſince Sir Lionel Jenkins's Time, it has been praiſed by the Secretaries of State to take Bond. I have look'd into Ruſhworth's Collections, and I cannot find one Precedent for a Secretary of State to commit any one.

It cannot be preſumed, that Sir William Trumball was a Juſtice of Peace; for it appears that he was Secretary of State, and as ſuch did make the Commitment: And truly, I cannot

ſee but he might as well commit for Murder or Felony, as for High Treaſon.

It is objected, That any Man may arreſt another for Treaſon; and that is true, but then he muſt carry him to a Juſtice of the Peace, which we ſay the Secretary of State is not: But however, though we grant that a Secretary of State has Power to commit; yet, with Submiſſion, in this Caſe they ought to be bailed, ſince they are within the Benefit of the Habeas Corpus Act. For the Commitment appears to be for the aſſiſting the Eſcape of Sir James Montgomery, who was committed for High Treaſon, but was never outlawed nor indicted. And my Lord Chief Juſtice Hale is expreſs, That the Gaoler ſhall not be arraigned for an Eſcape until the Priſoner be attaint; for if the Priſoner be acquit, the Eſcape is diſpuniſhable. Hale's Pleas of the Crown, fol. 110. Gaoler not to be arraigned for an Eſcape, till the Priſoner be attaint. *Dalt.* 331. *c.* 159.

And here the Priſoner cannot be attaint, for he is dead; ſo that they only can be fined and impriſoned.

Then with Submiſſion, to aſſiſt in the Eſcape of one committed for High Treaſon, is not Treaſon, unleſs the Party aſſiſting knew that he was committed for High Treaſon: And if this Offence be but Felony, the Commitment is illegal, becauſe it would have been too generally ſet forth. 2 Inſt. 589. 3 Inſt. 70. If a Priſoner broke Priſon, it was Felony at Common Law, be the Cauſe what it will; but by Stat. 1 Ed. 2. De frangentibus Priſonam, none ſhall ſuffer Judgment of Life and Member, unleſs the Cauſe for which he is impriſoned require ſuch Judgment: And I take it for a Rule, That whatever is not Felony on the Eſcape of a Felon, is not Treaſon upon the Eſcape of a Traytor. 2 *Inſt.* 589, 591. *Cro. J. Benſtead's* Caſe.

Then here it is ſaid, The Priſoner was in Cuſtody of a Meſſenger; but what that is, we know not, there's no Book of Law that takes Notice of any ſuch Perſon.

Then it does not appear what the Offence was, nor that any Treaſon was committed; ſo that we muſt throw our ſelves upon your Lordſhip's Juſtice, and hope, that for theſe Reaſons your Lordſhip will think fit to diſcharge us quite, or elſe to bail us.

Attorney General anſwered, That theſe Commitments by Secretaries of State, had always been received to be good, and that their Office was more ancient than the Priv Council, and that it was clear the Priv Council could commit; and that though the Warrant be not ſo exact, yet it is ſufficient, and it was not like an Indictment, for the Time and Place, and the particular Commitment by Secretary of State.

particular Fact need not be expreſs'd in the Warrant, as they muſt be in Indictments.

Shower. Here the Meſſenger being no Officer in Law, the Party in his Cuſtody may bring falſe Impriſonment againſt him; and then to aſſiſt a Perſon to eſcape in ſuch a Caſe, is no Fault at all, for it was to free him from one that had nothing to do with him.

How the Law takes Notice of a Meſſenger.

Holt, Chief Juſtice. The Law indeed does not take Notice of a Meſſenger; but however, if a Man reſcue another that is carrying to the Gaol by a Meſſenger, or any other Perſon, it is criminal.

Then why ſhould not a Secretary of State have Power by Law to make Commitments? Pray what Authority has a Juſtice of Peace to commit in Caſes of High Treaſon? It is not given to him by any Statute; and truly I cannot tell from whence he derives ſuch an Authority, unleſs it be by Vertue of the old Common Law, which doth authorize Conſervators of the Peace to commit in ſuch Caſes.

Vide 6 Mod. 179.

My Lord Coke does ſeem to intimate, as if a Man could not be committed till he was indicted: But certainly that is a Miſtake; for the conſtant Practice is otherwiſe.

But their ſtrongeſt Objection ſeems to be, That the Nature of the Treaſon is not ſet forth; as whether it be for levying of War, or for conſpiring of Treaſon, or any other Species of Treaſon.

Attorney General. Let the Treaſon be what it will, of whaever Sort it is, to aſſiſt ſuch a Perſon charged with it to eſcape, is Treaſon.

Chief Juſtice. Suppoſe the Treaſon were for Coining, &c. would it be Treaſon to aſſiſt ſuch a Perſon to eſcape?

Mr. Attorney. The Queſtion is, Whether this Man be charged with High Treaſon, as you have alledged it in the Warrant?

Rokeby, Juſtice. Does it appear to us, that this Offence is not bailable?

Holt, Chief Juſtice. I remember my Lord Chief Juſtice Hale, at Norwich Aſſizes, was of Opinion, That a Juſtice of

Peace might direct a Warrant to any Person to execute it; and in a Case that came before him there, the Warrant was directed to the Constable of one Parish, to be executed in another Parish; which was done, and held to be good.

A Justice of Peace may direct a Warrant to any Man to execute.

At another Day this Matter was again debated.

Holt, Chief Justice. In Anderson It was the Opinion of all the Judges, That the Privy Council, or any one of them, might commit; and certainly the Secretary of State is one of them.

Vide 1 And. 297. 2 Leon. 275.

Shower. As for that Resolution, it may well be suspected for Law, it was not judicial: And there have been Instances, where Judges have given different Resolutions under their Hands, from those which they have given judicially when they acted under an Obligation of an Oath; and with Submission, one of the Privy Council cannot commit, for he cannot give an Oath: And it seems against the Reason of our Constitution, That the same Officer should have Power to commit, and yet cannot administer an Oath, which I take to be necessary upon every Commitment; for my Lord Coke, in his 2 Inst. 51. says, That all Commitments must be upon Oath.

Commitment by one of the Privy Council.

Then it is very extraordinary, That an Officer shall have Power to commit, and yet he can neither administer an Oath, nor take a Recognisance to prosecute, nor take Bail, though his Judgment tells him, that the Offence is bailable: This seems very inconsistent.

These extraordinary Commitments are not favoured in our Law; and in the old Times, such Commitments were very seldom. Then 25 Ed. 3. cap. 4. is one of those Statutes that vindicates the Liberty of the Subject in respect of extrajudicial Commitments; for it is said there, none shall be apprehended upon Suggestion to the King or his Council, unless by Indictment or Presentment, or by Process at the Common Law: And in 4 Car. 1. these general Commitments per Mandatum Domini Regis, were thought a great Oppression to the Subject. 16 Car. 1. c. 10. p. 8. My Lord Coke, in his 2 Inst. 52. says, That before Commitment there must be an Oath; which in this Case could not be: It is true, the whole Privy Council may examine upon Oath; but that one Privy Councillor may do so, I do not find any where. In Prin's Animadversions on the 4th Institutes, there is a notable Record, when the Person was impeached by the Commons in Parliament, for a Riot and Assault on several Lords of the Council; from which I infer,

they would not have any Recourſe to the Legiſlators, had the Privy Council themſelves ſuch a Power to commit. I confeſs the Privy Council may cite; and ſo may the Eccleſiaſtical Court ſummon, but they cannot commit.

As to my other Exception in 2 Inſt. 705. it is ſaid, That a new Gaol cannot be erected without an Act of Parliament; How then can the Houſes of theſe Meſſengers be as ſo many Priſons? I think there are forty-two Meſſengers, and if their Houſes ſhould be lawful Places of Confinement, there would be ſo many new Gaols or Priſons erected without Authority of Parliament, which ought not to be. 5 Ed. 3. N° 68. In the 12 Rep. 129. indeed a Meſſenger is mentioned; but nothing can be drawn from thence, that he can therefore keep a Priſon.

Meſſengers.

So that if Sir James Montgomery was not in legal Cuſtody, the aſſiſting of him to eſcape is no Fault; there are other Places of Confinement beſides Meſſengers Houſes, that have been queſtioned whether they be Priſons or not; ſo it has been doubted, whether the Tower of London be a Priſon, or not within the Habeas Corpus Act?

Chief Juſtice. The Tower is a Priſon without Doubt.

Shower. My next Exception was, That the Warrant does not expreſs what the Treaſon is; and there may be a Treaſon, the aſſiſting of which is not Treaſon, as the Harbouring of Jeſuits, or Counterfeiters of Money, it is only a Miſpriſion of Treaſon. My Inference is, That if Sir James Montgomery was charged with ſuch a Treaſon, the aſſiſting of which would not make me guilty of Treaſon, then my aſſiſting him to eſcape is not Treaſon. 12 Rep. Dyer 296. a.

Then if the Intendment be general, it ſhall be taken for the Liberty of the Subject; ſo is Vaughan 136, 157. where it alſo appears, That the Return to an Habeas Corpus ought to be certain; and ſo it was reſolved in Buſhell's Caſe. So that if it cannot appear to your Lordſhips to be Treaſon, with Submiſſion, we ought to be bailed within the Habeas Corpus Act.

Levins, Serjeant. Ad idem. If Sir James Montgomery himſelf were here, he muſt have been bailed, by Reaſon of the Uncertainty of the Crime expreſſed in the Warrant of Commitment: And ſhall we be in a worſe Caſe than he himſelf would have been?

Then Returns in all Cases ought to be particular, and certainly express the Cause. Mo. 839. There are several Cases of Prisoners committed and delivered per Habeas Corpus; and the Returns of the Officers having Custody of them in the Fleet, Tower, Gate-House, and all certain. Returns to be particular and certain.

Then the Old Law is, That all Commitments shall be to the County-Gaol. Brit. 19. 92. Capt. Norwood's Case; and the Statute of 5 H. 4. that Justices of Peace shall commit to the County-Gaol, is but declaratory of the Common Law; and a Messenger's House certainly is not the County-Gaol: Indeed, a Man may be committed to a Messenger's Custody for twenty-four hours, &c. while the Matter is under Examination.

There is a Case in 1 Leon. 70. where the Power of the Secretary of State is questioned, but I am loth to meddle with it; and I think we need not have made all this Stir about it, we only desire to be bailed.

It is plain, That the Warrant must be legal.

And my Lord Chief Justice Hale, in his Pleas of the Crown, 116. is as plain, That the Rescuer shall not be arraigned till the Principal be attainted: Then if it be true, that Sir James Montgomery is dead, it is morally impossible for these Persons ever to be attainted.

Attorney General. Leon. 1. p. 70. Habeas Corpus was directed to the Steward and Marshal of the Marshalsea for Howell, who made Return that the said Howell was committed to his Custody, per Mandatum Fran. Walsingham Militis, Principalis Secretarii, & unius de Privato-Concilio Dom. Reginæ, and that Return was by the Court held insufficient, because the Cause why he was committed was not set down in the Return; and there the Court took a Difference, where one is committed by one of the Privy Council, for in such Case the Cause of the committing ought to be set down in the Return; but where the Party is committed by the whole Council, there no Cause need to be alledged. The Cause of Commitment to be set down in the Return. *Post*, 85.

It is objected, That the Treason not being express'd, therefore the aiding and assisting of him cannot be Treason; for say they, This Treason might be for harbouring Jesuits, Counterfeiters of Coin, &c. but the receiving of Jesuits, &c. is not an aiding and abetting of them: But with Submission, the assisting any of these Persons is Treason, though these Facts were made Treason by Act of Parliament.

So

On Trial of the Acceſſary, the Attainder of the Principal muſt be produced.

So I think it is not neceſſary to inſert the Overt-Act in the Warrant of Commitment, the Species of Treaſon is not uſually mentioned there; I do agree, that upon the Trial of the Acceſſary, there muſt be the Attainder of the Principal produced: But here in Treaſon, all are Principals; and let them take Advantage of that at the Trial.

As for their Objection, That no Perſon ſhall be committed but to the County-Gaol; this is not ſo, for then no Man could be committed to the Tower, Gate-Houſe, &c.

Solicitor General. Theſe Commitments in Caſes of High Treaſon have varied in all Times, ſometimes the particular Facts have been expreſſed, and ſometimes not; and yet thought good either Way.

Commitments without an Oath.

As for the Objection, That an Oath is neceſſary to be made before any Commitment; that need not be, there are many Caſes where Perſons may be committed without any Oath at all: So the Houſe of Commons may commit, and yet they cannot adminiſter an Oath; ſo a Conſtable may commit without any Oath. Staundf. 32.

Then as to the Objection concerning the Meſſenger, it is out of the Caſe; for though his Houſe be no Gaol, yet the aſſiſting of one to eſcape from thence, is as Criminal as if he had aſſiſted to eſcape from the County-Gaol. For being with the Meſſenger while he was under Examination, he was in the Cuſtody of the Law, and it is not the Breach of the Wall that is a Breach only of Priſon; for as Bracton obſerves, To aſſiſt a Man to eſcape that is going to be executed, is a Breach of Priſon; ſo that we conceive the Commitment to be lawful, and that they ought not to be bailed.

Holt, Chief Juſtice. Indeed you might have ſpared that Queſtion about the Secretary's Power to commit, it ſeems to have been made more for Delight, than for Neceſſity: But in Anderſon it is plainly reſolved; and ſo it is in 1 Leon. 71. that he hath ſuch Power.

But that which has always puzzled me is, What Authority there was to commit at Common Law? And why Juſtices of Gaol-Delivery at Common Law might impannel a Jury to enquire, &c.?

As to the Objection about the Commitment to a Meſſenger, ſurely the Party may be committed to him during Examination. Indeed I do take it, that generally the Commitments ought to be to the Common Gaol, eſpecially ſince the Habeas Corpus

Act, that the Party may better take out an Habeas Corpus; tho' you will find in my Lord Chief Justice Hale's Pleas of the Crown, That the breaking of other Prisons is Felony. Now consider this, That if an Act of Parliament make an Offence Felony, and there is not one Word as to the Accessaries, yet they shall be Felons; then why should not these Persons that are in the Nature of Accessaries to Treason, be likewise guilty of Treason?

But Mr. Attorney; I very much doubt whether you ought not to have specified what Sort of Treason it was, and that he had committed it: As for the Purpose, if it had been for the conspiring the Death of the King, or for adhering to his Enemies, &c. then the assisting the Escape of such a Traitor comes under the same Species of Treason.

Then it is a great Doubt with me, Whether you should not aver that he did actually commit the Treason?

Attorney General. With Submission, it would be too much to say in the Warrant of High Treason, that the Party was guilty. Indeed, in the Indictment we must alledge it.

Chief Justice. I think it must be considered of, though I doubt very much as to the not specifying of the Treason, that the particular Sort ought to have been express'd in the Warrant.

Commitment for Treason should specify the particular Sort of Treason. *Ante* 83.

Rokeby, Justice. Certainly a Conservator of the Peace at the Common Law might have committed, and to administer an Oath, is incident to his Office; so that I take it, that a Secretary of State is in Nature of a Conservator of the Peace, and may as well commit now, as the other could at Common Law: But indeed it seems to me, that they are bailable, because it is not express'd what Sort of Treason it was. As to the Messenger, I take him to be only a Carrier of the Party to Prison, and he is not in the Nature of a Gaoler.

Eyre, Justice. Upon the Whole, I think it reasonable that they should be bailed.

Chief Justice. Then let them be bailed.

Young *verſus* Rudd, *Paſch. 7 Will. Rot.* 78.

S. C. 2 *Salk.* 627.

INdebitatus Aſſumpſit, and a Quantum Meruit.

Poſt, 136. The Defendant pleaded in Bar, that he gave the Plaintiff a Beaver Hat, which he accepted in Satisfaction of the Debt.

The Plaintiff replied by Proteſtation, that the Defendant did not give the Hat in Satisfaction; and traverſed, that he did accept it in Satisfaction: And upon Demurrer,

It was objected in the Behalf of the Defendant, that this was an immaterial Traverſe, becauſe the Giving is the directing Matter, which ought to have been traverſed, and not anſwered by Proteſtation. Like the Reſolution in * Pynnell's Caſe, which was an Action of Debt on a Bond, of the Penalty of 16 l. for Payment of 8 l. 10 s. on a certain Day. The Defendant pleaded, That before that Day, he at the Requeſt of the Plaintiff paid him 5 l. which he accepted in full Satisfaction of the Debt; but becauſe he pleaded the Payment of the 5 l. generally, and not in full † Satisfaction of the whole Debt, the Plaintiff in that Caſe had Judgment.

* 5 *Rep.* 117. *Mo.* 677, 678.

† 5 *Co.* 117. b.

9 *Co.* 80. b. *Sty.* 263. *Winch*, 76. *Cro. Eliz.* 68. 103. *Sty.* 263, 239. 2 *Brownl.* 107.

And there it was held, that the Manner of Tender and Payment ſhall be directed by him who makes it, and not by him who accepts it; ſo that it is not material, how the Perſon to whom the Thing is given accepts it: For if it is accepted, it muſt be as the Giver intended it; and therefore the Plaintiff ought to have traverſed the Giving in Satisfaction, for that is the moſt material Part of the Plea, and ought to have been put in Iſſue; it is true, if it had been after a Verdict, the Giving and Acceptance might have been taken to be reciprocal Acts, (viz.) that the one would not have accepted it, unleſs the other had given it in Satisfaction: But upon a Demurrer it is otherwiſe.

Econtra, for the Plaintiff. Either the Giving or the Acceptance of what is given in Satisfaction, may be traverſed; this was the Opinion of my Lord Rolle, though he held it more proper to take Iſſue upon the Payment: But if the Acceptance in Satisfaction is traverſed, there will be no Occaſion of anſwering the Giving.

Sty. 239.

It is a Rule in Philoſophy, that Quicquid recipitur eſt ad modum recipientis; and there are Inſtances in Law to this Purpoſe, as in an Action of Debt upon a Bond. The Defendant pleaded, That whereas the Plaintiff was indebted to him for a Load of Lime, it was agreed between them, that the Defendant

Yel. 192. 1 *Brownl.* 109. 1 *Bulſt.* 66. 2 *Cro.* 254.

ſhould acquit him of the Lime, and yet the Plaintiff ſhould accept it in Satisfaction of the Bond, and avers, that he did accept it in Satisfaction of the Bond; and upon Demurrer to this Plea, it was held ill: Not becauſe the Defendant had pleaded the Acceptance only, and not the Giving in Satisfaction; but becauſe he ought to have pleaded the Acceptance in Satisfaction of the Sum mentioned in the Condition of the Bond, and not of the Bond generally, for that could not be diſcharged without a Specialty. *Vide* 5 Co. 117. b. 9 Co. 79. Cro. Eliz. 68. 193.

Curia. Where a Thing is pleaded by Way of Concord, it is iſſuable; but if the Concord is not executed by giving and receiving, it cannot be pleaded in Bar to the Action: Therefore the beſt Way of Pleading it, is by ſetting forth, that the Thing was given and received in the full Satisfaction, &c. according to the Reſolution in Pinnell's Caſe; but both are traverſable.

As for Inſtance, the Condition of a Bond was, That if the Defendant compounded with one Earle for his Lands, then he ſhould pay the Plaintiff 30 l. *Hob.* 178.

In an Action of Debt brought on this Bond, the Defendant pleaded, That he had not made any Compoſition with Earle, &c. the Plaintiff replied, That Earle did grant a Rent-Charge in Fee to the Defendant, in Satisfaction of his Title; and ſo he made a Compoſition. The Defendant proteſtando, that Earle non conceſſit pro placito dicit, he did not accept it in Satisfaction; and it was adjudged a good Plea, without traverſing the Grant: For as in that Caſe, there could not be any Compoſition without the Conſent of the Parties, which depended purely upon the Acceptance, which the Defendant denied to be in Satisfaction of his Title: So in this Caſe, the Denial of the Acceptance implies, that the Thing was not given in Satisfaction; and therefore Judgment was given for the Plaintiff.

Smith *verſus* Crompton.

S. C. 2 *Salk.* 644.

IN an Action on the Caſe for negligently keeping his Fire, whereby the Plaintiff's Houſe was burnt; there was a doubtful Evidence given at the Trial before the Chief Juſtice at the Niſi Prius, and the Jury gave a Verdict for the Defendant. *Vide Poſt.* 181.

It

Vide 2 *Salk.* 644, 645, 646, 648, &c.

It was moved ſeveral Times for a new Trial, becauſe the Evidence was very doubtful, upon which the Verdict was given againſt the Plaintiff; and it was inſiſted on his Behalf, that though it is true, that in an * Information of Perjury where the Defendant was found guilty, the Court would not grant a new Trial, though it appeared there was no Reaſon for ſuch a Verdict, unleſs the King's Counſel would conſent to it; yet in an Action of Debt brought by an Informer, and a Verdict for the Defendant, the Court may grant a new Trial, becauſe the Party hath an Intereſt; and this is the Difference taken in the Books.

* *Sid.* 49, 50.

Vide 2 *Salk.* 647, 649.

It might be a Thing of ill Conſequence; if it ſhould not be in the Power of the Court to grant new Trials in Caſes where there are apparent Reaſons for ſo doing; as where exceſſive Damages are given for Words, or where two Verdicts have been given againſt one Defendant, and in many other Caſes.

But on the other Side it was ſaid, that no new Trial could be granted in this Caſe, though the Court ſhould ſee any Reaſon for it: And the Caſe of Sir John Jackſon was chiefly relied on, who was diſcharged of a great Debt at the Aſſizes in Cumberland, by the Perjury of Fenwick and Holt, who being indicted for the ſame Crime, Sir John procured the Witneſſes to be arreſted, who could prove the Perjury, ſo that they could not come to the Aſſizes to give Evidence, and thereupon Fenwick and Holt were acquitted: And tho' this Practice did appear plainly upon ſeveral Affidavits, yet the Court would not grant a new Trial, but ordered an Information againſt Sir John Jackſon; upon which he was found guilty, and fined 1000 Marks.

Afterwards a new Trial was denied in the principal Caſe.

Plummer *verſus* Lea.

Bankrupts. *Vide* 1 *Salk.* 108, 109, 111. 6 *Mod.* 103. 2 *Jo.* 203.

ONE Alexander Holt recovered a Judgment Anno 17 Car. 2. againſt the Defendant, and had a Teſtatum Sci. Fac. to the Tertenants.

They appear and plead; and there was a Verdict againſt them at the Aſſizes in Suffolk, and Judgment thereupon.

Afterwards Holt became a Bankrupt, and the Commiſſioners aſſigned the original Judgment to Plummer, who now moved the Court, that it might be entered to entitle him to the Benefit of the Judgment upon the Sci. Fa. which was ruled accordingly, without bringing a new Sci. Fa. quod nota.

DE
Term. Sanctæ Trin.
Anno 7 W. III. Regis B. R. 1695.

Dalſton, *Bar. verſus* Janſon.

Vide 2 Salk: 703.

Lond. ſſ. JOhannes Dalſton Miles & Baronettus queritur de Joſhua Janſon, communi portatore in cuſtodia Mar. Mareſ. Dom. Regis coram ipſo Rege exiſten. pro eo videlicet quod cum præd. Joſhua decimo ſexto die Martii Anno Dom. 1693. & diu antea & ſemper poſtea fuit & hucuſque exiſtit Communis Portator [Anglice Carrier] bonorum & catallorum & pro ejus proficuo bona & catalla quarumcunque perſonarum hujuſmodi cariacon. rerequirend. a Wakefield, in com. Ebor. uſque ad London, & a London præd. uſque ad Wakefield, præd. per totum idem tempus pro mercede proinde habend. portare & carriare conſueverit, cumque per legem & conſuetudinem hujus Reg. Angliæ qui bet communis portator bonorum & catallorum qui bona & catalla alicujus perſonæ recipit ſic portan. eadem abſque ſubſtractione & amiſſione cuſtodire & portare tenetur ita quod in defectu talis communis portator' ſeu ſervien. ſui damnum non eveniat ullo modo, cumque idem Johannes eodem decimo ſexto die Martii Anno Dom. 1693. ſupradict. apud London præd. videlicet in paroch. beatæ Mariæ de Arcubus in Warda de Cheap poſſeſſion. fuit de bonis & catallis ſequen. viz. de una pixide abiegna [Anglice a Deal Box] & centum peciis Cunat' auri vocat Guineas, Legalis monetæ Angliæ ut de bonis & catallis ſuis propriis, & præd. Johannes ſic inde poſſeſſionat. exiſten. eodem decimo ſexto die Martii Anno Dom. 1693. ſupradict. apud London præd. videlicet in Paroch. & Warda præd. pixidem præd. cum præd. centum peciis auri Cunat' in eadem exiſten. præfat. Joſhuæ ad eundem a London, præd. uſque ad Wakefield præd. in com. Eborum pro mercede ſalvo & ſecure carriand. & ibidem idem Johannes deliberavit præd. Joſhuæ præd. pixidem & præd. centum pecias auri Cunat'

in eadem exiſten. adtunc & ibidem ad portand. & deliberand. in forma præd. recepit & habuit præd. tamen Joſhua ad aliquod tempus poſtea hucuſque pixidem præd. cum præd. centum peciis auri in eadem exiſten. eidem Johanni non deliberavit ſed pixis præd. & præd. centum peciæ auri Cunat' in eadem exiſten. poſtea, ſcilicet decimo ſeptimo die Martii Anno Dom. 1693. ſupradicto apud London præd. in Paroch. & Warda præd. pro defectu bon. cuſtod. ipſius Joſhuæ perdit. & amiſſa fuerunt Cumque etiam præd. decimo ſexto die Martii Anno Dom. 1693. ſupradicto apud London præd. videlicet in Paroch. & Warda præd. præd. Johannes poſſeſ. fuit de aliis bonis & catallis ſequen. videlicet de una pixide abiegna [Anglice a Deal Box] & centum peciis Cunat' auri vocat' Guineas legalis monetæ Angliæ ut de bonis & catallis ſuis propriis & ſic inde poſſeſſionat. exiſten. idem Johannes poſtea ſcilicet eodem decimo ſexto die Martii Anno Dom. 1693. ſupradicto apud London præd. in Paroch. & Warda præd. bona & catalla ill. extra manus & poſſeſſion. ſuas caſualiter perdidit & amiſit quæ quidem bona & catalla poſtea ſcilicet eodem decim. ſexto die Martii Anno Dom. 1693. ſupradicto in Paroch. & Warda præd. ad manus & poſſeſſion. præd. Joſhuæ per inventionem devenerunt præd. tamen Joſhua ſciens bona & catal. præd. ultima præd. fore bona & catalla præd. Johannis propria & ad ipſum Johannem de jure ſpectare & pertinere machinan' tamen & fraudulenter intenden. præd. Johannem in hac parte callide & ſubdole decipere & defraudare bona & catalla ult. mentionat. præd. eidem Johanni licet ſæpius requiſit, &c. nondum deliberavit ſed bona & catalla ult. mention. poſtea ſcilicet decimo ſeptimo die Martii Anno Dom. 1693. ſupradicto apud London præd. in Paroch. & Warda præd. ad uſum & commodum præd. Joſhuæ proprium convertit & diſpoſuit ad dampnum ipſius Johannis 150 *l.* & inde produc. ſectam, &c.

Trover. 2. Nar.

Non cul. Judicium pro Quer.

Dalſton *verſus* Janſon.

S. C. 1 *Salk.* 10. *Vide* 2 *Salk.* 703. The Pleadings. 1 *Vent.* 365. 1 *Sid.* 244.

THis was an Action on the Caſe brought againſt a Common Carrier upon the Cuſtom, and alſo a Trover was laid in the ſame Declaration.

Upon Not guilty pleaded, there was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment,

1. That theſe were different Actions, and ought not to be joined in one and the ſame Declaration, for one is grounded upon a Contract in Law, to which Non Aſſumpſit is the proper Plea, and the other upon a Tort, and it is for the ſame Reaſon that a Trover and an Indebitatus Aſſumpſit ought not to be joined, nor an

1 *Roll. Abr.* 6.

Ejectment, and an Action on the Case for scandalous Words, though the same Issue goes to both.

But Not guilty is not the proper Issue to this Action, for anciently the Defendant pleaded specially to the Neglect and Misfeasance.

It cannot be denied but that this Action is founded on the Contract, and for that, the Authority of the Case between Bosen and Sandford, is plain. *Show.* 29. 3 *Mod.* 321. 3 *Lev.* 258. 2 *Salk.* 440.

An Ejectment and an Action for an Assault and Battery were joined, and the Plaintiff had a Verdict, but the Court was of Opinion that this was the first Precedent, for they sever in Damages, and therefore they advised on it; but Justice Winch was of Opinion that it was not good. Bird *versus* Snell, *Hob.* 249. 1 *Brownl.* 235.

To which it was answered, That it was my Lord Hobart's Opinion in that very Case, that the Declaration was good after a Verdict; and that of late no Action had been brought against a Common Carrier, but Trover was joined with it. For the Plaintiff.

An Action on the Case for over-riding, and not delivering an Horse according to a Contract; and also for a Conversion to the Defendant's Use were joined together. Upon Not guilty pleaded, the Plaintiff had Judgment, though he might have demurr'd to the Declaration, it being double, but by pleading the general Issue, and that being found against him, it made the Declaration good. White *versus* Resden, *Cro. Car.* 20?

So Trespass for beating his Servant, per quod Servitium amisit, and an Action on the Case for keeping a Dog accustomed to bite Sheep, were joined in one Declaration, and the Plaintiff had Judgment; tho' it may be a Question whether Trespass will lie for the last or not, for it is only a Negligence to let the Dog loose, for which Trespass will not lie. Ash *versus* Rapier, *Pasch.* 26 *Car.* 2.

It is not the Contract which entitles the Plaintiff in this Case, for it is an Action grounded upon a Tort, and the Issue and Judgment are the same in both.

It is true, there was the like Declaration, Issue, and Verdict, in the Case of Matthew and Hopkins, and the Judgment was arrested; not for the Reason now given, but because the Plaintiff had alledged, that the Defendant was a Carrier on the 10th of May, and that he was possessed of the Goods on the 6th of May, on which Day he did deliver them, so that it did not appear he was a Carrier on the Day of the Delivery. 1 *Sid.* 244. 1 *Vent.* 365. 1 *Keb.* 870.

These are not Actions of different Natures, and therefore they may be joined: And the like hath been done in many other Cases, as Debt upon Bond, and Detinue, were joined; so likewise Debt upon a penal Statute, and an Indebitatus Assumpsit generally for *Fitz.* Title *Brief* 283. 3 *H.* 4. 13. *Br.* Joinder in Action, 97.

Tithes

Wright *verſus* Beale, 1 *Sid.* 223. 1 *Lev.* 141.

Tithes and Non Aſſumpſit pleaded to both, which was a Diſcontinuance to ſo much as related to the Penalty; but it was the Opinion of Juſtice Twiſden, That if the Iſſue could have been Not guilty, it might have gone to both.

8 *Rep.* 86.

Agreeable to this is that Diſtinction taken in Buckmere's Caſe, that in Actions real founded upon a Tort, a Man ſhall have but one Writ to recover Lands, to which he had ſeveral Titles; but in perſonal Actions, ſeveral Torts may be comprehended in one Declaration, becauſe in theſe there is not ſo much Regard to Forms as in the other.

Before the Statute de Bonis Aſportatis in vita Teſtatoris, it was a Queſtion, Whether an Action would lie againſt the Executor of a Carrier? But now it is not doubted.

Curia. ſſ. A Plaintiff cannot join two Actions which require ſeveral Iſſues; ſo that the Queſtion now is, Whether Actions may be joined where the ſame Pleading will anſwer both?

In ſuch Caſes as this, the Defendant in former Times did plead particularly to the Neglect; but it has been lately ruled, that Not guilty is a good Plea.

But it ſeems ſtrange, that Debt and Detinue ſhould be joined, becauſe thoſe Actions have different Judgments.

Upon the firſt Debate of this Caſe, they inclined for the Plaintiff; but afterwards, when Juſtice Rokeby came into the Court in Michaelmas Term following, they were all of Opinion that theſe were diſtinct Actions; for an Action againſt a Common Carrier, upon the Cuſtom of England, is not ſo much upon a Tort, as upon a Contract, for by receiving the Goods, and taking a Reward for the Carriage, the Defendant implicitely undertaketh to deliver them ſafely, and therefore the Law implies a Contract to anſwer the Value, if robbed.

The Caſe of Matthew and Hopkins the Carrier of Tiverton, was upon the common Cuſtom of the Realm, for negligently carrying a Bag of Wool, in which there was 50*l.* and in the ſame Declaration, there was a Trover for the ſaid Money; and it was held, that theſe were different Actions, and ought not to be joined, which is the Caſe in Point, ſo Judgment was given for the Defendant.

Ante 75.

Alice Maſters, *Admin'x of* Charles Maſters, *verſus* Lewes.

INdebitatus Aſſumpſit againſt Lewes, and upon Non Aſſumpſit pleaded, the Cauſe was tried before the Chief Juſtice of B. R. in Guildhall, London, and it was given in Evidence,

ſſ. That Maſters was indebted to Gosfright, and Lewes was indebted to Maſters who died Inteſtate.

That the Defendant, after the Death of Maſters, received 250 l. due to the ſaid Inteſtate for Wages, as Maſter of a Ship, and before any Adminiſtration was granted to the Plaintiff, (for that was conteſted by Gosfright) he levied a Plaint againſt the Archbiſhop of Canterbury, as Ordinary, for the Debt due to him. There was a Nihil returned in the Sheriff's Court of London, and upon four Summons there was a Sci. Fa. and Judgment againſt him, and the Money of the Ordinary was attached in the Defendant's Hands, which was afterwards condemned and received by Gosfright: Then Adminiſtration was granted to the Plaintiff, who brought this Action againſt Lewes, and had Judgment to recover. But whether the Point in Law was a good Bar to her Action, it was referred to the Opinion of the Court by the Chief Juſtice himſelf, to whom it was referred at the Trial. Foreign Attachments. *Vide* 1 *Salk.* 280, 29.

It was argued, that ſuch an Attachment was well warranted by the Cuſtom of London for above 150 Years; that there had been no Writ of Error in all that Time brought upon any ſuch Judgment, neither was there any Precedent to the contrary.

The Objections againſt it are,

Firſt, That by this Means the Adminiſtrator will be liable to a Devaſtavit.

Secondly, That no ſuch Action will lie in the Sheriff's Court againſt the Ordinary.

As to the firſt Objection, this can be no Devaſtavit in the Adminiſtrator; for if he is ſued, he may plead plene Adminiſtravit, which will be good, eſpecially in this Caſe, where no Goods came to his Poſſeſſion.

Then as to the ſecond Objection, by the Statute W. 2. c. 19. the Ordinary was liable for any Debt ſo long as he had Goods in his Hands, which Act was made in Affirmance of the Common Law. Now till Adminiſtration was granted, the Ordinary doth repreſent the Perſon of the Inteſtate. 2 *Inſt.* 397.

There are many Cuſtoms in London, which are allowed there, and in no other Place; as arreſting before a Debt is due, &c. and they are the proper Judges of their own Uſages; and this Court will preſume that they have acted according to Cuſtom, unleſs the contrary appears. *Ante* 75. *Calth.* 27.

So in London, an Executor ſhall be charged to pay a Debt upon a ſimple Contract of his Teſtator; and this was held a reaſonable Cuſtom. 5 *Rep.* 82. *Cro. Eliz.* 409. *Snelling's* Caſe.

Econtra.

ſſ. The Plaint is entered againſt the Archbiſhop, and he is ſummoned, which ought not to be; for the Money being in London, the Biſhop of London (if any Body) ought to be ſummoned: But the chief Queſtion is, Whether this is a Suit within the Cuſtom of foreign Attachments in London?

And as to that Matter, it was argued, That this is not a reaſonable Cuſtom; for at Common Law, before the Statute of W. 2. c. 19. W. 2. tho' the Ordinary could not ſue for or releaſe a Debt due to the Inteſtate, yet he might ſeize ſuch Goods which he found to be in the Inteſtate's Poſſeſſion, and diſpoſe them at his Will, or to pious Uſes; and it was a Queſtion, Whether Debt would lie againſt him if he did otherwiſe? For the Creditors of the Inteſtate could not call him to Account, becauſe the Law did adjudge him the fitteſt Perſon to take Care of the Eſtate.

It is true, the Common Law was a little defective in this Matter; but now by that Statute, Debt will lie againſt him for ſuch Goods which ſhall come to his Poſſeſſion; and the Reaſon which is given in the Statute, is the ſame which was before; for if the Ordinary will intermeddle with the Goods, he ſhall ac- F.N.B. 120. E. count as an Executor ought to do; and this is the very Ground of the Writ in F. N. B. ſſ. Præcipe A. Epiſcopo Lincoln. ad cujus Manus Bona & Catalla quæ fuer. B. qui obiit Inteſtatus, ut dicitur, *Devenerunt*, &c. And for this very Reaſon, if the Ordinary dies, his Executor ſhall be liable.

Now if he cannot be ſued but where the Goods of the Inteſtate Devenerunt to his Poſſeſſion, then the Plaint brought againſt the Archbiſhop is wrong; for he had no Goods of the Inteſtate in his Hands, and is a meer Stranger to the Suit and Judgment, and therefore is no proper Defendant; for which Cauſe this Attachment is not good.

31 Ed. 3. c. 11. Since the Statute 31 Ed. 3. the Ordinary is compellable to grant Adminiſtration to the next of Kin, which if he refuſe, B. R. will grant a Mandamus to compel him.

Now here is a Plaint brought againſt an Ordinary, to whom the Right of granting Adminiſtration did belong, and who never refuſed to grant it, and who cannot be anſwerable, unleſs he actually intermeddle with the Goods; but here he is condemned to anſwer before he knows any Thing of the Suit.

The Cuſtom is, That if the Defendant, who is really the Debtor, appears, the Attachment againſt the Garniſhee will be diſcharged, and then he muſt put in Bail to render his Body, or pay the Condemnation-Money; but the Archbiſhop cannot be compelled to do either, ſo he is not within this Cuſtom.

The Authority which comes nearest to this Case, is in Dyer 247. where one Toft was indebted to Foxcroft, and Wilkinson was indebted to Toft, who died Intestate. The Ordinary granted Administration to Marshall; then Foxcroft levies a Plaint in London against the Ordinary, and upon a Nihil returned, as in this Case, the Money was attached in the Hands of Wilkinson, and recovered and paid to Foxcroft, and the Administrator brought an Action of Debt for it. *Dyer* 247. a. *Pl.* 73.

The Defendant pleaded the Custom of Foreign Attachments in London, and all the Matter before mentioned, and upon Demurrer to the Plea, the Plaintiff had Judgment.

Now though Administration was granted in that Case before the Plaint levied against the Ordinary, which was not in this Case, yet the Reason of that Judgment may govern this Case: Because the Ordinary can have no Action against Wilkinson the Garnishee, to recover the Debt due to the Intestate; therefore no Action should lie against him; so in this Case, because the Ordinary cannot sue, it is unreasonable he should be sued, and the Custom will not extend to make him liable to such Suit.

Curia. The Reason why Money is attached in the Hands of the Garnishee, is to make the Debtor appear.

Now the Defendant Lewes was never indebted to the Ordinary; therefore he could not be compelled to appear, by entring a Plaint against the Archbishop, to whom there was nothing due.

There are several Customs in London against Law, as arresting the Bail without a Sci. Fa. or Capias against the Principal, &c.

But this Custom cannot be supported by Reason; and though their Customs are confirmed by Act of Parliament, yet such Customs which are contradictory to Reason, and to the Principles of the Common Law, shall not be allowed in B. R. Afterwards in Michaelmas Term following it was held, that no Action did lie against the Archbishop, and by consequence the Plaintiff in this Case had Judgment.

Wilson *versus* Guttery.

THE Defendant was arrested on a Sunday, by a Writ out of the Marshalsea, and now the Court was moved to discharge him; but it was denied, and he was directed to bring an Action of False Imprisonment. *6 Mod.* 96.

Rex

Rex *verſus* Harpur.

Vide 1 *Mod.* 13. 1 *Salk.* 175, 380, 381. 2 *Keb.* 557. 6 *Mod.* 96. *Poſt*, 179. *Aleyn* 78.

A Motion was made to quaſh an Indictment, which ſet forth, That the Defendant being qualified to be a Conſtable, was debito modo Electus to ſerve that Office at Iſlington; and that he had Notice of it, but did not take the Oath to execute that Office.

The Objection was, That the Indictment ſhould ſet forth, that he was choſe by one who had ſufficient Authority, and that he was ſummoned before a Juſtice of Peace to take the Oath; and therefore it not appearing how he was choſen, and that he had Notice, therefore the Indictment ought to be quaſhed.

Poſt, 127. 8 *Co.* 38. b. 11 *Co* 43. b. 2 *Ro. Rep.* 3. 1 *Salk.* 175.

Nota. A Leet may ſet a Fine on a Conſtable, but the Seſſions cannot.

Swales *verſus* Lowther.

Vide Cro. Eliz. 446, 475, 702. *F.N.B.* 53. *G.* 1 *Rol.* 645, 660.

A Man had a Houſe and a great Farm of Arable Land in the Pariſh of Kippax, where he dwelt, and he had five Acres of plowed Land, and forty Acres of Paſture, in the Pariſh of Snillington, upon which Paſture he fed his Cattle which were employed in Husbandry in the Pariſh of Kippax. The Parſon of Snillington libelled for Tithes, for the Agiſtment of Cattle there.

Thereupon the Defendant ſuggeſts, that by the Cuſtom of England, no Tithes ought to be paid for Agiſtment of Cattle kept for Plough or Pail.

2 *Cro.* 576.

And now a Motion was made for a Prohibition, becauſe the Plaintiff cannot libel for the Agiſtment of Cattle, but for ſuch as are fed in the ſame Pariſh, and not elſewhere: And the Paſturage of Cattle uſed for Husbandry in the ſame Pariſh is not titheable, becauſe the Parſon hath Tithes for them in another Kind.

Cro. Eliz. 702. *Moore* 910.

On the other Side it was ſaid, That the Parſon is to have a Profit where the Pariſhioner hath any Benefit, and that he is an Inhabitant where-ever he hath Land.

But the Court would not grant a Prohibition upon the firſt Motion, but gave the Defendant Leave to amend his Suggeſtion, by adding, that he had Arable Land in Snillington, and did exerciſe Husbandry there; which was amended.

Afterwards, in Michaelmas Term it was moved again, and the Court were of Opinion, That if the Cattle depaſtured were not for ploughing the Land in the ſame Pariſh where they are fed, he ſhall pay Tithes, though they plough in another Pariſh; and if he had more Cattle than he employed for the Plough in the ſame Pariſh, he ought to pay Tithes for them; but ordered the Defendant to make Affidavit to aſcertain the Fact.

Brockwell *verſus* Lock.

DEBT by the Bailiff of the Palace-Court of the Biſhop of Rocheſter for Fees, upon Execution of a Judgment in that Court, being 12 d. per Pound for any Sum under 100 l. and 6 d. per Pound if above that Sum; and this is by Vertue of the Statute 29 Eliz. in which there is a Proviſo, That it ſhall not extend to Fees taken or had within a City or Town-Corporate. *Vide* 11 *Mod.* 167. 4 *Mod.* 254, 255. 2 *Rol. Rep.* 59. 3 *Leon.* 268. 29 *Eliz. c.* 4.

The Plaintiff had a Verdict; and upon a Motion in Arreſt of Judgment, becauſe of that Clauſe in the Statute, it was alledged that this Caſe was not within that Proviſo, it being neither a City or Town-Corporate where the Execution was made.

Now the Reaſon why Execution-Fees are not to be taken in ſuch Places is, becauſe the Juriſdiction is narrow, the Sheriff is at leſs Trouble, and not ſo much in Danger of an Eſcape; but here the Juriſdiction of the Biſhop is as large as his Dioceſs, and ſo not within the like Reaſon.

Bailiffs of Franchiſes and Liberties are named in the Statute, and the Plaintiff being ſuch, and the Place not within the Proviſo he is entitled to this Action; and it hath been ruled, That where a Bailiff of a Franchiſe made Execution upon a Sci. Fa. he ſhould have his Fees by Vertue of this Statute.

Curia. An Officer of a Liberty ſhall have his Fees for executing the Proceſs of this Court; but it was never intended by the Statute, that he ſhould have any for executing Judgments obtained in Inferior Courts; therefore this Judgment was ſtayed.

South *verſus* Allen.

De Termino Sanctæ Trinitatis, *Anno* 7 Will. III.

S. C. 1 *Salk.* 228. *Vide Poſt,* 101.

Surr. ſſ. MEmorandum quod alias ſcilicet Termino Paſchæ Ann. 1° Dom. Regis nunc coram eodem Dom. Reg. nunc apud Weſtm. ven. Willielmus South per Thomam Johnſon ſen. Attorn. ſuum & protulit hic in Curia dicti Domini Regis tunc ibidem quandam billam ſuam verſus Robertum Allen & Johannem Wilſon in Cuſtod. Mareſcal', &c. de placito tranſgr. & ejectionis firmæ, & ſunt plegii de proſequendo ſcilicet Johan. Doe & Richard. Roe quæ quidem billa ſequitur in hæc verba ſcilicet: Surr. ſcilicet Willielm. South queritur de Roberto Allen & Johan. Wilſon in Cuſtod. Mar. Mareſch. Dom. Regis coram ipſo Rege exiſten. pro eo videlicet quod cum quidam Willielmus Birch & Sara uxor ejus primo die Maii Anno Reg. Dom. Jacobi Secundi nunc Regis Angliæ, &c. primo apud Tooting-Graveney in Com. præd. per quandam Indenturam ſuam manibus & ſigillis ſuis ſigillat. dimiſerunt conceſſerunt & ad firmam tradiderunt præfat. Willielmo South unum Meſſuagium cum pertin. & unum horreum & unum Pomarium & unum Gardinum ſcituat. jacen. & exiſten. in Tooting-Graveney præd. in Com. præd. habend. & tenend. ten'ta præd. cum pertin. præfat. Willielmo South & Aſſign. ſuis a præd. primo die Maii uſque plen. finem & terminum quinque Annorum extunc prox. ſequen. & plenar. complend. & finiend. virtute cujus dimiſſionis idem Willielmus South in ten'ta præd. cum pertin. intravit & fuit inde poſſeſſionat. quouſq; præd. Johannes Wilſon & Robertus poſtea ſcilicet Secundo die ejuſd. Menſis Maii Anno primo ſupradicto Vi & Armis in ten'ta præd. cum pertin. in & ſuper poſſeſſion. ipſius Willielmi South inde intraver. & ipſum Willielmum a firma ſua præd. Termino ſuo præd. nondum finito ejecerunt expul. & amoverunt ipſumq. Willielmum a poſſeſſione inde extratenuer. & adhuc extratenent & alia enormia ei intulerunt contra pacem dicti Domini Regis nunc ad dampnum ipſius Willielmi South centum libratum & inde produc. ſectam, &c.

Et modo ad hunc diem ſcilicet diem Lunæ prox. poſt Octab. Sancti Hillarii iſto eodem Termino uſque quem diem præd. Robertus & Johannes habuerunt licentiam ad billam præd. interloquend. & tunc ad reſpondend. &c. coram Dom. Rege apud Weſtm. ven. tam præd. Willielmus South per Attorn. ſuum quam præd. Robertus Allen & Johannes Wilſon

per Edwardum Shaller Attorn. ſuum & iidem Robertus & Johannes defend. vim & injur. quando, &c. Et dicunt quod ipſi nec eorum alter eſt inde culpabilis modo & forma prout præd. Willielmus South ſuperius narrando allegavit & de hoc pon. ſe ſuper Patriam & præd. Willielm. South inde ſimiliter, &c. Ideo ven. inde jur. coram Dom. Rege apud Weſtm. die Sabbati prox. poſt Octab. Pur. Beatæ Mariæ & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies dat. eſt partibus præd. ibidem, &c. poſtea continuat. inde proceſ. inter partes præd. de placito præd. per Jur. poſit. inde inter eos in reſpectu coram Dom. Rege apud Weſtm. uſq; diem Mercurii prox. poſt quinden. Paſchæ extunc prox. ſequen. niſi Juſtic. Dom. Regis ad Aſſiſas in Com. præd. capiend. Aſſign. prius die Jovis tertio die Martii apud Southwark in Com. præd. per formam Statuti, &c. ven. pro defectu Jur', &c. ad quem diem coram Dom. Rege apud Weſtm. ven. partes præd. per Attorn. ſuos, & præfat. Juſtic. Dom. Regis coram quibus, &c. miſ. hic recordum ſuum coram eis habit. in hæc verba ſcilicet Poſtea die & loco infracontent. coram Edw. Herbert Milite Capital. Juſtic. Dom. Regis ad placita coram ipſo Rege tenend. Aſſign. & Thoma Jennour Mil. un. Baron. Scaccarii dict. Dom. Regis ad Aſſiſas in Com. Surrey capiend. Aſſign. per formam Statuti, &c. ven. tam infranominat. Will. South quam infraſcript. Robertus Allen & Johannes Wilſon per Attorn. ſuos infranominat. & Jur. juratæ unde infra fit mentio exact. ſimiliter ven. qui ad veritatem de infracontent. dicend. electi triat. & jurat. dicunt ſuper ſacr'um ſuum quod diu ante infraſcript. temp. quo tranſgreſſio & ejectio infra-mentionat. interius fieri ſupponitur quidam Johannes Stone fuit ſe'it in dominic. ſuo ut de feodo de & in infraſcript. uno Meſſuagio uno Horreo uno Pomar. & uno Gardin. cum pertin. ſcituat. jacen. & exiſten. in Tooting-Graveney infraſcript. in Com. præd. ac quod præd. Johannes Stone ſic ut præfertur de & in ten'tis præd. cum pertin. ſe'it exiſten. poſtea & antea præd. tempus quo, &c. ſcilicet 29 die Octobris Anno Regni Dom. Caroli II. nuper Regis Angliæ, &c. 33° condidit Teſtament. & ult. voluntat. ſuam in ſcriptis ſignat. ſigillat. & publicat. per prædict. Johannem Stone in præſentia trium credibilium Teſtium quorum nomina eidem ult. voluntat. & Teſtamen. & in præſentia ipſius Teſtatoris per eoſdem Teſtes ſubſcript. ſunt in his Anglicanis verbis ſequen', (Viz.) **The Twenty-ninth of** October 1681. John Stone **of the Parish of** Alhallows Barking, London, **Citizen and Merchant-Taylor of** London, **being ſick and ill, makes his Will as follows: As to my Eſtate, I give and diſpoſe the ſame in Manner following:** Item, **I give unto my Siſter** Sarah Birch, **Wife of** William Birch, the

the Rents and Profits of all my Lands and Tenements lying in Tooting in the County of Surrey, during her natural Life, and to be paid by my Executors hereafter named, into her own Hands, without the intermeddling of her Husband; and after the Deceaſe of my ſaid Siſter Sarah Birch, I do give and bequeath the ſaid Lands and Tenements, with the Appurtenances unto and amongſt John Birch, Malme Birch, and Sarah Birch, Children of my ſaid Siſter, and to their Heirs and Aſſigns for Ever equally, Part and Part alike. Prout per eandem ult. voluntatem & Teſt'um præd. Johannis Stone præfat. Juſtic. & Jur. præd. modo hic oſten. prolat. lect. & in Evidentiam dat. (inter alia) liquet & apparet. Et Jur. præd. ulterius dic. ſuper ſacr'um ſuum præd. quod præd. Johannes Stone poſtea ſcilicet primo die Maii Anno Dom. 1682. apud Tooting-Graveney præd. in Com. Surrey præd. obiit ſic inde ſe'it de & in ten'tis præd. cum pertin. & Jur. præd. ulterius dicunt ſuper ſacr. ſuum præd. quod infranominat. Sara un. leſſor. Quer. & Ux. Will. Birch alterius leſſor. quer. in narration. præd. nominat. & Sara Birch in ult. voluntate & Teſt'o præd. Johannis Stone præd. ſimiliter nominat. ſunt una & eadem Perſona & non al. neque diverſa quodq; ten'ta in narration. præd. mentionat. & ter. & ten'ta in Tooting in Com. Sur. in ult. volunt. præd. mentionat. ſunt un. & eadem ter. & ten'ta & non alia neq; diverſa quodq; eadem Sara Birch in plena vita modo exiſtit & Jur. præd. ſuper ſacr'um ſuum præd. ulterius dicunt quod præd. Willielm. Birch & Sara Ux. ejus poſtea & poſt mortem præfat. Johannis Stone & ante præd. tempus quo, &c. ſcilicet 30 die Aprilis Anno Regni Dom. n'ri Jacobi II. nunc Regis Angliæ, &c. primo in ten'ta præd. cum pertin. in nar. & ult. voluntat. præd. mentionat. in & ſuper Poſſeſſion. præd. Roberti Allen & Johannis Wilſon inde intraver. & fuer. inde ſe'it prout lex poſtulat quodque præd. Willielmus Birch & Sara Uxor ejus ſic inde ſe'it exiſten. poſtea ſcilicet infraſcript. primo die Maii Anno primo infraſcript' apud Tooting-Gaveney præd. in Com. præd. per Indenturam ſuam infraſpecificat. manibus & ſigillis ſuis ſigillat. dimiſer. præfat. Willielmo South ten'ta præd. cum pertin. habend. & tenend. ten'ta præd. cum pertin. præfat. Willielmo South & Aſſign' ſuis a præd. primo die Maii Anno primo ſupradicto uſque plenum finem quinq; Annorum extunc prox. ſequen. & plenar. complen. & finien. virtute cujus quidem dimiſſion. idem Will. South in ten'ta præd. cum pertin. intravit & fuit inde poſſeſſionat. quouſque præd. Robertus Allen & Johannes Wilſon poſtea ſcilicet ſecundo die ejuſdem Menſis Maii Anno primo ſupradict. Vi & Armis, &c. in ten'ta præd. cum pertin in & ſuper poſſeſſion. ipſius Willielmi South inde intra-

ver. & ipſum a firma ſua præd. ejecer. ſed utrum ſuper totam materiam præd. per Jur. præd. in forma præd. compert. præd. Robertus Allen & Johannes ſunt culpabiles de tranſgr. & ejectione infraſcript. modo & forma prout præd. Willielmus South interius verſus eos queritur necne Jur. præd. penitus ignorant & inde pet. adviſament. & direction. præfat. Juſtic & Curiæ hic & ſi ſuper totam Materiam præd' per Jur. præd. in forma præd. compert. videbitur præfat. Juſticiar & Curiæ hic quod tenementa præd. cum pertin per præd. ultimam voluntatem & Teſt'um præfat. Johannis Stone deviſat. ſunt præfat. Sam. Birch pro Termino vitæ ſuæ tunc Jur. præd. dicunt ſuper ſacr'um ſuum præd. quod præd. Robertus Allen & Johannes Wilſon ſunt culpabiles de tranſgreſſion. & ejection. firmæ præd. infraſcript. modo & forma prout præd. Willielmus South interius verſus eos queritur & aſſid. dampna ipſius Willielmi South occaſione infraſcript. ultra miſ. & cuſtag. ſuas per ipſum circa ſectam ſuam in hac parte appo'it. ad ſex denar. & pro miſ. & cuſtagiis ill. ad 48 s. ſed ſi ſuper totam Materiam præd. in forma præd. compert. ten'ta præd. cum pertin. per præd. ult. voluntatem & Teſt'um præfat. Joh'is Stone non deviſat. ſunt præd. Saræ Birch pro termino vitæ ſuæ tunc Jur. præd. dicunt ſuper ſacr'um ſuum præd. quod præd. Robertus Allen & Johannes Wiſon non ſunt culpabiles de tranſgr. & ejection. infraſcript. prout iidem Robertus Allen & Johannes Wilſon interius placitando allegaver. & quia præfat. Juſticiar. & Curia hic de judicio ſuo de & ſuper præmiſſis reddend. nondum adviſantur dies inde dat. eſt partibus præd. in Statu quo nunc coram Domino Rege apud Weſtm. uſq; diem Mercurii prox. poſt quinden. Paſchæ de judicio ſuo inde audiend. eo quod præfat. Juſticiar. & Curia hic inde nondum, &c.

In Ejectment for Lands in Tooting, upon the Demiſe of William Birch and Sarah his Wife, a Special Verdict was found, That John Stone was ſeiſed in Fee of the Lands in Queſtion; and by his Laſt Will and Teſtament, deviſed the Rents and Profits thereof to the ſaid Sarah for Life, to be paid by his Executors into her Hands, *&c.* S. C. 1 *Salk.* 228. *& Vide ante* 63, 98.

The Queſtion was, Whether this was a Deviſe of the Lands to her for Life, or to the Executors during her Life? If it was to her for Life, then the Ejectment is well brought upon the Demiſe of the Husband and Wife.

Thoſe who argued for the Plaintiff, held that it was a good Deviſe of the Lands to the Wife for Life; for a Deviſe of the Rents and Profits, is a Deviſe of the Lands it ſelf: And the ſubſequent Words (Viz.) to be paid by his Executors, will make no

Alteration of the Eſtate; it makes them Bailiffs to a particular Purpoſe, but gives them no Intereſt.

Carpenter verſus Collins. Yelv. 73.

As for Inſtance: A Man had Iſſue a Son and a Daughter, and deviſed that his Son ſhould have his Lands at the Age of 24 Years, and bequeathed 40 l. to his Daughter at the Age of 21 Years, and appointed who ſhould be his Executor, and that he ſhould have the Overſight and Doing of all his Lands, &c. until the ſeveral Ages of his Children. It was adjudged, That the Executor had no Intereſt in the Lands by thoſe Words, but only a Stewardſhip for the Benefit of the Heir.

Pigott verſus Garniſh. Cro. Eliz. 674, 734.

So in Trinity Term, 41 Eliz. The Teſtator being ſeiſed in Fee, deviſed to his Son in Tail, and appointed that the Overſeer of his Will ſhould educate his Son till 21, and receive, ſet and let for him: It was adjudged, that the Overſeer had no Intereſt to make a Leaſe for Years in his own Name, but that he might make Leaſes at Will, and that his Receipts were for the Uſe of the Deviſee.

2 Leon. Placito 380.

If a Man deviſes that his Land ſhall deſcend to his Son, and that his Mother ſhall take the Profits until he is of Age; the Mother married, and afterwards died before her Son came of Age: it was ruled, That the Husband ſhould not have the Profits till that Time, becauſe no Intereſt was deviſed to the Wife, but a Confidence for the Benefit of the Son.

There can be but three Pretenders to this State; the Heir at Law, the Executors, or the Deviſee.

The Heir at Law cannot have it; for a Deviſe of Rents and Profits, is a Deviſe of the Lands it ſelf.

The Executors have no Eſtate by this Deviſe; for ſince the Statute of Wills, the Law never conſtrued a Freehold to paſs by ſuch Words, without Neceſſity required it; for nothing is given to them, but that they ſhall pay, &c. and 'tis no Conſequence, becauſe they are to pay, therefore they muſt have the Eſtate in the Land.

Horton verſus Horton 2 Cro. 74.

If a Leaſe is made, upon Condition that the Leſſee ſhould not alien but to his Children, and he afterwards deviſed Part of the Term to his Son, after the Death of his Wife, and made his Executors, and died; This is no Forfeiture, becauſe the Law will not intend it to be a Deviſe to the Feme by Implication, to make a Breach of the Condition in order to deſtroy an Eſtate expreſly deviſed; So in this Caſe, the Rents being expreſly deviſed to the Wife, though they are to be paid by his Executors, the Law will conſtrue it to be a Deviſe to the Wife, becauſe it doth not appear that he intended any Intereſt to the Executors.

Thoſe

Thoſe who argued for the Defendant inſiſted, That it was impoſſible to fulfil the Intent of the Teſtator, if the Eſtate ſhould not be veſted in the Executors: His Meaning was, that the Wife ſhould receive the Rents for her Life, which ſhe may do, if the Executors receive the Profits. For the Defendant.

An Executor Quatenus ſuch, hath nothing to do with the Freehold, ſo that his Office is not concerned in this Caſe; but the Perſon is diſcribed who ſhall receive the Profits, and therefore ſuch a Conſtruction muſt be made of the Will, that all the Parts of it may ſtand together.

Can any Reaſon be aſſigned, why a Deviſe of the Rents and Profits, &c. ſhould paſs the Land it ſelf, but only to fulfil the Intent of the Teſtator by Implication? For the Right which is given to a Man to receive the Profits entitles him to the Land; but if any thing appear in a Will, to ſhew the Intention of the Teſtator to be otherwiſe, there the Law will never make it an Eſtate by Implication.

If an Eſtate of Freehold ſhould be veſted in Sarah the Wife, then her Husband would have it during her Life; and if he ſhould be outlawed or become a Bankrupt, it would then be forfeited for his Life, and during that Time, ſhe could not have the Profits; which is directly contrary to the Will.

The Law hath appointed no particular Words to diſpoſe a Freehold by Will; therefore ſuch Words which ſhew the Intention of the Teſtator to deviſe ſuch an Eſtate, are ſufficient to make it ſo. Now an Executor cannot pay the Rents into the Hands of the Wife, unleſs he hath ſome Eſtate in the Land to ſue for and recover the Profits, if the Tenants ſhould deny Payment.

As to the Caſe of Carpenter and Collins, tis not to this Purpoſe, for that was only an Appointment to the Executors to look after the Land; they were no more than the Overſeers of the Will, and had no legal Intereſt by that Deviſe.

Curia. In Trinity Term. 1696. Judgment was given for the Defendant, by the Opinion of two Judges, againſt the Chief Juſtice, who held that the Intent of the Teſtator would be better fulfilled if theſe Words ſhould be conſtrued to give an Intereſt to the Executors during the Life of Sarah, becauſe the Will being penned againſt her Husband, by ſuch a Conſtruction he would have nothing to do with the Rents.

But by the penning this Will, the Executors have no Intereſt by theſe Words, for if they ſhould, it would contradict the precedent Deviſe of the Rents and Profits to the Wife; and that would be to make a Deviſe by Implication to the Executors, to con-

contradict an expreſs Deviſe to her for Life; but by the Opinion of the other Judges, the Defendant had Judgment.

Robinſon *verſus* Groſcourt.

Vide poſt 157, 167, 319, 320, & 438, 439.

6 *Mod.* 123, 177.

1 *Mod.* 10: 164. *Ray.* 447.

1 *Salk.* 341, 352.

THE Chamberlain of London brought an Action of Debt againſt the Defendant, for a Forfeiture upon the Breach of a By-Law, which being removed in this Court by Habeas Corpus, the Lord Mayor, Aldermen and Sheriffs made this Return; (viz) That the City of London is an ancient City, and that there had been a Cuſtom there, Time out of Mind, for the Mayor and Aldermen for the Time being, with the Conſent of other Faithful People, to make By-Laws for the Common Good of the Citizens, as often as there ſhould be Occaſion: That their Cuſtoms were confirmed by Act of Parliament; That at a Common-Council held at Guildhall, 11 Sept. *&c.* a By-Law was made; (*viz*) That whereas the Maſter, Warden, Aſſiſtants, and Commonalty of the Art and Science of Muſick, Freemen of the ſaid City, had been an ancient Brotherhood, and that no Perſon not being a Freeman ought to uſe any Art or Occupation within the ſaid City for Gain; That many Foreigners did take upon them the Art of Dancing, not being free of the ſaid City, nor Members of any Fraternity, *&c.* For Remedy whereof it was enacted by the Mayor, Aldermen, and Commons, That every Perſon uſing the Occupation of Muſick and Dancing, within the ſaid City, who ſhall have a Privilege to be made free by Patrimony, ſhall at next Court of Aſſiſtants of the Company of Muſicians, after Notice, accept and take upon himſelf the Freedom of the ſaid Company; and that every Perſon who hath ſerved an Apprenticeſhip to the Myſtery of Muſick and Dancing, and not made free, and ſhall yet exerciſe his Trade, ſhall forfeit 10 l. for every Offence, to be recovered by Action of Debt or Plaint, in the Name of the Chamberlain, in the Mayor's Court, one Moiety after Conviction to be paid to the Chamber of London, the other Moiety to the Maſter, Warden, and Aſſiſtants of the ſaid Company, for the Uſe of the Poor thereof.

It was argued for the Defendant, that By-Laws are good or bad, in reſpect to the End for which they are made, as againſt Frauds by Blackwell-Hall Factors, againſt reſtraining the Number of Carts and Coaches: But where the Publick is not concerned, a Man ſhall not be reſtrained of his Liberty by any Law whatſoever.

Therefore this By-Law is void:

1. For the Matter, because it is trivial; there are several Trades so mean, that they are not within the Intention of the Statutes of Bankrupcy, though those Statutes speak generally of all Persons using the Trade of Merchandize, by Way of Bargaining, Exchange, &c. or otherwise ingross or retail, or seeking his Living by buying and selling, &c.

All Customs or Laws which restrain Trade, are to be taken very strictly, because at Common Law any Man might use what Trade he thought fit; which is now restrained by the Statute 5 Eliz. to an Apprenticeship; but that being performed, he may set up his Trade where he can most conveniently.

A By-Law, without a Custom of the Place to support it, will not bind. Now the Custom of this Place is, That no Person not being a Freeman, ought to use any Art or Occupation within the City of *London* for Gain, not being free of the City, nor Member of any Fraternity; so that this Custom doth not bind a Man to be free of any particular Company; and then the By-Law exceeds the Custom, because though the Person is free, yet if he doth not take his Freedom of the Company of Musicians, it is not good. 1 *Salk.* 192, 193. 4 *Mod.* 27, 28.

This By-Law doth tend to deprive Persons of their Freedom, though they are entitled to it by Birth or Service, and to take away the Interest which they have, and which is vested in them by Custom; for there may be a Custom to appropriate particular Privileges to a Corporation, exclusive to all other Persons; but a By-Law without a Custom will not do it, because it is against the Liberties of the People in general.

2. The Penalty is exorbitant, in making the Forfeiture to be 10 l. for every Offence: And this hath often been adjudged in Cases of Lords of Manors, who have set arbitrary Fines on their Tenants; that notwithstanding they had Power to impose Fines, yet it must be according to Justice and Reason.

The Case which most resembles this, is that of Paine and Haughton, where the King by Letters Patents granted a Power to the Mayor and Commonalty of this very City to make By-Laws, and this was confirmed by Act of Parliament: Afterwards they made a By-Law, That no Carman should use a Cart in the City without a Licence from the Wardens of such an Hospital, under the Penalty of 15 *s.* This was adjudged void, because it was in Nature of a Monopoly, and made only for the private Benefit of such Wardens, without any Respect to the publick Good. 1 *Roll. Abr.* 364.

3. The Penalty is be recovered by Action of Debt, or Plaint, in the Name of the Chamberlain in the Mayor's Court, and one Moiety after Conviction to be paid to the Chamber of London. Now for this Reason the By-Law is void, because it is to make them Judges in their own Cause; which is so contrary to the Rules of Law, that it hath been held, If a Judge take the Caption of a Fine where he is a Party, the Cognizance is void.

Co. Litt. 14. a.

4. This Custom is not applied to those who are free of the City, but it is laid at large to be in the Mayor and Aldermen for the Time being, with the Consent of other faithful People, to make By-Laws, &c. which may be People of any other Place; and therefore it is naught, not being bound up to the Freemen of the City; for so was the Return in Wagoner's Case, (viz.) De assensu Communitatis ejusdem Civitatis.

8 *Rep.* 122.

5. Here is an arbitrary Power given to the Company of Musicians, who by admitting a Man into their Fraternity, may take what Fine they please; and if they refuse to admit him, there is no Penalty given by this Law to the Person thus refused to compel an Admittance, which is to put a certain Number of Men under the final Jurisdiction and Power of others; and that is contrary to a fundamental Rule in the Law.

Therefore a By-Law made by the Merchant-Adventurers, That no Man should buy or sell at four Fairs within such a Prince's Dominions, without first compounding with them, and paying a Fine; was held to be void, because it was an Infringement of the Liberties of all others not being free of that Company.

1 *Roll. Abr.* 363.

But admitting this By-Law to be good, they ought to have returned, That the Defendant had Notice of it, and the rather because he is not one of their Company; and it is a Rule in all Cases, Where Penalties are impos'd by way of Forfeiture, that the Party ought to have Notice of the Law. Those who argued on the other Side, answered some of the Objections, (viz.) As to that Objection, That the By-Law was void, because a Moiety of the Penalty was to be for the Use of the City: Admitting it to be void for that Reason, yet that will not make the whole By-Law so, because it may be good in Part, and void in Part.

Econtra.

The same Objection was taken in the Case of Player and Archer, where a Moiety of the Fine was appointed for the Maintenance of Christ's Hospital, and the other Moiety to the Mayor and Aldermen, &c. and there it was insisted, that the Court of Aldermen would be both Judges and Parties, yet a Procedendo was not allowed.

Sid. 105.

Neither is this By-Law contrary to a Cuſtom, or excluding thoſe who have Right by Birth to be Freemen, becauſe it is neceſſary, that even in ſuch Caſes the Party ought to be free of ſome Company, otherwiſe he cannot be free of the City; and if it is neceſſary that the Defendant ſhould be free of a Company, why not of the Company of Muſicians, which is the moſt agreeable to the Art of Dancing? And if he refuſe, why may not the Court of Aldermen have Power to impoſe him upon that Company?

As to the firſt Objection, That this By-Law is void, becauſe it is made about a trivial Matter: The Queſtion is not about the Meanneſs of the Thing, but whether the ſubject Matter is within the Juriſdiction of the Court of Aldermen; and if ſo, then whether they have done what is reaſonable?

And as to that, it cannot be denied, but that Muſicians are an ancient Brotherhood in London, and have been always under the Care and Government of the City; and the Law now in queſtion carries a Conveniency in the very Nature of it, for it is to keep good Order in the City, that the Youth ſhould not be taught but by ſuch who are approved Maſters in this Art; and it is not the Meanneſs of Trades which excludes the People who exerciſe ſuch Trades from the Care of the Civil Magiſtrate; for then Inn-keepers, Comb-makers, Patten-makers, and many other Trades, would be under no Government, which is moſt neceſſary in ſuch mean Employments; ſuch People are ſubject to By-Laws, not in Reſpect of their Occupations, but by Reaſon of the Diſtrict where they inhabit, that they may be kept in due Conformity and Order.

It is admitted by thoſe who argued on the other Side, That a Cuſtom may be good to exclude particular Perſons from certain Privileges, but that a By-Law cannot do it. Now it will not be denied, but that there is a Cuſtom in London, which enables them to make By-Laws, and that their Cuſtoms differ from others. Now, if a By-Law is founded on ſuch a general Cuſtom, and made in Purſuance thereof, it is as good as if there was an expreſs Cuſtom for this very Purpoſe.

As to the Penalty being exceſſive, the Court are the proper Judges thereof: There are many By-Laws where the like Penalty is inflicted, and thoſe which had the leaſt during all the Reigns of Edw. 6. and Queen Eliz. have 40 s. and ſome of them 5 l. ſo that this is but a reaſonable Fine.

Curia. Though the Cuſtom is, That whoever is free of the City, muſt be free of ſome Company; yet that Cuſtom doth not oblige

oblige a Man to be of any particular Company; for if it should, then tho' the Defendant is entitled by Birth to be free of such Company, yet he must also be free of this, otherwise he cannot exercise this Art, which is unreasonable.

They may make him take his Freedom, but cannot direct in what Company; for if they had ordered the Defendant to be admitted of the Blacksmiths Company, it had not been good.

It may be a Question, Whether the City hath a Power to enforce Men of no Trades to be free of those Companies which are suitable to their Professions? As Dancing is no Trade, but it may be called a Profession. It is true, Musick is suitable to it; but it is not absolutely necessary that a Dancing-Master should be free of the Musicians Company: There is no Fellowship of Refiners; but the Court of Aldermen cannot order them to be free of the Goldsmith's Company, which is the most suitable to them.

1 *Salk.* 143. So that this cannot be a good By-Law, because the Defendant cannot be compelled to be of that particular Company, and it is sufficient if he is of any other, which he may be for any Thing that appears upon this Return: It is in Nature of a Monopoly to the Company of Musicians, who cannot be compelled to make him free of that Company in case they had refused. So in Trinity Term, 8 Will. Judgment was given accordingly.

DE
Term. Sancti Mich.
Anno 7 W. III. B. R. 1695.

Britten *verſus* Cole, *Trin. 7. W. 3. Rot.* 187.

Glouc. ſſ. JOhannes Britten queritur de Thoma Cole in Cuſtod. Mar. Mareſc. Domini Regis coram ipſo Rege exiſten. de eo quod ipſe viceſimo Die Martii Anno Regni Domini Willielmi Tertii, nunc Regis Angliæ, &c. ſeptimo apud Hannam in Parochia de Bitton in Com. præd', Vi & Armis, &c. Averia, viz. quadraginta & tres Oves, & duos Agnos ipſius Johan. Britten, Pretii ſexdecim Librarum cepit & abduxit, & alia Enormia ei intulit contra Pacem dict. Dom. Regis nunc, ad Damnum ipſius Johan. quadraginta Librarum, & inde produc. Sectam, &c.

Et modo ad hunc Diem, ſcil. Diem Veneris prox. poſt Tres Sanctæ Trinitatis iſto eodem Termino uſque quem Diem præd. Thom. habuit Licentiam ad Billam præd. interloquendi, & tunc ad reſpondend', &c. coram Domino Rege apud Weſtm' ven. tam præd. Johannes per Attorn. ſuum, &c. quam præd. Thomas per Philippum Hodges Attorn. ſuum, & idem Thomas defen. Vim & Injur', quando, &c. & quoad venire Vi & Armis, ſeu quicquid quod eſt contra Pacem dict. Domini Regis nunc, idem Thomas dicit, quod ipſe non eſt culpabilis, & de hoc ponit ſe ſuper Patriam, & præd. Johannes Britten ſimiliter, & quoad reſid. Tranſgreſſion. præd. ſuperius fieri ſuppoſit' idem Thomas Cole dicit, quod præd. Johannes Britten Actionem ſuam præd. inde verſus eum habere, ſeu manutenere non debet, quia dicit, quod ante præd. Tempus quo Tranſgreſſio præd. ſuperius fieri ſupponit', ſcilicet duodecimo Die Februarii Anno Regni dict. Domini Regis nunc ſexto quoddam Breve dict. Domini Regis nunc de levari facias e Curia ipſius Domini Regis de Scaccario apud Weſtmonaſter. in Comitatu Midd. tunc exiſten. emanavit, Vicecom. Glouceſtr. direct', per quod quidem Breve idem Dominus Rex

recitan', quod cum Ric'us Cocks Bar. tunc nuper Vicecom. Glouceſtr. præd. Virtute Brevis ipſius Domini Regis de capias utlegat. extra Curiam ipſius Domini Regis de Communi Banco apud Weſtmonaſter' verſus Franciſcum Creſwick de Hannams-Court, infra Paroch. de Bitton in Com. præd. Ar', utlegat. in Com. Somerſet. duodecimo Die Junii Anno Regni dicti Domini Regis, & Dominæ Mariæ, nuper Reginæ Angliæ, &c. quinto ad ſectam Thomæ Cole Ar', modo Defend', & Mariæ Uxoris ejus de Placito Debiti emanan. præfat. nuper Vic. direct. viceſimo octavo Die Septembris Anno quinto ſupradicto cepit, & ſeiſivit in Manus ipſius Dom. Regis & Dom. Reginæ unum Capitale Meſſuag. ſive Tenementum [vocat. Hannams-Court] cum omnibus Horreis, Stabulis, extra Domibus, Edificiis, Gardinis, Pomariis, & Pertinen. eiſdem ſpectan. unum Clauſum Paſtur. [communiter vocat. Hill-Houſe] continen. per Eſtimationem quatuordec. Acras, unum alium Clauſum Paſtur. [vocat. the New Encloſure] continen. per Eſtimationem octo Acras. &c. [and ſo ſeveral other Grounds, &c.] quæ quidem omnia & ſingula Præmiſſa præd. cum Pertinen. fuerunt clari annualis Valoris in omnibus Exitibus ultra repriſ. quinquaginta & quatuor Libr. de Terris & Catallis prædict. Franciſci Creſwick, prout per Tranſcript. præd. Brevis de capias utlegat', & Recorn. ejuſdem & cujuſdam Inquiſition. ſuperinde capt. in Scaccarium dicti Domini Regis nunc certificat', & ibidem in Cuſtod. ipſius Domini Regis remanen. plenius appareat præd. Dominus Rex de Reddit. Exit. & Præmiſſis præd. ſatisfieri & reſponder. volen. (ut eſt juſtum) præfat. Vic. Glouceſtr. per præd. Breve de levari facias præcepit, quod non omittat propter aliquam Libertatem quin eam ingred', & omnes & ſingulos Reddit', Exit', & Proficua Præmiſſorum præd. cum Pertin. & cujuſlibet inde Parcel. provenien. a dict. Tempore Caption. eorundem in Manus præd. Dom. Regis uſque ad Feſtum Annunciationis beatæ Mariæ Virginis tunc prox. futur', inde præfat. Domino Regi nondum fuit reſponſus pro rata Temporis & juxta ratam & annual. Valor. ſuperius mentionat. fieri, colligi & levari faceret, ita quod Denar. ill. cum levaret, haberet coram Baronibus Scaccarii dict. Dom. Regis apud Weſtmonaſter. a Die Paſch. tunc prox. futur. in unum Menſem in Curia Domini Regis tunc ibidem ad Uſum ipſius Domini Regis ſolvend', & quod haberet ibidem tunc Breve illud, Virtute cujus quidem Brevis de levari facias Nathaniel Ridler Ar. adtunc & adhuc Vicecom. Glouceſtr. præd. exiſten. poſt Emanacon. ejuſdem Brevis, ſcil. ſeptimo Die Martii Anno Regni dict. Domini Regis nunc ſept. apud Bitton. præd. fecit Warrantum ſuum in Scriptis ſub Sigillo Officii ejuſdem Vicecom. direct. omnibus Balli-

vis Decenar. cæteriſque Officiar. ejuſdem Com. necnon Antonio Powell, Johanni Cooke Johanni Okes, & Joſepho Powell Ballivis ſuis per quod idem Vic. eiſdem Ballivis & cæteris Officiar. præd. mandavit quod omnia & ſingula Reddit. exitus & Proficua Præmiſ. in brevi præd. ſuperius mentionat. cum pertin. & cujuſlibet inde Parcel. provenien. a dicto tempore caption. eorundem in Manus dicti Dom. Regis nunc, uſq; ad Feſtum Annunciacon. beatæ Mariæ Virginis tunc prox. futur. pro rata temporis, & juxta ratam & annual. Valorem ſuperius mentionat. fieri colligi & levari fac. ita quod præd. Nathaniel Ridler præd. Vicecom. præd. illa haberet coram Baronibus Scaccarii dicti Domini Regis apud Weſtm. a præd. die Paſch. tunc prox. futur. in unum Menſem in Curia ejuſdem Dom. Regis tunc ibidem ad uſum ipſius Dom. Regis ſolven. ſecundum exigentiam brevis præd. & idem Thomas Cole, ulterius dicit quod præd. Capital. Meſſuagium ſive ten'tum [vocat. Hannams-Court] præd. ſeperal. clauſa & parcel. paſtur. cæteraq; præmiſſa in brevi de levari fac' præd. mentionat. tempore emanation. ejuſdem brevis & ſeperalibus temporibus promulg. & emanacon. utlegat. in eodem brevi de levari fac. recitat. fuer. & adhuc ſunt jacen. & exiſten. in Hannam præd. infra Paroch. de Bitton præd. in Com. Glouceſtr' præd. ac quia præd. quadraginta & tres oves & duo agni poſt emanacon. brevis præd. levari fac. & confectionem Warranti & ante præd. Feſtum Annunciationis beatæ Mariæ Virginis, videl't præd. Tempore quo, &c. fuerunt in præd. clauſo paſturæ [vocat. Hill-Houſe] in Hannam infra Paroch. de Bitton præd. exiſten. parcel. præmiſſorum præd. in præd. brevi de levari fac. præd. mentionat. ibidem depaſcen. levan. & cuban. idem Thomas Cole, adtunc & ibidem requiſivit præfat. Antonium Powell & Johannem Powell ad capien & abducen. præd. quadraginta & tres oves & duos Agnos ad fien. de exitibus & proficuis præd. ſecund. exigentiam brevis præd. de levari fac. præfat. Vic. direct. & Warrantum præd. per eundem Vic. fact. ſuper quo, &c. * Johannes Powell & Joſephus Powell Oves & Agnos præd. prædict. tempore quo, &c. apud Hannam in Paroch. de Bitton præd. ceperunt & abduxerunt quæ ſunt idem reſid. tranſgreſſionis præd. unde præd. Johannes Britten ſuperius verſus eundem Thomam Cole queritur & hoc parat. eſt verificare unde petit judicium ſi præd. Johannes actionem ſuam præd. inde verſus eum habere ſeu manutenere debeat.

H. G.

* *Nota*, The Warrant was not directed to *John*, but to *Anthony*, therefore upon a Motion to amend it, this was granted; for *per Curiam*, It is amendable within the Statute 8 *H.* 6.

Demurrer, and Joinder in Demurrer.

Britten

S. C. 1 *Salk.* 395, 396, 408, 409.

Britten *verſus* Cole.

IN Treſpaſs for taking his Cattle, the Defendant pleaded Not guilty as to the Force, and made a ſpecial Juſtification as to the Reſidue, (Viz.) that a Levari Facias iſſued out of the Exchequer, directed to the Sheriff of Glouceſter, reciting, That by Vertue of a Capias utlegatum againſt Fra. Creſwick, at the Suit of the Defendant Cole, the ſaid Sheriff had ſeized into the King's Hands one Meſſuage, and ſeveral Lands of the ſaid Creſwick's, being of the yearly Value of 54 l. beyond all Charges and Reprizes, by which Writ of Levari the Sheriff was commanded to levy the Debt due to the Defendant Cole out of all and ſingular the Rents, Iſſues, and Profits of the ſaid Lands; thereupon the Sheriff made a Warrant to ſeveral Bailiffs to levy the Profits of the ſaid Lands, &c. and the Sheep and Lambs being Levant and Couchant upon Parcel of the Lands ſo ſeized into the King's Hands, the Defendant required the Bailiff to take and carry them away; Super quo the Bailiffs did take them, which is the Reſidue of the Treſpaſs.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

1 *Saund.* 21, 22. 2 *Lev.* 175.

The Queſtion was, Whether the Defendant Cole hath well entitled himſelf to command the Bailiffs to execute this Writ? For he cannot juſtify under it himſelf, becauſe it is not alledged that it was proſecuted at his Suit, or that the Bailiffs had the Warrant, or that they took the Cattle Virtute Warranti, and he cannot juſtify in Auxilium of the Bailiffs, becauſe he was not preſent: If therefore he hath not ſhewed a ſufficient Juſtification, the Plaintiff ought to have Judgment.

Therefore it was ſaid, that he ought to have made himſelf one of the Bailiffs, or that he acted in Aid of them; but he hath ſet forth, That becauſe a Warrant was directed to them, therefore he came without their Conſent, or as aſſiſting them, and commanded them to take the Plaintiff's Sheep: So that though there was a good Warrant to the Bailiffs, yet the Defendant, who in this Caſe is a Stranger, had no Authority to require them to take the Goods of another.

The Writ and Warrant cannot give Power to any Perſon but to him to whom it is directed, or to the Party called in Aid by the proper Officer. As for Inſtance, In an Action of falſe Impriſonment, the Defendant juſtified by Vertue of a Warrant from the Sheriff, directed to the Bailiff who arreſted the Plaintiff, and

Cro. Car. 446.

required

required the Defendant to aſſiſt him to keep the other in ſafe Cuſtody: But here the Defendant is a meer Stranger to the Writ, neither named in it, or called to the Aſſiſtance of that Perſon to whom it was directed; and yet he required the Bailiff to carry the Cattle away.

2. The Defendant doth not confeſs and avoid as he ought to do, for he juſtifies the Treſpaſs without acknowledging the Taking: He ſhould have pleaded, that the Writ was delivered to the Officers in forma juris exequend', and that they took the Cattle virtute Warranti; but here he hath pleaded the executing before the Delivery of the Writ, and ſets forth, ſuper quo John Powell took the Sheep when the Warrant was not directed to him, but to Anthony Powell, ſo that John could have no Authority to take them. 1 *Saund.* 18. *Co. Entr.* 42, 106, 667.

3. He could not plead a Writ of Execution out of ſuch a Court, without ſhewing a Judgment to warrant it, which he ought to have averred, and therefore he ſhould have pleaded, that he ſued out an Original, &c. and the Outlawry thereon, and then ſet forth the Levari facias; for tho' the Writ without the Judgment will juſtify the Officer in the Execution of it, yet it will not juſtify a Stranger to require him to do it. 1 *Sid.* 125.

4. The moſt material Exception was, (viz.) It is ſaid, that the Sheriff made a Warrant directed to the Bailiffs, and that the Defendant required them to ſeize the Cattle, ſuper quo they did take and drive them away, but doth not ſay, that they had a Warrant at that Time, or that they took them virtute Warranti. Now theſe Words, ſuper quo, &c. can have no Reference to the Writ and Warrant, but only to the Requeſt, (viz.) Super quo Rogatu, he took them.

Then as to the Matter in Law, the Queſtion was, Whether the Cattle of a Stranger Levant and Couchant, upon the Lands of an outlawed Perſon, may be taken and ſold by Virtue of the Writ Levari facias?

And as to that, it is neceſſary to conſider the Statute W. 2. which directs the Sheriff what ſhall be accounted Iſſues, viz. Rents, Corn in the Grange, and all Moveables except Horſe-Harneſs and Houſhold-Stuff; and my Lord Coke, in his Comment upon this Branch of that Statute, explains it to be not only the Rents and Revenues of the Land, but Corn in the Barn, and all other moveable or perſonal Goods whatſoever. *Cap.* 39. 2 *Inſt.* 453.

But this Statute doth not affect this Case, it takes Notice of several Inconveniencies at Common Law, viz. That the Sheriffs did not return their Writs, or if they did, it was Tarde, or they made false Returns in making Mandates to feigned Liberties; or if a Bailiff of a Liberty had really the Return of Writs, yet he would do nothing, and that the Sheriffs would frequently return too small Issues, and no Averment could be made against such Returns. Now this Statute provided a Remedy against all these Inconveniencies, so that the whole Extent of it seems to be only to Process upon Originals, and the returning of Issues is only to make the Party appear, and it is never carried farther than the Goods of him whose Appearance is required.

And this seems plain by ancient Authorities, for as often as any Question hath been made upon this Statute, what are the Issues which Sheriffs must return, not only Rents, but all the Goods which the Defendant had at the Time of the Writ purchased, have been allowed to be Issues; which shews that he, and not another, must be Proprietor of such Goods.

But let the Issues be what they will, the Beasts of a Stranger cannot be so accounted in this Case, because nothing is forfeited by the Outlawry, but only the Profits of his Land who is outlawed; and the Levari facias is only to make the Sheriff accountable for the Profits as they arise, which are Rents and Corn, &c.

Plowd. 541. *Br. Tit.* Issue Return 9. 2 *Roll. Abr.* 808.

And therefore the King is not to have the Occupation, and the Profits of the Land in such Case; for if the Law was so, then he might plow and sow, and cut down Timber, for that is Part of the Profits; but this he cannot do upon such a Forfeiture: Therefore he is only entitled to the Profits as they arise upon the Land, which is all that is forfeited to him upon an Outlawry in a personal Action, and such Outlawry, and the Inquisition taken upon it, is to ascertain him what is forfeited; if it is a Rent, then he is to have the Rent; if a Manor, he is to have it; but he must not plow and sow the Demesns, for the Land is not the Debtor.

Neither doth the Sheriff's Return make any Debt to the King, for he is to make the best of the Land, and account for it, but cannot be charged with Issues, as he will be where Issues are returned.

Then as to the finding the Value, that is not conclusive to any Person, neither doth it make the Man Debtor.

9 H. 6. 10. *Br Tit. Patents* 5. *Tit.* Outlawry 36.

If the Cattle of a Stranger had been on the King's Land, which he had in Right of his Crown as forfeited by Outlawry for Felony, he could not have seized them for a Debt due to himself,

and therefore not in this Case where the Land is not forfeited at all, it being only an Outlawry in a personal Action, where he hath only the Pernancy of the Profits to such a Value, but hath no Title to the Land.

And where the King doth take the Profits of the Land upon an Outlawry in Trespass, yet if the Tenant or Owner makes a Feoffment thereof to another, the Profits as to the King shall from thenceforth cease. 21 H. 7. 7.

If it should be objected, That a Distress may be taken of a Stranger's Cattle for a Debt due to the King, if they are Levant and Couchant on the Land, that will not affect this Case; for no Authority can be found, that even in such Case the Goods so distrein'd might be sold, though the Law is otherwise now by a late Act of Parliament. 2 Roll. Abr. 159. Cro. Eliz. 434.

In Trover, the Defendant justified the taking the Goods as Bailiff to the King, of his Manor of Dunstable, upon a Plaint there affirmed, and Process was thereupon directed to the Defendant in that Case as Bailiff, &c. by Vertue whereof he distrain'd and sold the Cattle; and it was adjudged upon a Demurrer, that they could not be sold upon a Distringas in a Court-Baron. 2 Cro. 255. Yel. 194. Idem.

It is true, it hath been ruled in Trover, upon Not guilty pleaded, where the Evidence was, That the Goods were taken and sold by Vertue of a Commission of Sewers, that such Distress and Sale was good; but it is not mentioned any where, that the Cattle of a Stranger might be taken and sold for the Debt or Default of another. Aleyn 92. Style 12.

And therefore, where a Custom was alledged for a Lord of a Manor to have the best Beast which the Tenant had at the Time of his Decease, and if such Beast was esloined, then to have the like of any other Man, whose Beasts should be Levant and Couchant upon the Heriotable Land: This was held a void Custom, because it made the Goods of a Stranger forfeitable for a Heriot of another. Dyer 199. Benl. 39. Ca. Ent. 666.

But the Year-Book, 25 H. 7. hath this Case in Point, where the King had the Profits of a Man's Land by Outlawry in a personal Action, and the Cattle of a Stranger committed Trespass on that Land; it was held, that though he had a sufficient Interest to maintain an Action of Trespass, yet he could not seize the Cattle. If the Law should be otherwise, these Inconveniencies would follow: 25 H. 7. 2. Br. Prerog. Pl. 29.

1. Upon such a Seisure the Subject must lose his Cattle without a Trial, to which he cannot be admitted against the King.

2. If

2. If a Tenant's Cattle come upon the Land where the King is thus entitled to the Profits, for want of mending the Fences; this Tenant must both answer the Rent to his Landlord, and forfeit his Cattle to the King, which is unreasonable.

But common Experience shews, that the Law is otherwise; for whenever this Writ is issued, the Tenant is never altered, or put out of Possession; for it is no more than a Charge upon the Sheriff to levy so much Money for the King, who can have no more forfeited to him than the outlawed Person could forfeit, and that was no more than what he had in his own Right: So that if the Cattle of a Stranger came thither wrongfully, he might have an Action of Trespass, but cannot have an Execution at the first Instance.

Econtra pro Def.

Those who argued on the other Side, answered the Exceptions taken to the Pleading.

1. That this being in the Case of the King, and to levy a Sum certain out of the Rents and Issues of the Land, it is lawful for any Person to assist the Officer in the Performance of his Duty; and therefore it hath been held a good Justification, that the Defendant came in Auxilium of the Officer, without saying per Mandatum; for the Substance of the Plea is the Writ to the Sheriff, and the Warrant to the Officer.

2. It is pleaded, That a Warrant was directed to the Officers, and the Defendant required them to take the Cattle, super quo they did take them; which is as well pleaded, as if he had set forth that the Warrant was delivered to them: And though it was directed to Anthony and Joseph Powell, and they were required to take the Sheep, &c. and it appeared they were taken by Joseph and John, who was neither named in the Writ, or required to take them; it it may be good enough, because the taking by John is void, and then there will be sufficient Matter for Joseph to justify.

As to the Matter of Law, it was never yet disputed; therefore it must be presumed, that the King hath a Right to have the Cattle: For if the Sheriff should not have Liberty to take a Stranger's Goods Levant and Couchant on the Lands of an outlawed Person, the Levari Facias would be of very little Use.

There is no greater Hardſhip in this Caſe, than for a common Perſon to ſeize the Cattle of any Perſon whatſoever, Levant and Couchant on the Land charged with Rent; and it cannot be denied, but ſuch Cattle are diſtrainable.

It is true, the King ſhall be allowed no more than the extended Value; and if more is made of it, the Owner ſhall have it. *Hardr.* 106.

This Writ is to levy the Iſſues of the Land, and not of the Perſon outlawed; and the Profits being taken by the Cattle of a Stranger, it is reaſonable the King ſhould ſeize them: And this hath been the Courſe of the Exchequer Time out of Mind.

There can be no Doubt of what is meant by the Word Iſſues; my Lord Coke, in his Comment upon the Stat. of Weſt. 2. doth not reſtrain them to the Goods which the Defendant had at the Time of the Writ purchaſed, but declares them to be all moveable and perſonal Goods whatſoever. 2 *Inſt.* 453.

Curia. If the King had a Rent iſſuing out of Land, a Stranger's Cattle may be diſtrained and ſold for ſuch Rent in Arrear; ſo likewiſe, where he hath the Pernancy of the Profits returned upon an Outlawry, it is a Charge upon the Land it ſelf ariſing de Exitibus; and what thoſe Iſſues are hath been ſufficiently deſcribed by the Stat. Weſt. 2. the very being on the Land makes the Cattle Iſſues

Now the Land being charged with an annual Value to the King, where ſhall he have any Remedy for that Value, if a Stranger's Cattle eat the Profits, and are not liable to a Seizure?

And it is no new Thing in the Law, to puniſh one for the Fault of another; as if there is Tenant for Life, Remainder in Fee, and the Tenant for Life forfeits Iſſues and dies, they ſhall be levied upon him in Remainder, for they are to ariſe de Exitibus Terræ.

This Writ it ſelf imports, that the Charge is upon the Land; for in other Executions, the Sheriff is commanded to levy the Debt de Bonis & Catallis; but in this it is to levy ſo much de Exitibus Terræ: And therefore it ſeems unreaſonable, that the King ſhould be put to an Action of Treſpaſs againſt the Owner of ſuch Cattle which are Levant, &c. on the Lands of the outlawed Perſon.

It is true, if he had made a Leaſe of ſuch Lands before the Exigent returned, then the Cattle could not be ſeized by Vertue of this Writ; but even in ſuch Caſe, he muſt plead, that the Leaſe was made before the Outlawry: But here the outlawed

Perſon ſtill continues in Poſſeſſion, and having no Cattle of his own, takes in ſeveral Mens Cattle to agiſt.

The King hath not the Lands forfeited upon an Outlawry, but the Profits only; and when they are found by an Inquiſition to be of ſuch an yearly Value, then the Lands remain a Debtor to the Value till the Debt it ſelf is ſatisfied, but he can only agiſt or mow thoſe Lands; therefore if he could not ſeize the Cattle of a Stranger which eat up the Profits, he would have but little Benefit of an Outlawry.

Beſides, the Law is, If Iſſues are forfeited for not appearing of Jurors, the Cattle of a Stranger may be taken on their Lands for ſuch Forfeitures, which cannot be diſtinguiſhed from this Caſe.

There can be no Inconveniency nor Danger, that the Sheriff ſhould ſell the Cattle thus ſeized, becauſe he is to return the Contract or Agreement for depaſturing them, and then the Owners are to ſtand charged to pay the Money to the King; but it would be inconvenient for him to puniſh ſuch Owners in an Action of Treſpaſs, for that is a Remedy which was never yet taken.

Herbert *verſus* Waters.

S. C. 1 *Salk.* 205. *& vide ante*, 76, 77. 43 *Eliz. c.* 2. *Garth*: 362.

IN Replevin, the Defendant as Overſeer of the Poor juſtified the Taking, by Vertue of the Statute 43 Eliz. for a Poor-Tax; by which Statute it is enacted, (Viz.) That if after Iſſue tried for the Defendant, or Nonſuit of the Plaintiff after Appearance, the Defendant ſhall recover treble Damages, to be aſſeſſed by the ſame Jury, or a Writ to enquire of the Damages, as the ſame ſhall require, *&c.*

The Plaintiff was nonſuit, and the Jury had not aſſeſſed the Damages; and now the Court was moved to award a Writ of Enquiry to ſupply that Defect upon theſe Authorities.

1 *Roll.* 272. ſſ. Anno 13 Jac. The Defendant juſtified under this very Statute, in an Action of Treſpaſs brought againſt him; and the Plaintiff being nonſuit, a Writ of Enquiry was awarded for the treble Damages.

2 *Roll.* 112. Anno 17 Jac. In Replevin, the like Juſtification was made, as in this Caſe, and the Plaintiff was nonſuit; and upon a Writ of Enquiry awarded, Judgment was given for the Avowant, and a Writ of Error brought, becauſe the Enquiry was erroneouſly awarded, ſince the Statute expreſly requires, that the firſt Jury ſhall enquire of the Damages; but that Exception

was over-ruled: For though the firſt Jury might have inquired, yet it was only an Inqueſt of Office, and no Part of the Iſſue, nor was it a Thing for which an Attaint would lie againſt them; and therefore it is within the Rule taken in Cheyney's Caſe, Viz. That where the Court ex Officio, ought to enquire of a Matter upon which no Attaint lieth, the Omiſſion of it may be ſupplied by a Writ of Enquiry. 1 *Sid.* 380. 10 *Rep.* 119.

Beſides theſe Authorities in Point, there are other Caſes adjudged in Law which come near this, (Viz.) Where a Demurrer is joined upon the Evidence, the Jury are as much diſcharged from trying the Iſſue, as they are upon a Nonſuit; for the Fact being agreed by both Parties, the Judgment of the Court is then demanded, Whether the Matter given in Evidence be ſufficient to find a Verdict for the Plaintiff upon the Iſſue joined?

Now tho' the Jury are diſcharged of the Iſſue, yet they ought to aſſeſs Damages conditionally, (Viz.) Si lex eſt cum querente quod præd. Defend. eſt Culpabilis quodq; præd. (the Plaintiff) occaſione Præmiſſorum ſuſtinuit damna, &c. yet if this ſhall be omitted, it may as well be done upon a Writ of Enquiry of Damages after Judgment is given upon a Demurrer; and for theſe Reaſons a Writ of Enquiry was granted in this Caſe. *Cro. Car.* 143

Redſhaw *verſus* Heſter. *Trin. 7. W. 3. Rot.* 178.

Lond. ſſ. MEmorandum quod alias ſcilicet Termino Paſchæ Anno Regni Domini Willielmi Tertii, &c.

ſſ. Chriſtopherus Redſhaw & Anna Redſhaw Executores Teſtamenti & ult. voluntatis Georgii Redſhaw nuper de Wapping in Com. Middleſex Nautæ defunct. queruntur de Willielmo Heſter Filio & Hærede Willielmi Heſter defunct. nuper dict. Willielmum Heſter Civem & Soap-Maker Londini in Cuſtod. Mar. Mareſc. Domini Regis coram ipſo Rege exiſten. de placito quod reddat eis mille libras legalis monetæ Angliæ quas eis injuſte detinet pro eo videlicet quod cum præd. Willielmus Heſter pater cujus Hæres præd. Willielmus Heſter filius modo eſt, in vita ſua, videlicet octavo die Martii Anno Regni Domini Jacobi II. nuper Regis Angliæ, &c. Tertio apud London videl't in Paroch. Beatæ Mariæ de Arcubus in Warda de Cheape per quoddam ſcriptum ſuum obligatorium ſigillo ipſius Willielmi Heſter patris ſigillat. Curiæque dict. Dom. Regis nunc hic oſten. cujus dat. eſt eiſdem die & Anno cognovit ſe teneri & firmiter obligari præfat. Georgio Redſhaw in vita ſua in præd. mille libris ſolvend. eidem Geor-

gio

gio Redſhaw Executoribus vel Adminiſtratoribus ſuis cum inde requiſit. eſſet & ad eandem ſolutionem bene & fideliter faciend. præd. Willielmus Heſter pater in vita ſua obligavit ſe & Hæredes ſuos firmiter per idem ſcriptum obligatorium præd. tamen Willielmus Heſter pater in vita ſua ac præd. Will. Heſter filius & hæres ejuſdem Will. Heſter patris poſt ipſius Willielmi Heſter mortem licet ſæpius requiſit. &c. præd. mille libras præfat. Georgio Redſhaw in vita ſua ſeu præfat. Chriſtofero & Annæ vel eorum alicui poſt ipſius Georgii mortem nondum ſolverunt nec eorum alter ſolvit ſed ill. præfat. Georgio in vita ſua & præfat. Chriſtofero & Annæ poſt ipſius Georgii mortem hucuſq; ſolvere omnino contradixerunt & præd. Willielmus Heſter filius Chriſtofero & Annæ adhuc ſolvere contradicit ac injuſte detinet ad damnum ipſorum Chriſtoferi & Annæ centum librarum & inde produc. ſectam, &c. & profer. hic in Curia iidem Chriſtoferus & Anna literas Teſtamentar. præd. Georgii per quas ſatis liquet Curiæ dicti Domini Regis nunc hic ipſos Chriſtoferum & Annam fore Executores Teſtamenti præd. Georgii præd. & inde habere Adminiſtrationem, &c.

Et modo ad hunc diem ſcilicet diem veneris prox. poſt Craſtin. Sanctæ Trinitatis iſto eodem Termino uſq; quem diem præd. Willielmus Heſter filius habuit licentiam ad Billam præd. interloquendi & tunc ad reſpondend. &c. ven. tam præd. Chriſtoferus & Anna per Attorn. ſuum præd. quam præd. Willielmus Heſter filius per Willielmum Turbil Attorn. ſuum & idem Willielmus Heſter filius defend. vim & injur. quando, &c. & dic. quod ipſe de debito præd. ut filius & hæres præd. Willielmi Heſter patris ſui onerari non debet quia proteſtando quod ſcriptum obligatorium præd. non eſt factum præd. Willielmi Heſter patris ſui pro placito idem Willielmus Heſter filius dicit quod ipſe non habet nec die exhibitionis billæ præd. vel unquam poſtea habuit aliquas terras ſive ten'ta per deſcenſum hæreditarium de præd. Willielmo Heſter patre ſuo in feodo ſimplici & hoc parat. eſt verificare unde petit judicium ſi ipſe idem Willielmus Heſter filius de debito præd. virtute ſcripti obligatorii præd. ut filius & hæres præd. Willielmi Heſter patris ſui onerari debeat, &c.

Et præd. Chriſtoferus & Anna dicunt quod ipſi per aliqua per præd. Willielmum Heſter filium ſuperius placitando allegat. ab actione ſua præd. inde verſus eum habend. præcludi non debeant quia dicunt quod præd. Willielmus Heſter pater poſt 25 diem Martii Anno Dom. 1692. ſcilicet 27 die Novembris Anno Regni Dom. Williel. tertii nunc Regis Angliæ, &c. quinto, apud London præd. in Parochia & Warda præd. obiit quodq; præd. Willielmus Heſter filius, poſt mortem præd. Willielmi Heſter patris & ante exhibitionem billæ

præd. ſcil't 28 die Novembris Anno Regni Domini Willielmi tertii nunc Regis Angliæ, &c. quarto, habuit diverſa terras & ten'ta per deſcenſum hæreditarium de præfat. Willielmo Heſter patre ſuo in feodo ſimplici unde præd. Georgio Redſhaw in vita ſua & eiſdem Chriſtofero & Annæ poſt mortem præd. Georgii de debito præd. ſatisfeciſſe potuit videl't apud London præd. in Parochia & Warda præd. & hoc parat. ſunt verificare unde pet' judicium & debitum præd. una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c. & præd. Willielmus Heſter filius dicit quod ipſe de debito præd. ut filius & hæres præfat. Willielmi patris ſui defunct. onerari non debet quia dicit quod ipſe præd. Willielmus ante exhibitionem billæ præd. ſcil't die anno & loco in placito ipſorum Chriſtoferi & Annæ ſuperius replicando placitat. non habuit terras vel tenementa per deſcenſum hæreditarium a patre ſuo præd. in feodo ſimplici unde præfat Georgio Redſhaw in vita ſua aut eiſdem Chriſtofero & Annæ poſt mortem ipſius Georgii de debito præd. ſatisfeciſſe potuit quia dic. quod bene & verum eſt quod poſt 25 diem Martii Anno Domini 1692. ſcil't 27 die Novembris Anno Regni Domini Willielmi tertii nunc Regis Angliæ, &c. quarto apud London præd. in Parochia & Warda præd. præfat. Willielmus Heſter pater ſuus obiit quodq; ipſe præd. Willielmus poſt mortem præfat. Willielmi patris ſui & ante exhibitionem billæ præd. ſcil't eodem 27 die Novembris Anno & loco ſupradict. habuit terras & ten'ta per deſcenſum hæreditarium de præfat. Willielmo patre ſuo in feodo ſimplici ad valorem octingent. librarum & non amplius ſed præd. Willielmus ulterius dicit qd. præfat. Willielmus pater ſuus tempore mortis ſuæ ſcil't 27 die Novemb. Anno & loco ſupradict. per diverſa ſcripta obligatoria quibus obligaſſet ſe & hæredes ſuos indebitat. fuit pro veris & juſtis debitis divetſis perſonis al. quam præfat. Georgio Redſhaw ſcil't Johanni Lethieullier Mil', Johanni Nicolls Ar', Petro Baldwyn & Annæ Peachy in diverſis Denariorum ſummis in toto ſe attingen. ad 800 l. legalis monetæ Angliæ, & quod ipſe prædictus Willielmus ut filius & hæres præfat. Willielmi patris ſui ut præfertur defunct. poſtea ſcil't eodem 27 die Novembris Anno & loco ſupradicto præd. 800 l. ſeperal. perſonis præd. al. quam præfat. Georgio Redſhaw in exoneratione ſeperalium debitorum ſuorum præd. & ad plenum valorem omnium terrarum & ten'torum quorumcunq; quæ ad aliquod tempus ante exhibitionem billæ præd. ipſe præd. Williemus habuit per deſcenſum hæreditarium in feodo ſimplici a patre ſuo præd. ſolvit & ſolvi cauſavit & hoc parat. eſt verificare unde petit judicium ſi ipſe idem Willielmus Heſter fi-

lius de debito præd. virtute ſcripti obligatorii præd. ut filius & hæres præfat. Willielmi patris ſui onerari debeat, &c.

Et præd. Chriſtoferus & Anna dicunt quod placitum ipſius Willielmi Heſter filii modo & forma præd. ſuperius rejungendo placitat. materiaq; in eodem content. minus ſufficien. in lege exiſtunt ad ipſos Chriſtoferum & Annam ab actione ſua præd inde verſus eundem Willielmum Heſter filium habend. præcludend. ad quod ipſi iidem Chriſtoferus & Anna neceſſe non habent nec per legem terræ tenentur aliquo modo reſpondere & hoc parat. ſunt verificare unde pro defectu ſufficen. rejunction, in hac parte iidem Chriſtoferus & Anna ut prius petunt judicium & debitum ſuum præd. una cum damnis ſuis occaſione detentionis debiti illius ipſis adjudicari, &c. & pro Cauſis Morationis in lege ſuper placitum præd. ſuperius rejungendo placitat. iidem Chriſtoferus & Anna juxta formam Statuti in hujuſmodi caſu inde nuper edit. & proviſ. oſtendunt & Curiæ hic monſtrant has cauſas ſubſequentes, videl't eo quod præd. Willielmus Heſter filius in præd. rejunctione non oſtendit aut demonſtrat quæ ten'ta vel terras ipſe habuit per deſcenſum hæreditarium de præfato Willielmo patre ſuo in feodo ſimplici & de eo quod placitum præd. ſuperius rejungen. placitat. eſt incertum repugnans & caret forma.

Joinder in Demurrer.

Redſhaw *verſus* Heſter.

DEBT upon Bond againſt an Heir, who pleaded Riens per Diſcent.

The Plaintiff replied, That he had Lands and Tenements by Deſcent before the exhibiting the Bill, unde præd. (the Plaintiff)de debito præd. ſatisfeciſſe potuit, and then puts himſelf upon the Judgment of the Court.

Vide 1 *Sid.* 248. 342. 1 *Lev.* 130. 224.

And upon Demurrer, Exception was taken to this Replication, it being double, for he ought to have concluded to the Country.

2. The Replication is neither good at Common Law, or by the new Statute 3 & 4 Will.

'Tis not good at Common Law, for the Plaintiff doth not ſhew that the Defendant had Lands by Deſcent at the Time of the Bill filed, the Value of the Land was not material before this Statute; for if an Heir was ſued for 1000 l. and pleaded Riens per Diſcent, and it was found that but one Acre came to him by Deſcent, the Judgment muſt be quod præd. (the Plaintiff)

tiff) recuperet debitum ſuum præd', ſo that he ſhould be charged to pay the whole Debt, though nothing ſhould be put in Execution but that ſingle Acre.

But now this Statute hath made the Quantum of the Land material; for it provides, that the Heir may plead Riens per Diſcent at the Time of the Bill filed, and that the Plaintiff may reply, That he had Lands and Tenements from his Father before the original Writ brought; and if upon Iſſue joined it be found for the Plaintiff, the Jury ſhall enquire of the Value of the Land deſcended; and if ſold before the Action brought, Execution ſhall be taken out againſt the Heir to the Value of the Land ſo ſold by him, as if it had been his proper Debt.

Now this Replication is not agreeable to the Statute, becauſe the Plaintiff hath made the Value of the Land Part of his Plea; for he ſaith, That the Defendant hath ſuch Lands, unde debitum præd. ſatisfeciſſe potuit; and put himſelf upon the Judgment of the Court.

But the Replication directed by the Statute is, That the Defendant had Lands and Tenements by Deſcent before the original Writ brought; which ſhould have been tried by a Jury, who upon finding the Land deſcended, are ex Officio to enquire into the Value.

The Plaintiff hath alledged, That the Lands thus deſcended were to the Value of the Debt: Now if the Jury ſhould find that they were not half of that Value, this would falſifie his Plea; and yet if ſuch Pleading ſhould be allowed, he would recover even upon a Plea that was falſe; for the new Statute provides, that he ſhall recover to the Value of the Land ſold.

Econtra. The Inconveniencies which were at Common Law, and which are now remedied by this Statute, are as follow:

1. In Point of Time; for if the Heir had aliened before Proceſs iſſued againſt him, this Plea of Riens per Diſcent had been good, and the Plaintiff could not have recovered his Debt.

But this is now prevented; for if the Heir ſell any Lands, which by Law were liable to the Debt of his Anceſtors before any Action brought againſt him, yet he ſhall be anſwerable to the Value of the Land ſo ſold.

2. If before the Action brought he had ſold all the Lands deſcended to him but one Acre, and upon Riens per Diſcent pleaded,

ed, it had been found that ſuch Acre deſcended; though the Judgment was quod recuperet Debitum, yet at Common Law he could only extend that Acre: But now he ſhall have Execution to the Value of the Land ſold. So that though his Plea may be falſified by the finding of the Jury, yet the Plaintiff ſhall now recover pro Tanto.

So that the Replication is good, both by the Common Law and Statute.

Fletcher *verſus* Ingram. *Mich.* 7 *W.* 3. *Rot.* 107.

1 *Sal.* 175.

Staff. ff. JOſephus Ingram & Johannes Hale ſum. fuerunt ad reſpond. Jacobo Fletcher de placito quare ceperunt unam equam ipſius Jacobi & eam injuſte detin. contra vadios & pleg', &c. & unde idem Jacobus per Joh'em Lilly Attorn. ſuum queritur qd. præd. Joſephus & Johannes 20 die Februarii Anno Regni Domini Willielmi tertii nunc Regis Angliæ, &c. ſeptimo apud Shewſton in Com, præd in quodam loco ibidem vocat. le Lane ceperunt equam præd. ipſius Jacobi & eam injuſte detinuerunt contra vad. & pleg. quouſq; &c. unde idem Jacobus dicit quod ipſe deterioratus eſt & damnum habet ad valenc. 20 l. & inde produc. ſectam. &c.

Et præd. Joſephus & Johannes Hale per Thomam Callow Attorn. ſuum ven. & defen. vim & injur. quando, &c. & ut Ballii Rowlandi Fryth gen. bene cognoverunt captionem equæ præd. in præd. loco in quo, &c. & juſte, &c. quia dicunt quod idem locus in quo ſupponitur captio equæ præd. fieri continet & præd. tempore quo ſupponitur eandem caption. equæ fieri continebat in ſe unam Acram terræ cum pertin. in Shewſton præd. quæ quidem Villa de Shewſton eſt & a præd. tempore quo, &c. necnon a tempore cujus contrarii memoria hominum non exiſtit fuit infra manerium de Shewſton cum pertin. in Com. Stafford. præd. de quo quidem Manerio cum pertin. præd. Rolandus eſt & præd. tempore quo, &c. & diu antea fuit ſeiſit. in dominico ſuo ut de feodo, idemque Rolandus & omnes ill. quorum ſtatum ipſe habet in eodem Manerio cum pertin. a tempore cujus contrarium memoria hominum non exiſtit habuerunt & habere conſueverunt curiam Letæ ſive viſum Franci plegii ejuſdem Manerii & quicquid ad viſum Franci plegii pertinet de omnibus Inhabitantibus & reſiden. infra Manerium ill. coram Seneſchallo ſuo ejuſdem Curiæ pro tempore exiſten. quoliber Anno infra Menſem prox. poſt feſt. Sancti Michaelis Archangeli apud Manerium illud annuatim tenend. tanquam ad idem Manerium cum pertin. pertin. & iidem Joſeph. & Johan. ulterius dicunt quod infra Manerium præd. habetur &

a tem-

a tempore cujus contrarium memoria hominum non exiſtit habetur talis conſuetudo quod Juratores ad inquirend. & preſentan. ea quæ ad Curiam letæ & viſus Franci plegii ill. pertinen. onerati & jurat. ad Curiam viſus Franci plegii Manerii præd. tent. apud Manerium illud infra Menſem prox. poſt Feſtum Sancti Michaelis Archangeli annuatim elegerunt & a toto tempore ſupradicto eligere conſueverunt **Unum idoneum hominem** de inhabitan. infra Manerium præd. fore Conſtabular. Conſtabulariat. [Anglice **the Conſtablewick**] de Shewſton præd. pro uno Anno in Officio ill. deſervitur. qui quidem homo ſic elect. Officium illud ſuper ſe ſuſcepit & a toto tempore ſupradicto ſuſcipere uſus eſt & conſuevit & Sacramentum pro debita executione Officii illius præſtitit & præſtare conſuevit **Sub pœna rationabili per totum tempus** ſupradict. per jur. præd. ad hujuſmodi Curiam Let. & viſum Franci plegii in ea parte impoſit. & iidem Joſephus & Johannes ulterius dicunt quod præd. Rolandus Dom. Manerii præd. exiſten. ac de eadem in forma præd. ſeiſit. ad Curiam Letæ ſive viſum Franci Plegii Manerii illius apud Manerium illud infra Menſem prox. poſt Feſtum Sancti Michaelis Archangeli ſcil't nono die Octobris Anno Regni Dom. Willielmi tertii nunc Regis & Dominæ Mariæ nuper Reginæ Angliæ, &c. quinto coram Henrico Frith gen. ad tunc Seneſchallo ipſius Rolandi Curiæ ill. tent. præd. Jacobus Fletcher tunc & diu antea inhabitan. infra Manerium præd. ſcil't apud Shewſton præd. & idoneus homo exiſten. fore Conſtabular. præd Conſtabular. [Anglice **Conſtablewick**] de Shewſton præd. per Edwardum Thorneton, Thomam Grace, Johannem Cook, Joſephum Alſop, Jacobum Standley, Willielmum Milner, Willielmum Ridding, Michaelem Wiat, Thomam Salt, Jacobum Milner, Johannem Silveſter, Johannem Adcock, & Johannem Dickeſon, probos & legales homines & inhabitantes infra Manerium præd. ac adtunc & ibidem in eadem Curia jurat. & onerat. ad inquirend. & preſentan. ea quæ ad Curiam Letæ & viſus Franci plegii ill. pertinebant debito modo & ſecundum cons' præd. elect. fuit fore Conſtabular. Conſtabulariat. [Anglice **the Conſtablewick**] de Shewſton præd. pro uno Anno tunc prox. ſequen. in officio ill. ſervitur. & jurator. ill. adtunc & ibidem in eadem Curia ordinaver. quod idem Jacobus præſtaret Sacramentum ſuum pro debita executione officii ſui præd. ſub pœna forisfaciend. 40s. unde præd. Jacobus Fletcher ſtatim poſtea ſcil't eiſdem die & Anno ibid. **Notitiam** habuit idem tamen Jacobus non præſtitit Sacramentum ſuum pro debita executione Officii Conſtabular. præd. nec Officium illud executus fuit ſeu ſuper ſe ſuſcepit ſed ille ea facere adtunc & ſæpius poſtea ibidem penitus recuſavit per quod poſtea & ante tempus quo, &c. ſcilicet ad Cu-

riam Letæ ſive viſus Franci plegii præd. Manerii dicti Rolandi apud Manerium illud infra Menſem prox. poſt Feſtum Sancti Michaelis Archangeli videl't undecimo die Octobris Anno Regni dictorum Domini Regis & Dominæ Mariæ nuper Reginæ Angliæ Sexto coram præfat. Henrico Frith tunc Seneſchallo ipſius Rolandi Curiæ ill' tent' per Edwardum Thorneton, &c. probos & legales Homines adtunc Inhabitantes infra Manerium præd. adtunc & ibidem in eadem Curia jurat. & onerat. ad inquirend. & præſentan. ea quæ ad Curiam Letæ ſive viſus Franci plegii ill. pertinebant præſentat. fuit quod præd. Jacobus Fletcher eo quod ipſe debite fuit electus fore Conſtabular. Conſtabulariat. [Anglice the Conſtablewick] de Shewſton præd. ad ultimam Letam pro Manerio præd. tent. & ſub pœna 40s. ſuper eum impoſit. ordinat. fuiſſet officium illud ſuper ſe ſuſcipere ac ill. exequi & ſacramentum ſuum in forma præd. præſtare, pro debita executione officii illius quæ vel aliquod inde ille non feciſſet ideo ipſe forisfecit Domino Manerii præd. dictos 40s. de pœna præd. tunc Domino Manerii præd. ſolvend. prout per Record. inde penes dictum Seneſchallum Curiæ Manerii ipſius Rolandi præd. apud Manerium ill' remanen. plenius apparet & quia præd. 40s. de pœna præd. illi eidem Rolando Domino Manerii præd. ut præfertur. exiſten. præd. tempore quo, &c. aretro fuer. non ſolut. iidem Joſephus & Johannes ut Ballivi ipſius Rolandi bene cognoſcunt Caption. equæ præd. in præd. loco in quo, &c. & juſte, &c. pro eiſdem 40s. de pœna ſive Amerciamento præd. præfat. Rolando ſic aretro exiſten. non ſolut. & infra Manerium præd. &c.

Et præd. Jacobus dicit quod per aliqua per præd. Joſephum & Johannem ſuperius in cognitione præd. placitando allegat. iidem Joſephus & Johannes Caption. equæ præd. in præd. loco, &c. juſtam cognoſcere non debent quia dicit quod placitum præd. per ipſos Joſephum & Johannem modo & forma præd. ſuperius placitat. materiaque in eodem content. minus ſufficien. in lege exiſtunt ad Captionem equæ præd. in prædicto loco in quo, &c. juſtam cognoſcen. quodque ipſe ad cognitionem ill. modo & forma præd. fact. & placitat. neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat. eſt verificare unde pro defectu ſufficientis placiti in hac parte idem Jacobus petit judicium & damna ſua occaſione captionis & injuſtæ detentionis equæ præd. ſibi adjudicari, &c.

Et præd. Joſephus & Johannes dicunt quod placitum præd. per ipſos Joſephum & Johannem modo & forma præd. ſuperius placitat. materiaque in eadem content. bonum & ſufficien' in lege exiſtunt ad ipſos Joſephum & Johannem caption. equæ præd. in præd. loco, &c. juſtam cognoſcen. quod quidem placitum Ma-

teriamq; in eodem content. iidem Joſephus & Johannes parat. ſunt verificare & probare prout Curia, &c. & quia præd. Jacobus ad cognition. ill. non placitavit ſeu reſpond. nec ill. hucuſque aliqualiter dedicit iidem Joſephus & Johannes petunt judicium & retorn. equæ præd. una cum damnis miſis & cuſtagiis juxta formam Statuti in hujuſmodi Caſu edit. & proviſ. ſibi adjudicari, &c. ſed quia Curia dicti Dom. Regis nunc hic de judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram Domino Rege uſque a die

ubicunque, &c. judicio ſuo de & ſuper præmiſſis ill. audiend. eo quod Curia dicti Dom. Regis nunc hic inde nondum, &c.

Fletcher *verſus* Ingram.

S. C. 1 *Salk.* 175.

IN Replevin for taking a Mare at Shewſton, in a certain Place called the Lane.

The Defendants made Cogniſance as Bailiffs of one Rowland Fryth, Lord of the Manor of Shewſton, whereof he was ſeized in Fee, &c. Then they alledge a Preſcription to hold a Court-Leet there within a Month after Michaelmas every Year; and they ſet forth a Cuſtom within the ſaid Manor, to elect a Conſtable at the ſaid Leet out of the Inhabitants there; which Perſon ſo elected, hath uſed to take upon him that Office, under a reaſonable Penalty in that Behalf, to be impoſed by the Jury. 1 *Salk.* 175; 380.

That the Plaintiff at a Court-Leet held for the ſaid Manor, was elected Conſtable by the Jury: That he was ordered to take upon him the Execution of that Office, under the Penalty of 40s. which he neglected to do: That this Neglect was preſented at the next Court, by which the Plaintiff had forfeited 40s. to the Lord of the ſaid Manor; for which the Diſtreſs was taken, &c. *Ante* 96. 2 *Roll. Rep.* 3. 8 *Co.* 38. b.

The Plaintiff demurred to the Cognizance, and the Defendants joined in Demurrer.

The Exceptions taken to the Cognizance were,

1. That the Defendants have not preſcribed to any Right in the Lord of the Leet to diſtrain for an Amerciament, being a private Benefit to him, and which he cannot have without a Preſcription to the Diſtreſs. 11 *Rep.* 44. b. *Cro. Eliz.* 673.

2. The Jury ordered him to take his Oath generally to execute the Office of a Conſtable, but doth not ſay, he was ſummoned to appear before a Juſtice of Peace for that Purpoſe, or before whom, or where he ſhould come to take his Oath.

3. He

3. He doth not say, that the 40s. imposed on him for not taking upon him the Office, was a reasonable Pain.

1. As to the first Objection: It is true, this is an Amerciament which differs from a Fine, the first being always imposed by the Jury, and the other by the Court; and though it is a Thing of less Nature than a Fine, yet a Distress may be taken for it, without a Custom alledged so to do: And this is the Resolution in Greisly's Case.

8 *Rep.* 38. b. 41. 11 *Co.* 43, 44. *Cart.* 28. *Pal.* 7. *Cro. Eliz.* 241, 581. 2 *Ro. Rep.* 3. 1 *Roll. Rep.* 201. *Cro. Jac.* 382.

2. As to the second Objection: The Defendants have alledged a Custom, every Year to choose a fit Person at the Court-Leet to be Constable for that Year, and that the Plaintiff was elected Constable, which is a sufficient Obligation for him, under a Pain to come and take upon him the Office; and it is also alledged that he had Notice, so that the Custom of the Place operates upon him, which he is bound to obey. Now the administring the Oath is subsequent to the Custom, and he is thereby bound to do all reasonable Acts to qualify himself to take the said Office upon him, though usually the Steward certifies under his Hand what Person is chosen, which Certificate is carried to a Justice of the Peace; and if the Party refuse to take upon him the Office, the Justice usually sends his Warrant to compel him.

3. As to the last Objection: The Law ought to judge, whether the Penalty imposed on him be reasonable or not; and the averring it to be reasonable, will be of little Use if the Court should be of another Opinion.

In Hillary Term following, this Case was argued again, and it was objected, that it was an unreasonable Custom, and therefore void.

1. For the Incertainty of the Time when the Year shall begin, in which the Plaintiff is to take upon him this Office; and so like the Case where the Condition of a Feoffment in Fee is for Payment of a Sum of Money, and no Time limited for the Payment, there the Obligor hath Time during his Life to do it; and this being a Custom against Common Law, it must be taken strictly.

Co. Lit. 208.

To which it was answered, That the Time was certain enough, for the Plaintiff was to hold the Office pro uno Anno integro prox. sequend', that Day whereon the Court was held.

But 'tis as certain, as where a Custom hath been alledged for a Copyholder, to pay a Year's Value of the Land upon an Admittance; and yet such a Custom hath been held good, because the Value may be reduced to a Certainty. *Perkins* vet. lus *Titus.*

So where a Custom was, that the Surrendree shall come and be admitted after three Proclamations, otherwise that the Copyhold should be forfeited. The Surrendree died, his Heir within Age, who refused to be admitted; it was held, that the Lord might seise quousque the Infant came of Age, which is as incertain as this, for the Heir may die before that Time. *King* versus *Dilliston.*

So where a Man is beyond-sea, 'tis incertain when he may return, and yet his Right is saved by that Means. 2 *Cro.* 226.

2. 'Tis said, That the Homage ordered him to take an Oath duly to execute the Office, but doth not appoint before whom he should take it, or from whom he should accept it; and so not like* Greisly's Case, for there the Custom was laid to choose a Constable within a Month after Michaelmas, to hold the Office for one Year next following; and that if the Person was present in Court, that he ought to be sworn by the Steward; so that not only the Time, but the Person before whom the Oath should be taken is ascertained, which is wholly omitted in this Case. *8 *Rep.* 38.

This Objection was thus answered, (viz.) That 'tis true, where a Man is obliged to do an Act, it must appear to the Court that 'tis possible for him to do it; but that the Court will take Notice without setting it forth, That a Steward of a Leet, during the Time he held the Court, may give an Oath to a Constable, as well as a Justice of Peace after the Court is adjourned,

3. It doth not appear that the Plaintiff was summoned to the Leet, or that he had any special Notice that he was chosen Constable; but only generally, that Notitiam habuit, which is not sufficient; and for this Reason an Indictment was quashed in this Court, which set forth, That the Defendant was fit to be a Constable; that he was debito modo Electus; and that he had Notice of it, but did not take the Oath, &c. and because it was not said that he was summoned before a Justice of Peace for that Purpose, the Indictment was quashed. *Trin. 7 Will. Rex* versus *Harper.*

To which it was answered, That by alledging Notitiam habuit, it must be intended due and legal Notice, because the Law requires him to take the Oath before the Steward of the Leet, or a Justice of the Peace.

Aleyn 78. In Prigg's Case, who was indicted, for that he being chosen Headborough, refused to take the Oath to execute that Office; there is no mention of Notice or Summons before whom to appear for that Purpose; but a Writ was granted by B. R. directed to him, commanding him to go before a Justice of the Peace to take it.

Besides, 'tis alledged in this Cognizance, That the Plaintiff Statim postea ibidem Notitiam habuit, which Word ibidem is a Relative, as well in a legal as grammatical Construction, and must refer to the Court, being the Place where he was chosen Constable.

4. It was objected, That there was not a Custom alledged, to make any Distress for this Penalty: And though it may be true that a Man may distrain for an Amerciament, and for a Fine in a Leet, without alledging a Custom; yet for such an extraordinary Thing as this, there must be a Custom expressly laid to distrain, &c.

Godfrey's Case, 11 Rep. 43. Thus where a Custom was alledged to swear twelve Men, to enquire into the Articles given in Charge at a Court-Leet, and that the Men so sworn had used (inter alia) to present themselves to pay to the Lord of the Leet 10 s. pro certa Letæ, for which the Avowant distrained; but it was held unlawful, because it being for the particular Benefit of the Lord, and against common Right, he cannot justifie the taking a Distress without a Prescription, as he may for a Fine or Amerciament.

This Objection was answered by the Counsel, that a Distress is incident, as well for a Penalty, as for a Fine or Amerciament.

Curia. The Steward may impose a Fine upon a Person who is elected by the Homage, if he is present at the Leet, and refuseth to be sworn to execute the Office; but if the Person is not present, the Steward cannot fine him, but he may be amerced, which must be presented at the next Court, and affeered; and after the Court is over, the Justice of Peace may administer the Oath of Constable by the Power which they have as Conservators of the Peace, which Power they had at Common Law, and is now vested in them, and the rather because a Constable is but a subordinate Officer to them, for the Preservation of the Peace.

8 *Co.* 39. 11 *Co.* 43. 1 *Rol. R.* 73.

But the Party ought to be ſummoned, and a Time and Place ought to be appointed under a Penalty when and where he ſhall come, and before whom to take the Oath; and therefore Notitiam habuit generally is not enough, for though he is an Inhabitant, yet he may be eſſoined: And therefore for want of alledging ſpecial Notice, Judgment was given for the Plaintiff. *Winch. Ent.* 987.

Leaves *verſus* Bernard. *Trin.* 7 Will. 3. Rot. 41.

THE Plaintiff declared, That in Conſideration he had paid to the Defendant ſixteen Guineas, he promiſed to pay the Plaintiff 100 l. if no Town in Flanders garriſoned with 2000 Men, ſhould be taken or ſurrendered to the French King before the firſt Day of September 1695. and lays an Indebitatus aſſumpſit for the 100 l. upon a Wager, and another Indebitatus for the 100 l. received by the Defendant for the Uſe of the Plaintiff, to which the Defendant pleads thus: *Vide ante* 4, 5, 7. *& c. poſt.* 175.

Et modo ad hunc diem ſcil't diem Veneris prox. poſt Craſt. Sanctæ Trinitatis iſto eodem Termino uſque quem diem præd. Iſaacus Bernard (ſalvis ſibi omnibus & omnimodis exception. quoad Billam præd.) habuit licentiam ad Billam interloquendi & tunc ad reſponden', &c. coram Dom. Rege apud Weſtm. ven. tam præd. Johannes Leaves, per Attorn. ſuum præd. quam præd. Iſaacus per Johannem Bernard Attorn' ſuum & idem Iſaacus defen' vim & injur. quando, &c. & petit judicium de Narratione præd. quia quoad primam promiſſionem & aſſumption. ſuperius in Narratione illa mentionat. idem Iſaacus dicit quod præd. Johannes Leaves valorem præd. ſexdecim peciarum Auri cuneat. per ipſum Johannem Leaves, eidem Iſaaco ut præfertur ſolv. ſuppoſit. in narratione ſua præd. in certo monſtrare & allegare per legem terræ tenetur & debuiſſet unde ex quo præd. Johannes Leaves, verum valorem ſexdecim peciarum Auri cuneat. illius ſuperius non monſtravit ſeu allegavit idem Iſaacus petit judicium de Narratione præd. quoad primam promiſſionem & aſſumption. præd. & quod Narratio illa in ea parte caſſetur, &c. & quoad ſecundum promiſſionem & aſſumptionem præd. ſuperius in Narratione ipſius Johannis Leaves mentionat. idem Iſaacus ſimilit. petit judicium de Narratione illa quia præd. Johannes Leaves in narratione ſua præd. non oſtendit de vel pro quibus pignoribus in eadem promiſſione & aſſumption. ſuperius expreſs. fact. fuiſſet inter eoſdem Johannem Leaves aut Iſaacum, aut qualiter vel in quo modo præd. Johannes Leaves, pignus ill. de eodem Iſaaco lucraſſet

craſſet

craſſet prout per legem terræ oſtendere debuiſſet ita quod Curiæ Dom. Regis hic appareat utrum pignus præd. licitum ſeu illicitum fuiſſet unde ex quo præd. Johannes Leaves, ill. Curiæ Dom. Regis hic non oſtendit ſeu demonſtravit id. Iſaacus **petit judicium de Narratione** præd. quoad præd. ſecundam promiſſion. & aſſumption. & **quod Narratio** ill. in ea parte **Caſſetur**, &c. & quoad tertiam promiſſionem & Aſſumptionem præd. ſuperius in Narratione ipſius Johannis Leaves mentionat. idem Iſaacus ſimilit. **petit judicium de Narratione** præd. quia dicit quod centum libræ in eadem tertia promiſſione & aſſumptione ſuperius expreſs. ſunt eædem centum libræ in ſecunda promiſſione & aſſumptione præd. ſuperius in Narratione ipſius Johannis Leaves ſimiliter mentionat. & expreſs. & non al. neque diverſæ & hoc parat. eſt verificare unde ex quo præd. Johannes Leaves un. & eandem denariorum ſummam in una & eadem Actione bis petiit idem Iſaacus ſimiliter **petit judicium de Narratione** præd. quoad tertiam promiſſion. & aſſumption. & quod Narr. in ea parte ſimiliter **Caſſetur**, &c.

Concluſion of the Plea. *Vide poſt.* 146. 6 *Mod.* 102 1 *Lut.* 42.

It was objected againſt this Form of Pleading, That it was neither a Demurrer, or a Plea in Bar; and therefore it muſt be a Plea in Abatement, and ſo no Judgment final could be given, but a Reſpondeas ouſter.

1. **It cannot be a Demurrer, for that is where the Party will go no farther, becauſe the other hath not ſhewed ſufficient Matter againſt him; and therefore he ſaith, that** Narratio minus eſt ſufficien. in lege **to make him give any Anſwer thereunto: Whereupon he prays the Judgment of the Court if he ſhall be compelled to anſwer. All which Form is wanting in this Plea.**

2. **It cannot be a Plea in Bar to the Action, for then he ſhould have pleaded, That the Plaintiff** Actionem ſuam **againſt the Defendant** habere non debet; **and concluded his Plea thus,** (viz.) Unde petit judicium ſi præd. (**the Plaintiff**) Actionem ſuam præd. inde verſus (**the Defendant**) habere ſeu manutenere debeat, &c.

3. **Therefore it muſt be in Abatement, and that is either to the Writ or Count; if the Action is brought by Original, then the Plea is** petit judicium de Brevi, **and it muſt conclude in the ſame Words; if 'tis to the Declaration, then it muſt be** petit judicium de Billa & Narratione, **for** Billa **and** Narratio **are the ſame, and in this Form the Defendant hath now pleaded.**

The firſt Time that ſuch Incertainty of Pleading was introduced, was in the twenty-ſecond Year of Car. 2. where the Defendant began his Plea in Bar, (viz.) Actio non, &c. and concluded in Abatement, (viz.) Unde pro defectu ſufficientis Narrationis, &c. petit judicium; but all the other Entries are otherwiſe. 2 *Saund.* 128.

But the Court was of Opinion, that the ſubſtantial Part of a Demurrer was in this Plea, and therefore the Defendant had Judgment.

Smith *verſus* Sharp.

S. C. 1 *Salk.* 139.

WRit of Error upon a Judgment by Default in an Action of Covenant upon Articles, &c wherein the Defendant covenanted, that he or his Heirs would convey ſix Acres of Land, &c. to the Plaintiff, or his Aſſigns; and farther covenanted, that he would offer unto the Plaintiff a good Conveyance for the aſſuring the ſaid ſix Acres to him or his Aſſigns, and the Breach aſſigned was, that he had not executed a Conveyance to the Plaintiff himſelf, and takes no Notice of his Aſſigns; and for this Reaſon it was objected, that the Breach was not well aſſigned, for if it had been convey'd to his Aſſigns, the Covenant had been performed.

As for Inſtance; A Covenant was made by the Plaintiff, That he, his Executors, or Aſſigns, would repair, &c. the Breach was, That neither he, his Executors and Aſſigns, had repaired; and upon Demurrer it was held to be ill, becauſe he ought to have aſſigned the Breach in the Disjunctive according to the Covenant. *Cro. Eliz.* 348.

In the Principal Caſe, the Declaration was held good, for there is a Difference where a Thing is to be done by a Perſon, or his Aſſigns, and to a Perſon or his Aſſigns: For in the firſt Caſe the Breach muſt be aſſigned, that it was not done either by the one, or the other; but in the laſt Caſe it will be intended prima facie, to be done to the Perſon himſelf; but if he aſſign his Intereſt, then it may be done to the Aſſignee. Whereupon Judgment was given for the Plaintiff.

Tayler *verſus* Baker.

Staff. ſſ. MEmoran. quod alias ſcil't Termino Pas' ult. præterit. coram Dom. Rege apud Weſtm. ven. Henricus Tayler per Nathan. Hickman Attorn. ſuum & protulit hic in curia dict.

Dom. Regis tunc ibidem quandam Billam ſuam verſus Johannem Baker in Cuſtod. Mar. &c. de placito tranſgreſſionis ſuper caſum & ſunt pleg. de proſ. ſcil't Johannes Doe & Richardus Roe quæ quidem Billa ſequitur in hæc verba.

Staff. ſſ. Henricus Tayler queritur de Johanne Baker in Cuſtod. Mar. Mareſc. Domini Regis coram ipſo Rege exiſten. pro eo videl't quod cum præd. Henricus 21° die Maii Anno Regni Dom. Willi. Tertii nunc Regis & Dom. Mariæ nuper Reginæ Angliæ ſexto, apud Swinford Regis in conſid. quod idem Henricus ſervus ipſius Johannis fuiſſet & ipſe in labore Aurigæ ac in laboribus & operibus agriculturæ & agricolæ pro ſpacio octodecim menſium ante idem tempus bene & fideliter ſerviſſet ipſe idem Johannes ſuper ſe aſſumpſit & eidem Henrico adtunc & ibidem fideliter promiſit quod ipſe id. Johannes tant. denariorum ſummas quant. idem Henricus pro laboribus & ſervitiis ſuis tempore perform. eorundem habere mereretur eidem Henrico cum inde poſtea requiſit. eſſet bene & fideliter ſolvere & contentare vellet & idem Henricus in facto dicit quod ipſe pro laboribus & ſervitio ſuis ſicut præfertur per ipſum pro eodem Johanne factis habere meruit ſex libras legalis monetæ Angliæ unde idem Johannes poſtea apud Swinford Regis præd. notitiam habuit, cumque etiam præd. Johannes viceſimo octavo die Maii Anno ſexto ſupradicto apud Swinford Regis præd. inſimul computaſſet cum præfat. Henrico de diverſis aliis denar. ſummis eidem Henrico per præfat. Johannem ante idem tempus debit. & adtunc in aretro & inſolut. exiſten. pro diverſis aliis operibus & negotiis per ipſum Henricum pro eodem Johanne ante tempus illud performat. & ſuper Compo. ill. præd. Johannes invent. fuit in arreragiis ergà eundem Henricum in al. ſumma quinque librarum bonæ & legalis Monetæ Angliæ & præd. Johannes in conſideratione inde ſuper ſe aſſumpſit & eidem Henrico adtunc & ibidem fideliter promiſit quod ipſe idem Johannes præd. quinque libras eidem Henrico cum inde poſtea requiſit. eſſet bene & fideliter ſolvere & contentare vellet, Quæ quidem ſummæ in toto ſe attingunt ad undecim libras præd. tamen Johannes ſeparal. promiſſio. & aſſumptiones ſuas præd. minime curan. ſed machinan. & fraudulenter intenden. eundem Henricum in hac parte callide & ſubdole decipere & defraudare præd. ſeparal. denar. ſummas ſeu aliquem inde denar. eidem Henrico non ſolvit nec aliqualiter pro eiſdem contentavit licet ad hoc facien. præd. Johannes poſtea ſcil't primo die Februarii Anno ſexto ſupradicto apud Swinford Regis præd. in Com. præd. & ſæpius poſtea requiſit. fuit ſed ill. ei hucuſque ſolvere ſeu aliqualiter pro eiſdem contentare omnino recuſavit & adhuc

huc recuſat ad damnum ipſius Henrici viginti librarum & inde producit ſectam, &c.

Et modo ad hunc diem ſcil't diem Veneris prox. poſt Craſtinum Sanctæ Trinitatis iſto eodem Termino uſque quem diem præd. Johannes habuit licentiam ad Billam præd. interloquen. & tunc ad reſponden. &c. coram Dom. Rege apud Weſtm. ven tam præd. Henricus per Attorn. ſuum præd. quam præd. Johannes per Ric'um Longford Attorn. ſuum & idem Johannes defen. vim & injuriam quando, &c. & dicit quod præd. Henricus actionem ſuam præd. inde verſus eum habere ſeu manutenere non debet quia dicit quod poſt confectionem præd. ſeparal. promiſſion. & aſſumption. in narr. præd. mentionat. ſcil't eodem 21 die Maii Anno regni dictorum Dom. Regis & Dom. Reginæ ſexto apud Swinford Regis præd. concordat. fuit inter præd. Henricum & eundem Johan. quod præd. Henricus acceptaret & dict. Johannes daret eidem Henrico quandam Billam ſub manu ſua ipſius Johannis pro ſolutione ſummæ quinque librarum eidem Henrico ad feſtum Sancti Mich. Archang. tunc prox. ſequen. in plena ſatisfactione & exoneratione omnium denariorum ſummarum eidem Henrico a præfat. Johanne debit. & ſuperinde ipſe præd. Johannes adtunc & ibidem dedit eidem Henrico quandam Billam ſub manu ipſius Johannis & per eadem Billam cognovit ſe debere & ſtare indebitat. eidem Henrico ſummam 5 l. ſolven. eidem Henrico ad feſtum Sancti Mich. Archang. tunc prox. ſequen. ad quam quidem ſolutionem bene & fideliter faciend. idem Johannes obligavit ſe & hæredes ſuos per eandem Billam quam quidem Billam ipſe præd. Henricus adtunc & ibidem cepit & acceptavit in plena ſatisfactione & exoneratione præd. ſeparal. promiſſion. & aſſumption. ipſius Johannis in narratione præd. mentionat. & hoc parat. eſt verificare unde petit judicium ſi præd. Henricus actionem ſuam præd. inde verſus eum habere ſeu manutenere debeat, &c.

Et præd. Henricus dicit quod ipſe per aliqua per præd. Johannem ſuperius placitan. allegat. ab actione ſua præd. inde verſus eum haben. præcludi non debet quia proteſtando quod non concordat. fuit inter præd. Henricum & Johannem quod præd. Henricus acceptaret & dict. Johannes daret eidem Henrico Billam in placito præd. mentionat. ſub manu ipſius Johannis pro ſolutione ſummæ quinq; librarum eidem Henrico ad Feſtum in eodem placito ſpecificat. in plena ſatisfactione & exoneratione omnium denariorum ſum. eidem Henrico a præfat. Johanne debit. proteſtando etiam ſimiliter quod præd. Henricus non cepit & acceptavit Billam præd. in plena ſatisfactione ſeparal. promiſſion. & aſſumption. ipſius Johannis in placito præd. ſi'liter mentionat. prout. præd. Johannes ſuperius inde placitando allegavit pro placito idem Henricus dicit quod præd. Johannes

non

non dedit præfat. Henrico [illegible] quam Billam ſub manu & ſigillo ipſius Johannis pro ſolutione denariorum in placito præd. mentionat. & hoc parat. eſt verificare unde petit judicium & dampna ſua occaſione non perform. promiſſion. & aſſumption. præd. ſibi adjudicari, &c.

Demurrer, and Joinder in Demurrer.

Tayler *verſus* Baker.

QUantum meruit pro opere & ſervitio, and an Inſimul computaſſet for five Pounds, ſolvend. cum inde requiſit. eſſet.

Ante 86. The Defendant pleaded, that it was agreed between him and the Plaintiff, that the Defendant ſhould give, and the Plaintiff ſhould accept a Bill of 5 l. in Satisfaction of what was due to him, and that he did accept ſuch a Bill according to the ſaid Agreement.

The Plaintiff replied, Proteſtando that he made no ſuch Agreement; Proteſtando etiam, that there was no ſuch Bill given; Pro placito dicit, that it was under Seal; and upon Demurrer to this Replication, it was held good.

Bowers & Uxor *verſus* Cook *Executrix*, &c.

Vide Poſt, 145, 146. S. C. & 1 *Salk.* 298. *Powers verſus Clerk.*

DEbt againſt the Defendant as Executrix, &c.

She pleaded, that her Husband died Inteſtate, and that the Archbiſhop of Canterbury committed Adminiſtration to her; Cujus pretextu the ſaid Defendant adminiſtred to the Goods and Chattels of John Cook her Husband, unde petit Judicium, &c.

And upon Demurrer to this Plea, the Queſtion was, Whether ſhe ſhould not have traverſed, that ſhe was Executrix, or ever adminiſtred as Executrix?

Cro. Eliz. 108, 810. 3 *Leon.* 197. If the Plaintiff in this Caſe had replied, that ſhe adminiſtred de ſon Tort, and the Defendant had demurred, Judgment ſhould be given againſt him, becauſe by the Demurrer it is confeſſed ſhe was a wrongful Adminiſtrator, and therefore by her intermeddling with the Goods, an Advantage is given to the Creditor to ſue her, either as Executrix or Adminiſtratrix, though in Truth ſhe was neither at that Time; but Adminiſtration was committed to her afterwards. Now a wrongful Adminiſtration ſhall never be intended, unleſs the Party acknowledges the intermeddling with the Eſtate.

It is true, in the Case of Bradbury and Reynell, the Defendant's Plea went a little farther; that was an Action of Debt brought against an Executor. He confessed, that some of the Intestate's Goods came to his Hands, and that afterwards Administration was committed to another, to whom he delivered the said Goods: Now in such Case he may be sued as Executor de son Tort, because he had once charged himself to the Plaintiff's Action, and therefore shall not be discharged by Matter ex post Facto. *Cro. Eliz.* 565. *Vide* 1 *Cro.* 89. 3 *Cro.* 102, 406, 565. *Moor.* 419. 5 *Co.* 34. 1 *Mod.* 50, 213, *&c.*

The like Exception was taken to the like Plea, Anno 29 Car. 2. in the Common Pleas, and Judgment was given for the Plaintiff; not because the Plea was ill, nor for the Reason now alledged, but because it was a Plea in Abatement, and concluded in Bar. 1 *Mod.* 213, 214.

Afterwards it was adjudged in the principal Case, that the Plea was good, and that the Defendant need not traverse that she was Executrix, or ever administred as Executrix.

Rex *versus* Stocker.

S. C. 1 *Salk.* 342, 371.

THE Defendant was indicted for forging a Bill of Lading, and upon Demurrer to the Indictment, the Exception was:

1st. It set forth, that the Defendant scienter & subtiliter, nequiter & falso, fecit & fabricavit, vel fieri & fabricari causavit quandam Chartam, videlicet, quandam Billam Exonerationis, cujus Tenor sequitur, &c. which is too incertain, for this being an Indictment at Common Law, it ought to have more Certainty; and tho' the Defendant hath demurred, yet nothing is thereby confessed but what is well pleaded: Besides, these are distinct Offences, and require several Judgments. *Post*, 414.

To which it was answered, that the Word Vel is only an Explanation of what went before, and makes it signify the same Thing.

As for Instance: The Statute 5 Eliz. enacts, That it shall not be lawful to exercise a Trade except he shall be Apprentice seven Years, under the Penalty of 40s. per Month. A Man was indicted on this Statute, for that he did exercise Artem sive Mysterium, &c. and this was held good. 5 *Eliz. c.* 4.

Curia. An Indictment setting forth, that the Defendant murdravit, vel murdrari causavit, is not good; for those are distinct

Crimes, (viz.) one is the proper Act of the Party, and the other is not.

So in this Case, the Defendant might be absent when the Forgery was committed; and if so, it requires a distinct Consideration in respect of the Fine.

It is true, in a strict Sense he who causeth a Forgery to be done, is a Forger himself; but then it ought to be so laid in the Indictment.

If in an Action of Battery the Plaintiff should declare, that the Defendant verberavit, vel verberari causavit, the causing him to be beaten will not make him guilty of the Battery, for it is no more than a Trespass.

Co. Entr. 278. 2 *Roll. Abr.* 81. In an Indictment, or Information, the Fact is never laid in the Disjunctive; and therefore an Indictment on the Statute 8 H. 6. for a forcible Entry into two Closes of Meadow, or Pasture, was held void for the Incertainty.

Rex *versus* Gately.

Per Recordum de Termino Sancti Michaelis Anno septimo Willielmi, &c.

Midd. ff. MEmorand. quod ad general. Sessionem Pacis Domini Regis tent. pro Comitatu Midd. per Adjournament. apud **Hicks's-Hall** in **St. John-street** in Comitatu præd. Die Veneris, scilicet undecimo Die Octobris Anno Regni Domini nostri Gulielmi Tertii, Dei Gratia nunc Regis Angliæ, &c. septimo, coram German. Ireton Ar', Jacobo Mundy Ar', Willielmo Underhill Ar', Willielmo Withers Ar', & aliis Sociis suis Justiciariis dicti Dom. Regis ad Pacem in Com. præd. conservand', necnon ad diversas Felonias, Transgressiones & alia Malefacta in eodem Com. perpetrat', audiend. & terminand. assign', ordinatur per Curiam præd. prout sequitur, scilicet:

Whereas **James Cardrow** Esq; One of His Majesty's Justices of the Peace for this County of **Midd.** upon Complaint made by **Edward Green**, Apprentice to **Roger Gately**, now of the Parish of St. **James Clerkenwell** in the said County, and late of **London**, Surgeon, by Indenture of Apprenticeship, bearing Date on or about the 22d Day of **November**, in the Year of our Lord 1690, for the Term of seven Years, from the Date of the said Indenture, to learn the said Art; That the said **Gately** had not taught and instructed

inſtructed him the ſaid Green in the Art, Myſtery, or Profeſſion of a Surgeon, according to the Covenants in the ſaid Indenture of Apprenticeſhip, but had altogether compelled him the ſaid Green to be a Rope-Dancer, Tumbler, and Jackpudding. The ſaid James Cardrow, upon Examination of the ſaid Matter, for want of good Conformity in the ſaid Maſter, could not compound and agree the ſame; and therefore by Recognizance taken before him the ninth Day of September laſt, did bind the ſaid Gately with Sureties to appear at this preſent Quarter-Seſſions to anſwer the ſaid Complaint: Now upon Examination of the ſaid Apprentice, upon Oath, and other Proof, it appeared to this Court, That the ſaid Roger Gately had not taught and inſtructed the ſaid Green, or cauſed him to be taught and inſtructed in the Art, Myſtery or Profeſſion of a Surgeon during the Time of his Apprenticeſhip, but inſtead thereof, had altogether compelled him to practiſe the Art and Employment of Rope-Dancing, Tumbling, and Acting as a Jackpudding, on a Mountebank's Stage, and in Booths, in Fairs and Markets; and that the ſaid Gately alſo had at ſeveral Times immoderately beat and miſuſed his ſaid Apprentice: And for that it could not be made appear to this Court, that the ſaid Gately did either underſtand, practiſe or exerciſe the ſaid Art, Myſtery or Profeſſion of a Surgeon, and upon a full Hearing of what was inſiſted on by Counſel on either Side, this Court, upon Conſideration of the ſaid Matter, doth think fit, and order, That the ſaid Edward Green ſhall be, and he is hereby diſcharged from his ſaid Indenture of Apprenticeſhip to the ſaid Roger Gately; And the Juſtices of the Peace for this County, whoſe Hands and Seals are hereunto ſet (quorum unus, &c.) have declared, and do declare, That, for the Reaſons aforeſaid, they have diſcharged, and do diſcharge the ſaid Edward Green from his ſaid Indenture of Apprenticeſhip to the ſaid Roger Gately accordingly.

Rex *verſus* Gately.

S. C. 2 *Salk.* 471.

THE Order above-mentioned being removed in B. R. by a Certiorari, ſeveral Exceptions were taken to quaſh it.

1. The Order is, That the Servant ſhall be diſcharged from his Maſter: but the Maſter is not diſcharged from his Covenants to the Servant; therefore the Order being not mutual, is void.

To

To which it was answered, That it is not necessary it should be mutual, for when the Servant is discharged, the other is no longer a Master.

13 *Rep.* 12. 2. The Statute never intended to give the Justices in Sessions a general Power to meddle with Masters in all Trades, but only in such which were then used in England, and therein particularly mentioned; and it provides, That if such Master (which must be in one of those Trades) shall misuse his Apprentice, then the Justices may interpose: But a Surgeon is not named in that Act, and it being a Penal-Law, it shall not be extended according to Equity to comprehend any other Trade, but what is expressly named in the Act.

This Objection was thus answered, (viz.) That a Surgeon is a Trade within the Statute, for it is a Manual Occupation, and that is particularly mentioned in the Act.

1 *Saund.* 315: *Vide* 1 *Mod.* 2, 286. 1 *Vent.* 175. But it hath been held, that this Statute extends to more Trades than those mentioned in it; for the Apprentice of a Merchant hath been discharged from his Master by an Order of Sessions, and yet a Merchant is not named in that Act. Besides, it is not a Penal, but a Remedial Law, to regulate Masters and Apprentices.

Vide 1 *Salk.* 67, 68. 2 *Salk.* 471, 490, 491. 3. The Justices of Peace have no Authority to discharge an Apprentice, but where he was compelled by them to serve; and in such Case it is reasonable, that the Contracts which were made by their Authority should be dissolved by the same Power; but they cannot discharge any voluntary Agreements made between the Parties.

If they make an Order for the Payment of Servants Wages, it is good, because they have Power to compel the Service; but for the Wages of a Coachman, or the like, they have no Power to make an Order, because they cannot compel a Man to serve in that Capacity. One Reycroft, a Justice of Peace in Middlesex, made an Order for the Payment of a Seaman's Wages, and upon an Action brought against him, the Plaintiff recovered 30*l.* Damages.

2 *Keble* 822. 4. But if the Justices of Peace had any Power, they have not pursued it, for it doth not appear, that they who set their Hands and Seals to the Discharge were present in Sessions; and at the Examination of the Matter, it being only set forth in the Order, That the Justices of the Peace of the County, whose Hands

Hands and Seals are thereunto ſet, &c. and thoſe may be Juſtices acting out of Seſſions.

Afterwards it being moved again, this Order was quaſhed for the ſecond and third Exceptions taken to it.

Stedman *verſus* Page.

S. C. 1 *Salk.* 390.

IN Replevin, the Plaintiff declared for taking Bricks, &c. The Defendant made Cognizance as Bailiff of one John Bennet, and Grace his Wife; ſetting forth, That one Simon Bennet was ſeized in Fee of the Lands in quo, &c. and being ſo ſeized, made a Leaſe thereof to Griffith for forty-four Years, rendring Rent; that Simon Bennet died, and the Lands deſcended to his Daughters and Coheireſſes, one whereof married the ſaid John Bennet, and the other was the preſent Counteſs of Salisbury, and ſo made Cognizance for a Moiety of the Rent; and upon Demurrer, Judgment was given for the Plaintiff, becauſe one Coparcener cannot make ſuch an Avowry for a Moiety of the Rent before Partition, tho' they have ſeveral Inheritances.

Parceners muſt avow jointly. 1 *Salk.* 187, 390.

The King *verſus* Hill.

S. C. 1 *Salk.* 371.

Shower. THough the Statute of Recuſancy ſaith, That an Outlawry for Recuſancy ſhall not be reverſed for want of Form; yet in Serjeant Trinder's Wife's Caſe, 1 W. & M. you adjudged in this Court that it ſhould, that the Statute may be made Senſe: But an Indictment or Information for Recuſancy ſhall not be quaſh'd for Form; but yet on Traverſe of the Fact, and Bail given, the Outlawry ſhall be revers'd for Form, Quod Curia conceſſit.

Outlawry of Recuſancy revers'd for want of Form.

Chief Juſtice. On the Reverſal of an Outlawry, in an Information for ſending Children beyond-ſea to be bred Papiſts, the Defendants muſt plead Inſtanter, & ſic per *Aſtry*.

Reſid. ad Term. Sancti Michaelis 7 W. 3. in B. R coram Johanne Holt Mil. Cap. Juſt', & Sociis ſuis.

Prohibitory Writ againſt Players.

THere was a Prohibitory Writ iſſued out to the New Players, Betterton, &c. who had erected a Play-Houſe in Little-Lincoln's-Inn-Fields. The Writ recited, that it was a Nuſance to the Neighbourhood, and therefore prohibited them to continue it; but the Players not obeying this Writ, there was a Rule made for an Attachment, Niſi, &c.

Shower came and ſhewed, That no ſuch Writ could be granted by the Court, for that the Parties had no Way to defend themſelves, unleſs it were to come in and be examined upon Interrogatories upon Oath, and they would ſwear it was no Nuſance, as appeared by ſeveral Affidavits (which he then ſhewed;) but he ſaid, that the moſt proper Method would be to proceed by Indictment, then the Grand Jury, (viz.) the whole County, would conſider whether it were a Nuſance or not.

Prohibition.

Chief Juſtice. You are not concluded by this Writ, as to the Right; but you may come in and plead to this Attachment the General Iſſue, and if the Thing be no Nuſance, it is no Fault or Contempt to continue it. It is like the Caſe of a Prohibition to the Eccleſiaſtical Court, you make a Suggeſtion that the Defendant proceeded there contra Prohibitionem Regiam; upon which, if there goes an Attachment, the Defendant may come and take Iſſue, that he did not proceed after the Prohibition granted.

1 *Mod.* 76.

There was a Caſe in this Court of Jacob Hall, where the Court ſent ſuch a Writ as this is here, and made him pull down his Stage. But indeed, that of a Rope-dancer is a Nuſance in ſe, but here it is only ſo in Conſequence; for the acting of Plays you ſay is only a Nuſance, as it draws the People, and Coaches, and Sharpers thither.

Shower. The Law will not determine a Man's Right, but by a Jury. The Writ de Leproſo amovendo is a Writ of an extraordinary Nature, and I think has not been granted theſe hundred Years. But even in that Writ, the Sheriff is commanded to enquire by the Oath of twelve Men.

But beſides, in this particular Caſe, the Proſecution is carried on by the Patentees of the Old Play-Houſe, and not by the Inhabitants; which ſhews they do not think it a Nuſance, if it be one: And in Truth, the Queſtion at laſt will be, Whether thoſe Letters Patents, to have the ſole Liberty of ſetting up a Play-Houſe be not only a Licence and Authority which determined by the King's Death, and ſo does not bind his Succeſſor? And the new Players are licenſed by his preſent Majeſty.

Chief Juſtice. It is a Caſe of Conſequence, and therefore we will take Time to conſider of it.

Eyre, Juſtice. I think the moſt proper Way is to proceed by Indictment. Adjourn.

Davis *verſus* Speed.

Skinner. THis is Debt on a Deed for an Annuity, and the Action is laid in the County-Palatine of Cheſter. To which the Defendant demurs. *Vide Poſt*, 335.

1. Becauſe this Court hath not Juriſdiction.

2. The Bill is for Debt, and the Declaration is for an Annuity, which is a material Variance, for they ſhall receive different Judgments. Yel. 108. Lucas and Fullwood. The Plaintiff enters his Suit in Placito Debiti, and declares, that the Defendant reddat ei 50 l. de annuali redditu quas ei debet & injuſte detinet. On nil debet the Plaintiff had a Verdict, but it was adjudged, Quer' nil capiat per Billam: For by his Declaration he demands an Annuity, which is contrary to the Entry of his Plaint in Placito Debiti. The Declaration was, Per quod ſubſtraxit annualem redditum, he ſhall in a Writ of Annuity have a ſeveral and diſtinct Judgment; for in a Writ of Annuity he ſhall have Judgment of the Arrears hanging the Writ; but in Debt he ſhall only have Judgment for the Sum demanded. Bill in Debt and Declaration for Annuity. *Cro. Eliz.* 3. *acc.* 3 *Cro.* 268. Difference between a Writ of Annuity and Debt.

Then no Action of Debt lies for an Annuity for Life.

Chief Juſtice. No; nor on an Annuity for Years.

Cheſhire econtra. But this is all Annuity; the Bill and Declaration are the ſame in Annuity.

Chief

Chief Juſtice. They are ſo.

Vide 2 *H.* 7. 16, 17. Pleads to the Juriſdiction. County-Palatine.

Then as to the Juriſdiction; I don't know what became of Jennings and Hawkins's Caſe, there was a Plea to the Juriſdiction, in which there was another Point adjudged: That when the Defendant pleads to the Juriſdiction, he muſt alſo plead that he lives in the County-Palatine, or that he has Lands there whereby he may be ſummoned, though the Cauſe of Action be laid in the County-Palatine, and it is not well pleaded without it, becauſe Proceſs cannot iſſue againſt the Defendant in the County-Palatine.

So that though the Cauſe of Action here ariſeth in the County-Palatine, yet ſince that is not pleadable to our Juriſdiction, that is not material.

Judgment in a Writ of Annuity.

Then Annuity lies, tho' the Annuity continues, to recover the Annuity and Arrears; but for the future there muſt be a Scire Facias on the Judgment.

Judgment pro Quer'.

Churchy *verſus* Roſſe.

Vide 1 *Salk.* 402. & 6 *Mod.* 85, 163. 1 *Mod.* 1. 2 *Lill.* 47, 434. Where in a Warrant of Attorney to confeſs Judgment, no Attorney need to be preſent.

Per Holt, Ch. Ju. IF the Defendant is arreſted, and in Execution, and one becomes bound for him to the Plaintiff, and the Defendant gives him Judgment for his Counter-ſecurity, it is good, though no Attorney were preſent: And it is not within the Common Rule of the Court, becauſe it was not given to the Perſon himſelf (in which Caſe there muſt be an Attorney preſent) but to a third Perſon.

Lee *verſus* Barnes.

Where a Man may plead in Abatement of the Declaration, or not.

Ch. Juſt. YOU may plead in Abatement of a Declaration where it is by Original, for the Pleas there are different; but if the Action is by Bill, you cannot plead in Abatement of the Declaration, but only of the Bill, for they are the ſame Thing, and therefore the Entry in ſuch Caſe is Petit judicium de Billa.

Bowyer *verſus* Cook.

Vide ante, 136, 137.

Chief Juſtice. IN an Action againſt an Executor, the old Way was to plead, Nunque Exec', nunque Admin. as Executors; but this is a dangerous Way, and it is the better Way to plead (as this Caſe was) he is not Executor, but that the Biſhop has granted Adminiſtration to him, and that proves him not to be Executor. In Yelv. 115. it is ſaid, there ſhould be a Traverſe; but all the Precedents and the Reaſon of the Thing is to the contrary. If the Defendant is ſued as Adminiſtrator, and he pleads that there is a Will, and that he is made Executor, there ought to be a Traverſe, abſque hoc that the Teſtator died Inteſtate: But where he is ſued as Executor, and he pleads that he died Inteſtate, there needs no Traverſe,

Diverſity where one is ſued as Executor, and where as Adminiſtrator.

Shower. Then the Concluſion is, Quod reſpondere non debet ad Billam, is good, becauſe the Plaintiff names us Executrix, and not Adminiſtratrix, and either this or quod caſſetur Billa is good. 3 Bulſtr. 250. Debt by Executor, and a profert &c. the Defendant pleaded, That the Party which was dead, died Inteſtate, and that Letters of Adminiſtration were granted to him, abſque hoc that the Plaintiff is Executor; per Cur. the Traverſe is not good, and Day was given to put him to a Peremptory Plea.

2 *Saund* 97, 190, 337. *N. Law.* 144.

Chief Juſtice. You ſhould have begun the Plea, petit judicium de Billa: But if there had been a Traverſe, the Plea had been naught; as if he had ſaid, abſque hoc that he made her Executrix.

Dee. But my Exception is, that he ought to have traverſed, that he had not adminiſtred as Executor before Adminiſtration granted, for we have Liberty to charge him as Executor de ſon Tort as a rightful One. Mod. Rep. 239. is expreſſive on the Point: Debt againſt the Defendant, as Executor of J. W. Defendant pleads, J. W. made a Will, but made not him Executor, &c. and concluded in Bar. This is a Plea in Abatement only.

At another Day this Caſe was again debated.

Vide ante 136. Pleas in Abatement.

Shower. No Traverſe is neceſſary here, for a wrongful Adminiſtrator ſhall not be intended, but it is to come on their Side in their Replication. We have ſhewn, that the Plaintiff has miſlaid his Action by charging us as Executor, and alſo we have ſhewed

him how to mend it, that we are not Executor, but Adminiſtrator, which are the only two Things requiſite in Pleas of Abatement, and muſt be done. So if the Defendant pleads to the Juriſdiction of the Court, it will be bad, unleſs he ſhews ſome other Court, where the Plaintiff may ſue him.

Then the Reſpondere debet is only Form, and you are to give Judgment according to the Nature of the Caſe, and we have ſhewed it abateable, and therefore you will abate it.

Every Plea to have its proper Concluſion.

Chief-Juſtice. No; every Plea muſt have its proper Concluſion: You ſhould have pleaded in Abatement, but Reſpondere non debet is proper to the Juriſdiction, which, 'tis true, is in conſequence in Abatement; but they are two diſtinct Things, and you muſt begin and conclude the Plea properly, and put it to the Judgment of the Court. When a Man pleads to the Juriſdiction of the Court, Reſpondere non debet is a good Plea, ſometimes it is ſi Curia cognoſcere velit, &c.

Plea to the Juriſdiction.

Vide Ante 132, 133.

1 *Saund.* 283. 2 *Saund.* 97, 189, 190, 339. *N. Lutw.* 44. *Show.* 4. 1 *Lutw.* 303, 306.

Traverſe. *Ante.* 136.

But as to the other Exception, there ought not to be a Traverſe, and the Plea is much better without it; for he allows that he is chargeable as to the Right, but that it is in another Manner than you have charged him, and ſhews that it is as Adminiſtrator, which is enough, and is a full Anſwer to the Declaration. And it is a Foreign Intendment that he adminiſtred wrongfully; why ſhould he traverſe abſque hoc that he adminiſtred as Executor de ſon Tort? That is a ſpecial Matter not charged againſt him; He need not traverſe Adminiſtration as Executor before, when you only charge him generally in the Declaration; but you ought to reply, and ſhew what Act of Adminiſtration he had done: At Common Law an Adminiſtrator was only ſuable as Executor; we cannot ſuppoſe a Tort, unleſs it is alledged. But I think the Defendant ought to anſwer over for the other Fault.

Reſpondeat ouſter.

DE

DE
Term. Sancti Hill.
Anno 7 W. III. B. R. 1695.

Sir William Wentworth *verſus Comitem* Strafford.

ſſ. THE late Earl of Strafford in the Year 1676. gave a Warrant of Attorney to confeſs a Judgment at the Suit of the Plaintiff, and this was given to one Symſon, an Attorney in the Country, and ſent to one Wall, who was his Entring Clerk, and the Judgment was entred accordingly, quod recuperet Debitum & Damna ſua, and a Blank left to inſert what the Sum ſhould be for the Damages. *Vide* 1 *Salk.* 52. *Ray.* 39, 398. 1 *Sid.* 70. 2 *Mod.* 316. 3 *Mod.* 112. 5 *Mod.* 148. 6 *Mod.* 263. 2 *Lev.* 22.

Wall died ſoon afterwards, and the Warrant of Attorney and his Papers were all loſt; but Symſon, who was ſtill living, made Affidavit of the Fact. 2 *Saund.* 289, 290.

And now a Motion was made for Leave to put in a Sum certain for the Damages and Coſts, which was oppoſed for theſe Reaſons:

1. Becauſe there was nothing appeared to direct what the Amendment ſhould be, as a Declaration, which may be amended by a Writ, or one Roll by another, &c.

2. If any ſuch Thing had appeared in this Caſe, yet this could not be amended, becauſe it was of another Term, this Judgment being now nineteen Years old; and though this ſhould be admitted to be the Act of the Court, and ſo amendable, if in the ſame Term wherein the Judgment was entred, yet being now ſo many Years paſt, it cannot be done. 3 *Lev.* 430. 6 *Mod.* 164.

3. Neither can it be amended if it ſhould be taken to be the Miſpriſion of the Clerk; for at Common Law ſuch a Miſpriſion in Proceſs was not amendable in another Term; and 'tis 269. 1 *Saund.* 219.

8 H. 6. c. 12. not warranted by the Statute 8 H. 6. which extends to Records as well as to Proceſs, and likewiſe to Pleas, Warrants of Attorney, Original and Judicial Writs, Panels and Returns, in all which the Negligence of the Clerk is to be examined, reformed and amended in Affirmance of the Judgment.

Thoſe who argued for the Amendment, inſiſted, That the Court might put in any Sum to make the Judgment perfect, though it was incertain what Sum they ſhould allow for Coſts, becauſe it doth not appear what was confeſſed ſince the Warrant of Attorney was loſt; and this may be done, eſpecially ſince it appears to be the Neglect of the Clerk to enter the Judgment before the Coſts were tared.

The Words omitted are the Act of the Court, who have Power at Common Law to amend their own Judgments before any Statute of Amendments was made, though in another Term; as for Inſtance, in 4 Ed. 3. 9. B. a Præcipe quod reddat was brought, and the Defendants were eſſoined to Tres Mich. which was adjourned to Craſtino Purificationis, when it ſhould have been to Octab. Pur'; but it was amended: Now the Alteration of the Eſſoin in that Caſe was more than in this.

2 *Mod.* 316, 317. *Yelv.* 130. *Ray.* 38, 39, 398. 2 *Mod.* 112. 2 *Lev.* 22. 2 *Saund.* 289. 1 *Sid.* 70. So where a Writ of Error was brought in B. R. upon a Judgment in Replevin for the Defendants, and an Error aſſigned in the Entry of the Judgment, in which theſe Words were omitted, (viz.) That the Plaintiff nil capiat per Breve ſuum, ſed ſit in Miſericordia pro falſo Clamore, and that the Defendants eant inde ſine Die; but it was amended, and all theſe Words were inſerted in another Term.

So where a Judgment general was given againſt an Executor, and it was not entred de Bonis Teſtatoris in Manibus of the Defendant adminiſtred, and yet that was amended in my Lord Hale's Time; and even in the very laſt Term in the Common Pleas ſeveral Continuances were omitted, and upon great Debate it was amended.

Curia. This is amendable, if the Court had any Thing to amend it by. 'Tis the Act of the Court, and yet Judgment is not given by them as to the Damages. It might have been amended in the ſame Term; for though it is entred on the Roll, yet the Court hath Power to amend any Fault in a Record during that Term wherein it was entred.

Rex *verſus* Clough, *& al'*.

THE Defendants were indicted at the Seſſions upon the Statute 1 & 2 Ph. & Mar. by which it is enacted, That no Perſon dwelling in the Country out of a Corporation or Market-Town ſhall ſell, or cauſe to be ſold by Retail any Woollen Cloth, Linen Cloth, Haberdaſher Wares, or Mercery Wares, in any Corporation or Market Town, or the Liberties thereof, except in open Fairs, under the Penalty of 6 *s.* 8 *d.* for every Offence, and the Forfeiture of the Wares ſold, or offered to be ſold; one Moiety to the Queen, the other to the Seizer or Proſecutor, &c. Stat. 1 & 2 *Ph. & Mar. c.* 7.

The Indictment ſet forth, that the Defendants had ſold Earthen Ware in London, contra Formam Statuti; but it was quaſh'd upon a Motion, becauſe the Statute doth not give Juſtices of Peace any Juriſdiction to proceed in this Matter at their Seſſions, for they are not ſo much as named in the Act. See 2 *Salk.* 406, 475, 680.

Rex *verſus* Inhabitants of *Wootton-Rivers*.

S. C. 12 *Salk.* 492, 493.

TWO Juſtices of Peace made an Order for the Removal of a poor Woman from one Pariſh to another. The Order recited, That upon Complaint made to them, but did not ſay, by the Churchwardens or Overſeers of the Poor, &c.

This Exception being taken to the Order, it was inſiſted at the Bar, that if it is a Fault, yet it was helped by the Return of the Order; for there the Juſtices certify, that it was upon Complaint made to them by the Churchwardens, &c. ſo that if it is defective for this Omiſſion, it is helped by the Return.

And as to the Order it ſelf, it is not neceſſary to ſet forth, that the Complaint was made by the Churchwardens, &c. but where it is expreſly alledged in the Order, that the Perſon to be removed did endeavour to ſettle himſelf in a Tenement under the yearly Rent of 10 l. which was not mentioned in this Order, but only that he was likely to be chargeable, &c. and if ſo, then any of the Pariſhioners may complain.

To which it was anſwered and reſolved by the Court, That the Complaint muſt be made by the publick Officers of the Pariſh, to whom the Care of the Poor is entruſted by Law, and without ſuch Complaint the Juſtices of Peace have no Power to remove the Perſon; for the reſt of the Pariſh may be willing to keep him, or may take Security of another Pariſh to indemp-

nify them in particular from any Charge which may arise by his Poverty, and so they will have no Reason to complain.

Then as to the Return, it is not material to support this Defect; for the Order it self is the Record, and not the Return of the Certiorari, which cannot make a void Order good, because the Justices of Peace have executed their Authority by assigning the Order, and therefore shall not support this Defect by any subsequent Matter.

Nota, There was another Exception to this Order, viz. That it was not alledged the Person came to settle in a Tenement under the yearly Value of 10l.

But the Court held the Order to be good notwithstanding that Exception, for of late Years it is seldom expressed in Orders; and because the Practice had been so, they thought fit to continue it; so it was quashed upon the first Exception.

Pullen *versus* Palmer, *Trin. 6 W. 3. Rot. 179.*

2 *Salk.* 562, 629.
1 *Sid.* 298.
1 *Lev.* 190.

IN Replevin the Defendant avowed in his own Right, setting forth, that the Locus in quo was Parcel of a Tenement whereof such a Person was seized, who by Bargain and Sale granted it to thirteen Persons and their Heirs; that they being seized thereof, granted the Premises to thirteen more: Then he shewed, That four of these thirteen were dead, and that nine were living, of whom he was one; that there was Rent in Arrear, per quod idem (the Defendant) in Jure suo proprio bene advocat Captionem, &c.

1 *Salk.* 216.
2 *Sid.* 10, 11.

The Plaintiff replied, That one of the nine surviving Grantees did release the said Rent, to which Replication the Defendant demurred, and the Plaintiff joined in Demurrer.

The Exceptions to the Avowry were:

1. The Defendant sets forth, that he was seized generally, and doth not say of what Estate, either in Fee or for Life.

2. That the Estate was conveyed by Bargain and Sale; and it may be a Question, Whether that is a sufficient Conveyance to raise an Use?

3. And lastly, [which was chiefly relied on] That he did not sever in the Avowry; for he ought to have avowed in his own Right, and to have made Cognizance as Bailiff to the rest; but having avowed generally, and made no Cognizance as Bailiff

liff to the other Jointenants, the Avowry cannot be good, for tho' he may diſtrain for himſelf, yet he muſt do it as the Law directs; for his Fellows Jointenants muſt join in an Avowry for Damage Feaſant, and much more for a Rent; all the Entries are ſo. *Thompſ. Ent.* 264.

To which it was anſwered, That this is but Form, for the Defendant had avowed for a Rent, and had ſhewed the ſpecial Matter, and therefore his Avowry is good.

For if one Jointenant doth make a Diſtreſs for the whole Rent in Arrear, and levy the Whole, the Taking is good, for he is accountable to the reſt; and in this Caſe the Defendant has ſpecially ſhewed, that ſuch a Rent was due to him, and to them, who being Jointenants were ſeized, and ſo it is well enough. *2 Rep. Tookɛr's* Caſe, *contra.*

A Rent-charge was granted to the Father and his Heirs during his Life, and the Lives of his Wife and two Daughters; one of them married the Defendant, who avowed for the Rent Arrear before Marriage due to him and his Wife; which being aſſigned for Error, it was held to be no more than Form, becauſe the Avowry being for Rent Arrear, to ſay it was due to him and his Wife, is but Surpluſage; and that Avowry was held good in Subſtance. Adjourn'. *2 Cro.* 282. *2 Cro. Wiſe* verſus *Billent.* *1 Roll. Abr.* 318.

Company of Vintners *verſus* Clerke. *Vide Poſt,* 156, 319.

JUſticiar. Dom. Regis ad Placita coram ipſo Rege tenen. ego Jacobus Fell, Cuſtos Gaolæ dicti Dom. Regis de Newgate humillime certifico quod Civitas London modo eſt & a toto tempore cujus contrarii memoria hominum non exiſtit fuit antiqua Civitas quodq; Cives & liberi homines Civitat. il. a toto tempore ſupradicto cujus contrarii memoria hominum non exiſtit fuerunt incorporat. tam per nomen Majoris Communitat. ac civium Civitat. London quam per nomen Major. Communitatis civitatis London ac quod de præd. civibus a toto tempore ſupradicto fuer. & adhuc ſunt ſeparal. Societat. Guild. & Fraternitat. infra eandem Civitatem unde ſocietas Myſterii Vintarum in præd. civitat. London a toto tempore præd. incorporat. per nomen Magiſtri cuſtod. ac liberorum hominum ac co'itat. Myſterii Vintarum Civitat. London fuit & eſt un. quodque tam de & in præd. Societate Vintarum quam de & in omnibus aliis Societatibus, Guildis ſive Fraternitatibus infra eandem Civitatem ſunt & a toto tempore ſupradicto fuerunt quidem homines exiſten. Cives civitat. præd. ac liberi homines earundem ſocietat. Guild. ſive Fraternitat. reſpective [vocat. Livery-men] qui de tempore in tempus & a toto tempore ſupradicto electi fuerunt & eligi conſuever.

Nota, The Gaoler hath laid a Preſcription in the Vintners to be a Company, when they were incorporated, but in the Reign of *Ed.* 6.

ſuever.per Societatem, Guild. ſive Fraternitat.unde hujuſmodi homines liberi extiterunt & quilibet liber extitit reſpective in Liberatur. [Anglice the Livery] ejuſdem Societat. Guild. ſive Fraternitat. unde ipſe reſpective ſic ut præfertur liberi homines extiter. qui quidem homines & quilibet eorum reſpective ſic elect. exiſten. idonei & non habentes ſeu habens aliquam rationabilem cauſam ſive excuſacon.in contrarium inde officium ſive locum unius liberatur. [Anglice of a Liveryman] ejuſdem Societat. Guild. ſive Fraternitat. reſpective in qua quilibet hujuſmodi liber homo elect. fuer. fore de liberatur. inde a toto tempore ſupradict. in ſe ſuſceperunt & ſuſcipere totaliter fuerunt ac debuerunt & debent ac officium il. ac omnia officii ſive loci illius onera & expenſa & denariorum ſummas erga ſupportationem & in & pro bono publico & pro meliori regimine ejuſdemSocietat.a toto tempore ſupradicto ſolverunt & ſolvere ſoliti fuerunt & debuerunt; & ulterius certifico quod infra civitat. præd. habetur & a toto tempore ſupradicto cujus contrarium memoria hominum non exiſtit habebatur quædam Curia Dom. Regis nunc & prædeceſſorum ſuorum Regum &Reginarum Angliæ de record. tent. ſeptimatim quolibet die Martis & quolibet die Jovis coram Majore & Aldermannis civitat præd. pro tempore exiſten. in Guildhall ejuſdem civitatis ſcituat. in Parochia Sancti Michaelis Baſſiſhaw in Warda de Baſſiſhaw in qua quid. Curia Major & Aldermanni Civitat. præd. pro tempore exiſten. a toto tempore ſupradict. tractaverunt regulaver. & ordinaverunt & tractare regulare & ordinare uſi fuerunt & conſueverunt omnia ad præd. ſeparal. Societat. Guild. & Fraternitat. Civitat. præd. pro tempore exiſten. tangen. & ſpectan. vel quoviſmodo concernen. quæ coram eis dilat. fuerunt pro meliori regimine & gubernatione inde in ſupportacon. honoris & dignitatis ejuſdem Civitatis quodque liberi homines exiſten. cives civitat. London præd. qualibet ſocietate Guild. ſive Fraternitate civitat. London præd. & eor. quilibet toto tempore ſupradicto fuerunt & fore conſueverunt & adhuc exiſtunt ſub regimine gubernatione correctione & punitione præfat. Major.& Aldermannor. civitat. præd. pro tempore exiſten. in Curia præd. in forma tent.pro omnibus & ſingulis materiis per aliquem hujuſmodi liberum hominem Societat. præd. inde fact. ſive fieri omiſſ. contra ſive in prejudicium boni regiminis & gubernationis præd. Societatis Guild. ſive Fraternitat. civitat.præd. & ulterius certifico quod infra civitat. præd. habetur & a toto tempore ſupradicto habebatur quædam al. conſuetudo infra civitat. præd.a toto tempore ſupradict. uſitat. & approbat. quod ſi aliqua querimonia [Anglice Complaint] fact. fuit in ſcriptis vel ore tenus præfat.Major.& Aldermannis civitat. præd. pro tempore exiſten. in

Curia præd. ſic ut præfertur coram eis ſecundum conſuetudinem præd. tent. per Magiſtrum & cuſtod. alicujus Societatis civitat. præd. infra eandem civitatem ſive per membra principalia alicujus Societat. civitatis præd. infra eandem Civitatem in qua non fuerunt magiſtri ſive cuſtod. ſeu eorum aliquis oſtenden. quod aliqua perſona exiſtens civis civitat. præd. ac membrum ejuſdem Societatis electus & idoneus pro officio illo fuit per Societat. il. liberatur. ejuſdem Societatis unde ipſe membrum extitit. ac requiſit. fuit ad officium ſive locum unius de liberatur. ejuſdem Societatis ſuſcipien. ac ad onus officii ſive loci illius ſubeun. & ſuſtinen. quodque hujuſmodi Civis liber homo ac membrum hujuſmodi Societat. abſque rationabili cauſa ſive excuſatione in contrar. inde fore de liberatur. hujuſmodi ſocietatis officium ſive locum il. ſuſcipere ac onus officii ſive loci illius ſubire & ſuſtinere recuſavit ac inde petiens remedium auxilium & juſtitiam ejuſdem curiæ coram Majore & Ald. ejuſdem civitat. pro tempore exiſten. ſic ut præfertur ſecundum conſuetudinem præd. tent. in præmiſſis verſus talem perſonam ſic recuſantem ac ſuperinde talis perſona verſus quam hujuſmodi querimonia fact. fuit exiſten. Civis liber homo ac membrum hujuſmodi Societatis coram præfat. Majore & Ald. civitat. præd. pro tempore exiſten. in Curia præd. convent. exiſten. coram iiſdem Majore & Ald. in eadem Curia præmiſſa cognoverit vel non dedixerit ſed monitus per eandem Curiam ad ſeipſum conforman. in ea parte ad officium ſive locum il. ſuper ſe ſuſcipere ac onus officii ſive loci illius ſubire & ſuſtinere aperte voluntarie obſtinate & contemptuoſe abſque aliqua cauſa ſive excuſatione quacunque in contrarium inde fore de liberatur. ejuſdem Societatis unde ipſe ſic ut præfertur membrum exiſten. vel onus officii ſive loci illius ſubire & ſuſtinere in eadem Curia recuſaverit tunc iidem Major & Ald. civitat. London pro tempore exiſten. in eadem Curia tent. ſecundum conſuetud. per totum tempus præd. uſitat. & approbat. hujuſmodi perſonam ſic recuſantem in Priſonam ſub cuſtodia Vic. civitat. London pro tempore exiſten. Aut al. officiar. ibidem mandaver. & commiſerunt ibidem ſub cuſtodia remanſur. & fore detent. quouſque eadem perſona quæ ſic in priſona commiſſa fuit Concetiret & declararet quod ipſe officium ſive locum præd. inde ſuſciperet ac onus officii ſive loci ſubiret & ſuſtineret vel aliter hujuſmodi perſona extra priſonam & cuſtodiam præfat. vicecomitis vel alii officiar. civitat. præd. per debitum legis curſum deliberaretur & exoneraret. quæ quidem ſeparal. conſuetudines ſupra mentionat. necnon omnia alia conſuetudines & libera uſuagia [Anglice Frank Uſages] civitat. præd. infra præd. civitat. uſitat. Autoritate Parliamenti Dom. Ric'i. nuper Regis Angliæ poſt conqueſtum ſecundi

tent. apud Weſtm. in Com. Mid. Anno regni ſui Septimo tunc majori & communitat. civitat. præd' ratificat. & confirmat. fuerunt & ulterius certifico quod ante adventum dicti brevis de Habeas Corpus mihi in hac parte direct. ſcil't quarto die Junii Anno regni Dom. Regis nunc ſeptimo, Iſaac Clerke in brevi huic ſchedulæ annex. nominat. qui adtunc & diu antea & continue poſtea hucuſque fuit & adhuc exiſtit' Civis civitar. præd. ac liber homo & membrum præd. Societatis vintarum in civitat. London prædict. per Societatem illam debito modo electus fuit in liberatura ejuſdem Societatis adtunc & adhuc exiſten' idoneus homo pro officio illo ac ad officium ſive locum unius liberatur. [Anglice of a Livery-Man] ejuſdem Societatis in ſe ſuſcipien. ac ad onus officii ſive loci illius ſubeund. & ſuſtinen' ſecundum conſuetudinem civitatis præd. a toto tempore ſupradicto uſitat. & approbat. in eadem unde idem Iſaac Clerke adtunc notitiam habuit & ad officium illud ſuper ſe ſuſcipien. requiſit. fuit quod facere præd. Iſaac Clerke adhuc penitus recuſavit ſuper quo poſtea & ante adventum præd. Brevis de Habeas Corpus mihi in hac parte direct' ſcil't die Martis tertio die Decembris Anno regni dicti Dom. Regis nunc ſeptimo quædam querimonia [Anglice a Complaint] fact' fuit ore tenus Johanni Houblon mil. adtunc & adhuc Majori & tunc Ald. Civitat. præd. in Curia præd. tunc tent' coram præfat. Majore & Ald. Civitat. præd. per quendam Thomam Collett adtunc magiſtrum & quoſdam Ludovicum Wilſon, Thomam Feilder & Johannem Knapp, adtunc cuſtod. Societatis Vintarum in Civitate London præd. oſtenden. quod præd. Iſaac Clerke exiſten. Civis & liber homo Civitatis præd. ac membrum ſocietat. Vintarum præd. in Civitate London præd. & idoneus homo pro officio præd. exiſten. electus fuit per Societatem illam in liberatura ejuſdem Societatis & adtunc & diu antea idoneus homo exiſten. tam ad officium quam ad onus ejuſdem officii ſubeun. requiſitus fuit ad officium ſive locum unius de liberatura ejuſdem Societatis in ſe ſuſcipien. ac ad onus officii ſive loci illius ſubeun. & ſuſtinen', Idem tamen Iſaac Clerke Civis & liber homo Civitat. præd. ac membrum ejuſdem Societatis abſque aliqua rationabili cauſa ſive excuſatione in contrarium inde fore de liberatura ejuſdem Societatis & officium ſive locum illum in ſe ſuſcipere ac onus officii ſive loci illius ſubire ſeu ſuſtinere penitus recuſavit ac proinde magiſtri & cuſtodes per querimoniam illam remedium auxilium & juſtitiam Curiæ præd. coram Majore & Ald. præd. ſecundum conſuetudinem præd. tent. in præmiſſis præd' verſus præfat. Iſaac Clerke petierunt ac ſuperinde præd. Iſaac Clerke coram præfato Majore & Ald' Civit. præd. in Curia præd' adtunc & ibid. ſecundum conſuetudinem præd. coram Majore & Ald. Civitat. præd. tent. convent. exiſten'

exiſten. & perſonaliter comparen. coram iiſdem Majore & Ald. Civitat. præd. in eadem Curia præmiſſa præd. non dedixit. videl't quod ipſe exiſten. civis & liber homo Civitatis præd. ac membrum a liber homo Societatis præd. ult. mentionat. exiſten. ac etiam idoneus homo tam ad officium præd. quam ad onus officii illius ſubeun. electus fuit per Societatem illam in liberatura ejuſdem Societatis & requiſit. fuit ad officium ſive locum unius de liberatura ejuſdem Societatis ſuſcipien. ac onus officii ſive loci illius ſubeun. & ſuſtinen. ac præd. Major & Aldermanni præd. electionem præfat. Iſaac Clerke ut præfertur fact. approbaverunt & allocaverunt, Idem tamen Iſaac Clerke Civis & liber homo Civitatis præd. ac liber homo & membrum Societatis illius & idoneus homo & præfectur. exiſten. officium ſive locum illud in ſe ſuſcipere ac onus officii ſive loci illius ſubire & ſuſtinere recuſavit coram præfat. Majore & Aldermannis Civitatis præd. in aperta Curia prædict. coram prædict. Majore & Ald. die & loco ultimo ſupradicto tent. ſuper quo præd. Iſaac Clerke adtunc & ibidem in eadem Curia per præfat. Majorem & Aldermannos Civitat. præd. ad ſe ipſum conforman. in ea parte ac ad officium ſive locum illum in ſe ſuſcipien. ac ad onus officii ſive loci illius ſubeun. & ſuſtinen. ſæpius in eadem Curia ibidem monitus fuit præd. tamen Iſaac Clerke non habens nec allegans aliquam cauſam ſive excuſation. quamcunque in contrarium inde poſt hujuſmodi monitionem ſibi in forma præd. fact. fore de liberatura ejuſdem Societatis ac officium ſive locum illum in ſe ſuſcipere ac onus officii ſive loci illius ſubire ſeu ſuſtinere in eadem Curia ibidem adtunc aperte voluntarie obſtinate & contemptuoſe abſque aliqua cauſa ſive excuſatione quacunque in contrarium inde officium illud ſuſcipere ſuper ſe & onus inde ſubire adtunc & ibidem renuit & expreſſe recuſavit per quod præfat. Major & Aldermanni Civitatis London præd. adtunc & ibidem in eadem Curia ante adventum præd. Brevis de Habeas Corpus præfat. Iſaacum Clerke ſic recuſantem per quoddam Warrantum in ſcriptis ſecundum conſ. præd. in priſona ſub cuſtodia mea mandaver. & commiſer. ibidem remanſur. & fore detent. quouſque idem Iſaac Clerke Concetiret & declararet quod ipſe officium ſive locum præd. in ſe ſuſcipere ac onus officii ſive loci illius ſubiret & ſuſtineret vel aliter per deb'um legis curſum deliberat. & exonerat. foret & ulterius certifico quod præd. Iſaac Clerke ad aliquod tempus hucuſque non conſentivit ſeu declaravit quod ipſe idem Iſaac Clerke officium ſive locum præd. in ſe ſuſcipere ſeu onus officii ſive loci illus ſubire & ſuſtinere voluit nec officium & locum il. in ſe ſuſcepit nec onus officii ſive loci illius ſubivit ſeu ſuſtinuit & hæc eſt cauſa captionis & detentionis præd. Iſaac Clerke in priſona

ſona mea quam una cum corpore præfat. Iſaac Clerke coram præd. Johanne Holt mil. capital. Juſticiar. præd. dicti Dom. Regis nunc ad placita coram ipſo Rege tenen. aſſign. ad tempus & locum in Brevi huic Schedulæ annex. detent. parat. habeo una cum dicto Brevi prout mihi per idem Breve præcipitur.

S.C. *poſt.* 319.

Company of Vintners *verſus* Clerke.

Upon an Habeas Corpus directed to the Keeper of Newgate he returned,

Vide 1 *Mod.* 10, 164. *Ray.* 447. 1 *Salk.* 341, 352.

That the City of London was an ancient City, and that the Citizens and Freemen thereof have Time out of Mind been incorporated by the Name of Mayor, Commonalty, and Citizens, &c. That there are ſeveral Companies, Guilds and Brotherhoods amongſt the ſaid Citizens, of whom the Company of Vintners was One; which Company was incorporated by the Name of Maſter, Warden, Freemen, and Commonalty of the Myſtery of Vintners: And that ſome Freemen of that Company were always of the Livery, and choſen by that Company, who being ſo choſen and fit Perſons for the ſaid Office, did uſually hold the ſame without ſome reaſonable Excuſe to the contrary.

6 *Mod.* 123, 177. 4 *Mod.* 27, 28. *Ante.* 104. *Poſt.* 320, 438, 439.

That there was a Court of Record held in the ſaid City before the Lord Mayor and Aldermen at Guildhall twice in every Week, where Rules and Orders were made in all Things relating to the ſeveral Companies for the better Government of the City, and that the ſaid Companies were under the Correction of that Court.

That there is a Cuſtom in the ſaid City, If any Complaint ſhould be made to the Mayor and Aldermen of the ſaid Court, by the Maſter and Wardens of any Company, of a Livery-man choſen, and refuſing to take the Office, being admoniſhed by that Court to accept it; That then the Mayor and Aldermen have uſed to commit the Perſon ſo refuſing to the Cuſtody of the Sheriffs of London, or any other Officer, there to be detained until he ſhould conſent, and declare that he would take upon him the ſaid Office.

Then he ſets forth, That theſe Cuſtoms were confirmed by Act of Parliament; and that before the iſſuing forth of the ſaid Writ, one Iſaac Clerke, being a Citizen of London, and a Freeman of the Company of Vintners, was choſen of the Livery, and required to take upon him the ſaid Office, which he refuſed: Whereupon Complaint being made to the Mayor, &c. by the Maſter and Wardens of that Company, the ſaid Clerke was ſummoned to appear, &c. which he did, and refuſed to take upon him the ſaid Office,

Office, and being admonished by the Court to conform, did still refuse, that the Mayor, &c. by a Warrant in Writing, did commit him to Custody, there to remain until he should consent and declare, That he would accept the said Office; and that this was the Cause of his Taking and Imprisonment.

Those who argued against this Return, said, That it consisted of several Facts, of which this Court could not take any Notice; but that none of these Facts were contained in the Warrant of Commitment, and that no Matter ought to be put in the Return which the Warrant it self doth not lead unto.

1. That the Return is void, both in Substance and Form; and 'tis void in Form for these Reasons:

Because 'tis laid specially, That the Mayor and Aldermen have a Custom to commit, till the Offender should consent and declare his Willingness to take upon him the Office; but he did not set forth to whom he should signifie such Consent; it being therefore incertain to whom such a Declaration should be made, 'tis void for that Reason, especially in this Case where the Liberty of the Subject is concerned, which is so much favoured by the Law.

Besides, 'tis a void and impertinent Custom to commit a Man to Prison, until he should consent and declare to hold an Office; the Mayor and Aldermen may have a Power to summon Men before them by Vertue of some ancient Custom, in order to reform or punish Offenders: But the Commitment in this Case is not a Punishment for the Refusal to take the Office, but because the Defendant would not declare he would do it; and when such a Declaration is made, then he is at large again, and may break his Word by refusing to be of the Livery, &c.

They might have imposed a Penalty to be levied by Distress, but ought not to commit the Offender; and thus it was adjudged in Clerke's Case, (viz.) The Town of St. Albans was incorporated by Ed. 6. and had Power to make By-Laws, and the Term being held there, the Mayor by the Consent of Clerke, who was one of the Burgesses of the Town, &c. made an Order for assessing every Inhabitant to the Charge of erecting Courts for the Judges and Suitors, and those who refused to pay, to be imprisoned; Clerke refused, but it was adjudged, that the Mayor could not justifie his Commitment by Vertue of that Order; because he ought to have inflicted a Pecuniary Punishment, or he might have brought an Action of Debt upon the By-Law, made for the Forfeiture of a particular Sum. 1 *Jo.* 162. 8 *Co.* 127. *Mo* 411, 412, 580. 5 *Rep.* 64. a. *Winch's Ent.* 252.

March 179. A Cuſtom for the Court of Aldermen to commit until the Offender ſhould take the Oath of Alderman, was held good, becauſe 'tis a publick Office for the Adminiſtration of Juſtice, and for the Government of the City, which are Things of Neceſſity; but it doth not appear, that the Office of a Livery-man is of any publick Concernment.

Style 78, 84. There are but few Authorities in the Books relating to this Objection; ſome there are; as for Inſtance: In an Action of falſe Impriſonment, the Defendant juſtified under a Cuſtom in London, to commit a Man for diſturbing the Election of a Warden of a Company, and to continue him in Cuſtody until he would promiſe not to diſturb ſuch Elections: And upon a Demurrer to this Plea, the Plaintiff had Judgment.

1 *Mod.* 10. So upon the Return of an Habeas Corpus, the Cauſe of Impriſonment did appear to be, for that he being choſen of the Livery, refuſed to ſerve, and it was not until he ſhould make an Inſignificant Declaration of his Conſent to hold the Office; and yet in that Caſe the Impriſonment was adjudged to be illegal; for they might have fined the Offender, and have brought an Action of Debt for the Fine; but they could not commit for ſuch a Refuſal.

2. Exception. ſſ. The Gaoler hath not ſet forth his Warrant in hæc verba, but only that per quoddam Warrantum in ſcriptis ſecundum conſuetudinem, &c. the Defendant was committed, and this is introduced with a long Story, not pertinent to the Commitment it ſelf, of which he hath not ſet forth any Cauſe.

31 *Car.* 2. *Cap.* 2. Now by the Statute 31 Car. 2. commonly called the Habeas Corpus Act, the Judges of either Court in Weſtminſter may upon Application made to them by the Priſoner, and upon View of the Copy of the Warrant of Commitment, or upon Oath made that it was denied, grant a Habeas Corpus in Vacation-time, returnable immediate; which Statute would be eluded if the Warrant it ſelf ſhould not be returned, for if the Officer ſhould return any Cauſe different from the Warrant of Commitment, and ſuch for which a Habeas Corpus is not allowed by that Act, then the Perſon muſt ſtill be kept in Cuſtody, tho' he is really bailable by Law, and he hath no Remedy but to bring an Action againſt the Gaoler for a falſe Return.

Therefore it ſeems neceſſary, that he ſhould return the whole Tenour of the Warrant, that the Court may make a proper Judgment of it; for otherwiſe by a Return of the Commitment generally the Gaoler makes himſelf a Judge of the Cauſe.

Neither doth it lie in the Power of the Officer to mend the Warrant of Commitment, but he is to return it as it is, that the Court may judge of it; 'tis his own Excuse for keeping the Prisoner in Custody, and if the Return and Warrant do not agree, he may keep him in Custody longer than the Law allows.

The whole Warrant was returned in * Bethell's Case, and this is agreeable to Law in other Proceedings; for if a Man is bound to make a sufficient Release to another, 'tis not enough for him to say generally, that he executed a Release, but he must set it forth at large, that the Court may judge whether 'tis sufficient or not. * Antea. 19.

The Habeas Corpus Act takes Care, that a Person who is bailed shall not be recommitted for the same Offence, under the Penalty of 500 l. to the Party grieved, any colourable Pretence or Variation in the Warrant of Commitment notwithstanding. From which it may reasonably be inferred, That the Makers of that Law did intend the Warrant should be returned; otherwise if the Party should be recommitted, how can it appear to be for the same Cause for which he was in Custody before?

Now it doth not appear upon this Return, but that the Warrant may be illegal, and the Commitment not to be justified by Law: Therefore it ought to be set forth at large, that the Court may judge of the Legality of it.

'Tis always so in the Common Cases of Orders made by Justices of Peace; for it may not appear in the Order it self, that those who signed it were Justices of Peace at that Time; and though it should appear so upon the Return of the Certiorari to remove such Order, yet this Court would quash it.

3. Exception. And the most insisted on, was, That in the Return a Custom was laid for the Mayor, &c. to commit the Offender to the Custody of the Sheriffs of London, or other Officer; and the Gaoler had returned, That he was committed Custodiæ meæ, when it doth not appear that he was either Sheriff or Officer at that Time; so that more is put in the Judgment than that is warranted by the Custom.

'Tis likewise said, That he was committed to Prison, but doth not say where; if he had returned, that the Prisoner was committed to Newgate, it might have been better, yet that would have been insufficient; for tho' Newgate is the King's Gaol, and admitting that the Person to whom the Defendant was committed was then Keeper thereof, yet that doth not make him appear to be an Officer of the City at that Time.

4. Lastly,

4. Laſtly, 'tis ſaid, he was committed quouſque concetiret, which is void and inſenſible, there being no ſuch Word.

Econtra.

Theſe Exceptions were thus anſwered by the Counſel, who maintained the Return to be good.

1. As to the firſt it was anſwered, That if the Party declares his Conſent to any Perſon that he would accept the Office, 'tis ſufficient; for upon ſuch a Declaration of his Mind he may be brought before the Court, and diſcharged from his Impriſonment.

And as to the Illegality of the Cuſtom it ſelf, to commit for refuſing to take upon him the Office of a Livery-man, it was argued, That the Cuſtoms of London are confirmed by Act of Parliament, to which all People virtually give their Conſent; therefore a Commitment by Vertue of a Cuſtom thus confirmed, in order to enforce an Obedience to it, is juſtifiable by the Law of the Land.

The City of London have many Cuſtoms more unreaſonable than this is, and which likewiſe tend to reſtrain Men of their Liberty, and yet they are allowed, becauſe they cooperate with an Act of Parliament; as for Inſtance, There is a Cuſtom for a Creditor to arreſt a Debtor before the Day of Payment, in order to compel him to give better Security for the Debt.

There is another Cuſtom for a Conſtable, upon Suſpicion only of any Immorality, to break open an Houſe, and to commit the Offenders, which is expreſly contrary to Law; and yet ſuch Cuſtoms being the particular Uſages of the City, are become Leges loci, and being confirmed by Act of Parliament, are binding to the Inhabitants.

When a Commitment quouſque may be good according as the Fact is, unleſs 'tis in Execution; and ſo was the Commitment in Alderman Langham's Caſe, until he ſhould take the Oath of Alderman, &c.

* *March.*

Beſides, the Court of Aldermen is a Court of Record, the Judges ſend Prohibitions to them. Now it appears upon the Return, that the Defendant Voluntarie, obſtinate & contemptuoſe, refuſed to take upon him the Livery of his Company, and 'tis incident to a Court of Record to commit for a Contempt.

8 *Rep.* 119. b. *March* 156.

2. As

2. As to the ſecond Objection, That the Warrant is not return'd in hæc verba; it was ſaid, that it is not neceſſary; for tho' the Law favours Liberty, yet it favours likewiſe Magiſtracy and Proceedings in Courts of Juſtice.

If the Commitment had been by mean Proceſs, then it might be neceſſary to ſet out the Warrant at large; but when it is in a judicial Way by a Court of Juſtice, it is not uſual to do it: As if a Commitment is made by B. R. and a Habeas Corpus is directed to the Marſhal, he never returns the Warrant it ſelf.

Therefore this is not within the Habeas Corpus Act, for it is a Commitment in * Execution by a Court of Record for a Contempt of their Authority, and in ſuch Caſe the Warrant it ſelf is never returned; it is ſufficient to ſay, that the Perſon was committed per Mandatum Domini Cancellarii vel Dominorum in Concilio; and it is likewiſe ſufficient as in this Caſe to ſet forth, that it was per Warrantum in Scriptis ſecundum conſuetudinem Civitatis, &c.

* *Quære*, For it concludes thus, (*viz.*) Till he ſhall be diſcharged by due Courſe of Law; which is not a Commitment in Execution. *Raym.* 446. *Brownl. Redi.* 385.

At Common Law it was ſufficient to ſet forth the Subſtance, and not the Thing it ſelf, which muſt be underſtood where the Officer did not take upon him to diſcloſe the whole Fact; but here he hath returned the whole Matter, which if not true, it is at the Peril of him who made the Return, and the Party grieved may have a Remedy by Action.

3. As to the third Exception, That it is not returned, that the Keeper of Newgate was an Officer of the City; it was anſwered, that the Return begins thus, (viz.) Ego Jacobus Fell, Cuſtos Gaolæ Domini Regis de Newgate, &c. and when he comes to the Warrant, he ſets forth, that the Defendant was committed to Priſon in Cuſtodia mea; which can be intended of no other Perſon than he who was at that Time Keeper of Newgate, who is well known to be an Officer of the Sheriffs of London, for the Judges deliver that Gaol every Month. *Co. Ent.* 346.

4. Then as to the laſt Objection, If the Word Concetiret is inſenſible, it is therefore void; but the following Word Declararet hath a certain Signification, and is more comprehenſive than Conſentiret if it had been Right, becauſe a Man may conſent to a Thing, and never declare his Conſent openly; but when he makes a Declaration thereof, he doth both.

Curia. A Commitment, till he ſhould declare his Conſent to accept the Office, is more than if he had been committed till he ſhould actually conſent; therefore, tho' the Court of Aldermen might commit him until he ſhould conſent, yet they may have no Power to impriſon him till he ſhould declare it.

As to the Warrant, it is always ſet forth at large in a Return made upon an extrajudicial Commitment; but when a Man is committed by a Court of Record, there is no Warrant at all; therefore the Court of Aldermen in this Caſe cannot be intended to proceed judicially, becauſe the Commitment is per Warrantum in Scriptis. They are the proper Judges of an Excuſe made by the Defendant, why he will not take upon him the Livery; and if they adjudge it inſufficient, and appoint him to accept it, and he refuſeth, it is a Contempt of their Authority, for which they may commit him.

But he is committed to the Keeper of Newgate, who may be an Officer of the City, but not one attending the Court of Aldermen; ſo that it doth not appear that he is a proper Officer of that Court to receive him, and therefore not like a Commitment by B. R. to the Marſhal, who is a proper Officer always attending that Court; and ſo is the Sheriff, where the Commitment is made by a Judge of Oyer and Terminer: Neither doth it appear that Newgate is in London; but if it did, he ought to be committed to the Sheriffs, and not to the Keeper of Newgate, tho' they might have taken him as their Officer; but this Court cannot take Notice that he is an Officer to the Sheriffs, no more than they can what Boroughs ſend Burgeſſes to Parliament. As for Inſtance; by the Statute 17 Car. 2. Thoſe who preach in Conventicles ſhall not come, or be within five Miles of a Borough which ſends Burgeſſes to Parliament. A Man was indicted upon this Statute for living in ſuch a Borough; but it was quaſhed in this Court, becauſe it was not averred, that the Borough wherein the Defendant lived did ſend Burgeſſes to Parliament.

Now certainly it is as well known to this Court, what Boroughs ſend Burgeſſes to Parliament, as that the Keeper of Newgate is an Officer of the Sheriffs of London; for which Reaſon the Return was held inſufficient, and the Defendant was diſcharged.

Rex *verſus* Hall.

AN Order was made by two Juſtices of Peace, to remove a poor Man from Redburne to the Pariſh of St. Michael in St. Albans; and upon an Appeal to the Quarter-Seſſions, the Order of the two Juſtices was quaſhed. *Vide Poſt*, 209, 397, 416.

Afterwards upon a Certiorari brought, the Seſſions Order was quaſhed, and the firſt Order was confirmed, ſo that the poor Man was now ſettled at St. Albans; but of his own Accord he returned to Redburne, and the Juſtices conceived that they had not any Power to ſend him to the Houſe of Correction for returning as aforeſaid, becauſe they were of Opinion that the firſt Order was not before them, being removed by Certiorari. 14 *Car.* 2. *cap.* 12. One Juſtice.

Therefore a Motion was made, that the Court would grant a Rule to enforce the Execution of the former Rule made in this Caſe, by which the Seſſions Order was quaſhed, and the Order of the two Juſtices confirmed.

But the Court directed, that the Juſtices ſhould have the former Rule of Court ſhewed to them, and the Order of the two Juſtices, and if they refuſed to puniſh the Perſon afterwards, then to move the Court upon an Affidavit of the Matter.

Rex *verſus* Paine.

INformation tried at the Bar by a Briſtol Jury, againſt one Samuel Paine, a Miniſter there, ſetting forth, That the Defendant was the Compoſer, Author, and Publiſher, of a moſt malicious and wicked Libel againſt the late Queen Mary, which was ſtyled, Her Epitaph. *Vide* 1 *Sid.* 270, 271. 2 *Salk.* 417, 418.

Upon Not guilty pleaded, the Caſe upon the Evidence appeared to be thus:

That Paine wrote the Libel, it being dictated to him by another. That he afterwards put it into his Study, and by Miſtake delivered it to one Brereton inſtead of another Paper, who tranſmitted a Copy thereof (through ſeveral Hands) to the Mayor of Briſtol, which occaſioned the Mayor to ſend for Brereton to examine him, which he did upon Oath, but not in the Preſence of *Paine*.

The Defendant Paine was afterwards examined by the Mayor, and confeſſed, that he wrote the Libel, but that he did neither compoſe

compoſe or publiſh it, only delivered it, inſtead of another Paper, to Brereton: But it was proved by his Servant, that he ſent him to his Study for a Writing, and that he not bringing the Paper ſent for, the ſaid Paine fetched it himſelf, and being in a Room only with Dr. Hoyle, the Libel was repeated, but he could not tell by whom; but he remember'd the firſt Verſe.

Brereton was now dead, and the Queſtion was, Whether his Depoſitions taken before the Mayor ſhould be given in Evidence at this Trial?

The Counſel for the Defendant inſiſted, that it could not be done by Law, becauſe Brereton being dead, the Defendant had loſt all Opportunity of croſs-examining him; that this Caſe was not like an Information before a Coroner, or an Examination by Juſtices of Peace of Perſons accuſed, and afterwards committed for Felony, becauſe they have Power by a particular Statute to take ſuch Examinations both of the Fact and Circumſtances, and to put it in Writing, and certify it at the next general Gaol-Delivery.

1 & 2 *Ph. & Mar. cap.* 13. 2 & 3 *Ph. & Mar. cap.* 10. *H.P.C.* 263.

But Depoſitions of this Nature are never allowed to be read as Evidence in a civil Cauſe, and much leſs in a criminal Caſe; that before the making thoſe Statutes, no ſingle Juſtice had Power to take the Information of Witneſſes againſt Criminals, neither could the Conſervators at Common Law take ſuch Depoſitions. They might remove or ſecure the Diſturbers of the Peace, and the Juſtices of Peace now may prepare Buſineſs for the Seſſions; but they have no Juriſdiction before the Indictment found: But if at any Time before the Statute they had taken ſuch Examinations, they were never given in Evidence againſt the Party.

To which it was anſwered, That the Statute makes no Difference in this Caſe, for the Power of a Juſtice of Peace to take Examinations is not grounded upon it; for he might examine a Criminal by Vertue of his Office, and the Statute doth only enforce the Execution of his Office by commanding him to take ſuch Examinations; ſo that if he had committed it to Writing, and tranſmitted it to the Gaol-Delivery, it would have been given in Evidence to convict the Party; and the Reaſon why ſuch an Examination ſhall be read, is not by Vertue of any Statute Law, but by the Authority of the Perſon before whom the Oath is taken; and if ſuch Oath ſhould be falſe, the Party might be indicted for Perjury.

The Court thereupon ſent the puiſne Judge to confer with the Juſtices of the Common Pleas, who returning, the Chief Juſtice declared, That it was the Opinion of both Courts that theſe Depoſitions ſhould not be given in Evidence, the Defendant not being preſent when they were taken before the Mayor, and ſo had loſt the Benefit of a croſs Examination.

Then the Queſtions ariſing upon the Evidence to prove the Defendant guilty, were theſe:

1. Whether he was the Author and Compoſer of the Libel?

2. Whether he was guilty of the publiſhing it?

As to the firſt Point, there was no Proof that he was the Compoſer of it, or that he wrote it, but by his own Confeſſion before the Mayor. Now if ſuch Confeſſion ſhall be taken as Evidence to convict him, it is but Juſtice and Reaſon, and ſo allowed in the Civil Law, that his whole Confeſſion ſhall be Evidence as well for as againſt him, and then there will be no Proof of a malicious and ſeditious Publication of this Paper; for he confeſſed that it was delivered by Miſtake.

Then as to his publiſhing it; if the Evidence had come up to prove that he read it, that will not be a Publication, and the Writing without the Publiſhing is no Crime.

'Tis true, my Lord Coke ſaith, Where 'tis maliciouſly repeated, or where a Copy of it is delivered to another, this will be a Publication; but here is no Proof that the Defendant repeated it in the Preſence of Dr. Hoyle; for non conſtat, but that the Doctor might read it to the Parſon. 5 *Rep.* 125.

The Jury, upon Conſideration of the whole Matter, found a Special Verdict, (viz.) That a certain Perſon to them unknown did pronounce, dictate and repeat the Words contained in the Libel, which the Defendant did write; and if that will make him guilty of compoſing and making the Libel, then they find him guilty, and as to the Publication thereof, they find him not guilty.

This Verdict was afterwards argued, That there was ſufficient Matter found to make the Defendant guilty; for 'tis eſſential that a Libel ſhould be in Writing. Words may make a malicious Speech, but 'tis Writing which makes a Libel; and this agrees with my Lord Coke's Definition of a Libel, That 'tis Scriptura Defamatoria. 5 *Rep.* 125.

This is the first Time that it became a Writing, and therefore it differs from Transcribing, for that must be of something in being before: But in this Case, when the Defendant heard the Words repeated, he knew they were defamatory, and he could have no other Purpose in writing it, but to perpetuate its Memory, and so he made it a Libel, which was not so before.

Pro Def'. It was argued for the Defendant, That there are three Things to be considered in this Verdict, (viz.) the Writing, the Making, and the Publication; the Defendant is acquitted of the last, so that if the Writing doth not amount to the Making and Composing, then he must be acquitted of the whole.

Now it cannot be said, That Writing is either a Making, or Composing what is written; for if that should be true, then a Man cannot write any Thing, but he must be the Author of it.

Lamb's Case, *9 Rep.* 60. The Writing may be some Evidence to a Jury, that he did it with an Intention to publish it, but he is acquitted of that; so that to make the Defendant guilty of this Information, he must be found to be a Contriver, or a Procurer of contriving it, which can never be by writing a Copy.

How far the bare Act of transcribing a Libel is criminal, is a Matter of another Consideration, 'tis certainly an Offence, and by consequence punishable to transcribe it; but it hath been a Question, Whether the writing and delivering it to the Party himself is punishable by an Action on the Case? And 'tis generally held, that such an Action did not lie at Common Law, because 'tis no Publication to deliver a Libel to the Party defamed, which is essential to make a Man guilty of it; but because 'tis an Offence against the King, and tends to the Breach of the Peace, 'tis punishable in B. R. by Information at the Suit of the Attorney-General.

Hob. 215. *Pop.* 139. Idem. 12 *Rep.* Dr. *Wooton's* Case. 3 *Inst.* 174.

Now the Reason given in the Books, why an Action will not lie in such a Case, is because the Party intended to be defam'd receives no Injury, for he cannot be defamed where there is no Publication of the Libel; and the Reason is the same in this Case, because there was no Publication; and 'tis the same Offence to write and not to publish, as to write and immediately to burn the Libel.

1 *Vent.* 31. *Cro. Car.* 125.

Lastly, If writing or transcribing a Libel is a Crime, yet as 'tis laid in this Information, and found by the Verdict, the Court cannot give Judgment on it; for the Jury have found it generally, That if Writing is Making and Composing, then they find him guilty, but do not say Modo & forma as laid in the Information; they should have found quo Animo he did write it.

Curia.

Curia. The Making a Libel is an Offence, though never published; and if one dictates, and another writes, both are guilty of making it. *Vide* 1 *Salk.* 417, 418, 419. 646. 1 *Sid.* 270, 271. 414. 1 *Mod.* 58. *Hard.* 470.

To what Purpose should any one write, or copy after another, but to shew his Approbation of the Contents of the Libel, and the better to enable him to keep it in his Memory, that he may repeat it to others.

Now though the bare reading a Libel may not be a Crime, because a Man may be surprized, and not understand what he is about to read; yet when one takes it from another, and hears it spoken before he writes it, this cannot be by Surprize, because he had Time to exercise his Thoughts before he writes what he heard read; so that 'tis not a Libel by repeating, but by writing it.

It doth not appear upon the Evidence, that this Libel was ever written before, so that the Defendant must be guilty of the Making it, by first reducing it in Writing, tho' probably he might not compose it.

'Tis true, the delivering it by Mistake is no Publication, and if there was no other Evidence against him but his own Confession, the Whole must be taken, and not so much of it as would serve to convict him.

But when he sent his Servant to his Study for a Paper, when he did not approve of the Paper brought by the Servant, but fetched another, 'tis not material whether it was read by Dr. Hoyle or not, for if that was the Libel, and read by either, 'tis a Publication.

If one repeats, and another writes a Libel, and a third approves what is wrote, they are all Makers of it; for all Persons who concur, and shew their Assent or Approbation to do an unlawful Act, are guilty: So that murdering a Man's Reputation by a scandalous Libel, may be compared to murdering his Person, for if several are assisting and encouraging a Man in the Act, tho' the Stroke was given by one, yet all are guilty of Homicide. Sed Adjournatur.

King *versus* Sharp *& al'*.

SCi. fa. against the Bail: To which, the Defendants pleaded in Bar, That the Principal died before the Day of the Return of the Capias ad satisfaciend. against him, which might be the Alias Capias, for he doth not say ante return. alicujus Brevis de Capias, &c. And upon a special Demurrer to this Plea, and this Matter *Vide* 1 *Salk.* 8. 1 *Mod.* 5, 6. 1 *Vent.* 253. 6 *Mod.* 142.

Matter being ſhewn for Cauſe, for he may die before the Return of the Alias Capias ad ſatisfaciend. whereas the Condition was broken by the Return of the firſt Capias, the Plaintiff had Judgment, although it was inſiſted, that this Plea being in Bar was good to a Common Intent; but the Court was of Opinion, that the Word Alicujus was neceſſary, which being omitted, the Plea was ill.

Haines *verſus* Jeſcott.

Vide Vaugh. 206, *&c.* 302, *&c.* 2 *Lev.* 254, 255.

PRohibition to the Eccleſiaſtical Court on a Suit there, againſt a Man for marrying his Siſter's Baſtard-Daughter: The Reaſons offered were;

2 *Vent.* 9, 10.

1ſt. This Marriage is not prohibited by any Law, 'tis not within any of the Levitical Degrees, and ſuch only are under the Cognizance of the Spiritual Court; for if a Marriage is not under ſome of thoſe Prohibitions, 'tis not to be impeached by

32 *H.* 8. 38.

any Court, becauſe 'tis enacted by the Parliament, That all Marriages contracted by lawful Perſons ſhall not be diſſolved; and ſuch are all thoſe who are not prohibited by God's Law.

2 *Inſt.* 683.

Now this Marriage is not prohibited by God's Law, which muſt be intended the Levitical Law given to the Hebrews, under the Moſaick Diſpenſation; in which Law there are ſix Degrees of Conſanguinity, and ſeven of Affinity, expreſſly forbidden.

Vaugh. 214, 215, 315, 316, *&c.*

A Man muſt not marry,

In Conſanguinity.

1. His Father's Siſter.
2. His Mother.
3. His Mother's Siſter.
4. His Siſter.
5. His own Daughter.
6. The Daughter of his Son or Daughter.

A Man muſt not marry,

In Affinity.

1. His Uncle's Wife.
2. His Father's Wife.
3. His Father's Wife's Daughter.
4. His Brother's Wife.
5. His Wife's Siſter.
6. His Son's Wife, or his Wife's Daughter.
7. The Daughter of his Wife's Son or Daughter.

But

But a Sister's Bastard is not mentioned amongst any of these Degrees.

It is true, the Levitical Law doth forbid a Man to approach to any near of Kin to uncover their Nakedness; but that can never be intended of a Bastard, because he is of Kin to no Person whatsoever; he is not esteemed as a Child in our Law, neither is he of sufficient Consideration to raise an Use as one of the Kindred of the Grantor; he is quasi nullius Filius: And therefore it is not a principal Challenge to him, being returned of a Jury that he is of Kin to either Party, because he cannot be of Kin to any; so in pleading either in a real or personal Action, he cannot alledge any Kindred, and nothing can be conferred upon him, but it must by such a Name which is common, and may be assumed by any other Person. 6 Rep. 65.

It is also true by the eighteenth Canon of the Apostles, a Man who married his Sister's Daughter, Clericus non potest esse, which is all the Punishment that the Church, in those Days, could inflict on the Person so married; they had no Jurisdiction, or Power of Divorce, even in Cases of incestuous Marriages, and therefore could not enter into any Examination of the Cause; but when the Parties were separated, it was by the Authority of the Laws to which they were locally Subject; and therefore it may be a Question, What Power the Spiritual Court hath to proceed in this Matter? But it being a Jurisdiction which hath often been allowed, it was not disputed now, only a Prohibition was prayed upon the whole Matter.

Econtra.

The Plaintiff cometh too late for a Prohibition, for he hath answered all the Allegations in the Ecclesiastical Court, where it appeared upon Proof, that the very Parson who baptized the Bastard married her to the Plaintiff, and did not aggravate the Offence to him before Marriage; but he persisted in his Resolution.

Now as to the Levitical Law, it expressly prohibits that ad proximum Sanguinis sui non accedat; and at the Time when this Law was established, there was no Difference amongst the Israelites between a Child born in Adultery, and lawful Marriage; and therefore a Bastard was proximus Sanguinis amongst these People, who were the best Expositors of that Law to whom it was first promulged, and all the Commentators upon this Law do allow the unlawful Issue to be incapable of inheriting.

But though the Marriage of the Uncle with the Niece is not forbidden by the Levitical Law, yet that of the Nephew with the Aunt, either by the Father or Mother's Side, is prohibited; and 2 Inst. 683.

ſo by Conſequence the other muſt be ſo too, becauſe it falls under the ſame Degree of Kindred with that which is forbidden by Name.

It is prohibited by the Levitical Law for a Man to marry his Siſter's Daughter; and it is no Objection to ſay, that a Baſtard is not a Daughter: For tho' ſhe is deprived of ſeveral Privileges by particular Laws, yet if there is any Morality in that Law, (which cannot be denied) it is morally as unlawful to marry a Baſtard, as one born in lawful Wedlock; and it is ſo alſo in Nature, for the Levitical Law was grounded upon a natural as well as a politick Reaſon to enlarge their Kindred, and unite their Families, for there are natural as well as legal Kindred; and if this ſhall not be expounded to fall under the Prohibition, that a Man ad proximum Sanguinis non accedat, then a Mother may marry her Baſtard Son.

The Court inclined not to grant a Prohibition. Sed Adjournatur.

S. C. 1 *Salk.* 344. *Poſt*, 175.

Huſſey *verſus* Jacob.

Lond. ſſ. WIllielmus Huſſey queritur de Alexandro Jacob in Cuſtod. Mar. Mareſc. Dom. Regis coram ipſo Rege exiſten. pro eo videl't quod cum Civitas London, in hoc Regno Angliæ eſt & a toto tempore cujus contrarium memoria hominum non exiſtit fuit antiqua Civitas, cumq; etiam Villa de Hereford in hoc Regno Angliæ eſt & a toto tempore ſupradicto fuit antiqua Villa, cumque etiam habet. & exiſtit & a toto tempore ſupradict. habebatur & fuit quædam antiqua & laudabilis conſuetudo inter Mercatores & alias Perſonas Commercio utentes in Hereford præd. reſiden. & Mercatores & alias Perſonas Commercio uten. in London præd. comoran. uſitat. & approbat. videl't quod ſi aliquis Mercator vel alia Perſona in Hereford præd. reſiden. faceret aliquam Billam Excambii ſecundum conſuetudinem Mercator. & eandem Billam Excambii aliæ Perſonæ Commercio uten. in London præd. comoran. direxit & per eandem Billam requiſivit eundem Mercatorem vel aliam Perſonam Commercio uten. apud London præd. reſiden. in hujuſmodi Billa Excambii nominat. cui eadem Billa Excambii ſic direct. foret ad ſolven. aliquam denar. ſummam in hujuſmodi Billa Excambii mentionat. alicui al. Mercatori vel aliæ Perſonæ Commercio uten. in eadem Billa Excambii nominat. ad aliquod tempus in hujuſmodi Billa Excambii ſpecificat. & quod ſi hujuſmodi Mercator vel alia Perſona apud Lond. præd. commoran. cui aliqua talis Billa Excambii ſic direct. fuit hujuſmodi Billam Excambii

ſibi ſic ut præfertur direct. ſecundum conſuetudinem Mercator. acceptavit tam hujuſmodi Mercator vel alia Perſona cui hujuſmodi Billa Excambii ſic fuit direct. per hujuſmodi acceptationem onerabilis exiſtit & a toto tempore ſupradicto onerabilis eſſe conſuevit ad ſolven. hujuſmodi denariorum ſummam in hujuſmodi Billa Excambii mentionat. hujuſmodi Mercatori vel aliæ Perſonæ in hujuſmodi Billa Excambii nominat. ad diem ſive tempus in hujuſmodi Billa Excambii appunctuta. pro ſolutione inde ſecundum tenorem & effectum hujuſmodi Billæ Excambii cumq; præhonorabilis Dominus Chandois 21 die Octobris Anno 1693. apud Hereford præd. exiſten. & Commercio uten. videl't apud Lond. præd. in Paroch. beatæ Mariæ de Arcubus [in Warda de Cheap] feciſſet primam ſuam Billam Excambii geren. datum eiſdem Die & Anno & eandem Billam Excambii præfat. Alexandro Jacob adtunc apud London præd. in Paroch. & Warda præd. reſiden. & commoran. & Commercio uten. direxiſſet & per eandem Billam Excambii præd. Dominus Chandois requiſivit præfat. Alexand. Jacob ad ſolven. infra Menſem poſt viſum Billæ Excambii ſui primæ ſummam centum & viginti peciar. Auri [Anglice vocat. Guineas] præfat. Will'o Huſſey per nomen Captain Huſſey, præd. Dom. Chandois & Will'o Huſſey adtunc & ibidem Commercio uten. idemque Willielmus præd. Billam Excambii poſtea ſcilicet 28 die ejuſdem Menſis Octobr. Anno ſupradicto apud London præd. in Paroch. & Warda præd. eidem Alexandro oſtendebat & adtunc & ibidem præfat. Alexand. requiſivit acceptare præd. Billam Excambii & ſolvere eidem Will'o præd. centum & viginti pecias Auri [Anglice vocat. Guineas] ſecundum tenorem Billæ præd. & ſuperinde præd. Alexander adtunc & ibid. ſup. viſum inde acceptavit præd. Billam Excambii ſecundum conſuetudinem Mercator. præd. ratione cujus quidem acceptationis præd. Billa Excambii ac ratione præmiſſor. idem Alexand. ſecundum conſ. præd. ſic ut præfertur uſitat. & approbat. onerabilis devenit ad ſolven. præfat. Will'o præd. centum & viginti pecias Auri in Billa Excambii præd. mentionat. ſecundum formam & effectum Billæ præd. & præd. Alexander poſtea ſcil't Die & Anno ultimo mentionat. apud London præd. in Paroch. & Warda præd. in conſ. præmiſſor. præd. ſuper ſe aſſumpſit & eidem Will'o adtunc & ibidem fideliter promiſit quod ipſe idem Alexander præd. 120 pecias Auri [Anglice vocat. Guineas] in Billa Excambii præd. mentionat. præfat. Will'o ſecundum formam & effectum Billæ Excambii bene & fideliter ſolvere & contentare vellet, cumq; etiam præd. Alexander poſtea ſcil't primo die Decembris Anno Dom. 1693. apud London præd. in Parochia & Warda præd. indebitatus fuiſſet eidem Will'o in aliis centum & viginti peciis Auri [Anglice

[Anglice vocat. Guineas] valoris centum & triginta & duar. librarum legalis monetæ Angliæ pro tanta denarior. ſumma per eundum Will'um pro eodem Alexand. & ad ſpecial. inſtantiam & requiſitionem ipſius Alexandri ante tempus illud ſolut. errogat. & extrapoſit. & ſic inde indebitatus exiſten. præd. Alexander in conſideratione inde ſuper ſe aſſumpſit & eidem Will'o adtunc & ibid. fideliter promiſit quod ipſe idem Alexander præd. 120 pecias Auri [vocat. Guineas] valoris 132 l. ult. mentionat. eidem Will'o cum inde requiſit. eſſet bene & fideliter ſolvere & contentare vellet cumque etiam præd. Alexander poſtea ſcil't eodem primo die Decembris, Anno ult. ſupradicto apud London præd. in Paroch. & Warda præd. indebitat. fuiſſet præfato Will'o in al. centum & triginta & duabus libris ſimilis legalis monetæ Angliæ pro tantis denarior. ſummis per eundem Willielmum eidem Alexandro ad ſpecial. inſtantiam & requiſicon. ipſius Alexandri ante tempus illud mutuo dat. & accommodat. & ſic indebitat. exiſten. præd. Alexander in conſ. inde ſuper ſe aſſumpſit & eidem Will'o adtunc & ibid. fideliter promiſit quod ipſe idem Alexander præd. centum & viginti pecias Auri [voc. Guineas] ult. mentionat. eidem Will'o cum inde requiſit. eſſet bene & fideliter ſolvere & contentare vellet cumque etiam præd. Alexander poſtea ſcil't eodem primo die Decembris, Anno ult. ſupradicto apud London præd. in Paroch. & Warda præd. indebitat. fuiſſet eidem Will'o in al. centum & viginti peciis Auri [vocatis Guineas] valoris centum triginta & duarum librar. ſimilis legalis monetæ Angliæ pro conſimili denar. ſumma per eundem Alexandrum pro præfat. Will'o & ad uſum ipſius Willi. ante tempus illud habita & recepta & ſic inde indebitatus exiſten. præd. Alexander in conſider. inde ſuper ſe aſſumpſit & eidem Will'o adtunc & ibidem fideliter promiſit quod ipſe idem Alexander præd. 120 pecias Auri [vocat. Guineas] ult. mentionat. eidem Will'o cum inde requiſit. eſſe bene & fideliter ſolvere & contentare vellet præd. tamen Alexander ſeparal. promiſſion. & aſſumptiones ſuas præd. in forma præd. factas minime curan. ſed machinan. & fraudulenter intenden. eund. Will'um in hac parte callide & ſubdole decipere & defraudare præd. 120 pecias Auri [Anglice voc. Guineas] in præd. prima promiſſione ſuperius mentionat. ad Menſem poſt viſum Billæ Excambii præd. ſuperius mentionat. ſeu præd. ſeparal. denar. ſummas in præd. ſecunda, tertia & quarta promiſſione ſuperius mentionat. eidem Will'o non ſolvit licet ad ſeparal. denariorum ſummas in præd. ſecunda, tertia & quarta promiſſione ſuperius mention. eid. Will'o ſolven. præd. Alexand. poſtea ſcil't decimo die April' Ann. Dom. 1694. & ſæpius poſtea apud Lond. præd. in Parochia & Warda præd. per præd. Will'um requiſit. fuit ſed il. ei hucuſque ſolvere omnino

recuſavit

recuſavit & adhuc recuſat unde id. Will'us dicit quod ipſe deteriorat. eſt & damnum habet ad Valentiam quadraginta libr. & inde producit ſectam, &c. Et modo ad hunc diem ſcil't diem Veneris prox. poſt Craſtinum Sanctæ Trinitatis iſto eodem termino uſque quem diem præd. Alexander habuit licentiam ad Billam præd. interloquen. & tunc ad reſponden. coram Dom. Rege apud Weſtm. ven. tam præd. Will'us per Attorn. ſuum præd. quam præd. Alexander per Vincent Skeynes Attorn. ſuum & idem Alexander defen. vim & injuriam quando, &c. & quoad ſecundam, tertiam & quartam promiſſionem & aſſumptionem in Narratione præd. ſuperius mentionat. idem Alexander dicit quod ipſe non aſſumpſit ſuper ſe modo & forma prout præd. Will'us ſuperius verſus eum queritur & de hoc ponit ſe ſuper patriam, &c. & præd. Will'us inde ſimiliter, &c. & quoad præd. primam promiſſion. & aſſumption. in Narratione præd. ſuperius mentionat. idem Alexander dicit quod ipſe virtute Billæ Excambii præd. prima promiſſione & aſſumption. ſuperius mentionat. & per ipſum ut præfertur fact. onerari non debet quia proteſtando quod præd. Dominus Chandois præd. tempore confectionis Billæ Excambii præd., ſeu unquam poſtea non fuit Perſona Commercio uten', proteſtando etiam quod præd. Will'us præd. tempore confection. ejuſdem Billæ Excambii non fuit Perſona Commercio uten. prout præd. Will'us per Narrationem ſuam præd. ſuperius ſupponit pro placito idem Alexander dicit quod poſt 29 diem Septembris Anno Dom. 1694 & antea confectionem primæ Billæ Excambii ſcil't 21 diem Decembris Anno Dom. 1693. ſupradicto apud London præd. in Paroch. & Warda præd. prædictus Dominus Chandois & Will'us ludebant inter ſe cum aleis ad quendam ludum [Anglice vocat. Hazard] quodque præd Dominus Chandois adtunc & ibid. ad ludum il. ad unum tempus & ad unum coitum [Anglice a Meeting] perdidit præfat. Will'o ſupra mentionat. ſummam 120 peciarum Auri [Anglice vocat. Guineas] quodque pro ſecuritate ſolutionis earundem 120 peciar. Auri per ipſum præd. Dominum Chandois præfat. Will'o ut præfertur perdit. idem Dominus Chandois poſtea ſcil't 21 die Octobris Anno Dom. 1693. ſupradicto apud London præd. in Paroch. & Warda præd, primam ſuam Billam Excambii eidem Alexandro direxit & per eandem Billam Excambii præd. Dominus Chandois requiſivit eundem Alexandrum ad ſolvendum ad menſem poſt viſum Billæ Excambii prædicti præd. ſummam 120 peciar. Auri [vocat. Guineas] præd. Will'o poſteaque ſcil't præd. 28 die Octobris Anno ultimo ſupradict. ſuper viſum præd. primæ Billæ Excambii idem Alexander apud London præd. in Paroch. & Warda præd. prædictam Billam Excambii pro ſolutione præd. 120 peciar. Auri acceptavit & ſuper

ſe aſſumpſit prout præd. Will'us per Narrationem præd. ſuperius ſuppoſuit quorum præmiſſor. prætextu ac vigore ſtatuti præd. in eo caſu edit. & proviſ. præd. prima Billa Excambii per ipſum Alexandrum ut præfertur acceptat. & acceptatio. inde & promiſſio & aſſumptio ipſius Alexandri per ipſum Alexand. ut præfertur fact. devener. & fuer. & modo ſunt vacuæ & nullius vigoris in lege & hoc parat. eſt verificare unde pet. judicium ſi ipſe virtute Billæ Excambii præd. per præfat. Dominum Chandois contra formam ſtatuti præd. ut præfertur dat. & confect. & per ipſum eund. Alexandrum in forma præd. acceptat. onetari debeat, &c. & præd. Will'us dicit. quod ipſe per aliqua per præd. Alexandrum ſuperius placitando allegat. quoad primam promiſſionem & aſſumptionem præd. ab actione ſua præd. inde verſus ipſum Alexandrum haben. præcludi non dedet quia dicit quod placitum præd. per præd. Alexandrum modo & forma præd. ſuperius placitat. materiaque in eodem content. minus ſufficien. in lege exiſtunt ad ipſum Will'um ab actione ſua præd. inde verſus præd. Alexandrum haben. præcluden. ad quod quidem placitum ipſe idem Will'us neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc parat. eſt verificare unde pro defectu ſufficien. reſpon. in hac parte ipſe id. Will'us petit judicium & damna ſua occaſione non performationis præd. primæ promiſſionis & aſſumptionis ſibi adjudicari, &c. & pro cauſis morationis in hac parte ſecundum formam ſtatuti in eo caſu edit. & proviſ. idem Will'us oſtendit & curiæ hic demonſtrat has cauſas ſequen. videl't quod placitum præd. attinxit ſolummodo ad generalem exitum necnon eſt duplex perplex. incertum & carens forma necnon minime reſpondens Narrationem præd. & præd. Alexan. dicit quod placitum præd. per ipſum Alexandrum quoad primam promiſſionem & aſſumptionem modo & forma præd. ſuperius placitat. materiaque in eodem content. bonum & ſufficien. in lege exiſtunt. ad ipſum Will'um ab actione ſua præd. inde verſus ipſum Alexandrum haben. præcluden. quod quidem placitum materiamque in eodem content. ipſe idem Alexander parat. eſt verificare & probare prout Curia, &c. & quia præd. Will'us ad placitum illud non reſpondit nec il. hucuſque aliqualiter dedicit ipſe idem Alexander ut prius petit judicium & quod præd. Will'us ab actione ſua præd. inde verſus ipſum Alexandrum quoad primam promiſſionem & aſſumptionem haben. præcludatur, &c. ſed quia Curia dicti Dom. Regis nunc hic de judicio ſuo de & ſuper præmiſſis redden. nondum adviſatur dies inde dat. eſt partibus præd. coram Dom. Rege apud Weſtm. uſque diem prox. poſt, &c. de Judicio ſuo de & ſuper præmiſſis il. audien. eo quod Curia dicti Dom. Regis nunc hic inde nondum, &c. & quoad trian. tam exitum præd. inter partes

partes præd. ſuperius junctum per patriam trian. quam ad inquiren. quæ damna præd. Will'us Huſſey ſuſtinuit occaſione Præmiſſorum præd. unde partes præd. in judicium Curiæ ſe poſuer. ſi contingat judicium inde pro præd. Will'o Huſſey verſus præfatum Alexandrum Jacob reddi ven. inde jur. coram Dom. Rege apud Weſtm. ad præfat. diem & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies datus eſt partibus præd. ibidem, &c.

Huſſey *verſus* Jacob.

S. C. 1 *Salk.* 344.

THIS was an Action on the Caſe brought upon a Bill of Exchange againſt the Acceptor, wherein the Plaintiff ſets forth, That the Bill was drawn by my Lord Chandois upon the Defendant, for the Payment of 120 Guineas to the Plaintiff. Then he ſets forth the Cuſtom of Merchants, and that both the Drawer the Plaintiff, and the Acceptor, were Perſons uſing Trade and Merchandizing, and that the Defendant had not paid the Money, &c.

Vide 4 *Mod.* 409. 1 *Lutw.* 484, 487.

The Defendant by Proteſtation ſaith, That neither my Lord Chandois, or the Plaintiff, were Perſons uſing Merchandize at the Time when the Bill of Exchange was drawn, or at any Time afterwards. Then he pleads, That after the making the Statute of Gaming, and before the ſaid Bill was given, my Lord Chandois, and the Plaintiff, did play at Dice at a Game called Hazard; and that my Lord at one Time and Meeting did loſe 120 Guineas to the Plaintiff, and that, for ſecuring the Payment thereof, he did draw the Bill of Exchange upon the Defendant, who accepted the ſame; and that by Vertue of the ſaid Statute the Acceptance was void in Law.

16 *Car.* 2. *cap.* 7 *Vide ante*, 45, *&c. poſt*, 351.

The Plaintiff demurred ſpecially, and ſhewed for Cauſe, That this Plea did amount to the General Iſſue, and no more; and the Defendant joined in Demurrer.

For the better underſtanding this Caſe, it may be neceſſary to recite ſome Part of that Statute, (viz.) If any Perſon ſhall play other than for ready Money, and ſhall loſe above 100 l. at one Time upon Ticket or Credit, the Loſer ſhall not be bound to pay it; but the Contract for the ſame, and all Judgments, &c. and other Acts and Deeds, and Securities whatſoever for ſuch Money, ſhall be void.

Thoſe who argued againſt this Plea ſaid, That the Statute of Gaming cannot be pleaded to this Action, becauſe 'tis no Anſwer to the Cuſtom of Merchants, ſo that the Declaration is true notwithſtanding this Plea.

Beſides,

Beſides, 'tis not alledged that the Money was loſt upon Ticket or Credit, or that it was not paid down at that Time when it was loſt; for in ſuch Caſes only the Contracts are void.

Now by this Way of Pleading, the Defendant hath not ſo much as brought himſelf within the Purview of the Statute, which was made againſt deceitful, diſorderly and exceſſive Gaming; and therefore ſhall not have the Benefit of the conſequential Part of the Law, which is the Avoidance of the Contract.

But this Statute doth not hinder the Plaintiff from his Action, becauſe he being a third Perſon, and not concerned in the Gaming, may promiſe the Payment of the Money upon a good Conſideration.

As, if a Man loſe above 100 l. at one Sitting, and give Judgment for the Payment; and a third Perſon doth promiſe the Winner, That in Conſideration he will not take out Execution within a Year, that he will pay the Money. This is a good Promiſe, and will bind him, becauſe it may have a reaſonable Beginning; for probably the Loſer would not plead to the Sci. fa', or take any Advantage of the Statute.

So if A. win above 100 l. of B. and at the ſame Time is indebted to C. in the like Sum, and then both A. and B. become bound to C. for the Payment of the Money, 'tis a good Bond, and not to be avoided by the Statute.

This Action being brought againſt the Acceptor, he muſt now anſwer upon a ſuppoſed Contract of his own, and not upon a joint Contract with another; for every Endorſer undertakes ſeverally for himſelf, and the Defendant in this Caſe hath undertaken to pay the Sum in Demand upon a ſubſequent Contract made by himſelf. Poſſibly my Lord Chandois might have taken Advantage of the Statute, but the Defendant cannot; for his Undertaking being ſubſequent to the Gaming, is neither within the Intent or Letter of the Law.

2. 'Tis not averred in the Plea, That the Plaintiff Huſſey did accept the Bill for ſecuring the Payment of the Money loſt at Play; and without ſuch Averment, 'tis not within the Meaning of the Statute.

Econtra.

If this Caſe ſhould not be within the Statute, becauſe 'tis a new Undertaking, then it would eaſily be eluded by getting one to be bound for the Money loſt at Play, which is a new Undertaking,

king for the Payment, and ſo the Statute would be of very little Uſe.

1. To the Cuſtom of Merchants, it need not be anſwered as 'tis ſet forth in the Declaration; for there is Special Matter enough, which alters the Cuſtom. 'Tis true, there is a Bill ſet forth, which is alledged to be drawn according to the Cuſtom of Merchants, but with this Impediment, That it was drawn as a Security for the Payment of Money won at Play, which Bill ought not to be taken by Law; ſo that though the Cuſtom is admitted, 'tis avoided by an Act of Parliament.

2. As to the ſecond Objection, the Plea is, That Jacob did accept the Bill for the Sum for which it was drawn, which was for Money won at Play; 'tis a Contract for the Payment of ſuch Money, which is void by the Statute.

Econtra. As to the firſt Exception, That 'tis a Plea which doth amount to the General Iſſue; a Man in many Caſes may plead Special Matter to avoid the Plaintiff's Action, tho' he might give it in Evidence upon the General Iſſue; as in Debt upon a Bond againſt a Feme Covert, ſhe may plead Coverture, or give it in Evidence upon Non eſt Factum. *2 Show. Dixon verſus Thompſon.*

The Law here pleaded is conſiſtent with the Action brought againſt the Defendant which he hath confeſſed, but hath alſo ſhewed Special Matter to avoid it.

It cannot be denied, but that if the Action had been brought againſt my Lord Chandois, the Drawer, upon the Refuſal of Jacob to pay it, my Lord might have taken Advantage of the Statute, which is an Argument that the Defendant ſhall alſo take the ſame Advantage, becauſe his new Contract ſtands upon the former Conſideration, and 'tis but a farther Security for the ſame Money loſt at Play; and his Acceptance of the Bill is an expreſs Promiſe to pay it.

Now this Gaming muſt be either upon Ticquet or for ready Money; but 'tis plain it could not be for ready Money, for then the Loſer would not have drawn this Bill for the Payment of it: Whereupon Judgment was given for the Defendant.

Wilſon *verſus* Howard.

Hertf. ſſ. EDwardus Wilſon nuper de Villa Sancti Albani in Com. præd. Inholder, attach. fuit ad reſponden. Johanni Howard de placito quare Vi & Armis, &c. domum ipſius

Johannis Howard apud Villam Sancti Albani præd. fregit & inravit & bona & Catalla ſua ad valentiam decem Librarum adtunc & ibidem nuper invent. cepit & aſportavit & alia enormia ei intulit ad grave damnum ipſius Johannis Howard & contra pacem Domini Regis nunc, &c. & unde idem Johannes per Johannem Leigh Attorn. ſuum queritur quod Edwardus Wilſon Viceſimo ſeptimo Die Octobris Anno Regni Domini Regis nunc, &c. Vi & Armis, &c. Domum ipſius Johannis Howard apud Villam Sancti Albani præd. fregit & intravit & bona & Catalla ſua videl't viginti Modios [Anglice Four Loads] tritici ipſius Johannis Wilſon ad valentiam, &c. adtunc & ibidem nuper invent. cepit & aſportavit totam tranſgreſſionem præd. a prædicto Viceſimo ſeptimo Die Octobris Anno Regni dicti Domini Regis ſeptimo ſupradicto uſque decimum ſeptimum Diem Novembris tunc prox. ſequen. diverſis diebus & vicibus continuando & alia enormia ei intulit ad grave damnum ipſius Johannis Howard & contra pacem, &c. unde dicit quod deteriorat. eſt & damnum habet ad valentiam viginti Librarum & inde producit ſectam, &c.

Wilſon *verſus* Howard.

TReſpaſs for taking four Loads of Wheat with a Continuando for a whole Month; there was Judgment in the Common Pleas by nil dicit, and a Writ of Error brought: And the Errors aſſigned were,

1. That the Words Viginti Modios Tritici, [Anglice Four Loads of Wheat] are inſenſible; for Modius ſignifies a Buſhel, and 'tis not poſſible to make four Loads of Twenty Buſhels.

Vide 1 *Sid.* 319. 1 *Lev.* 210. 6 *Mod.* 38. 2 *Salk.* 638.

2. The Treſpaſs is for breaking the Plaintiff's Houſe, with a continuando totam Tranſgreſſionem for a Month; which cannot be, for a Man muſt have ſome Time to reſt.

Econtra. To which it was anſwered, (viz.) As to the firſt Error aſſigned, the Anglice is void, and then the Viginti Modios Tritici may be well underſtood.

21 *H.* 6. 43. a. 2 *Roll. Abr.* 549.

2. The Continuando ſhews, that the Taking was not all at the ſame Time, like the Caſe in the Year-Book, 21 H. 6. where Treſpaſs was brought for taking his Goods, (viz.) Two Loads of Wheat, with a continuando diverſis Diebus & Vicibus, from ſuch a Day to ſuch a Day: and held good: For a Treſpaſs may be

be done in taking such a Quantity of Goods which cannot be removed in one Day, and therefore the Continuando is to shew how it was done. *Vide 6 Mod.* 38, 39. 2 *Salk.* 638. 2 *Mod.* 253.

Besides, where a Continuando is not well laid, and intire Damages given, it shall be intended for that only which can have a Continuance, and so was the Opinion of the Court in this Case; for the taking the Corn is laid to be on such a Day continuando Transgressionem præd', from that Day to such a Day, which is insensible, and so Damages could not be given, for that and a Continuando, may be laid quoad fractionem Domus, as well as Pedibus ambulando; but of that it was doubted: For if it had been continuando Transgressionem præd. generally, it had been well enough; but 'tis totam Transgressionem, which cannot be for breaking a House, *Yel.* 126. 1 *Sid* 319. 1 *Vent.* 363, 224, 249. 1 *Lev.* 219.

There was another Objection, (viz.) That the Defendant bona & Catalla adtunc & ibidem nuper invent. cepit, &c. which cannot be at one and the same Time. *Ray.* 396.

To which it was answered, That the Word Nuper relates only to the Time of Declaring, but the Time is not material, for he can give in Evidence but on taking. The Judgment was affirmed.

Rex *versus* Commings & *al'*.

1 *Salk.* 175, 380. 6 *Mod.* 96, *Ante*, 96.

The Defendants were indicted at the Sessions; for that they being chosen Overseers of the Poor of the Parish of Lynn for the Year 1693. and having taken upon them that Office, they & uterque eorum did collect and receive several Sums of Money for the Relief of the Poor, and did refuse to accompt within four Days after the End of the said Year; and after, other Overseers were nominated to give an Accompt to two Justices of the Peace of the Sums by them received, and to deliver over the same to the new Overseers; but converted it to their own Use, and did use other fraudulent Practices to deceive the Poor, &c. contra formam Statuti, &c. 43 *Eliz. c.* 2. *Paragraph* 2. *Vide* 2 *Salk.* 525, 531.

This Indictment was removed into B. R. by Certiorari; and the Exceptions to it were,

1. That an Indictment will not lie for this Offence; for 'tis grounded on an Act of Parliament, which appoints the Overseers to accompt, and a Punishment for Refusing, (viz.) To be committed by two Justices of the Peace till they accompt *Vide 6 Mod.* 86.

and

and pay what remains in their Hands, there to remain without Bail.

So that this being an Offence made by a particular Statute, which was not so at Common Law, and directing how the Offender should be punished; that must be the Remedy, and no other can be pursued.

2. If an Indictment will not lie for this Offence as set forth, it will not for the other fraudulent Practices mentioned in it, because 'tis too general: And so it hath been adjudged in like Cases, (viz.) Where a Man was indicted for being a Common Misdoer, it was held void without laying some particular Offence.

2 Roll. Abr. 79.

3. 'Tis said, That being Overseers of the Parish of Lynn, they did collect several Sums, &c. but have laid no Venue where the Money was collected; neither is it mentioned what Sums were received.

4. Two are indicted, and 'tis said, that they & uterque eorum did receive Money, which they had not brought to accompt: This is likewise void for the Incertainty, because the Act of one is not the Act of the other; as where four were indicted for using a Trade contra formam Statuti, setting forth that they & uterque eorum did use the Trade, it was quashed for this Reason, for the Using of one cannot be the Using of the other.

2 Roll. Abr. 81. 5 Eliz.

The Overseers are required by the Act to accompt, and their Refusal is a Contempt of the Law, for which they may be indicted: And as to that, there is no Difference when a Thing is enjoined, and when 'tis prohibited by a Statute; for when 'tis prohibited, the Party shall not only have his Action for the Injury done, but the Offender shall be punished at the King's Suit for the Contempt of his Law.

'Tis true, two Justices of Peace have Power to commit the Overseers refusing to accompt, which is a proper Means to come at the Right; but it doth not satisfie the King for the Contempt.

Then as to the Objection, That the Indictment doth not set forth what Sums were collected; 'tis not material, for the Offence is for not accompting.

And lastly, Though it is true, that two cannot be indicted for refusing to become Apprentices, because the Service of one cannot be the Service of the other; yet two may be indicted for a Cheat, and for several other Offences. Adjourn'.

Littleton *versus* Cole.

AN Action on the Case was brought for negligently keeping his Fire, by Reason whereof the Plaintiff's House was burned, (viz.) In parietibus in partitionibus fenestris in operibus ferrariis & ornamentis ejusdem Domus. *Vide* 5 Co. 13. *Cro. Eliz.* 777, 784. *Ante* 87. 4 *Mod.* 9. *Show.* 310. And Stat. 6 *Anne c.* 13.

And upon Demurrer, this Exception was taken to the Declaration:

That it was too general and incertain, for Damages could not be given for the Walls and Ornaments of the House.

As where Trespass was brought for taking diversa genera apparatuum, or Trover for Goods cum aliis Implementis & Necessariis, not shewing what they are; this was held ill after a Verdict, for the Court cannot give Judgment for such incertain Parcels. *Aleyn* 9. *Cro. Eliz.* 817. *Vide Post*, 324.

Econtra. It was argued for the Plaintiff, that the Action had been well brought without the Videlicet, for the enumerating the Particulars was but Matter of Aggravation and Inference; and this being an Action wherein Damages are to be recovered, they may be divided, and the Plaintiff ought to recover for that which is well laid in the Declaration, and that is, for negligently keeping his Fire. The Plaintiff had Judgment.

DE

Termino Paſchæ.

Anno 8 W. III. in B. R. 1696.

Chamberline *verſus* Harvey, *Mich.* 7 *W.* 3. *Rot.* 123.

Lond. ſſ. MEmorand. quod Die Mercurii prox. poſt tres ſeptiman. Sancti Michaelis iſto eodem Termino coram Domino Rege apud Weſtmonaſt. ven. Willoughby Chamberline per Godfridum Woodward Attorn. ſuum & protulit hic in Cur. dicti Domini Regis tunc ibidem quandam billam ſuam verſus Robertum Harvey Ar. in Cuſtod. Mareſchal', &c. de placito tranſgreſſ. Et ſunt pleg. de proſequend. ſſ. Johannes Doe & Richardus Roe quæ quidem billa ſequitur in hæc Verba ſſ. London ſſ. Willoughby Chamberline Ar. queritur de Roberto Harvey Ar. in Cuſtod. Mar. Mareſchal. Dom. Regis coram ipſo rege exiſten. de eo quod idem Robertus primo Die Septembris Anno Dom. Milleſimo ſexcenteſimo nonageſimo quinto Vi & Armis, &c. un. Æthiopem [Anglice vocat. a Negro] ipſius Willoughby pretii centum Librarum legalis monetæ Angliæ apud London præd. (viz.) in Parochia Beatæ Mariæ de Arcubus in Ward. de Cheape, cepit & abduxit & poſſeſſ. Æthiopis præd. a præd. primo Die Septembris uſque exhibition. hujus billæ adtunc & ibidem detinuit & cuſtodivit. Ita quod ipſe idem Willoughby uſum & beneficium Æthiopis prædict. per totum tempus prædict. totalit. perdidit & amiſit & al. enor. eidem Willoughby adtunc & ibid. intulit contra pacem dicti Domini Regis nunc ad dampnum ipſius Willoughby centum & quinquagint. Librarum & inde producit Sectam, &c.

Et præd. Robertus per Robertum Stone Attorn. ſuum ven. & defend. vim & injuriam quando, &c. & dicit quod ipſe non eſt inde culpabilis modo & forma prout præd. Willoughby verſus eum ſuperius querirur &

de hoc ponit ſe ſuper patriam & præd. Willoughby inde ſimiliter ideo ven. inde jurat. coram Domino Rege apud Weſtm. Die Jovis prox. poſt Craſ. Animar. & qui nec, &c. ad recogn', &c. quia tam, &c. idem Dies datus eſt partibus præd. ibidem, &c. poſtea continuat. inde proceſſus inter partes prædict. in placito præd. per jur. poſit. inde inter eos in reſpect. coram Domino Rege apud Weſtm. uſque Diem Jovis prox. poſt quinden. Sancti Martini niſi dilect. & fidelis Domini Regis Johannes Holt Mil. Capital. Juſticiar. Domini Regis ad placita in Cur. ipſius Domini Regis coram ipſo Rege tenend. aſſign. prius Die Mercur. prox. poſt Quinden. Sancti Martini apud Guildhall, London, per formam Statuti ven. pro defen. jur. &c. ad quem Diem coram Domino Rege apud Weſtm. venit prædict. Willoughby per Attorn. ſuum præd. & præfat. Capital. Juſtic. coram quo, &c. miſit hic Record. ſuum coram eo habit. in hæc Verba Poſtea Die & Loco infra content. coram Johanne Holt Mil. Capital. Juſtic. Domini Regis ad placita in Cur. ipſius Domini Regis coram ipſo Rege tenend. Aſſign. Aſſociat. ſibi Johanni Ince Gen. per formam Statuti, &c. ven. tam infranominat. Willoughby Chamberline Ar. quam infraſcript. Robertus Harvey Ar. per Attorn. ſuos infracontent. & jur. jurat. unde infra fit mentio exact. quidam eorum (viz.) Thomas Sericole, Ric'us Martin, Sam. Stone, Benj. Hodgſon, Jeremias Barrat, & Nathaniel Spinlow, ven. & in jur. ill. jurat. exiſt. & quia reſid. jur. ejuſdem jure non comperuer. ideo al. de circumſtantibus per Vic. Civitat. præd. ad hoc elect. ad requiſition. præd. Willoughby Chamberline ac per mandat. Capital. Juſtic. præd. de novo apponuntur quorum nomina panell. infraſcript. affilantur ſecundum formam Statut. in hujuſmodi caſu edit. & proviſ. ac jur. ſic de novo appoſit. (viz.) Thomas Pool, Ric'us Martin, Thomas Ward, Johannes Watſon, Ph'us Brewſter, & Ric'us Chauncey exact. ſimilit. ven. qui ad veritat. de infra content. ſimul cum al. jur. præd. prius impanellat. & jurat. dicend. elect. triat. & jurat. dicunt ſuper ſacr'um ſuum quod quidam Ed'us Chamberline diu ante infraſcript. tempus quo, &c. ſeſit. fuit de quadam Plantation. in Inſula de Barbadoes in le Weſt-Indies in partibus tranſmarinis in Dominico ſuo ut de feodo & de quibuſdam Servis Æthiopicis [Anglice Negroe-Slaves] Servis eidem Plantation. ſpectan. & pertinen. & præd. infraſcript. Servus Ethiopus diu ante infraſcript. tempus quo, &c. infra Inſulam præd. nat. fuit de Parentibus Æthiop. [Anglice Negroe-Slaves] Servis eidem Plantation. ſpectan. & pertinen. & quod diu ante infraſcript. tempus quo, &c. ſcilicet Viceſimo nono die Aprilis Anno Domini Milleſimo Sexcenteſimo ſexageſimo octavo per quendam Willielmum Willoughby deputat. Guber-

Gubernator. concilium & aſſemblation. repræſentat. Inſulæ illius exiſten. in ea parte legitime Authorizat. commiſſionat. apud Inſulam illam inactitat. fuit in his Anglican. verbis ſequen. Barbadoes. An Act declaring the Negro Slaves of this Iſland to be real Eſtates. Whereas a very conſiderable Part of the Wealth of this Iſland conſiſts in our Negro Slaves, without whoſe Labour and Service we ſhould be utterly unable to manage our Plantations here, thereby relieving our Wants, and bringing that conſiderable Increaſe of Revenue which this Place affords to his Majeſty's Coffers, as well here as in England; And whereas ſome Law-Suits have riſen, and other great Inconveniencies have followed, where divers Perſons dying Inteſtate have left the Right and Intereſt of their Negro Slaves to be by Law diſputed between their Heirs, Executors, and Adminiſtrators, wherein the various Judgments and Affections of ſeveral Courts, or Jurors, have ſometimes found for one, and at other Times for the other: For a full Remedy of theſe Inconveniencies, and to the Intent that the Heirs, and Widow who claims Dower, may not have bare Lands without Negroes to manure the ſame; and alſo, that the Condition, Right, and Intereſt of Negroes to all other Ends and Purpoſes may be fully known and determined; the Deputy-Governor, Council and Aſſembly, being willing that all Ambiguities herein ſhould be removed, and the Law in this Caſe be declared and put in a Certainty, have ordained and enacted, and it is hereby ordained and enacted by the Deputy-Governor, Council and Aſſembly, and by the Authority of the ſame, That from and after Publication hereof, all Negroe Slaves in all Courts of Judicature, and other Places within this Iſland, ſhall be held, taken, and adjudged to be Eſtates Real, and not Chattels, and ſhall deſcend unto the Heir or Widow of any Perſon dying, according to the Manner and Cuſtom of Lands of Inheritance held in Fee-ſimple, provided always, that no Perſon ſelling or alienating any of his or her Negroes, is hereby held or obliged to cauſe ſuch Sale or Alienation to be enrolled, as is accuſtomed to be done, and required by the Laws of this Iſland, as in all other Real Eſtates, any Uſage, Cuſtom or Law to the contrary notwithſtanding: Provided this Act, or any Thing therein contained, ſhall not be taken and deemed to extend unto any Merchant, Factor, or Agent, bringing Negroe Slaves to this Iſland, and having the Conſignments of any Slaves under them; but that in all Reſpects, they, their Executors,

Adminiſtrators or Aſſigns, may hold, poſſeſs, and enjoy ſuch Slaves, or Negroes, in ſuch Condition as they might have done before the Making of this Act, until Sale of ſuch Slave or Slaves hath been made in the Iſland.] Prout per Actu. ill. plenius apparet quodque præd.Edwardus Chamberline diu ante præd. tempus quo, &c. apud Inſulam præd. de ſimili Statu ſuo de & in Plantation. & Servis Æthiop. præd. ad inde pertinen. obiit ſe'it. per & poſt cujus mortem una tertia Pars Plantation. & Æthiop.ſervorum præd. unde Æthiop. Servus in narr. præd. mentionat. fuit un. deſcendebat Mariæ Vid.& Relict. præd. Edwardi Chamberline, nomine dotis ſuæ per leges Inſulæ præd. & reverſio præd. tertiæ Partis & præd. al. duæ tertiæ Partes deſcendebant præfat.Willo. Chamberline ut Fil. & Hæred. prædict. Edwardi & ſic ſe'it. exiſten. præd. Maria poſtea & diu ante tempus quo, &c. cepit in virum ſuum quendam Johan. Witham Mil. per quod præd. Johannes Witham ſe'it. fuit in jure Uxor. ſuæ præd. de una tertia Parte Plantation. & Æthiop. Servor. pro termino vitæ Uxoris ſuæ præd. ac præd. Johannes Witham ſic ſe'it. exiſten.infranominat. Æthiop. verum Nativum diu ante infraſcript. tempus quo, &c. ſcil't in Anno Regni Caroli Secundi nuper Regis Angliæ, &c. Triceſimo Sexto infra hoc Regnum Angliæ duxit & poſtea præd. Æthiop. Servus ſuperius mentionat. remanſit in Servitio ipſius Johannis infra hoc Regnum Angliæ per ſpacium diverſor. Annor. extunc & ante præd. tempus quo, &c. juxta ritus Eccleſiæ Anglicanæ ſed abſque notitia ſive conſenſu præd. Willoughby Chamberline ibidem baptizat. fuit quodque præd. Johannes Witham poſtea & poſt mortem præfat. Uxor. ejus ſed diu ante præd. tempus quo, &c. infra hoc Regnum Angliæ Æthiop.Servum præd.a Servitio ſuo penitus detruſit necnon poſtea & ante præd. tempus quo,&c. idem Æthiop. Servus alios hujus Regni Angliæ ſubdit. infra hoc Regnum Angliæ deſerviſſet ac infraſcript. tempore quo, &c. infra hoc Regnum Angliæ retent. fuit in actual. Servitio præd. Roberti Harvey capiend. de præfat. Roberto ſecundam ratam ſex Librarum perAnn.pro ſalario ſuo in ea Parte ſed utrum ſup.tot.materiam præd. per Jur. præd. in forma præd. compert. præd. Robertus Harvey ſit culpabil. de tranſgreſ. infra ſpecificat. necne Jurator. præd. penitus ignorant & pet. adviſament. Cur. hic de præmiſſis. Et ſi ſuper totam Materiam præd. per Jur. præd. in forma præd. compert. videbitur Juſtic. & Cur. hic quod præd. Robertus Harvey ſit culpabil. de tranſgreſſ. ill. tunc iidem Jurator. dicunt ſuper ſacr'um ſuum præd. quod præd. Robertus Harvey eſt culpabil. de tranſgreſſ. præd. prout præd. Willoughby Chamberline interius verſus eum queritur. Et aſſidunt dampna ipſius Willoughby occaſione tranſgreſſ. præd.

ultra miſ. & Cuſtag. ill. ad quinquagint. & tres Solid. & quatuor Denar'. Et ſi ſuper totam materiam præd. per Jur. præd. in forma præd. compert. videbitur eiſdem Juſtic. hic quod præd. Robertus Harvey non ſit culpabil. de tranſgreſſ. præd. tunc iidem Jurator. dicunt ſuper ſacr'um ſuum præd. quod præd. Robertus Harvey, non eſt culpabil. de tranſgreſſ. præd. prout ipſe idem Robertus Harvey interius placitando allegavit & quia, &c.

2 *Lev.* 201. *Vide* 3 *Lev.* 336, 337. 3 *Keb.* 785. *Ray.* 16. 2 *Salk.* 666, 667. *Cro. Car.* 19, 391, 545. *Cro. Eliz.* 126, 545. *Cro. Jac.* 262, 463.

TReſpaſs for taking a Negroe Slave of the Value of One hundred Pounds: Upon Not guilty pleaded, the Jury found a Special Verdict at the Guildhall, London: ſſ. That before the Treſpaſs committed, one Edward Chamberline was ſeized in Fee of a Plantation in Barbadoes, and of certain Negroe Slaves thereunto belonging; that the Negroe now taken was born within the ſaid Iſland of Negroe Parents, being Slaves belonging to the ſaid Plantation. They find an Ordinance made by the Deputy Governor, Council, and Aſſembly of the Repreſentatives in the ſaid Iſland, That the Negroe Slaves there ſhall be real Eſtates, and ſhall deſcend to the Heir or Widow as Lands of Inheritance, &c.

That Edward Chamberline died ſeized, &c. after whoſe Death one third Part of the Plantation and Negroe Slaves (whereof this Negroe was one) came to Mary his Widow and Relict, as her Dowry, and the Reverſion of the ſaid Thirds, and the two other Thirds did deſcend to the Plaintiff, as Son and Heir of Edward Chamberline. That the ſaid Mary did afterwards marry Sir John Witham, who thereupon was ſeized in her Right for her Life of one third Part of the Plantation and Slaves; and being ſo ſeized, he did, in the 36th Year of King Charles II. bring this very Negroe into England, where he continued in the Service of the ſaid Sir John Witham ſeveral Years; that he was baptized here, but without the Privity or Conſent of the Plaintiff; that after the Death of the ſaid Mary, Sir John Witham turned this Negroe out of his Service, who afterwards ſerved ſeveral other Maſters here, and at the Time when the Treſpaſs was ſuppoſed to be committed, was in the Service of the Defendant, and had for his Wages ſix Pounds by the Year. But whether, upon the whole Matter, the Defendant is guilty of the Treſpaſs, they refer to the Court.

A Caſe like this never happened before.

There were three Queſtions made upon this Verdict:

1. Whether upon this finding there was any legal Property veſted in the Plaintiff?

2. If any ſuch Property be veſted in him, then whether the bringing this Negroe into England be not a Manumiſſion, and the Property thereby diveſted?

3. Whether an Action of Treſpaſs will lie for taking a Man

Pretii centum Librarum.

As to the Firſt, Tho' the Word Slave hath but a very harſh Sound in a free and Chriſtian Country, yet perfect Bondage hath been allowed in ſuch Places; and the Power which doth naturally ariſe to the Lord over ſuch Bondmen or Slaves, is by Reaſon of his ſupplying them with Food and Raiment during their Lives, as a Recompence for their Labour; ſuch is the Uſage of the Iſland of Barbadoes. And the Jury have found a Law there, which makes theſe Slaves Part of the real Eſtate, and this Negroe was born of Negroe Parents there. Now the Children of ſuch Parents are Slaves as well as they; ſo it was amongſt the Romans, where both Parents were Aliens, the Children were ſo too. *Vide March* 12. *Hob.* 283. *Ray.* 16. 2 *Lev.* 201. 3 *Lev.* 336. 2 *Salk.* 667. *&c. ante.*

This Ordinance made in Barbadoes being ſubject to the Crown of England, hath the ſame Force there as an Act of Parliament hath here. Now if this had been the Caſe of a Villain here, the Jury have found enough to make him Regardant to a Manor; in which, by the Law of this Land, the Lord had ſo abſolute a Property, that if he be taken away, the Party detaining him gained no Property in him; for then the Writ de Nativo habendo muſt be brought againſt him, but it is only directed to the Sheriff to take him where-ever he may be found, &c. *Vide* 2 *Salk.* 411, 412.

An Action of Trover will not lie, but where the Plaintiff hath a Property in the Thing demanded. Now it cannot be denied, but that Trover will lie for a Negroe; for ſo was the Caſe of, &c.

It is true, there is no Judgment entred in that Caſe, but that may be the Fault of the Attorney in not bringing in the Poſtea.

2. Nothing here found doth amount to a Manumiſſion or Enfranchiſement.

Manumiſſion

Sect. 204. Manumission is defined by Littleton to be, when the Lord makes a Deed to his Villain to enfranchise him, this is one kind of Manumission; the other is, when the Lord doth some Act, which, in Judgment of Law, amounts to make his Villain free, as by making a Feoffment in Fee to him, and delivering Seisin accordingly, &c. It is true, he may have several temporary Privileges whereby he may be exempted from the Seisin of the Lord, as entring into Religion, &c. but can in no Case be infranchised but where the Lord is an Actor; and even in such Case, if the Lord himself had enfranchised him by Deed, cum tota sequela sua procreata & procreanda, this was not a sufficient Manumission of such Children which he had before the Execution of the Deed without special Words, because they were Villains in Possession at that Time.

Co. Lit. 137. *b.* 5 *H.* 7. 14. a. *Br. Tit. Villenage, placito,* 26.

But here is nothing of the Lord's Consent found in this Verdict, but the contrary.

Then bringing him into England by Sir John Witham will not make him free, because he was a Trespasser in so doing; for he ought not to have removed him from the Plantation to which he was regardant. If therefore taking him from the Plantation was Tortious, then the finding that he continued in his Service, and that he was afterwards turned away, will not amount to a Manumission.

The chief Question then is, Whether Baptism without the Privity of the Lord will amount to a Manumission?

Now if a bare Consent, without any other Act of the Lord, will not be sufficient to make his Villain free, so as to devest himself of that Property which he had in him; then a Fortiori, what the Villain doth without the Consent of the Lord, cannot acquire a Manumission.

Co. Lit. 136. b. That a bare Consent alone is not sufficient, appears by my Lord Coke's Comment on Littleton, and the Authorities there cited in the Margent; That if a Nief regardant to a Manor marries a Freeman without the Licence of the Lord, who afterwards makes a Feoffment of the Manor, and then her Husband dies, the Lord shall still have the Nief, and not the Feoffee.

If Baptism should be accounted a Manumission, it would very much endanger the Trade of the Plantations, which cannot be carried on without the Help and Labour of these Slaves; for the Parsons are bound to baptize them as soon as they can give a reasonable Account of the Christian Faith; and if that would make them free, then few would be Slaves.

Econtra.

It was argued on the other Side, That it was againſt the Law of Nature for one Man to be a Slave to another. 'Tis true, a Man may loſe his Liberty by a particular Law of his Country, or by being taken in War, for there he owes his Life to thoſe that preſerve him, or where a Man voluntarily ſells himſelf for Suſtenance, or Alimony; but no ſuch Thing is found in this Verdict, and nothing ſhall be preſumed but what is in Favour of Liberty.

'Tis by the Conſtitution of Nations, and not by the Law of Nature, That the Freedom of Mankind hath been turned into Slavery: Thus ſaith Bracton, Fiunt etiam ſervi liberi homines captivitate de jure gentium. But our Laws are called Libertates Angliæ, becauſe they make Men free; and therefore even in the Time of Villenage here, the Lord had not ſuch an abſolute Property over his Slave, but that in ſome Caſes that very Slave might have an Action againſt his Lord, as an Appeal for the Death of his Father; ſo where the Lord is indebted to the Teſtator of his Villain, he may bring an Action againſt him as Executor; ſo may the Neife have an Appeal of Rape, being raviſhed by her Lord. *Lib.* 1. *Cap.* 6. *Litt. Sect.* 189, 190.

If Slavery in Barbadoes, and Villenage here, were the ſame ſort of Servitude, the Plaintiff may be ſeized of this Negro as a Villain in Gross, or as Regardant to the Plantation; for there were but two ſorts of Villains here, either in Gross, or Regardant to particular Manors.

Now this cannot be a Villain Regardant to the Plantation, for then the Plaintiff and his Anceſtors muſt be ſeized of this Negro, and his Anceſtors Time out of Memory of Man, which could not be, becauſe Barbadoes was acquired to the Engliſh within Time of Memory; and he cannot be a Villain in Gross, becauſe 'tis found that he was born of Parents belonging to the Plantation. *Litt. Sect.* 181, 182.

But if the Plaintiff hath any Property in this Negro, he muſt either have an abſolute or qualified Property in him at the Time of the Treſpaſs ſuppoſed to be committed.

He could not have an abſolute or general Property, becauſe by Magna Charta, and the Laws of England, no Man can have ſuch a Property over another.

And if he had only a qualified Property, then an Action of Treſpaſs will not lay, but an Action per quod ſervitium amiſit.

But if the Plaintiff had any Right to the Servitude of this Negro, that Right is now diveſted by his coming into England; for the Ordinance made in Barbadoes ſhall not make him ſo Regardant to the Plantation there, as to go to the Heir, becauſe that is only Lex loci, and adapted to that particular Place (as the Law of Stannaries in Cornwall, and extends only to that Country) ſo long as he is occupied in Service on that Plantation; and if he be brought into another Country where that Law hath no Effect, that amounts to a Manumiſſion, ſo that the bringing him into England, diſcharges him of all Servitude, or Bondage, eſpecially being turned out of the Service of his Maſter, and not allowed Suſtenance by him, for Food and Cloathing are the only Recompence for Servitude.

But being baptized according to the Right of the Church, he is thereby made a Chriſtian, and Chriſtianity is inconſiſtent with Slavery. And this was allowed even in the Time when the Popiſh Religion was eſtabliſhed, as appears by Littleton, for in thoſe Days if a Villain had entered into Religion, and was profeſſed as they called it, the Lord could not ſeize him; and the Reaſon there given is, becauſe he was dead in Law, and if the Lord might take him out of his Cloiſter, then he could not live according to his Religion. *Sect.* 202.

The like Reaſon may now be given for Baptiſm, being incorporated into the Laws of the Land, if the Duties which ariſe thereby cannot be performed in a State of Servitude, the Baptiſm muſt be a Manumiſſion.

That ſuch Duties cannot be performed is plain, for the Perſons baptized are to be confirmed by the Diocеſan when they can give an Account of their Faith, and are enjoined by ſeveral Acts of Parliament to come to Church: And it cannot be an Objection of any Weight to ſay, That though he was baptized, yet it was not by the Conſent of the Lord, becauſe he is enjoined by the Law.

But if the Lord hath ſtill an abſolute Property over him, then he might ſend him far enough from the Performance of thoſe Duties, (viz.) into Turkey, or any other Country of Infidels, where they neither can or will be ſuffered to exerciſe the Chriſtian Religion.

The Law is ſo careful of the Liberties of Men under its Protection, that the King himſelf who hath ſo great a Right to the Duty and Service of his Subjects, cannot ſend any one out of England againſt his Will to ſerve in any other Place, even in his own Dominions, for this my Lord Coke ſaith would be perdere Patriam; and therefore the Lord could not ſend a Villain 2 *Inſt.* 46.

lain in Gyoſs out of the Kingdom, becauſe the King had a Right in him,

Thus it is alſo in the Caſe of Apprentices, who though they voluntarily ſubmit themſelves to ſerve their Maſters for a certain Number of Years, yet they cannot be ſent out of the Kingdom, tho' it be to their Maſter's Houſe, and in his Service, unleſs it be the Agreement, or the Nature of the Apprenticeſhip is ſuch. *Brownl.* 1. *Pſ.* 67. *Hob.* 134. *idem Coventry Woodall.*

Captives taken in War are under the moſt Slaviſh Degree of Servitude, and thoſe to whom they are ſubjected have thereby the higheſt Right in them, becauſe 'tis lawful not only to diſpoſe of them at their Pleaſure, but even to deſtroy them. But 'tis obſerved amongſt the Turks, That they do not make Slaves of thoſe of their own Religion, though taken in War; and if a Chriſtian be ſo taken, yet if he renounce Chriſtianity, and turn Mahometan, he doth thereby obtain his Freedom. *Molloy de jure Maritimo*, 355.

And if this be a Cuſtom allowed amongſt Infidels, then Baptiſm in a Chriſtian Nation, as this is, ſhould be an immediate Infranchiſement to them, and they ſhould thereby acquire the Privileges and Immunities enjoyed by thoſe of the ſame Religion, and be intitled to the Laws of England.

3. This Action will not lie for taking a Man, pretii centum librarum. Firſt, becauſe 'tis not found that either the Widow or the Heir was in Poſſeſſion of this Plantation, and Negro Slaves at the Time of the Action brought; for if this Negro be Part of the real Eſtate, then Sir John Wytham was a Diſſeiſor by bringing him into England, and a Diſſeiſee cannot have an Action of Treſpaſs before a Re-entry, becauſe the Freehold is in the Diſſeiſor. *Roll. Abr.* 2 *Pſ.* 553.

The Vagrancy of a Villain, or a Neife is the Fault of the Lord; and therefore Anno 7. R. 2. it was held, If a Stranger marry ſuch Neife, not knowing to what Lord ſhe belonged, he is not a Treſpaſſer, which is this very Caſe in Point Adjournatur. Afterwards, in Hillary Term, Judgment was given for the Defendant, that the Bill ſhall abate; for the Court were of Opinion, That no Action of Treſpaſs would lie for the taking away a Man generally, but there might be a ſpecial Action of Treſpaſs for taking his Servant, per quod Servitium amiſit. *Fitz. Abr.* Tit. Bar. *Placito* 240.

Roberts *verſus* Withered. 1 *Sal.* 233.

Mid. ſſ. FRan'cus Roberts qui tam pro Dom' Rege quam pro ſeipſo in hac parte ſequitur queritur de Thoma Withered in Cuſtod. Mar. &c. de Placito quod reddat. dicto Dom. Regi

Regi & eidem Fran. Triginta & ſex Cados [vocat. Barrels] Oleorum Olivarum [Anglice Olive-Oyls] continen. in toto treſdecim Tonnas [Anglice Tuns] Oleorum Olivarum præd. ad Valenc, quingent. & viginti librarum ac etiam ſexaginta & novem Pipas [Anglice vocat. Pipes] Vini continen. in toto Triginta & quinque Tunnas [vocat. Tuns] Vini præd. ad Valentiam Mille & quadraginta librarum quos ab eodem Dom. Rege & præfat. Fran. injuſte detinet pro eo videl't quod cumpoſt primum diem Aprilis Anno Dom. Milleſimo ſexcenteſimo ſexageſimo primo ſcil't inter decimum nonum diem Septembris Anno Dom. 1694, & diem exhibitionis hujus Billæ ſcil't decimo die Aprilis præd. bona importat. fuer. per præd. Thomam Withered & per ipſum habit. & poſſeſſionat. & ad uſum ſuum proprium conv. & depoſit. in qnadem nave ſive vaſe [vocat. the Stella] a Genoa in partibus tranſmarines in hoc regnum Angliæ videl't ad Radcliffe in Com. Mid. præd. infra portum London eadem nave ſive vaſe [vocat. Stella] dicto tempore importacon. bonorum præd. non exiſten. nave ſive vaſe vere & ſine fraude pertinen. ad populum Angliæ, Hiberniæ, Walliæ, vel Villæ Berwici ſuper Tweed aut aliquam eorum ut verus poſſeſſor. [Anglice Owner] & Proprietor inde & cujus Magiſter & tres quart. partes nautarum ad minus fuer. Anglici prædictaque nave vel vaſe non exiſten. nave vel vaſe forinſeca de edificatione. Genoa [Anglice the Built of Genoa] ſeu iſtius Regionis vel loci unde bona præd. fuer. creſcen. production. ſive Manufactur. vel talis portus ubi bona præd. potuer. ſolummodo eſſe aut maxime uſualiter fuer. primo eskippat. pro tranſportatione & unde Magiſt. & tres quart. partes nautarum ad minus fuer. ejuſdem regionis ſive loci contra formam ſtatuti in hujuſmodi caſu nuper edit. & proviſ. occaſione quorum quidem præmiſſorum nec non vigore ſtatuti præd. bona præd. forisfact. devener. & exiſtunt & quælibet inde parcel. forisfacta devenit. & exiſtit. unde actio accrevit. dicto Dom. Regi & eidem Fran. qui tam, &c. ad exigen. & haben. de eodem Thoma pro præd. Dom. Rege & ſeipſo præd. bona in forma præd. forisfact. præd. tamen Thomas licet ſepius requiſit', &c. præd. bona in forma præd. forisfact. dicto Dom. Regi & eidem Fran. qui tam, &c. nondam deliberavit ſed præd. bona dicto Dom. Rege & eidem Fran. qui tam, &c. hucuſque deliberare omnino contradixit & adhuc contradicitac injuſte detinet unde idem Fran'cus qui tam, &c. dicit quod deteriorat. eſt & damnum habet ad Valentiam duo mille librarum & inde producit ſectam, &c.

Roberts *verſus* Withered.

S. C. 1 *Salk.* 223.

AN Action of Detinue was brought for Goods forfeited by Vertue of the Statute 12 Car. 2. [Entituled, An Act for encouraging and encreaſing of Shipping and Navigation] in the eighth Paragraph whereof 'tis enacted, amongſt other Things, That no Olive-Oil, or Wines, ſhall from and after the firſt Day of April, in the Year 1667. be imported into England, Ireland, Wales, or Town of Berwick upon Tweed, in any Ship or Ships, Veſſel or Veſſels whatſoever, but in ſuch as do truly, and without Fraud, belong to the People thereof, or of ſome of them, as the true Owners and Proprietors thereof and whereof the Maſter and three Fourths of the Mariners at leaſt are *Engliſh*, except only ſuch Foreign Ships and Veſſels as are of the Built of that Country or Place of which the ſaid Goods are the Growth, Production or Manufacture reſpectively, or of ſuch Port where the ſaid Goods can only be, or moſt uſually are, firſt ſhipped for Tranſportation, and whereof the Maſter and three Fourths of the Mariners at leaſt are of the ſaid Country or Place, under the Penalty and Forfeiture of Ship and Goods; one Moiety to his Majeſty, and the other Moiety to him or them that ſhall inform, ſeize, or ſue for the ſame in any Court of Record.

12 *Car.* 2. *cap.* 18.

Detinue. *Vide* 11 *Co.* 89. 1 *Rol. Rep.* 118, 119, 161. 2 *Rol. Rep.* 275, 296. *Hard.* 353. *Noy* 12. *Cro. Jac.* 39. *Cro. Eliz.* 457. 2 *Danv.* 510.

Upon Non Detinet pleaded, there was a Verdict for the Plaintiff. And now it was moved in Arreſt of Judgment, that an Action of Detinue will not lie but where the Defendant comes by the Goods either by delivering or by finding, and where the Plaintiff hath an antecedent Right, neither of which is this Caſe; and it is not enough to ſay, that the Statute veſts a Property in him who firſt ſueth for the Forfeiture, becauſe by the expreſs Words thereof the Right is not attached but by Seizure or Information.

Moſt of the Statutes which give Penalties of Forfeiture, do direct how they ſhall be recovered, ſcil't, by Action of Debt, Bill, Plaint, &c. but where a Law giveth a Property by Information or Seizure of the Goods, an Action of Detinue will not lie till that be done, becauſe it cannot be a wrongful Detainer of that to which the Party had no Right.

If Genoa be the Place of the Growth of the Goods, then the ſhipping them there is not an Offence within the Act; and they do not ſay, that the Goods are not of the Growth, Production or Manufacture of Genoa, or that it was not the Place

where they were uſually ſhipped at the Time of the making of the Act.

The Proceedings upon ſuch popular Statutes have uſually been by way of Information: So was the Caſe of Pitcher and Jones in Michaelmas Term, in the thirteenth Year of King Charles II. in the Exchequer, which was an Information for importing two Bags of Spices from Holland, being of the Growth of Aſia, Africa, or America, that not being the Place where ſuch Goods were firſt moſt uſually ſhipped for Tranſportation, contra Formam Statuti. There was a Judgment for the Plaintiff; but it was arreſted, becauſe it was not alledged, that the Goods were not of the Growth of Holland; though the Information did ſet forth, that they were of the Growth of Aſia, &c.

Hard. 217.

Now it is not material where ſuch Goods were uſually ſhipped either before or ſince the making the Act; for they ought to aver, that Genoa was not the uſual Place of ſhipping them at the Time when the Act was made; like the Caſe where the King granted to a Biſhop, that the Manor and Lands belonging to his Biſhoprick ſhould be free for ever from ſuch a Foreſt. The Biſhop could not claim any Freedom for any other Lands, but ſuch which he had at the Time of the making the Grant.

2 *Roll. Abr.* 202. Biſhop of *Coventry* and *Litchfield*'s Caſe.

Econtra.

But thoſe who argued for the Plaintiff, ſaid, that nothing remained to be anſwered, upon reading the Act and the Declaration, but the firſt Queſtion, which was, Whether an Action of Detinue would lie or not in this Caſe? And it was inſiſted, that it would; for if the Act had given only the Penalty of 100 l. one Moiety to the King, the other to him who ſhall ſue for the ſame, and doth not ſay in what Action, it will not be denied but that Debt would have been the proper Action in ſuch Caſe for the Informer to recover his Moiety.

That there was no Difference between Debt and Detinue for ſuch a Forfeiture; for the Informer had an antecedent Property in neither.

But in this Caſe there is a Forfeiture immediately veſted in the King and Party, and if one may have an Action, the other may alſo ſue for his Moiety.

Now it is no Argument to ſay, becauſe ſome Perſons have choſe to proceed by way of Information upon Forfeitures on Penal Statutes, therefore an Action of Detinue will not lie for ſuch a Forfeiture.

To prove that a Forfeiture was veſted, this Caſe was compared by the Court to a Replevin, which doth ſuppoſe an antecedent Property, as much as an Action of Detinue; for it is a Rule, That the Plaintiff muſt have the Property of the Goods in him at the Time when they were taken; but yet the Lord ſhall have a Replevin of the Cattle of his Villain being diſtrained, though he had no Property in them at the Time of the Diſtreſs made: For my Lord Coke was of Opinion, That the bringing a Replevin is a Claim in Law, and that the Property is veſted thereby in the Plaintiff. 1 *Inſt.* 145. b. *F.N.B.* 69. b.

So by navigating contrary to the Act, the Property is diveſted out of the former Owners; and by this Action now brought, it is veſted in the Plaintiff, and therefore he may bring Detinue for it: So Judgment was given for the Plaintiff by the whole Court without any farther Argument.

Wolfe *verſus* Daviſon.

S. C. 2 *Salk.* 219.

Villa Novi Caſtr. ſup. Tinam, ff. MEmorandum quod al' ſcil't. Termino Paſchæ ult. præterit. coram Domino Rege apud Weſtm. ven. Henricus Wolfe per Thomam Matthews Attorn. ſuum & protulit hic in Cur. dicti Domini Regis nunc ibidem quandam Billam ſuam verſus Benjamin Daviſon Mercator. nuper Vic. Vill. prædict. in Cuſtod. Mar', &c. de placito debiti & ſunt pleg. de Perſonis, ſcil't. Johannes Doe & Richardus Roe quæ quidem Billa ſequitur in hæc verba, ff. Villa Novi Caſtr. præd. ſuper Tinam, ff. Henricus Wolfe queritur de Benjamino Daviſon Mercator. nuper Vic. Villæ præd. in Cuſtod. Mar. Mareſc. dicti Domini Regis coram ipſo Rege exiſten. de placito quod reddat ei centum & octo Libras legalis monetæ Angliæ quas ei debet & injuſte detinet pro eo videl't quod cum idem Henricus al's ſcil't. Termino Sancti Michaelis Anno Regni Domini Willielmi nunc Regis & Dominæ Mariæ nuper Reginæ Angliæ, &c. ſecundo in Cur. dictorum Domini Regis & nuper Dominæ Reginæ coram Henrico Polexfen Mil. & Sociis ſuis tunc Juſticiar. Domini Regis & nuper Dom. Reginæ de Banco apud Weſtm. in Com. Midd. per con. ejuſdem Cur. recuperaſſet verſus quendam Georgium Dale gen. pro nomen Georgii Dale nuper de Gateſherd in Com. Dunelm. Gen. tam quoddam debitum centum & ſex Libr. quam quadragint. Solid. qui eidem Henrico Wolfe in eadem Cur. adjudicat. fuer. pro dampnis ſuis quæ habuit occaſione detentionis debiti illius unde idem Georgius convict. fuit prout per Record. & Proceſſ. inde in eadem Cur. Domini Regis nunc de Banco apud Weſtm. præd. reſiden. liquet manifeſte ſuper

per quo præd. Georgius pro eo quod ipſe non ven. coram Juſtic. dictor. Domini Regis nunc & nuper Dominæ Reginæ de Banco apud Weſtm. præd. ad ſatisfacien. eidem Henrico de debito & Dampnis præd. in forma præd. recuperat. unde ut prefert. convict. fuit in exigend. poſit. fuit ad utlegand. in London & ea occaſione poſtmodum ſcil't. die Lunæ prox. ante. Feſtum S. Agathæ Virginis Anno ſecundo ſupradicto ad Huſtings de Communibus placitis adtunc tenr. in Guildhall Civitatis London ad ſectam ipſius Henrici utlegat. fuit prout per Record. & Proceſſ. utlegar. illius in præd. Cur. dicti Domini Regis nunc de Banco reſiden. plenius & manifeſte liquet ſuper qua quidem utlegaria verſus præfat. Georgium in forma præd. promulgat. idem Henricus Wolfe poſtea ſcil't. decimo tertio Die Aprilis Anno Regni dictor. Domini Regis & nuper Dominæ Reginæ, &c. quarto pro citiori obtention. debiti & dampnor. præd. proſecut. fuit extra præd. Cur. dict. Dom. Regis & nuper Dominæ Reginæ de Banco quoddam breve dictor. Domini Regis & nuper Dominæ Reginæ de Capias utlegat. verſus præd. Georgium tunc Vic. præd. Villæ Novi Caſtri ſuper Tinam direct. per quod quidem breve dictus Dominus Rex & nuper Domina Regina eidem Vic. Villæ Novi Caſtri præd. ſuper Tinam præd. præceper. quod præd. Georgium ad ſect. ipſius Henrici ut præfertur utlegat. ubicunque in Balliva ipſius Vic. tam infra libertat. quam extra inveniri contingeret caperet & eum ſalvo Cuſtod. ita quod haberet corpus ejus coram Juſticiar. dictor. Domini Regis & nuper Dominæ Reginæ apud Weſtm. in Craſ. Aſcen. Dom. tunc prox. ſequen. ad faciend. & Recipiend. quod eadem Cur. dictor. Domini Regis & nuper Dominæ Reginæ conſ. in ea parte & quod haberet ibi breve illud quod quidem breve idem Henricus Wolfe poſtea & antea retorn. brevis illius ſcil't. quarto Die Maii Anno Regni dictor. Domini Regis & nuper Dominæ Reginæ, &c. quarto ſupradicto apud Vill. Novi Caſtri ſuper Tinam præd. in Com. ejuſdem Villæ deliberavit cuidem Joſepho Atkinſon adtunc Vic. Vill. præd. exiſten. in forma Juris exequend. virtute cujus quidem brevis præd. Joſephus Atkinſon poſtea & ante retorn. brevis illius ſcil't. ſeptimo Die Maii Anno quarto ſupradicto tunc Vic. Vill. præd. exiſten. apud eandem Villam in Com. ejuſdem Vill. cepit & arreſtavit præd. Georgium & ipſum in Cuſtod. ſua in execution. pro debito & dampnis præd. adtunc & ibidem habuit & eum in Priſona dictor. Domini Regis & nuper Dominæ Reginæ ibidem detinuit & cuſtodivit uſque in exitum ipſius Joſephi ab Officio ſuo Vic. Villæ præd. prædictoque Georgio ſic ſub Cuſtod. præd. Joſephi Atkinſon in execution. pro debito & dampnis præd. in forma præd. exiſten. idem Joſephus Atkinſon poſtea ſcil't. decimo tertio

Die Octobris Anno quarto ſupradict. ab Officio ſuo Vic. Vill. præd. apud præd. Vill. Novi Caſtri ſuper Tinam debito modo amotus fuit & poſtea ſcil't eodem decimo tertio Die Octob. Anno quarto ſuprad. præd, Benjamin in Officium Vic. ejuſdem Vill. apud præd. Vill. Novi Caſtri ſuper Tinam debite elect. & conſtitut. fuit. Ac præd. Joſephus Atkinſon in dicto ejus exit. ab Officio ſuo Vic. Vill. præd. debito modo deliberavit eidem Benjamin Daviſon & in Cuſtod. ſuam præd. Georgium in priſona præd. ſic ut præfertur detent. in Execution. pro debito & dampnis præd. in forma præd. videlicet apud Vill. Novi Caſtri ſuper Tinam præd. idemque Benjamin ut Vic. Vill. præd. prædictum Georgium in priſona præd. ſub Cuſtod. ſua adtunc & ibidem in execution. pro debito & dampnis præd. recepit habuit & detinuit dictoque Georgio ſic in Cuſtod. ipſius Benjamin Vic. Vill. præd. ut præfert. exiſten. in execution. pro debito & dampnis præd. in forma præd. detent. exiſten. idem Benjamin poſtea ſcil't viceſimo Die Auguſti Anni Regni dict. Domini Regis & nuper Dom. Reginæ quinto apud Vill. Novi Caſtri ſuper Tinam præd. (eodem Benjamin adtunc Vic. Vill. præd. exiſten.) præd. Georgum è Priſona præd. extra Cuſtod. ipſius Benjamin ad largum quo voluit ire & evadere voluntarie petmiſit ſine conceſſu voluntat. vel aſſenſu ipſius Henrici eodemque Henrico Wolfe de debito & dampnis præd. vel aliqua inde parcell. minime ſatisfact. per quod actio accrevit eidem Henrico Wolfe ad exigend. & habend. de præd. Benjamin præd. centum & octo Libr. præd. tamen Benjamin licet ſæpius requiſit', &c. præd. centum & octo Libr. eidem Henrico Wolfe nondum ſolvit ſed ill. ei hucuſque ſolvere omnino contradixit & adhuc contradicit ad dampnum ipſius Henrici Wolfe triginta Libr. & inde producit ſectum, &c.

Et modo ad hunc Diem ſcil't Diem Veneris prox. poſt Craſ. Sanctæ Trinitatis iſto eodem Termino uſq; quem Diem præd Benjamin habuit licenc. ad Billam præd. interloquend. & tunc ad reſpondend', &c. coram Domino Rege apud Weſtm. venerunt tam præd. Henricus per Attorn. ſuum præd. quam præd. Benjamin per Nich'um Hardinge Attornat. ſuum & idem Benjamin defendit vim & injuriam quando, &c. & dicit quod ipſe non debet præd. Henrico præd. centum & octo Libras nec aliquem inde Denar. modo & forma prout præd. Henricus ſuperius inde verſus eum narravit & de hoc ponit ſe ſuper patriam & præd. Henricus inde ſimiliter, &c. Ideo ven. inde Jurat. coram Domino Rege apud Weſtm. Die Mercurii prox. poſt Tres ſeptiman. Sanctæ Trinitatis & qui nec, &c. ad recog', &c. quia tam, &c. Idem dies datus eſt partibus prædict. ibidem, &c. poſtea continuat. inde Proceſſ. int. par-

tes præd. de placito præd. per Jur. poſit. inde inter eos in reſpond. coram Domino Rege apud Weſtm. uſque Diem Mercurii prox. poſt Tres ſeptimanas S. Michaelis extunc prox. ſequend. niſi Juſtic. Domini Regis ad Aſſizas in Com. Vill. Novi Caſtri ſuper Tinam capiend. aſſign. prius Die Lunæ viceſimo ſecundo Die Julii apud Guildhall Vill. Novi Caſtri ſuper Tinam in Com. ejuſdem Villæ per formam Statuti, &c. ven. per defend. Jur', &c. Ad quem Diem coram Domino Rege apud Weſtm. ven. partes præd. per Attorn. ſuos præd. & præfat. Juſticiar. ad aſſizas coram quib. &c. miſ. hic Record. ſuum coram eis habit. in hæc verba, ff. Poſtea die & loco infra content. coram Edwardo Nevill Mil. un. Juſtic. Domini Regis de Banco & Johanne Turton Mil. un. Baron. Scaccarii dicti Domini Regis Juſticiar. ipſius Domini Regis ad Aſſizas in Com. Vill. Novi Caſtri ſuper Tinam capiend. aſſign. per formam Statuti, &c. ven. tam infranominat. Henricus Wolfe quam infraſcript. Benjamin Daviſon per Attorn. ſuos infracontent. & Jur. Jurat. unde infra fit mentio exact. ſimil. ven. qui dicunt ſuper ſacr'um ſuum qd. præd. Henricus recuperavit. verſus infranominat. Georgium Dale debitum & dampna in narration. ipſius Henrici infraſcript. mentionat. modo & forma prout per eandem narration. ſupponitur quodq; dictus Georgius ſuperinde ad ſectam & proſecution. ipſius Henrici utlegat. fuit modo & forma in narration. ill. ſpecificat. & quod idem Henricus ſuper inde proſecut. fuit breve de Capias utlegat. in dict. narration. mentionat. ac illud infranominat. Joſepho Atkinſon Vic. Vill. Novi Caſtri ſuper Tinam infraſcript. deliberavit qui dictum Georgium virtute brevis præd. cepit & arreſtavit modo & forma prout in eadem narration. continetur quodque idem Vic. dictæ Villæ ipſum Georgium in Cuſtod. ſua pro & ſuper breve illud habuit & eum in Priſona Domini Regis & nuper Dom. Reginæ ibidem detinuit & cuſtodivit prout lex poſtulat ac in exitu ſuo ab Officio ſuo Vic. Vill. illius debito modo deliberavit præfat. Benjamin (Vic. ejuſdem Vill. ſic ut in dicta narration. continetur exiſten.) & in Cuſtod. ſua præd. Georgium in Priſona præd. ſic ut præfertur detent. ex cauſa præd. quodque idem Benjamin ut Vic. Vill. præd. præd. Georgium in Priſona præd. ſub Cuſtod. ſua adtunc & ibidem recepit habuit & detinuit prout lex poſtulat dictoque Georgio ſic in Cuſtod. ipſius Benjamin in forma præd. detent. exiſten. idem Benjamin Vic. Vill. præd. ut præfertur exiſten. eundem Georgium e Priſona præd. extra Cuſtod. ipſius Benjamin ad largum quo voluit libere ire & evadere voluntarie permiſit ſine aſſenſu ipſius Henrici eodemque Henrico de debito & dampnis præd. vel aliqua inde parcel. minime ſatisfact. prout idem Henricus in narration. ſua

præd. interius allegavit ſed Juratores præd. ulterius ſuper ſacr'um ſuum præd. dicunt quod præd. Henricus nullam fecit petitionem alit. quam in dicta narration. ipſius Henrici ad onerand. præfat. Georgium in execution. pro debito & dampnis præd. per eundem Henricum verſus præfat. Georgium in forma præd. recuparat. & utrum præd. Georgius ſic ut præfertur ad Proſecution. præd. Henrici virtute brevis præd. de Capias utlegat. de & ſuper judicio præd. ſic ut præfertur capt. & arreſtat. ultra Annum & Diem poſt Judicium illud reddit. ligitime fuit vel eſſe potuit in execution. ad Sectam ipſius Henrici pro dampnis præd. ſine aliqua expreſſa petition. per ipſum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. necne idem Juratores penitus ignorant. & inde petunt adviſament. Cur. hic, &c. & ſi videbitur eidem Cur. hic quod præd. Georgius ſic a proſecution. præd. Henrici virtute præd. brevis de Capias utlegat. ut præfert. capt. & arreſt. ultra Annum & Diem poſt judicium præd. redditum legitime fuit vel eſſe potuit in execution. ad ſectam ipſius Henrici pro debito & dampnis ſuis præd. ſine aliqua expreſſa petition. per ipſum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. tunc Jur. præd. dicunt ſuper ſacr'um ſuum præd. qd. præd. Benjamin debet præd. Henrico infraſcript. centum & octo Libr. in forma qua idem Henricus interius inde narravit & aſſidunt dampna ipſius Henrici occaſione detentionis debiti illius ultra miſ. & cuſtag. ſua per ipſum circa ſectam ſuam in hac parte appoſit. ad ſex Denar. & pro miſ. & Cuſtagiis ill. ad quadraginta Solid. ſed ſi videbitur dict. Cur. præd. quod præd. Georgius ſic ad proſecution. præd. Henrici virtute brevis præd. de Capias utlegat. ut præfertur capt. & arreſtat. ultra Annum & Diem poſt judicium præd. reddit. legitime non fuit nec eſſe potuit in execution. ad ſectam ipſius Henrici pro debito & dampnis ſuis præd. ſine aliqua expreſſa petition. per ipſum Henricum ad onerand. eundem Georgium in execution. in ea parte fact. tunc Juratores præd. ſuper ſacr'um ſuum præd. dicunt quod præd. Benjamin non debet præfat. Henrico præd. centum & octo Libr. nec aliqu. inde Denar. prout ipſe dictus Benjamin interius inde placitando allegavit & quia Cur. dicti Dom. Regis nunc hic de judicio de & ſuper præmiſſis reddend. nondum adviſatur Dies inde datus eſt partibus præd. coram Dom. Rege apud Weſtm. uſque Diem prox. poſt

de judicio ſuo inde audiend. eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c.

Wolfe

Wolfe *verſus* Daviſon.

S. C. 1 *Salk.* 319.

Debt on an Eſcape. *Vide* 5 *Co.* 88, 89. *Cro. Eliz.* 706, 707. *Cro. Jac.* 361. 1 *Rol.* 810, 895. 1 *Leon.* 263. 1 *Sid.* 380. *Poſt*, 413, 416. *& infra.*

DEbt againſt the Sheriff for an Eſcape, wherein the Plaintiff ſets forth, That he had obtained a Judgment in the Court of Common Pleas againſt one Dale for 160 l. and Coſts, and the ſaid Dale not appearing to ſatisfy the ſaid Judgment, was outlawed at the Suit of the Plaintiff, who thereupon ſued forth a Capias Utlegatum againſt him, directed to the then Sheriff of Newcaſtle; and that the Plaintiff, before the Return of the ſaid Writ, delivered it to one Joſeph Atkinſon then Sheriff of the ſaid Will, who by Vertue thereof arreſted the ſaid Dale, and detained him in Priſon for the ſaid Debt and Damages, till the ſaid Atkinſon was diſcharged from his Office of Sheriff; that the Defendant was afterwards Under Sheriff, and the ſaid Dale was delivered to him in Cuſtody, and in Execution for the ſaid Debt and Damages; and that afterwards he ſuffered him to eſcape, the ſaid Debt not being paid.

Upon Nil debet pleaded, the Jury find a Special Verdict: If. They find that the Plaintiff had obtained a Judgment againſt the ſaid Dale for the ſaid Debt and Damages; they find the Outlawry, and the Capias Utlegatum, and the Arreſt upon it; and that the ſaid Dale was in Cuſtody of the Defendant, then Sheriff of Newcaſtle; and that he voluntarily ſuffered him to eſcape, the ſaid Debt not being paid; then they make a Special Concluſion, That if Dale ſo taken a Year and a Day after the ſaid Judgment recovered againſt him could be in Execution for the ſaid Debt and Damages, without any expreſs Prayer to charge him in Cuſtody; then they find for the Plaintiff, &c.

It was argued for the Plaintiff, That when a Man was outlawed after Judgment, the Capias Utlegatum is the proper Proceſs, and then the Plaintiff is at an End of his Suit; and therefore there can be no Default in him for not continuing his Proceſs, ſo as to have the Priſoner brought into Court; and then upon Prayer of the Defendant to be committed in Execution at his Suit. *Poſt*, 202.

1 *Sid.* 380. *Yelv.* 19, 20. *Cro. Eliz.* 652, 706, 850. *Bridg.* 7. *Moore* 567. *Hob.* 57, 115. *&c. ſupra.*

But admitting there was any Laches in the Plaintiff, or diſcontinuing the Proceſs, yet if the Party be in Execution upon a Capias Utlegatum after Judgment, he is in Execution at the Suit of the Plaintiff, if he pleaſe; for tho' the Outlawry be in the King's Name, yet it is at the Suit of the Party, and for his Benefit: And the Sheriff muſt take Notice of the

Law, That he hath him in Cuſtody for that Purpoſe unde Convictus eſt; for theſe are the Words in the Writ.

If the Defendant promiſe to pay a Debt in Conſideration of Forbearance to proſecute a Capias Utlegatum, this is good in Law, which proves that an Outlawry is at the Suit of the Party; for ſuch a Promiſe would be void, to ſtay any Proceſs at the Suit of the King. *Cro. Eliz. 909. Yelv. 19. Jennings verſus Harley.*

In the Fifth Report, there is a Caſe in Point, (viz.) Layton brought an Action of Debt againſt Walwyn and had Judgment, and then he was outlawed, and taken upon the Capias Utlegatum, and eſcaped: Whereupon the Action was brought againſt Garnon the Sheriff; and it was reſolved, That at Common Law, if there be an Outlawry after Judgment in Debt, and the Party is taken upon the Capias, there is an End of the Plaintiff's Suit; and if no Laches be in him in continuing his Proceſs, he ſhall be in Execution at his Suit if he will: For it is but reaſonable, That if the King ſhall have a Benefit at the Suit of the Party, that the Party ſhould have a Benefit at a Suit of the King. *Garnon's Caſe, 6 Rep. 88. Cro. Eliz. 707. idem. 1 Roll. 895, 810. Moore 556.*

This Caſe was adjudged in Michaelmas Term, in the fortieth Year of the Queen; and three Years afterwards in the ſame Term, Popham and Fenner ſeemed to be of another Opinion in an Action of Debt brought againſt an Adminiſtrator, upon a Judgment had againſt the Inteſtate. The Defendant pleaded, That the Inteſtate was outlawed after the Judgment, and taken upon the Capias, and died in Priſon; and upon Demurrer to the Plea, thoſe two Judges held that he was not in Execution at the Suit of the Plaintiff without his expreſs Prayer, and the Court award it: But Juſtice Gawdy was of a contrary Opinion in that Caſe. *Shaw verſus Cutteris. Cro. Eliz. 850. Moore, Placito 817.*

And according to his Opinion and the Reſolution in Garnon's Caſe, there have been ſubſequent Judgments in this very Point, That when the Party is taken upon the Capias utlegatum, he ſhall be in Execution for the Plaintiff if he will, altho' his Body was never brought into Court. *Bridgm. 6. More verſus Sir George Reynell idem, 2 Cro. 619.*

This Caſe came in Queſtion again in this Court in Michaelmas Term, in the 20th Year of King Charles II. It was Debt upon an Eſcape, wherein the Plaintiff declared, That he recovered a Judgment in the 13th Year of that King, that the Party was outlawed the 15th, and taken upon the Capias the 18th Year of the ſame King, and eſcaped: But he had not declared that he was in Cuſtody, and prayed to be ſo at his Suit, without which his Impriſonment upon the Capias did not make him in Execution at his Suit; for it may be, he was not *Latch 200. Sid. 380. Buckland verſus Kelland.*

contented with that, but intended to have another Execution than his Body.

But the Judgment in this Caſe is not reported, only the Opinion of Popham and Fenner is there cited, that he ſhall be in Execution at the Suit of the Party until he diſclaim it.

Bridgm. 7. If the Party be taken upon a Capias pro fine, he ſhall not be in Execution after a Year and a Day at the Suit of the Party without Prayer: But there in a Difference between that and this Caſe; for here it appears by Verdict, that the Plaintiff ſued out the Capias for the Recovery of his Debt; and it appears plainly, that he intended to have the Body of the Party in Cuſtody.

Cro. Jac. 545, 620, 657.

Econtra. It was admitted by thoſe who argued on the other Side, That if the Eſcape had been within the Year after he was taken by the Capias, that the Plaintiff ſhould have an Action of Debt againſt the Sheriff for an Eſcape; and the Reaſon is, becauſe within the Year the Plaintiff might have brought a Ca' Sa' againſt him, and charged him in Cuſtody, but after the Year he hath lapſed his Time, and is driven to a Sci' Fac', and therefore he ſhall not be then in Execution at his Suit without continuing the Proceſs; he is in at the Suit of the King to anſwer the Contempt of his Laws, and ſo it would have appeared if the Sheriff had returned a Cepi Corpus upon the Capias utlegatum; therefore ſomething muſt appear upon Record, to make him in Execution at the Suit of the Party.

Dalton 214.

When the Defendant is taken upon the Capias utlegatum, there is an End of the Party's Suit, as to any other Proceſs to be ſued by him, for he cannot have a Sci. fa. or any other Proceſs upon that Judgment; and ſo it was at Common Law, if there had been any Stay of Proceſs after the Year and Day; therefore it ought to be continued.

Ante. 201.

'Tis affirmed, that he is in Execution of the Party, nolens volens.

'Tis true, the Sheriff is bound to keep his Priſoners in Cuſtody, but not under equal Penalties; for in ſome Caſes an Action of the Caſe only will lie againſt him for an Eſcape, and ſometimes an Action of Debt, where the Plaintiff will recover both his Debt and Damages: But here an Action of the Caſe only will lie againſt the Sheriff.

The Reſolution in Garnon's Caſe will not come up to this, for the Words are, If the Defendant be taken upon the Capias utlegat. at the King's Suit, no Laches being in the Plaintiff in continuing his Proceſs, he ſhould be in Execution for the Plaintiff

tiff if he would; 'tis not ſaid with Prayer, or without Prayer, neither is the Year and Day mentioned there.

Neither is the Caſe in Bridgman an Authority for the Plaintiff; for that was an Action of the Caſe brought againſt the Sheriff for an Eſcape of the Party taken upon a Capias utlegatum, which is an Argument that they took the Law to be otherwiſe at that Time; for if the Priſoner had been in Execution at the Suit of the Party and eſcaped, they would have brought an Action of Debt, and not an Action on the Caſe. *Bridgm.* 6, 7.

The like Action on the Caſe was brought againſt the Sheriff of London for an Eſcape by Froſt, where the Defendant was in Cuſtody upon a Capias utlegatum ſued after a Year; and there it was agreed, That he could not be in Execution at the Suit of the Party without Prayer; but becauſe he was diſcharged from his Impriſonment, without finding Sureties to ſatisfy the Plaintiff according to the Statute, the Plaintiff was prejudiced thereby, and therefore an Action on the Caſe would lie againſt the Sheriff. 5 *Rep* 89. *Froſt*'s Caſe. 1 *Leon.* 263. *Bridg.* 7. 5 *Edw.* 3. *Cap.* 12.

But the Court were of Opinion, That it was in vain for the Plaintiff to ſue out an Outlawry if he had no Benefit thereby, when the Party was taken upon the Capias without continuing the Proceſs; for to what Purpoſe ſhould he take out a Sci' fa' after Judgment when the Party cannot be found, and nothing can be done upon it? Therefore Judgment was given for the Plaintiff.

Rex *verſus* Cranfeild.

THE Defendant was indicted at the Seſſions held for the Borough of Hatfeild, for ſpeaking theſe Words, ſ. The Mayor and Aldermen of Hatfield are a Pack of as great Villains as any who rob upon the High-way, and we will take away their Charter. He was found Guilty of ſpeaking theſe Words.

It was moved in Arreſt of Judgment, and ſeveral Exceptions taken,

1. This being tried at a Seſſions of a particular Borough, they ſhould have ſhewed what Authority they had to hold the Seſſions being in a private Place, either by Preſcription or Charter; which was omitted.

2. The Words are not indictable, for they are of Heat and Paſſion, for which the Defendant ought to be bound to his Good Behaviour, but not indicted.

In

In Eaſter Term, in the 21ſt Year of King Charles the Second, one Burford was indicted in this Court for theſe Words ſpoken by him of the Juſtices of the Peace; ſ. That none of the Juſtices of the Peace did underſtand the Statutes of Exciſe, except ſuch a one, [naming him,] and truly he did neither well underſtand them, nor moſt of the Parliament-Men who made them. And this Indictment was quaſhed.

3. It is ſaid, Juratores pro Domino Rege præſentant, it ſhould have been pro Domino Rege & Burgo prædict. præſentant.

Rex *verſus* Inhabitants of Liſley.

AN Order of Settlement was made by two Juſtices of Peace, to remove one Elizabeth Sinkwell, late of Liſley, Single-woman, and William her Son, to the Pariſh of Morton-Hampſtead; in which Order the Cauſe aſſigned was, becauſe that by Fraud and Colluſion of the Pariſh of Liſley, ſhe was delivered of the ſaid Baſtard-Child in the Pariſh of Morton.

Vide 2 *Bulſt.* 349, 358. *Blackerby's Caſes, p.* 32.

It was objected againſt this Order to quaſh it, becauſe it did not appear that the Mother was laſt legally ſettled in the Pariſh of Liſley, or that ſhe was a Pariſhioner there at the Time ſhe was delivered at Morton; they only ſaid, Elizabeth Sinkwell, late of Liſley, Single-woman; which is but a Deſcription of the Perſon, and an Addition of the Place, and not a ſufficient Allegation that ſhe was an Inhabitant there, or that the Child was ſettled there.

Now it appears by the Order, That the Child was born at Morton, and the Birth prima facie makes a Settlement in that Place, nothing appearing in the Order to make him an Inhabitant elſewhere; and they cannot ſend him back to a Place where he never was.

2. The Reaſon of the Removal is too general, ſ. That ſhe was delivered at Morton by Fraud and Colluſion of the Pariſh of Liſley.

As to the firſt Objection, it was anſwered, That the Order recites her to be late of the Pariſh of Liſley, Single-woman; which is a ſufficient taking Notice, that ſhe was an Inhabitant of that Pariſh.

As to the ſecond Objection, it was ſaid, That the Juſtices are not bound to ſhew a Reaſon why they make ſuch an Order to

remove her; and therefore if they aſſign a Cauſe incertainly, that ſhall not quaſh an Order.

The Court inclined, that ſhe ought to be alledged to be a legal Inhabitant in the Pariſh of Liſley; but would not quaſh the Order, becauſe it was nine Years ſince it was made; ſi. ever ſince October 1691.

Stanford *verſus* Chamberlaine.

EJectment tried at the Aſſizes, and a Verdict for the Plaintiff, the Judgment ought not to be ſigned till the Rules are out, which will be in four Days after the Poſtea returned, which happened in this Caſe to be the 6th of May: The Plaintiff got his Judgment ſigned on the very Day, but it was not executed till after the ſixth Day; ſo that the Defendant had Time enough to bring a Writ of Error, or move any Thing in Arreſt of Judgment: Yet the Court held, That the ſigning the Judgment was irregular, it being before the Day allowed by the Rules of the Court; and tho' it was taken out afterwards, that was not material; therefore the Judgment was ſet aſide, and the Party had Reſtitution.

Stephens *verſus* Squire.

AN Action was brought againſt Squire an Attorney, and two others, for appearing for the Plaintiff without a Warrant: The Cauſe was carried down to be tried at the Aſſizes; and the Defendant did promiſe, That in Conſideration the Plaintiff would not proſecute the Action, that he would pay 10l. and Coſts of Suit. And now an Action was brought againſt the Defendant upon this Promiſe.

The Queſtion was, Whether this was a void Promiſe by the Statute of Frauds, being made in Behalf of another, and not in Writing? Which Statute enacts, That no Action ſhall be brought to charge the Defendant upon any ſpecial Promiſe to anſwer for the Debt, Default, or Miſcarriage of another Perſon, unleſs it be in Writing.

But the Court were of Opinion, That this cannot be ſaid to be a Promiſe for another Perſon, but for his own Debt, and therefore not within this Statute.

Richards *verſus* Hill.

3 *Mod.* 48, 49. *Show.* 64. 3 *Lev.* 133.

AN Action of the Caſe for diverting a Water-courſe, in which the Plaintiff declared, That he was ſeized of a Water-mill to him and his Heirs, Secundum conſ. Decanatus de Woolverhampton, and ſo preſcribed for a Water-courſe, &c. and that the Defendant intending to deprive him of the Profit of the ſaid Mill, did divert the Water ab antiquo curſu ſuo, per quod he could not Molare ſo faſt. There was a Verdict for the Plaintiff.

Vide 1 *Sid.* 298. 1 *Lev.* 190. *Nelſ. Lutw.* 29. 2 *Sal.* 562.

It was moved in Arreſt of Judgment, for that a Copyholder cannot preſcribe in a Que Eſtate, and the Court could not take Notice of any other Eſtate the Plaintiff had by this Declaration; he ſhould have left out Secundum conſ. Decanatus; for how can he be ſo ſeized without ſhewing what that Cuſtom was?

2. He doth not ſay, that he diverted the Water from the Mill, but from its ancient Courſe, per quod, &c.

3. The Matter of his Damages is laid inſenſibly, for the Giſt of the Action is, That he had a Mill, out of which he had Profit by Grinding: Now the Word Molare is inſenſible, and there is a proper Word for Grinding.

The firſt Objection was over-ruled by the Court; for if the Plaintiff was ſeized of an Eſtate in Burrough Engliſh, that had been a cuſtomary Eſtate, becauſe he hath it by the Cuſtom of the Manor, and in ſuch he may preſcribe.

As to the ſecond Objection, it was held, That the Word Molare being inſenſible, no Damages could be given for it; and that the Declaration had been good, if that Part of it had been left out: So that the Plaintiff had his Judgment.

Rex *verſus* Cowper.

INdictment againſt the Defendant, ſetting forth, That there was a War with Lewis the French King; that during the Continuance of that War, the Defendant did hire a Boat for twenty Guineas, falſo malitioſe & proditorie, to aſſiſt the King's

Enemies; that the Boat ſo hired was brought to the Shore in order to imbark him and others, where he was taken. This Matter was all found by Verdict.

It was moved in Arreſt of Judgment, That this was not an Offence at Common Law; for then any Act, which ſhews an Intention to do an unlawful Thing will be a Fault; as if a Man hire a Houſe, with an Intention to ſet up an unlawful Trade.

If the Fact it ſelf doth not import any malicious Deſign, then the finding of the Jury will not alter the Nature of it.

If then there is nothing in this Indictment which ſavours of an Offence at Common Law, there is nothing prohibited by any Statute; for an Intention to do an unlawful Act is no Crime by either Law.

In this Caſe it was not ſo much as ſaid, That the Defendant endeavoured to go beyond Sea without the King's Licence.

Econtra,

To which it was anſwered, That it was a Crime to hire a Boat to aſſiſt the King's Enemies with an open and manifeſt Attempt, by viſible Acts ſo to do.

As if a Man prepare a Plate of the Breadth of the Broad Seal, and by ſome plain Act his Intention ſhould appear, that he deſigned to have counterfeited it, and is taken before his Deſign was brought to Perfection: This does not amount to High Treaſon, but it is a Misdemeanor.

It is an innocent Act to lie in a Hedge; but if it be with an Intention to attempt the Queen-Conſort, and that appear, it is a high Crime.

An Intention to fight a Duel is a Misdemeanor, and puniſhable by Fine and Impriſonment; and therefore if a Challenge be ſent to another, tho' the Parties never fight, yet both he who ſent and carried the Challenge, are puniſhable according to the Rule which is mentioned by my Lord Coke, Quando aliquid prohibetur, prohibetur & omne per quod devenitur ad illud. *Sid.* 168. *Rex* verſus *Darey* and *Collins.* 3 *Inſt.* 158.

The Knowledge and Concealment of Treaſon is Miſpriſion thereof, which is puniſhed by Impriſonment during Life, and forfeiting of the Goods and Profits of Lands during Life. Now ſince the Law inflicts ſo high a Puniſhment upon the Concealing a Treaſon, it cannot be a Queſtion, but the bare Intention to commit ſo high a Crime, is puniſhable likewiſe at Common Law.

It

It is no Argument to ſay, That becauſe the Defendant is not guilty of the higheſt Offence, therefore he is guilty of none; for there are Gradations in Law which vary the Offences of Men, and proportion their Puniſhments to their Crimes.

Curia. The very Intention to commit Treaſon is regarded in Law; and any Preparation to aſſiſt the King's Enemies is a Prejudice to the Publick, and therefore an Offence at Common Law.

Our Actions are governed by Intentions, as qualified by them; ſo that in divers Caſes the Intention makes the Act more or leſs criminal: Whereupon the Judgment was affirmed, and the Defendant fined 100 Marks, and committed till paid.

Keat *verſus* Barker.

AN Action was brought againſt the Defendant, for ſix Years Wages due to the Plaintiff for his Salary, being a Steward: There was a Verdict for the Plaintiff at the Aſſizes in Berkſhire, and only ſeven Pounds Damages given.

It was moved to diſcontinue the Action, and that the Poſtea might not be brought in; ſed non allocatur; for after a general Verdict the Court will not ſuffer the Plaintiff to diſcontinue his Action: It hath been allowed after a Special Verdict, and an Argument at Bar; ſo likewiſe after a Joining in Demurrer, but not after arguing ſuch Demurrer. But the Statute H. 4. doth ordain, That after Verdict a Plaintiff ſhall not be nonſuit; which was otherwiſe at Common Law; for if he did not like his Damages, he might be nonſuit.

Cro. Car. 575. Earl of *Oxon* verſus *Waterhouſe.* 1 *Saund.* 23, 38. 1 *Sid.* 84, 306. 2 *Sid.* 113. 2 *H.* 4. *c.* 7.

Rex *verſus* Inhabitants of *Haſwell.*

S. C. 2 *Salk.* 472.

Vide Poſt, 396, 416.

THE Statute made Anno 14 Car. 2. cap. 12. enacts, That upon the Complaint of the Church-wardens and Overſeers of the Poor to any Juſtice of the Peace, within forty Days after any Perſon cometh to ſettle himſelf in a Tenement under the yearly Value of 10 *l.* that two Juſtices of Peace (*Quorum unus*) of that Diviſion where ſuch Perſon is likely to be chargeable to the Pariſh, by Warrant, may remove him to the Pariſh where he was laſt legally ſettled. Provided, If he think himſelf aggrieved by the Judgment of the two Juſtices, then he may appeal to the

next Quarter Seſſions, who are required to do Juſtice according to the Merits of the Caſe.

Two Juſtices, by Warrants under their Hands and Seals, removed a poor Man from the Pariſh of Woking to Haſwell; thereupon an Appeal is brought, and the Seſſions Order was, That the Warrant of the two Juſtices ſhould be ſuperſeded, and that the Party ſhould be carried back to *Woking*. *Ante* 163. *Poſt*, 396, 416.

Which Order being removed by Certiorari, Exceptions were taken to it, ſ. That the Juſtices in their Seſſions had no Power to ſuperſede the Warrant made by the two Juſtices, becauſe they had only Power to quaſh or affirm it; and the Word Superſedeas is properly applicable to Proceſs before Judgment, and not to the Judgment it ſelf: As if a Man be in Cuſtody upon a Writ, and then comes a Superſedeas to the Writ, the Priſoner is thereby diſcharged. *Vide* 2 *Salk.* 472, 475, 477, 481.

The Court were of Opinion, that Superſedeas was not a proper Word in this Caſe, but would not quaſh the Order, but referred the Matter to the Judge of Aſſize.

Stokes *verſus* Oliver.

WRit of Error was brought to reverſe a Common Recovery, and a Sci. Fa. againſt the Tertenants, who are ſummoned and appear, and the Sheriff hath returned, that there is no other Tenants. The Error aſſigned was, that the Vouchee was a Feme Covert, and under Age, and appeared by Attorney. If ſhe had vouched in Perſon, or by Guardian, ſuch a Recovery ſhould not be reverſed for Error after full Age; becauſe a Guardian is made by the Court, who will not admit of any one, but ſuch who ſhall be anſwerable for the Loſs that the Infant may ſuſtain; but an Attorney is made by the Party, and an Infant may not have Diſcretion enough to chooſe an Attorney who will be faithful to him. *Vide* 1 *Sid.* 321, 322. 2 *Saund.* 94, 95. *Hob.* 197. *Cro. Car.* 307. 1 *Roll. Abr.* 731, 751, 752. *Bridgm.* 73. *Holland* verſus *Jackſon.*

Therefore ſhe appearing by Attorney, and ſuffering a Recovery, it ſhall be reverſed for the ſame after the Party comes of Age, becauſe it ſhall be tried by the Country, Whether the Warrant of Attorney was made when under Age, or not? 1 *Sid.* 322. *Raby* verſus *Robinſon.*

Neither can the Husband, tho' of full Age, make an Attorney for himſelf and Wife, under Age, to bind the Inheritance of the Wife; but ſhe being the Principal muſt be barred by her own Act; and therefore ſhe muſt appear in Court in ſuch Manner as the Law hath directed by Reaſon of her Infancy.

It may be a Queſtion, Whether ſhe can be barred by any Act of her own, beſides a Fine; for ſhe is not examined upon a Common Recovery?

3 *Lev.* 36. But this is not like the Caſe of a Fine levied by an Infant, for that cannot be reverſed but by the Infant himſelf during his Nonage; for it being the Act of the Court to ſuffer ſuch a one to levy a Fine, the Court muſt therefore reform the ſame by Inſpection, which cannot be after full Age.

For this Reaſon, the Recovery was reverſed Niſi Cauſa the End of the Term.

Haines Barley's *Caſe*.

Vide 6 Mod. 225, 248. *& Poſt*, 385, 386. EJectment for Lands in Eſſex tried at Bar, the Plaintiff claimed as Heir at Law to one James Wade, who had Iſſue William Wade, and one Daugeter, who was now the Lady Baſh, and Leſſor of the Plaintiff.

William Wade had likewiſe Iſſue, one Son and two Daughters, who were all dead without Iſſue.

The Defendant made a Title under a Conveyance by Leaſe and Releaſe, dated the 21 Maii, 21 Car. 2. and made between William Wade of the one Part, and Haines Barley and John Turner of the other Part, by which the Lands in Queſtion were ſettled upon them and their Heirs to the Uſe of William Wade for Life; ſo to his firſt, ſecond, and third Son in Tail-male, like Remainder to John William Haines and Charles Barley, Remainder to Haines Barley the Father, Remainder to the Right Heirs of William Wade for ever.

Vide 6 Mod. 149, 225, 248. *Fareſl.* 129. 1 *Mod.* 4, 94, 114. The Plaintiff then produced a Deed made in the Year 1633, between the ſaid James Wade of the one Part, and Charles Mordant and his Wife, and John Mordant, of the other Part; which Deed was atteſted by three Witneſſes, two of which were proved to be dead, and the other could not be found: By which Deed it appeared, that a Fine levied, and the Uſes thereof, were declared to James Wade for Life, Remainder to his firſt Son, and the Heirs Males of his Body; ſo to his ſecond, third, and all other the Sons of the ſaid James Wade in Tail-male, Remainder to the Iſſue Females, then to the Wife of William Mordant for Life, Remainder to Charles Mordant and his Heirs for ever: So that William Wade was Tenant in Tail, and could not bar the Remainder without a Recovery, which was then produced, and a Deed to lead the Uſes thereof, and

Livery and Seiſin endorſed, to make a Tenant to the Præcipe.

But it happened that one Frances Duglas had at that Time an Eſtate for Life in theſe Lands as her Jointure, but the Jointure-Deed could not be produced: But they proved, that in 1661, ſhe levied a Fine ſur conceſſit, and did demiſe the ſame to one Woolly for ninety-nine Years, if ſhe lived ſo long, for ſecuring the Payment of 400l. which Mortgage was afterwards aſſigned to one Monteatz, and both of them joined in a Leaſe to William Wade for ſixty Years, if the ſaid Frances lived ſo long, under the yearly Rent of 200l.

This was admitted to be a ſufficient Proof of the Jointure. And to the like Purpoſe they produced Depoſitions in Chancery, which they offered to be read, the Bill and Anſwer being taken off the File, and loſt; but they offered to give an Account that it was once filed, which was by the Six-Clerks Book; and produced an Inrolment of the Decree, which mentioned both Bill and Anſwer. And the Court being of Opinion, that the Jointure-Deed being loſt, they might ſupply the Proof by Memorials thereof, ſince it was impoſſible to ſhew the Deed it ſelf.

Vide 1 *Salk.* 278, 281, 286. 2 *Salk.* 555. 6 *Mod.* 225, 248. *& Poſt*, 386.

So the Plaintiff had a Verdict for ſo much as was in Jointure.

Martin *verſus* Monke.

IT was moved to amend a Fault in the Jurata after Verdict found for the Plaintiff at the Aſſizes in Suſſex; it was between the Plaintiff and Defendant, de placito, &c. ponitur in reſpectu coram Dom. Reg. & Dom. Regina apud Weſtm', &c. niſi Juſticiar', &c. ad Aſſiſas capien. aſſign. prius die, &c. viceſimo die Martii. It ſhould have been coram Domino Rege only, and the Day of Niſi prius was miſtaken; for the Aſſizes were the 23d of March. The Record was right, by which he prayed it to be amended; and for Authorities, the Caſe of Merchant and Reaſon was cited, where the Record was de Placito debiti, upon the Statute 2 Ed. 6. for not ſetting out Tithes, and the Jurata in the Record of Niſi prius was de Placito tranſgreſſionis. This was amended after a Verdict for the Plaintiff, becauſe it was only a Miſpriſion of the Clerk.

Vide 1 *Salk.* 50, 51, 88. *Poſt*, 399. 6 *Mod.* 268, to 287. 6 *Mod.* 164, 264. *Cro. Car.* 274. *Roll. Abr.* 202. *Placito* 7.

So where it was upon a * Niſi prius, that Challenge was made to the Sheriff after Iſſue joined, and Venire Facias awarded to the Coroner; but the Record was, that the Venire Facias was awarded unto the Sheriff, which was not entered at the Time of

* 2 *Cro.* 354. *Palm.* 378. 2 *Cro.* 669. Idem *Cro. Car.* 204. *Aquila Week's* Caſe.

of the Trial, but is uſually made up afterwards in Time of Vacation; yet this being only a Miſpriſon of the Clerk, ſhall be amended by the Record.

But on the other Side it was inſiſted, That this was not amendable, for the Juſtices of Niſi prius had no Authority to take ſuch a Record.

8 *Rep.* 161. b. *Blackmore's* Caſe. The Miſpriſion of a Clerk in a Writ of Niſi prius is amendable by the Statute of 8 H. 6. but then it muſt have ſufficient Matter expreſſed or implied to give Authority to the Judge to try the Iſſue, for without that Writ he cannot try the Cauſe; and therefore in Debt againſt the Defendant Husbandman, the 11 *H.* 6. 11. Queſtion was, Whether he was ſo, die Impetrationis brevis? And the Writ of Niſi prius, by which the Cauſe was tried, takes Notice that the Defendant was a Husbandman; but the material Part of the Iſſue was left out, ſ. Whether he was ſo, Die Impetrationis brevis, or not? There was a Verdict for the Plaintiff; and tho' the Record was right, the Court would not ſuffer the Writ of Niſi prius to be amended, becauſe by that Writ the Judges had no Power to try the Iſſue in the Record.

1 *Salk.* 50, 88. *Poſt*, 399. In all the Caſes where the Record of Niſi prius hath been amended by the Roll, the Writ of Diſtringas hath been right; which together with the Niſi prius is a ſufficient Authority for the Judge to try the Cauſe; but here the Diſtringas was wrong, for it was Gulielmus & Maria, Dei Gratia, &c. which could not be; for the Queen died in December, and the Cauſe was tried the 23d of March following; for which Reaſon the Court held this not amendable.

Thwaites & Ux. *&c.*

Vide 1 *Saund.* 282, 283. 2 *Keb.* 576. An Action of Debt was brought for Rent upon a Leaſe of a Houſe to be made by three Judges, purſuant to the Act, for erecting a Court of Judicature for Determination of Differences concerning Houſes built in London, whoſe Judgment and Decrees by the ſaid Act are made a Record and entered in a Book, and kept by the Lord Mayor, with the Records of the City; in which Leaſe the Rent of 2 l. 13 s. was reſerved per Annum, and the Plaintiff declared for 100 l. due for ſo many Years; and it appeared upon the Record in caſting up the Sums that he had declared for 8 l. too much.

The Defendant pleaded Nul tiel Record, and there was a Judgment for the Plaintiff, that he had produced the Record.

It was moved in Arreſt of Judgment, That this being in Debt for Rent, and an intire Demand of a Sum certain, the Plaintiff could never have Judgment, becauſe it appeared upon his own ſhewing, that he had not any Cauſe of Action for the Whole.

If it had been an Action of Covenant to pay a yearly Rent, and the Breach had been aſſigned for Non-payment of a certain Sum at ſuch Days, and the Whole had not amounted to ſo much as demanded, that might be well enough; becauſe in Covenant Damages are to be recovered according to the Evidence, and not as the Party hath ſummed it up. But my Lord Coke was of Opinion, That upon Debt for Rent it was otherwiſe, becauſe in that Action you recover the Sum demanded. *Roll. Rep.* 1 *Part* 335. *Ferrar* verſus *Snelling*, Ibidem 3 *Bulſt.* 145.

In all Actions of Debt, the Plaintiff is privy to the Sum in Demand, and therefore ought, at his Peril, to declare for the true Debt; and the Reaſon why he ought to demand the very Sum, is, becauſe if he ſhould do otherwiſe and recover, he might afterwards bring an Action for the true Sum, and ſo the Defendant would be doubly charged; and therefore in Debt upon a Bond, if the Plaintiff declare for leſs than due, he ſhall never have Judgment. *Roll. Rep.* 2 *Part*, *Pemberton* verſus *Shelton.*

To which it was anſwered, That tho' the Action was for an intire Sum, yet it was made up of ſeveral Rents to be paid at divers Days, and ſo muſt be taken as ſeveral Demands for the Rent; as where Debt was brought upon three Bonds, and upon Oyer the Defendant pleaded Condition perform'd, and there was a Verdict for the Plaintiff. Now tho' the Plaintiff could not have Judgment as found by the Verdict, yet releaſing Damages and Coſts, he had Judgment for the two firſt Bonds. *Hob.* 178. *Andrew* verſus *Delaney.*

So where the Defendant avowed for 5 l. Rent, and a Nomine pœnæ for Non-payment at the Day, but laid no actual Demand of the Rent, the Avowry was held naught as to the Nomine pœnæ, becauſe it could not be forfeited without a Demand of the Rent; yet he had Judgment for the Return of the Cattle, becauſe he had a lawful Cauſe to diſtrein for Rent Arrear, and the Demands were ſeveral. *Hob.* 133. *Howell* verſus *Sambach.*

The like Judgment was given where a Plaintiff brought an Action of Debt for 40 l. upon the Statute of Uſury, and declared, That the Defendant corruptive did lend 40 l. contra formam Statuti; and ſuch a Day did alſo lend 20 l. contra formam, &c. but *2 Cro.* 104. *Woody's* Caſe.

did not ſay corruptive. Upon Non debet pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Declaration was not good for the laſt 20 l. becauſe it wanted the Word corruptive: But the Court gave Judgment for what the Plaintiff had well declared; and nil capiat per Billam was entered as to the Reſidue. So it would have been if it had been upon Demurrer.

1 *Saund.* 282. 2 *Keb.* 576. But there is a later Book which ſeems to warrant this Caſe, in which the Caſe of Dupper and Baskervill is reported, which was an Action of Debt for Arrear of Rent, in which the Plaintiff declared for more Rent, and for a longer Time than upon his own ſhewing appeared to be due to him; which the Defendant perceiving, pleaded Nil detinet, but concluded his Plea with hoc paratus eſt verificare, and not to the Country as he ought to do, on Purpoſe that the Plaintiff might demur: Which was done accordingly, and had Judgment againſt the Defendant for the ill Concluſion of his Plea.

But the Plaintiff afterwards finding his Miſtake, he entered a Remittitur for ſo much in the Declaration more than was due to him, and took his Judgment for the reſt; and thereupon the Defendant brought a Writ of Error in the Exchequer-Chamber, and this very Exception was taken to the Declaration, and all the Caſes before-mentioned were cited, to prove that the Plaintiff might releaſe the Surpluſage before Judgment, which if he had neglected, the Court ought to give Judgment for ſo much as was well demanded in the Declaration. And this ſeems agreeable to the fourth Rule in Godfry's Caſe, That if a Man brings an Action for ſeveral Things, and upon his own ſhewing it appears that he cannot have an Action for one Thing, the Writ ſhall not abate for the Whole, but he ſhall recover for what the Action will lie, and be barred for the reſt.

1 *Saund.* 285. *Pal.* 524. *Yelv.* 71. 11 *Rep.* 45.

And laſtly, for a Caſe in Point, that of Barber and Pomeroy was cited, which was Debt for Rent as this is; and the Plaintiff had declared for more than was due upon his ſhewing, and upon Nil debet pleaded the Plaintiff had Judgment, and Damages and Coſts; and it was moved in Arreſt of Judgment, for the Plaintiff had made an intire Demand for Rent to a certain Sum; when it appeared that he could not have an Action for ſo much, yet the Court held that he might releaſe the Surplus, and Damages, and take Judgment for the Reſidue.

Roll. Abr. 1 *Part*, 785. *Style* 175.

It is true, my Lord Hale ſaid, That Judgment was never given in this Caſe; but my Lord Rolle cites the Number-Roll, and the Term when it was entered.

If this had been pleaded in Abatement, the Action had been diſcharged; but the Court ex Officio are not bound to abate it, eſpecially ſince the Defendant had waved that Matter, and pleaded Nul tiel Record, and inſiſted upon the Right.

And the Court was of Opinion, That if an Action of Debt be brought upon ſeveral Bonds, and it appears that one is not due, the Plaintiff may recover the reſt. So here the Plaintiff demandeth 100 l. upon ſeveral Arrears of Rent, and it appeareth that the Whole is not due, but falleth ſhort 10 l. he may recover for the Reſidue. 1 *Saund.* 284, 285. 1 *Sid.* 417.

DE

DE
Term. Sanctæ Trin.
Anno 8 Will. III. 1696.

Dorſet ſſ. DOminus Rex mandavit. Vic. Com. præd. Breve ſuum clauſum in hæc verba, ſſ. Will'mus Tertius Dei Gra. Angl. Scot. Franc. & Hibern. Rex, Fidei Defenſor, &c. Vic. Dorſ. ſalutem. Præcipimus tibi ſicut alias tibi præcepimus quod capias Bonham Strangewaies Ar. & Johannem Doe ſi invent. fuerint in Balliva tua & eos ſalvo Cuſtod. ita quod Habeas Corpora eorum coram nobis apud Weſtm. die Mercurii prox. poſt Tres Sep. Sanctæ Trinit. ad reſponden. Roberto Foreſt & Suſannæ ux. ejus de Placito tranſgr. ac etiam Bil. ipſius Roberti & Suſannæ verſus ipſum Bonham pro Cent. libr. ſecundum conſ. Cur. noſtr. coram nob. exiſten. & habeas ibi tunc hoc Breve teſte Johan. Holt Mil. apud Weſtm. 6° die Maii Anno Regni Regis vii.

Holt & Colman.

Executio iſtius Brevis patet in quadam Schedula huic Brevi Annex'. Will'us Bennet Ar. Vic.

Virtute iſtius Brevis mihi direct. & huic Schedulæ annex. quoddam Warrant. meum ſub manu mea & Sigillo officii mei Vic. Com. mei infraſcript. feci & direxi Thomæ Mereſt al. Merrice, Johanni Hinton & Edwardo GrimſtedBallivis meis in hac parte ad arreſtan. & capien. Bonham Strangewaies Ar. in dict. Brevi nominat. ſecund. exigen. ejuſd. Brevis qui quidem Tho. Mereſt al. Merrice, & Johannes Hinton Ballivi mei virtute Warrant. mei præd. Decimo die Maii Anno regni Dom. noſtri Will'i Tertii infraſcript. ſeptimo apud Portland in Com. meo Dorſet ceper. & arreſtaver. præd. Bonham Strangewaies & ipſum in cuſtod. ſua adtunc & ibidem habuer. & detin. & ſic in cuſtod. ſua adtunc & ibid. exiſten. poſtea ſcil't eiſdem die & Anno quidam Thomas Gilbert de Portland præd. Yeoman, Will'us Elliot de ead. Yeoman, Johannes Oyles de eadem Yeoman, Robertus Oyles de ead. Yeoman, Chr'us Witt de eadem Yeoman, Edwardus Glover de eadem Yeoman, Johannes Farr de eadem Yeoman, Johan. White de eadem Yeoman, & Johannes Peters de eadem Yeoman, adtunc

& ibidem Vi & Armis, &c. viz. baculis, gladiis, ſclopis [Anglice Piſtols] & cultellis, adtunc & ibidem riotoſe, routoſe, & illicite in ipſos Tho. Mereſt al's Merrice Ballivos meos inſult. fecer. & ipſos verberaver. vulneraver. & maletractaver', ita quod de vitis eorum deſperabatur & præfat. Bonham Strangewaies a dictis Ballivis extra Cuſtod. ſuos contra voluntates eorundem Ballivorum adtunc & ibidem Vi & Armis, &c. ceper. & reſcuſſer. & ipſum Bonham Strangewaies ad largium ire poſuer. & permiſer. ac idem Bonham Strangewaies ſeipſum extra Cuſtod. Ballivorum contra volunt. eorum Ballivorum adtunc & ibidem ſimiliter reſcuſſerunt & reſcuſſit contra pacem dicti Domini Regis nunc Coron. & Dignitat. ſuas, &c. Et poſtea idem Bonham Strangewaies ante retorn. brevis præd. non eſt invent. in Balliva mea.

W. Bennet Ar. Vic.

Bonham Strangewaies *Caſe on a Reſcue.*

Reſcous. *Vide 6 Mod.* 141, 173, 210, 211, *&c. ibid.* 3 *Mod.* 114, 115.

THE Sheriff of Dorſetſhire returned, That by Vertue of a Writ to him directed, he made a Warrant to three Bailiffs to arreſt Bonham Strangewaies, Eſq; which ſaid Bailiffs did take him, and had him in their Cuſtody; and one Gilbert and others, Vi & Armis in Thomam Merrice Ballivos meos inſultum fecerunt, &c. & idem the Defendant, adtunc & ibidem a Cuſtodia Ballivorum meorum & contra voluntates ſuas, did reſcue.

Exception was taken to this Return, for that the Reſcous was alledged to be ex Cuſtodia Ballivorum; whereas it ſhould have been ex Cuſtodia Vicecomitis, becauſe the Sheriff and not the Bailiff is the Officer of this Court, and the Proceſs is directed to him.

39 H. 6. 42. a. *Brooke Abr. Tit.* Reſcous, *Placito* 15.

Anno 39 Hen. 6. A Writ was directed to the Coroners of Surrey to arreſt a Man, and one of them made a Return in his own Name alone, that he had made a Warrant to his Servant to arreſt the Defendant named in the Writ, who took him, and afterwards he was reſcued from his ſaid Servant, when it ſhould have been from himſelf; for the Arreſt by the Servant, is the Arreſt made by the Maſter, and by Conſequence the Reſcous muſt be from him.

* *Cro. Car.* 212. *Roll. Rep. Part* 2. 73. *Het.* 145. *Lit. Rep.* 236. *Idem. March* 92. *Style* 417. *Sid.* 332.

And ever ſince that Caſe, this hath always been allowed to be a good Exception to a Return of Reſcous, where the Party is indicted for * it, and reſcued out of the Cuſtody of the Sheriff's Bailiff: But it may be otherwiſe, if he had been reſcued from a Bailiff of a particular Liberty, becauſe he is an Officer known in Law.

Anno 19 Car. 2. The like Exception was taken to a Retorn of a Reſcous. Juſtice Twiſden affirmed in this Court, that it had been ruled both Ways: But the Chief Juſtice Kelynge was of another Opinion, and that it had been uſually quaſhed for this Reaſon.

It is true, if an Action on the Caſe be brought againſt the Party for a Reſcous, there the Plaintiff may declare ſecundum Veritatem Facti, That the Defendant reſcued the Priſoner out of the Cuſtody of the Sheriff's Bailiff or Deputy: But if he be indicted for it, then it muſt be ſecundum Veritatem in Lege; ſi. That the Priſoner was reſcued out of the Cuſtody of the Sheriff himſelf.

But becauſe it was returned, That the Party was in Cuſtody of three of the Bailiffs, and the Defendants inſultum fecerunt upon one, which the Sheriff called Ballivos meos; for that Reaſon it was quaſhed.

Rex & Regina *verſus* Thorp, *& al'. Hill. 6 Will. & Mariæ, Regis & Reginæ.*

South'ton ſſ. MEmorandum quod Edw. Ward Mil. Attorn. Domini Regis & Dom. Reginæ nunc general. qui pro eiſdem Domino Rege & Domina Regina in hac parte ſequitur in propria Perſona ven. hic in Cur. dictor. Domini Regis & Dom. Reginæ coram ipſis Rege & Regina apud Weſtm. Die Martis prox. poſt Octab. Sancti Hill. iſto eodem Term. & pro eiſdem Domino Rege & Domina Regina dat Cur. hic intelligi & informari quod Henricus Thorp nuper de Reading in Com. Berks. Gen', Urſula Holton nuper de London Vid', Thomas Deer nuper de Winton in Com. South'ton Yeoman, Anna Deer Ux. præd. Thomæ, Elizabetha Streper Ux. Willielmi Streper nuper de Reading in Com. Berks Gen', al's dict. Elizabetha Streper nuper de Reading præd. in Com. præd. Vid', al's dict. Elizabetha Streper nuper de eiſdem Spinſter, & Franc'cus Harguile nuper de Reading in Com. Berks Yeoman, exiſtentes & quilibet eorum exiſtens Perſon. malor. nominis famæ & converſation inhoneſt. ac debit. & juſtiſſimas Leges hujus Regni Angl. parvi penden. decimo Die Octobris Anno Regni Domini Willielmi & Dominæ Mariæ Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis & Reginæ Fidei Defenſor', &c. quinto, & diverſis al. diebus & vicibus tam antea quam poſtea apud Winton. in Com. South'ton nequit. deceptive & illicite conſpiraver. machinaver. & intendebant quendam Edwardum Mitchell Gen. infra ætatem octo-

decim Annorum exiſten. Filium unicum & Hæred. cujuſdam * Roberti Mitchell de Petersfield in Com. South'ton Ar. extra Cuſtod. Conſil. & Gubernation. præd. Roberti Mitchell ſine notitia & contra voluntatem præd. Roberti Mitchell capere & ſeducere & cuidam Corneliæ Holton Perſon. malor. nominis famæ & converſation. inhoneſtæ necnon nullius Fortunæ ſive ſubſtantiæ eidem Edwardo Mitchell in Matrimonio conjungere & ad eaſdem conſpiration. machination. & diabolicas intention. ſuas præd. perficiend. & perimplend. præd. Henricus Thorp, Urſula Holton, Thomas Deer, Anna Deer, Elizabetha Streper, & Fran'cus Harguile poſtea ſcil't præd. decimo Die Octobr. Anno Regni dictor. Domini Regis & Dominæ Reginæ nunc quinto ſupradicto apud Winton. præd. in Com. South'ton præd. nequit. injuſte & illicite ſeſe aſſemblaver. & congregaver. quodque iidem Henricus Thorp, &c. poſtea ſcil't eiſdem Die & Anno ſupradicto apud Winton. præd. in Com. South'ton præd. ſecund. conſpiration. præd. ſic ut præfertur inter eos habit. falſe, malitioſe, injuſte & deceptive per diverſ. falſas, malitioſas, & deceptivas inſinuation. & vias decipiebant [Anglice did inveigle] & perſuadebant & quilibet eorum præd. Henricus Thorp, &c. adtunc & ibidem decipiebat & perſuadebat præd. Edwardum Mitchell ad præd. Robertum Mitchell patrem ſuum benevolum & amiciſſim. in odio & contempt. habere necnon Scholam apud Winton. in Com. South'ton præd. ubi per patrem ſuum præd. pro education. & inſtruction. ipſius Edwardi Mitchell in bonis literatur. boniſque moribus præd. antea locatus fuit relinquere & abdicare ac etiam domum ipſius Henrici Thorp apud Winton. in Com. South'ton præd. exiſten. frequentare iidemque Henricus Thorp, &c. per diverſas iniquas & falſas ſollicitation. adtunc & ibidem perſuadebant & illicite compellebant & quilibet eorum præd. Henricus Thorp, &c. perſuadebat & compellebat præd. Edw. Mitchell ad diverſas aquas ac liquores valde fortes bibere inebriari ac præd. Edw. Mitchell adtunc & ibidem fore ebrium fecer. & procuraver. & quilibet eorum fecit & procuravit necnon præd. Corneliam Holton adtunc & ibidem & præd. al. diebus & vicibus poſtea in conſortio præd. Edwardi Mitchell deceptive & aſtute introduxer. & procuraver. & per diverſas blandulas falſas & deceptivas locutiones & verba illicite & deceptive adtunc & ibidem perſuadebant & ſolicitabant præd. Edwardum Mitchell eidem Corneliæ Holton in Matrimonio conjungi. Et ulterius idem Attorn. dictor. Domini Regis & Dom. Reginæ nunc general. pro eiſdem Dom. Rege & Dom. Regina dat Cur.

* *Doth not ſay that Mr.* Mitchell *was a Man of an Eſtate.*

Cur. hic intelligi & informar. quod iidem Henricus Thorp, &c. in ulteriori proſecution. machination. & intention. ſuarum præd. poſtea ſcil't decimo ſexto Die Octobr. Anno Regni dictor. Dom. Regis & Dom. Reginæ nunc quinto ſupradicto apud Winton. præd. in Com. South'ton præd. illicite falſo & nequiſſime & per diverſas falſas aſſeveration. & promiſſion. ſolicitaver. incitaver. & procuraver.& quilibet eorum ſolicitavit incitavit & procuravit eundem Edwardum Mitchell ad Scholam præd. & frequentation. inde relinquend. & abſtinend. & abinde decedend. contra voluntat. & ſine notitia vel conſenſu præd. Roberti Mitchell patris ſui necnon eundem Edwardum Mitchell ſine notitia & contra voluntatem præd. Roberti Mitchell adtunc & ibidem receper. manutener. & cuſtodiver. ea intention. ad decipiend. & perſuadend. eundem Edw. Mitchell in Matrimonio cum præd. Cornelia Holton conjungi & quod præd. Cornelia Holton poſtea ſcil't viceſimo Die Octobr. Anno Regni dictor. Domini Regis & Dom. Reginæ nunc quint. ſupradict. apud Watlington in Com. Oxon. ex abettamento & præd. falſis mediis præd. Henric. Thorp, &c. contraxit Matrimonium cum præd. Edwardo Michell ad grave dampnum præd. Roberti Mitchell miſerrimam diſconſolation' & triſtitiam præd. Roberti Mitchell præd. patris præd. Edw. Mitchell ac omnium amicorum ſuorum in contempt. leg. hujus Regni Angliæ manifeſt. in malum exemplum omnium aliorum in tali Caſu delinquen. ac contra pacem dictor. Domini Regis & Dom. Reginæ nunc Coron. & Dignitat. ſuas, &c. unde idem Attorn. dictor. Domini Regis & Dom. Reginæ nunc general. pro eiſdem Domino Rege & Domina Regina pet. adviſamentum Cur. hic in præmiſſis & debit. legis proceſſum verſus præfat Henricum Thorp, &c. in hac parte fieri ad reſpondend. dictis Domino Rege & Dom. Reginæ de & in præmiſſis, &c.

Jur. dicunt quod defend. Urſula Holton, Thomas Deer, Anna Deer Ux. præd. Thomæ, Elizabetha Streper Ux. Willielmi Streper, & Franciſcus Harguile, non ſunt culpabiles quodque defend. Thorp. quoad omnia in information. content.præter compulſion. Edwardi Mitchell in information.præd. mentionat. ad aquas fortes & liquor.in informat. præd. bibend. eſt culpabil. & quoad compulſion. præd. Edwardi Mitchell ad aquas & liquores præd. bibend. Jur. præd. dicunt quod defend. Thorp non eſt culpabil'.

Rex & Regina *verſus* Thorp, *& al'*.

Information againſt Thorp and others, ſetting forth, That they, and each of them, being Perſons of ill Fame, did on the 10th of October, 5 Will. and at divers other Times, as well before as after, wickedly, unlawfully, and deceitfully conſpire at Wincheſter to take one Edward Mitchell, being under Age of eighteen Years, and the only Son and Heir of Robert Mitchell, Eſq; and to carry him out of the Cuſtody, Counſel, and Government of his ſaid Father, without his Notice, and againſt his Will, and to marry him to Cornelia Holton, a Perſon of ill Name, and of no Fortune.

Vide 1 *Salk.* 14, 15, 21. 2 *Salk.* 456. 1 *Mod.* 4. 2 *Mod.* 306. 1 *Lev.* 275. 1 *Lutw.* 122. 1 *Vent.* 12, 18, 25. 1 *Sid.* 424. 6 *Mod.* 261, *&c.*

That the Defendants did unlawfully aſſemble themſelves together, to accompliſh the ſaid Conſpiracy and wicked Intentions.

That they, and every one of them, by divers falſe, malitious, and deceitful Inſinuations, did falſly, unjuſtly, maliciouſly, and deceitfully perſwade the ſaid Edward Mitchell to hate his Father, and to leave Wincheſter-School, where he was placed by his Father for his Learning, and to frequent the Houſe of the Defendant Thorp at Winton, and did perſwade the ſaid Edward Mitchell, and by divers falſe Allurements did compell him to be drunk with Strong-Waters, and other Liquors; and that they introduced Cornelia Holton into his Company, and did unlawfully and deceitfully, by falſe Speeches, perſwade and ſolicite him to be married to her.

That in further Proſecution of their Intentions, the Defendants, and every of them, 16 October, 5 Will. did by divers falſe Aſſurances and Promiſes, ſolicite, invite, and procure the ſaid Edward Mitchell to leave the ſaid School againſt the Will, and without the Notice or Conſent of his Father, and did receive, maintain, and keep him, with an Intent to perſwade him to marry the ſaid Cornelia Holton.

That the ſaid Cornelia Holton did contract Matrimony with the ſaid Edward Mitchell on the 20th Day of October, 5 Will. at Watlington in the County of Oxon, by the Abetting and falſe Means of the ſaid Defendants, to the Damage of the ſaid Father, &c.

Upon Not guilty pleaded, this Information was tried at the Aſſizes at Wincheſter, and all the Defendants were found Not guilty, except Thorp; and he was acquitted of compelling the

ſaid Mitchell to be drunk, and found guilty of all the reſt in the Inforȝmation.

It was moved in Arreſt of Judgment; and the Exceptions taken were,

1. This Inforȝmation doth not contain any Matter of Misdemeanoȝ.

2. It is laid by way of Conſpiracy, and the Defendant Thorp being only found guilty, there can be no Judgment againſt him, becauſe one cannot conſpire.

3. Here is a Miſtrial; foȝ the Conſpiracy being laid in Hampſhire, and the Marriage being in Oxfordſhire, it ought not to be tried by a Jury of Hampſhire alone, but by a Jury of both Counties.

1. Here is no Misdemeanoȝ laid in this Inforȝmation; foȝ by the Laws of England, a young Man of the Age of fourteen Years and upwards may diſpoſe of himſelf in Marriage; and it is no Offence to perſwade him to marry, tho' it be a Woman of mean Foȝtune, and without the Conſent of the Father: Foȝ he cannoȝ have an Action foȝ the Loſs of the Marriage of his eldeſt Son and Heir, except where he is taken by Foȝce and married.

Cro. Eliz. 55. 1 *Leon, Placito* 63. *Idem Jones* 411. *Placito* 4. *Style* 216.

Foȝ an Action will not lie foȝ any Solicitation, becauſe People may differ in Opinion; one Man may think it a convenient Match, and another may be of a contrary Opinion: Therefoȝe the Plaintiff ought to ſhew, that the Defendant did ſolicit oȝ procure his Son to be married by ſome unlawful Means. The Inforȝmation is too general, he ſhould have ſhewed a particular Offence; beſides, it doth not appear that either the young Man oȝ his Father had any Eſtate Real oȝ Perſonal: It is ſaid, he was Son and Heir of Robert Mitchell, but non conſtat that he had any Eſtate.

2. The Intent of this Inforȝmation was to make theſe Defendants guilty of Conſpiracy. Every Act which is laid to be done by them, is in oȝder to accompliſh a joint Intention; foȝ it is laid, That all the Defendants did wickedly, &c. conſpire, endeavour, and intend to get the Son out of the Government of his Father, and marry him, &c. which is a joint Act. If it

had not been laid by way of Conſpiracy, it ſhould have been quilibet eorum, did endeavour and intend, &c.

So that all being acquitted but Thorp, the Verdict hath falſified the Information; for one cannot conſpire.

3. This Information conſiſts of two Parts, the perſwading the young Man to marry the Woman, which is laid to be in Hampſhire; and the Execution of their Deſign, which is Marriage it ſelf, and that is laid to be in Oxfordſhire; which being two Facts in different Counties, ought not to be tried by a Jury of one County alone, but both ought to join.

If a Man forge a Deed in one County, and publiſh it in another, the Trial ſhall be by a Jury of both Counties; for the Writing, as well as the Publication of that Writing, is material. *Roll. Abr.* 2 *Part*, 607. 4 *H.* 6. 4. b.

So in Replevin, the Defendant ſaid, That the Locus in quo, &c. contained four Acres in Coningham, which was his Freehold, and ſo juſtifies the taking Damage-Feaſant. *Yelv.* 177. *Broxelme* verſus *Thorold.*

The Plaintiff in Bar to the Avowry pleaded, That the Locus in quo, &c. was Parcel of a greater Common Field in Coningham, and that he prædicto Tempore, &c. was ſeiſed in Fee of a Meſſuage, and fourteen Acres of Meadow and Paſture thereunto belonging, and preſcribes to have Common for his Farmers and Tenants of the ſaid Meſſuage for his Cattle Levant and Couchant tanquam ad tenementum præd. ſpectan'. Upon this an Iſſue was taken, and a Verdict for the Plaintiff; but the Judgment was ſtayed, becauſe it is not ſet forth in the Bar where the Meſſuage and Land was to which the Common did belong, which ought to be, becauſe the Ve. Fa. muſt be where the Houſe and Land were, and not where the Common was, for that may be either appurtenant or appendant to Land in another County.

Econtra.

As to the firſt Objection it was anſwered, That there is a plain Offence ſet forth in this Information; and this appears upon the very reading of it.

Then it is not only an Information grounded upon a Conſpiracy, but it is laid by way of Aggravation in the Beginning; and when the particular Facts are ſet forth, there it is alledged, that quilibet eorum did wickedly perſwade, &c.

In Eaſter Term, 20 Car. 2. an Action was brought in this Court grounded upon a Tort, wherein the Plaintiff declared againſt the Defendant, That per Conſpirationem inter eos habitam, and to oppreſs and impoveriſh the Plaintiff, they cauſed a *1 Saund.* 228. *Skinner* verſus *Gunton, & al'.*

Plaint

Plaint to be levied againſt him in the Sheriff's Court of London, and the Plaintiff to be arreſted, &c. and upon Not guilty pleaded, they were all acquitted but one, as in this Caſe, and the like Exception was then taken in Arreſt of Judgment: But the Court were of Opinion, That notwithſtanding theſe Words per Conſpirationem, &c. it was an Action on the Caſe, the Subſtance whereof was the illegal arreſting the Plaintiff, and not the Conſpiracy, and that being found by the Jury, the Plaintiff had his Judgment.

Nota, *Morton* was of another Opinion, and *Saunders* himſelf was alſo of Opinion, That the Plaintiff ſhould not have Judgment, becauſe by theſe Words, *ſſ. per Conſpirationem*, it ſeemed to be a form'd Action of Conſpiracy, and the Declaration was falſified by the Verdict, one of the Defendants being only found guilty. *Vide* 1 *Saund.* 228, 229.

That which is lawful for one Man to do, may be made unlawful to be done by Conſpiracies; for Inſtance, it is lawful for any Brewer to brew Small Beer, but if ſeveral ſhall conſpire together to brew no Strong but all Small Beer, on Purpoſe to defraud the King of his Duties, ſuch Conſpiracy is unlawful. And ſo it was held in Sir Samuel Sterling's Caſe, who becauſe he could not Farm the Exciſe, did confederate with ſeveral Brewers to brew Small Beer only.

3. It is true, if a Deed be forged in one County and publiſhed in another, theſe are ſeveral and diſtinct Offences, and therefore ſhall be tried by different Juries.

So in the Caſe of a Common in one County, by Reaſon of Lands in another; if an Action of Treſpaſs be brought for feeding in the Common, and the Defendant juſtifies by Reaſon of a Preſcription as belonging to Lands in another County; there, if Iſſues be taken upon the Preſcription, it muſt be tried in the County where the Land lies, and not where the Common is.

But in an Indictment the Counties are never joined.

Curia.

It is a Misfortune that the Marriage is good; it is true, it is lawful to marry, but if it is obtained by unlawful Means, it is an Offence.

The Queſtion is, Whether a Father hath not the Guardianſhip of his Son and Heir apparent till the Age of twenty-one Years, as he had when there was Tenure in Knight's Service? For the Father hath ſuch an original Right inveſted in him by Nature, that he might have an Action of Treſpaſs againſt the Lord, Quare filium & hæredem ſuum rapuit. Adjourn'.

Newnham *verſus* Lunn.

AN Action of Debt was brought by a Common Informer upon the Statute 23 H. 6. againſt the Defendant, for taking 5 s. 6 *d.* for an Arreſt on a Bond. That Statute enacts, That the Sheriff ſhall have 20 *d.* and the Bailiff who makes the Arreſt 4 *d.* and that the Sheriff or Bailiff who doth contrary, ſhall pay treble Damages to the Party grieved, and forfeit the Sum of 40 *l.* one Moiety to the King, and the other to the Party that will ſue; and that the Juſtices of Aſſize in their Seſſions, Juſtices of the one Bench and of the other, and Juſtices of Peace in their County, may determine the ſaid Offences. 23 *H. 6. cap.* 10.

There was a Verdict for the Plaintiff, and it was moved in Arreſt of Judgment, for that by the Statute of King James I. all Offences committed againſt any Penal Statute, for which any Common Informer may have a Popular Action, Bill, Pleint, Suit or Information, ſhall be proſecuted in the Counties where the Offence was committed, and not elſewhere. So it was adjudged in this Court in Eaſter-Term, 27 Car. 2. between Nicholes and Cockerill; for if Debt will lie here by a Common Informer upon a Penal Law, then the Statute of King James I. will be wholly avoided. 21 *Jac. c.* 4. *Vide Poſt,* 425. 1 *Salk.* 373.

The Action was brought in London, and the Offence was committed in Buckinghamſhire. Adjournatur.

Jones *verſus* Bodinham.

S. C. 1 *Salk.* 1, & 173. *Poſt,* 310.

IN Treſpaſs for taking Cattle, the Defendant pleads, That in Hillary Term, Anno 6 Will. & Mariæ, a Writ iſſued out of this Court, reciting that ſuch a one was outlawed; whereupon the Sheriff was commanded to levy the Goods into the King's Hands, &c. That this Writ was delivered to the Sheriff, who made a Warrant directed to an Officer to levy the Goods, &c. who, by Vertue of that Warrant, took the Cattle upon Part of the Lands contained in the Outlawry.

The Plaintiff replies, That he did not take the Goods upon thoſe Lands; upon which Iſſue was joined, and there was a Verdict for the Plaintiff.

And now it was moved in Arreſt of Judgment, That the Juſtification of the Defendant conſiſts in three Parts, a Writ.

and Warrant, and Taking the Cattle upon the Land. Now there could be no ſuch Writ, for there was no ſuch Term as 6 Will. & Mariæ, for the Queen died before. So that the Queſtion was, Whether this ill Pleading of the Writ had made the whole Plea void? If ſo, then it was ſaid, that Iſſue being taken upon a void Plea, which contained no Matter of Bar, the Verdict therein was void alſo.

It was ſaid for the Plaintiff, That Iſſue was not taken upon the bad Part of the Plea, but upon the Taking of the Cattle upon the Land. Now the Defendant had admitted the Taking, but avoided it, by ſaying it was in ſuch a Place, which Prima facie is a good Defence and Juſtification; and though the Iſſue be joined upon a Thing not material, yet after Verdict it is aided by the Statute of Jeofails, which helps Miſpleading, inſufficient Pleading, and Miſjoining of Iſſue after an Iſſue tried.

32 *H.* 8. *cap.* 30.

But on the other Side it was ſaid, That this Plea contain'd no Matter of Bar, becauſe there could be no ſuch Writ under which he juſtified; and if there is no Bar, there can be no Iſſue, and ſo not aided by the Statute.

If the Defendant pleads a proper Plea, though it is not full, it is aided by the Statute; and therefore in all Caſes where Iſſue is taken upon an inſufficient Plea in Bar, and which would have been ill upon Demurrer, it is held, that after a Verdict the Defendant ſhould not take Advantage thereof; but here is no Plea at all, for it is meerly void.

Bartholomew verſus *Dighton, Cro. Eliz.* 778. 1 *Roll. Abr.* 225. *Moore* 696.

Therefore in Treſpaſs, where the Defendant pleaded a Concord in Bar, but not with Satisfaction, Iſſue being taken upon the Concord, the Plea was ill for Want of Satisfaction being pleaded; yet it was not wholly void, becauſe Concord was a good Plea to ſuch an Action, though not ſo fully pleaded as it might.

So in Debt upon a ſingle Bill, Payment without an Acquittance is an ill Plea; yet it is a proper Plea to ſuch an Action, and the Iſſue being found for the Plaintiff, he ſhall have Judgment.

Hob. 326. *Reynolds* verſus *Buckle.* 2 *Roll. Abr.* 709.

So in Debt for Rent upon a Leaſe for Years, Entry is a proper Plea, but not good, without ſaying he did expel and hold him out; yet if Iſſue be taken upon Non intravit, and found for the Defendant, he ſhall have Judgment.

But here is no Matter of Bar in this Plea, and therefore an Iſſue joined upon it is void.

To this Purpoſe there was a Caſe in this Court, Anno 33 Eliz. It was Treſpaſs for taking his Cattle. The Defendant juſtified for an Amerciament in a Court-Leet, for which he preſcribed to diſtrain the Cattle of any which came within the Manor, and were in the Poſſeſſion of any amerced; and ſaith, That they were in the Poſſeſſion of ſuch a Perſon, who was amerced, &c. Iſſue was taken that they were not in his Poſſeſſion, and there was a Verdict for the Plaintiff, and a Writ of Error brought, and the Error aſſigned, that the Iſſue was joined upon a Thing meerly void; for the Preſcription being void, there is no Matter of Bar to the Action; and the Judgment was traverſed. *Lovelace* verſus *Grimſden*. *Cro. Eliz.* 227.

The Plaintiff cannot have Judgment upon this Verdict for the Damages found, becauſe Iſſue is joined upon a void Plea; and therefore the Court may award a Judgment againſt him, as by Nil dicit, and ſo the Plaintiff may have a new Writ of Enquiry of Damages. *Lacy* verſus *Reynolds*. *Cro. Eliz.* 214. *Idem Roll. Abr. Part* 2, 99.

There was a Caſe in Michaelmas-Term, 1 Car. in this Court, which was Debt upon a Bond againſt an Adminiſtrator, dated the 20th of May, 20 Jac. The Action was commenced in Hilary-Term, in the laſt Year of King James, and entred in Eaſter-Term, 1 Car. and then the Defendant pleaded a Judgment upon another Bond, dated Anno quarto Regis nunc, which was impoſſible, it being the firſt Year of the King, ultra quod, &c. The Plaintiff replies, That Recovery was by Fraud; and Iſſue thereupon, which was found for the Plaintiff. The Defendant moved in Arreſt of Judgment, for that it was impoſſible in the firſt of the King that a Recovery ſhould be in the fifth Year, and therefore no Judgment could be given upon this Iſſue; yet the Plaintiff had Judgment. *Knight* verſus *Harvey*. *Cro. Car.* 25.

But this is no Authority againſt this Caſe, becauſe that was Debt againſt an Adminiſtrator who had pleaded a falſe Plea, which was found againſt him, and had not confeſſed Aſſets, but only to ſatisfy that Judgment.

Curia. When Iſſue is joined upon an ill Plea, and a Verdict for the Plaintiff, yet he ſhall have Judgment; for the Defendant ſhall not take Advantage after a Verdict of his ill Pleading.

As in Ejectment the Defendant pleaded, That one Ridler was ſeized in Fee, and made a Leaſe to him for five Years, by Vertue whereof he was poſſeſſed, until the Leſſor of the Plaintiff entred and diſſeized him, and made a Leaſe to the Plaintiff; that thereupon he re-entred and ejected him, prout ei bene licuit. The Plaintiff replies, That his Leſſor was ſeized in Fee, and leaſed to 2 *Cro. Johns* verſus *Ridler*.

to him, and the Defendant ouſted him; abſque hoc that he did diſſeize the Defendant; upon which Iſſue was joined, and found for the Plaintiff. Now this was a very vain Iſſue, for it is impoſſible that a Leſſee for Years ſhould be diſſeized; but the Defendant ſhall not take Advantage of ſuch an ill Plea, but having confeſſed a Leaſe made to the Plaintiff, and it being that he did not diſſeize the Defendant, the Judgment is well given.

For it ſtands with the Law, that the Plaintiff did not diſſeize him; but if there had been a Verdict for the Defendant, he could not have Judgment, for then the Jury would have found, againſt the Law, that a Termor was diſſeized.

Hartop *verſus* Thorp.

GUlielmus Tertius, Dei Gratia, &c. Johanni Holt Militi, Capital. Juſtic. ſuo ad Placita coram nobis tenend', Salutem.

Cum in Statut. Parliament. Dominæ Elizabethæ, nuper Reginæ Angliæ, apud Weſtmonaſterium viceſimo tertio Die Novembris, Anno Regni ſui viceſimo ſeptimo tent', edit. inter alia inactitat. fuit Authoritate ejuſdem Parliamenti, quod ubi Judicium ad aliquod Tempus poſtea reddit. ſit in Curia Banci Regis in aliqua Secta vel Action. debit. Detention. Convention. comput. Action. ſuper Caſum Ejectione Firmæ vel Tranſgreſſ. primo incept. vel incipiend. ibidem præter tal. tantum ubi dicta Regina erit Pars querens vel defendens verſus quem aliquod tale Judicium reddit. erit ad Election. ſuam proſecut. ſit extra Curiam Cancellar ſpecial. Breve de Error', to be deviſed in dicta Cur. Cancellar. direct. Capital. Juſtic. præd. Cur. Banc. Regis, pro Tempore exiſten. præcipiend. ill. cauſare dict. Record', & omnia tangen. dict. Judicium, to be brought coram Juſtic. de Communi Banco & Baronibus Scaccarii in Cameram Scaccarii ibidem examinand. per dict. Juſtic. Com. Banc', & præd. Baron. in dict. Juſtic. Communis Banci & tal. Barones Scaccarii qui ſint de Gradu of the Coife, vel ſex eorundem ad minus, Virtute illius Statuti habebunt inde plenam Poteſtatem & Auctoritatem ad examinand. omnes tales Errores quales aſſignat. vel invent. erint in vel ſuper aliquod tale Judicium, & inſuper reverſare vel affirmare dict. Judicium prout Lex requiret, præter Errores aſſignand. vel inveniend. pro vel concern. Juriſdiction. dict. Cur. Banci Regis, vel pro Defectu Formæ in aliquo Brevi, Retorn', Querela, Billa, Declaration. vel al. Placit. vel Proceſſ. Verdict. vel Proceden. qualicunq; Et quod poſtea dict. Judicium affirmat. vel reverſat. erit dict. Record. & omnia eadem tan-

tangen. removetur and brought back in dict. Cur. Banci Regis, quod tal. further Proceſs erit ſuperinde tam bene pro Execution. quam aliter prout ſpectabit, prout in dicto Statuto inter alia plenius apparet, ac quia in Recordo & Judicio, ac etiam in Reddition. Judicii Loquele, qd. fuit in Curia noſtra coram nobis per Billam inter Thomam Hartop & Ricardum Holt, alias dict. Ricardum Holt de London. Mercator', tam de Debito Trecent. triginta & quinque Lib', quod eidem Thomæ præfat. Ricardus exigebat, quam de Quadraginta & tres Solid. pro Dampnis ſuis quæ ſuſtinuit Occaſione Detention. Debiti illius, necnon in Adjudication' Execution' Judicii pred. ſuper Breve noſtrum de Sci. fa. eadem Cur. noſtra emanem. ad præd. Thomam verſus præfat. Ricardum de Debito & Dampnis ipſius Ricardi, ſicut ex Querela ſua accepimus, qui quidem Error nullo modo tangit nos aut Juriſdiction. præd. Cur. noſtræ de Banco Regis præd', vel aliquem Defectum Formæ in aliquo Brevi, Retorn', Querela, Billa, Declaration', aut alio Placito, Proceſſ. Verdict. aut Proceden. quibuſcunq; ut accepimus nos igitur volentes Error', ſi quis fuerit, juxta Formam Statuti prædicti corrigi, & Partibus præd. plenam & celerem Juſticiam fieri in hac Parte vobis mandamus, quod ſi Judicium reddit. ac Adjudication. Execution. ejuſdem Judicii ſuper Breve noſtrum de Sci. fa. adjudicat. ſunt tam Record. & Proceſſ. præd. cum omnibus ea tangen. coram dictis Juſticiariis de Communi Banco, & Baronibus Scaccarii noſtri præd. in Camera Scaccarii in prædict. Die Sabbati, vidilicet ſecundo Die Maii, prox. futur. Venire fac. coram dict. Juſticiariis & Baronibns noſtris, & examinat. Record. & Proceſſ. præd. ulterius inde Fieri fac. quod de Jure & ſecundum Legem & Conſuetudinem Regni noſtri Angliæ fuerit faciend', Teſte meipſo, apud Weſtm.

Die Anno Regni noſtri ſeptimo.

Hartop *verſus* Holt.

S. C. 1 *Salk.* 263.

The Plaintiff had Judgment in an Action of Debt in this Court, a Writ of Error was brought in the Exchequer-Chamber and the Judgment affirmed. Afterwards a Sci. fa. was brought quare Execution. non, and an Award of Execution thereupon: Then a Writ of Error was brought tam in Redditione Judicii quam in Ajudicatione Executionis, &c. which was allowed by the Clerk of the Errors, pending which Writ, the Plaintiff took out Execution; and now a Motion was made to ſet it aſide, becauſe it was ſued forth when there was a Writ of Error depending, which is a Superſedeas.

The Queſtion was, Whether a Writ of Error would lie in the Exchequer-Chamber, upon an Award of an Execution of a Judgment upon a Sci. Fa. now after an Affirmance of the firſt Judgment?

It was admitted, That the Statute gives a Writ of Error upon Judgments in ſeven Actions only, of which a Sci. Fa. is none; but it being for Execution of a * Judgment in an Action of Debt, 'tis within the Meaning and Equity of the Act, which was to relieve as well againſt an erroneous Execution as an erroneous Judgment; for that may be affirmed, and yet the Execution reverſed.

* *Cro. Car.* 286. *Nevell* verſus *South* 1 *Roll. Abr.* 929.

Cro Car. 464.

This was the Opinion of my Lord Hale; and the Reaſon by him given was, That a Judgment in a Sci. Fa. grounded upon one of thoſe Actions mentioned in the Statute, is in effect a Part of the firſt Suit, and they having Cognizance of the original Action, have alſo Cognizance of all the Dependencies.

Mod. Rep. 79.

But the Plaintiff ſhall not be Judge whether this Writ of Error be well brought or not; 'tis Prima Facie a good Superſedeas to his Action, and he muſt not undertake to determine the Validity thereof after 'tis allowed; therefore he ought not to take out Execution without Leave of the Court, or without pleading it in Abatement, or Demurring.

Yelv. 159. *Prowſe* verſus *Turner*, *Quære tamen* at the End of the Cauſe. Earl of *Straford* verſus *Needham* *Sid.* 143. * *Whitton* verſus *Preſton*, *Sid.* 240.

On the contrary it was ſaid, That a Sci. Fa. was a judicial Writ, and the Award of Execution upon it, is not ſuch a Judgment upon which a Writ of Error will lie in the Exchequer-Chamber; 'tis not a Judgment upon any of the ſeven Cauſes of Action mentioned in the Statute, and therefore ſuch a Writ of Error hath been diſallowed upon a Judgment in Scandalum Magnatum, and likewiſe upon a * Judgment on the Statute of Uſury, for taking more than 6 l. for the Loan of 100 l. but it hath been allowed upon the Statute of Tithes, for that gives an Action of Debt.

Afterwards in Michaelmas Term, the Court gave Judgment, viz. The Deſign of the Act of Parliament was to give a Writ of Error upon the Merits of the Caſe; but here the Right is determined, and the Writ of Error is brought upon the Award of Execution; ſo that the Exchequer-Chamber have no Authority after they have affirmed the firſt Judgment: Therefore the Writ of Error is no Superſedeas.

Johnſon

Johnſon *verſus* Lee. *Hill' Anno* 3.

Berks ſſ. MEmorand. quod al. ſcilicet Termin. Paſc. ult. præterit. coram Domino Rege & Domina nup. Regina Maria apud Weſtm. ven. Will'us Johnſon gen. qui tam pro Domino Rege & dicta Domina nup. Regina quam pro ſeipſo in hac parte ſequitur per Thomam Chadwicke Attorn. ſuum & protulit. in Cur. tunc ibidem quandam Billa ſuam verſus Godfrid. Lee gen. in Cuſtod. Mar', &c. de placito tranſgr. & contempt. contra eos qui ſecut. ſunt Placitum in Cur. Chriſtianitat. poſt prohibicon. Regiam eis prius inde in contrar. direct.& deliberat. & ſunt pleg. de proſequen. ſcilicet Johannes Doe & Ric'us Roe quæ quidem Billa ſequit. in hæc verba. ſſ. Berks, ſſ. Will'us Johnſon gen. qui tam pro Domino Rege & Domina Regina quam pro ſeipſo ſequit. in hac parte querit. de Godfrid. Lee gen. in Cuſtod. Mar. Mareſc. Domini Regis & Dominæ Reginæ coram ipſis Rege & Regina exiſten. de Placito tranſgr. & contempt. contra eos qui ſecut. ſunt Placitum in Cur. Chriſtianitat. poſt prohibicon. Regiam eis prius inde in contrar. direct. & deliberat. pro eo videl't quod cum ſecund. leg. & conſuet. hujus Reg. Angliæ omina & ſingula Pli'ta & cog. Placit. de quibuſcunque debit. contract. tranſgr. ſuper caſu. expens. ſive feod, infra hoc Regn. Angl. contingen. ſive emergen. cætetaque hujuſmodi Placita & negotia & eorum Placitorum cognicon. ad dictos Dom. Regem & Dominam Reginam nunc & coron. ſuam Regiam ſpecialit. ſpectant. & pertinent. ac per communem legem terræ hujus Regni Angliæ & non in Cur. Chriſtianitat. per leges ſive Cenſuras Eccl. ullo modo triari terminari aut diſcuti debeant & ſemper hactenus debuer. & conſuever. cumque etiam per quendam Actum in Parliamento Dom. Henr. nuper Regis Angliæ Octavi Anno Regni ſui viceſimo tertio tent. edit. & proviſ. inter alia inactitat. fuit authoritate ejuſdem Parliamenti quod nulla perſona foret citat. ſummonit. vel alit. vocat. ad comparen. per ſeipſum vel ſeipſos aut per aliquem procurator. coram aliquo Ordinario Archidiacono Comiſſar. Official. aut a- aliquo al. Judice ſpiritual. extra Dioceſ. vel peculiar. Juriſdict. ubi eadem perſona quæ foret ſic citat. ſummonit. vel alit. vocat. foret inhabitans [Anglice Dwelling] tempore adjudicacon. ſive emanacon. ejuſdem citacon. ſive ſumonicon. niſi foret per in vel ſuper certis Cauſis in eodem Actu particularit. except. menconat. quodque nullus Archiepiſc. neque Epiſcop. Ordinar. Official. Comiſſar. vel aliquis al. ſubſtitut. vel Miniſtr. aliquorum præd. Archiepiſc. Epiſc. Archidiacon. vel aliorum ten. aliquam Spiritual. jur.

ad

ad aliquod tempus a feſto Paſc. prox. ſequen. poſt edicon. actus præd. peterent demandarent caperent vel reciperent de aliquibus ſubdit. dict. Domini Regis aliquam ſummam vel ſummas pecuniæ pro ſigil. action. alicujus citation, poſt præd. feſtum adjudicat. vel obtent. quam tant. Tres denar. Sterlings ſuper pœnas & pœnalitat. in eodem actu content. & limitat. prout per eundem actum (relation. inde habit.) plenius liquet & apparet cumque etiam præd. Will'us Johnſon modo ſit & per ſpacium duorum Annorum jam ult. elapſ. fuit reſiden. & inhabitans apud paroch. de Hungerford in eodem Com. Berks infra peculiar. Jur. Decani de Sarum ac infra Dioceſ. Sarum & non eſt nec infra ſpatium duorum Annorum jam ult. elapſ. fuit inhabitan. ſive reſiden. infra Civitat. London. vel ſuburbium ejuſdem Civitatis neque alibi infra Dioceſ. Cantuar. acetiam liber homo hujus Regni Angliæ jam exiſtit & ſic per totum tempus vitæ ſuæ extitit ac ratione inde omnibus & ſingulis libertatibus privileg. & liberis conſuetud. hujus Regni Angliæ quatenus ligeus Domini Regis & Dominæ Reginæ nunc & progenitorum ſuorum nuper Regum & Reginarum hujus Regni Angliæ uſitat. & approbat. gaudere debeat præd. tamen. Godfridus Lee præmiſſ. non ignarus ſed machinan. ipſum Will'um Johnſon contra debit. hujus Regni Angliæ formam opprimere & dict. Dominum Regem & Dominam Reginam nunc exhæreditare ac cognicon. Placiti quæ ad Cur. dict. Domini Regis & Dominæ Reginæ nunc pertinet ad aliud examen in Cur. Chriſtianitat. trahere ipſum Will'um Johnſon primo die Septembris Anno Regni dict. Domini Regis & Dominæ Reginæ nunc quinto apud Hungerford in Com. Berks præd. ac infra peculiar. Jur. Decani de Sarum ac infra Dioceſ. Sarum Citari cauſavit ad comparen. coram venerabili viro Georgio Oxenden leg. Doctore Alm. Cur. Cantuar. de Arcubus London. Official. principal. ejuſve Surrogat. aut al. Judice ſpiritual. in ea parte competen. in Aula [voc. Doctors Commons] ſcituat. infra Civitat. London. ſecundo die Octobr, extunc prox. ſequen. ad quem diem & locum præd. coram præfat. Georgio Oxenden tunc Judice ſpiritual. (eodem Will. Johnſon ſecundum exigen. citation. præd. comparen.) præd. Godfridus Lee adtunc & ibid. coram præfat. Judice ſpiritual. petiit de eodem Will'o Johnſon pro feod. & expenſ. ſeparal. denar. ſummas in toto ſe attin. ad quind. libr. quatuor ſolid. & octo denar. in Schedul. libello poſthac menconat. annex. particularit. expreſſ. ſcilicet pro denar. expendit. quinque libr. & octo denar. & pro feod decem libr. & quatuor ſolid. caute & ſubdole verſus ipſum Will'um Johnſon libellando quod ipſe Godfridus Lee fuit & eſt procurator. Cur. conſiſtor. Epiſcopi London. ac quod in vacacon. poſt Terminum Sanctæ Trin. Anno Dom. 1683. vel Term. Sanctæ Mich. prox. & immediate ſequen.

dictus

dictus Will'us Johnſon tunc minor exiſten. Annos agen. vigint. & dimid. ſed viceſimum primum ætat. ſuæ ante tunc temporis non compleverit & eadem cauſa perſon. habilem ſtandi in judicio ad recuperan. legatum per Will'um Johnſon ejus avum nuper defunct. ſibi relict. & donat. non habend. quandam Margaretam Chriſtian Vid. Curatorem ſibi ad Officium præd. dicto Will'o Johnſon aſſign. onus curacon. in ea acceptavit eademque Margareta Chriſtian & dictus Will'us Johnſon vel aliquis al. amicus dicti Will'i Johnſon conſuever. ſeu eorum alt, conſuevit dictum Godfrid. Lee de proſequen. legitime contra quoſdam Rich'um Price & Thomam Battall Executor. Teſti. dict. Will'i Johnſon defunct. ad exhiben. Inventor. & redden. computum de Bonis & Catallis præd. Will'i Johnſon defunct. fecer. dictum Godfridnm Lee procurator. ad proſequen. Cauſam præd. Item quod dictus Godfridus Lee in vacation. ante Termin. Sancti Mich'is & ipſo Term. Sancti Mich'is Anno Domini 1683. ſuptadicto citacon. contra dict. Richardum Price & Thomam Battall Executor. teſt. dicti Will'i Johnſon defunct. ad exhiben. inventor. & computum bonorum dicti Will'i Johnſon defunct. & ad reſponden. dict. Willelmo Johnſon jun. per dcti. Margaretam Chriſtian ejus curatric. aſſign. in cauſa ſubſtraction legat. præd. ſub Sigillo Cur. conſiſtor. Epiſcopali London. miſit & in dict. Rich'um Price perſonalit. exequi curavit & dict. Executor. pro non comparen. juxta tenor. cujuſdam decreti viis & modis in dicta Cur. conſiſtor. Epiſcopal. London. pro contumacon. ſua excommunicari procuravit **ac quod omnia & ſingula feod. & cetere pecunie Summe in eadem Schedula ſpecificat. ex conſuetud. Cur. conſiſtor. Epiſcopi a tempore immemorat. & in preſenti ſunt debita & debite ſolven. Advocat. Procurator. Regiſtreriis & al. Miniſtr. dicte Cur.** prout in eadem Schedula continetur & quod præfat. Will'us Johnſon ſolucon. feod. & cæterarum pecun. ſummarum in dicta Schedula menconat. & expreſſ. in ſe ſuſcepit & promiſit ſolvere præfat. Godfrido Lee ſed nondum ſolvit aut ſatisfecit prout per Copiam libelli & Scheduli adinde annex. hic in Cur. prolat. lect. & audit. plenius liquet & apparet ac licet ipſe præfat. Will'us Johnſon, **ad aliquod tempus infra ſex Annos ante diem exhibition. querel. ſive libelli prefat. Godfrido Lee pred. non aſſumpſit ſuper ſe ad ſolven. prefat. Godfrido Lee debit. feod.** ſeu expenſ. in Schedula, libello præd. annex. mentionat. vel aliquem inde partem licetque præfat. Judici ſpiritual. manifeſte per libellum præd. apparet quod præfat. Will'us Johnſon fuit infra ætat. Viginti & unius Annorum ubi ſecta præd. verſus præfat. Rich'um Price & Thomam Battall proſecut. fuit per præd. Godfridum Lee licetque etiam idem Will'us Johnſon omnia & ſingula

præmiſſa præd. per ipſum Will'um Johnſon ſuper. ſuggeſt. & allegat. in præd. Cur. Chriſtianitat. coram præfat. Judice ſpiritual. in exoneration. ſuam & dimiſſion. ibid. in præmiſſ. ſæpius placitavit allegavit & il. inevitabili teſtimon. & veritat. probare obtulit idem tamen Judex ſpiritual. Placitum allegation. & probat. il. admittere ſeu recipere penitus recuſavit & præd. Godfridus Lee ipſum Williel-mum Johnſon per definitivam dict. Cur. Chriſtianitat. ſenten. de & ſuper præmiſſis præd. condemnare ac ipſum Will'um Johnſon ad ſolven. eidem Godfrido Lee omnia & ſingula feod. & expen. in Schedula libello præd. annex. mentionat. compellere tot. ſuis viribus conatur & indies machinatur in dict. Domini Regis & Dominæ Reginæ nunc contempt. & in ipſius Will'i Johnſon grave dampnum præjudicium gravamen. & depauperation. manifeſt. ac contra form. ſtatuti præd. ac licet Breve dict. Domini Regis & Dominæ Reginæ nunc de prohibicon. præfat. Godfrido Lee in hac parte Decimo die Martii Anno Regni dicti Domini Regis & Dominæ Reginæ nunc Sexto apud Hungerford præd. in Com. præd. in contrarium inde direct. & deliberat. fuit idem tamen Godfridus Lee Placitum præd. poſt prohibition. regiam prius ei in contrar. inde in forma præd. deliberat. poſtea ſcil't decimo quarto Martii Anno ſexto ſupradicto apud Hungerford præd. in Com. Berks præd. ult. proſecut. & in Placito il. proceſſit dict. Brevi dict. Domini Regis & Dominæ Reginæ nunc de prohibition. in forma ptæd. direct. in contrar. inde quovis modo non obſtante in dict. Domini Regis & Dominæ Reginæ nunc contempt. & ipſius Will'i Johnſon dampnum præjudic. depauperation. & gravamen manifeſtum unde dicit quod deteriorat. eſt & dampnum habet ad valen. quadraginta librarum & inde tam pro Dom. Rege & Domina Regina quam pro ſeipſo in hac parte producit Sectam, &c.

Et modo ad hunc diem ſcilicet diem Mercurii prox. poſt Octab. Sancti Hillar. iſto eodem term. uſque quem diem præd. Godfridus Lee habuit licen. ad billam præd. interloquen. & tunc ad reſponden', &c. ante quem diem præd. nuper Domina Regina Maria diem ſuum clauſit extremum coram Dom. Rege apud Weſtm. ven. tam prædictus Will'us per Attorn. ſuum præd. quam præd. Godfridus per Johannem Lee Attorn. ſuum & idem Godfridus defen. vim & injur. quando, &c. & omnem contempt. & quicquid, &c. & dicit quod ipſe non ſecut. eſt Placitum in præd. Cur. Chriſtianitat. poſt prohibition. regiam ei in contrar. inde direct. & deliberat. modo & forma prout prædictus Will'us Johnſon qui tam, &c. ſuperius verſus eum queritur & de hoc pon. ſe ſuper patriam & præd. Will'us Johnſon qui tam, &c. inde ſimiliter, &c. ſed per Breve dict. Domini Regis de conſultation. in hac parte impetran. idem Godfridus proteſtan.

quod præd. Will'us Johnſon in ead. Cur. Chriſtianitat. ſuperius mentionat. non placitavit ſeu allegavit quod ipſe idem Will'us ad aliquod tempus infra ſex Annos ante diem Exhibition. querel. ſive libelli ipſius Godfridi præd. non aſſumpſit ſuper ſe ad ſolven. eidem Godfrido debit. feod. ſeu expenſ. in Schedul. libello præd. annex. menconat. vel aliquam inde parcel. prout præd. Will'us Johnſon ſuperius allegavit pro Placito idem Godfridus dicit. quod in eodem actu in Nar. præd. Will'i Johnſon mentionat. inactitat. fuit quod nulla Perſona foret citat. ſummonit. vel alit. vocat. ad comparen. per ſeipſum vel ſeipſam aut per aliquem procurator. coram aliquo Ordinar. Archidiacono Commiſſar. aut aliquo al. Judice ſpiritual. extra Dioceſ. vel peculiar. Jur. ubi eadem Perſona que foret citat. ſummonit. vel alit. vocat. foret inhabitan. [Anglice Dwelling] tempore adjudication. ſive emanation. ejuſdem citation. ſive ſummonition. ſub Pœnis & pœnalitat. in eodem actu mentionat. except. foret in caſu quod aliquis Epiſcop. aut aliquis Judex inferior habens ſub ipſum juriſdiction. in ſuo jure & titulo vel per commiſſion. requiſition. vel inſtan. faceret Archiepiſcopo Epiſcopo vel alicui ſuperiori ordinario ad capien. tract. [Anglice Treat] examinan. vel determinan. materiam coram ipſo vel ejus ſubſtitut. & id ſolummodo facien. in caſibus ubi Lex Civilis vel Canonicalis affirmat execution. tal. requiſition. vel inſtan. juriſdiction. legal. ſeu tolerabil. eſſe & except. in quibuſdem al. Caſibus in eodem actu ſpecificat. prout in eodem actu plenius continetur & idem Godfridus ulterius dicit quod ipſe per ſpacium Vinginti & quatuor Annorum & amplius jam ult. elapſ. fuit & adhuc eſt unus procurator Cur. Conſiſtor. Epiſcopi London. quodque ipſe idem Godfridus Viceſimo Septimo die Octobris Anno Domini 1683 apud London. in Paroch. Sancti Benedicti prope ripam Paulan. in Warda de Caſtle-Baynard retent. fuit fore procuratorem ipſorum Margaretæ & Will'i in eadem Cur. conſiſtor. in Cauſa infra mentionat. & tunc & ibidem ad inſtan. & requiſition. præd. Margaretæ & Willielmi Johnſon citation. contra dict. Richardum Price & Thomam Battall Executor. Teſt'i præfat. Willielmi Johnſon defunct Avi dict. Willielmi qui tam, &c. ad exiben. inventorium & computum bonorum præfat. Willielmi Johnſon defunct. & ad reſponden. dicto Will'mo Johnſon modo quer. per dict. Margaretam ejus Curatricem per eandem Cur. aſſign. in Cauſa ſubſtraction. Legat. præd. per præd. Willielmum Johnſon defunct. ei donat. ſub Sigillo Cur. Conſiſtor. Epiſcopal. London debito modo proſecut. fuit & eandem citation. in dictum Richardum Price perſonalit. exequi cauſavit & dict. Executor. pro contumacia ſua in non comparend. juxta tenor. ejuſdem per debitum legis curſum Excommunicari procuravit quodque

quodque omnia & ſingula feod. & denar. ſummæ in Schedula præd. ſpecificat. juſte eidem Godfrido devener. pro feod. & expenſ. ſuis in Lite ſive Secta præd. & quia præd. Willielmus Johnſon modo quer. & præd. Margareta licet ſæpius requiſit. feod. & expenſ. præd. eidem Godfrido ſolide recuſaver. præd. Godfridus eundem Willielmum Johnſon modo quer. pro recuperation. denar. in præd. Schedula ſpecificat. in Cur. peculiar. Juriſdiction. Decan. Sarum ſectare intendebat & conabatur ſed Robertus Woodward legum Doctor Decan. Eccleſiæ Cathedral. Sarum Judex Cur. peculiar. Juriſdiction. præd. habens Jur. ibid. in jure ſuo per quoddam ſcriptum ſuum Sigillo ſuo ſigillat. quem idem Godfridus hic in Cur. profert geren. dat. viceſſimo quinto die Februar. Anno Domini 1692. requiſivit venerabil. præd. Georgium Oxenden Legum Doctor. & almæ Cur. Cantuar. Judicem vocan. eundem Willielmum Johnſon per nomen Willielmi Johnſon de Hungerford in Com. Berks infra peculiar. Jur. dict. Decani coram ipſo eodem Georgio Oxenden vel aliquo al. competen. judice dict. Cur. ad reſponden. dicto Godfrido Lee in Cauſa & ſubſtraction. feod. & quod Cauſa præd. audit. & determinat. in eadem Cur. ſecundum legem & juſtitiam prout per ſcriptum præd. plenius liquet & apparet & idem Godfridus ulterius dicit quod Lex Civilis vel Canonical. affirmat execution. tal. requiſition. vel inſtan. Jur. legal. vel tolerabil. eſſe ſuper quo idem Godfridus præd. Will'um Johnſon citari cauſavit ad comparen. coram præfat. Georgio Oxenden Legum Doctore Almæ Cur. Cantuar. de Arcubus London. Official. principal. ejuſve Surrogat. aut al. Judice competen. in aula [vocat. Doctors Commons] ſcituat. infra Civit. London. ſecundo die Octobris jam ult. elapſ. & in eadem Cur. ante prohibition. præd. eidem Godfrido deliberat. præd. Willielmum modo quer. pro feod. & expenſ. præd. traxit in Placitum prout ei bene licuit feod. & expenſ. il. tunc & adhuc eidem Godfrido debit. & inſolut. exiſten. quæ eſt eadem proſecutio & in Placitum tractio unde idem Willielmus Johnſon ſuperius queritur & hoc paratus eſt verificare inde pet. Judicium & Breve Domini Regis de conſultation. ſibi concedi, &c.

Et præd. Willielmus Johnſon qui tam, &c. dicit quod per aliqua per præd. Godfridum Lee ſuperius Placitando allegat. Breve dicti Domini Regis de conſultation. eidem Godfrido Lee in hac parte concedi minime debet quia proteſtando quod præfat. Godfridus Lee non retent. fuit fore procurator præd. Margaretæ & Willielmi Johnſon ad proſequen. præd. Thomam Price & Thomam Battall prout præd. Godfridus ſuperius inde Placitando allegavit proteſtandoque etiam quod Lex Civilis vel Canonical. non præ-

præfat. Georgio Oxenden fact. ad tenen. Placitum præd. in Placito præfat. Godfredi mentionat. fore legal. vel tolerabil. pro Pl'to tamen idem Will'us Johnſon dicit quod placit. per præd. Godfridum Lee quoad requiſition. præd. Roberti Woodward Decani Eccl. Cathedr. Sarum præd. Georgio Oxenden fact. ad vocan. præfat. Will'um Johnſon coram ipſo præfat. Georgio Oxenden vel al. Judice competen. dict. Cur. Cantuar. ad reſponden. dicto Godfrido in Cauſa præd. pro ſubſtract. feod. & quod Cauſa illa determinat. fuit modo & forma præd. ſuperius Placitat. materiaque in eodem content. minus ſufficien. in lege exiſtunt ad ipſum Godfridum ad Breve dict. Domini Regis de conſultation. in ea parte impetran. ad quod idem Will'us neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc parat. eſt verificare unde pro defect. ſufficien. reſponſ. in hac parte idem Will'us Johnſon pet. Judicium & dampna ſua præd. occaſione præd. ſibi adjudicari, &c. & præd. Godfridus dicit quod Placitum præd. per præd. Godfridum quoad requiſition. præd. Roberti Woodward. præd. Decani præd. Eccl. Cathedral. Sarum præd. Georgio Oxenden fact. ad vocan. præfat. Will'um Johnſon coram ipſo præfat. Georgio Oxenden vel al. Judice competen. dict. Cur. Cantuar. ad reſponden. eidem Godfrido in cauſa præd. pro ſubſtraction. feod. præd. & quod Cauſa illa determinat. in eadem Cur. Cantuar. determinat. fuit modo & forma præd. ſuperius Placitat. materiaque in eodem content. bon. & ſufficien. in lege exiſtunt ad ipſum Godfridum ad Breve Dict. Domini Regis de conſultation. in hac parte impetran. quod quidem Placitum materiamque in eodem content. idem Godfridus parat. eſt verificare & probare prout Cur', &c. & quia præd. Willielmus Johnſon ad Placitum il. non reſpon. nec il. hucuſque aliqualit. dedicit idem Godfridus ut prius pet. Judicium & Breve dict. Domini Regis de conſultation. in hac parte ſibi concedi, &c.

B. S.

Et quia Cur. dict. Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſis redden. nondum adviſatur dies inde dat. eſt partibus præd. coram Domino Rege apud Weſtm. uſque diem prox. poſt de Judicio ſuo de & ſuper præmiſſis il. audien. eo quod Cur. dict. Domini Regis nunc hic inde nondum, &c.

Johnſon *verſus* Lee.

Stat. 23 *H.* 8. *cap.* 9.

Vide 1 *Salk.* 40, 41. 2 *Lev.* 55, 90, 173. 1 *Lev.* 193. 1 *Saund.* 402.

IN a Prohibition, the Plaintiff declared, that by the Statute 23 H. 8. cap. 9. it is enacted, That no Perſon ſhall be cited to appear out of his Dioceſs where he dwelleth: That the Plaintiff was reſident at Hungerford in Berks, in the Dioceſs of Salisbury; that the Defendant cauſed him to be cited before the Dean of the Arches in London, and libelled againſt him for Expence and Fees in the Conſiſtory-Court of the Biſhop of London, and did aver, That ſuch Fees were juſtly due according to the Cuſtom of the ſaid Court, and that he promiſed to pay it: And although he made no ſuch Promiſe within ſix Years, yet the Court proceeded to give Sentence againſt him; and the Defendant proſecuted his Plea after the Writ of Prohibition delivered to him, &c.

The Defendant for Conſultation pleads the very ſame Statute; by which it is enacted, That no Perſon ſhould be cited or ſummoned, or otherwiſe called to appear by himſelf or herſelf, or by any Proctor, before any Ordinary, Archdeacon, Commiſſary, Official, or any other Spiritual Judge, out of the Dioceſs, or peculiar Juriſdiction, where the Perſon which ſhall be cited, ſummoned, or otherwiſe called, ſhall be inhabiting and dwelling at the Time of the awarding the ſame Citation or Summons; except (amongſt many other Cauſes in the ſaid Act mentioned) that any Biſhop, or any other Inferior Judge, having under him Juriſdiction in his own Right and Title, or by Commiſſion, make Requeſt or Inſtance to the Archbiſhop, or other Superior Ordinary or Judge, to take, treat, examine, or determine the Matter before him or his Subſtitute; and that to be done in Caſes only where the Civil Law or Common Law doth affirm Execution of ſuch Requeſt or Inſtance of Juriſdiction to be lawful or tolerable.

That the Defendant is a Proctor in the Conſiſtory-Court of the Biſhop of London, and was retained as ſuch by the Curatrix of the Plaintiff (he being then under Age,) to proſecute a Suit againſt the Executors of his Grandfather for a Legacy given to the Plaintiff, and to exhibit an Inventory; that they were excommunicated for Contumacy in not appearing, and that the Fees and Expences in the Libel were juſtly due to him for proſecuting the ſaid Suit. That he endeavoured to ſue the ſaid Plaintiff for the Recovery of the ſaid Fees in the Court of Peculiars of the Dean of Salisbury; but he being Judge of the

Court, and having Jurisdiction in his own Right, did, by a Writing under his Seal, require the Dean of the Arches to call the Plaintiff before him, to answer the Defendant in a Cause for Subtraction of Fees; which Cause was there determined accordingly: And the Defendant avers, that the Civil and Common Law affirmeth the Execution of such Request to be lawful. Whereupon the Defendant, before the Prohibition delivered to him, did cite the said Johnson to appear before the said Judge of the Arches in the Cause aforesaid, and avers it to be the same Prosecution of which the Plaintiff complained. The Request.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

1. It was argued, That no Consultation ought to go; for if the Defendant will bring himself out of the Statute, he must shew, that the Request made by the Inferior Ordinary was made to him who had the next Superior Jurisdiction; which he hath not done: For here the Request is from the Dean of Salisbury, who was Judge of the Peculiar, to the Dean of the Arches, when it ought to have been to the Bishop of Salisbury, being the next immediate Ordinary, unless it appear that a Peculiar is such a Jurisdiction from which there is no Appeal to the Ordinary; or that it is a Jurisdiction by Prescription. *Vide* 1 *Salk.* 40, 41. 2 *Roll. Rep.* 446, 448. *Gastrel* versus *Jones.*

The Judge of this Peculiar is an inferior Person to the Bishop, and the Peculiar it self may be subordinate to him; if so, he cannot transmit a Cause per Saltum to the Archbishop, but must leave it to the Ordinary from whom his Power is derived. *Hob.* 16, 186. *Jones* versus *Jones.* 1 *Sid.* 90. *Cro. Car.* 262.

2. The Defendant doth not say, That this was a Case which was permitted by their Law, but only that the Civil or Canon Law affirmeth such Request, which is in the Disjunctive, and very uncertain.

3. He alledged, That the Dean of Salisbury did request the Dean of the Arches to call the Plaintiff before him, to answer in a Cause for Subtraction of Fees; and the Libel is for Subtraction of Fees and Expences, which is larger than the Request, and therefore not good.

4. But the principal Point was, Whether the Defendant ought to sue for Fees in the Ecclesiastical Court, since such Things are properly cognizable at Common Law, for which he might

might bring a Quantum Meruit, or an Indebitatus Aſſumpſit, upon the Retainer pro Opere & Labore, and for Money laid out, and the Law raiſeth the Promiſe.

There is no Difference between Fees in the Prerogative-Court, and other Courts of Equity, for which Suits are uſually brought in this Court. The Uſage of which Courts may be given in Evidence at the Trial, and eſpecially in this Caſe, which is grounded upon a Preſcription for Cuſtomary Fees due Time out of Mind, which ſhall be tried by a Jury.

If it be objected, That Proctors Fees are Part of the Cauſe; this cannot be, becauſe when the Suit is determined, it cannot be afterwards continued for the Fees; and ſome of the Fees in that Court are ſettled by Act of Parliament, which are thoſe relating to Wills.

Neither can it be objected, That becauſe this Court will not grant a Mandamus to reſtore a Proctor when removed from his Office, therefore you will not grant a Prohibition when he ſues for a Recompence for his Labour and Pains; the Law of England takes Notice of ſuch Suits. But this Court will not take Notice whether the Party is a Proctor or not, but will leave the Determination thereof to a proper Court.

It is true, there is no Precedent of any Suits here for Proctors Fees; and it is as true, there are likewiſe no Precedents of ſuch Suits for Fees in Chancery: But they may be well commenced under the general Terms for Work and Labour, and are grounded upon a Cuſtom and Contract, which are Things triable at Common Law.

Roll. Rep. 59. It is true, a Prohibition to the Court-Chriſtian hath been denied by this Court, where the Libel was for Proctors Fees; but it was not for that Reaſon alone, for the Cauſe alledged for Prohibition was, That the Suit for which the Fees were laid out was not determinable in that Court. But the Judges thought it reaſonable not to prohibit the Proctor to ſue there, for he is only a Servant, and is not to take upon him to determine whether that Court had any Juriſdiction or not of the Cauſe.

Mich. 25. *Car.* 2. *C. B.* 1 *Mod. Rep.* 167. In the Caſe of Horton and Wilſon, a Prohibition was likewiſe denied to the Spiritual Court, where the Suit was for Proctors Fees; but there was but three Judges in the Common Pleas when that Rule was given: The Chief Juſtice was againſt the Prohibition, and the puiſne Judge for it; for he was of Opinion, That ſuch Fees ought not to be demanded in the Spiritual Court, becauſe the Plaintiff hath a Remedy at Law, for the Retainer implies a Contract, for which an Action on the Caſe will

lie. Juſtice Wyndham, who was the third Judge, was not clear of Opinion on either Side.

But even in that Caſe the Court held, That the Proctor having, amongſt other Things, demanded a cuſtomary Fee of 4d. for every Inſtrument which was read in the Cauſe, that the Law ought to determine, whether ſuch a Fee was cuſtomary or not. And why not in this Caſe, where the Defendant hath preſcribed for certain Fees, Time out of Mind?

Laſtly, They ought to allow the Plea of Non Aſſumpſit infra ſex Annos, for the Statute of Limitations extends as well to that Court as to Courts of Equity. *Hardr.* 502.

Econtra.

On the other Side it was argued, 1. That the Letter of Requeſt was to the next immediate Ordinary; and if it had appeared that this Juriſdiction had been ſubordinate to him, it would have altered the Caſe: But the Plaintiff having alledged, that it is a peculiar Juriſdiction, the Letter of Requeſt may be properly made from ſuch to the Archbiſhop himſelf.

2. If it had been free by a general Exemption from all Ordinary Juriſdiction, which was common, as my Lord Hobart tells us, in Monaſteries before the Diſſolution, then the Cauſe muſt be remitted to the King; for this Act was made as well for the Preſervation of the Juriſdiction of the Ordinary, as for the Eaſe of the People: For otherwiſe the Archbiſhop may call a Cauſe to him, which is in none of the Caſes within the Power given him by this Act, and then it will be totally eluded.

3. It is not enough for the Plaintiff to ſay, That he lived in the Pariſh of Hungerford, within a peculiar Juriſdiction of the Dean of Salisbury, ac infra Dioceſin Sarum; but he ought to ſhew that the Peculiar was ſubordinate to the Biſhop of Salisbury, being to deprive the Spiritual Court of a Juriſdiction which they had before the making this Act.

4. As to the Objection, That the Libel is larger than the Requeſt, one being for Fees and Expences, and the other being to anſwer in a Cauſe for Subſtraction of Fees only; this is not material, becauſe ſuch Fees muſt be intended as paid to others, as well as for ſuch as were due to the Plaintiff.

5. This Suit is within the Cognizance of the Eccleſiaſtical Court, of which a Proctor is an immediate Officer; and Fees are

incident to Suits commenced there; and they having Cognizance of the ſubject Matter for which ſuch Fees were expended, the Determination thereof is alſo incident to the original Cauſe: They have Power over him, and the Fees demanded by him, and may leſſen and abridge them as they ſee Occaſion; and by the ſame Reaſon that they may prohibit the Payment thereof, by the ſame Reaſon they may order the Payment.

March 45. If the Proctor had petitioned the Court, and not proceeded by way of Libel for his Fees, in ſuch Caſe a Prohibition would not lie; ſo that there can be no Inconvenience in allowing this Juriſdiction, for they are the proper Judges of what Buſineſs is done in their Courts, and can call for Vouchers better than a Jury can do.

Their Fees are eſtabliſhed by the Canon Law, and are leſſened and reſtrained by the Power and Authority of the Court. Rules are made here, to oblige the Attornies in Matters of Practice; and the like Rules are made there, to oblige the Proctors and Miniſters of the Court; ſo that they muſt be allowed to be the proper Judges in this Matter.

Moore 25. *Pl.* 2. *Juſtices Reg.* 58. Matrimony, and Things teſtamentary, were at firſt the whole Buſineſs of that Court; but now in Caſes where they have original Juriſdiction, they do retain Suits even for ſuch Matters which may be tried at Law, as a Libel may be there for not repairing a Way leading to a Church.

Gob. 260. *Greenway* verſus *Baker.* This Caſe may be compared to that where a Prohibition was prayed to the Court of Admiralty, becauſe inſtead of Stipulation (which is a Recognizance in their Law as much as Bail is here) they had taken a Recognizance at Common Law, wherein the Principal and Sureties, and their Heirs, Goods, and Lands were bound; whereas the Libel ought to be againſt the Ship and Goods, and Execution againſt the latter, and not againſt the Party: But the Civilians argued, That Execution might be taken of the Body, tho' not of the Lands; and that this was not in the Nature of a Recognizance, but a Stipulation in Nature of Bail, and might be ſued as well in the Court of Admiralty as at Common Law; and no Prohibition was granted, but the Matter was adjourned.

Tho' Serjeant *Harris* argued, That a Recognizance taken there to ſtand to the Order of the Court, was void. *Noy* 24.

The Caſe in the Modern Report is an expreſs Authority to rule this, where a Prohibition was denied for a Suit for Proctors Fees, and there is no Book againſt it. The Reaſon of the Law is for the Plaintiff; for he being a Proctor, is not a Temporal Officer, and what he hath done is about an Eccleſiaſtical Suit, and therefore that Court muſt judge of it.

Laſtly, The Statute of Limitations doth not extend to this Caſe; for it is not properly a Debt, becauſe Expences and Fees are of the ſame Nature with the ſubject Matter for which they were demanded: It may as well be alledged, That defamatory Cauſes are within the Statute; ſo that the Eccleſiaſtical Court having original Juriſdiction of this Matter, no Prohibition ought to go: It hath been denied in the Common Pleas for Regiſters Fees, in a Cauſe between Geſtlin and Froggat. Adjourn'.

Harris *verſus* Pett. *Paſch.* 8 *Will.* 3. *Rot.* 173.

Vide 1 *Sid.* 444. 1 *Mod.* 43. 2 *Keb.* 619. 2 *Saund.* 83, 84.

DEbt upon a Bond: The Condition thereof was, To free and keep harmleſs the Plaintiff off and from all Coſts and Damages which may ariſe by Reaſon of a Law Suit, *&c.*

The Defendant pleaded Non Dampnificatus generally; and upon Demurrer to the Plea, the Queſtion was, Whether ſuch Plea was good or not? It was agreed, That if the Condition had been to keep harmleſs only, then Non Dampnificatus had been a good Plea; but it being to free and keep harmleſs, he ought to ſhew how he had freed him, and not anſwered the Dampnification alone: And to prove this, the Caſe of Brett and Andrews was cited, which was Debt upon Bond for Performance of an Award, in which, amongſt other Things, it was awarded, That the Defendant ſhould acquit, diſcharge, and ſave harmleſs the Plaintiff off ſuch a Bond. And the like Plea was pleaded as in this Caſe, which was held inſufficient, becauſe the Defendant ought to ſhew how he had diſcharged him. 4 *Leon.* 62. 1 *Leon.* 71. *Idem Owen* 71. *Goldſ.* 63.

If the Award had been made, reciting a Suit in Chancery between the Parties, and that the Suit ſhould ceaſe, and the Plaintiff ſtaret acquietatus pro qualibet Materia in præd. Billa, there a Plea quod ſtetit quietus inde is good enough, without ſhewing how, becauſe he is acquitted by the Award it ſelf, (viz.) ſtaret acquietatus: But if a Man had been obliged to acquit another from a Debt or Suit, it is not ſufficient to plead Non Dampnificatus generally, but he ought to ſhew how and in what Manner. And this was the Caſe of Freeman and Sleen. 2 *Cro.* 339. 1 *Roll. Abr.* 432.

To which it was anſwered, That Brett and Andrews's Caſe differs from that at Bar, becauſe it was to acquit the Plaintiff from a peculiar Obligation; which Word Acquit implies, that it muſt be by Deed, and therefore he ought to ſhew by what Deed. *Placito* 2.

But

But this Condition was not to free and acquit the Plaintiff from a Suit, but to indempnify him from the Conſequences of it, which are Coſts and Charges; and the Defendant hath pleaded, That no Damage hath happened to him, ſo that it lies upon him to prove that he was damnified.

An Action of the Caſe was brought againſt the Defendant, who promiſed, That in Conſideration the Plaintiff would diſcharge a third Perſon then under an Arreſt, that he would pay the Money, and alledged in Facto, that he exoneravit. The Plaintiff had Judgment in the Common Pleas, and upon a Writ of Error in this Court, one of the Errors aſſigned was, That exoneravit eum was not good, without ſhewing how; but the Court held it well enough, and that it need not be as a Diſcharge of a Bond, or a Rent, which ought to be ſhewed in what Manner.

Cro. Eliz. 913. *King* verſus *Hobbs.*

If this had been pleaded in the Affirmative, that he had freed and acquitted the Plaintiff; there he muſt ſhew how: But it being in the Negative, the Plaintiff ought to ſhew how he was damnified.

2 *Cro.* 363, 634. 2 *Rep.* 4. *Mauſer's* Caſe.

And of this Opinion was the Court, That it was a good Plea, becauſe the Condition was to ſave the Plaintiff harmleſs from ſomething that was incertain at the Time of the Making thereof, (viz.) from the Coſts and Charges of the Suit, that no Coſts might be recovered againſt him; but if it had been to ſave harmleſs from a particular Thing, there ſuch a Negative Plea generally would not have done, becauſe the Defendant ought to ſhew how he indemnified the other: Whereupon the Counſel perceiving the Opinion of the Court, moved to have Leave to diſcontinue the Action.

2 *Saund.* 84. *Co. Ent.* 139. b.

Loveday *verſus* Winter.

S. C. 2 *Salk.* 537. *Poſt*, 378. *Vide* 6 *Mod.* 20.

IN Treſpaſs and Ejectment the Jury found a Special Verdict; the Subſtance whereof was, *ſi* George Pawlet was ſeized in Fee of the Manor of M. whereof the Lands in Queſtion being Copyhold were Parcel: That upon the Marriage of Edward his eldeſt Son, he ſettled the Manor and Lands, &c. upon Truſtees and their Heirs, to the Uſe of himſelf for Life, and after his Deceaſe, to the Uſe of his Wife for Life, then to Edward Pawlet, and the Heirs of his Body lawfully to be begotten, Remainder to his own right Heirs.

Proviſo, That it ſhall be lawful to and for the ſaid George Pawlet and Elizabeth his Wife, by Deed indented, to make Leaſes in Poſſeſſion for one, two, or three Lives, or for thirty Years, to commence after one, two, or three Lives, or for any other Term, determinable upon one, two, or three Lives, or in Reverſion for one, two, or three Lives, or for thirty Years, or for any other Number of Years, determinable upon one, two, or three Lives, ſo as ſuch Demiſe be not made of the ancient Demeſn Lands, Parcel of the ſaid Manor, or of any other Lands uſed therewith for the Space of ſeven Years, and ſo as the ancient Rent be reſerved.

George Pawlet by Deed indented, reciting that the Lands were Copyhold, made a Leaſe thereof to one Robert Blanchlow for thirty Years. *Vide* 1 *Inſt.* 58. *Poſt*, 379. 6 *Mod.* 20.

The Leſſor of the Plaintiff claims as Heir in Tail to George Pawlet his Father. And,

The Queſtion was upon this Proviſo in the Marriage-Settlement, Whether this was a good Leaſe, or not?

Thoſe who argued in the Negative inſiſted, That it was not warranted by the Power, either as to the Land it ſelf, or as to the Term.

1. As to the Tenure of the Land which is expreſly found to be Copyhold, but it could never be intended that he ſhould make any new Eſtate of Copyhold Lands; for the Eſtates he was to make are to be by Deed indented, and Copyhold cannot be let by ſuch Deed, ſo it is not within the Power; and the Acceptance of a Leaſe of the ſame Lands by a Copyholder, is a Determination of his Copyhold Eſtate. *Lane's* Caſe. 2 *Rep.* 16. 4 *Rep.* 24. 8.

The Exception is of all ancient Demeſn Lands Parcel of the Manor, which are ſufficient Words to exempt theſe Lands out of the Power of Leaſing; for a Manor conſiſts of Demeſns and Services, and theſe are not only found to be Copyhold, but Parcel of the Demeſns.

2. But if the Lands in Queſtion had been comprehended under the general Words, yet the Leaſe made by George Pawlet is void, by Reaſon of the Term demiſed; for it is expreſly againſt the Power reſerved, which ought to be taken ſtrictly againſt the Leſſor.

Cro. Eliz. 5. 2 *Cro.* 318. *Hocomb* verſus *Hawkins.* *Yelv.* 222. *Idem.* 6 *Rep.* 33. a. 8 *Rep.* 70. b.

And therefore where a Manor is in Leaſe, and he who hath the Reverſion in Fee levies a Fine to the Uſe of himſelf for Life, then to his eldeſt Son in Tail, but reſerved a Power for him to make Leaſes for twenty-one Years, who made a Leaſe before that in Being expired, to begin after the Determination thereof; it was adjudged void, for it ought be a Leaſe in Poſſeſſion, and not an Intereſt to begin in futuro.

To which it was anſwered,

That as to the Objection, That the Proviſo did not give George Pawlet any Power to make Leaſes of Copyhold Lands, becauſe they are Parcel of the Demeſns of the Manor, for nothing but the Capital Houſe, and the Lands therewith occupied, are properly the Demeſns of a Manor: But in the ſimple Acceptation of the Word, no Perſon hath any true Demeſns, becauſe all Land dependeth on the Crown; that is the Reaſon why in Pleading it is uſually ſaid, That ſuch a Perſon was ſeiſed in his Demeſns as of Fee.

Terms of Law, Title *Demeſns* 114.

A Manor conſiſts of Demeſns and Services, and nothing elſe: Now if the Demeſns cannot be let, then the Power given by this Proviſo ſignifies nothing, for Services are not Lands, and therefore nothing can be leaſed; and theſe Powers are not to be conſtrued according to Strictneſs of Law, but as Words uſed by Lawyers to ſignify their Meaning.

For which Reaſon, theſe Words, (viz. So as the Demiſe be not made of the antient Demeſn Lands of the Manor) muſt be taken according to the common Acceptation thereof; that is to ſay, a Leaſe ſhall not be made of any Lands uſually occupied with the Capital Meſſuage.

Then as to the Term demiſed, which, as hath been objected, ought not to have been for thirty Years abſolute, but determinable upon one, two, or three Lives.

Curia. Copyholds in Strictneſs are Part of the Demeſns of the Manor, becauſe the Tenancy being at the Will of the Lord, the Lands are ſuppoſed to be always in his Hands; but in vulgar Acceptation it is otherwiſe. Now the Lands which were in Leaſe for Lives, are not Parcel of the Manor during the Continuance of the Leaſe, but the Reverſion thereof is Parcel. Adjournatur.

Petit *verſus* Smith.

THE Teſtator by his laſt Will appointed two Executors, and gave each of them a Legacy of 5 l. and did not diſpoſe the Reſidue of his Eſtate.

The Will was proved in Common Form, and the Daughter of the Teſtator ſued in the Spiritual-Court for a Diſtribution; for that the Executors ought to have nothing by Vertue of their Executorſhip, becauſe they had expreſs Legacies deviſed to them by the Will, which ſhews that the Teſtator intended them no more. Whereupon the Court compelled them to exhibit an Inventory of the Perſonal Eſtate in order to make a Diſtribution. And now they moved for a Prohibition, ſuggeſting that the Eccleſiaſtical-Court had not ſuch a Power, but only in Caſes where the Parties die Inteſtate, and therefore a Prohibition was granted Niſi cauſa, &c.

DE

DE

Term. Sancti Mich.

Anno 8 W. III. B. R. 1696.

Vide 2 Salk. 280.

Hallett *verſus* Byrt, *& al'. Trin. 8. Rot. 23.*

Dorſet ſſ. JOhannes Byrt nuper de Southmoreton in Com. præd. Yeoman, & Eraſmus Hallet nuper de Beaminſter in Com. præd. Yeoman, Attach. fuer. ad reſpondendum Thomæ Hallett Lanio de placito quare ipſi ſimul cum Thoma Hallett nuper de Southmoreton in Com. præd. Yeoman Vi & Armis averia ipſius Thomæ Hallett Lanii pretii viginti Librarum apud Beaminſter præd. invent. & exiſten. abſque aliqua rationabili cauſa ceperunt & abduxerunt per quod idem Thomas averia ſua præd. penitus amiſit & alia enormia ei intulerant ad grave damnum ipſius Thomæ Hallett Lanii & contra pacem Domini Regis nunc & nuper Dominæ Reginæ Mariæ Angliæ, &c. & unde idem Thomas per Williel-mum Ball Attorn. ſuum queritur quod præd. Johannes & Eraſmus ſimul cum, &c. primo Die Auguſti Anno Regni Domini Regis nunc & nuper Dominæ Mariæ Reg. Angliæ ſexto Vi & Armis, &c. averia ipſius Thomæ Hallett Lanii videlicet tres Vaccas [Anglice Cows] & tres Juvencas [Anglice Heifers] pretii, &c. apud Beaminſter præd. invent. & exiſten. abſque aliqua rationabili cauſa ceperunt & abduxerunt per quod idem Thomas averia ſua præd. penitus amiſit & alia enormia, &c. ad grave damnum, &c. & contra pacem, &c. unde dicit quod deteriorat. eſt & dampnum habet, ad valentiam 40 Librarum & inde producit ſectam, &c.

Et præd. Johannes Byrt & Eraſmus Hallett per Egidium Clarke Attorn. ſuum ven. & defen. vim & injuriam, &c. & quoad venire Vi & Armis ſeu quicquid quod eſt contra pacem dicti Domini Regis nunc & nu-

per Dominæ Mariæ Reg. necnon totam tranſgreſſion. præd. præter captionem & abduction. præd. trium Vaccarum de averiis præd. in narratione præd. ſuperius mentionat. dicunt quod ipſi in nullo ſunt culpabiles modo & forma prout præd. Thomas Hallet Lanius ſuperius inde verſus eos narravit & de hoc ponunt ſe ſuper patriam & præd. Thomas Hallet Lanius ſimiliter & quoad captionem & abductionem præd. trium Vaccarum iidem Johannes & Eraſmus dicunt quod præd. Thomas Hallet Lanius actionem ſuam præd. inde verſus eos habere ſeu manutenere non debet quia dicunt quod Hundredum de Beaminſter in Com. Dorſet præd. eſt antiquum Hundred. quodque diu antea præd. tempus quo ſupponitur caption. & abduction. Vaccarum præd. fieri ſcilicet decimo Die Maii Anno Reg. Dom. Jacobi ſecundi nuper Regis Angliæ, &c. primo Reverendus in Chriſto Pater ac Dom. Dominus Sethus tunc Epiſcopus Sarum ſeiſit. fuit ut de feodo & jure in jure Epiſcopatus ſui Sarum præd. de & in Hundredo præd. cum pertin. quodque idem Epiſcopus & omnes Prædeceſſores ſui & omnes ill. quorum Stat. dictus Dominus Epiſcopus tunc habuit in Hundredo præd. a tempore cujus contrarii memoria Hominum non exiſtit habuerunt & habere conſueverunt quandam Curiam hundred. de actionibus perſonalibus non attingen. ad quadraginta Solid. & de **Replegiare** * **vetit. Namio** infra Hundred. præd. emergen. a tribus ſeptimanis in tres ſeptimanas infra Hundredum præd. Hundred. præd. coram liberis ſectatoribus Curiæ præd. tenend. & iidem Johannes & Eraſmus ulterius dicunt quod ipſe idem Epiſcopus & omnes illi quorum ſtatus ipſe tunc in eodem Hundred. habuit **a tempore cujus contrarium memoria Hominum non exiſtit uſi fuerunt & conſueverunt per ſe vel Seneſchallum ſuum Hundredi prædict. ſuper querimoniam Domino Hundredi præd. pro tempore exiſten. vel Seneſchallo ſuo Hundredi præd. in ea parte fact. in prædicta Curia Hundredi præd. vel extra eandem Curiam infra Hundred. præd. averia perſonæ ſic querentis infra Hundredum præd. injuſte capt. & detent. tali quer. infra Hundred. præd. Replegiare** & deliberare vel replegiari & deliberari cauſare & iidem Johannes & Eraſmus ulterius dicunt quod præd. Sethus Epiſcopus Sarum de Hundred. præd. ſic ut præfertur ſeiſit exiſten. ipſe idem Epiſcopus poſtea ſcil't undecimo Die Maii, Anno Regni dicti Domini Jacobi II. nuper Regis Angliæ, &c. primo

* *That is, where a Lord of a Franchiſe forbiddeth his Bailiff to deliver the Diſtreſs taken by him to the Sheriff when he comes to replevy.* 2 Inſt. 140.

Quære, *Whether one can preſcribe to have a Juriſdiction* de Vetito Namio? *For it is not incident to a Court-Baron, or Hundred-Court, as the Cogniſance of a Perſonal Action under* 40 s. *is.*

ſupradict. apud Beaminſter præd. in Com. præd. per quandam indenturam ſuam inter ipſum Epiſc. ex una parte & quendam Carleton Whitlock de Medio Templo London Ar. ex altera parte fact. cujus quidem Indenturæ unam partem ſigillo ipſius Epiſc. ſigillat. iidem Johannes & Eraſmus hic in Curia proferunt cujus dat. eſt Die & Anno ult. ſupradictis præd. Epiſc. conceſſit eidem Carleton & Hæredibus & Aſſign. ſuis inter alia totum illud Hundredum de Beaminſter in Com. præd. Curias Letas, Curias de Viſu Franci plegii & omnia alia Rectas Juriſdictiones Franchef. privileg. libertates proficua commoditates emolumenta & hæreditament. quæcunque cum pertinen. dict. hundred. ſpectan. penden. ſive pertinen. habend. & tenen. dict. Hundred. de Beaminſter præd. præfat. Carleton Whitlock, Hæred. & Aſſign. ſuis pro & duran. vitis præd. Carleton Whitlock & Katharinæ Uxoris ejus & Andreæ Henley de Bromhall in Com. South'ton Bar. & pro vita eorum diutius viventis, virtute cujus quidem conceſſionis idem Carleton de Hundredo præd. cum pertin. fuit & adhuc eſt inde ſeiſit. & ſic inde ſeiſit. exiſten. ante præd. tempus quo ſupponitur caption. & abduction. vaccar. præd. fieri præd. Thomas Hallet modo quer. & quidam Johannes Rodbart averia videl't præd. tres vaccas in narratione præd. ſuperius mentionat. exiſten. averia cujusdem Th. Hallet Jun. Yeoman apud Beaminſter præd. infra Hundred. præd. ceperunt & ea apud Beaminſter præd. ac infra Hundred. præd. imparcaverunt per quod idem Thomas Hallet Junior. Yeoman ante præd. tempus quo, &c. ſcilicet triceſimo Die Maii Anno Regni Dom. Willielmi & nuper Dom. Mariæ Reginæ Angliæ, &c. ſexto ſupradict. apud Beaminſter præd. infra Hundred. præd. cuidam Henrico Samwaies Gen. adtunc & ibidem Seneſchallo præd. Carleton Whitlock Curiæ Hundred. ſui præd. queſtus fuit de præfat. Thoma Hallet modo quer. & præfat. Johanne Rodbart de injuſta captione & detentione averiorum ſuorum præd. exiſten. vaccæ in narratione præd. mentionat. & adtunc & ibidem levavit quandam querelam ſuam in Hundredo præd. in placito caption. & injuſtæ detenionis averiorum ſuorum præd. & invenit eidem Carleton Whitlock pleg. tam de clamore ſuo proſequen. quam de averiis ill. retornan. ſi retorn. inde adjudicaretur ſuper quo quidem Henricus Samwaies adtunc Seneſchallus Curiæ Hundredi præd. poſtea ſcil't eodem triceſimo Die Maii Anno ſexto ſuprad. apud Beaminſter infra Hundred. præd. per quoddam Warrantum in ſcriptis ſub ſigillo ſuo quo in ea parte uſus fuit ſigillat. Ballivo Hundredi de Beaminſter præd. necnon præfat Eraſmo Hallet direct. eis mandavit quod vaccas præd. præfat. Thomæ Hallet Junior. Yeoman ſine dilatione replegiari & deliberari facerent & pon. per vad.

& ſalvos pleg. præfat. Thomam Hallet Lanium & Johan. Rodbart quod eſſent ad prox. Curiam Hundredi præd. apud Beaminſter infra Hundred. præd. tenen. viceſimo Die Junii tunc prox. ſequen. ad reſponden. præfat. Thomæ Hallet Jun. Yeoman de placito caption. & injuſtæ detentionis averiorum ſuorum præd. quod quidem Warrantum poſtea & antea præd. tempus quo, &c. ſcil't eodem triceſimo Die Maii Anno ſexto ſupradict. apud Beaminſter præd. in Com. præd. idem Thomas Hallet Jun. Yeoman præfat. Eraſmo Hallet cui idem Warrantum in forma præd. direct. fuit deliberavit in forma juris exequen. virtute cujus quidem Warranti idem Eraſmus & præfat. Johannes Byrt in auxilium ipſius Eraſmi & ad ejus requiſitionem poſtea ſcil't Die & Anno ult. ſuprad. apud Beaminſter præd. in Com. præd. infra Hundred. præd. dicta averia præd. Thomæ Hallet Jun. Yeoman ceperunt & abduxerunt & replegiaver. & dict. Thomæ Hallet Jun. Yeoman ibidem ſecundum formam & effectum Warranti præd. deliberaver. qui eadem ex deliberatione illa ibidem adtunc recepit & adtunc & ibidem præd. Eraſmus poſuit per vadios & ſalvos pleg. præd. Thomam Hallet Lanium & Johannem Rodbart quod eſſent ad præd. tunc prox. Curiam Hundredi præd. apud Beaminſter præd. tenen. ad reſponden. præfat. Thomæ Hallet Jun. Yeoman de placito captionis & injuſtæ detentionis averiorum ſuorum præd. quæ eſt eadem captio & abductio Vaccarum præd. unde præd. Thomas Hallet Lanius ſuperius ſe modo queritur abſq; hoc quod præd. Johannes & Eraſmus ſunt culpabiles de captione & abductione Vaccarum præd. vel alicujus Vaccæ inde ad aliquod tempus ante confection. Warranti præd. ſeu poſt retorn. inde ſeu aliter vel alio modo quam ut præd. Johannes & Eraſmus ſuperius placitando allegaverunt & hoc parat. ſunt verificare unde pet. judicium ſi præd. Thomas Hallet Lanius actionem ſuum præd. inde verſus eos habere ſeu manutenere debeat, &c.

E. R.

Et præd. Thomas Hallet Lanius quoad præd. placitum præd. Johannis & Eraſmi quoad caption. & abduction. præd. trium Vaccarum ſuperius in Bar. placitat. dicit quod ipſe per aliqua per præfat. Johannem Byrt & Eraſmum ſuperius placitando allegat. ab actione ſua præd. inde verſus eos haben. præcludi non debet quia dicit quod placitum præd. per præd. Johannem & Eraſmum modo & forma præd. ſuperius placitat. materiaque in eodem content. minus ſufficien. in lege exiſtunt ad ipſum Thomam ab actione ſua præd. verſus præd. Johannem & Eraſmum haben. præcluden. quodque ipſe idem Thomas ad placitum illud modo & forma præd. ſuperius placitat. neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc parat. eſt verificare

care unde pro defectu ſufficientis reſponſionis in hac parte idem Thomas Hallet pet. judicium & dampna ſua occaſione tranſgreſſionis illius ſibi adjudicari, &c. & pro cauſis morationis in Lege in hac parte juxta formam Statuti in hujuſmodi caſu nuper edit. & proviſ. idem Tho. Hallet Lanius demonſtrat & Curiæ hic oſtendit has cauſas ſequen. videl't pro eo quod placitum præd. tendit ad generalem exitum ac eſt duplex repugnans incertum & caret forma, &c.

B. S.

Joinder in Demurrer.

S. C. 2 *Salk.* 580.

Hallet *verſus* Byrt.

TReſpaſs againſt Byrt and Hallet, for taking and detaining the Plaintiff's Cattle.

The Defendants plead Not guilty as to all, but the taking three Cows; and as to that, they ſay, That the Hundred of Beaminſter is an ancient Hundred, whereof the Biſhop of Saliſbury was ſeized in Fee, and that he and his Predeceſſors have Time out of Mind kept a Court there from three Weeks to three Weeks, for the Trial of perſonal Actions under the Value of 40s. and ſo preſcribes to grant Replevins either by himſelf or Steward in Court or out of Court, upon Complaint made to them of the taking, and unjuſtly detaining, any Cattle within the ſaid Hundred.

That the Biſhop did afterwards convey this Hundred to one Whitlock for three Lives, by Vertue whereof he was ſeized. That the Plaintiff, and one Rodbart took and impounded the Cows within the ſaid Hundred, being the Cows of a Stranger, who made Complaint thereof to the Steward, and he directed his Warrant to the Bailiff of the Hundred, and to the ſaid Hallet, commanding them to replevy the Cattle, by Vertue whereof Hallet, and the other Defendant Byrt, in Auxilium ejus, did take and deliver them to the Owner, and traverſed that they were guilty of the taking at any Time before the Warrant, or after the Return, aliter vel alio modo.

The Plaintiff hath demurred, and ſhewed for Cauſe, that this Plea did amount to the general Iſſue; but it was argued to maintain it,

That there was ſufficient Colour to make this Plea good, for in an Action of Treſpaſs, Poſſeſſion is a good Colour; and the Defendant may have the Benefit of ſuch Plea when the Subſtance of it is by way of Excuſe, tho' he might have pleaded the general Iſſue.

Econtra

The Plaintiff hath declared for taking his Cattle, and the Defendants plead, That the Property was in another, so that they are not guilty of taking his Cattle: Which Pleading might have been good in Replevin, but not in an Action of Trespass. 27 H. 8. 21. a.

And to this Purpose a Case was cited, where in Trespass for breaking his Close, and taking away 20 Load of Wood, the Defendant pleaded as to breaking the Close, That he had a Lease of it at Will from the Plaintiff himself, by Vertue whereof he entred; and as to the carrying away the Wood, That another was possessed thereof, and of the said Close, who made his Son Executor and died; and that the said Executor gave the 20 Load of Timber to the Defendant; and traversed that he took any of the Plaintiff's Wood: The Court held this to be no more than the general Issue. 9 H. 6. 11. a.

When such Pleading hath been allowed to be good, it was where the Plaintiff had not alledged any Property in the Cattle, or where the Defendant had confessed it: And therefore where the Plaintiff declared of taking quædam Averia, and the Defendant pleaded that the Property was in him, and that a Stranger took them and put them in the Plaintiff's Close by his Assent, where he found and retook them, prout ei bene licuit; that Plea was held good, for the Plaintiff had not claimed any Property in the Cattle, but only that the Defendant took quædam Averia, and doth not say ipsius Querentis, as in this Case. Cro. Eliz. 162. Rookwood and Frazar. Cro. Eliz. 329.

Besides the Defendant ought to have alledged not only a bare Possession, but a reasonable Property in this Stranger: They say, that the Plaintiff took the Cattle mentioned in the Declaration, existen. Averia cujusdem Thomæ Hallet Jun', so that he might only have a Possession of them.

As where Trespas was brought for taking of Boards, the Defendant pleaded, That he was possessed of them, and gave them to the Plaintiff to keep, and redeliver to the Defendant when he should be required, and he carried them to D. where the Defendant retook them. This was held an ill Plea, because the Defendant had alledged no Property in himself. 5 H. 7. 18. Br. tit. Colour, Placito 43.

But the Court did not speak to this Point; they held, that at Common Law no Replevin was made by Plaint, for that was a Remedy given by the Statute of W. 1. cap. 16. the other was by Writ of Justicies in Replevin directed to the Sheriff, who thereupon either went himself, or made a Precept to his Bailiff to make Deliverance. F. N. B. 68. Dyer 246. 1 Inst. 145. b

Now if the Sheriff in his County-Court, which is a Court incident to his Office, could not make a Replevin, but by Writ in open Court, before the Statute of Marlbridge, which gives a quicker Remedy by Plaint, and was made for the Benefit of the Owner of the Cattle, that he should not stay for them till next Court; How can the Hundred-Court, which is derived out of the County-Court, prescribe to grant Replevins out of Court, when the Authority of the Sheriff himself so to do began by an Act of Parliament?

Bro. tit. *Pleint, Placito* 66. 'Tis true, all these Courts do hold Plea in Replevins, but 'tis illegal, for the Party ought to go to the Sheriff for that Purpose, whose Court is in Nature of a Court-Baron; therefore this Custom was held to be void, for it was against Law and Reason: And so the Plaintiff had Judgment, the Plea being naught.

Rex *versus* Major' & Burgen' Wilton.

GUlielmus Tertius Dei gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Rex fidei Defensor &c. Majori & Burgensibus Burgi de Wilton in Com. nostro Wilts salutem. Cum Elias Chalke un. Burgen. Burgi præd. secundum consuetudinem libertat. & privilegia ejusdem Burgi debito modo elect. & præfect. fuit cumque idem Elias Chalke in locum & officium un. Burgen. Burgi diu se bene gessit & gubernavit vos tamen Major & Butgen. Burgi præd. præmissa parvi pendentes præd. Eliam Chalke indebite & absque causa rationabili ab officio & loco un. Burgen. Burgi præd. minus juste amovistis in nostrum contemptum & ipsius Eliæ Chalke dampnum non modicum & gravamen & status sui læsionem manifestum sicut ex querela sua accepimus Nos igitur præfat. Eliæ Chalke debitam & festinam justitiam in hac parte fieri volentes ut est justum vobis & cuilibet vestrum mandamus sicut alias vobis & cuilibet vestrum mandavimus firmiter injungen. quod immediate post receptionem hujus brevis præd. Eliam Chalke in locum & officium unius Burgensium Burgi de Wilton præd. restituatis seu restitui faciatis una cum omnibus libertatibus privileg. præ-eminentiis & commoditatibus ad locum & officium spectan. & pertinen. vel causam nobis significetis in contrarium ne in vestro defectu querela ad nos perveniat iteratim & qualiter hoc præceptum nostrum fuit execut. nobis constare faciatis apud Westm. Die Mercurii prox. post Mensem Paschæ hoc breve nostrum nobis tunc remitten. sub pœna quadraginta Librarum; Teste J. H. Mil. apud Westm. secundo

cundo Die Maii Anno Regni Regis Octavo. Astry.

Per reg Cur. Parry pro profecut. executio iſtius brevis patet in quadam Schedul. huic brevi annex. Reſponſ. Majoris & Burgenſium Burgi de Wilton ad breve huic Schedulæ annex. ſecundum exigentiam brevis præd. Domino Regi humillime certificamus qd. præd. Burgus de Wilton eſt antiquus Burgus quodque infra Burgum præd. talis habetur & a tempore cujus contrarium memoria hominum non exiſtit habebaturc onſuetudo quod Major & Burgenſes Burgi illius ad hoc electi & jurati extiterunt & fuerunt de ſeipſis corpus incorporat. & politicum in re facto & nomine per nomen Major. & Burgen. Burgi de Wilton in Com. Wilts & per idem nomen placitare & implacitare placitari & implacitari conſueverunt ac ultetius Domino Regi certificamus quod per totum tempus ſupradict. iidem Major. & Burgen. Burgi præd. aliquem Burgenſem Burgi præd. qui aliquid ageret ſive perpetraret in Sacramenti ſui leſionem aut quo quid detrimenti caperet res publica Major & Burgenſes Burgi præd. ſuper Auditum hujuſmodi Burgenſis taliter delinquen. & peccantis & probatione inde ab officio & loco unius Burgen. Burgi præd. amovere conſueverunt &, potuerunt & ulterius certificamus quod præd. Elias Chalke ſexto Die Maii Anno Regni Domini Caroli II. nuper Regis Angliæ, &c. 35° apud Wilton præd. electus & præfectus fuit unus Burgen. Burgi præd. & eodem ſexto Die Maii Anno 35° ſupradicto apud Wilton præd. Sacramentum præſtitit corporale coram tunc Majore Burgi præd. juxta antiquam conſuetudinem Burgi præd. quod ipſe idem Elias eſſet verus & fidelis corporationi Majori & Burgen. Burgi præd. & præſtaret [Anglice would yeild] optimum certamen & auxilium ſuum pro dignitate [Anglice the Advancement] & utilitate [Anglice the Wealth] inde & omnes terras & poſſeſſiones ad inde pertinen. per omnes honeſtas & laudabiles vias & modos & ulterius Domino Regi certificamus quod poſtea & ante adventum brevis præd. idem Elias Chalke apud Wilton præd. elect. & præfect. fuit Major Burgi præd. & 23 Die Octob. Anno Domini 1690. apud Wilton præd. Sacramentum ſuum præſtitit corporale modo quo alii Majores præd. conſueverunt quod ipſe videret quantum poſſet quod redditus Burgenſium & communitatis Burgi præd. applicarentur [Anglice employed] ad emolumen. eorundem ac etiam in Omnibus Negotiis ſubſtan. tangentibus ſive concernentibus Burgi præd. conſuleret fratres ſuos & minime concluderet inde niſi cum eorum conſenſu poſteaque iterum elect. idem Elias ſcil't 13 Die Octobris Anno Domini 1693. iterum jurat. fuit Major Burgi præd. modo quo prius & Major Burgi præd. fuit & continuavit per ſpacium unius Anni integri

integri poſt quodlibet temporum præd. quo ipſe jurat. fuit Major Burgi præd. ut præfertur & ulterius Domino Regi certificamus quod præd. Elias Chalke Sacramenta ſua præd. vili pendens & dignitatem ſive utilitatem corporationis Major. & Burgen. Burgi præd. minine curan. ipſe idem Elias miniſtros Burgi præd. per CommuneConciliumCorporationis præd. debite electos & qui per Commune Concilium Corporationis præd. & non aliter ab Officiis ſuis amoverentur arbitrarie amovit ab Officiis ſuis Authoritatis ſuæ colore abſque conſenſu vel aſſenſu Communis Concilii præd. ſcil't Robertum Paine Commun. Clericum Corporation. præd. Will'um Cowdry Jun. ſervien. ad clavum & recepit ſeparales denariorum ſummas debitas & ſolubiles Majori & Burgenſibus Burgi præd. quas ipſe idem Elias in uſum ſuum proprium convertit & diſpoſuit apud Wilton præd. & computum inde Majori & Burgenſibus Burgi præd. minime reddidit ſcil't unam Libram & duodecim Solidos per ipſum recept. pro redditu tolneti pontis in Harneham in Com. præd. ac debit. Corporationi ac etiam monetam per ipſum de Corporatione præd. recept. ſecundum ordinem & conſuetudinem ibidem uſitat. minime diſpoſuit (viz.) decem Solidos debit. Eliæ Glide Ballivo Majoris Burgi præd. ac etiam idem Elias Chalke clandeſtine & abſque conſenſu Corporationis præd. cauſavit quandam intrationem electionis cujuſdam Jacobi Hopgood eſſe membrum Corporationis præd. obliterari [Anglice to be ſtruck out] a quodam libro [vocat. the Ledger-Book] de & pertinen. præd. Corporarioni & manum ſuam propriam aliæ intrationi in loco intrationis ſic ut præfertur obliteratæ & eraſæ ſcripſit & inſeruit in libro præd. exiſten. libro in quo actus publici rempublicam Majoris & Burgenſium Burgi præd. aliqualiter tangentes memorantur & recordantur De quibus omnibus aliiſque Criminibus ei object. & per ipſum exiſtentem Burgen. Burgi præd. in Sacramenti ſui præd. læſionem & Reipublicæ præd. Majoris & Burgenſium Burgi præd. detrimentum fact. & perpetrat. ipſo eodem Elia Chalke in Communi Conſilio [Angl. Aſſembly] Major. & Burgenſium Burgi præd. plenius audit. & ſuper probation. examination. & matur. conſideration. inde iidem Major & Burgen. Burgi præd. in Communi Conſilio præd. apud Guildhall Burgi præd. 28 Die Auguſti An. Dom. Milleſimo ſexcenteſimo nonageſimo quinto aſſemblat. ordinaverunt eundem Eliam Chalke ab officio & Loco unius Burgen. Burgi præd. Amoveri [Anglce disfranchiſed] & per eundem ordinem fuit amotus inde & redditus incapax aliquid amplius agen. ut membrum ejuſdem Corporationis hiſque de cauſis eundem Eliam Chalke in locum & officium unius Burgenſium Burgi præd. reſtituere non poſſumus.

W. Sharpe, Major.

Rex *verſus* Major. & Burgen. Wilton.

MAndamus to reſtore one Elias Chalke to the Place of a Burgeſs in Wilton; the Return whereof was, That Wilton is an ancient Borough wherein there was a Cuſtom, That the Mayor and Burgeſſes ſhould be a Body Incorporate, and that they might diſplace any Burgeſs who ſhould act any Thing againſt his Oath, or againſt the Intereſt of the Borough, upon hearing the Offence and Proof of his Crime. *Vide ante*, 10, 11. *poſt*, 314, 404, 452. 6 *Mod.* 18.

That Elias Chalke was choſen a Burgeſs there in May, Anno 29 Car. 2. and then took an Oath to be faithful and true to the Corporation, and to endeavour the Advancement thereof.

That he was afterwards choſen Mayor of the ſaid Corporation, and took an Oath, That the Rents thereof, as far as he could, ſhould be imployed for the Profit of the ſaid Corporation; and that in all Matters of Moment he would conſult his Brethren, and conclude on nothing without their Conſent. But that he not regarding his Oath, and neglecting the Profit of the Corporation, did arbitrarily diſcharge Robert Paine and others from their Offices there, and that they ought not to be removed but by the Common-Council. That he received ſeveral Sums of Money due to the Corporation, and converted the ſame to his own Uſe, without giving any Account thereof. That he hath made undue Entries of Elections of Members of the Corporation in their Leidger-Book; and ſets forth all theſe Matters in particular. For which, and other Crimes, he being heard in Common-Council, and it being proved upon him, the Mayor and Burgeſſes of the ſaid Borough being aſſembled in Common-Council, did diſfranchiſe him, and made him incapable to hold that Office of Burgeſs any longer; for which Reaſons they could not reſtore him.

Thoſe who argued againſt this Return, ſaid, 1. That it was inſufficient and illegal: For if the Mayor and Burgeſſes have an Authority to diſfranchiſe, and this general Cuſtom, as returned, ſhall extend to ſuch Things which they may lawfully do; yet they have not well purſued it, becauſe it doth not appear that he was ſummoned to anſwer theſe Offences which are laid to his Charge, or that he had due Notice to defend himſelf; for a Man may be heard as 'tis alledged in the Return, but not in his own Defence.

Therefore a Summons is neceſſary in all ſuch Caſes, and not generally, but to anſwer thoſe particular Matters.

Thus it is, if the Party leaves the Corporation, and inhabits elſewhere: In ſuch Caſe a general Summons is not ſufficient, it muſt ſpecifie the Offence of which he is accuſed; and therefore a general Return of a Summons, (viz,) Quod licet ſæpius requiſitus fuit, hath been held inſufficient to turn a Man out of his Freehold.

Rex verſus *Glyde.*

The End of a Summons is to bring the Party to give his Anſwer by the ordinary Proceſs of the Court, and likewiſe to give him Notice of his Accuſation, and therefore it ought to be particular: So that tho' 'tis returned, that he was fully heard de omnibus Criminibus; yet without a Summons he may not be prepared to anſwer, or to make a full Defence.

11 *Rep.* 99. Agreeable to this is the Reſolution in James Baggs's Caſe, That notwithſtanding a Corporation hath an Authority to remove either by Charter or Preſcription, and have a juſt Cauſe ſo to do; yet if it appear by the Return of a Mandamus, that they have proceeded againſt the Party without hearing him to what was objected, or that he was not reaſonably warned, ſuch a Diſfranchiſement is void, and ſhall not bind the Party.

Style 151, 446, 452.

2. The Return is incertain; for it is, That he was Plenius audit. de omnibus aliisCriminibus, &c. and that upon Proof thereof he was diſfranchiſed; which is not ſufficient to juſtifie it, becauſe 'tis not poſitively ſet forth that he was heard concerning thoſe other Crimes laid to his Charge, or before whom he was heard. 'Tis true, 'tis alledged, That he was heard in Communi Concilio, who might be aſſembled in the Council-Houſe not to conſult but to feaſt; it ſhould have been, That it was heard apud Commune Concilium, &c. So it was held in the Caſe of the Mayor of Gloceſter, who returned, That he called to him 30 of the Council in Domo Concilii aſſemblat', and did remove the Party: This was held inſufficient, becauſe it did not appear that it was apud Commune Concilium.

3 *Bulſt.* 189. *Poph.* 133. 1 *Roll. Rep.* 409.

Sid. 313. Then they return, That the Crimes were proved upon him, but do not ſay by what Proof, or that it was upon Oath. Now Proof without deſcribing in what Manner, muſt be ſuch which is allowed at Common Law, and that is by Jury, which was not in this Caſe.

3. It doth not appear but that thoſe other Crimes may be ſuch for which they could not juſtify this Diſfranchiſement. They ſhould

ſhould have retoꝛned, That he was required to make his Defence to particular Crimes objected againſt him; foꝛ in all Retoꝛns of this Nature there muſt be a pꝛeciſe Certainty, and the Court will intend nothing but what is ſufficiently alledged.

Beſides, the Crimes which are expꝛeſſed, are not ſo certainly ſet foꝛth that this Court may judge of the Cauſe of this Pꝛoceeding againſt the Party; foꝛ 'tis ſaid, that he removed the Servants of the Coꝛpoꝛation from their Offices, who ought not to be removed but by the Common-Council. Now it doth not appear what Intereſt thoſe Perſons had in their Offices, oꝛ that they were removed by him againſt their Conſent, foꝛ it may be that they ſurrendered willingly.

4. They retoꝛn, That an Order was made to diſfranchiſe him, and that by Vertue of that Order he was made incapable of acting as a Member of the Coꝛpoꝛation. This is alſo inſufficient, becauſe they cannot remove any one by Vertue of an Order; it muſt be by a coꝛpoꝛate Act under the Common Seal.

5. As to his receiving Money due to the Coꝛpoꝛation, and converting it to his own Uſe without giving any Accompt thereof, they do not ſay, that they required him to give an Accompt, and that he refuſed.

6. Laſtly, as to his ſtriking out an Election of a Member in the Leidger-Book, and ſigning another Entry inſtead of that ſtruck out; this doth not appear to be any Crime in him, foꝛ they do not ſay, that ſuch was an undue Entry; he might ſtrike it out with an Intent to wꝛite another who was lawfully choſen. 'Tis not objected againſt him as an Abuſe oꝛ Falſity: Foꝛ which Reaſons a peꝛemptoꝛy Mandamus was pꝛayed.

Econtra

It was argued on the other Side, and the Court inclined, that there need not be any Summons to anſwer particular Matters; neither doth Baggs's Caſe ſay that the Party ſhould be ſummoned: 'Tis ſufficient if he hath been heard, which may be done, and was in this Caſe without any Summons, and if heard, the Court will intend that it was in his Defence; ſo that there is no need of a Summons at all, becauſe the Intent of it is anſwered. But this was not the Gꝛounds of the peꝛemptoꝛy Mandamus, which was granted foꝛ the other Reaſons abovementioned.

Placita

Placita coram Domino Rege apud Weſtm. de Termino Sancti Hillarii Anno Regni Domini Will'i Tertii Regis Angliæ, &c. Sexto. Rot. 729.

Wigorn. ſſ. MEmoran. quod die Mercurii prox. poſt Octab. S. Hillarii iſto eodem Termino coram Domino Rege apud Weſtm. venit Georgius Leigh per Thomam Callow. Attorn. ſuum & protulit hic in Curia dicti Domini Regis tunc ibidem quandam Billam ſuam verſus Samuelem Brace in Cuſtod. Mar. &c. de Placito Tranſgreſſionis & ejectionis firmæ & ſunt pleg. de proſ. ſcilicet Johannes Doe & Richardus Roe quæ quidem Billa ſequitur in hæc verba.

ſſ. Georgius Leigh queritur de Samuele Brace in Cuſtodia Mar. Mareſcal. Domini Regis coram ipſo Rege exiſten. pro eo videlicet quod cum quidam Johannes Cookes primo die Octobris Anno Regni Domini Will'i nunc Regis & Dominæ Mariæ nuper Reginæ Angliæ, &c. Sexto, apud Paroch. de Bromſgrove in Com. præd. dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat. Georgio unum Meſſuagium ttigint. acras Terræ decem acras prati & viginti acras Paſturæ cum pertin ſcituat. jacen. & exiſten. in Paroch. de Bromſgrove præd. in Com. præd. haben. & tenen. ten'ta præd. cum pertin. eidem Georgio & aſſign. ſuis a Feſto die Sancti Michaelis Arch'i tunc ult. præterit. uſque plenum finem & Terminum Septem Annor. extunc proxime ſequen. & plenar. complen. & finien. virtute cujus quidem dimiſſionis idem Georgius in ten'ta præd. cum pertin. intravit & fuit inde poſſeſſionat. quoſque præd. Samuel poſtea ſcilicet eodem primo die Octobris Anno Sexto ſupradicto vi & armis in ten'ta præd. cum pertin. in & ſuper poſſeſſionem ipſius Georgii inde intravit & ipſum Georgium a firma ſua præd. Termino ſuo præd. inde nondum finito ejecit expulit & amovit ipſumque Georgium a poſſeſſione ſua præd. inde extratenuit & adhuc extratenet & alia enormia eidem Georgio adtunc & ibidem intulit contta pacem dictor. Domini Regis nunc & nuper Dominæ Reginæ & ad dampnum ipſius Georgii decem librarum & inde producit ſectam, &c.

Et præd Samuel Brace per Johannem Hancocks Attorn. ſuum venit & defen. vim & injuriam quando, &c. & dicit quod ipſe non eſt inde Culpabilis & de hoc ponit ſe ſuper patriam & præd. Georgius ſimiliter, &c. Ideo ven. inde Jur. coram Domino Rege apud Weſtm. die Martis prox. poſt Octab. Purificationis beatæ Mariæ & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies dat. eſt partibus præd. ibidem, &c.

Poſtea continuatur inde proceſſus inter partes præd. de Placito præd. per jur. poſit. inde inter eas in reſpectu coram Domino Rege apud Weſtm. uſque diem Mercurii prox. poſt quinden. Paſchæ extunc prox. ſequen. niſi Juſticiar. Domini Regis ad Aſſiſas in Com. præd. capien. prius die Sabbati ſecundo die Martii apud Wigorn. in Com. præd. per formam ſtatuti, &c. ven. pro defectu Jur', &c. ad quem diem coram Dom. Rege apud Weſtm. venit præd. Georgius per Attorn. ſuum præd. & præfat. Juſticiar. coram quibus, &c. miſ. hic record. ſuum coram eis habit. in hæc verba.

ſſ. Poſtea die & loco infracontent. coram Egidio Eyre milite un. Juſtitiar. Domini Regis ad Placita coram ipſo Rege tenen. aſſign. & Thoma Breton Ar. eidem Egidio Eyre & Willielmo Gregory mil. al. Juſtitiar. dicti Dom. Regis ad Placita coram ipſo Rege tenen. aſſig. Juſtitiar. ipſius Dom. Regis ad Aſſiſas in Com. Wigorn. capien. aſſign. per formam ſtatuti, &c. hac vice aſſociat. præſentia præd. Will'i Gregory non expectat. virtute Brevis Dom. Regis de ſi non omnes, &c. ven. tam infranominat. Georgius Leigh quam infraſcript. Samuel Brace per Attorn. ſuos infracontent. & Jur. Juratæ unde infra fit mentio exact. ven. qui ad veritatem de infracontent. dicen. electi triati & jurati dicunt ſuper ſacrament. ſuum quod quidam Walterus Brace ſeiſitus fuit de ten'tis in Narratione infraſcript. mentionat. in Domin. ſuo ut de feodo & ſic inde ſe'it exiſten. præd. Walterus Brace ante præd. tempus quo, &c. ſcilicet 25 die Julii Anno Regni Dom. Jacobi Primi nuper Regis Angliæ, &c. 20, per quandam Chartam ſuam Sigillo ipſius Walteri ſignat. & juratæ præd. in evidentiam oſtenſ. cujus dat. eſt eiſdem Die & Anno feoffavit quoſdam Thomam Wilks & Thomam Flavell de & in ten'tis præd. cum pertin. haben. & tenen. eiſdem Thomæ & Thomæ & Hæredibus ſuis ad uſus in præd. Charta ſpecificat. tenor cujus quidem Chartæ ſequitur in hæc verba.

To all Chriſtian People to whom this preſent Writing ſhall come, Walter Brace **of** Forkbury, **in the Pariſh of** Bromſgrove, **in the County of** Wigorn', **Yeoman, ſendeth Greeting. Know ye, that I the ſaid** Walter Brace, **for the natural Love and Affection which I bear unto my Son** Thomas Brace, **and for divers other Conſiderations me eſpecially moving, have given, granted, enfeoffed, and confirmed; and by theſe Preſents do give, grant, enfeoff, and confirm, unto** Thomas Wilkes, **of** Forkbury **aforeſaid, Yeoman, and unto** Thomas Flavell **of** Bromſgrove **aforeſaid, Clerk, their Heirs and Aſſigns, all that Dwelling-Houſe or Tenement, with the Appurtenances, which I the ſaid** Walter Brace **purchaſed of** Stephen Dipple **of** Bromſgrove **aforeſaid, and is ſituate in the High Street**

of Bromſgrove, between the Land of Edward Seabright, Eſq; and the Lands of Gilbert Butler Gent. and now in the Tenure or Occupation of Walter Roſe; and alſo one other Houſe or Cottage, with the Appurtenances, ſituate and being in Forkbury aforeſaid, wherein Gilbert Weſtley now dwelleth, together with the Cloſe wherein the ſaid Cottage ſtandeth, containing by Eſtimation one Acre and an half, or thereabouts, be the ſame more or leſs; one other Cloſe of Paſture called by the Name of Whern's Cloſe, containing by Eſtimation three Acres or thereabouts; one other Cloſe of Paſture called by the Name of Woodſell, containing by Eſtimation five Acres or thereabouts; two other Cloſes called the Slade Crofts, containing by Eſtimation ſix Acres or thereabouts; one Day's Mowth of Meadow Ground lying in Long Meadow, next unto the Gate there; and two Fleeting Acres lying in Broad Meadow; with all Ways, Waters, Woods, Underwoods, Commons, Profits, Commodities, Advantages, and Hereditaments whatſoever unto the ſaid Premiſſes, and every Part and Parts thereof belonging, or in any wiſe appertaining, all which ſaid Premiſſes are ſituate, lying and being in the ſaid Pariſh of Bromſgrove, and County of Wigorn': To have and to hold the ſaid Houſes or Tenements, Lands, and all and ſingular other the Premiſſes with the Appurtenances, and every Part thereof, to the ſaid Thomas Wilkes and Thomas Flavell, their Heirs and Aſſigns, to the Uſes, Intents and Behooſs herein after by theſe Preſents mentioned and declared, and to no other Uſe, Intent or Purpoſe; That is to ſay, to the Uſe and Behooſ of me the ſaid Walter Brace, for and during my natural Life; and after the Deceaſe of me the ſaid Walter Brace, to the Uſe and Behooſ of the aforeſaid Thomas Brace my Son, and his Heirs for ever: And for Default of Iſſue of the Body of the ſaid Brace, then to the Uſe and Behooſ of the Right Heirs of me the ſaid Walter Brace for ever, to be holden of the Chief Lord or Lords of the Fee or Fees of the Premiſſes by the Rents and Services thereof, firſt due and of Right accuſtomed: And I verily the ſaid Walter Brace and my Heirs, the ſaid Houſes or Tenements, Lands, and all and ſingular other the Premiſſes, with the Appurtenances, and every Part and Parcel thereof, unto the ſaid Thomas Wilkes and Thomas Flavell, and their Heirs, ſhall and will warrant and for ever defend by theſe Preſents. In Witneſs whereof, I the ſaid Walter Brace unto this my preſent Writing indented, have ſet my Hand and Seal the 25th Day of July, in the Year of the Reign of our Sovereign Lord King James, by the Grace of God, of England, France and

Ireland, King, Defender of the Faith, &c. the Twentieth, and of Scotland the Fifty-fifth, Annoque Domini 1622.

Virtute cujus necnon vigore actus Parliamenti de uſibus in poſſeſſion. transferen. edit. & proviſ. idem Walterus ſeiſitus fuit de præmiſſis in eadem Charta mentionat. exiſten. præmiſſa præd. in narratione præd. ſpecificat. ut delibero ten'to ſuo pro termino vitæ ſuæ remanere inde præfat. Tho. Brace ſpectan. prout lex poſtulat & iidem Juratores ulterius ſuper ſacr'um ſuum dicunt quod præd. Walterus Brace poſtea & ante præd. tempus quo, &c. obiit & quod præd. Thomas Brace filius ipſius Walteri intravit in ten'ta in narratione infraſcript. mentionat. & fuit inde ſeiſitus prout lex poſtulat & quod ipſe præd. Thomas Brace ſic inde ſe'it exiſten. debito modo & forma fecit ultimam voluntatem ſuam in ſcriptis decimo ſexto Die Aprilis Anno Regni Caroli ſecundi nuper Regis Angliæ, &c. Triceſimo tertio, quæ quidem voluntas ſequitur in hæc verba.

In the Name of God, Amen. The ſixteenth Day of April, in the twenty-third Year of the Reign of our Sovereign Lord Charles II. by the Grace of God of England, Scotland, France, and Ireland, King, Defender of the Faith, &c. Annoque Domini 1681. I Thomas Brace of Forkbury, in the Pariſh of Bromſgrove, in the County of Wigorn', Yeoman, being weak of Body, but of ſound and perfect Memory and Underſtanding, Thanks be to God; calling to Mind the incertain State of this Life, and being deſirous to ſettle Things in Order for the leaving the World, I having lived in the Enjoyment thereof till a very conſiderable Age, do make this my laſt Will and Teſtament in Manner following, revoking by theſe Preſents all and every other Teſtament or Teſtaments, Will and Wills, heretofore by me made either by Word or Writing, and this to be taken only for my laſt Will and Teſtament. Firſt, I bequeath my Soul unto God my Creator, and to Jeſus Chriſt my Redeemer; and my Body to the Earth from whence it was taken, to be decently buried in ſuch Chriſtian Manner as to my Executor herein after named ſhall be thought moſt convenient, there to reſt untill my Soul and Body ſhall meet again, and be joined together at the Reſurrection. And touching ſuch temporal Eſtate as God hath been pleaſed to beſtow upon me, I do order, give, and bequeath the ſame in Manner following:

Imprimis, I do hereby give and deviſe unto my Son Samuel Brace, during the Term of his natural Life, eight Pounds a-year of lawful Money of England, to be paid him Quarterly, from the Time of my Deceaſe, by my Executor herein after mentioned, he my

ſaid

ſaid Son Samuel permitting and ſuffering William Fowkes, and Jonathan Wall, their Executors, Adminiſtrators, and Aſſigns, peaceably and quietly to hold and enjoy the Lands and Tenements, and Premiſes to them by me ſeverally leaſed, at and under the Rents and Covenants ſpecified in their ſeveral Leaſes; but if he moleſt or hinder the ſaid Jonathan Wall and William Fowkes of their quiet enjoying the Premiſſes, or any Part thereof to them by me deviſed, then my Will is, That my ſaid Son Samuel have four Pounds a Year only during his Life, paid him Quarterly by my Executor, in full Diſcharge and Satisfaction of the ſaid eight Pounds a Year. Item, I give and bequeath unto my Daughter Elizabeth Brace three hundred Pounds of like lawful Money of England, to be paid by my Executor as followeth, (viz.) two hundred Pounds within a Year, and one hundred Pounds more, the remaining Part of the ſaid three hundred Pounds, within two Years after my Deceaſe if ſhe ſo long live, or bear any Iſſue of her Body, with all my Goods that ſhall be in my Houſe at Whernes-Aſh at my Deceaſe. Item, I give to my Grandſon Henry Cooks, during his natural Life, all that my Meſſuage or Tenement in Forkbury, with two Acres of Land to the ſame belonging, in the Poſſeſſion of one William Perkes, and four more Acres of Land to the ſame adjoining, in the Poſſeſſion of one William Oxford, the Rents and Profits of the ſaid Meſſuage, and ſeveral Parcels of Land, to be received and enjoyed by my Executor, till my ſaid Grandchild ſhall attain to the Age of 21 Years, for the Maintenance and Education of my ſaid Grandchild. Item, I give and deviſe to my Grandchildren Mary and Hannah Cooks, all thoſe my two Cloſes of Land in Catſill adjoining to the Common Field there, called Intall-Field, containing by Eſtimation about four Acres, and three ſeveral Parcels of Land in Intall-Field, containing by Eſtimation three Acres. And Laſtly, I give and deviſe unto John Cooks, my Son-in-Law, whom I make Executor of this my Will, and to his Heirs on the Body of my Daughter Rebecca begotten, or to be begotten, all my Eſtate, Lands, Tenements, and Houſes whatſoever in Forkbury and Catſill, in the ſaid Pariſh of Bromſgrove and County of Worceſter, and not herein before deviſed, and the Reverſion of the ſaid Meſſuage and Lands herein before bequeathed to my ſaid Grandchild Henry Cooks from and after his Deceaſe, paying the Legacies and Annuities in this my Will compriſed, &c.

Et iidem Juratores ulterius ſuper ſacr'um ſuum dicunt quod præd. Thomas Brace poſtea obiit de ten'tis præd. cum pertin. ſeiſit. ut præfertur & quod tenementa

præd. cum pertin. in narratione præd. ſpecificat. & ten'ta præd. in voluntate præd. prius recitat. & per eandem expreſſ. fore deviſat. præfat. Johanni Cooks in poſſeſſione ſunt eadem ten'ta cum pertin. & non alia nec diverſa & quod præd. Johannes Cooks poſt mortem ipſius Thomæ Brace in ten'ta præd. exiſten. ten'ta in queſtione intravit colore voluntatis præd. & fuit inde ſeiſitus prout lex poſtulat & iidem Juratores ulterius ſuper ſacr'um ſuum dicunt quod præd. Johannes Cooks poſt mortem præfat. Thomæ Brace tam omnes & ſingulas legationes & annuitates in eadem voluntate mentionatas & compriſatas ad talia tempora & modo & forma prout in eadem voluntate direct. eſt quam omnia debita juſta & expenſas funerales præfati Thomæ Brace ſolvit ſecundum veram intention. dictæ voluntatis & Juratores præd. ſuper ſacr'um ſuum præd. ulterius dicunt quod infranominat. Samuel Brace modo defenden. eſt filius & hæres de corpore præd. Tho. Brace & quod idem Samuel Brace poſt mortem præfat. Thomæ patris ſui in ten'ta præd. cum pertin. intravit & fuit inde ſeiſitus prout lex poſtulat & præd. Joh'es Cooks poſtea & ante præd. tempus quo, &c. ſcilicet infraſcript. primo die Octobris Anno Regni Domini Willielmi nunc Regis Angliæ & nuper Dominæ Mariæ Reginæ Angliæ, &c. ſexto apud Parochiam de Bromſgrove infraſcript. in Com. præd. in tenementa præd. cum pertin. intravit & adtunc & ibidem dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat. Georgio ten'ta præd. cum pertinen. haben. & tenen. ten'ta præd. cum pertin. eidem Georgio & Aſſign. ſuis a Feſto Die Sancti Michaelis Archangeli tunc ult. præterit. uſque plenum finem & Terminum ſeptem Annorum extunc prox. ſequen. & plenar. complen. & finien. virtute cujus quidem dimiſſionis idem Georgius in ten'ta præd. cum pertin. intravit & fuit inde poſſeſſionat. quouſque præd. Samuel Defenden. poſtea ſcil't eodem primo Die Octobris Anno ſexto ſupradicto in ten'ta præd. cum pertin. in & ſuper poſſeſſion. ipſius Georgii inde intravit & ipſum Georgium a firma ſua præd. prædicto termino ſuo nondum finito ejecit expulit & amovit ipſumque Georgium de poſſeſſione ſua præd. inde extratenuit & adhuc extratenet ſed utrum ſuper totam materiam præd. per Juratores præd. in forma præd. compert. præd. Samuel Brace modo defenden. eſt culpabilis de tranſgreſſione & ejectione firmæ infraſcript. modo & forma prout præd. Georgius interius verſus eum queritur necne Juratores præd. penitus ignorant. & inde pet. adviſamentum & conſiderationem Curiæ, &c. & ſi ſuper totam materiam præd. per Juratores præd. in forma præd. compert. videbitur Curiæ Domini Regis hic quod præd. Samuel Brace modo defen. eſt culpabilis de tranſgreſſione &

ejectione firmæ infraſcript. modo & forma prout præd. Georgius interius verſus cum queritur tunc iidem Juratores ulterius ſuper ſacr'um ſuum dicunt quod præd. Samuel Brace eſt Culpabilis de tranſgreſſione & ejectione infraſcript. modo & forma prout præd. Georgius Leigh interius verſus eum queritur & aſſidunt damna ipſius Georgii Leigh occaſione infraſcript. ultra miſi & Cuſtag. ſua per ipſum circa ſectam ſuam in hac parte appo'it. ad ſex denar.& pro miſ. & Cuſtagiis il. ad quadraginta ſolid. ſed ſi ſuper totam materiam præd. per Juratores præd. in forma præd. compert. videbitur Curiæ hic quod præd. Samuel Brace modo defenden. non eſt Culpabilis de tranſgreſſione & ejectione firmæ infraſcript. modo & forma prout præd. Georgius interius verſus eum queritur tunc iidem Jur. ulterius dicunt ſuper ſacr. ſuum præd. quod præd. Samuel Brace non eſt Culpabilis de tranſgr. & ejectione in Narratione infraſcript. ſpecificat. prout præd. Samuel Brace interius pro ſe Placitando allegavit & quia Curia Domini Regis nunc hic de judicio ſuo de & ſuper præmiſſis redden. nondum adviſatur Dies inde datus eſt partibus præd. coram Domino Rege apud Weſtm. uſque diem prox. poſt
de judicio ſuo de & ſuper præmiſſis il. inde audien. eo quod Curia dicti Domini Regis nunc hic inde nondum, &c.

Leigh *verſus* Brace.

UPon a ſpecial Verdict in Ejectment, the Caſe upon the Pleading was thus:

1ſt. Walter Brace being ſeized of the Lands in Queſtion, did on the 25th Day of July, Anno 1622, make a Feoffment thereof in Fee to Thomas Wilkes and Thomas Flavell. and their Heirs, to the Uſe of himſelf for Life, and after his Deceaſe to the Uſe of his Son Thomas Brace and his Heirs for ever; and for Default of Iſſue of the Body of the ſaid Thomas Brace, then to the Uſe and Behoof of the right Heirs of the Feoffor for ever.

That Walter Brace afterwards died ſo ſeized, and Thomas his Son entered upon the Lands, who on the ſixteenth Day of April 1681, made his Will, and amongſt other Things, deviſed the ſame to his Son-in-Law John Cookes and his Heirs, on the Body of Rebecca his then Wife begotten, or to be begotten, paying his Debts and Legacies. That the ſaid Thomas Brace died ſeized of the ſaid Lands; and after his Death John Cookes entered by Vertue of the ſaid Deviſe. That Samuel Brace the Defendant is Son and Heir of the ſaid Thomas Brace, and that the ſaid Samuel, after the Death of his Father, did likewiſe enter upon

theſe Lands, That John Cookes afterwards entered, and made a Leaſe to the Plaintiff for ſeven Years, by Vertue whereof he entered and was poſſeſſed until Samuel Brace ejected him; and ſo make a general Concluſion.

The ſingle Queſtion was, What Eſtate Thomas Brace took by this Feoffment?

It was argued, That he had a Fee-ſimple, for ſuch an Eſtate was expreſly limited to him; and if the Deed had gone no further, it muſt be an Eſtate in Fee, and no otherwiſe.

But that which makes the Doubt, are the Words which immediately follow, (viz.) And for Default of Iſſue of the Body of the ſaid Thomas Brace, then to the Grantor and his Heirs. It is true, theſe Words might create an Eſtate-Tail in a Will, and alter an expreſs Limitation made of the Eſtate before; and the Reaſon is, becauſe a Man in extremis eſt Inops Conſilii: But it is otherwiſe in a Feoffment, which is ſuppoſed to be made upon Deliberation, and with Advice of Counſel.

And therefore it was reſolved in the Caſe of Dutton and Engram, That where the Teſtator deviſed Lands to his Wife for Life, and after her Deceaſe to John his eldeſt Son and his Heirs, upon Condition that he did grant an yearly Rent to Stephen and his Heirs; and if John died without Heirs of his Body, then to Stephen and the Heirs of his Body. This was held to be an Eſtate-Tail in John, tho' it was objected, that he muſt have an Eſtate in Fee, otherwiſe he could not grant the Rent in Fee. 1 *Cro.* 427. 1 *Roll. Abr.* 842, 938.

Now this was in the Caſe of a Will: But there is a wide Difference between Conſtructions of Wills and Deeds, for the latter are always taken very ſtrictly againſt the Grantor, and therein the firſt Intention ſhall always take Place; for the Law will not allow any Implication which can or may be made upon a ſubſequent Clauſe in a Deed, to alter any expreſs Eſtate therein limited before.

As for Inſtance: It hath been ruled, That where a Copyholder in Fee ſurrendred to the Uſe of Frances and John Reeve, and the Survivor; and for want of Iſſue of the Body of *John*, lawfully to be begotten, then to remain over; with a Memorandum, That the Surrender was not to be in Force till after the Death of the Surrenderor. Now if this Memorandum ſhould be allowed to be good, it would have made the whole Surrender void, becauſe it had been to commence at a Day to come; therefore it was held, That the Surrender being perfect in the Beginning, ſhall not be avoided by this ſubſequent Clauſe, but that John ſhould have an Eſtate for Life only, which ſhould not be enlarged by Implication by a ſubſequent Clauſe, either in a *Cro. Car.* 367. 2 *Roll. Abr.* 61. *Jones* 342.

Surrender

Surrender or Conveyance, where the Party might have Counsel to direct him.

1 *Inst.* 21. a. *Hob.* 172. It is true, my Lord Coke in his Comment upon Littleton, tells us, That if Lands are given to B. and his Heirs, Habendum to him and his Heirs if he hath Heirs of his Body; and if he die without Heirs of his Body, that the Land shall revert to the Donor. This is an Estate-Tail, for the Habendum shall be construed upon the whole Deed to be a Declaration, what Heirs were meant in the Premisses.

But this was all in one Sentence, and for that Reason the Estate in Fee was never made perfect and absolute: It is all but one Limitation, neither did it stand with any Implication, as in the Case at Bar; and therefore it can be no Authority to prove that to be an Estate-Tail.

19 *H.* 6. 74 b. *Plowd.* 541. Neither is the Year-Book, 19 H. 6. an Authority to this Purpose; where it is held, That if a Feoffment is made to a Man and his Heirs, and if it should happen that he die without Heirs of his Body, the Remainder over, that the Law will intend it to be an Estate-Tail. It is true, the Book is so, but it doth not appear that it was the Judgment of the Court, but only asserted by Counsel arguendo.

But in the principal Case, the Estate was once made absolute; which being done, the Grantor had executed his Power, and could never make any further Limitation, especially it being in the Case of a Deed.

Econtra.

But on the other Side it was said, That this is not an entire Sentence, but it is complicated with the whole Clause.

That there are many Forms of Words to create an Estate-Tail; and though it is generally true, that the Words Heirs of the Body are requisite in a Gift in Tail, yet general Words which are equivalent will create the like Estate. As for Instance, Lands are given to a Man & Hæredibus de Carne sua; for the Makers of the Statute de Donis, &c. did not intend to enumerate all the Forms of Estates-Tail.

1 *Inst.* 20. b. 13 *Edw.* viz. *W.* 2. *c.* 1.

It is very true, such Estates must be limited by express Words, and it is sufficient if by Words which are of the same Import and Signification; therefore Littleton tells us, what an Estate-Tail is, but doth not shew what Words are necessary to create such an Estate.

Sect. 14. Now the subsequent Words in this Case do certainly make an Estate-Tail in the Feoffee, for they shew what Issue was intended to inherit, viz. Issue of the Body of the Feoffee; and this

this will be ſufficient to abridge the precedent Eſtate in Fee; and if theſe Words ſhould not be taken in this Senſe, then they are vain, and to no Purpoſe.

Thus my Lord Rolle in abridging 27 Aſſiſar', tells us, If Lands are given to a Man and his Heirs, Habendum to him and his Heirs, if he ſhall have any Heirs de Carne ſua, and if not, that it ſhall revert to the Donor; though the firſt Words import a Fee, yet the Whole make an Eſtate-Tail. 27 *Aſſiſ. Placito* 15. 1 *Roll. Abr.* 838.

Agreeable to the Caſe at Bar is that of Walts and Waſtfeild, where Lands were given to a Man and his Heirs; and if it happened that he died without Heirs of his Body, Remainder over: This is an Eſtate-Tail, for the Limitation of the Remainder over ſhews what Heirs were intended. 1 *Roll. Abr.* 839.

But Beak's Caſe is in Point; that was in a Conveyance by way of Feoffment, as this is, (viz.) To the firſt Son who ſhall have Iſſue, and to his Heirs; and for Default of ſuch Iſſue, the Remainder over. This was held an Eſtate-Tail. *Lit. Rep.* 344.

Curia. The Intention of the Feoffor is plain, That an Eſtate in Fee ſhould not paſs to his Son, for the ſubſequent Words ſhew, that he intended no abſolute Eſtate ſhould veſt in him; it is no more than if a Gift had been made to a Man and his Heirs, (viz.) to the Heirs of his Body. So Judgment given for the Defendant.

Breedon *verſus* Gill, *qui tam, &c.*

2 *Salk.* 555.

Anglia ſſ. MEmoran. quod die Martis in Craſtino Animarum iſto eodem Termino coram Domino Rege apud Weſtm. ven. hic in Curia Rob'tus Breedon in propria Perſona ſua & dat. Curiæ hic intelligi & informari quod cum per leges & ſtatuta hujus regni Angliæ quilibet exitus junct. in aliqua cauſa dependen. in aliqua Curia Regis infra hoc regn. coram aliquo Judice vel aliquibus Judicibus per Teſtimon. teſtium viva voce in hujuſmodi Curia producen. ac non per lectionem notarum ſive minutar. in ſcriptis continen. teſtimonium alicujus teſtis vel aliquorum teſtium in eadem ſive aliqua al. Curia ante tempus triacon. talis exitus per aliquem clericum alicujus Curiæ capt. triari & terminari debent. Cumque quædam informatio nuper ſcil't decimo Octavo die Januarii Anno Regni dicti Domini Regis nunc Septimo ſecundum formam ſtatuti in hujuſmodi caſu edit. & proviſ. exhibita fuit apud London. in Parochia coram Capitali Commiſſionar. & gubernatore reventionum dicti

Domini Regis de le Exciſe ſecundum formam ſtatuti in hujuſmodi caſu nuper editi & Proviſi appunctuat. per quendam Thomam Gill gen. qui tam pro Domino Rege quam pro ſeipſo & pauperibus Parochiæ Sancti Martini in campis in Com. Mid. ſequitur verſus eundem Robertum Breedon oſtenden. quod dictus Rob'tus Breedon communis pandoxator inhabitan. & cuſtodien. Commune cerviſiar. [Anglice a Common Brewhouſe] pro pandoxan. cerviſiam lupulat. & cerviſiam illupulat. infra Limites & Juriſdictiones general. Officii de le Exciſe ſituat. in Broadſtreet, London, videlicet, in Parochia Sancti Martini in Campis præd. abſque prius dand. notitiam deinde apud dictum Officium de le Exciſe ſive Commiſſionariis aut gubernatoribus præd. aut aliquibus eorum infra Limites & Juriſdictiones ejuſdem in & circa 16 diem Decembris tunc ult. præterit utebatur [Anglice did make uſe of] & Cuſtodiebat privatum & concelatum Repoſitorium [Anglice a private and concealed Stone-houſe] ſive Romeam [Anglice Room] pro locan. [Anglice laying] cerviſiam Lupulat. [Anglice Beer] & cerviſiam illupulat. [Anglice Ale] aut liquorem cerviſiæ incoctum [Anglice Worts] in Teſtis [Anglice Casks] eodem non exiſten. tal. qual. fuit aperte cognit. detect. [Anglice diſcovered] ſive uſum fuit [Anglice made uſe of] in communi uſual. Cerviſiano ſuo [Anglice in his Brewhouſe] ad dampnum & præjudicium dicti Dom. Regis in reventione ſua de le Exciſe quod fuit contra formam ſtatuti in hujuſmodi caſu edit. & proviſ. atque igitur Judicium dictor. Commiſſionar. & gubernator. per informationem il. petebat prout in & per Leges Exciſæ deviſebatur & appunctuabatur ad quam quidem informationem coram præd. Commiſſionar. & gubernatoribus dictus Robertus Breedon poſtea ſcilicet Tertio die Martii Anno Regni dicti Domini Regis nunc Octavo ibidem comperuit & Placitavit quod ipſe non fuit Culpabilis de offenſa in dicta informatione content. & exit. ſuperinde ibid. junct. fuit taliterque ſuperinde coram dictis Commiſſionar. & gubernatoribus revention. dicti Dom. Regis de le Exciſe proceſſum fuit quod poſtea ſcil't eodem Tertio die Martii Anno Octavo ſupradicto ibidem præd. Commiſſionar. ac Gubernator. adjudicaverunt eundem Robertum fore Culpabil. de Præmiſſis ei par information. præd. ſuperius object. a quo quidem Judicio & determinatione ac pro relevio haben. in præmiſſis præd. Robertus Breedon poſtea ſcilicet 24° die Aprilis Anno Regni dicti Domini Regis nunc Octavo ſecundum formam ſtatuti in hujuſmodi caſu nuper edit. & proviſ. appellavit ad Comiſſionar. de le Appeales per leges & ſtatuta hujus Regni Angliæ in hujuſmodi caſu appunctuat. & præd. Thomas Gill qui tam pro Domino Rege quam pro ſeipſo & pauperibus Parochiæ Sancti Martini in Campis præd.

30 die Octobris Anno 8° ſupradicto apud Weſtm. in Com. Mid. coram Bodington Lock & Challoner Armigeris Comiſſionar. de le Appeales præd. debito modo ad hoc ſecundum formam ſtatuti in huſmodi caſu edit. & proviſ. appunctuat. ad proban. præd. Robertum Culpabilem de Præmiſſis in præd. informatione ſpecificat. in evidentiis obtulit quaſdam Notas [Anglice Notes] & Minutas [Anglice Minutes] Teſtimonii [Anglice of the Evidence] per Thomam Everard, Johannem Booth, & Henricum Caſeburt tunc & adhuc in plena vita exiſten. & reſiden. apud Civitat. London præd. teſtes coram præd. capituli Comiſſionar. & Gubernatoribus Revention. ſuper triationem præd. exitus coram iis dat. tunc per quendam Edwardum Noel Ar. Clericum præd. Capital. Comiſſionat. abſque aliqua legali authoritate in ſcriptis capt. Ac licet idem Robertus Breedon adtunc & ibidem præd. Comiſſionar. de le Appeales allegavit & objecit quod præd. Notæ per leges in evidentiis perlegi non debent ac petiit quod præd. Thomas Everard, Johannes Booth, & Henricus Caſeburt tunc & adhuc ut præfertur in plena vita exiſten. ſuper ſacra. ſua coram iiſdem Comiſſionar. de le Appeales adtunc adjudicaver. quod dictæ Notæ [Anglice Notes] ſive Minutæ [Anglice Minutes] ſic ut præfertur per eundem Edwardum Noell abſque aliqua legali authoritate capt. lect. forent. in evidentiis contra leges & ſtatut. hujus regni Angliæ ac præd. Thomas Gill judicium ſic ut præfertur per Capital. Comiſſionar. & Gubernator. revention. dicti Domini Regis de le Exciſe dat. ſuper evidentiam præd. totis ſuis viribus procurare confirmari conatus & indies Machinatus eſt in dicti Domini Regis nunc contemptum & ipſius Roberti Breedon damn. præjudicium & gravamen manifeſtum & contra legem & conſ. hujus Regni Angliæ & hoc parat. eſt verificare unde idem Robertus Breedon Curiæ dicti Dom. Regis de prohibitione præfat. Commiſſionar. de le Appeales in hac parte dirigenda ad prohiben. ipſos ne ipſi admittant notas præd. in Evidentiis in cauſa prædicta.

Breedon *verſus* Gill, *qui tam, &c.*

S. C. 2 *Salk.* 555.

By a Statute made Anno 12 Car. 2. cap. 23. Certaim Impoſitions are given to the King upon Beer and Ale, and other Liquors, for the encreaſing his Majeſty's Revenue; and the Forfeitures and Offences within that Act, which are committed within the Limits of the Chief Office of Exciſe in *London*, are to be determined by the Commiſſioners and Governors of Exciſe appointed by

by the King, or the major Part of them; or in caſe of an Appeal, then by the Commiſſioners of Appeal, for regulating that Duty.

15 *Car.* 2. *cap.* 11. *Anno* 15 *Car.* 2. An additional Act was made for the better collecting the ſaid Duty, and preventing the Abuſes therein; by which it was enacted, That no common Brewer ſhall ſet up, or alter, any brewing Veſſels, without Notice thereof given to the Office of Exciſe, or ſhall uſe or keep any private or concealed Storehouſe, Cellar, or other Place for the laying any Beer, Ale, or Worts in Casks, other than which be uſed in his Common Brewhouſe, and which are openly diſcovered or known, upon Pain to forfeit 50 *l.* for every Tun, Fat, Back, Copper and Cooler, ſet up and made uſe of without ſuch Notice given as aforeſaid.

Note, The Appellant is firſt to lay down the ſingle Duty of Exciſe in the Hands of the Commiſſioners, and to give Security to the Commiſſioners of Appeals for the Fine and Forfeiture which was adjudged againſt him, if the Judgment ſhould be affirmed upon the Appeal, and likewiſe to pay double Coſts; but if reverſed, then the Informer is to pay double Coſts.

Vide Show. 158, 172. 1 *Sid.* 65, 332. 6 *Mod.* 252. *Fareſt.* 137, 148.

The Plaintiff Breedon ſuggeſts for a Prohibition, that by the Laws of England, when an Iſſue is joined between the Parties, that it ought to be tried by the Evidence of Witneſſes viva voce, and not by Notes or Minutes of their Teſtimony. That an Information was exhibited againſt him before the Commiſſioners of the Duty of Exciſe, ſetting forth, That he was a common Brewer, and did keep a private Storehouſe without acquainting the ſaid Commiſſioners therewith; that he was found guilty, and that he appealed from their Sentence to the Commiſſioners of Appeals, before whom the Informer did produce, as Evidence, the Minutes taken before the Commiſſioners of Exciſe, and that the Witneſſes who gave Evidence there were ſtill alive; which Minutes were allowed as Evidence by the Commiſſioners of Appeals, &c. And now the Queſtion was, Whether a Prohibition ſhould be granted, directed to them not to admit ſuch Evidence?

Thoſe who argued for the Prohibition inſiſted, That ſuch Evidence before the Commiſſioners of Appeals was irregular, and that it ought not to be allowed in any Court where the Party may be examined viva voce.

That the Words of the Statute are penned, as if on purpoſe to prevent ſuch Proceedings; for after the Appeal is given to the Party grieved, and Authority to the Commiſſioners of Appeals to determine the ſame, the Statute requires them to ſummon

mon the Offender, and upon his Appearance or Contempt to examine the Fact, and upon Proof made, either by Confession of the Party, or by the Oath of one or more Witnesses (which Oath two of them have Power to administer) to give Sentence, and to issue out Warrants to levy the Forfeitures, &c. *Vide Nelf. Lutw.* 205, 206.

So that the Statute having provided in what Method the Commissioners of Appeals shall proceed, and having given them Power to administer an Oath to the Witnesses, it is plain that Depositions taken before the Commissioners of Excise cannot be read as Evidence before them.

Besides, the Reason of the Thing speaks, that such Depositions cannot be given in Evidence there, because the Statute hath not appointed any Officer to take such Minutes, neither is their Clerk upon his Oath; and the Party can have no Remedy against him if he takes such Minutes wrong, nor can he compel him to take them right; he cannot be compelled to put them in Writing, what is done is to help his own Memory, and never signed by the Witnesses till of late.

This is a new Offence created by the Statute, and a new Penalty imposed, which must have been determined in the Courts of Common Law, if the Law-makers had not shewed how the Proceedings should be, and what Proof should be made, (viz.) a voluntary Confession, or Oath of one or more Witnesses, which the Commissioners of Appeals have Power to administer. Now it would have been to very little Purpose to give them that Power, if they might as well admit any former Depositions to be read in Evidence, which indeed can be no Evidence before the Commissioners of Excise themselves, and much less before the Commissioners of Appeals; for they are to hear the Cause originally, without any Regard to what hath been done by the Commissioners of Excise.

The Commissioners of Appeals are directed to proceed in a different Manner from the Common Law, by which Law all Examinations of Fact are to be made by Witnesses and a Jury. It is true, a Jury is not required in this Case, but Witnesses are still necessary to prove the Fact, and that upon Oath viva voce, and the rather because the Party may have Liberty to cross-examine them.

In Attaints, the Witnesses are examined upon Oath de novo, though no other can be produced but such who gave Evidence in the original Cause.

So here the Witnesses are examined by the Commissioners of Excise but on one Side, and Judgment is given by Default; therefore the Party must have a Right to have the Witnesses ex-

amined de novo upon the Appeal, especially since the Cause is now before another Jurisdiction, which was created for the Benefit of the Party, that he might have Justice done.

Besides, where-ever an Act of Parliament gives an Appeal, the Fact as well as the Law is always examined upon the Appeal. As for Instance, in the Case of Bastardy, where two Justices have Power by the Statute 18 Eliz. to make an Order to charge the Parents for the Maintenance of the Bastard, from which Order they may appeal to the Sessions, and there it is the constant Practice to examine the Fact again, and not to rely upon the Examination taken before the two Justices.

18 *Eliz. cap.* 3.

It cannot be objected, that Depositions taken in inferior Courts, are transmitted both to the Delegates and to the Chancery, and read and allowed there without re-examining the Witnesses; for this Case is not like the Proceedings in those Courts where such Depositions may be read as Evidence, because the Chancery is a Court by Prescription and ancient Usage, and there are Commissioners on both Sides to see Justice done; but a constant Usage cannot be in this Case, for it is a new created Jurisdiction.

The Statute 42 Eliz. gives Authority to two Justices of Peace to determine the Settlement of a poor Man likely to be chargeable to a Parish; but there is an Appeal given to the Quarter-Sessions, but it was never known that the Sessions was governed by any Notes taken by the Clerks of the two Justices who made the original Order.

Post, 308, 309.

The Commissioners of Bankrupts are appointed by a new Law, but if Bankrupcy or not should be the Question at a Trial at Law, the Depositions taken before such Commissioners shall not be read as Evidence, but the Witnesses shall be examined again viva voce.

2. The next Question will be, Whether this Court will now interpose, since by the Statute the Judgment of the Commissioners of Appeals is to be final?

As to that Matter, the Grievance of the Plaintiff begins at this Court of Appeals, who have proceeded in another Method than what is directed by the Act; and therefore the Remedy is proper in this Court, who are not desired to determine the Cause, but only to interpose where another Court useth any extravagant Method in proceeding contrary to their Power.

For this Court prohibits the Courts of Admiralty, and the Eccleſiaſtical Courts, even in ſuch Caſes where they have an original Juriſdiction, if they either deny or delay Juſtice. *F. N. B.* 41, 42. 5 *Co.* 73. *Hob.* 247.

So in Suits for Tithes, if any Thing ariſes concerning the Bounds of Pariſhes, or a Modus decimandi, they are prohibited; ſo where they deny the Proof of a Thing by one Witneſs they will likewiſe be prohibited, though this Court cannot determine the original Cauſe; for it is an Oppreſſion which the Common Law will not allow. 1 *Show* 179, 353, 396.

So if the Spiritual Court ſhould refuſe to give a Copy of the Libel, this Court will grant a Prohibition; Quouſque, &c.

So if a Juſtice of Peace refuſe to ſign the Rate for the Poor, or if a Corporation will not chuſe Officers, it is uſual for B. R. to grant a Mandamus, for this is for the Preſervation of Order and Government; and ſuch Proceedings are not to take any Thing from a proper Juriſdiction, but to hinder them from proceeding irregularly. *Yelv.* 93. *Cro. Car.* 333. *Vide* 2 *Salk.* 428, 435. *Ante* 257.

Now though the Statute doth ſay, That the Judgment of the Commiſſioners of Appeals ſhall be final; and though the Commiſſioners of Exciſe had a Juriſdiction of the ſubject Matter, yet if they err in their Proceeding, this Court will take Notice of the whole Fact to do Juſtice to the Party injured.

As if the Commiſſioners of Exciſe ſhould examine Witneſſes, but not upon Oath, and give Sentence which is confirmed upon Appeal; this Court would reverſe that Sentence, though the Statute is, That the Judgment of the Commiſſioners of Appeals ſhall be final.

Econtra.

Thoſe who argued on the other Side ſaid, That where a Juriſdiction is created by Act of Parliament which gives an Appeal, that muſt be the laſt Reſort; and in ſuch Caſe this Court may command them to execute their Power, but cannot reform their Judgment.

This Statute gives the Commiſſioners of Appeals Power to examine Witneſſes, but leaves the Method of ſuch Examination to themſelves.

Now the Nature of an Appeal is, That the Court, from whoſe Sentence it is brought, hath done Injuſtice to the Party, and therefore it is very reaſonable that the Superior Court ſhould know upon what Grounds they proceeded below; which cannot be done more effectually, than by reading theſe very Depoſitions which were taken there.

The

The Caſe now before the Court is not by Reaſon of any Complaint that ſome of the Witneſſes were not examined, or that the Commiſſioners of Exciſe refuſed to take their Depoſitions, and examined only one Side, for in ſuch Caſes it had been proper to make Application to this Court; but it is to re-examine the ſame Witneſſes; and to what Purpoſe ſhould that be, unleſs to deny what they have already ſworn, which would be to introduce Perjury.

Beſides, it would tend to make the Court of Appeals an original Juriſdiction, which is contrary to the very Nature and Intent of Appeals; for thoſe Commiſſioners are not to admit any new Evidence, they muſt take the Caſe as it was before the Commiſſioners of Exciſe, and judge whether they have done Right or not.

To ſay, that Orders and Decrees made by Commiſſioners of charitable Uſes, upon Depoſitions taken before them, ſhall not be confirmed by the Court of Chancery, upon reading thoſe Depoſitions, is not applicable to this Caſe. It is true, the Matter muſt be re-examined there, becauſe the Statute gives that Court Juriſdiction in thoſe Caſes; for it requires ſuch Orders and Decrees to be certified into that Court, under the Seals of the Commiſſioners, within ſuch Times as ſhall be limited in their Commiſſions, and then the Chancellor is to take ſuch Order for the due Execution thereof as he ſhall think fit.

Neither can the Practice of the Juſtices of Peace in the Seſſions upon Appeals rule this Caſe, for they have a diſcretionary Power to examine the Witneſſes again viva voce, or take ſuch Examinations as have been made by thoſe of the inferior Juriſdictions.

Nor is this Caſe like thoſe where Prohibitions have been granted to Eccleſiaſtical Courts, becauſe by bringing the Appeal, you admit the Juriſdiction of thoſe Courts.

As for thoſe Prohibitions to Spiritual Courts, where they deny the Proof of any Payment by one Witneſs, it ſeems to be very unreaſonable when they have an original Juriſdiction of the Cauſe, that they ſhould not proceed in their own Methods.

It is true, the Statute doth empower them to examine Witneſſes upon Oath, but doth not ſay, whether it ſhall be in Writing or not. Now if the Commiſſioners of Exciſe cauſe ſuch Depoſitions to be written which have been taken before them, and tranſmit them to the Commiſſioners of Appeals, that is an Examination upon Oath.

It is much better for the Party himself, that the Depositions should be in Writing; for if a Witness should die before he can bring an Appeal, he may have the Benefit of such Depositions to be read in Evidence for him, as well as against him.

Lastly, The Proceedings upon the Statutes against Bankrupts cannot be objected to this Purpose, because such Proceedings in Inferior Courts are not conclusive; but when Actions are brought in this Court, they must be determined according to the constant Method used there.

Neither doth B. R. send mandatory Writs to others to direct them what Judgment to give, but to command them to proceed according to Justice. Now the Commissioners of Appeals have proceeded, and gave Judgment in this Case according to such Evidence as was given below, and it is in their Power whether they will have the Oath in Writing or not; but it hath been the constant Practice to have it in Writing.

It must be agreed, that this Act hath settled no Course of Proceeding in this Case, it hath only excluded Trials by Jury; and where no such Trials are, the Fact is always determined by Depositions in Writing: As in Chancery, there are Cases of the highest Nature try'd by the Oaths of Witnesses, upon written Depositions taken before an Examiner in a Closet.

Curia. The Common Law doth not require, that Witnesses shall be examined viva voce, but where the Trial is by Jury.

These Depositions were taken in Court, where the Evidence is enter'd, and when that is done, the Party hath nothing to do, but to appeal from an Injury, supposed to be done by an Inferior Court; and it is very fair to transmit that Evidence which was given before them, and upon which they gave their Judgment. *Vide ante* 9. 1 *Salk.* 286, 275. 2 *Salk.* 555.

It is true, they would have the Commissioners of Appeals try the Cause de novo, which is contrary to the very Nature of an Appeal. This Statute directs, That the Commissioners shall proceed by the Oath of Witnesses, or the Confession of the Party: And the last Resort is in the Commissioners of Appeals, if they do not meddle with what is out of their Jurisdiction; which is not the Complaint now, but only of the Course and Method of the Proceedings.

The Case of Shotter and Friend, which was lately adjudged in B. R. comes near this Case; for there a Prohibition was granted to the Consistory Court of the Bishop of Winton, after Sentence, because they refused to allow the Proof of a Payment of a Legacy by one Witness. 1 *Show.* 172.

But a Prohibition was never yet granted to any Eccleſiaſtical Court for proceeding according to ſuch Evidence as is allowed by the Common Law; for which Reaſons nothing was done at this Time: But after, upon farther Conſideration, a Prohibition was granted; Quoad, &c.

Crumwell *verſus* Grunſdale.

Midd. ſſ. MEmoran. quod alias ſcilicet Termino Sancti Mich'is ultimo præterito coram Domino Rege nunc & nuper Domina Regina Maria apud Weſtm. venit Georgius Crumwell per Samuelem Aldridge Attorn. ſuum & protulit hic in Curia tunc ibidem quandam Billam ſuam verſus Johannem Grunſdale Adminiſtratorem omnium & ſingulorum Bonor. & Catallor. Jur. & Creditor. quæ fuer. Rogeri Urlwyn nuper de Iver alias Ever in Com. Bucks Yeoman defunct. alias dict. Roger Urlin, of Iver alias Ever in the County of Buckingham, Yeoman, qui obiit inteſtat. ut dicitur in Cuſtodia Mar', &c. de Placito debiti & ſunt pleg. de proſ. ſcilicet Johannes Doe & Rich'us Roe quæ quidem Billa ſequitur in hæc verba, ſſ. Midd. ſſ. Georgius Crumwell queritur de Johanne Grunſdale Adminiſtrator. omnium & ſingulor. Bonor. & Catallor. Jur. & creditor. quæ fuerunt Rogeri Urlwyn nuper de Iver alias Ever in Com. Bucks, Yeoman, defunct. alias dict. Roger Urlwyn, of Iver alias Ever in the County of Buckingham, Yeoman, qui obiit inteſtat. ut dicitur in Cuſtodia Mar. Mareſc. Domini Regis & Dom. Reginæ coram ipſis Rege & Reg. exiſten. de Placito quod reddat ei quadraginta libras legalis Monetæ Angliæ quas ei injuſte detinet pro eo videlicet quod cum præd. Rogerus in vitâ ſua ſcilicet primo die Julii Anno Domini Milleſimo Sexcenteſimo Septuageſimo quarto apud Paroch. Sancti Clementis Dacorum in Com. Midd. præd. per quoddam ſcriptum ſuum obligatorium Sigillo ipſius Rogeri in vita ſua Sigillat. Curiæque dicti Domini Regis & Dominæ Reginæ nunc hic oſtenſ. Cujus dat. eſt eiſdem die & Anno ſupradict. cognovit ſe Teneri & firmiter obligari præfat. Georgio in præd. quadraginta libris per hæc verba in Quadrants libris ſolven. eidem Georgio cum inde requiſit. eſſet præd. tamen Rogerus in vita ſua & præd. Johannes poſt ipſius Rogeri mortem licet ſæpius requiſit. &c. præd. quadragint. libras eidem Georgio nondum ſolverunt nec eorum alter ſolvit ſed illas ei præd. Rogerus in vita ſua & præd. Johannes poſt ipſius Rogeri mortem hucuſque ſolvere omnino contradixerunt & præd. Johannes adhuc contradicit & injuſte detinet ad dampnum ipſius Georgii

viginti librarum & inde producit ſectam, &c.

Et modo ad hunc diem ſcil't diem Mercurii prox. poſt Octab. S. Hillarii iſto eodem Termino uſque quem diem præd. Johannes habuit licent. ad Billam præd. interloquen. & tunc ad reſponden', &c. ante quem diem præd. Dom. Regina Maria diem ſuum clauſit extremum coram dicto Dom. Rege apud Weſtm. venit tam præd. Georgius per Attorn. ſuum præd. quam præd. Johannes per Robertum Stone Attorn. ſuum & idem Johannes defen. vim & injuriam quando, &c. & dicit quod ipſe de debito præd. virtute ſcripti obligatorii præd. onerari non debet quia dicit quod ſcriptum obligatorium præd. non eſt factum præd. Rogeri Urlwyn & de hoc ponit ſe ſuper patriam & præd. Georgius inde ſimiliter, &c. Ideo venit inde jurat. coram Domino Rege apud Weſtm. die Mercurii prox. poſt Quinden. Paſchæ & qui nec, &c. ad recogn', &c. quia tam, &c. idem dies datus eſt partibus præd. ibidem, &c. poſtea continuatur inde Proceſſus inter partes præd. de Placito præd. per Jur. poſit. inde inter eas in reſpectu coram Dom. Rege apud Weſtm. uſque diem Veneris in Craſtino Aſcenſionis Dom. niſi dilect. & fidelis Domini Regis Johannes Holt miles Capital. Juſtitiar. dict. Domini Regis ad Placita in Curia ipſius Domini Regis coram ipſo Rege tenen. aſſign. prius die Mercurii prox. poſt quinque Septimanas Paſchæ apud Weſtm. in Magnâ Aula Placitor. ibidem per formam ſtatuti, &c. ven. pro defectu Jur', &c. ad quem quidem diem coram quo, &c. miſit hic recordum ſuum coram eo habit. in hæc verba, ſſ. poſtea die & loco infra content. coram Johanne Holt mil. Capital. Juſtitiar. Domini Regis ad Placita in Curia ipſius Domini Regis coram ipſo Rege tenen. aſſign. aſſociat. ſibi Johanne Ince generoſo per formam ſtatuti, &c. ven. infra nominat. Georgius Crumwell, per Attorn. ſuum infracontent. & infraſcript. Johannes Grunſdale licet ſolempniter exact. non ven. ſed defalt. fecit ideo Jur. unde infra fit mentio capiatur verſus eum per defalt. & Jur. Jurat. ill. exact. quidam eorum videl't Jacobus Partheridge de Paroch. Sancti Egidii in Campis, &c. venerunt & in jurata illa Jur. exiſtunt & quia reſid. juratæ ejuſdem Jur. non comperuerunt Ideo alii de circumſtantibus præd. Vic. Com. Midd. infraſcript. ad hoc elect. ad requiſitionem præd. Georgii Crumwell ac per Mandatum Capital. Juſtitiarii præd. de novo apponuntur quorum nomina Panello infraſcript. affilantur ſecundum formam ſtatuti in hujuſmodi caſu nuper edit. & proviſ. ac Jur. ſic de novo appo'it videlicet Johannes Caine & Timotheus Thornbury exact. ſimiliter venerunt qui ad veritatem de infracontent. ſimul cum al. Jur. præd. prius impanellat. & jurat. dicen. elect. triat. & jurat. dicunt ſuper Sacramentum ſuum quod quidam Rogerus Urlwyn inteſtat.

inteſtat. præd. Johannis Grunſdale in Vita ſua ſimul cum quadam Anna Urlwyn Ux. præfat. Rogeri ſignaverunt & ſigillaverunt ac uterque eorum ſignavit & ſigillavit & ut fact. ſuum deliberaverunt & uterque eorum deliberavit præfato Georgio Crumwell quoddam ſcriptum in forma ſcripti obligatorii quod quidem ſcriptum ſequitur in hæc verba.

ſſ. Noverint univerſi per præſentes nos Rogerum Urlwyn, and Anne my Wife, of Iver alias Ever, in the County of Buckingham, Yeoman, Teneri & firmiter obligari Geo. Crumwell in Comitat. præmiſ. de viginti in quadrants, Libris bonæ & legalis Monetæ Angliæ ſolven. eidem Geo. Crumwell aut ſuo certo Attorn. Executoribus, Adminiſtratoribus vel Aſſign. ſuis, ad quam quidem ſolutionem bene & fideliter facien. obligo me Hæredes, Executores & Adminiſtratores meos firmiter per Præſentes: Sigillo meo ſigillat. dat. primo die Julii, Anno Regni Regis Caroli Secundi Milleſimo ſexcenteſimo ſeptuageſimo quarto.

The Condition of this Obligation is ſuch, That if the above-named Roger Urlwyn and my Wife, his Heirs, Executors, Adminiſtrators, or Aſſigns, ſhall pay, or cauſe to be paid to the above-ſaid George Crumwell, his Heirs, Executors, Adminiſtrators, or Aſſigns, the Sum of twenty Pounds and twelve Shillings, of good and lawful Money of England, in and upon the twenty-fifth of December next enſuing the Date hereof, at or in the Dwelling-houſe of the above-ſaid George Crumwell in Sunbury, that then this preſent Obligation ſhall be void, and of no Effect, or elſe to remain in full Force and Vertue.

Roger Urlwyn.
The Mark X *of*
Anne Urlwyn.

Prout per idem ſcriptum liquet & apparet ſed utrum ſuper totam materiam præd. per Jur. præd. modo & forma compert. ſcriptum obligator. præd. in Narratione infraſcript. ſpecificat. ſit factum præd. Rogeri Urlwyn necne iidem Juratores penitus ignorant & inde petunt adviſamentum & conſiderationem Curiæ hic & ſi ſuper totam materiam per ipſos juratores in forma præd. compert. videbitur Curiæ hic quod ſcriptum præd. in Narratione infraſcript. ſpecificat. ſit factum Rogeri Urlwyn inteſtati tunc iidem Juratores dicunt ſuper ſacr'um ſuum quod præd. ſcriptum eſt factum præd. Rogeri Urlwyn inteſtat. & tunc aſſidunt damna ipſius Georgii Crumwell occaſione detentionis debiti infraſcript. ultr miſ. & Cuſtagia ſua per ipſum circa ſectam ſuam in hac parte appo'it ad duodecim denar. & pro miſ. & Cuſtagiis il. ad viginti ſolid. & ſi ſuper totam materiam præd. per ipſos juratores in forma præd. compert. videbitur Curiæ hic quod præd. ſcriptum non ſit factum præd. Rogeri Urlwyn inteſtati tunc

iidem Juratores dicunt ſuper ſacr'um ſuum quod ſcriptum præd. non eſt factum præd. Rogeri Urlwyn prout præd. Johannes Grunſdale interius placitando allegevit ſed quia Curia dicti Domini Regis nunc hic de judicio ſuo de & ſuper præmiſſis redden. nondum adviſatur Dies inde dat. eſt partibus præd. coram Domino Rege apud Weſtm. uſque Diem prox. poſt de judicio ſuo de & ſuper præmiſſis illis audien. eo quod Curia dicti Domini Regis nunc hic inde nondum, &c.

Crumwell *verſus* Grunſdale.

S. C. 2 *Salk.* 462.

DEbt upon a Bond for 40 l. brought againſt the Defendant as Executor of Roger Urlwyn. The Plaintiff declared, That Roger Urlwyn *alias* Urlin, 1674. did by a certain Writing obligatory ſealed by him, &c. become bound to the Plaintiff in 40 l. by theſe Words, (viz.) In Quadrants Libris. 2 *Jones.* 58.

Upon Non eſt Factum pleaded, the Jury found a Special Verdict, (viz.) They find that Roger Urlin did ſign, ſeal, and deliver to the Plaintiff a certain Writing following; Noverint, &c. nos Rogerum Urlin, &c. teneri & firmiter obligari Georgio Crumwell in Com. prædict. Mid. de viginti in quadrants libris, &c. dat. primo Die Julii Anno Regni Regis Caroli ſecundi, 1674. they find the Condition of the Obligation was for Payment of 20 l. 12 s. that it was ſigned with the Mark of Roger Urlwyn.

The Queſtion was, Whether the Bond found by the Jury will warrant that ſet forth in this Declaration?

Thoſe who argued for it inſiſted, 1. That this was a good Declaration, and a good Verdict. They agreed, That if the Condition had been collateral, there might have been ſome Difficulty to find out the Meaning of theſe Words in the Bond: But here the Bond and Condition make one intire Obligation, and the Viginti ſhall be rejected as Surpluſage; for it can have no Signification here, becauſe it is not according to the Condition.

If ſo, then Quadrants muſt be taken to be the Word to ſignify the Sum in which the Obligor intended to be bound, and then no Rule in Law will be broken; for though it is an inſenſible Word, yet the Bond is good.

As for Inſtance, a Man was bound in Seſſanta for Sexaginta Libris, and the Bond was held good; ſo if a Man is bound in * Septuaginta & quinquaginta Libris, this is good for 750 l. tho' the Jury did not find that the Obligor intended to be bound in ſuch a Sum. 2 *Roll. Abr.* 147. 2 *Cro.* 208. *idem.* *Hob.* 19. * *Hob.* 116. 2 *Roll. Abr.* 147.

2. But the ſecond and more difficult Point was concerning the Date of this Bond, which ſeemed impoſſible; for the Year of the Lord was applied to the Year of the King's Reign.

1 *Brownl.* 110. *Yelv.* 193. *Idem.* And as to that, there was a Caſe Anno 8 Jac. which was relied on for this Purpoſe, (viz.) The Bond was full of falſe Latin, and is tranſcribed by Juſtice Yelverton, who was Counſel for the Plaintiff; it was dated, Tres viginti Die Octobris, Anno Regni Reginæ Domini noſtri Jacobi, Dei Gratia Angliæ, Scotiæ, &c. de Scotiæ ſexto, de Anglia quadrageſimo ſecundo, 1608. and upon Demurrer the Plaintiff had Judgment; for in that Caſe the Parties to the Bond, and the Sum in which the Obligor was bound, was ſufficiently expreſſed; and though there was no ſuch Year as the 42d Year of that King's Reign over England, or the 6th of Scotland, that was not held material, becauſe a Man may ſuggeſt a Date where there is no Date at all, if the Deed is good; for the Defendant muſt anſwer that, and not the Date. *Noy.* 21.

20 *Ed.* 4. 1. 21 *Ed.* 4. 38. b. The Law was held to be ſo Anno 21 Ed. 4. for then an Action of Debt was brought on a Bond, in which the Plaintiff declared for ſo much Flemiſh Money, and ſhewed that the Bond was dated 8 Die Decembris Anno 78, without ſaying what Year of the Lord or of the King, when it ought to have been Anno 1478. This was held to be a void Date, and that the Plaintiff might declare of what Date he would ſince the Bond delivered, and ſay Primo deliberat. on ſuch a Day.

2 *Cro.* 136. 2 *Roll. Abr.* 706. *Style* 414. So where Debt was brought on a Bond, dated 15 Novembris 25 Eliz. and upon Non eſt Factum pleaded, the Jury found that the Bond was dated 15 Novembris Anno 23 Eliz. but not ſealed until 18 Novembris, 26 Eliz. and the Court was unanimouſly of Opinion, That the Verdict was well found for the Plaintiff; becauſe upon this general Iſſue it appeared to be the Defendant's Deed, tho' there was a Variance in the Date of the Bond it ſelf upon which the Plaintiff had declared.

2 *Rep.* 5. So it was held in Goddard's Caſe, that the Date was not any Part of the Subſtance of the Deed: That Caſe was thus, (viz.) Goddard, as Adminiſtrator, brought an Action of Debt upon a Bond againſt the Defendant, which was made to his Inteſtate, and dated 4 Aprilis 24 Eliz.

The Defendant pleaded, That the Inteſtate died before the Date of that Bond; and concluded his Plea, That the Writing Non eſt Factum, &c. The Jury found that the Defendant did deliver it as his Deed the 30th of July, in the Year before, at which Time the Inteſtate was living, and they found the Bond in hæc Verba, but that he died before the Date in April,

yet the Plaintiff had Judgment: For though in Pleading he cannot allege the Delivery before the Date, because he is eſtopped, (that is, he is concluded to ſet forth the Truth) yet that ſhall not conclude the Jury to find it.

Econtra.

It was argued on the other Side, 1. That Quadrants will not anſwer the Word Quadraginta; and that in all the Caſes where Bonds of this Nature have been adjudged good, the Words which denote either Tens or Hundreds are plain and clear.

As to the Caſe of Parry and Dale in my Lord Hobart, Fol. 119. he hath reported it different from all the Reporters of that Time; for it was, Noverint univerſi per præſentes nos, &c. teneri, &c. in quinquegintis Libris; this was adjudged againſt the Plaintiff in this Court, becauſe Quinquegintis was not a Latin Word: It is true, upon a Writ of Error brought in the Exchequer-Chamber, he tells us, That moſt of the Judges were of Opinion, that was a good Bond for 500l. but no Judgment was given upon the Writ of Error, the Cauſe being ended by Agreement: But all the other Reporters of that Caſe ſay, That the Word ended in Gentis, which always ſignifies an hundred Pounds. Juſtice Croke tells us, That it was in quemquegentis Libris. Juſtice Yelverton ſays, It was in quimquegent; And my Lord Rolle, in quinquegentis Libris: And yet Judgment was given for the Defendant, becauſe Quimque or Quemquegent was an inſenſible Word, by which a Man could not be bound. 2 *Cro.* 146. *Yelv.* 65. 2 *Roll. Abr.* 146.

So in Walter and Piggot's Caſe, the Septua for Septingentis Libris, had a plain Signification; for Septua is Part of a good Latin Word, as Septuaginta. *Cro. Eliz.* 417.

But Sexagint can never be taken for Sexcenta, for there is no ſuch Word, as it was held in the Caſe of Gery and Davis; and tho' Juſtice Croke hath reported it to be Sexagintis, yet Judgment was given for the Defendant. *Yelv.* 105. 2 *Roll. Abr.* 147.

It is true, if it had been Sexigint or Sexingint for Sexaginta, that is good, becauſe thoſe Words have all the ſame Intendment, and the Ginta is right; but Quadragent for Quadraginta is wrong, and ſo is Octigent for Octoginta. 2 *Cro.* 338. *Style* 241, 257. 2 *Roll. Abr.* 147.

Seſſanta inſtead of Sexaginta Libris has been held good, becauſe it was an Italian Bond, and not intended to be put into Latin. *Hob.* 19. 3 *Cro.* 208. *Hob.* 19.

So is Octogeſimo Libris a good Bond for 80l. for it hath the ſame Signification. 2 *Roll. Abr.* 147.

But

But the Word Quadrants in this Case is insensible, there is no such Latin Word, and so the Defendant is bound in no Sum at all; and if so, the Plaintiff cannot have Judgment upon this Declaration, and Verdict either as to the Sum, for that is not known; nor in what Year the Bond was made. And as to that,

2. The Variance between the Date of the Bond as found by the Jury, and the Date in the Bond on which the Plaintiff declared, is very material; for the Date in the Declaration is Part of the Description of the Bond it self; and by saying Cujus dat. est eisdem Die & Anno, the Plaintiff hath tied himself to that very Date, and therefore it is necessary that should be found.

It cannot be denied, that if he had declared on a Bond geren. dat. such a Day, and the Bond had been found to be of another Day, that had been void. Now this is to the same Effect, for there can be no Difference between geren. dat. and cujus dat. est, &c.

The Date of the Deed which the Plaintiff hath set forth in his Declaration, is the only Thing which can entitle him to an Action; and if the Date of the Bond found varies from that Date, then there is no such Bond as that upon which he had declared.

Cro. Eliz. 603. If a Man makes a Feoffment in Fee, dated 10 Septembris, and the Feoffee reciting, that a Feoffment was made to him 11 Septembris, gave Authority to another to receive Livery and Seisin for him, secundum formam Chartæ: This was held a void Feoffment, because the Warrant to receive Livery is by a Letter of Attorney, which gave him Power to take it, secundum formam Chartæ, dated 11 Septembris, when in Truth the Feoffment was made the Day before; so there being no Feoffment made on that Day, by Consequence he could not have any Warrant to receive Livery, secundum formam Chartæ, dated the 11th Day; therefore it was held void.

As to Goddard's Case, that cannot be urged as an Authority against the Defendant, because the Jury did find the Date of the Bond to be according as the Plaintiff had declared: For in Truth, the Bond was dated 4 Aprilis 24 Eliz. and the Plaintiff declared upon a Bond of that Date, and the Jury found it in hæc Verba, tho' the Delivery was before, (viz.) in the Life-time of the Plaintiff's Intestate; but here the Jury have found the Date of a Bond, which differs from that upon which the Plaintiff declared, so not like this Case.

In Dodſon and Key's Caſe, which was objected out of Yelverton on the other Side, tho' the Year of the King was miſtaken, as in this Caſe, yet the Year of the Lord 1608 was right; which was the true Reaſon that prevailed with Juſtice Croke to give Judgment for the Plaintiff. *Yelv.* 193.

In Lane and Plegdall's Caſe, reported in 2 Cro. 136. the Declaration was general; but in all theſe Caſes the Jury found it to be the Deed of the Defendant, tho' dated at another Time; but here they have not found it to be his Deed, but that he ſealed quoddam ſcriptum, and ſo leaves it to the Court to judge, whether it was the ſame Deed upon which the Plaintiff had declared; ſo that if there is any Variance between the finding of the Jury, and the Declaration of the Plaintiff, the Court cannot judge it to be the ſame Bond. *2 Cro.* 136.

Curia. The Court held the Date in this Caſe to be impoſſible, ſo it is a void Date. The Plaintiff hath declared upon a Bond cujus dat. eſt ſuch a Day, and the Jury find the Bond to be of an impoſſible Date; ſo that the Bond found by the Verdict cannot be the ſame upon which the Plaintiff had declared; and upon this Exception they inclined againſt the Plaintiff: But Adjournʼ.

Lyndſey *verſus Sir* Thomas Clerke.

S. C. 1 *Salk.* 54.

IN Ejectment there was a Verdict for the Plaintiff in B. R. and a Writ of Error brought in the Houſe of Peers: A Motion was afterwards made for the Direction of the Court, whether a Capiatur ſhall be awarded againſt the Defendant? Which is uſually done ex Officio, for a Fine to the King for a Breach of the Peace: But now by a late Statute it is enacted, That no *Capias pro fine* ſhall be proſecuted againſt the Defendant, either in Treſpaſs, Ejectment, Aſſault, or falſe Impriſonment: In lieu whereof, the Plaintiff is to pay the proper Officer upon ſigning the Judgment ſix Shillings and eight Pence, over and above the uſual Fees; ſo that now it will be Error to have a Capias awarded, ſince the Act prohibits its Execution by remitting the Fine: Therefore the Court was of Opinion, That the Capias ſhould be wholly omitted. *Vide* 3 *Lev.* 401, *&c.* 5 *& 6 Will.*

Blackwell *verſus* Eales.

IN Treſpaſs, Aſſault, and falſe Impriſonment, the Plaintiff declared, That the Defendant primo Die Februarii Anno Regni Domini noſtri Willielmi Tertii nunc Regis Angliæ, &c. octavo, Vi & Armis, &c.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and the Poſtea being ſtayed, the Queſtion was, Whether the Plaintiff ſhould have his Judgment? For the Declaration was of Eaſter-Term laſt, and he had declared of a Treſpaſs on the firſt Day of February 8 Will. which Time was not yet come.

It was argued for the Judgment, That an impoſſible Time is no Time at all, and that this Miſtake ſhall be helped by the Verdict; that the Plaintiff could never have had a Verdict, unleſs the Treſpaſs had been proved to have been done before the Bill filed, and that he could give nothing in Evidence after the Action brought.

2 *Cro.* 626. So where the Plaintiff declared, That the Defendant retained him in ſuch a Pariſh, quod aptaret & conficeret a Suit of Cloaths for him, and doth not ſhew the Day or Place; this was held good after a Verdict.

Econtra.

But on the other Side it was ſaid, That the Plaintiff could not have Judgment in this Caſe: For as it is certainly true, that he ſhould never recover where the Cauſe of Action appears to be after the Suit commenced; ſo the Reaſon is the ſame, where the Day is not come at the Time of the Judgment given, as where the Cauſe appears to be after the Action commenced; and the Reaſon why it is erroneous, is becauſe the Plaintiff had ſued, when it appears he had no Cauſe for ſuch Suit.

When the Defendant had pleaded Not guilty, he then denies the Charge in the Declaration, and it is impoſſible that the Jury ſhould find him guilty of a Fact which never was committed; therefore it muſt certainly be wrong to give a Judgment for that, which upon the Face of the Record appears to be impoſſible.

2 *Leon.* 75. *Moore* 188. The want of alledging a Place cannot be helped even after a Verdict, as in an Action on the Caſe, in Nature of a Conſpiracy brought againſt two, ſetting forth, That they were joint Merchants of a Stock of Wares, and did not ſhew where: The

Plaintiff had Judgment; but it was reverſed in the Exchequer-Chamber for that very Reaſon.

Now if want of alledging a Place is not helped after a Verdict, no Reaſon can be given why want of Time ſhould.

The Caſe of Hambleton and Veer is an expreſs Authority, that the Plaintiff cannot recover Damages for a Time to come after the Action brought; it was an Action on the Caſe, wherein the Plaintiff declared, That one Veer became his Apprentice on the 29th of September, Anno 16 Car. 2. and was to ſerve him nine Years. That he ſerved him five Years; and the Defendant on the laſt Day of October, 21 Car. 2. had procured the ſaid Apprentice to depart out of his Service, per quod the Plaintiff loſt the Profit of his Servant per totum reſiduum Termini præd. ventur'; and it was adjudged, That the Plaintiff could not recover Damages for ſo much of the Term which was to come. *2 Saund. 169. 1 Lev. 299. 2 Keb. 693, 697. 6 Mod.*

It is true, that too much Time was laid in that Declaration: And the Reaſon why the Plaintiff could not recover Damages, was, becauſe the Apprentice might return. But in this Caſe, the Jury could not have any Conſideration of a Time which was not come.

As to the Objection, That an impoſſible Time is no Time; and if ſo, the want of alledging a Time is helped after Verdict. That may be true, and yet not to this Purpoſe, becauſe here is a certain Time ſet forth in the Declaration, which will come.

Time and Place are ſuch material Circumſtances, that they require Certainty in a Declaration, and ſome Day muſt be laid before the Action brought, which is not done here; for to make this to be 8 Will. you muſt reject twenty Days, which will never be allowed.

Curia. There muſt be Evidence given of a Fact done before the Action brought, the Time is but a Circumſtance of a Thing done; for when by a Traverſe it is made Part of the Iſſue, ſuch Traverſe is never good. So the Plaintiff had Judgment.

Rex *verſus* Keat.

THE Defendant was indicted at the laſt Aſſizes, both at Common Law, and upon the Statute of Stabbing, for the Murder of one James Wells; which Indictment being tried before the Chief Juſtice, the Jury gave a Special Verdict to this Effect, (viz.) That before the ſaid Fact committed, (viz.) the 15th of June, 1696. the Defendant did retain the ſaid James Wells to ſerve *Vide Kelynge's* Reports, the Caſe of *Mawgridge, Ibid.*

ſerve him as a Gardiner, and being in a little Room near the Kitchin, did ſend to the ſaid Wells to deliver the Key of the Garden to the Defendant, which he refuſed to ſend. That one Henry Phillips, who was the Perſon ſent to demand the Key, returned and told the Defendant, that Wells refuſed to deliver it. That the Defendant immediately went into another Room and fetch'd his Sword, and came to the ſaid Wells, and expoſtulated with him about the Delivery of the Key: That the ſaid Wells told the Defendant, he might have it if he would; thereupon the ſaid Defendant ſtruck him on the Head with his Sword, and Wells having a Snead of a Sithe in his Hand, ſtruck at the Defendant; but the Force of the intended Blow was prevented by the Rack in the Kitchin in which the Sithe ſtuck: That afterwards the ſaid Wells thruſt at the Defendant ſeveral Times, and thereupon the Defendant killed him with the Sword. And whether this was Murder or not, was the Queſtion.

The Defendant being at Bar, deſired that Sir Bartholomew Shower, and Mr. Eyre, might be his Counſel, which was granted; and Mr. Cowper was aſſigned by the Court to be of Counſel for the King.

Then they moved that he might be bailed, being a Gentleman of Quality; which was denied by the Court, as it was in Buck-
Style. 467. ner's Caſe: The Chief Juſtice affirming, that the Court could not bail in Manſlaughter till after the Party had his Clergy allowed.

In Hillary-Term next, it was argued for the King, That this was Murder, and that for two Reaſons, though there was no expreſs Malice found:

1. Becauſe the Defendant was doing an unlawful Act when the Death of the Party did enſue.

2. The Deceaſed was killed without any Provocation. And in both theſe Caſes the Law doth imply Malice.

1. The Defendant was doing an unlawful Act, which was, in correcting his Servant with a Sword drawn, a very improper Inſtrument for that Purpoſe; and Death thereupon enſuing, the
3 *Inſt.* 51. *H. P. C.* 44. Law will imply Malice from the Nature and Manner of doing it, to make the Act Murder.

My Lord Coke mentions several Cases which have been adjudged Murder, where Death immediately follows the doing unlawful Acts; as in stealing Deer in a Park, and the Thief shooting at the Deer, and killing a Boy in a Bush; so the shooting at a Cock or Hen, or any other tame Thing in which one hath a Property, and a Man is killed: This is Murder, because the Act was unlawful. 3 *Inst.* 56, 57.

There could be no Malice in those Cases either against the Man or Boy, for the Defendants were not acquainted with them; but the Facts being unlawful, the Law couples the Event to the Causes, and so implies Malice to make it Murder.

Nay, my Lord Coke goes a little farther, for he tells us, That if Death did ensue an Act done with an ill Intent, though that Intent extends not to Death, and though the Criminal did not know the Party slain, yet 'tis Murder. And he gives an Instance of a Man throwing a Stone over a Wall amongst a Multitude of People, which he knew were coming from Church, with an Intention only to fright them, and one is killed; this is Murder: And this is applicable to the Case at Bar, for the Defendant might not intend to kill his Servant when he first corrected him with a Sword; but that being a very improper Instrument for Correction, doth shew that he had some ill Intent, and Death ensuing, 'tis Murder. 3 *Inst.* 57.

Agreeable to this was the Resolution formerly in B. R. in the Case of Wormall and others, Anno 18 Jac. they entered Hyde-Park, and one Hillock and others, who where Servants to the Keeper, commanded them to stand, which they refused, but fled: Thereupon one of the Servants shot at them and wounded one. Then they all turned back, and one of them killed Hillock; for which they where all indicted for Murder ex Malitia præcogitata, and were convicted; for tho' there was no Malice to the Party slain, yet they all coming into the Park with an ill Intent, and to do some unlawful Act, and Death ensuing, the Law doth imply Malice. 2 *Roll. Rep.* 120. *Plmer* 35. *idem.*

The like Indictment was against my Lord Dacres and others for the like Offence, for which they where convicted and executed. *Moore* 86.

Now all these Cases extend to make that Murder by Implication of Malice prepensed, where Death did ensue by the Means of doing some unlawful Act by the Person killing, tho' Death was not at first intended by him.

But there is yet a stronger Case, where, by the Opinion of all the Judges of England, it was ruled Murder in the Keeper of a Park for killing another, though the Person killed was at

that Time doing an unlawful Act himself: And this was Holloway's Case, which was thus;

Cro. Car. 131. *Palmer* 547. *Jones* 198.

A Boy climbed a Tree in Austerly Park to cut Boughs, and Holloway the Woodward commanded him to come down, which he did; then he tied him with a Rope to a Horse's Tail, and struck both the Boy and the Horse, which running away with the Boy thus tied broke his Shoulder, and thereupon he immediately died. This was adjudged Murder, though Holloway had no Intention to kill the Boy; but being killed without making any Resistance, by one who had no Authority to correct him in that Manner; and though the Person thus killed was doing an unlawful Act in cutting the Boughs, the Law implies that Malice was prepensed, which was the Reason of that Judgment.

Now the most favourable Thing which can be said for the Defendant Keat, is that his Servant sent him a saucy Answer, for which he might have corrected him; but then it must be done with a fit and proper Instrument, and not with a Sword.

Tis not a material Objection to say, That because he had no Intention to kill his Servant, therefore it cannot be Murder; for in Holloway's Case before mentioned, he had no Intention to kill the Boy, yet that was held Murder.

11 *H.* 7. 23. *Placito* 14.

The Law was the same Anno 11 H. 7. when Fineux Chief Justice gave the Rule, (viz.) That if two were playing at Sword and Buckler by Consent, and one killed the other, it is Felony, because such Plays are unlawful, and yet there was no Intention of killing.

So in this Case, the first Act of beating the Servant with a Sword was unlawful; and it hath been constantly ruled, That where Death doth ensue an unlawful Act, 'tis Murder; for it cannot be intended in this Case, that the Master did thrust at his Servant with a Sword Animo corrigendi.

Sid. 277.

So 'tis where A. meets B. in the Street and cudgels him, and B. draws his Sword, then A. kills him, 'tis Murder; for the first Act of beating him was unlawful, and the ill Event shall be coupled to the first Act.

2. The Deceased was killed without any Provocation; and in such Cases likewise the Law supplies Malice prepensed.

The Pushing the Prisoner with the Snead of the Sithe, cannot be a Provocation to justifie this Fact, because it was in Defence of his Person, it was subsequent to the Fact begun by the Master which was unlawful, (viz.) the striking the Servant with a Sword; for which Reasons this must be Murder.

Econtra

Thoſe who argued for the Defendant, began with the Definition of Murder, which in the old Books is defined to be occulta Hominis occiſio; and the Reaſon of it was, becauſe in former Ages, when the Danes and Normans inhabited here, the Malice between them and the Engliſhmen was ſo great, that if any Perſon was killed and not known by whom, the Murderer was taken to be either a Dane or Norman, unleſs there was plain Proof that it was done by an Engliſhman.

It hath now another Definition, for Murder is where a Man of ſound Mind and Memory unlawfully killeth a reaſonable Creature in Rerum Natura under the King's Peace with Malice forethought, either expreſſed by the Party, or implied by Law, ſo as he die within a Year and a Day after the Fact. 3 *Inſt.* 47, 48.

Malice muſt therefore be the Foundation of Murder, both at Common Law and upon the Statute of Stabbing; and ſuch Malice, my Lord Coke tells us, is the compaſſing to kill, wound, or beat another ſedato Animo: So that if there is any ſudden Occaſion of Heat or Quarrel amongſt Men, and they immediately fetch their Swords and go into the Field to fight, and one is killed; this is not Murder, becauſe it was not ſedato Animo, without which there can be no Malice, and conſequently no Murder. 3 *Inſt.* 51.

The Law of God doth admit this Diſtinction, and hath in ſome Meaſure diſpenſed with the Sixth Commandment, by which we are forbidden to kill: For God commanded the Children of Iſrael when they divided the Land of Canaan, to give the Levites ſix Cities of Refuge, and to appoint ſome ſuch Cities for themſelves, that the Slayer might fly thither who killed another unawares, that is, without Malice; and this was to preſerve himſelf from the next Kinſman, who had Power to put him to Death: But his Power did not extend to take Vengeance of him who killed another without any Malice; and therefore this Remedy was provided, leſt he ſhould deſtroy him in his Rage. *Numb.* Chap. 35.

But if he ſmote the Deceaſed with an Inſtrument of Iron, that is, purpoſely or wilfully to kill him, or with throwing a Stone which might probably kill him, or with a hard Weapon of Wood, or if he thruſt him out of Hatred, which muſt be Malice forethought, or ſmote him in Enmity ſo that he died; in all theſe Caſes 'twas Murder.

So that if the Man-ſlayer was not in Enmity with the Perſon ſlain, or did not ſeek his Harm; then the Magiſtrates of the City were to give Judgment between him and the next Kinſman,

and

and to deliver him to the City of Refuge whither he fled, where he was to be confined till the coming of the High Priest.

'Tis plain therefore, That if there was no Malice in the Slayer against the Person slain, he was not to be punished as a Murderer by the Law of God.

Sanctuaries were also allowed here in England formerly; but they were taken away by the Statute 23 H. 8. which likewise takes away the Benefit of Clergy from those who shall commit wilful Murder of Malice prepensed. And another Statute made Anno 1 Ed. 6. provides, That in other Cases, that is to say, if there is no Malice prepensed, the Party shall have the Benefit of the Clergy, and the Privilege of Sanctuary.

23 *H.* 8. *c.* 1

1 *Ed.* 6. *c.* 12.

To apply this to the present Case, there is no express Malice found: So that if there was any, it must be implied by Law either for killing the Servant in Pursuance of an unlawful Act begun by the Master, or by killing him without any Manner of Provocation, as it hath been argued against the Prisoner.

1. Malice cannot be implied in this Case for killing the Servant in Pursuance of an unlawful Act.

My Lord Coke hath put the Case so generally as to the Unlawfulness of the Act, that little can be collected from it: He tells us, That if the first Act is unlawful, and Death ensues, 'tis Murder. 'Tis true, he Instances in a Man intending to steal a Deer in a Park, and shooting at the Deer, he kills a Boy hid in a Bush; this he says is Murder, though he had no Intent to hurt the Boy, because the first Act was unlawful: So likewise in the Case of throwing a Stone over a Wall and killing another, which has been observed on the other Side; this is Murder, because the Law implies Malice.

3 *Inst.* 56.

But my Lord Hale was of another Opinion, for he tells us, That if the unlawful Act wants Deliberation, or if no Personal Hurt was intended to another, 'tis no more than Manslaughter.

H. P. C. 44, 57.

Besides, that Intent must extend to Death; for if 'tis only to commit a Trespass, or to beat a Man, and Death doth ensue, that will not make it Murder.

Therefore my Lord Coke distinguishes with too much Nicety upon the Life of a Man, and directly contrary to the Levitical Law, and not warranted by the Authorities which he hath cited in the Margent of his 3d Institutes: Which are these:

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The first is, Anno 2. H. 4. which is no more than the Opinion of the Court, That if a Man killeth another by Misfortune he shall forfeit his Goods, but shall have his Pardon ex Gratia. Now this is rather an Authority for the Prisoner, than against him. 1 H. 4. 18.

The other Case was, Anno 11 H. 7. where by the Opinion of Fineux, Chief Justice, 'tis held, That if two play at Sword and Buckler by the Command of the King, and one is killed, 'tis not Felony; but if the King had not commanded it, 'tis otherwise: For though such Games are suffered, they are not lawful; which is as much as to say, that the King may tolerate what is unlawful, and that is not to be presumed. 11 H. 7. 23. 4.

The same Chief Justice was of Opinion, That if a Man throw a Stone over a House and killeth another, 'tis not Felony; which is denied by Brooke in abridging the Case, so that 'tis but one Judge's Opinion against another: Besides, Fineux doth not say, 'tis Murder, but only Felony; neither doth he mention whether that Felony is without the Benefit of Clergy. *Bro. Abr.* Tit. *Coron.* *Placito* 228.

And my Lord Coke himself gives some Instances, where Death did ensue an unlawful Act, and yet it was not Murder. As if two Men fall out, and presently fetch their Swords and go into the Field and fight a Duel, and one is killed, 'tis not Murder, because there was no Malice prepensed. Now it cannot be denied, but that 'tis an unlawful Act to fight a Duel, and yet he was of Opinion, that this was not Murder. 3 *Inst.* 51.

Those Cases, of shooting at a Deer and killing a Man are not applicable to this Fact; for the Act of Shooting was not only unlawful, but it was voluntary, and the immediate Cause of Death: So likewise was the throwing a Stone; for though no Malice was intended to the Person slain, yet 'tis plain that the Slayer did not value who was killed.

Therefore great Care ought to be taken to distinguish rightly in such Cases where the Life of a Man is concerned. For my Lord Coke's Distinction is too narrow, in saying, that 'tis Murder if Death doth ensue an unlawful Act, because the Act must not be only unlawful, but voluntary.

If a Man should climb an Apple-Tree to steal the Fruit, and fall down by Misfortune upon the Head of another under the Tree, and kill him without hurting himself: This is not Murder, and yet no Man will deny but stealing the Apples was an unlawful Act, and Death did ensue that Act; but the Fall which was the Cause of it was involuntary, and therefore it was not Murder.

'Tis likewiſe to be conſidered, whether the Act is done ſedato Animo, or in Paſſion; for if in Paſſion, 'tis not material who was the Aggreſſor.

As for Inſtance: If there is Malice between A. and B. and they fight and A. is killed, 'tis Murder in B. though A. gave the firſt Blow; ſo if he had aſſaulted B. and then fled to a Wall, and
H. P. C. 47. in his own Defence had killed him: Tho' 'tis queſtioned by my Lord Hale, whether this is Murder or not.

But both theſe Caſes are put, where the Malice was prepenſed, for 'tis that which is the material Matter to make it Murder, and not by whom the firſt Stroke was given.

The Caſe in Croke is much ſtronger than this now at Bar.
2 Cro. 296. ſt. Two Boys were fighting in a Field, one beat the other ſo that his Noſe bled: The Boy went home to his Father, being a Mile diſtant from the Place where they fought, and complained to him; who immediately came into the Field where the other Boy was, and after ſome foul Language ſtruck him with a Cudgel, of which Stroke he died. This was adjudged Manſlaughter only, becauſe it was upon a ſudden Occaſion. The Father was provoked by ſeeing his Son's Blood, and no precedent Malice in him; and though it was at the Diſtance of a Mile, yet it was but one continued Paſſion, and the firſt Heat of Blood not cooled.
H. P. C. 48. This was a Caſe which my Lord Hale put for Law; and yet it was as unlawful for the Father upon ſuch a Provocation to correct that Boy, as it was for the Priſoner to beat his Servant.

The Caſe of Wormall, mentioned on the other Side, is not like this; becauſe he and his Companions came with a malicious Intent to rob the Park, and either to maintain their Purpoſe, or kill the Oppoſers.

And as for Holloway's Caſe, the Act was ſo barbarous, that it could not be found otherwiſe than Murder; for the Boy who was killed, gave the Keeper no manner of Provocation, but ſubmitted himſelf to his Mercy, and he turned him over to the Mercy of his Houſe.

2. Malice cannot be implied in this Caſe by killing the Servant without any Provocation, becauſe there was undutiful and irreverent Language given by him to his Maſter. 'Tis true, this is not ſuch a Provocation which will juſtify the Maſter in cutting his Servant on the Head with a Sword, much leſs for killing him; but ſtill it is a Provocation, and the Books mention,

tion, that the Law implies Malice where a Man is killed without any Provocation; which is not this Case, for there was a Provocation. 9 Rep. 67 B.

A Butcher and others quarrelled, and in the Affray the Butcher was hurt. One of the Persons in that former Quarrel came by his Shop three Days afterwards and made a wry Mouth at him; upon which he came out of his Shop and cut him on the Calf of his Leg with a Sword, whereof he instantly died. Now here being a former Quarrel, which had continued three Days, the Court, upon the whole Matter, directed this to be found Murder; but if there had been no precedent Quarrel, and the Wound had been given upon a sudden Provocation, by making a wry Mouth, without any Intention of killing at that Time, it had been otherwise. Noy 171. Cro. Eliz. 694, 778. id.

Curia. It was justifiable in the Servant to use the Snead of the Sithe after a Cut made on his Head by his Master. The Provocation given to him was very slender, and may be esteemed as none at all, because after the Answer sent by the Servant, the Prisoner did expostulate with him for some Time. Sed adjournatur.

Swinsted *versus* Lydall. *Trin.* 8 *Will. Rot.* 229. S. C. Salk. 408.

AN Action of Trespass and false Imprisonment was brought by the Plaintiff, and for detaining him in Custody until he had paid 11 s. for his Deliverance.

The Defendant pleads the Jurisdiction of the Court of Conscience in London, That they had Power to make Orders and exact Obedience to them. That an Order was made by that Court for the Plaintiff to pay 10 s. 4 d. &c. which he not performing, the Defendant took him by Vertue of a Precept of that Court, and so justifies the Imprisonment, and detaining him till he had paid that Sum.

To this Plea the Plaintiff demurred, because the Justification did not go to the whole Sum of 11 s. but only to 10 s. and 4 d.

To which it was answered, That the Sum was no Part of the Trespass, but only an Aggravation of the Damages; That the Imprisonment was justified, which in this Case is sufficient, so that the Defendant could not be punished for false Imprisonment, though he might for Extortion; but that must be by another Action.

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1 *Roll. Rep.* 264.

As for Inſtance: In an Action of Aſſault and Battery, and falſe Impriſonment, at Charlton, till he had paid 28 l.

The Defendant pleaded not Guilty as to all beſides the Impriſonment; and as to that, he juſtified by a Proceſs out of the Court of Stannaries, by Vertue whereof he took the Plaintiff, and detained him till he paid the Money: and upon Demurrer to this Plea, one Exception was, That the Defendant having pleaded Not guilty as to all beſides the Impriſonment, he muſt of Conſequence be guilty as to the taking the 28 l. and then the Juſtification of the Impriſonment till he had paid the 28 l. is repugnant in it ſelf, ſo that he ought to have made a particular Anſwer to the Payment of the 28 l.

But the Court was of another Opinion, becauſe having anſwered the Impriſonment, that ſhall be a good Anſwer likewiſe to the Payment of the Money, for that takes in the whole Subſtance of the Action.

So that this Plea is good, though it doth not come up to the whole Sum; for if he had ſaid nothing to it, yet his Plea had been good.

2. Another Exception was, That the Defendant did not ſet forth, that he took the Plaintiff to carry him to the Compter.

The Anſwer was, That 'tis ſufficient to ſay, that he took him Virtute Præcepti. 'Tis true, by Law the Defendant ought to have carried him to Priſon, but he may keep him a reaſonable Time in his Cuſtody till he can find Bail, and 'tis not falſe Impriſonment, tho' he doth not immediately carry the Priſoner to Gaol.

Curia. This is a ſpecial Authority given by Act of Parliament to this Court of Conſcience to commit, &c. but the Officer is not to detain the Perſon in Cuſtody till the Money is paid to him; for neither he or the Sheriff ſhould receive it, unleſs 'tis upon a Fi' fa'. And afterwards in Hillary Term for this Reaſon Judgment was given for the Plaintiff.

Rex *verſus* Biſhop of *Cheſter*, *Peirce* and *Cook*.

S. C. 2 *Salk.* 560.

THis was a Writ of Error to remove a Record of Quare Impedit brought againſt the Biſhop of Cheſter, and Richard Peirce, and Richard Cook, for hindering the Plaintiff to preſent to the Church of Bedall, ſetting forth, That Queen Eliz. 12 Feb. Anno 12. of her Reign, was ſeized of the Advowſon of Bedall in Fee ut de uno groſſo, and being ſo ſeized, ſhe preſented thereunto one John Tymms, prout by the Enrollment of ſuch Preſentation in the Court of Chancery, and there remaining, it doth appear, That Tymms was inſtituted and inducted, and that after the Death of the Queen, the ſaid Advowſon deſcended to King James.

Parliament Caſes, 212. *Quare Impedit.* *Vide* 3 *Lev.* 377. 4 *Mod.* 200. *Hob.* 224, 230. *Moore* 413. 2 *And.* 32, 36, 154. *Poſt*, 335, 336, *&c.*

That the Church being void upon the Death of Tymms, the King preſented Dr. Wilſon, and afterwards died ſeized, and the ſaid Advowſon deſcended to King Charles I.

That upon the Death of Dr. Wilſon, that King preſented Dr. Wickham, who was inſtituted and inducted, and died.

That upon the Death of Dr. Wickham, one John Peirce, the Father of Richard Peirce the now Defendant, did preſent William Metcalfe by Uſurpation, who was likewiſe inſtituted and inducted.

That upon the Demiſe of that King, the ſaid Advowſon deſcended to King Charles II. who 28 Auguſti, Anno 1. of his Reign, did preſent one Peter Samwaies, upon the Death of the ſaid Metcalfe.

That the ſaid Advowſon did afterwards deſcend to King James II. upon whoſe Abdication it came to King William and Queen Mary. That the Church became void by the Death of Samwaies, ſo that it belonged to them to preſent, who were hindered by the Defendants.

The Defendants Plea.

The Biſhop pleaded, That he claimed nothing but as Ordinary; upon which there was Judgment againſt him in common Form.

The other Defendant Richard Peirce pleads, That bene & verum eſt, that King Charles I. was ſeized of this Advowſon, de uno groſſo ut de feodo, prout in the Declaration, and that he preſented Dr. Wickham, who was inſtituted, &c. But farther ſaith, That the ſaid King being ſo ſeized, did by Letters Patents dated 19 Julii, Anno 14. of his Reign, grant the ſame to William Feekſtone, tunc Armigero poſtea militi, and to his Heirs.

That John Peirce did by Uſurpation preſent the ſaid Metcalfe, and that Sir William Feekſtone releaſed the ſaid Advowſon to Peirce and his Heirs; who thereupon became ſeized in Fee, and died ſo ſeized.

That the ſaid Advowſon deſcended to the Defendant Richard Peirce. That the Church became void upon the Death of Metcalfe, and that afterwards King Charles II. did preſent the ſaid Samwaies by Lapſe, who died; ſo that now it belonged to him the ſaid Richard Peirce to preſent, and traverſed that King Charles I. died ſeized modo & forma.

The other Defendant Cook pleads the like Plea by way of Excuſe; (for he could not plead to the Right of the Advowſon) and that Richard Peirce preſented him.

The Attorney General demands Oyer of the Letters Patents of King Charles I. which are entered in hæc Verba, reciting that Q. Eliz. granted to the Earl of Warwick, and his Heirs, the Manor of Bedall, and the Advowſon thereunto appendant, habend', &c. in Capite by the fortieth Part of a Knight's Fee, which Rent deſcended to K. James, who 18 Auguſt, Anno 7. of his Reign, granted the ſame to Sir Chriſtopher Hatton and his Heirs; and that the Advowſon did afterwards come to Sir William Feekſtone and his Heirs, to whom the King did ratify and confirm the ſame.

In which Grant there is another Recital and Clauſe, confirming all that was granted by Queen Elizabeth and King James; and that Sir William Feekſtone, by Vertue of that Grant, claimed the ſaid Advowſon.

That upon a Vacancy by the Death of one Petty, King James did preſent Dr. Wilſon by Lapſe; and after his Death King Charles preſented Dr. Wickham, againſt whom Sir William Feekſtone brought a Quare Impedit.

That being at Iſſue, an Agreement was made, that Dr. Wickham ſhould hold the Living during his Life. Then follow theſe Words:

Sciatis, Know ye therefore, That we ex ulteriori Gratia noſtra concedimus Willielmo Feekſtone Militi advocationem donationem & liberam diſpoſitionem Eccleſiæ de Bedall quando & quomodo it ſhall become void, Habendum to him, his Heirs and Aſſigns; under whom Peirce the now Defendant claimed.

This being the Caſe upon the Letters Patents and the Pleadings, there was a Demurrer to this Plea, and Judgment given in the Common Pleas, That the Grant made by King Charles I. was a void Grant, becauſe it was of this Advowſon as appendant to the Manor of Bedall, when it was an Advowſon in Groſs; and if ſo, the Defendants have not well induced the Traverſe.

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It was now argued for them, That the Letters Patents were good; for admitting that this Advowson was granted by the Queen to the Earl of Warwick, as appendant to the Manor, when it was in Gross; it doth not therefore follow that King Charles, reciting that void Grant in his Letters Patents, can give no Title to Sir William Feekstone; for every Mistake or Misapprehension in Letters Patents will not make them void: As for Instance, If the King should be mistaken in the Law, when he is truly informed of the Fact, that will not make his Grant void.

But it doth not appear that the Queen was mistaken in her Grant, for she was not only seized of this Advowson, but of the Manor of Bedall by the Death of one Simon Digby; then she granted it as an Advowson appendant, and K. Charles I. granted it as such. Therefore it must be a very immaterial Allegation at this Time to say, that it was in Gross, especially since it tends to vitiate two Royal Grants, one of them being made above one hundred and twenty Years since: So that tho' the Queen might be mistaken then, yet that Mistake shall not turn to the Prejudice of the Defendant's Title now, because of the Length of Time; for they cannot take Issue upon it, whether Appendant or not, or traverse that it was an Advowson in Gross.

Neither doth the Attorney General rely upon this wholly as his Title, but he goes on and lays a Seisin in King James and Charles; he might have begun it in either of those Kings, which would have been good to revest the Advowson in the Crown; and there was no Necessity to resort to the Seisin of the Queen, for it is not material whether she was seized of this Advowson in Gross or not, or whether she was seized at all, because the Defendant could not take Issue upon it, or traverse it: So that it being not material to their Title, and they having no Way to come at it in Pleading, this Court will not take Notice of it; or if it doth, the Judges will expect a very clear Evidence, that it was an Advowson in Gross in the Queen, before they will avoid those Letters Patents by a Suggestion that it was not.

It is plain, that the Queen granted the Advowson to the Earl of Warwick, and whether Appendant or not, is but Surplusage, and need not be set forth. As where the Demandant brought a Formedon in Descender upon the Grant of a Reversion to two by Fine, the Remainder to his Ancestor who was seized, &c. the Tenant would have taken Advantage that there was no such Fine: But the Court would not admit it, because the mentioning a Fine was but Surplusage; for a Formedon in Descender may be maintained without Deed or Fine. 9 H. 4. 39. a. 14 H. 4. 31. a.

1 *Rep.* 41. *Moore* 413. 2 *Rol.* 114. 2 *And.* 154. 1 *Jo.* 79.

So where the Defendant pleaded to an Information of Intrusion, That before that Time Anne Countess of Warwick was seised in Fee, and that she Anno 3 H. VII. levied a Fine to him, and the Heirs males of his Body, the Reversion to the Countess and her Heirs, after whose Death it descended to Edw. Earl of Warwick, her Cousin and Heir, who Anno 19 H. VII. was attainted of Treason by Act of Parliament: By which Statute it was enacted, That he should forfeit all his Lands; so that H. VII. was seized of the Reversion in Fee. After whose Death, both the Estate-Tail and Reversion in Fee descended to H. VIII. That 5 Julii Anno 23. of his Reign, it was found by Office, that the Countess did levy a Fine, that she died seized of the Reversion, that it descended to the Earl of Warwick, that he was attainted of Treason Anno 19 H. VII. by Force of which Attainder King H. VII. was seized in Fee, and did seized; after whose Death it descended to H. VIII. who granted it to one Walsh.

Exception was taking to this Pleading, because it did not appear when the Earl of Warwick died; for tho' it is said in the Act of Attainder, That he shall forfeit; yet those Words vest nothing in the King at Common Law until Death or Office found; so that there could be no Seisin in H. VII. as alledged; and if so, it could not descend to H. VIII. therefore that Allegation being Wrong, it made the Grant to Walsh void.

But the Court was of another Opinion, That the Plea was good in Substance, for they would not take Notice of the Seisin of H. VII. and the Descent from him to H. VIII. for that was altogether immaterial, because H. VIII. was entitled by Vertue of the Office found, and therefore his Grant to Walsh was good.

So here the Court will not take Notice, whether the Queen was seized of this Advowson either as Appendant or in Gross: For when King James, and King Charles, had presented to the Church, and their Presentees were instituted and induced, and enjoyed the same under such Presentations, it is not material whether the Queen was seized or not.

Neither can it be objected, That the Defendant in Pleading hath alledged this Advowson to be in Gross. It is true, he saith, That bene & verum est, that King Charles was seized thereof in Fee ut de uno grosso, but that cannot be any Concession that it was so in the Queen.

And after all, admitting that the King was mistaken in the Law, yet if he was truly informed of the Fact, such a bare Mistake shall not avoid his Grant.

Here the Letters Patents of the Queen are truly recited, of which he was well apprised; then there happens to be a falſe Suggeſtion of the Patentee, and the King ratified and confirmed it, but did not grant all that was in thoſe Letters Patents. Now if he apprehended that the Advowſon paſſed by this Grant, it is his own Collection, and not what was falſly ſuggeſted by Sir William Feekſtone.

So is my Lord Chandois's Caſe, to whom H. VII. granted a Manor in Tail. And the ſame King by other Letters Patents reciting the former Grant, and that in Conſideration of the Surrender thereof to be cancelled, that he was and is ſeized in Fee, did grant the ſaid Manor to Husband and Wife, and to the Heirs of the Husband, &c. *6 Rep.* 55. *Hob.* 224. *2 Roll. Rep.* 277, 278, 360. *Lane* 3, 7, 9, 76, 112.

Now tho' by the Surrender of the firſt Letters Patents, the Eſtate-Tail was not determined, and ſo the King not ſeized of the Manor in Fee as he recited he was in the ſecond Grant, for he had only a Reverſion in Fee expectant upon the Determination of the Eſtate-Tail; yet that Clauſe, (viz.) By Vertue whereof we are ſeized in Fee, was but what the King collected to be the Conſequence of the Surrender. So that being truly informed by the Party both of the Intail and the Surrender, the Miſtake which he made in the Law being no Part of the Conſideration ſhall not avoid his Grant.

But admitting in the preſent Caſe, that the Queen was miſtaken in her Grant, and ſo it became void; yet King Charles having recited the ſame by other Letters Patents, and having granted this Advowſon to Sir William Feekſtone, and his Heirs, non obſtante aliquo defectu vel aliquibus defectibus in the Queen's Grant, he hath a good Title by ſuch Grant; for otherwiſe theſe Words ſignify nothing: But the natural Senſe and Meaning of them is, That if the Grant of the Queen was not good, yet this ſhall be a good Grant to the Patentee.

Therefore it is a good Rule taken in the Earl of Cumberland's Caſe, That if the King's Grant may be taken to two Intents, one of which may be good, and the other not; it ſhall be conſtrued to ſuch an Intent, that the Grant may take Effect: *8 Rep.* 167. *Lane* 39, 40.

As if he grants totum illud Manerium ſuum ſive totam illam Rectoriam ſive Advocationem, &c. Now if he had a Manor and no Rectory, or an Advowſon and no Rectory, or a Manor, or a Rectory impropriate; yet that which he had ſhall paſs, becauſe it was the Effect of the Grant. So here, whether the Advowſon was Appendant or in Groſs it is not material, for nothing ſhall paſs but what the King had.

Afterwards in Hillary-Term the Court gave Judgment, viz. Two Judges were of Opinion againſt the Judgment in the Common Pleas, not upon the Matter in Law, but for the Variance between the Pleading and the Letters Patents; for the Defendant hath ſet forth a Grant made to William Freekſtone, tunc Armigero poſtea Militi, and upon Oyer of the Letters Patents it is to William Feekſtone Militi.

2 *Inſt.* 594. *Bro.* Addition 58.

Now he could not be a Knight and Eſquire at the ſame Time. Knight is a Word of Dignity, and Part of his Name, but Eſquire is not; and ſo are all the old Authorities.

7 *H.* 4. 7. b. 14 *H.* 6. 15. *Bro. Title Noſme, Placito* 33.

A Biſhop entered into a Bond; the Obligee was then an Eſquire, but afterwards made a Knight, and died. An Action of Debt was brought againſt the Biſhop by the Plaintiff, and Executor of ſuch a one Eſquire; which was according to the Bond: But Rickhill, Chief Juſtice of the Common Pleas, gave Judgment, That the Writ ſhould abate, becauſe he was not named Knight.

22 *H.* 6. 29. b. *Bro. Title Noſme* 61.

So where the Heir apparent of the Earl of Shrewsbury brought an Action by the Name of John Talbot Knight, and pending the Suit, his Father died: The Queſtion was, Whether the Writ ſhould abate, becauſe the Plaintiff was then an Earl? Priſott, Chief Juſtice of the Common Pleas, held that it ſhould not; but it was for this Reaſon, becauſe his Dignity deſcended to him by the Act of God: But if it had come to him by the Act of the King, it had been otherwiſe.

Latch. 161. *contra. Hutt.* 41. *Lit. Rep.* 181. *Jones* 215. * 2 *Cro.* 240. 4 *H.* 6. 1. *Bro.* Grants, *Placito* 50.

It is likewiſe ſo where there is an Addition of Knight, when the Perſon is not knighted, as where it is omitted when he is really ſo; for in both Caſes it is void in * Pleadings or Grants, tho' not in a Conveyance: And the Reaſon is, becauſe Knight being made Part of the Name of the Grantee, when in Truth he was not ſo, he cannot be intended to be the ſame Perſon mentioned in the Grant.

8 *Ed.* 4. 23. a. *Long quinto* 106. b. 2 *Roll. Abr.* 198.

As to the Lord Ever's Caſe, who had a Grant made to him by the Name of Ralph Ever Knight, Lord Eure, when he was not at that Time a Knight. It is true, it was held good, becauſe ſatis conſtat de Perſona by the Addition of Lord Eure, for there is but one Lord of that Name in England, and therefore the Addition of Knight, tho' falſe, ſhall not vitiate the true Deſcription of the Perſon.

2 *Cro.* 240. 1 *Bulſt.* 21. *Idem.*

So if a Grant ſhould be made to John Biſhop of Winton, when his Name was Peter, the Grant is good; for there is but one Biſhop of Winton, and therefore he is ſufficiently deſcribed by that Addition.

Econtra.

But the Chief Justice, and Rokeby Justice of B. R. were of Opinion, That this was a good Grant in Law; for they did not speak to the Variance between the Pleadings and the Grant.

They held, that it was not material to alledge the exact Time when the Queen was seized of this Advowson in Gross, it is sufficient to alledge a Seisin generally; and therefore an Admission of that which is immaterial will not help.

As in Debt upon Bond, conditioned, That if the Plaintiff did not depart out of the Defendant's Service without his Leave, &c. then if he paid the Plaintiff 100 l. within twenty-eight Days, upon Demand, the Bond shall be void. The Defendant pleaded, That the Plaintiff 4 Maii, 30 Eliz. departed out of his Service, and without his Leave. 2 *Leon.* 99.

The Plaintiff replied, That 6 Septemb. in the same Year she departed with Leave; and that afterwards 4 Octob. she demanded the 100 l. which the Defendant refused to pay, absque hoc that she departed 4 Maii without Leave.

It happened that the Demand was laid to be 4 Octobris, and the Writ was Teste 18 October, so that there was not twenty-eight Days between the Demand and the Action brought; yet the Plaintiff had Judgment, tho' upon his own shewing he brought the Action fourteen Days too soon; for the Issue was upon the Departure, and the Demand in the Replication was altogether immaterial, and therefore shall be rejected as Surplusage. *Hob.* 71.

Every Thing in a Grant shall be intended to be good, if the contrary doth not appear. As in Debt upon the Statute 2 Ed. 6. for not setting out Tithes, the Plaintiff declared, That the Defendants were Occupiers of one hundred and twenty-eight Acres of Meadow in Radley, and he derived a Title under Letters Patents of Q. Elizabeth to himself for Life, out of which, &c. 2 *Cro.* 679.

The Defendant crayed Oyer, &c. and it appeared that the Queen demised the Tithes of certain Lands in Bremere, and Barton Bremere in the Parish of Radley, but did not mention the 128 Acres, &c. yet upon Demurrer Judgment was given for the Plaintiff, tho' it did not appear that the Tithes of 128 Acres was granted to him by those Letters Patents; neither was it averred, that those Acres were any of the Lands mentioned in the Letters Patents, because the Plaintiff had alledged that the Queen granted to him prædictas decimas, which was a sufficient

ſufficient Averment that thoſe Tithes paſſed by that Grant; and if it had been otherwiſe, the Defendant ought to have pleaded quod non conceſſit.

Then as to the other Matter, this Advowſon might be Appendant when the Earl of Warwick had it, and it might afterwards be in Groſs. It was certainly once Appendant to the Manor; and this appears in my Lord Coke's Entries, for there we find that one Digby was Tenant in Tail of this Manor, who committed Treaſon, and the Church being void, the Queen preſented, then the Advowſon muſt be in Groſs. The Tenant in Tail was afterwards attainted, then it became Appendant again by reaſon of ſuch Attainder; for there was no Act done to ſever the Advowſon from the Reverſion in Fee.

Co. Entr. 477. b.

But if it did not appear to be Appendant at the Time of the Queen's Grant, yet it will paſs by that Grant of Charles I. for it is granted in full, expreſs, and large Words, without any manner of Reſtriction. And there are ſtronger Caſes than this, where the King's Intention appearing to paſs an Intereſt, though there happen a Fault in the Grant, yet it ſhall paſs accordingly.

To Inſtance in ſome, viz. As where Edw. II. by Letters Patents granted the Caſtle and Manor of Skipton in Craven to Robert de Clifford in Tail, and H. VI. granted reverſionem præd. Caſtri & Manerii to Thomas Lord Clifford, necnon Caſtrum & Manerium præd'. Now if the Eſtate-Tail was good, then he had granted the Reverſion only; if not, then by the Words necnon Caſtrum & Manerium præd', he granted the Poſſeſſion.

8 Rep. 166.

So a Grant of a Manor, though it is not really ſo, but only in Reputation, is a good Grant, and the Manor will paſs.

6 Rep. 63.

There are many other Caſes in the Books where the King's Grants have been adjudged good, and many favourable Conſtructions have been made by the Judges to ſupport them.

As where the Surrender of Lands in Suſſex was made the Conſideration of the Queen's Grant, when in Truth the Lands were in Eſſex, and ſo the County miſtaken; yet the Grant was held good, becauſe a Miſpriſion in the Recital of a Thing ſhall not make the Grant void.

1 Roll. Rep. 23.

So likewiſe where Edw. 6. granted Totam illam Rectoriam de Dale ac omnes decimas, &c. quæ quidem omnia & ſingula præmiſſa are of the true yearly Value of 32 l. and at the Time of this Grant there was a Farm in the Pariſh of Dale, in Leaſe under a yearly Rent. Now the Words, Quæ quidem omnia, &c. refer only to Tithes of that yearly Value, and it may be the King intended to paſs no more; yet having granted Totam illam Rectoriam generally, it was adjudged, that the Tithes of that Farm ſhould paſs, though it made it more than 32 l. per Annum. 2 *Roll. Rep.* 118.

The true Way had been to have taken Iſſue upon the Traverſe.

Gatehouſe *verſus* Row.

S. C. 2 *Salk.* 663.

WRit of Error on a Judgment in the Common Pleas, in an Action on the Caſe upon an Indebitatus Aſſumpſit and Quantum Meruit, brought by Gatehouſe for Meat, Drink, &c. which the Defendant had when he ſtood for Burgeſs for Stockbridge, and declared upon three ſeveral Promiſes, the laſt of which was thus, (viz.) Cumque etiam præd. (the Defendant) in conſideratione that the Plaintiff at his Requeſt had found and provided for him Meat, Drink, &c. ſuper ſe aſſumpſit, and doth not ſay, that the Defendant ſuper ſe aſſumpſit. This Cauſe being tried at the Aſſizes at Winton, and a Verdict for the Plaintiff Gatehouſe, and entire Damages given; it was now moved in Arreſt of Judgment, That the laſt was a void Promiſe, becauſe it was not alledged, That the Defendant had promiſed: So that poſſibly a Stranger might make the Promiſe, and then the Defendant is not bound by it. *Vide 6 Mod.* 227, 260, *&c.* 1 *Saund.* 6, 7. 1 *Sid.* 309. 3 *Lev.* 55. *Fareſt.* 143.

It cannot be taken by Intendment to be the Defendant, becauſe it is the very Giſt of the Action, and ſince the Jury have found that Row ſuper ſe aſſumpſit modo & forma, and have aſſeſſed entire Damages occaſione præmiſſorum, and every Promiſe being a diſtinct Declaration, and one of them being wrong laid, it is therefore naught.

As for Inſtance, in Aſſumpſit the Plaintiff declared, That in Conſideration he would marry the Defendant's Daughter, ſuper ſe aſſumpſit, to pay the Plaintiff 100 l. Upon Non aſſumpſit pleaded, the Plaintiff had a Verdict, but the Judgment was arreſted, becauſe it was not alledged that the Defendant ſuper ſe aſſumpſit, which is this very Caſe in Point. *Cro. Eliz.* 913. *Noy*, 50. *Idem.*

Vide 1 *Salk.* 23, 24, 27, 28.

This might have been good in an Indebitatus Aſſumpſit, becauſe where there is a Debt, the Law fixeth a Promiſe upon the Debtor to pay it.

Econtra.

To which it was anſwered, That if the Conſideration be void, then the Jury have not given Damages for it, for they cannot give a Verdict either for no Promiſe, or a bad Promiſe.

As to that Caſe in Croke before-mentioned, there were three Perſons named in that Declaration, of which the Defendant's Daughter was laſt named, and the Words ſuper ſe aſſumpſit immediately following might relate to her, which was the Reaſon of that Judgment; but here there are but two Perſons named, ſo that when the Plaintiff declares againſt the Defendant, it muſt of neceſſity be intended, that the Defendant aſſumpſit, and no Body elſe, becauſe the Conſideration ariſes from him, and thoſe Words, Cumque etiam in the third Promiſe, couple that Sentence to the firſt.

1 *Sid.* 306. 2 *Vent.* 141.

If it had been, that the Plaintiff aſſumpſit to pay himſelf, it had been good after a Verdict.

Cro. Eliz. 848.

So if there are ſeveral Conſiderations alledged in one Declaration, and one of them is ſufficient, though the other are wrong, both as to Matter and Form, yet the Declaration will be good.

Sid. 292. *Latch*, 125.

So where an Aſſumpſit was brought againſt an Executor upon the Promiſe of the Teſtator, and the Defendant pleaded, That he himſelf made no ſuch Promiſe; after a Verdict it ſhall be intended to refer to the Promiſe of the Teſtator.

Afterwards in Hillary-Term the Plaintiff had Judgment, it being after a Verdict.

Warſopp *verſus* Abell. *Trin.* 8 *Will. Rot.* 594.

Copyhold in Remainder veſts before Admittance.

IN Treſpaſs and Ejectment for a Copyhold, upon the Demiſe of John Spencer, the Jury found a Special Verdict; the Subſtance whereof was, That John Spencer purchaſed this Copyhold, and on the 23d of October, Anno 1652. took a Surrender thereof to the Uſe of himſelf for Life, then to Alice his Wife for Life, and to the Survivor of them; and after their Deceaſe, then to the Uſe of the laſt Will of the ſaid John Spencer, and for Default of ſuch Will, to his own right Heirs, and that he was admitted, &c. That he made a Will, and deviſed all his whole Eſtate, both real and perſonal, to Alice his Wife, after his

Decease, the Remainder to be divided between his Relations on both Sides, according to the Discretion of his Executors, and died. *Vide* 1 *Salk.* 185.

They find that the Executors did enter with an Intent to divide the Estate, pursuant to their Will; but that they were not admitted to this Copyhold.

So that the Question was, What Estate was vested in them before Admittance, and what passed by this Will?

And it was held, That the Admittance of Tenant for Life, upon a Surrender, is an Admittance of those in Remainder.

Bennet *versus* Talbot.

S. C. 1 *Salk.* 212.

IN Trespass the Plaintiff declared, De Placito quare vi & armis clausum ipsius (the Plaintiff) fregit & intravit & herbam pedibus ambulando conculcavit & cum averiis Bobus & Vaccis did eat his Grass, necnon that the Defendant being an inferior Tradesman, viz. a Clothier, adtunc & ibidem in clauso præd. venatus fuit & alia enormia ei intulit contra pacem, & contra formam statuti, &c.

There was a general Verdict for the Plaintiff at the Assizes at Salisbury, and it was moved in Arrest of Judgment, because part of the Action was for a Trespass at Common Law, and Part upon the Statute; and having concluded contra formam statuti, that goes to the Whole.

The Statute 13 R. 2. enacts, That no Layman who hath not Lands of the yearly Value of 40 *s.* nor Clerk who hath not 10 *l.* *per Annum* Revenue, shall have or keep a Greyhound. 13 *R.* 2. *cap.* 13.

The Statute 22 & 23 Car. 2. provides, That Persons not having Lands, or some other Estate of Inheritance in their own or Wives Right of 100 *l.* *per Annum*, or of 150 *l.* *per Annum* for Life, or for ninety-nine Years, shall not keep Guns, *&c.* And in the same Year it was enacted, That if the Jury find the Damages under 40 *s.* in Actions of Trespass, the Plaintiff shall recover no more Costs, and if more Costs are awarded, the Judgment shall be void. 22 *Car.* 2. *cap.* 25.

By the Statute 4 & 5 Will. it is enacted, That all and every Law and Statute now in Force, for the better Preservation of the Game, shall be duly put in Execution.

Then there is this Clause, (viz.) And whereas great Mischiefs do ensue by inferior Tradesmen, Apprentices, and other dissolute Persons neglecting their Trades and Employments, who follow Hunting, Fishing, and other Game, to the Ruin of themselves, and

and Damage of their Neighbours; for Remedy whereof, Be it enacted, &c. That if any ſuch Perſon, as aforeſaid, ſhall preſume to Hunt, Hawk, Fiſh or Fowl (unleſs in Company with the Maſter of ſuch Apprentice duly qualified by Law) ſuch Perſon or Perſons ſhall be ſubject to the Penalties by this Act, and ſhall or may be ſued and proſecuted for their wilful Treſpaſs in ſuch their coming on any Perſon's Land, and if found guilty, the Plaintiff ſhall not only recover his Damages, thereby ſuſtained, but his full Coſts of Suit, *&c.*

Now this Clauſe is a Repeal of the Statute 22 & 23 Car. 2. which gives no more Coſts than Damages. As to the Matter of Coſts,

It was ſaid, This was an independent Clauſe; the Plaintiff ſhould have declared that he hunted, being an inferior Tradeſman, which had been ſufficient to entitle him to Coſts upon a general Law; and the beſt Way had been to omit contra formam ſtatuti.

Aleyn 43. As for Inſtance: One was indicted for ſtabbing another, and two others for being preſent, and abetting, and concluded contra formam ſtatuti; they were all found guilty, when it is plain he could only be ſo who gave the Stroke; yet that Indictment was held good, becauſe they might have been found guilty at Common Law upon the ſame Indictment; for the Statute doth not alter the Nature of the Offence, but takes away the Privilege of the Clergy allowed by Law, and need not conclude contra formam ſtatuti.

But this being moved in Hillary-Term, the Court was of Opinion, that where a Statute makes an Offence, the Concluſion muſt be contra formam ſtatuti. But this was an Offence before the making that Act, which only repeals that Clauſe of the Statute 23 Car. 2. and therefore tho' the Declaration concludes contra formam ſtatuti, it is well enough: And ſo the Plaintiff had Judgment niſi cauſa.

S. C. 1 *Salk.* 348. *Vide Ibid.* 351.

Bracey *verſus* Harris.

BRacey was ſummoned before the Commiſſioners of Bankrupts, to give an Account of the Bankrupt's Eſtate.

The Queſtions demanded of him were,

1. To give an Account of all Matters which he knew concerning the ſaid Eſtate.

2. When

2. When and in what Manner he did aid and abet the Bankrupt in carrying away his Effects, or in imbezilling or concealing the same?

Which Questions he refused to answer, because the first was too general, and the other was to accuse himself: so that he would be liable to the Penalty of * double the Value of the Goods which were concealed: He was willing to answer what he could at present, or to any particular Question which the Commissioners should ask.

* *Per Stat.* 13 *Eliz. cap.* 7.

But upon his Refusal to answer those two Questions, he was committed; and having brought an Habeas Corpus, it appeared upon the Return, that the Warrant of Commitment concluded, that Bracey should be committed until he conform to the Authority of the Commissioners: Which was now alledged to be a void Commitment, because they have a special Authority given them by Act of Parliament, That if the Party shall refuse to be sworn, and to answer such Questions as shall be ministred to him, that then the Commissioners, or the greatest Number of them, may commit the Person refusing to Prison, there to remain without Bail, *&c.* until he submit to the Commissioners to be examined, and not till he conform to the Authority of the Commissioners: And therefore it was moved, that he might be discharged.

1 *Jac. cap.* 15.

To which it was answered, That as to the general Questions, the Statute doth not give the Commissioners Power to ask such Questions, even of the Bankrupt himself; and that the Conclusion of the Warrant is well enough, for the Words of the Act are, That the Commissioners may commit till he submit to be examined; which is a Consequence that he conform to their Authority.

Curia. But the Court seemed to incline, That the Party need not pay an universal Obedience to the Commissioners, so as to answer all Questions, but only to examine him what he knows concerning the carrying away any Part of the Bankrupt's Estate by any Person, but not by himself.

Vide Post, 368. 1 *Salk.* 348, 351.

But for that Fault in the Conclusion of the Warrant of Commitment, Bracey was discharged.

Jones *verſus* Bodiner. *Paſch.* 8 *Will. Rot.* 382.

S. C. *Ante* 225. 1 *Salk.* 1, 173.

AN Action of Treſpaſs was brought in this Court for taking the Plaintiff's Sheep.

The Defendant pleaded his Privilege, as an Attorney of the Court of Common Pleas.

The Plaintiff reply'd, Quod per aliqua præallegat. Curia hic a cognitione Placiti præd. repelli non debet quia dicit quod præd. Will'us Bodiner tempore exhibitionis Billæ ipſius (the Plaintiff) ſcil't 25 die Maii Anno Regni Dom. Will'i Tertii nunc Regis Angliæ, &c. Octavo, fuit in cuſtodia Mar. Mareſc. Dom. Regis coram ipſo Rege exiſten. ſcil't apud Weſtm. præd. in Com. præd. ad ſectam cujuſdam Catherinæ Madern vid. in quodam Placito tranſgr. & adtunc & ibidem per Curiam præd. idem Will'us tradit. fuit in Ballium in Placito præd. ad ſectam dictæ Catherinæ prout patet per Recordum inde in Curia dicti Domini Regis coram ipſo Rege nunc hic apud Weſtm. præd. remanen. ſuper quo præd. (the Plaintiff) poſtea ſcil't eodem 25 die Maii Anno Octavo ſupradicto (Placito præd. præfat. Catherinæ minime determinat. exiſten.) ſecundum conſ. hic a tempore cujus contrarii memoria hominum uſitat. & approbat. Billam ſuam verſus præd. Will'um in Curia hic exhibuit prout ei bene licuit & hoc paratus eſt verificare unde petit judicium & quod præd. Will'us ad Billam ſuam præd. reſpondeat, &c. B. S.

Demurrer, and Joinder in Demurrer.

It was inſiſted for the Defendant, That he being in the Cuſtody of the Marſhal, ſhall not hinder him from pleading his Privilege of an Attorney of the Common Pleas; and to prove it, a Caſe was cited out of the Year-Book, which was an Action of Treſpaſs brought in B. R. ſuppoſing it to be done in a Franchiſe, and the Bailiff of that Franchiſe demanding Cognizance (which is the ſame Thing as Privilege) it was oppoſed, becauſe it was not claimed whilſt the Proceſs was continued: But the Court was of Opinion, that it might be demanded at any Time.

22 *Aſſiſe, Placito* 83.

27 *H.* 6. 6. a. 2 *Roll. Abr.* 275.

It is by Compulſion of Law, that the Defendant was in Cuſtody of the Marſhal, and therefore he ſhall have his Privilege of Attorney of the Common Pleas; but if he had admitted the Juriſdiction of B. R. it had been otherwiſe.

Judgment, that the Bill ſhall abate.

Norris *verſus* Mawditt. *Mich. 8 Will. Rot. 169.*

WRit of Error on a Judgment in the Common Pleas, in an Action of Debt brought upon the Statute for a falſe Return of a Burgeſs to ſerve in Parliament for the Borough of Leverpool: The Action was, Ad reſpondend. tam Dom. Regi quam (to the Plaintiff) qui ſequitur, &c.

The Statute enacts, That if any Mayor, *&c.* ſhall return other than the Perſon choſen by the Burgeſſes of the Borough where ſuch Election ſhall be made, that he ſhall forfeit to the King 40 *l.* and alſo gives an Action of Debt for 40 *l.* againſt ſuch Mayor, *&c.* his Executors and Adminiſtrators, to any Perſon choſen and not returned, or to any other Perſon, who in Default of ſuch Burgeſs ſo choſen, will ſue for the ſame.

23 *H. 6. cap.* 15. *Vide* 1 *Mod.* 145, 146, *&c.* 2 *Lev.* 114. *Pollex.* 470. *Fareſt.* 13. 6 *Mod.* 45, 49. 3 *Keb.* 365, 389, 664. 1 *Salk.* 19. 2 *Salk.* 503, 504.

The Plaintiff declared, That the Town of Leverpool was an ancient Borough, out of which two Members were to be choſen to ſerve in Parliament by thoſe Burgeſſes there, who have a Right to vote: That upon the Death of the Earl Rivers, his Honour deſcended to the Lord Colcheſter, who ſerved for that Borough; and that he being removed to the Houſe of Peers, a Writ iſſued out of Chancery, directed to the Chancellor of the Dutchy of Lancaſter, &c. who directs his Writ, under Seal of the County Palatine of Lancaſter, to the Sheriff of that County, commanding him to cauſe another Burgeſs to be elected in his Room: That the Sheriff made a Precept to the Mayor, &c. of Leverpool, commanding them to proceed to an Election, &c. That the Plaintiff, on ſuch a Day and Year, was, and is ſtill a free Burgeſs of that Place, on which Day he was choſen a Burgeſs to ſerve in Parliament for that Borough, in the Room of the Lord Colcheſter; but that the Defendant had returned Mr. Brotherton.

There was a Judgment againſt the Defendant by Default, and a Writ of Error brought, and the general Error aſſigned. And now ſeveral Exceptions were taken to the Declaration:

1. As to the Perſon ſuppoſed to be elected, he ſhould have averred, That he was none of thoſe excluded by the Act, as Sheriff, Lawyer, Merchant, or Infant; for the Authority given by the Act is limited, both as to the Perſon to be choſen, and by whom the Choice is to be made; and the Plaintiff had not brought himſelf within either.

2. This

23 *H. 6. cap.* 15. 2. This Action is founded on the Statute 23 H. 6. which directs how and in what Manner the Sheriff, after the Receipt of the Writ, shall make his Precept under his Seal, (viz.) To the Mayor, &c. (reciting the Writ) and commanding him by the said Precept (if it is in a Borough) to chuse a Burgess by Burgesses.

But this Precept, set forth in the Declaration, is directed to the Mayor to chuse one Burgess of the discreet Men of the Borough, and doth not say by Burgesses.

It is not enough for the Plaintiff to say, That he was a free Burgess on such a Day, &c. and that he was chosen on that Day; for he ought to set forth how, and by whom, either by the Burgesses, or by Vertue of the Precept directed to the Mayor and Burgesses, which gives them Power to chuse. The Plaintiff might have waived this Action of Debt, and brought one for a false Return; but having founded it on the Statute for a Sum certain, and not pursued the Directions on that Statute, he cannot come at the Penalty.

3. The Action is not well brought as to the Form in the Commencement of it, for it is in Debt, Tam pro Domino Rege quam seipso, when in such Case the King ought to be made a Party. The Difference is thus:

1st. When a Statute makes an Offence, and adds no Penalty, the Action brought against the Offender must be Qui tam, &c. but where a Penalty is given to the Party injured, the King must never be joined in that Action.

Moore 63. 1 *And.* 138. Now in this Case, there is a particular Measure of the Subject's Wrong, and likewise a Measure of the Forfeiture to the King; for which Reason, they ought not to be joined in this Action.

Cro. Eliz. 621. *Moore* 911. As in Debt upon the Statute of Edw. 6. for not setting out Tithes, if it is in the Qui tam, &c. it is naught, because the treble Value is given to the Party grieved, and the King can have no Benefit of it.

Rast. Entr. 446, 186. *Placit. Red.* 72. *Plond.* 118. All the Precedents in Cases of this Nature begin with Summonitus fuit ad respondendum to the Plaintiff; and conclude, per quod actio accrevit to him alone.

Econtra.

These Exceptions were thus answered, (viz.) As to the first, it is sufficient to shew that the Plaintiff debito modo fuit Electus,

and he need not ſet forth, that thoſe who choſe him had a Right to elect, or that he is not a Perſon excepted, and the rather, becauſe the Action is brought againſt the Defendant for a Wrong done.

2. Then as to the next Objection concerning the Form of the Precept directed to the Mayor to chuſe one Burgeſs, and doth not ſay by Burgeſſes, and ſo not purſuant to the Statute; but no Advantage ſhall be taken of this Omiſſion now, as it might if the Precept had been void of it ſelf; becauſe the Mayor is bound to obey: It is like the Caſe of a Sheriff who levies Goods upon a Fieri Facias without a Teſtatum, and upon an Action brought againſt him, it will be not allowed that he ſhall take any Advantage of an irregular Proceſs.

But by returning Mr. Brotherton, he hath admitted the Precept to be good; and when he took it as ſuch, and executed it after a wrong Manner, he muſt be charged with an Action.

Neither is it neceſſary for the Plaintiff to ſhew that he was choſen by Vertue of that Precept; for he alledged that he was choſen Loco Domini Colcheſter, and that is ſufficient.

3. Laſtly, as to the Objection, That in this Action the King ought not to be made a Party; the Form is well enough, for it is brought in the Qui tam, &c. for a Contempt to the King, who hath a Diſappointment of a Member to ſerve in Parliament: And this was occaſioned by a falſe Return; but, at the moſt, it is but Matter of Form and Surpluſage.

The Statute 8 H. 6. gives an Action on the Caſe, and treble Damages to the Party grieved, who by Conſpiracy is indicted in any other County than where he dwelleth, and is acquitted; and yet ſuch Action is brought Tam pro Domino Rege quam pro ſeipſo.

So it is upon the Statute of Hue and Cry, and it is always ſo in Prohibitions, for there is a Fine due to the King for the Contempt to his Laws; and therefore it muſt be Tam pro Domino Rege, &c. *Raſt. Entr.* 403.

Note, Reader, This is not very clear, for no Penalty is given to the King by thoſe Statutes, and in ſuch Caſe a Fine is always for a Contempt; but here is a Penalty of 40 l. given by this Statute to the Plaintiff.

But to proceed. A Man was outlawed after Judgment, and arreſted upon the Capias Utlegatum, and eſcaped; and in an Action brought againſt the Sheriff, Tam pro Domina Regina, &c. *Cro. Eliz.* 877.

this was aſſigned for Error, but adjudged good; for it is a Contempt of the Queen to ſuffer a Perſon outlawed to eſcape.

Curia. This Precept is well enough, for it commands them to chuſe Burgeſſes de eodem Burgo; which is no more than what the Law was before the making this Act.

As to the Form of this Action, that it is brought Tam pro Domino Rege quam pro ſeipſo; it is true, where a Statute gives Damages to the Party injured, as for Inſtance, the Statute of R. 2. for a Scandalum Magnatum, it is uſual to join the King with the Party; but where a Sum certain is given, as in this Caſe, they need not be joined. So upon the Statute of Hue and Cry they are always joined.

Raſt. Entr. 593.

Coke Entr. 349.

But here is a Contempt made by the Defendant to an expreſs Law, which is puniſhable by Fine, and therefore the Action may be brought Qui tam, &c. There was the like Precedent in this Court, between Culliford and the Mayor of Dorcheſter, Anno 3 Willielmi, which was an Action of Debt upon a falſe Return in this very Form. Sed Adjourn'.

Hackſhaw *verſus* Clerke.

Vide Poſt, 367.

An Action on the Caſe was brought upon a Bill of Exchange; to which the Defendant pleaded, That after the Acceptance of the Bill he gave a Bond in Diſcharge thereof; and upon Demurrer to this Plea, it was objected, That it amounted to the general Iſſue, for the Debt upon the Bill being extinguiſhed by the Bond, the Defendant ought to have pleaded Non Aſſumpſit, and to have given the Bond in Evidence; and the Court ſeemed of that Opinion; but by Conſent, the Defendant did plead the general Iſſue.

Rex *verſus* Owen.

Vide 2 *Jon.* 177.

Mandamus to ſhew Cauſe why the Defendant did not deliver the Mace, and other Enſigns of Mayoralty, to one Bennet, the ſucceeding Mayor, &c. in which Writ the uſual Clauſe, Vel Cauſam nobis ſignificetis, was left out; and upon a Motion made to quaſh the Writ, it was argued, That thoſe Words were ſo material, that they could not be omitted; and it was compared to a Præcipe quod reddat for Land, or a Præcipe quod reddat rationabilem computum: Which Writs muſt always conclude thus, Vel oſtenſurus quare non fecerit, &c.

But on the other Side, the Caſe of the King and St. John's College was remember'd in this Court, where the ſame Words were left out of a Mandamus, the Writ concluding Sicut informamur; and the Court would not quaſh it, becauſe it being a mandatory Writ, the Perſon to whom it is directed ought to make a Return, or obey it, and it is not abſolutely neceſſary that theſe Words ſhould be inſerted. They were firſt introduced in James Baggs's Caſe, but have been omitted in many Caſes ſince, and therefore a Pluries Mandamus was now granted.

Blanchly *verſus* Fry.

S. C. 1 *Salk.* 193.

TReſpaſs quare Clauſum fregit, and for cutting and carrying away his Corn; the Jury found the Defendant guilty of breaking the Cloſe and cutting the Corn, but not of the carrying it away, and gave 10 s. Damages.

And now it was moved in Arreſt of Judgment, the Queſtion being, Whether this Caſe was within either of the Statutes, which give no more Coſts than Damages? 43 *Eliz. c.* 6. 22 & 23 *Car.* 2. *c.* 9.

The Statute of Queen Eliz. enacts, That if upon any perſonal Action to be brought in the King's Courts at *Weſtminſter*, not being for any Title or Intereſt of Lands, nor concerning the Freehold of any Lands, nor for any Battery; it ſhall appear to the Judge who tried the Cauſe, and ſo ſignified by him, that the Debt or Damages recovered ſhall not to amount to 40 *s.* or above, that he ſhall not award for Coſts more than the Debt or Damages recovered.

The Statute 22 Car. 2. recites that former Statute, and enacts, That in all Actions of Treſpaſs, Aſſault and Battery, and other perſonal Actions, wherein the Judge at the Trial of the Cauſe ſhall not certify upon the Back of the Record, that the Aſſault and Battery was ſufficiently proved, or that the Freehold or Title was chiefly in Queſtion; if the Damages found be under 40 *s.* the Plaintiff ſhall have no more Coſts, and if more ſhall be awarded, the Judgment ſhall be void; and the Defendant may have an Action for ſuch vexatious Suit.

In this Caſe, the Freehold or Title of the Land was not in Queſtion, the Action being brought againſt a Gentleman for entring into the Plaintiff's Ground, who was then following his Game in Hunting.

But it was ſaid, That in a like Action for breaking and entring a Houſe, and breaking the Plaintiff's Glaſs-Windows, and diſturbing him in his Poſſeſſion, the Plaintiff had Judg- 2 *Vent.* 215.

ment

ment and full Coſts; which was denied by the Chief Juſtice to be ſo.

So where the Plaintiff declared for breaking and entring his Cloſe, and for ploughing up his Ground, he had full Coſts.

So for entring his Boat, and cutting his Rope, and but a Penny Damages, yet the Plaintiff had full Coſts. Adjourn'.

Le Roy *verſus* Slatford.

Vide 2 *Jon.* 121, 122. *Poſt*, 402, 403, 431. *Stat.* 7 & 8 *W.* 3. *c.* 27. *Stat.* 11 & 12 *W.* 3. *c.* 17. Return to a *Mandamus*, That the Party had not taken the Oaths.

MAndamus iſſued to the Mayor and Commonalty of the City of Oxon, to admit S. to be their Town-Clerk. They return, That he had not taken the Oaths according to the Statute 13 Car. 2. c. 1.

Exceptions to this Return.

Levins. They have not returned, they did adminiſter the Oaths to him, which they ſhould have done, for no Man can give himſelf an Oath; ſo that it was a Duty incumbent on this Corporation to have tendered the Oaths to all their Officers, and all Oaths muſt be tendered by ſome Perſon that had lawful Authority to tender them; and for ought appears, he might deſire to take the Oaths, and they would not give them.

Harcourt. This is an Officer removeable at Pleaſure by the Mayor and Commonalty; and if they have a Power to remove him, and act in Purſuance of that Power, the Court will not grant a Mandamus to have him reſtored. So is 1 Sid. 14. Ventr. 77.

But with Submiſſion, there is very little in Mr. Serjeant's Objection, for the Party is bound at his Peril to take theſe Oaths. And you may as well ſay, That upon a Return of 25 Car. 2. it muſt appear, that the Parſon tendered the Sacrament; as to ſay, the Corporation is bound to tender the Oaths.

Chief Juſtice. Though a Man that holds but at Will may be removed without Cauſe, yet the Corporation here has not declared their Will to remove him; which they muſt do, or elſe we cannot take Notice of it.

But the Words of the Statute are very poſitive, That at the Time of the taking the Oaths of his Office, he ſhall take the other Oaths, and ſubſcribe the Declaration. The Caſe of the King and Thacker in Sir Thomas Jones, Caſe 121. is plain againſt you: A Mandamus iſſued to the Mayor, &c. of Norwich

to reſtore an Alderman; they returned, that he being elected took the Oaths in the ſaid Act of 1 W. 3, and of K. Ch. and pronounced the Declaration, but he did not ſubſcribe when he took the Oaths to execute the ſaid Office. Counſel excepted to the Return, becauſe it doth not appear that he was required to make the Subſcription, or that the Declaration was tendered to him to be ſubſcribed, and the Act requires Tender, and the Proviſo refers to it; But the Court held that Tender is not neceſſary, and the Officer ought to do it at his Peril, and the Office is void for Non-ſubſcription by the Words of the Act; and the ſaid Cauſe was allowed by the Court.

Indeed, if the Mayor and Commonalty ſhould refuſe to adminiſter the Oaths, it's a great Misdemeanour, for which an Information will lie, and it is finable. And conſider whether an Action will not lie againſt the Mayor for not tendering theſe Oaths for Damages in loſing the Place by it, for they ought to have tendered them; and the Words of the Act are, That the Oaths ſhall be adminiſtred: But however, the Party muſt take them at his Peril, the Words of the Statute are ſtrong againſt him. Refuſal to adminiſter the Oaths.

At another Day,

Webb. My Firſt Exception to the Return is, That they have made it narrower than it ought to have been, for they ſay, That he did not take the Oaths before the Mayor and Commonalty; but they do not ſay he did not take them before Two Juſtices of the Peace: So that for ought appears, we might have taken them before Two Juſtices of the Peace, and then we have a good Title; and a Return muſt be certain to every Intent, for we have no Opportunity as in Pleas in Bar we may reply, and therefore they need not be ſo very certain.

2d. Exception. They do not give us Negative Words, they do not ſay we had not no better Title, for they only give us a defeaſible Title; but they ought to have added, we have no other Title, for perhaps he might have been choſen afterwards, and might have had another good Title.

Econtra.

Shower. As to the firſt Exception, we have ſaid, That he did not take the Oaths when he was choſen to this Office, and that is ſufficient, for that implies he did not take them then before any one: Beſides, by the Act he ought to take the Oaths before the Mayor and Commonalty.

As for the second, we have sufficiently alledged his having no Title. Then this Writ of Mandamus only concerns the Possession, and does not determine the Right; therefore the Return to it need not be so very certain.

Then the Words of the Statute are, That they are authorised to tender the Oaths, but not commanded to do it.

A Man at his Peril must take the Oaths in the Corporation Act.

Chief Justice. The Design of this Act was to secure the Government in general, and likewise of the Corporations in particular, therefore at his Peril he must take the Oaths; otherwise the Corporation, by Agreement amongst themselves not to tender the Oaths, might dispense with the Act, which might prejudice the Government.

Then the Question is, That Two Justices of the Peace have Power to administer the Oaths in case of Omission of the Mayor and Commonalty: If so, then the Return is too short.

At another Day.

Wright, Serjeant. The great Exception is, where it is said, That he ought to take the Oaths coram Majore pro tempore existen'; so that it's wholly uncertain whether it was meant of the Mayor, before the Mayor at the Time of making the Letters Patents, or at the Time of making the Statute in King Charles II.'s Time, when the Statute was made to regulate Corporations, or at the Time of the late Act.

Northey. Tho' the Statute be misrecited, yet it being a Publick Act, your Lordship will take Notice of it.

As for the Exception, pro tempore existen', so much relied on, it shall be intended before the Mayor for the Time being at the Time of taking the Oaths, it shall be understood eodem tempore when he took the Oaths.

Misrecital of a Statute.

Chief Justice. As to the Misrecital, if there be sufficient recited for the Plaintiff's Case, it's well enough. So in the Case of Robbery on the Statute of Hue and Cry, tho' the Plaintiff in Recital of this Statute omits [Murder,] yet the Plaintiff will have Judgment.

Afterwards in Trinity Term following, a peremptory Mandamus was granted; for that by the 12th Paragraph, he might have taken the Oaths before Two Justices of the Peace. If the Justices of the Peace have Power to administer the Oaths as well as the Mayor, and you have returned only that he did not take them before the Mayor, it's ill, and the Return is too short.

Clark's

Clark's *Caſe*

S.C. ante 156.

Hall. THIS comes before your Lordſhip upon a Return to an Habeas Corpus: They ſet forth the Charter of the City of London, &c. and farther ſay, That in the ſaid City there are ſeveral Companies and Societies, and that the Company of Vintners is one of them, &c. and that thoſe Companies are under the Government of the Mayor and Aldermen: And they ſay alſo, That if any refuſed to take upon them the Office of a Livery-Man of any Company, he might be thereof convicted and impriſoned by the Mayor and Aldermen; and they ſay, That Clark refuſed to take upon him the Office of a Livery-Man of the Company of Vintners, tho' he was a Citizen and Freeman of London, and ſubject to the ſame; and that therefore the Mayor and Aldermen commited him to Fell the Keeper of Newgate, untill he ſhould take npon him the ſaid Office.

Retorn on *Habeas Corpus.*

Cuſtom as to Livery-Men, *Lond.*

1 *Salk.* 192, 193, 341, 352. 6 *Mod.* 123, 177. 1 *Mod.* 10, 164. *Ante.* 104, 105, 156, 157.

I think this Caſe to be of great Conſequence to the Liberty of the Subject, which, my Lord Coke ſaith, is more precious than the Advantage of any particular Society. 2 Inſt. 45, 46. 3 Inſt. 124.

There have been many Exceptions taken already, and many Authorities quoted; and amongſt the reſt, the moſt remarkable are 1 Mod. 10. and Tavernor's Caſe in Raymond 447.

Tavernor was choſen a Livery-Man of the Company of Vintners, and refuſed, and they aſſeſs'd a Fine of thirty-one Pounds eight Shillings and four Pence, according to a By-Law. Per Cur'. It's not unreaſonable and againſt Law; were the Fine more or leſs, it would not make the By-Law void, for it is only to bind the Members of a Corporation; and when a Man doth agree to be of a Company, he doth thereby ſubmit to the Laws thereof, and they are not to take Notice of the Extravagancy of the Charges they lay upon themſelves, and it's convenient to keep up their Reputation and the Honour of the City of London to have ſuch Power.

Then it hath been already obſerved, that this Return is only by Way of Recital.

Now I ſhall add what occurs to me:

1. It does not appear he was choſen to be a Livery-Man; for the word [Electus] is not there.

2. Then

2. Then they ought to have alledged, That Mr. Clark had no reasonable Excuse; for that they entitle themselves to so supream a Power of committing his Majesty's Subjects to Prison.

3. Then it does not appear that Mr. Fell was an Officer of the City. (This Exception was much insisted on in a former Argument in this Case.)

4. They ought to have asked Clark before the Commitment, What he had to say for himself? As the Practice is always in Criminal Cases,

Custom to commit a Man to Prison. *Vide ante*, 106, 107, 156, 157.

5. A Custom to commit a Man to Prison, is a void Custom. 2 Brownl. 191. The Case of the Cinque-Ports. 1 Leon. 105, 106. 4 Leon. 109. Style 78, 84. 1 Roll. Abr. 364. Marsh. Rep. 186, 187. Langham's Case.

As for the Objection, That this Custom is confirmed by Act of Parliament; there are several Statutes that are adjudged to be void, which are unreasonable in themselves.

Then it does not appear in all this Return, that these Livery-Men are of any Use to the good Government of the City, which should have been taken Notice of. 1 Mod. 164 Magdalen-College Case.

Holt, Chief Justice. We ought as far as we can by Law to support the Government of all Societies and Corporations, especially this of the City of London; and if the Mayor and Aldermen should not have Power to punish Offenders in a summary Way, then farewell the Government of the City.

But the Exception which sticks with me most is, That it is not set out that Fell is an Officer of the City; and indeed I think not that he is an Officer of the City, quatenus a City, tho' I confess he is an Officer to the Sheriffs as he keeps the County-Gaol: But it ought to have appeared, that he was committed to an Officer of the Mayor and Aldermen.

Clark was afterwards discharged per totam Curiam, tho' all the Court declared their Opinion, That the Custom was a good Custom, and was for the Advantage of the good Government of the City, and therefore they would always support it.

Rex

Rex *verſus* Peckham.

Vide 1 *Salk.* 378, 383.

ANo 3 & 4 Willielmi, it was enacted, That if any one ſhall * hunt, take in Toils, † kill, wound or take away any red or fallow Deer, in any Foreſt, Chace, or Purlieu, Paddock, Wood, Park, or other Ground encloſed where Deer are kept, without the Conſent of the Owner or Keeper, or ſhall be aiding or aſſiſting therein, and ſhall be convicted either by Confeſſion, or by the Oath of one or more Witneſſes, before one or more Juſtices of the Peace where the Offence was committed, or Party apprehended; ſuch Perſon being proſecuted within twelve Months after the Offence committed, ſhall forfeit twenty Pounds for every Offence, though no Deer is taken; but if killed, wounded, or taken, thirty Pounds for every Deer, to be levied by Diſtreſs, by Warrant ununder the Hand of that Juſtice or Juſtices before whom the Conviction was made, one Third to the Informer, another to the Poor, another to the Owner of the Deer or Park; and if no Diſtreſs can be had, then the Offender is to be impriſoned for a Year, and ſtand in the Pillory.

* Tho' no Deer are taken, forfeits 20 *l.* for every Offence.

† If wounded or taken, it is 30 *l.*

One Peckham was convicted upon this Act for ſtealing a Deer, which Conviction being removed into B. R. by Certiorari and filed, theſe Exceptions were made to it: *Vide* 2 *Salk.* 582.

1ſt. The Conviction being made upon this Statute, the Proſecution ought to have been within twelve Months, which it was not: For the Offence appeared to be done 14 Auguſt, 7 Wil. and the Information was exhibited 13 Auguſt, 8 Will. and not before. Now an Information is no Proſecution; and if ſo, the Party was not proſecuted within twelve Months after the Offence committed.

To which it was anſwered, and ſo ruled, That the Record ſets forth, that the Defendant debito modo & ſecundum formam Statuti convictus fuit, which is well enough. 1 *Salk.* 383.

The Inhabitants of Chidingfold *verſus Inhabitants of* Penſhurſt.

S. C. 2 *Salk.* 473, 474.

AN Order was made by two Juſtices of Peace, to remove a poor Man from the Pariſh of Chidingfold to Penſhurſt, which Order was confirmed upon an Appeal. *Vide* 6 *Mod.* 180. *Poſt*, 322, 325, 330. *Ante*, 149, 162, 208.

14 *Car.* 2. *cap.* 12.

1. And now a Motion was made to quash the first Order, because it did not shew that the Man settled in a Tenement under the yearly Value of ten Pounds.

2. The Statute enables two Justices of Peace to remove the Party, one of whom is to be of the Quorum, which Word was omitted in that Order.

The Court disallowed the first Exception, which was the same formerly over-ruled, in the Case between the Inhabitants of Marlborough and Wootton-Rivers.

Vide 2 *Salk.* 473, 480, 488, 489.

But the Order was quashed for the other Exception, the Court being of Opinion, That two Justices cannot remove a poor Man out of Sessions, unless one of them is of the Quorum, because they have a special Jurisdiction given by the Act, which must be followed. 2 Salk. 474.

Parish of Walton *versus Parish of* Chesterfield.

Vide Post, 325. *Ante*, 149, 163, 204.

Nota. Another Order was made, to remove a poor Man from the Parish of Walton to Chesterfield in the County of Derby, which was likewise confirmed upon an Appeal: But the first Order was now quashed, because it did appear to be made by two Justices of the Peace; it is only, Whereas Complaint hath been made to us; and so they did not recite their Authority in the Order. It is true, they were mentioned to be Justices upon the Appeal, but that will not help, for they might be so then, and not at the making the first Order; and for this Reason it was quashed.

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Term. Sancti Hill.

Anno 8 W. III. B. R. 1696.

Memorandum. This Term Serjeant *Wright* was called within the Bar, being made King's Serjeant, and afterwards Lord Keeper of the Great Seal.

Mrs. Barney's *Caſe.*

A Bill of Indictment was found againſt her at the Quarter Seſſions in Norwich, for petty Treaſon and Murder of her Husband. She came now in Cuſtody, and moved the Court by her Counſel, that ſhe might be bailed. It is true, this Caſe is not within the common Rule; but it appearing by Affidavits of the Fact, that it was a malicious Proſecution, and there being nothing done either upon the Indictment or Coroner's Inqueſt, or at the Aſſizes, and the Man being dead above a Year, ſhe was bailed. *Vide* 2 *Jon.* 210, *&c. Poſt*, 455.

Redwood *verſus* Coward. *Trin.* 8 *Will. Rot.* 645.

WRit of Error upon a Judgment for the Plaintiff in the Palace-Court. The Error was aſſigned in the Judgment it ſelf; for it was, That the Jury Aſſident damna, inſtead of Aſſidunt, it ſhould have been in the Preſent Tenſe; it is like Recuperaret damna, inſtead of Recuperet, which cannot be good.

Now tho' both theſe Words may have the ſame Signification, as Conceſſum eſt is the ſame with Conſideratum eſt, &c. yet Uſage had made the Word Aſſidunt to be the proper Word in ſuch Caſes.

To which it was anſwered, That Aſſident is the moſt proper Word, for it comes from Aſſideo, ſo doth Aſſeſſor; and the Jury are the Aſſeſſors of the Damages.

Curia. And the Court was of the ſame Opinion, but would not allow Conceſſum and Conſideratum to be the ſame; for it may be Conceſſum, and often is without Conſideratum eſt.

Salisbury *verſus* Proctor.

Vide Sty. 31, 224, 227. 1 *Sid.* 60, 98. *Nelſ. Lutw.* 478. *Mar.* 60. *Cro. Jac.* 169. *Palm.* 393. *Latch*, 216. *Ante*, 181.

IN Trover the Plaintiff declared, That he was poſſeſſed of divers Goods, viz. of fifty Pieces of Gold coined within this Kingdom, ac de Viginti petrat. Carnis Bovinæ, [Anglice twenty Stone of Beef] ac de viginti Vaſibus [Anglice wooden Veſſels] as his proper Goods which he loſt, quæ quidem Bona & Catalla poſtea apud, ſuch a Place, ad Manus & Poſſeſſionem of Defendant per invention. debuerunt.

There was a Verdict for the Plaintiff, and intire Damages given. And now it was moved in Arreſt of Judgment, and theſe Exceptions were taken:

1. He hath declared, That he was poſſeſſed of fifty Pieces of Gold coined within this Kingdom, but doth not name what Money it was; for which Reaſon it is incertain; for Pieces of Gold are coined here of ſeveral Values.

2. That he was poſſeſſed de Viginti petrat. Carnis Bovium. Now there is no ſuch Word as petrat, which ſignifies a Stone of Beef; and there is a proper Word for a Stone-Weight: And the Rule is, When an improper Word is put in the Declaration, for which there is a proper Word to ſignify the ſame Thing, it is always held to be naught.

Vide 1 *Sid.* 60. 1 *Lev.* 48. *Nelſ. Lutw.* 478, 480.

3. That he was poſſeſſed de Viginti Vaſibus, [Anglice wooden Veſſels;] the Word Vas is too general: So de uno Pullo hath been held ill for the ſame Reaſon.

4. It is ſaid, theſe Goods ad Manus of the Defendant per invention. debuerunt, inſtead of devenerunt; for which Reaſons this is not a good Declaration.

Econtra.

It was said, That in the first Year of the King the Plaintiff declared in Trover, that he was possessed de una pecia Branditti Vini; and that was held good after Verdict, tho' there is a proper Word for Brandy. Adjourn'.

Parishioners of Trobridge *versus* Weston.

S. C. 2 *Salk.* 473.

Exceptions were taken to an Order made by two Justices of the peace, concerning the Removal of one Anne Jervis, a poor Woman, from Trobridge to Weston.

The first was, That the Order doth not affirm, that the Place to which she was removed was the Place of her last legal Settlement; it is only said by the Justices, Whereas we are credibly informed, *&c.* it should have been upon Oath, and being a Judgment, ought to be positive and certain. *Vide Ante,* 322.

But this Order being confirmed upon an Appeal, the Court held that to be a void Exception, otherwise it had been good.

2. It doth not appear, that the first Order was made by two Justices of Peace of the Division, where the Person was likely to be chargeable to the Parish: And the first was held a good Exception. 14 *Car.* 2. *cap.* 12.

Rex *versus* Morgan Rice.

Mandamus to an Archdeacon, to swear the Defendant Church-warden of a Parish, setting forth, the Custom of the Place was to chuse Habilem & Idoneam Personam to bear the Office of Church-warden; that the Defendant was in Court and chosen, but refused by the Archdeacon, &c. who returned, That the Defendant was a poor Dairy-Man, & minus Habilis to be a Church-warden.

Exceptions were taken to this Return, That it doth not appear that there was any other Man in the Parish, besides the Defendant, who was fit to execute this Office. *Vide* 2 *Salk.* 430, 432, 436.

The Archdeacon hath not an Authority to refuse a Church-warden being chosen; for if such Power should be allowed, the Custom of chusing him will be quite overthrown. The Parishioners are the proper Judges of his Qualifications; and the Archdeacon hath no more to do than to administer the Oath, and admit the Person chosen; and is no more a Judge in this Case, than he is of an Executor or Administrator.

The Party refused cannot bring an Action upon this Return to try the Right; for to say, Non fuit pauper Lactarius, would be very incertain, because he may be poor in several Respects, and yet not be thereby disabled to hold this Office.

Econtra.

The Question is, Whether the Person who by Law is to administer the Oath of Office, hath any Power to judge of the Ability of the Person chosen to such Office?

The Office was Spiritual, therefore the Ecclesiastical Court is not only to swear him, but is likewise to judge of his Ability; he is presented to them for that Purpose. They have a formal Proceeding to examine his Sufficiency, and their Determination, that he is Minus Habilis, must always be allowed where they have any Jurisdiction of the Cause.

43 *Eliz. cap.* 2. A Church-warden is an Office of Trust; he is made Overseer of the Poor by the Statute of 43 Eliz. without any Election; he is accountable to the Parishioners at the Expiration of his Office; and therefore Care ought to be taken that he should be Habilis & Idonea Persona.

But the Court were of Opinion, That a Church-warden is a Temporal Officer; that he is a Corporation; and Actions are brought in his Name, and likewise against him by his Successor, to recover an Account.

He being then a Temporal Officer, and having a Temporal Trust reposed in him, and there being a Custom for the Parishioners to chuse him, it is the Duty of the Archdeacon to swear him when chosen, without inquiring into his Ability.

For why should he be Judge of that, rather than those who are most concerned in Interest, which are the Parishioners? And it is not to be presumed, that the Archdeacon will take more Care to put a fit and able Person into this Office, than they in whose Power it is to chuse him: And for this Reason, the peremptory Mandamus was granted.

College of Phyſicians verſus Salmon.

S. C. 2 *Salk.* 451. *Vide* 4 *Mod.* 47. 6 *Mod.* 44. *Stat.* 14 *H.* 8. *cap.* 5.

By the Statute Anno 14 H. 8. the Charter is confirmed, by which the College of Phyſicians is incorporated: Which Act made them a perpetual College in London, and ſeven Miles Compaſs thereof, with Power to chuſe a Preſident every Year. It enables them to purchaſe Lands, and to ſue and be ſued; and prohibits any to practiſe Phyſick within that Circuit, unleſs approved under the Seal of the College, upon Pain of 5 l. to be divided between the King and the College.

An Action of Debt was brought upon this Statute by the Plaintiff, by the Name of Præſidens & Collegium ſeu Communitas Facultatis Medicinæ London, againſt the Defendant, for practiſing Phyſick without Licence: Per quod Actio accrevit Domino Regi & Dom. Reginæ & eidem Præſidenti qui tam Collegio & Communitate, &c. Upon Demurrer to the Declaration,

Dr. *Laughton* verſus *Gardner.* *Cro. Jac.* 121, 129. 1 *Roll. Abr.* 515. 2 *Bulſt.* 185. Corporation of Phyſicians *verſus* Dr. *Tenant*, *Jones* 262.

It was inſiſted, 1. That the Action was miſconceived, for it ought to be brought by the Preſident of the College of Phyſicians only. So is Dr. Laughton's Caſe, who brought an Action as Preſident of the College of Phyſicians in London, and of the Corporation of Phyſicians there; for the Preſident and College being incorporated, they ought to join in the Action; it had been naught if the Action had been brought in the Name of the Preſident alone without the College.

2. The Statute prohibits the Practice of Phyſick within ſeven Miles of London, unleſs the Perſon ſo practiſing be approv'd under the Seal of the College, under the Penalty of 5 l. to be divided between the King and College.

They alledge, that the Defendant did practiſe within that Circuit, not being admitted under the Common Seal of the Preſident and Commonalty, when the Statute ſaith, It muſt be by the Preſident and College, *ſive Communitas*; and by the Statute the Penalty is given to the King and College, which is not the ſame Perſon.

Cro. Car. 256.

3. The Concluſion is, Per quod Actio accrevit Domino Regi, &c. & Præſidenti qui tam, &c. Collegio ſive Communitate, &c. when it ſhould have been brought by the Informer; Qui tam pro Domino Rege quam pro ſeipſo.

Econtra.

Econtra.

As to the laſt Exception, that is of no Force; for in all Informations upon penal Statutes, the Concluſion is, Per quod Actio accrevit Domino Regi, and puts the King before the Informer.

As to the ſecond Objection it was ſaid, College and Community are Words ejuſdem Significationis, therefore ought to be taken ſo in this Caſe.

2 *Bulſt.* 185. And as to the firſt Objection, which was anſwered laſt, it was ſaid, that it is a Queſtion, Whether this Action had been good, if it had been brought by the Preſident alone? But it cannot be a Queſtion, Whether it ſhall be good or not, when brought by the Corporation?

In the Caſe of this College and Buſh, it was brought by the Name of Præſidens Collegium ſeu Communitas, &c. and held naught.

In Dr. Goodall's Book, treating of this College, there are ſeveral Precedents of Actions brought by them in the ſame Form as this is; and it muſt be the proper Way to ſue by the incorporate Name.

Curia.

The Chief Juſtice ſaid, there was no Judgment in that Caſe of Buſh; but this is the beſt Way of declaring, eſpecially ſince the Penalty is given to the Corporation. Sed Adjourn'.

Rex *verſus Inhabitants of* Cheſterfield.

See the Caſe of St. *Bride's* and St. *Saviour's* Pariſhes, 2 *Salk.* 533. That Apprentice may gain a Settlement tho' the Maſter has none.

ONE Francis Jeniſon lived as a Footboy with Sir Paul Jenkinſon in Walton, which was a Mill in Cheſterfield; he was diſcharged of his Service, and Sir Paul ſent him to Cheſterfield, to one Thorp a Barber, and gave him 6 l. for one Year to teach him to ſhave.

Cheſterfield complained, that he came to be an Inhabitant there, and refuſed to give Security; and it appearing that Walton was the laſt Place of his legal Settlement, he was ſent thither by the Order of two Juſtices.

Walton appealed, and the firſt Order is confirmed; which being removed hither by Certiorari,

It was ſaid, That ſerving a Year upon an expreſs Agreement, makes him an Inhabitant at Cheſterfield.

Econtra.

The Statute of King William is explanatory of the former Laws made about Settlements; and the Party must now bring himself within that Act, or can gain no Settlement. 3 & 4 W. 3.

That Act requires, That if an unmarried Person, not having Child or Children, be lawfully hired for a Year, such Service shall be a good Settlement. Now that must be a Service for a Year.

This was no lawful Hiring, for it doth not appear that he was retained by his own Consent; and an Action would not have lain against him upon his Departure out of his Service, because there was no mutual Contract between the Master and Servant.

The Agreement was made between Sir Paul Jenkinson, and the Master, who was bound only to teach the Boy to shave. F.N.B. 168. B. Lit. F.

If this should amount to a Contract between them, it must be as an Apprentice; which cannot be, because not by Indenture, and therefore void.

If he had been an Apprentice, it must be for seven Years, and then his Trade is accounted an Estate, which is a Security to the Parish. Adjourn'.

This Case was spoke to again in Easter-Term following, and it was insisted, That the Order of Sessions upon the Appeal was final; but afterwards in Trinity-Term, the Court held this to be no good Settlement in Chesterfield, and that the Person was well removed to Walton.

Rex *versus* Turner.

S. C. 2 *Salk.* 474.

AN Order was made at the General Sessions of the Peace, held for the County of Wilts, by which the Defendant was assessed towards the Relief of another Person, by Vertue of the Statute of 43 Eliz. and was indicted for disobeying that Order; which being removed hither, this Exception was taken to it, ſſ. The Order is laid to be made Ad generalem Sessionem Pacis tent', &c. and doth not say, Quarterialem; when it is expressly required by the 7th Paragraph of that Act, That the Relief shall be as the Justices of the Peace at their general Quarter Sessions shall assess: For which Reason it was quashed. 43 *Eliz. c.* 2. 2 *Salk.* 474, 476.

Dalbury *and* Foiſton *Pariſhioners.*

Vide 2 *Salk.* 533, 534, 535, 536.

AN Order was made by the two Juſtices of the Peace, to remove one Robert Blood, from the Pariſh of Foiſton, in the County of Derby, to the Pariſh of Dalbury, being the Place of his Birth.

The Inhabitants of Dalbury appeal to the Quarter Seſſions, and the Fact was ſtated upon the Order, ſſ. That he lived at *Foiſton* a whole Year, and being a Smith, worked for the Lord of the Manor, and the Vicar of the Pariſh, in ſhoeing their Horſes; which was held to be a ſufficient Notice; and therefore the Order was confirmed upon the Appeal, though no Notice in Writing was given to the Church-wardens and Overſeers of the Poor of the ſaid Pariſh of the Place of his Abode, and the Number of his Family.

1 *Jac.* 2. *c.* 17. Notice.

Vide Poſt, 454.

Theſe Orders being returned hither by Certiorari, it was moved, to affirm the Order made upon the Appeal, and ſaid, That Settlements will be as formerly before the making of that Act, unleſs the Party comes clandeſtinely into the Pariſh, which was not done in this Caſe. So that having lived at Foiſton above forty Days, he is now legally ſettled in that Place.

The greateſt Part of the Pariſh requeſted this Man to inhabit there, becauſe they wanted a Smith. Therefore ſince he came thither at their Deſire, and openly, the Statute will never extend to him; becauſe that was made to prevent the concealing themſelves above forty Days to gain a Settlement.

It hath been held in this Court, That where the Pariſhioners of Grampound met at a poor Man's Alehouſe to make a Rate, that did amount to Notice, though no ſuch was given in Writing; and it was allowed a good Settlement after the forty Days.

Econtra.

But on the other Side it was ſaid, he was no Houſholder, but lived with the Widow of the former Smith in that Pariſh, and worked there as her Servant.

The Intent of the Statute was, That by giving Notice in Writing, the Pariſh may know as well the Number of his Family, as the Place of his Abode; but neither the Lord of the Manor, nor the Vicar, can tell how many this Smith had in his Family by ſhoeing their Horſes.

The laſt Statute ſeems to be made purpoſely to prevent ſuch Settlements, which enacts, That the forty Days ſhall be accounted from the Publication of Notice in Writing of the Place of his Abode, and Number of his Family; which he ſhall deliver to the Church-warden, &c. *Vide Stat.* 3 & 4 *Will.* & *Mariæ.* 2 *Salk.* 523, 534.

By which Statute, ſeveral Things are allowed to make a Settlement without Notice in Writing.

As if a Man execute a publick Office for a Year, or ſhall be charged with publick Taxes to the Pariſh, or unmarried Perſon hired for a Year, or Apprentice, &c.

Since the making this Act, it hath been adjudged in this Court, That if a Man be aſſeſſed to the Pariſh-Rates, and doth not pay the Sum at which he is aſſeſſed, that ſhall make no Settlement; and yet in the Caſe of Ipſwich it was held, that if a Man be aſſeſſed to the Land-Tax, it amounts to a ſufficient Notice, and yet it is no Pariſh-Tax. *Inter* Pariſhioners of St. *Hellen* and St. *Nicholas* in *Abingdon.*

Curia. Notice by Implication will defeat the laſt Act, which is explanatory of the Statute of King James, and muſt be purſued; for the Court cannot go beyond that Explanation. So the firſt Order was confirmed.

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Termino Paſchæ.

Anno 9 W. III. in B. R. 1697.

Puliſton *verſus* Warburton, *& al'.*

S. C. 1 *Salk.* 48.

Vide 1 *Sid.* 316, 416. *Ray.* 165.

IN Ejectment, the Declaration was of Trinity-Term laſt paſt, upon the Demiſe of John Levett and Anne his Wife, for Lands in Blymhill, in the County of Salop, dated 10 April 1697, and the Ouſter is laid to be, Poſtea ſcil't eodem decimo die Aprilis 1697.

The Defendant's Attorney entred into the Common Rule, to confeſs Leaſe, Entry, and Ouſter, and to try the Cauſe at Bar; and the ſame was tried accordingly laſt Michaelmas-Term, which was in the Year 1696, and which was half a Year before the Plaintiff had any Title, as appeared by the Declaration; whereupon the Defendants moved to ſtay the Entry of the Judgment: He had a Verdict the ſame Term the Cauſe was try'd, by Reaſon of this Miſtake of the Year of our Lord in the Demiſe, which ſhould have been 1696, inſtead of 1697, and they had a Rule accordingly. And the firſt Day of the laſt Term, the Defendants moved it again, and the Rule was continued till the Plaintiff ſhould move the Court, which he did by Serjeant Wright laſt Term, to amend the Declaration, and make the Demiſe to be in the Year 1696, inſtead of 1697.

The Declaration delivered to the Tenant in Possession was right, and a full Defence being made at the Trial, the Judgment may be well entered, notwithstanding this Mistake; and this is warranted by the Statute of Repleader, which enacts, That in all Actions after Issue join'd, Judgment shall be given, notwithstanding any Mispleading, Lack of Colour, insufficient Pleading, Miscontinuance, Discontinuance, or Misconveying of Process, Misjoining of Issue, &c. or any other Default or Negligence of any of the Parties, their Counsellors or Attorneys; which are large and general Words, and will not justify the Amendment in this Case. 32 H. 8. c. 30.

This Court hath * changed the Plaintiff in Ejectment after the Declaration delivered, he being a Witness to prove a Deed in the Cause. Sid. 24. * But it was before Plea pleaded.

It hath likewise enlarged the Term where the Cause hath been long in Agitation, and it was never denied to amend where there is any Thing to amend by.

An Ejectment is an Action brought by Consent, and more immediately under the Power of this Court than any other Action, for it a Matter of Form set out by the Court.

Now the Declaration below against the casual Ejector being right, that being in Nature of an Original, in whose Room the Defendants are to come in by Rule of Court.

It is plainly the Misprision of the Clerk, and therefore it may be also well amended within the Statute of H. 6. especially when the Amendment is in Affirmance of the Judgment. 8 H. 6. c. 15.

Birch Serjeant, Sir Francis Winnington, and Sir Thomas Powys, contra.

If by these general Words in the Statute of H. 8. every Thing may be amended as it hath been argued on the other Side, then all Motions in Arrest of Judgment would be vain, and to no Purpose; because let there be never so many Errors, either in Title, Substance, or Form, they may be all amended; but the Practice is otherwise.

As to the Reason offered, why the Court should make an Amendment in this Case, because they have altered a Plaintiff in the same Action, that can be of little Force; for it is not material who is Plaintiff in Ejectment, for he is only a nominal and imaginary Person: And therefore Judgment shall be entered against him after he is dead, because he is not concerned in Interest. Mod. Rep. 252.

This Miſtake was ſeen before the Trial, and the Plaintiff moved the Court twice, but they would not alter it; but yet he proceeded to try the Cauſe, and would not have the Court make a new Record, a new Leaſe, and a new Ouſter, which could not be done without the Conſent of both Parties.

All Amendments extend to Forms and Miſtakes of Clerks, but not to Titles and Subſtance as this is.

That the Court ſhould give Leave to amend this Declaration, becauſe they enlarged the Term where the Cauſe hath been long depending. Certainly, that can ſignify but little to this Purpoſe, becauſe where Difficulties ariſe, Curia adviſare vult for two or three Years together, rather than give a haſty Judgment. Now that is the Act of the Court, and no Default of the Parties, therefore they may well enlarge the Term.

It cannot be ſaid with any Colour of Reaſon, that this Action is more under the Power of this Court than any other; for Proceedings in Ejectment are as regular as in any other Caſes whatſoever.

In the Caſe of Thompſon and Leach, an Ejectment was brought for ſo many Acres Ligni, but the Court would not amend it, and put in the Word Boſci; and therefore the Plaintiff having declared of ſeveral other Things, Care was taken to ſeparate the Damages by the Verdict.

Now this being Matter of Subſtance, it cannot be amended by the Statute of H. 6. becauſe that doth not extend to this Caſe, for it muſt be after Judgment, and in Affirmance of the ſame; and this Motion is made in Arreſt of Judgment.

The latter Statutes do not extend to it, but only Matter of Form, ſo that it will be difficult for the Plaintiff to ſhew any particular Proviſion in thoſe Acts to ſuit with this Caſe.

1 *Show.* 537. This Court denied to enlarge the Term in an Ejectment between Hutchins and Baſſett, which was hung up many Years by Privilege of Parliament.

22 *H.* 6. 58. *Bro.* Amendment 41. This is not the Miſpriſion of the Clerk, and therefore it cannot be now amended in another Term: So was the Law formerly held to be in an Action of Treſpaſs, for breaking the Plaintiff's Cloſe, and carrying away his Goods; which Words were left out of the Declaration. This was not allowed to be amended in another Term, for the Plaintiff is to declare at his Peril.

* *Paſchæ*, 21 *Car.* 2. 1 *Sid.* 416. Neither can the Caſe of * Pemble and Stern be an Authority to govern this; it was a ſpecial Verdict in Ejectment, and an Exception was taken to the Declaration, becauſe it was of a Park, without ſaying how many Acres, & de Pannagio, of which an

Ejectment would not lie: But the Court being divided upon another Point, a Rule was made to adjourn it into the Exchequer-Chamber; and before the Record was certified, Sir Wadham Wyndham, one of the Juſtices againſt the Judgment for the Plaintiff died, and then there being but three Judges in Court, a Motion was made for Judgment, according to the Opinion of the other two, Kelynge and Twiſden, the Plaintiff having releaſed the Damages for theſe Things without the Conſent of the Defendant, which could not be done by Law; and it being oppoſed by Weſton, who was of Counſel with the Defendant, yet at laſt he conſented to it, becauſe he ſaw theſe two Judges would otherwiſe give Judgment againſt his Client.

Cholmondley *verſus* Broom.

DEbt upon Bond was brought againſt the Defendant in this Court in Cuſtod. Mar', who pleaded, That about the Time of the exhibiting the Bill, he was an Inhabitant in the County-Palatine of Cheſter, ſſ. apud Nantwich, and notoriouſly known there.

Now this being held to be a Foreign Plea, and not ſworn, the Plaintiff for that Reaſon ſigned his Judgment.

Mr. Cheſhire moved to ſet it aſide, becauſe tho' it is a Plea to the Juriſdiction, yet it is not a Foreign Plea, and therefore need not be ſworn. 1 *Salk.* 30, 201, 202. *Vide* 2 *Salk.* 515, 543, 544.

Antient Demeſne, and all Pleas of Privilege, are Pleas to the Juriſdiction; but they are not foreign, and therefore they are to be received without an Oath. *Lutw. Rep.* 236.

Many Inſtances may be given of Foreign Pleas, which if not collateral to the Action, muſt be received in that Manner: As in an Action of Debt for Money, if it appear upon the Condition of the Bond, that it ſhould be paid out of the Juriſdiction of an Inferior Court, and the Defendant pleads Payment accordingly, this Plea muſt be received without an Oath: And for this Reaſon the Judgment was ſet aſide. *Styl.* 225. *Sid.* 329. 1 *Saund.* 97, 98.

Rex *verſus* Jevois.

A Trial at Bar in a Quare Impedit for the Church of Northfield, ſetting forth, That John Webly, late Prior of the diſſolved Monaſtery of St. James the Apoſtle, of Dudley, in the County of Worceſter, was ſeized of the Advowſon of the ſaid Church *Quare Impedit.* *Vide Ante*, 297, 298, &c.

Church in groſs as of Fee in Right of his ſaid Priory, and that he and his Convent did, on the 9th of June, 21 H. 8. grant the next Preſentation thereof to Ralph Bradley, and others, under their Common-Seal.

That by the Statute 4 Febr. 27 H. 8. the Priory was diſſolved, 37 H. 8. cap. 8. not having above the clear yearly Value of 200 l. per Annum, and the Poſſeſſions thereof were given to the King and his Heirs.

That H. 8. died ſeiſed, and it afterwards came to Queen Mary, and ſo on to Queen Elizabeth.

That Ralph Bradley, the 14th of Auguſt, 1558, which was in the laſt Year of Queen Mary, granted the next Preſentation to Sir Richard Levingſton, and Edward Levingſton, Eſq; that Sir Richard died, and Edward Levingſton ſurvived, and was ſole poſſeſſed.

That Queen Mary died ſeized of the Advowſon, and the Church became void by the Death of Richard Walker, and that Edward Levingſton preſented Henry Eſquire, who was inſtituted and inducted.

That Queen Elizabeth died without Iſſue, and the Advowſon of the ſaid Church deſcended to King James I. and ſo derives a Title to his preſent Majeſty; and that the Church being void, it belonged to him to preſent.

The Defendant pleads, That Bene & verum eſt, that King James was ſeized of the Advowſon in groſs as of Fee, prout in the Declaration; but that he by Letters Patents under the Great Seal, dated the 11th of July, in the 13th Year of his Reign, granted the ſame to Sir Charles Montague, and Edward Sawyer, and their Heirs, the Church being then full of the ſaid Henry Eſquire.

That they 15 July, in the ſame Year, granted it to Edward Skinner, and his Heirs; that Skinner afterwards levied a Fine to Sir Thomas Jarvois, and declared the Uſes thereof to the Cognizee, and his Heirs.

That Sir Thomas Jarvois, 30 March, 4 Car. 1. granted the next Preſentation to Phineas White; that the Church became void by the Death of Eſquire, and that Phineas White preſented Timothy White, who was inſtituted and inducted.

That Sir Thomas Jarvois died ſeized, and the Advowſon did deſcend to Sir Thomas Jarvois his Son and Heir, and that the Church became void by the Death of White; he thereupon preſented John Hinkley, who was inſtituted and inducted.

That Sir Thomas Jarvois died ſeized, and the ſaid Advowſon deſcended to the Defendant, being his Son and Heir, and that the Church being void by the Death of Hinkley, he preſented the Defendant Hinkley thereunto, who was inſtituted and inducted, and traverſed, that King James died ſeized of the Advowſon aforeſaid, Modo & forma prout Attorn. general. præd. Dom. Regis nunc per Narration. ſuam præd. ſuperius allegavit, proteſtando quod Sir *Thomas Jarvois* deceaſed, and the Defendant *Jarvois*, were ſucceſſively for the Space of ſixty Years, and more, before this Writ brought, ſeized of the Advowſon in groſs as of Fee, and that *Henry Eſquire* died about ſixty Years before the Writ brought; for Plea ſaith, That *Bene & verum eſt*, that King *James* was ſeized, and derived a Title to the Defendant *Jarvois*, *abſque hoc*, that the Church was void by the Death of *Henry Eſquire*.

The Attorney General took Iſſue upon the Traverſe of Jarvois, which was now to be tried.

The Queſtion at the Trial was, Whether the Defendant ſhould give Evidence, and ſhew how this Advowſon came out of the Crown? For having alledged, that Bene & verum eſt, that King James was ſeized; and induced his Title by a Grant from the King, and having traverſed that the King died ſeized, &c. he ought to produce his Grant, and ſhew how it came out of the Crown; for the Seiſin of the King being confeſſed in the Plea, ex hoc ſequitur, that he died ſeized.

But notwithſtanding this Confeſſion in the Plea, the Court made the Plaintiff give ſome Evidence, that this Advowſon was once in the Crown; who thereupon produced a Grant of the Prior made by him of the next Preſentation, and the Priory being now diſſolved, the Advowſon of Conſequence muſt be in the Crown.

Then the Defendant produced his Grant, which was by a Warrant from the Commiſſioners under the Great Seal, for confirming defective Titles.

It was inſiſted by the Counſel for the Plaintiff, That ſuch Grant was not ſufficient, becauſe thoſe Commiſſioners had not an Authority to make an Original Grant; they had only a ſpecial Authority given them to ſupply defective Titles, by confirming ſuch Grants which were already made by the King.

This Commiſſion, which is dated the 24 Feb. 1 Jacobi, is upon Record under the Great Seal; it is an expreſs Authority given to certain Perſons, and the Grant made by them is with reference to that Authority, for it is Per Warrantum Comiſſionar', therefore they muſt produce an actual Grant from the Crown. Now it appears, that the King was deceived, even upon the very

very Record; which makes the Letters Patents void without a Sci. Fa. for he intended to grant nothing but what was in the Poſſeſſion of the Party before, or for which he had ſome Colour of a Grant upon which the Commiſſion was to operate.

Econtra.

But it was argued for the Defendant, That he need not ſhew a precedent Grant, becauſe this made by the Commiſſioners was ſufficient; for it ſhall be preſumed, that the Commiſſioners did purſue their Authority; and the Poſſeſſion having been in the Defendant, and his Anceſtors, for ſixty Years and upwards, and no Preſentation ſince from the Crown, it ſhall never be intended that thoſe Commiſſioners exceeded their Power.

And of this Opinion was the Court, eſpecially ſince the Plaintiff could not produce any Evidence, that the King did preſent to this Living ſince the Diſſolution of the Priory; and therefore it is poſſible that the Prior might grant away this Advowſon before the Statute of H. 8. and it might be that Evidence was given of ſuch a Grant to the Commiſſioners.

Theſe Letters Patents were granted to Commiſſioners to quiet the Poſſeſſions of the People, whether the Crown had any Pretence or not.

The Plaintiff was nonſuit.

Brace *verſus* Pennoyer.

S. C. 1 *Salk.* 319.

Vide Moore 367. 21 *H.* 7. 16. 1 *Salk.* 264. *Carter* 112, 193.

IN Treſpaſs, there was a Judgment in the Common Pleas againſt three Defendants, who brought a Writ of Error in this Court; and before the Record certified, one of the Plaintiffs in Error died, and after his Death a Capias ad ſatisfaciend. was taken out againſt the other two ſurviving without bringing a Sci. Fa.

The Queſtion was, Whether there ought not firſt to be a Sci. Fa. becauſe, as it was ſaid, the Execution varies from the Judgment, and is not purſuant to the Record, becauſe there was an Alteration of the Perſons from three to two?

2 *Inſt.* 471. *Cart. Rep.* 193.

It is true, where one is not Party to the Record as Heir, Executor, or Adminiſtrator, he can have no Execution without a Sci. Fa. tho' it be within the Year, becauſe the Alteration of the Perſon altereth the Proceſs.

Noy 150.

But it is as true if two Plaintiffs recover, and one die before Execution, the Survivor may take it out without a Sci. Fa. becauſe he is Party and privy to the Judgment; and if it

ſhould happen that the dead Man had releaſed the Judgment, the Defendant may bring an Audita querela and be relieved. *Vide* 1 *Salk.* 264, 319.

It is true, if one of the Plaintiffs in Error had died after the Affirmance of the Judgment, there muſt be a Sci. Fa.

In Replevin, three Defendants made Cognizance, &c. and a a Verdict was given for the Plaintiff in Michaelmas-Term, in the ſecond Year of Queen Elizabeth; one of the Defendants died after the laſt Continuance, yet Judgment was given againſt the other two ſurviving without a Sci. Fa. By which it appears, that Execution may be taken in this Caſe without any Suggeſtion made on the Roll, and without Application made to the Court. *Dyer* 175.

Curia. A Sci. Fa. is not neceſſary upon the Abatement by the Death of the Party; for what Need is there of it, when the Party cannot plead to it?

If they preſs for a Return of the Writ of Error, it will be certified; and without a Suggeſtion upon the Roll, he had no Means to know, that one of the Parties was dead. *Vide* 1 *Lilly.* 2.

Therefore ſuch a Suggeſtion ought to be made, and then to pray Execution againſt the Survivors, Et quia ſuper Examination. conſtat Cur', that one of the Defendants was dead; therefore the Court doth award Execution againſt the reſt: And for this Reaſon a Superſedeas was awarded Quia improvide.

D E

DE

Term. Sanctæ Trin.

Anno 9 W. III. B. R. 1697.

Rex *verſus* Broom.

Vide 1 *Salk.* 31.
2 *Salk.* 440.
3 *Lev.* 351.
6 *Mod.* 13.
4 *Mod.* 176.
2 *Lev.* 27.
Ray. 489.
Show. 29.
1 *Sid.* 320, 367.
2 *Saund.* 260.

IN the Year 1691, the African Company hired the Ship called the America, whereof one John Broom was Maſter, who took a French Ship in the Weſt Indies, and ſhe was condemned there as Prize, and the Property was veſted in the King. Afterwards Broom ſold the Goods in Barbadoes, and then came home, and he was proſecuted in the Admiralty-Court at the Suit of the King; upon which Proſecution there was a Sentence, and an Appeal was brought from that Sentence; and pending that Appeal, Broom moved for a Prohibition, ſuggeſting, 1. That the Ship and Goods were taken in the Weſt-Indies, infra Corpus Comitatus, and ſo the Court of Admiralty had no original Juriſdiction of the Cauſe: And this was on Purpoſe to ſtop the Proceeding upon his own Appeal.

2. That the Property being once veſted in the King, by the Condemnation of the Ship as Prize, there can be no Suit afterwards in the Admiralty-Court here: For if after ſuch Condemnation the Goods be converted, the King muſt bring an Action of Trover: And this is a plain Action of Trover upon the Face of the Libel.

To which it was anſwered, That this Ship was taken without any Commiſſion, or Letters of Mart; and therefore it is a Perquiſite to the Admiralty, and Broom is reſponſible to the King for the Ship and Goods.

There is nothing within the Libel upon which to ground a Prohibition.

First, they say, That the Ship was taken in the West Indies, infra Corpus Comitatus, which is not sufficient; for it ought to appear upon the Libel, that she was taken upon the Land beyond Sea, because this Court takes no Notice of Counties there, and no Prohibition after Sentence shall be granted upon a bare Suggestion, that the Captain was not super altum Mare. 3 *Mod.* 244, 245. 1 *Lev.* 243. 1 *Sid.* 367. 1 *Roll. Rep.* 80. 2 *Brownl.* 34.

That the Property is not vested in the King by the Condemnation, for that only declares it to be in him, for which he may afterwards sue in the Admiralty here; and tho' the Goods were sold at Land, and an Action might be brought at Law for the Conversion, yet the Original Cause arising upon the Sea upon which this Sale did depend, gives the Court of Admiralty Jurisdiction, for the Conversion was at Sea, tho' the Goods were sold at Barbadoes; and the first Motion he made towards the Place was a Breach of Trust, of which the Conversion at Land was an Evidence. *Cro. Eliz.* 685. 2 *Saund.* 260. 1 *Sid.* 320. 1 *Mod.* 18. 3 *Mod.* 244, 245. 2 *Salk.* 440.

But it is too late to pray a Prohibition after Sentence, and an Appeal brought; for it would be a great Inconveniency to allow it after so much Expence, and no Exception taken to the Jurisdiction. This is a Reason given by my Lord Rolle in his Abridgment. As for Instance: *Roll.* 2 *Abr.* 319. *Frisewell's* Case.

By the Statute 23 H. 8. c. 9. No Man is to be cited to appear out of the Diocese where he liveth, except, *&c.* upon Pain of double Damages to the Party grieved, and ten Pounds to the King.

A Suit was commenced in the Prerogative-Court for a Legacy, and the Party had Sentence for it; and upon an Appeal from the Sentence to the Delegates, the Sentence was confirmed, and Costs taxed, and Excommunication for Non-payment. Now the Executors would have a Prohibition upon the Statute, because they dwelled in another Diocese; but the Court granted a Consultation because they came too late for a Prohibition, having so long allowed the Jurisdiction of that Court. Adjourn'. *Cro. Car.* 97. *Smith* versus *Executors Poyndreill.* *Vide* 3 *Cro.* 686.

Rex *versus* Holroy.

THE Defendant was indicted for concealing Traytors unknown, and buying Clippings. He was found guilty, and brought a Writ of Error, and assigned for Cause, for that there was a Mi'a instead of a Capiatur: And for this Reason the Judgment was reversed.

Rex *verſus* Greep.

THE Defendant was convicted of Perjury at a Trial at Bar, upon an Information at Common Law, ſetting forth, That there was a Trial in the Common Pleas ſuch a Term, between Richards Plaintiff and Cornforth Defendant.

Quodque ſuper triation. ill. per quoſdam Teſtes adtunc & ibidem ex parte præd. Roberti Richards in cauſa præd. product. & adtunc & ibidem debito modo jurat. Juratoribus jurat. illius in evidenc. adtunc & ibidem dat. fuit quod præd. indentura barganiæ & vendition. geren. dat. dicto decimo quinto Die Junii Anno Domini Milleſimo ſexcenteſimo octogeſimo primo ſupradicto necnon præd. indentur. relaxation. geren. dat. dicto decimo ſexto Die Julii Anno Domini Milleſimo ſexcenteſimo octogeſimo primo ſupradicto ſigillat. & deliberat. fuiſſent per præfat. nuper Ducem Albemarle tempore dat. earundem Indentur. apud tunc domum manſional. ipſius nuper Ducis Albemarle co'it vocat. ſive cognit. per nomen de Albemarle-Houſe quæ quidem Domus præd. decimo ſexto Die Julii Anno illo fuit ſituat. in Paroch. Sancti Martini in Campis in Com. Middleſex præd. quodq; quidam Richardus Strode Armiger. temporibus ſigillation. & deliberation. Indentur. ill. fuit præſens in domo ill. cum præfat. Duce Albemarle & fuit Teſtis præd. ſigillation. & deliberation. earundem, ac ulterius idem Coron. & Attorn. dicti Dom. Regis pro eodem Domino Rege dat. Cur. hic intelligi & informari quod adtunc & ibidem ad triand. ill. ſcilicet in præd. Octab. Sanctæ Trinitatis Anno Regni dicti Domini Regis nunc octavo ſupradicto apud Weſtminſter præd. in Com. Middleſex in præd. Cur. ipſius Domini Regis de Banco præd. ibid. quidam Robertus Greep nuper de Paroch. de Plimpton S. Mariæ in Com. Devon. Yeoman product. fuit Teſtis ex parte præd. Henrici Cornforth defend. in cauſa præd. & adtunc & ibidem jurat. fuit ſuper Sacroſanct. Dei Evangelio ad dicen. veritatem, totam veritatem & nihil præter veritatem de & in præmiſſis in exitu inter partes præd. modo & forma præd. poſit. quodque idem Robertus Greep Deum præ oculis ſuis non habens ſed inſtigation. Diabolica mot. & ſeduct. adtunc & ibidem per actum & conſenſum ſuos falſo, malitioſe, voluntarie & corrupte ſuper ſacr'um ſuum præd. dixit depoſuit juravit & juratoribus Juræ præd. in Evidenc. de & concernen. præd. Richardo Strode dedit quod circa medium Julii [Anglice **the middle of** July] Octogeſimo primo Menſem Julii Anno Dom. Mil-

leſimo ſexcenteſimo octogeſimo primo ſupradict. innuend. Magiſt. Strode præfat. Richardum Strode innuendo fuit apud Newnham (quandam Domum vocat. Newnham in Paroch. de Plimpton Sanctæ Mariæ in Com. Devon. innuendo) Et quod circa medium Julii [Anglice July] Milleſimo ſexcenteſimo octogeſimo primo eundem Menſem Julii eodem Anno innuendo Magiſter Strode eundem Richard. Strode iterum innuendo fuit apud Newnham dict. Dom. vocat. Newnham Paroch. de Plimpton Sanctæ Mariæ in Com. Devon. præd. innuendo & quod circa medium Menſis Julii Anno Dom. Milleſimo ſexcenteſimo octogeſimo primo Magiſter Strode ipſum eundem Richardum Strode iterum innuendo fuit apud Newnham (præd. Domum vocat. Newnham in Paroch. præd. de Plimpton Sanctæ Mariæ in dicto Com. Devon. iterum innuendo) ubi revera & in facto præfat. Richardus Strode circa medium dicti Menſis Julii Anno Domini Milleſimo ſexcenteſimo octogeſimo primo ſupradicto vel ad aliquod aliud tempus quodcunque in dicto Menſe Julii eodem Anno non fuit apud Newnham præd. prout idem Robertus Greep ſuper ſacr'um ſuum præd. falſo malitioſe voluntarie & corrupte dixit depoſuit juravit & juratoribus ibidem Juræ præd. Eviden. dedit, &c.

Rex *verſus* Greep.

S. C. 2 *Salk.* 513.

THE Defendant was convicted of Perjury. And now it was moved in Arreſt of Judgment: *Vide Poſt*, 348.

1. For that it is not ſet forth, That the Oath was material to the Matter in Iſſue.

2. The Fact is laid, That at a former Trial Mr. Strode gave Evidence, that the Indentures of Leaſe and Releaſe were executed by the Duke of Albemarle, at Albemarle-Houſe, about the Time of the Date thereof, which was the 16th Day of July, in the Year 1681, and that he was then and there preſent with the Duke, and was a Witneſs that the Duke did ſeal and deliver the ſame; and the Perjury now aſſigned is, that the Defendant then depos'd, That about the ſame Time Mr. *Strode* was at *Newnham*, (Quand. Domum vocat. Newnham in Paroch. Plimpton S. Mariæ in Com. Devon. innuendo.) Now the Words about which Time, are very uncertain; for if he had depoſed, Mr. Strode was then at Newnham, without ſaying any more, it muſt be agreed that had been incertain; for it doth not appear where Newnham was,

was, or that it was Mr. Strode's House, or in what County, or in what Place.

Then the Innuendo must be the only Support of this Information, and that makes it worse, for the Defendant swore, that Mr. Strode was then at Newnham, which may be taken or intended any Newnham in England; and by the Innuendo it is tied up to a special Newnham in Devon, at which Place it doth not appear he swore Mr. Strode then was; so there being no such Newnham mentioned before the Innuendo is immaterial, for the Duty of an Innuendo is to ascertain a Thing mentioned before.

They should have set forth, that there was a Trial, &c. that a Deed was given in Evidence, and that Mr. Strode was produced as a Witness to support that Deed, that he had a House in Devon, called Newnham, and that he deposed, he saw the Deeds executed in Albemarle-House at such a Time; and the Defendant swore, that Mr. Strode was then at Newnham.

When Words spoken are incertain, they shall not be made actionable by an Averment; as to say of an Attorney, Thou hast forged Writings, innuendo Bonds and Covenants; or to say, a
3 *Bulst.* 265. Man had the Pox, innuendo the French Pox.

There ought to be a greater Certainty of the Place, than of an Addition to the Party; and for this Reason, where
1 *Bulst.* 183. eighteen were indicted for a Riot, and there was no Place named where seventeen of them did dwell, the Indictment was quashed.

Cro. Eliz. 428. In Michaelmas-Term, Anno 37 Eliz. a Man was indicted in this Court upon the Statute 5 Eliz. for Perjury. The Indictment set forth, That there was a Suit in Chancery between two Parties, for the Manor of Staverton in Devon, and a Commission was awarded to examine Witnesses in that Cause, and that the Defendant being examined, did swear, that a Feoffment of the Manor was delivered as an Escrow, &c. Innuendo præd. Manerium. Now it did not appear that the Oath, which the Defendant then made of the Delivery of that Deed, did concern the Manor of Staverton then in Question; and it shall not be made more certain by the following Words, viz. (Manerium præd. Innuendo) because a Man shall not be punished for a Perjury by the Help of an Innuendo.

Now though that Indictment was upon the Statute, yet the same Reason which was then given, will hold good upon an Information at Common Law for the same Offence.

Upon the whole Matter, 'tis incertain what Newnham was intended by the Witneſs, for 'tis not inconſiſtent with his Evidence, to ſay that it was Newnham in Middleſex; and the Jury would have no Conſideration of it, unleſs it had been deſcribed to them, by asking what Newnham was meant.

So that without the Innuendo, non conſtat what Newnham it is; for it may be a Houſe, or a Hill, or a Lieu Conus, and near Albermarle-Houſe, 'tis the Diſtance from thence which makes the Thing material.

Now Mr. Strode having depoſed, That on or about the middle of July, he was a Witneſs to the Execution of the Deeds at Albermarle-Houſe, and the Defendant having ſworn he was then at Newnham generally, it may be intended the very next Houſe to Albermarle-Houſe; but the Innuendo makes it to be at Newnham in Devon; which is different from what was ſworn, for the Law Prima facie intends Newnham to be a Hill, and the Innuendo limits it to a particular Houſe in a Pariſh, which alters the very Signification of the Word, and reduceth it from a Generality to a Certainty.

The Law will not allow Words to be enlarged by an Innuendo, ſo as to ſupport an Action on the Caſe for ſpeaking them; a multo fortiori in Caſes of Perjury, for that would be to convict a Man of one of the higheſt Crimes in a Matter never ſworn by him. *Hob.* 2, 6; 45. 1 *Ventr.* 337. 2 *Cro.* 126. *Godb.* 191.

This was the Opinion of Juſtice Gawdy, that a Man cannot be perjur'd by an Innuendo.

And there is no Authority cited on the other Side, to prove that an Innuendo will make Words actionable which are not ſo in their own Nature; but where a Colloquium is laid, or the Words of themſelves are actionable, there an Innuendo may explain them. And therefore it was agreed, that if a Man ſay, Thou haſt ſtolen my Piece, Innuendo my Gun, the Action will not lie; for though by common Intendment a Piece is a Gun, yet 'tis incertain, and ſhall not be helped by an Innuendo; but if there had been any previous Diſcourſe of a Gun, then the Action might have been ſupported by the Innuendo. *Godb.* 339.

2. Perjury muſt be in ſomething material to the Iſſue, for if it be wholly foreign and impertinent, 'tis not Perjury, but a vain and idle Oath. *Godb.* 191.

In Michaelmas Term, 5 Jacobi, a Man was indicted in the Star-Chamber for Perjury committed by him in the Court of Requeſts, in giving Evidence there in a Cauſe concerning the Title of Lands, which was reſolved by all the Judges of England not *Yel.* 111. *Paine's* Caſe. 1 *Buſſ.* 107. *idem.*

to be punishable, for it was an impertinent and not a corrupt Oath, because that Court hath no Authority to examine such Titles.

Hob. 53. 11 *Rep.* 13. The Oath of a Jury Man is, That he shall well and truly try the Issue between the Parties: So that if he doth try any Thing besides the Issue, 'tis Per non Juratum; and if his Verdict thereupon be false, 'tis not Perjury, neither can he be attainted, because neither Party is grieved thereby.

Econtra.

It was argued for the King, That the Innuendo makes the Place certain enough, and that the Breach of the Oath is well assigned; for 'tis laid in Fact, That Mr. Strode non fuit apud Newnham præd.

'Tis admited, that an Innuendo is not proper to extend Words beyond their ordinary and common Meaning; and likewise where a Word is capable of two Significations, and by an Innuendo is tied up to one, that shall not prejudice the Party: As for Instance, if a Man say I stole his Corn, it may be as well standing Corn, as cut down.

Neither can an Innuendo restrain a Genus as him or her. Thus they who argued for the King, as well as those who had argued for the Defendant, did not differ in the Law concerning an Innuendo, but only in the Application of it.

Now in this Case, the Court cannot take Notice judicially, that Newnham is a general Word, or that it hath two known Significations.

Post. 352. But admitting that the Place is not well explained, and that the Innuendo was out of the Case, then Newnham is at large, and non constat where it is; but be it where it will, it must be another Place from Albermarle-House. Now supposing it to be near Albermarle-House, 'tis still Perjury in the Defendant; for Mr. Strode deposed he was at such a Time in Albermarle-House, and the Defendant swore he was then at Newnham, supposing it to be the next Door.

5 *Eliz. ca.* 9. 3 *Inst.* 167. My Lord Coke, in his Exposition upon the Statute 5 Eliz. saith, That if the Thing sworn be not true, and not material to the Point in Suit, 'tis not Perjury, because it is Extrajudicial, and that Act giving a Remedy to the Party grieved, he can in no Sort be damnified if the Deposition be not material to the Matter in Issue.

This Opinion of my Lord Coke must be intended upon the Statute, and 'tis then a little too streight; for if the Thing sworn be impertinent, or doth but conduce to the Matter in Issue, and false, 'tis still Perjury.

But what was sworn in this Case, was not so immaterial to the Point in Issue, for it may create a Belief in the Jury, that Mr. Strode was not at Albermarle-House at that Time he swore himself to be there. The Case put in those Books upon the Statute.

As to the Case in Cro. Eliz. which hath been objected, that proves nothing against this Innuendo; it was a Suit in Chancery for the Manor of Staverton, and the Defendant swore that a Feoffment of the Manor was delivered as an Escrow, when in Truth it was delivered absolutely: And this was assigned for Perjury in the Defendant, with an Innuendo præd. Manerium; because he had not sworn that the Feoffment was of the Manor of Staverton, but of the Manor generally, the Oath was held to be immaterial to the Matter in Issue, it was not shewn that either Party produced the Feoffment at the Commission, or if it had been produced, that it concerned the Manor then in Question, which being so very incertain, could not be supplied by an Innuendo, and for this Exception that Indictment was discharged; besides, it was an Indictment upon the Statute, and not at Common-Law as this is.

But here the Innuendo is explanatory without adding any Thing to the Sense of the Words precedent; for 'tis laid, That Mr. Strode being produced as a Witness, did depose, that such a Day in July he was Witness to the executing of Deeds in Albermarle-House, in the Parish of St. Martin in the Fields. The Defendant swore, Mr. Strode at that Time in July was at Newnham, Ubi revera & in facto he was at no Time in July in that Year at Newnham: And this is found by the Verdict. *Yelv.* 21. *Aleyn* 32. *Cro. Eliz.* 193.

An Innuendo hath been allowed to make a farther Explanation of Precedent Words than in the Case at Bar.

As in an Action on the Case for slandering the Plaintiff's Title, he declared, That he was seized of the Manor of Upton Grey, and that the Defendant said he had no Title to Upton, Innuendo Upton Grey. After a Verdict for the Plaintiff, this Exception was taken in Arrest of Judgment, viz. That the Words were spoken of Upton generally, which cannot be intended of Upton Grey, and so could not be helped by the Innuendo. But the Court was then of Opinion, that it was sufficient to explain what Upton was intended, and so affirmed the Judgment. *Cro. Eliz.* 419. *Marein* versus *Maynard.*

Anno

Anno 23 H. 8. The Marquels of Exeter was indicted for theſe Words, ſi. I like well the Proceedings of Cardinal Pool. Inuendo Carolum Pool, who wrote againſt the King's Supremacy; and he was convicted and beheaded.

Curia.

Sid. 107. An Information for Perjury at Common Law as this is, doth not require ſo much Certainty as an Indictment upon the Statute; for if Perjury be aſſigned in ſwearing to ſeveral Interrogatories in Chancery without ſhewing in which; this is good at Common Law, but not upon the Statute.

1 *Roll. Rep.* 79. Neither will an Indictment lie for a Perjury upon the Statute which may be maintained at Common Law, as for making a falſe Affidavit in the Chancery, or in this Court.

The Statute hath made the Offender ſubject to a certain Penalty, and to a corporal Puniſhment, and therefore the Perjury muſt be by ſwearing falſly in a Court of Record, and in a Thing material to the Iſſue.

2 *Roll. Abr.* 257. *Placito* 2. But this is not required at Common Law; for 'tis Perjury to ſwear falſly in a Court-Baron, or in the Eccleſiaſtical Court, which are not Courts of Record; nor that it ſhould be in a Thing material to the Iſſue, for a Man may be perjured in an Anſwer in Chancery to a Thing not charged in the Bill.

Sid. 274. *Rex* verſus *Drue*, There was a Trial in which the Queſtion was, Compos vel non Compos; the Man died in Kent, and the Witneſs lived in Oxfordſhire; at the Trial he made a Preface to his Evidence, by telling a Hiſtory of his Journey, where he lay, where he dined, where he ſtayed on the Road, and when he arrived at London, and ſo till he came to Kent.

Suppoſe he had been indicted for Perjury, in ſwearing he dined by the Way at Uxbridge, Ubi revera he did not dine there: Is this Perjury at Common Law? Certainly it is not. Adjournatur.

Rex *verſus* Melling.

2 *Jones*, 163. *Ray.* 170, 405. 1 *Sid.* 153, 154. HE was found guilty of Perjury at a Trial at Bar. And now a Motion was made for a new Trial:

1. Becauſe the Verdict was againſt Evidence.

2. Becauſe it was againſt the Opinion of the Jury who gave it.

The Fact was thus: The Jury found the Defendant guilty of Perjury, but not of wilful and corrupt Perjury, as it was laid in the Information: And Justice Rokeby being alone in Court, asked the Jury, Whether they found for the Defendant? They replied, No. Upon which he told them, That he could not record the Verdict which they had given, for it was contradictory, and they must find him guilty, or acquit him. He asked them, Whether they did believe that the Matter sworn was false? They replied, Yes. Then he asked, Whether they did believe the Defendant did know it to be false? They replied, They could not tell that. Then the Foreman said, That they agreed before they came into the Court to find the Defendant guilty of Perjury, but not guilty of wilful, malitious, and corrupt Perjury; and if that Verdict should not be recorded, then to find him guilty generally, because some of the Jury were dissatisfied to find him guilty of wilful and corrupt Perjury. Whereupon, without any further Consideration, they found him guilty generally, which is a Verdict both Ways, and not only against Evidence, but against their own Opinions, which cannot be dictum Veritatis.

But the Court held, That when a Cause is tried at Bar, a new Trial is never granted for the single Reason, that the Jury went against Evidence. It is true, it was granted in my Lord Fitzwater's Case, for there was a Misbehaviour in the Jury, in flinging Dice to decide, whether they should find for the Plaintiff or Defendant, which would alter the Trial, by Verdict of twelve, to a Trial by Lot; so likewise for excessive Damages for Words, as for calling the Plaintiff Traitor, and the Jury giving 1500 l. Damages. 3 Keb. 555. Style 462.

Then it was insisted on behalf of the King, that there was no Affidavit of any Misbehaviour of the Jury, for they were all unanimously agreed to find the Defendant guilty; but the Ambiguity of the Word Corrupt, did puzzle them, which made them scrupulous of finding the Perjury to be such, because they had no Evidence of any Bribery to forswear himself.

Neither is it a Misdemeanor in them, First, to give a Verdict which would have amounted to make the Defendant not guilty; and immediately, before they went from the Bar, to find him guilty.

As to the first, they asked the Opinion of the Court, Whether such a Verdict might be received? Which is what they ought to do; and if they have the Opinion of the Court, that such Verdict which is offered is not agreeable to Law, then they are to consider, what Verdict to give.

Now it is plain, they had this Matter under Conſideration before they came to the Bar, becauſe when the Judge told them he would not record the firſt Verdict, they immediately found the Defendant guilty: Which is an Argument, they were fully agreed of the Fact to find him guilty, though they could not find him wilfully and corruptly guilty, becauſe they had no Evidence of it.

Now to imagine this to be a Miſdemeanor, is an Offence and Reflection upon the Court; for if there had been any Miſbehaviour, the Judge would have told them of it.

They ſhould have oppoſed the receiving this Verdict; but ſince it is recorded, they muſt not now ſet it aſide.

11 *H.* 4. 2. *Brook*, conſp. 13. For Authorities, the Caſe Anno 11 H. 4. was cited, which was an Action of Conſpiracy brought againſt two, and upon Not guilty pleaded, the Jury found one guilty, and acquitted the other; and they being adviſed by the Court to conſider better of their Verdict, which was contradictory in it ſelf, becauſe one alone could not conſpire, they thereupon found both guilty, which is a ſtronger Caſe than this at Bar.

Plowd. 211. *B.* in *Saunder's* and *Freeman's* Caſe. It is no new Thing for a Jury to recall their firſt Verdict, and for the Court to receive another at the ſame Time: This was done in one Archer's Caſe, whom the Jury acquitted upon an Indictment of Felony; and immediately they recollected themſelves, and told the Court they were miſtaken, and found him guilty. And this was entred as their Verdict.

Econtra.

Sid. 58. New Trials have been granted in this Court after a Conviction of Perjury. It was done in the Caſe of one Cornelius, who was indicted for Perjury, for ſwearing that ſuch a Perſon was at a Conventicle, when in Truth he was not; and it appearing that the Foreman of the Jury, who gave the Verdict, was Owner of the Barn where the Conventicle was held, and being challenged for that Reaſon, and yet ſworn of the Jury, the Court granted a new Trial.

3 *Keb.* 525. *Jones* 163.

It hath been granted likewiſe for the Miſcarriage of the Jury, to whom the Plaintiff delivered a Paper after they were gone from the Bar.

The Law requires the Evidence to be clear to convict a Man of Perjury, and it muſt be of wilful and corrupt Perjury. Now when the Jury was ſatisfied that the Defendant was not guilty of wilful and corrupt Perjury, and yet find him guilty generally, this is a Verdict which is repugnant in it ſelf.

They ought to find him guilty of wilful and corrupt Perjury, or to acquit him.

In an Indictment for Perjury, brought upon the Statute of the Queen, the Plaintiff declared, That the Defendant Falso dixit & deposuit, and shewed in what Issue, and in what Court, and concluded & sic commisit voluntarium & corruptum Perjurium. The whole Court were of Opinion, That this Declaration was insufficient, because it was not said, that Falso voluntarie & corrupte dixit, &c. for the Clause which followed, & sic commisit voluntarium & corruptum Perjurium, will not help it, because it is a Conclusion upon Premises insufficiently alledged. 3 *Inst.* 176.

The Counsel for the King would excuse this Misdemeanor in the Jury, by the Common Case, of asking the Opinion of the Court in a Point of Law, which it is their Duty to do; but that is not applicable to this, for they were agreed upon two Verdicts which were inconsistent, and upon the latter without any Consideration at all.

It is agreed they may vary from a privy Verdict; the Reason is, because it may be presumed that they had some subsequent Consideration of the Evidence after such Verdict given.

Besides, a privy Verdict in Strictness is no Verdict, it is only a Favour which is allowed to the Jury for their Ease.

Curia.

If the Thing sworn was manifestly false, the Mind must be corrupt, and then there need be no Evidence of Bribery. Adjournatur.

Stanhope *versus* Smith. *Mich.* 8 *Will.* 3. *Rot.* 462.

AN Action was brought upon a Note for Money won at Play: The Defendant pleaded the Statute of Gaming, and set forth, that at one Sitting he lost 85 l. to the Plaintiff, and 40 l. more to one Yate; and upon Demurrer it was argued, that the Act made no Securities void, neither was the Winner to pay the treble Value of the Money won, unless it was above 100 l. for if three Men should each of them win 50 l. neither of them shall forfeit; for though it is more than 100 l. among them all, yet it is under that Sum to each, and the Statute makes no Forfeiture, but where the Person winning has got above 100 l. at one Sitting. *Vide* 1 *Salk.* 344, 345. *Lutw.* 180. 3 *Keb.* 671. 4 *Mod.* 409. *Ante*, 1, 2, 175.

On

27 & 28 *Car.* 2. *Rot.* 109, 110. *Hodgſon* verſus *Mallen.*

On the other Side it was alledged, That in Hillary-Term, 27 & 28 Car. 2. two Judgments were given againſt the Pleas to Demurrers upon the like Plea, and in the Caſe between Edgebury and Roſſindale, which was upon Articles concerning a Horſe-Match, wherein the Defendant agreed to run four Heats at ſeveral Days for 40 l. each Heat. This was held by my Lord Hale to be but one Agreement, tho' to be run at ſeveral Times, and the Defendant in that Caſe had Judgment.

But in the principal Caſe, Judgment was given for the Plaintiff, for the Statute intends a Remedy where more than 100 l. is loſt to one Perſon, and at one Sitting; for if it be loſt to ſeveral, it is not within that Act: As for Inſtance, If a Man laſes 95 l. to one Man, and refuſes to play any longer with him, and then voluntarily loſes 10 l. to another at the ſame Sitting; this ſhall not defeat the firſt Perſon of the Money which he lawfully won.

Toddard *verſus* Middleton. *Paſch.* 9 *Rot.* 199.

AN Action of Covenant was brought upon the Penalty of certain Articles, wherein the Defendant had agreed to pay ſo much per Chaldron for all Coals laden either at Newcaſtle, or upon the River Tyne, and brought to London; and the Breach aſſigned was, That the Coals were laden on ſuch a Ship infra Portum de Tinmouth, viz. at North Shields, and brought from thence to London.

Vide Ante, 286, 287, 346.

To this Declaration the Defendant demurred, becauſe it did not appear that Tinmouth was upon the River Tyne, and ſo the Breach is not well aſſigned, and the Court cannot take Notice judicially, that Tinmouth is upon that River; and for this Reaſon they inclined againſt the Plaintiff, but gave him Leave to diſcontinue upon Payment of Coſts.

Maddiſon *verſus* Shore.

RAd'us Maddiſon per Will'um Duncomb Attorn. ſuum queritur de Patricio Shore, gen. un. Attorn. Curiæ Domini Regis de Banco preſen. hic in Curia in propria Perſona ſua de eo quod non reddidit ei decem libras quas ei debet & injuſte detinet pro eo videlicet quod cum in ſtatuto in Parliamento Dominæ Elizabethæ nuper Reginæ Angliæ apud Weſtm. in Com. Midd. duodecimo die Januarii Anno regni ſui quinto tent. edit. inter alia in-

actitat. fuit authoritate ejuſdem Parliamenti quod ſi aliqua Perſona, &c.

Cumque idem Rad'us nuper ſcil't Termino Sanctæ Trinitatis Anno Regni Domini Will'i nunc Regis Angliæ Septimo in Curia ejuſdem Domini Regis nunc hic coram ipſo Rege eadem Curia apud Weſtm. præd. tunc exiſten. impli'taſſet quendam Steph'um Rothwell per Breve dicti Domini Regis de Sci. Fa. Vic. Lincoln direct. pro reſtitution. habend. de quindecim libris quas ipſe antea in Curia ejuſdem Domini Regis de Banco apud Weſtm. per judicium ejuſdem Curiæ de Banco recuperaſſet verſus eum pro damnis ſuis quæ ſuſtinuit tam occaſione cujuſdam tranſgreſſionis eidem Stephano per ipſum Rad'um nuper illat. quam pro miſ. & Cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit. quod quidem judicium idem Rex in Curia ſua coram ipſo Rege apud Weſtm. præd. ob Errores in Recordo & Proceſſu inde compert. revocaſſet & adnullaſſet per quod conſideratum fuit in eadem Curia dicti Domini Regis coram ipſo Rege apud Weſtm. quod idem Rad'us ad omnia quæ ipſe occaſione judicii præd. amiſiſſet reſtituetur & idem Dominus Rex nunc in dicta Curia ſua coram ipſo Rege ex parte ipſius Rad'i acciperet quod ipſe poſt judicium præd. redditum fuit & ante revocation. ejuſdem ſcilicet 20 die Junii Anno regni ejuſdem Domini Regis 3° apud Wragsby in Com. Lincoln præd. ſolveret præd. Stephano præd. quindecim libras per eundem Steph'um verſus ipſum Rad'um ut præfertur recuperat. in Plena ſatisfactione & exoneratione damnor. præd. prout in eodem Brevi de Scire facias plenius continetur quod quidem Breve de Sci. Fa. præd. Steph'us præd. Termino Sanctæ Trinitatis Anno ſeptimo ſupradicto in præd. Curia Domini Regis coram ipſo Rege apud Weſtm. præd. comparen. Placitabat in Barram ſive præcluſionem hujuſmodi reſtitution. verſus eum habend. quod præd. Rad'us poſt judicium præd. reddit. & ante revocationem ejuſdem non ſolvit. eidem Stephano præd. quindecim libras modo & forma prout per dictum Breve de Sci. Fa. ſuperius ſuppo'it fuit & de hoc poſuit ſe ſuper patriam & præd. Rad'us ſi'liter id' præcept. fuit Vic. Com. Lincoln quod Venire faciat coram Domino Rege a die Sanctæ Trinitatis in tres ſeptimanas ubicunque, &c. duodecim, &c. per quos, &c. & qui nec, &c. ad recogn. &c. quia tam, &c. idem dies dat. fuit partibus præd. &c. ad quem diem coram Dom. Rege apud Weſtm. ven. tam præd. Rad'us quam præd. Steph'us per Attorn. ſuos præd. & Vic. Com. Lincoln miſ. inde Breve de Venire facias in omnibus ſervit. & execut. una cum panello de nominibus Ju'ræ quorum null', &c. ideo præcept. fuit Vic. Com. Lincoln præd. qd. Diſtring. Jur. præd. per omnes Terras & Catalla, &c. & quod de exit', &c. ita quod habeat corpora eor. coram Domino Rege a die S. Mich'is in Tres Septiman.

ubicunque, &c. vel coram Juſtitiariis Domini Regis ad Aſſiſas in Com. Lincoln capiend. aſſign. ſi prius die Lunæ decimo quinto die Julii apud caſtrum Lincoln in Com. præd. per formam ſtatuti. &c. ven. pro defectu Jur', &c. prout per record. & proceſs. inde in dicta Curia dicti Dom. Regis coram ipſo Rege apud Weſtm. præd. reſiden. plenius apparet. Cumque nuper hic idem Rad'us eodem Termino Sanctæ Trinitatis Anno ſupradicto proſecut. fuiſſet extra eandem Curiam dicti Domini Regis Breve de Subpœna præfat. Patricio & cuidam Johanni Doe direct. per quod quidem Breve eiſdem Patricio & Johanni præcept. fuit quod omnibus aliis prætermiſſis & excuſationibus quibuſcunque ceſſan. in propriis Perſonis, &c. Quod quidem Breve de Subpœna idem Rad'us poſtea & antea præd. Aſſiſas ſcilicet 13 die Julii Anno 7 ſupradicto apud Caſtrum Lincoln eidem Patricio deliberavit ac duos ſolidos & ſex denarios pro ejus Caſtagiis & oneribus in hac parte ſuſtentan. eidem Patritio ſolvit. qui quidem duo ſolid. & ſex denar. fuer. ſufficien. pro Cuſtagiis & oneribus ipſius Patritii ſecundum diſtantiam locorum vocation. & ſtatum ipſius Patritii ac licet ad præd. Aſſiſas præd. die Lunæ decimo quinto die Julii apud Caſtrum Lincoln in Com. præd. tent. coram Johanne Powell Milite adtunc un. Baron Scaccarii dict. Domini Regis & Georgio Dodſon Ar. eidem Johanni Powell aſſociat. & Nich'o Lechmere Mil. al. Baron. Scaccarii dict. Domini Regis Juſtitiar. ipſius Domini Regis ad Aſſiſas il. in Com. Lincoln capien. aſſign. per formam ſtatuti hac vice aſſociat. præſentia præd. Nich'i Lechmere non expectat. virtute Brevis dicti Domini Regis de ſi non omnes, &c. venerunt tam præd. Rad'us per Attorn. ſuum præd. quam præd. Steph'us per Ric'um Milner Attorn. ſuum & Jur. Juratæ illius exact. ſi'liter venerunt & ad veritatem de exit. præd. inter ipſos Radi'um & præfat. Steph'um jurat. dicend. electi triat. & juaat. fuer. præd. tamen Patritius ſtatut. præd. minime ponderan. nec pœnam in eodem content. veren. coram præfat. Juſtitiariis ad Aſſiſas præd. prædicto die Lunæ decimo quinto die Julii apud Caſtrum Lincoln præd. juxta exigentiam præd. Brevis de Subpœna non comperuit ad notitiam ſuam in cauſa præd. dicend, nullum adtunc habend. legitimum ſeu rationabile obſtaculum ſive impedimentum in contrarium inde ſed adtunc & ibid. in cauſa præd. jurari & notitiam ſuam inde dicere juxta tenorem ejuſdem Brevis defalt. fecit contra formam ſtatuti præd. per quod præd. Rad'us exit. ill. ex parte ſua Jur. Juratæ illius pro defectu Teſtimonii præd. Patritii Shore probare non potuit nec ſectam ſuam præd. verſus præfat. Steph'um ulterius proſequi ſicque idem Rad'us magnopere gravat. & multipliciter deteriorat. fuit per quod vigore ſtatuti præd. actio accrevit eidem Rad'o ad exigend. & habend. de præfat.

Pa-

Patritio præd. decem libraspræd. tamen Patritius licet ſæpius requiſit præd. decem libras eidem Rad'o nondum reddidit ſed il. ei hucuſque reddere omnino contradixit & adhuc contradic. unde dicit quod deteriorat. eſt & damnum habet ad Valentiam centum librarum & inde petit remedium, &c.

Maddiſon *verſus* Shore.

This was an Action of Debt brought upon the Statute for not appearing and giving Evidence at the Aſſizes, being ſerved with a Subpœna for that Purpoſe. Upon Nil debet pleaded, there was a Verdict for the Plaintiff: And it was moved in Arreſt of Judgment,

1. That it did not appear by the Declaration, that the Subpœna was left with the Defendant, for the Delivery of the Ticket, and reading the Writ, is no good Service.

But this Exception was over-ruled, for the Plaintiff ſhewed that he delivered the very Writ of Subpœna to the Defendant himſelf; but the Delivery of a Ticket containing the Subſtance of the Writ, is a ſufficient Service within the Act.

2. It was then objected, That the Plaintiff had not ſet forth any ſpecial Damage which he had ſuſtained by the Negligence of the Defendant in not appearing to give Evidence, as that he was nonſuited, or could not proceed in Trial for want of the Defendant's Evidence, and the Action is given to the Party grieved. Now if the Plaintiff is not grieved, he cannot bring this Action.

For the Plaintiff it was inſiſted, That the Action being only brought for the 10 l. and not for any more Damages, the Declaration was well enough.

But the Court of Common Pleas held the Declaration to be ill for this laſt Objection; becauſe there muſt be a Party grieved, otherwiſe there is no Cauſe of Forfeiture, and there muſt be a particular Damage ſet forth, though this was contrary to a Judgment in the like Caſe, Anno 30. Eliz. where the like Exception was taken and over-ruled. 1 Leon 122. Cro. Eliz. 130. *idem.*

Afterwards a Writ of Error was brought on this Judgment, but it was affirmed.

Vinkeſtone *verſus* Ebden.

Civit. Ebor. ſſ. MEmorand.qd. alias ſci't Termino Paſchæ ult. præterit. coram Dom. Rege apud Weſtm. venit Hubertus Vinkeſtone per Galfridum Vibergh Attorn. ſuum & protulit hic in cur. dict. Domini Regis tunc ib. quand. billam ſuam verſus Jacobum Ebden in Cuſtodia Mareſc', &c. de Placito tranſg. ſuper caſum & ſunt pleg. ad proſequend', ſſ. Johannes Doe & Ric'us Roe quæ quid. Billa ſequitur in hæc verba, ſſ. Civit. Ebor', ſſ. Hubertus Vinkeſtone queritur de Jacobo Ebden in Cuſtod. Mar. Mareſc. Domini Regis coram ipſo Rege exiſten. pro eo videl't quod cum idem Hubertus ultimo die Auguſti Anno Regni Domini Will'i nunc Regis Angl', &c. Septimo apud Civitat. Ebor. poſſeſſionat. fuit de una Anchora ſex velis [Angl. Sail-cloths] tribus funibus Anchorariis ad Valenc. decem libr. leg. monetæ Ang. ut de bonis & Catallis ſuis & id. Hu'rtus ſic inde poſſeſſionat. exiſten. poſtea ſcil'c eiſd. die & Anno apud Civitat. Ebor. præd. Bona & Catalla præd. extra manus & poſſeſſionem ſuas præd. Caſualit. perdidit & amiſit quæ quid. Bona & Catalla poſtea ſcil't primo die Octobr. Anno ſeptimo ſupradicto apud Civit Ebor. præd. ad manus & poſſeſſion. præd. Jacobi per invention. devener. præd. tamen Jacobus ſcien. Bona & Catalla præd. fore Bona & Catalla ipſius Huberti propria & ad ipſum de jure ſpectare & pertinere Machinan. tamen ipſum Hubertum de Bonis & Catallis præd. callide & ſubdole decipere & defraudare Bona & Catalla præd. eidem Huberto licet poſtea ſcil't eiſdem die & Anno ult. mentionat. apud Civit. Ebor. præd. per ipſum Hubertum requiſit. fuit non deliberavit ſed Bona & Catalla præd. poſtea ſcil't eodem die & Anno ult. mentionat. apud Civit. Ebor. præd. in uſum ſuum proprium convertit & diſpoſuit ad dampn. ipſius Huberti quinquagint. libr. & inde producit ſectam, &c.

Et modo ad hunc diem ſcil't diem Mercurii prox. poſt Tres Septimanas Sancti Mich'is iſto eodem Termino uſque quem diem præd. Jacobus habuit licentiam ad Billam præd. interloquend. & tunc ad reſpondend', &c. coram Domino Rege apud Weſtm. venerunt tam præd. Hubertus Vinkeſtone per Attorn. ſuum præd. quam præd. Jacobus Ebden per Henricum Clarebrough Attorn. ſuum & idem Jacobus defendit vim, & injur. quando, &c. & dic. quod ipſe non eſt indeCulpabilis & de hoc ponit ſe ſuper patriam & præd. Hubertus ſimiliter, &c. ideo ven. inde jur. coram Domino Rege apuc Weſtm. die

Mercurii prox. poſt Octab. Purification. Beatæ Mariæ Virginis & qui nec, &c. ad recogn', &c. quia tam, &c. id. dies dat. eſt partibus præd. ib', &c.

Ad quem diem Jur. int. parres præd. de Placito præd. poſit. fuit inde ulter. eos in reſp. hic uſque diem Mercurii prox. poſt Quinden. Paſchæ tunc prox. ſequen. niſi Juſticiar. dicti Domini Regis ad Aſſiſas in Civitat. præd. capien. aſſign. per formam ſtatuti, &c. die Mercurii undecimo die Martii apud Guildhall Civit. Ebor. præd. prius ven. & modo ad hunc diem ven. tam præd. Hubertus Vinkeſtone quam præd. Jacobus Ebden per Attorn. ſuos præd. & præfat. Juſtic. coram quibus, &c. Miſer. hic record. in hæc verba, ſ. Poſtea die & loco infracontent. coram Johanne Turton Mil. un. Baron. Scaccarii Domini Regis & Thoma Hæſletyne Ar. eidem Johanni Turton, & Ed'ro Nevill Mileti un. Juſtic. dicti Domini Regis de Banco Juſticiar. ipſius Domini Regis ad Aſſiſas in Com. Civit. Ebor. capien. aſſign. per formam ſtatuti, &c. hac vice aſſociat. virtute Brevis dicti Domini Regis de ſi non o'es, &c. ven. tam infranominat. Hubertus Vinkeſtone quam infraſcript. Jacob. Ebden per Attorn. ſuos infracontent. & Jur. unde infra fit men. exact. ſilit. venet. qui ad veritat. de infracontent. dicen. electi triat. & Jurat. dicunt ſuper ſacrament. ſuum quod præd. Hubertus inframentionat. tempore in Narratione infraſcript. interius mentionat. poſſeſſionat. fuit de Bonis & Catallis in Narratione ipſius Huberti interius ſpecificat. ut de Bonis & Catallis ſuis propriis & idem Jurator. ſuper ſacr'um ſuum dicunt ulterius quod villa Novi Caſtri ſuper Tinam eſt antiqua Villa & quod Port. Novi Caſtri ſuper Tinam eſt antiquus portus ſub cura conſervation. & gubernation. Major. & Burgens. villæ il'; quod; per conſuetud. infra eand. villam a tempore cujus contrar. Memoria hominum non exiſtit uſitat. Major & Burgenſ. villæ præd. ad Onera & Cuſtagia ſua propria eund. Portum reparare mundare & pro ſalva & ſecura Navigation. & mora navium ib. commodum reddere & ſervare uſi fuer. & conſuever. & tenentur & quod in conſ. inde Major & Burgenſ. villæ præd. per totum tempus ſupradict. habuer. & receper. & habere & recipere uſi fuer. & conſuever. & debuer. debitum [Anglice a Duty] vel Tolnetum quinque denar. per Celdam [Angl. Chaldron] pro omnibus Carbonibus e portu villæ præd. exportat. vel in aut ſuper aliquam navem poſit. & onerat. cum intentione fore exportat. & quod officiarius [vocat. the Water-Bailiff] dictæ villæ Novi Caſtri pro tempore exiſten. ſive ejus deputat. a toto tempore ſupradicto diſtrixit & diſtringere uſus fuit & conſuevit quæcunque Bona & Catalla per legem Diſtringibil. [Anglice Diſtrainable] quarumcunque Perſonar. Bon. & Merchandiz. præd.

exportant. vel ſup. navem onerat. fore exportat. & debitum vel Tolner. præd. ſolvere recuſant. pro non ſolution. dicti debiti vel Tolnet. & jurat. præd. ſuper ſacr. ſuum ulterius dicunt quod præd. Hubertus ante præd. tempus in Narratione infraſcript. interius ſpecificat. quand. navem ipſius Huberti [vocat. the William and Thomas of Lyme] cum quinquaginta Celdis Carbon. [Anglice Chaldron of Coals] valoris viginti & ſeptem. librar. & decem ſolidor. infra Portum Novi Caſtri præd. onerari ea intentione ad eoſdem Carbones a dicto portu exportand. & iidem Jurator ſuper ſacr'um ſuum præd. ulterius dicunt quod præd. Jacobus præd. tempore quo, &c. in Narration. infraſcript. interius mentionat. & diu antea fuit & continuavit officiar. ejuſdem villæ & portus [vocat. Deputy Water-Bailiff] per Majorem & Burgenſes præd. debito modo conſtitut. & idem Jacob. invenien. Navem præd. cum Carbonibus præd. ut præfert. onerat. parat. fore exportat. dict. deb. vel Tolnet. pro carbonibus præd. a præd. Hub'to petiit & demandavit & præd. Hub'tus dict. debitum vel Tolnet. ſolvere omnino recuſavit & ſuper inde præd. Jacobus Bona & Catalla in Narration. infraſcript. interius mentionat. exiſten. part. ſive parcel. Armamentor. [Anglice Tackle] dicti Navis ſpectan. pro & in nomine diſtriction. cepit & adhuc detinet pro non ſol. dictor. debiti & Tolneti & iidem Jurator. ſuper ſacr. ſuum præd. ulterius dicunt quod Bona & Catalla in Narration. infraſcript. interius mentionat. tempore captionis eor. valebant ſeptem libras & decem ſolid. ſed utrum ſuper totam materiam præd. per jur. præd. in forma præd. compert. dicta Bona & Catalla ſunt in tali caſu diſtringibilia [Angl. Diſtrainable] per legem terræ necne Jur. præd. penitus ignorant & inde petunt adviſament. & conſ. Cur. hic & ſi ſuper totam materiam præd. in forma præd. compert. videbitur Cur. hic in tali caſu non ſunt diſtringibilia [Anglice Diſtrainable] tunc Jur. præd. dicunt ſuper ſacr. ſuum præd. quod præd Jacobus eſt culpabilis de præmiſſis interius ei impoſit. modo & forma prout præd. Hubertus interius inde verſus eum queritur & tunc aſſid. dampna ipſius Huberti actione infraſcript. ultra miſ. & Cuſtag. ſuum per ipſum circa ſectam ſuam in hac parte appoſit. ad ſeptem libras & decem ſolid. & pro miſ. & Cuſtag. il. ad quadragint. ſolid. ſed ſi ſuper totam materiam præd. per Jur. præd. in forma præd. compert. videbitur Cur. hic quod præd. Bona & Catalla per legem ſunt in tali caſu diſtringibil. tunc Jur. præd. ſuper ſacr. ſuum præd. ulterius dicunt quod præd. Jacobus non eſt culpabilis de præmiſſis interius ei impoſit. prout præd. Jacobus interius pro ſe Placitando allegavit & quia Cur. dicti Domini Regis nunc hic de Judicio ſuo, &c.

Vinke-

Vinkeſtone *verſus* Ebden.

S. C. 1 *Salk.* 248, 249.

TRover and Converſion for an Anchor, ſix Sail-Cloths, and three Cable-Ropes: Upon Not guilty pleaded, a ſpecial Verdict was found, ſi. That the Town of Newcaſtle was, Time out of Mind, an ancient Mill, in which there was an ancient Port; that the Mayor and Burgeſſes of the ſaid Town have, Time out of Mind, cleanſed and maintained the ſaid Port for the ſafe Navigation of Ships, and for the Benefit of Exportation. In Conſideration whereof, they, and all thoſe, &c. have, Time out of Mind, &c. received the Toll of 5 d. for every Chaldron of Coals exported, or intended to be exported, out of the ſaid Port. They find that the Plaintiff loaded a Ship with fifty Chaldron of Coals, and that he refuſed to pay the ſaid Toll. They find that the Defendant was Under-Bailiff, and Servant to the Town of Newcaſtle, who diſtrained the Goods in the Declaration mentioned, for refuſing to pay the Toll. They find alſo, that the ſaid Goods were Part and Parcel of the Tackle of the Ship. Then they conclude, that they know not whether the ſaid Goods are liable, or not, to be diſtrained for the Duty, which they ſubmit to the Court; if they are not, then they find for the Plaintiff; but if otherwiſe, for the Defendant.

Vide 1 *Sid.* 348, 409. 2 *Mod.* 99, 102. 1 *Mod.* 77. 2 *Vent.* 50. 3 *Lev.* 260.

The ſingle Point was, Whether the Tackle of the Ship may be diſtrained for this Duty? Or, Whether they ought not to diſtrain the Coal?

Thoſe who argued for the Plaintiff held, That the Tackle were not diſtrainable, becauſe they are neceſſary to carry on the Trade of Sailing, by which the Owner of the Veſſel got his Livelihood, and are therefore privileged.

The Statute 51 H. 3. prohibits People to diſtrain Averia Carrucæ; and this, my Lord Coke ſays, is agreeable to the Civil Law, which commands, that Executio non fiat in Boves, aratra aliave inſtrumenta ruſticorum, becauſe they are of publick Uſe and Benefit.

2 *Inſt.* 133. *W.* 2. *cap.* 18.

And for this Reaſon, neither a Mill-Stone, or Smith's-Anvil are diſtrainable; for if that ſhould be allowed, it would be a great Hindrance to thoſe Men who uſe thoſe reſpective Trades; and for this

14 *H.* 8. 25. *Bro. Abr.* 23. *Rol. Rep.* 2 *Part.* 202.

this Reaſon the Houſe of a Carrier is privileged: And there is no Difference as to this Matter, between a Carrier and the Maſter of a Ship, whoſe Tackle ſhould be likewiſe privileged for the ſame Reaſon.

When a Diſtreſs is taken for a Toll, ſuch Things ought to be diſtrained upon which the Duty doth ariſe; but in this Caſe the Preſcription muſt be void, becauſe no Duty at all is to be paid; for by Magna Charta, and other Statutes, the Subject hath Liberty to go and come upon the Sea without being diſturbed. Now if the Defendant will preſcribe for a Toll upon the Sea, he muſt lay a very good Conſideration to intitle himſelf to ſuch Duty, becauſe it is againſt the Liberty of the Subject; but the Conſideration here laid is not ſufficient, it is only for cleanſing and maintaining a Port which is for the publick Good of the Subject, and the King is the Governor of all the Ports; and therefore, where the like Preſcription was made for maintaining a Wharf or Key, the Judges inclined, that it was void, becauſe it was not a ſufficient Compenſation to the Subject to deprive him of the Benefit of the Law.

Moore Rep. 104.

Two Things are to be conſidered, where a Diſtreſs is taken for a Toll.

1. That the Diſtreſs may be returned in the ſame Condition that it was taken.

2. And in the next Place, that it may be made upon ſuch Things which may be impounded, that a Replevin may be made therefore, according to the Courſe of the Common Law of this Realm.

Fitz. Herb. Avowry, *Placito* 192.

Neither of which can be done in this Caſe; for when the Ship is once replevied, and at Liberty to ſail, ſhe cannot be returned in the ſame Condition as when diſtrained, becauſe the Tackle may be damaged by the Weather, and no Man will be Security for it when ſhe is about to ſail to another Land.

It cannot be objected, that here was any Neceſſity for ſuch a Diſtreſs, becauſe it is not found in the Verdict, that this Ship was like to ſail out of the River.

But the Jury have found, that there is a Cuſtom in the Town of Newcaſtle, for the Mayor and Burgeſſes to repair and cleanſe the Port, and in Conſideration thereof to take a Duty of 5 d. for every Chaldron of Coals exported, &c. which is an outragious Toll, and therefore unlawful; for the Coals there are not worth more than 11 s. per Chaldron.

The Statute of Marlbridge requires, That reaſonable Diſtreſſes ſhall be taken, Et non minus graves propter exceſſum; and therefore it hath been adjudged, that where a Lord diſtrained two or three Oxen for one Shilling, the Party grieved might have an Action upon that Statute for the exceſſive Diſtreſs. 1 *Inſt.* 107. 20 *Ed.* 4. 3. B.

Econtra.

But on the other Side it was argued, that many Things are privileged from a Diſtreſs, as the Horſe upon which a Man rides, or a Carrier's Horſe, and a Horſe at a Smith's Shop, Cloaths at a Taylor's; becauſe it is not agreeable, that the Rent of a Stranger ſhould be paid by ſuch Things; but this muſt be underſtood where there is other Goods ſufficient to be diſtrained: But if ſuch are not to be found, then even the Beaſts of the Plough are to be diſtrained; for Si ſumma quæ requiritur non ex aliis exurgit, nec arantibus parcendum eſt. *Dyer* 312. 2 *Inſt.* 132. 1 *Inſt.* 47.

Now though it be generally true, that no Man ſhall be diſtrained by the Utenſils of his Trade, yet that muſt alſo be intended where there are Goods, or other Beaſts, enough to be diſtrained, and nothing beſides the Rigging of the Ship could be diſtrained; for the Coals are put under-board, and not to be come at.

It would be altogether as inconvenient to bring an Action of Debt againſt the Maſter, becauſe Trade will be as much prevented if the Maſter be arreſted, as if the Rigging of the Ship be diſtrained; for ſhe can ſail no more without a Pilot than without Sails.

Beſides, in the Caſe of ſeafaring Men, this is the moſt proper Remedy; for no Duty doth ariſe till the Ship is about to ſail.

Then as to the Conſideration, it is ſufficient to entitle the Plaintiff to this Duty; for though it is convenient that the Ship ſhould ſail, it is inconvenient that ſhe ſhould ſail into a neglected Port.

The Admiralty have the proper Juriſdiction to take Care of Sailing, and it is uſual in that Court to take out Proceſs againſt the Sails, which may intimate, that ſuch a Thing may be done at Common Law.

Curia. This is not diſtrainable of Common Right, but by Cuſtom, which is laid to be as large as the Common Law.

Cro. Eliz. 549, 596. 3 *Lev.* 260. There is a Difference between the Diſtreſs which is allowed by the Law for Rent, and for a Toll, as in this Caſe. Adjournatur.

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Term. Sancti Mich.

Anno 9 W. III. B. R. 1697.

Rex *verſus* Cook, Snatt *and* Collier.

THey were found guilty upon an Indiãment for the following Crime, ſſ. Sir John Friend and Sir William Perkins were convicted for High Treaſon, in conſpiring the Death of the King; and the Defendants being preſent with them at the Place of Execution, did all of them lay their Hands on Sir John Friend, who ſhewed no Repentance for the Crime for which he was about to die, and Cook pronounced the Abſolution, and Snatt and Collier ſaid Amen.

That they all three likewiſe laid their Hands on Sir William Perkins, who was likewiſe impenitent of this Crime, and Collier pronounced the Abſolution, and Cook and Snatt ſaid Amen. And that they all aſſiſted in, and aſſented to the ſaid Abſolution.

The Jury made a ſpecial Concluſion in their Verdict, Whether the Laying on the Hands of three, and but one at a Time pronouncing the Abſolution, makes them all guilty of the whole Matter? Adjourn'.

Riccards *verſus* Corneforth.

S. C. 2 *Salk.* 580.

WRit of Error upon a Judgment in the Common Pleas, for taking ſeveral Cattle, in the Declaration mentioned, on the 26th Day of September, 7 Willielmi, in the Pariſh of Enfield.

The Defendant made Cognizance as Bailiff to Ralph Earl of Mountague, and Elizabeth his Wife, and sets forth, That the Duke of Albemarle was seized in Fee of the Lands, in which, &c. and being so seized, did demise the same to John Bathurst for twenty-one Years, under the yearly Rent of 140 l. payable at Lady-Day and Michaelmas: That the Duke being so seized of the Reversion, did on the 14th Day of July, in the Year 1687, make his Will, and devised the Reversion to the Dutchess; that the Duke died, and that the Earl hath since married the Dutchess. Et quia 350 l. de Redditu præd. super Dimissionem præd. superius reservat. pro duobus Annis & dimid. unius Anni post Mortem præd. Ducis, finit. ad Festum S. Mich. Arch. ult. præterit. eisdem Rad'o Comiti Mountague, & Elizabethæ Uxor. ejus, Tempore quo, &c. aretro fuerunt & insolut'. Idem the Defendant, ut Ballivus præd. Rad'i Comitis Mountague, & Elizabethæ Uxoris ejus, pro præd. 350 l. de Reddit. præd. made Cognizance.

The Plaintiff pleaded in Bar, and said, That before the Duke made his Will, he did execute a Lease and Release of these Lands to the Earl of Bath in Tail, and traversed, that the Duke died seized; upon which they were at Issue, and the Defendant had a Verdict.

The Error assigned was, 1. The Declaration was of Hillary-Term, 7 Willielmi, which was in the Year 1695, and the Avowry and Pleadings are of the same Term, and the Taking is laid to be 26 September, 7 Willielmi, which was likewise in the Year 1695. The Defendant justified the taking, because 350 l. Rent was in Arrear for two Years and a half, Finit. ad Fest. S. Mich. Arch. ult. præterit', which must be Michaelmas 1695, and that Michaelmas Rent was not due at the Time of the taking the Cattle, which was on the 26th of September; so that the Defendant had avowed for half a Year's Rent after the Distress was taken, and for this Reason the Judgment was erroneous.

But on the other Side several Authorities were cited, to prove that so much Certainty was not required in an Avowry as in a Declaration; for though an Avowry is in some Sort a Declaration, yet it is not so in omnibus; for the Avowant is a Defendant, and the Law allows him more Favour than a Plaintiff in an Action, who is to make out a Title to a Thing in Demand, and therefore his Declaration must be certain.

In Declarations, there can be but one Point in Issue; but in an Avowry there may be two, as for Rent upon two Demises, and if one be found for the Avowant, he shall have a Retorn. habend'.

If the Avowant is not intitled to the whole Rent for which he diſtrained, yet he ſhall have a Return for ſo much as is in Arrear. It is true, the Book ſaith, That the Quantity of the Rent muſt be agreed in the Pleading, and then if a Diſpute happens, how much is in Arrear, and the Defendant avows for more than is due, he ſhall have a Return. *Moore* 281. the 8th Reſolution in the Caſe of *Battey* and *Tervilion.*

So where the Defendant avowed for a Rent, and a Nomine Pœnæ for Non-payment of it, but laid no actual Demand of the Rent, the Avowry was adjudged ill for the Penalty, becauſe it could not be forfeited without an actual Demand of the Rent; but the Plaintiff in Replevin had a Return, for he had good Cauſe to diſtrain for his Rent. *Hob.* 133. *Howel's Fambach.* *Hob.* 208.

In the Caſe of Goodman and Ayling, the Court made a Diſtinction between a Replevin and a Treſpaſs. ſ. It was an Action of Treſpaſs for entering his Houſe, and taking a Chaſing-diſh. The Defendant pleaded, That the Houſe was Parcel of a Half-yard Land, held of the Earl of Northumberland, as of his Manor of W. by Homage, Fealty, incertain Eſcuage, Suit of Court, incloſing of the Park with Pale, and a Pound of Cummin Rent, and juſtified his Entry and Taking for the Rent. The Plaintiff replied, That it was held of another Lord, and traverſed, that it was held of the Earl Modo & Forma. *Yelv.* 148.

The Jury found, that it was held of the Earl as of his Manor of P. (which was not the Name ſet forth in the Avowry) by Homage, Fealty, incloſing of the Park, and the Rent of a Pound of Cummin, & non aliter. Here the Verdict did in no Sort agree with the Plea in the Tenure, yet Judgment was given for the Defendant; and the Reaſon was, becauſe it was an Action of Treſpaſs, in which the Subſtance of the Matter in Queſtion was found, and which was ſufficient to excuſe the Treſpaſs, viz. the Taking for the Rent; and that the Houſe was held of the Earl: And though it was ſaid in that Caſe, that it would have been otherwiſe in an Avowry, for the Avowant ought to make out a Title in omnibus, becauſe the Plaintiff in Replevin is to have a Return; yet that is not an Authority againſt the Caſe at Bar, but agrees with it; for this Avowant hath demanded but one Thing, which is Rent, and which is found to be due, though not ſo much as mentioned in the Declaration: And the true Reaſon why an Avowant for Services muſt make out a Title to all, is, becauſe if it be found for him, it will be a perpetual Charge upon the Tenant; but in an Avowry for ſeveral Sums of Money due for Rent, it is ſufficient if the Subſtance be found, ſ. that Rent is in Arrear, though not ſo much as in Demand. *Cro. Eliz.* 795.

9 H. 7. 3. It hath been objected, That if a Man diſtrain for Rent due at ſeveral Days, which Diſtreſs is reſcued, and in an Action of Reſcous brought, it appears by his own Shewing, that one Rent is paſſed, but the other is not, at the Time of the Diſtreſs taken, and a Verdict for the Plaintiff, and Damages intire, the Plaintiff ſhall never have Judgment for the Damages
2 Cro. 115. he ſuſtained by reſcuing thoſe Cattle from him, which he had taken for Rent before it was due.

So in Aſſumpſit, if two Breaches are aſſigned, and one is ill aſſign'd, and a Verdict for the Plaintiff, and Damages entire, he ſhall never recover, becauſe Damages are intended as well for the Breach which is ill aſſigned, as for the other which is well: From whence they would infer, that in Replevin (as this Caſe was) becauſe the Defendant had avowed for more Rent than was due, and Damages intire, the Judgment ought to be reverſed.

Anſwer. But Damages in an Avowry are not given in Reſpect of the Rent for which the Diſtreſs was made, but for taking the Cattle, and are given to the Defendant by the Statute
21 H 8. cap. 19. 21 H. 8. cap. 19. in ſuch Manner as the Plaintiff ſhould have if he had recovered, which muſt be for taking the Cattle, and not otherwiſe, and ſo ſhall not vitiate this Judgment.

It was likewiſe objected, That by the Judgment in Replevin the Return ought to be irrepleviſable; ſo the Defendant having diſtrained more than will ſatisfy the Rent really due at the Time of the Diſtreſs taken, ſhall retain the Surplus by Vertue of this Judgment for Rent which was not then due.

Anſwer. If the Value of the Cattle be leſs than the Rent really due, that will be a ſufficient Anſwer to this Objection. The Cattle now taken were of the Value of 40 l. and no more, and the Rent then due was 240 l.

But the Court reverſed the Judgment principally for this Reaſon, and ſaid, That the Avowry, quoad the laſt half Year's Rent, ſhould have been abated, becauſe it was not due till three Days after the Diſtreſs made, and for which the Defendant avowed.

Now by the Judgment in this Action (the Verdict being for the Defendant) the Cattle taken by him are for ever afterwards irrepleviſable for two Years Rent and an half, when upon Tender of the two Years Rent, the Man ſhould have his Cattle again, which were kept for ſuch Rent for which they were not

taken, for it was due after the Diſtreſs. Judgment reverſed niſi.

Anonymus.

Nota. By a private Act of Parliament it was enacted, That if a Trial be had between two Inhabitants of *Newcaſtle upon Tine*, and the Damages not exceeding 40*s.* that in ſuch Caſe the Plaintiff ſhall have no Judgment, but the Defendant ſhall have Coſts. An Indebitatus Aſſumpſit was brought, and a Verdict for the Plaintiff, and 30*s.* Damages; and the Queſtion was, How the Defendant ſhould have his Coſts? and now a Motion was made, That this Matter might be ſuggeſted on the Roll; but the Chief Juſtice ſaid, That the Judge of the inferior Court ſhould have directed the Jury to find for the Defendant.

Woolvil *verſus* Young, *& al'*.

THE Plaintiff declared upon the Cuſtom of England, ſi. That if any Perſon ſign a Bill to pay Money at a Day, that by the Cuſtom he ought to pay it upon that Day; and then ſets forth, That the Defendants were reſidentes & negotiantes infra hoc Regnum Angliæ, and that they had ſigned ſuch a Bill, but did not pay the Money; and upon Demurrer to the Declaration, it was held to be ill, for this Way of Declaring ſo generally will exclude all Conſiderations which muſt be averred. *Vide* 1 *Salk.* 124, 125, 127, 130, 132. *Vide Ante*, 13.

Every Man is Negotians in the Kingdom, and if the Plaintiff would have brought his Caſe within the Cuſtom of Merchants, he ought to have ſaid Commercium habentes, or have ſhewed, that the Bill ſigned was a Bill of Exchange.

It is true, in the Caſe of Sarsfeild and Witherly, the Declaration was, That the Defendant Witherly was reſidens & negotians apud London, &c. without ſaying Commertium habens; but it appeared upon the whole Frame of the Declaration, that it was a Bill of Exchange. 2 *Vent.* 295.

Gregory's

Gregory's *Case.*

See the new Stat. 5 *Georgii*, and my Obſervations thereon, *Pag.* 15, 16, *&c.* *Vide Ante*, 274, 308, 309.

HE was committed by the Commiſſioners of Bankrupts, for not anſwering and making a Diſcovery of his Eſtate: And now he appearing in Court upon a Habeas Corpus, it was moved that it might be filed, and that he might be diſcharged, upon producing Affidavits that he had made a Diſcovery.

But the Court would not diſcharge him; for if the Commitment was void, he may bring an Action of falſe Impriſonment; and the Court ſaid, That the Commiſſioners need not ask the Party, whether he will be examined or not? for the Statute gives them Power to examine upon Interrogatories, which they muſt prepare, and tender to him ready drawn; and this being not returned upon the Habeas Corpus, the Warrant of Commitment, for that Reaſon, was held void.

Ellis *verſus* Ellis.

INdebitatus Aſſumpſit was brought againſt an Executor for 60 l. as well for Money lent, as laid out for the Teſtator, &c.

Vide 1 *Salk.* 279, 386, 387.

The Defendant pleaded, that the Teſtator was an Infant.

The Plaintiff replied, proteſtando, that William Ellis, the Teſtator, was not at that Time an Infant, pro placito; that he laid out Money for Lodging, and for Meat and Drink for himſelf and Family, and that it was ſo laid out for Neceſſaries: And upon Demurrer to this Replication, Judgment was given for the Defendant. For though the Plaintiff had made a good Anſwer concerning the Money laid out, yet he ſaid nothing to maintain his Declaration for the Money lent.

S. C. 1 *Salk.* 198. 2 *Salk.* 615.

Brewſter *verſus* Kidgil.

THis was a ſpecial Action on the Caſe upon a feigned Iſſue, by Conſent, to ſettle a Difference between the Grantor and the Grantee of a Rent-charge, concerning the Payment of Taxes.

The Plaintiff declared, that he was ſeized of a Rent-charge in Fee of 40 l. per Ann. iſſuing out of the Lands of the Defendant, &c. The Defendant confeſſed the Seiſin, but averred, that it was lawful for him to deduct 4 s. per Pound out of the

ſaid Rent for two Years and a half, by Vertue of an Act of Parliament, &c. The Plaintiff avers, That it was not lawful for him to deduct it, and concluded to the Country. The Defendant joins Iſſue.

Vid. 5 Co. 16 *Hard.* 87. 2 *Brownl.* 281, 282. 4 Co. 80, 81.

This Cauſe was tried in Middleſex, and the Jury found a Special Verdict. If. That on the 26th Day of November, which was in the Year 1649, one Robert Langford was ſeized in Fee of thoſe Lands, and by a Deed of the ſame Date, for and in Conſideration of the Sum of 800 l. paid to him by the ſaid Ellen Brewſter, did grant to her and her Heirs 40 l. per Ann. to be iſſuing out thereof, payable every half Year. There was a Covenant for farther Aſſurance, on which Deed this Memorandum was endorſed:

If. Memorandum, That 'tis the true Intent and Meaning of theſe Preſents within written, That the ſaid Ellen Brewſter and her Heirs ſhall be paid the ſaid Rent-Charge of 40 l. per Ann. for ever after, without any Abatement, Deduction, or Defalcation, for or upon Account of any Taxes upon the Lands, or the ſaid Rent.

But it was not proved when this Endorſement was made, or by whom.

Afterwards the ſaid Robert Langford did, by another Deed made in the Year 1652, grant and confirm this Rent-Charge to the ſaid Ellen Brewſter and her Heirs, and did covenant therein, That he was ſeized in Fee of the Lands out of which the ſaid Rent was iſſuing; that it was free of all Incumbrances; that he had good Right to grant; and that the ſaid yearly Rent, free of all Taxes, ſhall for ever after be paid to Ellen Brewſter and her Heirs.

The Queſtion was, Whether the Endorſement in the firſt Deed, or the Covenant in the ſecond Deed, is ſufficient to diſcharge the Rent from the Taxes now impoſed by Act of Parliament, the firſt Clauſe of which Act charges 4 s. per Pound upon Land.

Then there is a Proviſo, That nothing ſhall make void any Agreements between Landlord and Tenant.

In the Statute 3 Will. there is no Proviſion made for Rent-Charges, but in the latter Acts thoſe are comprehended.

Now a Rent-Charge can be ſubject to no other but Parliamentary Taxes, 'tis not contributory to Church, Poor, Sewers, or Highways.

The Words Tax and Tribute are ſynonymous, and properly ſpeaking no other Charge upon Lands is a Tax, but ſuch as is impoſed by Parliament; for Sums of Money which are collected

for the Relief of the Poor are called Rates or Aſſeſsments, and have no other Denomination; and this was firſt charged upon Land by Vertue of the Statute 43 Eliz. for before that Time poor People lived upon the Charity of religious Perſons.

The Word Tax is alſo the ſame with Tallagium, only the latter is a general Word in which the former is included; but both are taken to be when the King hath a Share of the Goods or Yearly Profits of the Lands, and are properly of Parliamentary Uſage.

Now tho' it doth not appear when this Indorſement was made, yet 'tis plain it muſt be before the Sealing of the other Deed.

Therefore this Word muſt refer to Taxes impoſed by Parliament, and cannot be reſtrained to other Taxes alone, becauſe then it would be to avoid the Intent of the Grantor, who uſed general Words to free the Rent from Taxes.

And ſuch Conſtruction is rather to be made of this Word Tax, becauſe at the Time when this Deed was made, there was an Ordinance for a Land-Tax impoſed by the Authority then in Being; and all Words in Deeds are to be conſtrued moſt ſtrongly againſt the Grantor, both with Reſpect to the Intereſt granted, and the Qualification of the Grantor.

'Tis true, a Multitude of Words are now confuſedly put together by Scriveners in all Conveyances; as, That the Lands ſhall be free from all Taxes, ordinary or extraordinary, impoſed or hereafter to be impoſed, &c. but ſuch Clauſes will not guide the Judgment of this Court to expound this Sentence.

Econtra.

It was inſiſted on the other Side, That the late Acts of Parliament do allow the Tenants of the Land to ſtop the Taxes out of the Rent; but there is a Proviſo which excepts Agreements between Landlord and Tenant; but this Caſe is not within that Proviſo, neither is any Thing found by the Verdict which hinders the Defendant from deducting the Tax out of this Rent.

The Words of the Endorſement are not found to be Part of the Deed, or by whom ſigned, or when, or that it was the Agreement of the Parties to that Deed upon which the Endorſement was made; for the Jury find generally, that Super Indentur. ſic indorſatur; ſo that muſt be out of this Caſe.

Then it muſt depend upon that Covenant in the Deed made in 1652, wherein the Grantor covenants, That the Rent ſhall be freed of all Taxes, and ſhall be ever paid, &c.

Now

Now this is not a Covenant which is saved in this Act of Parliament, because such must be a proper Agreement relating to Parliamentary Taxes only.

The Word Tax relates to ordinary Taxes and Imposts, such Taxes which are made for Relief of Poor, or by Authority of Commissioners of Sewers. It is used in the very Commission which is given by the Statute of H. 8.

It is also named in the Statute of Queen Eliz. and it has been ruled, That an Inhabitant who hath a Rent-Charge, and no other Land in the Parish, shall be liable to that Tax for the Poor; therefore there is no Reason to construe this Word to relate to Parliamentary Taxes alone.

And such as these were the constant Taxes when this Deed was made.

There was nothing like this Covenant in the Original Deed by which this Rent was granted, but in the Deed for further Assurance; and no Alteration is found of that first Agreement between the Parties, but these Words were thrown in by a Scrivener: Therefore it shall not be intended that Men do covenant against great and publick Charges, unless particularly named.

But if it should be otherwise construed, these Words should then extend to no other Taxes but such as were in Being at the making of this Grant, and not to future Taxes; for tho' the Word Tax be a general Word, yet an express Covenant between the Parties to free the Rent from all Taxes, shall tie it up to those Taxes alone.

Agreeable to this is the Resolution in Noke's Case, which was, A Man grants and demises a House for Term of Years, (which Words in a Grant import a Covenant in Law) and he expressly covenanted for quiet Enjoyment against himself and all claiming under him, and gave Bond for Performance of Covenants. An Action of Debt was brought upon this Bond, and the Breach assigned was, That a Stranger had recovered in Ejectment. The Court held, that the express Covenant, which was much narrower than the Covenant in Law, did restrain that Covenant, though it was resolved against the Plaintiff in another Point, ſi. Because the Plaintiff did not shew that the Eviction was not by an elder and sufficient Title upon which it was had; for tho' the Stranger recovered by Law, yet it may be without a Title.

4 *Co.* 80,81. *Cro. El.* 674. *Cro. Car.* 176. 2 *Browl.* 213. *Co. Lit.* 139. *b.*

Curia. The Queſtion is, Whether this Covenant ex vi Termini is to extend to any Impoſition to be made by a Law ſubſequent to that Covenant?

It ſhould have been, All Taxes impoſed, or hereafter to be impoſed by Act of Parliament.

It cannot be denied, but this Covenant doth oblige Langford and his Heirs to pay the Rent clear of all Taxes; and if ſo, it doth extend to ſuch Taxes which ſhall be given by Act of Parliament.

1. Becauſe where Taxes are mentioned (if the ſubject Matter will allow it) it muſt be intended Taxes by Parliament, which are the moſt eminent.

This is agreeable to the Opinion of thoſe in former Times, who were converſant in the Affairs of the Exchequer, that a Tax was nothing elſe but a Subſidy granted by Parliament. There were other Ways of Taxation then in being, as a Fifteenth Part of the Lands or Goods of the Laiety. This was called a Quinzime, and granted by Parliament, and was at firſt ſet upon the Polls, but afterwards was impoſed upon every Town in England, and then the Inhabitants of the reſpective Towns taxed themſelves. The Clergy paid Yearly the Tenths of all their Spiritual Livings, and theſe were called Diſmes; but when the Laiety paid both Tenths and Fifteenths, that muſt be underſtood of Perſonal Eſtates, and not ariſing out of their Lands, ſi. The tenth Part of their Goods in Cities and Borough-Towns, and the Fifteenth Part in the County at large; and this was the ancient Way of taxing the People. Now whilſt thoſe Taxes were in being, ſuch a Covenant as this would have no Reſpect to a Rent-Charge, becauſe the Land was always charged, and every Occupier knew what to pay, and the Rent was never charged.

34 *H.* 8. *Brooke Tit. Quinzime, Placito* 9.

Afterwards there were Subſidies, and thoſe were always granted by Parliament upon urgent Occaſions, and were uſually ſet upon the Perſon in reſpect of his Lands or Goods, ſi. For Lands at 4 s. per Pound, for Goods at 2 s. 8 d. and this way of taxing began about 32 H. 8. and in thoſe Days if the Tax upon the Land did amount to more than that laid upon Goods, then the Land uſually paid the Tax, and Men were then taxed where they lived, and not where they had Land.

And even in such Case there had been no Occasion of such a Covenant, for the Grantee of a Rent-charge was never liable to pay such Taxes, which were still imposed by Reason of the Land; and this way of Taxing did continue till the latter End of the Reign of King Charles the First.

Then came Assessments or Royal Aids, which were almost the same Thing; and last of all, Pound-Rates.

The Design of the Parties in 1649, was to establish a Rent for ever free from all Taxes; it was in that very Year in which Taxes of this Nature did obtain. If this Covenant had been made in the Year 1640, it would not have extended to this Case, because there were no Taxes then in being, which charged the Land or Personal Estate; but in 1649, the Rent was as much taxed as the Land.

The first Ordinance of Assessment was in February 1642: There was another in February 1644, and another in April 1649. And by this last Ordinance Rents were taxed, and it was in Force when this Covenant was made.

Now tho' these were not real Acts of Parliament, but made in the Times of Usurpation, yet they had the same Efficacy; they had Power, but not a legal Power, to which the People did generally submit.

Another Reason why this Rent should be taxed is, because the Grant thereof is in Fee, and it would fall short of that Estate if the Covenant should not extend to future Acts of Parliament.

The Exposition of Statutes is the subject Matter of this Court; and it cannot be denied that subsequent Acts of Parliament have been expounded to relate to Things done long before the making such Acts: As where there was Tenant in Tail, and for want of Issue by him, the Remainder in Tail to one Basset; the Tenant in Tail before the Statute which enabled him to make a Lease for 21 Years, or three Lives, entered into a Recognizance to him in Remainder, that he would not alter or dispose the Land, but for his own Life; and it was adjudged, that if he made a Lease pursuant to the Statute, it was a Forfeiture of his Recognizance, though made before the Statute. *Dyer* 48. *B. Placito* 5. 32 *H.* 8. *ca.* 28.

So is the Reason of Chedington's Case; to whom Hen. 4. by Letters-Patents granted, That he, and his Brethren, and Successors, should be for ever discharged of all Taxes, when and as often as the same should be granted to him by the Commons, or a Tenth by the Clergy, and afterwards a Tenth was given to the King by the Clergy. The Collectors of this Revenue, when they came to give up their 1 *Co.* 153, to 156. 19 *H.* 6. *fol.* 62.

Accompts, pray to be discharged of this Matter, because they could not levy the Tenth upon the Rector, by Reason of the King's Charter of Exemption. Whereupon Process went out against him, and he pleaded these Letters-Patents, and the Attorney-General demurred; and it was objected by Fortescue the King's Serjeant, that the Grant was void, because the King had not this Revenue at the Time of the Grant made; but the latter Opinions were, That the Grant was good.

So here, though this Covenant was made in general Words long before these Statutes, yet it shall extend to subsequent Provisions made by Act of Parliament.

It hath been objected, That tho' it may extend to Taxes given to the Crown by way of Assessment, yet it cannot to those new Taxes.

But these Taxations differ not in Substance, but in Form; for Taxes and Assessments are of the same Nature, and the same Things are taxed by both, ſi. Rents as well as Lands.

Curia. The Court did not like this way of trying Causes by Wagers: and they were of Opinion, That the Plaintiff had no Remedy at Law upon this Covenant against the now Defendant, for he was only a Tertenant, and could not be charged as Assignee, because the Covenant did not run with the Land, neither was it annexed to the Thing granted; and therefore he ought to bring an Action against the Grantor or his Heirs; for this Covenant doth not extend to any Thing or Parcel of the Demise; but to Taxes which had not Existence at that Time, and is for that Reason a personal Covenant, by which the Heir may be charged in respect of Assets descended, and not otherwise. He might have Remedy in Equity against the Assignee, but not at Law, for that would be to make this Covenant of as high a Nature as a Warrantia Chartæ.

5 *Rep.* 16. *Spencer's* Case. *Hard.* 87. *Cook* versus Earl of *Arundel.*

Mandamus *to grant Administration.*

Vide 1 *Sal.* 250, 251.

A Mandamus was granted last Term to the Judge of the Spiritual Court, to grant Administration to J. S. who, as he suggested, was next of Kin to the Intestate.

Northey moves for a Supersedeas to it, for that the Fact was, That J. S. being cited, refused to come in; upon which another of the Kindred sued for Administration, but was opposed in it by one who pretended there was a Will. Which Matter was now under

under Controverſy before the Judge there; and therefore till that was determined, the Spiritual Judge could not obey the Mandamus.

Shower. You commonly grant a Mandamus to the Judges of the Spiritual Court, upon Suggeſtion, that J. S. died Inteſtate, and that J. S. is next a Kin, and if it be falſe, they may take Iſſue upon it; and ſo they may do in this Caſe. 1 *Salk.* 37.

Holt, Chief-Juſtice. Is there no Difference between a Controverſy, and no Controverſy? When there is no Controverſy, we do ſo; but here is a Controverſy, and we will not grant a Mandamus till it be determined. For ſuppoſe the Will ſhould prove good, what then will the granting Adminiſtration ſignify? If there be a Controverſy in the Spiritual Court, no *Mandamus* till it be determined.

Sutton *verſus* Moody.

S. C. 2 *Salk.* 556.

Fieſp. ACtion was brought for breaking the Defendant's Cloſe, and hunting his Conies, &c. Treſpaſs for hunting Conies.

Gould, Serjeant, moved in Arreſt of Judgment, That no Action will lie for hunting Conies which are Feræ Naturæ, and ſo is Greenhill's Caſe, 1 Cro. 553. As to Deer in a Park, and Conies in a Warren, the Owner hath a ſpecial Property in them as long as they are in the Warren or Park; but if they be not in a Park or Warren, he may not ſay Suas, unleſs he add, That they were Domeſtick: Indeed, had it been Warrenam ſuam, it might have been good; but now as it is laid, here can be no Property preſumed.

Econtra. We take it to be good enough: In Raſt. 450. b. and in the Regiſter 93 b. there is an Action for breaking his Cloſe, and taking away his Sparrow-hawks, and certainly they are as wild as Conies; ſo is Thel. Dig. 196. 25 H. 6. 59. b. As for Jo. 440. and 1 Cro. 553. Greenhill's Caſe, doth not come up to this Caſe, for it muſt be meant, if they are not in the Plaintiff's Soil, then no Action lies. So in Ventris, quare Piſces ſuos cepit in ſeperali Piſcharia, moved in Arreſt of Judgment, that the Plaintiff ought not to have called them Piſces ſuos, unleſs they had been in a Stew or Pond. Sed non alloc. After Verdict it ſhall be intended they were in a Stew-pond, but it had been good upon Demurrer; it was good by Reaſon of local Property; and then this

this being after a Verdict, it ſhall be preſumed the Plaintiff proved a Property.

C. J. The Conies are as much his in his own Ground as if they were in a Warren, and the Property is Ratione ſoli; the Warren does not give a greater Property. So in the Book of 12 H. 8. 10. If a Man ſtarts an Hare in his own Ground, he has a Property in it, Ratione loci. Indeed if the Deer eſcape out of a Park into the neighbouring Ground, you have no longer a Property.

Gould, Serj. As for the Caſe of the Hawks, there was a Property Ratione impotentiæ.

Rokeby, J. Here is a Verdict, and it was in his own Cloſe, and why ſhould any Man come there?

Ch. J. If the Declaration had been Cuniculos generally, you ſay he ſhould recover Damages: And why in that Caſe, if not in reſpect of the Conies? Leave out ſuos, and the Jury may give Damages. Perhaps theſe Rabbits were for the Suſtenance of his Family; and why ſhould you deprive him of it?

Smallcomb *and* Buckingham.

S. C. 1 *Salk.* 320. *Vide* 6 *Mod.* 292

Two Writs of *Fi. Fa* delivered to the Sheriff the ſame Day, and the laſt was executed firſt.

HEre were Two Writs of Fi. Fa. delivered to the Sheriff the ſame Day; Ours was delivered firſt, which we ſay bound the Property. Indeed, before the late Statute of Frauds and Perjuries, at Common Law if the Writ that had the laſt Teſte had been delivered firſt, yet the Writ that had the firſt Teſte muſt take Place, as it is in 3 Cro. 174. and if the Lands are charged by the Delivery of the Writ, no Doubt but the Sheriff may ſell the Goods. Now ſuppoſe, after the Sale of the Goods by Fi. Fa. the King's Writ comes, the Goods may be ſeized again for the King; for it can be no Concluſion or Eſtoppel to the Sheriff.

Statute of Frauds and Perjuries.

Now for the late Statute of Frauds and Perjuries, the Queſtion is, Whether there ſhall be a Fraction in a Day? for the Statute ſaith, Time of the Delivery, but not the Day of the Delivery: No Writ of Fieri Facias, or other Writ of Execution, ſhall bind the Property of the Goods, but from the Time that ſuch Writ ſhall be delivered to the Sheriff, &c. and for the Manifeſtation of the Time, ſhall endorſe the Day when they received

ceived the ſame. Suppoſe the Sheriff makes an Indorſement, yet the Parties are not concluded; but the marking it is only directory to the Sheriff.

I agree, there is no Diviſion of a Day, unleſs in Caſe of Neceſſity; as in Co. Lit. 135. and 6 Co. 33. b. where there was Priority of an Inſtant. *Vide* 1 Co. 76. 174. *Ow.* 126.

If twenty-four Hours muſt be the whole Time, then we are in the Wrong; but if only the very Time of its Delivery, then, with Submiſſion, our Writ ought to take Place, it having been firſt delivered. 1 Sid. 272. Cro. Eliz. 440. 3 Keb. 397. Goods are liable to Execution from the Time of the Teſte of the Fieri Facias, and that this ſhall be ſaid Emanatio Brevis. Bayly and Bunning. *Cro. Eliz.* 726, 792. 2 *And.* 131. *Ray.* 142.

Shower. If the King's Writ of Extent comes out after Execution, yet it is ſuperſeded, and the King's Extent ſhall take up the Goods; but if the Sheriff had ſold the Goods by Bill of Sale, &c. the Property is altered, and ſhall not be deveſted by the King's Writ.

So here are two Writs indorſed the ſame Day, and the Sheriff having made the Bill of Sale to us, is thereby concluded.

Holt, Chief Juſtice. This is a Caſe of ſome Concern, and it is fit that the Law ſhould be ſettled, and it is worthy Conſideration. Indeed, here was an honeſt Sale, you put in the Writ and let it lie longer; then comes the other and brings the Writ the ſame Day, and calls for a Warrant preſently, and ſo gets a Bill of Sale, and executes it honeſtly; and now you would defeat it.

C. J. At another Day:

Though the Fieri Facias was delivered, yet, ſaith the Party to the Sheriff, you may let it lie, it requires no Haſte; and therefore deſires no Warrant, nor leaves any Fee. Now when a ſecond Fieri Facias comes out the ſame Day, upon which the Sheriff preſently grants, and makes a Bill of Sale of the Goods, the Sale ſhall be good, and ſhall not be avoided. Tho' the ſecond Fieri Facias was delivered a Fortnight after, yet if it be the firſt executed, it ſhall be good, and the Party has only his Remedy againſt the Sheriff. Later *Fieri Facias* firſt executed.

Winter *verſus* Loveday.

S. C. *Ante*, 244, 245.

Reſolutio Curiæ.

Vide 6 Mod. 20. *Raym.* 132. *Poph.* 9. *Yelv.* 222. *Lutw.* 269. *Moore* 494.

THE Caſe upon a ſpecial Verdict in ſhort is thus: George Pawlet makes a Settlement on Marriage, in which there is this Power, That it ſhould be lawful for the ſaid *George Pawlet*, during his Life, to make Leaſes of the ſaid Lands, for the Term of three Lives in Poſſeſſion, or for the Term of thirty Years, or for any other Term or Number of Years, for one, two, or three Lives in Reverſion, and ſo that it be not of ancient Demeſne Lands: And the Lands which were leaſed, in Purſuance of this Power, were Copyhold Lands, and made for thirty Years, and for ought appears, were in the Hands of the Tenants at that Time, and if ſo, then they could not be leaſed out in Poſſeſſion.

Eyre, Juſtice. Upon this Caſe, two Queſtions do ariſe:

Power to make Leaſes.

Queſt. 1. Whether George Pawlet had Power to make a Leaſe for thirty Years, or any other Term, determinable on one, two, or three Lives? And this is clear he had ſuch Power.

It ſeems to me, that here are diſtinct Clauſes; the Words [Or for any other Term of Years, *&c.*] do plainly deſcribe another Eſtate; ſo that he ſhould have Power to make a Leaſe for thirty Years abſolute, or to make a Leaſe for any Term determinable upon Lives.

There is a Difference; where a Man hath a Power to make a Leaſe indefinitely, there he ſhall not make a Leaſe upon a Leaſe, &c. but where a Power doth expreſs what Leaſe he ſhall make, as a Leaſe in Poſſeſſion, or in Reverſion, there he may make it accordingly. Yelv. 222. Upon a general Power to make Leaſes, without more ſaying, the Law ſhall adjudge, that theſe ought to be Leaſes in Poſſeſſion; for if by ſuch Power he may make a Leaſe upon a Leaſe, he might make Leaſes in infinitum, and detain thoſe in Remainder from the Poſſeſſion for ever; which is contrary to the Intent of the Parties, and againſt all Reaſon.

General Power to make Leaſes, how to be conſtrued.

Queſt. 2. Whether he could make ſuch a Leaſe of theſe Lands which are Copyhold, for that Demeſne Lands are excepted? So that if the Lands in Queſtion are Parcel of the Demeſne Lands, this Leaſe cannot be good.

Now if they were Copyhold Lands, they muſt be Parcel of the Manor, ſince the Freehold is in the Lord, and in Law they are but Tenants at Will ſtill, and ſo is Lit. Sect. 553.

Therefore upon this ſecond Point, I hold that this Leaſe is not warranted by the Power. And that for this Reaſon, Judgment ought to be for the Plaintiff.

Turton, Juſtice. I do concur with my Brother that ſpake laſt, that this Leaſe, under which the Defendant claims, is not warranted by the Power.

Firſt, I take it, that George Pawlet had a Power to make a Leaſe for thirty Years abſolutely; and it ſeems to me, that the Intention was, he ſhould have ſuch a Power, or elſe theſe Words would have been altogether inſignificant, and the Words, [Or for any other Term,] would have been ſufficient of themſelves, and if it ſhould have been for thirty Years, for one, two, or three Lives, it would have been too ſcanty.

Now the next Queſtion is, Whether theſe Lands, being Copyhold Lands, could be demiſed, for that in Judgment of Law Copyhold Lands are Parcel of the Demeſnes? So is 1 Inſt. -----And if Copyholds are Parcel of the Demeſnes, then they are out of the Power. *Vide Ante*, 245, 246. 6 *Mod.* 20.

2. The next Thing I go upon, is upon the Marriage-Settlement, and the Conſideration is a Portion of 8000 l. and therefore it ſhall be taken ſtrictly againſt George Pawlet.

Then it cannot be preſumed, that it was the Intent of the Parties, that ancient Copyhold Tenures ſhould be deſtroyed; and the Wife here was to have ſuch a Power, though ſhe had but a Jointure.

Beſides, here were other Lands upon which the Power might have been exerciſed.

Upon the whole, I am of Opinion, that Judgment muſt be for the Plaintiff.

Rokeby, Juſtice. I do concur, that this Leaſe is not warranted by this Power.

All Powers ought to obſerve two Rules: Two Rules of Power.

1. The Conſtitution of theſe Powers ought to be interpreted according to the Intent of the Parties.

2. The

2. The Powers muſt be ſtrictly purſued.

As for the Intention of the Parties, 1. It ſeems to me that their Intention was not to take away the Copyhold Tenures, and ſo to have deſtroyed the Manor; and I do conceive that Copyhold Lands are Parcel of the Demeſnes of a Manor.

2. I take it, that whatever Number of Years the Leaſe was made for, it was to be ſubject to a Determinability of Life or Lives; for the ita quod, &c. ſeems to take Care, that the Owners of the Fee ſhould ſtill have a Suſtenance for their Families. The Freehold of the Copyhold is ſtill in the Lord, and the Copyhold it ſelf is only at Will.

The Words [for any other Term or Number of Years] has no Weight with me; for it cannot be intended to be of the ſame Duration, both in Poſſeſſion and in Reverſion.

Vide Cro. Jac. 319. *Poph.* 9. *Cro. Eliz.* 5. *Lat.* 269. 1 *Brownl.* 149. *Raym.* 132. Conſtruction of Powers to make Leaſes.

The Caſe in Yelv. 222. and in Cro. Jac. 318. Shecomb and Hawkins, was on a ſpecial Verdict. Tenant in Fee of the Manor of D. which was then in Leaſe for Years, levied a Fine thereof to the Uſe of himſelf for Life, and after to the Uſe of his eldeſt Son in Tail, reſerving Power to himſelf to make Leaſes at any Time for twenty-one Years. Before the Leaſe in Being expired, he made another Leaſe to J. S. (under whom the Defendant claims) for twenty-one Years, to begin after the Determination of the former Leaſe, and died; the firſt Leaſe expires, the Son enters, and makes a Leaſe to the Plaintiff, and it was adjudged for the Plaintiff; for it ought to have been a Leaſe in Poſſeſſion, and not an Intereſt to begin in Futuro, or Reverſion, after another Eſtate determined, for then he might by infinite Leaſes detain thoſe in Reverſion out of Poſſeſſion for a long Time, againſt all Reaſon. 6 Rep. Fo. 33. Leaper and Wroth's Caſe, cited in Fitzwilliams's Caſe. There was a Proviſo, to make Leaſes for twenty-one Years, and afterwards he who had the Power, 3 April, makes a Leaſe for twenty-one Years, to commence at the Feaſt of St. Michael then next enſuing. And although the Power was general, to make Leaſes for twenty-one Years, without any Reſtraint to make them in Poſſeſſion, or any Number of them, but indefinitely to make Leaſes for twenty one Years, yet it was adjudged, that the ſaid Leaſe was void; for that if by the ſaid Power he might make a Leaſe in Futuro, or a Leaſe in Reverſion, tho' he might make a Leaſe for twenty-one Years in Poſſeſſion, yet after that infinite other Leaſes, &c.

These Cases are full to confirm me in my Opinion, and I hold Judgment to be for the Plaintiff.

Chief Justice. Having put the Case, ut supra;

The general Question is, Whether this be a good Lease by Vertue of this Power? And I am of Opinion, that this is not a good Lease.

The first Question is, Whether this Term be within the Power? And I hold, that it is a Term within the Power, and this depends on the penning of the Words of this Power. Now in a large Sense, any Lease made to commence at a Day to come, may be called a Lease in Reversion; but that is not meant in this Case, but the Lease here is rather to be taken in the common Sense, from and after a present Interest then in Being, and the Power extends not only to a Lease for Years in Reversion, but also to a Lease for Life in Reversion; and if it is for Life, it is a concurrent Interest.

Lease in Reversion, what.

But now I take it, as this Power is penn'd, he may make a Lease for thirty Years in Reversion absolute; for the Clauses are distinct to make a Lease for thirty Years, or else for any other Term of Years determinable on one, two, or three Lives; so that this Word [or] disjoins what follows, and makes it a distinct Addition to the precedent Matter. So is 6 Rep. 39. Finch's Case.

But whether this Copyhold Lease was in Being at that Time is uncertain; and if a Man hath Power to make a Lease in Possession or Reversion, he cannot do both.

Now as to the second Question, Whether this Power does extend to make Leases of the Copyholds? I do think that this Power extends not to a Copyhold Estate; for I agree with my Brother Rokeby, that it was never intended that this Power should extend to Copyhold, for it was not their Design to destroy the Manor.

This Syllogism will clear the Case:

All the Demesnes of the Manor are expressly excepted out of this Power.

The Copyholds are Part of the Demeſnes.

Ergo, Copyholds are expreſly excepted out of this Power.

Copyhold, Parcel of the Demeſnes.

Manor, what it muſt conſiſt of.

3 *Bulſt.* 14.

1 *Rol. Rep.* 142.

2 *Rol. Rep.* 180.

That the Copyholds are Parcel of the Demeſnes, is ſo plain, that there needs no Authority to be quoted but Alton Wood's Caſe, 1 Rep. 46. b. and that is expreſs. And it is obvious that every Manor muſt conſiſt of Demeſnes and Services, and thoſe are ſufficient to ſupport the Being of a Manor; for if the Lord of a Manor aliens his Manſion-houſe which he had in Poſſeſſion, yet if the Copyholds and Services remain, it is ſtill a good Manor. Then there was no Occaſion that this Power ſhould extend to Copyholds. Indeed, it was objected by Sir B. Shower, that if you conſtrue this to extend to Copyholds, there are no other Lands to be demiſed. One of my Brothers has anſwer'd, That there were other Lands within the Pariſh which might have been demiſed.

But that will not do, for the Land to be deviſed muſt be Parcel of the Manor.

As to this I anſwer, That this Power has ſubject Matter enough to exert it ſelf upon; for he may make Leaſes in the Manor of the Rents and Services; and though it be ſaid, reſerving the ancient Rent, and that no Rent can be reſerved out of the Rents and Services, yet that ſignifies nothing; for tho' the Qualification cannot be obſerved, yet the Power may ſtill be executed ſo far as it may be performed. 2 Roll. Abr. 262. Conveyance of divers Manors and Lands to the Uſe of J. S. for Life, &c. with Power to make Leaſes of all, or any Part thereof, for three Lives, &c. Ita quod, That ſuch Rent, or more, be reſerved upon every Leaſe, which was reſerved, or paid for it, within two Years then next before, and ſome of the Land was not leaſed before at any Rent within the two Years, he may by Force of this Power make ſuch Leaſe of this Land, reſerving what Rent he pleaſeth. Cumberford's Caſe. And though the Words of the Qualification be general, yet the Application may be particular. Hill. 27 & 28 Car. 2. in Walker and Web's Caſe, the Leaſe for Tithes was held good, without reſerving any Rent, and yet the Power was to reſerve Rent.

Reſerving the ancient Rent.

Tho' the Qualification be general, yet the Application may be particular.

Now indeed, if this Exception had ſeparated the Demeſnes from the Rents and Services, it would have been hard to have made ſuch a Conſtruction.

So that upon the whole Matter, I hold,

1. That this Leaſe for thirty Years abſolutely, is a good Leaſe within the Power.

2. That theſe Lands being Part of the Demeſnes, were within the Exception.

Judgment for the Plaintiff.

DE

Term. Sancti Hill.

Anno 9 W. III. in B. R. 1697.

Trevillian *verſus* Andrew.

EJectment. The Jury find a Leaſe for ninety-nine Years, if three Perſons ſo long live, and that one of the Lives was in Being.

They find another Leaſe made to the Leſſee for ninety-nine Years, if he lived ſo long, and that he aſſign'd his Term to the other, who died inteſtate, and that this Perſon was living.

Spry, who had a Grant of the Reverſion, entered before Adminiſtration de bonis non was granted, and died ſeized. The Queſtion was, Whether that had taken away the Entry of the Adminiſtrator?

Curia. The Term had an Exiſtence as ſoon as Adminiſtration was granted, and the Adminiſtrator may have a ſpecial Action of Treſpaſs.

Nota. It was held, That if a Leſſee hold over his Term, you cannot bring an Action of Treſpaſs without an actual Entry.

Mathew *verſus* Tompſon.

Vaugh. 28. 2 *Jones* 27. *Vide Ante*, 210, 211.

EJectment for the Scite of the late Priory of Leoffeild, upon the Demiſe of Thomas Earl of Suſſex. Upon Not guilty pleaded, there was a Trial at Bar by a Jury of the County of

Bucks,

Bucks, and the Plaintiff's Title appeared to be thus: ſſ. The Lands now in Queſtion were formerly the Lands of Sir Arthur Throgmorton, who had Iſſue four Daughters; the eldeſt and the youngeſt were out of this Caſe; Anne the ſecond Daughter married Sir Peter Temple, and in Conſideration of that Marriage, Sir Arthur Throgmorton, Anno 12 Jacobi 1. ſettles theſe Lands in Truſt for himſelf for Life, then to Dame Anne his Wife for Life; then to Sir Peter, and Anne his Wife, for their Lives, and the Life of the Survivor; and after their Deceaſe, then to Truſtees to preſerve contingent Remainders; then to the firſt Son of the Body of Anne by the ſaid Sir Peter begotten, or to be begotten, and the Heirs Males of the Body of ſuch firſt Son; and for want of ſuch Iſſue, then to the Uſe of all the Iſſue Female of the Body of the ſaid *Anne*, by the ſaid Sir *Peter* begotten, and to the Heirs of the Bodies of ſuch Iſſue Female, like Remainders to her Iſſue by any other Husband, Remainders to Elizabeth his third Daughter, and the Heirs of her Body. *Vide* 1 *Salk.* 285. 6 *Mod.* 44, 45.

Sir Peter Temple died without Iſſue Male, but left two Daughters; Anne, who was the Lady Baltinglaſſe; and Martha, who died very young; but were both born before the particular Eſtate determined, otherwiſe the Remainder had veſted in the elder.

Theſe Siſters were Jointenants for Life, with ſeveral Inheritances, and my Lady Baltinglaſſe enjoyed the whole for forty Years by Survivorſhip, and died in Auguſt 1696. without Iſſue. 6 *Mod.* 44, 45.

So that the Lands muſt now come to the Heirs of the Body of Elizabeth, who married Thomas Lord Dacres, by whom ſhe had Iſſue Francis, who had Iſſue Thomas, the Leſſor of the Plaintiff.

There having been ſome Opinions formerly, that my Lady Baltinglaſſe was Tenant in Tail, by Vertue of this Settlement, ſhe ſuffered a Common Recovery to bar the Remainders; and to maintain this Opinion it was now ſaid at the Bar, that the Remainder did attach in her, and could not be diveſted by the ſubſequent Birth of her younger Siſter, for the Words, ſſ. To the Uſe of all the Iſſue Female of the ſaid *Anne*, by Sir *Peter*, and the Heirs of their Bodies, are Words of Limitation, and not of Purchaſe; but if they ſhould be adjudged Words of Purchaſe, then the Eſtate-Tail is veſted in the eldeſt Daughter.

It is true, if there had been two Iſſues Female living at the Time of the making this Settlement, it would have made them

Jointenants for Life, with ſeveral Inheritances; but this being upon a Marriage-Settlement, before any Iſſue born, alters the Caſe.

The Birth of the youngeſt Daughter cannot make her Jointenant with the other, for the Poſſeſſion was coupled with the Remainder. If it ſhould be otherwiſe, then theſe Siſters will take by Parcels, which cannot be; for admitting the eldeſt Siſter ſhould have Children, and live many Years, and then die, and afterwards a younger Siſter is born, of what Eſtate can the eldeſt Siſter die ſeized?

But the Court were unanimous of another Opinion.

Then the Plaintiff was put to prove his Title, but could not produce the Original Settlement made by Sir Arthur Throgmorton, of which he gave this Evidence:

Vide Ante, 211. 6 *Mod.* 149, 225, 248. 2 *Lev.* 108, 109. 1 *Mod.* 4, 94, 114.

1ſt. He proved, that it came to the Hands of the Lady Baltinglaſſe, and ſhe having committed a Forfeiture, by ſuffering a Recovery, brought the Deed to Mr. Grange, to adviſe with him in that Matter.

He proved likewiſe, that this Deed was produced before a Maſter in Chancery, in a Suit there depending, and a Copy of it made, but that my Lady got the Copy away.

He proved alſo, that there was a Trial at Law upon a Power of making Leaſes, at which Trial that Copy was produced, and a ſpecial Verdict found, in which this Settlement was ſet forth in hæc Verba, the Record of which Verdict was now produced in Court.

That there was likewiſe another Controverſy upon a Leaſe made of this Land, and a Bill in Chancery exhibited againſt my Lady Baltinglaſſe, in which this Settlement was ſet forth, and which my Lady admitted in her Anſwer; and upon this Proof, my Lord Suſſex had a Verdict for a Moiety.

Sanders *verſus* Owen.

S. C. 2 *Salk.* 467.

WRit of Error to reverſe a Judgment in the Common Pleas, in an Aſſize of Novel Diſſeiſin for the Office of Clerk of the Peace of the County of Kent.

Upon Non diſſeiſivit pleaded, the Recognitors find a ſpecial Verdict, 1ſt. That Heneage Earl of Winchelſea was Cuſtos Rotulorum of that County, to whom of Right it doth belong to conſtitute the Clerk of the Peace.

They find the Act 1 Gulielmi, by which the Cuſtos, or other Perſon to whom of Right it doth belong, ſhall from Time to Time nominate the Clerk of the Peace.

That this Office being vacant, the ſaid Earl, by Writing under his Hand, did conſtitute Philip Owen to be Clerk of the Peace, to exerciſe the ſaid Office either by himſelf or Deputy; which Writing the find in hæc verba.

That at an adjourned Seſſions at Canterbury, this Writing was read in Court, and there the ſaid Earl, without any Relation to his former Grant, did, viva voce, ſay, I appointed *Philip Owen* to be Clerk of the Peace according to Act of Paliament.

That the Earl of Winchelſea died, and that the Earl of Rumney was made Cuſtos, who appointed the Plaintiff to be Clerk of the Peace, and that he was a fit Perſon. There was a Judgment for him in the Common Pleas, and a Writ of Error now brought.

It was inſiſted for the Plaintiff in Error, That no Title was found for the Plaintiff; for he brought an Aſſize for an Office at Maidſtone, and doth not ſay, that Maidſtone is in Kent, ſo it is ill in Subſtance, and no Venue; and the Court cannot judicially take Notice that Maidſtone is in Kent.

Then as to his Title, the Pretences are two:

1. By Grant.

2. By parol Declaration.

As to the firſt, he had no Title by the Grant.

Then as to the parol Appointment, there is no ſuch Thing found, for the Words being ſpoken at the very Time the Grant was read in Court, muſt have Reference to that; and it is all but one Act.

It doth not mention either what Eſtate the Perſon ſhall have in the Office, or in what County he ſhould be Clerk of the Peace, or according to what Act of Parliament; for both the Statutes of H. 8. and Edw. 6. and 1 Will. are all in Being, and do all concern this Office. So that there is a very great Incertainty in this Nomination. 37 *H.* 8.

If I grant Land to another, without mentioning what Eſtate, it is a Tenancy at Will.

He might nominate a Man to be Clerk of the Peace, according to an Act of Parliament, and never intend to give him ſuch an Eſtate as directed by the Act.

It

It was the Earl of Winchelſea's Intention, that Philip Owen ſhould have the Place; but it doth not appear, that he intended it for him during Life.

I do appoint *Philip Owen*, &c. Theſe Words do amount to no more than an Evidence of a Nomination; but it is not a Nomination itſelf, like the Caſe in Noy, where it was held, That a Reſignation to a Proctor, doth not make the Church void, without the Acceptance by the Biſhop; and the Jury found an Inſtrument under the Seal of the Biſhop, upon which there is an Indorſement, that the Reſignation was accepted by him. This was held to be no finding of an abſolute Reſignation in facto.

Noy 147, 148.

So in the Caſe of a nuncupative Will, it is not ſufficient that the Jury find, that the Teſtator dixit; but they muſt find, that he intended it to be his Will, or that he ſpoke the Words animo teſtandi.

It doth not appear that the Earl ſpoke theſe Words, Animo conſtituendi; therefore they ought to find ſo much as may amount to fulfil his Intent.

No Freehold of an Office can paſs at Common Law without a Deed or Writing, it might be ſupplied by Livery: But that is not found in this Caſe.

This Office cannot be diſtinguiſhed from any other, for it is incorporeal, and therefore muſt paſs by one of thoſe Ways.

May, an Uſe, after it was turned into an Eſtate by the Statute of Hen. 8. could not be granted by Parol.

The Statute of 1 Will. makes no Alteration as to the Conſtitution, but as to the Qualification of the Perſon, and Duration of his Eſtate; it directs the Cuſtos to give the Office to the Clerk of the Peace, quam diu ſe bene geſſerit; it was to make him independent on the Cuſtos, who had an Authority to grant him ſuch an Eſtate.

Now when the Statute requires a Thing to be done, and doth not direct in what Manner, it muſt be according to the Courſe of the Common Law, and by that Law no Freehold can paſs by an Act executed in the Life-time of the Perſon, without Deed in Writing.

And this appears by Caſes of the like Nature, viz. All Commitments by Juſtices of the Peace muſt be in Writing, except upon a ſudden Affray in their View by a Court of Seſſions.

A parol Aſſignment of Commiſſioners of Bankrupts is not good.

2 Econtra.

Econtra.

As to the firſt Objection, Maidſtone will refer to Kent in the Margin.

The Queſtion is, Whether this is a bare Authority, or an Intereſt claimed under the Cuſtos?

And it was inſiſted, that it was a bare Authority, but the Nominee had his Intereſt in the Office by Act of Parliament: And this appears by the Nature of the Office it ſelf, for the Cuſtos has but an Intereſt at Will in it; and therefore the Clerk of the Peace cannot have a larger Intereſt from the Cuſtos than he had himſelf in the Office, out of which the Clerk's Place is derived.

It is like a Power given to a Man to make Leaſes; as ſoon as the Leaſe is made, the Leſſee is in by Vertue of the Grant, and not by the Perſon who made the Leaſe.

It is true, that Things which lie in Grant cannot paſs without Deed, which is an Inſtrument that the Law hath provided inſtead of Livery. So where a Man claims a Right to an Office, it muſt be by Deed; but this is an Authority which may execute by Parol, and then it is otherwiſe.

And though it is only an Authority, yet the Cuſtos may lawfully give ſuch an Eſtate as he hath done: As if a Man deviſe, that his Executors ſhall ſell his Eſtate; this is an Authority, and no more, and yet when the Eſtate is ſold, the Vendee is in by the Will.

The Office of Regiſter of the Court of Admiralty may be granted by Parol, according to Cuſtom.

The Statute of Hen. 8. ſaith, Give, Grant, Nominate, and Appoint; and doth not ſhew in what Manner. So that in this Caſe the Nomination is the ſame Thing with Writing, for both are only to ſignify the Man. Adjourn'.

Hawkins's *Caſe*.

THE Church-wardens of the Pariſh of St. Edmond's on the Bridge in Exeter, libelled againſt Hawkins, ſetting forth an ancient Cuſtom within that Pariſh, That the adorning the Inſide of the Chancel hath been done and performed by the Church-wardens, at the publick Charge of the Owners and Occupiers of ancient Houſes within the Pariſh, by a Rate to be made by the ſaid Church-wardens, by and with the Conſent of

Vide 1 *Vent.* 367. 1 *Mod.* 79, 194, 236, 261. 4 *Mod.* 148. 2 *Jones* 122. *Poſt*, 447.

the major Part of the Parishioners, having Respect to the annual Value of the Houses.

Vide Hard. 379. 5 *Co.* 66, 67. *Cro. Eliz.* 659. 2 *Jones* 122. 1 *Mod.* 79, 194, 236, 261. *Raym.* 246.

That the Chancel wanted Reparations and Ornaments, and that the Church-wardens, by the Consent of the major Part, &c. did make a Rate, which was confirmed by the Bishop, by which Hawkins was rated 17 l. 1 s. for Mills and Racks within the said Parish, which was his due Proportion according to the yearly Value of the Houses there; and that he had not paid the same.

The Defendant suggested for a Prohibition, that the Parishioners ought not to contribute to the Repairs, and the adorning the Inside of the Chancel, and denied the Custom, and that the Rate was not made by the major Part of the Parish.

The first Issue is found for the Plaintiff, That there is such a Custom. And the second Issue was found against him, viz. That the Rate was not made by the major Part of the Parishioners.

It was moved in Arrest of Judgment, and that a Consultation might be granted, because the Spiritual Court having the original Jurisdiction of Reparations of Churches, must likewise have the same Jurisdiction of all the Incidents thereunto belonging, as Rates, &c. and the Verdict cannot stand in the Way, for the Trial is void, because the Matter was not triable at Law; and therefore the Jurisdiction is still saved.

If a Plea Ne unques accouple should be tried at the Assizes, neither Party would be concluded by a Verdict upon that Issue.

If there had been any Inequality in the Rate, it might have been tried at Law; but whether a Rate or not, belongs to another Jurisdiction.

Yelv. 172. *Starkey* versus *Barton*, and *Gore*. *Raym.* 246. *March.* 73.

And to prove, that where the original Matter is of Ecclesiastical Cognizance, all the Dependants thereon are so likewise, there was a Case cited, Hill. 7 Jacobi, in this Court, where the Church-wardens libelled against a Parishioner for a Church-tax, but the Sentence was against them. Whereupon they appealed to the Metropolitan, and pending that Appeal, one of them gave the Parishioner a Release of all Actions and Demands; the other still proceeding to reverse the Sentence, the Parishioner moved for a Prohibition, suggesting this Release; and upon Demurrer it was held to be no Cause for a Prohibition, because the principal Matter was meerly Spiritual; and therefore the Temporal Court would not determine, whether the Release, which was dependant upon it, was a Bar or not?

And for this Reason, though Part of the Issue be found against the Plaintiff, yet he shall have Judgment notwithstanding; as where the Defendant avowed for Rent, supposing that one Vavisor was seized in Fee of the Locus in quo, &c. and granted the Rent; and upon Non concessit pleaded, it was found specially, that another Person was seized and made a Lease to this Vavisor, who granted the Rent. Now it happened that this Lease was determined before the Distress taken; and therefore, though the Issue be found for the Avowant, quod Vavisor concessit, yet the Estate being determined out of which the Rent was supposed to be granted, the Court gave Judgment for the Plaintiff, though the Issue was found against him. 2 *Cro.* 442. *Harrison* versus *Metcalf.*

Econtra.

No Man can say, that the Parishioners ought of Common Right to repair the Chancel; there must be either a Custom or Prescription to charge them.

There are two Reasons why the Defendant cannot be charged in this Case:

1. They alledge a Custom, for Owners and Occupiers of ancient Houses to be contributary to the Ornaments of the Chancel; but they have not brought the Defendant to be within that Custom, for they do not charge him in respect of Houses, but for Racks and Mills. Now if a Mill should be construed to be a House, yet a Rack is not.

2. The Charge for and towards the Ornaments of a Church or Chancel is a personal Charge, and shall never be imposed upon the Lands of the Parishioners, but upon the Inhabitants themselves: If it had been for the Repairs of the Church, there the Land is liable to be rated; but this Rate cannot be good, because it is made for him to pay so much for Ornaments in Proportion to the yearly Value of his Racks and Mills. 2 *Roll. Rep.* 262, 270. 2 *Roll. Abr.* 291. K. *Ante* 68. *Post*, 393, 452.

Curia. Without a special Custom the Parishioners are not to repair the Chancel; the Parson is bound to do it of common Right; but where a temporal Inheritance is to be charged by a particular Custom, the Church-wardens must bring the Defendant within the Custom, otherwise it is not good; for it is the Custom which gives the Jurisdiction.

Now in this Case, the Custom was alledged for Owners of Houses to repair, and they have rated the Defendant as Owner of a Mill, which cannot be intended a House; for in a Præcipe quod

quod reddat, a Mill cannot be demanded by the Name of Domus, but it muſt be De molendino. Adjourn'.

Anonymus.

5 & 6 Will. & Ma. By an Act for granting to their Majeſties ſeveral Duties upon Parchment, Paper, *&c.* it is enacted, That *6 d.* ſhall be paid for every Piece of Parchment on which any common Bail ſhall be filed, and on which an Appearance ſhall be made upon ſuch Bail: Which Appearance or common Bail, the Defendant ſhall cauſe to be entered or filed in eight Days after the Return of the Proceſs, on Pain of 5 l. to be paid to the Plaintiff, for which the Court ſhall immediately give Judgment, and the Plaintiff take out Execution. The Writ and Return was brought into Court, and a Certificate from the proper Officer, that common Bail was not filed within eight Days, &c. Upon which a Motion was made, and the Court gave Judgment Niſi, &c.

DE

Termino Paſchæ.

Anno 10 W. III. in B. R. 1698.

Rex *verſus* Stainford.

THE Defendant was indicted, for that he on the 19th of June, &c. and before, being an Inhabitant at a Town in Derbyſhire, was ſummoned to watch with one Booth a Conſtable, and that he obſtinately, contemptuouſly, and maliciouſly made Default. Exceptions were taken. *Vide* 1 *Mod.* 73. 1 *Sid.* 218. 2 *Keb.* 713. 2 *Saund.* 423. *Ante* 68.

1. He ſaith, That he was an Inhabitant the 19th of June, and before, and doth not ſay that he continued to be ſo.

2. Doth not ſay, That Notice was given to him to watch within the Pariſh.

3. Saith, he did not watch with one Booth a Conſtable; he ought to have ſaid he did not watch at all; for poſſibly he might watch that Night with another Conſtable.

Econtra.

This Indictment is founded at Common Law, and not upon the Statute of Winton. And as to the ſecond Exception, 'tis ſaid he was ſummoned to watch with the Conſtable, but doth not ſay within the Pariſh. Now there may be a Place Extraparochial, where the Conſtable is to watch.

As to the other Exceptions nothing was ſaid.

Curia. Demur to the Indictment. They would not quaſh it.

S. C. 1 *Salk.* 13. *poſt* 405, to 410.

Saville *verſus* Roberts. *Trin.* 9 *W. Rot.* 784.

Vide 2 *Mod.* 306. 6 *Mod.* 30, 90, 137. 185, 169. *Lridg.* 131.

THE now Plaintiff was indicted for a Riot, and acquitted; and he brought an Action of the Caſe againſt the Defendant, for that ſuch a Day, in ſuch a Year, he did falſely and malitiouſly procure the Plaintiff to be indicted, &c. and had Judgment in the Common Pleas. And now a Writ of Error was brought to reverſe the ſame.

It was inſiſted, That the Judgment was well given, and ought to be affirmed.

The Queſtion is, Whether an Action will lie for cauſing another malitiouſly to be indicted of a Treſpaſs?

2 *Inſt.* 385.

It muſt be admitted, if the Indictment be not good, the Action will fail, becauſe the Party is not Legitimo modo acquietatus.

But there is no ſuch Objection here; for 'tis not pretended but that the Indictment was good both in Subſtance and Form.

Object. The moſt material Objection is, That a Man ſhall not be ſued or vexed for proſecuting the King's Writ.

Anſw. 'Tis true, that it is lawful to proſecute ſuch Writ; but though the Suit is legal, yet if it be for a thing which is falſe, and known to be ſo even by the Plaintiff himſelf, an Action will lie againſt him for his unjuſt Vexation and Malice. And this was the Opinion of my Lord Hobart, in giving Judgment

Hob. 205, 206.

in the Caſe of Freeman and Waterer; it was an Action of the Caſe for a double Execution. Judgment was given for the Plaintiff, though he was not twice charged with the Damages; for the Goods levied by the firſt Execution remained in the Sheriff's Hands pro defectu emptorum, but he was malitiouſly vexed the ſecond Time.

'Tis Malice that is the Foundation of all Actions of this Nature, which incites Men to make uſe of Law for other Purpoſes than which it was ordained.

Actions on the Caſe are frequently brought for ſuing without any Cauſe of Action; and 'tis never allowed to ſay, that the Plaintiff hath a ſufficient Recompence by Coſts obtained by ſuch Suits; for thoſe are but Expenſæ Litis; 'tis the unjuſt Trouble and Vexation which intitles him to the Action.

It lies for malitiouſly proſecuting one in the Eccleſiaſtical Court, and cauſing him to be excommunicated; in which Cauſe this very Objection was made, That a Man ſhall not be puniſhed for proſecuting the King's Writ. And it was alſo objected, That an Action will lie for falſely indicting a Man for a Treſpaſs: Yet the Court were of Opinion, That a Citation ex Officio proſecuted with Malice, was a ſufficient Ground for the Action. 1 *Vent.* 86. *Hocking* verſus *Matthew.* *Cro. Car.* 291.

An Action of the Caſe, in the Nature of a Conſpiracy, will lie againſt two for conſpiring a falſe Indictment; and by the ſame Reaſon, an Action will lie where one alone cauſes another to be indicted falſo & malitioſe. 2 *Inſt.* 562. 2 *Cro.* 193. *Cox* verſus *Virral.*

And this ſeems to be the ancient Law; for in Edw. III's Time, a Bill of Conſpiracy was allowed in the Court to be brought by him who was indicted of a common Treſpaſs, and acquitted. 1 *Roll. Abr.* 112. *Placito.* 10. 3 *Aſſ. Placito* 13. 11 *H.* 7. 26. *Placito* 7.

Vide Reſolution of the Court poſt. 405.

Atkinſon *verſus* Corniſh.

AN Infant was made Executor, and the Ordinary committed Adminiſtration to another Durante minore ætate; this doth ceaſe at his Age of Seventeen. But if ſuch Adminiſtration be granted Durante minore ætate of one who is not made an Executor, it doth not ceaſe till the Party is of full Age. Per Cur. *Fitz. N. B.* 116. *Litt. fol.* 2. *Reg.* 134. *b.* S. C. 1 *Salk.* 69.

The Caſe of Pigot and Gaſcoigne was cited to maintain this Opinion; which was, Anthony Longvill made William his Executor, who was under Age: The Plaintiff took out Adminiſtration to Anthony durante minore ætate of William, and brought an Action of Debt upon a Bond, and averred that William was alive, and within the Age of one and twenty. Now becauſe it did not appear but this Adminiſtration was granted whilſt he was under the Age of Seventeen, the Plaintiff was nonſuit. *Cro. Eliz.* 602. 5 *Rep.* 29. *Prince's* Caſe.

Cox *verſus* Copping.

A Difference ariſing between the Plaintiff, who was Impropriator, and the Pariſhioners, concerning the Right of a Houſe, he brought an Ejectment, and by his Counſel moved the Court, That the Church-wardens, who had the Cuſtody of the Pariſh-Books, might

might produce them, ſo that he might have a Sight thereof, and Copies of what concerned his Title; and this was compared to the Caſes of Corporations and Copyholders, who upon ſuch Motions have frequently obtained Rules of this Court for the Steward to grant Copies, and that the Court-Rolls might be produced at Trials.

It was likewiſe ſaid, That if the Plaintiff ſhould exhibit a Bill againſt the Church-wardens, he would have an Accompt of the Pariſh-Books.

But the Court were of Opinion, That this Caſe differed from that of Copyholders, becauſe all the Tenants of the Manor have an Intereſt in the Court-Rolls; but here the Impropriator hath a diſtinct Intereſt from the Pariſhioners, for it was not a parochial Right, but a Title which is now in Queſtion. And therefore it was not Reaſon that the Pariſh Books ſhould be produced, which would be to ſhew the Defendant's Evidence.

Then as to Church-wardens, they are not a Corporation without the Parſon.

Inhabitants of Batterſea *verſus* Weſtham.

Vide 2 *Salk.* 472, 494, 606. *ante* 208, 209. *poſt* 416.

TWO Juſtices made an Order to remove a poor Man from Weſtham to Batterſea; the Pariſhoners of Batterſea appealed to the Seſſions, and the Order of the two Juſtices was ſet aſide: Afterwards, but in the ſame Seſſions, upon Allegation of Counſel, the Seſſions did ſuperſede their firſt Order, and confirm the Order of the two Juſtices; and upon a Motion made to this Court, it was alledged, That the Record was in the Breaſt of the Court during the whole Seſſions, and therefore they might lawfully ſuperſede their own Order. To which it was anſwered, That they having once executed their Authority, they cannot ſet it up again. The Court affirmed the ſecond Order of Seſſions, and quaſhed the Firſt.

Anonymus

1 *Salk.* 339. 2 *Salk.* 567, 568, 598. 6 *Mod.* 274, 319.

NOta: Per Cur. A Writ of Error was brought in this Court, to reverſe a common Recovery, and there was a Sci. Fa. iſſued out againſt all the Tertenants, and they made Default. The Recovery was reverſed, and it appearing afterwards, that the Plaintiff in the Writ of Error had no Eſtate, there being a Remainder

mainder Man before him, the Court reverſed their former Reverſal. Quod Nota.

Anonymus.

AN original Order was made at the Seſſions to this Effect: *Vide ante* 163,209. *poſt* 416.
It. It appearing to this Court, that the Pariſh of Dimchurch, in the Hundred of Worth, being over-burdened with Poor, and that the Pariſh of Eaſtbridge within the ſame Hundred of Worth, having no Poor relievable within their ſaid Pariſh; 'tis ordered, That the ſaid Pariſh of Eaſtbridge be from henceforth annexed to the ſaid Pariſh of Dimchurch, and that the Occupiers of Lands and Tenements, within the ſaid Pariſh of Eaſtbridge be chargeable and contributary towards the Relief of the Poor of the ſaid Pariſh of Dimchurch the Sum of 20 l. per Annum by monthly Payments, ſo long as the ſaid Pariſh ſhall be over-burdened, and no Poor within the ſaid Pariſh of Eaſtbridge.

A Motion was made to quaſh this Order, becauſe it was in Nature of an Act of Parliament; but it was quaſhed, becauſe it was an original Order: It ſhould have begun with two Juſtices.

Anonymus.

TWO Juſtices made an Order, viz. Being informed that the Overſeers of the Poor had refuſed to pay 1 s. a Week to a poor Man; they order, That the ſaid Overſeers ſhall continue to pay him the Arrears till they find him a Houſe. 2 *Salk.* 473, 491.

It was objected againſt this Order, That the Overſeers have not Power to find a Houſe for him; that muſt be done by the Conſent of the Lord of the Manor, or by the Juſtices in Seſſions.

2. It did not appear that he was poor or impotent: And for theſe Reaſons it was quaſhed.

Atwood *verſus* Duell.

Vide 1 *Salk.* 89. 2 *Salk.* 603

THere was a Judgment in Sci. Fa. againſt the Bail: They brought a Writ of Error, as well upon the principal Judgment, as upon the Judgment in the Sci. Fa.; but it was quaſhed, becauſe they were not Parties to the original Judgment.

Savage *verſus* Robury.

S. C. 2 *Salk.* 694. *Vide* 1 *Vent.* 117, 263. *Ray* 62, 169. *Jon.* 156. 2 *Saund.* 307. 1 *Lev.* 280.

THE Plaintiff was a Tradeſman, who brought an Action againſt the Defendant for ſcandalous Words ſpoke of him, You are a Cheat, and I will prove you a Cheat for many Years. The Plaintiff had a Verdict, but the Judgment was arreſted, becauſe theſe were Words of Heat, and not actionable, having not alledged that the Cheat was in any thing concerning his Trade. Quod Nota.

Addingſon *verſus* Oakley.

THE Plaintiff had a Verdict at the Aſſizes in Oxford, and a Motion was made to ſtay the Judgment till he brought in the Poſtea, for it did not appear to the Court on what Day the Aſſizes was held, for the Record of Niſi prius was, ſſ. Niſi Juſticiar. Domini Regis ad Aſſiſas in Com. præd. capiend. aſſign. &c. die Jovis decimo ſexto die Martii apud Oxon'. &c. The Diſtringas for the Jury to appear was, Si prius die Jovis viceſimo ſexto die Martii apud Oxon'. &c. So was the Jurata.

The Counſel for the Defendant deſired, That it might be referred to the Maſter of the Office to be examined; but the Court would not allow it, for it was to examine Matter of Fact againſt a Record: But they held, That the Defendant could not take Advantage of this after Judgment; for if the Clerk of the Aſſize will enter Judgment for the Plaintiff inſtead of the Defendant, he has no Remedy but by Action.

Carter *verſus* Shephard.

Vide 6 *Mod.* 36. 2 *Salk.* 442. 3 *Lev.* 299. 3 *Mod.* 86. *Molloy Li.* 2. *Ch.* 10.

THE Defendant was a Goldſmith, and the Plaintiff had a Note of 100 l. drawn upon him, which he brought to his Shop in order to receive the Money; at the ſame Time another Perſon came thither to pay the Goldſmith 80 l. which he deſired the Plaintiff to tell in part of his 100 l. Accordingly the Plaintiff told 50 l. thereof, and put it in his own Bag, and laid it upon the Counter, and whilſt he was telling the reſt, another Perſon (there being ſeveral in the Shop paying and receiving Money) ſtole away the Bag of 50 l. The Action was now brought againſt the Goldſmith for 100.

It was ſaid, that this 50 l. was not paid to the Plaintiff, for the whole Money muſt be in the Poſſeſſion of the Goldſmith till all was told, for the telling is only in order for Payment; and as long as it is ſubject to be retold by the Goldſmith, it is not in the Receiver's Poſſeſſion. 6 *Mod.* 36, 37. 2 *Salk.* 442. 3 *Mod.* 86. 3 *Lev.* 299. *Hob.* 154.

Now though the 50 l. was put up in the Bag, yet if the 80 l. had been told ſhort, the Goldſmith would have retold the 50 l. 2 *Mod.* 23, 24. *Molloy Li.* 2. *Ch.* 10.

Curia. Telling the Money, and reſting ſatisfied when told, is ſufficient to carry the Poſſeſſion to the Receiver, and he, and not the Goldſmith, might have maintained an Action of Detinue for this Money in the Bag; but the Plaintiff had Judgment for 50 l. & nil capiat per Billam as to the reſt.

Dubartine *verſus* Chancellor.

AN Action was brought againſt the Defendant, for lying with the Plaintiff's Wife: He pleaded in Abatement, and there being a Judgment to anſwer over, Iſſue was joined, and it was tried in the Country, and the Plaintiff had a Verdict. *Vide* 1 *Salk.* 47, 48, 49, 53.

It was moved to ſet aſide this Judgment, becauſe the Plea in Abatement was not entered on the Niſi prius Roll; the Plea Roll was right, but the Niſi prius Roll ſhall not be amended by that. And for this Reaſon the Court did ſet aſide the Judgment. *Ante* 212.

Rex *verſus* Mayor of *Lincoln.*

WIll'us Tertius Dei gratia, &c. Majori & Vic. Civibus & Com. Civit. Lincoln. in Com. noſtro Linc. ſalutem. Cum a tempore cujus contrar. memoria hominum non exiſtit talis conſuetudo habit. fuit infra Civitat. præd. quod quælibet Perſona qui inſerviret tanquam Apprentitius infra Civitat. præd. in aliqua Arte ſive Myſterio cum aliquo libero Homine vel aſſign. ſuis liberis Hom. Civit. præd. per ſpatium ſeptem Annor. clamaret Libertatem & Privileg. fore admiſs. in Locum & Officium un. liberor. Hom. Civit. præd. & in Libertatem præd. [Anglice Freedom] Civitat. præd. & ſecundum conſuetud. Civit. illius gaudere & uti omnibus Liber. Priv. Preeminentiis & Commodit. lib. Hom. Civit. præd. ſpectan. & pertinen. cumque etiam quidam Abrahamus Morrice nuper inſervit ut Apprentitius infra Civit. præd.

præd. per Spatium ſeptem Annor. in Arte ſive Myſterio Mercerii cum libero Homine Civitat. præd. & Aſſign. ſuis liberis Hominibus Civitat. prædict. ſecundum Conſ. Civitat. prædict. & ſuper inde clamavit Libertatem & Privileg. fore admiſs. per vos in Locum & Officium un. liberorum Hominum Civitat. præd. & in Libertatem [Anglice Freedom] Civitat. præd. admitti & ſeſe obtulit ad præſtand. Sacr'um in eo Caſu requiſit' per Solempn. Affirmat. ſive Declarat. ſecundum Actum in Parliamento tent. in Annis Regni Will. tertii, nunc Regis Angliæ, &c. ſeptimo & octavo fact. & edit. Dict. Abrahamo ad tunc exiſten. un. de Diſſentien. [Commun. vocat. Quakers.] Vos tamen Ma'or, &c. præmiſſor. non ignari prædict. Abraham. Morrice in præd. Locum & Officium un. liberorum Hominum & in Libertat. Civitat. prædict. non admiſiſt. nec præd. Abraham. Morrice per ſolempn. Affirm. ſive Declarat. ſecundum Actum prædict. in Loco Sacramenti in eo Caſu Uſitat. fore præſtand. ſecundum debitum Offic veſtrum facere permiſiſt. ſed ita facere minus juſte recuſatis in noſt. contemptum & ipſius Abrahami Dampnum non modicum & Gravamen & Status ſui Læſionem manifeſt. ſicut ex Querela ſua accepimus. Nos igitur præfat. Abrahamum Morrice, debitam & feſtinam Juſtitiam in hac Parte fieri volentes, ut eſt juſtum, vobis & cuilibet veſtrum mandamus, firmiter injungen', quod immediate poſt Reception. hujus Brevis prædict. Abrahamum Morrice in Loco &Officio un. liberor. Hominum & in Libertat. Civit. præd. admittatis una cum omnibus Libertat. Privileg. Commoditat. ad inde ſpectan. & eundem Abrahamum Morrice ſolempnem Affirmat. ſive Declarat. præd. in Loco Sacramenti in eo Caſu uſitat. facere permittat. vel Cauſam nobis ſignificetis in contrar. ne in veſtris defectib. Querela ad nos perveniret iteratim, &c.

The Return.

Executio iſtius Brevis patet in quadam Schedula huic Brevi annex. Georg. Bracebridge Major. Reſponſ. Major. Vic. Civium & Communitat. Civitat. Lincoln. de Brev. huic Schedulæ annex. ſecundum Exigentiam Brevis prædict. Domino Regi humillime certificamus quod Civitas Lincoln. prædict. non eſt in Com. Lincoln. ſed in Com. Civitat. Lincoln. & quod habetur, & a Tempore cujus Memoria Hominum non exiſtit talis Conſuetudo habita fuit infra Civitat. prædict. quod quælibet Perſona quæ inſerviit tanquam Apprentice infra Civitat. præd. in aliqua Arte ſive Myſterio cum aliquo libero Homine, vel Aſſign. ſuis liberis Hominibus, Civit. præd. per ſpatium ſeptem Annor. poſtquam ſeſe obtulit in Commun. Conſilio Maj. Vic. Civ. & Communitat. Civitat. prædict. ad præſtand. & præſtavit Sacramentum in eo Caſu uſitatum in his Anglicanis Verbis ſequentibus:

You

You ſhall bear faithful Allegiance to our Sovereign Leige Lord, King (Regem tunc regnantem nominando) and to his Heirs, Kings of England; and be meet and juſtifiable to the Mayor of this City that now is, and his Succeſſors that hereafter ſhall be, all that may be for the common Profit of this City you ſhall do, and all Liberties and Franchiſes thereof you ſhall maintain. To your Power all Ordinances and Cuſtoms, made and to be made, you ſhall keep. You ſhall be levant and couchant, to keep Houſe or Chamber within this City, and all manner of Charges and Offices laid to you, for common Weal, Worſhip, or Profit of this City you ſhall bear, and be contributary to your Power. You ſhall have no Part of Merchandize with any Merchant-Stranger to ſell or colour by any means, but you ſhall pay Toll for it. You ſhall colour none of infranchis'd Men's Goods, whereby the Sheriffalty or the Commonalty ſhould loſe their Right. You ſhall nothing do nor labour that ſhall be to the Prejudice, Derogation, or Hinderance of the common Weal or Profit of this City; but all Points and Articles, and what elſe belongs to be done by a Freeman of this City, you ſhall keep and maintain to your Power: So help you God. Et non priuſquam clamaret Libertat. & Privileg. fore admiſs. in Locum & Officium un. liber. Hominum Civitat. prædict. & in Libertat. [Anglice Freedom] Civit. præd. ſecundum Conſ. Civitat. illius & gaudere & uti omnibus Libertatibus, Privileg. Preeminenciis, & Commoditat. Libero ho'i Civitat. præd. ſpectan. & pertinen. & poſt Præſtation. Sacr'i præd. & non ante admitti debet per Commune Concilium Majoris Vic. Civium & Civitat. præd. in Locum & Officium un. liber. Hom. Civitat. præd. & in Liber. [Angl. Freedom] Civ. præd. ſec. Conſ. Civit. ill. & gaudere & uti omnibus Libertatibus, Privileg. Preeminenciis & Commoditat. libero Homini Civit. præd. ſpect. & pertinen'. Et ulterius certificamus, quod præd. Abrahamus Morrice nuper, videlicet 10 Die Februarii Anno Regni dicti Dom. Regis nunc octavo, inſerviit ut Apprentitius infra Civitat. præd. per ſpacium ſeptem Annor. in Arte ſive Myſterio Mercerii cum libero Homine Civitat. præd. ſecundum Conſ. Civitat. prædict. & poſtea præd. decimo Die Febr. eodem Anno Regni dicti Dom. Regis nunc octavo ſuperinde ad Commune Conſilium Majoris Vic. Civium & Communitat. Civit. præd. adtunc infra Civitat. tent. clamaret ad Libertat. & Privileg. fore admiſs. ad tunc & ibidem per Commune Conſilium præd. in Locum & Officium un. liberorum Hominum Civitat. præd. & in Libertat. [Anglice the Freedom] Civitat. præd. Et adtunc & ibidem ſeſe obtulit loco uſualis Formæ Sacramenti præd. ad præſtand.

præſtand. ſuam ſolemnem Affirmat. ſive Declarat. Verbor. Sacramenti præd. ſecundum Actum in Parliamento tent. in Annis Regni Will. tertii nunc Regis Angliæ, &c. ſeptimo & octavo. fact. & edit. entitulat', **An Act that the ſolemn Affirmation and Declaration of the People called Quakers, ſhall be accepted inſtead of an Oath in the uſual Form.** Ipſo Abrahamo adtunc & adhuc exiſten. un. de Diſſent. Commun. vocat. **Quakers,** ſed præd. Abrahamus adtunc & ibid. recuſavit præſtare Sacramentum præd. in uſual. Form. præd. ſecundum Conſ. Civitat. prædict'. Et ulterius dicto Domino Regi certificamus, **Quod Officium & Locus liberi Hominis Civitat. præd eſt Officium & Locus Commodi in Gubernation. in Actu præd. mentionat.** Et quod infra Civitat. præd. habetur, & de Tempore cujus contrarium Memoria Hominum non exiſtit. talis habebatur Conſuetudo, quod quilibet liber Homo Civit. præd. Vocem haberet in eligendo duos Cives ad ſervien. pro Civitat. præd. in Parliament. hujus Regni quandocunque Rex Parliamentum ſuum teneri ordinaverit, & quod quilibet liber Homo Civit. præd. habeat communem Paſtur. in vaſtis jacent. infra Civitat. præd. pro tribus Equis, vel pro tribus Vaccis, vel pro tribus Juvencis ſuis, omni Tempore Anni. Et ulterius dicto Domino Regi certificamus quod præd. Abrahamus Morrice nunquam ſeſe obtulit in Communi Conſilio Majoris Vic. Civ. & Communitat. Civitat. præd. præſtare nec unquam præſtavit Sacramentum præd' in uſuali Forma præd. & ex his Cauſis præd. prædict. Major Vic. Civ. & Com. Civit. præd. prædict. Abrahamum Morrice in præd. Locum & Officium un. liberorum hominum, & in Libertat. præd. non admiſer. nec præd. Abrahamum Morrice per ſolempnem Affirmation. ſive Declaration. ſecundum Actum præd. in Loco Sacramenti in eo Caſu uſitat. fore præſtand. facere permiſer. ſed ita facere præd. decimo Die Februarii in præd. octavo Anno Regni dicti Domini Regis nunc recuſaver'.

George Bracebridge, Mayor.

Rex *verſus* Mayor of *Lincoln.*

1 *Lev.* 91.
1 *Sid.* 107.
Vide 2 *Jon.* 52.
3 *Mod.* 333.
1 *Sid.* 29, 71.

This was a Mandamus to the Mayor, &c. **of Lincoln, to admit one** Abraham Morrice **to his Freedom, he having ſerved an Apprenticeſhip there.**

He was a Quaker, and the late Statute enacts, That every Quaker, &c. who ſhall be required upon any lawful Occaſion to take an Oath, where by Law an Oath is required, ſhall, inſtead of he uſual Form, be permitted to make his ſolemn Affimation or Declaration,

claration, &c. Then there is a Proviſo, That no Quaker or reputed Quaker ſhall, by Vertue of that Act, be qualified to give Evidence in any criminal Cauſe, to ſerve on any Jury, or bear any Office or Place of Profit in the Government. *Stat.* 7 & 8. *W.* 3. *c.* 34.

The Mayor hath returned, That the City of Lincoln is an ancient City, and alledges a Cuſtom, Time out of Mind, for every Perſon who hath ſerved an Apprenticeſhip there, to offer himſelf to the Mayor and Common-Council to take the uſual Oath (which is ſet forth in hæc verba) before he ſhall be admitted to his Freedom. That the ſaid Morice had ſerved an Apprenticeſhip there to a Mercer; and thereupon he claimed his Freedom of the ſaid City, and offered to take the ſolemn Affirmation and Declaration: That he was a Diſſenter called a Quaker, and refuſed to take the uſual Oath according to the Cuſtom of the ſaid City: That to be a Freeman thereof, is a Place of Profit in the Government: And that there is a Cuſtom there, for every Freeman to vote in the Election of two Citizens to ſerve in Parliament for the ſaid City, and to have Paſture for three Horſes in the Common, &c. That the ſaid Morrice never offered himſelf in Common-Council to take the ſaid Oath in uſual Form; and for that Reaſon they did not admit him to his Freedom upon his ſolemn Affirmation and Declaration, &c. which they would not ſuffer him to take. *Vide ante* 316, 317. *poſt* 431, 432.

The Queſtion was, Whether the Freedom of this City was a Place of Profit in the Government?

And it was argued, That it was not; 'tis only a Qualification or a Privilege to agree or conſent to the Perſon who ſhall be his Repreſentative in Parliament.

On the other Side it was ſaid, That the Deſign of the Act is to give Eaſe to the Quakers who ſcruple to take an Oath, and to relieve them from Penalties and Puniſhments for refuſing to ſwear where by Law an Oath is required.

That an Oath is not required here, ſo as to ſubject a Perſon to a Penalty for the Refuſal, becauſe he who bears an Office is not obliged to take an Oath but for his own Benefit; and he incurs no Penalty to refuſe it, but only acquits himſelf of the Office.

This is either a publick or a private Place in the Government; 'tis publick as it intitles him to vote for Repreſentatives in Parliament, or private as to be a Magiſtrate in that particular Place where he hath obtained a Freedom.

Curia. This Perſon hath a precedent Right to have his Freedom: The Quakers are uſually admitted in London upon their ſolemn Affirmation; and ſo he was in this Caſe.

Rex

Rex *verſus* Blythe.

Vide 4 *Mod.* 106, *&c.* 122, *&c.* 236, 238. *poſt* 452, 453.

By the local Statutes of Clare-Hall in the Univerſity of Cambridge, 'tis provided, That the Perſon in quem Magiſter & major pars Sociorum convenerit pro Socio habeatur.

It happened that Mr. Jennings was choſe by eight of the Fellows, and another was choſe by ſix; and the Maſter of the Hall, Dr. Blythe, gave his Vote with the ſix.

Mr. Jennings ſuppoſing himſelf to be duly elected Fellow, brought his Mandamus to be admitted, having been refuſed by the Maſter, &c. becauſe it was inſiſted that his Concurrence was neceſſary; for by the Statutes of the Founder, he muſt be One, and that without him a Fellow could not be elected: The Words are, In quem Magiſter & major pars Sociorum convenerit.

There was a Clauſe, That if any Doubt ſhould ariſe about the Expoſition of theſe Statutes, it ſhould be determined by the Viſitor.

It was argued, That the Viſitor had only a Power to diſplace upon Miſdemeanors, he was appointed to a ſpecial Purpoſe, Quoad Punitionem, and that the Maſter had only Authority to correct for Miſdemeanors.

Curia. It was never yet determined what Power the Viſitor hath: In Dr. Patrick's Caſe the Queſtion was, Who was Viſitor? And the Court was divided.

All eleemoſynary Corporations who are to receive the Charity of the Founder, have Viſitors, if they are eccleſiaſtical Corporations; and if a particular Viſitor is not provided by the Founder, then the Ordinary of the Place is Viſitor; if they are Lay-Corporations, the Founder and his Heirs are perpetual Viſitors.

4 *Mod.* 368. *poſt* 452, 453.

Rokeby, Juſtice, was of Opinion, That a Fellowſhip was ſuch an Intereſt, for which a Mandamus ought to be granted; and it would appear upon the Return, whether the Party had ſuch an Intereſt or not.

The Court were alſo of Opinion, That the Maſter had only a negative Vote in this Caſe.

Calverly *verſus* Leving.

COvenant for not repairing a Houſe in Cheſter, the Action was brought in Cheſter generally; after Iſſue joined, quod reparavit, there was a Mandate to the Chief Juſtice of Cheſter, to award a Venire quia exitus præd. inter partes præd. ſuperius junct. per ho'ies Com. Palatini Ceſtriæ videlicet de vicinet. de Tarvin præd. in Com. Ceſtriæ præd. ubi Breve Dom. Regis non currit & alibi triari debet, ideo record. loquelæ præd. Mand. Juſticiar. ipſius Domini Regis præd. Com. Ceſtriæ ita quod iidem Juſticiar. dict. Domini Regis Com. Ceſtriæ præd', &c.

There was a Verdict for the Plaintiff, and 40 s. Damages, and it was moved in Arreſt of Judgment, That this was a Miſtrial, for the Iſſue was Local, ſ. within Cheſter generally, and the Trial was in the County of Cheſter at large. So it was not of a Jury of the County or Place where the Action was laid, but by a Jury of the wrong County, which is not aided by the Statute, but only a wrong Venue in a proper County: As if the Iſſue ariſeth at Iſlington in Middleſex, and the Venue is of Hampſtead in the ſame County, the County is right, but the Venue is otherwiſe. *Vide* 2 *Saund.* 252, 258, 393, 414. 1 *Saund.* 8, 229, 247.

So it was in the Caſe of Cotton and Johnſon, Hill. 1 Will. an Ejectment was brought for Lands in the County of Ely, and the Cauſe was tried in Cambridgſhire; it was held good, becauſe Ely was Part of the County: But in this Caſe there are diſtinct Counties.

The Statute muſt not be conſtrued, that the Cauſe ſhall be tried where the Action is laid, but in the County where the Iſſue doth ariſe, which was in Cheſter; but this Cauſe was not tried there.

Curia. Trials have been ſet aſide lately for this Reaſon.

Roberts *verſus* Savill.

S. C. *Ante* 394.

Reſolutio Curiæ.

Holt, Ch. J. THis Caſe comes before us on a Writ of Error brought upon a Judgment given in the Common Pleas, in an Action on the Caſe, wherein the Plaintiff declared, That the Defendant did falſly and malitiouſly, &c. cauſe him to be indicted at the Seſſions for a Riot, upon which he ap- *Vide* 2 *Mod.* 306. 6 *Mod.* 30, 90, 137, 185, 169.

peared, and was acquitted; and alſo, that the Defendant did falſly and malitiouſly cauſe him to be indicted another Time at the Seſſions for a Riot, to which Indictment he appeared, pleaded, and was acquitted; by Reaſon of which Proſecutions he loſt his good Name, and was at great Trouble and Expences, &c. to his Damage 100 l. To this Declaration the Defendant pleads Not guilty, and Iſſue being joined and tried, the Jury gave a Verdict for the Plaintiff, and 11 l. Damages.

The Defendant moves in the Common Bench for Arreſt of Judgment, and the Queſtion there was, Whether the Action lay? And upon Debate there, the Court was of Opinion, that the Action did lie: And the ſame Queſtion having been debated and argued here, we are alſo of the ſame Opinion, that the Action does lie.

This is no new Point, it has been often controverted here, though I think there are full Authorities to maintain this Action.

Three Sorts of Damages which will ſupport Actions of this Nature. 1 *Salk.* 13, 14. 1 *Vent.* 86. *Ante*, 395.

And for the better ſettling the Matter, it may be fit to conſider, upon what Grounds theſe Actions are maintained; and I take it, that there are three Sorts of Damages which will ſupport all Actions of this Nature.

Firſt, Where a Man is injured in his Fame or Reputation, ſo that his Good-Name is loſt, by Reaſon of which Injury, if the Words themſelves do not bear an Action, the Loſs or Damage that may enſue, will. Yelv. 46. Barns and Conſtantine, the Action there was for indicting the Plaintiff before ſuch Juſtices, Ad diverſas Felonias necnon ad pacem conſervand. aſſignat. as a common Barretor, and Non culp. pleaded, and that he was lawfully acquitted. The Defendant demands Oyer of the Indictment, and it was certified to be taken before ſuch Juſtices Ad pacem conſervandam only; and yet it was held, that the Action lies. And that this Action is but for Damages for Slander, which well lies, although the Indictment be Erroneous; or as it had been adjudged if a Bill be offered, and Ignoramus found. Cro. 2. 32. Same Caſe.

Raym. 180. for malicious indicting the Plaintiff, being a Juſtice of Peace, for diſcharging a Vagrant out of Cuſtody without Examination. Per Cur', Where a Man prefers an Indictment maliciouſly, and ſuch Indictment contains Matter of Imputation and Scandal, as well as Crime, there the Action will lie. Aliter where the Indictment contains Crime without Scandal, as on forcible Entry; here is Slander as well as Crime. Judgment pro Quer. Sir Andrew Henley and Dr. Brunſthall.

The Second relates to a Man's Perſon, where he is aſſaulted or beaten, or put under any Confinement whereby he is deprived of his Liberty; as appears by the Statute 3 Edw. 3. 33. But my Lord Coke, in 2 Inſt. 566. ſays truly, That that Statute was made in another Year, viz. 3 Edw. 3. 19.

But neither of theſe Sorts of Damages are the Foundation of this Caſe, for here his Reputation or Perſon are not damnified.

Now there is a third Sort of Damages, which a Man may ſuſtain in reſpect of his Property; and this is the Ground of the preſent Action, for that the Plaintiff was put to unneceſſary Charges to anſwer this Indictment; and it is moſt plain, that he was put to unneceſſary Expences, for that the Jury have found this Proſecution was falſe and malitious.

Now if there be an Injury done to a Man's Property occaſion'd by a wicked and malitious Proſecution, it is all the Reaſon in the World that a Man ſhould have an Action to repair himſelf. And ſo it appears in 3 Ed. 3. 19. which is expreſs. 3 Aſſ. Pl. 13. 7 Hen. 4. 31. 11 Hen. 7. 25, 26. One was indicted by two Defendants in another County than where he was Demurrant, Secundum Stat. 8 Hen. 6. cap. 10. though it be Conſpiraverunt, yet one ſhall plead without the other, for the Tort is ſeveral; and many other Books.

It has been objected againſt theſe old Caſes, that theſe Actions were grounded upon a Conſpiracy, which is odious in the Law, and that to diſcourage ſuch Conſpiracies to ruin Men, ſuch Actions were allowed.

But I anſwer, that in thoſe Caſes the Conſpiracy was not the Ground of the Action, but the Damage which the Plaintiff ſuſtained in reſpect of the needleſs Expences he was put to; for no Action lies for the bare Conſpiracy, but it is the malicious Proſecution which is the Ground of the Action: And when one only doth falſly and maliciouſly carry on the Proſecution, ytt an Action lies; and thongh it is called an Action of Conſpiracy, yet truly it is only an Action on the Caſe. Jo. 93. F. N. B. 110, 116. And it is only properly an Action of Conſpiracy where the Indictment is for Treaſon or Felony. 2 Inſt. 562.

Actions for Conſpiracy. *Vide* 1 *Salk.* 174. *Ante*, 223, 224, 394.

And

And therefore if ſuch an Action be brought againſt two, and one only is found guilty, no Judgment can be given, for this is properly a Conſpiracy, it being to indict a Man for ſo criminal a Matter.

Action of Conſpiracy againſt two, and one is only found guilty.

But where the Conſpiracy is only to indict a Man for a Miſdemeanor, though the Action be againſt two, and only one is found guilty, yet Judgment ſhall be againſt him as in the Caſe of Treſpaſs; for really it is an Action on the Caſe, and no Action of Conſpiracy.

1 *Salk.* 13, 14, 15, 21. *Ante*, 223, 224. 1 *Saund.* 229, 230. 1 *Vent.* 12, 18, 25. *Raym.* 135, 176, 180. 2 *Salk.* 456. 2 *Mod.* 306. 6 *Mod.* 261, &c.

There has been another Objection, and that is, the Opinion of the Judges in the Caſe of Sir Andrew Henley and Dr. Burnſtall, Raym. 180. and Low *cont.* Beardmore, Raym. 135.

But though I have a great Reſpect for the Authority of Judges, who at that Time ſat here, yet I think it ought not to have ſo much Weight, for that the Judges only ſpoke it Obiter, it not being material to the main Point; and when a Bill of Indictment is not found, there is no Damage done. There is a great deal of Difference between bringing an Action maliciouſly, and proſecuting an Indictment maliciouſly.

The Reaſon of finding Pledges, and of being amerced.

In an Action, a Man either claims ſome Title, or complains of an Injury; and therefore if a Man only thinks ſo, the Law allows him all juſt Remedy. 4 Rep. 16. But then if the Plaintiff's Demands are unjuſt, he is to be puniſhed by way of Amerciament, pro falſo clamore ſuo; and beſides, no Man is to proſecute an Action without finding of Pledges; and where an Action was vexatious, the Plaintiff was amerced proportionably.

But indeed, this Remedy being but formal, the Act of Parliament gave the Defendant Coſts: However, the ancient Form of finding Pledges, and being amerced, is ſtill retained; and though it is true it is nothing but Form, yet the Principle of Law which makes the Difference is ſtill the ſame.

And beſides the Coſts, if it appear that an Action is brought meerly through Malice and Vexation, a good Action lies upon ſhewing forth this ſpecial Matter. So where one Man arreſts

another for a great Sum of Money, when but a ſmall one is due; or where a Stranger, who is not concerned, brings an Action; in either of theſe Caſes a good Action lies. 21 Car. 2 Mich. 1 Sid. 424. Daw and Swain. In Caſe the Plaintiff declares, That the Defendant having arreſted the Plaintiff in Middleſex, and intending to detain him in Gaol, falſo & malitioſe told the Sheriff, That the Plaintiff owed him 5000 l. and that he ought to take Bail accordingly, and that he was kept in Priſon ſeveral Days. Verdict pro Quer. Per Cur. The Plaintiff had Judgment given, becauſe he had ſpecial Damage by ſuch Parlance. 1 Saund. 228. Action on the Caſe in Nature of a Conſpiracy againſt three, one is found guilty, and the other two not guilty: Per Cur. It is good againſt him that is found guilty. This Action was brought to the Intent to keep him in Priſon for Default of Manucaptors for 3001. ubi revera there was no Cauſe of Action. Gunſton's Caſe, Raym. 135. and 2 Sid. 1659. Chamberlain and Preſcot's Caſe, was for malicious Indictment on Stat. 8 El. c. 2. for procuring the Defendant to be arreſted in another Man's Name, the Action lies; yet it is ſaid there, this Judgment was reverſed in the Exchequer-Chamber. And this Matter was mightily controverted; and it's true the Judgment in that Caſe was reverſed, but it was not becauſe the Action would not lie, but becauſe he was not indicted of any Offence within the Statute, as appeared upon the Fact as it was ſet forth in the Indictment: So that if he had been convicted, he could have incurred no Damage; for the Court would have arreſted Judgment. 1 Cro. 291. Carlion and Mill's Caſe was, That the Defendant, being Apparitor under the Biſhop of Exeter, maliciouſly, and without Colour or Cauſe of Suſpicion of Incontinency, of his own proper Malice procured the Plaintiff (ex Officio) to be cited to the Conſiſtory-Court, &c. and there to be at great Charges and Vexation until he was cleared by Sentence, which was to his Diſcredit and great Expences. It was moved, That the Action lay not for this; for he did not cite him but as an Informer, and by Vertue of his Office: But per Cur', the Action lay; for it is alledged, that he falſo & malitioſe cauſed him to be cited upon pretence of Fame, when no ſuch Offence was committed, and avers, That there was not any ſuch Fame, ſo as he did it maliciouſly and of his own Head. 1 Roll. Abr. 112. Action on the Caſe againſt Church-wardens, for that they falſo, &c. to the Intent to draw the Plaintiff within the eccleſiaſtical Cenſures for Adultery with A. S. and the Declaration was, That they conſpired to do it, and the one was found guilty, and the other not guilty; yet this being but an Action on the Caſe, it lies. Dament and Rudock.

Procurement of one to be arreſted in another Man's Name.

Vide 1 *Salk.* 14, 15. 6 *Mod.* 137.

If A. cauſe B. to be indicted for a common Barretor, upon which Indictment B. is acquitted, he may have his Action againſt A. Ibid.

But I muſt tell you, That this Action ought to be handled with a great deal of Caution after the Grand Jury have found the Bill upon their Oaths. But indeed, unleſs the Bill be found, no Action will lie, for that the Party is not damaged; neither is it a good Ground of Action or Indictment againſt a Man, that he barely procured him to be falſely indicted; but there muſt be expreſs Malice found, that it may appear that the Proſecution was not for the ſake of Juſtice, but to gratifie the Party's peeviſh Revenge or Malice.

So that upon the whole we all agree, That the Judgment muſt be affirmed.

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Term. Sancti Mich.

Anno 10 W. III. in B. R. 1698.

Harriſon *verſus* Cage & Ux.

S. C. 1 *Salk.* 24, 25. Conſideration of Marriage. Mutual Promiſe of Marriage. *Vide 6 Mod.* 172, 156. 3 *Lev.* 65. 2 *Salk.* 437, 438, 553.

THIS is an Action on the Caſe, wherein the Plaintiff declares, That in conſideration the Plaintiff would marry the Defendant, the Defendant promiſed to marry him, and that he had offered himſelf to her, but that ſhe refuſed him, and had married the other Defendant.

With Submiſſion, this Action does not lie: Indeed it might be otherwiſe in the Caſe of a Woman; for a Marriage is an Advancement to a Woman, but not to a Man; as appears in Anne Davis's Caſe, 4 Rep. and in the Caſe of a Feoffment cauſa Matrimonii prælocuti. Which ſhews, there is a great Difference between the two Caſes of a Man and a Woman; for it is a Breach of a Woman's Modeſty to promiſe a Man to marry him, but it is not for a Man to promiſe a Woman to marry her. Then here is no Time laid when this Marriage was to be--- And it may be ſtill.

Then the Conſideration is ill, 'tis no more than, I'll be your Husband, if you'll be my Wife: 'Tis no more than this, I'll be your Maſter, and you ſhall be my Servant. Carter 220.

Then 'tis not reaſonable that a young Woman ſhould be caught into a Promiſe.

Econtra.

With Submiſſion, the Action very well lies, and certainly Marriage is as much Advancement to a Man, as it is to a Woman. And I am ſorry that the Counſel of the other Side has ſo mean an Opinion of a good Woman, as to think ſhe is no Advancement

to a Man. We ſay we have offered our ſelves, and ſhe did refuſe us; and though we do not mention the Portion, it is well enough.

Ch. J. Why ſhould not a Woman be bound by her Promiſe as well as a Man be bound by his? Either all is a Nudum Pactum, or elſe the one Promiſe is as good as the other, and you agree a Woman ſhall have an Action. Now what is the Conſideration of a Man's Promiſe? Why, 'tis the Woman's; then why ſhould not his Promiſe be a good Conſideration for her Promiſe, as well as her Promiſe is a good Conſideration for his? There's the ſame Parity of Reaſon in the one Caſe as well as in the other, and the Conſideration is mutual: As for the Caſe of the Matrimonii prælocuti, that goes upon another Reaſon, there being a Feoffment of Lands, and a Condition annexed to it; but this here is upon a Contract.

Vide Nelſ. Lutw. 68, 78, 79. 1 *Salk* 24, 25, *&c. ante.*

Ch. J. In the eccleſiaſtical Court he might have compell'd a Performance of this Promiſe; but here indeed ſhe has diſabled her ſelf, for ſhe has married another.

Then you might have given in Evidence any lawful Impediment upon this Action; as that the Parties were within the Levitical Degrees, &c. for this makes the Promiſe void; but it is otherwiſe of a Precontract.

Turton, J. There is as much Reaſon for the one as for the other; and Halcomb's Caſe in Vaughan is plain.

Rokeby, J. If a Man is ſcandalized by Words, per quod Matrimonium amiſit, a good Action lies, and why not in this Caſe? 1 Rol. Rep. 79. 2 Rol. 18. b.

Turton, J. This Action is grounded on mutual Promiſes.

Ch. J. The Man is bound in reſpect of her Promiſe; if ſhe makes none, he is not bound by his Promiſe, and then 'tis a Nudum Pactum: So that her Promiſe muſt be good to make his ſignify any thing to her; and then if her Promiſe be good, why ſhould not a good Action lie upon it?

Judgment pro Quer.

Odes

Odes *verſus* Clark.

Sir B. Shower. This is an Action of Eſcape brought againſt the Sheriff, in which the Plaintiff declares, That the Defendant did arreſt J. S. by Vertue of a Latitat, but ſaith not out of what Court, and afterwards ſuffered him to eſcape: And now the Sheriff moves in Arreſt of Judgment, and pretends, that the Proceſs is not well ſet forth in the Declaration. But the Sheriff cannot take Advantage of erroneous Proceſs.

Eſcape. *Vide Ante*, 8, 202. *Poſt*, 415. 1 *Salk.* 272, 273.

Here is ſufficient in the Declaration to charge the Sheriff, and to ſhew he has been guilty of a Breach of his Duty; and if we have alledged ſufficient Authority for the Sheriff to take him, it is well enough.

Econtra. The Exception to the Declaration is, That it cannot appear to your Lordſhip upon this Record out of what Court this Writ iſſued. It is only ſaid, that the Plaintiff arreſted J. S. Virtute cujuſdam Brevis de Latitat in general, without ſaying, it iſſued out of this Court; and they have Latitats in one Senſe in the Common Pleas, that is, they have Writs in which the Word Latitat is uſed.

Now though a Sheriff ſhall not take Advantage of erroneous Proceſs, yet he ſhall take Advantage of void Writs; and this is a void Writ, for that it does not appear out of what Court this Writ iſſues; and if a Writ iſſues out of the Common Pleas, and made returnable here, it is void.

Sheriff not to take Advantage of erroneous Proceſs.

Upon Reading the Declaration, the Words appeared to be, Quoddam Breve de Latitat de Curiis Dom. Reg. apud Weſtmonaſterium, without ſaying out of which Court it iſſued.

Rokeby. A Latitat goes out of no Court but this.

Turton, Juſtice. Every one imagines a Latitat to go out of this Court.

Counſel. Then it is Breve de Latitat, and there is no ſuch Thing in Nature as a de Latitat. It ſhould be, Quoddam Breve vocat. Latitat.

Object. Whether profecut. fuit in Curia Dom. Regis will not imply this Court.

Reſp. They are all the King's Courts, and here it is always ſaid, Coram ipſo Rege.

Chief Juſtice. Suppoſe he had ſaid only Latitat in general, and had not ſaid, Cur. Dom. Regis, would not that be well enough?

Let it ſtay.

S. C. 1 *Salk.* 272.

Rex *verſus* Fells.

Indictment for Eſcape.

Sir B. Shower. WE move upon two ſeveral Indictments of Fells the Keeper of Newgate, for ſuffering Berkenhead and Rayes to eſcape out of Gaol, &c.

Upon which Indictments, Fells has been found guilty.

And now we move in Arreſt of Judgment:

Vide 1 *Sid.* 208, 209, 439. *Ante*, 137. No Indictment to be taken by Intendment.

First, Upon Berkenhead's Indictment; for that it is not ſaid, that he was in Cuſtody of Fells as the Keeper of Newgate; ſo that he might be in his Keeping tortiouſly, or out of the Gaol, and perhaps he never was within the Gaol of Newgate, and then the letting him eſcape is no Crime; and to ſay that Fells did negligently permit him to eſcape out of the Gaol where he was not ſaid to be, will not do. And no Indictment ſhall be taken by Intendment, the Facts muſt be certainly alledged, that we may know what to anſwer unto.

6 *Mod.* 72, 86, 211. *Ante*, 202, 413.

Then it is not ſaid, that Berkenhead was in his Cuſtody lawfully, or that he was to be there until he were diſcharged by Law; and to oblige a Gaoler to keep him, there muſt be a legal Commitment, and there ought to appear a lawful Warrant to charge him; and therefore if he did not come there by a lawful Warrant, the Gaoler is not bound to keep him until he be diſcharged by Law: And perhaps this Berkenhead might be only committed until the next Seſſions, or till Examination by a Secretary of State, &c. And it is only ſaid, that he was there charged for High Treaſon, which might be only by Fame or Hearſay.

Now as to Rayes's Indictment: It is said, That he was committed in Execution to the Gaoler; which is ill, for it ought to be expressed, that he was committed to the Custody of the Sheriff, who is the proper Officer: And why should Fells be any more subject to be answerable for these Escapes than any private Turnkey or Warder?

Then it ought not to have been, that Fells permitted him to escape without Satisfaction made to the Plaintiff, or Performance of the Judgment, &c. for it is the Sheriff who is to see the Punishment inflicted, or Satisfaction made. It is not in the Gaoler's Power to perform the Judgment.

Northey. These Indictments are very extraordinary in the Frame of them: Certainly these Indictments, if turned, would not make a good Declaration. Sir, the Word Onerabilis is not good, they must shew how he was committed, for that Onerat. is uncertain; and though it is said, he was Onerat. with High Treason, yet it is not said, that when he escaped he remained sic onerat', as all the Precedents are in Actions of Escape.

Rokeby, Justice. There is certainly a Difference between Actions of Escape and Indictments.

Attorn. Gen. The Gaoler is an Officer of whom the Law takes Notice, and he is answerable for Escapes as well as the Sheriff.

As for the Objection, That it is not said that Berkenhead remained charged with High Treason at the Time of his Escape; if the Fact was so, then Fells might have taken Advantage of it at his Trial, and he would have been acquitted.

So a general Allegation, that the Judgment was not satisfied, is well enough. If it was satisfied, it ought to have been shewed on their Side.

Then the Indictment is express, That Berkenhead was in Fell's Custody in Newgate as Gaoler, and not there in Custody of him as a private Person. 1 *Salk.* 272.

The greatest Exception is, That it is only said generally, he was onerat', and does not shew particularly how; and perhaps in Actions of Escape the Precedents may be so particular, because the Party must shew how he is intitled more than any other Person, and to ascertain the Damage, must distinguish the Person; but here the King is a Sovereign, and Trustee for the Publick, and he need not distinguish himself, or shew how he is charged.

Holt,

Holt, Ch. Ju. The Charge upon him is as Gaoler of Newgate, and you do not say, Berkenhead was in Newgate.

Then you say, he was charged for High Treason; now that might be, and yet he might not be committed for High Treason. Suppose he had been in Custody for Debt or Felony, now he may be charged with High Treason by another Person, and yet all this while he was not committed for High Treason.

And in Indictments for suffering Persons to escape, it must appear that the Party was lawfully committed.

1 *Vent.* 169, 170. Indictment for suffering two Persons to escape qui commissi fuer. by the Justices of Peace for Offences against the Statute of Forcible Entry. Error, because it is not set out how the Commitment was, whether upon a View of the Justices, or Verdict on the Indictment; and so it appears not whether he was legally committed. Per Cur. It being but Inducement to the Offence, and after Verdict, shall be intended the Commitment was legal. The King against Wright.

But, without doubt, Gaolers are chargeable for Escapes.

Indeed, if the Gaoler be insufficient, the Sheriff is answerable. Adjourn'.

The Parishes of *Ricelip* and *Henden*.

S. C. 2 *Salk.* 524, *bis.* & 525.

Order of Sessions for removal of a poor Fellow. *Vide Ante*, 163, 209, 396. *Blackerby's* Cases 188, 189, 190, &c.

IT was moved to quash an Order of Sessions, which was made for the Removal of a poor Fellow from Ricelip to Henden.

They set forth an Order of two Justices of Peace, by which he was removed first of all from Harrow to Henden; and upon Appeal to the Sessions, he was sent back again to Harrow. Then Harrow sends him to Ricelip, who appeal, and the Order affirm'd. Then Ricelip sends him to Henden, and Henden appeals, and that Appeal disallow'd, and upon this Appeal he was settled at Ricelip.

Now the Order by which he was sent from Ricelip to Henden is not good. The Statute of Car. 2. cap. 12. gives an Authority to send poor Persons to the Place of their last legal Settlement; and therefore the Justices, at their Sessions, having once settled this Person at Ricelip, and so executed their Authority, he is not to be removed again.

Sir B. Shower. I hope this Order shall be quash'd, for it is at Henden that he was legally settled, where he had 4 l. per Ann. Freehold: He was never legally settled at Ricelip.

We ſay, that Ricelip is not concluded, for that we were never before heard; for an Appeal is only final, and concluſive between the Parties; but ſhall a Combination between two Pariſhes conclude another Pariſh, becauſe Henden hath prevailed againſt Harrow, by Conſent perhaps? That ſhall not conclude Ricelip, which is a third Pariſh, and a Stranger to the Appeal between Henden and Harrow. *Vide 2 Salk. 492, 524, 606, 527. 6 Mod. 269, 287.*

Econtra. If Ricelip could have ſhewn, That he had a legal Settlement elſewhere, it would be ſomething.

Sir B. Shower. Our Caſe is this: Ricelip removes him to Henden, then Henden appeals, and that Appeal is diſallowed; but it appearing upon the Face of the Order, that he was legally ſettled at Henden, that Order ought not to have been likewiſe quaſh'd.

Econtra. The firſt Order was from Harrow to Ricelip, and that Order was adjudged good upon an Appeal by Harrow; then Ricelip ſends him to Henden, which we ſay they cannot do, for that they were concluded. *Vide 6 Mod. 287. 2 Mod. 72. 10 Co. 101.*

Ch. J. Where the Juſtices of Peace do give a ſpecial Reaſon for their Settlement, and their Concluſion which they make in point of Law will not warrant the Premiſes, there we will rectify their Judgment; but if they had given no Reaſon at all, then we would not have ravelled into the Fact.

But here at Henden it appears, That he had a Freehold which deſcended to him. Now if this Man may go and live three forty Days, ſhall he be diſturbed? No certainly. And tho' they do adjudge this not to be a Settlement, yet we determine it otherwiſe according to Law.

But it was ſaid, here the Juſtices have adjudged the Matter upon an Appeal between Ricelip and Henden; and this is concluſive.

Turton, J. No, ſince it appears that this Order was good upon the ſpecial Matter.

Shower. This Matter comes here upon the whole for the Opinion of the Court.

Ch. J. But ſuppoſe he had ſold his Eſtate at Henden, why then his Settlement ceaſed there, and perhaps he might have acquired another elſewhere, and therefore Ricelip may well be concluded; for that this might be the Place of his laſt legal Settlement, and then this Pariſh muſt maintain him till they find out another Pariſh where he was laſt legally ſettled.

The Queſtion here is, What was the laſt Place he was legally ſettled?

Turton, J. If it appears that they have adjudged a legal Settlement which is not ſo, we may quaſh that Order, where the ſpecial Matter appears upon the Order.

Ch. J. That's true.

Rokeby, J. I thought this Difference had only been, whether the Boarding had been a legal Settlement, or his having a Freehold, the one being at Ricelip, and the other at Henden; and if ſo, I ſhould be of Opinion, that the Settlement is at Henden.

Turton, J. Here ſeems to be Res inter alios acta, &c. for Ricelip and Henden were not concerned before.

Ch. J. But Ricelip was no third Perſon, for Ricelip was concerned.

Turton, J. It plainly appears now, that Henden is the Place where he was legally ſettled; and why ſhall not Ricelip ſend him thither?

Ch. J. This Fellow ſhall at this rate be ſent up and down from Pariſh to Pariſh, and ſo made a Vagrant by the Juſtices of the Peace's Order. Indeed, the Meaning here was, to have the Judgment of the Court upon the whole where this Man was legally ſettled, and the Deſign of this Order was to lay all Matters before us.

Shower. We ſay, That this Man was not ſettled at Ricelip, for that he had a Freehold at Henden.

Ch. J. But the Adjudication of the Juſtices of the Peace was, That he was ſettled at Ricelip, and we cannot falſify their

Judgment; tho' it be illegal we cannot correct them in Fact, of which they are sole Judges.

N. Obj. Two Justices of Peace cannot send a Man over to any other Place than his last legal Settlement before an Appeal: And why should they have Power to send him over after an Appeal?

Ch. J. Let a Man be settled where he will, we are all of Opinion, that a Man may go and live where he had an Estate, and therefore he might have gone to the Place where he had a Freehold. Adjournatur. 2 *Salk.* 524, 536.

The King *versus* Pope.

MOmpesson moved, to quash an Order made by the Justices of Peace at their Sessions for Servants Wages, and Costs of Suit. They have committed him to Prison for not performing it, which they cannot do, they ought to have indicted him for disobeying their Order. Then the Justices of Peace have no Power to compel the Payment of Servants Wages.

Order by Justices to compel Payment of Servants Wages. *Vide* 2 *Salk.* 442, 477, 484.

Ch. J. Let it be quash'd, Nisi.

Alinson *versus* Spence.

COunsel moved, to quash an Order that was made for the maintaining of a Bastard-Child when it was born in lawful Wedlock; for it's said, That the Husband was at Cadiz.

Then here is a Sum in gross ordered, which is ill; besides, we say it is a Contrivance.

Maintenance of a Bastard-Child born in Wedlock. *Vide* 1 *Salk.* 122. 2 *Salk.* 434.

Sir B. Shower. None can be a Bastard within the Statute, but those who are Bastards within the Statute of Stilborn-Children, 21 Jac. 1. c, 27. And no one will say this Woman was within that Statute.

I grant this Child could not inherit the Husband's Estate, but that goes upon the particular Rules of Discents; but this Child is within the Stat. of 43 Eliz. and the Father should have maintained it.

I have another fatal Exception to this Order; it is said, That he was not there when the Child was begot or born; in the Disjunctive, which is ill; for he might be there at one of those Times, and he might be absent the whole space of Time, both when the Child was begot, and when 'twas born.

Ch. J. Suppose a real Action had been brought by this Child, and Bastardy pleaded; must not the Bishop have certified, that he was a Bastard?

Indeed, where a Man is a Mulier, there must be a special Bastardy certified, for that the Bishops own such a one to be legitimate.

But here the Father being beyond Sea, whether this Child is not Nullius Filius?

And what if he be born within lawful Matrimony, yet why is he not within the Stat. of 18 Eliz.? Is not the Child born in Adultery?

As to the Case of Still-born Children, that Statute is a penal Law, and to be taken strictly. Is it not an unconscionable Thing for the Husband to keep this Child which was got by another Man?

Indeed, the other Exception requires some Consideration. If the Child be not a Bastard, the Order is Ipso facto void; 'tis out of their Jurisdiction, they must take Care that it be a Bastard.

N. But the Justices have undertaken to say she was delivered of a Male Bastard-Child; and the rest stands indifferent whether he was here in the mean while, you will not intend it.

Shower. It would have been void, if you had only said, That she was delivered of a Bastard-Child.

Ch. J. The Order must be quash'd; for it must appear, That he was not here all the Space. If he was here either at the Begetting, or at the Birth of the Child, it is sufficient. Let the reputed Father be bound over to appear here.

Mandamus *to the Justices of the Peace and Overseers, to give Account of Money received.*

Vide 2 *Salk.* 525, 531.

A Mandamus was granted to the Justices of the Peace, and to the Overseers of Shipton Mallet, to give an Account for certain Monies which they had received, &c.

The

The Juſtices and Overſeers make a Return, That there was an Account given of their Moneys, and that they had diſpoſed ſeveral Sums in ſuch particular Manner, &c. 2 *Salk.* 525. 6 *Mod.* 97, 98.

Per Cur'. Both the Return and the Writ of Mandamus are very ill.

Chief Juſtice. You ſhould have ſaid in your Writ, that you could not have your ordinary Remedy.

Turton, Juſtice. That ought to have appeared as well in the Writ it ſelf, as upon the Suggeſtion of the Counſel at the Bar.

Coot *verſus* Lynch.

S. C. 1 *Salk.* 361.

THE Queſtion in this Caſe was, Whether a Judgment given here (B. R.) upon a Writ of Error on a Judgment in Ireland, could be executed here in England for the Coſts? For that Execution had been taken out againſt the Party who was here in England.

Judgment in *B. R.* here on a Writ of Error on a Judgment in *Ireland*, where to be executed for the Coſts.

Chief Juſtice. Whatever Judgment the Court gives here, muſt be executed in Ireland: Here can be no Teſtatum go into a Foreign County, the original Judgment being given in Ireland. Would you execute a Judgment by Piecemeals? Shall you execute an acceſſary Part of a Judgment, when the principal Judgment cannot be executed here?

Rokeby, Juſtice. Execution muſt follow the Nature of the original Action, and this Court is to ſend a Mandate to the Judges in Ireland, to ſee that the Judgment which was given here, be put in Execution there.

Chief Juſtice. I am of Opinion, that this Execution ought to be ſet aſide, & ſic per Cur. let Superſedeas go, Quia erronice, &c.

Mr. Jennings's *Caſe of* Clare-Hall.

COunſel moved, upon a Return to a Mandamus to the Maſter and Fellows of Clare-Hall, to reſtore Jennings to his Fellowſhip on Mr. Dickins's Foundation. *Vide* 6 *Mod.* 18, 260, 363. *Poſt*, 452, 453.

They return their ſeveral Statutes, &c. and that by one of them the Chancellor is appointed to be their Viſitor, and therefore the Maſter is not obliged to admit Mr. Jennings to his Fellowſhip, there being a Viſitor.

Poſt, 453. Wright. I take this Return to be very inſufficient; for I agree, where there is a general Viſitor, that he ought to be applied to: But here the Chancellor is only a Viſitor to ſome particular Purpoſes, as appears by the Conterture of the Statute, which ſays, If a Man be guilty of ſuch particular Crimes, why then *in omnibus*, that is, in all Things relating to thoſe Facts, he ſhall be ſubject to the Chancellor.

Then the King cannot appoint a Viſitor to any particular Foundation. Indeed, to Hoſpitals, &c. he may appoint Viſitors.

So that it ſignifies nothing, though King James did make a Viſitor; for the Counteſs of Clare did found this Charity in Provectionem Rei Literatæ. So that this is wholly a Lay-Foundation, and it doth not appear to be for Spiritual Matters. So a Foundation ad Studend. & Orand', is Lay, though it be ad Orand', for every Man is bound to pray to God.

Then the Statutes of my Lady Clare, who puts the Maſter and Fellows founded by her under the Power of the Chancellor, does not ſubject thoſe Fellowſhips which were founded afterwards unto his Power. Therefore ſince we have no other Remedy, I hope we ſhall have a peremptory Mandamus granted by this Court.

Econtra. As for what he ſaith out of the Return, I ſhall not anſwer it.

Firſt, I take it, that no peremptory Mandamus ought to go, for that he is not duly elected.

Secondly, Whether he be or be not duly elected, the Examination of it does not belong to this Court, but to another Juriſdiction.

Theſe Fellows are the Founders Creatures, and muſt be ſubject to thoſe Reſtrictions and Limitations as are preſcribed by the Statutes, which ſay, That the Majority of the Fellows, and the Maſter, ſhall chuſe; ſo that the Maſter's Conſent is abſolutely neceſſary: And here Dr. Blith is the Maſter, and does not think fit to conſent and chuſe Mr. Jennings Fellow. And here is nothing in the Statute to enforce the Maſter's Conſent. 1 Rol. Abr. 530.

So in Peterhouſe there cannot be an Election without the Maſter's Conſent. In the next Place, here being a Viſitor appointed by the Statutes, this Court will not interpoſe.

If this Cauſe had related to the old Foundation, there had been no Doubt of it. Now it is ſaid, that in Omnibus the Chancellor ſhall be Viſitor.

Then, Profert hic in Curia is not neceſſary to be in a Return.

Chief Juſtice. To what Purpoſe ſhould it be produced in Court, when no Body is here to demand Oyer?

As to the Merits of the Cauſe: How can they bring in Strangers, and make 'em ſubject to the Reſtrictions impoſed by the Founder? Tho' there be a Viſitor for the Fellows founded by my Lady Clare; yet, whether this Viſitor ſhall be extended to the new Fellows? is the Queſtion. Whether there muſt not be a new Incorporation of the ſecond Fellowſhip founded by Dickins?

Rokeby. Dickins's Charity is to be diſpoſed of by the Maſter and Fellows, but it does not ſeem to relate to the old Eſtabliſhment. Adjourn'.

Okell *verſus* Sudlow.

THis is an Action of Debt upon a Bond for 40 l. wherein the Plaintiff declares as Adminiſtrator to Thomas Rider, and ſets forth, That Adminiſtration of all the Goods, &c. not exceeding above the Sum of 40 l. was granted to him by Dr. Cartwright, Dean Rural of Fradſham, within the Dioceſs of Cheſter, who had a peculiar Juriſdiction, &c.

To this the Defendant pleads, That Thomas Rider had Goods, &c. to above the Value of 40 l. viz. to the Sum of 50 l. at Fradſham, within the Dioceſs of Cheſter; and that the Biſhop's Official had granted the Adminiſtration of all the Goods, &c. of Thomas Rider to Sarah Dutton, and traverſes abſque hoc that Dr. Cartwright, the Dean Rural of Fradſham, had any Power to grant the aforeſaid Adminiſtration to the Plaintiff as he had declared, &c.

Vide 6 Mod. 134, 145, 241. 1 *Salk.* 40, 41. Power of a Rural Dean to grant Adminiſtration.

To

To this Plea we have demurred, and shew for Cause that it is double.

Chief Justice. You shew for Cause of Demurrer, that the Plea is double, and wants Form, &c. Now let them shew that the Plea is not double, nor wants Form.

Then, with Submission, it does not appear, that this Bond of 40 l. was out of the Peculiar's Jurisdiction at the Time of Rider's Death. 'Tis said indeed in the Plea, that he died at Fradsham, but it is not said where this Fradsham was, whether within the Dioces or not.

Chief Justice. It does not say, it was out of the Archdeaconry.

Resp. 'Tis a Dean Rural.

Chief Justice. But you should have shewn some special Matter to oust the Peculiar.

Resp. The Peculiar has only Jurisdiction of 40 l. and we have shewed, that the Testator had above 40 l. when he died, and traverse that the Dean Rural had Power to grant Administration; which is the Gist, and material Part of the Declaration.

It doth not appear he had above that Value within the peculiar Jurisdiction.

Then this Plea doth contain double Matter.

It is said, that Thomas Rider, at the Time of his Death, had above 40 l. at Fradsham; and also, that Administration was granted by the Bishop's Official, so that he has jumbled all together; and therefore the Inducement is ill with these several Facts jumbled together, when either of them alone might have been a good Plea, and a sufficient Answer to the Declaration.

Object. Then the Traverse is ill, for it is Matter of Law, whether the Peculiar has a Right, or not? Which cannot be tried by the Jury.

Resp. 'Tis a Matter of Fact, Whether the Peculiar has Power to grant this Administration, or not? Which we are willing to have tried, and we have no other Way to try it.

The Case in Cr. Eliz. 718. Jackſon Leſſee for Years by ſeveral Leaſes of Lands, ſome in the Dioceſs of York, and ſome in another Peculiar in the ſame Dioceſs, deviſes theſe Lands to his Son, and made his Daughter, a Minor, Executrix: The Mother adminiſtred durante Minoritate. Per Cur. Adminiſtration ſhall be granted in two Places, viz. One within the Peculiar, and the other by the Archbiſhop of York; for the Archbiſhop ſhall not have any Prerogative here, becauſe this Peculiar was firſt derived out of his Juriſdiction. Price and Simpſon's Caſe. There this Caſe is expreſs, that both theſe Juriſdictions are conſiſtent, and that the Peculiar, and the Biſhop too, may at the ſame Time grant out two Adminiſtrations; and ſo it was reſolved in that Caſe of Price and Simpſon,

But it is diſputed, Whether this Peculiar had any Juriſdiction at all?

Ch. J. Not ſaying, it was out of the Archdeaconry, makes the Plea immaterial.
Let it ſtay.

Anonymus.

Ch. J. IT was reſolved lately by ten of us, That no Action of Debt lies in Weſtminſter-Hall, for exerciſing a Trade, contrary to the Statute, out of the proper County. But the Proſecutor is reſtrained by the Statute 21 Jac. 1.

And we were alſo of Opinion, That this Statute 21 Jac. c. 1. only extends to Acts made before that Act, and not to ſubſequent Acts of Parliament.

My Lord Ch. J. Hale was always of Opinion againſt the Caſe of Hughes, according to our Reſolution. Vid. ſupra.

Note. In a Caſe on the Statute of Limitations, the Lord Ch. J. Hale cited the Caſe of Heyling and Haſtings; which is ſhortly this:

The Executor brings an Action of Indebitatus aſſumpſit for Goods ſold by the Teſtator to the Defendant.

Defendant pleads Non aſſumpſit infra ſex annos; and in Evidence it appeared, That the Goods were ſold ſix Years before the Action was brought, &c. but that the Defendant did ſay to the

No Action of Debt for exerciſing a Trade to be out of the proper County.
1 *Salk.* 373.
4 *Mod.* 145, 146, 164.
6 *Mod.* 128, 220.
1 *Salk*, 67.
2 *Salk.* 613.
ante 225.
Stat. of Limitations.

Plaintiff when he demanded the Money, prove it, and I will pay you.

What amounts to a new Promiſe.

Ch. J. We are all of Opinion, That this is a new Promiſe, and ſhall charge the Defendant notwithſtanding the Statute of Limitations. For to ſay, prove it, and I will pay you: is as much as to ſay, If the Goods were ſold to the Teſtator, I promiſe to pay you for them.

We are alſo of Opinion, That if a Man do acknowledge a Debt within ſix Years, tho' this is not a Promiſe, yet it is an Evidence of a Promiſe. As in the Caſe of Trover and Converſion, tho' a Denial be not a Converſion, yet 'tis an Evidence of a Converſion.

But ſee 6 *Mod.* 212. That the very Denial of Goods to him that has a Right to demand 'em, is an actual Converſion. *per Holt. Ch. Juſt. vide* 10 *Co.* 56. 1 *Cro.* 262. *q.* 2 *Salk.* 655. 2 *Mod.* 245. 3 *Mod.* 2.

DE

Term. Sancti Hill.

Anno 10 W. III. in B. R. 1698.

Parkhouſe *verſus* Forſter.

TRelpaſs. And on a ſpecial Verdict the Caſe was: The Jury find, That the Plaintiff was an Houſe-keeper at Tunbridge, and did let out Lodgings to Strangers, and did alſo furniſh them with Stable-Room for their Horſes, &c. and that the Defendant being a Conſtable, did quarter a Dragoon at the Plaintiff's Houſe, for which this Action is brought.

See now the ſeveral late Statutes touching Soldiers Quarters, *&c.* wherein there are particular Clauſes for excepting *Tunbridge*, *Epſom*, *&c.*

Now the Queſtion is, Whether the Defendant can juſtify this? And whether he hath acted in purſuance of the late Act of Parliament, made in the ninth Year of his preſent Majeſty?

Before the fourth and fifth of William and Mary, the Billeting of Soldiers was wholly unlawful; but by that Act, and alſo by the 9th of W. 3. it is lawful for the Conſtable to quarter Soldiers upon publick Houſes: But if the Conſtable billets them upon private Houſes, a good Action lies againſt him, and there is all the Caution imaginable uſed; that private Houſes ſhould be exempted from quartering Soldiers.

And publick Houſes have a different Conſideration in Law from private Houſes of this Nature; for a good Action will lie againſt an Innkeeper, for refuſing to entertain a Stranger, Godb.

345.

345. Pal. 367, 374. And an Innkeeper has no Hire for his Lodgings, and is answerable for any Goods of his Guests which happen to be lost infra Hospitium: But otherwise it is in case of Lodgers in private Houses, for the Landlord there is not answerable for the Loss of their Goods; and before the late Act of Parliament, it was not Felony for a Lodger to take away the Landlord's Goods, tho' it was with a Design to steal them.

Then a Livery-Stable doth not alter the Case, for that is an Entertainment only for Horses, and not for Guests; and it is found here, that this Stable was only for the Use of the Lodgers; and the Stable being part of the House, can't be taken neither for a Livery-Stable, which is distinct from an House, as was ruled in the Case of the King and Marryott. So that we are not within the Consideration of an Inn, nor within any the four Particulars mentioned in the Act, which seem to describe Inns and publick Houses. Vide le Act 9 W. 3.

Econtra.

This Action is brought against a poor Constable for doing his Duty, so that we shall be intituled to all the Favour the Court can give us.

And I take it, That this Case doth not depend upon the Construction of any the Acts of Parliament concerning Tipling houses, but meerly upon the late Act of Parliament for billeting Soldiers.

Now they would exempt this House from quartering Soldiers, by saying, That this is not meerly an Ale-house nor a Livery-Stable, but it is of a mix'd Nature. Now if it be so to be taken, yet I shall shew it to you to be within the Act of Parliament.

But say they, This is not an House of Entertainment generally for all the King's Subjects, as Inns are; but if this Evasion should prevail, a great many Ale-houses would confine their Business to a particular Sort of People: So the Inns near the River-Side would entertain none but Watermen; so an Inn on the Northern Road is not universally used, 'tis only for People travelling that Way; and yet I hope that this is an Inn to all Intents and Purposes within the Meaning of the Act of

Parliament; and ſo at Epſom, and thoſe publick Places, ſince they entertain any Body that comes there, either for the Air, Pleaſure, or Health, and they refuſe no Body that comes for either of thoſe Purpoſes, they are as much within the Statute as any Inns whatſoever.

Another Reaſon is, That the Intention of the Act is to comprehend thoſe that ſold Ale by Retail in their Houſes; and if he had ſold Metheglin, he had certainly been within the expreſs Letter of it; and why not in this Caſe? The Membra Dividentia of this Act, are the publick Houſes and the private Houſes. If it is not a private Houſe, it muſt be a publick Houſe, there are no middle Sort of Houſes.

Then I obſerve this upon the Declaration; that tho' the Giſt of the Action is for Billeting a Dragoon upon the Plaintiff, yet it is not ſaid that he was quartered there contra Voluntatem of the Plaintiff. Indeed, it is ſaid, we cauſed the Plaintiff to find the Dragoon with Meat and Drink; but there is no ſuch Thing in the Verdict, though indeed, there it is ſaid to be againſt his Will, which is not in the Declaration; ſo that what is actionable in the Verdict, is not taken Notice of in the Declaration; and that which is actionable in the Declaration is not found in the Verdict. In the Verdict it is ſaid, that it was againſt his Will; but not ſo in the Declaration. In the Declaration it is ſaid, the Defendant cauſed the Dragoon to be in the Plaintiff's Houſe, where the Plaintiff found him Meat and Drink; but it is not ſaid ſo in the Verdict: So that one or other of them is defective, by Reaſon of which Defect the Plaintiff cannot recover.

Then the Conſtable is not reſponſible for conſequential Damages. He ſhall not be anſwerable for the Outrages which the Dragoon may commit, who is a free Agent; and himſelf, for his own Injuries which he offers to any Perſon, muſt be reſponſible. Indeed, in the Caſe of a Beaſt, the Owner is anſwerable for all Damages that may be done by his Cattle, the Beaſt not being a free Agent.

But the Statute provides a Remedy for Damages done by the Soldiers themſelves.

Chief Juſtice. If a Conſtable places a Dragoon where it is unlawful for him to do ſo, he muſt make Satisfaction for the conſequential Damages; as if the Dragoon ſhould, out of a Frolick, let the Drink about the Cellar, or do any other Prejudice, the Conſtable is reſponſible for the Damage that enſues; for ſince the placing of him there was unlawful, it ſhall be taken as if the Conſtable had put him there on Purpoſe to do an unlawful Act. Adjourn'.

Afterwards, in Trinity-Term following, the whole Court were of Opinion, that the Action was well brought, and that Judgment ought to be given for the Plaintiff.

DE

DE
Termino Paſchæ.

Anno 11 W. III. in B. R. 1699.

The King *verſus Dr.* Burrel.

THIS is an Information againſt Dr. Burrel, for executing the Office of Cenſor of the College of Phyſicians, he not having taken the Oaths as the Statutes do direct. *Vide* 4 *Mod.* 233.

To this Information the Defendant pleaded Not guilty; upon which the Jury find a Special Verdict, which was very long: But,

The ſingle Queſtion is, Whether this be ſuch an Office, and Place of Truſt, as is within the Statute of Ch. 2. and the new Statute which requires the Taking of the Oaths? *Ante*, 316, 317, 403. *Stat.* 31 *Car.* 2. *ch.* 1. & 25 *Car.* 2. *ch.* 2.

Pro Rege. I hold this to be an Office within thoſe Statutes.

I will conſider the Nature of an Office. In the Latin, the Word Officium ſignifies the Place and Duty of it, and therefore an Office is generally taken for a Place of Truſt: So in Statute Jac. 1. it is ſaid, That no Popiſh Recuſant ſhall exerciſe any Office or Charge. So Blount, in his Law-Dictionary. So Finch 13.

Now I will conſider whence this Office is derived.

The Royal Authority is the ſupream Office and Charge of our Conſtitution, and of our Government; and has likewiſe under him the Care and Preſervation of all his Subjects Healths; which Office, in this Particular, is exerciſed by the Cenſors of the

College in Subordination under him; and therefore thoſe who have any Branch of the Regal Office, ought to be termed Officers under him: So are Watchmen, &c. 9 Rep. 68. b. 22 Ed. 4. 22. And theſe Cenſors are not only Officers for the College, but they are deſigned for the publick Advantage and Benefit, to take Care of the People's Health, by ſupervising and correcting all Offenders againſt the Rules and Methods of Phyſick. So Judges, and thoſe who inflict Puniſhment, are Officers: And the Statute ſaith, That the College of Phyſicians was incorporated for the Good of the Commonwealth. 15 *H.* 8. 5.

But it is objected, That an inferior Civil Officer, as a Conſtable, Watchman, &c. is not within thoſe Statutes.

But this admits of an eaſy Anſwer, for theſe Offices are wholly ſervile and ſubordinate; but theſe Cenſors are Judges, and may fine and impriſon, and make Rules and Orders, &c. and not altogether ſubordinate.

Econtra. I take it plainly, that this Office is not within the Statute, which has wholly a Reference to the publick Adminiſtration, that concerns the publick Peace, Manners, and Government of the People; but theſe Cenſors are not Officers appendant to the Government, they only depend upon a private Conſtitution, which relates to the particular Science of Phyſick. It is an Office of Art and Science, and the principal Thing is Knowledge; it does not intermeddle with the Government, or with publick Affairs. It is no more an Office than a Schoolmaſter's Place.

Then it was never known, that any of theſe Cenſors did at any Time take theſe Oaths; they never looked upon themſelves to be within this Statute.

Chief Juſtice. The only Queſtion is, Whether this be a publick Officer, or not?

Rokeby, Juſtice. I don't think but a Popiſh Doctor may be a good Doctor to a Proteſtant Patient; but I do not think that a Popiſh Governor can be a good Governor for a Proteſtant Subject.

Chief Juſtice. Ay, but a Popiſh Cenſor is not ſo proper to ſupervise and inſpect all the Proteſtant Phyſicians. Adjourn'.

The Biſhop of Cheſter's *Caſe.*

Q. If this be not Dr. *Watſon*, the *quondam* Biſhop of St. *David's* Caſe. And ſee 1 *Salk.* 106, 134, 294. *Fareſt.* 56, 117.

THE Biſhop had moved for a Prohibition to the Delegates, to whom he had appealed upon a Libel againſt him in the Eccleſiaſtical Court.

Now it was argued by Wright, Serjeant, That no Prohibition ought to go, for that the Libel here is concerning ſpiritual Matters. And without Queſtion the Archbiſhop, as Metropolitan, hath the ſupreme Juriſdiction over the Biſhops, and every Thing that calls it ſelf Eccleſiaſtical. So ſaith Archbiſhop Whitgift, in his Reg. 177. which was printed in 1592. Indeed he talks there of the high Commiſſion Court; but however, as to this Matter it is the ſame Thing; for I confeſs the Archbiſhops are tied up only as to ſuch Matters as come within their eccleſiaſtical Conuſance. And no Inſtance can be given where a Prohibition has been granted to reſtrain the Archbiſhop from reforming his Clergy in Matters of this Nature, which are mentioned in the Libel.

The firſt Charge againſt the Biſhop, is for Simony; and certainly this is ſingly and purely an eccleſiaſtical Offence, and depends chiefly upon the Canons of the Church, as appears in Lyndewode 397. at the general Council of Chalcedon.

The next Charge is, for taking exorbitant Fees for giving Inſtitution, which is wholly of a ſpiritual Nature; and by the 135th Canon it is expreſly ſaid, That no Money ought to be taken for Inſtitution or Collation.

The third Offence is, for miſapplying of Charities, and converting of them to his own private Uſe; though I do agree, That this Matter may be redreſs'd in Chancery, upon a Commiſſion of charitable Uſes; but here the Deſign is to inflict a Puniſhment on the Biſhop for this Offence, which is not puniſhable in any other Place. Miſapplying of Charities.

False Certificate.

Fourthly: For certifying a Falſity under his Epiſcopal Seal, in a Matter which very nearly concerns the Government; for he hath frequently certified that ſeveral Perſons had taken the Oaths, when in Truth they had not taken them. This is the Caſe as it ſtands before the Archbiſhop; and I hope your Lordſhip will not prohibit the Archbiſhop from proceeding to enquire into theſe Offences, and to puniſh them by eccleſiaſtical Cenſures.

'Tis true, they ground their Suggeſtion upon this, That theſe Matters are puniſhable in the temporal Courts, as Sid. 217, 251. Prohibition on Suggeſtion, that the Spiritual Court ſued one there for forging Letters of Ordination; but the Truth is, it was to deprive him becauſe mere Laicus; no Prohibition was granted. But this is no Objection, for the Proſecution here is of a different Nature, it is pro ſalute animæ, as in 1 Keb. 121. 2 Keb. 215. Hob. Searl and Williams, 288.

And ſuppoſe two or three of the Crimes mentioned in the Libel, of which I have only repeated a few, were of a temporal Nature; yet you won't grant a general Prohibition as to all: Indeed, a Conſultation may be Quoad, &c. but a Prohibition Quoad, &c. is Rara avis in Terris. 2 Keb. 215.

Chief Juſtice. If it be a Matter that relates to the Duty of his Office, as a Cauſe of Deprivation, &c. they may proceed; and ſo it is in the Caſe of Perjury by a Clergyman, he may be proſecuted in the Spiritual Court, though the Crime is of a temporal Conuſance, but you won't go originally there.

Shower. Mr. Serjeant's Argument ſhews, there are many Points very doubtful and difficult, therefore I pray that we may declare upon a Prohibition.

Chief Juſtice. If he was only puniſhed there for a temporal Offence, it would be another Matter; but what was the Ground of Cawdry's Caſe? Why he was deprived for acting againſt the Duty of his Place.

G. Juſt. Always the Church has had a Power to clear themſelves. 31 Edw. 3. c. 4. In 2 Inſt. 586. it appears, that in the Time of Hen. 6. the Clergy's Extortions were complained of, which were redreſſed amongſt themſelves. And the Caſe of

Slader

Slader of Bromicham, Tr. 16. Car. 2. is a full Authority in Point; it was for forging Orders, for which he was puniſhed in the Spiritual Court.

Rokeby. Suppoſe a Clergyman commits a temporal Offence by which he alſo acts againſt the Duty of his Place, ſhall we prohibit the Spiritual Court from puniſhing him in not doing his Duty? Davis Rep. in the Caſe of Properties, Fol. 3. b. you have good Learning as to this Matter.

Chief Juſtice. If you do enter your Suggeſtion on the Roll, you ſhall enter all the Fact, that it may remain on Record for ever.

Wright, Serj. Their Deſign is only to delay us, and to get off for ſix Months. If they have any Thing to offer, I deſire they may do it now, and enter it upon the Roll.

Chief Juſtice. Indeed, whenever you move for a Prohibition, it is ſuppoſed that the Suggeſtion is entered upon the Roll, tho' this is not practiſed.

It was ſaid by the Counſel, if the Prohibition is not granted, we generally carry away the Suggeſtion in our Pockets. Adjournatur.

At another Day this Caſe was again debated.

Chief Juſtice. The eccleſiaſtical Men are governed by different Laws than other Men are; and therefore we are not ſo proper Judges of Matters of Facts ſet forth in the Libel, as the Simony and the Charity perverted, and the taking of Money for Ordination. Indeed, it ſeems ſtrange that a Man ſhould give Money for taking on him the Cure of Souls.

Shower. Here the Queſtion is, Whether the Cuſtom being to take ſuch and ſuch Fees, and the Party takes more than the Cuſtom allows, this is not conuſable here? Indeed, if he had done any Thing in general againſt the Duty of his Office, it might be otherwiſe.

Chief

Chief Juſtice. I do not know why they ſhould not try a Cuſtom which relates only to an eccleſiaſtical Perſon when a Lay Fee is not touched. So in the Caſe of a Penſion by Preſcription, there ſhall be no Prohibition granted, 2 Inſt. But that is not the Caſe, for you have not ſuggeſted that you ought to take any Thing by Cuſtom, you do not ſay there is any Cuſtom for you.

Take a Prohibition, Quoad, &c. Per Cur'.

The ECCLESIASTICAL JURISDICTION *as to* Seats *in the Church.*

Crook *verſus* Sampſon, *&c, Church wardens.*

Preſcription *in Navi Eccleſiæ. Vide ſub Caſu proximo.*

LIbel in the Biſhop's Court of Exeter, for a Seat which the Church-wardens aſſigned to one M. in whoſe Right the Plaintiffs claimed. The Defendants there, who now pray'd the Prohibition, preſcribed by a Que Eſtate for the Seat as ancient, and belonging to their Tenement in W. and that they, and all thoſe, &c. had uſe to repair. It was doubted whether this Preſcription in Navi Eccleſiæ be good; but in an Iſle it were good. The Court inclined, That ſuch a Preſcription in Navi Eccleſiæ may be for ſpecial Cauſe; but they would not grant a Prohibition. 2 Keb. 92.

S. C. 6 *Mod.* 230. *Fareſl.* 8. 2 *Salk.* 551. Libel for a Seat in the Church. *Vide ante* 69, 70.

Jacob *and* Dallow.

CAuſe ſhewed why a Prohibition ought not to go to the Eccleſiaſtical Court, where the Libel was for a Seat in the Church.

I take it, That the placing and diſplacing of People in the Seats of the Church, belongs purely to the Ordinary, unleſs there be a Preſcription by one who has a Freehold. 2 Rol. Abr. 288. Hob. 69. 2 Bulſt. May and Gilbert, where Prohibitions were denied.

Then ſome Preſcriptions are alſo triable in the Eccleſiaſtical Court, as Modus decimandi, repairing of Churches.

Econtra. Where a Man ſhews a fixed Intereſt, he may have an Action on the Caſe, which muſt be tried at Common Law; for how can they in the Spiritual Court award Damages? Here is a direct Preſcription, which they deny. *Vide* 2 *Salk.* 550. *pl.* 11.

Curia. Take a Declaration, and ſet forth the Suggeſtion:

Suppoſe a Man has ſate there for ſome Time, and he is diſturbed, ſhall not he ſue in the Eccleſiaſtical Court?

Defendant ſurmiſeth, That he and his Anceſtors have uſed, Time out of Mind, &c. to have an Iſle with a Seat in the Church, for himſelf and Family. This was on a Libel for a Seat in the Church. Cur', Becauſe it appeared upon the Examination of the Party himſelf, that the Pariſh have always uſed to repair the Iſle and Seat, the Court would not grant a Prohibition, for that proves his Anceſtors were not Founders of the ſaid Iſle and Seat. Godb. 199. Moore 878. 12 Rep. Garaen *and* Pym. *Vide Fareſt.* 8. 6 *Mod.* 230. 2 *Salk.* 551.

DE
Term. Sanctæ Trin.
Anno 11 W. III. B. R. 1699.

The City of London *and* Vanacre.

By-Laws. *Vide Ante*, 105, 106, 107, 156, 157. *Raym.* 447. 1 *Mod.* 10, 164. 1 *Salk.* 192, 193, 341, 352. 6 *Mod.* 123, 177. 4 *Mod.* 27, 28. 3 *Mod.* 193. 2 *Jones* 145. 1 *Jones* 162. *Cart.* 68, 114, 115. 1 *Vent.* 21, 196. 1 *Sid.* 284.

Chief Juſtice. THis Caſe now ſtands for the Reſolution of the Court.

It comes before us upon a Return to an Habeas Corpus; in which it is ſet forth, That the City of London is an ancient City, and are a Body Politick; and that King John, by his Charter did grant, that the Mayor and Aldermen ſhould chuſe any of the Freemen to be their Sheriffs. Then they return that Branch of Magna Charta which relates to the City, and the ſeveral Acts of Confirmation, &c. and that it has been a Cuſtom, Time immemorial, for the Mayor and Aldermen to make new By-Laws for the Advantage of the City; and that in purſuance of that Cuſtom, in the 7th of King Charles the Firſt, an Act of Common-Council was made, by which it was enacted in Manner following: That the Election of Sheriffs ſhall be annually on *Midſummer-Day*, and that no Citizen who is elected ſhould be diſcharged, unleſs he will take an Oath he is not Worth ten thouſand Pounds; and that if the Perſon elected ſhall not appear at the next Court, and give a Bond of 1000 *l.* to take upon him the Office of Sheriff at the Eve of St. *Michael*, then next following, or ſhall refuſe to take upon him the ſaid Office, or ſhall not appear at the next Court, that then he ſhall forfeit 400 *l.* and if he does not pay the Sum within three Months afterwards, that he ſhall forfeit 100 *l.* more.

That Vanacre was chosen Sheriff such a Day, &c. but did not appear at the next Court, either to take upon him the said Office, or to make any Excuse for his Discharge, by Reason of which he had forfeited the Sum of 400 l. And whether this Act of Common-Council shall be so far obligatory as to compel the Payment of this 400 l. is the Question.

And though several Objections have been made, yet we are of Opinion, that this is a good By-Law, and that a Procedendo ought to go.

1. Obj. It is objected, That the Mayor and Aldermen in Common-Council, have not Power and Authority to make such a By-Law.

2. Obj. That it imposeth Hardships upon the Citizens themselves, in respect of this Oath, which they are obliged to take.

3. Obj. That it is unreasonable he should forfeit 400 l. if he does not appear at the next Court and hold, unless they can excuse it, which, say they, makes them Arbitrary.

4. Obj. That here is no Provision made, that the Party shall have Notice of this Election, that he may have an Opportunity to excuse himself.

These are the Objections that have been made to this Return.

Now as to the first Objection; we are of Opinion, That this Privilege of making By-Laws and Ordinances is vested in the City by Common Right, if not by Custom, for that it concerns the good and better Government of the City, and every City and Town Corporate may, by an essential Power inherent to their Constitution, make By-Laws for the Advantage of the Government of that Body Politick; and this is the true Touchstone of all By-Laws, which ought to be for the Administration of the Government with which they are intrusted. Hob. 211. Norris *and* Staps's Case. Though Power to make Laws is given by special Clause in all Corporations, yet it is needless, for I hold it (saith my Lord Hobart) to be included by Law in the very Act of Incorporating; for as Reason is given to the natural Body for the governing of it, so the Body corporate must have Laws as a politick Reason to govern it, but those Laws must

Obj. 1. Respons.

By-Laws may be made for the Administration of the Government, with which the Corporation is intrusted.

Vide 1 *Rol. Rep.* 365. 3 *Leon.* 264, 265. *Moore* 576, 577, 580. 8 *Co.* 127. *Hard.* 56, 210. *Cart.* 68, 114, *&c. ante.*

must ever be subject to the general Laws of the Realm, and subordinate to it. So 5 Rep. 62. Chamberlain of London's Case.

Now it is for the Advantage of the City to have such a By-Law, that the Sheriffs should be Men of Substance, that they may be the better enabled to execute so great a Trust.

Then the very Constitution of King John's Charter gives the City of London Power to chuse Sheriffs; and it would be a vain Thing for the Charter to give a Power to chuse Sheriffs, if they cannot be compelled to hold that Office; and therefore the Persons whom the City nominates are obliged to stand. So by the Acceptance of any Letters Patents, there is an Obligation on the Parties accepting to perform all Things thereby required, as to undergo all Charges, Offices, &c. Certainly these Citizens who were then in Being, when this Charter was first granted, were obliged to stand, and so are all those who come after.

Now if there be Letters Patents which grant to the Body politick an Exemption from Tolls, or Privileges of Fairs, Commons, &c. yet all the particular Members shall take Advantage of these Grants, though they were made to the Body politick. Therefore it is but reasonable that the particular Members, who reap the Benefit of the Body politick, should also take upon 'em the Burden and Charge of Offices incident to it.

Then no Body can question, but that this Constitution is for the Advantage of the City; and therefore they must observe it exactly, or else it is a Forfeiture of the whole Franchise; and it is not in their Power to make an Alteration in their Constitution.

And to secure this Franchise, it is necessary for them to have a Power to compel 'em to execute this Office, or else this Franchise will be lost; and that the Aldermen may make Ordinances to enforce the Execution of their By-Laws, which are for the Advancement of the publick Good of the City, appears in Snelling's Case, 5 Rep. very full.

Now as to Mr. Northey's Objection, That the Party refusing to take upon him this Office may be indicted, and that it was held so in Norwood's Case.

First, This will not save the Forfeiture; for then there must be a Vacancy in the mean Time of this Office of Justice; so that they are bound to name such Sheriffs as shall stand, that there may be no Failure of the Execution of Justice; and therefore it is that they chuse Sheriffs so long beforehand, that if some

refuse

refuſe to hold, they may chooſe others; ſo that there may be no Forfeiture of the Franchiſe.

Then here can be no Indictment grounded; for to refuſe that he will not come and appear ſuch a Day, will not do; for tho' he ſays to every Body, he will not come, yet he may come notwithſtanding: And here he muſt come within ſuch a Time, and acquaint the Mayor and Aldermen that he will ſtand, or elſe he muſt be fined.

But 'tis objected farther, That though they may make ſuch a By-Law which ſhall affect the City, yet it ſhall not reach to the County of Middleſex, which is out of their Juriſdiction. But I take it, that this Act of Common-Council binds; for tho' the Execution of the Act be out of the City, yet it is for their Advantage, and the Perſons of the Sheriffs are within the City, and the Sheriffalty is within the City of London, and its Juriſdiction, and the Intereſt of it.

The ſecond Objection is, That it is unreaſonable to impoſe this Oath, That he is not worth ten thouſand Pounds. Obj. 2.

But this is ſo far from being a Hardſhip upon the Citizens, that it is a Relaxation of a Burden which lay on them before; for heretofore, though a Citizen was worth never ſo little, yet he was bound to hold this Office. Reſp.

And ſo it was reſolved in the Caſe of the City of Norwich, That a Man who was choſen Sheriff of that City was bound to ſerve in it, and that no Incapacity could excuſe him; ſo that if he does not qualify himſelf by receiving the Sacrament, &c. it is his own Fault, and he ſhall be puniſhed for not holding the Office. So is 1 Sid. 284. By-Law in London, that there ſhall be but 420 Carts let to hire in London; and that if any more be uſed, the Owners ſhall forfeit 40 s. Per Cur. It is a good By-Law; for if the Number of Carts ſhould not be reſtrained, they would ſtop the Streets, and be a great Nuſance. Player and Jenkin's Caſe. 1 *Vent.* 21, 196. *Vide Moor*, 580, 585. *Pal.* 3. *Hard.* 55. 2 *Brownl.* 179, 278.

But ſay they, What if the Perſon choſen to be Sheriff be a Madman, or a Fool, &c? Why, theſe Incapacities are excepted, they are tacitly excepted out of all Laws whatever, and therefore this By-Law ſhall not extend to ſuch Perſons; and the By-Law need not run, Provided that the Party to be choſen Sheriff be not a Fool, or a Madman; 'tis excepted without it.

Obj. 3. The third Objection is, That he is obliged to appear at the next Court of Aldermen, and to hold the Office, unless he can shew a good Excuse to the contrary. This, say they, gives an arbitrary Power to the Court of Aldermen to allow or disallow the Excuse.

Resp. To this I answer, That this Part of the By-Law is for the Advantage of the Citizens, for that they may make any reasonable Excuse that is consistent with their Constitution.

But suppose the Party who is chosen Sheriff makes a good Excuse, and they will not allow it: Why, he may either plead this, or give it in Evidence upon an Action brought; for it is not reasonable that the Party should be concluded by their Disallowance if the Excuse be reasonable; so upon that Case of the Commissioners of Sewers, their Discretion must be grounded upon Reason, and it must not be fanciful.

Obj. 4. The fourth Objection is, That here is no Notice given of this Election, and it may be that he was absent at the Time of the Election; and then 'twould be very hard that he must take Notice of it.

Resp. To this I answer, That every Freeman and Citizen, being a Member of the Body politick, is supposed to be present where the whole Body resides; and tho' in Fact one of the Members should be absent, yet it was his Duty to be there, and he is supposed in Law to be there: He shall be obliged to take Notice of this Election at his Peril.

Then the Election is made in the View of the City, of which all Persons are to take Notice, as Members of the Body politick; and the Proclamation is also made in the most notorious Place of the City, viz. on the Hustings, where every Person may take Notice of it.

As in Case of Outlawry, the Supposition is, That the Tenant is commorant upon the Land, &c. and so at the 5th Exact. that the Party is at the County-Court present.

So here, Is it not the same Case that the Freemen and Citizens of London are resident where the whole Body politick is assembled, and every Member of it is virtually and legally there, and all Acts done there conclude his Assent, and therefore he ought to take Notice of it. And suppose the Person so chosen was at York at the Time of his Election, yet he might have left Word with some of his own Family to give him Notice of it, and to apply to the Court of Aldermen to excuse him.

The

The Miſchief would be very great if every rich Citizen might withdraw himſelf from the Service of the City againſt the Time of the Election; for then you would have no Body to execute the Office of Sheriff.

I muſt needs ſay, That the Government of the City very much concerns the Good of the whole Nation; for that here the Trade of the Kingdom is chiefly managed, which ought to receive all the Care and Protection the Law can give.

I have endeavoured to inform my ſelf as to the ſeveral Acts and By-Laws which have been made about Perſons withdrawing themſelves from the Service of the City; and I find there is one Act of Common-Council, by which it is ordained and enacted, That if any Perſon doth willingly withdraw himſelf from ſerving any Office in the City, that he ſhall forfeit the Sum of one hundred Pounds, and alſo be diſfranchiſed, unleſs he did come with ſix Compurgators, and declare that he went abroad about his lawful Occaſions. Of Perſons withdrawing themſelves from the Service of the City.

But notwithſtanding all theſe Precautions, and that Elections have been always practiſed for many Ages in the Manner as is ſet forth in this Return; yet I know not for what Reaſon, there is a ſtrange Temper of oppoſing this plain Method of electing Sheriffs amongſt ſome of the Citizens. But as our Predeceſſors, who ſate in this Place, have ever ſupported the good Government of the City of London, ſo we ſhall do the ſame, and I hope that it will continue ſo when we are dead and gone.

And therefore we are all of Opinion, That this is a good By-Law, and that Mr. Vanacre hath juſtly forfeited the Sum of 400 l. for not complying with it.

Dom. Rex *verſus* Harniſſe.

THE Caſe here was this:

Upon a Vi Laica removenda, a Parſon had forcibly ſeiſed the Church, and upon Inquiſition the Force was found; but the Juſtice of the Peace did not preſently reſtore the Poſſeſſion, (as he ought to have done) but had a Record of it made up, and deferred the Delivery of the Poſſeſſion for two or three Years. *Vide procx. pl.*

And now all this Matter appearing to the Court, it being removed before them by Certiorari, they were of Opinion, That this Proceeding was very irregular, and that Reſtitution ought to be awarded.

Chief

8 *Co.* 119. b. 120. b. 2 *Brownl.* 266. 2 *Bulſt.* 139. 2 *Juſt.* 380. *Bro. Faux Impriſ.* 32. *Dett.* 16. *Execution.* 135, *&c.*

Chief Juſtice. I ground my Opinion upon the Authority in Dr. Bonham's Caſe, 8 Rep. which ſays, That the Commitment muſt be immediately. So upon the Statute of H. 6. of Forcible Entry, when the Force is found by the Inquiſition, Reſtitution muſt be immediately. The Reaſon of one Caſe is the ſame with the other.

Rokeby. Where an Inquiſition is taken, it is ſuppoſed there is a quicker Remedy, and therefore we think it is not in the Power of the Juſtice of the Peace to defer Reſtitution ſo long. The Act requires it to be done forthwith; and ſo is the Authority expreſly in the latter End of Dr. Bonham's Caſe; it muſt be reſtored upon View.

Per tot. Cur. Let Reſtitution be awarded.

The City of York *verſus* Toun.

Sir B. Shower. THIS is an Indebitatus aſſumpſit for a Fine impoſed upon the Defendant for not holding the Office of Sheriff in the City of York; but, with Submiſſion, no Indebitat. aſſumpſit lies in this Caſe; for how can there be any Privity or Aſſent implied, when a Fine is impoſed on a Man againſt his Will? Nor is there any precedent Conſideration, neither do they ſhew any Right to this Fine, nor who impoſed it, &c.

Vide ante 439, 440. 5 *Co.* 62. *Cart.* 68. 114.

Holt, Chief Juſtice. We'll conſider very well of this Matter, 'tis Time to have theſe Actions redreſſed. 'Tis hard that Cuſtoms, By-Laws, and Rights to impoſe Fines and Charters, and every Thing, ſhould be left to a Jury. Adjorn.

Turner *verſus* Maine.

Vide 6 *Mod.* 131. 1 *Salk.* 111.

N. THIS is an Action of Debt brought by the Aſſignees of the Commiſſioners of Bankrupts, and it is not ſaid that the Defendant had Notice of this Aſſignment.

Chief Juſtice. No Notice is neceſſary.

Econtra. How can we be guilty of a Devaſtavit to them, and yet do not know when the Aſſignment was made?

At another Day,

It was inſiſted, this is an Action brought by the Aſſignee of the Commiſſioners of Bankrupts, ſurmiſing a Devaſtavit, &c.

I take the Declaration to be ill.

1. It is not ſaid where the Converſion was.

2. It does not appear, that at the Time of Suing out the Commiſſion he was indebted.

3. It is not ſaid any where in the Declaration, that the Money was not paid to the Bankrupt himſelf.

Chief Juſtice. Read the Record------ It is all well enough, the Place is alledged.

And the Superinde is enough.

And for the laſt Exception, it is ſaid, that Execution ſtill remains of the Debt.

Let the Plaintiff have Judgment.

DE

Term. Sancti Mich.

Anno 11 W. III. in B. R. 1699.

The King *verſus* Chandler.

Indictment for Deer-ſtealing. *Vide* 1 *Salk:* 182, 369, 378, 383.

Broderick. This is a Conviction of the Defendant for Deer-ſtealing; and ſeveral Exceptions have been taken againſt this Indictment.

1. That Hunting was neceſſary as well as Killing.
But I know not upon what Rule ſuch an Exception is founded, nothing of it appears in the Statute.

2. That it is Forisfacit inſtead of Forisfecit.
But that ſure is nothing, for the Senſe of the one Word is as full and expreſſive as the other.

3. That ſeveral Sorts of Killing is lawful, as appears in Manwood's Foreſt-Law.
But here it is ſet forth, That the Killing being within the Park was unlawful.

But the two Things which ſeem to carry the faireſt Appearance of Objections, are theſe:

1. That the Days of the Killing does not appear.
But this ſignifies nothing, for if the Killing was within a Year before the Indictment brought, it is ſufficient.

So to say, between such a Time and such a Time, is well enough; as in the Case of a Butcher for buying and selling of live Cattle contrary to the Statute.

Besides, it is not practicable to set down the Day of the Month; and one of the Mischiefs is, it is difficult to discover when the Fact is done.

2. The second Objection that is considerable, is against the Form of the Indictment. It is said, that it ought to have been, that if there was not sufficient Distress found, that then the Offender should suffer Imprisonment.

But this is not of Necessity, for the Forfeiture is sufficient to be set forth in the Indictment. 1 *Salk.* 112, 385. 2 *Salk.* 681.

Chief Justice. It does not appear, whether the Conviction was upon Confession, or upon Evidence.

Broderick. It is said, we gave you a fair Opportunity of being heard, and that thereupon he was convicted.

Chief Justice. It seems to be well enough. Here the Act of Parliament designs a summary Conviction before a Justice of Peace.

Anonymus.

COunsel shewed Cause, why a Prohibition should not go to the Spiritual Court. The Foundation of the Libel was for a Rate to repair the Church, and there was a Sentence and an Appeal upon that. And now, after all this, they would have a Prohibition; but, with Submission, they come too late. *Vide Ante*, 389, 390, &c. 1 *Mod.* 79, 194, 236, 261. *Raym.* 246. 4 *Mod.* 148. *Hard.* 379. 2 *Jon.* 122. 1 *Vent.* 367.

It is true, in the Time of the late King James II. there was an Act made for Building this Church, with Power to raise a Sum not exceeding 5000 l. so that they suggest, that there was Money enough raised by that Act, and that this Rate was illegally made; but your Lordship will not examine into that now. Therefore we hope, since here is nothing contrary to the Act for ought appears against Law, we pray the Rule may be discharged.

Econtra. I hope not, they snap'd a Sentence ex Parte in the first Place, but we go upon two Points:

First,

First, Upon the Act of Parliament, which prescribes a particular Manner for raising the Moneys, and therefore you cannot go to the Spiritual Court for it.

Secondly, It is a Rate declared to be made by the Vestry, and no Vestry could be called till the Church was finish'd. That which we insist upon is, that the Statute is not followed which prescribes particular Ways of raising the Money.

Chief Justice. Ay, what say you to that?

Resp. Our Suit is for the Repairing the Church, and not for Building of it.

Chief Justice. But what will you say to the Rate that is made for Repairing the Watch-house? Certainly that must be ill.

Resp. This Money was not raised for the Watch-house, but for repairing the Church. There is indeed something of a Watch-house mentioned in the Libel.

Chief Justice. For that somewhat a Prohibition must go.

Give them a Declarat. in a Prohibition.

Clement *versus* Beard.

S. C. 2 *Jo.* 118.

Sir B. Shower. THE Libel in the Spiritual Court is for having married and cohabiting with his Wife's Sister's Daughter, which, we say, is clearly prohibited by the Levitical Degrees. So is 1 Inst. 235. 2 Jac. 1. Rot. 1032. Jo. 2, 191. Noy 29. Hob. 181. Vaugh. 303. and many other Books.

Vide 2 *Jo.* 191, 213. 2 *Lev.* 254. 2 *Vent.* 9. *Vaugh.* 206, *&c.* 302, *&c.*

It is said in some of the Books, That an Uncle might marry his Niece, but that a Man cannot marry his Aunt, by Reason of the Superiority which she has over him. I hope that we shall have a Consultation.

Chief Justice. What Superiority is there by an Aunt over her Nephew? What Ground is there for the Distinction? I cannot see any Difference between the two Cases. Now for your Case, it is certainly within the Degrees of Affinity; and in the

ſame Degree of Conſanguinity, there would be no Doubt of it; for a Man cannot marry his own Siſter's Daughter. I thought this Caſe had been ſettled, there is a Caſe againſt you in Point.

But indeed, if this Marriage be not within the Levitical Degrees, we are to hinder the Spiritual Court from proceeding on a wrong Foundation. Adjourn'.

Anonymus.

IT was moved by Mr. Northey, for a Prohibition to the Eccleſiaſtical Court of Durham. Prohibition.

This comes before your Lordſhip upon a Suggeſtion, That whereas a Libel was exhibited in the Spiritual Court of Durham, againſt a Woman for living incontinently with my Lord, &c. Now the Ground of our Suggeſtion is, for that this Citation was ſerved on her on a Sunday, which is contrary to the expreſs Words of the Act of Parliament made 29 Car. 2. by which it is enacted, That no Proceſs whatever ſhall be ſerved upon a *Sunday*, except in Caſes of Treaſon, Felony, or Breach of the Peace. *Hawk. Pl. cor.* 7. 1 *Keb.* 620. 1 *Sid.* 168.

So that ſince the Foundation of their Proceeding is ſo irregular, they ought not to go on any further.

Indeed, they pretend that this Citation was well enough ſerved, for that it was fixed upon the Church-Door according to the Cuſtom. But as to that, we ſay, they have no Authority to fix the Citation of any Perſon on the Church-Door, but when the Party cannot be cited perſonally; and it does not appear here, that this Woman could not be perſonally cited, or that any Attempt has ever been made to cite her perſonally; ſo that this Citation has been wholly irregular, and conſequently this Woman has been wrongfully excommunicated, and therefore we pray, that ſhe may be abſoiled.

Then they object, That we might have inſiſted on this Act of Parliament in the Spiritual Court; but we ſay, we were not bound to appear there by Vertue of ſuch an erroneous Citation, it being againſt an Act of Parliament----- And a Citation is look'd upon to be as much a Proceſs as any Proceſs whatſoever, in any of the Temporal Courts, as appears by 25 Ed. 3. Stat. 6.

And therefore, the one muſt be as much within the Act Car. 2. as the other; tho' indeed, we had the Opinion of the Court of Durham, that this Act of Parliament did not bind the Spiritual

Court. But I hope your Lordſhip will be of another Opinion, and think fit to grant a Prohibition.

I am told by the Civilians, that the Law and Cuſtom of the Eccleſiaſtical Courts is to fix the Citation on the Church-Door, and that this is ſufficient without any perſonal Service, and that this has been the conſtant Practice both before and ſince the Statute of King Charles the Second, and we defy 'em to ſhew any Precedent whenever any Prohibition has been at any Time granted ſince the making of the Statute, which was a great many Years ago.

Econtra. That is no Objection, for tho' the Cuſtom has been ſo practiſed ever ſince the making that Statute, which, ſay we, has been a miſchievous Practice, therefore it is high Time now to have it redreſs'd.

Chief Juſtice. Indeed, the greateſt Queſtion is, Whether the Act of Parliament extends to this Proceſs, which was uſed to be ſerved in ſuch a Manner by fixing of it at the Church-Door before the making of the Statute? And ſuppoſe the Eccleſiaſtical Law is, and has always been, to ſerve this Proceſs on a Sunday, ſhall theſe general Words in the Statute take away their Law?

There may be ſome Caſes to which the Statute may not extend; as for Inſtance, there is a Proclamation to be made on a Sunday at the Church-Door, by the Statute of : Now this is not taken away by the general Words of the Statute; the Reaſon of ſerving the Citation in ſuch a Manner on a Sunday, may be, for that they can't do it as well on any other Day in the Week. But the Caſe ſeems to be different in the Execution of other temporal Proceſs, which might have been as well ſerved on any other Day as on a Sunday. So that it does not ſeem to be the Intent of the Statute to take away the ſerving this Proceſs in ſuch Manner.

But I don't like your Partiality in the Spiritual Court, for proſecuting the Woman only, and not my Lord, &c. Pray, why ſhould not you proſecute him, as well as the Woman, if they are both equally guilty?

Machin *verſus* Malton.

S. C. 2 *Salk.* 549. 2 *Lutw.* 1057. *Nelſ. Lutw.* 335. Action on Stat. 23 *H.* 8. for being cited out of the Dioceſs where he lives.

HEre the Caſe was, That Machin had ſubſtracted Tithes, as they ſay, within the Dioceſs of York, and then removes out of that Dioceſs to Lincoln, and lives there, and ſeven Years after his living there, they libel againſt him in the Spiri-

tual Court at York, upon which he brings Action upon the Statute 23 Hen. 8. cap. 9. for being cited out of the Diocels where he lives.

And the Question is, Whether this is within that Act?

I take it, that this Case is not within that Act.

Indeed, the Design of the Act was to maintain the Jurisdiction of inferior Dioceſſes. Godb. 191. Fraums and Powell's Case. But where there is not a Remedy in the inferior Diocels, the Party may be cited to such a Court which has Jurisdiction of the Matter. And in Porter and Rocheſter's Case. 13 Rep. the Archbishop is reduced to his proper Diocels, or peculiar Jurisdiction, unless it were in five Cases, as in Default of the Ordinary; and in case of Appeal; so if the Ordinary dare not, or will not, convent the Party; or if the Ordinary be Party to the Suit below; or in case of Instance and Request by the Ordinary. 2 Brownl. 1, 2. The same Case, in case the Suit is begun below, and Sentence there given, and after, an Appeal upon this Sentence to the Delegates, and all this while no Endeavour to stay these Suits upon this Statute: The Legacy was sued for in the Prerogative Court, though the Parties dwelt in another Diocels. Vide 2 Roll. Rep. 328. And in every one of the Cases expreſs'd in the Statute, it is plain that Diocels and Jurisdiction are coupled together. So that it is evident, the Word Diocels imports Jurisdiction, and not any Compass of Ground, as appears also by the Statute of 27 Hen. 8. cap. 20. Winch, Entr. 570. 2 Roll. Rep. 448. and one sued for Tithes in the Bishop of Salisbury's Court, the other sues a Prohibition, for that he is in the Jurisdiction of a Peculiar; and that the Archdeacon is his Peculiar.

I take this Case to be expreſly within the Statute, which was made for the general Ease of the Subject from the Oppreſſion of the Apparators. For before that Statute the poor Subjects were worried up and down, and cited at great Distances from the Places where they lived, not only for defamatory Words, but also for the Substraction of Tithes, as appears in 1 Keb. 481. The Suggestion was, that the Party was cited out of the County where he lived, which is not within 23 Hen. 8. the Cause of Action being Local for Tithes within the Diocels, and Consultation was awarded on Motion; and the Canons made 1603. take Notice of this Statute.

Then to say, here is no Jurisdiction in the inferior Diocels is false, for the Person may be sued in the Place where he lives, for the Substraction of Tithes in another Diocels; and so is

2 Brownl.

2 Brownl. 1, 2. The Case of Lynch and Porter, which was argued by the Civilians.

For it is a Maxim in the Civil Law, that the Court may follow the Criminal.

Vide Godb. 134, 152, 154. 2 *Saund.* 423. 5 *Co.* 67. *Cro. Eliz.* 659, 843.

There is a Case in 3 Mod. 211. of Woodward and Mackprice, where a Prohibition was granted in such a Case. Woodward, and others, who lived in the Diocess of Litchfield and Coventry, but occupied Lands in the Diocess of Peterborough, were taxed by the Parishioners where they used the Land for the Bells of the Church; and upon Refusal to pay, a Suit was against them in the Diocess of Peterborough, and they had a Prohibition.

There is another Authority in 2 Brownl. 28. on which I chiefly depend; it is the Case of Jones against Boyer, where it was agreed, That if a Man inhabit in one Diocess, he hath cause to sue for Tithes in the same Diocess in which he inhabits; and if in another Diocess, there he ought to sue in the Diocess where the Defendant did inhabit, and not where the Tithes are payable, nor where the Plaintiff inhabits.

The Case is express for me, that the Suit ought to be in the Diocess where the Defendant inhabits. Therefore upon this Authority, which is so express for me, I pray your Lordship's Judgment for a Prohibition.

As for that Case in 2 Brownl. it was in the Case of personal Tithes, and there indeed Forum sequitur Reum, but not so in Case of Local Tithes.

Chief Justice. We will give our Opinions next Term.

Usher's *Case*.

Mandamus, to the Vice-Chancellor of *Oxon*, to receive an Appeal upon Expulsion of a Fellow. *Vide Ante*, 257, 314, 404, 421. 6 *Mod.* 18, 260, 386.

I Am to pray your Lordship for a Mandamus to the Vice-Chancellor of the University of Oxon, and it is in the Case of one Mr. Usher, who has been expelled out of University-College in Oxford, and was refused his Fellowship there. Upon which, Mr. Usher would appeal to the Vice-Chancellor, and Convocation; but the Vice-Chancellor refuseth to admit of his Appeal. Now the Question is, Whether the Vice-Chancellor and Convocation are Visitors of this College? And we take it, that the Body of the University in Convocation are legal Visitors of this College, as appears plainly by the Statutes of the College; and they have all along continued to exercise this visitatorial Power ever since the Year 1219. 4 Hen. 3. Therefore we hope, that the

Vice-Chancellor ſhall be compelled to do his Duty, and to receive the Appeal.

Ad idem. That the Vice-Chancellor and Convocation are the Viſitors of this College, is without Queſtion; for they are appointed ſo to be by the Statutes of the College, and by ſeveral publick Inſtruments: But it is a great Queſtion, Whether theſe Viſitors have an abſolute Power to condemn without Cauſe? Or whether it is not a limited Power to reprobate for a good and lawful Cauſe? For the Act which conſtitutes viſitatorial Power ſays, That they may condemn ex cauſa legitima. *Vide ante* 421, 422.

Then 'tis impoſſible for Mr. Uſher to come at his Right of Appeal, but by propoſing it to the Vice-Chancellor; and ſince he hath refuſed to receive it, there is no other Way but for your Lordſhip to compel him to it by your Mandamus, that he may do his Duty; which now he declines to do, by ſtopping up the Chanels of Juſtice.

Chief Juſtice. You are too ſoon for Argument: Let me know how the Caſe ſtands as to the Fact. Read to me your Conſtitution by the Statutes, that I may know how this Power is founded. Then the Statutes were read.

If you have any Mandamus at all, it muſt be directed to the Vice-Chancellor, Maſter and Scholars in Convocation.

Sir B. Shower. The Vice-Chancellor and Doctors of Divinity, and the Proctors, are without doubt Viſitors of this College, and the Vice-Chancellor and the two Proctors have three negative Voices; and if either of them refuſe to accept of this Appeal, or to propoſe him to the Convocation, it cannot be done. *Ante* 424.

Then this Gentleman ſtands expelled out of the Univerſity for a particular Offence. And whether the Crime for which he was expelled be true or not, he has acquieſced under that Expulſion: So that now if this Mandamus ſhould be granted, it would occaſion a great Confuſion in the Univerſity.

And we ſay, That this Gentleman is not capable of being relieved here, for that this is a Cauſe not examinable in this Place, there being proper Viſitors. And Mandamus's have been often denied, where it is plain that there is a Viſitor to whom the Party grieved may appeal. Therefore we hope your Lordſhip will not grant any Mandamus.

Chief Juſtice. The Queſtion is only this; Whether or no if an original Viſitor refuſed to accept an Appeal, and to do the Party grieved Juſtice, we ſhall compel him to it? Let us be attended with the Statutes of the College, and we'll conſider of it. Adjournatur.

Note. Before we quash an Order of Sessions, we must have an Affidavit of Notice given to the Parties concerned, or else we'll only quash Nisi on Notice.

The King *versus* the Inhabitants of *Chersey.*

Vide 2 *Salk.* 472, 473, 476, 478, 523, 524, 534. *Ante* 330.

IT was moved to quash an Order of Sessions, for that the only Ground of settling a poor Person in a Parish, appears upon the Order to have been, for that the Banns of Matrimony of the poor Person were published in the Parish-Church; which is ill, for that the Notice given to the Parish must not only be in Writing, but the other Ceremonies required by the Statute of 3 and 4 of William and Mary must be observed, and that Act being an explanatory Act, cannot be taken by Equity.

Cur. Let it be quashed.

Capt. Kirk's *Case.*

Vide Show. 190, 191.

THE Question was, Whether Captain Kirk, who was indicted for the Murther of Conway Seymour, Esq; should be brought to his Trial this Term?

Chief Justice. I am of Opinion this Fact ought to be tried, for that as I take it the Prosecutor has been too dilatory in his Prosecution; and Men ought not to be restrained of their Liberty any longer than a convenient Time for them to be brought to Trial.

This Remissness in the Prosecution of Criminals was look'd upon to be a great Mischief at the Common-Law, and therefore was redress'd by the third of Hen. 7. by which it appeareth, Justice ought not to be delayed.

But per Turton and Gould, the Trial ought to be put off, for that after his Surrender he did not give the Prosecutor timely Notice; and therefore he says, he is not prepared.

At another Day, Capt. Kirk was brought up by Rule of Court; and it was moved by Mr. Montague, that Mr. Kirk might be admitted to Bail, for that he and the other Gentleman Mr. Cage were dangerously ill, by Reason of the Badness of the Air, and the Inconveniency of the Prisons; and that upon Proofs of such Matters the Court had frequently bailed Persons, though the Coroner's Inquest have found them guilty of Murder; and the Reason is, for that Imprisonment in such

Caſe is not deſigned as a Puniſhment, but only to bring the Parties to Juſtice.

Reply'd econtra. 'Tis true, your Lordſhip hath Power to bail in Treaſon or Murder; but you will not exert that Power, unleſs it be in extraordinary Circumſtances: As in ſome Caſes that have been quoted; and eſpecially in ſuch where the Proſecution is thought not to be well groundrd. *Ante* 323. 2 *Jon.* 210.

But here is no Pretence of a malicious Proſecution, for that here are two Inquiſitions for Murder found, one before the Coroner, and the other by the Grand Jury. And 'tis not doubted whether Mr. Seymour was killed by this Gentleman; that too plainly appears. Here is no Peradventure, whether this unfortunate Gentleman was killed by Captain Kirk; ſo that 'tis but reaſonable he ſhould give Account of ſpilling his Blood. 2 *Jon.* 222.

Then here has not been any long lying in Priſon, this being but the firſt Term after their Commitment.

The Blood of Mr. Conway is upon the Land, until it be revenged, or the Juſtice of the Nation be cleared by a fair Trial. I could remember your Lordſhip of a Caſe, where a Perſon, after he was out upon Bail, was taken up in the Vacation, and was committed, it being in the Caſe of Murder, meaning Mr. C.

Chief Juſtice. I was very well ſatisfied with what I did then, and am ſo ſtill.

But indeed, in this Caſe I do not think that their Affidavits are full enough. It does not appear, that by this Impriſonment they are in Danger of their Lives.

It is ſaid in Egerton's Caſe in the 13th of Jac. 1. That if there were any Delay in the Priſoners in the putting off their Trial, or in not giving timely Notice, there could be no bailing of them. And here, ſince they did not give Notice of their Render to the Proſecutor, as this is good Reaſon for deferring their Trial, ſo it is alſo the ſame for not being bail'd.

Lane *verſus* Cotton, *Poſtmaſter-General.*

S. C. 1 *Salk.* 17, 18.

THE Plaintiff brought an Action againſt Sir Robert Cotton, Poſtmaſter-General, wherein he declares he ſent a Letter by the Poſt, &c. in which there was incloſed an Exchequer-Bill, and that this Letter and Bill were loſt, &c.

Upon

Upon the general Iſſue pleaded, the ſpecial Matter was found, viz. That the Letter and Bill were delivered to ſuch a Poſtmaſter, and that afterwards the Mail was robbed, and the Letter and Exchequer-Bill taken away, &c.

Upon arguing this Caſe, the Court ſeemed to be of Opinion, That the Action was well brought againſt the Defendant.

Chief Juſtice. It would be very hard upon the Subject, if this Action ſhould not lie. The Crown has a Revenue of 100000 l. per Ann. for the Management of this Office: And therefore Care ought to be taken that the Letters be ſafely conveyed, and that the Subjects ſhould be ſecured in their Properties. And why ſhould not this be the ſame with a common Carrier, who muſt anſwer for Jewels or other valuable Things as he loſeth, as appears in Aleyn's Rep?

Then 'tis very hard, that the Subject ſhould be prevented by the Act of Parliament from ſending his Letters by any other Carrier againſt whom he might have his Remedy, and yet not have his Remedy againſt the Poſtmaſter, by whom he is obliged to ſend his Letters.

But I was informed, that afterwards Judgment was given in B. R. for the Defendant. Diſſentiente Ch. J. Holt.

See the Reaſons of *Holt*'s Opinion, 1 *Salk.* 18, 19.

Anno 2 Will. & Mar. In B. C.

Tippet *and* Eyres.

Argued by the Judges.

IN Debt ſur obligat. for 300 l. It appeared upon Oyer to be for the Performance of an Award to be made by Barlow before the 4th of April, or elſe to the Umpirage of ſuch a one as he ſhall chooſe, to be made on or before the 16th of April. *Vide* 1 *Sid.* 428, 455. 1 *Lev.* 174, 285, 302. *Raym.* 187. 1 *Mod.* 15. 275. 2 *Mod.* 169. 2 *Jon.* 167. 1 *Salk.* 70, 72. 2 *Saund.* 64, 65, 130.

The Defendant pleaded, That neither the Arbitrator, nor the Umpire, made an award, Prout, &c.

Plaintiff reply'd, confeſſing the Arbitrator made no Award; but on the firſt of April they did chooſe and nominate one Gyſſop to be Umpire, who refuſed; and then they named one Clerk, who accepted and awarded, &c. and ſets forth a Breach on Demand.

Argued by the Judges.

Ventris. I am of Opinion, That the Award by Clerk is good, for the Submiſſion has put the Matter to the Determination of an Umpire, and I think this Umpire is ſufficiently named by the Arbitrators intitled to the Power. It's true, it's ſaid they named Gyſſop, and it's as true he did not accept thereof, and therefore could be no Umpire; and that an Acceptance is requiſite the Manner of pleading proves.

But 'tis objected, That this is an Authority, once executed, which cannot be acted over again. I do agree, that an Authority once well executed cannot be tranſacted anew; but where it's not well executed, it may be acted again: As where Executors by Deviſe have a bare Power to ſell Land, though they make a Feoffment, yet they may afterwards ſell; and in our Caſe the naming of Gyſſop is only a Commencement to the Execution of his Authority. Two Perſons cannot have a concurrent Juriſdiction to make an Award. 1 Rol. Abr. 261.

Rokeby. Gyſſop had never any Authority veſted in him, for his Refuſal prevented it; ſo, as I take it, the Caſes of Authority do in no wiſe influence the preſent Caſe. The Arbitrators had an Authority to make an Award till the 4th of April, and then they had a

Power to name an Ampire; for Gyſſop had no more than a Communication, &c.

P. J. The Nomination of Clerk was good; for Gyſſop's was wholly avoided by his Refuſal, and for that it is fit we ſhould compare it with other Caſes of Authorities; as where the Leſſee for Years will not conſent to the firſt Livery, the ſame Attorney may make Livery again. Pal. 289. Molyneux verſus Tolin. And ſo if Lands be given to J. S. the Remainder to ſuch a Perſon as he ſhall appoint, and he appoints a Monk, he may notwithſtanding appoint again. So of Elections, a void Election is adjudged to be no Election.

Ch. J. Pollexfen.

I agree, That if there be only a Communication or Diſcourſe between them, that would not have amounted to a Nomination; but Parols font plea, we muſt take it as it appears in the Record before us, and that ſays there was a Nomination, and if there had been none, the other Party could take Advantage of it upon Iſſue. And I do agree, that an Authority ill executed may be reaſted, as in the Caſe of Attorneys.

But the Arbitrators in our Caſe have no other Power than to nominate; which they have done, and I cannot imagine Gyſſop's Refuſal ſhould give them a new Power.

I know no Difference between this and other Powers: If the Refuſal makes the Nomination void, it muſt be immediately void, or elſe they have no Power to make a new one; and if it does, then it argues that they have a greater Power than the Submiſſion gave them, which was only once to nominate, which they have done.

I take it, That where a Man has only a bare Authority, and no Intereſt, his Refuſal ſhall not diſable him from executing it: As if an Executor, or an Attorney, in the Caſes beforementioned, ſhould ſay they would do nothing, that will not diſcharge their naked Power. 14 Hen. 7. 17. Albany's Caſe.

1 *Sid.* 428, 455. *Raym.* 187, 205. 1 *Lev.* 285. 1 *Mod.* 15, 257. 2 *Mod.* 169. 2 *Jo.* 167.

So that this Conſequence may follow our Caſe, that Gyſſop after his Refuſal may notwithſtanding make a good Award; and if Clerk may do ſo too, there will be two Ampires well choſen, and a concurrent Juriſdiction, which is not allowed. 1 Sid. Bernard verſus King. So 2 Saund. 130. Coping's Caſe is very ſtrong. But ſince my Brothers are againſt me,

Judgment pro Querente.

INFOR-

INFORMATION.

Mr. Prynn's *Caſe.*

AN Information was exhibited in the Crown-Office againſt ſeventy poor Perſons; which ſets forth, That one Mr. Prynn was Lord of ſuch a Manor, where the Defendants did aſſemble and meet together in a riotous Manner, and pull down certain Fences, &c. to which one of the Defendants comes and demurs. The Queſtion is, Whether an Information lies for this Riot? Information in the *Crown-Office.* 3 *Mod.* 72, 73, 117, 118.

Sir Fr. Winnington.

I conceive it does not, and that the Defendants cannot be proceeded againſt otherwiſe than by Indictment or Preſentment in the Country where the Fact was committed. And this I ſhall make appear: 1 *Vent.* 8. 1 *Sid.* 360. 1 *Salk.* 372.

Firſt. By the ancient Books of our Law; as Glanvil, c. 1. Fleta l. 2. c. 92, 102, 103. Mag. Ch. 29. 2 Inſt. 46. No Man can be charged but by Indictment or Preſentment. So are the Statutes 25 Edw. 3. 4. 42 Edw. 3. 3. 5 Edw. 3. 9. So in the Year-Books of the 26 Edw. 3. 4, 70. 43 Aſs. pl. 5. all Suits of the King muſt be by Preſentment or Indictment.

I ſhall come now to ſhew to your Lordſhip, from whence theſe Informations had their Birth, and how they had their Names.

King Henry the VIIth was a very rich Prince, and uſed all the Care and Induſtry imaginable to encreaſe his Coffers: The Inſtruments he made Uſe of for this Purpoſe, were Empſon and Dudley; who, in order to acquire their Deſigns, procured an Act of Parliament to be made, impowering Juſtices of the Peace, &c. upon Information for the King, to hear and determine all Offences and Contempts, except Treaſon, Murder, and Fenny.

You will find the Statute at large, in 11 Hen. 7. 3. Raſtal's Statutes: But this very Act was afterwards repealed, and condemned as injurious and oppreſſive to the King's Subjects, by 1 Hen. 8. 6. And the Authors themſelves of thoſe horrible Oppreſſions and Grievances, viz. Empſon and Dudley, came both to infamous Ends, for they were very fairly hanged; ſo there was and End of them, and their Informations.

In all Raſtall's and Coke's Entries, there are no Informations, but only upon general Statutes; and in Raſtall, I think there is hardly one Information.

1 And. 156. 4 Inſt. 41. No Man ought to be puniſhed, but by Preſentment or Indictment.

Now I ſhall come down to the Petition of Right, 3 Car. 1. which eſtabliſhes and confirms the Liberty of the Subject, and that no Man ſhould be tried but by legal Proceſs; and enumerates many Things there, wherein the Liberty of the Subject was invaded. But the King perceiving that the Parliament ſtrook very deep, and he being tender of his Royal Prerogative, preſently diſſolves them, and did not call them again till the 16th Year of his Reign; it was in this long Interval of Parliament, that this Miſchief crept in. The firſt Information begun 5 Car. 1. being exhibited againſt my Lord Hollis, Elliot, and others.

Cro. Car. 130, 152.

Their Counſel then inſiſted againſt the Attorney-General, That though the Crime was puniſhable, yet he ought not to have proceeded by Information, but by Indictment or Preſentment: The Attorney told them, there were many Precedents, but produced none. 1 Croke, King and Winckfield, 251. 80. Car. Lamb's Caſe, 1 Cro. Freeman's Caſe.

After the long Interval of Parliaments (the Intermiſſion of which was certainly the Cauſe of many Irregularities both in Church and State) then comes the 16 Car. 1. in the Year 1640. and the Parliament preſently aboliſhed the Star-Chamber-Court which had ſo long oppreſs'd and haraſſed the Subject by their miſchievous Informations, and other arbitrary Proceedings; of which the Parliament were ſo ſenſible, that they enacted, That no Court of that Nature ſhould ever again be ſet up in England. That Parliament alſo takes Notice of the Petition of Right.

After this, Informations ſeemed to be totally loſt, but certain it is they ſlept till the Reſtoration of King Charles II. After which they were ſometimes made uſe of, though but very rarely neither; for they received but little Countenance from the reverend Judges, with one of which I had the Honour to be acquainted, and that was my Lord Chief Juſtice Hale, who I remember very well has often ſaid, That if ever Informations came in Diſpute, they could not ſtand, but muſt neceſſarily fall to the Ground.

The Reaſon why Informations were ſo ſeldom queſtioned, is becauſe they were very rare; and when few People are pinch'd, few do object. But I confeſs, of late Times they have been more frequent than ever, and the Miſchiefs they produc'd are yet freſh

in

in our Memory. I will not trouble your Lordship with a long Repetition, but I cannot pass by two or three of them without mentioning. As first, that of Sir Samuel Barnadiston, against whom an Information was preferred, only for writing a merry Letter to some of his Friends in the Country, for which he was fined 10,000l. So about the Election for Sheriffs, an Information was exhibited against Pilkington, Shute, and others, and they were fined extravagant Sums, for nothing, but because they would not betray their Country, by voting for such Sheriffs as would be subservient to the then Court-Faction, and Prerogative-Interest. See the Collection of State-Trials.

So I remember one, for only drinking to the pious Memory of Stephen College, was presently attack'd by a furious Information, and had an exorbitant Fine imposed on him for so slight and frivolous a Matter.

Besides the arbitrary Proceedings of these Informations, many other Inconveniences do attend them.

1. The Party, if he be acquitted, cannot have any Costs against the King, but after an expensive troublesome Suit, must sit down contented with his own Loss, and be glad he escapes so.

2. If a Man come into Court upon his Recognizance, he must plead Instanter, though he cannot possibly be prepared for it, having never before heard the Information. And this was my Lord Russel's Case.

I cannot (my Lord) conclude, without mentioning the late Case of the Reverend Bishops, whom the Information brands for presenting a malicious, seditious, and scandalous Libel; which, in Truth, was nothing but a pious and humble Petition, and which they were obliged to do, by the Laws of God and Man. Certainly, no Jury could have ever found them guilty.

I suppose it will be objected against me, That there are many Precedents of Informations in the Office. But I answer in the Words which a great and learned Lawyer heretofore used, 1 And. 157. Nil agit exemplum quod litem lite resolvit.

Wherefore, my Lord, relying on the Authority of these Statutes which I have quoted, none of which (as I ever heard of) are yet repealed, and in respect also of those Inconveniences which are the essential Concomitants to all Informations; I pray your Lordship's Judgment for the Defendant, not only for

my Client's Sake, but for all the Gentlemen's at the Bar, nay, for all the Subjects of England, that our Liberties may not be invaded, nor our Properties trampled on, and our Lives snatch'd away by these oppressive Informations.

Sir William Williams, pro Rege.

Sir Francis Winnington's Argument is, I suppose, extemporary, and so I shall answer it.

The Matter on which this Information is grounded, is a Riot, for which I think the Information will very well lie, and is no Innovation; for the Officers of the Court will inform you, that there are Precedents of Informations as ancient as Indictments.

As to the Case of Empson and Dudley, the exhibiting of Informations was not alledged as a Crime against them, but it was for compounding of Informations, and mixing popular Actions in them. It is true, in capital Cases, Informations do not extend, and where the Statute saith, They shall not lie for Life or Limb, it implies, that they did lie in other Cases.

The Reason why the Court of Star-Chamber was repealed, was, because there was nothing punishable there, but what could be remedied by the Common Law in the King's Courts, and not because they proceeded by Information.

See *Vaughan*'s Report of this Matter, at the End of *Cro. Car.*

So as to my Lord Hollis's Case, there the Information was preferred against him, and others, for assaulting the Speaker in his Chair, and for speaking seditious Words in the House, for which Judgment was given against them. And afterwards, in 1667. that Judgment was reversed by the House of Lords; but the Reason of that Reversal was, because this Court had intermeddled with Matters done in Parliament, and because the Attorney did craftily intermingle Matters in the Information, and not because he proceeded by way of Information.

And though I grant, that Informations have sometimes been misused, yet the Abuse of a Thing will not destroy it; but if there be any Irregularities committed, your Lordship will reduce Matters to their old Stamp and Method, and the Court may do it in their Discretion.

As to my Lord Hale's Opinion concerning Informations, I heard him make this Distinction between an Information and an Indictment: In the first, every Person gives a distinct Fee; but in the last, one Fee lies only for several Persons. By this, my Lord Chief Justice Hale granted, that an Information would lie; and truly I never heard it questioned before this Time.

As for the Information concerning my Lords the Bishops, those Epithets of malicious, seditious, &c. were only Words of Form and Course, though I will not undertake to justify the Proceedings of the late Government: We have all done amiss, and must wink at one another.

Sir George Treby, Attorney General, pro Rege.

I never heard Informations questioned before; it is certainly a Doctrine very lately broach'd, and I believe will have very few Proselytes to espouse its Interest.

As for the old Statutes which Sir Francis Winnington cites, how that all Proceedings shall be by Indictment or Presentment, Why may not Presentment there be meant of a Presentment by the King's Attorney, which is nothing but an Information?

The Proceeding by Information has been constantly practis'd, and therefore is now the Law of the Land, and it is not created by the 11th of Hen. 7.

In Rastall's and Coke's Entries, there are many Informations, some for Intrusions, and others in Nature of a Quo Warranto. So the Statutes that do restrain Informers, do suppose, that there were Informations before.

As for my Lord Hollis and Selden's Case, that was, Whether an Information would lie for a Matter transacted in Parliament? *Cro. Car.* 130, 131, 152.

As to my Lord Hale's Opinion, I am sure there were several Informations in his Time; and he was a very conscientious Man, and if he had thought that Informations were wholly unlawful, he would not have suffered them: But indeed, I have heard him tell the Officers of the Court, that the Informations should not be vexatious, but never that they were illegal. *Hob.* 115, 109, 111. *Dyer* 93, 98, 376.

All the Records in the Crown-Office are so many Authorities for us.

Ch. Ju. Holt. The Matter truly seems not of any great Difficulty, for we shall hardly come now and impeach the Judgment of all our Predecessors; it would be a Reflection on the whole Bar. In Lamb and Winfield's Information, there were learned Counsel who would certainly have taken Exceptions to the Information, had they thought that it did not lie.

My Lord Chief Justice Hale complained of the Abuse of Informations, but not that they were unlawful. As to the Statute of Hen. 7. I do not think that the Star-Chamber was set up then, but was at the Common Law, and so Informations in that Court, and others, were at the Common Law. So notwithstanding

ſtanding the Repeal of 11 Hen. 4. by the 1ſt of Hen. 8. yet afterwards the 32d of Hen. 8. of Maintenance, ſuppoſeth, that Informations ſtill lay; and if it had been a new Thing, that Statute would have ſaid, that there ſhall be an Information for that Crime, and not that it ſhall be puniſh'd by Information, which ſuppoſes Informations to lie. You could never move to quaſh an Information againſt the Attorney, but an Indictment you may. A Man may make a better Argument againſt Writs of Enquiry, and new Trials, than againſt Informations.

Dolben Juſtice. There was an Information againſt Plowden, who was a learned Man, and a great Lawyer, and if he had thought Informations illegal, he would certainly have taken Advantage of it.

I confeſs, that in that long Interval of Parliament, which Sir Francis Winnington mentions, between the 5th and 16th of Car. 1. there were more Irregularities committed in this Court, than ever were before. Then the Buſineſs of Ship-Money was tranſacted in this Court.

The next Term after, this Queſtion was moved again.

1 *Saund.* 301, 302. 2 *Mod.* 128, 132.

Chief Juſtice Holt. Informations were at Common Law, and ſo the Statutes do ſuppoſe: The Court of Star-Chamber was taken away, becauſe the Crimes were puniſhable here. But a Crime committed in York cannot be puniſhed here by Indictment, for it cannot be removed out of the County, where all Indictments muſt be laid; therefore it is only puniſhable here by Information.

In the Books of Entries there be Informations for Perjuries and Intruſions againſt the Bailiff of Weſtminſter, and Keeper of the Gatehouſe, and yet they are no Officers of the Court.

All the Court were of Opinion, that Informations lay at Common Law.

And ſee 1 *Salk.* 374. That where-ever a Matter concerns the publick Government, and no particular Perſon is intitled to an Action, there an Information will lie.

A TABLE OF THE Principal Matters.

A.

Abatement. See Avowry, 1.

1. OF the Writ by Miſnoſmer in the Addition of a new Dignity *Page* 302.
2. Plea beginning in Bar, and concluding in Abatement, good 145, 146.
3. Where the Defendant may plead in Abatement to the Declaration, where not 144

Acceptance. See Reſignation.

1. Acceptance of a Thing in Satisfaction may be traverſed, and ſo may the Giving 86
2. Acceptance of 5*l.* in Satisfaction of Wages pleaded 136

Action on the Caſe.

1. Againſt a Common Carrier upon the Cuſtom of *England* 90
2. Againſt the Defendant for negligently keeping his Fire, held good, though the Declaration was uncertain *Page* 181
3. For diverting a Watercourſe from a Mill, and Exception to the Declaraon in Arreſt of Judgment 206
4. *Super ſe aſſumpſit*, and doth not ſay *Defendens ſuper ſe aſſumpſit*, good after a Verdict 306
5. Marriage a good Conſideration to raiſe a Promiſe.
6. Againſt the Poſtmaſter for the Loſs of a Letter, in which was an *Exchequer*-Bill 456
7. For maliciouſly indicting the Plaintiff at the Aſſizes 394, 405
8. For ſcandalous Words ſpoken of a Tradeſman, *viz. You are a Cheat*, not actionable 398

Addition.

The want of the Right Name of Dignity abates the Writ 302

Ad-

Adminiſtrator, and Adminiſtration. See Mandamus.

He may be compell'd by the *Spiritual Court*, to, 1. Exhibit an Inventory, but an Executor cannot *Page* 247

One Adminiſtration may be granted by the Biſhop,

2. And at the ſame Time another by the Peculiar 425

Leaſe for 98 Years if *B.* lived ſo long; he aſſigned the Term to *C.* who died inteſtate, the Grantee of the Reverſion entered before Adminiſtration.

3. *De bonis non, &c.* was taken out, and died ſeiſed, yet the Adminiſtrator may have a ſpecial Action of Treſpaſs, for the Term had an Exiſtence as ſoon as Adminiſtrarion was granted 384

Adminiſtration *durante minore ætate* of an Executor ceaſeth at 17, *aliter* of one who is not Executor 395

Admiralty.

1. Though the Goods are ſold at Land, yet the original Cauſe on which ſuch Sale did depend ariſing on the Sea, gives the Admiralty Juriſdiction 141

Admittance. See Copyhold. 3

Advowſon.

1. Grant of an Advowſon as appendant when 'tis in groſs, 'tis void, 298

Tho' confeſſed in the Pleading to be once in the Crown, yet the Plaintiff muſt at a Trial give ſome Evidence o ſhew it was ſo 337

Alimony. See Coſts.

Amendment,

1. May be made in the Entry of a Judgment where 'tis the Act of the Court, but not in another Term, *Page* 148

2. *Jurata* not amendable 211

3. Record of *Niſi prius* may be amended by the Roll, but the *Diſtringas* muſt be right 212

4. Where a Declaration in Ejectment ſhall be amended 332

5. Inſtruction right to a Curſitor, and he miſtakes or omits ſomething, 'tis amendable 17

6. Amendments are always made to ſupport Judgments, and not to ſet them aſide 69

7. Where the Record of *Niſi prius* and *Jurata* differ in the Day, the Defendant cannot take Advantage of it after a Verdict 398

1. Where the *Niſi prius*-Roll ſhall not be amended by the Plea-Roll 399

Amerciament.

1. Where a double Amerciament is good, where not good 67

2. Diſtreſs might be taken for an Amerciament in a Court-Leet, without alledging Preſcription 127

Annuity.

Debt will not lie for an Annuity 143

Appeal.

Where an Act of Parliament gives an Appeal, the Fact as well as the Law is to be re-examined 274

But that muſt be the laſt Reſort, for *B. R.* may compel the Juſtices to execute their Power, but they cannot reform their Judgment, *Page* 275

Apprentice. { See **Mandamus**, 10 / **Seſſions**, 2

Diſcharged from his Maſter by a Seſſions Order; it was quaſhed, becauſe it was to diſcharge him from a Trade not mentioned in the Act, 5 *Eliz.* and becauſe the Juſtices have no Power but over ſuch Contracts which were made by their Authority 139

Attainder.

Upon Reverſal of the Attainder, there is no Reſtitution of the Money which the King received by Virtue of ſuch Attainder 49, 61

Attorney.

1. Action brought againſt him for appearing without a Warrant 205
2. Attorney of the *Common Pleas* may plead his Privilege, tho' he is in Cuſtody of the Marſhal of *B. R.* 310

Avowry. See **Copartener.**

1. Abatable after a Verdict 29
2. Where Cognizance is made for all the Matter, and Juſtification only for Part, 'tis not good 77
3. One Jointenant avowed in his own Right, and did not make Cognizance as Bailiff to the reſt 150
4. Avowry need not be ſo certain as a Declaration *Page* 364
5. If 'tis for Rent, tho' ſome is due and ſome not, the Avowry muſt be abated 366
6. Avowry for *Services*, he muſt make out his Title *in omnibus*, becauſe the Plaintiff in Replevin is to have a Retorn, and if found for the Avowant, it will be a perpetual Charge on the Land 365
7. Damages in Avowry are not given in reſpect of the Rent for which the Diſtreſs was made, but for taking the Cattle 366

Authority. { See **Seſſions**, 3, 6 / **Umpire**, 1

B.

Bail.

1. NOT to be taken in Manſlaughter till after Clergy had 288
2. Was taken in Murder by *B. R.* in a particular Caſe 323
3. But denied in another Caſe 455
4. If Common Bail is not filed by the Defendant in eight Days after the Retorn of the Proceſs, the Defendants forfeits 5 *l.* for which Forfeiture the Court may give Judgment upon a Motion 392
5. The Bail brought a Writ of Error, as well upon the original Judgment as on the Judgment againſt themſelves on *Sci' Fa'*; it was quaſhed, becauſe they are not Parties to the original Judgment 397

Bankrupts. See **Action of Debt,** 8

Barons.

The Ancient way of making them, and what a Barony is by Law *Page* 65

Baſtardy. See **Juſtices of Peace,** 6, 11

Barretry.

On an Indictment of Barretry, the Defendant muſt have a Note of the Particulars, that he may know to what to anſwer 18

Bill of Exchange. Vide 314

Action thereon, without ſaying *Commercium habens*, 'tis good 367

Bond.

Where an inſenſible Word in the Obligation ſhall make it void, where not 281

Where an impoſſible Date ſhall make it void 285

By-Law.

1. By Law to confine one to take a Freedom in *London* of a particular Company excluſive of all the reſt, not good 106
2. Penalty may be impos'd for Breach of a By-Law, to be levied by Diſtreſs, but cannot commit for diſobeying it 157
3. A Fine may be ſet, and an Action of Debt brought to recover it 158
4. Power to make By-Laws, is included tacitly in the very Act of Incorporation *Page* 439
5. By-Laws, where good, where not, 104

C.

Capias Utlagat. 200

Pro fine taken away by Statute 5 & 6 *Will.* and the Fee of 6*s.* 8*d.* given for it, on ſigning Judgment in Treſpaſs, Ejectment, Aſſault or Falſe Impriſonment 285

Carrier. See **Action on Caſe,** 1

Trover and Caſe brought againſt him, not good 91

Church-warden. See **Mandamus,** 8

1. He is a Temporal Officer, and a *Mandamus* will lie to the Archdeacon to ſwear him 325
2. They are not a Corporation without the Parſon 395

Clerk of the Peace.

The Statute of 1 *Will.* makes no Alteration in the conſtituent Part, but in the Qualification of the Perſon, and Duration of his Eſtate 388

Commitment,

1. For a Fine, upon a Return of an *Habeas Corpus* it appeared to be to the Gaoler of *Newgate*, it ſhould be to the Sheriff 19, 21, 320
2. By a Secretary of State doubted whether good, but by the Privy-Coun-

Counſel 'tis good *Page* 81
3. Where it muſt be upon Oath, and where it may be otherwiſe 81, 84
4. Commitment for aſſiſting one to eſcape, who was in the Cuſtody of a Meſſenger for High Treaſon, and doth not ſay what Species of Treaſon 85
5. Till he paid a Sum of Money, good 296
6. Till he conform to the Authority of Commiſſioners of Bankrupts, not good 309
7. Retorn to a Commitment by Commiſſioners of Bankrupts, void, becauſe they did not retorn the Interrogatories which they had prepared and tendered to him ready drawn 368
8. 'Tis incident to a Court of Record to commit for a Comtempt 160
9. Court of Aldermen of *London* committed one for a Comtempt for not taking on him the Livery, it ought to be *Sheriff* 162

Common. Tenants in Common.

1. Cannot join in an Action 11
2. Cannot make joint Cognizance in Replevin 25
3. May join in an Avowry for Damage Feaſant, and likewiſe for a Treſpaſs 27

Continuando. See **Treſpaſs.**

Conſtable. { See **Indiament,** 16 / **Notice,** 1

Action againſt him for quartering a Soldier at an Houſe at *Tunbridge-Wells*, where People uſually lodged, and had Stables for Horſes; but was neither Common Inn, or Alehouſe *Page*, 429

Conſideration.

In an Action on the Cuſtom of Merchants, there is no Conſideration averred 367

Conſpiracy.

Againſt two, and one is acquitted, the Verdict falſifies the Declaration 234, *Vide* 407

Coparcener.

One Coparcener cannot avow for a Moiety of the Rent before Partition made 141

Copyhold,

1. Cannot paſs by Deed 245
2. Cannot be ſurrendred at a Day to come 267
3. Admittance of a Tenant for Life is the Admittance of him in Remainder 306
4. Whether Copyhold Lands are Demeſnes of a Manor 244, 378

Coſts. { See **Error,** 3 / **Execution,** 3

1. Allowed to a *Feme Covert* in the *Spiritual Court* on a Sentence for Alimony, the Husband cannot releaſe it 71
2. In Treſpaſs for breaking his Cloſe and *Soil*, no more Coſts than Damages; but for *ploughing the Soil*, full Coſts 74, 315
3. By a private Act of Parliament on a Trial between two Inhabitants of *Newcaſtle*, where the Damages do not

not exceed 40*s.* the Plaintiff ſhall have no Judgment, but the Defendant ſhall have Coſts; yet if Judgment is given, and 30*s.* Damages, the Defendant ſhall have no Coſts, becauſe the Judge of the *Inferior Court* ought to have directed the Jury to find for the Defendant, *Pag.* 367

4. Writ of Error on a Judgment in *Ireland*, affirmed here in *B. R.* cannot be executed here for Coſts 421

Covenant.

1. For conveying Lands to a Man and his *Aſſigns*, Breach is that he did not convey to him without mentioning his Aſſigns, good 133
2. To pay Rent, the Breach aſſigned for Non-payment of certain Sums, and the whole did not amount to ſo much as demanded, yet Damages ſhall be had for ſo much as was proved 213
3. To pay ſo much *per* Chaldron for all Coals laden either at *Newcaſtle*, or on the *River Tyne*, Breach that they were laden *infra Portum de Tinmouth*, but doth not ſay the *River Tyne*, not good 352

County-Palatine.

Plea to the Juriſdiction of a County-Palatine, how to be pleaded 144

Court-Leet.

See concerning ſuch Court 129
See Amerciament 2

D.

Damages

CAnnot be recovered in an Action of Treſpaſs for a Time to come, 287

In *Aſſumpſit*, where two Breaches are aſſigned, and one ill, and Damages entire, the Plaintiff ſhall not recover *Page* 366

Date.

1. Of a Bond, where it is impoſſible, it makes the Bond void 285
2. If the Year of the King is impoſſible, yet if the Year of the Lord is right, 'tis good 285

Debt. See By-Law, 3

1. Whether Debt or Detinue will lie for Goods forfeited by Act of Parliament 193
3. Againſt an Heir on the Bond of his Anceſtor 122
3. For Rent due at ſeveral Times, and in caſting up the whole, ir appear'd that the Plaintiff had declared for more than was due, he may recover for the Reſidue 214
4. By a Common Informer on a Penal Statute muſt be brought in the County whete the Offence was committed. 225
5. On the Statute for not appearing, and giving Evidence at the Aſſizes 355
6. This Action will not lie for Money won at Play 13
7. Againſt a Mayor for a falſe Retorn of a Member of Parliament 312
8. By *Aſſignees* of Commiſſioners of Bankrupts, without ſaying they gave Notice to the Defendant, of the *Aſſignment* 444
9. For a falſe Retorn of a Member to Parliament 312

Deer-ſtealing

1. Conviction thereon doth not appear whether on Confeſſion or Evidence, yet good 447
2. Another Conviction on Deer-ſtealing 321

Demeſnes,

Of a Manor, what they are 245
See **Copyhold** 4

Demurrer.

1. Special Demurrer to an *Indebitatus aſſumpſit* 131
2. No Cauſe of Demurrer where ſpecial Matter is pleaded, amounting to the General Iſſue 18
3. After Joinder in Demurrer, the Party cannot waive it, and plead the general Iſſue 18

Detinue,

Will lie for Goods forfeited by Act of Parliament 193

Deviſe.

1. Of the Rents and Profits paſſeth the Land 102
2. Of Rents and Profits to the Wife to be paid by his Executors, is a Deviſe to them in Truſt for the Wife, 63
3. That his Executors ſhall have the *Overſight and Doing* of his Lands, it paſſes no Intereſt 102
4. That the Overſeer of his Will ſhould receive, ſet and let, for his Son, he cannot make a Leaſe for Years by theſe Words *ibid.*
5. That the Mother ſhall take the Profits till the Son is of Age, ſhe being then a Widow, afterwards marries, and died before her Son came of Age, the Husband ſhall not take the Profits, becauſe no Intereſt paſſed by this Deviſe to his Wife *Page* 102
6. Where there ſhall be a Deviſe by Implication, where not, 102, 103

To *Wm.* for Life, then to *N.* and his Heirs, and if he die *without Heirs of his Body*, then to *R.* This is an Eſtate-Tail in *N.* 267

Diſcontinuance.

A Plaintiff cannot diſcontinue his Action after a Verdict; if he doth not like his Damages, he may do it after a ſpecial Verdict argued at Bar, and after Demurrer joined, but not after 'tis argued 208

Diſtreſs.

1. Whether the Tackle of a Ship may be diſtrained for a Toll 359
2. What Things are privileged from Diſtreſs *ibid.*
3. Diſtreſs for ſome Rent due, and ſome not due, the Diſtreſs is reſcued; the Plaintiff ſhall never recover Damages for that which is not due, being reſcued 366

Dower.

Whether a Woman ſhall be endowed of any Part of that which is *Caput Baroniæ* 65

E.

Eccleſiaſtical Court.

1. IN what Caſes they may be prohibited, though they have Cognizance of the principal Matter 70

2. *B. R.* will not prohibit a Suit there for Proctors Fees *Page* 242

Enquiry.

Upon a Nonſuit in Replevin, but no Damages given, the Court granted a Writ of Enquiry 76, 77, 118

Error.

1. Writ of Error will not lie on an Award of Execution on a *Sci' Fa'* 230
2. Error to reverſe a Fine, one of the Parties to the Fine was left out of the Writ of Error, it cannot be quaſhed for that Reaſon, but it may be diſcontinued, though that is ſeldom done 67
3. No Coſts in a Writ of Error on a Reverſal, 'tis only when 'tis *in dilatione Executionis* 67
4. Error on a Judgment in *B. R.* pending in the *Exchequer-Chamber*, may be pleaded in Abatement to an Action of Debt on that Judgment 68
5. In a Writ of Error all the Parties to the firſt Judgment did not join, 'tis amendable 69
6. *Aſſident* for *Aſſidunt* being a Miſtake in the Judgment it ſelf on a Writ of Error brought, it was held good 324

Before the Record certified one of the Plaintiffs in Error died, it muſt be ſuggeſted on the Roll, and Execution pray'd againſt the Survivors, 338

Eſcape.

1. Debt, and not Caſe, lies againſt a Sheriff for an Eſcape of a Perſon taken on a *Capias Utlegatum* without continuing the Proceſs, for he ſhall be in Execution at the Suit of the Party *Page* 202
2. Debt on an Eſcape after Commitment, and doth not conclude *prout patet per Recordum*, 'tis but Matter of Form 8
3. Debt on Eſcape, the Sheriff ſhall not take Advantage of an erroneous Proceſs 413
4. Gaoler as well as Sheriff is anſwerable for an Eſcape 416

Evidence. See Debt. 5

1. Depoſitions were taken by a Mayor, but not in the Preſence of the accus'd, the Witneſs who gave thoſe Depoſitions died, they ſhall not be read in Evidence againſt the Criminal, becauſe not preſent when they were taken before the Mayor 164
2. Examination of a Witneſs before a Juſtice of the Peace, may be given in Evidence at a Trial 164
3. Proof of a Jointure-Deed, which was loſt, was given by Memorials, that once there was ſuch a Deed 211
4. Depoſitions in one Cauſe may be given in Evidence in another 9
5. A Man ſtood in the Pillory, then came a general Pardon, he was admitted to be an Evidence 16
6. Standing in the Pillory for a *Libel*, a Man may be a Witneſs, but ſtanding there for a *Forgery* he cannot, becauſe 'tis an infamous Judgment 74
7. Minutes taken before Commiſſioners of Exciſe ſhall not be given in Evidence to Commiſſioners of Appeals where the Witneſſes are living 272

Exception.

Where it ſhall be tacitly included in a Law *Page* 441

Exchange.

Debt will not lie on a Bill of Exchange, 13

Execution.

1. Sheriff ſhall not take Fees for executing a Judgment in an inferior Court 97
2. One in Execution gives a Warrant of Attorney when there was not any Attorney preſent; 'tis good to a third Perſon, but not to the Party himſelf 144
3. Writ of Error on a Judgment in *Ireland*, and the Judgment affirmed; it muſt be executed in *Ireland*, and not here, for Coſts 421
4. Two *Fi. Fa's* delivered to the Sheriff on the ſame Day, who made out a Warrant on that which came laſt, and executed it by ſelling the Goods; the Sale is good 377

Exchequer.

Power of that Court over the King's Treaſure 48
The Oath of the Treaſurer, and Nature of his Office 50, 58

Executor.

1 Debt againſt her, ſhe pleads that Adminiſtration was committed to her, and doth not traverſe that ſhe was Executrix; the Plea is good, *Page* 136 145
2. Difference where the Defendant is ſued as Executor, and where as Adminiſtrator 145

Expoſition of Words.

1. Where the Word *Vel* makes an Indictment incertain 137
2. Where the Word *Anglice* ſhall be rejected 178
3. Where the Word *Nuper* ſhall not relate to a Time paſt, but to the Time of declaring 179

Where a [*viz.*] ſhall be rejected 28, 29, 181

F.

Fees.

1. Proctors Fees may be recovered in the *Eccleſiaſtical Court* 242
2. Sheriffs Fees not allowed for executing a Judgment obtained in an inferior Court 97

Fi. Fa. See Execution.

Fine.

The Husband entitled to be Tenant by the Curteſy levies a Fine with his Wife; 'tis extinguiſhed 67

Forgery.

Convicted for Forgery, and ſtanding in the Pillory, cannot be a Witneſs, 75

Formedon.

In Remainder, you muſt ſhew that the Tenant in Tail is dead without Iſſue, as well as the Iſſue in Tail 17

G.

Gaming. See Debt, 6

1. THE Statute of Gaming pleaded, and whether a Wager is within that Law *Page* 1
2. Debt will not lie for Money won at Play 13
3. One loſt above 100 *l.* at Play, and drew a Bill on a third Perſon to pay it, who accepted it; an Action was brought againſt the Acceptor on his Refuſal to pay; not good, but within the Statute of Gaming, 175

More than 100 *l.* muſt be loſt to one Perſon, and at one Sitting; for if loſt to ſeveral Perſons, though at one Time, 'tis not within the Statute 351

Goaler. See Eſcape.

Grants of the King.

1. Of his Revenue on the Duty of Exciſe 31
2. Where it may be taken to two Intents, one good, and the other not, it ſhall be conſtrued to ſuch Intent as makes the Grant good, 301
3. Where his Intention appears to paſs the Thing, it ſhall paſs 304

H.

Habendum.

1. CLauſe after the *Habendum* Explanatory of the whole 26
2. Where it ſhall be conſtrued upon the whole Frame of the Deed, tho' it doth not agree with the Premiſſes, *Page* 268, 269

Habeas Corpus.

1. What Retorn muſt be made on it upon a Commitment 158
2. Whilſt the Retorn was debating, the Party was bailed 23
3. The Retorn muſt be particular and certain 83

Heir.

Where *Riens per Diſcent* is a good Plea for the Heir, and where not 112

Hundred-Court.

Derived out of the County-Court, 254

Husband and Wife.

The Wife recovered Coſts in the *Spiritual Court*, which the Husband releaſed, and ſtill ſhe proceeded in that Court for the Coſts; if the Alimony is allowed he cannot releaſe the Coſts 71

Hunting. See Treſpaſs.

I.

Indictment.

1. SEtting forth an Intention to commit Treaſon, 'tis finable 207
2. For a *Reſcous*, and the Retorn of the Sheriff 218

3. For ſelling Low-Wines in a Cellar, *Contra formam Statuti*, 3 & 4 *Will'i*, *Page* 12
4. Againſt a Miller for taking exceſſive Toll, not quaſhed, though it was not ſaid *jurat' & onerat'*, for *B.R.* doth not quaſh Indictments for Oppreſſion or Extortion 13
5. For a Deceit 18
6. For abſolving Traitors who ſhew'd no manner of Repentance 363
7. For not watching with a Conſtable, 393
8. The Facts in an Indictment muſt be certainly alledged 414
9. For ſuffering one to eſcape, it muſt appear that he was lawfully committed 416
10. For a Forgery, quaſhed for Incertainty 137
11. For Recuſancy, ſhall not be quaſhed for want of Form 141
12. For ſelling of earthen Ware in a Corporation, contrary to the Statute 1 & 2 *Ph. & Mar.* not good in Seſſions 149
13. In Seſſions againſt Overſeers of Poor for not accompting 179
14 In Seſſions for ſpeaking contemptible Words of Magiſtrates 203
15. *Mi'a* for a *Capiatur*, the Indictment was reverſed 341
16. Againſt a Conſtable for not taking on him the Office 96

Inducement.

'Tis but Matter of Form, and not material 9

Infant.

Appearing by Attorney, and ſuffering a Common Recovery, it was reverſed 209
Debt againſt an Executor of an Infant for Money *lent* the Teſtator, and ſome laid out for Neceſſaries; 'tis 'tis not good for the Money lent, *Page* 368

Informer and Information. { See Debt 4.

For conſpiring to marry an Heir to a Woman of mean Fortune 211
May bring an Action of Detinue for Goods forfeited by Act of Parliament 193
Information at Common Law for a Perjury 342

Inferior Court.

Indebitatus aſſumpſit & Quantum meruit; but doth not ſay *infra Juriſdictionem Curiæ*, only in the firſt Promiſe 78

Innuendo.

The Office of an *Innuendo*, where 'tis explanatory, where not 346, 347

Intention.

To commit Treaſon is puniſhable by an Indictment and Fine 207

Inventory. { See Adminiſtration, 1 Prohibition, 4

Joinder in Action.

What Actions may be joined, what not 92
Tenants in Common cannot join in an Action 11

Joint-

Jointenants. See **Avowry.** 3

1. Need not ſever in Avowry, but if Rent is behind, one may avow in his own Right *Page* 72, 150
2. One Jointenant may receive the Profits for all the reſt, and his Receipt is good 72
3. He cannot bring Debt alone for Rent, but he may diſtrain alone, and avow in his own Right, and as Bailiff to the other 73

Iſſues.

What the Iſſues are which a Sheriff muſt retorn 114

Judgment. See **Capias pro Fine.**

Muſt not be ſigned till 4 Days after the *Poſtea* retorned 205
Where an Attorney need not be preſent when a Judgment is confeſſed 144

Juſtice of Peace. See **Examination,** 2 **Mandamus.** 4

1. Have no Juriſdiction in Seſſions to puniſh an Offence created by any Statute, unleſs they are named 149
2. Make an Order to remove a poor Man, and do not ſay that it was upon Complaint of the Church-wardens and Overſeers of the Poor, quaſhed for that Reaſon 149
3. Order of two Juſtices quaſhed at the Seſſions, and the Seſſions Order being removed into *B. R.* that was quaſhed, and the firſt Order confirmed; the Perſon removed, came back to the Place from which he was removed; he may be ſent to the Houſe of Correction 163
4. May take Examination of Criminals by Vertue of his Office, *Pag.* 164
5. Make an Order for Removal, and aſſign a Cauſe incertainly, it ſhall not be quaſhed for that Reaſon, becauſe they are not bound to aſſign any Cauſe 204
6. Order for removing a Woman delivered of a Baſtard, not good 204
7. Order of two Juſtices ſuperſeded only by the Seſſions, the Order of Seſſions was quaſhed in *B. R.* becauſe the Seſſions have Power to quaſh or affirm. but not to ſuperſede 208
8. May direct Warrants to any one to execute 81
9. Directed a Warrant to a Conſtable in one Pariſh to execute it in another, good *ibid.*
10. May be compelled by *Mandamus* to ſign a Poors Rate 275
11. Order a Sum in groſs to maintain a Baſtard-Child, 'tis ill 419
12. It muſt appear in the Order, that it was a Baſtard 420
13. Upon a forcible Entry they muſt give Reſtitution immediately 444
14. *Quorum unus* muſt be in an Order for removing a poor Man, or 'tis naught 321
15. They muſt appear to be Juſtices of the Peace in the Order it ſelf 322
16. It muſt appear in the Order that the Place to which a poor Man is removed, is the Place of his laſt lawful Settlement 325

Juſtification. See **Treſpaſs.**

K.

King.

MAY charge his own Revenue by his Grant 47, 53

L. **Leaſes.**

L.

Leaſes.

1. POwer to make Leaſes by Deed indented, and the Party made a Leaſe of a Copyhold which doth not paſs by Deed *Page* 245
2. Leſſee holds over his Term, Treſpaſs doth not lie without an actual Entry 384

Libel.

1. What ſhall be a Publication of it, what not 165
2. Reading a Libel is not a Crime; But if one repeat, and another writes, it is the Writer who may be properly ſaid to make the Libel 167

Liberate.

1. Granted upon a Petition to the King himſelf, but not to the Barons of the *Exchequer* 48
2. It is a Writ of Allowance, and giveth no Juriſdiction 58
3. Action of Debt will lie on a *Liberate* 62

Limitation [of Actions.]

1. After ſix Years, a Debt due by the Teſtator was demanded of his Executor, who reply'd, *Prove it, and I will pay you*; this is a new Promiſe, and not within the Statute 426
2. Acknowledgment of a Debt within ſix Years, tho' no Promiſe made of Payment, is an Evidence of a Promiſe 426

London-Cuſtoms.

1. *Cuſtoms* thereof againſt Law, *Page* 75, 93
2. Cuſtom to commit for refuſing to take upon him the Office of a Livery-man 160
3. Court of Aldermen have Power to impoſe a Fine on a Sheriff choſen by them, and refuſing to hold 440

M.

Mandamus.

1. TO reſtore nine Perſons to be Common-Council-men, not good for ſo many 11
2. Return, that *Non fuit debite electus* is too general, it ought to be poſitive that *Non fuit electus* *ibid.*
3. To reſtore a Man to be a Burgeſs of a Corporation 256
4. To a Juſtice of Peace to ſign an Aſſeſſment for the Poor 275
5. To a Corporation to chuſe Officers *ibid.*
6. To reſtore the Enſigns of Mayoralty to a ſucceeding Mayor, without ſaying, *Vel cauſam nobis ſignificetis*, good 314
7. To admit a Town-Clerk, the Return was inſufficient 318
8. To an Archdeacon to ſwear a Church-warden, and the Return, that he was *minus habilis*, it is not good 325
9. To the Spiritual Court to grant Adminiſtration 374
10. To a Mayor to admit one to his Freedom who had ſerved an Apprenticeſhip 402

11. To a Maſter of a College to admit a Fellow *Page* 404
12. To a Viſitor of a College to receive an Appeal upon the Expulſion of a Fellow 452

Mano.

Copyholds are Parcel of the Demeſnes of the Manor 244, 378

Marriage.

1. The Brother married his Siſter's Baſtard 168
2. The Degrees prohibited in Marriage *ibid.*
3. Promiſe of Marriage is a good Conſideration to raiſe an Action on the Refuſal of either Side 411
4. Marrying his Wife's Siſter's Daughter, not within the Levitical Degrees, but his own Siſter's Daughter is 448

Mis-trial.

A wrong *Venue* in a proper County is aided, but not where the Jury are of a wrong County which tried the Cauſe 405

Monſtrans de Droit.

Where, and in what Caſes it lieth 57

Murder.

1. Special Verdict found for Killing a Man 288
2. Doing an unlawful Act, or any other Thing, with an ill Intent, and Death enſuing, it is Murder 289
3. But then it muſt be done with Deliberation *Page* 292
Though ſuch Intent did not extend to Killing, and though the Party killed was doing an unlawful Act himſelf 290
4. Killing without Provocation, the Law ſupplies the Malice *ibid.*
5. The Definition of Murder 291

N.

Nonſuit.

AT Common Law, a Plaintiff might ſuffer a Nonſuit after a Verdict, if he did not like his Damages; but that is now remedied by the Statute 2 *H.* 4. 208

Notice.

1. Where it is neceſſary to be given to one who is choſen Conſtable at a Court-Leet 96, 129
2. Where it muſt be given to a Member of a Corporation before he is diſfranchiſed 257
3. Where it muſt be taken by one who is choſen Sheriff of *London* before he ſhall be fined 442
4. In Debt by Aſſignees of Commiſſioners of Bankrupts, Notice is neceſſary to be given of the Aſſignment 444
Notice by Implication, and not in Writing, not good to make a Settlement 330

Nuſance.

A prohibitory Writ was directed to the Players, reciting, That erecting

the Play-houſe was a Nuſance; but the better Way is to proceed by Indictment *Page* 142

O.

Oaths. See 316, 402, 431.

Office and Officers.

WHether the Cenſor of the College of Phyſicians is an Office of Truſt, and ſo obligeth him to take the Oaths 431

Orders. See **Juſtices of Peace.**

1. For Contribution to Scavengers Rates, good 68
2. To remove a poor Man, there muſt be an expreſs Contract of *Hiring* between the Maſter and Servant, and not by a third Perſon in Behalf the Servant 328
3. Indictment for diſobeying an Order for the Relief of a poor Man *ad Generalem Seſſionem Pacis*, and doth not ſay, *Quarterialem*, not good 329

Overſeers of Poor. See **Indictment.**

1. May be indicted at Seſſions for not accounting 179
2. *Mandamus* to make them account, it muſt appear that they could not have the ordinary Remedy 421

Outlawry.

1. In a perſonal Action, the Cattle of a Stranger levant and couchant on the Lands of him who is outlawed may be diſtreined for the Debt, by Vertue of a *Levari facias* 117, 118
2. For Recuſancy reverſed for want of Form *Page* 141
3. After Judgment, and Perſon taken by a *Capias Utlegatum*, and then eſcaped; tho' the *Capias* is at the Suit of the King, yet the Priſoner ſhall be in Execution at the Suit of the Party, and not at the Suit of the King, for Contempt of his Laws 200
4. The Defendant imparled, and before the next Term the Plaintiff was outlawed: Then the Defendant pleaded the Outlawry in Bar, without ſaying, after the laſt Continuance 12
5. Goods ſeiſed into the King's Hands in an Outlawry, no Reſtitution after Reverſal 61

P.

Pardon. See **Evidence.** 5

Parliament. { See **Debt, Detinue.** 9

Perjury.

The Difference between Perjury at Common Law, and on the Statute 348

Plea.

1. Beginning in Bar, and concluding in Abatement, good 131
2. Muſt have its proper Concluſion 146
3. Where Iſſue is joined on an ill Plea, and a Verdict for the Plaintiff, he ſhall have Judgment, for the Defendant ſhall not take Advantage of his ill Pleading 227
4. Debt

4. Debt upon an Eſcape, ſetting forth a Commitment, and doth not conclude *Prout patet per Recordum*, it is but Matter of Form *Page* 9
5. *Damnificatus* pleaded, and doth not ſhew how, yet it is good 243
6. Pleas amounting to the general Iſſue, where good 253
7. Where not good 314
8. Pleas to the Juriſdiction, *&c.* are not foreign, and therefore not to be put in an Oath 335

Poſſeſſion.

Telling Part of the Money in a Goldſmith's Shop, and putting it up in his Bag, carries the Poſſeſſion to the Receiver, and if ſtole before all is told, he, and not the Goldſmith, muſt loſe it 399

Promiſe.

Not in Writing, whether within the Statute of Frauds 205

Prohibition.

1. To the Eccleſiaſtical Court for Proctors Fees not granted 242
2. Denied to that Court where the Libel was for Tithes, for Agiſtment of Cattle ploughing in one Pariſh, and depaſturing in another 96
3. To that Court for marrying his Siſter's Daughter 168
4. To that Court where they compelled an Executor to exhibit an Inventory, in order to a Diſtribution 247
5. To that Court for citing out of the Dioceſs 238
6. To the Commiſſioners of Appeals upon the Act of the Exciſe of Beer and Ale 272
7. To the Spiritual Court, on a Libel for not paying a Rate to repair the Church and a Watch-houſe *Page* 447

To that Court for marrying his Wife's Siſter's Daughter 449

Proof.

Doth not ſay what Proof, it muſt be ſuch as is allowed by Common Law 258

Property.

1. Whether a Man can have a Property in a Negro, or not 189
2. The Property of Goods forfeited by Act of Parliament is veſted in the Informer, by bringing the Action even before the Seiſure 194

Q.

Quare Impedit. See 291, 298, 335, 336.

R.

Recuſancy.

Outlawry thereon may be revers'd for want of Form; but an Indictment or Information for it ſhall not be quaſhed for that Reaſon 141

Recovery Common.

1. Reverſed, becauſe ſuffered by a Feme Covert under Age, who appeared by Attorney 209
2. Can't be ſuffered to bar an Intail where there is an Eſtate for Life in Jointure, without her joining 211

3. Reverſed on a Writ of Error, but the Recoveror had no Title, there being a Remainder-Man before him that Reverſal was reverſed, *Page* 396

Replevin

BY Tenants in Common, 25, 26
By Jointenants. 71, 72 *&c.*
At Common Law, Replevin was made by Writ of *Juſticies*, and not by Plaint, which is a quicker Remedy given by the Statute *W.* 1. Now if a Sheriff could not make Replevin in his County-Court, but by Writ, a Cuſtom for a Steward of an Hundred-Court to grant Replevins out of Court, muſt be void, becauſe the Hundred-Court was derived out of the County-Court, 254

Replication.

Where good with a *Proteſtando*, 136

Reſcous

Exceptions taken to a Retorn of Reſcous, 218

Reſignation,

To a Proctor, doth not make the Church void without the Acceptance of the Biſhop, 388

Retorns,

To *Mandamus* muſt be certain, 259

S.

Scire Facias. See **Error,** 1

AGainſt the Bail, the Defendant pleaded, that the Principal died before the Retorn of the *Capias ad ſatisfaciend'*, which might be the *Alias Capias*; it ſhould be before the Retorn *alicujus Capias* *Page* 167
Judgment againſt the Defendant; and on a *Teſtatum Sci' Fa'* againſt the Tertenants, there was a Judgment againſt them; then the Defendant became a Bankrupt, and the Commiſſioners aſſigned the principal Judgment to one *P.* which was enter'd by Leave of the Court to entitle him to the Benefit of the Judgment upon the *Sci' Fa'* without bringing a new *Sci' Fa'* 88

Seſſions.

1. Juſtices in Seſſions cannot try an Indictment for ſelling Earthen Ware in a Corporation by an Inhabitant elſewhere, at a Fair held there, upon Stat. 1 *&* 2 *Ph. M. c.* 7. 149
2. Order of 2 Juſtices for Diſcharging an Apprentice confirmed at the Seſſions, but quaſhed in B. R. 139
3. Seſſions quaſh an Order of two Juſtices on an Appeal, and the ſame Seſſions ſuperſede their own Order, and confirm the Order of the two Juſtices: 'Tis wrong, becauſe they had executed their Authority before 396
4. Order quaſhed, becauſe it was made originally there 397
5. A poor Man was ask'd in a Pariſh Church: It makes no Settlement without Notice in Writing, for the Explanatory Act, 3 *&* 4 *Will'*, cannot be taken by Equity 454
6. Order of two Juſtices to remove one from *Harrow* to *Henden*, where he had a Freehold, was quaſhed on an Appeal: Then *Harrow* ſends him to

to *Ricelip* by the like Order of two Juſtices, which was affirmed upon an Appeal: Then *Ricelip*, by an Order of two Juſtices, ſend him to *Henden* again; that Order was quaſhed on an Appeal, but affirmed in *B. R.* for tho' the Juſtices had executed their Authority between *Harrow* and *Ricelip*, yet that ſhall not conclude *Ricelip* from ſending him to a third Pariſh where he had a Freehold, *Page* 417

7. Seſſions order the Payment of Servants Wages, and commit a Man for not performing it; 'tis wrong, for they ought to indict him for disobeying their Order 419

Sheriff. See **Eſcape** 1, 3

In *London* if choſen, and refuſing to hold, may be fined; and if an *Indebitatus aſſumpſit* be brought for the Fine, 'tis not good 444

Steward.

If a Court-Leet cannot impoſe a Fine on a Perſon who is not in Court, but may have him amerced 130

Statute.

1. Where it creates an Offence, and impoſes a Puniſhment, yet another Remedy may be proſecuted 179
2. Where it creates an Offence, you muſt conclude *contra formam Statuti*; but if it was an Offence before, and you make ſuch Concluſion, yet 'tis ſtill good 308
3. Where it creates an Offence, and adds no Penalty, the Action brought againſt the Offender muſt be *Qui tam, &c.* and ſo it may be where a Penalty is given; for 'tis a Contempt to the Law, and a Fine is due, *Page* 313

Though miſrecited, if there is ſufficient recited for the Plaintiff's Caſe, 'tis well enough.

Sunday.

1. Arreſt thereon, where good, 95
2. Service of a Citation thereon, good, 450

Surpluſage.

What is immaterial ſhall be rejected as Surpluſage 303

Surrender.

Of a Copyhold cannot commence at a Day to come 267

T.

Tail.

1. Feoffment to himſelf for Life, then to his Son and his Heirs, and for Default of Iſſue of his Body, then to his right Heirs Males, 'tis an Eſtate-Tail 266
2. What Words create an Eſtate-Tail by Deed 268
3. Settlement in Marriage to the Huſband and Wife for Life, then to the Iſſue Male, and for want of ſuch Iſſue, to all the Iſſue Female, and to the Heirs of the Bodies of ſuch Iſſue Female, they had afterwards two Daughters, they are Jointenants for Life with ſeveral Inheritances, being both

both born before the Eſtate for Life determined; for if not, the Remainder had veſted in the Elder, *Page* 385

Taxes.

The Grantor of the Rent-charge covenants it ſhall be *free of all Taxes*; this relates to Taxes which were afterwards given by Act of Parliament, and the Grantee may have an Action againſt the Grantor and his Heirs, by Reaſon of Aſſets deſcended, but not againſt the Aſſignee, for 'tis not a Real, but Perſonal Covenant, but the Aſſignee will be made liable in a Court of Equity, 373, 374

Time.

Time to come laid in an Action of Trepaſs, yet the Paintiff ſhall have his Damages after a Verdict 287

Traverſe. { See **Acceptance**, 1 / **Executor**, 1

One is ſued as Executor, who pleads, that Adminiſtration was committed to him, without traverſing that he was Executor, yet the Plea was good 146

Treaſon.

Intention to commit a treaſonable Action, is finable 207

Treſpaſs.

1. For taking 4 Loads of Wheat with a *Continuando* the Trepaſs for a Month, it was held good 178
2. It will not lie for taking a *Negro* *Page* 187
3. For falſe Impriſonment, and detaining him in Cuſtody till he had paid 11 *s.* the Defendant juſtified by Vertue of an Order of a Court of Conſcience to pay 10 *s* 4 *d.* which not being paid, he took him, *&c.* good without juſtifying for the whole 11 *s.* 295
4. Will not lie againſt a Leſſee who holds over his Term without an actual Entry 384
5. Againſt an inferior Tradeſman for hunting, not being qualified 307
6. For hunting Conies, not good, 375

Trial.

1. Where it ſhall be by a Jury of two Counties, and where not 223
2. Where a new Trial was denied, though the Evidence was doubtful, 88
3. Denied after a Conviction of Perjury, 350
4. Motion againſt Church-wardens to produce the Church-books at a Trial 395

Trover.

1. *Trover* and *Caſe* muſt not be joined in one Action 91
2. Where the Declaration was void for Incertainty 181
3. Improper Words in the Declaration will not make it void 324

Tythes,

Shall be paid for Agiſtment of Cattle in one Pariſh, and Ploughing in another 96

V.

Variance.

Between the Grant and the Pleadings make it void *Page* 302

Verdict.

1. The Declaration was for a Trepaſs done on a Day to come, 'tis cured by the Verdict, becauſe at the Trial there muſt be Evidence given of a Fact done before the Action brought 286
2. Want of alledging a Place, is not helped by a Verdict

Where the Jury agreed on two Verdicts, yet that was not a ſufficient Cauſe for a new Trial 349

Villain.

The Lord formerly had an abſolute Property over his Villain 189

Viſitor. See **Mandamus.**

Appointed by the Founder of a Colledge, if Charities are given to that College afterwards, they are not ſubject to the Controul of that Viſitor 423

Umpire.

Arbitrators nominated an Umpire who refuſed, they may nominate another, for by his Refuſal their Power was not executed 457

W.

Wages. { See **Acceptance.** **Seſſions.**

Witneſs. See **Debt.**

FINIS.